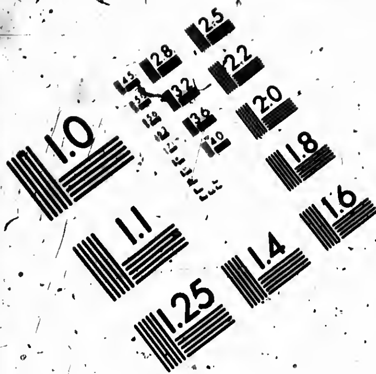

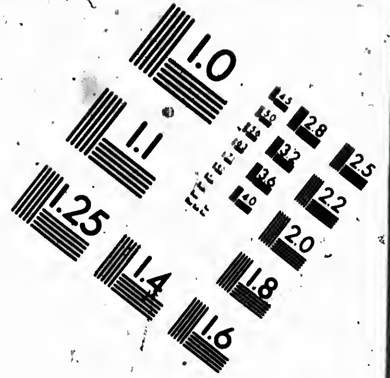

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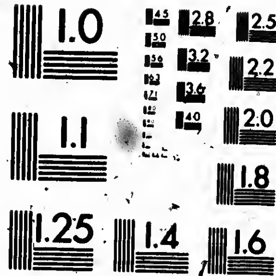

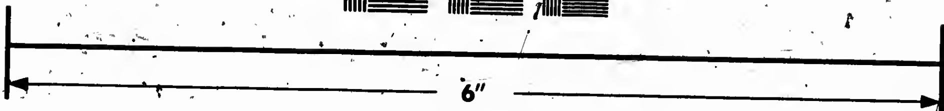

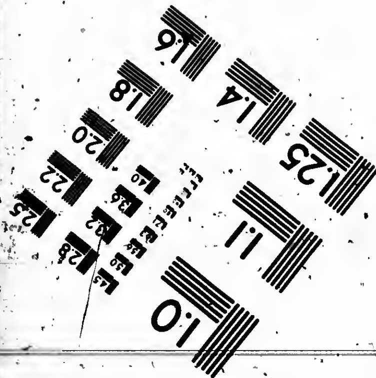

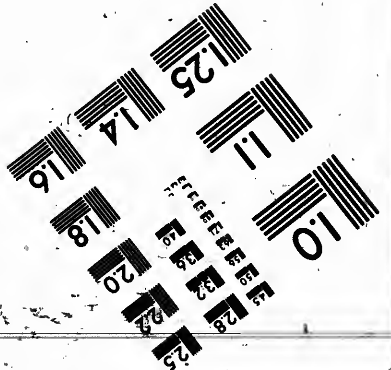

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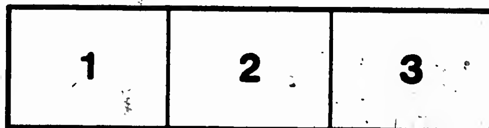

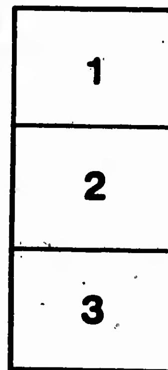

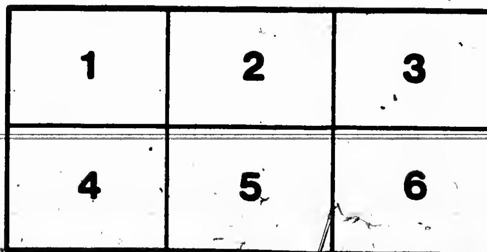

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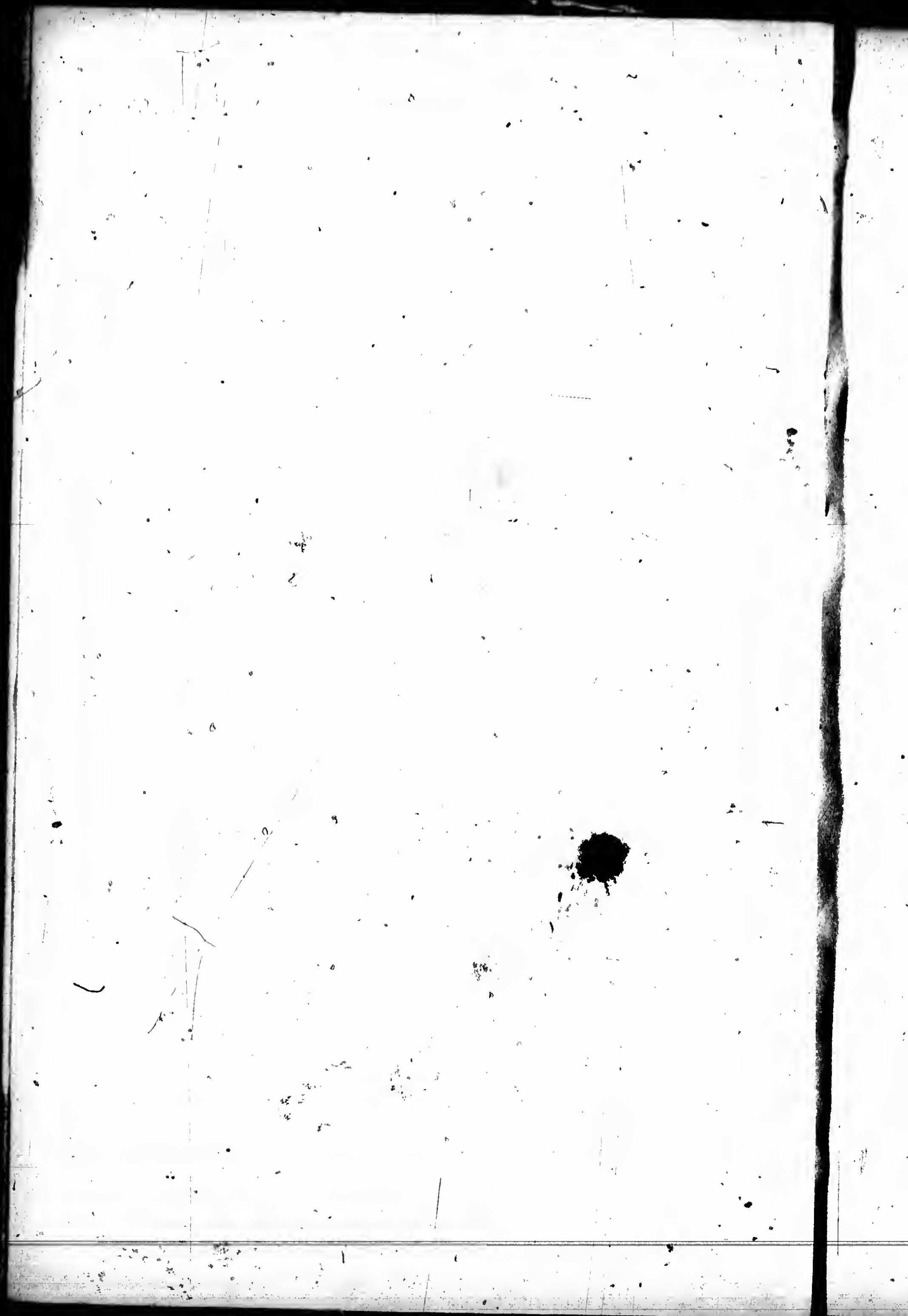

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Editorial Committee:

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COURT OF QUEEN'S BENCH, 1861.

MONTREAL, 9TH SEPTEMBER, 1861.

IN APPEAL FROM THE CIRCUIT COURT, DISTRICT OF MONTREAL.

Coram SIR LOUIS LAFONTAINE, C. J., AYLWIN, J., DUVAL, J., MEREDITH, J., AND C. MONDELET, J.

JESSE THAYER,

(*Defendant in the Court below,*)

APPELLANT.

AND

JOHN W. WILSCAM,

(*Plaintiff in the Court below,*)

RESPONDENT.

HELD:—1. The declaration on oath of the defendant in a cause that he paid the debt demanded, by a "contra-account," which contra-account he stated that "he had not yet made up, but always supposed that the plaintiff was in his debt," will not support a plea of prescription based on the allegation of payment.

2. Such a declaration affords a sufficient admission of the plaintiff's demand.

3. But *semble*, a plea of prescription, alleging payment, accompanied by a *défense au fonds en fait* is not an admission of the plaintiff's demand.

The facts of this case and the pretensions of the parties sufficiently appear by the opinions of the honorable judges composing the Court.

The judgment of the Court below was recorded as follows: 31st December, 1860. Mr. Assistant Justice MONK.

"The Court," &c., "considering that the defendant has not proved the allegation of "payment made in and by his plea, doth dismiss the said plea, and proceeding to "adjudge upon the plaintiff's demand, considering that the defendant by his plea hath "admitted the correctness of the account produced and filed by the plaintiff in support "of his demand, the Court doth maintain the plaintiff's action and doth condemn the "defendant to pay and satisfy to the said plaintiff, the sum of thirty-six pounds, six "shillings and nine pence current money of this Province of Canada, for medicines "found and provided by the said plaintiff, for the said defendant and his family, and "for the visits, care and attention of the said plaintiff, as a physician and surgeon, "made, given and bestowed upon the said defendant and his family, from the thirteenth "day of December, one thousand eight hundred and forty-nine, up to the fourth day of "June, one thousand eight hundred and fifty-six, inclusive; with interest upon the said "sum of thirty-six pounds, six shillings and nine pence, from the first day of October, "one thousand eight hundred and sixty, date of the service of process in this cause, "until actual payment, and costs of suit, &c."

MEREDITH, J., *Dissentiens*:—The plaintiff in the Court below sued the defendant for £36 6s. 9d., alleged to be due to the respondent for his services as a physician; part of that sum, namely, £36 4s. 3d., being for services alleged to have been rendered from the year 1849 to the year 1855.

The defendant met this demand, in so far as regards the said sum of £36 4s. 3d., by a plea of prescription of five years, in which the defendant alleged "that any

Thayer and Wilscam.

"and all sums of money which were at any time due by the defendant to the "plaintiff for any of the causes mentioned in the said account as previous to the "year 1856, were by the said defendant fully paid and satisfied to the said plain-"tiff long previous to the said year 1856."

And the judgment of the Court below was against the defendant, on the ground that the defendant "has not proved the allegations of payment made in "and by his plea, and that the defendant in and by his plea has admitted the "correctness of the account produced and fyled by the plaintiff in support of his "demand."

This judgment is, in my opinion, opposed to the rule which has heretofore been observed in our Courts, as to the effect of an admission contained in an affirmative plea, accompanied by one of a negative character.

According to the constant practice of our Courts, a defendant is allowed to file a denial, with an affirmative plea; and although it has often been strenuously contended, and not without some appearance of reason, that there can be no injustice in limiting a defendant, sued for a debt, to a single plea or answer, so as to compel him to say either that he never owed the debt, or that, at one time he did owe it, but has since paid it: there are nevertheless many cases in which it would be most unjust to limit the defendant to a single plea or answer.

We will suppose, for instance, that a defendant is sued for a debt alleged to have been contracted some ten or fifteen years ago. In the case supposed, a defendant might be certain that he had paid the amount, but be uncertain as to his being able to prove the payment, in consequence of his having handed the money to the plaintiff, or to his clerk, without a receipt; or the defendant possibly might have no recollection of having contracted the debt, and yet be satisfied, from his usual course of business, that if the debt ever was due he had paid it. If, in the case supposed, the defendant, being limited to a single plea, were to say, "I owe you nothing;" then, if the plaintiff were able to prove his stale demand, the defendant would not be allowed even to ask the plaintiff or his clerk whether the demand so made had not been paid. Nay, even if the defendant found a receipt in full, he would not be allowed to produce it. The conclusive answer to his request to do so, would be, you did not plead payment; but if he had pleaded payment merely, then if neither party had a particle of proof beyond his own statement, and that of his antagonist, the defendant would be condemned, on the ground that he had not denied the plaintiff's debt. Now let this system be contrasted with that to which it is opposed, and according to which the defendant in the case supposed would be allowed by one plea to say, I owe you nothing, and by another to say, the debt you claim has been paid; and it is obvious that these statements although they are different, and would admit different kinds of proof, are not in any degree inconsistent with each other. Each speaks of the present position of the defendant to the plaintiff, and each says in effect, your claim is unfounded. The defendant having thus pleaded, if the plaintiff proved his demand, and if the defendant failed in his defence, the plaintiff would have judgment; whereas if neither party could prove any thing the action would be dismissed. This, it appears to me would be just, because by requiring each party to prove his own statement, the plaintiff and defendant are placed upon a

Thayer and Wilscam.

footing of exact equality, whereas, if the defendant is limited to a single plea, he is told in effect, you cannot be allowed even to attempt to prove what you say, until you first relieve your opponent, the plaintiff, from the necessity of making any proof whatever. In the present case the defendant has filed two pleas; an exception of prescription and a denial of the debt; and the object of the foregoing remarks is simply to show that he had a right to do so, and that there is nothing unreasonable in giving him the benefit of the pleas as filed. The defendant, in the present case, having filed a denial of the debt, the effect of that denial was, according to my view, to confine any constructive admission contained in the plea of prescription to the issue in which that admission is made.*

The admission is deemed to be argumentative, or hypothetical, and the exception itself, as the learned counsel for the appellant very well expresses it, "is "looked upon as being called into action only when the existence of the debt "has been proved by the party asserting it."

Denisart says† "celui qui excipe, ne confesse que conditionnellement, en cas "que le demandeur fasse preuve de sa demande." And Guyot says, vol. 13, p. 562: "Le défendeur n'est tenu de cette preuve que lorsque celui-là a vérifié le "fondement de sa demande," and in another place the same author says: "par "la commune disposition du droit le défendeur, quand même il ne prouverait "pas son exception, est toujours en voie d'être renvoyé absous, si le demandeur "ne prouve pas sa demande, *actore non probante reus absolvitur*."‡

The members of the bar are familiar with these authorities, and I would not refer to them, were it not that I am alone in the opinion which I have formed of this case; but the authorities bearing on the defendant's plea, in so far as it can be deemed to allege payment, are so pointed that I cannot refrain from strengthening the position I take by a succinct reference to one or two of them.

Nouveau Denizart, Verbo confession, no. 9: "Supposons, par exemple, que "je vous ai assigné en payement d'une somme, que je soutiens vous avoir prêtée, "et que sur cette demande vous êtes convenu du prêt, mais en ajoutant que "vous avez rendu la somme, je ne pourrai pas diviser la confession, c'est-à-dire "me servir de votre aveu, pour prouver la dette, et rejeter sur vous la preuve du "paiement;" and Toullier, 6 vol., no. 339, says: "Sans doute il est bien juste "et naturel de ne pas séparer l'aveu de la dette, de celui du payement; *car*, "*c'est le véritable cas de l'indivisibliité de l'aveu;* car, si vous n'avez d'autre "preuve de votre créance que mon aveu, s'il n'en existait pas d'autre, il est "juste de m'en croire, lorsque j'affirme avoir payé, car, n'existant point de titre "contre moi, je n'ai pas dû songer à me faire donner une quittance parfaitement "inutile."

These authorities sufficiently show that the defendant cannot be bound by the admissions contained in his plea; but it may be said that although the defend-

* See the remarks of Baron Alderson in Stacy and Blake 1 M. and W., p. 172, where the above rule, and the limitations to which it is subject, are clearly laid down. *Vide* also 1 Starkie, pp. 257-386. 2 Starkie, p. 17. Am. Ed. of 1834.

† Denisart Verbo confession, No. 11.

‡ *Vide* the authorities on this point, 1 L. C. R., pp. 66 and 67.

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ant cannot be bound by the constructive admission contained in his plea, yet that he is bound by a like admission contained in his answer, upon the *serment décisoire*, in which the defendant, upon being asked, "Have you paid the amount "to be recovered by this action, and if so in what manner," said: "By contra "account:" and upon being further asked the amount of that contra account replied: "that he has not yet made it up, but always supposed that the plaintiff "was in his debt."

With respect to the foregoing answers, it is first to be observed that the questions put, were, according to my view of the case, irregular. Under the issues raised the plaintiff was obliged to prove his demand; but instead of doing so, he called upon the defendant to prove his defence, and because the defendant's answers were not deemed conclusive as to the payment, the plaintiff has had a judgment in his favor, without any other evidence in support of his demand.

The declaration by a defendant, that he has paid a debt, whether made in Court or out of Court, and whether made under oath, or not under oath, ought not, I think, to be divided, so as to separate the constructive admission that the debt once existed, from the accompanying express declaration that it had ceased to exist.

As further illustrating my view, I may revert to the hypothetical case already put. We will suppose that the defendant, when called upon to pay a debt alleged to have been contracted ten or fifteen years ago, were to write to the plaintiff saying, "Sir, I am astonished at your demand; you know the amount "you claim was paid to you long ago;" or we will suppose the answer to be, "We had as you know mutual accounts at the time, by which yours was satisfied." It will hardly be contended that such a letter could relieve the plaintiff from the necessity of proving his case. Now, if a defendant may write the truth in such a case with safety out of Court, why may he not speak the truth with equal safety in Court?

Where there are good grounds for so doing, a Court or jury may believe one part of a statement, and reject the remainder; but I cannot see any sufficient grounds for adopting that course in the present instance, and I feel the less disposed to do so in consequence of, as I conceive, the illegality of the questions put to the defendant.

Taking the whole of the defendant's answers together, they amount to this. I did not employ the plaintiff professionally; but if he ever had any claim against me, such as he contends, I had an account against him; which, although I never made it up, would, I am satisfied, more than suffice to counterbalance his.

The statement of the defendant that he never made up his account is considered to make against him; but it is to be recollected, that the plaintiff's account commenced as far back as 1849; and that the plaintiff has not proved that he ever even rendered an account to the defendant, or ever received any payment, however small, which could be deemed an acknowledgment of his right. It seems to me, that my learned brethren view this case, as if when the defendant was examined, the *onus probandi* was upon him. Of course, had this been the case, the deposition, even of a credible witness, that the plaintiff's debt was paid, by an account not made up, would not have been satisfactory; but at the time

Thayer and Wilscam.

of the examination of the defendant the *onus probandi* was upon the plaintiff.

And if it be plain that the answers of the defendant are not sufficient to prove his plea, it seems to be equally plain, that they do not prove the plaintiff's declaration. I therefore cannot concur in the judgment about to be rendered confirming the judgment of the Superior Court.

SIR LOUIS LAFONTAINE, C. J.

L'intimé, qui est médecin, demande le paiement de services professionnels.

Le défendeur oppose la prescription de cinq ans établie par le statut, excepté quant au dernier article du compte, lequel article est de 2s. 6d. qu'il offre et dépose au greffe avec les frais alors engagés sur l'action, comme dans une cause de la dernière classe à la cour de Circuit. Et il ajoute, dans son exception de la prescription, qu'à l'exception de la somme de 2s. 6d, pour service rendu en 1856, il a payé dès avant 1856, "toutes les sommes de deniers qui étaient en aucun temps dues par lui au demandeur pour aucunes des causes mentionnées dans son compte, antérieurement à la dite année 1856."

L'exception est suivie d'une défense au fonds en fait.

Le défendeur a été interrogé sur faits et articles et sur serment décisoire.

L'aveu qu'il a fait dans son exception de prescription, qu'il avait payé tout ce qui était dû pour les années antérieures à 1856, prouve qu'il avait, pendant ces années là, employé le demandeur comme médecin, ce qui contredit l'une de ces réponses sur faits et articles.

Sur serment décisoire, on lui fait deux questions : la première," have you paid the amount sought to be recovered by this action, and if so, in what manner ? Il répond, "by contra account." la deuxième, "Being asked the amount of that contra-account ? Il répond "that he has not yet made it up, but always supposed that the plaintiff was in his debt."

Par la première de ces réponses, il admet le compte du demandeur. Cela suffit pour établir la réclamation de ce dernier. Quant au compte qu'il prétend avoir contre le demandeur, il ne le produit pas, il ne l'a pas même encore fait. Si un tel compte existe, que ne l'a-t-il pas plaidé en compensation ? que ne l'a-t-il pas produit ? Il aurait fourni à son adversaire l'occasion de débattre ce compte, et d'établir que le chiffre en était bien au-dessous de celui du compte qui fait l'objet de l'action. On ne peut pas ainsi déclarer, sur la simple supposition que le défendeur exprime, que le demandeur lui a dû, et que même il est encore endetté envers lui.

A mon avis, le jugement de la cour de première instance est inattaquable. Le défendeur a, par ses aveux, fait sa propre condition ; Il doit en subir les conséquences.

ALWIN, J.—It is necessary to draw the attention of the parties to the *considérants* of the judgment in the Court below, which are as follows : "Considering that the defendant has not proved the allegation of payment made in and by his plea, and considering that the defendant by his plea hath admitted the correctness of the account produced and filed by the plaintiff in support of his demand." The majority of the Court do not concur in these *considérants.* They proceed upon a totally different basis—and these *considérants* must not hereafter be cited as law.

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The serment décisoire contains *a transaction*. When it is resorted to, the issues in the cause vanish,—and the justice of the demand is left entirely to the conscience of the party. This rule is handed down to us from the Roman law, and is well settled. *In fact*, the case is withdrawn from the judge, and is left to the party himself. Out of his own mouth he is to be acquitted or convicted.

If the answer of the appellant in this case had been clear there would have therefore been no difficulty.

But the answers in the case are not positive and unqualified—and moreover the questions themselves are very peculiar. Usually there is simply a precise question and a precise answer. It is much to be lamented that the usual practice was departed from in this case, and the proceeding taken is of doubtful regularity; but not being asked to declare the proceeding null, I do not feel authorized for my part to pronounce it so.

Therefore the paper being of record, the Court will take it as an answer binding upon the appellant.

It will be perceived that the appellant in his answer states that he has never made up his account, but *supposes* it exceeded that of the plaintiff. Since he has not produced the account or shown its amount, and does not swear positively to the amount of it, and in fact admits that he has never made it up, he plainly has doubts himself as to its amount. He avoids any decisive statement about it, and the result necessarily follows. Since therefore he will not take upon himself to give a decisive answer when the cause is left to himself, no injustice can be imputed to a Court which refuses to give effect to statements which are made without confidence. If he has a cause of action he can bring his suit, and both parties will then obtain justice.

The doctrine relied on by the appellant as to the affirmative plea is not only to be found in one book, but in every good book, and it cannot for a moment be disputed. It is not only Fachinæus who says so, but a hundred more authorities establish it. The reported case of Clark vs. Johnson contains many citations of authorities on the subject. And it is in accordance with reason and justice. Can it be possible that a defendant having twenty valid defences, is to be confined to one? If so, he must take the responsibility of selecting one only of these defences, by which selection he will be bound; and he must be very careful both as to his law and his facts, or he may not bring himself exactly within the views of the judge.

Such a course would be unjust in the extreme, and it is not required to be followed by the practice of the Courts of Lower Canada.

But on the grounds first stated resting upon the answers of the appellant to the *serment décisoire*, the judgment of the Court below should be confirmed.

Duval, J.—There is no difficulty about the pleadings. The difficulty is about the answers of the appellant.

He demanded the right of settling the question at issue by his own oath, and it was referred to that. But he did not settle it. He set up a contra account and gave no particulars of that account. If he had a set off, it should have been pleaded in order that the plaintiff could answer it.

But he says he has not made up the account. What remedy then had the

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plaintiff if the defendant's pretensions were unfounded? He could not proceed against the defendant criminally for perjury; for there were no details or particulars of the account sworn to, to afford the plaintiff the opportunity of testing the truth of the answer by contrary evidence; and therefore, there are no means of punishing the appellant, though his answer be false.

The fact is, the appellant put himself in the position of a plaintiff with regard to this account. And he desired to prove it by his own oath without producing it, or exhibiting the items of which it was composed. This he clearly could not do, and his plea should be rejected.

MONDELET, C. J.—This is an appeal from a judgment rendered by the Circuit Court at Montreal against appellant at the suit of a physician for medical attendance, &c., for £6 6s. 9d.

There is a plea of prescription under the act of 1859 (10 and 11 Vict. c 26, § 14,) "which provides that claims for medical attendance, &c., shall be prescribed by the lapse of five years from such attendance, service or medicine furnished." Defendant pleads he has paid and offers his oath.

There is also a general denegation. If the plea be a mere plea of prescription it is no admission of the debt. If it be a plea of payment, I hold it is.

The defendant has been examined on *faits et articles* and on *serment décisoire* and there he swears he has paid, but on being asked how he paid, he answers, "he has paid it by a contra-account."

Being asked the amount of this contra-account, he again answers that he has not made it up, but always supposed that the plaintiff was in his debt.

Now defendant never pleaded a set-off, he, therefore, cannot oppose any.

If he has not pleaded payment, as he maintains, then he cannot upon the *serment décisoire* be allowed the benefit of an answer of payment as if he had pleaded it.

But it is preposterous for the defendant to pretend that by his answer he has made out the payment. No such thing: he goes no further than to say he always supposed plaintiff was in his debt. That will not do. He has fully admitted that he owed, but has failed to prove he has paid. I am clearly of opinion that the judgment of the Court below ought to be affirmed.

The judgment in appeal was recorded as follows:

"The Court * * * * seeing the answers upon the *serment décisoire* of the appellant, who was the defendant in the Court below; considering that there is no error in the judgment appealed from, to wit, the judgment rendered by the Circuit Court for Lower Canada, sitting at Montreal, on the thirty-first day of December, one thousand eight hundred and sixty, in its *dispositif*, doth affirm the same with costs to the respondent against the said appellant; the Honorable Mr. Justice Meredith dissenting.

Judgment confirmed.

Abbott & Dorman, for appellant.

B. Devlin, for respondent.

(J. J. C. A.)

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As a valuable contribution to legal literature on the rule *qui excipit* NON FATETUR, the editors subjoin the following paper prepared by the Honorable J. J. C. Abbott, Q. C., for the respondent in FISHER vs. GAREAU. In Appeal, Montreal, 1863.

QUI EXCIPIT NON FATETUR.

In submitting authorities in support of this rule, the respondent does not contemplate attempting its discussion upon any other or higher grounds than its prevalence, its convenience, and its peculiar adaptation to the mode of procedure in our Courts. With this view, it is proposed to cite a few of the best known authors who have treated of it, and of the *arrets* in which it has been pronounced upon; to follow this by an examination of the jurisprudence of the Courts of Lower Canada in respect of it, in so far as the reports afford the means of information on the subject; and, finally, to endeavor to point out in what manner it operates in the practical conduct of legal business before the tribunals.

In the citations from authors, no originality or profundity of research is claimed, or has been attempted. Those authors only have been consulted whose works are in ordinary use, and the extracts from them will therefore be without novelty. But it is believed that the opinions of those jurisconsults thus brought together, will exhibit in the clearest possible manner, how much the weight of authority inclines in favor of the maxim contended for.

1.—Non utique existimatur confiteri de intentione, adversarius quocum agitur quis exceptione utitur.—*L.* 9 *Marcel*, *lib.* 3 *Digest.*

2.—Les exceptions péremptoires ne doivent être prouvées, qu'après que le demandeur a prouvé lui-même sa demande. * * En effet, de ce que le défendeur oppose une exception, il ne s'ensuit pas que le demandeur ne doive pas prouver la demande, car, " non utique existimatur confiteri," &c., &c.—*Pandectes, par Pothier, vol.* 18, *pp.* 141—2.

3.—Qui vult compensare supponit debitum probatum ab actore; non autem illud fatetur.—3 *Fachinæus, lib.* 11, *cap.* 6.

4.—Vulgo qui exceptione se defendit non videtur confiteri de intentione adversarii, nec quis quam prohibetur pluribus exceptionibus uti, etiam subimet invicem adversantibus.—*Warnkœnig, Corp. Jur. Roman, tom.* 1, *lib.* 1, *cap.* 5, *p.* 309.

5.—La demande de l'exception n'emporte pas acquiescement à la prétention du demandeur formulée dans *l'intentio*, de même que chez nous les conclusions subsidiares n'entraînent pas renonciation des conclusions principales, quoique bien souvent ces diverses conclusions paraissent s'exclure.— 2, *Bonjean des Actions*, *p.* 436.

6.—L'exception se présente toujours comme moyen subsidiaire, dont le juge ne doit s'occuper qu'autant que la demande serait pleinement justifiée en fait et en droit.—2 *Bonjean*, *p.* 300.

7.—Exception proposée n'est pas censée admettre la demande. Ainsi celui qui propose l'exception de paiement n'avoue pas la dette.—2 *Despeisses, tit.* 6, *No.* 5.

8.—Par la commune disposition du droit, le défendeur, quand même il ne prouverait pas son exception, est toujours en voie d'être renvoyé absous : si le demandeur ne prouve sa demande : *actore non probante reus absolvitur.*— *Bornier, p.* 36, *Art.* 3, *tit.* 5, *de l'ordon. de* 1667.

9.—Celui qui excipe ne confessé que conditionnellement, c'est-à-dire, en cas que le demandeur fasse preuve de sa demande.

Ce n'est point avouer qu'exciper : *Qui excipit non fatetur.—Denizart vo. Exception.*

10—Observez que lorsque je n'ai d'autre preuve que votre confession, je ne puis la diviser. Supposons, par example, que j'aie donné une demande contre vous pour une somme de 200 liv., que je soutiens vous avoir prêtée, et dont je vous demande le paiement; si, sur cette demande vous êtes convenu en justice du prêt, en ajoutant que vous m'avez rendu cette somme, je ne puis tirer de votre confession une preuve du prêt

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qu'elle ne fasse en même temps foi du paiement; car je ne puis m'en servir contre vous qu'en la prenant telle qu'elle est, et en son entier. Si quis confessionem adversarii allegat, vel depositionem testis, dictum cum sua quantitate approbare tenetur.—*Pothier Oblig.*, No. 833.

11.—Le demandeur doit prouver le fait qui sert de base à sa prétention, et comme le défendeur est toujours assimilé au demandeur lorsqu'il avance quelque chose dans ses exceptions, c'est à lui à prouver le fait sur lequel il appuie sa défense. Mais celui-ci n'est tenu à cette preuve que lorsque celui-là a vérifié le fondement de sa demande.

Lorsque le demandeur convient de ne pouvoir prouver ce qu'il avance, le défendeur n'est obligé à aucune preuve. Actor quod asseverat probare se non posse profitendo, reum necessitate monstrandi contrarium non astringit.

Comme le créancier qui repète une somme d'argent par lui prêtée, doit vérifier le prêt; de même aussi le débiteur qui soutient l'avoir remboursée, doit en justifier légalement. Ut creditor qui pecuniam repetit numeratam implere cogitur, ita rursum debitor qui solutam affirmat ejus rei probationem præstare debet. Ces sont les termes des Empéreurs Sévère et Autonin.

Ce principe n'est, comme on voit, qu'une conséquence de celui qui charge de la preuve, la personne qui affirme, et en dispense celle qui se tient à une simple négative.—*Guyot* vo. *Preuve, Section 1re.*

12.—C'est une autre règle fort importante en matière de confession, qu'elle ne peut être divisée et qu'il faut la prendre ou la rejetter tout entière. Supposons, par exemple, que je vous ai assigné au paiement d'une somme que je soutiens vous avoir prêtée: si sur cette demande vous êtes convenu du prêt, mais en ajoutant que vous m'avez rendu la somme, je ne pourrai pas diviser votre confession, c'est-à-dire, me servir de votre aveu pour prouver la dette et rejetter sur vous la preuve du paiement; il faut que je prenne votre déclaration telle qu'elle est, ou que je renonce à m'en servir sauf à moi de justifier ma créance par d'autre preuves.—*Nouveau Denizart*, v. *Confession.*

13.—C'est la déclaration seule qui doit décider du sort d'une demande qui ne se trouve soutenue d'aucun titre; et cette déclaration ne peut être changée, ni divisée, soit que le défendeur soutienne qu'il n'a jamais rien dû, soit qu'il soutienne qu'il a dû, mais qu'il a payé.—2 *Cochin*, *p.* 692.

14.—Le défendeur est tenu de prouver ses exceptions, mais cela ne décharge pas le demandeur de la preuve de sa demande.—*De la Combe, Recueil Preuve.*

It appears to be plain, from the treatment of the question by Merlin, Toullier, and Marcadé, at the portions of their works hereinafter referred to, that the article of the Code, declaring the indivisibility of the *aveu judiciaire*, has not materially changed the ancient law. In these and other modern authors, the same exceptions to the universal application of the article of the code are considered admissible, as the general rule was held to be subject to under the old system; and the commissioners for the codification of our own law have assumed the rule to be the same here as it is under the provisions of the Code Napoleon (Draft of Civil Code, Obligations, No. 262). It is therefore supposed, that modern French authorities may be quoted without impropriety.

1.—L'aveu est indivisible et doit nécessairement être pris dans son ensemble, lorsque le fait qu'il présente à côté de celui qu'allègue la partie adverse, se trouve avoir avec lui un rapport intime, une connexité toute naturelle. Ainsi quand le porteur d'un billet, tout en reconnaissant que la cause qui s'y trouve indiquée n'est pas réelle, affirme que ce billet a telle autre cause, sa déclaration ne saurait être scindée, et l'adversaire ne se peut faire décharger de la nécessité d'acquitter ce billet, qu'en prouvant en dehors de l'aveu que la prétendue créance ne repose, ni sur la cause indiquée par le billet, ni sur celle qui indique le porteur. De même quand le prétendu débiteur d'une somme avoue qu'en effet il a dû cette somme, mais en ajoutant qu'il l'a payée, on ne saurait diviser sa reconnaissance, et ce ne serait qu'en prouvant la dette autrement que par l'aveu, que le demandeur mettrait le défendeur dans l'alternative de payer ou de prouver sa libération. —Marcadé, Tit: des obligations. Art. 356.

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2.—Balceus réclame de Durlet la restitution de divers outils : celui-ci répond qu'il les détient à titre de gage pour les sommes que Balceus lui doit et dont il demande reconventiellement le payment.

Sur ce jugement du 5 mai, 1829 qui condamne Durlet à la restitution des outils reclamés.—Appel de Durlet. Arrêt du 29 juin 1859.

Considérant . . . que s'il résulte d'une partie de cet aveu que ce dernier est effectivement détenteur de certains objets qu'il indique, il résulte d'une autre partie qu'il en est détenteur pour sûreté des sommes qu'il affirme lui être dues. . . . La cour réforme et achemine Balceus à justifier ses conclusions par tous autres et nouveaux moyens qu'il juge convenables.—Boncenne Procd. Civil, pp. 272-3.

3.—La déclaration d'un officier ministériel qu'il a touché pour son client le montant d'une créance, mais qu'il l'a versée ensuite entre les mains de ce dernier, ne peut être scindée.—Cass : 6 Nov. 1838.—

See also.

Merlin questions de droit, vo. confession.—10 Toullier, No. 336, et seq ; 6 Toullier, No. 177.

In quoting the authorities above cited, which affirm the general rule of the indivisibility of the *aveu judiciaire*, the respondent does not altogether admit that the ordinary rules applicable to that principle, have the same force of bearing when applied to pleas, as they have in respect of the answers of a party when interrogated upon oath. It is hoped that it will be successfully shewn that there is a conventional effect given to an affirmative plea, coupled with a negative one, which seems to rest as much upon convenience and upon the usage and practice of Courts of Justice from the time of the Romans to the present day, as upon those rules which forbid the division of a judicial confession. At the same time as the respondent believes that the exception in this case could not be divided according to the authorities cited, even if it were an answer under oath ; *a fortiori* it cannot, under the rules on the same subject applicable to pleadings, which it is submitted are less variable in their operation and subject to fewer exceptions than those restricting the divisibility of judicial confessions under oath.

As allusion was made during the argument of the cause to the case of Stracy *v.* Blake (1 M. & W., 168), and as in reality our system of pleading—if system it can yet be called —possesses many features in common with that of England, it may not be unprofitable to examine how far the law of England, as exemplified by this case, sustains the respondent's pretensions.

The action was for an attorney's bill, for conducting on behalf of the defendant, an action of damages against one Pitfold. The defendant pleaded :—

1.—*Nunquam indebitatus.*

2.—That he had gone through the Insolvent Debtor's Court after the plaintiff's cause of action had accrued, and had got his discharge. That although the debt sued for was not in his schedule of liabilities, it was omitted therefrom with the full knowledge and consent, and by and through the contrivance and procurement of the plaintiff.

At the trial at *nisi prius*, the chief grounds of defence were that there never really had been any cause of action : it being pretended that the plaintiff had brought the action on his own account to extort money from Pitfold ; and that the debt was omitted from the defendant's schedule with the privity and by the procurement of plaintiff, and therefore that he could not avail himself of the omission. At the trial, it was on both sides "assumed throughout the cause" that the plaintiff's debt was omitted from the schedule, but the schedule itself was not put in and proved. Lord Abinger told the jury that the fact of the omission was admitted on the record. Upon this there was a verdict for the defendant, and a motion for a new trial on the ground of misdirection.

At the argument it was not denied that the parties, when before the jury, had conducted the case on the assumption that the debt had been omitted ; and Lord Abinger said

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that "it was taken as a fact on both sides, that the debt had been omitted." As to the mode in which he had charged with reference to the admission, he admitted that there had been a misdirection, as, "strictly speaking, no doubt it was admitted for the "purposes of that plea but not of the other." But not one of the judges who heard the case *in Banco* had the slightest hesitation in holding that the direct admission of the debt in the second plea was of no effect whatever, as relieving the plaintiff from proving his case.

Lord Abinger said (interrupting the Counsel moving), "I believe we all agree that an admission in one plea cannot properly be used to prove or disprove another plea" and afterwards "I fully admit that a fact admitted in one plea cannot be taken to prove or disprove another.

Baron Parke said (interrupting the Counsel moving), "Every cause involving several "issues is to be tried on each issue, as if they were several causes. Here you "try this case upon the issue on *Nunquam indebitatus*, as if there were no other issue "at all on the record. Thus in an action of trespass, if the defendant pleaded *not guilty* "and also *a justification of the right of way, the admission involved in such justification* "*clearly could not be used to disprove the plea of not guilty.*" And in rendering judgment "I should have thought fit to grant a rule, if the chief Baron had laid it down nakedly "that the jury might look at one plea to support the other, and there had been no other "admission to the same effect in the conduct of the cause. * * * Whatever is admitted "on any issue, I take it to be clear, is admitted only for the purpose of that issue."

Baron Alderson said, "I agree that we are not to take an admission in one plea as evidence on another." And Baron Gurney also put his concurrence on the ground that the fact of the omission was admitted at the trial, the only question in controversy being by whom the omission was made.

There can be no doubt, therefore, that the rule adopted in England is the one contended for by the respondent.

An examination of the jurisprudence of our Courts will show that the weight of authority to be derived from it, is entirely in accordance with the authorities cited from the civil law, and from both ancient and modern French law.

In making this examination, the authorities cited by the appellant at the argument will be first considered; and it is believed, that if no others existed, those authorities of themselves would bear out the proposition, that the jurisprudence of the Courts of Lower Canada is in favor of the respondent's pretension.

The first of these citations, namely, the well-known case of Forbes *vs.* Atkinson, does not professedly dispose of the question at issue. There was but one plea in that case and it contained an express denial of any right of action whatever, and an allegation that the debt claimed had been paid in part and the balance tendered. When the case came before the Court upon a motion for a Commission *Rogatoire*, and the defective character of the pleading was observed, there was no pretension, either by the counsel or the judge, that there was any admission in the plea that could enure to the benefit of the plaintiff. But the Court pointed out that the first part of the plea formed the proper subject of a *défense au fonds en fait*, while the latter really constituted an *exception péremptoire en droit*. The conclusion the learned judge arrived at was, that these matters of defence could not all be joined in the same plea; but so far from deciding that they could not be pleaded *to the same action*, he actually divided them into four classes; the first three of which he said, "ought to have been pleaded generally" by *défense au fonds en fait*; and the fourth, he was of opinion, "ought not to have been pleaded by way of *défense au fonds*, but by way of exception." So that so far from holding that a *défense au fonds en fait* was useless to the defendant if filed with a plea of payment, which would be the result of the pretensions of the appellant, he actually pointed out the proper mode of filing them both to the same action.

The second authority quoted was the case of McLean *vs.* McCormick, decided in the Circuit Court of Quebec, in 1851, by Mr. Justice Power (1 L. C. Rep., 369).

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Without the slightest disrespect to the learned judge, the respondent may be permitted to say, that while this case affords one adverse decision, it can scarcely be considered one which could be held to be of weight in settling the jurisprudence of the country. And the respondent cannot find that its influence in that direction is increased by an examination of the reasons given for it, or by the mode in which the authorities against the doctrine contended for are disposed of. For instance, after quoting the opinion of Despeisse, already cited, declaring that "Exception proposée n'est pas censée admettre la démande: ainsi celui qui propose l'exception de paiement n'avoue pas la dette;" the Court comments upon it as follows (p. 375):—"Nothing (it is said) can be more true or clear than this; but does not the *onus probandi* fall on the excipient? must he not prove his payment? and *failing to do so lose his cause.* Certainly the *onus probandi of payment* falls on the defendant. But if, by pleading payment *il n'avoue pas la dette*, how can the plaintiff gain the cause, without proving his case otherwise than by that plea? If he can, the opinion of Despeisse is plainly incorrect, although the Court declares it to be incomparably true. If he cannot, then the Court had the advantage of being correct in its appreciation of the opinion of Despeisse, though wrong in the application of it; and, as the Court therefore was necessarily in error in whichever way the question may be regarded, the view of Mr. Despeisse, should be preferred as being consistent with itself; and therefore, (if for no other reason) probably the more correct exponent of the law upon the point at issue. The criticism upon Denisart (p. 376) is no more conclusive than that upon Despeisse, for the doctrine held in the Ancien Denizart, under the word *exception*, is substantially reproduced in the Nouveau Denizart under the word *confession*. But as showing what the jurisprudence actually was, this case of McLean *vs.* McCormick is strongly in favor of the respondent's view; for it is professedly an elaborate attempt to arrest a course of judicial decision which the judge thought erroneous, but which he acknowledged had prevailed for a long period of time. He admits (p. 372) that, since 1810, an affirmative plea admitting and avoiding the debt, and the general issue, were permitted to be filed at the same time to the same action. It is true that he asserts that up to 1838, the doctrine he contended for had been adopted; but he only cites one case reported in four lines in the third volume of the *Revue*, in support of this assertion; and it is difficult to comprehend why the rules of practice of the Courts should expressly provide for these pleas being filed, while only one of them was regarded by the Court as having any effect upon the cause. But he distinctly declares (p. 372), that, from the time of the reconstruction of the Court in 1838, "new decisions established a new jurisprudence, giving "effect to the use of those inconsistent pleas, and, in cases such as the present, holding "one plea to be indivisible, and the other a denial of the debt, dismissing the plaintiff's "action with costs in favor of the defendant." In addition to this, he refers to the case of Holland and Wilson, which he is not satisfied with; and to "judgments of the Superior Court," which he considers himself not bound in law to follow. Surely the respondent could not hope to place before the Court more conclusive and reliable testimony, as to the prevalence of the jurisprudence contended for, than that which this most unwilling witness has placed on record.

The case of Copps *vs.* Copps (2nd L. C. Rep., p. 105) which is the only other authority cited in support of the appellant's view, is, in reality, so far as it bears upon it at all directly against it. The point there was, whether an ordinary *défense au fonds en fait* was a sufficient express denial to prevent the allegations of the declaration from being held to be admitted under the provisions of the 85th section of the 12th Vict. cap. 38. An exception was pleaded in that case, but the Court expressly declared that it gave no judicial opinion upon the point whether a plea of payment admitted the debt in such a manner as to exonerate the plaintiff from proving it in the usual manner. "But" (said Judge Aylwin, "I should have thought that the well-known principle *qui excipit non "fatetur*, left no room for difficulty" on that head. Judge Rolland only differed from Judges Panet and Aylwin in this, that he thought the ordinary *défense en fait* in that

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cause put all the allegations of the declaration in issue; thus going farther than Judge Aylwin in giving effect to both the pleas, namely, the pleas of payment and of general denegation, filed to the same action. The opinion of Judge Panet is not stated at length, but he is reported to have concurred with Judge Aylwin.

The respondent feels confident that it has been shewn by this cursory examination of the authorities cited by the appellant, that, with the single exception of Judge Power's opinion, they bear out his pretentions as to the jurisprudence on the point at issue; and that, while Judge Power expresses only his individual dissent, he proves the existence of that jurisprudance from 1838 to the date of his judgment.

But the design of the present memorandum will not be fully carried out unless it can be made to demonstrate that the doctrine contended for has been held by a large majority of the Honorable Judges down to the present time, and has been consecrated by express decisions of this Court.

The case of Holland *vs.* Wilson (1 L. C. Rep., 60) appears to have turned upon the effect of an affirmative pleading in answer to an exception, so far as the point in controversy can be gathered from the rather imperfect report; and in that case, Mr. Justice Vanfelson, in the Court below, and their Honors Sir James Stuart and Judges Panet and Aylwin, in appeal, concurred in adjudging in favor of the party who contended for the indivisibility of the *aveu* contained in the special answer.

For a short time after the passing of the 12th Vict. cap. 38, and before the practice under that statute had become settled, certain of the judges of the Superior Court at Montreal were of opinion, that its effect was to prevent the filing of affirmative and negative pleas to the same action, and, they therefore rejected a *défense au fonds en fait* pleaded together with a plea of compensation in the case of Johnson *vs.* Clarke. The defendant appealed, and the Court of Appeals, composed of the Hon. judges Rolland, Panet and Aylwin, unanimously reversed the judgment upon the express ground, that it was competent for the defendant to file both pleas; and, that the plaintiff was bound to prove the facts upon which his action rested, before the defendant could be required to prove his exception.

Judge Rolland said in rendering judgment (3 L. C. Rep., p. 425), "We hold that "such pleas may be pleaded in one and the same action, and that, in such a case, the "plaintiff must prove his demand, before the defendant can be obliged to enter upon "the proof the allegations of his exception or affirmative plea."

Judge Aylwin delivered an elaborate and learned opinion, and concluded by saying: "The practice in France seems to have been conformable to the Roman principle; and "I think I may say that, at least in the Court at Quebec within the period of my ex- "perience, it has been repeatedly held that a plea which admits and avoids does not "exempt the opposite party from making proof of his demand."

The next and only case of which the respondent is aware, in which the point has been raised since the decision of Clarke *vs.* Johnson, is that of Wilscam and Thayer. In that case, which was for a doctor's bill, a plea was filed, alleging payment and the lapse of more than five years after the alleged services were performed and before bringing the action; and offering the oath of the defendant to sustain the allegation of payment. A *défense au fonds en fait* was also filed. The defendant was examined upon the *serment décisoire*, and, in his answers, declared that the payment was effected by a contra account which he had not made out, but which, he said, he always supposed exceeded the plaintiff's claim. The reasons given for the judgment in the Circuit Court were, that the defendant had not proved the payment he alleged, and by his plea, had admitted the correctness of the account produced. This judgment bears intrinsic evidence of the hand of some clerk, rather than that of His Honor Mr. Justice Monk, who is well known to the bar to entertain the very opposite opinion to that expressed in the judgment, and who probably really condemned the defendant upon the grounds adopted by this Court. When judgment was rendered in appeal, His Honor Mr. Justice Mondelet expressed the opinion which he is known to hold, that a plea of payment though accompanied by a

The [illegible] Wilscam.

negative plea, admitted the debt, to the extent of relieving the plaintiff from proving it. His Honor the Chief Justice expressed no opinion upon the question upon the pleadings, placing his judgment chiefly upon the defendant's answer upon the *serment décisoire.*

Mr. Justice Meredith said that the judgment, in his opinion, was opposed to the rule which had theretofore been observed in our Courts, as to the effect of an admission contained in an affirmative plea, accompanied by one of a negative character. "According to the constant practice of our Courts (he said,) a defendant is allowed to file a "denial with an affirmative plea. * * * The defendant in the present case having "filed a denial of the debt, the effect of that denial was, according to my view, to con-"fine any constructive admission contained in the plea of prescription, to the issue in "which that admission is made. The admission is deemed to be argumentative or "hypothetical, and the exception itself is looked upon as being called into existence "only when the existence of the debt has been proved by the party asserting it."

His Honor Mr. Justice Duval, in expressing his opinion, said, "there is no difficulty "in this case in respect of the pleadings. The difficulty arises upon the answers of the "defendant in the Court below to the questions put to him upon the *serment décisoire.*" If the affirmative plea was an admission of the debt, then there was no necessity for discussing the defendant's answers. The plaintiff was entitled to judgment irrespective of those answers. The inference, therefore, necessarily is, that His Honor was not of opinion that an affirmative plea relieved the plaintiff from the necessity of proving his case. But His Honor Mr. Justice Aylwin set any doubt upon that subject at rest by the terms in which he delivered his opinion. "It is necessary," he began by saying, "first to direct attention to the *considérants* of the judgment of the Court below "(Reads them.) The majority of the Court do not concur in these *considérants*. Their "judgment will proceed upon a totally different basis, and these *considérants* must not "hereafter be cited as law. * * * The doctrine as to the effect of an affirmative plea "relied upon by the appellant cannot for a moment be disputed. It is not only to be "found in one book, but in every good book. Not only does Fachinœus advocate it, "but a hundred other authorities can be found to establish it; and without going "further into the matter, a number of these authorities will be found cited in the report "of the case of Clark *vs.* Johnson, wherein the question was unanimously decided by "this Court in the sense contended for by the appellant."

As Judge Meredith differed from the majority of the Court upon the ground that the same rule should be applied to the *aveu* contained in the answers of the defendant under oath, as the majority of the Court were willing to apply to the pleadings, the respondent is justified in believing that, of the five judges who sat in the case of Wilscam *vs.* Thayer, four were in favor of the proposition for which he contends.

The respondent has been unable to discover any other cases bearing upon the point under discussion, than those he has referred to. The only one of all these, in which the judgment of the Court is adverse to the pretentions of the respondent, is the case of McLean *vs.* McCormick in the Circuit Court at Quebec; and, in the opinion expressed by the Judge in that case, he expressly declares that the jurisprudence, for at least thirteen years, has been uniformly against him. Since that period, twelve years have elapsed, and no case can be found in which Judge Pow[illegible] adopted, but the contrary opinion is sustained in several; and in one, that [illegible] Johnson, [illegible] Court of Appeals, by its presiding judge, declared the q[illegible]ally set at rest by its unanimous decision. So that, not only is there at least twenty-five years' uniform practice adopting the view contended for, but the highest Court our country possesses has, in a solemn judgment turning solely upon the point now under consideration, unanimously and formally declared the jurisprudence to be established in the sense in which it is understood by the respondent.

It is probable that there is no other question that has ever given rise to any difference of opinion, on which the action of the Courts has been so consistent and so decisive.

Thayer and Wilscam.

The respondent respectfully submits, in conclusion, that the doctrine contended for is the safest, the most convenient, and the most just, that could be adopted.

When the ground or cause of an action consists of but one or of but a few items; when its origin is recent, and the evidence in support of it fully recollected and easily attainable,—it matters not which of the conflicting opinions is adopted.

But suppose the causes of action are numerous, and of a distant date; suppose, for instance, they consist of the account of a family grocer, afterwards deceased, extending over a series of years, copied from his books in which no credit appears. Few men do or can know whether the items of such an account, or the amount of it, are correct or not. Suppose that the debtor has been in the habit of paying his grocer's bills every week, but has never taken receipts. Suppose he is sued by the heirs, and as might probably be the case, does not know how much he has paid; or knows and can prove he has paid a certain sum, less than the amount demanded, but sufficient, as he is morally convinced, to cover the amount due. If he pleads payment, he thereby admits the entire amount, and must be condemned for the difference; if he denies the debt, he cannot prove the payments he has made. But there is a remedy for him, which exemplifies the effect of the rule the appellant contends for. Let him sue his grocer's heirs for the amount he has paid, as money advanced, or even for an amount equal to the amount they demand, though he cannot prove the whole of it; *they* will then be forced to plead compensation; *he* will thereby be entirely relieved from proving anything, while *they* will have to prove their account. So that it is a mere question of time. He who can get out his action first, is relieved entirely from any necessity for proving his demand, or is enabled to place his adversary at a most grievous disadvantage. Could anything be more inconvenient, or, in fact, more unjust than this? In a case of disputed opposing claims, why should he who happens to sue first be enabled to force his adversary either to admit his claim, or abandon his own?

Again: the plaintiff has the option of bringing his action or not, and of bringing it at what time and under what circumstances he pleases. If his claim be just, why should he complain of being obliged to prove it? And why should his position be any different from that of a defendant, who sets up a similar claim against him? If the defendant must prove his claim against the plaintiff, why must not the plaintiff prove his against the defendant?

It would be easy to multiply such illustrations, for every man in large practice meets with them constantly. But the rule contended for by the respondent obviates all such difficulties. If there be conflicting claims, each party must prove his own; and each is precisely on the same footing as the other. And, as those which cannot be proved cannot be presumed to be due, the ends of justice will be exactly attained; for neither party is embarrassed in his own case, by being forced to place himself in a more disadvantageous position as to his adversary, than his adversary occupies as to him. If this be the effect, or, in other words, the conventional interpretation of the defendant's meaning, when he files a plea of payment together with the general issue, then the result is beneficial, and favorable to the interests of justice. Such a practice is at once convenient, useful, and equitable. It throws no undue responsibility upon the advocate who pleads; it places the defendant in a position of less danger, if he has the misfortune to be inefficiently represented in the cause; it neither deceives nor is intended to deceive any one; and it is no more immoral or demoralizing than any other of the numerous technical forms of expression, which have conventionally an effect in some aspects different from their literal meaning. If no man, either by mistake or design, ever sought more than his due, the protection the rule contended for affords, would be unnecessary; but in that case, all pleadings, and all Courts of civil jurisdiction would be equally superfluous. Until that period arrives, the respondent trusts that the jurisprudence of this Court will continue to sustain the ancient and safe doctrine, *Non utique existimatur confiteri de intentione adversarius quo cum agitur quia exceptione utitur.*

COUR SUPERIEURE.

MONTREAL, 1 DECEMBRE 1864.

Coram, SMITH J.

No. 475.

Armstrong vs. *Rolston, Cur. and Dufresnay,*

Opposante.

The Trust and Loan Company of Upper Canada,

Contestants.

JUGE :— 1o. Que par les dispositions de la 29me clause du chapitre 30 de la 4me. Victoria, aucune hypothèque légale ou tacite ne subsiste sur les propriétés du mari pour le remploi des propres de la femme aliénés durant le mariage. St. Ref. B. C. Ch. 37. Sec. 51.
2o. Que la renonciation de la femme à l'exercice de ses droits et reprises, en faveur d'un créancier de son mari, n'est pas un cautionnement, et en conséquence, telle renonciation est valable.*

L'immeuble saisi et vendu en cette cause sur le défendeur Louis Boucher, était un propre de communauté appartenant à ce dernier qui l'avait acquis de Dame Sarah Taylor, le 24 avril 1847, Maître J. Belle, N. P.

L'opposante Dame Marie A. Dufresnay, l'épouse du défendeur, avait obtenu une séparation de biens d'avec Louis Boucher, son mari, le 19 février 1863 et par le rapport du praticien homologué le 30 juin 1863, ses droits et reprises furent constatés comme suit:

1o. Pour remploi du prix d'un terrain vendu, l'un de ses propres de communauté.. £ 900 0 0
2o. Pour remploi du prix du terrain en deuxième lieu décrit, aussi un autre propre de communauté vendu............................ 500 0 0

£1,400 0 0

Elle prétendait exercer sur l'immeuble saisi et vendu en cette cause une hypothèque et un privilège avant tous autres créanciers et remontant à la date de son mariage, le 21 novembre 1864, et par son opposition afin de conserver, elle réclamait la somme de £1,422 0 5 courant, avec intérêt sur £1,400 du 19 février 1863, étant £1,400 pour remploi de propres et £22 0 6 pour frais taxés sur son jugement en séparation.

La compagnie de Trust & Loan, qui avait fait une opposition afin de conserver pour la somme de $2,400, montant d'une obligation consentie par le défendeur le 26 août 1846, Maître T. Doucet, N. P. et enrégistrée le 27 août 1856 et hypothéquant l'immeuble saisi et vendu en cette cause, contesta cette opposition.

L'opposante Dame Dufresnay, avait fait une renonciation le 28 août 1856 devant Maître J. Bte. Chalu, N. P., dans les termes suivants :

Et pour assurer autant que faire se peut la garantie donnée à la dite compagnie pour le paiement de la dite somme et intérêt suivant les termes mentionnés en la dite obligation, a, par ces présentes, tant en son nom qu'au nom des enfants,

* 6 L. C. Jurist, Boudria & McLean, p. 65.

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nés et à naître de son mariage avec son dit époux, renoncé en faveur de la dite compagnie à son douaire coutumier, avantages et réclamations qu'elle peut ou pourrait avoir par son dit mariage sur l'immeuble mentionné dans la dite obligation.

La compagnie opposante, en contestant l'opposition de Dame Dufresnay ; allégua spécialement :

"That by the laws of this Province no legal or tacit hypothec, subsists on the "real estate of married men for securing the repayment to their wives of the "price of the *propre*-estate owned and possessed by them at the time of their "marriage, and afterwards sold during coverture (*remploi de propre*)."

"That the *propres* of the said Dame Marie Angélique Dufresnay, alleged in "her said opposition to have been sold during her coverture and of which she "claims the price (*remploi de propre*) were owned and possessed by her at the "time of her marriage with the said Louis Boucher, as appears by the allegations "of her said opposition, and that she consequently never had a legal or tacit "hypothec for the repayment of their price on the immovable property of her "said husband, Louis Boucher, which was adjudged and sold by the sheriff of "the district of Richelieu and of which the proceeds are in his hands awaiting "the order of this Honorable Court.

"That even supposing the said Dame Marie Angélique Dufresnay to have "had a legal or tacit hypothec, on the said immovable property, for securing "the restitution of the price of her said propres, (which, however, the said con- "testing parties specially deny that she ever had) it would now be extinguished "by virtue of the said deed of renunciation.

"That the two sales of which the said Dame Marie Angélique Dufresnay, "claims the restitution of the price by her said opposition, were made long after "the execution and registration of the deed of obligation hereinbefore recited "granted by the said Louis Boucher, to the said contesting parties ; that even "supposing the said Dame Marie Angélique Dufresnay, to have a legal or tacit "hypothec, on the immoveable property adjudged and sold by the sheriff of the "district of Richelieu, in this cause (which however the said contesting parties "specially deny that she has or ever had) it could only rank from the date "of the said sales, and therefore be subsequent and posterior to the hypothec of "the said contesting parties."

L'opposante répondit spécialement à cette contestation comme suit : Que la dite opposante Dame Marie Angélique Dufresnay, n'a pû en loi et n'a de fait renoncé par et en vertu de l'acte de renonciation allégué par la dite compagnie de dépôt et de prêt du Haut-Canada avoir été faite par la dite opposante Dame Marie Angélique Dufresnay qu'au douaire coutumier qu'elle avait ou pourrait avoir sur l'immeuble vendu en cette cause et non à tous avantages et réclamations qu'elle pouvait ou pourrait avoir, lui résultant de son mariage avec le dit Louis Boucher.

Que fût-il vrai qu'elle aurait par le dit acte de renonciation renoncé à tous autres avantages, droits et réclamations lui résultant du fait de son dit mariage avec le dit Louis Boucher, telle renonciation ne pourrait valoir en loi, vû qu'elle comporterait un avantage en faveur de son dit époux durant le mariage, et que tel avantage durant le mariage est réprouvé par la loi.

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Que la dite renonciation en autant qu'elle pourrait être considérée comme affectant les droits de reprises, de la dite Dame Marie Angélique Dufresnay pour remploi de ses propres aliénés, est nulle et de nul effet et doit être déclarée telle par cette cour, comme comportant de la part de la femme (l'opposante), un avantage en faveur de son mari et même de la dite compagnie; réprouvé par la loi.

Pourquoi la dite opposante Dame Marie Angélique Dufresnay persistant dans les conclusions par elle déjà prises dans et par sa dite opposition et persistant dans tous les allégués par elle faits dans sa dite opposition, conclut: à ce que la dite prétendue renonciation du vingt-six avril, mil huit cent cinquante-six alléguée dans la dite contestation de la dite compagnie de dépôt et de prêt du Haut-Canada, soit en autant du moins qu'elle pourrait affecter les droits de reprises soit hypothécaires, soit personnels de la dite opposante, Dame Marie Angélique Dufresnay, tant pour le remploi de ses propres aliénés pendant son dit mariage que pour tous autres avantages et droits matrimoniaux soit hypothécaires, soit personnels, lui résultant de son dit mariage; déclarés nulle et de nul effet; à ce qu'il soit déclaré et adjugé par le jugement à intervenir que la dite opposante Dame Marie Angélique Dufresnay avait sur le dit immeuble vendu en cette cause, lors de la vente et adjudication qui en a été faite par le shérif de ce district pour sûreté du paiement et remboursement de la somme par elle réclamée par sa dite opposition, une hypothèque remontant à la date de son dit mariage avec le dit Boucher et partant à ce qu'il soit ordonné qu'elle dite opposante Dame Marie Angélique Dufresnay sera payée, sur et à même les deniers provenant de la dite vente du dit immeuble, par le dit shérif, et ce par préférence et avant la dite compagnie de dépôt et de prêt du Haut-Canada, et enfin à ce que la dite contestation de la dite compagnie de dépôt et de prêt du Haut-Canada soit déboutée avec dépens.

Smith, J.—The opposition of the defendant's wife is contested by another opposant, the Trust and Loan Company of Upper Canada. The circumstances are these. Mr. Boucher's property was brought to sale. The Trust and Loan Company of Upper Canada claim a certain sum of money. Their contestation show that the property sold during the marriage and the amount whereof is now claimed by the wife was a *propre* which belonged to the wife. A question of some importance arises whether there is any protection to a married woman for the *remploi* of a *propre* that has been alienated by her husband, as she claims the *rapport* of that sum of money. There is no doubt that under the common law, this right still existed. The question is, how has the registry law affected this right? The 29th sec. 4 Vic. chap. 30, declared that no tacit or legal *hypothèque* shall be constituted or subsist, upon the husband's property except for securing the restitution and payment of the wife's claims by reason of property devolving upon her during the marriage. This property then did not come to Madame Boucher during her marriage. It was property she possessed at the time of her marriage. She was then able to protect herself from the acts of her husband. But the property that came to her during the marriage was not under her control, and accordingly the law declared that such property should be protected by *hypothèque*. But there was another point in the case which was conclusive: the wife, after the separation of property which took place, post-

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oned her rights to the Trust and Loan Company. The question then came p, could a woman renounce to these rights? Undoubtedly she could. It as only postponing her rights till the debts of her husband have been paid. It as been so held in the Court of Appeals. The renunciation of the wife is a ood one, and the Trust and Loan Company must get the benefit of it.

Contestation maintained.

La Cour a motivé son jugement comme suit:

The Court having heard the opposant, Dame Marie Angelique Dufresnay, and he said opposants, The Trust and Loan Company of Upper Canada by their ounsel upon the merits of the contestation by the said The Trust and Loan ompany of Upper Canada; of the opposition *à fin de conserver*, made and filed n this cause by the said opposant, Dame Marie Angelique Dufresnay; examined he proceedings and proof of record, and having upon the whole duly deliberated; onsidering that the opposant, The Trust and Loan Company of Upper Canada, ath established its contestation of the opposition of the said Dame Marie Angélique Dufresnay, seeking to be collocated by special mortgage from the day f the date of her marriage with Louis Boucher, and that by reason of the 29th lause of 4th Victoria, chap. 30; no tacit or legal hypotheque can exist on the roperty of the said Boucher, the property, accruing to the said Marie Angélique Dufresnay, having accrued to her before her marriage with the said Boucher. And further, seeing that the said Marie Angélique Dufresnay, by deed of renunciation, executed before Maître Chalut and his colleague, notaries, and bearing date the 26th day of August, 1856, did relinquish and postpone her right of mortgage to that of the said The Trust and Loan Company of Upper Canada, by reason of which renunciation, all rights of mortgage accruing to the said Marie Angélique Dufresnay became postponed to that of the said The Trust and Loan Company of Upper Canada, the said contesting parties: doth maintain the contestation of the said The Trust and Loan Campany of Upper Canada, and doth order in the distribution of the moneys of the said defendant, that the said The Trust and Loan Company of Upper Canada be collocated in preference to the said Marie Angélique Dufresnay, and that the said Marie Angélique Dufresnay do pay the costs of the said contestation.

Citations de la partie contestante.

1. No legal or tacit hypothec exists for the restitution of the price of the wife's *propre*—Estate sold during coverture.

Con. Statutes, L. C., Ch. 37, S. 46.

" " " S. 8.

Bonner's Essay, p. 61.

Reason for this:

Troplong, 2 Priv. and Hyp., p. 441.

2. A married woman can legally renounce her hypothec for matrimonial rights in favor of her husband's creditors.

6 Pandectes, traduites par Bréard-Neuville, p. 251.

1 Persil, Regime, Hyp., p. 305.

1 Persil, Priv. and Hyp., p. 253.

2 Troplong, Priv. and Hyp., p. 482.

13 Toullier, No. 122.

3 Revue de Légis, p. 134.

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6 L. C. Jurist, Boudria and McLean, p. 65.
3. The Renunciation need not be express.
2 Domat, Tit. 1, sec. 7, Nos. 12 and 13.
1 Persil, Priv. and Hyp., p. 257.
2 Troplong, Priv. and Hyp., pp. 475 and 483.
4. The Renunciation of her hypothec is not an indirect advantage, since the personal liability remains.
5. The legal hypothec of the married woman is not exempt from registration.
Con. Statutes, L. C., ch. 37, S. 1.
" " " S. 30.
2 L. C. Reports, p. 87. 2 L. C. Jurist, p. 86.

Bélanger & Desnoyers, avocats de l'opposante Dufresnay.
Henry Judah, avocat de The Trust and Loan Company, Partie contestante.
(P. R. L.)

MONTREAL, 19TH NOVEMBER, 1864.

Coram BERTHELOT, J.

No. 1398.

Kingston vs. *Torrance*, and *Torrance et al.*, T. S., and *Kingston*, contesting.

HELD :—A defendant foreclosed from pleading to a writ of *saisie arret* after judgment, will, on special motion, be allowed to answer the plaintiff's contestation of a *tiers saisi's* declaration made in obedience to such writ, if he has an interest in the matters raised by the contest.

In this case in obedience to the writ of *saisie arrêt* issued after judgment, the *tiers saisis*, executors to the will of defendant's father, declared that they had at the time of the service upon them of the writ, a sum of £2250, being the amount of a legacy coming to the defendant under his father's will, on his attaining the age of thirty years.

That the said sum had a long time previous to this action been assigned by marriage contract to trustees for the benefit of defendant's wife. That under these circumstances they were unable to decide to whom the said sum belonged. The plaintiff contested this declaration saying that according to the terms of his father's will, the defendant had no power to assign the said sum at the time he made the said assignment. The *tiers saisis* answered, denying the allegations of plaintiff's contestation. The defendant, who had been foreclosed from pleading to the writ of *saisie arrêt*, moved to be allowed to file the following special answers to the plaintiff's contestation :

"That the assignment by the defendant to the trustees, mentioned in the declaration of the *tiers saisis* of the sum of £2250 was so made by indenture of marriage then intended to be, and shortly after the execution thereof, duly had and solemnized; and upon such solemnization immediately arose and took effect, and became binding on all parties thereto for a valuable consideration, to wit, the marriage and settlement in life of the defendant.

That the said legacy of £2250 was absolutely the property of the defendant at the time of the said assignment, and by the terms of said will he was not restricted or hindered from the ownership, enjoyment, and assignment of the said legacy unless the executors of the will saw fit so to restrict him, which, in

oint of fact, they never did, but, on the contrary, when notified of the same, ecognized its force and validity, and paid over the interest on the said legacy nto the trustees of the settlement from time to time, and, by so doing, recog- ised and ratified said assignment, and waived their power to exercise said estriction and did not at the time of the seizure in this cause, hold the said gacy in trust for defendant, but for the said trustees of the said settle- ent to whom the same had been duly and legally assigned for a good and valu- ble consideration."

The plaintiff objecting to the filing of defendant's answers contended that efendant had no interest in joining issue in the cause. According to his own atement, his interest in the money had ceased, and if he had no interest he ould not be injured by the contestation. The trustees to whom defendant ade the assignment might possibly intervene, but the defendant had nothing o do with the contest.

On behalf of the defendant it was argued that the result of the contestation successful, would be to nullify the assignment that he had made years before. e was doubtless then greatly interested in the result; he had a right to defend mself. It was his interest that the covenant he had made should be maintained. was true that the parties to whom the assignment was made were greatly terested also, and might intervene in the cause, but that did not affect the efendant's position; his interest arose in a different way from that of the assignees. hey were interested in retaining the money; he was interested in maintaining is covenant. If it were not maintained, he would be liable in damages to the ssignees, so that in reality his interest was equal to theirs, although arising in a ifferent way.

The Court, in giving judgment, remarked that the defendant had an interest nd consequently, a right to answer the contestation and the motion should be ranted.

Motion granted.

S. Bethune, Q. C., for plaintiff.
Torrance & Morris, for defendant and *tiers saisis*.
(J. L. M.)

MONTREAL, 31st DECEMBER, 1863.

Coram BERTHELOT, J.

No. 1925.

Brewster et al., vs. Childs et al.

HELD: That the death of one of the plaintiffs interrupts the *péremption d'instance*.

This was a motion by certain of the defendants for *péremption d'instance*.

On the return of the rule, *Lafrenaye* for the plaintiffs (showing cause) fyled a certificate of the death and burial of Brewster, one of the plaintiffs, and prayed for the discharge of the rule.

Per Curiam.—On the authorities of An. Denisart, V° *Péremption*, p. 670, No. 12, and p. 661, No. 23, Pothier, Proc. Civ. p. 77, ch. 4, §4, and 1 Pigeau, p.

Howard et al., vs. Childs et al.

357, I hold that the death of one of the plaintiffs interrupted the *péremption*, and I therefore discharge the rule.

Rule for *péremption* discharged.

P. R. Lafrenaye, for plaintiff.
Strachan Bethune, for defendants.
(S. B.)

MONTREAL, 31st DECEMBER, 1863.

Coram BERTHELOT, J.

No. 601.

Howard et al. vs. Childs et al.

HELD: That the death of one of the defendants interrupts the *péremption d'instance*.

This was a motion by the defendants for *péremption d'instance*.

Ritchie, showing cause for the plaintiffs, fyled a certificate of the death and burial of Noad, one of the defendants, and prayed for the discharge of the rule.

Per Curiam.—In my opinion the death of any party in a cause interrupts the *péremption*. I have already ruled so in the case No. 617, The City Bank, vs. Tate et al., and I concurred in the judgment which was rendered in McKay vs. Gerrard, reported in the 5th L. C. Jurist, p. 331. I would also refer to Pothier, Proc. Civ. p. 77, ch. 4, and An. Den. V° *Péremption*, p. 660, No. 12, and p. 661, No. 23. The rule must be discharged.

Rule for *péremption* discharged.

Rose & Ritchie, for plaintiffs.
A. & W. Robertson, for defendants.
(S. B.)

MONTREAL, 31 MAI, 1864.

Coram MONK, A. J.

No. 1974.

St. GEMMES, *Appellant.*

AND

CHERRIER, *Intimé.*

JUGES DE PAIX—JUGEMENT.

JUGÉ :—Que lorsque deux ou plusieurs juges de paix ont instruit une cause, ils doivent tous concourir pour la juger.

L'intimé Cherrier ayant poursuivi l'appelant devant les juges de paix, pour dommages causés par des animaux, et l'appelant ayant été condamné, (Acte d'Agriculture, Stat. Ref. du B. C., ch. 26), il en appela à la cour de Circuit, en vertu de la 24ème. Vict. ch. 30.

MONK, J.—Dans la cour inférieure, deux juges de paix siégeaient lorsque la preuve a été faite et l'un deux seulement a jugé la cause, l'autre s'étant abstenu en conséquence d'une récusation dont il n'aurait pas dû s'occuper. Une cause, *ex parte* Robertson, jugée à Sherbrooke, en juillet, 1863, et rapportée dans l'ouvrage de M. Carter LAW AND PRACTISE *on summary convictions and orders*, p. 64, contient les motifs sur lesquels, je me fonde pour casser ce jugement. Il a été là décidé ce qui est résumé comme suit: If heard before two or more, they must all be present when they conclude and decide." L'autorité de Guyot, Répertoire, t. 9, voir *jugement* a été adoptée par le juge de Sherbrooke, et je l'adopte aussi. Elle décide que "lorsqu'il y a plusieurs commissaires nommés pour décider une affaire, ils doivent tous assister au jugement à moins que la commission ne porte qu'ils pourront juger en l'absence les uns des autres.

Magloire Lanctot, pour l'appelant. Appel maintenu.

Doutre et Doutre, pour l'intimé.

(J. D.)

MONTREAL, 25 JANVIER 1865.

Coram, SMITH, J. BADGLEY, J. BERTHELOT, J. siégeant en Cour de Révision.

No. 377.

Les Commissaires d'Ecole pour la Municipalité de la ville de Sorel

VS.

Crebassa et Walker; Adjudicataire mise en cause.

JUGE:—Que le dire du Shérif dans son rapport du writ *de Terris*, que la femme séparée de biens devenue adjudicataire était autorisée par son mari alors present, n'est point suffisant; sans la production d'une autorisation écrite et précise.

Le jugement de la Cour Supérieure, siégeant à Sorel, dans le district de Richelieu, a été rendu comme suit:

La Cour, après avoir entendu la plaidoierie des avocats des demandeurs sur la règle par eux obtenue pour contrainte par corps, contre l'adjudicataire Mary Walker épouse séparée de biens du défendeur, la dite adjudicataire ayant été appelée pour répondre à la dite règle et ayant fait défaut et avoir mûrement délibéré.

Considérant que quoique suivant l'ancien droit commun de la France qui est celui de ce pays, les adjudicataires de biens vendus judiciairement fussent contraignables par corps d'en payer le prix, les femmes et les filles en étaient cependant exemptées et que de plus dans la présente espèce, rien ne fait voir légalement que la mise en cause fût autorisée de son mari à se porter adjudicataire, le dire du Shérif sans la production d'une autorisation écrite et précise, étant insuffisant pour constituer une preuve légale de ce fait, a déchargé et rejeté et décharge et rejette la dite règle pour contrainte par corps émanée contre la dite adjudicataire mise en cause.

Ce jugement ayant été porté en Cour de Révision à Montréal; les demandeurs ont exposé les faits et le droit dans leurs moyens d'appel comme suit:

Raisons et moyens que les demandeurs invoquent pour la révision du jugement final rendu en cette cause.

Commissaires d'Ecole de Sorel vs. Crebassa et Walker.

1o. Le 30 mai 1864, la mise en cause Dame Mary Walker, épouse séparée quant aux biens de John George Crebassa, "étant;" suivant le rapport du shérif sur le writ d'*alias venditioni exponas de terris*; "bien et dûment autorisée "de son dit époux qui à ce présent a déclaré l'autoriser pour le dit achat," est devenue adjudicataire pour $2049 des cinq lots de terre là et alors vendus par le shérif sur le défendeur.

2o. Elle a alors payé $117.18 pour les frais encourus antérieurement sur une folle enchère.

3o. Elle a toujours négligé de payer la balance, savoir $1931.82.

4o. Le 14 novembre 1864, une règle fût prise et signifiée tant à Dame Mary Walker qu'à son mari, pour une contrainte par corps contre elle, pour la restitution de la somme de $730.82, étant la différence entre le montant de son enchère et celui de la revente sur folle-enchère, conformément aux dispositions de la section 25 du chapitre 85 des Statuts Refondus pour le Bas-Canada.

5o. Il est évident que la mise en cause qui a fait défaut et n'a pas contesté la règle, a été régulièrement autorisée par son mari lors du décrêt même et en présence de l'officier public.

6o. Par le chapitre 87 des Statuts Refondus pour le Bas-Canada, section 7 au préambule, il est statué comme suit: "Et considérant qu'il est désirable "d'adoucir la rigueur des lois qui règlent les *relations* entre *débiteur* et *créancier* "en autant que peuvent le permettre les *intérets du commerce*: à ces causes, "sauf toujours les dispositions prescrites dans la section 24."......et nulle "personne du sexe ne sera arrêté ni admis à caution à raison d'*aucune dette*, ni "à raison d'aucune autre cause *d'action civile* ou *poursuite quelconque*;" or, il est évident que les dispositions prescrites dans la section 24, s'appliquent tant aux femmes qu'aux hommes.

7o. Les dispositions de la 24e section, sont comme suit: "Rien dans le "présent acte n'aura l'effet d'exempter de l'arrestation ou de l'emprisonnement "*aucune personne*"......qui doit le prix d'achat d'aucunes terres ou ténéments, "biens ou effets vendus et adjugés par autorité de justice, par licitation, par le "shérif, par décret ou autrement."

Ces dispositions statutaires, ont été appliquées à un cas en tout semblable à celui-ci, à Québec, en la cause de McDonald vs. McLean, 11 L. C. Reports, p. 6.

Le jugement de la Cour de Révision, repose sur le principe qu'il n'a pas été prouvé que la femme avait été autorisée par son mari à se porter adjudicataire. Ce jugement est comme suit:

The Court, now here sitting as a Court of Review, having heard the parties by their respective counsel upon the judgment rendered in the Superior Court in the District of Richelieu, on the 19th November, 1864, having examined the record and proceedings had in this cause, and maturely deliberated; considering that it has not been shewn nor established of record in this cause, that the said Mary Walker, the said *mise en cause*, was authorized by her husband, the said John George Crebassa, to become the adjudicataire of the said several lots of land, mentioned in the said return of the said Sheriff of the District of Richelieu as having been by him adjudged to her; and considering therefore that the said rule for *contrainte par corps* against her, the said Mary Walker, in this cause

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issued at the suit of the said plaintiffs against her, the said *mise en cause*, as such *adjudicataire*, is contrary to law; considering that in the judgment rendered by the said Superior Court, sitting in the District of Richelieu, sought to be raised by the proceedings in revision before this Court for the reason aforesaid, there is no error; doth, for the reasons above mentioned, maintain and confirm the said judgment, with costs to the said *mise en cause* against the said plaintiffs in this Court in revision.

And it is ordered that the record in this cause be remitted to the said Superior Court sitting in the District of Richelieu.*

Olivier et Armstrong, avocats des demandeurs.

P. R. LaFrenaye, conseil.

Girouard, avocat de l'adjudicataire.

(P. R. L.)

CIRCUIT COURT.

MONTREAL, 31st DECEMBER, 1864.

Coram BADGLEY, J.

No. 7206.

Davis vs. *Jacobs*.

SECURITY OF COSTS.

HELD: That where a plaintiff has left the country subsequent to the institution of an action, security for costs may be demanded, although it be shown, by affidavits, that he has a place of business, containing valuable stock, and a domicile, in this city, and that his absence was believed would be temporary, namely about three months.

In November last, plaintiff, a merchant of, and then residing in Montreal, instituted an action against the defendant, also a resident of this city, on an account for goods sold and delivered.

On 10th December the defendant moved for security for costs, and fyled in support of his motion, an affidavit, alleging that he had been informed, that the plaintiff had, subsequent to the institution of the action, left for Europe.

The plaintiff resisted the application on the grounds, that the plaintiff had still a dwelling house and a place of business in this city,—that he possessed goods here of the value of $20,000,—that he was still carrying on business here, and that he was only temporarily absent in Europe for the purchase of goods, and was expected back in February next. He presented two affidavits, the one of which was made by a clerk, the other by the attorney *ad negotia* of the plaintiff's in support of all these statements.

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* Citations des demandeurs.

Différence entre les actes extra-judiciaires et les procédures.

1 vol. Rép. de Guyot, p. 829, vo. autorisation, sec. 5, $1 3 arrêts du Parlement de Paris, rapportés par Brillon, vo. autorisation, no. 18, Ed. de 1727.

Renusson, Com. partie 1ère, ch. 8, no. 12. "Lorsque la femme contracte en jugement conjointement avec son mari et donne quelque consentement, elle n'a pas besoin d'être autorisée expressément de son mari."

Tout ce qui est nécessaire c'est qu'il existe une preuve légale du consentement du mari. Vide, Guyot, Rép. vo. autorisation, p. 820, 2 vol., 1er alinéa.

Or, le rapport du shérif est une preuve légale.

Richardson vs. Thompson.

Per Curiam.—The defendant is entitled to the security. When the plaintiff returns to the country the securities will be discharged. Motion granted.

John Popham, for plaintiff.

H. J. Clarke, for defendant.

(J. P.)

(APPEALABLE SITTINGS.)

MONTREAL, 31ST OCTOBER, 1864.

No. 816.

Coram BERTHELOT, J.

Richardson vs. *Thompson & Thompson*, et al.

OPPOSANTS.

HELD: That where no fraud is proved, a judgment against an individual partner cannot be executed against property of the firm in which he is a partner.

The opposition in this cause was fyled by the firm of Job C. Thompson & Co., who claimed to be the owners of the goods and chattels seized under the plaintiff's writ. The partnership was alleged to have been formed in January, 1863, and was composed of the defendant and Alexander Brown, who carried on business at Montreal as hatters and furriers. The goods and chattels were seized in their store, and were alleged to form part of their stock.

The plaintiff contested the opposition on two grounds: 1st. That the debt for which the judgment had been rendered was contracted by the firm of C. Atkinson & Co., of which the defendant was a member; That on the dissolution of said firm, in September, 1862, the whole of the assets, stock in trade, &c., were made over to the defendant, and the debts and liabilities of the concern assumed by him; and that the whole of the said assets, stock, &c., were afterwards put into the partnership of Job C. Thompson & Co., formed in January following—and that said assets were liable and bound for the debts of C. Atkinson & Co.,—and the opposants, having taken possession of and benefited by them, were bound to pay said debts, even supposing the partnership to be in good faith.

2nd. That said partnership was in bad faith, and formed for the mere purpose of placing defendant's property out of the reach of his creditors, Brown being a nominal partner, and having put nothing into the business.

The opposants produced their partnership deed, executed before notaries and proved at the *enquete* that the goods were seized in the possession of the firm and formed part of their stock in trade—that the old stock of C. Atkinson & Co., had been sold off long before the seizure was made, with the exception of an iron safe, a letter press and a deer's head.

The plaintiff examined the opposant, Job C. Thompson, who stated that the firm of C. Atkinson & Co. at time of dissolution was insolvent—that he only undertook to pay the debts specified in the schedule annexed to the deed of dissolution, in which the plaintiff's claim was not included—that he had since paid off more than the amount in value of the assets of the old firm—he also stated that Brown had put goods to the value of about £1000 into the business.

The deed of dissolution of C. Atkinson & Co. was fyled at the *enquete*. No other evidence was adduced on either side.

Berthelot, J., in rendering judgment said that no proof had been offered in support of the allegations of fraud. There was nothing to shew that Brown was aware of the existence of the plaintiff's claim at the time he entered into partnership with the defendant. If he had referred to the deed of dissolution of C. Atkinson & Co., he would have found nothing there to indicate that such a claim had ever existed. The opposition must therefore be maintained with costs.

Authorities cited on behalf of opposants.

Pardessus, Vol. 4, Nos. 975 and 1087.

Vincens, Législation Commerciale, Vol. 1, *des Sociétés*, cap. 2, § 7.

Judgment rendered by Smith, J., in No. 28, Molson vs. Burroughs & Burroughs *et al., opposants*, 31st Dec., 1858.

Cited by plaintiff.

1574—*McLeod* vs. *Caldwell & Guthrie, et al.*, opposants. S. C. judgment rendered 22nd April, 1863.

A. & W. Robertson, for Plaintiff.

Cross & Lunn, for Opposants.

(A. H. L.)

QUEBEC, 24 DECEMBRE 1864.

Coram Taschereau.

No. 622.

Mignot vs. *Reeds*.

Jugé:—Qu'une action portée par le cessionnaire d'une créance sans signification de transport ou sans acceptation par le débiteur, sera renvoyée avec dépens sur une défense en droit.

Par son action le demandeur Henri Mignot de Québec, réclamait du défendeur James Reed, écuier, du même lieu, la somme de $100,00, que le défendeur avait promis payer à un nommé Bédard sous certaines conditions en vertu d'un acte sous seing privé, passé à Québec le 22 avril 1864, et à lui transportée par Bédard par acte sous seing-privé, aussi passé à Québec, le 18 Mai, 1864.

Le défendeur répondit à cette action par une *Défense en Droit*, dans laquelle il niait le droit d'action du demandeur, celui-ci ne lui ayant jamais fait signifier son transport. La cour adoptant les conclusions du défendeur, maintint la défense en droit, et renvoya l'action du demandeur avec dépens. Le jugement est comme suit:

La cour ayant entendu les parties en cette cause par leurs procureurs respectifs sur les plaidoyers, sur la défense en droit du défendeur, et mûrement délibéré:

Considérant que le demandeur n'allègue pas que le transport qu'il a obtenu de la créance sur laquelle son action est basée a été signifié au défendeur ou par ce dernier accepté:

Considérant qu'en loi le cessionnaire d'une créance n'en est saisi que par la signification du transport qui en est faite au débiteur, ou par l'acceptation, que ce dernier en ferait, la cour maintient la défense au fonds en droit du défendeur à l'action du demandeur et renvoie la dite action avec dépens.

Le défendeur cita:

Institutes de Justinien.

Pigeau, Procédure Civile, 1 vol. p. 33 et 41.

Mignet vs. Reed.

Merlin, vo. action.
Guyot, vo. 20.
Art. 108 de la Coutume de Paris.
Pothier, vente, nos. 316, 554.
Guyot, vo. Transport.
Bourjon, Droit Commun, 1er vol. p. 465.
Coquille, Cout de Nivernois, art. 1er des Exécutions.
Bacquet, Droits de Justice, ch. 21, no. 288.
Journal des Audiences, vo. Transport.
Brodeau, Commentaires sur l'art. 108 de C. de P.
Troplong, Vente, ch. viii, art. 1691, etc., tome ii, nos. 882, etc.
Marcadé, tome vi, p. 325.
Troplong, Privilèges et Hy: 1 vol., no. 340, art. 2.
Projet de Code Civil du Bas-Canada, Traité de la vente, p. 66.
1er vol. L. C. J., page 102.
VII. id. page 313. Voir le 4e considérant du jugement.

Holt et Irvine, pour le demandeur.
Taschereau et Blanchet, pour le défendeur.
(A. T.)

MONTREAL, 30th June, 1864.

Coram, MONK, J.

No. 43.

Ward vs. *Cousine*.

Held :— That in an action commenced by *saisie gagerie* the declaration must be served either by depositing a copy with the clerk of the court within the eight days after service of writ, (Cons. Stat. of L. C., ch. 85, sec. 57) or if served in ordinary course must be served on defendant giving the usual delay before return.

In this case a *saisie gagerie* for $72 issued on the 5th January, 1864, the writ being made returnable the 20th January. The seizure was made on the 15th January, and the declaration was served on defendant personally the 19th of January, 1864. The defendant, by *exception à la forme*, among other things pleaded as follows:

"Because no declaration of plaintiff's action and demand was ever served "upon him, defendant, according to law, by being left at the office of the clerk "of the Court within the delays allowed by law and the statute, or by a true "copy thereof being delivered to or legally served upon him, defendant, within "like delays, but on the contrary defendant says that a copy thereof was only "delivered to him at the office of his attorneys on the 19th day of January, "instant, between three and four of the clock in the afternoon the day before "the return of this action."

The Court, considering that the declaration had not been served as required by the Statutes of Lower Canada, ch. 83, sec. 57, or ch. 83, sec. 170, ss. 2 maintained, the *Exception à la forme*. *Exception à la forme* maintained.

Devlin & Kerr for plaintiff.
Perkins & Stephens for defendant.
(J. A. P., jun.)

SUPERIOR COURT.

MONTREAL, 7TH JANUARY, 1865.

Coram SMITH, J.

Regina vs. *Bennet H. Young et al.*

HELD:—That the Imperial Statute 6th and 7th Vict., ch. 76, which was suspended in this colony by the Queen's proclamation of the 28th day of March, 1850, was not revived by the passing of either of the Provincial Acts, 22nd Vic., ch. 29, and 24th Vic., ch. 6, and consequently, that a judge of the Superior Court for Lower Canada has jurisdiction over the several classes of offences enumerated in the treaty between Great Britain and the United States, commonly known as the "Ashburton Treaty."

This was a motion by the prisoners, who were arrested under a warrant issued under the provisions of the Ashburton Treaty by the Hon. Mr. Justice Smith, one of the judges of this Court, charging them with having committed a robbery on the 19th of October last, on the person of one Samuel Breck, in the town of St. Albans, in the State of Vermont, one of the United States of America, and within the jurisdiction of the said United States, claiming to be released from custody on the ground that the judge had no jurisdiction in the premises.

Kerr (for the prisoners) said he would have the honour to submit the same points, in fact, which he had laid before Judge Coursol on the 13th of December last. The question was one which affected the jurisdiction of the Court as to the matter of extradition. The constitution of the Province of Canada organizes the country into a corporation—a corporation, it is true, of extensive powers—nevertheless the power is limited and defined by the clauses and sections to be met with in the Union Act. The same consequences follow the acts of this province, supposing that the Legislature exceeds the powers of the Act of Incorporation, as would follow all by-laws passed by a corporation erected as such by the legislature of the country. The Legislature of Canada exceeded its power when it went beyond the limits assigned to it by the Act of Union, which gave it authority to pass Laws for the peace, welfare, and good government of the province. But it was a stipulation that no act should be passed by our legislature which was repugnant to the provisions of any Imperial Act. There were certain subjects that did not come within the power of the Province of Canada, and there were certain statutes of Great Britain and Ireland which were declared to extend to the provinces and colonies, such as Navigation Acts, Acts of Revenue and of Shipping, although the colonies were not named therein. Another power not delegated to the colonies was that of legislating on treaties, this being reserved to the Imperial authorities. No colony belonging to the British Empire had power to make treaties or to declare war, consequently a colony had no right whatever to legislate *quoad* the interpretation of these treaties, or the manner in which they ought to be carried into effect. Extradition for criminal offences could not be demanded by Great Britain or France in Europe, or by the United States on this continent, unless it were specially provided for by treaty. On this point he would refer to Lawrence on Wheaton's International Law, pages 233-4. Great Britain and the United States entered into a treaty in 1842, generally

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known as the Ashburton Treaty, by which extradition was allowed in certain cases. It was there provided that the different legislatures of Great Britain and the United States should vest in their judges and magistrates jurisdiction over offences committed in foreign countries, so as to allow, as far as we were concerned, the extradition of the offender, on the issue of the warrant of the Governor General, but the treaty between two such powers as the United States and England was not of itself executive, and it required, especially in a constitutional monarchy like Great Britain, that it should be submitted to the legislature, to be made law, and in order that justices of the peace and judges should be invested with the necessary jurisdiction to carry the law into effect. No jurisdiction was invested in justices of the peace or in judges by common law, or by statute, in the normal condition of the country. The jurisdiction of judges and legislatures was confined entirely to offences committed within the legal limits of the country, and it was a principle of international law well understood that in no country whatever was there any right to interfere for the punishment of crime committed outside of its boundaries, unless under the terms of such a treaty as exists between Great Britain and the United States. This was provided for by the Legislature of Great Britain in the 6th and 7th Vic., ch. 76, which was an act for giving effect to the treaty in question. Through that act provision was made that it should not be lawful for any judge, or any magistrate to issue his warrant for the arrest of any offender accused of foreign crime, unless in the first instance that a warrant had issued if the offender were in England, signed by the Secretary of State, and if in a British Colony by the Governor, requiring all judges and magistrates to assist in apprehending the offender. Consequently, under the Imperial Act no doubt could be entertained that jurisdiction was alone vested on the issue of the Governor General's warrant, as mentioned in the said act. By the 5th section of that act, provision was made that if any by-law or ordinance thereafter to be made in any of Her Majesty's possessions abroad, provision should be made for carrying into effect the treaty, it might seem meet to Her Majesty to suspend the operation of the Imperial Act within the limits of the province, so long as such specified enactment should continue in force and no longer. That fifth clause of the Statute conferred on the colonies the power to pass an act to carry into effect the provisions of the treaty in question. In 1849 Messrs. Lafontaine and Baldwin being Attorneys-General and Mr. Drummond Solicitor-General, an Act was introduced into the Canadian Parliament, founded on the 5th clause of the Imperial Statute, by which provision was made to carry into complete effect the provisions of the treaty in question. That Act vested in officers named in the treaty, the powers, on complaint being made before them on oath, to issue their warrants for the apprehension of offenders who had committed crimes in the United States. It re-enacted certain clauses of the Imperial Act; but the only clause which derogated from the Imperial Statute was the first clause, by which the necessity of obtaining from the Governor General his warrant to a justice of the peace was abolished, and the right was given to any person to come before a justice and, upon oath, obtain a warrant for the arrest of an offender; and jurisdiction was vested either in the judges of the Superior Court or in the magistrates of this province. When arguing this case before

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Judge Coursol, he (Mr. Kerr) had been led into error. He had imagined it was a reserved act, but it was not, for it was an act passed by the Legislature of Canada, and assented to by the Governor. Soon after an order in council from Her Majesty was made, in which, in view of the passing of the statute in question by our Provincial Legislature, in view of the fact that complete provision was made for carrying out the treaty, Her Majesty suspended the operation of the Imperial Act. Consequently this law of the Imperial Parliament under and by virtue of the permission granted in the 5th section, was temporarily repealed *quoad* Canada, during the time that the 12th Vic., ch. 19, should be in force and no longer. Things continued in this way till the consolidation of the Statutes of Canada, when, under the act of consolidating these statutes, the 12th Vic. ch. 19 was repealed. It is true the greater number of its enactments were retained in one of the statutes contained in the Consolidated Statutes; still it is true that the 12th Vic., ch. 19, ceased to exist, and that another statute took its place. The proclamation of the Governor General embodying the Queen's order in Council, suspending the Imperial Act was published in the Canada *Gazette* of 1850, page 8295. He now came to the statute under which it is pretended that the present proceedings were inaugurated. He had seen it seriously advanced in a communication to one of the city papers, signed by one of the learned Counsel for the Crown, that the 12th Vic., ch. 19, still exists; that by the fact that the whole of the clauses in that statute were not repealed in the 24th Vic., ch. 6, the Imperial statute is still suspended. There could be no more unfounded pretension. He maintained that the order of Her Majesty in Council suspending the Imperial Act had ceased to have any effect, and that, being no longer in force the Imperial Act had resumed its operation. There was nothing to prove the order in council, and the Court could not take judicial notice of it. If there were an order in council suspending the Imperial Act, why was it not published and proved? If it be pretended that without publication, the order in council had the effect of suspending the Imperial Act, it was incumbent on the counsel for the prosecution to produce the certified copy of that order. He had undoubted authority for saying that if Judge Short, in the recent case of extradition, had not been taken by surprise, this order of the Privy Council being flashed before his eyes as an authentic document, the case presented to him would have been decided in the same way as Judge Coursol decided. He said this in order that justice might be rendered to the judge who, on the 13th December last, pronounced his decision—a decision founded on law and equity, and for which he had been maligned right and left in the public prints of the country. The Imperial Statute 6th and 7th Vic., ch. 76, is now in force in the Province of Canada at the present moment. The provisions of that statute not having been followed out, and no warrant from the Governor General having been issued to vest jurisdiction in this Court, or any other court in the land, his honour had no jurisdiction whatever to issue the warrant upon which these men were arrested. This was the point presented to Judge Coursol, and he (Mr. Kerr) believed that Judge Smith would have no other alternative but to declare that he has no jurisdiction.

Bethune, Q. C. (acting on behalf of the U. S. Government) said the point

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raised by Mr. Kerr, as to our legislature not possessing in itself, independent of the Imperial Parliament, full authority to deal with this matter, touched the whole question. If he (Mr. B.) could show that our legislature had full power to legislate upon this subject, irrespective of any treaty or imperial statute bearing on the point, the whole fabric of Mr. Kerr's argument would fall to the ground. He had referred to the Union Act as demonstrating the power of our legislature, which he had thought proper to designate a mere corporation. The wording of the act was this:—"That this legislature shall have power to make "laws for the peace, welfare, and good government of the Province of Canada." This has the largest possible form of expression on the subject. Were we then to be told that our legislature undertaking to regulate as to what classes of criminals should remain here or be sent to any place whence they came, was exceeding its powers? It was an absurd proposition. To show this power was inherent in our legislature, he would refer to what the legislature of Upper Canada did, before the union, on this subject, and would cite from the Revised Statutes of Upper Canada, p. 592. But, first, the question of extradition had nothing to do with treaties. A treaty was a mutual compact between two nations, and, of course, required the interposition of the Crown, and the Crown alone. But in a mere question of extradition the legislature of this province was supreme. Well, in 1833, the legislature of Upper Canada, long before any treaty, legislated upon this subject, and in a broader sense than that of the treaty. The act set forth that, whereas, it was expedient to provide by law for the apprehending and delivering up of felons and malefactors who, having committed crimes in foreign countries have sought, or may, hereafter, seek an asylum in this province, it was enacted not only that persons committing such crimes as murder and robbery, arson, &c., might be given up, but those guilty of "larceny or other crimes." Were we to be told this was an unconstitutional act—an act in force ever since 1833? It stands on our statutes ratified by the Crown and recognized as law. In Lawrence's Wheaton on International Law, p. 241, it is recorded, that it was stated by the British Minister at the time of the signature of the Treaty of 1842, that the Rendition Treaty could have no effect in the British dominions in Europe, till provisions were passed to give it effect; but that in Canada the treaty could have immediate effect, because in Upper Canada there existed a provision of law touching this very question. Lord Ashburton apologized to Mr. Webster for the time that must elapse before the treaty between Great Britain and the United States could go into effect as regards other portions of the British empire, adding that in Canada it could have immediate effect, as the Governor General had sufficient authority, under the local legislation; "and "that the convention would be acted upon as soon as its ratification can be "known." We had the wording of the old Quebec Act giving the legislature of Upper Canada the most ample power to "legislate on every subject affecting "the peace, welfare, and good government of the province." We had that legis-"lature passing its statutes in accordance with that power. We had that statute recognized by Great Britain through its ambassador negotiating that treaty. Now the Imperial Act respecting this treaty afforded a confirmation of this view. That Act, in referring to our power on this subject, did not refer to any power as

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being thereby given us, but to a power already existing at the passing of the said Imperial Act. The wording of that Act took it for granted that such a power really existed with us, and it provided that it should be competent to Her Majesty to suspend the Imperial Act—not that it should be obligatory upon her to do so. It must be borne in mind that the Crown was under treaty obligations with another nation, and that it was necessary for the Crown, in good faith, to take care that all our obligations were carried out faithfully. If the legislature of this colony did not legislate sufficiently in the matter, the Imperial Parliament could always step in and supply all deficiency so as to answer fully the purposes of the treaty. Therefore, the Imperial Legislature very properly reserved to itself the right to see the colonial enactment before it would suspend its own enactment. But there was nothing illegal or improper in the Provincial and Imperial enactments going on together; on the contrary, they contemplated such a state of things. We passed an act in 1849, but it did not require any sanction from Her Majesty in order to make it law. As the act created a machinery of our own, for the sake of convenience, our legislature left it to Her Majesty to indicate a day upon which this Act should come into force, in order that if she thought proper to suspend the operation of the Imperial statute, there should be no confusion, and that we should always, or in the meantime, have some law in operation. But what was the language of Her Majesty, as appeared by the *Canada Gazette?* "By virtue of the authority vested in me by the Provincial "Act"—the Act of 1849 passed by our legislature. This was not surely the authority of a mere corporation. So much for the objection that the Provincial Legislature had no power to legislate upon the subject. It would thus be seen that it had such power; and if we had the power to enact, we had the power to go further, and amend or repeal *in toto*. Her Majesty's power of suspension existed as long only as our statute existed. As to the argument that the Imperial Act revived on the repeal of the statute of 1849, the clause Mr. Kerr relied on was the 5th of the Act, respecting the Consolidated Statutes of Canada, 22nd Vic., ch. 29. The clause provided that on and after such day as that on which the Provincial Act should come into force and effect, by direction of the Consolidated Statutes of Canada, etc., all the enactments and parts of enactments mentioned in a certain schedule should stand and be repealed, "save only as "hereinafter provided." Now, as to the argument that because the 12th Vic., ch. 19, was embodied in that schedule that it was therefore repealed, and that when the act 12th Vic. was embodied in the Consolidated Statutes a new statute was created, it is to be noted, in connection with the words "save only as hereinafter provided," that the 8th section of the Consolidated Statutes enacted that said Consolidated Statutes should not be held to operate as a new law, "but as "a consolidation, and as declaratory of the laws contained in the acts so repealed, "and for which the Consolidated Acts were substituted." It was also argued by his learned adversary that by another act—that of 1861—there was a partial repeal of the statute of 1849, and that consequently the Imperial statute revived. Her Majesty had no power to do anything more than deal with the whole act. She had declared that the Imperial Act would be suspended as long as the Provincial Act continued in force, and no longer. But was it to be argued that

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when an act was amended by the legislature it was consequently repealed? The Act of 1849 still exists on our Statute Book, as amended, but amended in a very small particular. Upon the question as to the jurisdiction of our Courts, it was amended in only one particular as to the powers of justices of peace in the matter. In the statute of 1861, we had merely approached nearer to the Imperial Act, restricting the power given under that law, by taking it away from mere justices of the peace, and giving it in lieu to judges of sessions, and stipendiary magistrates. There could be no revival of the Imperial Act unless the whole act of 1849 had been repealed by us, which had not taken place, it being still in the Statute Book, and but slightly amended. In reference to the argument that our law was powerless wanting the assent, or proclamation of Her Majesty giving such a sanction, he contended we required no special aid or order in Council to be proclaimed in the *Gazette* to give the statute life. Our legislature in the Act of 1849 merely gave the Queen power to fix a day on which our Act should come into force so that there might be no clashing of the two Acts, but in the Statute of 1861 no requirement of the kind was introduced. Was it to be said that when the legislature had power to enact, it had no power to amend or repeal laws? Our Act of 1861 did not require any confirmation at Her Majesty's hands. She had power to reserve it, but did not do so. The only other power she had as regards that act, was to disallow it; but instead of doing so, Her Majesty, treating it as an ordinary act by an order made in Her Privy Council, declared that she left it to its operation. He (Mr. B.) denied His Honour had any power to question the constitutionality of the act, under which he was sitting in this case.

The law was in the Statute Book, and the judge had no power to say the Legislature of Canada had no right to pass a law on this subject. Our legislature had the most complete power and control over this question, and required no treaty even in the first instance. It was, then, out of the Court's power to set aside an act of Parliament which gave it jurisdiction in this matter. It could not be maintained that even if the Imperial Act had revived, the two could not exist and operate together. Even if the Imperial Statute has revived, enacting that the Governor General might sign a warrant of arrest in such a case as this, was it to be understood that no other official could do anything towards securing the arrest of accused parties in such a matter? He concluded by repeating that Her Majesty had merely been empowered to suspend the Imperial Act if she saw fit to do so, and that the only effect of her not doing so would have been to allow the Imperial and Provincial enactments to work together.

Johnson, Q. C., (as representing the Crown) said that his instructions from the government were to take part in the case—that part which an English Crown officer could legally take part in proceedings of this description—that was to say, to watch the case, and maintain, if need be, the jurisdiction and authority of the Court. But the jurisdiction of the Court had been very ably and eloquently maintained by his learned friend Mr. Bethune. He did not know that any argument of Mr. Kerr's had been left unanswered by Mr. Bethune. He (Mr. J.) very much regretted that the view he took of this case could not be enunciated in the way he was prepared to do it, as he thought such would have brought the matter to speedy issue. He regretted also, that illness prevented his able col-

league, Mr. Carter, from appearing in the case, as he (Mr. J.) was thus deprived of much valuable assistance.

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Per Curiam.—The examination of the witnesses in the case of the robbery of Brett having been concluded, Mr. Kerr, on behalf of the prisoner, raised a preliminary objection, on the allegation of the total absence of jurisdiction on the part of the examining judge, on the ground that the arrest of the prisoner was illegal, the warrant of arrest not having been preceded by a warrant under the hand and seal of the Governor General, signifying that a requisition had been made by the authority of the United States for the delivery of the offender.

"That my warrant having been issued without such authority, it was altogether illegal, null and void, and that the prisoner was entitled to his discharge."

"The argument was, that there was no law in force in this Province, under which such warrant could legally issue, except the Imperial Statute 6th and 7th Victoria, chapter 76—and that such law imperatively required the authority of the Governor General, before such arrest could be made, and that without such authority the warrant of arrest was altogether illegal.

"In support of this argument, the Counsel for the prisoner stated several propositions.

1st. That the arrest and delivering up of persons accused of crimes was entirely within the scope of Imperial authority, and beyond the jurisdiction of a Colonial Executive.

2nd. That there was no provision by Common Law, or by the Comity of nations, to effect this object.

3rd. That this matter is regulated entirely by treaty, between independent nations, and that the only treaty which regulated this subject between Great Britain and the United States of America, is the Ashburton Treaty.

Let us assume then, for the sake of argument, that the three propositions above stated are true, and that the provisions of the Ashburton Treaty can alone settle and determine the rights of both nations on the subject,—and that the starting point in the settlement of the question is that Treaty.

The Ashburton Treaty was finally settled by the two Governments on the 30th day of October, 1842, by the exchange of ratifications at London.

By the tenth article of this Treaty, it was agreed, "That Her Majesty and "the said United States should upon mutual requisitions by them or their minis- "ters, officers, or authorities, respectively made, deliver up to justice all persons "who being charged with the crime of murder, or assault with intent to commit "murder, or piracy, or arson, or robbery, or forgery, or the utterance of forged "paper, committed within the jurisdiction of either of the high contracting par- "ties should seek an asylum or should be found within the territory of the "other."

Provided that this should only be done upon such evidence of criminality as, according to the laws of the place where the fugitive, or persons so charged, should be found, would justify his apprehension and commitment for trial, if the crime or offence had been there committed. And that the respective judges and other magistrates of the two Governments should have power, jurisdiction and authority, upon complaint made under oath, to issue a warrant for the ap-

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prehension of the fugitive or person so charged, so that he might be brought before such judges or other magistrates respectively, to the end that the evidence of criminality might be heard and considered, and that if on such hearing the evidence should be deemed sufficient to sustain the charge, it should be the duty of the examining judge or magistrate to certify the same, &c., &c., &c.

An act was afterwards passed in the Imperial Parliament to give effect to the Treaty in the 6th and 7th years of Her Majesty's reign; and by one of the clauses of that Act,

It was provided, "That before the arrest of any such offender, a warrant shall "issue under the hand and seal of the Governor General, or person administering "the government, to signify that such an application had been made by the United "States for the delivery of such offender, and to require all justices of the peace "and other magistrates and officers of justice to govern themselves accordingly."

By the fifth section of the said Imperial Act, it is provided that if, by any law or ordinance to be thereafter made by the local Legislature of any British colony or possession abroad, provision shall be made for carrying into complete effect within such colony or possession the objects of the said Act (that is) for giving effect to a Treaty between Her Majesty and the United States of America for the apprehension of certain offenders, by the substitution of some other enactment in lieu thereof, then Her Majesty may, with the advice of Her Privy Council, (if to Her Majesty in Council it seems meet) suspend within any such colony or possession the operation of the said Act of the Imperial Parliament so long as such substituted enactment continues in force therein, and no longer.

Under the authority of the fifth section of this Act the Parliament of Canada passed an Act intituled "An Act respecting the Treaty between Her Majesty "and the United States of America for the apprehension and surrender of certain "offenders," being the 12th Victoria, chapter 19.

By this Act it was stated in the preamble, "that the provisions of the Impe-"rial Statute were found to be inconvenient in this Province in practice, particu-"larly in that part which required the authority of the Governor General before "any arrest of a criminal could be made; and whereas, by the fifth section of "this Imperial Act, it is enacted that if by any law or ordinance, to be thereafter "made by the local Legislature of any British colony, or possession, provision "shall be made for carrying into complete effect the objects of the said Act, by "the substitution of some other enactment in lieu thereof, Her Majesty might, "with the consent of Her Privy Council, if to Her Majesty in Council it seems "meet, suspend the operation of the Imperial Statute so long as such substituted "enactment continues in force, and no longer"; and then follows the enactment of the bill doing away the necessity of the Governor General's warrant.

By the fifth clause of the said Act it was provided that the Act 12th Victoria, chapter 16, shall come into force upon the day to be appointed for that purpose in any proclamation to be issued by the Governor General, or person administering the Government of the province, for the purpose of promulgating any order of Her Majesty, with the advice of Her Privy Council suspending the operation of the Imperial Act hereinbefore cited, within this Province, and not before;

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and this Act shall continue in force during the continuation of the 10th Article of the Province, and no longer.

This proclamation was made by the Governor General on the 28th March, 1850, and was published in the *Canada Gazette* at that time.

The order in Council required by the fifth clause of the 6th and 7th Victoria Imperial Act was passed, and the operation and authority of the Imperial Statute 6th and 7th Victoria was therefore suspended within the limits of this Province, and the 12th Victoria, chapter 19th became the law of the Province.

The effect, therefore, of the passing of the 12th Victoria, chapter 19, was to carry out more completely the stipulation of the treaty. By the 10th article of that treaty, jurisdiction was given to the judges and magistrates mentioned in the treaty. By the Imperial Act 6th and 7th Victoria, it was enacted that before these judges or magistrates could act under the treaty, an authority from the Governor General was necessary;—so far as this is concerned it was a departure from the stipulation of the 10th article. Suppose the 6th and 7th Imperial Statute had enacted that the warrant by a judge or magistrate could not be enforced, except a previous warrant had been issued under the hand and seal of the principal secretary of state, surely it would not be contended that such an enactment would not have been contrary to the provisions of the Treaty, and that it would have frustrated the very object of the Treaty so far as this country is concerned; what possible difference can it make that the name of the Governor General is substituted for that of the secretary of state, so far as mere convenience is concerned, the Governor General who resides at the distance of one thousand miles from the Western extremity of the Province, and the secretary of State, who resides in England, are in a similar position, and the preamble of the 12th Victoria, chapter 19, declares that the provisions of the Imperial Statute had been found inconvenient in practice in the country and that it is necessary to change them.

This Act, so reasonable in that particular, was passed without objection, and it was not even a reserved Act. It was passed by the concurrent action of the three branches of the Legislature of Canada, and became complete, so soon as the Royal assent through the Governor General had been given.

But the time of this act to come into force was left to the Governor General to proclaim, so soon as the 6th and 7th Victoria (Imperial Act) should have been suspended, and was only necessary for that purpose; and as it was enacted in 12th Victoria, chapter 19, the proclamation announcing the suspension also became necessary.

But the Act itself was passed as an ordinary act of Parliament, and passed as the Act itself says by virtue of the authority given to the Parliament by the fifth clause of the 6th and 7th Victoria.

The jurisdiction over the subject matter of the Imperial Act, and of the Treaty itself in so far as the mode of carrying out the provisions of the Treaty within the Province, is concerned, was given to this country, and it fell by the operation of the Imperial Act, under the ordinary jurisdiction of the Canadian Parliament, as all other matters of a local nature fell under the jurisdiction of Canada, by the Union Act itself.

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The mere fact that the 6th and 7th Victoria was a separate Act and provided for its coming into force again in the event of this country not carrying out the provisions of the Ashburton Treaty by enactments of its own, does not affect the question.

The Union Act gave complete and supreme authority over all matters concerning this Province to the Parliament of Canada.

The Act of 6th and 7th Victoria gave complete jurisdiction to this country over the provisions of the Ashburton Treaty, so far as it related to this country, and to the mode of carrying into effect the provisions of the treaty itself within the territory of Canada. There was no limitation to this authority by the Act itself. It was enacted that the mode of carrying into effect the treaty should be regulated by the Provincial Government, and if from the nature of the treaty itself, it would only come into force by Imperial authority, the 10th article of the treaty clearly embraced the whole of the dominions of Great Britain, and vested in the judges and magistrates of the two countries, all necessary jurisdiction and authority for arresting and examining the offenders mentioned in the said treaty. So far as mere jurisdiction is concerned, it was absolutely given by the treaty, and the Imperial Act in that respect confirmed this jurisdiction. The Ashburton Treaty was passed by the Imperial Government for the whole nation, and for that purpose the Imperial authority was supreme.

By the express provisions of the treaty itself, jurisdiction was given to the judges and magistrates of the Province, the consent to this jurisdiction was given by the Crown, 1st, by the ratification of the treaty; 2nd, by the legislative action contained in the provisions of the 6th and 7th Victoria, with the already mentioned restriction of the Governor General's warrant, and 3rd, by the provisions of the 12th Victoria, chapter 19, expressly doing away with this restriction; and so far as the surrender by the country of persons charged with offences specially pointed out in the treaty, the jurisdiction was complete. Even if the 6th and 7th Victoria had never been passed, it is difficult to conceive on what authority this country could have refused to carry out the provisions of the Ashburton Treaty.

But it is not necessary for me to pursue this point any further, as the full and complete jurisdiction was given to this country by the Act 6th and 7th Vic., and by the 12th Vic., chap. 19, so far as to the manner of effectually carrying out the provisions of the treaty is concerned.

I deduce, therefore, from the previous observations,

1st. That supreme authority was given to the Parliament of this country to effectually carry out the provisions of the Ashburton Treaty within the limits of our territory, as it thought proper, and that this authority is to be found in the fifth clause of the 6th and 7th Victoria Imperial Act.

2nd. That by the passing of the 12th Vic., chap. 19, the mode of carrying out the provisions of the treaty is there pointed out.

3rd. That so long as the provisions of the 12th Vict., chap. 19, remained in force, the provisions of the 6th and 7th Victoria were suspended in this country.

4th. That the 12th Vict., chap. 19, having received the Royal assent, the right to change the mode of procedure pointed out to be observed by the 6th

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and 12th Vic., and the substitution therefor of the mode of procedure pointed out by the 12th Vic., chap. 19, was an act clearly within the jurisdiction of this country, otherwise that Act would never have received the Royal assent.

5th. That if the mode of procedure can be changed with the sanction of the Crown, any second change not infringing the provisions of the treaty is also within our jurisdiction, and that the same authority having sanctioned this change, it is absolutely binding on all the inhabitants of this country.

The prisoner's counsel, however, contends that as the 12th Vic., chap. 19, is no longer in existence, that it has been positively repealed, and that, consequently, the Imperial Act of the 6th and 7th Victoria again revived, and became law in this Province.

The argument is, that the 12th Vic., chap. 19, has been changed by the 24th Vic., in such a way as to require a second order in Council, and a second Proclamation to give it effect.

That as the 12th Vic., chap. 19, required a Proclamation and Order in Council to suspend the 6th and 7th Vic. in this country, so also the 24th Victoria also required a second Order in Council again suspending the 6th and 7th Victoria, and a Proclamation to that effect.

In answer to this argument, it may be said that the 24th Victoria does not repeal the 12th Victoria, chap. 19; it simply substitutes three new sections, viz., 1, 2, 3, for the 1, 2, 3, sections of the 12th Victoria, chap. 19.

That the change in part of the said Act does not operate in law as a repeal—See Dwarris, page 534 and 535.

That the 6th and 7th Victoria does not speak of a repeal or change at all, but simply states that in the event of this Parliament making provision for the carrying into complete effect within this colony the objects of the said Act, by the substitution of some other enactment in lieu therefor, that is, in lieu of the enactments contained in the 6th and 7th Victoria, then the operation of the 6th and 7th Victoria may be suspended.

The 12th Victoria was passed substituting new enactments for those of the 6th and 7th Victoria, and received the Royal assent, and the operation of the 6th and 7th Victoria in this country was suspended, and remained suspended so long as such substituted enactments remain in force.

The moment, then, that the colonial amendments were substituted for the Imperial provisions contained in the 6th and 7th Victoria, the colonial law necessarily superseded the Imperial authority.

The Imperial Act 6th and 7th Victoria does not restrain the Provincial Parliament in any way in the mode of carrying out the provisions of that Act, viz., to carry into complete effect the Ashburton Treaty; and the same Act gave to the Colonial Parliament the same authority in this country that it had itself, and delegated to the Canadian Parliament the duty it had itself assumed towards the United States, within the Province of Canada, viz., to carry out the stipulations of the Ashburton Treaty, and it consequently fell under the ordinary jurisdiction of the Canadian Parliament, as all other matters of local concern under the Union Act.

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If the Canadian Parliament had a right, therefore, to deal with the subject at all, it had a right to amend its own Acts in that particular.

I think it will scarcely be denied that if the right to legislate upon any particular subject exists, that it includes the right to amend its own Acts. Now the 24th Vic. was a mere amending Act, and was assented to in the same manner as all other Acts of Parliament were.

It was not even a reserved Act. The same authority which assented to the 12th Vic. assented to the 24th Vic., in so far as the inhabitants of this Colony are concerned, and all magistrates and judges are bound by it. As well might it be pretended that any other law in the Statute Book is illegal, as to say the 24th Vict. is not the law of the land.

It was in fact doing what the 6th and 7th Victoria authorised the Parliament to do, namely, to substitute Canadian enactments for Imperial ones, thereby the more effectually to carry out the provisions of the Ashburton Treaty.

It was to do what by the fifth section of 6th and 7th Vict. this country was authorized and empowered to do, and the effect was, as then stated, to suspend the operation of the 6th and 7th Vict., so long as any substituted enactments existed in the country for carrying out that Act, and by this law, 24th Vict., no Proclamation and no Order in Council were necessary. It was not necessary by the Treaty, and the Order in Council was only necessary by the Act of 6th and 7th to declare the suspension of the Imperial Act.

If no such Order in Council had been made, the local Act would not have had the less force. It was the enacting clauses which declared the suspension of the Imperial Statute, so soon as a Canadian Act was passed; and from the moment the 12th Vict., chap. 19, became law, the Imperial Act was virtually suspended.

It was a mere form generally used in matters of State, and the usual mode of making known the suspension of any law. But in no other way was it necessary to make or complete a law. So far as regards the proclamation, it was not necessary to make the law, but merely to announce the time of its coming into force, as it was provided by the 12th Vict., chap. 19.

However, as regards the 24th Vict., there was an Order in Council, but it was solely to say that the Act 24 Vict. was left to its operation, and to intimate that the Act would not be disallowed within the two years pointed out by the Union Act. Now, would such an Order in Council have been passed if it had been for a moment considered, that the mere amendment of the 12th Vict., chap. 19, had or could have had the effect of again reviving and bringing into force the 6th and 7th Victoria?

The members of the Council and the law officers of the Crown whose attention was particularly drawn to the provisions of that law by the then Secretary of State for the Colonies, the late Duke of Newcastle, would not have fallen into such a blunder as to advise Her Majesty to leave the 24th Vict. to its operation, if thereby the 6th and 7th Vict. would have again come in force.

The result would have been that two laws on the same subject would have existed, repugnant and antagonistic in their nature, which would have nullified each other, and the Ashburton Treaty itself, the one declaring that the warrant

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of the Governor General was necessary, and the other affirming that it was not, and both sanctioned by the same authority, viz., the Queen in Council. It is impossible to suppose that if such had been the effect of passing the 24th Vict., so great an embarrassment would not have been avoided.

The Order in Council, instead of leaving the law of the 24th Victoria to its operation would have advised her Majesty to have disallowed the Act.

The Imperial authorities considered therefore that the enactments of the 24th Vict., chap. 6, fully carried out the provisions of the 6th and 7th Vict., by substituting the enactments required to suspend the operation of the 6th and 7th Vict. in this country, and so long as these enactments existed, the 24th Vict. was the law of the land. The argument that the Act of the 12th Vict. was repealed by the Consolidated Statutes of Canada, cannot affect the question, for the 24th Vict. was substituted for the 12th Vict., with all necessary enactments required by the Imperial statute 6 and 7 Vict., to give effect to the law.

The very terms of the Order in Council on the subject of the 24th Victoria, clearly indicated that the Imperial authorities considered that the subject was exclusively within the jurisdiction of the Canadian Parliament; for the words used in the Order in Council, viz:—That the 24th Victoria should be left to its operation, imply, according to Dwarris, pages 907-8-9, that it, the law, is an affair of an ordinary and local nature.

If a second Order in Council had been necessary according to the argument of the Council for the prisoner, although not required by the act itself, such a pretension must clearly rest on the assertion that a mere Order in Council and a proclamation have greater power and force than an act of Parliament.

The 24th Victoria having received the Royal assent, it still had not the force of law, until Her Majesty in Council had approved of it, and ratified it. An assent had already been given by the Queen as the third great power in the Parliament of Canada, but that assent must be again affirmed by an Order in Council before the act could become law; if so, there is not a single act in the Statute Book which has the force of law.

The proposition therefore is that Parliament, composed of the three great powers of the State, (the only powers which could make a law,) have assented to the law—still the Privy Council, which has no legislative functions whatever, must approve and ratify it before the act can become a law.

This argument in my opinion is untenable; the 12th Victoria required an order in Council precisely because the 6th and 7th Victoria required it, not for the purpose of giving effect to the Act of 12th Victoria, but solely to suspend the operations of the Imperial Act. As soon as an Act was passed in this country to carry out the treaty in Canada, the law had been fulfilled, and the jurisdiction transferred from the Imperial Parliament to the Canadian Parliament.

If not for this object, what was the Canadian legislation to effect?

If then these Acts had not required an order in Council to be given, such order would not have been necessary.

The Act 12th Victoria and the Imperial Act 6 and 7 Victoria, both stated that as soon as Her Majesty, by an order in Council, suspended the 6th and 7th

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Victoria, then the Canadian law should come into force. This order was given, and the Imperial Act was consequently suspended.

Thus, then, by the passing of the 24th Vic., all the powers of the government were brought into harmonious action.

The Legislature, the Judicial and the Executive, all concurred in giving full effect to the treaty.

The powers conferred by this concurrent action upon the Judges and Magistrates of the country, in general terms, were as a mere matter of local jurisdiction finally regulated by the amending Act. For the 12th Victoria, chap. 19, in giving this jurisdiction to the Judges and Magistrates, generally, might have been inconvenient in practice, as the most important questions of international law might have been left to the determination of any country magistrate, who could not be supposed to bring to such important considerations either the requisite time or the knowledge to deal satisfactorily with the subject. I say this in no spirit of blame, but solely to show how and for what purpose the amending Act was passed, and that in so leaving the investigation of these points to more experienced judges, Parliament in no way exceeded its powers or violated any of the provisions required for effectually carrying out the treaty.

The treaty only received legislative effect in the United States in 1848, several years after it had been passed.

Whether such legislative action was required to give effect to the treaty had been then discussed.

The case of Nash, otherwise called Robbins, delivered up in Charlestown for mutiny and murder, and afterwards executed in Jamaica, had raised doubts, and these doubts were therefore effectually put an end to by the passing by Congress of the Act of 1848.

Those desirous of further examining this question are referred to Hind on *Habeas Corpus*, page 581, and following pages, where the subject has been to a certain extent discussed.

The moment, then, that the order in Council required by the 6th and 7th Victoria, and 12th Victoria, chap. 19, had been passed, and the proclamation made in this country to that effect, the order in Council had fulfilled the object intended to be attained by it, viz., the suspension of the Imperial Act within the limits of this province, and was no longer necessary.

It was intended in the first instance merely to declare that as the Imperial Act alone could legislate on the subject for all the dominions of Her Majesty, the Act had been passed; but so soon as the Canadian Parliament had legislated for the purpose of carrying into effect that law, within the jurisdiction of that Parliament, according to its own laws and institutions, that the Imperial Act in that particular would be accordingly suspended. Once suspended it remained suspended, so long as Canadian legislation existed on the subject.

Whether the Canadian Parliament could originate legislation on the subject, is beside the question.

If it had authority in the first instance, it was delegated to it, and delegated by the only authority which had any control over the matter.

If the Imperial authorities were satisfied with the matter, surely it is not for the people of this country to complain.

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The Imperial Act, therefore, once suspended, it remained suspended, so long as there remained on the Statute Book any enactment instituted for the Imperial one, carrying into complete effect the Ashburton Treaty.

The conclusions, therefore, which I deduce from this branch of the case after the passing of the 24th Vic., are,

1st. That the 24th Vic. was an amending Act to the 12th Vic., chap. 19, and simply substituted one mode of procedure for another.

That such power was expressly given by the fifth section of the 6th and 7th Victoria, chap. 76. That the power given to regulate necessarily implies the right to amend.

That such amendment having received the Royal assent, it became law, and was absolutely binding on all the inhabitants of the country.

That it was more effectually to carry out the provisions of the law, and the treaty, as declared in the Imperial Act.

That it had not the effect of reviving the 6th and 7th Victoria, Imperial Statute.

That the only law in force in the province on the subject, is the 24th Victoria, consequently that my warrant issued under the provisions of that law is legal to all intents and purposes.

I need not therefore extend the argument any further. I have confined it to the examination of the general proposition, that the Imperial Statute, 6th and 7th Victoria, was in force, and that I was therefore without jurisdiction in the matter.

I will not touch on the smaller points raised tending in themselves only to support the general objection. I have confined the argument to a strictly legal view of the objection, without I trust being unnecessarily diffuse.

Allusion has been made in the course of the argument to the fact that different opinions have been entertained on this subject. Whatever may be the opinion of others on this point, it is neither my business nor my duty to inquire. I am not here to criticise the opinion of others, but to state my own. This opinion has been formed, irrespective of the opinions of all others, and I may say I have never entertained a doubt on the subject.

In doing this I have stated the propositions of law, which I consider as necessarily flowing from the argument, and after a careful examination of the matter, I have come to the conclusion that my warrant was properly issued, and the objection taken by the Counsel for the prisoners is therefore overruled.

The subject matter of the judgment rendered by Mr. Justice Smith is sufficient reason for the publication of the following notes of opinion prepared by Mr. Justice Badgley who heard the arguments at the bar, but did not participate in the proceedings: the notes are merely technical, and in accordance with the judgment rendered.

"This preliminary objection is technical, and involves the legality of the warrant, and may be considered upon legal grounds only.

The right of territorial asylum is national.

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As regards Great Britain and the United States of America, it is Imperial and Federal, not Colonial nor State.

The extradition of criminals is a matter of comity, not of right, except in cases of special convention.—2 Phillimore, International Law, p. 413.

Both Great Britain and the United States maintain upon principles of International law, irrespective of treaty, that the surrender of foreign criminals cannot be demanded.—Ditto, p. 411.

Hence the necessity for its regulation by conventional or treaty stipulations which can only be made by the treaty making power of the nation.

Hence again, therefore, Great Britain and the United States, the high contracting parties, did agree by treaty stipulations between them, for the extradition from their respective dominions or territories of persons seeking an asylum or found therein, charged with any of the offences enumerated in the treaty, committed within the jurisdiction of either power.

See the Ashburton Treaty of 1842.

The offences enumerated in the treaty are social, not political.

To give effect to these conventional treaty stipulations, the national Legislatures of Great Britain and the United States of America intervened, and made them national laws for each respectively, thereby given them a municipal legal character.

The Imperial legislation of Great Britain was the Imperial Act 6-7 Vict., ch. 76, intituled "An Act for giving effect to a treaty between Her Majesty and "the United States of America for the apprehension of certain offenders." Passed in 1842.

This Imperial Act covered the empire, together with its colonies and foreign possessions.

Previous thereto, no such municipal law existed in the United Kingdom, and from its Imperial nature none such could have really legal effect in the dependent colonies and possessions.

The Imperial Act became the sole legal and paramount law in the colonies respecting extradition therefrom.

It became paramount necessarily, because—

1. The Act in its own terms and enactments so provided, until its suspension by an order of Her Majesty in Her Privy Council which should substitute local legislation upon the objects of the act, in lieu of the Imperial Act, and suspend the latter during the continuance of the local law.

2. The subject matter and objects of this Imperial Act were Imperial, not Colonial, and could not be subjected to the control or direction of a Colonial Executive of Legislature without Imperial sanction.

3. Legislative concurrence in this particular matter and for the particular objects of the treaty, requiring treaty stipulations to be made between the nations themselves, could not co-exist between the empire and a colony or dependence, without admitting an equity of Imperial power to both.

4. The Imperial Constitutional Act of Canada, the Union Act, third and fourth Vic., cap. 35, prohibits all local legislation repugnant to Imperial enactments, necessarily implying that local legislation to the same effect would be useless and superfluous.

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But the Imperial Act did delegate to Colonial Legislatures power to make local enactments and laws upon the objects of the Act; and to prevent a conflict and concurrence of the Imperial with the local enactments, legislative authority was given in express terms by the Imperial Act to Her Majesty, by an Order in Her Privy Council, to suspend the latter and to substitute the former in its place as the law of the colony.

The terms of that authority were as follows: "If the Colony should thereafter make legal provision for carrying into complete effect within the Colony the "object of the Act by the substitution of some other enactment in place of the "Imperial Act, Her Majesty would, by an Order in Her Privy Council, suspend "the operation of the Imperial Act so long as the substituted local enactment "should continue in force, and no longer."

Colonial Legislative action was, therefore, expressly allowed only for the purpose of carrying into effect the objects of the Imperial Act within the Colonial jurisdiction, according to the local circumstances and position of each Colony and Dependency.

This delegated power of local legislation was, therefore, absolute in its nature, but restricted in its purport and extent by the objects of the Imperial Act.

These objects once secured by the local law, the mode and manner of carrying that law into operation, technically the *procedure* of the law, or, in common parlance, the machinery for obtaining its required purposes, were left to the direction of the local legislature to be provided for according to the circumstances and position of each colony.

These objects of the Imperial Law are set out in the preamble of the treaty. "And whereas it is found expedient for the better administration of justice and "the prevention of crime within the territories and jurisdiction of the two parties "respectively, that persons committing the crimes hereinafter enumerated, and "being fugitives from justice, should under certain circumstances be respectively "delivered up."

More briefly, the extradition of proved criminals, from their refuge in the colony, to the United States, in which their offence was committed.

And the 10th section of the treaty provides the mode and manner of securing those objects, as follows: "It is agreed that Her Britannic Majesty and the United States, etc., shall deliver up to justice, etc., upon requisition, &c.

The suspension therefore within the colony of the Imperial Act, was essential to give operation to the local enactment, and which could only take effect after Her Majesty's approval and allowance of the Local Act, and Her order in Council adopting and substituting the latter for the former.

But that suspension was precarious, being entirely dependent upon the continuance in force within the colony of the local enactment and law.

The legislature of Canada did, in 1849, act upon this delegated legislative power, and did pass the Local Act, 12 Vic., cap. 19, which made provision for carrying into effect within the colony, the objects of the Imperial Act, and also for removing practical inconveniences resulting from the Imperial Act in the manner of carrying those provisions and objects into effect, and finally for affording facilities for the practical working of the local enactment.

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By the last section of the Local Act, it was enacted that it should not have operation until a day to be named in a proclamation to be issued by the Governor, for the purpose of announcing, 1st, the fact that Her Majesty had made the Order in Council referred to in the Imperial Act, whereby Her Majesty had suspended that Act; and had adopted and substituted the Local Act in its place; and 2nd, the particular day for the coming into operation in Canada of the substituted local law.

The Order in Council was made on the 8th January, 1850; the proclamation to announce the same was dated on the 28th March of the same year, which also fixed the day of operation of the local law, namely, the 10th April following.

The proclamation was not required at all by the Imperial Act, and formed no part or portion of the purview of the Local Act; it was needed, however, for the formal and special purposes of announcing the making of the Order in Council and the day for the coming into operation of that local law; having fulfilled that special purpose, and for which alone it was required, it became thereby exhausted and effete, nor was it afterwards mentioned or referred to by the Legislature.

The Local Act, 12 Vic., cap. 19, thus substituted for the Imperial Act, became by these means the sole, absolute, and permanent law of Canada for extradition from her territorial jurisdiction.

The objects of the treaty, made municipal by the Imperial Act, were thus carried into complete municipal effect within Canada, by the provisions of the local law, which gives to the Imperial Representative, Her Majesty's Governor of Canada, authority to extradite from the Province persons found therein, charged with the commission in the United States of America of any of the enumerated social offences detailed therein, but only after sufficient legal evidence of their criminality shall have been established before the local magistrates and officers of justice, and upon the certificate of the latter to that effect to the Governor for his action in the matter pursuant to the law.

The Governor is the only authority in Canada for the extradition therefrom of fugitive criminals from the United States of America; but his power to act at all is derived solely from the local law substituted for the Imperial Act, by his Imperial constituent, Her Majesty, and therefore his power is necessarily confined within the letter of the local law.

Hence the Governor is powerless to act against such fugitives charged with the commission of any other of the formidable list of social offences not enumerated in the treaty, because these are not contained within the local law.

And he is still more completely without power against fugitives for political offences, not only because of their non-inclusion amongst the offences enumerated in the local and imperial laws and in the treaty stipulations, but because the right of territorial asylum for such fugitives is within the protection and safeguard of the imperial authority, and may not be violated by the self-action of the administrator of the colony.

It is manifest, therefore, that the power of extradition and its exercise in Canada resides in the Governor as the representative of Her Majesty and of the Imperial power as settled by the local law, and not as the mere colonial executive

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Subsequently to the Act of 1849, 12 Vic., cap. 19, the Legislature of Canada deemed it expedient for the public convenience to bring together and consolidate all the existing Statutes of Canada into one general act, to be denominated "The Consolidated Statutes of Canada," and did in fact so consolidate them, including amongst their number the substituted enactment, 12 Vic., cap. 19, under the chapter 89 of the general Consolidated Act 22 Vic., passed in 1859.

But it was specially and expressly declared by this latter act "that the Consolidated Statutes of Canada shall not be held to operate as new laws, but shall "be construed and have effect as a consolidation and as declaratory of the law "as contained in the said acts and parts of acts so repealed and for which the "said Consolidated Statutes are substituted."

The Local Act, the 12th Vict., cap. 19, was transferred bodily *in integris*, into the Consolidated Statutes with its detailed preamble referring to the Treaty and the Imperial Act, to the delegated power of legislation upon the objects of the Imperial Act, to the inconveniences practically resulting from its requirements and the necessity of a change in the latter, together with its five sections, for carrying into effect the objects aforesaid, and for continuing the local law during the continuance of the 10th article of the treaty. The only omission from that Local Act was that portion of its last section which required the issue of the proclamation [illegible] referred to, because, having accomplished the particular purposes for which it was required it had become effete and useless, and was not therefore transferred.

The local enactment and law so consolidated continued therefore to exist in force in Canada, and was declared by the Consolidated Statutes not to be a new law.

The local extradition law, therefore, contained in the act so technically known as the 12th Vict., cap. 19, became thereafter technically known as the chapter 89 of the Consolidated Statutes; the particular classification of the year in which it originally was passed, namely, the 12th year of Her Majesty's reign, and its particular number, 19, amongst the chapters of enactments of that year, were dropped, but the law itself remained in full force under the number chapter 89, and was the same as the original act.

So that, in fact, the local extradition law of Canada remained unchanged and in full force notwithstanding its consolidation amongst the other statutes of Canada in 1859, because, in fact, the consolidation was only the re-expression of existing law.

And thereby the objects of the Imperial Act were preserved, undisturbed and in complete effect as provided for originally in the local act 12th Vic., which was, as above stated, continued in force by the Consolidated Statutes.

But by the local act of 1861, 24th Vict., cap. 6, intituled "An Act to amend "chapter 89 of the Consolidated Statutes of Canada respecting the extradition "of fugitive felons from the United States of America," the three first sections of the Consolidated Statute, chapter 89, were thereby repealed, but it was also thereby enacted *eo instante*, and without interval of time, that the second, third, and fourth sections or paragraphs of this Act 24th Vict., should be substitutd for the first, second, and third sections of chapter 89, and should be read as first, second, and third sections of that chapter of the Consolidated Statutes.

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And thereby the three first sections of the substituted local law, 12th Vic., being the same sections of the Consolidated Enactment, cap. 89, were in effect replaced by the said three sections and paragraphs of the act 24th Vic., which were required to be read in the Consolidated Statutes and consequently in the 12th Vic., in the place of the three sections of the original act transferred to the Consolidated Statutes and placed therein.

But this substitution did not interfere with or impair the objects of the Imperial Act, nor in any manner or way substitute by local legislation other or local objects in the place of the objects of the Imperial Act.

Nor did it affect the substance or purport either of the act 12th Vic., or of its consolidation under the chapter 89. On the contrary, the substitution merely afforded additional facilities for carrying the local law into effect; it made verbal amendments in the original sections, but *in eodem sensu*, and referred to the mode and manner only in which the objects of the Imperial Act are to receive complete effect, and the provisions of the local law for that purpose are to be enforced, namely, by the specification of particular local officers of justice before whom the evidence of the offence itself and of its commission in the United States is to be established, for the action thereon of the Governor, namely, the use of his resulting authority for the extradition of the accused fugitives from justice to the territories of the United States, under the terms and as provided by the local law.

The substituted sections of the 24th Vic., cap. 6, in fact applied only to the machinery or technical procedure of the local law, by giving practical, improved or rather additional facilities, for carrying out the law, and were simply amendments of the previously existing enactments.

But it is objected that the repeal of the first three sections of the Consolidated Statutes, cap. 89, and thereby, of the similar three sections of the 12th Vic., was absolute, and *eo instante*, brought the Imperial Act into paramount legal force and effect in Canada, thereby displacing the local law, because the suspension of the Imperial Act was to continue no longer than the continuance of the substituted local enactment, which consequently ceased to have effect by the repeal of the enactments contained in the said three sections of the cap. 89, and 12th Vic. respectively.

Without adverting to the consequence of such revival, the question involved in the objection is simply and entirely technical and legal, viz., the legal fact of the absolute repeal, in effect, of the Consolidated Statute, cap. 39, and thereby necessarily of the 12th Vic.

The remarks previously made on the subject of the substituted sections of the 24th Vic. show that the alterations contained in them were, in fact, only amendments of the previous enactments and of the existing law.

And that it is so, the Legislature of Canada has declared by intituling the said 24th Vic., cap. 6, "An Act to amend cap. 89 of the Consolidated Statutes."

Hence, therefore, the enactments of the 12th Vic., were not, in fact, repealed by their transference *in integris* into the chap. 89 of the Consolidated Statutes, which themselves were not new laws, but declaratory only of existing law, and the 24th Vic. being only an amendment of such existing law without interference

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with the objects of the Imperial law, the original enactment and law of the 12th Vic., were merely amended and not repealed by the amending sections and paragraphs of the 24th Vic., substituted for those of the chap. 89.

But upon this technical question legal construction and authority in the construction of statutes concur together in opinion, and corroborate the result above expressed of the amended character alone of the said above existing law.

That legal construction and authority may be thus enunciated.

The principle of law is, that when an act is repealed, it must be considered, except as to transactions passed and closed, as if it had never existed.

But it is laid down by Lord Cheif Justice Kenyon as follows:—"It cannot "be contended that a subsequent Act of Parliament will not control the provi- "sions of a prior statute, if it were intended to have that operation; but there "are several cases to show that where the intention of the legislature was ap- "parent, that the subsequent act should not have such an operation, then, even "though the words of such statute, taken strictly and grammatically, would repeal "a former act, the courts of law, judging for the benefit of the subject, have held "that they ought not to recommend such a construction."

And Dwarris (on Statutes, p. 534), holds, "The word 'repealed' is not to be "taken in an absolute, if it appear on the whole act to be used in a limited "sense."

It is therefore manifest that neither in fact, nor by construction of law, is the act 24th Vic. a repeal of the previously existing local law of extradition, and that it can be considered only as an amending act perfectly within the attributes of the Local Legislature to make, being without alteration of the substantial objects of the Imperial Act, or of its original substituted act, 12th Vic., cap. 19.

Under these circumstances, the Imperial Act has not revived, and has no operation in Canada, the local law of extradition alone being in force.

But a close examination of the two local laws, the amending Act 24th Vic., and Consolidated Statute, chap. 89, shows in the former an omission from the latter, which requires notice.

In the original act 12th Vic., the words "any of such States" are generally found in immediate connection with the previous words "the United States of "America," as in the first section, "Upon complaint made on oath charging any "person found, &c., having committed within the jurisdiction of the United "States of America, or of any of such States, any of the crimes," &c. So again "the governor may issue a warrant upon the requisition of the proper autho- "rities of the said United States, or of any such States," &c., and so, also, in the second and third sections.

The 24th Vic. has omitted the words "any such States" and has limited the enactment expressly to the United States of America, using those terms solely in all the particular places of the sections without the following words of the previous law, "or of any such States."

But the additional words "or any such States" in the previous enactments would seem to be superfluous, and their omission in the sections or paragraphs of the amending act 24th Vic. merely renders the local enactment more perfectly conformable with the terms of the treaty and of the Imperial Act, and with the delegated power of legislation by the Colonial Legislature.

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The objection is very specious; but is the omission really important?

The Treaty was made by the national Governments, and evidently had in view the aggregated Governments as such, the United Kingdom with its colonies and dependencies, and the General Government of the United States of America, composed of its Federated States. The Treaty did not contemplate the home Kingdoms of England, Scotland, and Ireland, and the numerous foreign possessions, as several, but the Empire, comprehending them all in the aggregate; nor did it in the terms "United States of America" contemplate the several states composing the Federation or Union, but the General Government of the Federated States, as an aggregated Government known as the United States of America.

The Imperial Act, passed to carry into effect the Treaty of 1842, also contemplated the aggregate or British Empire, and the aggregate or General Government of the United States of America in the like manner as the Treaty.

Again, in the preamble of the Treaty the words jurisdiction and territories are used concurrently and correlatively: it is there set out, "for the better "administration of justice and the prevention of crime within the territories and "jurisdiction of the two parties:" the fact, crime being made in terms to have a local habitation; and by the 10th Art. of the Treaty, "it is agreed that Her "Britannic Majesty and the United States, &c., shall upon mutual requisitions "by them made, &c., deliver up to justice all persons who, &c., being charged "with the crimes, &c., committed within the jurisdiction of either, shall seek "an asylum or be found within the *territories* of the other," &c.

So the preamble of the Imperial Act, referring to the Treaty, adverts "to per- "sons charged with the crimes, &c., committed within the jurisdiction of either "of the high contracting parties," &c., and finally declaring the expediency "that "provision should be made for carrying the said agreement into effect," proceeds to enact "that in case of a requisition made by the authority of the United "States for the delivery of any person charged with the crimes, &c., committed "within the jurisdiction of the United States of America, who shall be found "in the territories of Her Majesty," &c., "it shall be lawful," &c., and "the "person so charged shall be delivered to the person authorised to receive him in "the name of the United States," &c., and "to take him to the territories of "the United States."

The several colonies or foreign possessions of the British Empire and the several States of the Union are not mentioned in the Treaty nor in the Imperial Act.

But the general designations necessarily had reference to the aggregated dominions and territories of the high contracting parties, the General Governments of each, the United Kingdom of Great Britain and Ireland, with its dependencies and colonies, on the one part, and the Federated General Government of the United States with its State Governments on the other, as aggregate territories over which their respective general public authority prevailed.

The application of the terms "jurisdiction" and "territories" was general not particular, comprehensive not special, and referred to general not particular territories or districts comprised within the general designated terms "Kingdom "of Great Britain and Ireland," and "the United States of America."

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The term jurisdiction, then, as applied to Great Britain and the United States of America is synonymous with the territories of either.

This term jurisdiction has several significations, but cannot at least in this question be interpreted in its most limited sense, namely, as mere judicature or administration of justice in a colony.

In its extended sense, it means a legal authority, extent of power, and likewise also applies to the district or country, otherwise territory, to which any authority or power of Government extends, covering under the general term the territories of the Kingdom of Great Britain and Ireland at home and abroad, and in like manner those of the Union or General Government of the United States, composed of its several States.

It must not be forgotten that the chief and principal object of the Treaty and of the laws made for giving it effect, was with respect to the commission of crimes and the places of their commission; the enumerated crimes were those committed in the kingdom of Great Britain and Ireland and in the United States of America.

Hence, the more immediate objects of the Treaty and of the Imperial Act as they applied to the United States of America, were, first, the fact of the enumerated crimes having been committed within the territories of the United States, and second, the extradition of the fugitive offender from his refuge in the territories of Great Britain and her colonies *into the territories of the United States*, the place of the commission of the crime, the actual extradition being restricted to these territories in the Treaty and Imperial Act, as well as in the 12th Vic., cap. 89, and 24th Vic.

Now, although the 12th Vic. and the consolidated chapter 89 have the words "jurisdiction of the United States of America," or "of any such States," in connection with the commission of the crimes therein, and as to the requisition to the Governor for his warrant of extradition, still that warrant by both Statutes is directed to issue for the extradition of the offender into the *territories of the United States* only. The enactments authorizing the person authorized to receive the offender, giving him power "to hold such persons in custody and take him to the territories of the said United States, pursuant to said Treaty."

By the terms of the Treaty and of the Imperial Act, jurisdiction and territories were correlative, and the addition of the words "or, of any such States" would be useless as being, in fact, included in the general aggregate expression "United States of America."

The omission, therefore, of those terms can have no legal effect.

Finally, under the legal system in force in this country, a statute enactment or law passed by the Legislature of the Colony, duly assented to by the Governor and publisher in the Statute Book of the Colony, is a public law, governing and controlling all persons, judiciary and others in the Colony, and if not disallowed by the Crown, and that disallowance publicly proclaimed in the Colony by the Governor, within the two years provided by the Canada Union Act, it must be held to have received Imperial sanction for its operation.

It is a principal of our law here in England that the binding effect of a Statute whose language is explicit and meaning plain, is unquestionable, and

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that its authority cannot in general be questioned in any court of justice or by any judge in Canada.

The binding efficacy of Statutes is paramount here, although it does not prevail as a principal of law in the United States, because the Constitution there being a written one, designating the constituents of the general government, as well as the powers and duties of the Legislature and of the judicial powers, the latter as one of those constituents, has therefore the power to determine whether a Statute or act is or is not constitutional; otherwise the law would be superior to the constitution and become paramount law. It has accordingly become a settled principle in the legal policy of the United States, that it belongs to the judicial power as a matter of right and duty to declare any act of the Legislature made in violation of the Constitution or of any provision of it, nul and of no effect.

But by the Constitutional Act of Canada, the Union Act, 3 and 4 Vic., it is only required that our local legislation should not be repugnant to Imperial enactments made for our local guidance; and in the particular of this matter, the Imperial Treaty Act has prevented such a possibility by delegating to our local legislature the power to make local law to be substituted for its own enactments.

The local legislation made under this delegation, the 12th Vic., cap. 19, was not only expressly allowed and approved by her Majesty, but under the sanction of the delegating Imperial Act was, by her Majesty, substituted for that Imperial Act and the subsequent local legislative amendments made to the original and substituted law have not been disallowed whilst the last local law, the 24th Vic., by a special order of her Majesty in Council, has been remitted and left to its operation in the Colony.

As a necessary conclusion and legal deduction from the foregoing, the Consolidated enactment, chapter 89, amended by the 24th Vict., is a subsisting provincial statute, continuing the original enactments and law of the 12th Vict., and is the declared will of the supreme power within the colony, which, not being repugnant to Imperial enactments in such matter, all subjects in Canada are bound to obey; and in as much as this subsisting law is created by the exercise of the highest authority which the Court of Canada acknowledges, it cannot be dispensed with, altered, amended, suspended, repealed or annulled but by the same power from which it derives its existence.

This amended subsisting law being the actual and sole extradition law of the colony, authorizes the issue in the first instance and at once of a warrant by a Judge of the Superior Court, without the previous warrant under the hand of the Governor, and therefore the warrant issued in this case is good and according to law.

Judges Berthelot and *Monk* concur with the foregoing notes of Judgment of *Judge Badgley*.

Application rejected.

F. G. Johnson, Q. C., for the Crown.

Strachan Bethune, Q. C., *B. Devlin*, } for the U. S.

Hon. J. J. C. Abbott, Q. C., *W. H. Kerr*, } for the prisoners.

(S. B.)

MONTREAL, 25 JANVIER 1865.

Coram SMITH, J., BADGLEY, J., BERTHELOT, J.

Siégeant comme Cour de Révision.

No. 442.

Walker et vir vs. Crebassa, Junior.

JUGÉ :—1o. Que dans l'espèce actuelle, la vente faite au défendeur, par la demanderesse séparée de biens, de certains immeubles qui lui sont propres ; doit être rescindée sur le principe qu'aucune valeur n'a été prouvée lui avoir été payée.

2o. De plus : par la Cour Inférieure ; que les engagements contractés à cette vente par la demanderesse l'ayant été pour les dettes de son mari, sont nuls en vertu de la 55me section du chapitre 37 des Statuts Refondus du Bas-Canada.

Le jugement rendu par la Cour Supérieure à Sorel dans le district de Richelieu le 14 novembre, 1864, est comme suit :

La Cour, après avoir entendu la plaidoirie contradictoire des avocats de la demanderesse et du défendeur sur le fond du procès mis entre eux ; pris connaissance des écritures des parties faites pour instruire leur cause, examiné leurs pièces et productions respectives, duement considérée la preuve et sur le tout avoir mûrement délibéré ;

Considérant qu'il est en preuve et ce sur l'admission même du défendeur que la demanderesse n'avait point, lorsqu'elle a consenti l'acte de vente reçu devant Maître N. D. Crebassa et confrère, notaires, le deux avril, mil huit cent soixante et deux, dont elle demande la résiliation ; reçu le prix porté au dit acte de vente savoir, la somme de dix-huit cent piastres quoiqu'il soit erronément dit au dit acte que cette somme lui avait été payée avant sa passation et qu'elle en ait donné quittance, qu'ainsi l'énonciation faite au dit acte relative à ce paiement est fausse ;

Considérant qu'il est encore admis par le défendeur que la considération par lui donnée comme prix de la dite vente a été la remise qu'il prétend avoir faite au demandeur, John George Crebassa, mari de la demanderesse d'une créance qu'il avait contre lui ; qu'il résulte de cette admission que la demanderesse, épouse séparée de biens du dit John George Crebassa, a payé en faisant la dite vente une dette contractée par son mari, soit avant, soit pendant leur mariage.

Considérant que par la cinquante-cinquième section du chapitre trente-sept des Statuts Refondus du Bas-Canada, il est décrété " 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, obliga- " tions ou engagements contractés par le mari avant leur mariage ou pendant la " durée du mariage et tous engagements contractés par une femme mariée en " violation de cette disposition seront absolument nuls et de nul effet," et que les engagements contractés à la dite vente par la demanderesse, qui n'était pas commune en bien avec son mari, mais qui, au contraire, en était séparée, l'ont été pour les dettes de son dit mari et partant en violation et en fraude de la loi, déclare nulle et de nul effet ; au besoin annule, rescinde et met au néant la dite vente faite par la demanderesse au défendeur et remet les parties au même et semblable état qu'elles étaient avant icelle, en conséquence déclare que la deman-

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deresse est et n'a pas cessé d'être propriétaire des immeubles désignés comme suit au dit acte de vente............

Ordonne au défendeur de l'en remettre en possession sous quinze jours de la signification de la présente sentence, sinon, il y sera contraint par toutes les voies légales, et la Cour condamme le dit défendeur, à payer à la demanderesse, les dépens de la présente instance.

Le jugement ayant été porté devant la Cour de Révision à Montréal ; le défendeur produisit des raisons d'appel comme suit :

Raisons et moyens que le défendeur invoque pour la révision du jugement final rendu en cette cause le 14 novembre 1864.

1o. Le deux avril 1862, la demanderesse a comparu à un acte de vente, devant Maître N. D. Crebassa, N. P., et autorisée de son mari et de lui séparée de biens, elle a vendu divers terrains au défendeur moyennant $1800.

2o. Par sa déclaration, elle allègue qu'aucune valeur n'a été donnée pour cette aliénation et son allégué est comme suit :

" That in truth and in fact no consideration whatever was given to the said " plaintiff, Mary Walker, *or either of them*, and that the said deed was and is " fraudulent and without any just cause or consideration, and that neither the " said sum of $1800 or any part thereof was ever paid to plaintiff, Mary Walker, " *or either of them.*"

3o. Elle conclut à la rescision de l'acte de vente.

4o. La première défense du défendeur, allègue que ces terrains ont été achetés et payés avec les deniers de John George Crebassa, le mari de la demanderesse et au nom de cette dernière, et que c'est lui qui gère toutes ses affaires, perçoit tous ses revenus et dispose de tous ses biens comme bon lui semble.

5o. La seconde défense allègue qu'elle a *reçu bonne et valable considération que quittance finale en a été donné*, que cet acte de vente a été fait de bonne foi par elle dûment autorisée et que tradition en a été donnée par elle au défendeur. Il y a aussi une défense au fonds en fait.

6o. Les réponses sont générales.

7o. Les demandeurs n'ont produit aucune articulation de faits conformément aux dispositions de la section 87 du chapitre 83 des Statuts Refondus pour le Bas-Canada.

8o. La demanderesse ayant examiné le défendeur sur faits et articles, ce dernier prouve que la valeur stipulée en l'acte de vente se trouvait déjà entre les mains du mari de la demanderesse, qu'elle a été employée à payer les dépenses de la famille, et la demanderesse l'a ainsi reçue, en sorte que l'allégué de valeur n'est point prouvé.

9o. La demanderesse examinée sur faits et articles ne peut pas expliquer en quoi et comment elle a pu acquérir ces terrains.

10o. Examinée comme témoin le 16 janvier 1864, le demanderesse reconnait et avoue formellement que c'est son mari qui gère et transige ses affaires ; en un mot qu'il a toujours agit pour elle et en son nom.

11o. Il est prouvé par témoins et des documents que ces terrains ont été acquis au nom de la demanderesse hors sa connaissance et sans qu'elle puisse expliquer comment ils ont été payés, car c'est son mari qui a tout géré et transigé

12o. Il est donc évident que le demandeur était l'agent et le mandataire de sa femme la demanderesse, que ce fait est admis dans la déclaration, puisqu'il y est dit : que les deniers n'ont été payés ni à l'un ni à l'autre "or either of them" et que ces terrains appartiennent aussi bien au mari qu'à la femme.

13o. Il n'y a aucune preuve que la valeur mentionnée en l'acte de vente n'a pas été payée soit à l'un ou à l'autre, "or either of them" suivant les expressions de la déclararation; puisque les réponses sur fait et article du défendeur établissent que cette valeur et bien au-delà, était lors de la vente, en dépôt entre les mains du mari le *mandataire* et l'agent de la demanderesse, donc, elle a reçu valeur par l'entremise de son agent qui a toujours géré ses affaires.

14o. En supposant même; que ces témoins eussent été donnés par la femme en paiement des dettes de son mari, l'action serait mal fondée; en autant que la loi statutaire du pays citée dans le jugement n'empêche pas la femme séparée de biens de faire des actes d'aliénation ; comme de renoncer à une hypothèque ou d'aliéner ses héritages et en agissant ainsi, elle ne se porte pas caution ni responsable et elle n'en court aucune responsabilité.

Vide. Boudria et McLean, v. 2 L. C. Reports, p. 135, et 6 L. C. Jurist, p. 65, Armstrong vs. Rolston, et Dufresnay oppt. et The Trust and Loan Company of Upper Canada, contestants décidé à Montréal le 1er Décembre 1864, Smith J. 3 vol. Revue de Jurip. p. 121.

Sous l'empire de la doctrine établie par ces autorités il s'ensuit qu'il existe une distinction bien marquante entre la capacité de la femme pour s'engager à *garantir* et sa capacité pour s'engager à ne pas exercer ses droits.

M. Le Juge Meredith, en rendant le jugement de la Cour d'Appel en la cause de Boudria et McLean donne l'interprétation légale de la clause de la loi citée dans le jugement rendu en cette cause comme suit : "And as in my opinion "there is a plain difference between the *contracting* of a *liability* and the "*renunciation of a right*," (Troplong Priv. et hyp. No. 596. Pandectes de "Justinien, vol. 6, p. 551) I think that the provision of the law relied on by the "appellant is inapplicable to the present cause." 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 have, as* "*she unquestionably has the power of alienating her property 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."

6 L. C. Jurist p. 73.

Ainsi nul doute que la femme mariée peut aliéner ses propres pour le paiement des dettes de son mari, en effet la loi lui défend d'encourir aucune responsabilité comme *garante*, mais elle ne l'empêche pas d'aliéner ses biens pour payer les dettes de son mari. "Leaving at the same time the rights and powers of married women "in other respects unimpaired," comme remarque le même Juge; 6 L. C. Jurist p. 74.

Le défendeur cita les autorités suivantes à l'appui de ses prétensions.

6 Vol. Pandectes de Justinien traduites par Bréard—Neuville page 249, "Il "importe peu, par rapport à l'intervention, qu'une femme ait compté la somme "en espèces, ou qu'elle ait donné ses effets en paiement; car soit qu'elle ait

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"vendu sa chose pour en donner le prix ou pour le déléguer au créancier d'un "autre, je ne pense pas qu'il y ait lieu au *sénatus consulte*," or donc, "si une "femme en intervenant, a délégué un de ses débiteurs, le *sénatus consulte* n'est "point applicable, parce qu'il n'y aurait pas lieu si elle eût compté la somme, le "*sénatus consulte* se proposant seulement de la *relever* de ses engagements, et "non de l'empêcher d'aliéner."*

Page 251, Alexandre dit également: "Si majeure de vingt cinq ans, vous "avez vendu vos propriétés et payé pour votre mari, vous ne pouvez invoquer "le secours du *sénatus consulte*," Par la même raison, "quoiqu'il faille interve- "nir pour donner un gage, cependant, suivant Julien, si la femme créancière a "délivré le gage pour le débiteur, il n'y a point là d'intervention."

C'est pourquoi les empereurs Philippe disent, dans un rescrit adressé à une femme, "Il est constant en jurisprudence que même durant le mariage, les "droits d'hypothèque et de gage peuvent être remis au mari."

BADGLEY, J.—Several years ago Madame Crebassa sold a quantity of land to the defendant in this cause. In the deed of sale it was mentioned that the purchase money had been paid. The action has been brought before the Court below to recover from the defendant the property so sold on the ground that it was not the case that the money had been paid. The defendant pleaded that the other plaintiff, the husband, was the agent of the plaintiff Walker his wife and transacted all her affairs, and that plaintiff owed the defendant at the time of the purchase a large sum of money which he set off. But the defendant proved nothing with reference to this sum of money. He admitted that he paid no money whatever, and that the only consideration for the deed according to him was the deposit in the husband's hands. Under these circumstances the case came before the Court of Review, but the amount of the purchase money had never been paid at all. The Court is of opinion that the plaintiff has established her right, and consequently the judgment of the Court below must be confirmed.

Olivier & Armstrong, avocats des demandeurs. Judgment confirmed.

Lafrenaye & Bruneau, avocats du défendeur.

(P. R. L.)

SUPERIOR COURT.

MONTREAL, 15TH NOVEMBER, 1864.

Coram SMITH, J., *and Special mixed Jury.*

AND

31*st December*, 1864.

Coram BERTHELOT, J.

No 2029.

TIMOTHY CUNNINGHAM,

Plaintiff.

THE GRAND TRUNK [illegible] COMPANY OF CANADA.

Defendants.

HELD :—1st, That a railway passenger havi[illegible] ticket, and offering the same to the conductor when requested to pay his f[illegible]annot be considered as "refusing to pay fare."

2nd, That the condition on a return ticket "good for day of date and following day "only," cannot be enforced when it is proved that the company has habitually neglected to enforce the said condition.

3rd, That, by law, the company are bound to treat all passengers alike, and if tickets be once treated as valid, like tickets are valid under similar circumstances.

4th, That if a conductor takes from a passenger his return ticket, which has not been used on the return trip, and retains the same, he cannot demand return fare from the passenger.

5th, That the power to eject passengers for non-payment of fare must be strictly confined to persons who refuse to pay fare.

6th, That plaintiff, having paid $2.50 for a ticket from Actonvale to Montreal and return, the conductor keeping the return ticket could not demand further fare.

Corum BERTHELOT, J., on motion for new trial.

1st. That under circumstances proved the law of presiding judge was correct, and new trial must be refused.

2nd. That jury are judges of the damages, which were not excessive.

3rd, That plaintiff is entitled to costs of an action in Superior Cou[illegible]

The plaintiff resides at Actonvale. On the 6th day of November 1861, he purchased for the sum of $2.50 a ticket called a return ticket to Montreal and back. On the ticket was printed "Good for day of date and following day only."

The plaintiff proceeded to Montreal on the 6th day of November, and on the 8th day of the same month embarked on the train to return to Actonvale. On presenting his return ticket to the conductor, the conductor took the ticket, retained it and demanded full fare from Montreal to Actonvale. Plaintiff refused to pay full fare, and the conductor ejected him from the cars at Charrons Station.

The plaintiff brought an action against defendants for breach of contract of carriage, alleging the facts, the offer and reception by conductor of said ticket, his refusal to return the same, his demand for full fare $1.75, and claimed damages for $300 cy.

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Defendants pleaded the condition on the ticket, and that plaintiff could not make use of the same after the delay thereon specified and that plaintiff had suffered no damage.—a *défense en fait*, also.

Plaintiff answered that company had frequently waived the condition in the case of other passengers, and could not exact it of one passenger when it was not exacted of others, and that a ticket was good until used.

Evidence before Jury.

A. H. Pike—Was with plaintiff; conductor took ticket and demanded fare. Conductor refused plaintiff back his ticket, and put him off the cars at Charrons Station, but without violence. The ticket had not been used; the notice had been given of non-validity of ticket in depot or cars. Conductor showed no regulations, the same fall witness passed on a return ticket, after date four days. Estimates the damages $300 cy. Would not be put off for that sum; it was a custom to allow tickets as good after date.

Cross-examined.— Plaintiff was often a passenger; single ticket cost $1.65 cy. ten cents more if paid in the cars; return ticket cost $2.50. There was plenty of room in the cars.

W. H. Dubord—Was with plaintiff; plaintiff gave and conductor kept ticket; witness often travelled on such tickets after date. The same day one Mignault passed after three days on a like ticket, every body passed after date on like tickets; Acton is fifty miles from Montreal.

Cross-examined.— Conductor took plaintiff to the door; does not think he got off.

S. B. Nagle, Esq., often travelled on like tickets after date in 1858 and 1859; and within two years, even two or three weeks after date no difficulty ever made as to their validity in 1861.

Henry Merrill—Lives at Acton; in 1861 travelled on like tickets after date, even ten days after date; have often seen others passing after date of ticket.

Moïse Couture, was conductor of company for eleven years; plaintiff travelled often. Many other people travelled on return tickets after date in 1861; there was an objection to their doing so. The company gave instruction not to allow persons to travel on expired return tickets; but the superintendent told witness to let them pass rather than to have any trouble.

Cross-examined.—The parties so saying were Messrs. Starke, Bailey, and Freer.

A. H. Dubrule.—I am ticket agent at Acton; many people passed after date on return tickets; plaintiff was in the habit of buying return tickets, and was often absent several days. The conductor collects the tickets; people often passed on return tickets after their date.

Defendants' Evidence.

George R. McNamee.—On 8th November I was conductor on the train. Left Montreal 11 o'clock A.M., was friend of Plaintiff; there were seven or eight return tickets on cars. Refused plaintiff's ticket as out of date. Read my instructions to plaintiff; was not authorized to accept such tickets, and had before received instructions not to do so. Mr. Hardman gave instructions. At Charrons, asked plaintiff for fare, and on his refusal requested him to leave the cars. He said he would have to be put off by force. Touched him lightly on the shoulder. Pike

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paid his fare. Have often refused like tickets; gave plaintiff and Pike back their tickets; did never allow any one to pass after date.

Cross-examined.—Instructions given to conductor; demanded $1.75 for fare; never punched the ticket of plaintiff, plaintiff had no baggage.

J. H. Greglistine.—Clerk in 1861, and now in Audit office. Instructions given to McNamee, who was very strict, proves instructions of 1861 now to be in Hardman's writing and copied from book; tickets all go to Audit office from conductor; after being collected are checked and destroyed.

Cross-examined.—Conductors may not return spent tickets if collected; they should return tickets to Audit office; any return ticket after date is checked in Audit office, and lies in company's possession. Was in office in 1860; and knew that return tickets out of date were returned to office, and the company knew this by the checking of the tickets; instructions must have been given in consequence.

R. McKay, Esq., for defendant, submitted, 1st, the condition printed on return ticket was and is lawful; any such conditions are lawful (Hawcroft *vs.* G. North R. Co. 8th Eng. L. and E. Reports, Boston edition; Romsey *vs.* N. E. R. Co., June, 1863, (such a condition held to derogate from Statute Right). In New York, per Marvin, J., in 1860, Barker *vs.* Coffin; in Massachusetts, 1st Allen's Rep., 267; In Lower Canada, Pothier Oblig., Nos. 130, 136, 146.

When a person is travelling without a proper ticket, and refuses to pay fare he may be put off from railway cars. Cons. Stat. Canada, ch. 66; and see Regina *v.* Faneuf, L. C. Jurist, vol. 5.

2nd, the proof made by plaintiff of conductors having occasionally passed passengers with spent tickets was useless. The proof of usage attempted cannot avail plaintiff; no such proof, no parol proof can override the express contract here. (1st Greenleaf, Evidence, p. 336, and note 2, Parsons on Contracts, pp. 53, 56, 57, 59.)

The learned Counsel alluded to the conditional contract not being fulfilled by plaintiff, who had in reality suffered no damage; that though asked for fare he had tendered no fare, even the difference of one dollar. That a party buying a theatre or excursion ticket could, if this case were maintained, demand entrance on any day to the theatre, or on any excursion train, and if refused, demand back his money. Besides, the company had not contracted for any other day after the 6th November, 1861; the risk or danger might be greater on any subsequent day. After going over the facts of the case as proved, and of evidence to be adduced by the company, he contended that the case was clearly in favor of the defendant. F. P. Pominville on same side, in French.

J. A. Perkins, jr., for Pltff., submitted:

1st. That the company could only charge 2d. per mile travelled, and that as a corporation by law and the statute, no undue preference could be given one person over another. (Stats. of Canada, 1851; Incorp. G. T. R. R. Co.; Cons. Stats. of Canada, ch. 66, Sec. 25.)

2nd. That the condition attached to the ticket was illegal, and in any event not proved legal. (Cons. Stats. of Canada, ch. 66, Sec. 151.)

3d. That usage and custom as pleaded was well proven, and the law presumed the plaintiff to have purchased his ticket in reference to the custom extant, and that

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custom and usage explained the contract, the condition of which the company had always waived.

Grant on Corporations, Customs, Sect. 320, 321, 322; 22 Barbour's Repts. p. 130; Northern R. R. Co. *vs.* Paige; 24 do., p. 514, Pier *vs.* Finch et al: 25 Wendell, 419; 9 Pickering, 338; Curtis' Digest Supreme Court U.S. p., 578, Usage; Parsons on Contracts, vol. 2, pp. 48 to 59 (of the effect of Customs or Usages) 7 Ellis and Blackburn; 278-79, and other authorities.

He observed that the conductor had retained the ticket, that the cars were not full, and the company suffered no loss in the carriage, and had the ticket been bad, that they might have sued for passage money, and not proceeded summarily. That the fare demanded was too much, and plaintiff justified in refusing to pay. That the company having always checked tickets returned by their conductors, connived at the practice of passing after date, which practice was universal, and known by the conductors. That plaintiff had suffered injury, been forced to return to Montreal, and that the company could not complain of being bound by the custom they had themselves introduced.

V. P. W. Dorion, for plaintiff.

The instructions proved are dated 18th November, 1861, ten days after the expulsion. By these instructions nothing is said as to return tickets; but it is left entirely discretionary with the conductors whether or not to receive spent tickets. That the law of corporations required the company to treat all men alike, and not show favor. That the conductor had the same day passed Mr. Mignault of St. Hyacinthe, on the same train, on a ticket dated five days before, and he asked the jury to find the company guilty of breach of custom, always waived by them, and to find for the plaintiff who had paid money and received his ticket, the consideration whereof he had been refused, and never received.

His Honor, Judge Smith, in charging the jury, remarked that the case did not present any difficulty as to facts; that if the jury were satisfied, that the conductor allowed others to pass or any one to pass after the date of spent ticket, he should have allowed plaintiff to pass. If the company allowed the custom of receiving tickets after time and checking them, it was a principle of law regulating them as well as all corporations, that they should deal with and treat all persons alike and show no preference. As to the testimony of the keeping of plaintiff's ticket, and the passing of Mignault on the same train, the jury were the best judges. If these points were found in favor of plaintiff, he was entitled to a verdict, the damages to be settled by them. On the point of law he said the condition was a valid condition, and the fact was to be decided whether or not waived by the company.

"Verdict for plaintiff $100 currency."

On the twenty-fourth day of November 1864, defendants moved for a new trial, and plaintiff moved for judgment on verdict.

The case was argued as before the jury, defendants further contending:

1. That no damages had been suffered, and none proved.

2. That the charge of the presiding judge was erroneous in law, and that such judge should have directed the jury to find a special contract, and that the ticket was spent and useless.

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Further authorities cited—

By plaintiff (who contended that award of damages was small, and should not be disturbed.)

U. C. Law Repts., vol. 8, No. 7, July 1862.
Curtis vs. The G. T. R. R. C. ($300 damages).
Addison on Contracts, Ed. 1857, p. 509.
3 Barn and Ald, p. 728, Smith and Wilson. Remarks Baron Parke.
Hilliard Torts, vol. 2, p. 569, 576, 577, (Nos. 21, 24, 25, 26).
Index to Eng. Com. Law Repts. "New Trial."

Berthelot, J., remarked (after detailing facts of case as proved) that it was clearly established that the conductor had kept the ticket of plaintiff and refused to return it; that under such circumstances plaintiff was not in the position of a passenger refusing to pay his fare. The company could in any event only demand the difference between the sum paid ($2.50) and the united prices of two separate passages, and not the price of a new journey. That the defendants were aware of the custom of receiving, *as good*, tickets after date, and could not deal differently with different parties in the face of the statute law requiring like companies to treat all persons alike, and to shew no undue preference, under the circumstances. His Honor adopted the charge of the presiding judge, and said that the Company had acted illegally in ejecting the plaintiff from their cars. As to the damages, the jury were the sole judges; and Courts were not in the habit of granting new trials where the verdict was small (in England £20 sterling).

Motion of defendant refused.

Motion of plaintiff granted (costs of Superior Court allowed on action).

Perkins & Stephens, for plaintiff.
V. P. W. Dorion, counsel.
Mess. Cartier & Pominville, for defendant.
R. Mackay, Esq., counsel.
(J. A. P., JUN.)

MONTREAL 26 JANVIER 1865.

Coram Smith, J.

Beaugrand dite *Champagne* vs. *Lavallée* et *Trigge* et al., Opposants et Contestants.

Jugé :—1o. Que l'hypothèque légale de la femme séparé de biens, pour le montant d'un legs particulier dû en vertu du testament de son père décédé avant son mariage célébré sans contrat; ne prime point les créanciers subséquents qui ont enrégistré leur titre, faute d'enregistrement de sa part.

2o. Que la réception du montant de ce legs par le mari durant le mariage et après avoir constitué une hypothèque en faveur des opposants pour une rente foncière sur ses immeubles; ne donne à la femme aucune réclamation hypothécaire antérieure aux créanciers de cette rente foncière.

3o. Que par le fait de la femme d'avoir fait vendre les biens de son mari à la charge de cette rente foncière, il s'ensuit qu'elle a reconnu la validité de cette réclamation hypothécaire.

Par le rapport de collocation et de distribution produit en cette cause par le protonotaire, la demanderesse séparée de biens du défendeur son époux, fut colloquée pour £180. 13s. 4d, sur et en déduction de ses reprises matrimoniales constatées par le rapport du praticien en vertu de la sentence en séparation de

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biens qu'elle avait obtenue contre le défendeur son mari le 15 mai 1858. Le défendeur et la demanderesse furent mariés le 5 juin 1835, sans contrat de mariage.

Le père de la demanderesse par son testament en date du 28 juillet 1832, et un codicile en date du 8 août 1833, Mtre. Chalut, N. P., lui légua la somme de 2600 livres, anciens cours égale à £104. 3s. 4d. et quelque meubles.

Par acte de cession en date du 25 octobre 1849, Mtre. Chalut, N. P., la mère de la demanderesse lui donna *en paiement de ce legs*, une terre que le défendeur a ensuite échangée avec le nommé B. Gervais le 11 août 1851; et à raison duquel échange, il a reçu de ce dernier une soulte de 2000 livres ou £83. 6s. 8d.

La demanderesse ayant fait établir par le praticien ses droits et reprises matrimoniales;

1o. En la somme de............ Montant de ce legs.	£104	3	4
2o. En celle de............ Montant de cette soulte.	83	6	8
3o. En celle de............ Montant du prix de la vente des terrains obtenus en échange de B. Gervais et puis vendus par le défendeur en 1851............	303	19	8
4o. En celle de............ Montant composé partie de deniers reçus de sa mère et partie de meubles reçus de sa mère;	75	0	0

elle fut colloquée en déduction de ces reprises comme ci-dessus dit.

Les opposants Trigge et consort contestèrent cette collocation sur le principe que la créance de la demanderesse n'a jamais été enrégistrée, que ces reprises n'ont jamais été légalement constatées, que son hypothèque ne datant que du jour de la réception* de ce legs de £104. 3s. 4d, par son mari, savoir: le 25 octobre 1849, elle est postérieure à celle des opposants qui repose sur un acte d'accords en date du 21 mai 1847; Mtre. David N. P., et enregistré le 8 juin 1847, enfin qu'elle a renoncé à son hypothèque en leur faveur en faisant vendre l'immeuble saisi sur le défendeur *à la charge* de la rente foncière des opposants qui leur est due en vertu de leur acte d'accords et ce conformément à leur opposition afin *de charge* produite en cette cause.†

La demanderesse a répondu spécialement à cette contestation en disant que l'hypothèque des opposants Trigge et al., n'affectait qu'un arpent de terre sur cinq arpents saisis et vendus en cette cause, que son jugement en séparation a été enregistré le 6 Février 1860, que ses droits et reprises ayant été constatées à £504. 3s. 1d, elle se trouve créancière d'un montant plus que suffisant pour maintenir sa collocation.

Les parties ayant prouvé leurs allégués respectifs, elles furent entendues au mérite.

LaFrenaye, pour les contestants.

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* Vide—Statuts Refondus du Bas-Canada, chap. 36. sect. 46.

† Lacombe—Recueil de Jurisprudence, vo. contrat, no. 19, vo. hypothèque, no. 13. Louët, No. 6.

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L'ordonnance, 4 Vic. ch. 30, s'applique tant aux contrats de mariage passés antérieurement à sa mise en force qu'après.

Le contrat de mariage pour conserver le douaire préfix doit être enregistré en temps utile.†

Pour conserver le douaire coutumier, l'enregistrement n'est pas nécessaire; car c'est un droit de propriété.†

Il en est de même quant au propre ameubli.§

Pour conserver une rente viagère stipulée en contrat de mariage, il faut en faire l'enregistrement.†

Pour conserver les droits ou sommes dotales provenant de succession, il faut faire enregistrer le titre qui en accuse la réception.

Pour conserver les droits de *toute* donation *faite pendant la durée* du mariage, il faut enregistrer le titre du *jour de la mise* à exécution de telle donation.§

Les dispositions de la clause 29, du ch. 30, (4 Vic. ch. 30) s'appliquent à tous les droits et réclamations qui ont pu devenir *ouverts* depuis la mise en force de l'ordonnance, savoir: 1er nov. 1841.

Il y a donc une distinction remarquable à faire entre les sommes dotales *promises* ou *donnée* par le contrat de mariage et celles qui ne deviennent échues que pendant la *durée* du mariage.

Les premières doivent être assurées par l'enregistrement du contrat de mariage et les secondes qu'au fur et à mesure que leur *reception* par le mari sera constatée par un *titre* qui pourra être enregistré.

Il faut remarquer que lorsque la femme prétend *exercer* contre *son mari* son droit de *restitution* de dot, c'est l'acte qui constate que *lui* le *mari* a reçu cette dot qui doit être enregistrée sur les biens du mari.

A quoi servirait de faire enregistrer les actes antérieurs à cette réception par le mari? Cet enregistrement ne pourrait pas affecter ses biens immeubles tant qu'il n'aurait pas reçu cette dot.

Quant aux donations *pendant la duree* du mariage; d'après les dispositions de la clause 29, elles sont bien distinctes de la question du remploi des propres qui était réglée par la section 34.

Par la sec. 23 de la 4e vic. ch. 30, (S.R., B.C., ck. 37. p. 33), la femme elle-même peut faire enregistrer ses droits pendant la durée du mariage.

Cette rente foncière a été reconnue par la demanderesse; car c'est elle qui a fait saisir et vendre les biens immeubles en cette cause A LA CHARGE de cette rente foncière suivant et conformément à *l'opposition afin de charge* des opposants qui a été *admise* par la demanderesse.

Or, elle a ainsi renoncé en faveur des opposants à toute hypothèque qu'elle aurait pu exercer.

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* 4 Vic. ch. 30, sec. 4.

† 6 L. C. R., p. 100, Forbes et Legault.

‡ 4 L. C. Jurist, p. 315. Sims vs. Evans et opposant.

§ 2 L. C. R., p. 198. Nadeau vs. Dumont.

* 2 L.C.R., p. 115, Garneau vs. Fortin.

† 2 L. C. R., p. 89, Dictum de Bowen, J. C.

† 2 L. C. R., p. 87, Girard vs. Blais.

§ 4 Vic. ch. 30, sec. 29, 2. L. C. R., p. 87, Girard vs. Blais. 2 Vol. L. C. J., p. 86, Dom: Reg: vs. Comte.

Champagne vs. Lavallée et Trigge et al.

[illegible] Lacombe—Recueil de Jur., vo. Contrat, no. 19, vo. hypothèque no. 13. "[illegible] un corps CERTAIN ou *fonds designé* est hypothèqué, et l'acte souscrit [illegible] le créancier sans PROTESTATION." ....Louët, No. 6[illegible]

En loi, elle a valablement renoncé à son hypothèque si [illegible] elle en [illegible] une sur un CORPS CERTAIN et FONDS DESIGNÉ, suivant [illegible] de Louët.

Persil priv. p. 257.
2 Trop. Priv. et hypothèques, p. 475, 483.
6. L. C. Jurist, p. 65, Boudria et McLean.

Nonobstant sa renonciation [illegible] et [illegible], elle répond à la contestation en prétendant restreindre l'hypothèque des opposants à un arpent de terre et la [illegible] refuse sur les quatre autres arpents.

Elle allègue avoir fait enregistrer son jugement le [illegible] février 1860.

La demanderesse et le défendeur se sont mariés sans aucun contrat de mariage le 5 de juin 1835.

Elle [illegible] par sa réponse que le 25 octobre 1849, par acte de cession devant Mtre. [illegible] de sa mère, Dame Magdeleine Dessert un immeuble [illegible] avec Bénoni Gervais le 11 août 1851, Mtre. Coutu N. P., avec [illegible] 2000 [illegible] c. ou £83 6s. 8d.

Elle allègue [illegible] que les immeubles obtenus en échange furent vendus par le défendeur les 11 avril 1851, Mtre. Coutu N. P. à Jos. Lefebvre pour. 191 13 4
Et [illegible] avril 1851, Mtre. Coutu N. P., à Chs. Gervais, pour.............. 70 13 0
Et [illegible] Avril 1851, Mtre. Coutu N. P., à N. Aubucson pour.............. 41 13 4

$387 6 4

Elle allègue de plus que par le testament de son père du 28 juillet 1832, et le codicile du 8 août, 1833, Mtre. Chalut, N. P., elle la demandresse est devenue créancière de sa mère, Dame Magdeleine Dessert pour £104. 3s. 4d, ainsi que de meubles mentionnés au testament valant au-delà de £50. 0s. 0d, (cette somme de £50. 0s. 0d, n'est pas mentionnée dans le rapport du particien) et qu'en loi le défendeur était tenu de veiller au paiement de ce legs dès l'époque de son mariage, 5 juin 1835. £154 3s 4d

Intérêt du 15 mai 1858.

Mais cette somme de £104. 3s. 4d, a été reçue le 25 octobre 1849, par la terre que sa mère lui a donnée par l'acte de cession du 25 octobre 1849, en sorte que cet immeuble ci-dessus mentionné qui a été changé comme ci-dessus mentionné lui avait été donné en paiement par sa mère pour s'acquitter de ces legs.

Voir l'acte de cession du 25 octobre 1849. Exhibit no. 8 de la demanderesse.

Le particien constate ce PAIEMENT dans un de ses rapports entre le 7me et le 8me article. Exhibit de la demanderesse 4 A.

Conséquemment, cet immeuble ayant été donné en paiement [illegible] mère pour les legs qu'elle lui devait, ce serait faire double emploi que d'[illegible] mari de rendre compte de cette immeuble. Il n'est à tout événement [illegible] de rendre compte que de ces legs [illegible] montant à 2500 livres a. c. [illegible] 104. 3s. 4d.

Les diverses sommes [illegible] ant £75 dont parle la dem[illegible] en sa réponse se composent partie de deniers et partie de meubles que [illegible] est persuadé

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tout simplement que la demanderesse a dû recevoir durant la communauté, et il ne constate pas si ce sont les effets mobiliers mentionnés au testament.

Elle veut dépasser le montant de ses droits et reprises constatés par le rapport du praticien en alléguant que son mari a acquitté des créances hypothécaires sur l'immeuble reçu en PAIEMENT de sa mère, or cette prétention est illégale. Vide Doutre vs. Trudeau. 8 L. C. Jurist, p. 135.

Par leur réponse spéciale, les opposants allègnent que la demanderesse a reconnu par sa saisie et vente de l'immeuble à la charge de leur rente, qu'ils doivent la PRIMER, et que c'est elle qui aurait dû faire enregistrer ses créances du *jour* de leur RECEPTION par son mari, savoir: l'acte de cession du 25 octobre 1849, vû que par la loi, elle en avait le droit, et que l'enregistrement de son jugement est non-valable. De plus, il est bon de remarquer que le mari n'a reçu ces legs qu'après l'acte d'accords des opposants.

Par les dépositions des témoins produits par la demanderesse, l'arpent sur lequel, disent-ils, les opposants avaient leur hypothèque, valait lors de la vente en cette cause les ⅘ ou total de la propriété vendue.

Barnard pour la demanderesse.

1st. The wife relies on the case of Gibb vs. Sheppard, 3 Rev. de Leg., and Sir James Stuart's reasoning as proving that no registration is necessary in the case of marriages anterior to 1841, there being in that case no provision in the law imposing penalties against the husband neglecting to register, Sect. 21st of 4 Vict., c. 30.

2nd. But even assuming that the general rule is that registration is necessary, —the prothonotary, in framing the report, has held that registration in the present case was an impossibility, there being no contract of marriage. If it is pretended that in the absence of contract of marriage, something else must be registered, the answer is that there has been so far no reported decision to that effect. It is Mr. Bonner's opinion, and he limits it to the case of marriages subsequent to 1841.

But even assuming the necessity of registration, *per equipollentem*, there was nothing in this case admitting of registration. The notarial discharge, showing that the husband has received the amount bequeathed to his wife by Mr. Champagne, her father, is dated in 1849, subsequent to the registration of the mortgage of the opposants Trigge.

The registration of such a discharge would have therefore been vain. But the main point is that the wife's mortgage against her husband is independent of the fact of his receiving the money, and consequently is independent of the discharge or document evidencing the receipt.

Pothier, Comm: No. 609 says, "le mari comme administrateur est tenu envers "sa femme de sa négligence dans le recouvrement qu'il était tenu de faire."

To make the wife's mortgage depend on the registration of the discharge by the husband, would evidently be to limit the legal rights of the wife in all cases where the husband has failed to collect the amount at all or has neglected his duty for a time.

The registering of Mr. Champagne's will would have been of still less avail, or the wife has no claim against Mr. Champagne's estate, the money having

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been received by the husband from Mr. Champagne's estate; nor would the registering of the will of Mr. Champagne prove that the amount would necessarily be collected by the husband, since Mrs. Lavellée herself might have collected it before marriage, or might have reserved at the time of the marriage the right to collect it herself at a later period.

The preceding remarks apply to the contestation in so far as it relates to the wife's claim for the amount bequeathed to her by Mr. Champagne's will.

3rd. As to her claim for *remploi de propres*, the wife's proposition is that the repeal in 1849 of the 34th clause, has had the effect of reviving the old law, and if the intention was to make the provision of the old law so revived dependent on registration, some special enactment to that effect was necessary.

Vide Bonner, p. 69.

Leriger dit Laplante, 1 L. C. Jurist, p. 106.

4. The opposants Trigge have no interest in contesting the plaintiff's collocation. 1st. Because they have already received the full value of the one arpent, upon which alone they had a mortgage.

2nd. Because the mortgage itself was a nullity as to third parties.

3 L. C. Jurist, p. 184.

As to the pretension that the plaintiff has renounced her right to contest the validity of the mortgage or its rank when the proceeds would come before the Court, because the property has been sold *à la charge de la rente foncière*, it seems unnecessary to refute it.

SMITH, J.—The question in this case affects the rights of married women with respect to the registration of their legal hypothecs. The facts of the case are as follows:— the opposants Trigge, *et al.*, had a mortgage upon the land sold; for a *rente foncière*, under a deed of 1847. Under this deed, there had been a question as to a dike resting on one side of the river; the action was contested in all the courts of the country and the right of the opposants was confirmed by the Privy Council. The property sold in this cause was advertized for sale at the instance of the plaintiff, subject to the opposition *à fin de charge* which had been fyled by the opposants for this *rente foncière*, due and payable to them upon the property. The plaintiff being the wife of the defendant, got this property seized for the amount mentioned in the *rapport du Praticien*, consequent upon her *séparation de biens*. Now the plaintiff claims hypothecary rights upon this property, for the amount of a legacy due to her under the will of her father, who died before her marriage with the defendant, and which has been paid to her husband by her mother under the *acte de cession* of 1849, and under the old system, she would have been entitled to claim such hypothec from the day of the marriage contract, or the day of the marriage ceremony if there were no contract.

The contestation raised by the opposants Trigge *et al.*, is, as to the necessity for the plaintiff to have registered her hypothecary claim for this amount due her by the succession of her father; they contend that their deed for the payment of the *rente foncière*, payable by the husband, and which has been registered, must take precedence, and that the plaintiff was bound by law to register her

claim. * The plaintiff did not stipulate in any way for the preservation of her hypothec at the time of her marriage with the defendant, when that legacy due to her was then payable since the death of her father.

By the terms of the registry ordinance, no legal or tacit hypothec shall subsist upon the real estate of the husband, except for securing the restitution and payment of all claims and demands of his wife, for or by reason of any succession devolving upon or accruing to her, and such hypothec shall be accounted from the respective periods at which such succession so devolves and accrues. In the present case, this claim accrued to the wife before her marriage, and was paid to the husband under the *acte de cession* of 1849, and subsequently to the title of the opposants of 1847.

Under these circumstances the judgment must go in favor of the opposants, and their contestation is therefore maintained.

The judgment is *motivé* as follows:

Considering that the opposants, W. H. Trigge *et al.*, have established the matters and things set up, and alleged by them in their contestation of the collocation of the said plaintiff for the sum of £185. 2s. 6d. by the 6th item of the draft or order of distribution and collocation prepared and posted in this cause, and their right to be collocated to and in preference of the said plaintiff, and considering that the said plaintiff hath failed to shew that any hypotheque duly registered existed upon the lands seized and sold in the cause by reason whereof she can claim to be paid from and out of the proceeds of the sale of said lands, in preference to the said opposants Trigge, the sum of £504. 3s. 4d., or any part thereof; and further considering that by reason of the 29th clause of the 4th Victoria, ch. 30, no tacit or legal hypotheque can exist on said property or be available in her favor; and further, that in and by the writ of execution issued in this cause for the sale of the said lands at the instance of the said plaintiff, it was ordered that said lands should be sold subject to, *a la charge* of the said *rente foncière*, claimed by the said opposants Trigge *et al.*, and thereby acknowledging the correctness of said claim......

Contestation maintained.

Rivard, avocat de la demanderesse.
Barnard, Conseil.
LaFrenaye & Armstrong, avocats des opposants *Trigge et al.*
(P. R. L.)

MONTREAL, 31 MARS 1865.

No. 1178.

Tessier vs. *Bienjonetti*.

JUGÉ:—Que la demande en nullité de la vente par decret faite *super non domino* etant dirigee tant contre l'adjudicataire que contre les autres parties au decret et le Sherif † est valable.

Le jugement rendu en cette cause est suffisamment motivé pour expliquer tous les faits de la cause. Il est en ces termes:

* Cons. St., L. C. ch. 37, § 32.
† 6 L. C. Rep. p. 186.

Tessier vs. Bienjonetti.

La Cour après avoir entendu le demandeur et le défendeur François Bienjonetti au mérite sur l'action et les défenses et plaidoyers de ce dernier, les dits deux autres défen[illegible]-Baptiste Legault et Tancrède Bouthillier étant en défaut de com[illegible] examiné la preuve et la procédure et sur le tout mûrement [illegible]érant qu'il est en preuve que le demandeur est devenu acquéreur de l'immeuble désigné en la déclaration en cette cause, comme suit, savoir :

"Une terre située au côté Nord-Est de la côte St.-Louis de Soulanges, en la "dite paroisse et désignée numéro vingt-et-un, de la contenance de trois arpents "de front sur vingt-huit arpents [illegible] plus ou moins, tenant en avant "au chemin de Base de la dite côte, en arrière aux terres de la côte St.-Grégoire, "d'un côté à Antoine Cherrier, fils, et de l'autre côté à Joseph Dupont, avec ses "dépendances," et ce, en vertu de l'acte de donation en date du 29 janvier 1861, que lui en a consenti le nommé Jean-Baptiste Legault, par acte passé ce jour là devant Maître Dumesnil et confrère, Notaires, qu'il en a pris possession en vertu du dit acte lors de sa passation, et qu'il en était aussi propriétaire en possession, tant le 15 octobre 1863, lors de la saisie de l'immeuble et la poursuite du défendeur François Bienjonetti sur le nommé Jean-Baptiste Legault, l'auteur du demandeur, que le premier mars 1864, jour de l'adjudication qui en a *été* faite au dit François Bienjonetti, par Tancrède Bouthillier, l'autre défendeur, par suite de la prétendue vente par décret que le dit défendeur François Bienjonetti en faisoit poursuivre contre l'autre défendeur Jean-Baptiste Legault;

Considérant qu'à raison de ce que dessus, la dite prétendue vente par décret du premier mars 1864 est nulle et de nul effet vis-à-vis du dit demandeur comme ayant été faite *super non domino.*

La Cour adjuge et déclare le dit demandeur seul vrai et légitime propriétaire du dit immeuble, et le maintient en possession d'icelui, qu'il n'a pas perdu nonobstant le dit décret, déclare nulle, illégale et de nul effet la dite vente et adjudication du dit immeuble, faite le dit jour, premier mars 1864, par le dit Tancrède Bouthillier, en sa qualité de Shérif du district de Montréal, au dit défendeur François Bienjonetti, ainsi que tout acte ou titre que le dit Shérif pourrait en avoir donné au dit défendeur François Bienjonetti, et aussi tous les procédés adoptés par les dits défendeurs François Bienjonetti et Tancrède Bouthillier, Ecuier, pour parvenir à la dite vente et adjudication du premier mars 1864; le tout avec dépens contre le dit défendeur François Bienjonetti, et ordonne que le présent jugement soit signifié aux dits défendeurs Tancrède Bouthillier, Ecuier, et Jean-Baptiste Legault, aux dépens du dit défendeur François Bienjonetti.

Bondy et Fauteux, avocats du demandeur.
Moreau, Ouimet et Chapleau, avocats de Bienjonetti.
(P. R. L.)

MONTREAL, 31st OCTOBER, 1864.

Coram SMITH, J.

No. 1693.

Cushing vs. *Davies.*

HELD :—That an undertaking by a purchaser of a mining lot, to account to the vendor for "one-"tenth part of all net profits to result, after deduction of losses and charges, from all "such mining operations as he shall carry on in and upon" the property sold, is not bound to account for more than one-tenth of the amount actually realised by him, under an agreement with a practical miner to work the mines at his own risk and costs, and deliver over to the purchaser a certain proportion of the ore, dressed for market.

This was an action to render account.

The plaintiff, in the right of his deceased mother, claimed from the defendant an account of the net profits resulting from his mining operations on certain property in Acton, purchased by the defendant from the plaintiff's mother.

The clause in the deed of sale relied on was in the following words,—"and of "the further payment to be made forever hereafter by the party of the second "part (Davies) to the party of the first part (Mrs. Cushing) of *the one-tenth* "part of all net profits to result after deduction of losses and charges, from all "such mining operations, as he shall carry on, in, and upon the said lots, the "same to be ascertained to the 31st day of December, yearly, and to be "accounted for and paid *over* within the six months next following."

The defendant, instead of actually mining himself, had entered into an agreement with one Lewis Sleeper, who undertook to do all the mining operations on the property at his own risk and costs, and to deliver to the defendant a certain proportion of the ore, dressed for market.

The defendant accounted to the plaintiff for one-tenth of the net profits arising from the sale of the proportion of ore so delivered to him by Sleeper, but the plaintiff contended that he was bound to account to him for one-tenth of the net profits of all the ore extracted by Sleeper and dressed for market.

Per curiam :

This is an action to account brought against the defendant to account for the proceeds of the Acton Mines, sold by the plaintiff to the defendant under a deed of sale of the two lots of land, on which the mine was supposed to be. The defendant pleaded that he was ready to account under the said deed, for all that plaintiff was entitled to claim, had always been so, and that in fact he did account and fyled certain statements shewing the net proceeds of the mining operations on the said two lots of land. The plaintiff replied by contesting the principle on which the account was rendered, pretending that an account was due not only of the interest of the defendant in the said mine, but claiming an account of the operations of one Sleeper in the said mine, Sleeper being the man who had worked the mine for Davies, under the provisions of a certain paper or agreement shewing on what terms and conditions the mine was to be worked. In order to understand thoroughly the true difficulty arising out of the pretensions of both parties, it is necessary to cite the clauses of the deeds under which the two lots were transferred to Davies, and the agreement under which the mine was worked by Sleeper.

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By the deed of sale by Cushing to Davies, after settling the ordinary conditions of a deed of sale, it is there stipulated, that in the mining operations to be carried on by Davies, that a royalty of one tenth of the net proceeds of the mine should be paid over to the vendor Cushing, on these terms;—"and of the "further payment to be for ever made hereafter by the party of the second part "(to wit, Davies) to the party of the first part (to wit, Cushing) of the one-tenth "part of all net profits to result after deduction of losses and charges, from al "such mining operations, as he shall carry on in and upon the said lots, the same "to be ascertained to the thirty-first day of December yearly, and to be duly ac- "counted for and paid over within the six months next following;" so far as this is concerned the language is plain enough, Davies was to pay over one-tenth of the nett profits, after deduction of all losses, charges, disbursements for working the mine. For these net profits he has accounted. But by the agreement made by Davies with Sleeper, the plaintiff pretends, that he has a right to one-tenth on Sleeper's profits, that is, on the profits or gains made by Sleeper in working the mine; and the following are the terms of the agreement with Sleeper: After setting out that the mine shall be worked by Sleeper, the agreement proceeds to point out and settle the remuneration which is to be paid by Davies to Sleeper, in the following terms: "All ore thence resulting "shall be divided between them at the mine, ready dressed for market, as fol- "lows: one-half thereof to each party until such half shall amount to ofurteen "hundred dollars in value, and thereafter two thirds to the said Lewis Sleeper, "and one third to the said W. H. A. Davies.—Such per-centage of profits as "may accrue to Mrs. Cushing under *her deed of the said property to the said "W. H. A. Davies*, shall be borne by the parties rateably according to their "shares of such ore." This is the clause under which it is pretended this roy- "alty is due on Sleeper's share.

The contract is, that two thirds of the royalty to be paid by Sleeper is to be paid under the provisions of the deed from Cushing to Davies rateably, now the agreement by Cushing with Davies is that the royalty shall be one tenth on the net profits of Davies, that is, after he, Davies, shall be paid for all losses, charges and disbursements. The disbursement of Davies was what he paid for the working of the mine to Sleeper, and that was two thirds of the ore got out by the skill and at the sole expense of Sleeper. What matter was it that the disbursement to Sleeper was paid in ore instead of cash. It did not alter the essence of the contract. Davies could pay Sleeper in money or in ore, and if the payment had been in money, could it be pretended that an amount was due by Sleeper of all the profits he might make in working the mine for Davies' benefit. Surely not. If Davies had agreed to give to Sleeper one hundred and sixty thousand dollars (the supposed value of the two thirds ore accruing to Sleeper) for working the mine for his (Davies') benefit, it would have been an outlay by Davies to that extent in working the mine. In stipulating that the outlay should be in ore instead of money, Davies simply escaped any possible loss he might have suffered, if the working had turned out unprofitably. He threw this risk upon Sleeper; and he (Sleeper) assumed the risk. He trusted to the knowledge and skill he had in mining operations, and ventured on the risk. But Davies, having no

such skill or knowledge, refused to accept the risk. So if no ore was found, the loss on the working of the mine would have fallen on Sleeper, and if ore was found, he was satisfied to take one third of his profits, leaving Sleeper to do the best he could with the mine to secure himself from loss. This was no violation of his agreement with Cushing, and it is not even pretended that it was in any way fraudulent.

Now in order to establish a claim of royalty over the operations of Sleeper, two things are necessary to be established under the terms of the deed to Davies. 1st. That the fund on which the royalty is claimed should be a net profit, and 2nd, that it should be a net profit of Davies. It is manifest that unless such be the case under the terms of the deed to Davies no such royalty can be claimed.

The pretension of the plaintiff is not that he has a right of royalty on the two-thirds gross return of the ore from the mine, for such a pretension would be too extravagant to be thought of for a moment; but that he is entitled to claim a royalty on the profits made by Sleeper in the working of the mine, that is on all beyond the actual disbursements incurred by Sleeper in producing the ore.

To maintain such a pretension it must appear to be founded on some clause of the deed other than the one regulating the royalty on Davies' profits, otherwise it must be said, that the outlay made by Sleeper is the outlay made by Davies, and the profits made by Sleeper over his actual disbursements are the profits of Davies; in other words, that the working by Sleeper was the working by Davies himself, and that such must be considered to be the meaning of the clause in the original deed of sale to Davies, and must also be the necessary meaning of the contract by which Davies agreed with Sleeper for the working of the mine; or,

2ndly. That the working of the mine was a joint working by Davies and Sleeper involving joint interests and joint profits, and thereby a working by Davies. As regards the defendant's contract of sale, it is clear, nothing in it can constitute, so far as words can express it, any claim to take any thing more than one-tenth of Davies profits. Are then the two-thirds of the ore extracted by Sleeper to be considered as the net profits of Davies in any such way as to justify a claim on the part of Cushing for royalty?

The deed from Cushing to Davies is in its nature absolute. It conveyed the property away in fee. The only reserve in favor of Cushing, apart from the contingency of giving up the contract, is in the one-tenth reserved in the shape of royalty. There is no stipulation about the manner of working the mine. Davies was free in all respects to do as he pleased, provided he did not violate his contract.

He had a right either to work it himself or to do so by others. He could lease it, that is, the working of it, as he chose. He might work it by himself or by others. He might pay for the working by money, or an equivalent in money, that is, by paying in ore. He might give money or ore, and might set apart so much of the ore extracted as would meet the money required for the working of the mine. If he had contracted with Sleeper to give him so much money for the working of the mine, it would have been a disbursement,

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which must have been charged out of the gross returns, before a royalty could have been claimed. If, instead of giving so much money, the payment was made in ore, what difference does it make. It was a disbursement or outlay in the one case, as in the other. It is not pretended that there is any thing illegal or fraudulent in the transaction, or that it violates any of the stipulations of the contract. If Davies would have contracted with Sleeper to work the mine for so much money, or so much ore, could Sleeper not have sublet the contract? and if he Sleeper had made money out of his contract, or the sub-contractor out of his, could the profits made by one or the other have been considered a profit made by Davies? Surely not; otherwise there can be no meaning in words. In fact, it was no more than a disbursement or outlay made to obtain the ore; and if a portion of it went to pay this outlay, it must be considered as a fair outlay, or a disbursement, whether it be made by Sleeper or Davies or any one else; and if it is an outlay or charge on the working of the mine, it cannot by any means be considered a profit, and if not a profit it is clearly not subject to royalty.

It has been argued, in fact it forms one of the grounds of the judgment already pronounced in a similar case between the same parties, by the Court of Appeals, that the mine was worked conjointly, or in participation, or by some kind of partnership. It does not appear to be so; nothing in the stipulation of the parties can make it so. On the contrary, the reverse is the case as it is the fact, for Davies in no way participated in the profits of Sleeper.

In fact the only way in which he participated was by obtaining as his profit the one-third of the ore to which the royalty attaches.

In giving the working to Sleeper and in making Sleeper make all the outlay by paying him two-thirds of the ore, or its value, it became a mere outlay as any other would be, and a necessary expense in working the mine.

He (Davies) saved himself from all loss, and threw the contingency of there being ore enough to pay Sleeper's expenses on Sleeper himself. It was a contract of chance. There might have been ore, or there might not have been. Sleeper chose to run the risk for two-thirds of the ore found. It is precisely as if Davies paid him two thirds of the ore in money value for the expenses incurred in making the mine. To interpret this contract in any other way, is to violate the plain meaning of words, and the construction of contracts, and to make that to be a profit, which by the very contract and words used by the parties themselves, is intended to be a disbursement. It is also pretended that by the stipulation in Sleeper's contract by which he was to bear a proportionate share of the royalty, that it was thereby meant by the parties, themselves, and intended to shew that the royalty should extend over any profit which Sleeper might make in making the outlay.

But such an interpretation is forced and quite contrary to the plain common sense of the terms used. It speaks of sharing Davies' royalty alone with Sleeper.

Apart from the two-thirds of the ore to be paid by Davies, he stipulated that he (Sleeper) should pay two-thirds of *his (Davies,)* royalty. Davies charged Sleeper with an additional outlay; no doubt Davies thought that the outlay by Sleeper

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was very large, and he therefore saddled him with the payment of two-thirds of his (Davies) royalty to be paid to Cushing. This cannot change the original contract in any way. If Sleeper's outlay is to be considered a disbursement, it is consistent then with the evident intention of the parties; for otherwise it would be to declare that Sleeper should pay a royalty on his own disbursements, which would be evidently inconsistent with the contract of the parties. In coming to a conclusion different from that arrived at by the Court of Appeals, I have done so, after great reluctance and after a careful study of the rights of the parties in a case involving a large sum of money; but I have not been able after the most careful examination, to come to any other conclusion. I regret this the less, however, as this judgment may be immediately revised by the Court of Review, and afterwards again by the Court of Appeals; and if any error exist either in the reasoning on, or in the conclusions to which I have arrived, it may be rectified, and justice done to both parties.

The following was the judgment of the Court:

"The Court * * * * *considering that the said defendant in this cause hath rendered an account of all the net profits made by him (William H. A. Davies), under the contract made and entered into by him with the said Job A. Cushing, and that the plaintiff had failed to show any right in law, or by reason of any of the clauses of the deed of sale, by the said Cushing to the said Davies, or by reason of any clause or undertaking in the agreement made by the said Davies with one Lewis Sleeper; and further considering that the two-thirds of the ore got out of the mine, and stipulated to be given to the said Sleeper for working the mine aforesaid, must be considered in law and by force of the said agreement to be a mere disbursement or outlay made by Davies under his deed from Cushing, and nothing more, and cannot be considered in law or by the contract to be a net profit, or any profit at all to which any royalty could by law or the contract attach. The Court doth dismiss the contestation of the said Cushing in so far as concerns any claim for royalty on the operations of Sleeper, and doth allow the said parties to *debattre le compte rendu* as they may be advised by law, and doth condemn the plaintiff to pay the costs of the contestation, *distraits* to Henry Stuart, the attorney of the said defendant."

A. & W. Robertson, for plaintiff. Judgment maintaining account.

Henry Stuart, Q. C., for defendant.

(S.B.)

MONTREAL, 28 FEVRIER 1865

Coram BERTHELOT, J.

No. 40.

Coulombe vs. *Lemieux*,

JUGE ;—Que nonobstant que le domicile du défendeur soit en dehors du district ou l'émanation de la saisie-arrêt avant jugement ait eu lieu et que le défendeur n'y ait pas été assigné, les faits de fraude qui lui sont imputés comme ayant eu lieu dans un district étranger, sont attributifs de Juridiction. Vide 1 L. C. Jurist, p. 100, Richer vs. Mongeau.

Le 30 novembre 1864, un writ de saisie-arrêt conservatoire fut émané pour saisir-arrêter toute la cargaison d'huîtres appartenant au défendeur dans une

Coulombe vs. Lemieux.

goëlette mouillé au port de Montréal. Le demandeur par sa déclaration alléguait: "Qu'en la cité de Québec" le 24 septembre 1864, le défendeur l'engagea ainsi que sa goëlette, par marché sous seing privé, pour aller en bas de Québec, dans le golfe St. Laurent, chercher une cargaison d'huîtres pour le compte du défendeur qui devait être ensuite conduite à Montréal pour y être vendue pour le profit du défendeur, et ce marché avait été fait pour £15 par mois payable sans terme, tout le temps que la goëlette et son équipage seraient employés. Que le demandeur ayant exécuté ce marché et ayant un lien et privilège spécial pour le paiement de son frêt établi par tel marché avait droit à une saisie conservatoire avant jugement sur cette cargaison, vû que le défendeur dans le but de le frauder disposait de cette cargaison à vil prix, et il concluait à l'émanation de ce writ et au paiement de sa créance.

La saisie fut faite d'environ 80 quarts d'huîtres à bord de cette goëlette, mais le défendeur qui était domicilié à Québec ne pût être assigné.

Le défendeur ayant néanmoins comparu, produisit une exception déclinatoire en ces termes: "Et le dit défendeur se réservant le droit de produire tous autres "plaidoyers à cette action en temps et lieu, dit, pour exception déclinatoire à "cette action, que le dit défendeur n'est pas justiciable de cette cour, mais bien "dans le district de Québec, où le défendeur a son domicile, et ce pour entre "autres raisons les suivantes:

"1o. Parce que le défendeur n'a pas son domicile dans le district de Montréal.

"2o. Parce que le bref de sommation émané en cette cause n'a pas été "signifié au défendeur personellement dans le district de Montréal.

"3o. Parce que la cause de l'action en la présente instance n'a pas originé "dans le district de Montréal."

Le demandeur répondit spécialement en ces termes:

"Que la dite exception est mal fondée et doit être renvoyée, parce qu'ainsi qu'il appert par la déclaration en cette cause, l'action intentée par le demandeur a pour but, la conservation de son privilège sur le gage qui lui assurait le paiement de sa créance contre le défendeur, savoir: la cargaison d'huîtress aisie en cette cause, laquelle se trouvait alors au port de Montréal, dans les limites de la juridiction de cette cour. Parce que de plus, c'est par suite de la fraude du défendeur, qui étant alors en la cité de Montréal, dans les limites de la juridiction de cette cour, a vendu à vil prix en la dite cité de Montréal, toute la dite cargaison d'huîtres, dans le but de frustrer le demandeur de tout recours sur icelle, que ce dernier a été forcé de recourir à la protection des tribunaux de ce district; et le demandeur met en fait que le défendeur s'est par là soumis à la juridiction de cette cour."

Jetté, pour le demandeur.

L'objet de l'action du demandeur était de mettre sous la main de la justice, la cargaison d'huîtres par lui transportée, pour le compte du défendeur, et sur laquelle il avait un privilège qu'il était en danger de perdre par la fraude du défendeur qui avait vendu cette cargaison à vil prix.

Ce que le demandeur cherchait par son action, c'était donc non pas tant une condamnation contre le défendeur, que la conservation de son privilège, par la voie de la saisie-arrêt conservatoire.

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Or son fret n'était dû qu'au terme de son voyage, et son privilège n'était acquis que là et alors.

Angell ou Carriers, no. 400.

C'était donc là, c'est-à-dire ici, qu'il avait droit de l'exercer.

En second lieu, le demandeur soumet : Qu'il a été forcé par la fraude du défendeur de prendre ici les procédés auxquels il a eu recours pour se protéger.

Le défendeur se rend de Québec ici, et y vend à vil prix sa marchandise, à l'insçu du demandeur et pour le frauder. La livraison est déjà commencée lorsque le demandeur s'aperçoit que ses intérêts sont en danger.

Pourrait-il prendre le temps d'aller faire son affidavit à Québec, pour y obtenir un bref de saisie-arrêt qui ne serait arrivé ici qu'après livraison complète de la cargaison ?

On dit, mais il pourrait s'opposer à cette livraison.

Oui, mais la saison était alors extrêmement avancée, (30 novembre), le demandeur ne pouvait pour garder cette cargaison d'huîtres dans son bâtiment, s'exposer à voir son bâtiment pris dans les glaces.

Le seul moyen qui lui restait, était donc de mettre ces huîtres sous la main de la justice, sauf à faire prononcer ensuite sur sa créance.

De plus, l'acte frauduleux du défendeur qui a forcé le demandeur d'adopter la saisie contre lui *a été commis dans ce district.*

Or c'est là, la cause d'action du demandeur, car cette action n'est que l'exercice du privilège que le défendeur par sa fraude mettait en péril.

Sénécal vs. Pacaud, L. C. Rép., vol. 10, page 419.

Le jugement est motivé comme suit :

" La cour ayant entendu les parties par leurs avocats au mérite de l'exception " déclinatoire produite et filée en cette cause, par le défendeur, examiné la procé- " dure et pièces produites et avoir délibéré ;

" Considérant que les faits de fraude imputés par le demandeur au défendeur " dans et par la déclaration en cette cause, comme ayant eu lieu en la cité de " Montréal, ainsi qu'il est admis par le défendeur, ont pu donner ouverture au " profit du demandeur à l'exercice de la *saisie-arret conservatoire* par lui " pratiquée en cette cause à la suite du writ ou mandat de *saisie-arrêt* émané en " icelle, et par conséquent à l'action du demandeur, a débouté et déboute la dite " exception déclinatoire avec dépens."

Lesage et Jetté, avocats du demandeur.

Dorion et Dorion, avocats du défendeur.

(P. R. L.)

MONTREAL, MARCH 31st, 1865.

Coram Berthelot, J.

No. 2284.

Humphries vs. *the Corporation of Montreal.*

Held :—That for injuries sustained in a street encumbered with building materials, an action of damages lies directly against the Corporation of the City, in which such street is situated; irrespective of the negligence of the contractors.

The plaintiff having alleged in his declaration that on the night of the 25th August, 1864, he had sustained severe injuries, by running his horse and carriage as a carter, in Bleury street in the city of Montreal, against certain piles

Humphries vs. The Corporation of Montreal.

of stone, brick and other building materials, encumbering that street opposite a house in course of construction, and that his horse and harness were much injured; claimed from the defendant the sum of £100 for damages.

The plea to the action was, that the defendants never impeded or obstructed the said street, and that such obstruction, if any existed, which they denied, were not made by the orders or with the privity or consent of the defendants.

The defendants admitted that Bleury street was, on the 25th August, 1864, and still is, a public street within the incorporated limits of the city of Montreal, and a public thoroughfare.

It was proved in evidence, that the street in question was encumbered as alleged by the plaintiff. That the plaintiff, while endeavoring to pass another vehicle, was thrown heavily from his carriage, broke his collar bone, and lay insensible on the ground. His horse and harness were also much injured. He himself was for a long time unable to earn his livelihood, and required medical attendance.

Per Curiam.—The Court considers that the accident occurred through the negligence of the Corporation in allowing the street to be unduly encumbered. The amount demanded, considering the severe nature of the injuries, is not excessive, and the Court feels justified in giving judgment in favor of plaintiff for the entire sum of £100, with costs.

The judgment is *motivé* as follows:

La Cour après avoir entendu les parties par leurs avocats au mérite, examiné la procédure et la preuve, vû les admissions faites et filées par les défendeurs et avoir sur le tout délibéré, considérant que le demandeur a suffisamment prouvé les allégués de sa déclaration et particulièrement que le 25 août dernier dans la nuit, cette partie, de la rue Bleury (une des rues publiques de cette Cité) entre les rues Ste. Catherine et Sherbrooke était obstruée en contravention de la loi et des règlements faits par les dits défendeurs à cet égard, et que par suite de ce, le dit demandeur en passant dans la dite rue Bleury a été renversé de sa voiture et a souffert des blessures ou des fractures qui l'ont rendu depuis et pendant longtemps incapable de travailler, que sa voiture a été brisée et que par et à raison de tout ce que dessus, il a souffert, des dommages qui sont prouvés être et raisonnablement estimés à la somme de £100, a condamné et condamne les dits défendeurs à payer au dit demandeur la dite somme de £100, avec intérêt de ce jour et les dépens.

Doherty, attorney for plaintiff.

Stuart & Roy, attorneys for defendants.

(P.R.L.)

MONTREAL, 31ST MARCH, 1865.

Coram BADGLEY, J.

No. 2239.

Plessis dit Belair vs. *Dubé.*

HELD:—That by the effect of a judgment of *separation de biens* duly executed, the wife is exempted from any liability by her previously incurred as security, *caution*, for her husband.*

The following judgment sufficiently explains the facts of the case: "The Court having heard the plaintiff and Dame Appolline Dubé, one of the defen-

* 1 Vol. Revue de Lég. & Jur. p. 333. Bertrand & Saindon.

dants, by their counsel, upon the merits of this cause, the other defendants, Hubert Gravel and Appolline Gravel, having declared that they do not plead to this action, and having been duly foreclosed from so doing, examined the proceedings and proof of record, seeing the admissions made and fyled by the said defendants, Hubert Gravel and Appoline Gravel, and upon the whole duly deliberated: considering that at the date of the *acte de conventions* fyled in this cause by the plaintiff, and dated the 19th October, 1863, and upon which this action was instituted against the said defendants, Appolline Dubé and her husband Hubert Gravel, and the other defendant, an action was pending at the suit of the said plaintiff against the said defendants for the recovery of a note *en brevet* dated the 18th day of February, 1861, executed by the said Appolline Dubé and Hubert Gravel and their two children therein mentioned, in favor of the said plaintiff for sum of money therein mentioned.

Plessis dit Bélair vs. Dubé.

Considering that the said *acte de conventions* was made and executed by her and her said husband, together with the said other defendants in this cause, their said daughter, for the settlement of the said debt and for discontinuance of the said action.

Considering that the said debt was a debt *de Communauté*, contracted during the community of property which then existed between the said Appolline Dubé and the said Hubert Gravel her said husband, and that the said community of property between them was terminated by a judgment of *séparation de biens* in her favor against her said husband, rendered by the Superior Court, here on the 24th day of April, 1863, afterwards duly executed, and that she the said Appollime Dubé duly made and fyled her renunciation to the said community on the day following the date of the said judgment.

Considering that by law and the effect of the said judgment of separation and of her renunciation of the community aforesaid, she could not in law incur any liability whatever with her said husband, the said Hubert Gravel, and that the said *acte de conventions* above mentioned and referred to, was, as regards her, absolutely null and void to all intents and purposes whatever, doth dismiss the said action against the said Appolline Dubé, with costs *distraits* to Chas. A. Pariseault her attorney.

And considering that the said plaintiff hath established the allegations of his said declaration against the other defendants, the said Hubert Gravel père, and Appolline Gravel, doth adjudge and condemn the said Hubert Gravel, père, and Appolline Gravel, jointly and severally, to pay and satisfy to the said plaintiff the sum of two hundred and twenty-nine dollars and sixty-two cents current money of this Province of Canada, balance of a larger sum, due under and by virtue of the said *acte de conventions* of the said 19th October, 1863, with interest thereon from the 16th September, 1864, and costs of suit.

Girouard attorney for plaintiff.

Pariseault attorney for defendant.

(P.R.L.)

MONTREAL, 31st MARCH, 1865.

Coram BADGLEY, J.

No. 891.

Bergevin dit Langevin et al. vs. *Persillier dit Lachapelle et vir.*,

AND

The same, *Opposants*, and *Meloche*, *Intervening party*.

HELD:—That a judgment debt being legally susceptible of transfer, and having been legally transferred, the assignee (*cessionnaire*) has the right to enforce the judgment in the name of the judgment-creditor.

In this case, the plaintiff having obtained, on the 28th October, 1858, a final judgment against the defendant for the sum of £61, transferred that judgment to the *auteurs* of the intervening party by a deed of *cession* passed on the 28th January, 1859, before Mtre Gervais, N. P. The transfer by Pierre Lemieux, fils, to the intervening party, was never served (*signifié*) on the defendant. In the transfer from the plaintiff to Pierre Lemieux, père, no clause is to be found authorising the assignee (*cessionnaire*) to use the name of the plaintiff in issuing the execution, *writ de bonis*.

The defendant, having made an opposition, *à fin d'annuler*, to the seizure of her goods and chattels on the ground that the judgment had been transferred by the plaintiff to Pierre Lemieux, père, who had transferred the same to Pierre Lemieux, fils, and afterwards by the latter to the intervening party Meloche, and that the execution could not issue in the name of the plaintiff, the said Meloche intervened, as *cessionnaire* of the latter, and contested this opposition as unfounded in law and illegal.

The judgment of the Court is *motivé* as follows:

The Court, having heard the opposant and the intervening party, contesting said opposition, by their counsel, as well upon the *défense en droit* fyled by the said intervening party to the said opposition as upon the merits thereof, the plaintiffs having declared that they do not admit nor contest the said opposition, examined the proceedings and proof of record, and having, upon the whole, duly deliberated, and considering that the allegations in the opposition in this cause by the said opposant, defendant in this cause, are not sufficient in law to maintain the said opposition; and, considering that the said judgment-debt and judgment in the pleadings in this cause referred to were legally susceptible of transfer, and have been legally transferred to the said intervening party; considering that the mutation of the judgment creditor is not a change in the right of execution, and that the intervening party as *cessionnaire* of the said judgment obtained by the plaintiffs against the defendant, Dame Angèle Persillier dit Lachapelle, on the the 28th October, 1858, and of their rights therein, has a legal right to enforce and execute the said judgment for his own interest in the name of the said plaintiffs judgment-creditors aforesaid, doth reject the said opposition with costs against the said opposant aforesaid, in favor of the said intervening party.

Opposition dismissed and intervention maintained.

Girouard, attorney for plaintiff and intervening party.

Méléric Lanctot, attorney for defendant.

(P. R. L.)

MONTREAL, 31st MARCH, 1865.

Coram BADGLEY, J.

No. 1272.

Dubuc vs. *Charon*.

HELD:—That a *délégation imparfaite* in a deed of sale is not a personal undertaking on the part of the purchaser to pay the amount so delegated.*

In the deed of sale by Augustin Dubuc to the defendant, several *indications de paiements* were made, and amongst others, one was made in favor of the plaintiff, Luc Dubuc.

The defendant having obtained a ratification of his title, and deposited the amount of his purchase money, the hypothecary creditors, whose claims were anterior to the plaintiff's mortgage, were paid in preference to the latter, who brought this action on the ground that by his deed the defendant had undertaken to pay this debt.

The defendant pleaded the judgment of distribution of the purchase money, and that no personal engagement existed on his part to make good the plaintiff's claim.

The judgment of the Court is *motivé* as follows:

The Court, having heard the parties by their counsel upon the merits of this cause, examined the proceedings and proof of record, and having upon the whole duly deliberated, considering that the delegations set forth in the deed of sale by Augustin Dubuc to the said defendant under date of the 4th June, 1862, and fyled in this cause, made by the said vendor in favor of the said plaintiff, was not a personal undertaking and engagement on the part of the said defendant to pay to the said plaintiff the said sum of fourteen hundred livres, ancient currency thereby delegated, and was only for the payment of the said sum out of the amount of the said price or purchase money in the said deed of sale mentioned according to the sufficiency of the said price after the payment of prior and preferential privileges and mortgages chargeable and payable thereout: considering that the entire price or purchase money was required and ordered to be distributed amongst, and for the payment of privileges and mortgages anterior to and preferable to the demand of the plaintiff: considering that the defendant hath maintained and established the material averments of his exceptions and pleas by him fyled in this cause, doth dismiss the plaintiff's action with costs.

Jodoin & Lacoste, attorneys for plaintiff.

Cartier, Pominville & Betournay, attorneys for defendant.

(P. R. L.)

* *Vide* also 2 L. C. Rep., p. 243, La Banque du Peuple—Gingras, where it was held that a *tiers detenteur* is never presumed to bind himself personally.

COUR DE CIRCUIT.

POUR LE DISTRICT DE RICHELIEU.

SOREL, 23 JUIN, 1864.

Coram LABERGE, J. A.

No. 505.

Maillou vs. *Sommerville.*

JUGE:—Qu'une simple requête à fin d'opposition demandant la nullité de la saisie-arrêt avant jugement, est permise par la loi; (Ord. de 1667, titre 35, art. 2)* et que le défendeur peut se servir de cette voie pour obtenir l'annulation de la saisie-arrêt avant jugement.

Le demandeur ayant fait émaner le 10 juin, 1864, une saisie-arrêt avant jugement pour saisir-arrêter les biens meubles du défendeur; ce dernier présenta le 13 juin, devant le juge en chambre, une requête d'opposition exposant les nullités, tant de forme que de fonds de cette saisie arrêt et concluant à son annulation. Sur l'ordonnance du juge, le demandeur comparut en chambre le 16 juin, et fut tenu de répondre à cette requête. Le 17 juin, les parties procédèrent en chambre à leur preuve respective sur appointement à cet effet.

Après audition au mérite, et sur la motion du demandeur pour faire mettre tous les procédés de côté, la cour a rendu un jugement final renvoyant la saisie-arrêt et elle a motivé son jugement comme suit:

Sur la requête d'opposition et demande de nullité de saisie-arrêt du défendeur et sur la motion du demandeur pour faire rejeter la dite requête—considérant: 1° Que la dite requête est permise par la loi, et que le défendeur peut se servir de cette voie pour obtenir l'annulation de la saisie-arrêt avant jugement prise contre lui pendant que la cour de Circuit n'est pas en terme pour ce district, et que célérité est requise dans les procédés; 2° que la dite motion est mal fondée et ne peut être maintenue. 3° Que sur la production de la dite motion, l'enquête ayant été ordonnée sur les faits de la dite requête, il est prouvé que le bref de saisie-arrêt a été injustement et illégalement obtenu par le demandeur, et que l'allégué contenu dans son affidavit qu'il a toute raison de croire et croit vraiment en sa conscience que le dit William Sommerville, (défendeur), est sur le point de recéler ses biens, dettes, effets, et le dit bois fait par le demandeur et de laisser incontinent le Bas-Canada, et que le dit William Sommerville se cèle dans la vue de frauder le dit déposant son créancier, et ses créanciers est d'après la preuve faite, faux en fait et mal fondé en loi. Requête d'opposition maintenue.

Gauthier, avocat du demandeur.

Piché et Brossard, avocats du défendeur.

(P. R. L.)

ST. JOHN, 12TH MARCH, 1863.

Coram LORANGER, J.

No. 533.

Narbonne vs. *Tetreau.*

HELD:—That a signature subscribed to a negotiable note by a person other than the maker of the note is equivalent to an *aval.*

This action was instituted on the 7th January, 1863, to recover the sum of twenty dollars, amount of a promissory note, in the following terms:

* Vide 8 L. C., Jurist, p. 5, Leslie and Molsons Bank, Rodier sur l'ord. de 1667, tit. 35, art. 2.

Narbonne vs. Tetreau.

"I, for value received, promise to pay Jean Tetreau or bearer the sum of "twenty dollars, ten the first January next, and ten dollars the first April next "with interest.

Signed,

Franklin, N. Y., Sept., 1861. "WM. YOUNG.
JEAN TETREAU.

Plaintiff, alleged in his declaration that Tetreau, the defendant signed the said note as *aval*.

Defendant pleaded as follows:

"Et le dit défendeur pour défense à la présente action, dit, que tous et chacun des allégués du demandeur en sa déclaration sont faux et mal fondés, et "dit de plus qu'il ne s'est jamais porté caution, du dit William Young et n'a "jamais prétendu en aucune manière endossé le dit billet.

"Pourquoi etc."

MACDONALD, for plaintiff argued that the note being negotiable, no endorsement was required, and that consequently the Court could not look upon the signature at the bottom of said note "Jean Tetreau" in any other light than that of a *caution solidaire*, and in support thereof cited Story Prom. Notes, sec. 462, p. 569. Story on Bills, sec. 455, p. 531. Loranger, J., rendered judgment for plaintiff as above noted.

Judgment for Plaintiff.

L. G. Macdonald for plaintiff.
E. Pelletier for defendant.
(L. G. M.)

COURT OF REVIEW.

MONTREAL, 30TH NOVEMBER, 1864.

Coram SMITH, J., BERTHELOT, J., MONK, J.

No. 336.

Molsons Bank vs. *Janes et al.*

HELD:—That a transfer of goods may be validly made to a banking institution by the delivery of a warehouse receipt without endorsement.

The plaintiffs in this cause revendicated 300 tons of coals lying in a yard in Commissioners street in the city of Montreal.

In their declaration they set up that they were a body, politic and corporate, carrying on the business of banking in Montreal, and that defendants were coal and commission merchants. That on the 27th day of June, 1863, defendants delivered to them their promissory note for $1000 payable three months after date, which they discounted for them. That as collateral security for the payment of the said note so discounted, the defendants, at the same time, being then warehousemen, signed and delivered to them a warehouse receipt by which they declared to have received into store on storage, on account and deliverable only to the order of the plaintiffs, acting through their cashier, 300 tons of coal. That by such delivery the plaintiffs became the legal owners and bailees of the said 300 tons of coal. That the said note was never paid, and the plaintiffs, as the actual holders in possession and as bailees of the said coal, were entitled to the exclusive right and possession thereof until payment of the amount of the

Molsons Bank vs. Janes et al.

said note; but the defendants had refused to deliver up the said coal, wherefore the plaintiffs had a right to revendicate the same.

The intervening [illegible] came into the cause, setting up by their petition in intervention, *inter alia*, that they were creditors of the de[illegible]ts for the sum of $1[illegible]22.06. The defendants were not, and, in fact, never were at Montreal or elsewhere, at the time the said warehouse receipt was given to the plaintiffs, engaged in the calling of warehousemen, and, in fact, they had not and never had had the capacity of warehousemen, and were not publicly known as such; but, on the contrary, were merchants, traders, and dealers in coal, and that the coal seized never was in the possession of any warehouseman or any third person, for or on behalf of the plaintiffs, but at all the said times remained in the ownership, custody, possession, and power of the defendants; and the said pretended warehouse receipt was illegal, null and void; and no right or title to the said coals was thereby or in anywise vested in the plaintiffs. That the defendants were at the time the said writ of attachment was issued, insolvent, by reason whereof all their property, including the said coal, was, at the time of the said attachment, the general *gage* and property of the intervening parties and the other creditors of the defendants, and the plaintiffs had no *lien* or privilege whatever on the said coal.

On the above intervention, issue was joined, and the parties went to proof.

At *Enquête* it was proved that the defendants were not engaged in the calling of warehousemen, although they had stored goods on two or three occasions.

The said warehouse receipt was not endorsed.

The Court dismissed the intervention.

J. L. Morris, for intervening parties, at argument in review, submitted: The princip[illegible]estions raised in this cause are two of fact and two of law depending [illegible]e questions of fact. The first question of fact raised is, were the[illegible]ts warehousemen at the time they gave the receipt fyled in this caus[illegible] first proposition of law depends upon the negative answer to the foregoing que[illegible] of fact, and may be thus put, if the defendants were not warehousemen at the time of their giving the said receipt, the plaintiffs were not legal bailees of the coal mentioned therein.

The second question of fact is, did the defendants endorse the said receipt to plaintiffs? The second proposition of law, in like manner depends upon the negative answer to this second question of fact, and is as follows: If the defendants did not endorse the said warehouse receipt, the delivery of the same to the plaintiffs did not operate as a valid transfer thereof.

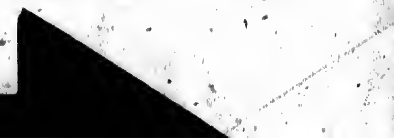
In answer to the first question of fact, viz., were the defendants warehousemen at the time they gave the receipt fyled in this cause, it may be urged by the plaintiffs that the proof shows that the defendants stored goods; but it is submitted as a further proposition of law that one or two acts do not constitute a man a trader (a warehouseman is a trader); there must be a continuity of acts. *Vide* De Lamarre and Lepoitevin, *Droit Commercial*, vol. i, p. 83, sec. 37, *et seq.*, and sec. 39. It is evident that the first question of fact being answered in the negative, the first proposition of law laid down is sound, and that a warehouse receipt can only be legally given by a person engaged in the calling of a warehouseman, known to the public as such, and having warehouses for the storage of goods, and that therefore the plaintiffs were not legal bailees of the coal

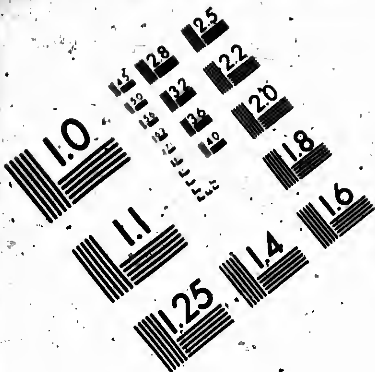
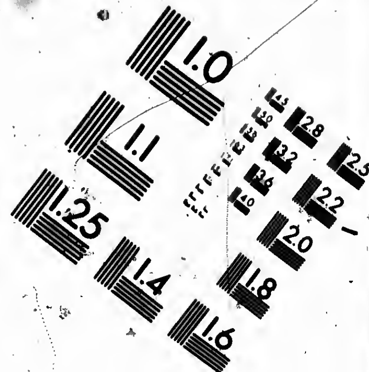
seized. The injustice of a contrary holding is manifest. A merchant, ostensibly the owner of large quantities of goods displayed to the public on his premises daily, might, on failure, prove to have given warehouse receipts for these, and the chief assets go into the pocket of the holder of the receipt leaving the creditors without remedy. These creditors deal with their debtor on the supposition prevalent in all trading matters, that the possessor is the proprietor, and are manifestly deceived. No such injury arises [illegible] of a *bonâ fide* warehouseman, because the public presume tha[illegible] not his, or that if his, they may be pledged. If a trader [illegible] obviously, his course is to warehouse them, and then endo[illegible] receipt. No injury to public morals arises then, since the pled[illegible]y divesting of possession, nor *a fortiori* is the pledge by a t[illegible]ready warehoused, calculated to deceive. But in the other cases the b[illegible]ge of the creditors is swept away, and they are deceived, and a principle [illegible] laid down which would shake the foundations of trade.

The common law and the act of incorporation of the Molsons Bank equally forbid the bank to enter into a contract such as the one in question. *Vide* Pothier, Nantissement, vol. ii, p. 94, § 8 and 17, and 18 Vic. cap. 202, s. 20.

A bank cannot receive a warehouse receipt as security, for moneys advanced, from any person not engaged in the calling of a warehouseman. Con. Stat. Can., cap. 54, sec. 8, p. 645.

The second question of fact, viz., did the defendants endorse the said receipt?" is answered by reference to the receipt fyled which bears no endorsement; and the second proposition of law, viz., That the delivery of the said receipt to the plaintiffs without endorsement did not constitute them bailees of the said coal, will be found to be correct on reference to Con. Stat. C. cap. 54, sec. 8, p. 645, which reads as follows: "Notwithstanding anything to the contrary in the charter or act of incorporation of any bank in this province, any bill of lading, any specification of timber, or any receipt given by a warehouseman, miller, wharfinger, master of a vessel, or carrier, for cereal grains, goods, wares, or merchandise, stored or deposited, or to be stored or deposited in any warehouse, millcove, or other place in this province, or shipped in any vessel, or delivered to any carrier for carriage from any place whatever, and whether such cereal grains are to be delivered upon such receipt in species or converted into flour, may, by endorsement thereon by the owner of or person entitled, to receive such cereal grains, goods, wares, or merchandize, or his attorney or agent, be transferred to any incorporated or chartered bank in this province, or to any person for such bank, or to any private person or persons, as collateral security for the due payment of any bill of exchange or note discounted by such bank in the regular course of its banking business, or any debt due to such private person or persons, and being so endorsed shall be vested in such bank or private person from the date of such endorsement, all the right and title of the endorser to or in such cereal grains, goods, wares, or merchandise, subject to the right of the endorser to have the same retransferred to him, if such, bill, note, or debt be paid when due; and in the event of the non-payment of such bill or note or debt when due, such bank or private person may sell the said cereal



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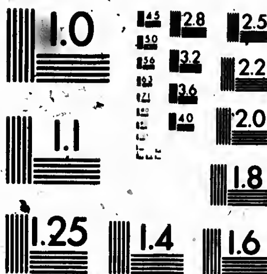
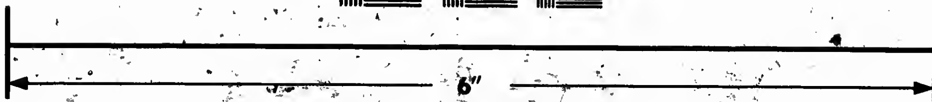
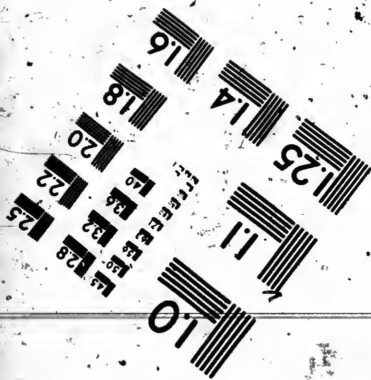
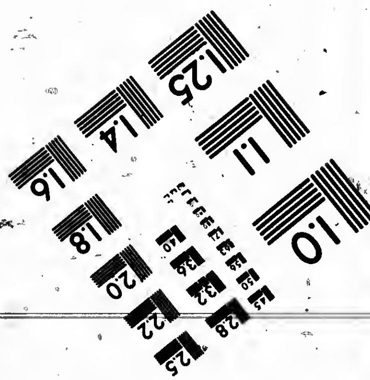

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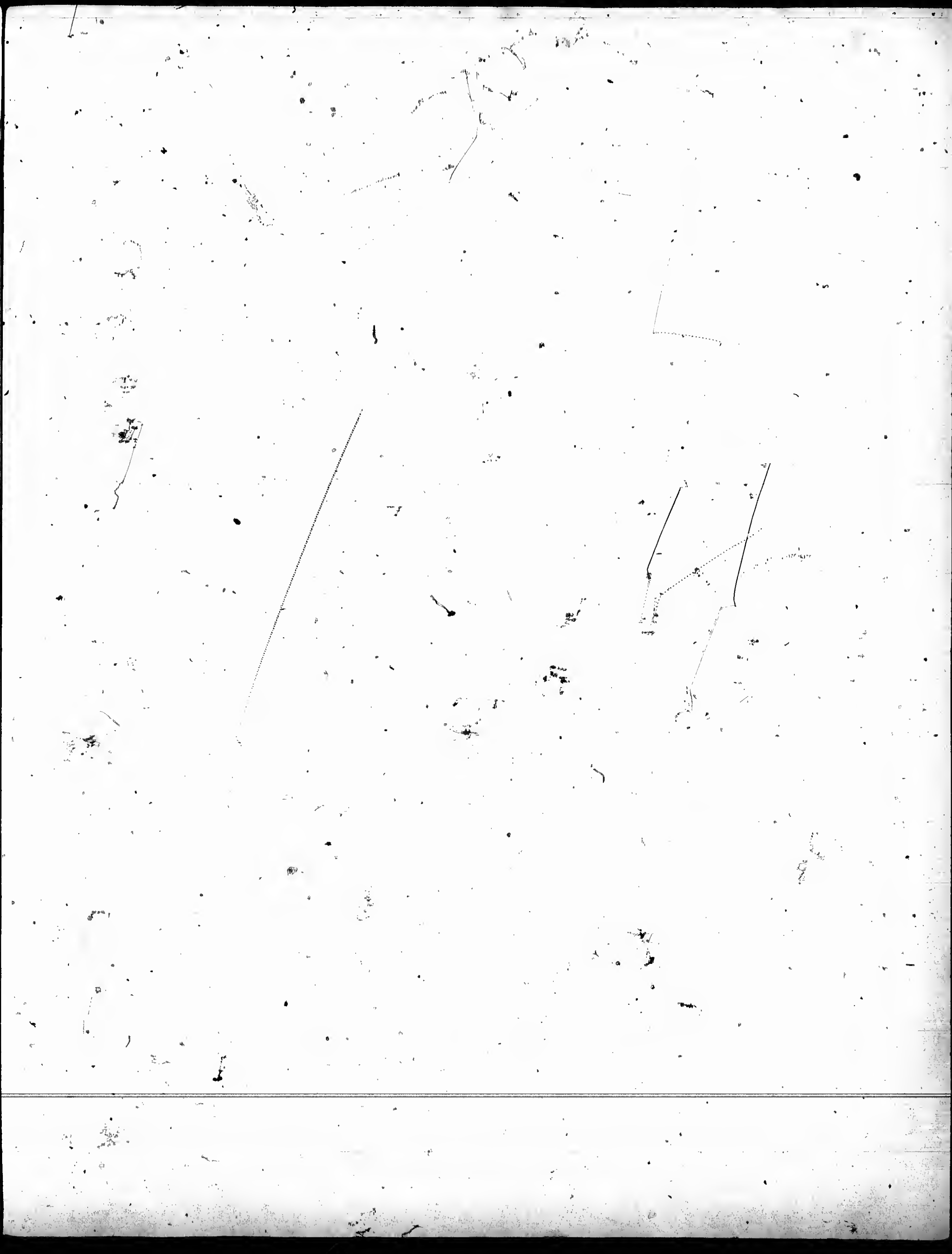

Molsons Bank vs. James et al.

grains, goods, wares, or merchandise, or retain the proceeds or so much thereof as will be equal to the amount due to the bank or private person upon such bill or note or debt, with any interest or costs, returning the overplus, if any, to such endorser."

Even when the warehouseman giving the receipt is also the owner of the goods, a bank cannot obtain any privilege by the delivery to it of such warehouse receipt unless the party who unites in his person the qualities of warehouseman and owner endorses his name thereon, as will appear by reference to 24 Vic., cap. xxiii, sec. 1, amending cap. 54 Con. Stat. of Can., and which reads as follows: "Provided that when any person engaged in the calling of warehouseman, miller, wharfinger, master of a vessel, or carrier, by whom a receipt may be given in such his capacity, as hereinbefore mentioned, for cereal grains, goods, wares or merchandize, is at the same time the owner of or entitled himself (otherwise than in his capacity of warehouseman, miller, wharfinger, master of a vessel, or carrier,) to receive such cereal grains, goods, wares or merchandise,—any such receipt, or any acknowledgment or certificate intended to answer the purpose of such receipt, given and endorsed by such person, shall be as valid and effectual for the purposes of this act, as if the person giving such receipt, acknowledgment or certificate, and endorsing the same, were not one and the same person," &c. The reason of this is to identify the warehouseman as owner. If the endorsement is not made, there is nothing to show that the warehouseman is owner; and if it were held that warehousemen might transfer warehouse receipts without endorsement by the owner, the latter would have no security in storing goods.

They would disappear, being transferred by the warehouseman if dishonest, and the public, by receiving the receipts, would become a party to the fraud.

R. Laflamme, Q. C., for plaintiff, argued that the defendants were warehousemen. In their declaration of co-partnership, a copy of which was fyled of record, they were described as coal dealers and commission merchants. As commission merchants, they were in the habit of receiving consignments of goods for sale; these goods they had to warehouse and therefore they were evidently within the meaning of the act engaged in the calling of warehousemen, and as such could validly grant a warehouse receipt. They had also described themselves warehousemen in the warehouse receipt in question.

As to the second proposition of law submitted by the counsel for the intervening parties, it was true that the 8th sec. of the 54th chapter of the Consolidated Statutes of Canada, required an endorsement of a warehouse receipt by the warehouseman, to make a valid transfer of the same. But in this case the defendant was the owner of the coals, and according to the Act 24 Vic., sec. 1, amending the former Act, endorsement was no longer necessary except in the case where the warehouseman acted purely and simply as such, and did not combine in his person the qualities of warehouseman and owner.

The Court confirmed the judgment of the Superior Court, dismissing the intervention.

Judgment confirmed.

R. & G. Laflamme, for plaintiffs.

Torrance & Morris, for intervening parties.

(J. L. M.)

COURT OF QUEEN'S BENCH, CROWN SIDE.

MONTREAL, 30TH MARCH, 1865.

Coram MONDELET, J.

Regina vs. *Daoust.*

HELD :—That persons tried for felonies may make their full defence by two counsel and no more before a jury wholly composed of persons skilled in the language of the defence.*

This was an indictment for forgery.

The evidence of the witness whose signature was alleged to have been forged having been corroborated by other evidence, as required by section 26th of ch. 94 of the Consolidated Statutes of Canada; Messrs. Ouimet and Denis of counsel for the prisoner addressed in French the jury, wholly composed of French speaking persons, for the defence. Mr. Chapleau, of counsel for the prisoner, rose also to address the jury on behalf of the prisoner, but was stopped by the Court on the principal that two counsel only could be heard on behalf of persons indicted for criminal offences.

(P. R. L.)

MONTREAL, 20TH APRIL, 1865.

Coram MONDELET, J.

Regina vs. *Daoust.*

FELONY—NEW TRIAL.

HELD :—That a new trial will be granted, in a case of felony, on an application, supported by affidavit, based on the discovery of new evidence.†

This was a motion for a new trial in the case of the prisoner present in Court, who was convicted of forgery.

Two indictments had been found, and a conviction secured on the first indictment. At the trial on the second indictment, important evidence was adduced which was not known or remembered at the previous trial, and the prisoner was acquitted.

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* Cons. St. of Canada, ch. 99, sec. 55; Cons. St. for Lower Canada, ch. 84, sec. 31. 4th Vol. of Blackt's Com; Wendell's Ed., p. 356. By Statute 7 W. III, c. 3, persons indicted for high treason may make their full defence by counsel not exceeding two.

† *Vide* Archbold's Plead. & Ev. in criminal cases, by Jervis, Ed. of 1862, p. 158 :—"It was formerly said that no new trial would be granted in a case of *treason* or *felony*, "where the proceedings had been regular; 67 T. R. 638; Burns, J., new trial; 1 Chitty's "Crim. L., 652; Corner's Cr. Prac., 161; but now the Court of Queen's Bench, when "the record is before that Court, will in its discretion order a new trial in cases of "felony where evidence has been improperly admitted, or where the jury have been "misdirected. Reg. *v.* Scaife, 2 Den. C. C. 281, 17 Q. B., 238."

Roscoe's Digest of the Law of Evidence in Crim. Cases, edition of 1862, by Power, page 215. "There can be no new trial in cases of felony, whether the defendant be "acquitted or convicted; Ex parte Edulgee Byramgee, 11 Jurist, 855. In R. *v.* Scaife, "17 Q.B., 238, where a conviction for felony was removed into the Court of Queen's "Bench, a new trial was moved for on the ground of the improper reception of depo-

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Ouimet G., in moving, remarked that the motion was based upon new evidence—the evidence of the witness Legault, whose testimony mainly acquitted the prisoner on the second indictment. This evidence was found after the date of the trial on the first indictment. He submitted affidavit setting forth the above facts and alleging the prisoner had used all due diligence in the first case; but the new evidence was discovered accidentally. He urged that it would be a serious injustice to the prisoner if he were deprived of the opportunity of establishing his innocence. The innocence of the prisoner in the second case had been declared emphatically by the verdict of the jury in that case; and the only difference in the charges was in the date and in the amount of the note. The absence of Legault in the first case made the difference in the verdicts.

Johnson, Q.C., Crown Prosecutor, said:—The Court will probably consider that under the peculiar circumstances of the present case, I am precluded from offering any opposition to the motion of my learned friend. The first indictment was supported by direct and positive evidence, as indeed was the second; but there is this difference between the two cases, viz.: that in the first, the evidence for the prosecution was not encountered by any testimony on the prisoner's behalf tending to explain or exculpate his conduct, and the conviction upon that indictment was, therefore, a matter of course; while upon the second trial it was proved, by evidence that was only discovered after the verdict in the first case, that authority to sign the name of the prosecutor existed to an extent to satisfy the jury of the prisoner's innocence. I feel therefore that he should have the opportunity accorded to him of adducing the same justification in the case

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"sitions in evidence, and was granted; but it is said that that case was without pre-"cedent, and it has not been followed."

Russell on Crimes, edition of 1857, by Sharswood, p. 726. "Where the defendant "had been convicted on an indictment for felony, there can be no new [illegible] * * *

NOTE. † "In the United States a new trial is granted to the [illegible], in capital "cases, for any cause which would be sufficient in a civil action, [illegible] a conviction "for a misdemeanor. 3 Dallas, 515, 1 Bay, 372; 17 Mass., R. 515."

Parker's Crim. Reports, 1 vol., p. 625, The People *v.* Morrison; and p. 642.

Archbold's Pleadings, vol. 1, page 177, note, Watterman's edition; Wharton's Crim. Law, No. 3078; Eighth Rep. Com. Crim. L., pp. 18, 19, 20, 21, and 22; Appendix to Second Report, p. 100; Lower Canada Reports, vol. 14, p. 78; Duval dit Barbinas, plaintiff in error, and The Queen, defendant in error.

Cons. St. for Lower Canada, chap. 77, sec. 63. In Upper Canada, by the Act extending the right of appeal in criminal cases, passed in 1857, 20 Vict., chap. 61, it is enacted that "when any person shall be convicted before any Court of Oyer and "Terminer, or Jail Delivery, or Quarter Sessions, of any treason, felony, or misde-"meanor, such person may apply for a new trial to either of the Superior Courts of "Common Law where such conviction has taken place, before a judge of either of such "Courts, or to such Court of Quarter Sessions when the conviction has taken place at "such Sessions, upon any point of law or question of fact, in as full and ample a "manner as any person may now apply to such Superior Court for a new trial in a "civil action." * * * * * * * * * * * * *

Upper Canada Q. B. Reports, 22 Vic., 17th vol., Reg. *v.* Oxentine, p. 295. "The "Court are not authorised to grant a new trial in criminal cases, on the discovery of "new evidence, or for the misconduct of the jury." Robinson, C. J.

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now before the Court. It has been suggested to me that upon this motion being granted, I should fyle a *nolle prosequi*. I am not prepared to go that length, however: I am bound to protect the rights of the prosecutor, as well as those of the prisoner, and the prosecutor must have in the present case the opportunity of rebutting the prisoner's evidence, if he can. I will take the prisoner's recognizance to appear on the first day of next Term.

The Court said the prisoner was between two verdicts, one of guilty and the other of not guilty, and the only difference in the cases was in the evidence of Legault. Under the circumstances the Court was of opinion that it would be injustice to the prisoner not to afford him the opportunity to prove his innocence. He therefore granted the motion. The prisoner then gave his own recognizance in the sum of $1000 to appear for trial next Term.

Motion for new trial granted.

F. G. Johnson, Q. C.
Gédéon Ouimet, for prisoner.
(P. R. L. & S. B.)

SUPERIOR COURT, 1864.

MONTREAL, 20TH SEPTEMBER, 1864.

Coram BERTHELOT, J.

No. 2001.

Mackenzie et al. vs. *Mackenzie and McKenzie et al. T. S.*

HELD: That an advocate and attorney, Tiers Saisi in a cause, cannot refuse to declare what moneys he may have in his hands belonging to a defendant in the cause, on the ground that his doing so would be a betrayal of professional confidence.

This was a motion by the plaintiff, to compel Murdoch Morison, Esq., one of the *tiers saisis* to make a proper declaration as such, he having declined doing so, on the ground that whatever he had in his hands he held as the attorney and counsel of the defendant, who had been arrested by the plaintiffs on a charge of embezzlement, and that he could not, without violating the obligations of his profession and the faith due to his clients, depose in the case, according to the exigency of the writ of attachment served upon him.

Morison (for self) *and Kerr*, counsel, submitted the following authorities in support of the pretensions of the *tiers saisis*:—

2 Evans' Pothier, p. 316; 2 Phillips on Ev. (Am. Ed.) p. 167, (180 Eng. Ed.); Guyot, Vo. Avocat, p. 766; 1 Phillips and Amos, p. 174, 181, 183; Archbold's Civil Practice, p. 61; 1 Taylor on Ev. par. 840; Gugy vs. McGuire; Bioche Vo. Avocat, Nos. 64, 67, 68; Nouv. Den. Vo. Avocat, p. 738; Woolrich's Crim. Law, p. 234; Ryan vs. Halpin.

Bethune, Q. C., for plaintiffs, called the attention of the Court to the foot note, in the citation from Guyot;—"Il n'est point obligé de révéler comme temoin ce qu'il ne sait que comme avocat, *à moins que son client ne lui ait montré frauduleusement de la confiance, que pour écarter son témoignage*," and argued that the exception here stated exactly fitted the present case, where the client, for the mere purpose of fraudulently avoiding an attachment of his funds, placed them

Mackenzie et al. vs Mackenzie and Mackenzie et al. T. S.

in the hands of his professional adviser; and also contended that apart from any express authority on the subject, it was impossible, on principle, for the Court to maintain so monstrous a proposition as that contended for in the present instance, as its doing so would involve the making of the legal profession the recipients of stolen property.

The Court granted the plaintiff's motion, and ordered,—"That the said Murdoch Morison do forthwith comply with the exigency of the said writ, and do declare on oath what goods, moneys, credits, debts, or effects belonging or due, or to become due to the defendant, he had in his possession, custody or power, at the time of the service of such writ, or has since had or expects to have." And, in so doing, referred to first Greenleaf on Ev., ch. 14, Nos. 237, 238, 240, 244, 245.

Motion granted.

Strachan Bethune, Q. C., for plaintiffs.
M. Morison, T. S. in person.
William H. Kerr, Counsel.
(S. B.)

MONTREAL, 1st April, 1864.

Coram Smith, J.

No. 1855.

Mongenais vs. *Pilon, and Pilon*, Pltff. *en gar.* vs. *Brasseur*, Deft. *en gar.*

Held: That where a defendant *en garantie* confesses judgment for a portion only of the principal demand, and contests the principal action as regards the balance and judgment is rendered for the amount confessed, the defendant *en garantie* must nevertheless pay all the costs of both demands, including those of contestation, and that according to the class of the original demand.

This was a hypothecary action for the recovery of £110 16s. 8d. currency and interest claimed to be due plaintiff on a notarial obligation executed by the defendant *en garantie*.

The defendant *en garantie* pleaded to the principal demand, contending that the only amount really due to the plaintiff was $166.64 with interest from the first of February, 1863, and declaring that he confessed judgment for that amount, and praying that the plaintiff's demand as regarded the surplus, might be dismissed with costs.

The plaintiff joined issue on this plea, and, after a protracted contestation, judgment was eventually rendered exactly for the amount confessed; but the defendant *en garantie* was condemned to pay all the costs of both demands, including those of contestation, as in an action above £100 currency.*

Moreau, Ouimet & Chapleau for plaintiff.
Bondy & Fauteux for defendant and plaintiff *en gar.*
A. D. Bondy for defendant *en gar.*
(S. B.)

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* *Vide* Routh vs. Dougall, 2d L. C. Jurist, p. 286.

MONTREAL, 2 AVRIL 1865.

Coram BERTHELOT, J.

No. 2130.

Delagrave vs. *Dessaules et Delagrave, Opposant, et Dénéchaud, Opposante, et Delagrave, Contestant.*

JUGE :—Que le créancier qui a une hypothèque spéciale sur l'immeuble vendu par décrêt, a le droit de demander d'être colloqué jusqu'à concurrence du montant prélevé ; en par lui donnant caution de rapporter le montant des deniers pour lesquels il sera ainsi colloqué dans le cas où les immeubles non encore saisis et vendus et spécialement hypothé qués ou paiement de la créance de l'autre Opposant créancier par hypothèque générale seraient insuffisants pour payer et satisfaire la créance de cet autre Opposant.

L'opposante Dénéchaud était coloquée par le rapport de collocation et distribution pour partie du principal d'une rente lui appartenant en vertu d'un titre du 13 novembre 1810 et du titre nouvel du 16 Septembre 1841 sur l'immeuble saisi et vendu en cette cause.

Le Demandeur et opposant Delagrave contesta cette collocation, et de plus l'opposition de l'opposante Dénéchaud, en alléguant ses titres de créance hypothécaire par hypothèque spéciale sur l'immeuble saisi et vendu en cette cause et sur aucun autre ; tandis que l'opposante Dénéchaud n'avait qu'une hypothèque générale en supposant, disait-il, qu'elle eût une hypothèque sur cet immeuble, et que, l'hypothèque spéciale qu'elle avait sur les autres biens du Défendeur était beaucoup plus que suffisante pour lui assurer le paiement de sa créance et sous ces circonstances, l'opposant Delagrave concluait au renvoi de l'opposition, à l'amendement et à la réformation du rapport de collocation et concluait subsidiairement à ce que dans le cas où telles conclusions ne lui seraient pas accordées en entier, à ce qu'il fût colloqué au lieu et place de l'opposante Dénéchaud en par lui donnant caution de rapporter les deniers dans les cas où les biens hypothéqués en faveur de l'opposante Dénéchaud se trouveraient insuffisants pour payer intégralement sa créance.

La Cour, en rendant son jugement, a cité la cause de Laframboise vs. Berthelet et Lynch et ux., opposants, ci-dessous rapportée et la cause de Baby vs. Pothier et Weilbrenner, opposant. (1).

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(1) MONTREAL, 24 AVRIL 1849.

Coram ROLLAND J. C., DAY, J., SMITH, J.

No : 1373.

Laframboise et al. vs. *Berthelet et Kernick, Curateur, et Laframboise et al., Opposants, et Lynch et ux., Opposants en sous ordre.*

JUGE :—Que le créancier d'une rente constituée ne peut en demander le remboursement à raison de ce qu'une autre rente constituée qui lui est hypothéquée est remboursée à son débiteur par suite du décret forcé de la propriété sur laquelle est assise cette dernière rente ; s'il a d'ailleurs d'autres hypothèques suffisantes pour assurer la prestation de sa rente.

La propriété de feu Frs. Bender ayant été acquise par le Défendeur et ensuite par lui délaissée et ayant été vendue ou décrêt sur le curateur au délaissement, les Demandeurs, Opposants, réclamaient par leur opposition afin de conserver le remboursement d'une rente constituée assignée sur cette propriété et formant le prix de la vente de cette propriété qui avait été faite par les auteurs des Demandeurs Opposants au dit Frs. Bender en 1815 en sorte qu'elle avait été créée *in alienatione fundi.*

Delagrave vs. Dessaulles Delagrave, Opposant, et Dénéchaud, Opposante, et Delagrave Contestant

Le jugement est motivé comme suit :

La Cour après avoir entendu le dit Cyrille Delagrave et la dite Dame Josephte Reine Dénéchaud, tant sur la contestation faite par le dit Cyrille Delagrave, à l'opposition de la dite Josephte Reine Dénéchaud, qu'au rapport de collocation et de distribution préparé en cette cause que sur la réponse à icelle et sur le tout délibéré.

Considérant qu'il appert par la procédure, que par acte du 15 Avril 1852, reçu devant Mtre. O. Désilets et confrère Notaires, il y a eu entre J. Bte. Germain d'une part, alors propriétaire en possession de l'immeuble saisi en cette cause et d'autre part avec les divers Co-Seigneurs propriétaires de la Seigneurie dont relevait alors en censive le dit immeuble, la commutation de tous droits Seigneuriaux sur icelui aux termes de la 8me. Victoria ch. 42 pour la considération de la somme capitale de £755, cour actuel restée affectée et hypothéquée sur le dit immeuble pour la sureté d'une rente perpétuelle de £51,6, ce qui eu l'effet d'en faire un franc aleu roturier exempt des hypothèques invoquées par l'Opposante comme lui étant acquises par suite des actes du 13 Novembre 1810, et du 16 de Septembre 1841 récités en la dite Opposition pour ne lui laisser l'exercice de ces hypothèques que sur le capital susdit de £755, capital de la dite rente perpétuelle susdite, ainsi que sur les autres biens seigneuriaux affectés par les débiteurs de la dite opposante à la sureté de sa créance par les dits deux actes du 13 Novembre 1810 et du 16 Septembre 1841. Considérant que si le dit immeuble comme franc aleu roturier est aucunement affecté et hypothèqué à la créance de la dite Opposante, ce ne peut être, que par suite de l'hypothèque générale consentie par le dit acte de L. A. Dessaulles, titre nouvel du 13 Septembre 1841, sur tous ses biens alors présens et futurs pour la sureté de la rente constituée pour laquelle le dit titre nouvel était donné et consenti ; considérant que les droits que peut avoir la dite opposante de

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Par le rapport de collocation et distribution, les Demandeurs opposants furent colloqués pour £636,0,0 pour le capital et les arrérages de cette rente constituée.

Patrick Lynch et sa femme firent une opposition en sous ordre de Laframboise et al pour la somme de £1,208,9,2 courant, montant en capital et arrérages d'une rente constituée due par ces derniers aux opposants en sous ordre par acte reçu le 22 Mars 1828, Mtre. Bédouin N. P. consenti par les Demandeurs, en faveur des opposants en sous ordre et par lequel ils constituèrent en leur faveur une rente annuelle de £60 en considération de la somme de £1000 qu'ils avaient reçue lors du contrat. Par cet acte, plusieurs immeubles étaient hypothéqués à la prestation de cette rente de £60.

Laframboise et al contestèrent cette opposition en sous ordre quant au remboursement du capital de £1,000 seulement ; pour les raisons suivantes : 1er, parceque les demandeurs opposants n'étaient pas en déconfiture ; 2me. parceque le capital de cette rente n'était pas exigible ; 3me. parceque les opposants en sous ordre avaient d'autres hypothèques suffisantes sur les immeubles qui y étaient spécialement désignés.

Lynch et al répondirent spécialement que ce remboursement de la rente due à Laframboise et al par suite du décret diminuait les suretés des opposants en sous ordre et avait pour effet d'ouvrir en leur faveur le recours en remboursement du principal de leur rente constituée et que le fait qu'il existait d'autres immeubles affectés au paiement de leur rente, ne pouvait pas être un moyen de faire repousser leur opposition en sous ordre. Le jugement de la Cour fut rendu comme suit :

La Cour après avoir entendu les dits Demandeurs et opposants en cette cause Alexis Laframboise et Maurice Alexis Laframboise et les dits Patrick Lynch et Dame Mary Murphy son épouse, Opposants en sous ordre des dits Alexis Laframboise et Maurice

Delagrave vs. Dessaulles et Delagrave, Opposant, et Dénéchaud, Opposante et Delagrave Contestant.

faire valoir ses droits et hypothèques sur le capital susdit de £755 représentant la dite rente perpétuelle susdite consentie par le dit J. Bte. St. Germain pour représenter les droits seigneuriaux dont il a obtenu la commutation par le dit acte du 15 avril 1852, ne s'opposent pas à l'exercise des droits du dit Cyrille De Lagrave tels qu'il les réclame et aux offres qu'il fait dans et par ses dits moyens de contestation de donner caution à l'opposante; considérant que le dit opposant et contestant Cyrille de Lagrave n'a hypothèque que sur l'immeuble vendu par décret en cette cause et dont le produit est maintenant devant cette Cour pour la sûreté et le paiement de sa créance, et qu'à ce titre de créancier hypothécaire par hypothèque spéciale, il a le droit de demander d'être colloqué pour et jusqu'à concurrence du montant prélevé en cette cause, en satisfaction et paiement des créances hypothécaires qu'il invoque en son opposition en par lui donnant bonnes et suffisantes cautions judiciaires, à la dite opposante de lui rapporter le montant des deniers pour lesquels il sera colloqué dans le cas où les biens qui ont été spécialement hypothéqués à sa rente tant en capital qu'arrérages par les dits actes du 13 Novembre 1810 et du 16 de Septembre 1841 comme susdit, seraient insuffisants pour payer et satisfaire la dite rente constituée qu'elle réclame tant en capital qu'intérêt ainsi qu'il l'offre dans et par sa dite contestation. La Cour ordonne et adjuge en conséquence que le dit rapport de collocation soit amendé et réformé ainsi que ci-dessus prescrit de condamne le dit Cyrille Delagrave à tous les frais de la contestation de l'opposition de la dite Dame Josephte Reine Dénéchaud, et ordonne que les dépens de la contestation de l'ordre de distribution soient divisés entre les parties.

Dorion et Dorion, Avocats du Demandeur et opposant Delagrave.

Jodoin et Lacoste, Avocats de l'opposante Dénéchaud.

(P. R. L.)

Alexis Laframboise sur la contestation élevée par ces derniers sur la dite opposition en sous ordre des dits Patrick Lynch et sa femme, avoir examiné la procédure, pièces produites, et en avoir délibéré, rejette la réponse en premier lieu plaidée par les dits opposants en sous ordre Patrick Lynch et son épouse et maintient la dite contestation, excepté quant aux arrérages de la rente constituée réclamés par les dits opposants en sous ordre avec dépens.

Giard et Lafrenaye Avocats des dits Demandeurs et opposants.

C. S. Cherrier, C. R. Conseil.

Beaudry, Avocat des opposant Lynch et ux.

Dans la cause de Baby vs. Pothier no. 1273 à Montréal en 1841 à la Cour du Banc du Roi, une opposition fut admise le 13 Novembre 1841 par Pyke J. B. R. de la part de R. C. Weilbrenner et ux. le 13 Novembre 1841, et qui s'opposaient à la vente de certains immeubles du Défendeur à la poursuite de la Demanderesse qui avait une hypothèque générale sur tous les biens du Défendeur, tandisque les opposants n'avaient qu'une hypothèque spéciale sur ces immeubles saisis et annoncés en vente. Les opposants alléguaient que si ces immeubles étaient vendus avant que les fiefs Delanaudière et Marie-Anne fussent discutés et qui pouvaient rapporter au moins £20,000, de manière à faire vendre tous les biens immeubles du Défendeur en même temps, les créanciers antérieurs en hypothèque générale les empêcheraient et les priveraient du droit d'être payés sur les seuls immeubles affectés à leur hypothèque; en sorte qu'ils concluaient à la discussion des autres immeubles du Défendeur affectés à l'hypothèque générale de la Demanderesse et offraient de lui avancer les deniers nécessaires à cette discussion.

Les parties ayant transigé sur leurs droits, cette opposition n'eut pas de suite.

ST. HYACINTHE, 5 AVRIL 1865.

Coram LORANGER, J.

No.

Vital Pigeon vs. La Corporation de la Paroisse de St. Jean Baptiste, dans le Comté de Rouville.

MANDAMUS.

JUGÉ :—1o. Que le lieu des séances du Conseil Municipal ayant été fixé et choisi, *de facto*, dans un certain endroit, dans la municipalité, lors de l'organisation primitive du Conseil en août 1855, il n'était pas nécessaire qu'un règlement fût passé, pour déterminer le lieu des séances en cet endroit, et que le lieu, ainsi fixé et choisi, était le siége légal du dit Conseil depuis cette époque.

2o. Que le Bureau du Secrétaire-Trésorier du Conseil Municipal est, d'après la loi, fixé au lieu des séances du Conseil Municipal, sans qu'il soit nécessaire de le déterminer, par règlement ou autrement.

Cette action demandait l'émanation d'un *Bref de Mandamus*, à l'effet d'enjoindre et prescrire à la Corporation de la paroisse de St. Jean-Baptiste de fixer, par un réglement, dans un endroit quelconque dans la municipalité de cette paroisse, le lieu des séances du conseil local de cette paroisse, et de fixer en même temps le lieu où devait se tenir le bureau du Secrétaire-Trésorier de ce conseil. L'action alléguait que ce conseil n'avait jamais fait de réglement pour fixer son lieu de séances, et n'avait jamais non plus fixé le lieu où devait se tenir le bureau du Secrétaire Trésorier ; le Demandeur alléguait même que le Secrétaire-Trésorier tenait son bureau dans un endroit, dans la municipalité, autre que le lieu des séances du conseil, tandis que, d'après la loi, il était obligé de tenir son bureau au lieu des séances du conseil.

La Défenderesse plaida à cette action qu'elle avait un lieu de séances dans la municipalité, et un bureau d'affaires notoirement connus ; que son lieu de séances avait été fixé d'une manière légale, quoique le conseil n'eût jamais fait de réglement pour le fixer d'avantage ; qu'elle avait un lieu de séances et un bureau d'affaires légalement fixés dans la municipalité et que cette action n'avait été prise que pour tracasser la Corporation.

La Défenderesse prouva que le lieu où elle avait tenu ses séances depuis l'organisation des conseils municipaux en 1855, était dans la salle du Presbytère de la paroisse de St. Jean-Baptiste et qu'elle n'avait jamais changé de lieu de séances qui était notoirement connu.

Elle produisit de plus une copie de l'avis donné par le régistrateur du comté de Rouville, lors de l'organisation des conseils municipaux en 1855, fixant le lieu de la première session du conseil dans cette salle du Presbytère ; et s'aidant du Statut 23 V. C. 61, S. 18 qui dit : " Les conseillors élus ou nommés s'assembleront aux lieux, jour et heure qui auront été fixés pour la tenu de la première session du conseil, qui doit avoir lieu après leur élection ou nomination, et s'assembleront à toutes les sessions subséquentes du conseil au même lieu, ou à tout autre lieu qui sera fixé par le conseil pour cette fin," elle prétendit que puisque le Conseil n'avait pas jugé à propos de changer le lieu où il avait tenu sa première session, c'était la loi elle-même qui fixait le lieu des séances du conseil dans cette salle du Presbytère, et que le conseil n'avait pas besoin de passer de réglement pour faire de cet endroit son lieu de séances, attendu qu'il était aux yeux de la

loi le seul lieu de séance légal tant qu'il n'était pas changé par le conseil ; que le conseil n'avait jamais changé ni voulu changer son lieu de séances.

Vital Pigeon. Vs Corporation de la Paroisse de St. Jean Baptiste, dans le Comté de Rouville.

La Défenderesse prétendait de plus quant au bureau du Secrétaire-Trésorier que la loi elle-même le fixait au lieu des séances du conseil ; qu'il n'y avait pas besoin de règlement pour le fixer en cet endroit attendu que la loi elle-même l'y fixait ; et elle prétendait conséquemment que si le Secrétaire-Trésorier ne se transportait pas effectivement au lieu des séances du conseil, c'était une désobéissance à la loi, qui pouvait mériter destitution si le conseil l'eut voulu ; mais que cette désobéissance à la loi ne pouvait empêcher que le véritable bureau légal du Secrétaire-Trésorier ne fût au lieu des séances du conseil, et que si quelques municipes avaient des taxes à payer ou autres devoirs à remplir dans le dit bureau leurs offres étaient suffisantes si elles étaient faites au lieu des séances du conseil, parceque réellement c'était le bureau d'affaires de la Corporation tant que le conseil n'avait pas jugé à propos de le changer. Le jugement de la Cour est motivé comme suit :

"La cour après avoir entendu la plaidoierie contradictoire des Avocats du Demandeur et de la Défenderesse sur le mérite de la requête libellée qui fait le fond du procès mû entre eux, pris connaissance des écritures des parties faite pour instruire leur cause, examiné leurs pièces et productions respectives, dûment considéré la preuve, et sur le tout avoir mûrement délibéré.

"Considérant que depuis le premier août, 1855, jusqu'au jour de l'émanation du *Bref de Mandamus* contre lequel la Corporation Défenderesse est appelée à montrer cause, les séances du conseil local de la municipalité de St. Jean Baptiste de Rouville ont toujours été tenues en la salle du Presbytère de la dite paroisse de St Jean Baptiste de Rouville, lieu fixé et choisi par le dit conseil, et notoirement reconnu comme tel, et que pour valider les dites séances et les délibérations prises en icelles, il n'était pas nécessaire qu'un autre lieu où elles devaient se tenir fût fixé, ni que le lieu susdit ou elles ont été ainsi tenues fût fixé autrement qu'il ne l'a été.

"Considérant que la dite Corporation n'était pas tenue de fixer ainsi que le requiert le Demandeur, un endroit quelconque où devait se tenir le bureau du Secrétaire-Trésorier de la dite paroisse de St. Jean Baptiste, le bureau du dit Secrétaire-Trésorier étant établi par la loi au lieu où se tiennent les séances du dit conseil ;

"Considérant qu'à raison d'aucune des causes énumérées en la dite requête libellée, le fonctionnement de la loi municipale en la dite paroisse n'a été mis en péril ni qu'il n'y ait lieu de craindre qu'il ne le soit à l'avenir, et que partant le dit Demandeur est sans griefs ;

"A débouté et déboute le dit Demandeur des conclusions de sa dite requête et met au néant le dit *Bref de Mandamus*, le tout avec dépens de l'instance contre le Demandeur."

Bourgeois & Bachand, pour Demandeur.

Chagnon & Sicotte, pour Défenderesse.

(W. H. C)

MONTREAL, 24 FEVRIER 1865.

Coram BERTHELOT, J.

No. 223.

Gravelle vs. Marcotte.

JUGÉ :—Qu'un writ de mandamus adressé à une personne comme "secrétaire-trésorier de la corpo-"ration de la paroisse de......" est nul, en autant qu'il n'existe pas un tel officier public.

Dans cette cause, un writ de mandamus ayant été émané à la poursuite du demandeur sur sa requête libellée et ayant été adressé au défendeur en qualité de secrétaire-trésorier de la Corporation de la paroisse de St. Antoine, ce dernier plaida une dénégation générale en ces termes :

Et le dit Joseph N. Marcotte pour défense au fonds en fait à la présente requête dit : que tous les allégués contenus en la dite requête sont faux et mal fondés, que le bref de mandamus est irrégulier et a été émané irrégulièrement et illégalement et le dit Joseph N. Marcotte dit qu'il a toujours rempli en sa qualité d'officier public les devoirs de sa charge suivant la loi, que tous et chacun les allégués de la dite requête annexée au présent bref de mandamus sont faux et les conclusions de la dite requête ne peuvent être accordés et l'action des demandeurs doit être renvoyée. Lors de l'audition au mérite, le défendeur prétendit que le writ de mandamus devait être renvoyé sur le principe qu'il était "secrétaire-trésorier du conseil municipal de la paroisse de St. Antoine," et que c'est en cette qualité qu'il aurait dû être assigné et que c'est-là la seule qualité reconnue par la loi municipale et il cita le chap. 24 des Statuts Refondus pour le Bas-Canada, sec. 12 et 14, et spécialement sec. 20.

Les demandeurs répondirent que le défendeur ayant accepté la qualité qui lui était donnée dans le bref et ayant plaidé au mérite, sans exciper de ce prétendu vice de désignation, il ne pouvait plus soulever de question là-dessus. De plus par la section 20, le législateur n'a pas entendu faire autre chose que d'assigner à cet officier le titre de "secrétaire-trésorier." Les autre mots "du "conseil municipal du comté ou de la paroisse," ne peuvent pas être considérés comme attachés au nom du "secrétaire-trésorier," puisque dans les formules qui font suite à la loi et qui sont une partie même de la loi, on ne prend aucun soin de le désigner ainsi. En effet, au bas de la formule A et A 2, il doit signer "secrétaire-trésorier de———; au bas de la formule X, il doit signer, "secrétaire-trésorier du comté de———; au bas des formules DD EE et KK il doit signer "secrétaire-trésorier de la municipalité de la paroisse de——— Il y a quelques-unes de ces formules où il est désigné comme dans la sec. 20, mais ce n'est pas la majorité.

La Corporation recèle en elle tous les éléments qui la composent, les conseillers, le conseil et les officiers, et il est plus régulier, quand il est question d'une Corporation de la désigner par le nom qui renferme le tout, que par le titre assigné à une de ses parties constituantes.

Le jugement est motivé en ces termes :

La cour * * * Considérant que le writ de mandamus émané en cette cause est adressé à Joseph N. Marcotte comme "secrétaire-trésorier de la corporation de "la paroisse de Ste. Antoine ;" et qu'il n'existe pas tel officier public en vertu

des dispositions légales du chapitre 24 des Statuts Refondus du Bas-Canada ou d'aucune autre loi ou statut du pays; a renvoyé le dit writ de mandamus et toute la procédure qui y a donné lieu, le tout sans frais.

Gervelle vs. Marcotte

Doutre et Doutre, avocats du réquérant.

Cartier, Pominville et Betournay, avocats du défendeur.

(P. R. L.)

MONTREAL, 29 AVRIL 1865.

Coram MONK, J.

No. 1151.

Lefebvre vs. *Gosselin.*

SERVITUDE—DECRET.

JUGÉ:—1o. Qu'un droit d'usage en bois entre particuliers, est un droit personnel et non reel.
2o. Que ce droit de coupe de bois est purgé par le decret. *

Dans cette instance, il s'agissait d'une action négatoire concernant une coupe de bois que le défendeur prétendait exercer sur la terre que le demandeur avait acquise au décret le 12 août 1863.

Lors de la vente de cette terre par le shérif, il ne fut aucunement question de cette coupe de bois que le défendeur est venu faire plus tard, c'est-à-dire dans le cours de l'hiver suivant. Le défendeur plaida à cette action son droit à une coupe de bois sur cette terre résultant d'anciens titres datant de 1787 et prétendit que le décret n'avait plus l'effet de purger l'exercice de ce droit qu'il alléguait être une servitude réelle. Le défendeur dans ses défenses alléguait entre autres choses ce qui suit: "Qu'au reste le défendeur en enlevant et coupant ce bois qu'il a employé à se chauffer et aussi de quoi faire des membres de traines, n'a fait qu'user du droit qu'il a de prendre pour son usage toutes espèces et autant de bois qu'il juge à propos sur la terre susdite, servitude dont elle est chargé la dite terre au profit de celle voisine dans la profondeur actuellement possédée par le défendeur.

"Que ce droit lui a été cédé et donné par ses auteurs Michel Gosselin et son épouse sur la terre qui lui a été donnée suivant acte du 11 juillet 1861 reçu devant Mtre. F. Geoffrion et son confrère notaires publics en la dite paroisse de Contrecœur, en vertu duquel acte il aurait été stipulé, que le défendeur donataire aurait le droit de prendre du bois sur la terre du nommé Pierre Lefebvre, laquelle dernière terre est celle actuellement possédée par le demandeur décrite en sa déclaration. Que ce droit remonte à une époque très-ancienne, savoir: au 28 juin 1787."

Le défendeur n'alléguait aucun enrégistrement de ses titres.

Le demandeur répondit spécialement ce qui suit:

"Que de fait par l'acte de vente en date du 6 octobre mil huit cent trente quatre et reçu ce jour là à Contrecœur, dans le district de Montréal, par-devant

* Vide—Statuts Refondus pour le Bas-Canada, ch. 36, sec. 27. "Nulle adjudication de biens immeubles par le shérif ou adjudication dans un cas de licitation forcée, ne déchargera la propriété d'aucune servitude à laquelle elle était sujette jusque là."

Lefebvre vs. Gosselin.

"Mtre. A. C. L. Duplessis et son confrère notaires entre Joseph Trudeau et "autres vendeurs d'une part, et le dit Michel Gosselin et son épouse d'autre "part; ces derniers ont acquis la terre que possède actuellement le dit défendeur "en vertu de la donation que le dit Michel Gosselin et son épouse, (ses pères et "mères) lui en ont faite le 11 juillet mil huit cent soixante et un et lequel acte "de donation est invoqué par le dit défendeur en sa dite exception, comme lui "conférant un tel prétendu droit de coupe de bois; et en faisant acquisition de "la dite terre, le dit Michel Gosselin et son épouse n'ont acquis aucun droit de "coupe de bois quelconque, et les dits vendeurs Joseph Trudeau et consorts ne "leur ont transmis ni cédé, ni vendu, ni transporté aucun droit de coupe de "bois que ce soit, en sorte qu'en supposant qu'il existait alors ou qu'il existerait "encore aucun droit de coupe de bois, ce que le dit demandeur n'admet pas, mais "au contraire nie formellement; tel prétendu droit de coupe de bois ne réside"rait pas dans la personne des dits Michel Gosselin et son épouse, ni dans celle "du défendeur, et partant tel prétendu droit de coupe de bois invoqué par le "dit défendeur ne lui appartient pas et ne lui a jamais appartenu non plus qu'à "ses auteurs Michel Gosselin et son épouse.

"Que le dit défendeur n'a aucun droit de servitude à exercer sur la susdite "terre du demandeur et que la prétendue servitude invoqué par le dit défen"deur dans sa dite exception, n'existe pas et n'a jamais existé, et que d'ailleurs "la prétendue servitude ne saurait être exercée par le défendeur depuis la vente "au décret de la dite terre dont le dit demandeur est propriétaire et en posses"sion et ainsi qu'il est allégué dans sa dite déclaration et lequel décret a eu "l'effet de purger la dite terre de toute telle prétendue servitude.

"Qu'en conséquence le défendeur est mal fondé à prétendre exercer un droit "de servitude ou coupe de bois ainsi qu'il est allégué par lui en sa dite exception, "vû surtout que le dit défendeur n'a jamais fait aucune opposition afin de "charge sur la dite terre lorsqu'elle fut vendue au décret comme susdit."

A l'enquête, le demandeur prouva les voies de fait commises par le défendeur ainsi que le montant des dommages, et le défendeur prouva que lui et ses auteurs avaient exercé cette coupe de bois à différentes époque sur la terre du demandeur.

LaFrenaye, pour le demandeur.

Ce n'est pas une servitude qui passe avec l'héritage.

Les titres du défendeur font voir que ce n'est qu'un droit d'usage en bois dans les bois *d'un particulier* en faveur d'un autre particulier; or ce n'est pas une *servitude*.

Vide—Duranton, vol. 5, p. 123.

Des droits d'usage en bois dans les bois des particuliers, au profit *d'autres particuliers*. 5, Duranton, p. 11, la cause de Michel Armand et al., p. 13.—"La Cour d'Appel de "Bourges s'est proposée à décider deux questions etc., etc., distinction entre les servi"tudes et les droits d'usage, etc., etc., page 14, "et que par conséquent les maximes et "les principes adoptés en matière de servitudes ne sont pas applicables au droit "d'usage."

Vide—Merlin, Rép., vo. usages (droit d') et aussi à la page 239, section 2 et 5.

Article du Code Napoléon 628.

1 Teulet, Codes Annotés, pp. 159 et 160.

Lefebvre vs. Gosselin.

C'est un droit d'usage constitué en faveur de la personne et non pour l'utilité de sa terre.

La coupe de bois de chauffage n'est à tout événement qu'une servitude personnelle, même lorsque c'est un droit d'usage *féodal ou communal.*

Legrand, Cout. de Troyes, p. 288, Titre 10, Art. 168, Nos. 34, 35 et 36.

Bouhier sur la Cout. de Bourgogne, p. 704, Tome 2, Chap. 62, Nos. 26, 27, 28, 29, 30 et 31.

Même lorsque la concession a été faite au concessionnaire, *ses hoirs et descendants* sans en rattacher l'exercice à aucune habitation *particulière et désignée.*

Proudhon, 6 vol., de l'usufruit, d'usage etc., No. 3093, p. 540 et p. 544.

Ce droit d'usage est donc bien différent du droit de *pacage* dont il est question en la cause de Dorion et Rivet, rapportée au 7 vol. des Déc. des Trib. du Bas-Canada, p. 257, ou il s'agissait d'un *droit de pacage* "qui appartiendra............et à leurs successeurs et " ayant cause aux dits emplacements," p. 260, au haut de la page.

Dans le doute de savoir quelle espèce de bois le cessionnaire a le droit de prendre, lorsque la concession est faite en termes *généraux*, c'est un droit d'usage au chauffage seulement, 6 vol., de Proudhon, de l'Usufruit, pp. 546 et 547.

L'on doit adopter ce qu'il y a de plus favorable à la libération, semper in obscuris quod minimum est sequimur.

6, Proudhon, de l'Usufruit, p. 547, Nos. 3101, p. 550.

Les Statuts Refondus du Bas-Canada, ch. 36, sec. 27, parlent des *servitudes* et non des *droits d'usage.*

Le titre du défendeur, si toutefois il en a un l'autorisant de couper du bois sur la terre du demandeur, aurait dû être enregistré pour lui conférer ce droit de coupe de bois, 5 L. C. R., p. 393., Thibeault vs. Dupré.

L'action négatoire est une action réelle.

Pothier, Introduc. Génér. aux Coutumes, Ch. 4, Sec. 1, p. 56.

Le jugement de la Cour est en ces termes :

La Cour ayant entendu les parties par leurs avocats au mérite de cette cause examiné la procédure, pièces produites et preuve, vu les admissions faites et filées par le défendeur et avoir sur le tout délibéré, déclare la terre mentionnée et décrite en la déclaration en cette cause libre et franche de tout droit de coupe de bois en faveur du dit Défendeur, et fait défense à ce dernier sous toutes les peines de droit, et même par corps de ne plus troubler à l'avenir le dit demandeur dans la jouissance pleine et entière de la dite terre et de tout le bois debout et croissant et gisant sur icelle, et lui fait défense sous les mêmes peines de droit de ne pas toucher ni enlever aucune partie du dit bois debout et gisant sur la dite terre.

Et la Cour condamne le dit défendeur, à payer au demandeur, la somme de cinq dollars du cours actuel, de dommages, pour les causes et raisons mentionnées en la dite déclaration, avec intérêt sur icelle à compter de ce jour et les dépens.

LaFrenaye et Armstrong, avocats du demandeur.

C. et F. X. Archambault, avocats du défendeur.

(P. R. L.)

ST. JOHNS, MARCH, 1865.

Coram M'CORD, J.

No. 226.

MacDonald et el. vs Lafaille.

HELD:—That in a case of absentee the service of a Rule for the examination of the absentee upon interrogatories *sur faits et articles* made at the office of the Prothonotary is sufficient and that the Court can in its discretion, prolong the rule to the 1st day of the next term for Defendant to answer same.

The defendant was described as of St. Marguerite de Blainfindie, in the district of Iberville. The bailiff made a return of absence, and the defendant was duly summoned by advertisement in the papers published in this town, and at the expiration of the delay allowed absentees to appear: defendant appeared by his attorney.

On the 10th March, 1865, the bailiff served a rule together with the interrogatories *sur faits et articles* addressed to the defendant at the office of the prothonotary in St. Johns, and certified, after diligent search for the defendant, that he could not be found, and furthermore that the defendant had elected no domicile in the town of St. Johns, or in the district of Iberville.

The defendant was called *Cour tenante* to answer this rule on the 13th March and made default. The following day plaintiff's attorney moved that the interrogatories be taken *pro confessis*.

Delagrave, for defendant, moved that the interrogatories *sur faits et articles* and the rule thereunto annexed be rejected from the record for the following reasons:

Motion de la part du défendeur, que le défaut, obtenu contre lui, par les demandeurs, sur la règle pour faits et articles, signifiée au bureau du Protonotaire de cette Cour soit levé en autant que la dite signification est illégale, nulle et de nul effet, pour entre autres raisons, les suivantes:

1er. Parceque le défendeur qui réside à Wister, dans l'état du Vermont, un des Etats Unis d'Amérique, depuis plus de deux ans, ne peut être tenu légalement de venir répondre aux interrogatoires sur faits et articles annexés à la dite règle de Cour.

2me. Parceque, en supposant que les demandeurs avaient le droit de faire telle signification, au bureau du Protonotaire de cette Cour, ils devaient donner une notice suffisante au Procureur du défendeur, de la signification qu'ils se proposaient de ainsi faire, afin de fournir l'occasion au dit défendeur de venir repondre aux dits interrogatoires annexés à la dite règle de Cour.

Delagrave referred the Court to

7 Jurist: p. 297 *Fenn vs Bowker.*

8 do: p. 133 *Lamoureux vs Boisseau.*

Macdonald, for plffs., in reply relied entirely on Cap. 83 of the Cons. Stat. of L. C., sec. 64,—the case cited by the defendants' attorney and reported in the 7th Jurist p. 297, Fenn vs. Bowker, he contended, had no application; as to the other case in the 8th Jurist, Lamoureux vs. Boisseau, the ruling being the same as in the case of Fenn vs. Bowker the cases must (although it did not positively appear from the report) be identical, therefore neither precedents applied.

E. MacDonald et al. vs. Lefaille.

The judgment of the Court was as follows:

The Court, having heard the parties by their counsel upon the motion of the defendant of the 14th day of March, 1865, having examined the proceedings and deliberated thereon considering that the signification of the rule of this Court of the 10th March, 1865, made at the Prothonotary's office, for the examination of the defendant upon interrogatories *sur faits et articles*, and of the said interrogatories, was sufficient and strictly in accordance with the Statute, do reject the said motion of the defendant with costs; and further considering that the defendant, although an absentee called by the papers, having appeared and fyled a plea to this action by his attorney, and being to all intents and purposes within the jurisdiction of this Court, the Court doth further order that the rule be prolonged to the 1st day of next term, to allow defendant to appear and answer same.

L. G. Macdonald, for plaintiff. — Rule prolonged.

G. Delagrave, for defendant.

(L. G. M.)

MONTREAL, 30TH SEPTEMBER, 1864.

Coram LORANGER, J.

27TH APRIL, 1865.

Coram MONK, A. J.

No. 2663.

Les Curé et Marguilliers de l'Œuvre et Fabrique de l'Isle Perrot vs. Ricard.

HELD:—That the existence of a fence for upwards of forty years, as a dividing line between two properties, will not prescribe either the right to institute proceedings *en bornage* or the right of the lawful owner to such portion of the property as may have been improperly enclosed by such fence.

This was an action *en bornage*, to which the defendant pleaded (amongst other things) that he and his *auteurs* had possessed the property claimed to have been encroached upon openly and publicly for upwards of 40 years, and that a fence existed during the whole of that time in the same line of division as at the date of the institution of the plaintiff's action.

The existence of the fence and the possession of the defendant and of his *auteurs* during the period above stated, was proved beyond question.

At the hearing of the cause on the merits the defendant contended, that the plaintiff's right of action and claim to the land in dispute was prescribed.

LORANGER, J., nevertheless ordered the *bornage* to be held, giving the following reasons in support of his judgment:—"Considérant que le défendeur "n'a fait preuve d'aucune possession qui puisse lui donner le droit d'invoquer "la prescription contre les titres des demandeurs et au delà des siens et former "une fin de non recevoir contre le principal ou aucun des accessoires de l'action "en bornage des demandeurs; laquelle est de sa nature imprescriptible, rejette "les exceptions du dit défendeur."

A *bornage* was had accordingly, and the surveyors in their report stated that

Les Curé et Marguilliers de L'Œuvre et Fabrique de L'Isle Perrot. vs. Ricard.

according to the title deeds of the parties, the fence along its entire length encroached on the property of the plaintiffs, and that the proper line of division was several feet inside of such fence. And by such Report, the surveyors further declared, that they had separated the properties of the respective parties by planting *bornes* in the line of division thus indicated by them as the true line of separation, according to the title deeds submitted to them.

The defendant moved to reject the report, on the ground (amongst others) that the fence in question had existed for upwards of 40 years, as the division line between the respective properties of the plaintiff and defendant, and ought, for that reason, to have served as a base for the *bornage*.

MONK, J., homologated the report, and ordered the defendant, within a certain delay, to abandon the portion of the property lying between the fence and the line of division established by the report, and deliver up the possession thereof to the plaintiffs.

Judgment for plaintiffs.

Moreau, Ouimet & Chapleau, for plaintiffs.
Joseph Duhamel, for defendant.
(S. B.)

MONTREAL, 31 MAI 1865.

Coram, MONK, J.

No. 1037.

Moreau et vir vs. Léonard, Défdr. et Lapierre, Intervenant.

JUGE:—Que la demande en peremption de l'instance principale doit être signifiee à toute partie intervenante dans la cause et qu'à defaut de cette signification, ellene peut pas être accordee.

Le défendeur fit motion en cette cause pour faire déclarer l'instance principale périmée. La règle prise sur cette motion fut signifiée aux demandeurs.

Les demandeurs s'y objectèrent, d'abord parceque l'un des procureurs du défendeur était décédé et ensuite sur le principe que cette demande en péremption aurait dû être signifiée à l'intervenant dont l'intervention aurait dû subir le sort de l'instance principale.

Le défendeur prétendit qu'il lui était loisible de demander la péremption de l'instance sans s'occuper des incidents qui avaient pu être formés dans le cours de cette instance et au soutien de la procédure qu'il avait adoptée pour la péremption de l'instance principale *seulement*, il cita les autorités suivantes:

Du décès ou changement de district, etc., etc. de l'un des procureurs d'une partie.
6 L. C. Reports, p. 194. / 1 L. C. Jurist, p. 16. } Tidmarsh *vs.* Stephens.
5 L. C. R., p. 167, Dubois *vs.* Dubois. being a case of *péremption*.
9 L. C. R., p. 395, en appel. De la demande en intervention comme demande séparée, Status Refondus du Bas-Canada, ch. 83, sec. 71.
De la divisibilité de l'instance.
Instances du principal et de l'incident considérées distinctes et séparées.
Rodier, quest. sur l'Ord. de 1667, p. 199, Nos. 7 et 8.
Brodeau sur Louet Lettre P., Som. 16, No. 9.
Dalloz, Recueil périod. 1829, p. 74, 2ème partie.

Moreau et vir. vs Léonard, Défdr. et Lapierre, Intervenant.

Dalloz, Recueil périod. 1830, p. 221, 2ème partie.
Voir ce volume, où l'arrêt a été rendu nonobstant la *jonction* de plusieurs instances.
Dalloz, Recueil pér. 1835, p. 26, 1ère partie.
Dalloz, Recueil pér. 1835, p. 173, 2ème partie.
Carré et Chauveau, Proc. civile, 3 vol., p. 395, Quest 1421.
"Il suit de là que les incidents tombent sous le coup de la péremption de l'instance "durant laquelle ils ont été formés."
Dalloz, Jur. Gén du Royaume, vol. 11, p. 186, No. 6, et Merlin, Pigeau et Favard y cités.

Per Curiam.—The Rule for peremption must be discharged. No notice has been given to the intervening party. This want of notice is fatal.

Rule discharged.

Ouimet, Morin et Marchand, avocats des demandeurs.
LaFrenaye, avocat du défendeur.
(P. R. L.)

MONTREAL, 31 MARS, 1865.

Coram BERTHELOT, J.

No. 2644.

Quinn vs. *Edson.*

JUGÉ:—Que la caution solidaire répond a toutes les obligations du débiteur envers le créancier sans que ce dernier soit tenu de veiller a ses intérets.

Le demandeur réclamait la somme de $635.32 pour balance de loyer due par bail reçu le 10 janvier 1857, Mtre. J. Belle, N. P., par ses locataires Messieurs A. Booth et John C. Booth, et ce du défendeur comme leur caution solidaire par acte de cautionnement reçu le 20 février 1857, Mtre. J. Belle N.P. Le défendeur plaida à cette demande que lors du départ des locataires, ils possédaient des animaux et effets mobiliers dont la saisie et la vente par autorité de justice aurait pu réaliser une somme d'au moins $300 et que le demandeur avait sur les dits animaux et effets un privilège qu'il était tenu d'exercer ou de conserver dans l'intérêt du défendeur pour exercer aucun recours contre ce dernier. Que par sa négligence le dit demandeur avait laissé prescrire et perdre le privilège, et que le demandeur s'était mis dans l'impossibilité de subroger le défendeur dans toutes les actions et privilèges qu'il avait. Que conséquemment, le défendeur était bien fondé à demander la réduction de toute somme que le demandeur aurait pu prélever, en exerçant son privilège et notamment la réduction de la somme de $300 et il concluait à cette réduction.

Le demandeur répondit en droit à cette exception comme suit: "That he was "not by law bound to guard the interests of the defendant nor to subrogate "him to the rights and privileges referred to in said exception for and by reason "of the allegations of said exception or by law and because the defendant being "by the contract of leasing sued upon and his intervention thereto sets forth by "plaintiff jointly and severally *solidairement* liable with the lessees therein "mentioned he is and always was personally and directly liable to plaintiff and "a principal debtor *quoad* the plaintiff."

Après l'audition en droit des parties, la cour, par son jugement interlocutoire, a maintenu la réponse en droit et a rejeté l'exception *cedendarum actionum* du défendeur.

Quinn vs. Edson.

Autorités citées par la cour.

Rogue—1 vol. Jurisprudence consulaire, p. 134.

La caution est tenue des intérêts de la somme pour laquelle elle a cautionné à compter du jour de la demande contre le débiteur, quoiqu'elle n'ait pas été assignée; mais elle ne doit les dépens, parce qu'ils sont personnels; elle a dû être sommée.

Denisart, au mot caution.—4 V. § 2. P. 321.

"Le cautionnement étant solidaire, cela répond à toutes les obligations du créancier, "qui n'est pas astreint à aucune discussion.

"Il n'est pas obligé de veiller sur le principal débiteur parce qu'il n'y a pas de débiteur principal entre deux débiteurs et co-obligés solidaires.

"Le créancier est bien fondé à rester tranquille tant qu'il croit un des débiteurs solidaires solvables.

"C'est précisément ce qui constitue la différence entre le cautionnement simple et "l'obligatoire *solidaire* qu'on qualifie *improprement de caution solidaire*."

2 V. Revue de LeTourneux, p. 263, no. 2.

"Lorsque, sur la demande du créancier, il y a eu condamnation contre le débiteur "principal, tant pour le capital que pour les intérêts, la caution est tenue de ces intérêts, quoique telle demande n'ait pas été formée contre elle."

Réponse en droit maintenue.

Doherty, avocat du demandeur.

Doutre & Doutre, avocats du défendeur.

(P. R. L.)

MONTREAL, 30TH JUNE, 1864.

Coram BERTHELOT, J.

No. 1364.

Ferres vs. Rutherford et al., and The Montreal and Champlain Railroad Company, T. S.

HELD:—That the words "*may* be deprived of his remedy and *may* lose his debt and sustain damage," in an affidavit for an attachment before judgment, are insufficient to justify the issuing of a writ of *saisie arret*.

Per Curiam:—This is a motion by the defendants to quash the writ of *saisie arret* issued in this cause, for various reasons set forth in the motion. Without adjudicating on the sufficiency or insufficiency of all these reasons, it is enough to take up the expressions in the affidavit that the plaintiff "*may* be deprived of his "remedy, and *may* lose his debt and sustain damage." The statute requires that the parties making the affidavit shall state, that he "doth verily believe that "without the benefit of such attachment he *would* lose his debt or sustain damage." Now, it is quite clear that a party swearing that he *may* and not that he really *would* lose his debt, &c., has not complied with the exigency of the statute. The writ must therefore be quashed.

Saisie arret quashed.

A. & W. Robertson, for plaintiff.

Henry Stuart, Q. C., for defendants.

(S. B.)

MONTREAL, 30TH JUNE, 1864.

Coram MONK, A. J.

No. 1980.

Stansfield and vir. vs. *Stansfield*, Tutor.

HELD :—That where the conditions of sale, in an action of licitation, required that the purchase money be deposited in the hands of the Prothonotary, the Court cannot authorise the retention of such purchase money by one of the parties in the cause who has become *adjudicataire*, and who is apparently entitled to receive the amount eventually, even on giving good and sufficient security.

This was an application by one of the plaintiffs in an action of licitation, who had become the *adjudicataire* of the property sold, to be permitted to retain in her hands the portion of the purchase money which, from the facts disclosed by the record, must evidently be awarded to her eventually, on giving good and sufficient security. According to the conditions of sale this portion of the purchase money was required to be deposited in the hands of the Prothonotary.

Per Curiam :—The conditions of the sale are peremptory, that the money must be deposited, and as it is out of the power of the Court to change the conditions, the application must be rejected.

Plaintiff's application rejected.

A. & W. Robertson, for plaintiff.
Loranger & Loranger, for defendant.
(S. B.)

MONTREAL, 30TH SEPTEMBER, 1864.

Coram SMITH, J.

No. 2208.

Reid vs. *Robinson*, and *Robinson*, *Opposant*.

HELD :—Where in an action for *séparation de corps et de biens* an order for an alimentary allowance in favor of the wife having been given during the pendency of the suit, the parties come together again, and again separate, an action by the wife for the allowance is bad without proof of cause for the second separation.

Per Curiam.—This was an action *en séparation de corps et de biens*. The defendant pleaded to the action, and, while the suit was pending, the Court ordered an alimentary allowance to be paid to the wife. But, in the meantime, the wife returned to her husband's domicile, and became reconciled to him. The husband was afterwards sued for the amount of the alimentary allowance which he had been ordered to pay, and execution was taken. The husband then put in an opposition alleging that he and his wife had become reconciled, and that this reconciliation had the effect of destroying the action *en séparation de corps et de biens*. There could be no doubt that this pretension must be sustained. It was true the wife subsequently left her husband, but this act had not been accounted for, and the result of her returning to the conjugal roof must be that she would be obliged to begin her action again. Opposition maintained.

Leblanc & Cassidy, for plaintiff, contesting.
Devlin & Kerr, for Opposant.
(J. L. M.)

MONTREAL, 14 FEVRIER 1865.

Coram BERTHELOT, J.

No. 7230.

Penny et al. vs. Berthelot.

JUGE :—Que la livraison au Bureau de Poste, d'un Journal adressé à une personne résidante dans un autre District, donne droit d'action dans le District où se fait la livraison du Journal.

Par leur action, les demandeurs propriétaires du "Montréal Herald" papier-nouvelles, publié à Montréal, réclamaient du Défendeur résidant à Ste. Scholastique, District de Terrebonne, la somme de vingt deux piastres pour abonnement à leur journal.

Le défendeur répondit à cette action par une défense en fait; par laquelle, il nia la dette et spécialement l'allégué de la déclaration qui comportait que la dette avait été contractée dans la cité et District de Montréal et qu'étant domicilié dans le District de Terrebonne, le tribunal devant lequel l'action était portée, n'avait pas la juridiction voulue par la loi pour en décider, et à ces causes, concluait au renvoi de l'action.

Le 14 Février 1865, les parties se présentèrent devant Mr. le Juge Berthelot qui, ayant pris connaissance de la défense, déclara qu'il suffisait que la livraison du journal, se fit au Bureau de Poste du lieu où le dit journal était publié, pour donner droit d'action dans ce District.

La dette et la livraison ayant été prouvés, jugement pour les demandeurs.

Laframboise et Joseph, avocats des demandeurs.

Alphonse Meilleur, Avocat du Défendeur.

(J. O. J.)

MONTREAL, 30TH APRIL, 1864.

Coram MONK, A. J.

No. 1050.

Kenny vs. McKeown.

HELD :—That the statement, in an affidavit for *capias*, that the defendant is truly and personally indebted to the plaintiff in the sum of £300, "for the balance of an account for various trans-"actions which the said defendant had with the plaintiff in their business as wood merchants, "which sum defendant hath acknowledged to owe the plaintiff," is a sufficient statement of the cause of debt, to entitle the plaintiff to a *capias*.

This was a motion to quash a writ of *capias ad respondendum*, on the ground (amongst others) that no sufficient cause of action was set out in the affidavit to justify the issuing of the writ.

The cause of debt was set forth in the affidavit in the language above quoted.

Per Curiam :—The cause of action is quite sufficiently stated in the affidavit; the statute, in fact, not requiring the plaintiff to do more than swear that the defendant is personally indebted in a sum of money amounting to or exceeding ten pounds of lawful money of this Province. The motion is therefore rejected with costs.

Motion to quash rejected.

J. J. Curran, for plaintiff.

M. Doherty, for defendant.

(S. B.)

RULE OF PRACTICE for the Superior Court for Lower Canada, sitting as a Court of Review at Montreal, under the authority of the Provincial Statute, 27 and 28 Vict., ch. 39.

The Rule of Practice for the said Court of Revision, promulgated by the Superior Court aforesaid on the seventeenth day of October last, is repealed and annulled and the following Rule substituted in its stead:

It is ordered that the three juridical days immediately preceding the 25th day of the month in every term of the Superior Court shall be special days for the hearing of cases in Revision.

(Signed,) J. SMITH, J.
" WM. BADGLEY, J.
" J. A. BERTHELOT, J.
" S. C. MONK, A. J.

MONTREAL, 31ST JUNE, 1865.

Coram BERTHELOT, J.

No. 2039.

Langevin vs. McMillan.

HELD:—Where a horse was stolen and sold at public auction, the purchaser at auction in good faith has no right or title to the horse, but must restore the same to the original owner, his only recourse being against the seller for recovery of the purchase money.

In this case the plaintiff revendicated a horse which the defendant had bought in good faith at public auction.

The defendant pleaded the above fact, and offered to restore the horse to the plaintiff on payment of the auction price.

It was admitted and proved that the horse had been stolen and sold without the plaintiff's consent. The good faith of the defendant was also admitted.

David, for plaintiff, cited Hughes vs. Reed, 6 L. C. Jurist, where it was held that the purchase 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. The case of Herbert and Fennel, where the owner was maintained in his rights to a lost violin after a lapse of three years, was also referred to.

Morris, J. L., for defendant, cited Code Civil du Bas Canada, vol. 2, p. 43, No. 13, where the following principle is laid down: "If a thing lost or stolen be bought in good faith, in a fair or market, or at a public sale, or from a trader dealing in similar articles, the owner cannot reclaim it without reimbursing tó the purchaser the price he has paid for it," and the following authorities which expose the reasons on which the above principle is founded: C. N. 2280.—Lamoignon, *arr. tit.* 21, *art.* 96.—Pothier, Cheptels, *Nos.* 45, 48, 50.—Troplong, *Vente, No.* 42.—Merlin, *Rep. vo.* vol., sec. 4, §1, *No.* 2.—C. C. Vaud, 1682.—C. Title "Of Prescription," *art.* 119. The Counsel for the defendant also remarked that the case of Herbert and Fennell was not in point, the sale being a private one, and there being a total abs[illegible] of good faith. [illegible] essen-

Langevin vs. McMillan

tial difference in the case submitted was the public sale by auction, and the entire good faith.

Per Curiam.—The sale at public auction cannot be assimilated to a judicial sale. In the case of Herbert and Fennell, decided by the Court of Appeals, and reported in the 7th vol. of the L. C. Jurist, p. 302, the plaintiff's right to a violin which he had lost for some years was maintained, and the Court must now follow that decision which settled the point. The defendant has his action *en garantie* against the seller.

Judgment for plaintiff.

Mousseau & David, for plaintiff.
Torrance & Morris, for defendant.
(J. L. M.)

MONTREAL, 31st MARCH, 1865.

Coram BADGLEY, J.

No. 1272.

Dubuc vs. *Charron.*

HELD:—In the case of a simple delegation of payment in a deed of sale where the vendee, in the course of proceedings for a judgment of ratification, deposits the total amount of purchase money in Court, that the vendee is completely exonerated from all further responsibility to pay the amount stipulated to be paid to the creditor *délégué* even if such creditor receive nothing in the distribution of the moneys so deposited.

This was an action by a creditor *délégué* in a deed of sale against the vendee, to recover from him, personally, the amount which the vendee undertook, by the deed, to pay to such creditor *à l'acquit* of the vendor.

The defendant pleaded and proved that, immediately after the execution of the deed of sale, (having ascertained that the mortgages on the property sold were in excess of the purchase money) he applied for a ratification of title, and, in due course, and after the observance of all needed formalities, deposited the total amount of purchase money in Court, which was afterwards distributed, amongst the creditors entitled to it. In this distribution, nothing was awarded to the plaintiff, and he accordingly endeavored, by the present action, to recover from the defendant under the covenant contained in the deed of sale.

The parties having been heard, on the merits, the Court pronounced the following judgment:

"The Court * * * * Considering that the delegation set forth in the deed of sale by Augustin Dubuc to the said defendant, under date of the 4th of June, 1862, and fyled in this cause, made by the said vendor in favor of the said plaintiff, was not a personal undertaking and engagement on the part of the said defendant to pay to the said plaintiff the said sum of fourteen hundred livres, ancient currency, thereby delegated, and was only for the payment of said sum out of the amount of the said price or purchase money in the said deed of sale mentioned according to the sufficiency of the said price, after the payment of prior and preferential privileges and mortgages chargeable and payable thereout.

Considering that the entire price or purchase money was required and ordered

to be distributed amongst and for the payment of privileges and mortgages anterior to and preferable to the demand of the plaintiff.

Dubee vs. Charron.

Considering that the defendant hath maintained and established the material averments of his exceptions and pleas, by him fyled in this cause, doth dismiss the plaintiff's action with costs. *Distraits* to Messieurs Cartier, Pominville and Bétournay.

Action dismissed.

Jodoin & Lacoste, for plaintiff.
Cartier, Pominville & Bétournay, for defendant.
(S. B.)

MONTREAL, 31ST MARCH, 1865.

Coram BADGLEY, J.

No. 1953.

Charbonneau vs. *Gladu* and *Paquette* et als., oppts., *en sous ordre.*

HELD:—That in the absence of allegation of insolvency, in an opposition *en sous ordre*, and of proof of that fact, the Court will dismiss the opposition with costs, although no distinct issue on the point be raised by the contestation fyled.

This was an opposition *en sous ordre*, to which a contestation was fyled by the plaintiff, attacking only its sufficiency on the merits.

The opposition wholly failed to allege insolvency on the part of the plaintiff, and no attempt was made to prove such insolvency.

The parties having been heard on the merits of the opposition and the contestation thereof, the Court rendered the following judgment: "The Court * * * considering that the said opposition *en sous ordre* in this cause fyled is irregular and insufficient, and that it contains no allegation therein of the insolvency of the said François Charbonneau, nor is there proof of record of that fact, doth dismiss the said opposition *en sous ordre* with costs to the said plaintiff *contestant.*"

Opposition *en sous ordre* dismissed.

C. & F. X. Archambault, for plaintiff.
Doutre & Doutre, for defendant.
(S. B.)

MONTREAL, 30TH DECEMBER, 1864.

Coram BERTHELOT, J.

No. 1571.

Delisle et al, vs. *Decary*,

AND

Delisle, et al., Plffs. en faux vs. *Decary, Deft. en faux.*

HELD:—That where the defendant was examined by the plaintiff, defendant's attorney may adduce evidence to prove that such defendant is not a reliable witness, he being *"d'une intelligence bien faible et d'une memoire très bornée."*

This question arose out of an inscription *de faux* of the plaintiffs against a document purporting to be a donation, fyled with defendant's plea to the action.

The plaintiff's *en faux* at the *enquête* thereon examined the defendant *en faux*

Dubois et al. vs. Dowley

as witness for plaintiffs *en faux*. The evidence and admissions of defendant *en faux* were considered by the plaintiffs *en faux* to be conclusive in their favor. Plaintiffs *en faux* closed their *enquête*.

Defendant *en faux* commenced his *enquête*, and in course of examining a witness asked him the following question:

"N'est il pas vrai que le dit defendeur en faux est d'une intelligence bien faible et d'une mémoire très bornée."

This question was objected to by plaintiff *en faux*, as illegal, irrelevant, and tending not to destroy the evidence of plaintiff *en faux* or to refute or explain the same, but to attack the intelligence and memory of defendant *en faux*, a fact not in issue.

The objection was overruled by Judge Berthelot, presiding at *enquête*. A motion being made in term before same judge to revise the ruling at *enquete*, was refused, with costs.

Perkins & Stephens, for plaintiffs.

A. Brunet, for defendant.

R. Laflamme, Q. C., Counsel.

(J. A. P. Jr.)

QUEEN'S BENCH,

MONTREAL, 9TH MARCH, 1865.

Coram Duval, Ch. J., Aylwin, J., Meredith, J., Drummond, J., Mondelet, J.

No. 1351.

FOLEY et al, *Defdts. in Court below,* Appellants.

and

TARRATT et al., *Pltffs. in Court below,* Respondents.

Held:—1. That where the pleas are precisely similar to four separate actions between the same parties on promissory notes matured at different dates, the Court will not entertain a motion by the defendants to unite the causes, if the application be resisted by the plaintiffs.

2. The Court of Appeal will not allow an appeal from an interlocutory judgment of the Superior Court, rejecting a motion such as the above.

Semble.—That the Court can, in its discretion, allow motions to unite causes, although the consent of the opposite party be withheld.

This was a motion for an appeal from an interlocutory judgment, rendered by the Superior Court, at Montreal, on the 28th day of February, [illegible] rejecting a motion made by the appellants to unite the present and [illegible] causes pending in that Court between the same parties.

The actions in the Court below were founded on promissory notes which had matured at different dates; and the application to unite the cases was made on the ground that the pleas were precisely similar in all the actions, and that it was of consequence, to avoid the costs of four sets of *Commissions Rogatoires* to England, that the causes should be united.

The motion was resisted in the Court below, on the ground that the union of the causes would retard the plaintiffs in obtaining judgment in two of the

Foley et al. and Tarrat et al.

cases which were more advanced than the others, and thus operate unjustly towards them, and the plaintiffs relied on the judgment of Simard vs. Perrault, 1st L. C. Jurist, p. 249, where it was held, "That it is not competent to unite "two causes together, on the ground that the matters in contest, in both cases, "are identical."

Monk, A. J., rejected the motion in the Superior Court, on the specific ground, that without the consent of all the parties to the cause, it was out of the power of the Court to grant such a motion.

The Court of Appeal rejected the motion for permission to appeal, on the ground that in a case like the present the Court ought not to interfere, unless all the parties consented; but the judges *were all of opinion that the Court had power, in any case*, to order the union of actions without the consent of the parties where the ends of justice call for such a course.

Motion for an appeal rejected.

A. & W. Robertson, for appellants.
Strachan Bethune, Q. C., for respondents.
(s. B.)

CIRCUIT COURT, 1864.

THREE RIVERS, 3rd NOVEMBER, 1864.

Coram POLETTE, J.

No. 176.

Rieutord vs. *Ginnis.*

HELD:—1st. That the amount of a constituted rent established by the schedule of a seigniory cannot be contested after its completion.

2nd. That the schedule proves not only the amount of the constituted rent, but also, in the absence of other proof, the amount of the *cens et rentes* which it replaces.

The plaintiff as Seignioress of the fief Hautboc, claimed the sum of £40. 7. 6, from the defendant for ten years' arrears of rent, accrued partly before and partly after the passing of the Seigniorial Act of 1854, on two lots situated within the said fief, of which one (No. 17) was alleged to be charged by the schedule with a constituted rent of £2. 13. 10, and the other, No. 18, with a constituted rent of £1. 6. 11.

The defendant pleaded *inter alia*, that the lot No. 17 was before the making of the schedule free of seigniorial dues; that the lot No. 17 was only charged with a rent of £0. 12. 6 and not one of £1. 6. 11, as mentioned in the declaration, that it was established arbitrarily and without proof, and that the plaintiff and her late husband had often acknowledged that the rent was only £0. 12. 6, and had never received it at the rate fixed by the schedule; and that the schedule could not make proof of the amount of the rents before its completion, nor give the plaintiff the right to exact any rent for the lot No. 17 and a higher rent than £0. 12. 6 for the lot No. 18.

The plaintiff answered generally.

In support of her demand the plaintiff produced an authentic copy of the schedule, which was duly completed on the 1st December, 1860, and deposited

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on the 8th April, 1862, and made no other proof of the amount of the rents. The defendant abandoned his pretension with respect to the lot No. 17, and produced in support of his pretension that the rent of lot No. 18 was only £0. 12. 6—1o. a deed of sale of the 12th November, 1850, before Guillet, N. P., from Mr. Clair to Mr. Lottinville, and 2o. a deed of sale of the 13th November, 1850, before the same notary, from Mr. Lottinville to the defendant, in which it was stipulated that the purchasers should pay an annual rent of £0.12. 6 to the De Tonnancour family, and such seigniorial dues as might be exigible to the seignior of the fief within which it was situated.

Per Curiam :—

Le cadastre du fief est produit pour prouver le montant de la rente de chacun des terrains.

Le défendeur y objecte en disant, 1o que le cadastre ne fait pas foi des rentes échues avant sa confection, et ne donne pas droit à la demanderesse d'exiger une rente sur le premier emplacement No. 17, qui était auparavant libre et franc de toute rente, et 2o. que quant à la rente sur le second terrain No. 18 elle a été fixée arbitrairement, et sans titres, pièce, ou preuve pour justifier sa fixation, et est erronée et bien plus forte que la véritable.

Sans entrer dans le détail des pouvoirs et des devoirs des Commissaires nommés en vertu de l'acte pour l'abolition de la tenure seigneuriale, (S. R. B. C. Ch. 41) il suffira de dire, 1o que le commissaire qui a fait le cadastre du fief Hautboc a dû prendre *le montant des cens et rentes et charges annuelles comme la valeur annuelle d'iceux* (Sect. 10 § 1), 2o qu'aussitôt après la confection du cadastre, il a dû le déposer et en donner 30 jours d'avis, afin que la seigneuresse et les censitaires pussent faire corriger les erreurs, s'il en existait, (Sect. 18), 3o. que deux commissaires nommés pour reviser les cadastres ont dû reviser celui-ci si on s'en est plaint, et que leur décision est finale, (Sect. 29 § § 1 & 2), 2o. qu'aussitôt que ce cadastre a été complété, il a dû être déposé au greffe, (Sect. 25.)

Nous avons la preuve que le cadastre a été confectionné suivant la forme voulue par la loi, et qu'il a été déposé au greffe; ces faits sont établis par le cadastre même et les certificats qui l'accompagnent; et la présomption légale, est que le commissaire s'est conformé à la loi, le contraire ne paraissant pas. Ainsi il faut dire que les rentes telles que portées dans le cadastre, représentent le montant juste des cens et rentes et charges annuelles dont ces emplacements étaient grévés auparavant.

Si le commissaire chargeait trop, le défendeur devait se plaindre, et deux commissaires auraient revisé le cadastre. S'il s'est plaint, les commissaires reviseurs ont examiné et jugé sa plainte, et nous en voyons le résultat dans ce cadastre, car la cour présumera que les commissaires ont fait leur devoir. S'il ne s'est pas plaint, c'est sa faute, et il en doit subir les conséquences.

Le titre-nouvel donne droit au seigneur de réclamer les droits seigneuriaux qui y sont portés, mais s'il contient des charges plus fortes que celles établies par le titre primordial, le censitaire a droit de les faire réduire au taux de ce dernier acte.

Est-ce qu'un cadastre ne vaut pas un titre nouvel ? Il a plus de valeur lors-

que le temps de s'en plaindre et de le faire reviser est passé car alors on ne peut plus rien faire réduire : il est final.

La Cour est donc d'avis que le cadastre fait preuve complète, non seulement de la rente constituée, mais encore des cens et rentes et charges annuelles que cette rente constituée remplace, car le commissaire a dû avoir la preuve de la quotité des cens et rentes pour fixer la rente constituée qui doit les remplacer.

Judgment for Plaintiff for £40. 8. 6, with interest and costs.

Sévère Dumoulin, for Plaintiff.

Hart & McDougall, for Defendant.

(J. W.)

MONTREAL, 31ST MAY, 1865.

Coram BERTHELOT, J.

No. 793.

Maguire vs. the Trinity House of Montreal, and Cunningham et al., intervening parties.

HELD:—That the captain and not the owners of a vessel has a right to two-thirds of the net proceeds of things found by him accidentally while navigating his vessel.

This action was instituted by plaintiff against the defendants under the statute 22 Vic., chap. 12, in virtue of a deed of transfer from one Robert Foran, formerly captain of the Barquentine Warrellite, to recover the two-thirds of net proceeds of the sale of an anchor found by Robert Foran while in command of his vessel in the port of Montreal in the month of June, 1864.

To this action the defendants pleaded, denying the facts of plaintiff's declaration:

That the defendants were ignorant whether or not the said Robert Foran had found the said anchor.

That the anchor had been placed in the hands of the Trinity House officers by the firm of Phillips & Co., of Montreal, representing themselves as the agents of the owners of said vessel Warrellite—and that as such agents they had claimed the profit derived from the sale of said anchor.

That another party, Messrs. G. & D. Shaw, of Montreal, as agents of the vessel "Gipsey Bride," had also claimed the two-thirds of the net proceeds of the sale of said anchor. That the defendants were ready to pay over the money to whomsoever the Court should order, and the amount was duly tendered into Court with defendant's pleas. The defendants prayed that in consideration of the circumstances they be not condemned to pay any costs.

The intervention of intervening parties set forth

That they were proprietors of the vessel "Warrellite." That the crew of said vessel or some one of them had found the anchor referred to in plaintiff's declaration and that *as owners* of said vessel they had a claim for two-thirds of the net profits of the sale of said anchor.

The case was submitted to the Court without any evidence either on the part of plaintiff or intervening parties—leaving the question to be decided—"whether

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the captain or the owners of the vessel have a right to claim the profits arising from things accidentally found in navigating the vessels."

The Court stated that the captain had been placed in charge of the vessel to perform a certain duty. That any fortuitous circumstances occurring outside of that duty the captain must either derive the advantage or suffer the loss arising therefrom, and consequently judgment must go in favor of plaintiff—costs of action and defense to be taken out of net proceeds, and costs of intervention to be paid by intervening parties.

J. J. Curran, for plaintiff.

J. Monk, for defendant.

L. N. Benjamin, for intervening parties.

(J. J. C.)

MONTREAL, 30TH SEPTEMBER, 1864.

Coram LORANGER, J.

No. 1248.

Chapman vs. *Hodgson.*

HELD:—That an award of *arbitrateurs et amiables compositeurs* not signified to the parties interested until after the delay limited by the *compromis* for the rendering of the award, is null and void; notwithstanding such award may have been rendered within the prescribed time.

This was an action to recover from the defendant the sum of $114.60, being the amount alleged to have been awarded by *arbitrateurs et amiables compositeurs*. The *compromis* required that the award should be rendered not later than the 15th of May, 1863. Within the delay named the award was deposited with the notary before whom the *compromis* had been executed, but it was not signified to the defendant until the 3rd day of June, 1863.

The defendant pleaded that the award was null, inasmuch as it wholly failed to allege that the parties concerned were either heard or even notified to appear and be heard before the arbitrators, and because the award was not pronounced to the said parties and specially to the defendant, one of them, nor in any way legally signified within the delay specified in the *compromis*.

Bethune, Q. C., for defendant, relied at the argument, on the following authorities:—

1 Bornier (on Art. 7 of 26 Tit. of Ord. of 1667) p. 235; Jousse, Traité de la Justice, 2 Vol. pp. 706. 710, 711; Guyot, Vo. Arbitrage, pp. 547, 548; Nouv. Den. Vo. Arbitrage, No. 10, p. 244; Blanchet et ux. vs. Charron, 4 L. C. Jurist, p. 8.

Judah, Thos., for plaintiff, contended that the authorities cited had reference only to *sentences arbitrales* properly so called, and not to the awards of mere *amiables compositeurs*, and that the plaintiff was entitled to his judgment.

Per Curiam. "Considérant que la sentence arbitrale, sur laquelle repose la demande, n'a pas été rendue et signifiée dans le temps voulu par le compromis, et que, de ce défaut, résulte la nullité de la dite sentence, que partant le demandeur n'a pas fait de preuve légale l'a débouté et déboute d'icelle avec dépens."

Action dismissed.

Thos. S. Judah, for plaintiff.

Strachan Bethune, Q. C., for defendant.

(S. B.)

MONTREAL, 9TH MARCH, 1865.

IN APPEAL FROM THE SUPERIOR COURT, DISTRICT OF MONTREAL.

Mackenzie and Taylor.

Coram DUVAL, C. J., AYLWIN, J., MEREDITH, J., DRUMMOND, J., C. MONDELET, A. J.

NANCY MACKENZIE,

(*Plaintiff in the Court below,*)

APPELLANT

AND

HUGH TAYLOR,

(*Defendant in the Court below,*)

RESPONDENT.

CURATOR—USE OF TRUST FUNDS—PURCHASE BY CURATOR OF PROPERTY OWNED BY HIM AS AN INDIVIDUAL.

HELD:—1o. That the law allows a tutor or curator six months to find an investment of trust funds.

2o. That from the moment he uses, for his own profit, the money coming into his hands, as tutor or curator, however soon that may be after his appointment, he is liable for interest thereon.

3o. That where a party deposited a trust fund to his own credit, in a bank, and afterwards, from day to day, drew out those funds as if they were his own, by cheques signed by himself, and in his own name, it became incumbent upon him to show, if he could, that he had so drawn out the trust funds for the purposes of the trust, and, in default of his doing so, the conclusion is that he must have used the trust fund for his own purposes.

4o. That a person in his capacity as curator, cannot purchase from himself individually, and in his own right, a debt, and cannot indirectly, with the assistance of a *prête-nom*, do an act which he cannot do directly in his own name.

5o. It is not necessary, *quoad* the demand of the plaintiff for interest on an investment, in order to pronounce upon the illegality of transfers accepted by the defendant as curator, that all the parties thereto should be in the cause.*

This was an appeal from a judgment of the Superior Court, Montreal, 31st October, 1862, dismissing an action to account brought by the plaintiff, against the defendant, and the *demande* of the plaintiff, as set forth by her *débats de compte* for a condemnation against the defendant for the sum of £849 5s 7d currency.

The declaration of the plaintiff set up the will of Alexander McKenzie, of date 10th February, 1830, whereby *inter alia*, the testator bequeathed to his executors and to the survivors or survivor forty shares of stock in the Bank of Montreal, upon trust, for the sole use and benefit of the plaintiff, "his will being that all the profits, dividends, or interest, arising or to arise therefrom, be the property of, and be had and received by plaintiff, during the term of her natural life, and that at her death the said forty shares do become the property of the child or children by marriage of the plaintiff, to be divided equally among them if there be more than one child; and, in case the said Plaintiff should die childless, or in case the said child or children should die before becoming lawfully entitled, &c., then the said stock to revert to the executors, in trust for John George McKenzie, upon the terms of, and upon the same conditions as the bequest thereinafter mentioned."

* *Vide* Desjardins vs. La Banque du Peuple; 10 L. C. Repts., 325; 8 L. C. Jur., 106 Cumming and Smith 5 L. C. Jur. 1 Auld and Laurent 8 L. C. Jur., 146.

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That the said Alexander McKenzie, by his said will, further bequeathed to his said executors and the survivors and survivor of them the sum of £1100 of the capital stock of the Hudson Bay Company, then owned by him, upon trust, for the use and benefit of said John George McKenzie; his will being that the interest, dividends, or profits arising or to arise from the same, be paid to the said John George McKenzie, during the term of his natural life, and that at his death the said stock should be transferred to his child or children by marriage, &c.; and if the said John George McKenzie should die without child or children, or in case the said child or children should die before becoming entitled to bequest, then the said stock should revert to executors, in trust for plaintiff and children; and after her death without children, then in trust for his nieces, to wit, Anne, Nancy, Elizabeth, Rosina, and Margaret, as his residuary legatees. George Simpson, Adam L. McNider, and Charles Tait were appointed executors.

That the death of testator took place 23rd July, 1830. That the will was proved on the 24th July, 1830. That the said Adam L. McNider and Charles Tait accepted of the office of executor, and George Simpson renounced the same. That the above bequests were accepted by the plaintiff. That William Cowie, her husband, died in A. D. 1836. That the said John George McKenzie died 20th June, 1838, unmarried and without issue, by which the Hudson's Bay stock vested in plaintiff for her natural life under the said will. That Adam L. McNider died 20th November, 1840, whereby Charles Tait became sole surviving and acting executor. That Charles Tait sold the Hudson's Bay stock, realizing £3300. That proceedings at law were taken by plaintiff against Charles Tait to account for his gestion, and pay over proceeds of stock, and judgment was rendered in her favor.

The declaration further set up the proceedings in cause No. 1291, Froste et al. vs. Tait, and sale of the defendant's lands, and opposition by plaintiff for £3300, and interest from 1st July, 1844, and collocation in her favour, and judgment accordingly, 29th January, 1848. That the said Hugh Taylor was nominated curator to substitution under said will, 15th February, 1848, and accepted the said office. That payment was made to him, on same day, of £3510 1s 5d. namely—£3300 of principal, and £210 11s. 5d. of interest. That from the 15th February, 1848, the Defendant converted said sum to his private use. That he failed to account.

"Wherefore the plaintiff brings suit and prays that the defendant may be adjudged and condemned—Firstly, to render to the plaintiff a just, true, and faithful account, under oath, of the said sum of three thousand five hundred and ten pounds one shilling and five pence currency, held by the defendant as curator as aforesaid, from the said fifteenth day of February, one thousand eight hundred and forty-eight, to the present time, the account aforesaid to comprise the interest which the said defendant received, or which he ought to have received, on the said sum of money, from the time it came into his hands, the said account to be accompanied by the vouchers relating thereto. Secondly, to pay over to the plaintiff all the sums of money, including the said sum of two hundred and ten pounds eleven shillings and five pence, as interest and profits on the said sum of three thousand three hundred pounds, and also on the said sum of two hundred

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and ten pounds eleven shillings and five pence, as principal, which, upon the rendering of the said account, shall appear to be due and owing to the plaintiff by the defendant. Thirdly, in default of the said defendant accounting as aforesaid, that he, the said defendant, may be personally adjudged and condemned to pay to the plaintiff the sum of one thousand pounds in lieu of her the plaintiff's rights, claims, and demands in relation to the said interests and profits on the sum of three thousand three hundred pounds, the plaintiff reserving her recourse against the defendant for the recovery of the said principal sum of three thousand three hundred pounds currency, the whole with costs.

The defendant pleaded to the action by a first plea :—

That defendant only received in his capacity of curator the sum of £3300. That on the 20th April, 1854, the said Hugh Taylor transferred to Dame Elizabeth McGillivray, £3300, due by Messrs. Badgley & Abbott to him, under deed of sale, 14th February, 1854, payable in ten years, from the date of the deed; and on the 20th October, 1854, Dame Elizabeth McGillivray transferred this amount to the defendant in his quality of curator. That defendant, from time to time, paid plaintiff all interest due on the said sum up to 15th August, 1853, and on the 21st December, 1853, accounted with the plaintiff (plaintiff's Exhibit B.); and on that day there was £172 due her by defendant. "That subsequently to rendering such account he paid plaintiff the said balance of £172 and all the interest accrued upon £3300, from the 15th August, 1853, to the 15th August, 1855." That since the 15th August, 1854, up to that date the plaintiff, by herself and her agents, had collected the interest due her out of the estate to which she was entitled under the said will of the said Alexander McKenzie, and in particular from the said Badgley & Abbott, excepting the sums mentioned in the account, (defendant's Exhibit No. 1.) which account was true. That in consequence of the acts of the plaintiff, interfering with the management and agency of the defendant, and getting in and receiving sums of money arising out of the said estate, the defendant was unable to state what sums of money, if any, were due for arrears of interest. That by the said account, (Exhibit No. 1,) a balance stood in favour of defendant of £174 10s, which the plaintiff had admitted and promised to pay defendant. Concluding that the account therewith filed be declared a true, just, and correct account, and that the balance of £174 10s, the true balance therefor, was due by plaintiff to Defendant, with costs against plaintiff.

The defendant also pleaded a *défense au fonds en fait.*

The ANSWERS of Plaintiff were—

— First — That Defendant did receive from the sheriff of the District of Montreal £3517 11s 5d, as alleged in the declaration, and as appeared by receipt to the sheriff of 15th February, 1848, of which £3300 was principal, and £217 11s 5d was interest due to plaintiff personally as usufructuary legatee. That from the 15th February, 1848, the day of the receipt of the said sum of £3510 1s. 5d. the defendant converted the said sum to his own private and personal use. That it was true that by deed of sale, 14th February, 1854, defendant sold to M.M. Badgley & Abbott a lot of land for £3000, payable in ten years, from 1st February, 1854, with interest from that date. That the defendant,

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well knowing that the land so sold was not sufficient security, and was not actually worth £3000, transferred the same to the said Dame Elizabeth McGillivray, by act of transfer of 8th April, 1854, and with the intention of preventing the said Dame McGillivray, (who was moreover a relative of defendant,) from loss or damage; and to shift the same from himself and the said Dame McGillivray, defendant caused the deed of transfer of 20th October, 1854, to be executed by said Dame McGillivray to defendant in his said capacity. That the said deeds of transfer were collusive, fraudulent and void, and the said Elizabeth McGillivray was the mere *prête-nom* of the Defendant, and her name only made use of for the purpose of such transfers, and that she had no interest in them, and that the security upon which the said £3000 was alleged to have been lent was wholly inadequate and insufficient, and the plaintiff was not bound by such transfers. That the defendant was liable to pay to the plaintiff 6 per cent, on the said £3517. 11s. 5d. from the 15th February, 1848. The answer concluded by praying that the transfers might be declared null and void, and the said first plea dismissed.

Second.— The plaintiff's second answer was:—That the defendant never accounted for the moneys received from the sheriff in Frosto v. Tait, No. 1291, and that the accounts rendered by defendant, plaintiff's Exhibits B. and C., were never sanctioned or acknowledged by plaintiff. The answer then sets out an agreement of 5th May, 1859, between plaintiff and defendant, by which interest on £3,300 was to be unaffected, (Exhibit D.) That at that time plaintiff was unaware that the defendant had received for her account from the sheriff the said sum of £217 11s. 5d., and that he had concealed it from her. Concludes for dismissal of the plea.

Third — The plaintiff's third answer was:— That she had not drawn or collected interest arising from the estate of Alexander McKenzie, nor interfered with the management of the defendant, and concluded for dismissal of the plea.

The plaintiff filed a replication to the *défense au fonds en fait.*

The plaintiff at the same time by *Débats de compte* disputed the account exhibited by the Defendant as his Exhibit No. 1.

The Debats de Compte were in effect as follows:—

That the account produced by Defendant as Exhibit No. 1, is not an account of the sum of £3517 11s. 5d, but mixes Bank dividends.

1. Items of dividends on Bank stock are included.

2. The said account only credits plaintiff with interest on £3300 instead of on £3517 11s. 5d. actually received. The plaintiff is entitled to interest on £3300 from 15th February, 1848, and to the sum of £217 11s. 5d. arrearages thereof and to the interest thereon from 15th February, 1848.

3. Defendant only credits plaintiff with interest on £3300 from 15th August, 1854, whereas plaintiff is entitled to interest on £3517 11s. 5d. from 15th February, 1848, as defendant from that time had and used this sum.

4. That in said account, plaintiff is debited with the sum of £200 on 4th May, 1854, with £25 on 3rd March, 1855, with £10 on 4th September of same year: —all which sums had been previously debited to the plaintiff by defendant as appears by accounts relating to other transactions between plaintiff and defendant

fyled by plaintiff, marked with E. and F., and were in fact paid by defendant to plaintiff, out of other funds belonging to plaintiff.

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5. That in said account defendant professes to charge only £75 for agency whereas he did in all charge £129 18s.

6. The additions and summings of said account are inaccurate.

7. That said account is not the account demanded by plaintiff in her present action.

8. That it is untrue that the plaintiff is indebted to the defendant in the sum of £174 10s.; on the contrary, the defendant is indebted in the sum of £860.

The conclusions of the *Débats de Compte* were as follows:

"Wherefore the plaintiff prays that the said plea of the said defendant be hence dismissed with costs, and further prays that judgment be pronounced in her favor, declaring that the sum of eight hundred and sixty-two pounds eight shillings and nine pence currency be due and owing to her by the defendant, the said sum being composed of the balance of interest unaccounted for by the defendant and unpaid by him to the plaintiff, upon the said sum of three thousand three hundred pounds from the fifteenth of February, one thousand eight hundred and forty-eight to the thirteenth September, one thousand eight hundred and sixty, and also of the said sum of two hundred and seventeen pounds eleven shillings and five pence currency, so as aforesaid received by the said defendant, of and from the sheriff of the District of Montreal, on the fifteenth day of February, eighteen hundred and forty-eight, for and on behalf of the plaintiff, and for interest thereon, from the same day, to wit, from the fifteenth of February, eighteen hundred and forty-eight to the thirteenth of September, one thousand eight hundred and sixty; and that the said defendant, as well individually and personally, as in his capacity of curator as aforesaid, be adjudged and condemned to pay to the said plaintiff the sum of eight hundred and sixty-two pounds eight shillings and nine pence currency, with interest thereon, till paid from service of process and costs of suit."

The defendant replied as follows to the answers and *débats de compte* of the plaintiff.

To the answer of the plaintiff firstly pleaded, he replied generally. He further replied to the plaintiff's first answer to the effect following: that he was only accountable for the sum of £3300 in the present suit: that the balance of £217 11s. 5d. cy. did not at the time of payment belong to the estate of Alexander McKenzie, and this balance was paid to him in his capacity of attorney of the plaintiff, and not as curator: that the defendant had a right to the delay of six months to procure a good and safe investment for the sum of £3300 cy.; that for three years after his appointment as curator, he had been unable to find such good and safe investment, although he had paid her interest to her satisfaction, as appears by his account rendered on the 23rd December, 1853.

The defendant replied to the answer by the plaintiff, secondly pleaded after denying all the allegations of the pleading, except as expressly admitted, that the agreement of date, 5th May, 1859, between the plaintiff and defendant, had no connection with the present suit.

The Defendant replied generally to the answer by the plaintiff thirdly pleaded.

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The Defendant answered the *débats* firstly pleaded by the plaintiff that the account rendered by him was correct; to the *débats* secondly pleaded that the plaintiff was only entitled to interest from the defendant as curator on £3,300 which interest was accounted for to her up to the 23rd December, 1853, to her satisfaction; that the interest had since been regularly paid up to February, 1854; and since then the plaintiff, and her agent had been receiving the interest and dividends payable thereon without his intervention; to the *débats* thirdly pleaded that the plaintiff by law could only claim interest upon £3,300 from the 23rd December, 1853, because all interest previously thereto had been paid, and accounts anterior thereto settled; and to the *débats* fifthly, sixthly, seventhly and eighthly pleaded, the defendant answered generally.

The following was the judgment of the Superior Court:—

The 31*st October*, 1862.

PRESENT:

THE HONORABLE MR. ASSISTANT JUSTICE MONK.

"The Court, having heard the parties by their counsel upon the merits of this cause, examined the proceedings and evidence of record, and having deliberated thereon, considering that the said defendant in his said capacity, hath proved by legal and sufficient evidence the essential averments of his plea firstly pleaded in this cause, doth maintain the same; and proceeding to adjudge upon the merits of the plaintiff's action considering that the said plaintiff hath not proved that the said defendant on the fifteenth February, one thousand eight hundred and forty-eight received from the sheriff of the district of Montreal, the whole of the sum of three thousand five hundred and seventeen pounds eleven shillings and five pence in his quality and capacity of curator to the substitution created by the last will and testament of the said late Alexander McKenzie, but that on the contrary, it is established that he received only the sum of three hundred pounds in his aforesaid quality and capacity at the date aforesaid; considering that of the said sum of three thousand five hundred and seventeen pounds eleven shillings and five pence, the said defendant received the sum of two hundred and seventeen pounds eleven shillings and five pence as the attorney *ad litem* of the said plaintiff in a certain cause mentioned in the pleadings in this cause: seeing therefore that the defendant in his quality and capacity aforesaid cannot by law be made accountable to the said plaintiff for the said last mentioned sum, or for any alleged interest thereon by the present action, doth overrule and dismiss that portion of the plaintiff's demand; and seeing that it is not proved by legal and sufficient evidence that the defendant in his aforesaid quality and capacity or otherwise did use or convert the said sum of three thousand and three hundred pounds or any part thereof, so by him received as such curator between the said fifteenth February, one thousand eight hundred and forty eight, and the fifteenth August, one thousand eight hundred and forty eight, or that he received any interest, revenue, profit, or advantage therefrom; considering therefore that the said defendant is not, in his said quality and capacity or otherwise, answerable or liable to account or pay interest to the said plaintiff for, or on, the said sum of three thousand and three hundred pounds or any part thereof during the six months

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which elapsed between the fifteenth February, one thousand eight hundred and forty-eight, and the fifteenth August, one thousand eight hundred and forty-eight; considering that by law the defendant in his said quality and capacity was allowed six months to find and procure a safe and secure investment of the said sum of three thousand and three hundred pounds: the Court doth overrule, reject and dismiss so much of the plaintiff's demand as seeks to recover interest from the said defendant in his quality and capacity aforesaid, on the said sum of three thousand and three hundred pounds between the fifteenth February, one thousand eight hundred and forty-eight, and the fifteenth August, one thousand eight hundred and forty-eight; and considering that the plaintiff hath proved by legal and sufficient evidence, the material allegations of her declaration, in so far as regards the defendant's liability in law as such curator to account to the said plaintiff for interest on the said sum of three thousand and three hundred pounds from the fifteenth August one thousand eight hundred and forty-eight, to the thirteenth day of September, one thousand eight hundred and sixty, date of the service of process in this cause; and seeing that the defendant in his said quality and capacity hath legally and sufficiently accounted for the interest on the said sum of three thousand and three hundred pounds during the period last aforesaid, and that as the present action is brought, the Court cannot condemn the said defendant to pay over the balance of interest, to wit: the sum of three hundred and eighty-one pounds accrued, but not received by the said defendant at the time of the institution of the present action, and considering that by law the Court cannot, under the present action, declare the investment of the sum of three thousand pounds, dated twentieth October, one thousand eight hundred and fifty-four, by the said defendant in his said quality and capacity, null and void, doth dismiss the said action with costs."

Torrance for the appellant, argued as follows:

It was proved and admitted that the defendant, on the 15th February, 1848, received the sum of £3517 11s. 5d. currency in question, and forthwith deposited it in the Bank of Montreal to the credit of his private account, from which it was gradually withdrawn in small sums, until, six months afterwards, there remained only £102 to his credit in the bank.

It was further proved that the transfer from the defendant to Dame Elizabeth McGillivray, and from her to himself as curator, of £3000, was without any consideration and was only done in order as the defendant imagined, legally to transfer the proprietorship of a debt of £3000 due by Messrs. Badgley and Abbott from Hugh Taylor the individual to Hugh Taylor the curator, and this seemingly meaningless formality became full of meaning and signification when it is observed that thereby, if the transfer were legal, Taylor the individual sold a debt of the nominal but questionable value of £3000 for £3000, and at the same time relieved himself of a liability of £3000 as curator. Dame Elizabeth McGillivray was a mere *prête-nom* in the transaction; and the appellant contends that the respondent in this matter sought to shift a bad security from his pocket to that of his *cestui que trust*. It was satisfactorily proved that the land on which the obligation purports to rest is not worth more than £2000 and

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the judiciousness of the investment can only be judged of by the value of the land securing the obligation.

The plaintiff further proved the agreement of 5th May, 1859, whereby the question as to the accounts and interest was kept open, and further it is to be remarked that the concealment by the defendant of the receipt of so large an item as £217 11s. 5d. for twelve years when it was only revealed through the investigations of the plaintiff's counsel entitles the plaintiff to open up all the accounts between her and her sworn agent the curator.

As to the accusation made by the defendant, that the plaintiff and her agent interfered with his collections of interest from Messrs. Badgley and Abbott, and approved of the investment, the evidence of Mr. Cowie, p. 1 app., and of Mr. Abbott, p. 13 app., directly contradicts this.

The appellant humbly submits that the following rules should be applied to the facts of record in this cause:

1. The defendant, as the agent of the plaintiff, having used the moneys of his trust for his own purposes, must pay interest on the moneys so used from the time he so used them, viz., 15th February, 1848.

2. The sale from Hugh Taylor the individual to Hugh Taylor the curator was a nullity.

3. Even admitting the lawfulness and propriety of the sale, it was incumbent upon the defendant to show that he had used due diligence in the collection of the interest due by the debtors, and the defendant has failed to exhibit any such diligence.

1°. That an agent of any description must pay interest on the money of his principal which he uses for his own purposes.

The basis of the French authorities on the subject is to be found in the Digest, where we find three cases given as follows:

Dig. Lib. 17, Tit. 1, Mandati vel contrà, L. 10, § 3, "Si procurator meus pecuniam meam habeat, ex morâ utique usuras mihi pendet. Sed et si pecuniam meam fœnori dedit, usurasque consecutus est, consequenter dicemus, debere eum præstare, quantumcunque emolumentum sensit, sive ei mandavi sive non; quia bonæ fidei hoc congruit, ne de alieno lucrum sentiat. Quod si non exercuit pecuniam sed ad usus suos convertit, in usuras convenietur quæ legitimo modo in regionibus frequentantur. Denique Papinianus ait, etiam si usuras exegerit procurator, et in usus suos converterit, usuras eum præstare debere."

Dig. Lib. 16, T. 3, L. 28, "Quintus Cæcilius Candidus ad Paccium Rogatianum epistolam scripsit in verba infra scripta; Cæcilius Candidus Paccio Rogatiano suo salutem. Viginti quinque nummorum, quos apud me esse voluisti notum tibi ita hac epistola facio, ad ratiunculam meam ea pervenisse; quibus ut primum prospiciam, ne vacua tibi sint, (id est, ut usuras eorum accipias,) curæ habebo. Quæsitum est, an ex eâ epistolâ etiam usuræ peti possint? Respondi, deberi ex bonæ fidei judicio usuras, sive percepit, sive pecunia in rem suam usus est."

Dig. Lib. 13. T. 7 L. 6 § 1: "Si creditor pluris fundum pignoratum vendiderit, si id fœneret, usuras ejus pecuniæ præstare debet ei, qui dedit pignus. Sed et si ipse usus sit ea pecunia, usuras, præstare oportet. Quod si eam depositam habuerit, usuras non debet."

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In the first of these quotations, which refers to the mandatory, it is decided that if an agent lend out the money of his principal at interest, and receive interest, the interest belongs to the principal: that if the agent, in place of lending the money, converted it to his own use, he owes legal interest on it. So also, if the agent received interest, and converted it to his own use, he owed interest on the interest so converted.

In the second of these quotations, which has reference to the depositary of moneys, he owes interest on money deposited with him. 1o. if he put it out at interest and drew interest. 2o. If he put the money deposited into his own business, or applied it to his own uses (*sive pecunia in re sua usus est*).

In the third of these quotations, a creditor who sells the pledge of his debtor as the Roman law permitted, of his own motion, and after realizing more than sufficient to pay his claim, kept the balance, and lent it at interest, he owed interest. If he converted it to his own use, he owed interest. On the contrary, if he held it as a deposit by itself, he did not pay interest.

These rules are adopted by French authors. Domat. Lib. 3. Tit. 5, Sect. 1, Art. 8. "Ceux qui retiennent en leurs mains des deniers appartenans à d'autres personnes et qui les divertissent, et les tournent à leur profit, sans le consentement de ces personnes, en doivent l'intérêt, sans qu'il soit demandé, car c'est une injustice qu'ils font à ceux de qui ils retiennent les deniers; et cet intérêt est dû comme un dédommagement de la perte qu'ils peuvent causer et une juste peine de leur mauvaise foi. Ainsi lorsqu'un associé se trouve avoir en ses mains des deniers de la société qu'il ait tournés à son usage, et pour ses affaires particulières, il en doit les intérêts suivant la règle qui a été expliquée dans le titre de la société. Ainsi un créancier se trouvant surpayé, ou par la vente d'un gage, ou par des jouissances ou autrement, doit à son débiteur les intérêts de ce qu'il a trop reçu, s'il l'a employé à son propre usage."

Id. 13. "La règle qui défend les intérêts des intérêts, n'empêche pas qu'un mineur n'exige légitimement de son tuteur, non seulement les intérêts des sommes provenues des intérêts que les débiteurs du mineur ont payés au tuteur, mais encore les intérêts des intérêts des sommes que le tuteur lui-même pourrait lui devoir en son nom. Car tous ces intérêts entre les mains des tuteurs sont capitaux dont leur charge les oblige de faire un emploi. Et s'ils ne l'ont fait, soit par négligence, ou *pour avoir employé les deniers à leurs affaires* particulières, ils sont tenus d'en payer les intérêts."

Domat. Lib. 2, Sect. 2, Art. 3. "Les règles qui ont été expliquées dans le titre des tuteurs, et qui peuvent convenir aux fonctions et aux engagements des curateurs, doivent s'y appliquer."

"On ne fait pas courir incontinent les intérêts contre le tuteur, on lui laisse le temps de deux mois pour exiger ce qui est dû, et pour placer ce qu'il reçoit, et l'on observe ainsi en jugeant le compte de tutelle. *Cet espace ou relâchement de temps ne s'accorde point à ceux qui ont détourné à leur usage, les deniers des mineurs.*" L. 7, § 11 de admin. et peric. tut. "Si le *tuteur* ou le *curateur* retiennent à leurs usages les intérêts qu'ils se sont fait payer, ils en doivent les intérêts; car il importe peu que ce soit le principal ou les intérêts des deniers pupillaires qu'ils ont appliqués à leurs usages."

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Meslé, p. 204, § 12, Ed. of A. D. 1752, p. 161 of Ed. of A. D. 1735.

This authority is adopted by Toullier:

"Ce qu'il y a de remarquable encore, est que le tuteur qui a détourné à son profit les deniers pupillaires, doit en payer l'intérêt, du moment même qu'ils lui ont été livrés."

Ferrière, Tutelle pp. 172-3 A. D., 1766. 2 Toull. p. 384, n. 1215. 6 Toull. p. 281, 2. 11 Toull. p. 50, n. 41. It is not merely when the agent makes a profit out of the moneys of his principal that he owes interest, but when he applies it to his wants (*applique à ses besoins.*) Troplong. Mandat. p. 404, n. 417.

"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 banker's, and this answers the purpose of his credit as much as if the money were his own." Lewin on Trusts, p. 328. London, A. D. 1837. 2 Williams, Executors, p. 1132. London, A. D. 1832. Gridley v. Connor. 2 Louis. Ann. Repts., 91 C. C. L., Art 2984. Dwight v. Simon, 4 L. A. 497.

2. The sale by Taylor the individual, to Taylor the curator, by the medium of Dame Elizabeth McGillivray, is an absolute nullity.

"Item ipse tutor et emptoris et venditor is officio fungi non potest." Dig. Lib. 26 Tit. 8 l. 5 Sect. 2. § 3. Domat. Lib. 2. Tit. 1. Sect. 3. § 16. The tutor cannot buy what belongs to the minor. Meslé, p. 184, Cap. 9.

An agent employed to buy cotton, cannot take cotton which he holds for sale himself as a commission merchant to fill the order. This is not that concurrence of *two* minds *aggregatio mentium*, which is essential to the contract.

Beal v. McKiernan, 6 Louis. R. 417. The leading case in Louisiana.

An agent who has been employed to purchase slaves, cannot purchase from himself either in his personal capacity, or as administrator of the estate of another. Brownson v. Fenwick, 19 L. 431. Baldwin v. Carleton, 15 L. R., 398. Macarty v. Bond. 9 Louis: p. 355.

"The question here is not whether a sale ought to be avoided as fraudulent, but whether a contract of sale is shown to exist. Without parties capable of contracting, there can be no contract: without a vendee capable of purchasing, there is no sale. We are of opinion there has been no sale of the property because the administrator is incapable of purchasing either directly or by interposition of a third party."

Dunlop's Paley's Agency, 3rd Amer. Edn., A. D. 1847.

[33] It is a fundamental rule, applicable to both sales and purchases, that an agent employed to sell, cannot make himself the purchaser; nor if employed to purchase, can he be himself the seller. The expediency and justice of this rule are too obvious to require explanation. For with whatever fairness he may deal between himself and his employer, yet he is no longer that which his service requires, and his principal supposes and retains him to be,—he acts not as an agent, but as an umpire."

Id.: [37.] "It has been said that the same principle operates upon agents employed to purchase. The undertaking of an agent employed at a certain commission or salary to purchase for the use of his principal is to buy in the most

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beneficial manner for him; and therefore it is declared to be contrary to the duty and trust of a person in that situation to be himself the seller unless it be so understood by plain and express consent. It is obvious that the character of a seller is incompatible with diligence and exertion in obtaining goods at the lowest price.

In a note to the above the judgment of Lord Langdale, M. R., in the case of Gillett v. Peppercorne, 3 Beavan, 78 is given, wherein (*inter alia*) his Lordship remarked:

"When a man employs another as his agent, it is on the faith that such agent will act in the matter purely and disinterestedly for the benefit of his employer; and assuredly not with the notion that the person whose assistance is required as agent, has himself, in the very transaction, an interest directly opposite to that of his principal. It frequently, I believe, happens that the same person is agent for both parties, in which case he holds an even hand, and acts in one sense as arbitrator between them; but if a person employed as agent on account of his skill and knowledge is to have in the very same transaction an interest directly opposite to that of his employer, it is evident that the relation between the parties then becomes of such a nature as must inevitably lead to continued disappointment if not to the continued practice of fraud. I am of opinion that these transactions cannot be supported. Not only are they in themselves so extremely likely to lead to the commission of fraud, *as to make them directly against the policy of the law*; but in those cases which have occasionally come to the knowledge of the Court, and which fortunately have not been frequent, it has invariably been found that fraud has been the result of such transactions. It is not necessary to show that fraud was intended or that loss afterwards took place in consequence of these transactions, because the defendant, though he might have entertained no intention whatever of fraud, was placed in such a situation of trust with regard to the plaintiff, that the transaction cannot in the contemplation of this Court be considered valid."

It is important to notice that the defendant is not a gratuitous mandatory, but is paid for his services at the rate of 5 per cent. on his collections.

Further, even if the judgment is in any respect a correct one which the Appellant humbly represents cannot be maintained, yet it is certainly defective in not condemning the defendant as regards £300 balance uninvested by him of the principal sum of £3300, for it is to be borne in mind that the security due by Messrs. Badgley and Abbott is only £3000.

The respondent by his pleadings has contended that he cannot be made liable in the present action for the sum of £217 11s. 5d. interest on the principal sum of £3300 received by him from the sheriff, along with the larger sum on the 15th February, 1848. But assuming that his duties as curator did not embrace this interest, still the defendant chose to take it with the sum of £3300 paid to him as curator, and having received it, it would be a useless circuity of action to compel the appellant to take out another action against Taylor the individual. Such a technical objection will find no favour in this Court, provided the substantial rights of the parties are protected. The Court will also remark that the condemnation sought against the defendant by the *débats de compte* is as well in

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his personal name as in his capacity of curator. This condemnation will be perfectly regular if the views of the appellant are approved by this Court, and the respondent ordered at once to answer for his intro-missions as regards the interest on the entire sum of £3517 11 5 withheld from the plaintiff.

Stuart, Q. C., for the respondent argued as follows:

The pretensions of the respondent, which were admitted by the judgment of the Court below, were: That the defendant in his quality of curator, could only legally receive from the sheriff the sum of £3,300; that he was unable to obtain a safe investment for a very considerable period of time, during which period of time he himself paid the interest regularly, commencing at the expiration of the six months after the receipt of the money, viz:—on the 15th August, 1848,—he being by law exonerated from the payment of interest for six months, being the the period of time fixed as affording sufficient delay to the trustee to seek for and obtain satisfactory security for the trust funds. The plaintiff, however, made an attempt to establish by evidence that the defendant had converted these funds to his use, and was under the impression that he had succeeded in so doing when he produced the Bank clerks to shew the condition of his private account, which it would appear had in the Bank of Montreal been diminished or exhausted by cheques, at different intervals during the six months. The respondent believes that this scrutiny of the private affairs of a depositor by a creditor, and the granting of such information by the Bank clerks, is wholly unwarrantable and illegal, and that this testimony ought to be set aside. In England, trust funds must be kept in some public institution, and the absence of such deposit establishes the use by the trustee. In Canada, no such duty is imposed upon the trustee, and he may carry the funds in his pocket, or place them in his safe, and transfer them from one place to the other as often as he may please, without being compelled to pay interest for the same until the expiration of the six months—the exception being, that if the money be invested within that time, the trustee cannot pretend that the interest paid him for the period of the six months by the borrower should belong to him—but on the contrary he is bound to account to his ward for the same. In the present case no investment was made until long after the six months, and no legal proof was adduced of the use of the money by the defendant.

That the defendant had transferred on the 8th April, 1854, to Mrs. McGillivray, £3,000, due by Messrs. Badgley and Abbott to him in virtue of Deed of Sale executed 14th February, 1854, payable in ten years, and that on the 20th October, 1854, the said Elizabeth McGillivray transferred the amount to the defendant, in his quality of curator. It was established that all the interest had been paid upon this amount up to the 15th August, 1855, when the plaintiff by herself and her agent collected the interest from Badgley and Abbott, and was therefore unable to state the amount of arrears.

The plaintiff having adopted the investment, so far as she could do so, by collecting the interest from the debtors, cannot be permitted to set up the nullity of the transfer; but under no circumstances could she be allowed to do so. Her father having by his will declared her incompetent to invest the money, she cannot complain of the investment and demand its avoidance. The only and

proper course to have been adopted—presuming that she believed the tale of injustice which she mentioned in the Court below—was to have complained to the tribunals of the conduct of the curator, and demanding that another should be substituted in his place. If her complaint had been well founded, another curator would have been substituted, who, as proprietor, could have objected to the investment, and prayed that it should be declared null and void. In the present suit, the deed of transfer to the defendant as curator cannot be avoided, so that the answer to this action is complete, and the judgment of the Court below must be confirmed. If any other view were to be entertained, deeds between Badgley and Abbott, the purchasers of real estate and the debtors for the price and Mrs. McGillivray the assignee, would be set aside, without their being parties to the present suit, a proceeding so entirely novel and unwarrantable, that it is somewhat surprising that this Court should be called upon to reverse the judgment of the Court below upon this point.

Though it should be admitted, for the sake of argument, that these deeds could be set aside, if all the parties were in the cause and at the instance of the new curator, it would be impossible to do so in the present instance. The investment, if accepted by the new curator, would be valid; if set aside without his authority and the defendant were to become insolvent, a valuable security would have been withdrawn from the ultimate legatees at the instance of the plaintiff, having no authority or capacity to decide upon the legality or sufficiency of the investment made or to be made by her curator. Her interest is limited to the removal of an unfit curator, to be replaced by another, responsible for his management of the trust funds. With reference to the balance of £300 remaining in the defendant's hands, the interest has always been regularly paid to the plaintiff, and, it is believed, does not form part of the present contestation.

With reference to the £210 1s. 5d., amount received by the defendant in his private character, it will be sufficient to account for this amount when an action is instituted for the same. It is only necessary to add that this amount was handed over to Taylor and Hartly, the then advocates of the plaintiff, and it is presumed that the same has been paid by that firm, if not absorbed by legal costs.

MEREDITH, J., gave the judgment of the Court.

The plaintiff, widow of William Cowie, sued the defendant, in his quality of curator to the substitution created by the will of her father the late Alexander McKenzie, bearing date 10th February, 1830. By that will the testator gave to his executors, Simpson, McNider and Tait, and the survivor of them, as trustees, the sum of £1100 which he had of stock in the Hudson Bay Company; the usufruct whereof to belong to his son John George McKenzie, and at his decease, the property to belong to his children; and in case the said John G. McKenzie should die without children, then, the said stock should revert to his said executors, in trust for the plaintiff and her children. Alexander McKenzie, the testator, died in July, 1830; McNider and Tait accepted the office of executors; and Simpson renounced the charge. William Cowie, the plaintiff's husband, died in 1836, and the said John George McKenzie in June

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1838, without children, and thereby the £1100 Hudson Bay Company stock became the usufruct property of the plaintiff. Upon McNider's death, Tait, as surviving executor, realized the Hudson Bay Company stock for £3300, which he received. The plaintiff sued Tait to render account, and obtained judgment, and afterwards in a case of Frosto et al., vs. Tait, in which the plaintiff was opposant as well in her own name as in her quality of Tutrix to her children she was collocated for £3510 1s. 5d. *id est* £3300. as the proceeds of the Hudson's Bay Company stock realized, and £210 1s. 5d. being the interest thereon from 1st July, 1844, to 24th July, 1845, as by judgment of collocation of 29th January, 1848.

On the 15th February, 1848, the defendant Taylor was appointed curator to the substitution created by the testator's will, and having accepted that office, the defendant on the day of his appointment received the full sum of £3510 1s. 5d. The declaration alleges that the defendant never rendered any account, and never paid the interest due and that the defendant has converted the said sum of £3510 1s. 5d. to his own use and profit. It would be tedious, and I think unnecessary to refer in detail to the pleadings—I shall therefore proceed at once to state succinctly my views respecting each of the more important points submitted for our consideration. It is to be recollected that the sum of £3510 1s. 5d. received by defendant was composed of £3300 capital which belonged to the trust, and of £210 1s. 5d. being arrears of interest. As to the sum of £210 1s. 5d., we all hold that that sum was due by the defendant personally, to the said plaintiff, and cannot enter his account as curator. Therefore judgment cannot go against the defendant personally for that amount in this action, which is brought for moneys received by defendant in his capacity as curator. The next question is as to whether the defendant is liable to pay interest upon the trust funds received by him before the expiration of six months from the time of the receipt of those funds. We hold that the law does allow a tutor or curator six months to find an investment; but we also hold that from the moment he uses, for his own profit, the money coming into his hands as tutor or curator, however soon that may be after his appointment, he is liable for interest thereon. In the present case it appears that as soon as the defendant received the sum of £3510 1s. 5d. already spoken of, namely: on the 15th February, 1848, he deposited the whole sum to the credit of his own account, as a private individual, in the Bank of British North America. When he made this deposit the defendant had at his credit £1140 17s. 11d. In less than a month, namely, on the 11th March, 1848, the defendant had withdrawn by cheques the whole of his own money, and had begun to use the trust fund. In less than another month from the time at which the trust fund was so commenced to be used, the defendant, by numerous cheques drawn, from day to day in his own name, made use of that fund to the extent of £2590 12s. 5d. cy. and in less than three months, he had used the whole of the remainder of that fund excepting £2 4s. 7d. that being the balance at his credit on the 2nd June, 1848. It has been contended, and my brother Mondelet holds, that the facts above adverted to, are not sufficient to prove that the defendant used the trust funds for his own profit. But the Chief Justice, and hree of the judges of this Court are of opinion that as the defendant deposited

the trust fund to his own credit, and afterwards, from day to day, drew out those funds as if they were his own, by cheques signed by himself, and in his own name, that it became incumbent upon him to show, if he could, that he had so drawn out the trust fund, for the purposes of the trust; and as he has not attempted to do so, and indeed could not do so, as he, in fact, made no investment for three years afterwards, the conviction forces itself upon our minds that he must have used the trust funds for his own purposes.

At the argument before us it was said that the proof adduced by the plaintiff, as to the use of the money by the defendant, might be sufficient to convince a person out of Court; but that it ought not to be held sufficient by persons discharging judicial functions. I then observed, and now repeat, that men must use their reasoning powers in Court, as they use them out of Court; and that the same degree of evidence which, out of Court, ought to satisfy a man, in matters of the utmost importance to himself, ought also to satisfy him in Court, when performing the important duties of judge or juror. Greenleaf says: "By "satisfactory evidence, which is sometimes called sufficient evidence, is intended "that amount of proof which ordinarily satisfies an unprejudiced mind beyond "reasonable doubt." The rule is laid down in the same way by all the writers on evidence. It is acted upon constantly both here and in England in the most important criminal cases; and we cannot require, in a civil case, a higher degree of evidence than is deemed necessary in cases involving life. Applying then to the present case, the rules of evidence to which I have just adverted; after a most careful examination of the proof adduced, I must say it removes from my mind all reasonable doubt as to the defendant having used the trust fund, for his own benefit, and it is therefore my duty to act upon that evidence, and to concur in the judgment which holds the defendant liable for interest from the time he so began to use the trust funds. I now pass to the consideration of the question, is the defendant liable for interest on the sum of £3000 subsequently to the time at which he alleges he invested it?

The contention on the part of the defendant is, that in order to invest the said sum of £3000, he, individually, transferred a *bailleur de fonds* claim amounting to £3000 to Dame Elizabeth McGillivray; and that that lady afterwards transferred the same *bailleur de fonds* claim to him, in his capacity of curator, in consideration of £3000 paid from the trust fund—and it is contended that the said sum of £3000 in that way, due by Messrs. Badgley & Abbott and became invested in the said *bailleur de fonds* claim, and therefore that the defendant personally is not liable for the interest. It is proved however that Elizabeth McGillivray gave no consideration for the transfer made to her by the defendant, as an individual; and that she received no consideration for the transfer made by her to defendant as curator; the fact being beyond doubt that she was a mere *prête-nom* in the matter. The defendant, therefore, very properly admitted that the sole object of the transfer from him individually to Dame Elizabeth McGillivray was to vest the said sum of £3000 in him as curator. So that the matter reduced itself to this—that the defendant, as curator paid to himself as an individual, from the trust fund in his possession £3000 currency, and thereupon as an individual he transferred to himself, as a curator, the said *bailleur de fonds* claim of £3000.

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The arrangement thus attempted to be made is liable to two objections. In the first place it is proved that the property upon which the *bailleur de fonds* claim rests is not worth £3000; and in the second place, it was, in a legal point of view impossible for the defendant as a curator to buy, with trust funds, from himself, as an individual, a debt due to himself. Even where there is no trust involved, the fundamental and well known rule is that an agent employed to sell cannot be himself the buyer. And with respect to cases such as the present, the rule has often been laid down, in effect, as follows: "that where an agent has duties of a fiduciary character to perform towards his principal, he shall not be allowed to enter into engagements in which he has or can have a personal interest conflicting, or which possibly may conflict, with the interests of those he is bound to protect."

This rule is founded upon the plainest principles of justice. It has its origin in the Roman law, has the sanction of the leading authorities in the French law, and is constantly acted upon by the Court of Chancery in England; and I deem it one of our most important duties to see it strictly enforced, as being absolutely necessary for the protection of the interests of minors and others whose property is entrusted to the care of tutors and curators and other like officers. It is not however necessary in this case to dwell upon this point, or to cite authorities respecting it; because, it was not contended, and, indeed was not likely to be contended, by the learned counsel who argued the cause, that the defendant could, as an individual, sell to himself as curator, the *bailleur de fonds* claim in question. The points, I believe, really relied on were—that the transfers complained of, although they might be voidable, were not void; that they could not be set aside in the absence of several of the parties interested; and that until set aside they must be held valid as against all the parties. This is the part of the case that has presented the greatest difficulty to my mind. I readily admit that, as a general rule, a deed cannot be set aside in the absence of any of the parties interested. Nevertheless I do not think that a curator who enters into an illegal contract with respect to the trust fund in his hands, *can* be allowed to avail himself of that contract, to the prejudice of those whose interests he was bound to protect.

The plaintiff has plainly a legal right to the interest which she claims, and the defendant, who was bound to protect her rights, cannot be allowed to allege his own illegal act so as to defeat or retard the enforcement of those rights. It has been said that the defendant would be subject to great loss and inconvenience if he were required to pay the interest himself without the deeds being set aside; but we think it fitting that the loss or inconvenience resulting from the passing of the illegal acts in question should be borne by the party responsible for the execution of those acts, rather than by the plaintiff whose interests were under his care.

The judgment in appeal was recorded in the following words:

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 filed by the appellant and the answers thereto, and mature deliberation on the whole being had:

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Considering that in the judgment of the Court below, in so far as it dismisses the demand of the plaintiff for the sum of two hundred and seventeen pounds, eleven shillings and five pence currency, mentioned in the pleadings in this cause, and in the said judgment, there is no error, doth confirm the said judgment in so far as regards the said sum of two hundred and seventeen pounds, eleven shillings and five pence currency.

And seeing that it is established that the defendant in his quality of curator to the substitution created by the last will and testament of the late Alexander McKenzie, mentioned in the said pleadings, on the fifteenth day of February, one thousand eight hundred and forty-eight, received from the sheriff of the District of Montreal, the sum of three thousand three hundred pounds, mentioned in the plaintiff's declaration; and that the defendant, on the same day, deposited the said sum of three thousand three hundred pounds, and also two hundred and seventeen pounds eleven shillings and five pence, in the Bank of Montreal, to the credit of his own private account; seeing that immediately before the said defendant so deposited the said trust funds amounting to three thousand three hundred pounds, to the credit of his own private account, the balance at his credit in the said Bank was eleven hundred and forty pounds seventeen shillings and eleven pence currency; and that within one month from the date at which the said deposit was so made, namely on the fourteenth day of March, one thousand eight hundred and forty-eight, the defendant had withdrawn from the said Bank the whole of his own funds, and had begun to use the said trust fund by drawing cheques in his own name individually, payable out of the said trust fund; seeing that within one month from the time when the said defendant began so to use the said trust funds, namely on the thirteenth day of April, one thousand eight hundred and forty-eight, he had by means of various cheques, in his own name individually, used the said trust funds to the extent of two thousand five hundred and ninety pounds, twelve shillings and five pence currency; and that within three months from the time of which the defendant so began to use the said trust funds, namely on the second day of June, one thousand eight hundred and forty-eight, he had in the same manner used the whole of the said trust funds excepting only two pounds, four shillings and seven pence —as the whole appears by the account filed in this cause, on the fourth day of March, one thousand eight hundred and sixty-two, marked with the letter A.

Considering therefore that the defendant is liable to pay interest on the said trust funds amounting to three thousand three hundred pounds from the time at which he so began to use the same, to wit, from the fourteenth day of March one thousand eight hundred and forty-eight, and that in the judgment of the Court below, declaring that the defendant had a right to hold the said trust funds, until the fifteenth day of August, one thousand eight hundred and forty-eight, without paying interest for the same, there is error;

And considering—with reference to the deed bearing date the twentieth day of April, one thousand eight hundred and fifty-four, by which the defendant transferred to Dame Elizabeth McGillivray, three thousand pounds, due to him by Messrs. Badgley and Abbott, under deed of sale bearing date the fourteenth day of February, one thousand eight hundred and fifty-four—that the defendant

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hath expressly admitted that the said transfer was made to the said Dame Elizabeth McGillivray without any consideration therefor having been paid by her,—and that the defendant hath also admitted that the transfer subsequently made by the said Elizabeth McGillivray of the last mentioned debt of three thousand pounds, to the defendant, in his said capacity of curator, was also made without any consideration having been received by her; and seeing that the defendant in answer to the twenty-sixth interrogatory submitted to him hath said: "The sole object of the transfer from me individually to the said Dame "Elizabeth McGillivray was to vest the said sum of three thousand pounds, in "me as curator to the substitution under the will of the said Alexander "McKensie;"

And considering therefore that it is manifest that the said Dame Elizabeth McGillivray had no real interest in the said transfers, and was merely a *prete-nom* in relation thereto;

And considering that the defendant in his said capacity as curator, could not purchase from himself individually and in his own right, the said debt of three thousand pounds—and that he could not indirectly, with the assistance of a *prete-nom*, do an act which he could not do directly in his own name—and therefore that the said two transfers are illegal and not binding upon the said plaintiff, who, moreover, is not proved to have acquiesced in the same;

And considering that the defendant, by alleging his own illegal acts, namely, the execution of the said two deeds of transfer, cannot defeat or delay the plaintiff in the exercise of her lawful rights against him; and therefore that in the judgment of the Court below maintaining the exception of the defendant founded upon the said two deeds of transfer, there is error—the Court doth in consequence reverse the judgment complained of, to wit:

The judgment rendered by the Superior Court at Montreal, in this cause, on the thirty-first day of October, one thousand eight hundred and sixty-two, excepting only in so far as it has been hereinbefore in part confirmed; and proceeding to render the judgment which the Court below ought to have rendered in the premises, doth dismiss the peremptory exception in this cause filed by the defendant on the third day of June, one thousand eight hundred and sixty-one, and doth maintain the *débats de compte* in this cause filed by the plaintiff in so far as regards her claim for interest on the said sum of three thousand three hundred pounds from the time the defendant so began to use the same as aforesaid, to wit, the fourteenth day of March, one thousand eight hundred and forty-eight, and also in so far as regards the balance of interest due to the plaintiff from the said fifteenth day of August, one thousand eight hundred and forty-eight, until the thirteenth day of September, one thousand eight hundred and sixty: And the Court doth in consequence condemn the defendant, as well individually and personally, as in his capacity as curator to the said substitution, to pay to the plaintiff the sum of four hundred and sixty-four pounds three shillings and one penny currency, that is to say eihgty-two pounds, ten shillings, currency, being interest on the said sum of three thousand, three hundred pounds, from the fourteenth day of March, one thousand eight hundred and forty-eight, when the said defendant so began to use the same, until the fifteenth day of August, one

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thousand eight hundred and forty-eight, and three hundred and eighty-one pounds, thirteen shillings and one penny currency, being the balance of the interest due upon the said sum of three thousand three hundred pounds from the said fifteenth day of August, one thousand eight hundred and forty-eight, until the thirteenth day of September, one thousand eight hundred and sixty, after deducting the commission charged by the defendant, and not contested by the plaintiff.

And the Court doth condemn the defendant to pay to the plaintiff interest on the said sum of four hundred and sixty-four pounds, three shillings, and one penny, from the thirteenth day of September one thousand eight hundred and sixty, date of the service of process in this cause until paid; and costs of suit, as well in this Court as in the Court below: and the Court doth reserve to the said plaintiff her recourse against the said defendant for the recovery of the above mentioned sum of two hundred and seventeen pounds eleven shillings and five pence currency.

(The Honorable Mr. Assistant Judge Mondelet, dissenting.)

Judgment reversed.

Torrance & Morris, for appellants.
H. Stuart, for respondent.
(F. W. T.)

MONTREAL, 7TH JUNE, 1865.

Coram DUVAL, C. J., AYLWIN, J., DRUMMOND, J., MONDELET, J.

JOHN U. GREGORY

Defendant in the Court below,

AND APPELLANT.

HENRY W. IRELAND

Plaintiff in the Court below,

RESPONDENT.

HELD:—An affidavit, on which a writ of *capias ad respondendum* issued, is sufficient if it contains all the allegations required by the statute, although in a different order.

This was an appeal from the following judgment rendered by the Superior Court, District of Montreal, dismissing the appellant's petition to be released from custody under a writ of *Capias ad Respondendum*. "La Cour après avoir "entendu les parties par leurs avocats sur la Requête du dit John U. Gregory, "le defendeur, demandant que le Bref de *Capais ad Respondendum* emané de "cette cour contre la personne du dit défendeur et Requérant, a été émané de "cette cour en l'absence de toute cause légale; que l'affidavit sur lequel le dit "bref de *capias ad respondendum* a été émané soit declaré illégal, insuffisant et "comme non avenu, qu'il soit dit et déclaré que le dit bref de *capias ad respon-* "*dendum* a été émané de cette cour contrairement à la loi; qu'icelui soit déclaré "illegal, nul et de nul effet, cassé, annullé et mis au néant le tout avec depens "contre le demandeur et que main levée soit donnée au défendeur du dit bref "de *capias ad respondendum* et que le dit defendeur soit libéré de son incar- "ceration; avoir examiné la procédure et le temoignage et avoir délibéré, a

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"rejeté et rejette la dite Requête faute de preuve des allégués de la dite "Requête, avec dépens distraits a M. John L. Morris, avocat du demandeur."

The following is the affidavit on which the writ of *capias* issued :—

Henry W. Ireland, of the City and District of Montreal, Merchant, the above plaintiff being duly sworn, doth depose and say :—That John U. Gregory, heretofore of the said City of Montreal, Commission Merchant and Auctioneer, doing business there as such in co-partnership with one Robert K. Blackwood, under the name and firm of John Gregory & Co., and presently in the City of Quebec, in Lower Canada, is justly, and truly, and personally indebted to this deponent in a sum exceeding $40, to wit in the sum of $596.15, being $545 for principal, $11.15 for interest on $445 from the 8th of April last, and on $100 from the 23rd of March last, and $40 as and for the costs of obtaining judgment as hereinafter mentioned; which sum, interest and costs are due under and by virtue of a judgment of the Superior Court for Lower Canada, sitting in and for the District of Montreal, rendered on the 27th day of May last, in a certain cause bearing the number 2134 among the records of the said Court, wherein this deponent was plaintiff, and the said defendant and the said Robert K. Blackwood were defendants, by which judgment the said defendants were jointly and severally condemned and adjudged to pay and satisfy to the plaintiff the sum of $545 with interest on $445 from the 8th day of April last, and on $100 from the 23rd day of March last, and the costs of the said suit, amounting to $40.

And this deponent saith that he hath reason to believe that the said John U. Gregory is *immediately* about to leave the Province of Canada, and to abscond with the intent to defraud this deponent, and that without the benefit of a Writ of Attachment to take and detain the body of the said John U. Gregory, this deponent will lose his debt and sustain damage.

And this deponent saith as follows, as regards the grounds of his said belief: that on or about the 12th day of April last, and while the suit hereinbefore mentioned was pending, the said John U. Gregory secretly and fraudulently, and with intent to defraud this deponent, did abscond from, and leave the Province of Canada, without making any settlement whatever of his debt to this deponent, or to his other creditors, and did go, as this deponent is credibly informed, to the United States of America, to wit, to the City of New York; that after such departure of the said John U. Gregory, the said Robert K. Blackwood did make a notarial assignment of certain goods, credits and effects belonging to the said firm of John U. Gregory & Co., by deed of assignment passed before Easton and Colleague, Notaries, on the 15th of April last, to three assignees, of whom this deponent was one: that nearly all of said goods, credits and effects have been realized, but no dividend has yet been declared, but this deponent is aware that the proceeds are not sufficient to pay more than two shillings in the pound to the creditors of the said firm of John U. Gregory & Co.: that the said John U. Gregory never joined in any assignment of property to this deponent, or assignees for his benefit as a creditor, nor has he made any offer of settlement whatever to this deponent, or, as this deponent believes, to his other creditors, but on the contrary, secretly and fraudulently left this Province as aforesaid to avoid his creditors; that the said John U. Gregory has come back from the United States,

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and is now in the said City of Quebec, or in its neighborhood, but that he has no domicile, nor is he doing any business in Canada, and is likely at any moment to return to the United States; that since his return to Canada the said John U. Gregory, has made no offer of settlement to this deponent, nor so far as he can learn, to any of his other creditors, and that this deponent hath good reason to believe and doth verily and in his conscience believe that the said John U. Gregory intends and is about again to abscond and depart from the Province of Canada with intent to defraud this deponent and his other creditors.

Cassidy F., in support of the appeal submitted

L'affidavit sur lequel est émané le bref de capias ad respondendum ne contient pas les énonciations et déclarations exigées par la loi. D'après la section 1ère, chap. 87 des statuts refondus du Bas-Canada, la personne qui désire obtenir l'émanation d'un capias ad respondendum contre son débiteur, qui est sur le point de quitter incontinent la Province, doit déclarer sous serment, *qu'elle a raison de croire et croit véritablement* qu'il est immédiatement sur le point de quitter la Province, et donner les raisons qui motivent une telle croyance. Dans l'espèce actuelle le Déposant (Intimé) se contente de déclarer *qu'il a raison de croire* au départ de l'Appellant, il ne dit pas qu'il croit véritablement à ce départ; il nous semble que cette omission est fatale. Cette allégation qui a été omise était essentielle, non-seulement elle était exigée par la section du statut qui vient d'être citée, mais encore elle est mentionnée comme requise dans la formule prescrite par le statut, voir à la suite de la section 216 du chap. 83 des statuts refondus du Bas-Canada, où cette formule est rapportée.

Dans les raisons spéciales que l'Intimé énonce pour justifier sa croyance, il est vrai qu'il dit qu'il a raison de croire et croit véritablement que l'Appellant est sur le point de quitter la Province, mais il est à remarquer que ces raisons spéciales ne constituent pas l'affidavit, elle n'ent sont que la justification, par conséquent l'Intimé ne peut se fonder sur ces raisons pour parer à l'insuffisance de son affidavit.

D'ailleurs cette partie de ses raisons spéciales n'est pas en conformité au statut, car il n'y est pas dit que l'Appelant est *immédiatement* sur le point de quitter la Province, le mot *immédiatement* est omis. Ainsi dans ce dernier cas comme dans le premier, l'Intimé ne s'est pas conformé à la loi; l'Appellant devait donc obtenir le rejet du capias d'après ces seuls moyens.

L'Appellant est confiant que ce tribunal trouvera que la cour de premier instance a mal jugé et qu'il sera réintégré dans ses droits.

Morris J. L., for Respondent submitted that all the material allegations required by the statute were contained in the affidavit, which was, therefore, sufficient.

DUVAL, C. J. The appellant seems to have been misled by a repetition in the affidavit. Few grosser cases of fraud have come up and the Court are unanimous in confirming the judgment of the court below.

DRUMMOND, J., would have been inclined to dismiss the action if he had been alone. There were irregularities in the affidavit. The form of affidavit given in the statute had not been strictly followed, and in cases of the description of the present one he was inclined to hold parties to the letter of the law. How-

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ever, he did not feel called upon to dissent from the majority of the Court, as the case was one which exhibited great fraud. He made these remarks principally for the purpose of being understood, so that if another case arose of a similar kind, he should not be thought inconsistent if he were to take a different position from the one he now appeared to take by concurring in the judgment.

Judgment confirmed.

Leblanc & Cassidy, for Appellant.
John L. Morris, for Respondent.
(J.L.M.)

MONTREAL, 7TH JUNE, 1865.

Coram, DUVAL, C. J., AYLWIN, J., DRUMMOND, J., MONDELET, J.

JOHN U. GREGORY

Defendant in Court below,
APPELLANT;

THE BOSTON AND SANDWICH GLASS COMPANY

Plaintiffs in Court below,
RESPONDENTS.

HELD:—1st. That the cause of action was sufficiently set forth in an affidavit on which a writ of *capias ad respondendum* issued where it alleged that the deponent was agent at Montreal of the plaintiffs and that the defendant was justly, truly and personally indebted to the plaintiffs in a sum exceeding forty dollars, to wit, in the sum of \$2,500, being as and for the price and a value of a large quantity of glass sold by the deponent as agent of the plaintiff to the defendant.

2nd. That where the contracts for the sale of goods were made with defendants in Montreal through the agent in Montreal of the plaintiffs, who were a foreign Company, and the invoices were sent to the agent, so that the defendants could not have got the goods from the Custom house in Montreal without applying to the agent, but where they were at defendant's risk the moment they were placed on the railroad at Boston; the cause of action did not arise in a foreign country.

The proceedings in this cause were commenced by a Writ of *Capias ad respondendum* issued against the defendant on the following affidavit:—

PROVINCE OF CANADA, }
District of Montreal. } SUPERIOR COURT.

"The Boston and Sandwich Glass Company, a body politic and corporate, having a legal capacity in the State of Massachusetts, one of the United States of America, doing business at the City of Boston, in the said State, as Manufacturers of Glass, *plaintiffs*; and

John U. Gregory, heretofore of the City of Montreal, Commission Merchant and Auctioneer, doing business there as such in copartnership with one Robert K. Blackwood, under the name and firm of John Gregory & Co., *defendant*.

"FREDERICK W. HENSHAW, of the city and district of Montreal, commission merchant, being duly sworn, deposeth and saith: that he is agent in Montreal of the said Boston and Sandwich Glass Company, a body corporate and politic above described, and doing business as above described: that the said John U. Gregory above described, and now in the City of Quebec, is justly and truly, and personally indebted to the said Boston and Sandwich Glass Company in a sum exceeding forty dollars, to wit, in the sum of twenty five hundred dollars, being as and for the price and value of a large quantity of glass sold by this deponent

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as agent for the said plaintiffs, to the said firm of John Gregory & Co., composed of the said John U. Gregory and the said Robert K. Blackwood above described; and this deponent saith that he hath reason to believe, and doth verily believe, that the said John U. Gregory is immediately about to leave the Province of Canada, and to abscond with the intent to defraud his creditors generally, and this deponent in particular; and that without the benefit of a writ of attachment to take and detain the body of the said John U. Gregory, the said plaintiffs will lose their said debt, and sustain damage. And this deponent urges as follows, as the ground of his said belief:—That on or about the twelfth day of April last, and while this debt was due to the said plaintiffs by the said defendant, the said John U. Gregory secretly and fraudulently, and with intent to defraud the said plaintiffs, did abscond from and leave the Province of Canada, without making any settlement whatever of his debt with the plaintiffs or with his other creditors, and did go, as this deponent is credibly informed, to the United States of America, to wit, to the City of New York; that after such departure of the said John U. Gregory, the said Robert K. Blackwood did make a notarial assignment of certain goods, credits, and effects belonging to the said firm of John Gregory & Co., by deed of assignment passed before Easton & Colleague, Notaries, on the 16th day of April last, to three assignees, of whom this deponent was one: that nearly all of said goods, credits, and effects have been realized, but no dividend has yet been declared; but this deponent is aware that the proceeds are not sufficient to pay more than two shillings in the pound to the creditors of the said firm of John Gregory & Co.; that the said John U. Gregory never joined in any assignment of property to this deponent, as one of said assignees, or to assignees for his benefit, or for the benefit of the plaintiffs as his creditors; nor has the said John U. Gregory made any offer of settlement to the said plaintiffs, or, as this deponent believes, to his other creditors; but, on the contrary, secretly and fraudulently left this Province as aforesaid to avoid his creditors, and did secrete his effects, with intention of defrauding the said plaintiffs; that the said John U. Gregory has returned from the United States, and is now in the City of Quebec, or in its neighborhood, but that he has no domicile, not is he doing any business in Canada, and is likely at any moment to return to the United States; that since the return of the said John U. Gregory to Canada, he has not made any offer of settlement with the said plaintiffs, or with this deponent, as their agent, nor, so far as this deponent can learn, with any other of his creditors: and that this deponent hath good reason to believe, and doth verily and in his conscience believe that the said John U. Gregory intends and is about again to abscond and depart from the Province of Canada, with intent to defraud the plaintiffs and his other creditors.

(Signed) F. W. HENSHAW.

Sworn before us at Montreal, this twenty-fourth day of September, eighteen hundred and sixty-three.

(Signed) MONK, COFFIN, & PAPINEAU, P. S. C.

The defendant was arrested in Quebec.

The declaration set forth that the glassware, for which the debt was contracted

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was sold in Montreal by F. W. Henshaw, plaintiffs' agent, to the firm of John Gregory & Co., of which the defendant was a member.

A petition to quash the *capias* was presented by defendant's counsel, based on the following grounds:—

That the allegations of the affidavit were insufficient to justify the issuing of a *capias* against the defendant:

1st. Because in law the plaintiffs' agent had no right to take the oath on which the writ of *capias* was issued; that it was only the clerk or legal attorney of the plaintiffs who had a right to take the oath.

2nd. Because in the affidavit on which the writ issued, it was not alleged in what country the debt due the plaintiffs was contracted.

3rd. Because none of the reasons in the affidavit were sufficient to justify the belief therein expressed; and in the said petition the defendant alleged that the debt in question had been contracted in Boston, and the defendant could not be arrested for a debt contracted in a foreign country.

At *enquete* F. W. Henshaw, Esq., plaintiffs' agent, stated:

The glassware in question in this cause was bought from him personally as agent of the plaintiffs in Montreal. All the contracts were made with him personally. The goods were conveyed from the City of Boston in the State of Massachusetts at the defendant's risk. The cost of freight is always paid by the purchaser, and the goods considered delivered when they are duly handed over to the Railway Company for transportation to Montreal. Invoices of the goods in question were always sent direct to him by plaintiffs, as being responsible to them; and the defendant could not have received the goods in any case or passed them through the Custom House in Montreal without his consent. The plaintiffs always looked to him for payment.

The following was the judgment appealed from:

La cour après avoir entendu les parties par leurs avocats sur la rêquete du dit John U. Grégory, le défendeur en cette cause, demandant que l'affidavit sur lequel est émané le bref de *capias ad respondendum* contre le dit réquérant, soit déclaré insuffisant, illégal, nul et de nul effet, cassé, annulé et mis au néant, et main levée soit donnée d'icelui au défendeur, et que ce dernier soit libéré de sa dite incarcération et mis en liberté, avoir examiné la procédure et le témoignage en cette cause, et avoir délibéré, a rejeté et rejete la dite requête, faute de preuve des allégués, avec dépens.

Cassidy F., for appellant, invoked the following reasons of appeal:

1°. La créance en question a été créée en pays étranger, cela est constaté par la preuve.

2°. L'Affidavit est insuffisant vu qu'il n'y est pas déclaré en quel pays la créance a originé: l'intimée étant une corporation étrangère, on doit présumer qu'elle a vendu ses marchandises à Boston où se trouvait le siége de ses affaires.

3°. L'appelant lors de son départ du Canada, en avril 1863, n'a point soustrait ses biens aux recherches de ses créanciers; ces derniers ont été mis en possession de tels biens par Blackwood, son associé. Le seul fait du départ de l'appelant n'a point constitué de sa part un acte de fraude.

4°. L'intimée en alléguant, dans les raisons spéciales contenues dans son

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affidavit, que l'appelant, au mois d'avril, 1863, avait caché ses effets, n'a pas allégué suffisamment, elle était obligée de déclarer en quoi ce recel avait consisté, afin de fournir à l'appelant l'occasion de contredire ou expliquer ce fait mis à sa charge.

5°. Le retour de l'appelant à son ancien domicile au Canada, opéré trois mois après son départ, doit faire présumer que son intention lors de son départ, était de revenir, et par conséquent a dû faire disparaître tout indice suspect auquel sa conduite avait pu donner lieu.

Morris, J. L., for respondents, submitted.

The first point relied upon by the appellant is

"That the debt in question originated in a foreign country; as appears by the proof."

Were this first reason of appeal true and supported by the evidence, the appeal would be well founded.

But it is untrue that the evidence proves the debt to have been contracted in a foreign country; on the contrary it shows clearly that it was contracted in Montreal. *Vide* the evidence of W. F. Henshaw, such answers as the following settle the question: "I consider the sale was entirely made and concluded by me in Montreal and that the goods would not have been sent to Gregory & Co. without my orders.

Question.—Did said John Gregory & Company buy said goods from you personally or from the plaintiff.

Answer.—They bought them from me personally as agent of the plaintiff.

And in cross-examination Henshaw says that the contracts for the purchase of the said goods were made in the city of Montreal with him personally. Payments for the goods were made to Henshaw in person in Montreal.

Probably the appellant relies on proving that the deliveries were made in Boston, and that therefore the whole cause of action did not arise in Montreal, but even that is not borne out by the evidence. It is true that Henshaw says that the goods were conveyed from Boston to Montreal at appellant's risk, that the cost of freight is always paid by the purchaser, and the goods are considered delivered when handed over to the R. Co. for transportation to Montreal. But he also says that invoices were always sent direct to him, as responsible to them, and appellant could not have received the goods or passed them through the Custom House in Montreal without his consent.

The evidence of Blackwood confirms this—in so far as it is favorable, and as to that part which is against, it must be remembered that Blackwood was the partner of Gregory and the evidence shows that he connived at his escape. He is, therefore, unworthy of belief.

But even supposing it were proved that the deliveries were made in Boston, it does not follow from that that the cause of action arose in a foreign country. The contracts for purchase were made in Montreal, and they constituted the cause of action. It may be said they did not constitute the whole cause of action, because, they implied an agreement on the part of the seller to deliver, as well as an agreement on the part of the buyer, to pay the price. The agreement to pay depended on the fulfilment of the agreement to deliver. But the

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seller would have had the right to sue the buyer for breach of contract if he had refused to receive the goods, and where would that action have to be taken ? Surely in Montreal, where the contract was made. This is the true test.

In Jackson & Coxworthy, 12 L. C. R., p. 416, held "In an action on an obligation passed in Quebec to pay a sum of money in London, the whole cause of action arose in Quebec...."

The next point stated by the appellant as a ground of appeal is

That the affidavit is insufficient, as it is not therein declared in what country the debt originated, and the plaintiffs being a foreign corporation, the presumptions are that the goods were sold at Boston where their place of business was.

It would have been better to have stated in the affidavit the place of sale—better because it would have prevented at least part of the present argument, but yet unnecessary. There is nothing in the law requiring mention of the place of debt in the affidavit, sec. 1st of cap. 87, con. stat. L. C., requires simply the allegation that the defendant is personally indebted to the plaintiff in a sum amounting to or exceeding $40. The affidavit form A. p. 773, shews the same thing. The disclosure of the circumstances of the debt is reserved to be set forth at length in the declaration.

The evidences of fraud on the part of the defendant, as proved, are—1st. That he actually did abscond from the province of Canada, to avoid his creditors, about the 12th of April, 1862.

2nd. That just before he absconded, he secreted 9 hogsheads of glassware, belonging to the insolvent firm of John Gregory & Co., of which he was a member, by storing them, without his partner's knowledge, in a warehouse, in the name of one Moreau, a relation of his own, having first obliterated the marks on the packages, and no entry of the fact was made in the books of John Gregory & Co.

3rd. When the firm of John Gregory & Co., had suspended, he received from his partner Blackwood, a sum of over four hundred dollars, belonging to the firm, and no entry of the transaction was made in their books.

4th. He absconded to New York, and there commenced business, having purchased a grocery establishment for $400.00, being evidently the same sum which he had absconded with.

5th. Before he absconded, moneys were received by him which were never entered in the books of the firm.

6th. About the middle of August, 1863, defendant returned to Montreal, and a writ of *capias ad respondendum* was issued against him by H. W. Ireland Esq., one of his creditors. After dark, defendant went to Mr. Ireland's house, and having promised that he would attend a meeting of his creditors on the following week, and furnish information to them, induced Mr. Ireland to suspend his *capias*. Instead of attending the promised meeting, defendant secretly left Montreal; and the plaintiffs having heard that he was in Quebec, and judging from his past conduct and from his failure to keep his promises, that he was about again to abscond, had him arrested. Defendant proved that he had temporary employment in a Government office at the time of his arrest; but there is no proof that he had any domicile, and it is not likely that he would leave his

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grocery business in New York for the sake of a subordinate and temporary engagement on an election committee. The probability is, that he returned to Canada for the purpose of taking his family back with him to New York; and the temporary situation in Quebec was merely a blind intended to throw his creditors off their guard.

The evidences of fraud are so many and convincing that the respondents have every confidence that the judgment of the Court below will be confirmed.

DUVAL, C. J.—This case turned upon the question as to whether the debt was contracted in a foreign country. The Court was of opinion that the contract was entered into at Montreal. It was true the respondents' principal place of business was in a foreign country, but they also did business in Montreal through their agent there, who had contracted with appellant. As to the grounds which the plaintiffs had for making the affidavit, there could be no doubt that the facts fully justified them in doing so. The defendant had run away from the Province in a fraudulent manner. There was no doubt about that. Not only was he insolvent, and without means of paying his debts, but he carried off $400 belonging to his creditors, which sum he applied to the purchase of a grocery store in New York. He had returned, but had not met or arranged with his creditors. The fraud was very clear.

Judgment confirmed.

Leblanc & Cassidy, for appellants.
John L. Morris, for respondents.
(J. L. M.)

COUR SUPERIEURE.

MONTREAL, 19 JUIN, 1865.

Coram BERTHELOT, J.

No. 1017.

Dorion vs. Dagenais et al.

JUGÉ.—Que l'exécution d'un jugement doit être suspendue, avenant le décès du défendeur après la Saisie,—et qu'avant de continuer les procédés sur cette Saisie, le jugement doit être déclaré exécutoire contre les représentants du défendeur décédé.

Un bref de *Fieri facias* étant émané en cette cause, contre les terres, le shérif fit rapport qu'il avait saisi certaines terres et les avait annoncés en vente et qu'en conséquence du décès du défendeur, avenu depuis la saisie, il n'avait pas procédé à la vente.

Là-dessus, motion du demandeur que le retour du shérif soit mis hors de cause et qu'il soit ordonné qu'il émane un bref de *venditioni exponas*, contre l'immeuble saisi et que le shérif procède immédiatement à la vente du dit immeuble; et pour raisons à l'appui de cette motion le demandeur disait: 1° qu'il n'apparaissait pas par les documents de la cause que le défendeur fût mort, 2° qu'en supposant qu'il fût décédé, le shérif ne pouvait en loi suspendre la vente, vu que les héritiers du défendeur n'avaient aucun intérêt à être mis en cause, 3° que le shérif n'avait reçu aucune ordre de suspendre la vente,—qu'il avait au contraire

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reçu ordre du procureur d'man leur de procéder à la vente, 4° que l'immeuble avait été saisi, comme conquêt de communauté, appartenant conjointement et par indivis aux deux défendeurs, 5° qu'il n'apparaissait pas que la défenderesse, veuve du défendeur et propriétaire de la moitié indivise du dit conquêt de communauté, fût décédé, 6° que la dite vente devant avoir lieu tant sur la dite défenderesse que sur le défendeur décédé, elle était bonne et valable en loi.

Cette motion fut signifiée au shérif et à Dame Marie Elphise Labelle, tant personnellement que comme tutrice de Marie Emma et Elphise Dagenais, filles mineures de Michel Dagenais et de la dite Marie Elphise Labelle.

BERTHELOT J. La doctrine que le *mort exécute le vif* est bien établie, tant dans la loi que dans la jurisprudence. Elle a été mise en pratique en plusieurs circonstances et notamment en Nov. 1858 dans la cause de Harpin & Léodel & Léodel opposant; et en Sept. 1863 dans la cause do Russell et Larocque. Dans cette instance le demandeur veut exécuter le mort. En point de fait le demandeur ne peut être admis à mettre en question la mort du défendeur; car il l'a lui même prouvée. Il ne reste donc que la question légale: l'exécution d'un jugement peut-elle être poursuivie contre un défendeur décédé? Les mêmes autorités qui établissent que le mort peut exécuter le vivant repoussent les prétentions du demandeur. L'Art 168 de la coutume de Paris dit: "Obligation passée par le mari, ou sentence contre lui donnée, après le trépas du dit mari, ne sont exécutoires sur les biens de la veuve, ni des héritiers du dit défunt, avant que tels soient déclarés. Et pour ce faire les faut appeler."

L'Art 169 dit que les biens du défendeur ne peuvent être saisis que par mesure de conservation. Brodeau sur Paris, T. 2. p. 558. "*Le mort exécute le vif.*" Quant aux héritiers du créancier, ils ne sont pas obligés de faire déclarer l'obligation exécutoire à leur profit, ils peuvent faire exécuter directement l'obligé, comme le défunt pourrait faire. Parceque le mort exécute le vif *et non contra.* Nouveau Denizart *Verbo* Exécution, p. 189, N°1. "L'exécution des jugemens peut être poursuivie non seulement au nom de ceux qui ont personnellement obtenu en leur faveur, mais même au nom de leurs héritiers, lesquels ne sont pas obligés de faire prononcer un nouveau jugement: de là cette maxime si connue, "le mort exécute le vif," *Id* N°2. "L'inverse de la maxime que nous venons de rappeler, forme une autre règle de procédure: *Le vif n'exécute pas le mort.* Si celui qui a été condamné par un jugement vient à perdre la vie naturelle ou civile avant que le jugement obtenu contre lui ait été mis à exécution, ce jugement n'est exécutoire contre ses héritiers, que lorsque, par un nouveau jugement, il a été ordonné qu'il serait exécuté contre eux." Ferrière, Gr. Cout. T. 2. p. 1151. "Quoique l'héritier soit tenu personnellement des dettes du défunt *ex quasi contractu*, toutefois l'héritier ne peut point être exécuté en vertu des obligations passées par le défunt, qu'elles n'aient été déclarées exécutoires contre lui." A la page 1152, Ferrière cite la maxime de pratique de Loysel, que le mort exécute le vif et le vif n'exécute par le mort. C'est à-dire "que tout droit d'exécution *s'éteint* avec la personne de l'obligé," suivant Loysel, T. 2. des exécutions et décrets; Tit. 5.—art. 2. p. 287. Pour ces raisons la motion doit être rejetée.

Motion rejetée avec dépens.

P. A. A. Dorion, pour demandeur.

(J.D.)

MONTREAL, 9TH SEPTEMBER, 1864.

In Appeal, from the Superior Court, District of Montreal.

Coram DUVAL, C. J., MEREDITH, J., MONDELET, J., DRUMMOND, J., BADGLEY, J.

SKIFF FAREWELL SYKES,

(*Defendant in the Court below,*)
APPELLANT;

AND

SARAH CAROLINE SHAW ET AL.,

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

HELD:—1o. That an entry of a baptism in a non-authentic register where mention is made of the date of the birth of the person baptized, signed by both parents, is only *primâ facie* proof of the birth at that date, and such date may be contradicted and disproved by oral testimony.
2o. That a deed must stand unrevoked and good and valid in law, until revoked in the presence of all the parties thereto.

The following were the issues between the parties:—

In April, 1859, the respondents (plaintiffs in the Court below) instituted a petitory action against the appellant (defendant in the Court below), setting forth by their declaration, "That in 1811 one Noah Shaw was a resident of "Montreal, and had his domicile there, and contracted marriage in the United "States about the 21st January, 1819, with Frances Durgen, with the intention "of continuing his domicile in Montreal, and returned there; and that thereby "a community of property was created between them. That, after the marriage, "and during the community, Noah Shaw acquired a certain property, part at "sheriff's sale on the 9th December, 1830, described as 'A lot of ground in St. "'Ann's Suburbs, in the city of Montreal, being lot No. 90, containing 45 feet "'in width by 90 feet in depth, bounded in front by Nazareth street, on one "'side by Justice Smith, on the other side by Noah Shaw, and in the rear by "'the representatives of Nahum Mower;' and the remaining portion of the said "property being purchased by him the said Noah Shaw from Thomas McCord, "by deed of sale before Jobin and colleague, notaries, *on the 30th October*, "1818,—the said two portions being known and described as 'A piece or lot of "'ground situate in this city, measuring 66 feet English measure in front, by "'90 feet in depth, bounded in front by Nazareth street, in rear partly by the "'said Noah Shaw and partly by William Thornton, on one side by the said "'Noah Shaw, and on the other side by a lot in the possession of the defendant,' "—to which said lot of land the said Frances Durgen had a right for one undivided half.

"That the said Frances Durgen died on the 9th October, 1840.

"That the only issue of Noah Shaw with her is the said Sarah Caroline "Shaw, born on the 19th October, 1828, and who, by the death of her mother, "was seized of all the estate of her mother; to wit, her share in the community, "by virtue of the last will and testament of the said Frances Durgen, subject to "the condition therein mentioned.

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"That, by the said last will and testament, executed before Hunter, notary, "and witnesses, at Montreal, the 12th August, 1840, the said Frances Durgen "bequeathed all her property, real and personal, to the said Noah Shaw, to have "and enjoy as his own property for ever, with the condition, that, in case the "said Noah Shaw should marry again, then the will of the said Frances Durgen "was, that the one-half of all the property above bequeathed should immediately "revert to and belong to the children born or to be born of the marriage.

"That the said Noah Shaw afterwards contracted marriage, to wit, on the 1st "November, 1849, with one Eliza Anne Fackerell, and thereby the one undivi-"ded fourth of all the property of the community vested in the said Sarah Caro-"line Shaw, who became thereby seized, as sole proprietor, of one undivided "fourth of the lot of land above mentioned.

"That the said Sarah Caroline Shaw contracted marriage with her husband, "the said Edward Sharpe, on the 3rd September, 1846, without any contract in "writing; and is duly separated from him as to property by judgment of the "Court.

"That the defendant hath unjustly obtained possession of the undivided "fourth of the said lot, and refuses to deliver it up to the plaintiffs.

"Wherefore the plaintiffs pray, that the defendant may be condemned to de-"liver it up to the plaintiff as proprietor thereof, and that the said lot of land may "be divided; and that, if it cannot be divided, that the sale thereof be proceeded "to by licitation, and the proceeds divided according to the rights of the parties."

The respondents, with their declaration, fyled several Exhibits; among which were a certificate of the marriage of Noah Shaw with Frances Durgen, at Tamworth, in the State of New Hampshire, U.S., *on the 21st February*, 1819,—fyled as plaintiff's Exhibit No. 1; and a paper writing, purporting to be a certificate of the baptism of Noah Alpheus and Sarah Caroline Shaw, but which, by the judgment of the Court below on the inscription *de faux* confirmed by the judgment of this Court, has already been declared not to be an "Extract carrying with it authenticity."

To this petitory action so instituted against him, the appellant pleaded, besides the general denegation, "that, by deed of sale before Doucet and col-"league, at Montreal, on the 11th August, 1855, he acquired from Noah Shaw "the piece or lot of ground, of 66 feet front by 90 feet in depth, described in "plaintiff's declaration.

"That only part of it was acquired after the marriage of Noah Shaw with "Frances Durgen, to wit, 'Forty-five feet in front on Nazareth street, by ninety "feet in depth, the remaining portion, to wit, twenty-one feet on Nazareth street, "ninety feet in depth, having been acquired by Noah Shaw before his marriage; "'to wit, by deed of sale from Thomas McCord to him, before Jobin and col-"'league, notaries, on the 30th October, 1818.'

"That Sarah Caroline Shaw was born on *the 19th September*, 1828, and not, "as falsely alleged by the plaintiffs, on the 19th October, 1828; and, that the "plaintiffs' Exhibit No. 4 was not an extract, such as it purported, namely, "from the register of the American Presbyterian Church.

"That, on the 21st September, 1849, at Montreal, in and by a certain deed "of sale executed by and between the said Edward Sharpe and the said Sarah

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"Caroline Shaw, then of full age and being the wife of the said Edward Sharpe "and by him duly authorized, and the said Noah Shaw, before Griffin and col-"league, notaries, it was declared as follows:

That whereas the late Frances Durgen, in her lifetime wife of the said Noah Shaw, and mother of the said Caroline Shaw, departed this life on or about the ninth day of October, in the year one thousand eight hundred and forty, having previously thereto made her last will and testament before Maitre J. S. Hunter, public notary, and two witnesses, bearing date the twelfth day of August in the last-mentioned year (to wit: the last will and testament of the said late Frances Durgen, in part recited in plaintiffs' said declaration); and, amongst other things in her said last will and testament contained, did will as follows, to wit: —I give, devise, and bequeath to Noah Shaw, my husband, all the property, either moveable or immoveable, real and personal, plate and plated ware, debts and actions, whatsoever, wherever the same may be situated, and to whatever amount the same shall come, to me in any wise belonging and appertaining, or in which I may have any right, interest, and share, at the day of my death without any exception or reserve. To have and to hold, receive, take, and enjoy, and dispose of, the said before-mentioned and intended to be hereby bequeathed premises unto the said Noah Shaw, my beloved husband, his heirs and assigns, as his and their own property, for ever. It is my wish, however, that in case the said Noah Shaw shall, after my death, contract a second marriage, then, and in such case, my will is, that one-half of all the said property above bequeathed shall immediately revert to, and belong to, the children, born or to be born, issue of my marriage with the said Noah Shaw, to be divided between them share and share alike.

And whereas, since the decease of the said Francis Durgen, the said Caroline Shaw (her only child), issue of her marriage with the said Noah Shaw, her surviving, has been united in the holy bonds of matrimony with the said Edward Sharpe; and, since their marriage, the said Noah Shaw has at divers times lent and advanced and paid unto the said Edward Sharpe and Caroline Shaw, his wife, divers sums of money for and towards their household and domestic and personal expenses.

And whereas, in consideration of the love and affection which the said Caroline Shaw bears towards her said father, and also for other the considerations hereinafter mentioned, the said Edward Sharpe and Caroline Shaw, his wife, have agreed to relinquish all and every interest, contingent or direct, which the said Caroline Shaw hath or may be supposed to have, under the last will and testament or otherwise, into or upon the estate and succession of her said deceased mother, and to assign the same to the said Noah Shaw, her father.

Now it is witnessed by these presents and by us the undersigned public notaries, that, in consideration of the release, acquittance, and discharge which the said Noah Shaw hath given and granted, and by these presents doth give and grant, unto the said Edward Sharpe and Caroline Shaw, accepting thereof, of and from the payment of the aforesaid several sums of money, amounting together to the sum of five hundred and one pounds, fifteen shillings, currency of this province, by him the said Noah Shaw heretofore lent and advanced unto and paid for the said Edward

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Sharpe and Caroline Shaw, his wife; and also in consideration of the further sum of thirty-two pounds, currency aforesaid, which, at the execution of these presents and in presence of us notaries, the said Noah Shaw had paid unto the said Edward Sharpe and Caroline Shaw, his wife,—the receipt whereof they do hereby acknowledge,—the said Edward Sharpe and Caroline Shaw, his wife, by him duly authorized as aforesaid, have granted, bargained, sold, assigned, and confirmed, and by these presents do grant, bargain, sell, assign, and confirm unto the said Noah Shaw, accepting thereof for himself and his heirs, executors, and administrators and assigns, all and every the right, title, interest, claim, and demand, contingent and otherwise, which the said Caroline Shaw had or hath, or which she may be supposed to have had or have under and by virtue of the aforesaid last will and testament of the said late Frances Durgen, her mother, or otherwise, in, to, or upon the estate and succession of the said late Frances Durgen:—to have and to hold the same, and every part and portion thereof unto the said Noah Shaw, his heirs, executors, administrators, and assigns, as of his and their own *indefeasible* estate and property, for ever. The said Edward and Caroline Shaw, his wife, putting, placing, and subrogating (*subrogeant*) the said Noah Shaw, his heirs, executors, administrators, and assigns, in all and every their and each of their rights and actions, *droits, noms, raisons et actions*, in the premises, and constituting him and them their attorney and attorneys, irrevocable in the premises.

"That by reason of the premises, the plaintiffs, for the consideration, amongst "other things, of the said sum of £501 15s. currency, and £32 currency, form- "ing together the entire sum of £533 15s. currency, so paid to the said plaintiffs, "as in the said *acte* or deed of sale mentioned, sold, assigned, transferred, and "made over to the said Noah Shaw, all the right, title, interest, claim, and "demand in and to the said piece or lot of ground, as well as to all other the "property to which the said Sarah Caroline Shaw and the said Edward Sharpe, "her husband, or either of them, in any way may have become entitled, under "the said last will and testament of the late Frances Durgen.

"Wherefore the defendant prays plaintiff's action be dismissed with costs."

In support of his plea, the appellant fyled a copy of the deed of sale from Noah Shaw to him, as his Exhibit No. 1; of the deed of sale from Thomas McCord to Noah Shaw, of the 5th October, 1818, as his Exhibit No. 2; and of the deed of sale and relinquishment from respondents to Noah Shaw, as his Exhibit No. 3.

To this plea the respondents answered, that Noah Shaw could not legally sell the lot of land in question to the appellant; that it was made in fraud of his creditors, when he Noah Shaw was insolvent; that it was not true, that Sarah Caroline Shaw was born on the 19th September, 1828, but on the 19th October, 1828; that the respondents having proved the date of the birth by the duly certified extract from the register of the church, according to the forms required by law, the appellant could not attack the authenticity of it, except by an *inscription en faux;* that the deed of sale and relinquishment (defendant's Exhibit No. 3) was null; that Sarah Caroline Shaw was a minor at the time of the execution of it; that Noah Shaw was her tutor or guardian, and

had made no inventory; that he had never paid any value or consideration, as falsely alleged in the deed of sale and relinquishment; that it was obtained fraudulently; that, besides, it contained a sale of the rights which Sarah Caroline Shaw might pretend in the succession of her mother, the said Frances Durgen, in virtue of her last will; that such an alienation was null, the said Sarah Caroline Shaw being at the time a minor.

The appellant answered this pleading, denying the facts and the sufficiency of them in law; and, after the disposal by the Court below and by this Honorable Court in Appeal of the *inscription de faux* above mentioned, the parties proceeded to evidence on the principal *demande.*

The judgment of the Court below, rendered on these issues, was as follows:—

The 30th September, 1862.

PRESENT:

The Honorable Mr. Assistant Justice MONK.

"The Court, having heard the parties by their respective counsel upon the merits of this cause, examined the proceedings, proof of record, and having deliberated, considering that the defendant hath not established by legal and sufficient evidence the allegations of his plea, doth overrule and dismiss the same, and considering that at the time of making and entering into the deed of sale or transaction, dated the twenty-first day of September, one thousand eight hundred and forty-nine, executed before Maitre John C. Griffin and his colleague, public notaries, from the said Sarah C. Shaw to her father Noah Shaw, the said Sarah C. Shaw had not attained the age of twenty-one years, seeing consequently that the said deed of sale or transaction is entirely null and void in law. And considering that the plaintiffs have proved by legal and sufficient evidence the allegations of their declaration, doth maintain the action and demand of the said plaintiffs, and doth declare the said Sarah Caroline Shaw, one of the said plaintiffs, to be, under and in virtue of the last will and testament of Frances Durgen, her mother, deceased, the proprietor of and entitled to the one undivided fourth part of the lot of land mentioned and described in the declaration of the said plaintiffs, as follows, to wit: "a piece or lot of ground situate in this city measuring sixty-six feet English measure in front, more or less, by ninety feet in depth, bounded in front by Nazareth street, in rear partly by the said Noah Shaw and partly by William Thompson, on one side by the said Noah Shaw, and on the other side by a lot in the possession of the defendant." And the Court proceeding to adjudge upon the conclusions of the said declaration of the said plaintiffs, doth condemn the said defendant to quit, abandon, restore, and deliver up the said undivided fourth of the said lot of land to the plaintiff, Sarah Caroline Shaw, as proprietor thereof, and entitled to have and possess the same under the said last will and testament, and to pay over to the said plaintiff, Sarah Caroline Shaw, the rents, issues and profits thereof, if any, and in order that the said lot of land may, under the authority of this Court, be divided, it is ordered that the said lot of land be by competent persons, experts, agreed upon by the said plaintiffs or defendant, or in their default named by this Court or a judge thereof in vacation,

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examined, seen and valued, in order to ascertain and establish the part that ought to belong to each of the parties in the said lot of land, to the end that the said lot of land may be divided into portions equal and according to the respective rights of the said parties, and in case that the said lot of land cannot be divided in a manner corresponding with the respective rights of the parties, then it is ordered that the sale thereof shall be proceeded to by licitation to the last and highest bidder in the usual and accustomed manner, and after the usual and accustomed notices and advertisements, and the price thereof divided between the said parties according to their respective rights and shares, reserving to the said plaintiffs the right of taking such other conclusions as may be necessary during the course of proceedings in this cause; the whole with costs against the said defendant, distraits in favor of Messieurs R. & G. Laflamme, the attorneys of the said plaintiffs.

BADGLEY, J., giving judgment in appeal.—This is an hypothecary action instituted by the plaintiffs to recover for the female plaintiff from the defendant, her share of property, in the lot of land described in the declaration, which is claimed from the defendant as the purchaser from her father, Noah Shaw, and to which, as forming part of the community of property between her father and mother, she alleges herself to be entitled as legatee to her mother's rights in that community under her last will.

Noah Shaw and Frances Durgen, the father and mother of the female plaintiff, were married in 1819, and by effect of that marriage a community of property was established between them by the operation of law. During their cohabitation children were born to them, of whom that plaintiff was the sole survivor of their mother, and property was acquired by them, of which the law gave the mother a moiety, which, by her last will, she disposed of by giving all her rights to her husband, except upon the contingency of his second marriage, naturally concluding that, except in that event, her child would not be deprived of her property; the condition upon the event of such second marriage was that one-half of her share of the community should revert and belong to her surviving child. That community included a portion of the real property in contestation. Mrs. Shaw died on the 9th October, 1840; her will is dated in August of that year. By a notarial deed, dated the 21st September, 1849, executed between Noah Shaw, the father, and the plaintiffs, his said daughter and her husband, the latter, in consideration of £30 then paid to them by him, and of a sum of upwards of £500 alleged to have been previously paid to them by Shaw, the receipt of which sums they thereby acknowledged and from which they discharged him, relinquished to her father every right and interest, contingent or absolute, that she could claim under her mother's will, and assigned and conveyed her right and interest therein to him, thereby, of course, selling and conveying to him all her property in the lot of land aforesaid.

On the first of November following, a few days after the execution of the deed, Shaw contracted a second marriage, and on the 11th of August, 1855, he sold to the defendant the realty in question, which has given occasion to this action *en déclaration d hypothèque* against the latter as the holder thereof.

The defendant pleaded against the action her deed of relinquishment and

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discharge to her father, and her want of claim in consequence against him as the purchaser from her father under her title.

In reply to the plea of her said deed, she alleged her then minority and the consequent nullity of the deed as to her, and further the legal nullity of that transaction as having been made between pupil and tutor without account made or vouchers produced; but she did not conclude or pray for the revocation of that deed.

Upon the first point as to her minority and being under age at the date of the deed, it may be premised, that the question is important not so much only as regards the female plaintiff, but as it regards the faith and credibility to be attached to church registers from the presumed knowledge of the age of their children, declared in the registry by their parents.

The leading fact at issue between the parties is the time of the birth of the female plaintiff, whether she was born on the 19th September, 1828, alleged by the defendant, whereby she would have been of age at the date of the deed, or on the 19th October, 1828, as alleged by her, which would have made her a minor at the date of the deed, both of which dates carrying the controversy to a fact taking existence upwards of 30 years ago.

The plaintiffs support their assertion by an entry in a book, kept as a Church Register of the American Presbyterian Church in this city, under date of 2nd January, 1832, in which she is declared to have been born on the 19th of October, 1828, and this entry is signed by Noah Shaw, the father, Frances Durgen, the mother, Sally Durgen, the grandmother, and certified by the signature of the then Minister of the Church, the Rev'd. G. W. Perkins. The original entry is as follows:—

"Noah Alpheses, and Sarah Caroline, children of Noah Shaw, carpenter, "living in the District of Montreal, and Fanny Durgen his wife; Noah born on "the first of October, eighteen hundred and twenty, and Sarah, born on the "nineteenth of October, eighteen hundred and twenty-eight, were baptised the "second of January, eighteen hundred and thirty-two, by

"(Signed,) G. W. PERKINS,"
Minister.

(Signed,) NOAH SHAW,
" FRANCES DURGEN,
" SALLY DURGEN,
" MARY ANN PERKINS.

The signatures of the parties, father, mother, and grandmother, are proved, and it is also proved that although the book is not a legal register entitled to full authenticity according to the laws of the Province, it has always been considered to be the first of the registers of that Church, and kept as such by Ministers of the Church for the time being.

It need scarcely be observed that being unauthentic, the declarations contained in that register are subject to contradictory proof, and to be disproved in the same manner as upon *inscription de faux*, authentic registers are liable to objection and contradictory proof, but in both cases, admitting those declarations *jusqu'à preuve contraire* as *primâ facie* evidence. The declared entry on the

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register of her baptism, dated the 2nd January, 1832, subject to this test, is, that she was declared to have been born on the 19th October, 1828, nearly three years and four months previous to her baptism; moreover there is no evidence to show when, by whom or in what terms the declaration was made, or whether it had been read to or by the signers before they signed it.

There is some misapprehension upon the subject of the absolute evidence afforded by a register, but the authorities are clear that full faith is due to it only to a certain extent. The ordinance of 1667, title 20, in several of its articles makes special provision for and requires special facts to be stated in the registrations of baptism, marriage and burial, and to these facts the law attaches full faith. But the register is also required to contain certain declarations, such, amongst others, as the day of the birth of the person baptised, the day of the death of the person buried, which, as Dumoulin observes, are things *quæ non fiunt nec disponuntur sed tantum rescitantur*, and of these declarations Ancien Denisart, vbo Baptême, says at p. 23: "Il est essentiel de remarquer dans cette opération (Baptême) les pasteurs ou ceux qui les représentent ne sont juges de rien, ils n'ont rien à prononcer, ils n'ont qu'à consigner dans le régistre ce qui a été dit et ce qui a été fait." Bonnier de la preuve, p. 465, says: "Telles personnes ont déclaré l'existence de "tels ou tels faits au fonctionnaire, etc., mais nullement que ces faits déclara-"toires soient conformes à la vérité; ce dernier point ne serait établi que jusqu'à "preuve contraire": and at p. 473, "l'acte de Baptême prouve jusqu'à l'inscription "de faux que tel enfant a été présenté, que telles déclarations ont été faites, etc. "sur l'époque de la naissance, qu'on lui a donné tel nom, etc., quant aux déclara-"tions elles-mêmes, elles ne font foi que jusqu'à preuve contraire, etc." And Rodier in his notes on the 9th, 10th and 14th articles of the ordinance which bear upon this matter of the registers, shows that if errors exist in them, they may be corrected; that the correction may be made from verbal testimony, but only by Royal Judges or *juges de parlement*, not by *juges de seigneurs*. He shows that the enunciations of age are not absolute proof of the fact but only *primâ facie* evidence. He says: "supposons qu'en baptisant un enfant nommé Jean, on eut écrit "Pierre, ou qu'on eut écrit que Jean Croc a été baptisé, marié ou enseveli, le 15 "mars 1750, et que ce fut néanmoins un autre jour, dans un autre mois ou dans "une autre année, ou enfin qu'on eut fait quelqu'autre erreur; il n'est pas juste "que la partie en souffre. On peut ordonner cette réforme d'erreur ou "incidemment à un procès ou indépendamment de tout procès."

The same good common sense which makes the declaration of age, if erroneous, subject to correction by the effect of disproof, is to a larger extent adopted in the English law, to which I refer, casually, as regards the proof of the fact of the age. The English law refuses the declaration altogether, and as laid down in 2nd Taylor on Evidence, p. 1403, No. 1877: A register of baptism is evidence of the fact of baptism, and of its date, but it furnishes no proof of the time of birth, although it state that fact. R. vs. Clapham, 4 Carr. and P. 29, and the principle is confirmed in 6 Carr. and P. 196—3 Starke R. 63—6 M. and W. 166—7 East. R.

Now although in the authenticated register, the declaration of age is taken as *primâ facie* evidence *jusqu'à preuve contraire*, that is founded on the fact of the necessity of baptizing the infant immediately upon birth, according to the dogmas of

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the Roman Catholic Church, so that, between birth and baptism, in Roman Catholic countries, and especially in France, where the Ord. of 1667 first was law, no appreciable interval existed, so, also, under the modern law of France, the declaration of the birth is required to be made to the public officer within three days, in both cases forming a very strong presumption of the truth of the fact; whilst in this case an interval of upwards three years and a quarter intervened before baptism.

This certificate stands self-supported as *primâ facie* evidence only; the signatures of the parents and grandmother strengthen that evidence, because they may be assumed to have knowledge upon the subject, particularly the mother, and all of them at the time must have been entirely free from all interest to record or certify a falsehood. But against this presumptive and *primâ facie* evidence is produced oral and written testimony of facts, which conflict with it very materially.

The oral testimony adduced is 1st, of two women, the female neighbors and acquaintances of Mrs. Shaw, who saw and conversed with her, and saw and handled the child within twenty-four hours of its delivery; 2nd, of the midwife who assisted at her delivery; lastly, of Noah Shaw, the father of the child: and in connection with this, the written evidence afforded by the entry made by the late Doctor Caldwell, in his account-book of his surgical attendance, upon the occasion in question. The two female witnesses testify, as to the birth, that the delivery was troublesome and required to be effected by *forceps;* that Mrs. Shaw herself told them of the delivery by forceps, of the difficulty she had suffered, and of the *presence of the* doctor to assist: and Mrs. Stuart, the midwife, although very aged, remembers well having attended upon Mrs. Shaw at the birth of the plaintiff, whom she has known ever since, and whom she also delivered of her first child. Mrs. Stuart also mentions the attendance of Doctor Caldwell and his use of instruments. Both these neighbors fix the time from circumstances which give strong credibility to their testimony—the birth of their own children and the circumstances attending them. Mrs. Briggs, fifty-six years of age, speaks positively of the time of the *accouchement* upon a calculation of the birth of her own child, of which there can be no possible mistake; and she declares the birth of her child to have been four months and a few days, seven or eight days, before the plaintiff's birth, and she produces the baptismal certificate from the Roman Catholic registry, showing that her child was born on the 7th May, 1828, which would make plaintiff's birth to be in September, certainly in the middle of that month. Mrs. Cutler, sixty-three years of age, says her first child was born on the third of August, 1829, ten months and a half after the birth of Mrs. Shaw's child; she had been married in 1828; she visited Mrs. Shaw the day after the delivery; Mrs. Shaw told her of her difficulty and of the presence of the doctor; she says that Mrs. Stuart was the attending midwife, that she herself became *enceinte* only six weeks after this visit, and was delivered ten months and a half after Mrs. Shaw; this would also bring the delivery of plaintiff to about the middle of September, 1828. In addition to this oral evidence is the entry made by Doctor Caldwell himself in his usual account-book, charging Noah Shaw, under the specific date of the 19th September, 1828, with attendance for accouchement and delivery by for-

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ceps; substantiating the testimony of the midwife in these particulars, as well as that of the two female neighbors.

As this point of the case is a matter of serious importance, it is not unreasonable or improper to receive the light and assistance of decisions outside of our particular jurisprudence. But first it must be observed that although hesitation might attach to the doctor's entry if it stood alone, yet the circumstances surrounding it, and the oral testimony connected with it, are strong to show its effectiveness. The book itself is produced in evidence by Mr. Andrew Shaw, the curator appointed to the doctor's estate shortly after his death, in 1833; and it had constantly been in his possession since that time. The curator shows the account of Noah Shaw, entered in that book in order of date, day and year, by the doctor himself, in his own handwriting. He declares, moreover, that the doctor kept no blotter or day-book, and swears to his belief that the doctor kept no other entry book. The evidence of the curator is very clear, and is as follows:

"I have here in my possession one of those books of account kept by the late Dr. Caldwell, which is principally in his hand-writing. I cannot divest myself of this book of account, but I am quite willing that any extracts should be taken from it. On the one hundred and sixty-fifth and the one hundred and sixty-sixth pages there are entries for medical services and medicines rendered and furnished apparently by the late Dr. Caldwell to or for the said Noah Shaw. The account commences on the one hundred and sixty-sixth page, with the year one thousand eight hundred and twenty-five, and is headed 'Mr. Shaw, carpenter, Griffintown,' and is continued over unto the one hundred and sixty-fifth page, where the following entries appear:

	£		
"1828. Mr. Shaw, from the other side.			
"May 2—Consultation, pil x 4, Mist Ziy		10	
"July 18—A visit, pil-x-28 a visit pil 18 mist 2 my..		20	
"Aug. 7—Boy, a visit, pil y........................			7
"Sept. 19—A visit express, and delivery by forceps...	2	10	0
	3	2	6
	7	10	
		12	6

All of the foregoing account is in the handwriting of the late Dr. Caldwell in the said book of account, page one hundred and sixty-five.

CROSS-EXAMINED.

Question.—Did you find amongst the books of the late Dr. Caldwell any blotter, day-book, or journal out of which this account could have been made or extracted?

Answer.—No.

Question.—To your knowledge did he ever keep any blotter, day-book, or journal out of which this account referred to could have been taken or extracted?

Answer.—No, he did not, to my knowledge, keep any such book. I believe he entered them only in this book out of which a *fac simile* is taken.

"On page one hundred and sixty-five, wherefrom the above extract is taken, there is another account or entry close above it without more space between them than between the first and second lines of said extract, and immediately below said extract there is another entry for an account, with the space of about a quarter of an inch from the said account of Mr. Shaw, and the date of the account above is January, one thousand eight hundred and twenty-six, and the date of the account below is February the seventeenth, one thousand eight hundred and twenty-six.

"I would account for this by the fact that the account must have been transferred from the opposite page, when the entries were made during the year eighteen hundred and twenty-six, to a space then remaining."

It must be observed here, that after the production of the book, at the Enquête Court, as the curator would not divest himself of it, the extract of the account contained and given in his evidence was made from it by the officer of the Court, as is invariably practised in cases where the witness is not at liberty to leave the original on file, and in that case, the extract is taken as evidence. It must also be stated that no o[illegible] was taken by the plaintiff at the time of taking this evidence in the E[illegible] to the appearance of Mr. Shaw, the curator, as a witness, or to hi[illegible] of the book at the Enquête in the cause, or to the said extract being t[illegible] it for evidence, or to that remaining of evidence instead of the book, [illegible] motion was made at the hearing on the merits for the rejection of any part of this testimony, and it comes before this Court with the same authority and credibility attached to it as was allowed to it by the parties themselves in the Superior Court; they were willing to submit the case as it was, adopting the entry instead of the book as evidence in that respect, and in the same manner it has been submitted to this Court. There is nothing therefore to cast suspicion upon this entry, which is an account of itself, independent of any other entry on any other page, and charges the doctor's services in 1828, from the 2nd May to the 19th September, added up at the total of £7 10. The estate of the doctor can have no interest in it, because it was more than thirty years old at the time of its production as evidence, and the debt was absolutely discharged by prescription, as much as if it had been marked "paid" by the doctor himself.

A very similar case strongly bearing upon this point occurred in England, and is reported in 10 East, p. 109.

The question there was a question of age; and to prove on what day a child was born, after a good deal of oral testimony from relatives and others had been advanced, the book of the accoucheur who had attended at the mother's confinement was produced by his son, who had possession of the book, his father being dead, which exhibited the charge therein for attendance on a day specific marked in the book, and the delivery by forceps; and the entry was admitted as evidence of the date of the birth. The conformity of this reported case with the one in hand is conclusive.

Now then, as our law does admit and acknowledge that the declaration of age is only *primâ facie* evidence, subject to rebuttal by contradictory evidence, we have on the one side a mere presumption, because the date of the birth is declared

in the register, and nothing more; whilst on the other there are facts proved, the evidence of the midwife, who distinctly remembers the birth of the plaintiff, and the delivery of her mother by Dr. C. with forceps; then the evidence of the two women, neighbours, who saw Mrs. S. almost immediately after the plaintiff's birth, who are as credible as to the birth of their own children as Mrs. S. could be as to the birth of the plaintiff. They also state their distinct recollection of the event of the plaintiff's birth, under the management of Mrs. Stuart the midwife; they refer distinctly to the instrumental delivery by the medical man, sworn to by the midwife, and as disclosed to the witnesses by Mrs. Shaw herself, within twenty-four hours of the event, and finally confirmed by the entry made by the doctor himself under the specific date. It is true that the birth is established by the two women from calculations, and about the time, but recollection of distant events is almost always made up by references, and in this case the thing from which they calculate is, I may say, an absolute certainty in the recollection of mothers, and in this case cannot admit of dispute.

Taking this evidence then as it stands, the plaintiff's birth appears to be established as about the middle of September, 1828, certainly a little earlier by three or four days than the 19th of that month; and it must also be admitted that this testimony is not obnoxious to *réproche* either of interest or partiality; all that can be objected to it is that it goes to prove a fact more than thirty years old.

The testimony of Noah Shaw, the father, has not been adverted to, and, except in proof of the signatures of his wife and her mother with his own, will be best passed over without much remark. It is obnoxious to strong reproach from interest to sustain the deed of sale and transaction of 21st September, 1849, and to prove his child's majority at the date of the deed; his testimony is in conflict with his own signature to the registry at a time when he had no interest to put his signature to an untruth; and, moreover, he undertakes to state a fact which may probably be in his recollection, but which few or no fathers ever do remember, I mean the exact day of the birth of their children: fortunately for the defendant, his other proof is sufficient of itself.

The majority of the plaintiff appearing to me to be established as at the date of the deed, this instrument is not a nullity by reason of her minority at the time.

The other ground of objection remains, the alleged nullity of the deed of transaction between the father and his child just out of her minority, only two days afterward according to the defendant's statement, and without account rendered or voucher shewn.

Now, whether the deed be fraudulent and *entaché de dol* or not, it stands unrevoked. How happens it that in the many years between 1849, its date, and the institution of this action in 1862, the plaintiffs adopted no proceedings against her father after his second marriage for the revocation of this alleged fraudulent instrument? They have allowed it to stand presumptively a good and valid deed, and even have prosecuted in this cause without putting Noah Shaw *en cause* to test its validity. The plaintiffs plead with a stranger, the defendant, the nullity of the deed, but do not conclude or pray for its revocation, nor that

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it should be declared a fraud and a nullity, but have allowed it to stand good against themselves. Under such circumstances with the deed subsisting and presumptively valid, the plaintiffs' second ground of plea cannot be sustained; both being set aside, the judgment of this Court must necessarily be in favour of the defendant, and the judgment of the Court below must be reversed.

DUVAL, CH. J.—The principal question to be determined was the true date of the plaintiff's birth? Did it take place on the 17th September, or the 17th October. The Court were of opinion that it was proved, beyond all doubt, that she was born on the 19th September, and consequently that she was of full age when she alienated her rights. We had first the evidence of the father himself, who stated that, according to a custom which generally prevails, he made an entry of the date of his daughter's birth in the family Bible. This book was subsequently destroyed by fire, but Mr. Shaw declared it was the 17th September. There was moreover an extract from the account book of Dr. Caldwell, who assisted at the *accouchement*, and who also entered the birth on the 17th September. There was another fact which might be referred to. It was quite evident that the father, intending to come to an amicable arrangement with his daughter, waited till she had attained the age of 21, and as soon as he was satisfied that she was of full age, he made the contract in question. Now, it was a fair conlusion to come to that the father would not have entered into the contract unless he had been perfectly satisfied that she had attained the age of 21. There was also the testimony of various persons who remembered the time of birth. Against this there was the church register which stated the birth to have taken place in October. On this question the Court was of opinion that the plaintiff was of full age. As to the legality of the transaction apart from this, the Court was also in favour of defendant's pretension.

The judgment in appeal was *motivé* as follows:

"Considering that it hath been established in evidence that at the date of the execution of the said deed of sale or transaction, dated the 21st day of September, 1849, before John C. Griffin and his colleague, public notaries, between the said Sarah C. Shaw, and Edward Sharpe, her husband, the respondents in this cause, plaintiffs in the Court below, and the said Noah Shaw, her father, the said Sarah C. Shaw had attained the age of majority of 21 years; considering that the said Noah Shaw is not a party in this cause, and that no proceedings have been shewn to have been taken by the said respondent against him for the revocation of the said deed; considering that the said deed stands unrevoked, and in presumption of law is good and valid as between the said respondents and the said Noah Shaw, until so revoked as aforesaid; considering that in the judgment of the Superior Court for the District of Montreal, rendered on the 30th September, 1862, whereby it is declared that the said Sarah C. Shaw had not attained the age of 21 years at the time of her execution of the said deed, and that, consequently, the said deed was entirely null and void in law; whereupon the action and demand of the said respondents, plaintiffs aforesaid, were maintained against the said appellant, defendant in the said Court below, there is error:

This Court, proceeding to render the judgment which the said Superior Court

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ought to have rendered, doth, for the reasons hereinabove mentioned, dismiss the said action and demand of the said respondents, plaintiffs aforesaid, with costs as well of this Court as of the said Court below."

Judgment reversed.

Day & Day, for appellants.
R. & G. Laflamme, for respondents.
(F. W. T.)

MONTREAL, 6TH JUNE, 1865.

Coram DUVAL, C. J., MEREDITH, J., AYLWIN, J., MONDELET, A. J., DRUMMOND, J.

In Appeal from the Superior Court, District of Montreal.

JAMES FOLEY,

(Defendant in Court below,)

APPELLANT;

AND

ROBERT T. GODFREY,

(Plaintiff in Court below,)

RESPONDENT.

REGISTRATION—PROOF OF.

HELD:—That the certificate of registration of a deed is not insufficient because written on a separate paper from the deed.

The principal pretension of appellant as stated in his factum is the following: "There is no sufficient evidence of the registration of plaintiff's *titre de* "*créance*, plaintiff's exhibit No. 1. The certificate, plaintiff's exhibit No. 2, is "not placed upon any copy of the deed of sale itself, but is a distinct and separate "paper, purporting to be an epitome of the deed of sale. This, it is submitted, is "not sufficient; the certificate should be upon an authentic copy of the deed." It would, in that case, show that "the very instrument itself had been registered, "but this does not now appear; nor does the certificate state in what way it "was registered, by memorial, or at full length. If the proof as to registration "is defective, the action ought to have been dismissed against a third party."

The Honorable Mr. Chief Justice Duval, in giving judgment in this case for Court of Appeals, confirmed the judgment of the Superior Court, and remarked as follows:

"The Court below gave judgment against appellant, as possessor of a lot of "land in the Eastern Townships for the amount of a mortgage due Dr. Godfrey. "The appellant now pretends, that the certificate of registration is bad, as "written on a separate paper from the mortgage, and also that the *faits et* "*articles* are irregularly submitted. As to the first objection it is true in fact "but not necessary in law. On both points the Court is against appellant."

A. W. Robertson, for appellant. Appeal dismissed.
C. R. Bedwell, for respondent.
(W. E. B.)

MONTREAL, MARCH, 1865.

In appeal from the Circuit Court, District of Montreal.

Coram, DUVAL, C. J., AYLWIN, J., MEREDITH, J., DRUMMOND, J., AND MONDELET, A. J.

ANNE JANE ATWELL,

(Defendant in Court below,) APPELLANT;

AND

DUNBAR BROWNE,

(Plaintiff in Court below,) RESPONDENT.

HELD:—That an attorney at law has no right of action against his client for costs of a suit which is still pending.

This was an action commenced by *saisie arrêt* before judgment, in the Circuit Court, for $200, for professional services, disbursements, &c.

The recapitulation of respondent's (plaintiff in the Court below) detailed account against the appellant is as follows:

Taxed Bill, ex parte Dooley, &c.	$105 88
Disbursements	14 15
Additional fees	79 97
	$200 00

The above item of "disbursements" $14.15, and the item "Additional fees" $79.97 were both in and about the said case of *ex parte* Dooley, &c.

According to the affidavit of respondent himself, the case of *ex parte* Dooley, &c., was still pending when he instituted his action in the Court below to recover costs from the appellant.

On the 30th December, 1863, the Honorable Mr. Justice Loranger gave judgment in the Court below in the favor of the plaintiff, for the sum of $190 and costs.

The case was appealed, and in the March term of 1865, the judgment of the Court below was reversed.

MEREDITH, J., dissenting, said, that the plaintiff had been employed to procure the removal of a tutor and sub-tutor, in whom the defendant had no confidence. Part of the plaintiff's demand was a taxed bill of costs. The object of the proceedings was to secure a sum of money belonging to defendant, and the appellant having come of age, this money had been secured. He thought the plaintiff was at least entitled to his bill of costs.

DRUMMOND, J., also dissenting, said, that he fully concurred with Mr. Justice Meredith. The bill of costs was made up and taxed by the prothonotary.

As a general rule, his Honor did not think the attorney of record was entitled to his costs till the case was disposed of in one way or other; but this was a peculiar case. Why should the plaintiff put his client to further costs when the object had been attained?

DUVAL, C. J., said that, as a general rule, the attorney could not bring the action for his costs before the final judgment was pronounced, unless the party

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thought proper to change his attorney. It was said that there was no use in obtaining final judgment in the suit in which the costs were incurred for the recovery of which the respondent brought his action. But the defendant in that suit would have been condemned to pay costs, and thus have obviated the necessity of demanding them of the appellant.

Perkins & Stephens, for appellant.

C. J. Dunlop, for respondent.

(W. E. B.)

COURT OF REVIEW.

MONTREAL, 30TH NOVEMBER, 1864.

Coram SMITH, J., BERTHELOT, J., MONK, A. J.

No. 413.

THE EASTERN TOWNSHIPS BANK, *Plaintiff*;

vs.

PACAUD, *Defendant*.

HELD:—That any report of distribution homologated by the prothonotary in accordance with the provisions of 23 Vic., chap. 57, sec. 32, may be reviewed before three judges under the Act 27 and 28 Vict., chap. 39, sec. 20.

A report of distribution of the moneys levied by the coroner for the District of St. Francis having been homologated by the prothonotary at Sherbrooke on the 28th September, 1864, one of the hypothecary creditors, being aggrieved, inscribed the case for review in Montreal.

The parties were heard, and the report of distribution was amended with costs in favor of the party aggrieved. Report reformed.

Sanborn & Brooks, attorneys for plaintiff.

L. E. Pacaud, attorney for creditor.

(P.R.I.)

MONTREAL, 30TH JUNE, 1865.

Coram BADGLEY, J., BERTHELOT, J., MONK, A. J.

No. 662.

Johnston et al. vs. *Kelly*.

HELD:—That a final judgment rendered by a judge dismissing a writ of attachment issued under the Insolvent Act of 1864, section 3rd, sub-section 6, is subject to review under the provisions of the Act 27 and 28 Vic., chap. 39, sec. 30.

The estate and effects of the defendant in this cause having been attached by the sheriff of the district of Richelieu, and report of his proceedings having been made, the defendant fyled preliminary pleas *à la forme* against the insufficiency of the proceedings, and also a *requête* containing the *moyens de nullité* against the proceedings. The parties having been heard upon the merits of such pleas and petition, the Superior Court at Sorel maintained the pretensions of the defendant and dismissed the writ of attachment with costs.

This judgment was rendered on the 19th April, 1865, and is as follows:

"La Cour, après avoir entendu la plaidoirie contradictoire des avocats des

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"parties sur le mérité de la requête du défendeur afin d'annuler le bref de "saisie émané contre lui à la poursuite des demandeurs, pris connaissance des "écritures des parties, faites sur la dite requête; dûment considéré les moyens "de la dite requête et les réponses à iceux faites par les demandeurs, examiné le "dit bref et le rapport fait sur icelui par le shérif et sur le tout avoir mûrement "délibéré;

"Considérant qu'il est de principe que les dispositions du droit commun non "spécialement modifiées par la loi qui crée une législation exceptionnelle, demeu-"rent en vigueur et doivent être observées, que si la loi nouvelle pour mettre à "effet quelques dispositions qui dérogent au droit commun, a recours à un procédé "judiciaire quelconque; ce procédé doit être, hormis dérogation spéciale, revêtu "des formes essentielles exigées par le droit commun et les ordonnances à peine "de nullité dans le cas où la loi a attaché cette peine à l'inobservance des forma-"lités, et que sous prétexte de mettre à effet une intention présumée du légis-"lateur, le juge ne peut fonder sur des inductions non écrites dans la loi, la dis-"pense des règles ainsi prescrites;

"Considérant que le paragraphe six de la clause troisième de la loi concernant "la faillite de mil huit cent soixante-et-quatre, en permettant en certains cas "l'émanation d'un bref de saisie contre les biens d'un débiteur insolvable et "la saisie d'iceux n'a point dispensé cette saisie de formalités ordinaires, "qu'au contraire il contient une disposition qui soumet telle saisie aux règles de "procédure ordinaires suivies devant les Cours d'où elle est émanée et qu'aux "termes du droit commun et des ordonnances, pour être valable, une saisie "quelconque doit être accompagnée d'un procès-verbal de l'officier saisissant, "contenant par le menu les effets saisis, et que dans l'espèce actuelle, le shérif "qui a pratiqué la prétendue saisie de biens du défendeur ne l'a pas accom-"pagné de semblable procès-verbal;

"Considérant que le règles de pratique faites sous l'autorité de la dite loi "par dix des Honorables Juges de la Cour Supérieure du Bas-Canada, dont la "douzième dispense* les shérifs d'accompagner leurs saisies de semblable procès-"verbal n'ont jamais été, enrégistrées en ce district où elles ne sont pas en force, "et que l'eussent-elles été; le dispositif de cette douzième règle excède les pou-"voirs conférés aux dits juges par le dit acte concernant la faillite qui leur a "donné le pouvoir de faire des règles de pratique pour régler la procédure à "faire pour mettre à effet les dispositions de cet acte et non pour en créer de "nouvelles et que partant les demandeurs ne pourraient invoquer l'autorité de "la dite douzième règle pour réclamer la dispense du procès-verbal en question;

"Considérant de plus qu'en supposant que les dites règles de pratique et la "dite douzième règle en particulier fussent en force en ce district, elles exigent "à peine de nullité, que le syndic ou gardien nommé par le shérif produise le

* The Rule of practice alluded to is the 31st and not the 12th, and is as follows: "21. "The sheriff to whom the writ of attachment shall be directed, shall not be required to "make any detailed inventory or *procès-verbal* of the effects or articles by him attached "under such writ; but a full and complete inventory of the Insolvent Estate so attached "by the sheriff shall be made by the assignee or person who shall be placed in possession "thereof as guardian under such writ."

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"jour du rapport de la saisie l'inventaire qui a été substitué au procès-verbal, ce "[illegible] pas été fait en la présente espèce;

"[illegible]sidérant enfin qu'aux termes du douzième paragraphe de la dite clause "troisième, le défendeur avait le droit d'invoquer la nullité de la dite saisie et "de prétendre en conséquence lors de la production de la requête que les biens "n'étaient pas encore assujétis à la liquidation forcée;

"Maintenant la dite requête, annulle et met au néant la dite saisie faite des "biens du défendeur dont elle lui donne main levée, ainsi que de la garde con- "férée des dits biens à James Morgan, nommé au rapport [illegible] "avec dépens contre les demandeurs."

The plaintiffs, considering themselves aggrieved, inscribed the cause for review before three judges in Montreal.

The defendant moved that the inscription be discharged on the ground that the only case under the Insolvent Act of 1864, subject to such review, was the order of the judge upon the award of an assignee under section 7 of the Insolvent Act, and that no other order or judgment of a judge under the Insolvent Act could be reviewed or appealed from.

The [illegible] of the motion is as follows:

"Parceque [illegible] rendu en cette cause le dit jour, 19 avril 1865, "en vertu de l'acte concernant la faillite, 1864, n'est pas un des ordres ni juge- "ments déclarés par ce dit dernier acte, sujets à révision devant trois juges de la "dite Cour Supérieure à Montréal ou ailleurs. Et qu'enfin aucune telle révision "de la dite cause et du dit jugement final n'est permise ni autorisée par la loi."

By the judgment of the Court of Review, this motion is rejected with costs.

Sweedon & Gairdner, attorneys for plaintiffs.

Pichè, attorney for defendant.

(P. R. L.)

MONTREAL, JANUARY 25TH, 1865.

Coram SMITH, J., BERTHELOT, J., AND MONK, A. J.

No. 2604.

Beaudry vs. *Ouimet et al.*

1o. A client supplied his attorney *ad litem* with money for carrying on a suit. The attorney was paid his bill of costs in the suit taxed against the other party, who was condemned to pay the costs by the judgment of the Court. The client brought an action against his attorney to recover back the money so supplied. Held:—that the attorney had a right to offset against the *demande* of the client the value of his services rendered to the client in the case over and above the taxed costs paid to the attorney by the other side.

2o. That answers of a party on *faits et articles* shall have a retroactive effect, and will, as a *commencement de preuve par écrit*, legalize oral evidence previously produced to prove an agreement above the sum of $25, notwithstanding the said evidence was objected to at the time, and a motion made to have it rejected.

3o. That an attorney is not liable in damages to his client except for gross negligence; and that allowing an action to become *perimée* does not of itself constitute such negligence.

SEMBLE:—That the declaration of a client that *he will be liberal*, and that he wishes his case to be carried on with diligence *coûte que coûte*, and that *he will pay all* [illegible] *expenses*, gives to his attorney a right to a retainer,—the value of which can be p[illegible] witnesses.

The plaintiff alleged in his declaration that the defendant [illegible]ht an action for him against one [illegible]in, advocate; that the case [illegible]ed, and that he paid the disburseme[illegible]mself both in the Inferior C[illegible] Court of Appeals to the amount of £58 13s. 2d.

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The plaintiff further alleged that, in 1855, the defendant took out for him an action of damages against one Plinguet for libel; that after instituting this action the defendants, contrary to plaintiff's instructions, neglected to carry on proceedings for three years, and thereby the action was lost by *péremption d'instance* with costs against the plaintiff to the amount of £12 4s. 6d., and plaintiff alleged that this action was so lost, and costs incurred by him through the negligence of defendants.

He concluded his declaration by praying that the defendant might be condemned to pay him the two sums above mentioned, amounting to £70 17s. 8d.

The defendants, by *exception péremptoire*, detailed the proceedings in the case against Papin; alleging that they performed important extra services in that case of the value of £37 10s., but which they reduced to £30; that their taxed costs in that case were £18 3s. 6d., which they were entitled to receive from plaintiff, the case having been ended; alleging also that in the plaintiff's case against *Plinguet* they did not receive instructions to proceed, and that the *péremption d'instance* was not owing to their negligence, and that the whole costs of that suit, with the sums above mentioned, amounted to £72 4s. 8d., which they had a right to set off against plaintiff's demand.

Issue was joined, and the parties went to evidence on the 24th January, 1863. The only part of the evidence which it is important to introduce here is that which had reference to the promise of a retainer.

On the 5th September, 1863, Charles Deslauriers, advocate, was produced by defendants, and deposed as follows: "J'étais étudiant en droit chez Messieurs "Ouimet, Morin et Marchand, avocats de la dite cité de Montréal en l'année "1856. * * * "Il est à ma connaissance que le demandeur est venu plusieurs "fois à l'étude de Messieurs Ouimet, Morin et Marchand, avocats de Montréal, "pour leur demander d'agir comme avocats, et de s'intéresser comme avocats "dans deux causes, une, contre Monsieur Joseph Papin, avocat de Montréal, et "l'autre contre Monsieur Jacques A. Plinguet, etc.

"Je me rappelle très-bien que le demandeur est venu quatre ou cinq fois et "plus peut-être en l'étude des défendeurs au meilleur de ma connaissance vers "la fin de l'automne ou au commencement d'hiver, 1856. Et de plus, je me "rappelle que le demandeur est venu trouver Monsieur Louis Siméon Morin, un "des défendeurs en cette cause, le dimanche après-midi à sa pension chez Mme. "ma mère, et que là, et alors, il aurait dit à Monsieur Morin qu'il devait "descendre à Québec coûte que coûte. *Objecté à cette partie du témoignage "qui tend à prouver par preuve orale une convention au dessus de cent francs "et comme illégale et non avenue. Objection réservée de consentement.* * * * "Il est à ma connaissance qu'avant cette dernière occasion, Monsieur le demandeur est venu à l'office des défendeurs et leur a dit qu'il fallait absolument "qu'ils descendent à Québec coûte que coûte, et qu'il paierait tout ce qu'il faudrait pour cela, (*même objection réservée de consentement*) qu'il savait que des "retenus étaient indispensables ou plutôt qu'il savait qu'il y aurait des frais à "encourir et qu'il était prêt à les payer, que n'importe le montant des frais "encourus par les défendeurs pour descendre à Québec *et cœtera*, qu'il les paierait."

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Maxime Gareau, advocate, of the city of Montreal, a witness also produced by defendants, and who was also a law student in their office at the time of the occurrence of which he speaks, deposes to the same effect as the preceding witness, that the plaintiff insisted that Mr. Morin, one of the defendants, should go to Quebec to plead plaintiff's case against *Papin* before the Court of Appeals, and that he understood plaintiff to promise to pay defendants liberally for such service.

The plaintiff objected to this evidence because that, being oral, it tended to prove an agreement for a sum exceeding a hundred francs.

On the 26th September following the defendants made a motion that a rule for *interrogatoires sur faits et articles* issue addressed to the plaintiff, which was granted, and the plaintiff made the following answers to the 11th and 12th interrogatories annexed to the said rule: To the 11th, "J'ai à plusieurs reprises "témoigné aux défendeurs mon désir de faire terminer cette affaire, et que je "serai libéral à leurs regards."

To the 12th, "Au commencement du procès," (that is the action against Mr. Papin), "M. Morin est venu à mon bureau et m'a signalé le désir d'avoir "cinquante dollars et je les lui ai donnés, pour lesquelles il ma donné un bon. "Je n'ai jamais demandé le montant de ce bon, car j'ai considéré que le mon-"tant était pour retenue et que je n'en serai pas remboursé."

On the 30th September, 1864, the Superior Court (His Honor Mr. Justice Smith) rendered judgment as follows:

The Court * * * * * * * *
"considering that the said plaintiff hath fully proved the allegations of his said "action against the said defendants, in so far as they relate to the sum £58 13s. "2d. paid by him, the said plaintiff, in the action against Joseph Papin, and that the "said sum of £58 13s. 2d. was afterwards received by the said defendants from the "said Joseph Papin, as costs, after the termination of the said suit, and for "which sum the said defendants are now liable to account to the said plaintiff; "and further considering that the said plaintiff hath failed to establish any "further right or claim against the defendants, by reason of any of the allega-"tions in the said action so far as regards their other claim, the Court doth "reject the same; and further, considering that the said defendants have failed "to establish against the said plaintiff any claim in the shape of retainers, or for "expenses in travelling or otherwise, the same are rejected; but considering that "it hath been shown by the said defendants that the said plaintiff stands indebt-"ed to the said defendants in the sum of £18 2s.6d. and £11.17s. 8d., amount-"ing in all to the sum of £30 2s., as and for taxed costs due defendant in the two "causes of *Beaudry* vs. *Papin* and *Beaudry* vs. *Plinguet*, and which costs have "not been paid, the Court doth compensate and set off *pro tanto* the said sum of "£30 2s. against the said sum of £58 13s. 2d. so due to plaintiff, which leaves a "balance due to plaintiff of £28 13s., for the payment of which the Court doth "condemn the said defendant, &c., &c."

The defendants had this judgment revised by the Court of Review. The latter Court concurred with the Superior Court in rejecting plaintiff's claim for damages against defendants on the ground of their negligence in the case against Plinguet.

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Mr. Justice Berthelot, in rendering the judgment of the Court, stated on one of the incidents of the case, that the tariff of fees was not made to regulate the amount of costs to be claimed by an attorney from his client, but only the costs to be paid by the party condemned in a suit.

The judgment of the Court of Review was as follows:—Considérant qu'il y a erreur dans le dit jugement, (that is the judgment of the Superior Court just recited).

"Considérant que des réponses faites par le demandeur aux 11me. et 12me. interrogatoires des faits et articles qui lui ont été proposés par les défendeurs, il résulte un commencement de preuve par écrit des allégués des défendeurs en leurs plaidoyers, que le demandeur s'était obligé de leur payer une retenue dans sa cause contre feu Joseph Papin soit en Cour Supérieure ou sur les appels incidents à icelle cause, et de leur payer certains frais, dépenses de voyage par eux faits à Québec à cette occasion, et que ce commencement de preuve était suffisant pour autoriser la preuve testimoniale sur ces faits;

"Considérant qu'il est suffisamment prouvé que les défendeurs méritent avoir de demandeur pour retenue sur la dite cause contre Joseph Papin, écuier, ainsi que pour frais de voyager à Québec à l'occasion des appels incidents à cette cause, une somme de trente louis cours actuel;

Considérant que les faits de négligence imputés par le demandeur aux défendeurs par sa déclaration et réponses aux exceptions ne sont pas prouvés ni suffisants en loi pour empêcher les défendeurs de recouvrer du demandeur la somme de £18, 2, 6, cours actuel montant des frais et déboursés qui leur sont dus comme Avocats et procureurs du demandeur dans la dite cause contre feu Joseph Papin écuier, devant la dite Cour Supérieure aussi bien que la somme de £11, 17, 8 cours actuel pour leurs frais et déboursés comme avocats et procureurs du dit demandeur dans la cause contre J. Plinguet;

Considérant que ces trois sommes réunies ensemble forment celle de £60, 0, 2, cours actuel que les défendeurs ont bien le droit d'offrir et opposer en compensation des sommes de deniers qui font le sujet de la demande;

Considérant que le demandeur n'a point prouvé qu'il eut droit de réclamer en vertu de sa demande contre les défendeurs aucune autre somme que celle de £58, 13, 2, cours actuel qui est plus que compensée, payée et éteinte par la dite somme de £60, 0, 2, dit cours—que les défendeurs ont le droit de demander et réclamer du demandeur;

La Cour procédant maintenant à reviser le dit jugement du 30 septembre dernier et à rendre le jugement qui aurait dû être rendu, a déclaré la dite demande compensée et même au-delà d'une somme de £1, 7, 0, cours actuel pour laquelle les défendeurs pourront se pourvoir autrement et par conséquent déboute l'action du demandeur avec dépens."

Judgment reversed and action dismissed.

R. Roy, for plaintiff.
L. S. Morin, for defendants.
E. M. Piché, Counsel for defts.
(W.E.B.)

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Plaintiff's authorities—3 Adolphus & Ellis, Q. B. R., p. 136.
Veitch vs. Russell, 2 Thomine, Desmazures, p. 41, No. 599.
Ord., 1667, Tit. 31, art. 12; 1 Pigeau, p. 398.
Pothier, Louage, No. 10.
Pothier, Mandat, Nos. 24, 26, 131.
2 L. C. J., p. 183, Devlin vs. Tumblety.
4 Martin's L[illegible]

Defend[illegible] Jousse sur ord. 1667.
Sect. [illegible] Art. 5.
Pothier, Contrat de Louage, Nos. 10, 12, and 397, 401.
Id. Mandat, Nos. 22, 24, 26, 27, 29, 68, 123, 125.
Id. Procédure Civile, part. iv, Chap. I, § ii.
Alinéas 1 and 15. § vi, De l'Action de Salaire.
Jousse Ord., 1667, tit. 31. Art. 1, [illegible]. Arts 8, 9, 12, 14, et principalement Art. 5, note 1. Alinéas 1 et 3. Art. 18, note 1. Alinéas 1 et 2.

PIGEAU.—Le "Tarif des Salaires des Procureurs au Châtelet," à la fin du 2me vol. de Pigeau, p. 525. Articles 1, 2 at 14.
Fait et promulgué (Le dit Tarif,) en vertu et en exécution de l'art. 18 du Tit. 31 déjà cité de l'Ord. 1667.
Id. p. 535, Règlement général sur les voyages et séjours, en date du 16 Août 1665.
Id. 537, Art. 24.
Id. Vol. 1, p. 878, Alinéa 5, et p. 879, Alinéas 4, 5, 6, 7.

ZACHARIÆ.—Droit Civil français. Edition en 5 vols. 8vo., vol. 3, p. 121 (au bas) du mandat, note 2. *La définition que l'article 1084 donne du mandat est beaucoup trop vague,* et n'indique pas les *caractères propres* et distinctifs de ce contrat. "C'est pour n'avoir pas "nettement saisis ces caractères, que la plupart des auteurs ont confondu avec le mandat, "des conventions d'une nature toute différente, et notamment le *louage de services*."

"Tout mandat implique à la vérité une stipulation et une promesse de services. Mais "le mandat contient quelque chose de plus que le louage de Services." Il confère au mandataire le pouvoir de représenter le mandat, etc., etc. P. 122 (*au bas*), note 8. "Le salaire est censé tacitement stipulé et promis dans les mandats relatifs à des affaires, dont le mandataire se charge *par état*, ou par *profession*—par exemple, dans les mandats confiés à des avoués, ou des agents d'affaires, et dans les commissions données à des courtiers, ou à des commissionaires de commerce.

SAUNDERS.—Pleading and Evidence, Am. Ed. 1851, vol. 1, p. 251. Attorney, actions by and against. Evidence for plaintiff. The plaintiff must, upon *non-assumpsit*, or *nil debet*, prove his retainer by defendant; and that he has performed the work and business charged for. "He should also be prepared with evidence of the reasonableness of the charges," or prove that the bill was delivered a month before action, in respect of which the charges are made. P. 253—proof of the work and business being done. "After the "proof of the *retainer*, the performance of the work and business must be proved. This "may be done by the plaintiff's clerk, or other person, who has acted and can speak of the "*causes of business*, in respect of which the charges are made, and who can prove the *main* "*items*. It is not the practice to require proof of every item."

P. 260. "If the action was commenced before the passing of this statute (6 and 7 Vict., c. 73), "the plaintiff should prove the reasonableness of charges, as in other charges for work and labor."

MASSABIAU. (Ed. en 3 vols. 8), "Manuel du Procureur du Roi." Vol. 3, p. 245, No. 3100 "Les Avocats ont droit à des honoraires;—ils ont même pour les réclamer un "Action ouverte devant les Tribunaux." * * * * * * "Du reste ils se taxent eux-mêmes

"pour leurs *Honoraires* et ne sont point tenus à suivre d'autre *Tarif* que leur discrétion et "leur délicatesse."

Beaudry vs. Ouimet et al.

3 L. C. J., p. 182, Devlin vs. Tumblety.
1 L. C. J., p. 114, Beaudry vs. Papin.
3 L. C. J., p. 46, " "
3 L. C. J., p. 237, Beaudry vs. Pilinguet.

SUPERIOR COURT.

MONTREAL, 31 JANVIER, 1865.

AT ENQUETE SITTINGS.

Coram BERTHELOT, J.

No. 1619.

Brown vs. *Carter*.

HELD:—That a physician is compelled to disclose information acquired by him confidentially in his professional character.*

In this case a physician having been summoned as a witness, and been under examination, objected to answer a question, contending that he could not be compelled to disclose facts the knowledge of which he had acquired confidentially as a physician. The question put to the witness, Dr. A. Nelson, was as follows:

Question.—Que connaissez-vous du caractère et des habitudes du défendeur, en conséquence de vos rapports professionnels.

Objection.—Le témoin objecte à cette question comme tendant à violer le privilège professionnel qui ne permet pas aux médecins de dévoiler les faits parvenus à leur connaissance, par des rapports professionnels.

Objection renvoyée.

The ruling of the judge was adverse to his pretensions, and he was compelled to answer. This decision rests on the following authorities cited by the judge presiding at *enquêtes*.

GREENLEAF, *Law on Evidence*, § 248. Neither is this protection extended to *medical persons*, in regard to information which they have acquired confidentially, by attending in their professional characters:

Duchess of Kingston's case, 11 Hargr. St. Tr. 243; 20 How. St. Tr. 572; Rose vs. Gibbons, 1 C. and P. 97; Broad vs. Pitt, 3 C. and P. 519, per Best, C. J. By the Revised Statutes of New York (vol. 2, p. 406, § 73), and Missouri (Revised Code of 1835, p. 623, § 17), "No person, duly authorized to practise physic or surgery, shall be allowed to disclose any information which he may have acquired in attending any patient in a professional character, and which information was necessary to enable him to prescribe for such patient as a physician, or to do any act for him as a surgeon." But though the statute is thus express, yet it seems the party himself may waive the privilege; in which case the facts may be disclosed.

* Taylor on Evidence, No. 837

These Statutes were evidently passed to extend the principle of privileged communication to physicians, which does not exist at common law.

Girouard, attorney for plaintiff.

Mackay & Austin, attorneys for defendant.

(P. R. L.)

SUPERIOR COURT.

MONTREAL, 30TH JUNE, 1865.

Coram BERTHELOT, J.

No. 2499.

Moore vs. *O'Leary et al.*

HELD:—That a direct action can be maintained at the instance of a partner for setting aside a judgment rendered upon the confession of his co-partner made after the dissolution of the partnership.

The plaintiff by his declaration alleged: that before and on the 17th June, 1862, he and one of the defendants, John O'Leary, were co-partners. That on the 17th June, 1862, the firm did not owe the other defendant, Matthew O'Leary, $462 $\frac{50}{100}$. That the firm was dissolved in June, 1862, to wit, 23rd June, 1862. That the defendant John O'Leary, colluding with the other defendant, his father, on the 17th June, 1862, made and signed a promissory note with the name of the firm of Moore & O'Leary to the order of Matthew O'Leary, promising to pay him on demand $462.50.

That on the 23rd June, 1862, a suit was instituted, No. 2096, in the Superior Court at Montreal, by the said Matthew O'Leary against the firm for the recovery of the said note. That on the 14th July, 1862, the said John O'Leary, using the name Moore & O'Leary, confessed judgment.

That the firm was dissolved on the 23rd June, 1862. That all such proceedings were kept secret from the plaintiff in this cause.

That the plaintiff has been damaged as a trader by such suit and judgment to the extent of $5000. The plaintiff concluded to the nullity of the promissory note, and prayed that the said judgment be declared fraudulent, null and void, and set aside with costs.

The defendant met this action by a *défense au fonds en droit* and a *défense au fonds en fait*. The reasons in support of the first plea are as follows:

1° Because it is not alleged in the said declaration that the judgment in the said cause rendered, complained of, has been set aside by any competent tribunal.

2° Because from the allegations of the said plaintiff's declaration it is apparent that the proper remedy for the setting aside of the said judgment was by opposition, a *simple requête à fin d'opposition* in lieu of the action.

3° Because from the allegations of the said plaintiff's declaration it is apparent that his, the said plaintiff's, remedy for setting aside the said judgment was by instituting an appeal to the Court of Queen's Bench, appeal side.

4° Because this Court has no power by action to set aside a judgment rendered therein.

5° Because so long as the judgment of this Court complained of by the said

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plaintiff remains, neither reversed nor set aside, the said plaintiff cannot claim damages on account of its having been obtained against him.

6o Because the causes of action in the said declaration contained are incompatible, and cannot be joined together. Après preuve et audition des parties; le jugement final de la cour est motivé comme suit:

La Cour après avoir entendu les parties par leurs avocats au mérite de cette cause, avoir examiné la procédure et la preuve et sur le tout mûrement délibéré:

Considérant qu'il appert par la preuve et la procédure que le quatre de juillet mil huit cent soixante-et-deux, la société de commerce qui avait existé auparavant en la dite cité de Montréal entre le demandeur et le défendeur John O'Leary sous les noms et raison de "Moore et O'Leary," avait cessé et avait été dissoute depuis quelques jours auparavant et que depuis la dissolution de la société l'un des deux ci-devant associés ne pouvait plus faire aucun acte qui put engager son co-associé;

Considérant que le demandeur est bien fondé à se plaindre du jugement rendu par le protonotaire de cette Cour le quatre de juillet mil huit cent soixante-et-deux en vertu de la section cent treize du chapitre quatre-vingt trois des Statuts Refondus pour le Bas-Canada dans une cause sous numéro deux mil quatre-vingt seize à la poursuite du défendeur en cette cause, Matthew O'Leary, demandeur en la dite cause numéro deux mil quatre-vingt seize contre lui le dit Terence Moore et le dit John O'Leary pour la somme de quatre cent soixante-deux piastres, et cinquante centins, alléguée être due sur un billet pour le même montant consenti par la dite société en faveur du dit Matthew O'Leary en date du dix sept juin mil huit cent soixante-et-deux, le dit jugement, ayant été faussement et erronément rendu sans qu'aucun défaut ait été entré légalement contre le dit Terence Moore, et sans que la prétendue confession de Jugement faite en la dite cause par le dit John O'Leary, l'un des dits défendeurs, en date du dit jour quatre juillet mil huit cent soixante-et-deux, pût autoriser et justifier l'entrée du dit jugement contre le dit Terence Moore qu'elle ne pouvait lier ni engager;

La Cour déclare le dit jugement entré par le protonotaire de cette Cour le dit jour quatre du juillet mil huit cent soixante-et-deux dans la dite cause numéro deux mil quatre-vingt seize à la poursuite de Matthew O'Leary contre le dit Terence Moore et le dit John O'Leary, nul et illégal et sans aucun effet vis-à-vis du demandeur, le tout avec dépens contre les défendeurs.

Judgment for plaintiff.

Mackay et Austin, avocats du demandeur.
J. B. Nagle, avocat des défendeurs. (*)
(P. R. L.)

(*) Plaintiff's authorities, 5 L. C. Jurist, Beaufield et Wheeler.
Direct action, although an opposition is allowed. 10 L. C. Rep., p. 370. Thouin et Leblanc.
Opposition was and is *facultatif*. See Cons. Stat. L. C. p. 5 of Jud. Act, English version.—"May" is not imperative.
Merlin, Rep. vo. Opposition (tierce), § VI.
Merlin, quest. de droit vo. chose jugé, § XI.
After dissolution, one of the late partners cannot confess judgement using the name of the firm.
1 L. C. Rep., p. 433.

SUPERIOR COURT.

MONTREAL, 28th JULY, 1864.

IN CHAMBERS.

Coram BADGLEY, J.

Ex parte *Jane Shaw*, a minor, Petitioner for emancipation,

AND

Peter Cooper, Tutor, *mis en cause*.

MINOR—EMANCIPATION.

HELD:—That a minor aged 19 years and upwards may be emancipated as regards the administration of her property.

The minor, Jane Shaw, on the 12th July, 1864, addressed a petition to one of the Justices of the Superior Court, whereby she humbly shewed:

"That by *acte de tutelle*, duly homologated before Monk, Coffin and Papineau, Prothonotary of the Superior Court for Lower Canada, in the District of Montreal; Peter Cooper, of the said city of Montreal, plasterer, was appointed tutor, and John Emmanuel Tanner, minister of the Evangelical Church, Montreal, sub-tutor to your petitioner, the said *acte de tutelle* bearing date the sixth day of August, eighteen hundred and fifty-eight.

"That by an order of his Honor Mr. Justice Monk, bearing date the second day of March, eighteen hundred and sixty-three, made on the petition of the said Peter Cooper for a writ of *habeas corpus* to bring up the petitioner, alleged to be detained by the said John Emmanuel Tanner, it was ordered that the then petitioner, the said Peter Cooper, should take nothing by his then petition, and it was further ordered that your petitioner, the said Jane Shaw, be allowed, and she was thereby allowed, to choose the person with whom she would reside. *Vide* 8 L. C. Jur., 113.

"That the said Peter Cooper, although he has drawn the rents of your petitioner's estate during the last six years, and although the said rents are abundantly sufficient for your petitioner's aliment, yet the said Peter Cooper has not supplied such aliment or money therefor, or for any other purpose, to your petitioner during the last year.

"That your petitioner, since the eleventh day of September last, has boarded with Dame Eleanor Haight, of the city of Montreal, schoolmistress, widow of the late Robert W. Lay, in his lifetime of the same place, publisher, for the purposes of education, and there is now due by your petitioner to the said Eleanor Haight for board and tuition, since the said eleventh day of September last, the sum of three hundred and seven dollars ninety-nine cents currency, which the said Peter Cooper has refused to pay for your petitioner, to hes great pain and discomfort.

"That your petitioner is of the age of nineteen years and upwards, having been born on the fourth day of May, eighteen hundred and forty-five, and your petitioner is capable of managing her affairs and property, and desires to be permitted so to do, if it should please your Honors, or one of your Honors, to accord her emancipation from the said tutorship.

Shaw and Cooper.

Wherefore your petitioner humbly prays that your Honors, or one of your Honors, will be pleased to order to assemble a sufficient number of the relatives, and in default of relatives, of the friends of the said minor, that upon their consent, if the same shall be duly given, your Honors, or one of your Honors, may be pleased to accord to your petitioner emancipation from the said tutorship, permitting her to manage her own affairs, and to employ her moveable property, and the rents and revenues of her immoveable property, in as full and ample a manner as if your petitioner had attained her age of majority."

Notice of the presentation of the petition was given to the tutor, Peter Cooper, who appeared by his attorney, B. Devlin, Esquire, when the petition was presented to the Honorable Mr. Justice Badgley, in Chambers, who then ordered the assembling forthwith of the relations and friends in the usual form, and took the advice of the relations and friends recommending the emancipation, and delay was given to the tutor to make objections thereto, if he had any, on or before the 14th then instant, by writing, or verbally, at that time, as he might be advised. On the 14th, the petitioner present, by her attorney, as ordered above, and the tutor also present, by his attorney, no objection was made or fyled, and a statement of the petitioner's revenues was ordered to be submitted and the case suspended. On the 25th July, the judge ordered that an *assemblée de parens* be had for the purpose of naming a fit person as curator *aux causes* and *tuteur aux actions immobilières* of the said petitioner.

On the 28th July, the assembly for the purpose of appointing the curator *aux causes* and *tuteur aux actions* was had, and Archibald Ferguson, Esquire was appointed such curator and tutor, and on the same day appeared the said Peter Cooper, the tutor of the minor, with his said attorney, who, on behalf of the said tutor, did fyle his consent to the emancipation of the minor.

Therefore the judge gave the following order:

"Having heard the said Jane Shaw and the said Peter Cooper, by their respective counsel, upon the petition of the said Jane Shaw to be emancipated and freed from the control of her said tutor, Peter Cooper, and permitted to manage her own affairs, and to enjoy her moveable property, and the rents and revenues of her immoveable property in as full and ample a manner as if she had attained her age of majority, having seen and considered as well the said petition as the *avis de parens* made and given before me on the twelfth day of July, one thousand eight hundred and sixty-four; considering, also, the *avis de parens* for the appointment of Archibald Ferguson, Esquire, as curator, *curateur aux causes* and *tuteur aux actions immobilières* of the said Jane Shaw, had before me on this twenty-eighth day of July, instant; considering, also, the consent made and given by the said tutor, Peter Cooper, by his attorney, to the emancipation of the said minor, Jane Shaw, I do hereby confirm and homologate the said *avis de parens*, made and given on the twelfth day of July, instant, for the emanciption of the said Jane Shaw, and I do hereby declare the said Jane Shaw to be, from this day, emancipated and freed from the control of the said Peter Cooper, as such tutor as aforesaid, and permitted to have the management of her own estate and to enjoy her moveable property and the rents and revenues of her immoveable property, subject to the limitations following: 1st. That the said petitioner shall

Shaw and Cooper.

not be at liberty to alien, sell, mortgage, dispose, or in any way bind the real estate to her belonging, nor any or either of the shares of stock, standing in her own name or to her belonging, as being in the name of her said late tutor, Peter Cooper; that she shall be at liberty to receive, upon joint receipt of herself and of the Reverend John Emmanuel Tanner, her late sub-tutor, the rents and revenues of her said real estate, due and as they become due, and the interest and dividends due and as they become due and payable upon the said shares of stock standing in her own name or in the name of the said Peter Cooper for her as her tutor, namely, upon six shares of stock in the Bank of Montreal, upon twenty-eight shares of stock in the City Bank, sixteen shares of stock in the Commercial Bank, and two other shares in the capital stock of the said City Bank of the value of eighty dollars, entered in the books of the said bank in the name of William Workman, Esquire, for the benefit of the said late Patrick William Cooper; and I, the said judge, do further confirm and homologate the *avis de parens*, this day had and taken for the appointment of the said Archibald Ferguson as *curateur aux causes* and as *tuteur aux actions immobilières* of the said Jane Shaw until her majority."

Petition granted.

F. W. Torrance, for petitioner.

B. Devlin, for tutor.

(F. W. T.)

Any judge of the Superior Court has the power and authority of the Superior Court in what respects emancipation. C. S. L. C., cap. 78, §§ 6 and 23, pp. 667, 672. Cap. 86.

As to emancipation of minors, *vide* Pothier, Personnes, p. 622.

Guyot, Emancipation, pp. 659, 660.

Nouv. Den. *vo.* Emancipation, p. 503.

Pigeau, Pro. Civ. 2, 308-311.

Code of Canada, cap. on Emancipation, p. 98-100, Nos. 74-5, and 77-8.

MONTREAL, 15TH FEBRUARY, 1865.

Coram BERTHELOT, J.

No. 1281.

Mitchell vs. *Browne*.

HELD:—A notice of protest of a promissory note, addressed to a lady as "Sir" instead of Madam, is sufficient, if duly served upon her.

BERTHELOT, J. This action was upon a promissory note. The point raised was that the notice of protest was not sufficient, because it was addressed "Sir" instead of Madam, and that there was nothing to show that the lady in question had ever received notice so as to render her liable. But it appeared from the evidence that she received the notice herself; under these circumstances, the notice was sufficient. In the case of Seymour vs. Wright, 3 L. C. R., p. 454, where it was held that "notice of protest addressed to a a female endorser, beginning 'Sir,' is bad, and the action against such endorser will be dismissed," another party had received the notice.

Judgment for plaintiff.

A. Brunet, for plaintiff.

Dunlop & Browne, for defendant.

(J. L. M.)

ARTHABASKA, 16TH JUNE, 1865.

Coram POLETTE, J.

Ex parte W. H. TROWLEY,

For Certiorari,

AND

THEOPHILE COTE,

Prosecutor in the Court below.

HELD :—That in a case heard before three Justices of the Peace, judgment may be rendered by two.

In this case it was made to appear by the affidavit of circumstances amongst other reasons for granting the writ, that the complaint and witnesses for the prosecution had been heard before three justices of the Peace. No defence was made, the defendant having protested and denied the jurisdiction of the Court. After the hearing of the cause, one of the justices present withdrew from further proceeding in the case,—the two remaining justices adjourned, taking the case *en délibéré*, and subsequently rendered judgment against the defendant.

The defendant moved the Superior Court for a writ of *certiorari*, maintaining, amongst other grounds that two justices could not render a judgment in a case heard before three.

Per Curiam.—The absence of one of the justices having heard the case does not affect the judgment rendered by the remaining two, as by the statute one justice might have heard and determined the case; there being two remaining, the judgment is good.

Writ refused.*

Felton & Felton, for petitioner.
William Duval, for prosecutor.
(W. H. F.)

COUR DE CIRCUIT.

MONTREAL, 28 FEVRIER, 1865.

Coram BERTHELOT, J.

No 5459.

Morgan vs. *Valois.*

JUGÉ :—Que sur une règle prise contre les greffiers, pour mépris de Cour à raison de la non-production du dossier qui est adiré ; les parties sont tenue de sepurger par serment sur les faits qui sont reprochés aux greffiers.

Le demandeur fit motion le 10 décembre 1864, pour l'émanation d'une règle contre les greffiers de la Cour de Circuit à Montréal pour mépris de Cour par suite de leur refus de lui donner communication du dossier en cette causo et qu'ils allèguent être adiré

La Cour par son jugement interlocutoire a ordonné ce qui suit : "Avant "d'adjuger sur la règle, il est enjoint aux parties de se purger, par serment, sur "les faits qui sont reprochés aux Greffiers de cette Cour par la motion du demandeur en cette date du 10 décembre 1864."

Adolphe Ouimet, avocat du demandeur.
S. B. Nagle, avocat du défendeur.
(P. R. L.)

* Sed Vide 9 L. C. Jurist, p. 22.

COUR DE CIRCUIT.

MONTREAL, 30 AVRIL 1865.

No. 1035.

Coram MONK J.

Montférant vs. *Bertrand.*

JUGE.—Que le Tribunal peut révoquer le privilége de procéder *in formâ pauperis*, acordé au demandeur, lorsqu'il appert soit par la procédure ou par la preuve que le demandeur vaut plus que £5 sterling.

Le demandeur avait obtenu le privilége de procéder *in formâ pauperis*, malgré qu'il n'eût pas allégué qu'il ne valait £5 sterling, et avait en conséquence poursuivi la défenderesse en sa qualité de légataire universelle de feu Joseph Montférant, pour un an de gages comme serviteur. A cette action, la défenderesse plaida que le demandeur avait été reçu chez feu Montférand par charité et qu'il n'en avait été chassé que lorsque sa présence fut devenue insupportable.

La preuve du demandeur dévoila le fait que ce dernier avait des moyens d'existence et des valeurs au delà de £5 sterling.

La défenderesse par une motion demanda, que le privilége de procéder *in formâ pauperis* accordé au demandeur, fut revoqué ; que la procédure, n'étant pas timbrée au désir de la loi, fut déclarée nulle, et l'action déboutée quant à présent.

M. DESJARDINS pour le demandeur, prétendit que la preuve indiquait que le demandeur était un pauvre homme, et que ce qui apparaissait dans le témoignage de son client, ne pouvait être regardé que comme une exagération inspirée par l'orgueil de ne pas passer pour un mendiant.

Quant au point soulevé que l'action devait être déboutée, parceque la procédure n'était pas timbrée, l'absence de timbres devait être tolérée par la Cour qui l'avait permise, et que la seule conclusion à laquelle la Cour pouvait arriver sur ce point, était de limiter un temps pour l'imposition de tels timbres.

G. DOUTRE, pour la défenderesse, plaida, que la preuve du demandeur tant par témoins que par actes authentiques, donnait à ce dernier un caractère d'homme à l'aise. Un acte de vente indiquait qu'il avait possédé une maison sur la rue St. Paul et en avait reçu un prix raisonable. Le propre témoignage du demandeur indiquait qu'il avait acheté un cheval de la valeur de $80, un mois après la poursuite, qu'il en avait déjà payé la moitié, et se vantait de pouvoir payer la balance avant six mois.

Sous ces circonstances, il n'y avait pas de doute à entretenir sur la position du demandeur. Les auteurs sont unanimes pour suggérer la révocation du privilége de procéder *in formâ pauperis*, s'il a été accordé à une personne valant plus £5 sterling.

Statuts Refondus B. C., Ch. 82 Sect. 24.
Archbold's Practice, Vol 11, Page 169.
Tidd's Practice, Vol 1, Page 97.
Tidd's Forms, Page 18.
Lush Practice, Page 208.

Quant à la question du timbre, la 27—28 Vict., ch 5, sect. 18, donne à la Cour le droit de permettre l'imposition du timbre sur des procédures non timbrées, lors-

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que l'acte n'a pas été violé sciemment et volontairement, or dans ce cas, le demandeur ne s'est-il pas soustrait à cette imposition du timbre par un mensonge, et s'il avait dit la vérité dans l'affidavit, comme il l'a dit dans son témoignage, le privilége de procéder *in forma pauperis*, ne lui aurait-il pas été refusé !

Le demandeur a donc violé la loi sciemment et volontairement, et s'est ainsi placé dans une position à empêcher la Cour de lui permettre l'imposition du timbre.

Par la sect. 13 du même statut, la loi déclare nulles toutes les procédures non timbrées, qui auraient dû l'être.

Ainsi toute la procédure du demandeur est nulle, et la défenderesse doit être renvoyée des fins de l'action, sauf au demandeur à se pourvoir.

Jugement :

" La cour après avoir entendu les parties sur la motion faite par la défenderesse le 11 mars courant, avoir examiné la procédure et pièces et avoir sur le tout délibéré, considérant qu'il résulte de la déposition du dit demandeur que lors de l'institution de cette action, le dit demandeur n'était pas dans une condition de pauvreté telle qu'il eut pu obtenir de procéder *in forma pauperis*, si les faits eussent été fidèlement représentés au juge qui a permis cette forme de procéder, accorde avec dépens la partie de la dite motion tendant à dépaupériser le demandeur, rejette le reste de la dite motion et déclare le demandeur déchu du droit de procéder *in forma pauperis*, et ce à compter de l'émanation du bref de sommation en cette cause inclusivement. En conséquence la cour ordonne que tous procédés en cette cause soient suspendus jusqu'à ce que les actes de procédure qui auraient dû être revêtus de timbres, si le demandeur n'eût pas obtenu de procéder *in forma pauperis* soient revêtus de tels timbres suivant la loi."

Le demandeur, ayant négligé d'apposer le timbre sur sa procédure, un autre application a été faite pour qu'un délai fut fixé par la Cour. Le délai fixé étant expiré, et le timbre n'ayant pas été apposé, l'action du demandeur fut renvoyée avec dépens, *sauf à se pourvoir autrement*, par son Honneur le Juge Berthelot le 30 Mai 1865.

Bélanger et Desjardins, pour le Demandeur.
Doutre et Doutre, pour la défenderesse.
(G.D.)

MONTREAL 30 AVRIL, 1865.

Coram BADGLEY, J.

No. 2118.

Lord vs. Laurin et al.

JUGE :—Que lorsqu'une signature à un billet est déniée ; des experts—vérificateurs peuvent être nommés sur motion, de l'une des parties et leur rapport sera homologué et concluant.*

La Défenderesse, Monique Laurin, étant poursuivie en sa qualité de légataire universelle de feu François Quenneville son époux décédé, pour le recouvrement

* Ord. de 1667, Titre 22, art. 5, 6, 7, et 8 ; Vide 1 Foster and Finlayson, p. 270, Birch vs. Ridgway and p. 550, Cooper and Dawson.

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d'un billet au montant de $135, en date du 15 octobre 1862, allégué avoir été souscrit par son mari, comme faiseur de ce billet; elle nia la signature de son mari et elle plaida que cette signature était "contrefaite et forgée." Le 10 juin, 1864, avant l'ouverture de l'enquête, le demandeur fit motion pour la nomination de trois experts pour procéder "à l'examen, constatation, vérification "et preuve de tous les faits allégués par les parties et résultant de la contesta- "tion liée en cette cause et notamment à l'examen, contestation, vérification "et preuve des écritures, signatures, endos ou endossements qui se trouvent sur "aucune partie du billet produit en cette cause."

Après l'audition des parties sur cette motion, la cour a rendu le 30 septembre 1864, un jugement interlocutoire comme suit:

"La cour, après avoir entendu la plaidoirie des avocats des parties sur l'incident "soulevé par la motion du demandeur, en date du dix juin dernier, à l'effet de "faire procéder par experts à la vérification des écritures affirmées par la partie "demanderesse, et déniées par les autres parties, savoir: des signatures que le "demandeur allègue être celles de feu François Quenneville et du défendeur "Charles Falkner apposées au bas du billet, produit en cette cause et au dos "d'icelui, signatures déniées respectivement par la défenderesse Monique Laurin "exécutrice testamentaire et légataire du dit François Quenneville, et par le dit "Charles Falkner lui-même; avoir examiné la procédure et sur le tout avoir "délibéré."

"Considérant que le titre 22 de l'ordonnance de 1667, et tous les articles "d'icelui et notamment les articles 5, 6, 7 et 8, de ce titre sont en force en ce "pays, bien que depuis de nombreuses années, ils n'y aient pas été observés, lequel "défaut d'observance n'en a cependant point produit l'abrogation par désuétude."

"Considérant que le mode de vérification des écritures déniées prescrit par les "articles ci-haut cités, est un mode rationnel se conciliant facilement avec notre "système d'enquête et cadrant parfaitement avec l'économie de notre procédure "qui n'a point perdu de son efficacité pour avoir été mis en oubli pendant longtemps, "et que le demandeur soutenant la vérité des signatures apposées sur l'effet de "commerce qui fait la base de son action, signatures que les défenderesses dénient, "avait le droit d'invoquer la dite ordonnance de 1667 et les titres et articles "suscités qui sont comme susdit en pleine force et vigueur, et demander la "vérification des dites signatures, accorde la dite motion et en conséquence:"

"Ordonne que par trois experts nommés ce jour par les parties, savoir; par "Joseph Belle, Henri Coté et Benjamin Henri Lemoine, écuiers, de la cité de "Montréal, lesquels seront au préalable assermentés par le greffier de la cour, il "sera procédé, parties présentes ou duement appelées à la vérification tant par "témoins que par comparaison d'écritures dont les parties conviendront ou par les "interrogations sous serment d'aucunes d'elles déférées tant par les parties respec- "tivement que du chef des experts s'ils le jugent à propos, à la vérification des "signatures ci-haut mentionnées, apposées au bas et au dos du billet promis- "soire produit par le demandeur."

"Et de leurs opérations et du résultat de leur enquête et délibérations, feront "les dits experts procès-verbal et rapport à la cour, le ou avant le dixième jour "de décembre prochain."

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Par leur procès-verbal et rapport, les experts déclarent qu'ils " ont procédé "tant par des témoins que par des pièces de comparaison, à la vérification du "dit billet et de la signature: Frs. Quenneville " ...." et après en avoir "conféré entre eux, ils ont été unanimement d'avis que la dite signature n'est "pas de la main ni écriture du dit feu François Quenneville."

Par son jugement final, la cour a homologué le rapport des experts et a débouté l'action du demandeur quant à la défenderesse Monique Laurin, avec dépens.

Johnson et Piché, avocats du demandeur.

Leblanc, Cassidy et Leblanc, avocats de la défenderesse.

(P. R. L.)

MONTREAL, 30TH JUNE, 1865.

Coram BADGLEY, J.

No. 1673.

O'Connell vs. *Frigon*.

HELD—1°, that a report of arbitrators will be set aside and annulled on motion, when it appears that a material witness gave evidence before the arbitrators without having been previously sworn.

2°. That such evidence afterwards reduced to writing and signed and sworn to by the witness is irregular, cannot be fyled of record or used, even where two of three arbitrators consent to such a course.

3°. That when two of the arbitrators change the place of meeting or deliberation, notice of such change should be given to the third.

This was an action brought by Thomas O'Connell against Pierre Frigon, for $110.00—being $52.00 balance due for work done on drains in the city of Montreal, under contract between plaintiff and defendant, and $56, as damages caused the plaintiff by defendant by reason of the latter having taken from plaintiff a portion of the work originally contracted for. Frigon took the work in question from the Corporation of Montreal, and sublet to O'Connell.

Defendant admitted his indebtedness in the sum of $52, but denied plaintiff having suffered any damage; also his right to complete the balance of the contract.

The question was submitted to arbitration,—a day fixed for the taking of evidence and hearing the parties. Several witnesses were examined on both sides *vivâ voce*,—one important witness, Patrick McQuisten, giving evidence without having been previously sworn. Two of the arbitrators, Messrs. Bastien and Rielle, (the third being absent) consented that the evidence given by Mr. McQuisten be reduced to writing, sworn to and produced of record, all of which was done.

Afterwards the two first mentioned arbitrators, without having notified plaintiff or his arbitrator, repaired to a place other than that at which the usual meetings were held, there deliberated and drew up their report, which was in favour of the defendant, dismissing plaintiff's pretensions to the extent of the damages claimed.

Plaintiff moved that the report of the arbitrators be set aside and annulled, for the causes above set forth.

PER CURIAM:—It is evident that the witness McQuisten (whose evidence was important to the issue) was not sworn at the time he gave such testimony

O'Connell vs. Frigon.

before the three arbitrators. This course was decidedly irregular; and the fact that two of the arbitrators consented to have such evidence reduced to writing, sworn to and produced, in no wise could be sufficient to cover the irregularity. The change of place of meeting or deliberation by two of the arbitrators, without notice to the third, was irregular, and may have done great injury to plaintiff who was deprived of the right of being represented at such meeting; consequently, the Court doth set aside, reject, and annul the report of the arbitrators fyled, together with costs, and orders that the parties proceed *de novo* to arbitration on the matter at issue, either with the same or other arbitrators, as they may agree. Report set aside.

S. B. Nagle, for plaintiff.

Messrs. Leblanc, Cassidy & Leblanc, for defendant.

(S. B. N.)

MONTREAL, 30th JUNE, 1865.

Coram MONK, J.

No. 1224.

Scullion vs. *E. B. Perry* et al.

HELD:—In an action brought against the maker and endorser of a promissory note, the maker being described in the notary's protest and in the writ and declaration as E. B. Perry, instead of Joseph B. Perry, a plea by the endorser of Joseph B. Perry's note, to the effect that he never endorsed the note described by plaintiff and that a protest of E. B. Perry's note was not a legal protest of Joseph B. Perry's note, is bad.

In this case the declaration set forth that the plaintiff was the holder of a promissory note made by one E. B. Perry, one of the defendants, payable to the order of F. W. Alport, the other defendant, who endorsed it over to the plaintiff; that it had been protested for non payment.

The note fyled with the action was signed J. B. Perry. The notary's protest fyled was made against, and purported to have been served upon, one E. B. Perry.

The defendant, F. W. Alport, pleaded as follows: "That it is untrue that he ever endorsed the promissory note specified and mentioned in the plaintiff's declaration or any other promissory note drawn by the said E. B. Perry, the other defendant in the said plaintiff's declaration mentioned. That it is untrue that the said promissory note in the said declaration mentioned was ever duly and legally protested; or that notice of such protest was ever given the defendant F. W. Alport. But the defendant, F. W. Alport, saith that he endorsed a promissory note for one Joseph B. Perry of the city of Montreal on the fourteenth day of December last, and payable two months after the date thereof, which note although purporting to be presented on the seventeenth of February, was not in fact ever presented for payment until the eighteenth day of February last past, and was not then presented to the drawer thereof, to wit the said Joseph B. Perry, but to one E. B. Perry, an individual not known to the said defendant F. W. Alport; and that a notice of the protest of a note drawn by the said E. B. Perry and addressed to the said defendant, F. W. Alport, was deposited on the twentieth day of February last with one James Langland of Montreal, who,

handed the same to said defendant, F. W. Alport, which was the only notice which ever reached the said defendant, F. W. Alport."

At *enquête* and hearing it was admitted on the part of the plaintiff that the name of the maker of the note was Joseph B. Perry, not E. B. Perry.

Monk, J., for defendant, F. W. Alport, contended that the action ought to be dismissed with costs or at least the plaintiff should be compelled to amend his declaration on payment of costs.

The Court gave judgment for the plaintiff.

J. J. Curran, for plaintiff.
John Monk, for defendant.
(J. L. M.)

Scallion vs. Perry et al.

MONTREAL, 31st DECEMBER, 1864.

Coram BERTHELOT, J.

No. 2617.

McKinnon vs. *Cowan.*

ACTIO MANDATI CONTRARIA.

HELD:—That a surety has, after expiration of time of payment, a good action against the principal debtor to compel him to produce receipts from the creditor, or pay him, the surety, the amount for which such surety is responsible to the creditor.

This was an action brought by a surety against the principal debtor. The defendant had entered into a certain contract with the New City Gas Company for the purchase of coal tar, and the plaintiff in the above cause, with one Cross, were the two sureties for the due execution of the contract.

Plaintiff brought his action against the principal debtor, alleging that the latter had failed to carry out the terms of the contract, and to make the payments coming due under it; that his co-surety had left Lower Canada, and had no property here; and that in consequence he, the plaintiff, was exposed to pay alone the sums that had become due by the defendant to the said Gas Company, as, also, all other sums which would become due by the defendant to the said Company under the said contract.

Under these circumstances he prayed that the debtor be condemned to pay him the amount which had already fallen due under the said contract, in default of producing satisfactory receipts from the said Gas Company; and, further, that the said defendant be condemned to furnish to the said Company another surety in lieu of the said Cross, who had left Lower Canada, and, in default of so doing within such delay as might be fixed by the Court, to pay to the plaintiff a further sum of two thousand dollars to stand in lieu of such security in the hands of the plaintiff.

To this action defendant fyled a demurrer and a special plea.

By his demurrer he claimed that plaintiff's action was unfounded in law because it was not alleged by plaintiff in his declaration that he had ever paid or been called upon to pay to the said Gas Company any amount or money whatever, or that he was ever troubled in any manner whatever by the said Gas Company on account o the said contract and his said suretyship.

McKinnon vs. Cowan.

Secondly. Because it was not alleged in plaintiff's declaration that the defendant was *en deconfiture* and unable to pay.

Thirdly. Because it was not alleged in plaintiff's declaration that the defendant was bound in [illegible] of the said contract or agreement or otherwise to furnish plaintiff or the said Gas Company any new security, and [illegible] the New City Gas Company not being a party to this suit, the defendant could not be bound towards it by a judgment rendered in the above cause.

Plaintiff replied to defendant's demurrer by a general replication, and to his special plea by a special answer.

After hearing upon the demurrer before Mr. Justice Berthelot, his honour was of opinion that the action was one recognized by our law, and the defendant's demurrer was therefore dismissed.

By the same judgment it was held that plaintiff's answer in law was irregular, and it was also dismissed.

Demurrer dismissed.

Dorion & Dorion, for plaintiff.
R. C. Cowan, for defendant.
(W. E. B.)

PLAINTIFF'S AUTHORITIES.

Domat, tit. 4, sect. 3, No. 3, p. 255, fol. ed.
Pothier, Obligations, No. 441.
2 Bourjon, p. 434, tit. 1, c. 5, sect. 3, No. 15.
Troplong, Cautionnement, No. 398.
5 L. C. J., p. 128, Perry vs. Milne.

DEFENDANT'S AUTHORITIES.

Pothier, Obligations, No. 441.
Code [illegible] Art. 2028.

COUR DE CIRCUIT.

MONTREAL, 30 JUIN, 1865.

Coram MONK, J. A.

No. 1318.

Doutre vs. *Dempsey*.

SOLIDARITE ENTRE MANDANTS AD LITEM.

JUGE:—1o. Qu'il n'existe aucune solidarité entre plusieurs parties signitaires de la pièce de procédure, par laquelle commencent les vacations de l'avocat, pour le paiement des honoraires de cet avocat.

2o. Que l'avocat est lié par les conventions particulières intervenues entre tels signataires, relativement aux frais à faire, quoique cet avocat soit étranger à ces conventions et même les ignore, et que si, par telles conventions, l'un des signataires est exonéré des frais par ses co-signataires, l'avocat n'a aucune action contre celui-là.

L'action réclamait du défendeur la somme de $21, balance de plus forte somme due aux demandeurs pour honoraires et déboursés dans une instance où ils avaient été employés par le défendeur et autres huissiers de la cité de Montréal pour présenter et poursuivre devant la Cour Supérieure une requête demandant la radiation des noms d'un certain nombre d'huissiers, que les requérants prétendaient être incompétants à agir comme huissiers dans la cité de Montréal.

Le défendeur plaida qu'il n'avait aucun intérêt dans les procédés qui avaient

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eu lieu,—qu'il n'avait jamais employé les demandeurs pour présenter la dite requête et qu'il n'avait jamais autorisé qui que ce soit à employer les demandeurs ; que le seul document requis par le défendeur était un mémoire qui lui avait été présenté par divers huissiers avec l'assurance que la seule dépense à encourir serait de trente sous, pour faire faire des copies, laquelle somme le défendeur a payée et que si les demandeurs ont été employés par d'autres parties, ce que le défendeur ignore, lui, le défendeur, n'est pas responsable de leur fait, et ne peut être condamné ainsi que l'action de demandeur.

Les demandeurs appelés sur *Faits et Articles* [illegible]nt que le défendeur avait eu communication avec les demandeu[illegible] [illegible]uête signée par lui ; le défendeur en signant cette requête [illegible] membre du Barreau de la présenter en Cour et de la con[illegible] j[illegible], résultat qui ne pouvait être obtenu que par le ministère d'[illegible]u. De plus, le défendeur avec tous les signataires à la dite [illegible] de sa signature sur icelle, autorisait les demandeurs à présen[illegible] poursuivre la dite requête, enfin, les demandeurs furent employés par tou[illegible] des parties à la requête : et furent spécialement retenus par Paschal Leclerc, Joseph Sipling, Joseph Boucher, M. E. Mercier et autres, et généralement par tous les signataires.

Les demandeurs produisirent la requête, et le jugement rendu sur icelle. La signature du défendeur fut admise, ainsi que tous les procédés de la requête et la valeur des services des demandeurs.

Deux témoins furent examinés de la part du défendeur ; ils prouvèrent que le défendeur avait signé la requête et avait payé 25 cents pour la transcription de la requête et des copies. Les témoins lui ont dit que c'étaient les seuls déboursés jusque là, mais ne lui ont pas dit qui ils emploieraient comme avocats. Tous les huissiers contre lesquels la requête voulait procéder étaient Canadiens-Français. Les témoins en transquestion, affirment qu'ils n'ont pas dit au défendeur qu'en payant 25 cents, il payait tous les frais à encourir sur la requête. Les témoins pensent que c'est un Mr. Boucher qui employa les demandeurs. Ils sont huissiers eux-mêmes et savaient que les demandeurs présentaient la requête et c'était généralement connu parmi les signataires.

Un des témoins produisit un reçu qui le déchargeait de sa solidarité avec les autres signataires, par le paiement de $2.00.

G. Doutre, pour le demandeur, soumit à l'audition les autorités suivantes, pour établir la solidarité des signataires.

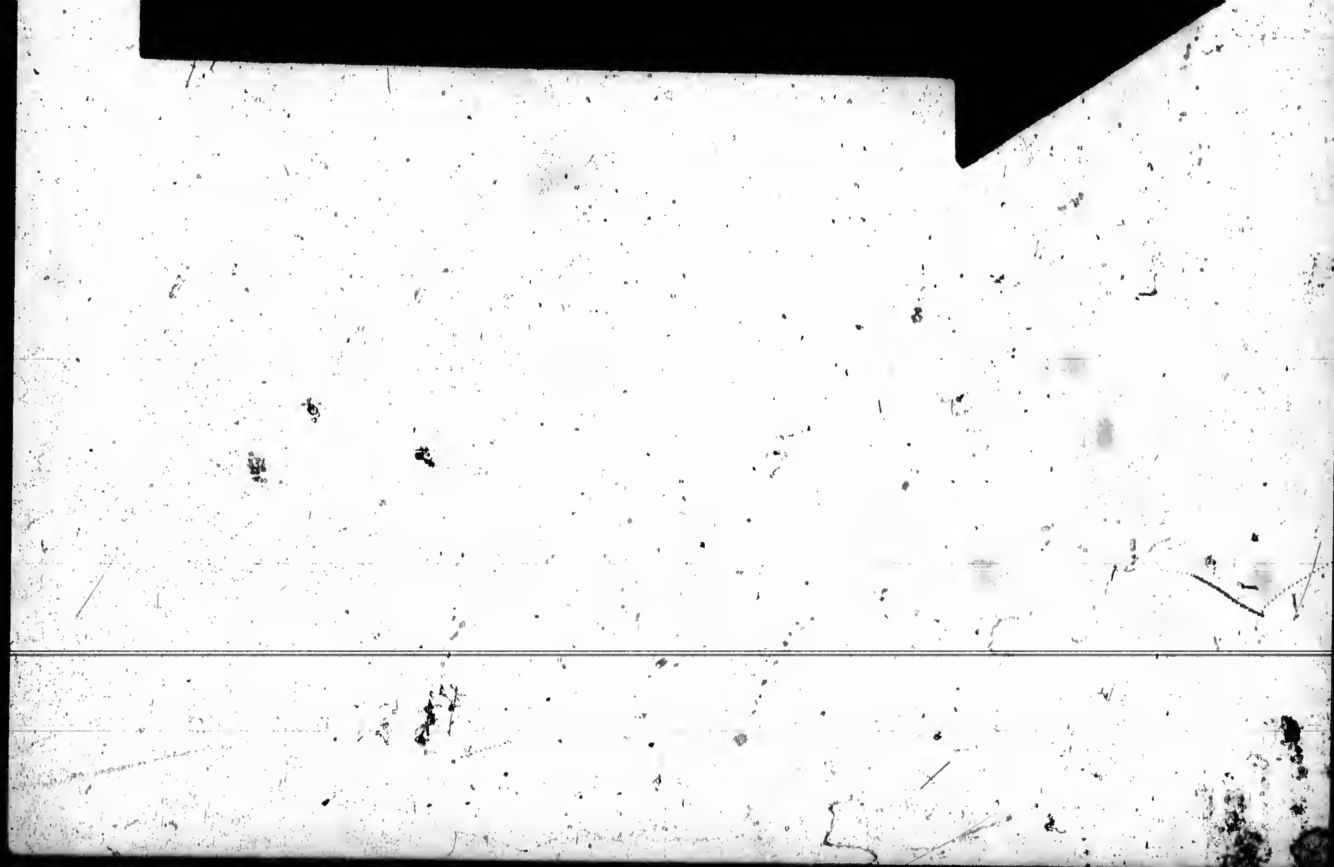
CARRÉ ET CHAUVEAU, Vol. 1° Page 655. Question 553 : "Dans tous les cas, du reste, "l'avoué peut réclamer solidairement des parties, les dépens qu'il a exposés pour elles. "Ses qualités de mandataire lui en donnent évidemment le droit."

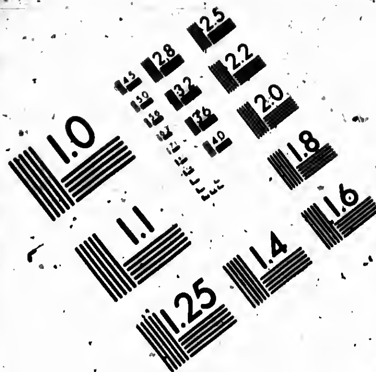
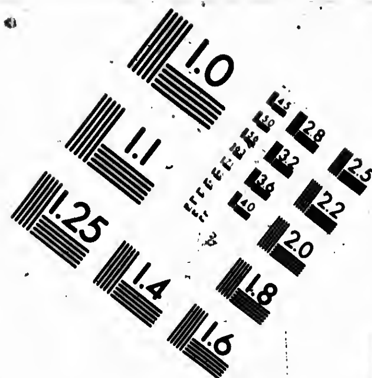
CODE CIVIL FRANÇAIS : N° 2002.

PIGEAU Comm. T : 1, page 308.

FAVARD DE LANGLADE. Vo. Dépens, page 55, No. 5.

DALLOZ T : 9, page 667, N° 4 : "Un avoué qui a occupé pour plusieurs personnes "intéressées dans la même affaire a-t-il pour le paiement de ses frais une action solidaire contre chacune d'elle ? Il nous semble que l'avoué peut agir solidairement. "L'art 2002 lui est appliqué ; en vain dit-on que cet article ne concerne pas le mandataire *ad litem*, que la solidarité n'existait pas en faveur de l'avoué qu'autant qu'elle



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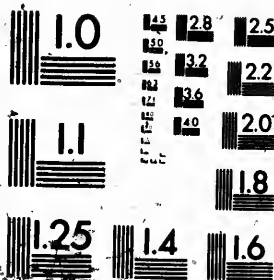
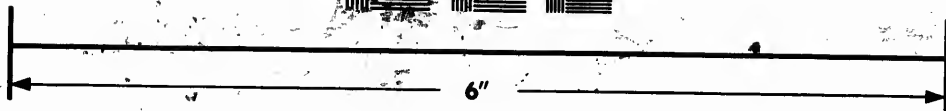

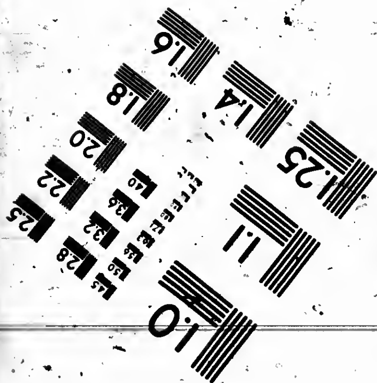
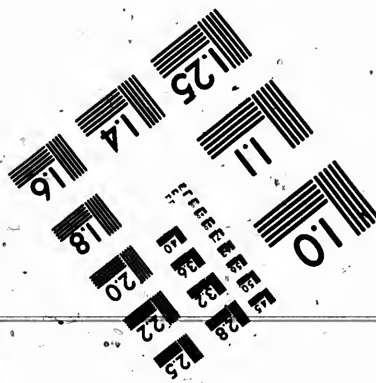

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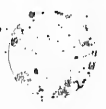

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"lui serait accordée par les lois de la procédure. Cette argumentation n'est que subtile. Le code civil forme le droit commun et ses dispositions ne perdent leur vigueur que lorsqu'il y est dirigé par quelque loi spéciale. Aucune loi ne fait exception à l'art. 2002 à l'égard des avoués, ils doivent avoir les droits comme ils ont les obligations des autres mandataires."

DOMAT, Lois civiles, T. 1, page 127, Tit. XV, Sect. 11 page 5 :

"Si plusieurs ont constitué un Procureur, ou donné quelque ordre, chacun d'eux sera tenu solidairement de tout l'effet de la procuration, mandement ou commission envers le Procureur constitué : et de le rembourser, indemniser, dédommager s'il y en a lieu de même que s'il avait donné seul la procuration ou autre ordre ; encore qu'il n'y soit pas fait mention de solidité. Car celui qui a exécuté l'ordre, l'a fait sur l'engagement de chacun de ceux qui l'ont donné : et il peut dire qu'il ne l'aurait pas fait sans cette sûreté de l'obligation de chacun pour toutes les suites de l'ordre qu'il donnait."

Berriat Saint Prix, Page 73, note 22, N°. 24.

W. Robertson, pour le défendeur, dit que son client n'avait aucun intérêt dans les fins de la requête. Il est anglais et sa pratique n'est qu'anglaise. Il avait signé la requête pour faire plaisir aux autres signataires. Les huissiers que l'on voulait faire suspendre étaient des huissiers Canadiens-Français, et leur suspension n'affectait et ne profitait en rien à la position du défendeur. Il avait payé sa part, en donnant 25 cents, et se trouvait libéré de toute réclamation. Les demandeurs n'avaient reçu aucune autorisation de comparaître en son nom et le défendeur n'était jamais allé au Bureau des demandeurs pour s'entendre et conférer sur la requête. Que le défendeur, dans le cas où il serait lié avec les demandeurs, ne pouvait enfin être condamné qu'à payer $2.00, comme d'autres l'ont fait.

G. Doutre répliqua que les demandeurs ignoraient les conventions particulières des requérants et devaient les ignorer. Vingt-quatre des requérants auraient bien pu s'entendre entr'eux et se donner quittance réciproque et charger un vingt-cinquième insolvable de voir à trouver un avocat pour les représenter. Il serait étrange que l'avocat se trouverait lié par ces conventions particulières dans lesquelles il ne serait pas partie et qui auraient lieu à son insu. Le défendeur avait le même intérêt dans la requête que les autres signataires. Le fait qu'il est anglais n'est pas un obstacle à une pratique française. Il y a autant d'anglais qui emploient un huissier français, qu'il y en a qui emploient un avocat français, et *vice versa*. La suspension des huissiers étrangers était dans l'intérêt de la Communauté en général des huissiers de Montréal.

Le défendeur l'avait admis en se plaçant au nombre des autres signataires, et les demandeurs n'avaient pas à voir si l'intention du défendeur en agissant ainsi était de faire plaisir à ses confrères ou non. Les 25 cents payés par le défendeur constituaient sa part dans les frais de la transcription de la requête et des nombreuses copies, frais non compris dans le mémoire des demandeurs. Enfin le défendeur n'ayant pas désavoué les demandeurs lorsqu'ils présentèrent la requête et répondirent aux contestations sur icelle, et la conduisirent jusqu'au jugement, est mal fondé à prétendre qu'il n'a donné aucune autorisation aux demandeurs d'agir.

Per Curiam :—L'action des demandeurs n'est pas fondée. Le défendeur en payant 25 cents, s'est libéré de toute responsabilité vis-à-vis des demandeurs. Aucune autorisation n'a été donnée par le défendeur aux demandeurs ; le seul

recours que les demandeurs peuvent exercer, est une action contre les parties à la requête qui leur ont confié leurs intérêts. L'action est déboutée avec dépens.

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Médéric Lanctot, pour les demandeurs.

A. & W. Robertson, pour le défendeur.

(J.D.)

COURT OF QUEEN'S BENCH.

MONTREAL, 9TH MARCH, 1864.

In appeal from the Superior Court, District of Montreal.

Coram DUVAL, C. J., MEREDITH, J., BADGLEY, A. J., LORANGER, J., *ad hoc.*

THOMAS CUSHING AYLWIN,

Plaintiff in the Court below,

APPELLANT;

AND

HENRY JUDAH,

Defendant in the Court below,

RESPONDENT.

CESSIONAIRE—SIGNIFICATION.

HELD :—1o. That while an action upon a transfer not signified may be maintained against the original debtor, a hypothecary action against a *tiers détenteur* upon such transfer, cannot be maintained without previous signification of the transfer upon the debtor.

2o. That partial payments by a debtor, on account of a debt transferred, or papers *sous seing privé*, showing that the debtor had a knowledge of the transfer, are equivalent to a transfer only as between the *cessionaire* and the debtor, and not as between the *cessionaire* and a third party.

3o. That in order to sustain a hypothecary action the debt set up by the plaintiff must be due and exigible.

This was an appeal from a judgment dismissing Plaintiff's action.

His pretensions were fully set out in his factum in appeal as follows:

On the 23rd November, 1840, the Honorable Jean Roch Rolland executed an *Obligation* in notarial form, before Guy and colleague, notaries, in favour of the Honourable Samuel Gale, for the sum of £1,000, money lent, payable in one year from the 9th day of said November, with interest under a general *hypothèque* of the debtor's immovables. This obligation was duly enregistered at Montreal, by the creditor, on the 26th December, 1843. On the 21st November, 1850, Mr. Gale assigned the said obligation, with subrogation of his hypothecary rights by Deed of *Transport*, before the same notaries to John Rowand, the debtor being a party to the deed, and declaring himself duly notified.

On the 19th August, 1852, Rowand assigned the same obligation, by *transport*, to William Aylwin, with a similar subrogation of *hypothèque*, before the same notaries—the debtor, Mr. Rolland, being again a party to the deed, and declaring himself satisfied.

On the 28th November, 1855, by deed before Gibb and colleague, notaries,

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William Aylwin assigned the said obligation to the present appellant, that is to say, to the extent of £250, absolutely, and the remaining £750 as security for the due payment of the said sum of £250.

On the 6th November, 1852, not three months after the assignment to William Aylwin, Mr. Rolland, the debtor, by deed before Weekes and colleague, sold to the respondent, in this cause, the property in the city of Montreal, known as the *Bocage*, which was subject to the *hypothèque* created in favor of Mr. Gale, by reason of its being within the registry limits of the county of Montreal; the price was £2,252, "*payé comptant et dont quittance par le vendeur*, as stated on the face of the deed. The sale makes mention of a certain *rente* in favour of the *Dames Religieuses de l'Hôtel-Dieu*, but contains an express and formal declaration on the part of Mr. Rolland, the vendor, as follows: *déclarant de plus la propriété présentement vendue franche et quitte de toutes autres charges et hypothèques.*"

On the 11th April, 1856, the appellant fyled an opposition, in the Superior Court, to an application made by the respondent for ratification of his titles to the *Bocage*, and claimed the exercise of the *hypothèque* to Mr. Gale, by right of subrogation, under the assignments to Rowand, William Aylwin, and to himself.

Other oppositions having been fyled on the behalf of older hypothecary creditors to a large amount, resort to an action became necessary; and on the 13th September, 1856, the appellant commenced in the Superior Court at Montreal, the suit in which the judgment, now brought up for revision before this Court, was rendered.

This action was *en déclaration d'hypothèque*. After setting out the original obligation and its several assignments, the declaration alleges that "the said Jean "Roch Rolland, on the day and year last mentioned, at Montreal aforesaid, had "due notice of the said last mentioned assignment to the said Plaintiff, by the "said William Aylwin, and hath since paid to the said Plaintiff, under the same, "the two several instalments of interest on the said sum of £1,000 which respectively accrued and became due on the 19th day of February, and 19th day "of August last past."

The conclusions are: "that by the Judgment of this Honorable Court, the "said immovable property be *declared hypothecated for the payment and satis-"faction of the said principal sum of* £1,000, and the interest accrued thereon, "and to accrue, since the 19*th day of August last past*, and that the said defen-"dant, as the *possesseur* and *détenteur* of the same, be held within fifteen days "from the service of judgment upon him, to *délaisser*, surrender and abandon "and deliver up the same, *en justice*, to the intent that the same be sold by the "sheriff, in the ordinary course of law, and that out of the proceeds of such sale "the said plaintiff be paid his said principal and interest, and that in default of "such surrender, abandonment and *délaissement*, within the said fifteen days, the "said defendant, after the lapse of the same, be held and declared to be the per-"sonal debtor of the said plaintiff, and be condemned as such, to pay him the "said sum of £1,000, with interest to be reckoned from the said 19th day of "August last, the whole with costs of suit in either case."

On the return of process into Court, the respondent appeared by attorney, but not pleading to the action, he was foreclosed in due course, and proceedings were had *ex parte*.

Witnesses were examined to prove the handwriting of Mr. Rolland to several letters written in acknowledgment of the appellant's claim, and payment to him of the two instalments of interest accrued between the date of the assignment and the bringing of suit. The respondent was also examined upon *faits et articles*. The 7th interrogatory is in these terms: "Is it not true that the said Jean Roch "Rolland has stated to you, either in writing or verbally, that he had made "efforts and would make efforts, *to raise the sum of money claimed by the "plaintiff hypothecairement, upon the said property, in order to pay off and "discharge the said claim*; and is it not true that this statement was made to "you before the bringing of the present suit?" The answer is Yes. In answer "to the 9th interrogatory, the respondent produced and fyled the following letter:—

Monnoir, 30, août 1856.

"Mon cher Monsieur,

"J'ai reçu ce matin votre lettre du 28. Je me "préparais à aller à la ville lundi, pour arranger cette affaire que j'ai autant hâte, "que vous de voir terminer. L'opposition de M. McGill étant retirée *il me reste "à persuader à M. le Juge Aylwin de retirer la sienne* ce sur quoi je comptais, mais à ma grande surprise, il fait des difficultés. Je n'ai pas pu encore avoir "une entrevue avec lui, et je ne suis pas sans espérance de réussir. *Si je trou-"vais un emprunt j'acquitterais de suite cette dette.*"

In a note addressed to the appellant, and produced in the cause as Exhibit A, bearing date the 2nd April, 1856, Mr. Rolland says: "I called upon Mr. Gibb, "the notary, to pay the half-yearly interest, due to your brother William "(William Aylwin the appellant's assignor). He usually had a receipt to give "me. But he has informed me that you were to receive the money; so I en-"closed a cheque for £30, and you will send me a receipt at your leisure."

Exhibit E is another note, without date, referring to another payment to the appellant of £30 another instalment of interest—which from the allusion contained in it to the opposition to the letters of ratification, must refer to the instalment of interest due on the 19th August, 1856.

In another letter, dated the 26th July, 1856, the passage occurs: "I would "give your brother *or yourself* a mortage on Monnoir, which ought to be unex-"ceptionable security, and that is all you can want. Trusting to this arrange-"ment, I write to tell you *you may have the necessary document drawn out; "and when I go to town, next week, I will execute it in due form.*" It was judged prudent to prove the payment of the two instalments in question, in consequence of another note dated le 6 Septembre, 1856—(Exhibit D)—in which the following is to be found: "Je suis bien malheureux d'avoir provoqué votre "ressentiment. Je voulais seulement vous donner à entendre qu'une opposition "faite en votre nom serait *sujette à contestation et peut-être contestée, ce qui "amènerait à procès, si la chose etait inévitable.* Je n'avais pas vu l'acte et *je ne "l'ai vu que ces jours derniers, et je dois vous dire qu'en effet, il me paraît que*

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"*vous n'êtes pas saisi de la dette n'y ayant eu aucune signification au débiteur ;*
"M. Judah pourrait se débarrasser de l'opposition aussi bien *que moi-même si j'y*
"*étais contraint par une dure nécessité à vous faire cette objection.* En août der-
"nier le 2 du mois, ayant été au bureau de M. Gibb, pour payer les 6 mois d'intérêt
"et *pensant y trouver comme à l'ordinaire un reçu de M. Aylwin, M. Gibb me*
"*dit qu'il n'en avait pas et que vous aviez maintenant les affaires en main ; alors*
"*de suite je vous ai envoyé un checque pour* £30, *en faveur de M. Aylwin, sans*
"*demander plus d'explication. Voilà le fait. Pouvez-vous dans ces circons-*
"*tances maintenir votre opposition ?*"

The respondent *de plano* sued Mr. Rolland *en garantie* in the Court below. An appearance was put in on his behalf by Attorney; but as he abstained from pleading to the action, the respondent, it appears, proceeded *ex parte* against him.

At the hearing of the cause, the quibble, as to the want of signification, was set up on the behalf of the defendant, *en garantie*, together with other formal objections as shadowy, both to the appellants' action and to the respondents' demand, *en garantie*.

The hearing took place on the 24th February, and on the 28th was rendered the judgment, in the Court below, now complained of by the appellant, and which is as follows:—

The 28th February, 1857.

PRESENT:

The Honorable Mr. Justice Smith.
" Mr. Justice Mondelet.
" Mr. Justice Chabot.

"The Court having heard the principal plaintiff by his counsel, upon the "principal demand *ex parte*, the principal defendant not having pleaded to the "said principal demand, and being duly foreclosed from so doing, and having "also heard the plaintiff *en garantie* by his counsel, upon the *demande en ga-* "*rantie*, made in this cause *ex parte*, the defendant *en garantie* not having plea- "ded to the said *demande en garantie*, and having been duly foreclosed from so "doing, having examined the proceedings, proof and evidence of record, and deli- "berated, adjudging, firstly upon the principal demand, and considering that the "said plaintiff, Thomas Cushing Aylwin, hath *failed to establish that the debt* "*now claimed by him*, under transfer from William Aylwin, and bearing "date 28th November, 1855, *is due by and exigible from the Honorable Jean* "*Roch Rolland, the principal debtor, as set forth in his said declaration, and* "*considering further, that by acte before Maitre Guy and his colleague, notaries* "*public, and bearing date the 19th day of August*, 1852, *the said William Ayl-* "*win, acting through his attorney, the present principal plaintiff, did agree to* "*and with the said Honorable Jean Roch Rolland, to give delay of payment to* "*the said Honorable Jean Roch Rolland, for a period of ten years*, to be com- "puted from and after the said 19th day of August, 1852, of the debt then vest- "ed in him, the said William Aylwin, by transfer bearing date the said 19th "August, 1852, from John Rowand, Esquire, acting through his attorney, "Duncan Finlayson, Esquire, before Maitre Guy and his colleague, notaries "public, and that by reason of such delay of payment, the said plaintiff, *cannot*

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"*quant à présent*, now have *and maintain his said action hypothécaire as now* "*brought*, doth dismiss the said *action hypothécaire quant à présent* with costs."

"And the Court further considering, that by reason of the said action hypo-"théoaire having been so instituted by the said plaintiff, the said defendant was "entitled by law, to implead the said defendant *en garantie*, the Honorable Jean "Roch Rolland, as in and by his said *action en garantie*, he hath done, and con-"sidering that the said principal plaintiff hath *failed to establish by law, any* "*right to the conclusions by him taken, and this Court cannot now adjudicate* "upon the said action, *en garantie*, the Court doth condemn the said plaintiff "*demandeur principal* to pay the costs thereof."

By this judgment, it will be at once perceived that the appellant, an utter stranger, to the *demande en garantie*, is yet condemned to pay costs to the respondent, *without any conclusions having been taken to that effect, or any demand whatever, and without hearing*. Another anomaly in this branch of the judgment, is the declaration made by the Court below that it "*cannot now adjudicate upon the said action en garantie*," at the same time that it pronounces, that the respondent was entitled to sue *en garantie*, and that the appellant had failed to establish his principal demand, and a condemnation of costs. If this be not an adjudication "*now*," it is difficult to understand how any adjudication in the premises can possibly be made by the same Court *in future*, or what remains to be disposed of after payment of the costs awarded. It may safely be asserted, in this respect, that the judgment is *unique* and without precedent. Conceding most fully that costs be within the discretion of the Court in Lower Canada, no instance can be cited in which they have been awarded against a plaintiff proceeding *ex parte*, and upon an *incident* not *joint au principal*. The fact that the award of costs was made *suo sponte* by the Court below, without any demand, and without hearing the appellant, is one to which the attention of the Court here is pointedly drawn, as it is respectfully contended that such an exercise of power is not merely discretionary, but arbitrary. The action, as has been already stated, was hypothecary. The judgment, however, commences with the assertion that the appellant has failed to prove that the "*debt* now claimed," *is due by and exigible* from the Honorable Jean Roch Rolland, the principal debtor, *as set forth in his declaration*. If the declaration be looked at, this assertion will be found to be unwarranted. The original *hypothèque* in favour of Samuel Gale, to secure payment of one thousand pounds and interest, "in one year to be accounted from the 9th of the said month of November, then instant," that is November, 1840, is set out. And then follow the assignments; no mention whatever is made of any other term of payment.

The statement in the Declaration is, that the defendant is *détenteur* of the immovable property in question, "and that, by reason of the premises, the same "is firmly held and bound, and duly hypothecated and mortgaged in favour of the "said plaintiff for the security and punctual payment of the said sum of £1000 "and interest thereon."

The Court below, in the absence of any plea whatever, and straying out of and beyond the limits of the declaration, thought fit to supply an exception, which the party did not urge, and here is to be found the root of the error complained

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of. The transfer, by Rowand, to William Aylwin, contains matter not stated in the declaration as not affecting the right of *hypothèque* which the action was brought to enforce. To elucidate the transaction between the parties, it may be proper to make the following extract from that deed :—"And "whereas the said sum of £1000 currency, together with the further sum of "£2000, amount of a certain other obligation, stated 7th June, 1845, granted "by the said Honorable Jean Roch Rolland to the said Honorable Samuel "Gale, was transferred, by the said Honorable Samuel Gale, to the said John "Rowand, with promise of warranty *de fournir et faire valoir*, on the part of the "said Honorable Samuel Gale, on condition *that the said John Rowand should "within two years and one month from the said 21st day of November*, 1850, "*commence proceedings for the collection of the said last mentioned sum of "money, on the said last mentioned day, and thereafter prosecute the same with "diligence and effect*; and whereas the said John Rowand is desirous of conti- "nuing *the garantie of the said Samuel Gale, for the payment of the remainder "of the said debt, it is hereby further witnessed that the said Honorable Samuel "Gale shall remain as much liable for the said balance or sum of* £2000 *cur- "rency as he now is for the entire sum of* £3000, it being agreed by the said "William Aylwin that he shall, in respect of the sum of money hereby assigned, "*rank after and posterior to the said John Rowand, or his assigns, for the said "other sum of* £2000 *currency amount of the mortgage bearing date 7th June*, "1845; and further, that nothing in these presents contained shall have the "effect of impairing the recourse or remedy of the said John Rowand against "the said Honorable Samuel Gale, for the said balance, which shall, as well as "the rights of the said Honorable Samuel Gale, remain as completed as if these "presents never were passed. And it is further agreed that nothing in these "presents contained shall prejudice *any rights which the said Samuel Gale "might be entitled to invoke, on paying the said sum of money so assigned by "him, or any part thereof, but that notwithstanding anything herein contained, "the said John Rowand shall have the right to place him, the said Samuel "Gale in the same position as he would have been entitled to be placed in had "these presents never been executed, should he pay the sum of money for which "he is garant as aforesaid, and demand subrogation from the said John Rowand*." The transfer by Rowand to William Aylwin is: "*without any other warranty "than that the sum of money hereinafter mentioned* (the £1000) *is justly and "lawfully due him*."

Au pied of this assignment, bearing the same date, 19th August, 1852, is an instrument before the same notaries, by which Mr. Rolland "*ayant pris com- "munication du dit acte de transport* des autres parts le prend pour signifié, "l'accepte, et le tient pour bon et valable, sur quoi le dit Sr. Aylwin *donne préfi- "xion et delai au dit Sr. débiteur pour le terme et espace de dix années à courir "et à dater de cejourd'hui pour le remboursement et payement de la dite somme de "mille livres courant, mentionnée au dit transport de par lui en payant l'intérêt "légal semi-annuellement, à compter de cette date d'aujourd'hui*."

The *terme de paiement*, it will be seen, is a *terme de grâce*, given, by a separate instrument, long after the debt had become due, and was subject to the

rights reserved in favour of Mr. Gale to demand immediate payment from Mr. Rolland, upon reimbursing the £3000, "or any part thereof." With reference to debts, *à terme*, in their creation and inception, Toullier says, vol. 6, page 690:— "C'était autrefois une grande question de théorie agitée et résolue diversement "par les interprètes, de savoir si le créancier à terme n'a absolument aucune ac- "tion avant l'échéance, ou s'il existe en sa faveur une action, mais qui peut être "écartée par une exception;" and he cites Vinnius in libros instit. lib. 3, tit. 16: Quiqus modis stipulatio fit. De stipulatione purâ, vel in diem. No. 5, vol 2, p. 682—Quarto édition by Heineccius. "Cette question n'était qu'une vaine "dispute de mots, qui ne mérite pas de nous arrêter aujourd'hui. Quoique l'obli- "gation soit actuellement existante, quoique l'action ou le droit de contraindre le "débiteur existe aussitôt que l'obligation, quoiqu'elles naissent ensemble et au "même moment, l'exercice de l'action peut être déféré par *le contrat lorsqu'il "fixe un terme pour l'exécution de l'obligation*. Ce n'est donc pas l'action ou le "droit d'agir qui est suspendu par le terme, c'est l'exercice de ce droit, No. "623. Mais cette suspension, établie dans l'intérêt du débiteur et uniquement "pour qu'il ne puisse être contraint de payer avant l'échéance du terme, ne doit "pas être étendue au-delà de son objet; elle ne doit pas empêcher le créancier "d'agir pour conserver son droit, pour en préparer, pour en assurer l'exercice; en "un mot pour se mettre en mesure de faire exécuter l'obligation au jour fixé. "Rien de plus juste que d'accorder au créancier la faculté de s'assurer *à ses frais* "qu'il sera ponctuellement payé, pourvu que les moyens qu'il emploie ne portent "aucun préjudice au débiteur."

Ainsi dans l'ancienne jurisprudence française, l'ordonnance de 1539, art 92 et 93, permettait au créancier à terme de citer son débiteur en justice avant l'échéance dans quelque lieu qu'il se trouvât et sans qu'aucune incompétence pût être alléguée pour le faire condamner et reconnaître ou à dénier l'écriture d'un billet sous seing privé. Si le débiteur faisait défaut, l'écriture était tenue pour confessée et emportait hypothèque du jour de la sentence, comme si elle eût été confessée. Si le débiteur comparaissait pour dénier son écriture, hypothèque avait lieu du jour de la dénégation, lorsque la dénégation se trouvait mal fondée.

The *terme de grâce* not being a part of the original contract, under which the *hypothèque* was created, it was the business of the party claiming the benefit of it to set it up by exception. It is a general rule that, in declaring upon a deed or other instrument consisting of several distinct parts, the plaintiff is required to state only so much of the instrument as constitutes *primâ facie* a complete right of action; and if any other part of the instrument furnishes the means of defeating the action, *it is matter of defense*, of which the defendant may, on his part, avail himself for that purpose. But in declaring upon a covenant or upon articles of agreement, an exception, if there be any *in the body of the covenant, &c.*, must be set out, and the subject matter of the exception must be excluded from the breach assigned. Such is the doctrine in the English books on pleading—1 Chitty on pleading, 300-1; 1 Saunders, 233; Gould on plead. ing, cap. 4, sect. 19 and 20, page 178. Under our system, the reason of the rule is apparent as equally applicable. The respondent, so far from setting up

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the *terme* by exception, made no defence at all; the Court below erred, therefore, in supplying the exception in this cause. If the *terme* had been a part of the original contract, even then the debtor might, if he pleased, renounce the benefit of it, and no doubt would be supposed to have done so, if in pleading to the action, he had not urged the *terme* as an exception temporary or dilatory; but in the present instance it was against the interest of the respondent to set up such an exception. If the Court below could notice *ex officio* the *terme* contained in the instrument *au pied* of the assignment, it could not shut its eyes against the contents of the deed of sale to the respondent by Mr. Rolland. The price of the sale is acknowledged to have been received in the entire by Mr. Rolland, at the time of the passing of the contract; and more than this, there is the clause of *franche et quitte de toutes hypothèques.* The Court, again, ought not to have ignored the answer of the respondent upon *faits et articles*, in relation to his demand of letters of ratification, and the Appellant's opposition to it, and the fact of there being other oppositions. The record establishes against the respondent's vendor the *crime de stellionat.* The *terme*, under such circumstances, was a prejudice to the respondent, and in fraud of his rights. He felt this, and brought his action *en garantie* to compel his vendor to furnish him with a clear title, and to purge the *hypothèques.* With what face could the vendor set up the *terme* in direct conflict with his express *garantie de franche et quitte.*

The *stellionat* committed by the vendor, *ipso facto*, operated a forfeiture of the *terme*, as laid down by Toullier, vol. 6, No. 664:—*Il faut distinguer, ou le débiteur à terme n'a rien fait qui puisse donner de l'inquiétude au créancier, ou il a tenu une conduite qui avertit celui-ci de se mettre en garde et de veiller à la conservation de ses droits.* Au second des cas que nous examinons, c'est-à-dire si la conduite du débiteur a été telle qu'elle puisse donner des soupçons sur sa bonne foi, ou seulement sur sa ponctualité à remplir ses obligations, le créancier peut agir avant le terme et demander que le débiteur soit condamné de payer à l'échéance. Par exemple, si le débiteur appelé pour reconnaître son écriture, *l'avait dénié et soutenu qu'il ne devait rien, cette dénégation autoriserait le créancier à conclure non-seulement à ce qu'après vérification préalable, l'écriture fût tenue pour reconnue; mais encore à ce que le débiteur fût condamné de payer la somme contenue dans son billet à son échéance.*

No. 666.—Non-seulement le créancier à terme peut agir avant l'échéance, pour faire condamner le débiteur de payer au terme fixé, lorsque la conduite de ce dernier fait naître des inquiétudes, mais, *s'il va jusqu'à diminuer par son fait les sûretés qu'il avait données par le contrat à son créancier, il ne peut plus réclamer le bénéfice du terme. Vainement alléguerait-il qu'il reste des sûretés suffisantes, cette allégation fût-elle prouvée, ne l'excuserait pas:* il suffit qu'il ait violé la loi du contrat pour qu'il soit déchu du bénéfice du terme.

No. 667.—Tant que l'acquéreur de partie des biens hypothéqués ne purge pas l'hypothèque, les sûretés ne sont pas diminuées. Elles ne le sont même pas encore lorsque l'acquéreur fait notifier son contrat au créancier avec offre d'acquitter sur le champ la dette hypothécaire jusqu'à concurrence du prix. Les sûretés ne sont diminuées, la condition du créancier n'est véritablement changée qu'au moment ou après le délai de quarante jours fixé par l'article 2185.

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L'acquéreur veut le forcer de recevoir un paiement partiel, sous peine de voir consigner le prix du contrat, mais comme la notification du contrat dans la forme présentée par les articles 2188 and 2183, contient *non-seulement la menace de purger, mais encore un commencement d'exécution, le créancier peut dès lors agir contre son débiteur direct pour demander ou qu'il rembourse la totalité de la dette, ou qu'il fasse cesser les poursuites faites pour purger l'hypothèque.' Si le débiteur les fait cesser*, le créancier ne peut exiger son remboursement avant le terme: parce qu'il n'a plus à se plaindre, ses sûretés ne sont pas diminuées; *mais si l'acquéreur n'a pas notifié son contrat au créancier, celui-ci n'a point encore d'action parce qu'il n'a point encore à se plaindre ;* il y a possibilité que les sûretés soient diminuées sans doute, mais cette possibilité existe même avant que le débiteur ait rendu partie des biens hypothéqués, car il est toujours libre de vendre. En un mot, la simple possibilité que l'hypothèque soit diminuée ne suffit pas pour autoriser le créancier à demander la déchéance du terme ; *il faut qu'il y ait diminution effective ou menace de l'effectuer et commencement d'exécution, comme il faut que l'acquéreur soit troublé dans sa possession, ou qu'il soit menacé de l'tre avant d'agir en garantie contre le vendeur.*

No. 674.—Si le débiteur vendait argent comptant, des immeubles sur lesquels le créancier *aurait oublié et négligé* de faire inscrire sa créance, *il nous paraît encore que la déchéance serait encourue, car*, ou il les a vendus pour payer son créancier, et alors il ne doit pas se plaindre que celui ci le contraigne à payer, *ou il a vendu pour en détourner le prix, et alors il y a une fraude qui le rend indigne de la grâce qui lui était accordée.* The conduct of the debtor in this cause, in impeaching the appellants' opposition for want of signification of the *transport*, and in denying the very existence of the hypotheque, by his assertion in the deed of sale and *garantie*, that the property in question was *franche* and *quitte*, it is contended, is an acte of *stellionat* or a *fraude* which justly strips him of all claim to the *terme de grâce*. Such a debtor at least should have been held to plead the benefit of the *terme*, and a Court of Justice ought not to have supplied him with such an exception, when he did not even appear before that Court, to admit his obligation as *garant*. The behaviour of the debtor towards the appellant, is certainly in the words of Merlin, Répertoire, Verbo Hypothèque, sect. 2, §2, art. 6, vol. 5, page 867, "*une conduite qui l'avertit de se mettre en garde et de veiller à la conservation de ses droits.* Le créancier à terme "peut agir et pourquoi? parce que, de l'aveu de tout le monde, les actions "purement conservatoires lui appartiennent ni plus ni moins que si sa "créance était échue, parce qu'on ne peut considérer que comme purement "conservatoire l'action qu'il intente à l'effet de faire dire *qu'un tel qui nie être "son débiteur, ou qui, en l'avouant, se conduit de manière à faire craindre "pour sa solvabilité, lui doit telle somme payable, à tel terme et qu'à l'échéance "il sera tenu de la payer.*

The letters produced by the appellant show that the debtor aimed at nothing less than to get rid of the old *hypothèque* created upon the *Bocage* property in favour of Mr. Gale, at the outset of the transaction of loan, by an offer of a new *hypothèque* upon Monnoir, without leaving it to his creditor to judge of the sufficiency of such altered security; but in any view that can be taken of the

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present case, the judgment of the Court below cannot be sustained. Admitting the *terme non échu*, the appellant was yet entitled to obtain so much of his conclusions as prayed for a declaration *contradictoirement* with the respondent, that the property in question was subject to the *hypothèque* declared upon, though the action as brought, may in the estimation of the Superior Court, have gone too far, yet it contained all the requisites of a simple action, *en interruption de prescription*. Under a system, where *les actions sont de bonne foi*, why not then have pronounced a judgment so modifying the conclusions, as to declare the existence of the *hypothèque*, as a security for the appellant's debt, and the liability of the respondent as *détenteur*, to submit to a sale *en justice*, at the expiration of the *terme*? The action *hypothécaire* and that *en interruption* have many things in common. Is it because the appellant may have asked too much that for his *plus petition*, he must be made to lose all, or to bring another action, more precise and formal in its character? If so, the Court below supplied an exception *à la forme*, not set up by any of the parties, and certainly not in furtherance of the just rights of any of them, or founded upon a *nullité d'ordonnance*.

In putting the plea of *terme* into the mouth of the vendor, the Court below deprived the appellant of the right of answering it. Fortunately the answers on *faits et articles*, the letters, and above all, the deed of sale, prove facts which repeal the *terme*, and impose a present liability to pay. But had the plea been urged, it would have been met by an answer, shewing that the proceedings on the ratification demonstrate the existence of anterior and preferential *hypothèques* to that of Mr. Gale, to the amount of more than double the *prix de vente* received *comptant* by Mr. Rolland, from the respondent. If the sale had not been made for cash, but for the same price payable into Court, the *hypothèque* of the appellant was worthless; he must have allowed the ratification to go; in which case he undoubtedly would have been entitled to a judgment for the immediate payment of this capital. Is it because the price has been pocketed by the vendor, and the £2,000, for which a preference to Rowand was given by William Aylwin, are unpaid, together with two other heavy anterior *hypothèques*, that the appellant's claim is to be defeated? It was not for the Court below to presume that the plea of *terme* could not meet with an answer. The appellant in his declaration disclosed no more of the case than was necessary; he knew that the *terme* could not be pleaded or set up by the vendor, without bringing down the answer of *stellionat* and fraud, and therefore abstained on his part from expressing it. The fact that not three months after the execution of the deed by which William Aylwin gave his debtor a ten years delay, and consented to allow a subsequent *hypothèque* for £2,000, precedence over his own for £1000, that debtor alienated the immovable subject to both *hypothèques* for a little more than £2,000 which he required in cash, upon a false representation that there was no *hypothèque*. That fact, if pleaded, would have disposed of the *terme*. But though not pleaded, it is in proof upon the Record. If the Court, then took notice *ex officio* of the *terme*, why did it not equally notice what defeated and put an end to it? Should such a Judgment be sanctioned it would go far to encourage litigation and chicane in its most insidious shape,

as it would make the Court, in some measure, to be counsel for defendant in causes *ex parte*; it would enable defendants to benefit by a defence which they could not have pleaded, in regular course, and would give them a greater latitude and a more advantageous position than a *bonâ fide* and open contestation could afford. More especially when costs are awarded against the plaintiff, without any demand for them, it may be anticipated that default cases will be on the increase. The question before the Court, besides its importance to the appellant, individually, is one of general interest. The cross-examination of witnesses allowed to defendants at *Enquête*, and the notices of inscription for evidence and hearing, would seem to have gone great lengths in favour of this class of suitors, but plaintiffs must also be protected in their rights; and formal objections are never more formidable, than when they are made to defeat substantial interests, without being formally urged by the party litigant. To these observations it is deemed necessary only to add the reasons of appeal assigned by the appellant as follows:—

1st—Because the debt evidenced by the deed between Jean Roch Rolland and Samuel Gale declared upon is a debt long since due and *exigible*.

2nd—Because the appellant by reason of the assignments in the declaration mentioned, is *aux droits* of the said Samuel Gale.

3rd—Because no plea, setting up a *terme de paiement*, was pleaded by the respondent, and the Court below, in a case *ex parte* gave judgment, as if such plea had been urged in defense, thus setting it up *ex officio*, and unauthorisedly.

4th—Because the *terme de paiement* contained in the deed of the nineteenth day of August, one thousand eight hundred and fifty-two, by which Jean Roch Rolland, the original debtor, made acknowledgment of the transfer and assignment by his creditor, of the original debt, was a *terme de grâce*, freely granted by the new and substituted creditor in gift *ultro et nullo jure cogente*, not a stipulation or covenant, novating or altering the original debt, and that the benefit of it should have been expressly invoked by him, or *his ayant cause* the Respondent, if of right he could.

5th—Because if the *terme de paiement*, had been invoked by the respondent, his plea would have been met by an answer, setting forth facts apparent upon the record to defeat it, and prove the appellant's immediate right of action, *nunc pro tunc*.

6th—Because on the face of the record, there is proof that the original debtor Jean Roch Rolland, forfeited his *terme de grâce*.

7th—Because the said Jean Roch Rolland, in and by his deed of sale to the respondent, of the land, *hypothecated*, to Samuel Gale, in respect whereof the appellant had brought suit (which deed is in proof in this cause) to wit: the deed of sale dated the sixth day of November, one thousand eight hundred and fifty-two, falsely and fraudulently, declared *la propriété présentement vendue, franche* and *quitte de toutes autres charges et hypotheques*, at the same time, well knowing that the said property was subject to the said *hypothèque* of the said Samuel Gale or his assigns, that is to say, the appellant as recognized by the Judgment appealed from, with intent to defraud him.

8th—Because the said Jean Roch Rolland, in executing the said deed of sale to the respondent, was according to the recognition of the appellant's *hypothe-*

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que, made by the Court below itself, in the judgment complained of guilty of the crime of *stellionat*, and *ipso facto*, forfeited and lost the benefit of any *terme* of payment even by covenant, but especially one given *de grâce*, as was that of the appellant.

9th—Because the *terme de paiement* was set up by the Court below, *suo sponte* against the interest of the respondent himself, he having paid to the said Jean Roch Rolland the entire price of sale, at the time of passing the deed and being entitled to hold the property, *franche, quitte et nette.*

10th—Because the respondent sued to the Court below, for a ratification of his title from the said Jean Roch Rolland, absolutely, and unconditionally, and that the said appellant *s'est porte opposant, à la sentence;* all which appears by the record, and should have been noticed by the Court below, if it thought fit to notice, the *terme de grâce*, assigned as the grounds for the dismissal of the appellant's action.

11th—Because even upon its own showing, the judgment of the Court below supposing it to be rightly predicated, upon the *terme de paiement*, should have been a judgment *en interruption de prescription*, not an absolute judgment of dismissal, the case being undefended and *ex-parte*, and the *conclusions* of the appellants being sufficiently ample to call for and warrant such judgment *en interruption.*

12th—Because by the law of the land, it is enacted, that all allegations made by a party plaintiff, in his declaration, if not *expressly* denied by the defendant are to be taken, as admitted, and that in a cause proceeding *ex parte*, a defendant should not be allowed a larger latitude than he would have, if he openly appeared and defended the suit; and the Courts in *ex parte* causes ought not to interfere to the prejudice of plaintiffs, having an apparent title; and ought not to give to defendants the benefit of their counsel, unsolicited and unasked, so as to impair contracts and to derogate from vested rights, when no assertion of a contrary right is made by the party impleaded and no judicial cognizance of facts in avoidance is imparted to them by the declaration, on its face.

13th—Because the Court below supplied an *exception à la forme*, set up by the party to the cause, and set it up wrongly and in error to the prejudice of the appellant's undoubted and indisputable hypothecary right, and of the true interest of the respondent, as understood by himself.

14th—Because it appears, that the respondent, as by law he was entitled to do, impleaded the aforesaid Jean Roch Rolland, *en garantie formelle*, but did so without pleading to the original action or demanding any stay of proceeding in the original cause or making the appellant a party to the proceedings *en garantie;* and the said Jean Roch Rolland, the *appelé en garantie* or *garant*, made no defense to the action.

15th—Because the appellant, though no party to the action *en garantie*, and an utter stranger to it, has been without hearing or means of defence, arbitrarily condemned by the Court below to pay costs of a proceeding which he was obliged to ignore, in which he could not participate, and in which the action against the *garant* was *ex parte* and undefended, though he was impeached of *stellionat.*

16th—Because the said Jean Roch Rolland making default, and setting up

no defense to the action brought against him by the respondent, and being his *garant* formally, was the proper person to be condemned, not only as to the payment of the principal sum, demanded by the appellant, but beyond doubts to the costs of the *demande en garantie*, even upon the supposition that the original demand was unfounded, there being privity of contract and a personal obligation between the vendor and vendee, to that effect, saving the recourse of the former against the appellant, and not *per saltum*.

17th—Because the award of costs of the *demande en garantie*, against the appellant, who was no party to it, was not even asked or sought for, either by the respondent or by the said Jean Roch Rolland, and that in this respect, the judgment of the Court below is manifestly wrong not only as being *ultra petita*, but as unwarranted by any aid, prayer or *conclusions* whatever, to that effect, and is therefore an illegal and arbitrary assumption and stretch of power by the Court below, over one of the Queen's subjects, who *quo ad hoc* was not before it or subject to its jurisdiction in that behalf.

18th—Because the assertion by the Court below, that "it cannot now adjudicate upon the said action *en garantie*," is no judgment at all, but a plea of temporary bar set up by the Court below, as purporting to excuse itself from rendering judgment on the merits of the *demande en garantie*, while, at the same time, it awards costs *dans tout évènement du procès* against one who was no party to the said instance *en garantie*.

19th—Because the judgment of the Court below, now complained of, has been rendered against law, evidence, and justice.

AUTHORITIES CITED BY APPELLANT AT THE ARGUMENT ON THE 9TH DECEMBER, 1863.

Lacombe, Recueil de Jurisprudence. Verbo *Transport*, No. 87. Mais si le débiteur s'oblige envers le cessionnaire au paiement de la dette cédée, cela vaut signification. Brodeau eodem. N. 2, V. Délégation : même par un acte séparé. Brod., eodem.

Il en est de même si le débiteur paye le cessionnaire et prend de lui quittance, parce que le paiement par le débiteur vaut acceptation de la délégation, leg. 3, cod. de novatione et delegatione par ces termes : VEL ALIQUID EX DEBITO ACCIPIAT.

Si delegatio non est interposita debitoris tui ac propterea actiones apud te remanserunt; quamvis creditori tuo adversus eum salutionis causâ mandaveris, tamen *antequam illis contestatur*; vel ALIQUID EX DEBITO ACCIPIAT, *vel debitori tuo denunciaverit*, exigere a debitore tuo debitam quantitatem non vetaris et eo modo tui creditoris exactionem contra eum inhibere.

Laurière, sur la Coutume de Paris, article 108, volume 1, p. 317.

Afin que celui à qui des actions soient cédées puisse en être le maître, il faut qu'il fasse de trois chose l'une; ou qu'il forme sa demande en justice contre le débiteur, ou QU'IL REÇOIVE DE LUI UNE PARTIE DU PAIEMENT, ou qu'il lui donne ou lui fasse signifier son transport.

Duvergier, Vente, vol. 2, p. 270, No. 216.

L'acceptation authentique du débiteur cédé est nécessaire, *à l'égard des tiers*, parce que l'autorité citée, donne certitude à la date et prévient la collusion; mais *l'acceptation sous seing* privé suffit *entre le cessionnaire et le débiteur cédé*. Lorsque celui-ci a par un acte, *que qu'il soit, accepté le transport, il a reconnu qu'il est désormais tenu de payer;* il ne peut plus payer à son créancier originaire, *sans manquer à son engagement et sans s'exposer à payer deux fois*. Egalement il ne peut plus opposer au cessionnaire les exceptions

qu'il aurait eu le droit d'opposer au cédant, car, aux termes de l'art. 1322, l'acte sous seing privé a entre les parties la même force que l'acte authentique, *l'acceptation verbale prouvée par un aveu, par un premier paiement* PARTIEL OU PAR TOUTE VOIE LÉGALE CRÉERAIT ÉGALEMENT POUR LE DÉBITEUR UN LIEN DONT IL NE POURRAIT PLUS S'AFFRANCHIR.

Rousseaud de Lacombe, vo. Transport, No. 17; M. Delvincourt, t. 3, notes, p. 170 M. Duranton, t. 16, No. 496; M. Troplong, No. 901.

Delvincourt, Cours de Code Civil, vol. 3, p. 170, notes et explications, p. 84; *à l'égard des tiers*, car à l'égard du débiteur toute acceptation vaut délivrance.

Duvergier, Vente, vol. 2, p. 240, No. 209 et 210.

Si les tiers, qui contestent au cessionnaire la propriété de la chose cédée, avaient *eu connaissance eux-mêmes du transport antérieurement à l'époque où ils ont acquis leurs droits, cette circonstance, qui presque toujours les constituera en état de mauvaise foi, sera suffisante pour que la cession soit maintenue*, QUOIQU'ELLE N'AIT PAS ÉTÉ SIGNIFIÉE.

16 Duranton, p. 505, No. 496.

Mais à l'égard du débiteur de la créance cédée et à l'égard des tiers, le cessionnaire, d'après l'article 1690, n'est saisi que par la signification qu'il fait de son transport au débiteur, ou *par l'acceptation que celui-ci fait du transport par acte authentique.*

Toutefois, il n'est pas douteux que le cessionnaire ne soit pareillement valablement saisi vis-à-vis du débiteur *par l'acceptation que celui-ci fait du transport par un acte sous seing privé, car les actes sous seing privé ont entre ceux qui les ont souscrits, leurs héritiers et ayant cause, la même foi que l'acte authentique.* Depuis ce moment, le débiteur ne pourrait donc plus payer au cédant ni compenser avec lui au préjudice de la cession qu'il a acceptée, s'il l'a acceptée purement et simplement. *Bien mieux, s'il avait accepté verbalement le transport et s'était ainsi obligé à payer au cessionnaire, il ne pourrait plus payer la dette à son préjudice, et en cas de contestation* SUR LE FAIT DE L'ACCEPTATION DU TRANSPORT, LE CESSIONNAIRE POURRAIT LUI DÉFÉRER LE SERMENT, LE FAIRE INTERROGER SUR FAITS ET ARTICLES ET MÊME PROUVER PAR TÉMOINS L'ACCEPTATION VERBALE, SI LA SOMME NE S'ÉLEVAIT PAS AU-DELA DE CENT CINQUANTE FRANCS.

The *signification* is established by the AVEU contained in the very letter which objects to its sufficiency; exhibit D.

Marcadé, vol. 6, p. 327.

On s'est demandé si la formalité de la délégation ou de l'acceptation serait suppléée par la connaissance que le débiteur ou toute autre personne argumentant du défaut de cette formalité, aurait autrement acquise de la cession faite. En principe, la négative ne saurait être douteuse; le code ayant cru devoir exiger tel mode déterminé de faire connaître la cession, ce serait refaire la loi que de déclarer suffisante toute connaissance acquise indirectement et par quelque moyen que ce soit; tant que la formalité n'est pas remplie, le tiers débiteur ou autre tiers qui se trouve autrement informé de la cession, peut, en général, penser qu'elle n'est pas sérieuse. MAIS S'IL EN EST AINSI EN PRINCIPE, ON CONÇOIT QUE LES CIRCONSTANCES DE FAIT PEUVENT COMMANDER, PAR EXCEPTION, UNE SOLUTION DIFFÉRENTE, ET QUE LE TRANSPORT DEVRAIT ÊTRE MAINTENU SI ON RECONNAISSAIT LA FRAUDE CHEZ CEUX QUI LE CONTESTENT, FRAUS OMNIA CORRUMPIT. Voir Troplong, 2, n. 900 et 901; Zachariae, 2, p. 555, 13 juillet 1831; Dalloz, 31, 1, 242; Marcadé, 5, p. 40, No. 1322.

L'acte sous seing privé reconnu par celui auquel l'on oppose, ou légalement tenu pour reconnu, a entre ceux qui l'ont souscrit et entre leurs héritiers et ayant cause, LA MÊME FOI QUE L'ACTE AUTHENTIQUE (1323). Celui auquel on oppose un acte sous seing privé est obligé d'avouer ou de désavouer formellement son écriture ou sa signature. Troplong, Vente, No. 900, p. 468.

On demande si la connaissance indirecte que le débiteur pourrait avoir du transport serait de nature à suppléer au défaut de signification.

Ferrière soutient la négative. Il veut que, quoique le débiteur ait été assuré d'ailleurs du transport, il puisse néanmoins payer au cédant; il s'appuie de l'autorité

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de Brodeau. L'o[illegible] Ferrière n'était cependant pas sans contradicteurs. On peut citer parmi [illegible] Chopin, Balde, etc., 4, Concilia 383, vol. 3. De nos jours, elle compte la cour de Cassation parmi ses adversaires, et je crois que si les frais dont on veut induire la connaissance du transport par le débiteur ont quelque chose de non équivoque, s'ils ne laisse aucun doute sur la volonté du cessionnaire de se prévaloir de la cession, les adversaires de Ferrière devront l'emporter. Voici l'espèce de l'arrêt émané de la cour de Cassation. (Perrin, Grenoble, Dalloz, 29, 2, 125; 31, 1, 242.)

Balde, Conciliorum sivé Responsorum, No. 383, vol. 2, p. 92-93, impressum Francofurti and Mœna, impensis Sigis, Feyrabendil, anno 1589.

Debitor an possit solvere cedenti, in prejudicium cessionarii *quando debitor erat sciens.* In casu ergo nostro, quia cessum fuit omne jus, sciens debitor non potuit solvere in prejudicium cessionarii, cum sua non interesset. Ego Baldus.

Mulleri, Promptuarium, verbo *Cessio*, vol. 1, p. 544, No. 161. Lipsiæ, sumptibus Caspari Fritschii, 1792. Si debitor EXPRESSE VEL TACITE CESSIONEM *adprobat valet* CESSIO *ex nova contractu*

Troplong, Vente, n. 901, p. 473.

J'ai parlé tout à l'heure de l'acceptation du transport par le débiteur, faite dans un acte authentique, comme d'un équipollent légal de la signification (art 1690.)

Il serait indifférent que cette acceptation fût contenue dans le titre même qui renferme le transport, pourvu qu'il fût authentique. La loi n'exige pas que l'acceptation soie faite séparément; tout ce qu'elle veut, c'est qu'il y ait une acceptation solennelle.

Mais cette acceptation authentique n'est nécessaire que pour la sûreté des tiers. *Si le débiteur avait accepté par un acte sous seing privé,* il serait engagé, d'après l'article 1322 du code civil; *le cessionnaire serait saisi à son égard, et tout paiement fait au cédant, au mépris de cet engagement ne pourrait lui porter préjudice.* Il en serait même SI L'ACCEPTATION ÉTAIT VERBALE, pourvu qu'elle fût PROUVÉE PAR UN AVEU OU DE TOUTE AUTRE MANIÈRE, OU MÊME SI ELLE RÉSULTAIT IMPLICITEMENT D'UN FAIT QUI CONTIENDRAIT UNE ADHÉSION NÉCESSAIRE, COMME PAR EXEMPLE, SI LE DÉBITEUR PAYAIT AU CESSIONNAIRE UNE PARTIE DE LA SOMME DUE, OU DES INTÉRÊTS ET DES ARRÉRAGES. Il est clair QUE LE FAIT DU PAIEMENT ÉQUIVAUT À UNE ACCEPTATION. Ferrière, sur Paris, art. 108, § 1, No. 13, Malleville, art. 1690, Rousseau de Lacombe, Vo. Transport; Dalloz, Vente. p. 916, No. 18.

Ferrière, sur Paris, art. 108, § 1, No. 13, vol. 2, p. 128, édition de 1714.

On demande si le transport des rentes par assignat, c'est-à-dire, dont le paiement est assigné sur le revenu de certains héritages, est nécessaire comme celui des autres rentes *constituées* à prix d'argent, en sorte qu'encore que le cessionnaire eût joui de l'assignat pendant plusieurs années, il ne serait pas pour cela véritable propriétaire de la rente.

On tient que quand le cessionnaire avait joui de la rente par assignat PENDANT UN AN ET PLUS, TELLE JOUISSANCE AURAIT LE MÊME EFFET QUE L'EXPLOIT DE SIGNIFICATION, LE CESSIONNAIRE ÉTANT ENTRÉ EN POSSESSION DE LA RENTE PAR LA RÉCEPTION DES ARRÉRAGES QU'IL EN AURAIT REÇUS DU DÉBITEUR OU DE SON FERMIER, DE SON CONSENTEMENT.

MEREDITH, J.—The Courts, both at Quebec and Montreal,* have held that an action upon a transfer, not signified may be maintained against the *original debtor*. And although authorities, well deserving of respect may be cited in opposition to those rulings, yet in cases coming before me, I have not attempted to disturb the jurisprudence settled as I think by the judgment of our own Courts, because, as I observed in the first case of this kind, which came before

* Court of Queen's Bench, Quebec, Dubord and Lafranche, No. 304 of 1847. Bouchette and Bonner, decided in appeal at Quebec. Quinn and Atchison, 4 vol. L. C. R., page 378. Martin and Côté, 1 L. C. R., page 239. See also 7th L. C. R., page 51.

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me, namely in Martin et Côté, that jurisprudence although it may be objectionable in theory—in practice relieves the plaintiff from expense, without so far as I can see, subjecting the defendant to any possible injury.

But there is it seems to me, a very important difference in this respect between a personal action against the *debtor himself* and a hypothecary action against a *tiers détenteur*.

A personal action founded on a transfer, when directed against the debtor himself may reasonably be regarded as equivalent to the signification of such transfer upon the debtor, so as to prevent the *cédant* from making a valid subsequent transfer—and therefore in such a case, the objection reduces itself, in theory, to this—that the transfer ought to have been perfected before action brought—and in practice to a question of costs.*

But the institution of a hypothecary action against a *tiers détenteur*, cannot be deemed equivalent to a service of the transfer upon a different person, namely upon the *personal debtor;* and consequently is not sufficient to prevent a second transfer of the same debt, if duly signified, before the first, from being effectual.

Therefore if a *tiers détenteur* were to pay a plaintiff, suing upon a transfer not signified, he might be exposed to pay a second time, if a second transfer were signified before the first.

This consideration of itself is sufficient to show, that, if the hypothecary action of the appellant is to be considered as founded upon a transfer not signified, it was rightly dismissed.†

It has however been contended, and numerous authorities have been cited as establishing, that partial payments by a debtor, on account of a debt transferred, or papers even *sous seing privé*, showing that the debtor had a knowledge of the transfer, are equivalent to a formal signification of it. This doctrine is true; but it is true only as between the *cessionnaire* and the debtor, and not as between the *cessionnaire* and a third party.

The authorities cited by the appellant at the pages nine and ten of his factum, and more particularly the passages from Duvergier, Duranton, and Troplong, establish this distinction—and the respondent being in my opinion, *a tiers*, as regards Mr. Rolland from whom he purchased, I think the action against him, as such *tiers*, was rightly dismissed, it being founded on a transfer, not duly signified.

* And as showing that costs ought not to be allowed to a plaintiff in such a case, V. Paré and Derousselle, 6 L. C. R., page 411.

† See as to this: observation of Sir L. H. Lafontaine, 7 L. C. R., page 51 and judgment of Justice Chabot, 4th March 1859, Quebec, Superior Court, No. 293, Gagné *vs.* Morin, "Considérant que l'acte de quittance du trois juin mil huit cent cinquante "sept, par lequel Dame Rachel Taschereau a transporté au demandeur les créances et "dettes y mentionnées, pour le recouvrement desquelles le demandeur poursuit en la "présente cause le défendeur, *tiers détenteur*, n'a pas été signifié au débiteur Louis "Plante, ni accepté par lui, et que partant le demandeur n'a jamais été saisi des dites "créances et dettes, et qu'icelui acte de quittance et transport est de nul effet et d'aucune force vis-à-vis et à l'égard du défendeur, *tiers détenteur*, déboute le demandeur "de sa présente action quant à présent, avec dépens contre lui en faveur du défen- "deur."

It was upon this ground that the late much lamented Chief Justice of this Court was prepared to confirm the judgment now under consideration; and as I believe we all agreed with him as to this point, I have thought it right to explain my views as to this part of the case, before adverting to the reasons assigned by the learned judges of the Superior Court in support of their judgment.

But, notwithstanding the very carefully prepared factum of the appellant, I am not by any means prepared to say that the reasons embodied in that judgment are insufficient to support it. The chief *considérant* is in the following words: "Considering that the said plaintiff, Thomas Cushing Aylwin, hath "failed to establish that the debt now claimed by him, under transfer from William Aylwin, and bearing date 28th November, 1855, is due by and exigible "from the Honorable Jean Roch Rolland, the principal debtor, as set forth "in his said declaration, and considering further, that by act before Maître "Guy and his colleague, notaries public, and bearing date the 19th day of "August, 1852, the said William Aylwin, acting through his attorney, the "present principal plaintiff, did agree to and with the said Honorable Jean Roch "Rolland, to give delay of payment to the said Honorable Jean Roch Rolland, "for a period of ten years, to be computed from and after the said 19th day of "August, 1852, of the debt then vested in him, the said William Aylwin, by "transfer bearing date the 19th August, 1852, from John Rowand, Esquire, "acting through his attorney, Duncan Finlayson, Esq., before Maître Guy, and "his colleague, notaries public, and that by reason of such delay of payment, "the said plaintiff cannot *quant à présent*, now have and maintain his said action "*hypothécaire* as now brought, doth dismiss the said action *hypothécaire* "*quant à présent* with costs."

On the part of the appellant it was contended "that the terme *de grâce* not "being part of the original contract, under which the *hypothèque* was created it "was the business of the party claiming the benefit of it to set it up by exception"—and that, as a general rule, "in declaring upon a deed or other instrument consisting of several distinct parts, the plaintiff is required to state only "so much of the instrument as constitutes *primâ facie* a complete right of "action; and if any other part of the instrument furnishes the means of defeating the action, it is matter of defense, of which the defendant may, on his part, "avail himself for that purpose."

The rules of pleading contended for by the appellant was reasonable and right; but I cannot see that they are in conflict with the judgment of the Superior Court. If the plaintiff in the Court below (now appellant) could have established his claim without adverting to the covenant, giving Mr. Rolland certain delay, the rules of pleading relied on by the appellant would have been in his favor. But the fact is that the agreement, giving the delay in question, forms part of a covenant, which is an essential link in the chain of evidence necessary to support the plaintiff's claim.

The transfer from Rowand to William Aylwin was evidently a fundamental part of the plaintiff's claim. That transfer was made by Finlayson, as the agent of Rowand; but a power of attorney from Rowand to Finlayson was not produced.

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It therefore became absolutely necessary for the plaintiff to allege the deed by which Mr. Rolland acceded to the transfer in favour of William Aylwin, and the plaintiff did so in the following terms:

"To which said deed the said Jean Roch Rolland assented and declared that "he held the assignment as duly notified to him by the said William Aylwin, "and as legal and binding on him the said Jean R. Rolland, and promised to "pay the sum of £1000 with interest to the said William Aylwin, in manner "and form as by the last mentioned deed now brought into Court, more fully "and at large appears."

The plaintiff has thus made it the duty of the judges to read, *not as matter of a defence*, but as an essential part of the evidence of the plaintiff, the instrument by which Rolland assented to the assignment from Rowand to William Aylwin; and, on reference to that instrument, we find that the promise to pay, expressly alleged by the plaintiff, is so incorporated with the term of delay given by William Aylwin, as to make the promise relied on in effect a promise to pay after the lapse of ten years.

The appellant having thus brought the agreement giving Rolland delay under our notice, it was needless for the respondent to do so; and, having that deed before us, we see the debt claimed by the plaintiff was not due at the time of the institution of his action.

I, therefore, agree with the learned judges of the Superior Court in the reason assigned by them in support of their judgment; and, moreover, think that judgment may also be confirmed on the ground that, as against a *tiers détenteur* there can be no action upon a transfer not signified.

The judgment in appeal was *motivé* as follows:

The Court, &c., &c., Considering that in the judgment pronounced on the 28th February, 1857, by the Superior Court, sitting at Montreal, dismissing the action of the appellant, plaintiff in the said Court, against the said defendant, with costs, as well of the principal action as of the *action en garantie* in favour of the said respondent against the said appellant, there is no error save and except in that part of the said judgment which condemns the appellant to pay the costs incurred on the *action en garantie*, this Court doth confirm the judgment pronounced by the Superior Court, save and except that part which condemns the said appellant to pay the costs of the *action en garantie*, which part of the said judgment is hereby reversed, annulled, and set aside.

And this Court doth order that each party do pay the costs by him incurred in the present appeal," &c.

Judgment confirmed in part.

H. Stuart, Q.C., for appellant.
T. S. Judah, for respondent.
(F. W. F.)

COURT OF QUEEN'S BENCH.

CROWN SIDE.

MONTREAL, 7TH MARCH, 1865.

Coram DUVAL, C. J., AYLWIN, J., MEREDITH, J., DRUMMOND, J., AND MONDELET, A. J.

In Appeal from the Court of Quarter Sessions, District of Montreal.

Regina vs. *Lebœuf.*

C. S. L. C., cap. 77, sect. 73. "No Clerk of the Crown shall, while he remains such, practice as an advocate, proctor, solicitor, or attorney, or counsel in Lower Canada."

HELD :—That the above section does not debar a clerk of the Crown, being a Queen's Counsel, from appearing in open Court, and conducting a case on behalf of the Crown, but must be construed to mean that the person holding the office of the Clerk of the Crown cannot practise for individuals.

Semble:—Also that the above section has the same application to a clerk of the Crown *not* being a Queen's Counsel.

At an early stage of the proceedings in the case of Regina vs. Bennet H. Young et al., Edward Carter, Esquire, Q. C., and Clerk of the Crown, received instructions from the Honorable the Attorney General for Lower Canada, to join Mr. Justice Coursol, Judge of the Sessions of the Peace, and take part in the proceedings before him with the view to the apprehension of the persons charged with having committed offences at St. Albans, coming under the provisions of the treaty (Ashburton); and at a later date he received further instructions from the same source to take part in the examination of witnesses, and all other proceedings to be had in the case, and in all arguments that might take place either before the Judge of Sessions or upon any applications for Habeas Corpus, in the same manner and to the same extent as any Queen's counsel would do authorised by the Crown to act in prosecution of offences committed within the jurisdiction of the Canadian Government.

The Counsel for the prisoners objected to Mr. Carter's appearing in the case in the capacity of Queen's Counsel to conduct the proceedings on the part of the Crown.

An argument took place between Mr. *Carter* and the prisoners' counsel, and Mr. Justice Coursol gave judgment on the 7th of November, maintaining the objection.

COURSOL, J.,—I have hitherto refrained from giving a decision upon the objection raised by the prisoners' counsel, as I had been given to understand that the objection would not be pressed; but the objection not having been formerly waived, Mr. Carter has insisted this morning upon my decision upon the point, declining to act until such opinion be given. It is Mr. Carter's undoubted right to claim a decision. I am therefore called upon as any judge would have to do, acting under the Statutes made to give effect to the treaty, to pronounce my decision.

The question presents itself in a very simple form. Mr. Carter is a Queen's counsel, it is true, but he is now under commission from the Crown, performing the duties of Clerk of the Crown for the District of Montreal. The Sect. 75 of

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cap. 77 of the Consol. Stat. of Lower Canada, declares in express terms that "no Clerk of the Crown shall, while he remains such, practice as an advocate, "proctor, solicitor, attorney, or counsel in Lower Canada." In giving an interpretation to these words, the object of the Legislature must not be lost sight of, and it appears clear to my mind, that the intention was to secure to the public at large greater efficiency in the performance of the duties of the important office of Clerk of the Crown, by establishing this prohibition to the performance of any other act, not strictly pertaining to the duties of that office.

On the other hand it is argued, that by a clause in the Interpretation Act, cap. 5, Consol. Stat. of Canada, which is as follows:—"No provision or enactment in any such act as aforesaid shall effect in any manner or way the right "of Her Majesty, her heirs or successors, unless it is expressly stated therein "that Her Majesty shall be bound thereby; nor shall it affect the right of any "person or of any body politic, corporate or collegiate, unless such act is a "public general act," that the prohibition of that Statute cannot be held to affect the right of the Crown, and that Mr. Carter as Q. C. would be authorized to act for the Crown, as any other Counsel, *not being a clerk of the Crown*, could do.

After giving the matter my most serious consideration, I have come to the conclusion, that the clause of the Interpretation Act does not remove the objection, as it declares in express terms," that a prohibition is not to affect the rights of *any person*, only when the act is not a *public general act*." The rights of the Crown are not in any way brought into question, (as far as I can see) by this objection, but simply a personal right, claimed by Mr. Carter and objected to. I do not therefore think that the clause referred to in the Interpretation Act can affect this question, because there is a disability imposed upon certain officers of justice, and it would seem to me certainly to adopt a broad construction of that act, if I held, that when the law, in plain and positive words, prohibits any subject or public officer from doing a particular thing, the Crown could, nevertheless, permit or require such a thing to be done I am, therefore, compelled to maintain the objection.

Mr. *Carter* took advantage of the hearing before the Queen's Bench, of this case of Regina vs. Lebœuf, reserved case from the Quarter Sessions, to make an application to be heard in the case on behalf of the Crown, and to obtain the decision of the Court of Queen's Bench upon the objection to his right to act for the Crown in the conduct of a case.

MEREDITH, J., said:

As our Legislature have not defined the duties of the office of Clerk of the Crown, and as the commissions to the Clerks of the Crown in this country* are framed in general terms, I think that the duties of that office, except where our local laws interfere, must be held to be the same here as in the country from which we have taken our criminal law, of which the office of Clerk of the Crown is a usual and, I may say, necessary accompaniment. And, indeed, it seems to me plain that if we do not adopt the rule above suggested, we shall be without any rule whatever on the subject.

* C. 77 sec. 74, C. S. L. C.

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It is true that the commission of a Clerk of the Crown is not worded here as it is in England, the difference being that in England the officers mentioned in the commission given to the Clerk of the Crown, or the master of the Crown office, as he is sometimes called, are the offices of "Coroner and Attorney" of the Queen's Bench.

The words "Clerk of the Crown," or "Master of the Crown office" not being mentioned in the English patent; whereas, in the commission under which a Clerk of the Crown is appointed in this country, the office is described as the "Office of Clerk of the Crown, with all and every the powers, authority, privileges, emoluments, and advantages to the said office, of right, by law appertaining."

The difference between the two commissions does not, however, appear to me to be as important as might at first sight be supposed.

If, in the English patent, the Clerk of the Crown were granted the office of Clerk of the Crown, and *also* the office of Queen's coroner, and attorney in the Court of Queen's Bench, then it might fairly be contended that the offices of Queen's Coroner and Attorney were offices granted *in addition* to the office of Clerk of the Crown; and as the Canadian patent contains no such additional grant, that the Canadian patentee could not claim any office other than that expressly granted. But the fact is that, in the English patent, the office granted is described in "technical language," as the office of "coroner and attorney, &c.;" whereas, in the Canadian patent, the office is described by the name under which it is generally known, both in the mother country and the colony, namely, the office of the "*Clerk of the Crown*," and it seems to me that the terms of the Canadian patent, although not so technical, are as comprehensive as those of the English patent.

Assuming, then, as I think we may do, that, subject to the changes made by our Statute law, the duties of a Clerk of the Crown are the same here as in England, we have next to see what are the duties of a Clerk of the Crown in England.

Gude, speaking of the Master or *Clerk of the Crown office*, says: "In proceeding in criminal cases in the Court of King's Bench, it is the duty of that officer to appear as the King's attorney,"* excepting in certain cases mentioned by the author, and which have no relation to the matter now under consideration.

It has, however, been objected that although the Clerk of the Crown may be the "Queen's attorney," yet that he ought not to be allowed to perform those duties which usually are performed by barristers, namely, to examine the witnesses and argue the case.

In order to determine on this objection, I have thought it right, although, perhaps, not absolutely necessary, to ascertain what is, in England, the position of the two branches of the legal profession with respect to the privilege of acting as an advocate in Court.

So far as I have been able to ascertain, there is no general Statute on the subject; and the doctrine appears to be that in this, as in other respects, the judges

* 1 Gude, p. 23.

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have power to regulate the proceedings in their own Courts. Accordingly we find, although attorneys, according to an ancient usage, are not allowed to practice as advocates in the Superior Courts at Westminster Hall, yet that in the county, and other local Courts, and in the Quarter Sessions in remote places, where members of the Bar do not attend, "members of the other branch of the "profession (namely, attorneys) are permitted to act as advocates."* Even as to the Superior Courts, Judge Littledall, in the case of Collin and Hicks, in which the right of attorney to act as an advocate on the trial of an information before justices of the peace was fully discussed, observed: "Every court of justice has the power "of regulating its own proceedings. In the Superior Court in Westminster Hall, "where barristers attend, they only are permitted to act as advocates. *Perhaps* "*if they did not attend attorneys might be heard as advocates.*"† And Chief Justice Wilmot, in delivering the unanimous opinion of the Judges, in answer to the questions submitted to them by the House of Lords, in the well known case of John Wilkes, in speaking of the office of attorney general said: "The great "abilities of the persons appointed to this office have made it figure high in the "imagination, and annexed ideas which do not belong to it. He (the attorney "general) is but an *attorney*, although to the King, and *in no different relation* "*to him than every other attorney is to his employer.*"‡

The result of my examination of the authorities on this subject is to lead me to believe that in England there is no positive rule of law to prevent any Court of justice from allowing the attorney, even of a private individual, from acting as an advocate, in any case, where it may be thought necessary to do so. And I have not found any decision, or authority of any kind, even tending to establish that the usage which excludes the attorneys of private individuals from practising as advocates in the Superior Courts, would be extended by the Court of Queen's Bench in England so as to prevent the Clerk of the Crown, as the attorney of the Queen, from conducting criminal prosecutions before that Court if ordered to do so by the Government.

It appears that the Superior Courts at Westminster have always been anxious to prevent any connexion between the two branches of the legal profession which could afford opportunities for malversation.§ But it is plain that no reason of this kind could be urged as an objection to the Master of the Crown office conducting criminal prosecutions in the Court in which he is an officer.

As to the practice in England, I have not been able to find any case in which the Clerk of the Crown conducted the prosecution; but this may, perhaps, be accounted for by the great amount of other business which it may well be supposed that officer has to attend to. Besides, we know that for some time past but few criminal cases have been tried before the English Court of Queen's Bench, and that those cases are generally of such importance as to secure the attendance of counsel. But, judging from the observations made in the case of

* Pulling's Law of Attorneys, pages 8 and 139.

† 2 Barnewall and Ad., page 670, Collin vs. Hicks.

‡ 19 State Trials, page 1129.

§ Per Lord Denman in Exp. Bateman, 6 Ad. and El. No. 6, page 858.

the Queen and Farrell,* tried at Dublin in 1848, before Chief Baron Pigot and Baron Pennefather, there cannot, I think, be any reasonable doubt that in Ireland the Clerk of the Crown is not only permitted, but *required* to conduct prosecutions when counsel are not employed to prosecute.

In that case the Clerk of the Crown, who had conducted the prosecution, had omitted to examine a witness whose name appeared on the back of the indictment. The attention of the Court having been called to the fact, Baron Pennefather, a very eminent and also a very experienced judge, observed: "That it "was very wrong not to have called the witness and examined him at the trial;" adding, "*It is the duty of the Clerk of the Crown, where counsel are not* "*employed* to prosecute, *to conduct the prosecution* generally, and examine the "witnesses." And Mr. Curran, who defended the prisoners, then observed: "It "would be very desirable if your Lordships would make a rule that has been "made in England, that where there is no counsel employed by the prosecutor, "the prosecution should be given to one of the junior counsel present—for THE "ASSISTANCE OF THE CLERK OF THE CROWN—who has a great deal of other business to attend to." But Baron Pennefather said, "I disapprove of employing "counsel *on the moment*, as I do not think a prosecution can be properly carried "on in that way,—adding further—*I will say* that, in MANY INSTANCES, cases "are very improperly prosecuted by the Clerk of the Crown."† This case is not reported as showing, according to the words of the learned Baron, "that "where counsel are not employed to prosecute, it is the duty of the Clerk of the "Crown to conduct the prosecution generally, and examine the witnesses." Indeed this point is not even noticed in the marginal abstract of the case or in the index to the volume.

But it is not the less true, that the *fact of the Clerk of the Crown having actually conducted the prosecution*, the observation of Baron Pennefather in the presence of the Chief Baron, and the suggestion of Mr. Curran, as to adopting the English practice of employing one of the junior counsels "for the assistance of the Clerk of the Crown," are conclusive evidence of the practice in Ireland as to the point under consideration.

The fact that the practice is incidentally established, without any direct reference to it by the reporter, makes the report in some respects the more valuable; because it shows that the practice was so generally known and acquiesced in that it was deemed unnecessary to call attention to it.

We have also the satisfaction of knowing that the opinions of some of the most distinguished judges of our own country have been perfectly in accordance with the practice of the Queen's Bench in Ireland, to which I have alluded.

At the argument in this cause my brother Drummond mentioned that, upon the occasion of a difference of opinion at Sherbrooke between the then Chief Justice, Sir James Stuart, and the Solicitor General, as to the immediate prosecution of the case, Sir James Stuart said "*that if the Queen's Counsel* "*would not proceed with the prosecution he would direct the Clerk of the Crown.*

* 3 Cox, C. C. 139.

† Queen *vs.* Farrell, 3rd Cox, Crim. Cases 139.

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"*to do so*;" thus assuming that it was competent for the Clerk of the Crown to act as Crown prosecutor. I also understood Judge Aylwin to say that at Sorel in 1862 he had ordered or allowed the Clerk of the Crown to act as Crown prosecutor; and I am quite within bounds when I say that Sir James Stuart and my brother Aylwin were as little likely to be mistaken on a point of this kind as any judges in this part of her Majesty's dominions.

It may, however, be said, that although a Clerk of the Crown could have acted as Crown prosecutor before the passing of the Statute 12 Vic., cap. 37, s. 30 (p. 664, C. S. L. C.), that he cannot do so since that Statute became law. But this pretension is, I think, plainly wrong.

Neither in England * nor in this country is it absolutely necessary that the Clerk of the Crown should be a barrister. And according to the views which I have already explained, where a Clerk of the Crown, being a barrister, conducts a criminal prosecution for the Crown, he does so, under his commission as Clerk of the Crown, and not under his commission as a barrister; and therefore the Statute, prohibiting him from practising as a barrister, can have no bearing upon the case. The question really is this; may it be the duty of the Clerk of the Crown, as such, to conduct a criminal prosecution? If it may, then he cannot be prevented from performing that duty, by a Statute the object of which was to secure the efficient performance of all the duties of his office; and the prohibitions of which are exclusively directed against the performance of duties distinct from those of his office, as Clerk of the Crown.

It is, however, obvious that the Clerk of the Crown, in the more populous districts, could not, in addition to the duties usually performed by himself, efficiently discharge those of a Crown prosecutor; but, on the other hand, in the remote districts, where the attendance of experienced counsel cannot always be secured, the conducting of criminal prosecutions by the Clerk of the Crown might be very advantageous to the public.

There may also be objections in theory to the Clerk of the Crown acting as Crown prosecutor. But in England and Ireland these objections have not been considered of sufficient weight to cause any change to be made in the duties of that officer. We also know that in this country the Clerks of the Peace for many years discharged the duties of Crown prosecutors in the Quarter Sessions efficiently and satisfactorily, and that in principle there are the same reasons for and against the Clerks of the Peace acting as Crown prosecutors in the Quarter Sessions, that there are for and against the Clerks of the Crown acting as prosecutors in the Queen's Bench.

It is, however, for the Crown to determine in [illegible] may be a[illegible]le that the Clerk of the Crown should act as Crow[illegible]tor. The main question that we have to decide is simply, has Her Majesty a right to avail herself of the services of the Clerk of the Crown, as Crown prosecutor? And, after giving to the subject the best consideration in my power, I must say I know of no law, usage, or reason which would justify us in questioning that right.

* [illegible], page 22, says: "A gentleman at the Bar is usually selected to fill this situa[illegible]." In this country the office has been held by several gentlemen, not members of the legal profess[illegible].

Regina vs. Laboeuf.

I shall add merely that Mr. Carter, in the course of his argument before us, claimed the power of acting as Crown prosecutor, not only under his commission as Clerk of the Crown, but also under his commission as Queen's Counsel; and judging from the only reports we yet have of the proceedings before Judge Coursol, it was under his commission as Queen's Counsel that Mr. Carter upon that occasion mainly rested his right to take part in the proceedings. I therefore think it proper to observe that in disposing of the case before us, I have found it unnecessary to pronounce any opinion upon the question whether a Clerk of the Crown, being a Queen's Counsel, can act as such, even on behalf of Her Majesty, since the passing of the Provincial Statute.

The following was the judgment of the Court of Queen's Bench:

"After having heard * * * * * and due deliberation had, upon "the application of Mr. Carter as Queen's Counsel and also as Clerk of the "Crown for the district of Montreal, it is considered and adjudged that the "said Edward Carter had a right to be heard on behalf of the Crown."

DUVAL, C. J., *dissentiente*.

(W. E. B.)

MONTREAL, 7TH DECEMBER, 1863.

In Appeal from the Circuit Court, District of Montreal.

Coram LAFONTAINE, C. J., DUVAL, J., MEREDITH, J., MONDELET, J., AND BADGLEY, J.

HENRY THOMAS,

(*Defendant in Court below,*)

APPELLANT;

AND

AMABLE ARCHAMBAULT,

(*Plaintiff in Court below,*)

RESPONDENT.

A. sends a letter missive to a notary public in the following terms: " Je prends la libert de vous transmettre sous ce pli, deux transports créanciers à moi faits par A. H. Leclaire, écr., marchand de votre village et "qu'il m'a demandé" de placer entre vos mains pour collection; à cette fin, je vous inclus la procuration nécessaire. Je désire que vous donniez l'avis nécessaire aux différents debiteurs, du transport qui m'a été fait de leur créance, etc., etc., etc. *M. Leclaire m'a dit qu'il s'était entendu avec vous au sujet de la rémunération* de vos services dans cette affaire, etc., etc,

HELD:—That such letter missive was a sufficient *commencement de preuve par écrit* to entitle A. to adduce parol evidence to establish the existence of an understanding between the notary and Leclaire, A's *cédant*, that the notary was to look to Leclaire for his fees.

2. That the claim of a notary public for professional services is not a commercial matter, and therefore the English rules of evidence are not applicable to it.

By an action instituted in the Circuit Court, District of Montreal, the 2nd of October, 1861, the respondent (plaintiff in the Court below), a notary public, claimed from appellant the sum of £38 12s. 6d., as amount of notarial fees which he alleged to be due to him by appellant for signifying notice of transfer upon the debtors of one Antoine H. Leclaire, at appellant's request.

The appellant pleaded to the action in French as follows: "Qu'il avait engagé et requis les services du demandeur, en vertu et par une lettre missive adressée au demandeur, le 10 mai, 1858, dans laquelle il lui dit qu'il avait été informé et

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qu'il était entendu que A. H. Leclaire, le cédant du défendeur, s'était arrangé avec lui, le demandeur, pour le paiement de ses émoluments pour signifier le dit transport, aux débiteurs y nommés et pour ses honoraires, et la rémunération de ses services dans l'affaire; que de fait, le dit demandeur devait alors et doit encore au dit Leclaire, un compte d'effets et marchandises s'élevant à un montant considérable, comme il appert au compte produit; que le demandeur était arrangé avec le dit A. H. Leclaire pour le paiement de ses dits émoluments dans toutes les transactions en question, qu'il a reconnu plusieurs fois, tant avant qu'après le dit transport, et nommément en avril, 1860. Que le dit demandeur a accepté le dit A. H. Leclaire, en paiement pour ses émoluments comme agent du demandeur, et ayant signifié le transport comme tel, le défendeur a opéré une transaction commerciale et le paiement de ses émoluments et honoraires était en déduction du compte de marchandises qu'il devait au dit A. H. Leclaire, son créancier. Que le défendeur ne doit rien au demandeur."

The respondent, plaintiff in the Court below, met this plea by a general answer, and the parties went to evidence.

The respondent produced witnesses to establish that his charges were the ordinary charges for such services as he had performed for appellant.

The appellant produced his *cédant*, Leclaire, and a brother of Leclaire to prove that an understanding existed, to which the respondent was privy and a party, that the respondent was to be paid *his fees* for signifying the transfer, by Leclaire, and the appellant relied upon the following letter to respondent and its answer as a sufficient *commencement de preuve par écrit* to entitle him to the right of producing such parol evidence.

Montréal, 13 mai 1858.

A. Archambault, écr., St. Louis de Gonzague.

MONSIEUR,—Je prends la liberté de vous transmettre sous ce pli, deux transports de créance à moi faits par A. H. Leclaire, écr., marchand de votre village, et "qu'il m'a demandé" de placer entre vos mains pour collection, à cette fin, je vous inclue la procuration nécessaire.

Je désire que vous donniez l'avis nécessaire aux différents débiteurs du transport qui m'a été fait de leurs créances, et que vous receviez de suite des mains de M. Leclaire, les obligations, billets et comptes qui m'ont été transportés.

J'aimerais que tous ces montants fussent collectés au plus tôt possible en usant toutefois d'une sage discrétion à l'égard de la position où peuvent se trouver placés les débiteurs.

M. Leclaire a promis de vous donner toutes les informations dont vous pourriez avoir besoin, et il désirerait être présent lorsque vous réglerez avec les gens, vû que plusieurs doivent des arrérages d'intérêt et qu'il pourrait vous être bien utile.

M. Leclaire m'a dit qu'il s'était entendu avec vous au sujet de la rémunération de vos services dans cette affaire; néanmoins, je vous prie de me dire combien vous chargeriez pour cela, car je veux qu'il soit bien compris que vous agissez comme mon "agent" et que vous ne rendiez compte qu'à moi de tous les argents retirés par vous au moyen de la présente procuration; et quoique les services de M. Leclaire puissent être bien utiles et d'une grande valeur, vous devez les

accepter de manière à ne compromettre en aucune sorte "la cession" qui vient de m'être faite et mon recours contre les débiteurs.

Veuillez, s'il vous plaît, accuser la réception des obligations des mains de M. Leclaire.

Je suis Monsieur,

Votre, etc.

HENRY THOMAS

H. COTTÉ.

Maison Bruyère, Thomas & Cie.

It should be observed here that the appellant also pretended that the acts of respondent in his behalf were of a commercial character and that consequently English rules of evidence were applicable.

Respondent opposed these pretensions of appellant, and objected to his being allowed to adduce parol evidence.

The Circuit Court (Monk, A. J.) 24 Nov., 1862, rendered the following judgment:

La Cour après avoir entendu les parties par leurs avocats sur le mérite de cette cause et sur la motion du demandeur du onze Novembre courant, examiné la procédure, pièces produites et preuve et avoir sur le tout délibéré; considérant que la preuve à laquelle le demandeur a fait des objections sur les dépositions de Antoine Hector Leclaire et Xavier A. Leclaire, témoins examinés en cette cause est illégale, et vû la motion pour rejeter telle preuve illégale, accorde la dite motion du demandeur, maintient les dites objections et rejette la preuve à laquelle les objections ont été faites; et procédant à juger sur le mérite de cette cause, considérant que le défendeur n'a pas fait une preuve légale et suffisante des allégués essentiels de sa défense produite et filée en cette cause, déboute la dite défense; et considérant qu'il résulte de la preuve produite que le demandeur en sa qualité de Notaire, a fait à la requisition du défendeur pour lui les actes et l'ouvrage professionnel mentionnés et détaillés en son compte contre le défendeur, filé en cette cause, vû qu'il est prouvé d'une manière précise et légale que les émoluments et honoraires chargés et demandés pour tels actes et ouvrages professionnels sont justes et raisonnables, et que le demandeur mérite pour ses services tels que mentionnés dans la déclaration en cette cause, le montant par lui réclamé par son action; la Cour condamne le défendeur à payer la somme de £38. 12. 6., etc.

This judgment was appealed from, and the Court of Appeals rendered judgment reversing it on the 7th December, 1863.

LAFONTAINE (Juge en chef) *dissentiens*, said:

1° Je suis d'opinion que les vacations de Notaire ne constituent pas un fait commercial. La preuve verbale ne devait donc pas être admise à ce titre, ainsi je dois approuver la partie du jugement de première instance qui accorde la motion du demandeur à l'effet de faire rejeter cette preuve, que le demandeur (appelant) a voulu faire à l'appui de sa défense.

2° Je regarde la lettre du 13 Mai 1858 adressée au demandeur par le défendeur, comme constituant, de la part du défendeur, le premier, son préposé pour

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faire en sa qualité de Notaire, les significations des transports en question, et de plus son propre agent pour faire la recette des débiteurs délégués. La stipulation contenu dans un seul des transports, celui du 12 mai 1858, que "toutes copies du dit transport et signification de ce transport aux débiteurs, ou à aucun d'eux, seront aux frais et à la charge du dit cédant," est une stipulation qui ne regarde que les parties au dit transport, c'est-à-dire, l'appelant Thomas et Leclaire et nullement l'intimé.

Je ne vois pas une pareille stipulation dans le transport du 26 Avril. La lettre du demandeur n'est pas à mes yeux, une preuve suffisante que le défendeur, en accusant la réception, eût dû considérer le nommé Leclaire (Antoine Hector) comme devenant le débiteur de ses honoraires, à la place du dit Henry Thomas et que celui-ci ne devait pas en être tenue. "Je veux," lui dit Thomas, "qu'il soit bien compris que vous agissez comme mon agent et que vous ne rendiez compte qu'à moi de tous les argents retirés par vous au moyen de la présente procuration," il lui avait dit auparavant dans cette même lettre: "Je vous inclus la procuration nécessaire."

En effet, cette procuration est du 12 mai 1859, et passée devant Maître Belle, notaire; et copie en est produite à l'enquête par le demandeur. Il y est bien fait mention de deux transports, comme étant datés l'un du 26 avril et l'autre du 12 mai 1859, et comme étant les seuls auxquels doive se borner l'agence donnée à l'intimé, mais il n'y est nullement fait mention des conditions de paiement, auxquelles cette agence était donnée, et comme devant changer, sous ce rapport, les relations du mandant et du mandataire.

3° L'appelant, prétend que le demandeur alléguait un transport du 1er mai mais qu'il ne produisait qu'un transport du 12 mai. Cela n est pas exact. Le demandeur déclarait bien, dans sa déclaration, que Leclaire "le 1er (si toutefois ce chiffre est lisible) ou vers le premier mai 1859, aurait transporté, etc., etc." Il n'allègue pas de date précise quant au mois. Mais il produit les deux transports des 26 avril et 12 mai 1859. Je crois que cette allégation "vers le 1er mai 1859" est suffisante pour comprendre le dernier comme le premier des dits deux transports. Si elle n'est pas suffisante pour comprendre le dernier, ne pourrait-on pas dire également qu'elle ne doit pas l'être pour comprendre le premier?

4° Le défendeur a aussi prétendu, "dans sa défense écrite, que le demandeur "a même été infidèle à son mandat, en faisant *des actes contraires* aux intérêts "du défendeur, mais favorables à M. Leclaire son créancier." Ceci est assez grave, mais l'accusation aurait dû être plus précise et mieux indiquée et formulée. Il s'est contenté de produire son transport, en date du 12 mars 1860, fait de certaines créances par Antoine Hector Leclaire à son frère Xavier Alphonse, Leclaire, et passé devant "Maître Am. Archambault. N. P." c'est-à-dire devant le demandeur lui-même. Assurément avec cette seule preuve, il nous est impossible de décider si le reproche fait au demandeur par le défendeur est bien fondé ou, non.

L'assertion est trop vague, et la prétendue preuve trop peu satisfaisante.

Je suis donc d'opinion de confirmer le jugement de première instance.

MEREDITH, J., said:—The claim of the respondent, for services as a notary

public, is not a commercial matter; and, therefore, the English rules of evidence are not applicable to the case; but I am clearly of opinion that the appellant made out a sufficient *commencement de preuve;* and, therefore, that he is entitled to the benefit of the parol evidence which he adduced.

In the letter of the 13th May, 1859, Mr. Thomas says:

"Je prends la liberté de vous transmettre sous ce pli deux transports de cré-
"ance à moi faits par A. H. Leclaire, écr., marchand de votre village et qu'il
"m'a demandé de placer entre vos mains pour collection, etc."

And with respect to the payment of Mr. Archambault's services, Mr. Thomas says: "Mr. Leclaire m'a dit qu'il s'était entendu avec vous *au sujet de la rému-*
"*nération de vos services* dans cette affaire, néanmoins je vous prie, etc., etc."

Mr. Archambault acknowledged the receipt of this letter, by a letter of the third of June, in which he declared himself willing to comply with the request of Mr. Thomas, without in any way questioning the statement made by Mr. Leclaire, and communicated by the appellant to the respondent, "Qu'il s'était' 'entendu avec vous au sujet de la rémunération de vos services en cette affaire.'

As to this letter, I believe my brother Badgley thinks it must be understood as referring exclusively to the services of Mr. Archambault as agent; but I cannot see anything in the wording of that letter to justify such a restricted construction of it; and it seems to me difficult even to imagine any reason which could have led to the making of such a distinction; for there was exactly the same reason for applying Mr. Archambault's professional fees in part payment of the debt due by him to Mr. Leclaire, that there was for applying his agency fees in the same way.

It has also been said that Mr. Thomas could not make a *commencement de preuve par écrit* for himself, by his own letter. That is quite true, but we draw the *commencement de preuve* not from the letter merely, but from the fact that Mr. Archambault received it, and acted upon it, without disclaiming the statements it contains as to his agreement with Mr. Leclaire.

With reference to the *commencement de preuve par écrit* it is also to be observed that in the transfer of the 12th of May there is a clause as follows: "Toutes copies du présent transport, et signification de ce transport aux dits débiteurs ou à aucun d'eux seront aux frais, et à la charge du dit cédant," and that the respondent Mr. Archambault was fully aware of the clause is certain, as he must have written it each time that he made copy of that transfer. This clause is of importance not only as corroborating the *commencement de preuve par écrit* resulting from Mr. Thomas' letter and the answers of Mr. Archambault, but also as confirming the interpretation which, I think, ought to be given to that letter; because it appears by the clause under consideration that, at least in so far as regards the professional services relating to the transfer of the 12th May, the respondent knew perfectly he had to look for payment, not to Mr. Thomas, to whom he now looks, but to Mr. Leclaire.

In considering the question as to whether there is or is not a *commencement de preuve*, it is proper to bear in mind that at the time of the alleged agreement, the respondent was indebted to Mr. Leclaire in a sum of money much exceeding the amount of his charges for professional services. The arrangement alleged

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by the appellant was, therefore, exactly what was to have been expected under the circumstances: supposing all the parties to be honest and reasonable.

It enabled the respondent, by means of his professional services, to pay a part of the debt due by him to Mr. Leclaire; and it enabled the latter *pro tanto* to discharge his liability towards the appellant, and thus avoided a circuity of payments: which, supposing the parties to be willing to pay their debts, would otherwise be necessary; viz: a payment for professional services from Thomas to Archambault, then a payment by the latter of his account to Leclaire; and in fine a payment on account by Leclaire to Thomas.

The respondent on his part desires to stop the circle of payments—not, however, by the fair mode of compensation; but by exacting payment in cash from Mr. Thomas, and at the same time leaving the debt due by himself to the debtor of Mr. Thomas unpaid. I shall add merely, that if, as I think, there is a sufficient *commencement de preuve par écrit*, then it is proved beyond doubt by the two Leclaires, that the respondent agreed to allow his charges for the professional services in question to go in deduction of his indebtedness to Mr. A. L. D. Leclaire, and therefore his action against Mr. Thomas ought not to have been maintained.

Judgment reversed.

Moreau, Ouimet et Chapleau, for appellant.
Leblanc et Cassidy, for respondent.
(W. E. B.)

MONTREAL, 4TH MARCH, 1862.

In appeal from the Circuit Court, District of Terrebonne.

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

JOSEPH CHAUMONT,
(*Defendant in Court below,*)
APPELLANT;

AND

DAME MARIE ANGELE GRENIER,
(*Plaintiff in Court below,*)
RESPONDENT.

HELD:—That a deed creating a mortgage, passed since the registry ordinance came into force, is invalid as against a subsequent purchaser, unless it be enregistered before the title of such purchaser.

Semble:—That two deeds, one of which was deposited with the registrar on Sunday, and the other at the opening of his office on Monday morning, are to be considered as enregistered *at the same moment of time*, so that one will have no preference over the other by virtue of registration; and that if the former be a deed of mortgage, and the latter a deed of sale, the former is inoperative, void, and of no effect against the latter.

Semble—That the more ancient date of one of two deeds placed, at the same time, in the hands of the registrar, gives to it no priority in respect to the time of enregistration.

The facts of this case are stated in the report of the judgment of the Court below, 2 L. C. Jurist, 78 and 79, which was reversed in appeal.

MEREDITH, J.—There cannot be any doubt that the mere knowledge of an unregistered incumbrance will not bind a party whose claim is duly registered

Ross and Daly, 3 L. C. R. p. 126 et seq., and in the present case, the pleadings do not accuse the appellant of fraud of any kind.

Chamard and Grenier.

The parol evidence, therefore, in so far as it tends to prove that the appellant knew of the unregistered incumbrance, in favor of the respondent, was, to say the least, useless.

That portion of the parol evidence which tended to prove that the respondent's obligation was placed in the hands of the registrar, on Sunday, the 14th November, 1858, might also have been objected to, as there was no *inscription en faux* against the registrar's certificate. But even according to the parol evidence adduced, the registrar was right in treating, as he did, the obligation in favor of the respondent, as if it had been placed in his hands at the opening of his office on the morning of Monday the 15th of November.

The respondent, it is true, could not gain any advantage by placing her obligation in the hands of the registrar at a time when, according to law, his office was closed; but, on the other hand, I do not think the respondent can suffer, in any way, from the registrar having received her mortgage a few hours before she had a right to place it in his hands.

According, therefore, to the certificates of the registrar, which, as to their legal effect, are not opposed to the parol evidence, the two deeds must have been considered to have been placed in the hands of the registrar, at the same moment; and such being the case it seems to me plainly impossible that the registrar could, at his own mere will and pleasure, give one of the parties precedence over the other. I therefore regard the two deeds as having been, in contemplation of law, registered at the same time.

Viewing the case in this light the respondent contends that, as the two deeds were registered at the same time, the first in date ought to be held the first in right; or, in other words, that, as the two deeds were registered at the same time, neither party ought to be considered to have acquired, under the registry law, any right against the other. And therefore it is argued by the respondent, this case ought to be decided irrespective of the provisions of the registry law, and, consequently, that the prior hypothec of the respondent should be held good against the subsequent sale to the appellant.

This reasoning is not without force; and, as regards deeds executed before the registry law came into operation, it seems to be well founded; because, as to such deeds, the law in effect declares that the deed first in date shall be inoperative against the second, only in the event of the second being enregistered before the first.

The words of the law, as regards deeds executed *before* the registry law came into operation, are as follows:—

"But every such notarial obligation, contract, instrument in writing, &c., which "was not registered on or before the day last mentioned, shall be and has been "from the said day inoperative, void, and of no effect whatever, against any sub- "sequent *bona fide* purchaser, grantee, mortgagee, &c., for or upon valuable consid- "eration whose claim has been registered before the registration of such obliga- "tion, instrument or document as aforesaid." Con. Stat. L. C., cap. 37, sec. 3, sub-sec. 2, p. 344.

Chaumont and Grenier.

But the law is essentially different as regards deeds executed after the registry ordinance came into operation.

The provision of law as to the class of deeds last mentioned is as follows:—

"And every such deed or instrument in writing, &c., shall be inoperative, "void and of no effect, against any subsequent *bona fide* purchaser, &c., for or "upon valuable consideration, unless it has been registered *before* the registering "of the deed, instrument in writing, &c., under which such subsequent purchaser, "grantee, mortgagee, &c., claims." Con. Stat. L. C., cap. 37., sec. 1, sub-sec. 2, p. 343.

Here the legislature has in effect declared that a deed, although prior in date to another, shall be inoperative, void, and of no effect against it, viz., against the subsequent deed, unless the deed so prior in date has been registered *before* the registering of the second deed.

In the present case, as I have already observed, the two deeds before us were registered *at the same moment of time.*

It therefore does not appear that the first deed has been registered *before* the registering of the second; and therefore, according to the express words of the law, the first deed "is inoperative, void, and of no effect" as against the appellant, a subsequent *bona fide* purchaser for valuable consideration.

It is not for us to decide whether there is any sufficient reason for the distinction made by the legislature between the two classes of deeds to which I have adverted; but I may observe that in a case between two claimants under deeds in force when the registry ordinance was passed, and not registered within the delay allowed by law, but subsequently registered at the same time, neither party under the provisions of the registry law, could justly claim to have any advantage over the other; because both, as to negligence and diligence, they would be exactly upon the same footing; whereas in the case of two deeds passed subsequently to the registry law coming into operation, but at different dates, and registered at the same time, the holder of the second deed as the more diligent of the two claimants might, perhaps, according to the principles of the registry law, be entitled to a preference over the other. For instance in the case before us, the respondent as holder of the first in date of the two deeds, neglected to register her claim for more than ten years; whereas the appellant registered his deed at the earliest moment possible.

We are not, however, required to determine upon the wisdom or justice of the provision of law under consideration. It is sufficient for us to know that as regards deeds passed since the registry law came into force, and in cases such as the present, the law declares in effect that a deed prior in date to another, shall be inoperative against it, unless registered *before* it. The deed of the respondent is prior in date to that of the appellant, notwithstanding which it was not registered before it; and therefore, as has been already said, the respondent's obligation must be held inoperative as against the appellant's deed of sale.

MONDELET, J.—Appel d'un jugement rendu par la Cour de Circuit du district de Terrebonne, (Monk juge) le 21 février, 1861.

Une action hypothécaire ayant été intentée par la demanderesse Intimée, contre l'appelant pour £13 15s. 5d., fondée sur une obligation du 9 mars 1848

enregistrée le 15 novembre 1859, à neuf heures du matin. L'appelant, défendeur, opposa à cette action, un acte d'acquisition de la propriété en question, en date du 14 novembre 1858, enregistré le 15 novembre 1858, à 9 heures du matin, sous le No. 10513.

Question.—Deux actes comportant respectivement hypothèque sur le même immeuble, sont enregistrés simultanément. Le régistrateur certifiant leur enregistrement à la même heure, donnant à l'un (l'acte d'acquisition) le No. 10512, et à l'autre (l'obligation) le No. 10513, le titre de l'acquéreur ainsi enregistré détruit-il la priorité de l'obligation ?

L'on voit que la prétention de l'appelant, est qu'ayant acquis l'immeuble en question, par acte du 14 novembre 1858, temps auquel il n'existait alors, ni même lors de l'enregistrement de ce titre d'acquisition, aucune réclamation enregistrée la demanderesse intimée n'avait aucune hypothèque, qui pût valoir contre lui, et que l'action devait être déboutée.

Le détendeur a plaidé des impenses; il n'en peut être question ici, attendu que non seulement cet objet excèderait la jurisdiction de la Cour de Circuit, mais parceque dans notre droit, différant, sous ce rapport, du droit romain, le tiers détenteur n'a pas droit de retention de l'héritage jusqu'à ce qu'on lui ait payé ses impenses ou ses améliorations, dont il doit se faire payer en se faisant colloquer dans l'ordre de distribution, sur le prix de l'héritage, lorsque la vente a eu lieu par décret.

Revenant à la question d'enregistrement, nous avons en regard deux enregistrements faits à 9 heures du matin. L'obligation est plus ancienne, 19 mars 1848, l'acquisition subséquente, 14 novembre 1858.

Mais l'acte d'acquisition porte enregistrement sous le No. 10512, et l'obligation 10513.

"Je certifie que ce document a été filé et enregistré en entier à ce bureau, à "neuf heures, A. M. le 15 novembre 1858, sous le numéro dix mille cinq cent "douze" (No. 10512). Voilà quant à l'acte d'acquisition.

Je certifie, etc., sous le numéro dix mille cinq cent treize (No. 10513). Tel est le certificat quant à l'obligation.

Le jugement de la Cour de Circuit, dont est appel, ne renferme aucun motivé exprès et spécial à l'occasion de cette question, mais comme il maintient l'action hypothécaire, et condamne l'acquéreur au délaissement, la question qui est maintenant soumise à la Cour d'Appel, a été virtuellement résolue dans le sens de la demanderesse, c'est-à-dire que bien que l'enregistrement de l'acquéreur porte le No. 10512, et celui de l'obligation 10513, le droit d'hypothèque subsiste.

Je ne fais aucune difficulté de dire, que le jugement dont est appel, est bien fondé en loi.

J'aurais préféré que la Cour de première instance, n'eut pas admis la preuve testimoniale qu'elle a reçue quant à ce qui s'est passé en dehors de l'enregistrement qui a eu lieu le lundi matin, 15 novembre 1858, à 9 heures. Cette preuve n'est pas légale, et il n'en était aucunement besoin.

J'aurais aimé à voir dans le jugement le débouté des exceptions du défendeur qui a été omis.

Quant à la question d'enregistrement, il faut partir du principe que ces enre-

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gistrements ont pour fin la conservation, et non pas la destruction furtive des droits des individus, et que dans ces opérations, on n'exige pas plus que dans aucune autre, des impossibilités physiques. Il était en effet, impossible, mathématiquement, d'effectuer l'entrée au régistre du sommaire sur chaque acte, et bien que le régistrateur certifie qu'il les a enregistrés, à 9 heures du matin, cette déclaration, ou constate le fait, alors l'acquéreur n'a pas de priorité, ou elle atteste purement et simplement, que la présentation des deux actes ayant été simultanée, le régistrateur s'est conformé à la loi en donnant à chaque acte un numéro, aux termes mêmes de l'acte 4 Vict., chap. 30, sec. 19. (Statuts Refondus, chap. 37, sec. 60, p. 368).

" Tout sommaire ou document enregistré dans tel régistre sera numéroté, et " le jour, le mois, l'année et l'heure du jour où il est enrégistré seront entrés à " la marge du régistre.

Avant la promulgation de l'article 2147 du code Napoléon, l'on eût peut-être pu entrevoir quelque difficulté, si on eût mis la raison de côté ; mais un moment de réflexion suffit, pour faire saisir, de suite, que le seul sentiment bien fondé en pareille matière, est celui qu'on a adopté en France, savoir : " que tous les " créanciers inscrits le même jour, exercent en concurrance une hypothèque de " la même date, sans distinction entre l'inscription du matin et celle du soir " quand cette différence serait marquée par le conservateur."

On trouve dans Merlin (4e Edition, Rép. Vbo. Inscription Hypothécaire, t. 6, § 5, II) " Plusieurs hypothèques de même ou de différente nature, peuvent être cumelées sur un seul immeuble : et les divers créanciers auxquels elles appartiennent, peuvent venir s'inscrire simultanément. La priorité de l'hypothèque attribuée à celle de l'inscription, aurait pu faire naître des difficultés.

" Cet article les prévient, il ne veut pas, dans ce cas, que la priorité de l'hypothèque soit réglée, ni par celle de l'écriture, ni par l'instant mathématique où l'acte a été présenté à l'inscription : il attribue une hypothèque de même date et du même rang à tous les créanciers inscrits le même jour, sans distinction entre l'inscription du matin et celle du soir, quand bien même cette différence se trouverait précisée par le conservateur."

Rien de plus raisonnable et de plus juste que ce point de vue le plus conforme au bon sens. Appliquant à la question dont nous nous occupons, les principes sus-énoncés, on ne peut hésitier à dire que la Cour de Circuit de Terrebonne, a agi avec sagesse, en rendant le jugement dont est appel.

Je ne dirai rien du fait de la remise par l'intimée au régistrateur de son obligation, dans la soirée du 14 novembre, veille des enregistrements, car j'ai déjà remarqué que la cour de première instance, n'aurait pas dû recevoir cette preuve ; si cependant, l'on voulait appeler à son secours, le *fantôme d'équité*, comme le dit Touillier, ne pourrait-on pas soutenir que c'est l'intimée qui, la *première* a présenté ou fait présenter son titre, et qu'elle eût dû obtenir le numéro 10512, au lieu du numéro 10513, que le régistrateur a accordé à l'appelant ? Mais je n'attribue aucune importance à cette circonstance. J'opine donc pour la confirmation du jugement de la cour de première instance.

La majorité de la cour d'appel a maintenu la prétention de l'appelant par le jugement qui suit :

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La cour, 1o. Considérant que par la deuxième section de l'ordonnance de la 4ème année du règne de Sa Majesté la reine Victoria, chapitre 30, il est statué que tout titre ou instrument par écrit exécuté après le 31 décembre 1841, sera considéré comme sans force, nul et de nul effet à l'egard de tout subséquent acquéreur *bonâ fide* pour ou sur valable considération, à moins que tel titre n'ait été enrégistré avant l'enrégistrement du titre, transport ou obligation notariée, sur lequel se fondera tel acquéreur subséquent ;

2o. Considérant que la demande de l'intimée en cette cause est basée sur une obligation en date du 9 mars 1848, en vertu de laquelle, l'immeuble décrit aux pièces de procédure en cette cause, a été hypothéquée en faveur de l'intimée ; considérant que l'appelant a acquis le dit immeuble par acte de vente notarié en date du 14 novembre 1858, pour les prix et considération portés dans le dit acte, et que conséquemment, le dit appelant est vis-à-vis l'intimée, et relativement au dit immeuble, un acquéreur de bonne foi, pour valable considération ;

3o. Considérant que le dit acte d'obligation et le dit acte de vente ont été enrégistrés dans le même temps ; et considérant que le dit acte d'obligation en date du 9 mars 1848, n'ayant pas été enrégistré avant le dit acte de vente en date du 14 novembre 1858, doit en vertu des termes exprès de la deuxième section de la dite ordonnance d'enregistrement, être regardé comme nul et sans effet à l'égard de l'appelant, acquéreur subséquent de bonne foi, et pour valable considération ; et que, conséquemment, il y a erreur dans le jugement de la cour de première instance qui a maintenu la dite obligation contre le dit appelant ; infirme le dit jugement, savoir ; le jugement rendu par la cour de circuit pour le comté de Terrebonne, siégeant à St. Jérôme le 21me jour de janvier 1861, et procédant à rendre le jugement que la dite cour de première instance aurait dû rendre, renvoie la dite demande et action de l'intimée contre l'appelant, avec les dépens encourus tant en la dite cour de première instance que devant cette cour.

Le juge en chef et le juge Mondelet différant.

Judgment reversed.

Laflamme, Laflamme et Daly, pour l'appelant.
Moreau, Ouimet et Morin, pour l'intimée.
(W. E. B.)

SUPERIOR COURT.

MONTREAL, APRIL 23RD, 1864.

Coram MONK, A. J.

No. 1371.

Benning vs. *Malhiot.*

HELD:—That a witness cannot be examined in a cause until after the return day of the writ of summons, even though such witness be about to leave the Province.

A petition was presented by the plaintiff on the 21st April, 1864, alleging that he had sued the defendant in an action of damages for having had criminal conversation with his (plaintiff's) wife. The writ was issued on the said 21st of April, and returnable on the 2nd of May then next.

The petition further alleged that one Elizabeth Peltier, wife of Pierre Ferdinand Raymond, and heretofore of the city of Montreal, but then of the city of Chi-

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cago in the State of Illinois, was a material witness in the cause, and would testify to facts establishing and tending to establish the allegations of the plaintiff's declaration; that the said Elizabeth Peltier was then within the jurisdiction of the honorable Court, but was about immediately to depart from Lower Canada and from the Province of Canada, and to go to the State of Illinois, whereby the plaintiff might be deprived of her testimony.

The prayer of the petition was that the Court should authorize and order the evidence of the said Elizabeth Peltier to be forthwith taken in due form, and that the deposition of the said witness be taken down in writing, and be signed and sworn to and duly received, certified and put of record, in the said cause for all legal purposes.

To this petition was annexed the affidavit of one Adolphe Dumaine, to the effect that the said Elizabeth Peltier was a material witness in the cause, and that she was about to leave the Province.

MONK, J., said: This was a petition to examine a witness about to leave the Province. The application was made before the return of the writ of summons. The judges were almost equally divided as to the construction to be put upon the clause of the statute regulating this procedure. Three judges had expressed the opinion with a good deal of hesitation and uncertainty, that a witness could be examined before the return day; and four judges had declared their deliberate and solemn judgment to be that a witness could not be examined till after the return day, in fact not till issue had been joined; and his Honor was clearly of opinion that no such examination could take place untill after the return day, and that no such examination should take place till after issue joined.

The statute laid down that when a witness was sick, and perhaps about to take his long journey, issue must be joined before he could be examined; and was it to be supposed that a man merely going to Rouse's Point could be examined the day the writ was served. The words in the manner above expressed in the latter clause of the section 102, ss. 2 of the C. S. L. C., p. 736, evidently intended that the examination should take place after issue joined. It was impossible to suppose that the Legislature meant otherwise.

His Honor referred to the arguments of Mr. Justice Aylwin and Mr. Justice Mondelet in the case of Supple vs. Kennedy (10 L. C. R., p. 458), as most conclusive in favor of this view. Issue must either be joined or default entered against the defendant.

The petition must be rejected on these grounds as premature and insufficiently supported by evidence.

Petition rejected.

Alexander Cross, for plaintiff.
Abbott & Dorman, for defendant.
(W. E. B.)

NOTE. In the case above alluded to of Supple vs. Kennedy, in Appeal, the majority of the Court were against the opinion held by Mr. Justice Monk in the present case.

In the case of Malone and Tate, in Appeal, (2 L. C. R. p. 99,) the holding was the same as his Honor's in the present case.

MONTREAL, 31st MAY, 1865.

Coram BERTHELOT, J.

No. 635.

Fraser vs. S. J. Burnstein, and N. Burnstein, oppt.

HELD:—That an opposition *afin d'annuller* alleging a previous seizure, and that *saisie sur saisie ne vaut*, will not be set aside on motion.

The opposant having alleged in his opposition that the goods seized in this cause had already been seized at the instance of another creditor, and were still under such seizure, the plaintiff moved for the rejection of said opposition for the following reason:

"Because the ground upon which the said opposition is based, namely, that at "the time of the seizure in this cause the opposant had the goods already under "seizure, and that *saisie sur saisie ne vaut* are insufficient in this cause to main-"tain the conclusions of the said opposition."

Per Curiam.—Motion rejected. (*)

Popham, attorney for plaintiff.

R. Pope, attorney for opposant.

(P. R. L.)

MONTRÉAL, 31 DECEMBRE, 1865.

Coram BERTHELOT, J.

No. 1680.

La Banque du Peuple, Daoust et Daoust, oppt.

JUGÉ:—Qu'une opposition afin d'annuler peut être renvoyée sur une motion.

Par son opposition, le défendeur prétendait qu'il avait droit d'avoir main-levée de la saisie mobilière faite en cette cause; " en autant que Antoine Viger l'huis-"sier saisissant n'avait aucun droit de se faire accompagner d'un recors."

Le demandeur fit motion pour le rejet de cette opposition comme étant insuffisante.

Per Curiam. Motion accordée avec dépens.

Opposition renvoyée avec dépens.

Dorion et Dorion, avocats de la demanderesse.

Denis et Bayley, avocats du défendeur, opposant.

(P. R. L.)

COUR DE RÉVISION.

MONTRÉAL, 31 MAI, 1865.

Coram BADGLEY, J., BERTHELOT, J., MONK, J. A.

No. 348.

Beaugrand dite Champagne vs. Lavallée et Trigge et al., opposants.

JUGÉ:—Que l'hypothèque légale de la femme séparé de biens pour des sommes dotales reçues durant le mariage, pour la réception desquelles aucun titre n'a été enrégistré, ne peut être exercée sur les biens du mari au préjudice des créanciers qui ont enrégistré leur titre.

Le jugement porté en Cour de Révision et qui a été rendu le 26 janvier 1865, par la Cour Supérieure à Montréal (Smith, J.) a été rapporté dans le 9m. vol. du L. C. Jurist, p. 61.

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* Vide 7 L. C. Jurist, p. 140, *Warren vs. Douglas*.

Beaugrand dite Champagne vs. Lavallée et Triggs et al.

Par son jugement, la Cour de Révision a confirmé celui rendu par la Cour de première instance.

Rivard, avocat de la demanderesse.

Barnard, conseil.

Lafrenaye & Armstrong, avocats des opposants. (*)

(P.R.L.)

QUEEN'S BENCH.

MONTREAL, 6TH JUNE, 1865.

In appeal from the Superior Court, District of Montreal.

Coram DUVAL, C. J., AYLWIN, J., MEREDITH, J., DRUMMOND, J., MONDELET, A. J.

No. 46.

ALEXANDER FLECK,

(*Plaintiff in Court below,*)

APPELLANT;

AND

BROWN,

(*Intervening party in Court below,*)

RESPONDENT.

HELD:—That, although a seizure *corporeally* effected of property in the hands of a *tiers saisi* is null, an intervening party cannot, by motion made immediately after he is allowed to intervene and before any issue is joined on the intervention, claim the quashing of the seizure.

This was an appeal from the judgment of the Superior Court, at Montreal, reported in the 7th L. C. Jurist, p. 256.

In the Court below, the plaintiff had sued out a writ of *saisie arrêt en main tierce*, under which the sheriff seized *corporeally* in the possession of *tiers saisi* a quantity of railroad iron.

The *tiers saisi* appeared and declared under oath, that he had nothing belonging to the defendant, and Brown, the respondent, intervened in the case, claiming the iron as his and producing the bill of lading evidencing that fact, signed by the *tiers saisi*, who was the captain of the barge on board of which the iron was attached.

On his intervention being allowed in the ordinary form, the respondent moved that the seizure be quashed as being illegal, and the Superior Court granted the motion and quashed the seizure accordingly.

THE CHIEF JUSTICE in pronouncing judgment on the appeal remarked that the Sheriff's proceedings were certainly most extraordinary, but that the intervening party was premature in moving as he did. There was no issue properly joined between him and the plaintiff, and there was not and could not be, under the circumstances, any legal evidence that the property seized belonged to him. The judgment of the Superior Court was therefore reversed. The Court of Appeal assigning the following reasons for so doing:—

"The Court * * * * considering that at the time the respondent, an interve-

(*) Vide No. 298, Limoge vs. Marsan & Joly, oppt., décidé à Montréal en Octobre 1864.

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sing party in the Superior Court, made his motion praying the said Court to annul and set aside the seizure made by the Sheriff at the instance of the plaintiff of the eight hundred and five bars of railroad iron mentioned in the Sheriff's return to the writ of attachment issued in said Court, and considering further that at the time of the rendering by the said Court of the judgment on the said motion no written or parol evidence had been or could have been legally adduced before the said Court in support of the said motion, and that therefore in the judgment pronounced by the said Superior Court granting the said motion and annulling and setting aside the said seizure, there is manifest error, this Court doth reverse, annul and set aside the judgment so pronounced by the Superior Court at Montreal, on the twenty-ninth day of September, one thousand eight hundred and sixty-three, and proceeding to render the judgment which the said Superior Court ought to have rendered, doth order that the said respondent take nothing by the motion so by him made in the Superior Court as aforesaid, and doth condemn the respondent to pay to the appellant his costs incurred as well in the Superior Court as in this Court."

Judgment of Superior Court reversed.

Cross & Lunn, for appellant.

Strachan Bethune, Q.C., for respondent.

(S. B.)

MONTREAL, SEPTEMBER 6TH, 1864.

In Appeal from the Circuit Court, Bedford.

Coram DUVAL, C. J., MEREDITH, J., DRUMMOND, J., MONDELET, A. J., AND BADGLEY, A. J.

JOHN CARDEN,

(*Plaintiff in the Court below,*)

APPELLANT;

AND

JAMES RUITER,

(*Defendant in the Court below,*)

RESPONDENT.

In an action upon a lost note it was alleged in the declaration that the first instalment of it was payable in September. According to the parol evidence adduced, the first instalment was to be paid in November. Held, that the variance was not material.

2. That such variance was covered by the maker's acknowledgment of the note subsequent to his knowledge of its loss.

3. The payee proved the making and loss of the note by parol testimony, after first making affidavit himself of its loss. Held, that such proof was legal and sufficient.

The points involved in the case will sufficiently appear from the petition in Appeal, which contains the following allegations:—

"That on the 13th day of December, 1861, in the Circuit Court for the District of Bedford, your petitioner took out an action against one James Ruiter, of Nelsonville in the Township of Dunham, in the said District of Bedford, innkeeper, and alleged, in effect, in his declaration, that the said James Ruiter

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had, at Nelsonville, on or about the 25th of May, 1860, made, signed, and delivered to your petitioner, his (the said James Ruiter's) promissory note, for two hundred dollars for value received; one half of said sum to be paid in September following, and the other half in one year, with interest.

"That, in August, 1860, your petitioner accidentally lost said note, and has never been able to find it since. That James Ruiter, well aware of the loss of said note, subsequently paid divers sums on account of said note, to wit, about sixty-seven dollars, and frequently acknowledged his indebtedness to your petitioner, and promised to pay the same, but that he still neglected to pay him a balance of $143.60, for which sum, interest and costs, your petitioner concluded against him; praying *acte*, at the same time, of his readiness and willingness, and of his offer to give to James Ruiter good, valid, and sufficient security, that, after paying said note, he, James Ruiter, would never be troubled about it, and such further security as he might require.

"To this action, the defendant, James Ruiter, by his first plea, pleaded and alleged, that, true, he had, on the 25th May, 1860, made in favour of your petitioner, a certain obligation in writing of $200.00, payable in one year; that the consideration of said obligation was the alleged difference in exchange of horses between them; that your petitioner had cheated and defrauded defendant in said exchange; that defendant agreed to pay the said $200.00 only upon the condition that the horse which he then received in exchange was the 'Dumas horse;' that defendant, discovering that he had been cheated, offered to give up said horse to your petitioner, and take back his said obligation, *which was the only obligation or note ever consented by defendant in favour of your petitioner*, but that your petitioner refused to do so. The defendant also pleaded a *défense en fonds en fait*.

"Issue having been joined, the parties went to *enquête*, and examined a number of witnesses. And, previous to the opening of the *enquête*, your petitioner did, on the 7th March, 1862, make and file his affidavit, not for the purpose of making any proof for himself, but in order to show the impossibility in which he was to prove the actual loss of the said note. It appears by that affidavit, that on or about the 26th August, 1860, your petitioner had in his pocket a wallet containing the said note and other papers; that he went with the crowd to the wharf in Montreal to witness the arrival of the Prince of Wales, and that, about half an hour afterwards, he discovered that the button which was used to close the pocket of his pantaloons, had been cut off, and the wallet with its contents had been taken away by some person unknown to your petitioner, and that he afterwards notified James Ruiter of the fact.

"This affidavit was fyled, accompanied by a motion to be allowed to adduce parol evidence of the making and loss of the note. Evidence was thereupon adduced, as hereinabove stated, and, on the 24th day of February, 1863, judgment was rendered by his Honour Mr. Justice McCord, granting the defendant's motion to reject from the Record the said affidavit of your petitioner, and dismissing the action of your petitioner."

The judgment of the Court below was recorded as follows:—

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"The Court, having heard the parties by their Counsel on the merits of this cause, examined the proceedings and evidence of record, and, on the whole, maturely deliberated; proceeding, in the first place, to adjudicate upon the motion fyled by the defendant on the twelfth day of February, one thousand eight hundred and sixty-three, tending to reject the affidavit made and fyled by the said plaintiff on the seventh day of May, one thousand eight hundred and sixty-two, doth grant the said motion, for the reasons set forth in the same; and further, on the merits, considering that the said plaintiff hath not legally proved the loss of the pretended promissory note, or any note, upon which the said action was brought; and further that the proof of the contents and conditions set forth in the said pretended note, are different and contradictory to those set forth in the said plaintiff's declaration, inasmuch as, in the latter, one-half was to become due and payable in September, one thousand eight hundred and sixty, whilst in proof, that payment was to be payable in November, one thousand eight hundred and sixty, doth dismiss the present action, saving to the said plaintiff all legal recourse with costs against the plaintiff, *distraits* to Messrs. O'Halloran & Baker, attorneys for the said defendant."

From this judgment the plaintiff Carden appealed, and judgment was rendered by the Court in this appeal on the 6th September, 1864.

MEREDITH, J., (*dissentiens*) said: The note alleged in the declaration is a note for $200, payable one half in September following the date of the note, the other half in one year. Whereas the note proved is a note payable, one-half in November following the date of the note, and the other half in one year.

There is, therefore, material difference between the note as alleged, and the note as proved.

The learned counsel for the plaintiff, now the appellant, admitted that a judgment exactly according to the conclusions of the declaration would not be right, but contended that we could get over the difficulty by not taking into account the allegation in the declaration causing the variance. The rule on this subject, as I understand it, is that even unnecessary allegations, if descriptive of any material part of a written instrument, cannot be treated as surplusage, and this for the reason that they affect the identity of the instrument described.

It seems to be thought that because the legislature have, by recent enactments, allowed errors, such as the one which has occurred in the present case, to be amended on easy terms, that therefore those errors, even if not amended, may be treated as unimportant. But I think the inference to be drawn from the recent legislative provisions on this subject, is, not that the amendment of such errors has been thought unnecessary, but, on the contrary, that being thought necessary, it has been facilitated. The rule requiring our judgments to be *secundum allegata et probata*, is still in force; and if a party having the power to amend will not avail himself of that privilege, he must be treated as if it did not exist. It has, however, been said that the error is excusable as the note was lost when the declaration was drawn up. I readily admit that the loss of the note may account for the inaccuracy which has occurred in the description of it in the declaration, but it does not excuse the plaintiff for refusing to amend

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when his attention was drawn to the error; and here it may be observed that the fact of the note being lost gives the defendant an additional interest in having the note correctly described in the declaration. Had the plaintiff produced the note, it would have been identified by the initials of the officer of the Court; and the defendant on paying it would have been entitled to have it. But the note being lost, the defendant is liable to pay on receiving security; and if sureties by a bond undertake to hold him harmless from a note payable in September, it may be contended that this obligation ought not to be held to extend to a note payable in November. Much stress has also been laid upon the fact that but one note was ever given by the defendant to the plaintiff; and therefore it is said, there can be no difficulty as to the identity of the note lost. The answer is that the obligation of the sureties would rest exclusively upon their bond, and could not be affected in any way by the evidence in a case in which they were not parties.

The learned counsel who argued the case before us felt, as was to have been expected, the difficulty now being considered, but contended in effect that although a judgment exactly according to the declaration would not be right, yet that the misdescription of the note might be treated as surplusage, and a correct description given of it in the judgment. But I think it more fitting that the error should have been corrected upon a motion of the plaintiff to be permitted to amend, than by the Court, without any application from the plaintiff; and I further think that any costs or inconvenience resulting from the plaintiff's unamended error, ought to be borne by him rather than by his adversary; and as the judgment of the Inferior Court is in accordance with these views, I think it ought to be confirmed.

MONDELET, J., also *dissentiens*, said: This is an appeal from a judgment of the Circuit Court, District of Bedford, dismissing the appellant's action for the recovery of the balance of a promissory note alleged to have been lost.

At all times the judgment should agree with the allegations of the declaration, and those allegations which are not to be taken for granted, should be borne out by the evidence.

But in a case such as the present, the Court should strictly apply that rule, since a good deal depends on the condition of the bargain for the exchange of horses between the parties.

Now, there is no evidence whatever of the loss of the note; the plaintiff's affidavit amounted to nothing in that respect, and can make no case for him. The whole evidence shows there was some deception on the part of plaintiff in the exchange of the horses; and it may be quite reasonable to suppose, if not to presume, that he may possibly hold back the note, in the apprehension of its contents.

As to the identity of the note, it is to be borne in mind, that we are not to divide the defendant's admissions; he describes an obligation with conditions and payments at periods different from those alleged in the plaintiff's declaration, although he admits it was the only one he had with the plaintiff. But although there may have been only one note, not only does it not follow that it is that alleged by the plaintiff, but the very contrary must be presumed, since the

plaintiff has no other reliable evidence of the existence of a note, than the qualified admission of the defendant. *Chose jugée* could not be pleaded nor made out.

I therefore think the judgment of the Court below right in dismissing the plaintiff's action.

I do not understand why the Court below rejected from the record on motion of the defendant, the plaintiff's affidavit. Surely it could not have been used as evidence, it must have been put in merely (and I may say *inutilement*) to obtain leave to prove by oral testimony the loss and contents of the note. However, this is a matter of very little importance, the main consideration is the dismissal of the plaintiff's action which I think was justified.

In my opinion the judgment should be affirmed.

BADGLEY, J., said:

The action is on a lost note. The facts are as follows:—The parties made an exchange of horses, and the defendant agreed to pay the plaintiff $200 to boot over and above the exchange. He made his note dated at Nelsonville, 25th May, 1860, for that sum, payable to the plaintiff or bearer, one-half in six months, the other half in twelve months, and delivered it to him. In the following August, during a visit to Montreal, the plaintiff's pocket-book containing the note in question, was stolen from his pocket and has not since been found. Very shortly after the occurrence, the plaintiff communicated his loss to the defendant, who, notwithstanding, acknowledged his indebtedness, and promised to pay the amount of the note. On the 6th October following, he paid to the plaintiff on account $31, and on the 23rd February, 1861, he also paid a further sum of $27 on account, at the same time requesting time and indulgence to pay balance due on the note. Having failed to fulfil his promise in the time given, the appellant sued the respondent for balance, and by his declaration set out his demand, and declared upon the note made and dated as above stated for the said sum, payable one-half in September following, and the other half in one year. Then follow allegations of the loss of the note, and that it has not since been found; the defendant's knowledge of the loss, and his subsequent acknowledgment of indebtedness; his making to the plaintiff the two payments above stated on account, and requesting indulgence to pay the balance remaining due; and, finally, the plaintiff's offer of security to guarantee defendant against any demand for the note.

The defence was, 1st, want of consideration, and also fraud practised by the plaintiff in obtaining the note; 2nd, the general issue.

The first plea was not supported, and the issue rested therefore upon the *défense au fonds en fait.*

The defendant, by his articulations, has admitted that there was no other obligation between the parties save the note in question; and the plaintiff has proved the existence of the note as first mentioned above, its loss, the defendant's acknowledgment and subsequent payments on account, &c.; but the proved note differs from the note declared upon in one particular, that is to say, by the

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note proved, the first instalment was payable *in six months*, whilst in the declaration it is alleged payable *in September following*. There is no other variance between the note set out and the note proved.

The right of action upon a lost note has been doubted, but such a doubt is unfounded. 2 Rogue, Jurisp. Cons. p. 409, 411. "Billet perdu et qui n'est "pas à ordre, on peut le payer et en tirer quittance qui l'annulle, et si le billet "est à ordre et qu'on doute de la solvabilité de celui qui dit l'avoir perdu, ou "quand il serait solvable, on peut exiger une caution en justice ou devant "notaire, aux choix du débiteur, et au frais du créancier pour l'évènement," etc. The same author, at page 315, explains a similar right for lost bills of exchange, and this authority is fully sustained in French jurisprudence. The English law accords the same right, at Common Law or at Equity, according as the note was lost before or after due. The drawer of a lost bill or note may be compelled in Equity not only to renew it if not due, but to pay it if due; and Byles on Bills, p. 302, says, "This provision is not peculiar to the law of England, "but agreeable to the mercantile law of other countries, as of France, Code de "Comm., liv. 1, sect. 9, art. 151–2; and Ord. de Comm. de Ls. 14, vol. 5, art. 19, "which in this instance declared the law, and did not make the law," The same author, at page 300, says, "If a bill or negotiable note be lost, it is con- "ceived an action will lie either on the bill or on the consideration." There would, therefore, seem to be no valid objection to the right of action.

The appellant filed with his declaration his own affidavit of circumstances, stating the loss, etc., not as evidence of course, nor could it be taken as such, but simply as an indication of his good faith, and as laid down in 12 Wendell, 173, Bland vs. Noland, where it was held that "ex necessitate from the neces- "sity and hardship of the case, the Courts allow a party himself to prove the "loss or destruction of a paper preliminary to the introduction of secondary "evidence," and further, "*so as to repel an inference of fraudulent design in the* "*loss.*" In a case recently decided by the Court of Appeals at its Quebec sittings, of Brown against the Corporation of Quebec, in an action for a lost city debenture, a similar affidavit made by the plaintiff was filed in that case, and was allowed to stand without rejection.

Upon the point of the proof of the loss requisite to be made, it is laid down that "the holder of such lost note in an action against the maker, is not by law "required to give direct and positive evidence of its loss or destruction, where "he has not produced the note on trial, although it is overdue. It is sufficient "if he give such proof as shows that the note cannot be found, or if destroyed, "that the defendant cannot afterwards be compelled to pay the amount to a "*bona fide* holder; but in either case the holder must give an indemnity to the "maker." 8 Conn. 431.

The plaintiff has sufficiently proved the existence of the note and its loss, and defendant admits this note in question to have been the only obligation between them.

The sole remaining point is upon the variance. Now it must be remembered that the suit is between the original parties (the payee and the maker) of the

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lost note declared upon, although incorrectly in one particular, and long after the entire full term of its payment had expired; and, moreover, long after the expiration of the delay for the payment of the balance of the money stated in the note, accorded by the payee to the maker upon the particular request made to him by the latter. The real question between them is, can the defendant be prejudiced in any way either by at once amending the allegation under order of the Court, or by describing the correct note in the judgment for the purposes of defendant's indemnity? But, moreover, the variance is not material, and Byles says, "that the amending power is "exercised so liberally and beneficially as to cure most instances of variances in "actions on notes and bills. In a case before Lord Tenterden, the Chief Jus-"tice said, the object of the Act of Parliament was to prevent a failure of jus-"tice from accidental errors, etc. In England variances of all kinds are "corrected and amended, as in the amount stated of a note or bill, Sanderson "vs. Pipor, 7 Dowl. p. 32—or in the date and the time it had to run (as in "this case) Becket et al. vs. Sutton—10 Law J. 1—Bentzing vs. Scott, 4 Car. "& p. 24; or in the name of the payee, Parkes vs. Edge, 1 Cr. M. 429. "The Judge at the trial orders the record to be amended, and the only ques-"tion is, can the defendant be prejudiced in any way? Now by our own "Statute the Court may in its discretion at any time before judgment allow "any pleadings to be amended so as to agree with the fact found." The amendment could not possibly be refused to the plaintiff under the Statute, and it is not easy to doubt that as between the original parties to the note, and who are the only parties to this suit, wherein the defendant has not pleaded specially against the making of the note, or its times of payment, as alleged, and has specially admitted that there was no other obligation between them, it would seem impossible for the Court to deny that the note proved is indeed and in effect the note alleged, notwithstanding the accidental error in the alleged time of payment. It would seem clear that the amending power when exercised in or applied to such cases as this, puts aside the strictness of the old rule of the *allegata* and *probata* concurring, because taking the *allegata* as they stand, yet after contradictory or differing *probata*, the amending power actually substitutes other *allegata* in the place of the original, and thereby makes the corrected or amended *allegata* to be *secundum probata*, but not *vice versa*. Now as this power of amendment is not only a statutory benefit, but also a legal practice to prevent a failure of justice, which would ensue from supporting merely formal objections made not to subserve the actual rights of parties, or to protect them from prejudice; the Court should not therefore be prevented, especially under the proved circumstances and admissions in this case, and the manifest bad faith of the defendant's contestation, from maintaining the action under the indemnity offered by the plaintiff giving full security therefor, which is the only rightful and legal privilege to which the defendant could be entitled, and by stating the note correctly, in its judgment, and ordering the indemnity bond to be made in conformity therewith. The judgment of the Superior Court dismissing the plaintiff's action on the grounds therein stated should not be sustained and should be reversed.

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The following was the judgment of the Court of Appeals:

The Court, &c., considering that the said lost note, the subject of contestation in this cause, declared upon by the appellant, has been sufficiently identified with the note proved in evidence to have been made by the said respondent to said appellant, or bearer, for $200, bearing date at Nelsonville, on the 25th day of August, 1860, and payable with interest; considering that the variance between the allegations of the time of payment thereof in the declaration set out as "$100 in the month of September then next, and $100 in one year from the "date of said note," and the proof thereof in the evidence adduced in this cause "of one-half of the said sum of $200, in the said note mentioned, being payable "in six months, and the other half in twelve months from the date thereof," is not material and has been covered by the respondent's acknowledgment of the said note since his knowledge of the said loss thereof, and that the said note was the only note between the parties; considering that the loss of the said note has been sufficiently established, and that the appellant had a right to demand and have payment of the balance of the said note, with interest thereon as claimed by him in and by this action, upon his giving to the respondent good and sufficient security against any claims against him for payment of the said note, or any part thereof; considering that in the judgment of the Circuit Court for the District of Bedford, rendered on the 24th day of February, 1863, rejecting the appellant's affidavit filed in the said cause, and dismissing his said action, there is error, this Court, proceeding to render the judgment, which the said Circuit Court should have rendered, doth condemn the respondent to pay and satisfy to the appellant the said sum of $143.60 demanded in this action, being the balance of the said note, dated at Nelsonville, on 25th May, 1860, made by the said James Ruiter, and payable to the said John Carden, or bearer, for $200, one-half thereof in six months, and the other half in twelve months from the said date thereof, with interest from the said 25th day of May, 1860; upon the said appellant giving to the said respondent good and sufficient security to the satisfaction of the judge of the said Court, to guarantee the said respondent from all claims and demands which may hereafter be made against him, said respondent, for the payment of the said sum of money in the said note specified, or any part thereof, the said note in the bond of security aforesaid to be described as in this judgment mentioned, as to the time of payment thereof, namely, one-half in six months, and the other half in twelve months, from the date of said note.

The whole with costs of this Court, and of the said Circuit Court.

Judgment reversed.

A. W. Robertson, for appellant.
Cross & Lunn, for respondent.

(F. W. T. & W. E. B.)

SUPERIOR COURT.

MONTREAL, 31ST DECEMBER, 1863.

Coram SMITH, J.

No. 394.

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CAPIAS—UNLIQUIDATED DAMAGES.

Con. Stat. L. C., cap. 83, s. 7. Every day, not being a Sunday or holiday, shall be deemed "a juridical day for all the purposes of this Act," (i. e., "An Act respecting the ordinary procedure in the Superior and Circuit Courts") Held, that where a party declared that he might sustain damage, or lose his debt by waiting till Monday, there was sufficient to justify the Judge in causing a writ of *capias ad respondendum* to issue on Sunday.

2. That a claim of unliquidated damages for alleged personal wrongs is a sufficient cause of indebtedness to justify the issue of a *capias ad respondendum* when the facts submitted to the Judge satisfy him that there is something tangible to give damages.

3. That in Lower Canada, claims arising from *torts* are considered *debts* as well as those arising from contracts, and this in conformity to the French and Roman law.

This was an action commenced by the issuing of a writ of *capias ad respondendum*, based upon the following affidavit of plaintiff:

WILLIAM JAMES LEWIS REDPATH, of the City and District of Montreal, gentleman, being duly sworn upon the Holy Evangelists, doth depose and say: —That the Honorable Joshua R. Giddings of the same place, Consul General of the United States of America, is personally indebted to this deponent in a sum of money exceeding forty dollars, to wit: in the sum of twenty thousand dollars, current money of the Province of Canada, to wit: for personal damages suffered and sustained by this deponent, and for moneys paid, laid out and expended for and by reason of the several acts of violence committed upon the person of deponent, and of his illegal arrest, imprisonment and detention hereinafter mentioned, all which deponent alleges were done and executed by and at the instance and upon the order, and with the connivance, authority and sanction of the said Hon. Joshua R. Giddings, and without any just, reasonable or probable cause whatever, and without any warrant or legal authority to justify the same.

And deponent further saith, that with the view of perpetrating the said several acts of violence against him, and of arresting, imprisoning, and detaining in custody, this deponent, the said Hon. Joshua R. Giddings conspired, confederated and agreed with two depraved persons, well known to be persons of bad repute, to wit: with one Thomas Jones and one Matthew Hawkins, for said illegal purpose, and did agree and promise to pay said Thomas Jones and Matthew Hawkins a sum of money therefor, whereupon and in pursuance of the order to that effect of the said Hon. Joshua R. Giddings, and with his sanction, connivance and authority, but without any just, reasonable or probable cause, and without any warrant or other legal authority whatever, the said Thomas Jones and Matthew Hawkins, acting, as aforesaid, in concert with the said Hon. Joshua R. Giddings, did, at the said City of Montreal, in the district of Montreal, upon the thirty-first day of the month of October last, wickedly, falsely and maliciously, and with the view of carrying out the instructions and the said

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illegal object of the said Hon. Joshua R. Giddings, and of imprisoning and of detaining in custody this deponent, and of ruining him in his good name, fame and credit, falsely, wickedly and maliciously charge and accuse this deponent of having committed, in the City of New York, in the State of New York, one of the United States of America, the atrocious crimes of murder and arson, and did then and there, acting in concert as aforesaid, with the said Honorable Joshua R. Giddings, and in obedience to his order and with his sanction and authority, violently assault this deponent, and did also then and there, upon the day and year last aforesaid, at Montreal aforesaid, arrest and confine him under the false pretence that he had been guilty of the said crimes of murder and arson, and did also then and there force and compel this deponent to leave the said city of Montreal, and to go with them a prisoner to the said city of New York, all which illegal and wrongful acts were done, encouraged, counselled and advised by the said Hon. Joshua R. Giddings, acting for said purpose in concert with the said Thomas Jones and Matthew Hawkins, the agents and instruments by him employed for the execution of said criminal and unlawful objects; and this deponent further saith that immediately after he was arrested as aforesaid, he was forthwith forced and compelled to leave the said city of Montreal, and was, by the said Thomas Jones and Matthew Hawkins, acting always with the sanction, authority, and by the direction of the said Hon. Joshua R. Giddings, with force and arms, carried and conducted from and out of the said city of Montreal a prisoner to the city of Burlington, in the State of Vermont, one of the United States of America, with irons or handcuffs on his hands, and then, between the hours of eleven and twelve of the clock in the night of the said thirty-first day of October, that being the time of their arrival, was thrown into and imprisoned in a loathsome cell or dungeon, and there kept until about the hour of seven of the clock of the morning of the second instant, when this deponent was again, with great force and violence, assaulted and beaten by the said Thomas Jones and the said Matthew Hawkins, and by them dragged about and forced and compelled to go from there with them as a prisoner to the said city of New York aforesaid, at which place this deponent arrived a prisoner as aforesaid, to wit: at about nine of the clock upon the evening of the said second of November instant; and deponent further saith, that immediately after his said arrival in the city of New York, he was again forced into and confined in a most loathsome and offensive cell under ground, and kept therein without being permitted to communicate with any person from the time of his said last imprisonment, up to and until the evening of the fifth of November instant, when he was discharged and set at liberty without being brought to trial, or having undergone any examination before any Judge or Justice of the Peace, and because no offence was by him committed, and no charge was made, nor could any be proved against him; and this deponent further saith that by reason of his said illegal arrest and subsequent imprisonment, he hath not only been greatly and grievously injured in his credit and reputation, but he hath also undergone terrible sufferings in mind and body, and he is now seriously and dangerously afflicted with bodily pain and sickness, brought on and occasioned by the savage treatment and cruel torture to which he was subjected in manner and form as aforesaid, all which deponent expressly alleges was occasioned, counseled and

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devised by the direction, authority and sanction of the said Hon. Joshua R. Giddings, and executed and carried out by the agents and instruments by him employed for such evil and wicked purpose, to wit: by the said Thomas Jones and Matthew Hawkins, with whom he acted in concert as hereinbefore mentioned.

And said deponent saith that by reason of the premises and of his said arrest and imprisonment, he hath been obliged to lay out and expend a large sum of money, to wit: a sum of money exceeding four hundred dollars currency, in procuring legal advice and professional assistance at Montreal aforesaid, and in endeavoring to relieve and exonerate himself from his said arrest and imprisonment, and to obtain his return from the said city of New York to the said city of Montreal, and hath in fact altogether suffered, by reason of the premises and of the matters and things hereinbefore alleged, damage to the amount of the aforesaid sum of twenty thousand dollars, which he had a right to have and demand of and from the said Hon. Joshua R. Giddings, for the causes aforesaid.

And this deponent further saith that he is credibly informed, hath every reason to believe, and doth verily and in conscience believe that the said Hon. Joshua R. Giddings is now immediately about to leave the Province of Canada, with intent to defraud this deponent, and that without the benefit of a writ of *capias ad respondendum* against the body of the said Honorable Joshua R. Giddings, this deponent will be deprived of his remedy, lose his said debt, and sustain damage.

And deponent, for the special reasons and grounds of his said belief, saith that upon the thirteenth day of November instant, at the said city of Montreal, he was informed by the said Hon. Joshua R. Giddings that he would leave Canada forthwith, that he would be gone from thence within a few days, and that his son would take his place and act as consul of the United States of America; that he, the Hon. Joshua R. Giddings, was sorry he was going immediately from Canada, as otherwise he would try and do something for deponent for the injury which had been done him, meaning the injury occasioned by his wrongful and illegal acts, hereinbefore recited.

Wherefore deponent prays that a writ of *capias ad respondendum* to arrest the body of the said Honorable Joshua R. Giddings may issue forthwith, and further he saith not, and hath signed.

(Signed,) WM. JAMES LEWIS REDPATH.

Sworn before me at the City of Montreal, this fifteenth day of November, one thousand eight hundred and sixty-three.

(Signed,) S. C. MONK, A. J. S. C.

Upon this affidavit the following writ of *cap. ad res.* issued:—

PROVINCE OF CANADA, *District of Montreal*, SUPERIOR COURT. } VICTORIA, by the grace of God, of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith.

No. 394. *To the Sheriff of the District of Montreal in our Province of Canada,* GREETING:

WE COMMAND YOU, that you take the Honorable Joshua R. Giddings, of the City and District of Montreal, Consul General of the United States of America,

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if he may be found in your district, and him so taken, safely keep, so that you may have his body before our Superior Court, at the Court House, in our City of Montreal, in the said District, on Saturday, the twenty-eighth day of November instant, to answer William James Lewis Redpath, of the same place, gentleman, of a plea contained in the declaration to be served, for the sum of twenty thousand dollars, current money of our said Province; and have you then and there this writ.

IN WITNESS WHEREOF, we have caused the seal of our said Court to be hereunto affixed at Montreal, this fifteenth day of November, in the year of our Lord one thousand eight hundred and sixty-three, and in the 27th year of our reign.

(Signed,) JOHN HONEY,
Deputy Prothonotary of said Court.

A. M. DELISLE,
Sheriff.

(Endorsed.)

Issued upon the affidavit of the within-named William James Lewis Redpath, for the sum of twenty thousand dollars, current money of Canada.

Montreal, 15th November, 1863.

(Signed,) JOHN HONEY,
Deputy P. S. C.

(Signed,) B. DEVLIN,
Atty. for Pltff.

Let this writ be executed this day, being Sunday.

(Signed,) S. C. MONK,
Assist. J. S. C.

(Signed,) JOHN HONEY,
D. P. S. C.

(Signed.) A. M. DELISLE.

On the 17th December, 1863, the following motion to quash, and reasons in support of it, were presented to the Court by the defendant:

Motion on behalf of the Hon. Joshua R. Giddings, defendant, that the writ of *capias ad respondendum* in this cause issued, the affidavit to obtain such writ, the order of the Judge made and signed on such affidavit, be declared irregular, insufficient and illegal, and that the arrest of said defendant, and all proceedings had under said writ of *capias ad respondendum*, be declared illegal, irregular, null and void, and be set aside, and said writ be quashed and declared of no force or effect, and that the bail or security in this cause entered be declared at an end, and said sureties discharged and said defendant freed and discharged from the same, the whole with costs against plaintiff, for the following amongst other reasons:—

1st.—Because said writ was illegally and irregularly issued, made and signed by the Deputy Prothonotary of this Court, and it does not appear that under the circumstances he could have or had by law or the statute any power, right, or authority to sign, seal, issue or deliver the same, and by said writ it does not appear that said deputy prothonotary acted in place of the prothonotary of this Court, or in his or their sickness or absence, as in such case he only could so act and sign and issue the writ herein issued.

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2nd.—Because said writ issued and said affidavit was made, signed, and sworn to on a Sunday, the Lord's Day being a *dies non*.

3rd.—Because said writ issued on the Lord's Day, being Sunday, and could not by law issue or be signed, sealed or delivered on that day.

4th.—Because said Honorable Joshua R. Giddings was arrested and held to bail under said affidavit and writ of *capias ad respondendum*, on said Sunday, the fifteenth day of November last past, being the Lord's Day, contrary to law, and said bail bond was entered into and given on said day, being Sunday aforesaid, and could not by law issue or be signed, sealed or delivered on that day.

5th.—Because it does not appear in and by said affidavit, under and by virtue of which said writ issued, that the said Honorable Joshua R. Giddings is personally indebted to the therein deponent in a sum of money amounting to or exceeding forty dollars currency.

6th.—Because by said affidavit it appears that at the time of the making and taking of such affidavit and the issuing of said writ, that the sole pretended claim of the therein deponent against the said Honorable Joshua R. Giddings was and is for damages, said damages not then or now fixed, determined or settled, but then and now unliquidated, and by law no writ of *capias* can issue for, and no party whatever can be arrested or detained in a civil action for the recovery of damages unsettled, unliquidated, indeterminate and undetermined.

7th.—Because it does not appear by said affidavit that at the time of making said affidavit and the issuing of said writ of *capias ad respondendum*, that he, the said Honorable Joshua R. Giddings, was personally indebted to deponent or any person whomsoever, or to plaintiff, in any sum of money whatever; but, on the contrary, it is apparent from said affidavit that at such time no sum of money whatever was due by or exigible of him, defendant, by said deponent. Because said affidavit does not disclose or make known any legal right or cause of action, or any right or cause of action whatever in favor of the therein deponent, or of any person whatever against him, defendant, or any cause of debt whatever.

9th.—Because by said affidavit it appears that deponent had no legal, valid or sufficient right, debt, claim, or cause of action whatever, against defendant.

10th.—Because by said affidavit it appears that the matters and things complained of by deponent were committed by parties other than defendant, and for whose acts defendant is in nowise responsible, and defendant is not in any way, form, or manner, liable or accountable to deponent, and pretended plaintiff.

11th.—Because said affidavit discloses no matter, ground, or belief, cognizable by any Judge of this Court, or sufficient to authorize or allow the taking thereof, and the issue of said writ, or any proceedings thereunder, being taken and had on a *dies non*, to wit: the Lord's Day, Sunday, fifteenth day of November, one thousand eight hundred and sixty-three.

12th.—Because the order of the Honorable Judge was not had or given to the issuing of said writ on said day, from facts or allegations sufficient to authorize the giving or granting the same.

13th.—Because no Judge of this Honorable Court or Prothonotary of this

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Court, allowed, granted, or endorsed said writ, or the issue thereof, nor could the same be legally given on the allegations of said affidavit on said day.

14th.—Because it is not stated, nor does it appear by said affidavit, who are plaintiff or defendant in this cause, and it does not appear, nor is it disclosed by, or averred in, said affidavit that the deponent is the plaintiff in this cause, the bookkeeper of the plaintiff, or the clerk or legal attorney of the plaintiff, as required by law and the statute in such case made and provided.

15th.—Because it does not appear by, and said affidavit does not disclose that any departure of him, the said Honorable Joshua R. Giddings, would deprive plaintiff of his remedy against defendant, as required by law.

16th.—Because the requirements of law in regard to affidavits for *capias ad respondendum* are not in and inserted in said affidavit, and said affidavit does not contain the essential words and averments in such case required by law, and is not in the form required by law.

17th.—Because said affidavit does not disclose, state or make known in any form or manner any demand ever made on defendant by plaintiff for said damages, or the payment or refusal of payment thereof by defendant, or that the same are now and still due and unpaid.

18th.—Because the deponent in said affidavit hath wholly and entirely failed in said affidavit to show, disclose, or allege his grounds of belief, or any valid or sufficient grounds for his belief, that said Joshua R. Giddings was immediately about to leave the Province of Canada with intent to defraud his creditors generally, or the plaintiff in this cause, or the deponent of said affidavit in particular, and that such departure would deprive the plaintiff in this cause, or deponent in said affidavit, of his remedy against him, said Honorable Joshua R. Giddings.

19th.—Because the pretended grounds alleged in said affidavit are wholly insufficient to justify the making and swearing of such affidavit, or the belief therein expressed, and the issuing of said writ thereunder and in said cause.

20th.—Because the said affidavit and the averments thereof is and are wholly insufficient, and do not contain the allegations required by law to justify said writ or the issuing thereof, and said writ was issued illegally and on insufficient grounds and ought to be quashed and set aside by this Court.

21st.—Because the said affidavit, the said writ of *capias ad respondendum*, the pretended order of said judge on said affidavit written, and the said arrest is and are irregular, illegal, null and void, and should be so declared by this Honorable Court.

22nd.—Because the pretended cause of action in deponent's affidavit alleged contained, arose and originated in a foreign country, to wit: in the United States of America, as is averred in and by the said affidavit, and particularly that part averred in relation to the four hundred dollars currency as detailed by said deponent in his said affidavit.

23rd.—Because the said affidavit does not disclose or make known that the said Honorable Joshua R. Giddings ever consented to or requested any payment, by the deponent, of said $400, or that the same was at his request or for his benefit, and in any event said sum, if ever paid, forms part of the sum claimed for damages as alleged by the said deponent.

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Authorities of defendant on motion to quash.

1.—As to issue of writ on Sunday, without petition or sufficient grounds disclosed.
Cons. Stats. L. C., p. 707, sec. 7, chap. 83.—Dict. de Droit et Pratique vo. Dimanche —*Ferrière*.
Denizart, Actes de Notoriété,—P's 85, and Seq.
P. 270, and Seq.
P. 543.
Ancien Denizart vo. Fêtes et Dimanches

2.—As to unliquidated damages.—
Drake, on Attachment.
1 L. C. Jurist, p. 5.—Alexander vs. McLachlan.
6 L. C. Reports, p. 478—Allen vs. Allen.
" " p. 477—Dumaine vs. Guilmotte.
" " p. 491—Chapdelaine vs. Morrison.
1 L. C. Reports, p. 381—Malbiot vs. Bernier.
Leonard vs. Pennell,—No. 168 of 1849.—Superior Court, Montreal, (Smith, J.)
1 Lee's Practice, p. 17—Jenkins vs. Law.
1 Petersdorff, p. 384—Waters vs. Joyce.
390—Cope vs. Cooke.
Cooke vs. Dabree.
Archer vs. Ellard.
Stinton vs. Hughes.
391—Polleri vs. DeSouza.
1 Petersdorff, p. 410, 411.
" p. 405—Edwards vs. Williams.
1 " New Abrid., p. 142.
5 Taunton, p. 201—Lear vs. Heath.

3.—As to grounds of belief.—
4 L. C. Reports, p. 218—Berry vs. Wilson.—Opinion of Judge Meredith.
4 L. C. Reports, p. 402—Larocque vs. Clarke.

4.—Not allowed by the Judge or Prothonotary.—
Cons. Stat. L. C., chap. 87, p. 809.
chap. 83, p. 704.
chap. 78, p. 672.
As to power of Deputy.
chap. 83, p. 716, sec. 43.

5.—Not stated that deponent is plaintiff, or who is defendant.
Cons. Stats. L. C., p. 808,—requires affidavit of plaintiff, his bookkeeper, clerk or legal attorney.

6.—As to $400—if not foreign debt—see
1 Petersdorff, p. 389—Mann vs. Sheriff.
1 Durnford & East, p. 76—McKenzie vs. McKenzie.—Opinion of Judge Buller.
11 East, p. 316—Taylor vs. Forbes.
2 Maule and Selwyn, p. 603—Young vs. Gatien.
5 L. C. Jurist, p. 44 and seq.—Beaufield vs. Wheeler, argument and judgment.
M. & S., p. 643—Durnford vs. Messiter.
5 Dowl. Prac. chap. 11—Smith vs. Heap.
8 East. p. 106—Cothrow vs. Hagger.
1 Petersdorff, p. 404—Jackson vs. Pemberton.
1 " New Abrid., p. 139.—Case.

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On Motion for Security for Costs.

1 Cons. Stats. L. C., p. 726, sec. 68.
Civil Code Louisiana, p. 9, sec. 42.
1 Bourjon, Tit. 9, chap. 1.
Ferriere Dict. de Dt. Prat. vo. Domicile.
Domat Liv. 1, Tit. 16, sec. 3.
Coutume de Paris, Art. 173.
Guyot vo. Domicile, p. 109.
p. 110.

The Superior Court (Mr. Justice Smith) rendered judgment on the 31st December, 1863.

His Honor said: " Two points came up for examination in this case. The action was brought by Redpath against the defendant to recover damages for certain injuries to his person, which he alleged has been inflicted upon him by the order and authority, and with the connivance of the defendant, the American Consul General. An *exception à la forme* had been fyled by the defendant. His Honor had not observed in the record any plea to the merits. The defendant now moved first for security for costs, alleging that the plaintiff Redpath had no domicile in this country, and he produced a number of affidavits in support of this allegation. The plaintiff declared that he was a resident here, and in point of fact it seemed that he was a resident. The affidavits went to show that he had no legal domicile here. Well, it was not necessary that a man should have a domicile in order to bring an action in this country. If an injury were received here, it would be unjust to deny him the right of action because he happened to have no legal domicile, though a resident. But the only evidence respecting domicile consisted of the affidavits. These affidavits, with one or two exceptions, were taken in New York, and sworn before persons apparently authorized to receive depositions. But a moment's reflection must show that these depositions could not be received here. In order that these affidavits from a foreign country should be received here, they must be sworn before some individual recognizable by the Courts of Canada. But there was another objection, even if they could be read here. There was no doubt but all these depositions were calumnious in their nature. They did not touch the matter in question, but they vilified and abused the plaintiff, and pointed him out as the greatest scoundrel in the world. The judgment of the Court on these affidavits was that they must be struck from the files of the Court as calumnious and abusive in their nature, and not to be received at all. In the next place there was enough before the Court to show that the plaintiff was a resident here, though he might have no legal domicile. The Court must take the evidence as it stood, and must reject with costs the defendant's motion that plaintiff should be ordered to give security for costs. Next as to the main question. It was to be determined whether the action brought here was one that could be maintained in this Court. On reading over the papers it was evident that a very serious injury was complained of, and one which it was for the jury to appreciate, if the case ever proceeded to that point. It was, however, sufficient for the Court to take the statements as they appeared in the record. The defendant moved, in the second place, that this proceeding by

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capias be quashed upon several grounds, which resolved themselves into four main objections: 1st. That the *capias* was issued out upon a Sunday without adequate reason or just cause. 2nd. That there was no sufficient declaration in the affidavit that the defendant was personally indebted to the plaintiff in a sum exceeding £10. 3rd. That Mr. Honey, the deputy prothonotary, had no right to issue a *capias*. 4th. That the plaintiff in his affidavit did not assign sufficient reasons to justify the assertion that the defendant was about to leave the province. As to the first objection, that the writ was issued on a Sunday, and that the judge was not justified in granting the writ, the general rule was that it was only upon juridical days that process could issue at all. But there were exceptional cases. Where a party declared that he might sustain damage or lose his debt by waiting till the Monday, there was sufficient to justify the judge in allowing the writ to issue on Sunday. His honor would leave the second objection to be disposed of last. The third ground was that the deputy prothonotary had no right to act as prothonotary. There could be no doubt on this point; the deputy acted every day as prothonotary either in the absence of the chief officer, or for the despatch of business. This objection could not be maintained. The fourth ground was that there was no sufficient reason for supposing that the defendant was about to leave the province. But the plaintiff made oath that Mr. Giddings had told him so himself. If this were not true the defendant might petition to be liberated; if true, there was a good cause for the *capias*. There was only one question left—the principal one, namely, could a *capias* issue where the claim rested upon unliquidated damages? After a little examination the Court was satisfied that this right existed; for if it did not exist there would often be a denial of justice to the plaintiff under circumstances which would render such denial very sad. The plaintiff had sworn that the defendant was indebted to him in a sum exceeding £10, and he added that there was a sum of $400 which he had laid out and expended, and also a sum of $20,000 damages included in the $25,000. The plaintiff swears that in consequence of the orders or directions of the defendant he was carried away from this country, incarcerated and subjected to every indignity, and that he was obliged to lay out the sum of $400, in his own defence. Will any one say that under these circumstances this did not constitute a debt? A man had been taken away to a foreign country, and he had been obliged to lay out a large sum. Could this be set aside on the pretence that it was a debt contracted in a foreign country, and therefore it was not good for a *capias*? Why, it was part of the *res gestæ*; it was part of the *delictum*. It was impossible to divide the matter, and say that one part of the tort was committed in this country and another part in another country. There was then evidence that the debt existed. We come back to the main question, could a *capias* issue for damages? It had been said that where an action sounded in damages, the intervention of a jury was required to estimate the amount, and that there could be no debt in existence till it had been limited and restricted. Some had said that it must be a sum of money actually due, before it could be considered a debt at all. But in this country, where we followed the Roman and French law, all claims were considered debts whether they arose from a contract or a *tort*. It could not be said, therefore, that because

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there was no contract broken, their could be no debt. If a man knocked another down, maimed him or took away his life, the law made the contract, and the party having violated the law, became liable to damages. Did not this constitute a contract as strong as one passed between the parties? A number of authorities had been cited as to whether an action by *capias* would lie for damages of this description. In several of the states there were positive enactments, but in these very cases they took good care to make no distinction between cases of *tort* and cases of contract, and his honor considered that it would be monstrous to do so. It could only be done by the authority of the senate. Supposing a man inflicted bodily injury upon a person, this was ground for a *capias*; if he destroyed property, it makes no difference. And, going a step further, suppose life were taken away, what difference did it make? Was a man who had been ruined, his property destroyed and his person maimed, to be told on coming before the Court that his action could not be maintained, because their were no liquidated damages? This objection therefore could not be maintained. If the judge could see in the facts submitted to him something tangible that would give damages, it was merely a question as to the amount of bail. His honor was of opinion that if there were no other debt but the four hundred dollars, it would have been sufficient to maintain the *capias*, and how much more so when to this was added the claim for unliquidated damages? In an action for seduction in Upper Canada it was held that there was good ground. Under all the circumstances, his honor did not hesitate a moment to say, that an arrest might be made for unliquidated damages.

The motion to quash the *capias* must be dismissed with costs.

Motion dismissed.

B. Devlin, for plaintiff.

Perkins & Stephens, for defendant.

(W. E. B.)

MONTREAL, 31ST DECEMBER, 1863.

Coram SMITH, J.

2329.

Clark vs. *Ritchey*.

JURISDICTION—CAUSE OF ACTION.

Con. Stats. L. C. Cap. 82, Sect. 26, & Cap. 83, Sect. 63. A., resident at Toronto, and having no domicile, nor property, real or personal in Lower Canada, ordered goods by letter from B., a merchant in Montreal. A. also gave verbal orders for goods to B.'s travelling agent, at Toronto, which orders were transmitted by the agent to B. at Montreal. B. brought an action against A. in the Superior Court, District of Montreal, to recover the value of the said goods.

The defendant, A., fyled an *exception déclinatoire* to the action. Held, that the cause of action arose in Montreal and not at Toronto.

This was an action brought by the plantiff, a merchant of Montreal, against the defendant, a resident of Toronto in Upper Canada.

To this action the defendant filed an *exception déclinatoire* which contained the following allegations:

That the said defendant is not within the jurisdiction of this honorable

Court, and cannot by law be sued or impleaded before this Honorable Court inasmuch as he has no domicile or place of business in that part of the province of Canada heretofore Lower Canada, and also inasmuch as he had not at the date of the institution of this action, nor has he now any personal or real estate in the district of Montreal in Lower Canada.

That each and every of the causes of action alleged in the declaration of the plaintiff did not arise within this district but each and every of the said causes arose within the limits of that part of the province of Canada heretofore called the province of Upper Canada.

That the promissory notes declared upon by the plaintiff were made and signed by the defendant in Upper Canada aforesaid, and the goods, the price whereof is sought to be recovered by the plaintiff, were contracted for and brought by the defendent in Upper Canada aforsaid and the money alleged to be lent by the plaintiff to the defendant at his request was so lent at the request of the defendant made in Upper Canada aforesaid.

That at the date of the institution of this action and long before and after, the said defendant had not nor has he now any domicile within Lower Canada, aforesaid.

T[illegible] *[illegible]endant* as the said defendant expressly alleges, he had not at the ti[illegible] institution of this action and the service of the writ of summons in th[illegible] cause any personal or real property within Lower Canada * * * *

By reason of which premises the writ in this cause issued and the declaration thereunto attached are illegal, null and void, and cannot be by this Court maintained.

"Wherefore, &c."

To this exception the plaintiff filed a general answer.

It is established by the evidence adduced, the plaintiff himself being produced by the defendant as a witness, that the defendant was a resident of Toronto, Upper Canada; that of the sum of $3103.43 the amount claimed by plaintiff in this action from defendant, the sum of $218.37 was for goods and merchandise bought by defendant from plaintiff and ordered by defendant from plaintiff by letter written by him (defendant) from Toronto, and received by plaintiff at Montreal; that of the said sum of $3103.43, the sum of $2833.63 was for goods delivered to defendant by plaintiff on the order of the defendant to plaintiff's travelling agent at Toronto, and by said travelling agent transmitted to plaintiff at Montreal. These orders by defendant to plaintiff's travelling agent at Toronto were verbal orders given by the defendant and written down by the travelling agent on printed forms supplied to the agent for the purpose; the said forms being sent by the agent to Montreal when filled up.

The evidence and admissions of the parties also established the indebtedness of defendant to the plaintiff as set out by plaintiff's declaration and his accounts filed therewith.

The case was heard upon the merits of the *exception déclinatoire* and judgment rendered thereon by the Superior Court (SMITH, J.) on the 31st December, 1863.

SMITH, J.—This was an action brought by the plaintiff, a merchant in Montreal, against Ritchey, a person residing in Upper Canada. The defendant had been impleaded in this district, though he had no domicile here, nor any real or

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personal estate; and this departure from the usual course was based on the allegation that the cause of action arose in the district of Montreal. The defendant met this by a declinatory exception in which he stated that the cause of action did not arise in Montreal, but in Toronto; that the defendant never had a domicile here; nor did he possess any real or personal property in this district. The evidence abduced consisted of the statements of the plaintiff himself. He produced the bills of parcels, and went into all the details. One sum of twenty dollars was for a personal order given at Montreal. A second sum was for an order received from Toronto, but the goods were shipped at the railway station here, at the risk and peril of the defendant. The question was, did the cause of action, that is, the whole cause of action, arise here, or did part of it, namely, the order, arise in Toronto, and was the contract merely completed here by the delivery of the goods? If the latter were the case, the action must of course be dismissed with costs. The plaintiff said the orders were delivered by letter, transmitted from Toronto to Montreal, and executed here. The defendant said that the order was given at Toronto, and this part of the cause of action, the order, arose at Toronto and the other half, the delivery, at Montreal. The first point to be determined, therefore, was whether the order was given at Toronto or Montreal. The defendant relied upon two or three cases decided in the Court of Appeals, in which it was held that the whole cause of action must arise within the district of Montreal to enable the action to be brought here. The whole of these decisions rested upon one given in England. A person at Oxford gave an order upon a Manchester warehouse. The goods were placed upon the railway and transmitted to Oxford. The Manchester warehouseman sued in the Manchester County Court, and obtained judgment. An appeal was taken, and the judgment of the Manchester Court was reversed. In reversing the judgment, the judges in appeal, Chief Justice Maule and others, said that the Manchester County Court had no jurisdiction, because the order was given at Oxford, and the order was part of the cause of action. The Chief Justice said he was of opinion that the County Court was wrong; the cause of action meant the whole cause, and the whole cause could not have arisen at Manchester, it being proved that the order was given at Oxford. This brought us back to the question in the present case, did the whole cause of action arise at Montreal? If the order had been given at Toronto, his Honor would have no hesitation in maintaining the declinatory exception; but he was of opinion that the order had been given at Montreal. If the defendant had sent a letter to Montreal by a safe hand, would it be said for a moment that the order was given at Toronto? Supposing, to go a step farther, instead of sending an agent, he sent it through the post office, and the plaintiff, receiving it at Montreal, ships the goods at the railway station, does the fact that the man wrote his order in Toronto, but delivered it in Montreal, cause the order to be given at Toronto? The defendant in fact, could not have given the order at Toronto, because his order was a mere piece of waste paper till it had been executed here. The order was nothing at all till it had been accepted by the merchant here. His Honor was, therefore, of the opinion that the order, instead of being given at Toronto, was given here. *If the order had been obtained at Toronto by the plaintiff's agent, then part of*

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the *cause of action would have arisen at Toronto, and the Court would have had no jurisdiction.* The plaintiff would have been obliged, in accordance with the ordinary rule, to follow the domicile of his debtor, and implead him there. The declinatory exception must be dismissed.

The judgment was recorded as follows:

"Court * * * * * * considering that the cause of action arose within the city and district of Montreal and not at Toronto as pretended, doth dismiss the said *exception déclinatoire* with costs.

Exception dismissed.

A. & W. Robertson, for plaintiff.
Torrance & Morris, for defendant.
(W. E. B.)

AUTHORITIES OF DEFENDANT.

The rules as to jurisdiction are found at pp. 701 and 723, Cons. Stat. L. C.
That the cause of action means the whole cause.
Borthwick et al. vs. Watton et al., 29 Eng. Law and Eq. R. 269.
B, carrying on busines in Manchester, (Montreal,) by his traveller, sold goods to A, at Oxford, (Toronto,) which goods were to be forwarded in the usual way, viz., by the London and North Western Railway. The goods were accordingly packed, and sent by B to the railway station at Manchester (Montreal), addressed to A, at Oxford (Toronto).
Held:—That as the order for the goods was received at Oxford (Toronto), the whole cause of action did not arise in Manchester (Montreal), so as to give the County Court their jurisdiction to try it under the 9th and 10th Vict. C. 95, s. 60.
The above English case is cited as the rule to guide us in the following cases:
Rousseau vs. Hughes.
8 L. C. Repts. 187.
Senécal vs. Chenevert.
6 L. C. Jur. 46.
12 L. C. Repts. 145.
See also,
Warren vs. Kay.
6 L. C. Repts. 492.
Frothingham vs. B. & O. R. R.
3 L. C. Jur. 252.
That the burden of proof is upon the plaintiff.
Non utique existimatur confiteri de intentione adversarius quocum agitur, qui exceptione utitur.
L. 9 Marcel, lib. 3, Digest.
2 Bougeau des actions, 300, 436.
Bornier, p. 36., art. 3, tit 5, ord. 1667.

MONTREAL, MARCH 9TH, 1865.

Coram DUVAL, C. J., MEREDITH, J., MONDELET, J., and BADGLEY, A. J.

In Appeal from the Circuit Court, District of Montreal.

GEORGE STARKE ET AL.,
(*Defendants in Court below,*)
APPELLANTS;

AND

JAMES M. HENDERSON,
(*Plaintiff in Court below,*)
RESPONDENT.

ASSIGNEE—POWERS OF.

A commercial firm placed a quantity of tobacco in the hands of appellants to be held by them until the said firm should deliver to appellants a certain promissory note of another firm. The said first-mentioned firm becoming bankrupt assigned and transferred, with the consent of appellants, all their stock and claims (*créances*) to respondent as assignee of their estate, giving him full power to receive and sell and dispose of the said stock in such a manner as he should see fit for the benefit of their creditors. The respondent offered the said note to appellants, which they received and retained, but refused to deliver up the tobacco. Held, that the respondent, as such assignee, could, in his own name, revendicate the said tobacco in the possession of the appellant.

This action was brought by the respondent (plaintiff in the Court below) to recover possession of four boxes of tobacco, of the value of $133.90.

The declaration sets forth that, on the 27th of January, 1861, the firm of Stalker, O'Brien & Co. placed in the hands of appellants the four boxes of tobacco in question, to be held by them until Stalker, O'Brien & Co. should, in fulfilment of an undertaking then entered into, obtain and deliver to the appellants the promissory note of the firm of Newton & Jennings, for the sum of $100, dated 14th November, 1860, payable five months after date, and being in renewal of another note of Newton & Jennings, then held by the appellants, the appellants agreeing to deliver up the tobacco as soon as the said renewal note should be delivered to them.

That on the 12th of February, 1861, by deed before Doucet and colleague, notaries, Stalker, O'Brien & Co. dissolved co-partnership, and for the consideration and on the conditions in said deed mentioned, assigned, transferred, and made over to the respondent all their stock in trade, and all sums of money due to them, with full power to the respondent to demand, recover and receive the same, and thereby subrogated the respondent in all the rights and privileges of Stalker, O'Brien & Co., with full power to receive and sell and dispose of all their said stock in trade, in such manner as he should see fit.

That this transfer and assignment was made with the express consent, approval, ratification and acceptance of all the creditors of Stalker, O'Brien & Co., and especially of the appellants. And that said four boxes of tobacco, then in appellants' possession, formed part of the stock in trade assigned.

That immediately after the execution of said deed, and the ratification and acceptance thereof by appellants and other creditors of Stalker, O'Brien & Co., the respondent received delivery of the estate assigned, and took actual possession of all the stock in trade, except said four boxes of tobacco, and became invested

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with all the rights and privileges of the said firm, pertaining to the said estate and stock in trade, including said four boxes of tobacco.

That about the 14th March following, the respondent offered to appellants the said renewal note of Newton & Jennings, and demanded the tobacco. The appellants received and retained the note, but refused to deliver up the tobacco.

The declaration concludes that the appellants be ordered to deliver the tobacco to the respondent within a delay to be fixed by the Court; and, in default of so doing, that they be condemned to pay its value, with costs of suit.

The appellants pleaded five pleas:—

1.—A *défense au fonds en droit*, urging as reasons in support of it, that the respondent, as assignee to the estate, has no right of action. That the allegations of the declaration are insufficient to sustain his individual claim, or any right or claim in the quality of assignee. That the assignee has no right by law to revendicate goods forming part of the estate assigned to him. That the action should have been brought by Stalker, O'Brien & Co.

2.—That the tobacco does not belong to respondent, he never having received delivery nor had possession of it before the institution of this action, which is therefore unfounded.

3.—That on the 3rd of July, 1860, Stalker, O'Brien & Co. were indebted to the appellants in the sum of £69 0s. 4d. for goods, and they agreed to give to appellants' customers paper as collateral security for the above amount and for subsequent purchases. That on the 3rd day of August, 1860, Stalker, O'Brien & Co. gave appellants Newton & Jennings' promissory note at three months, for $100, and also Leblanc & Bourdon's note for $100 as security for the debt aforesaid. That these two notes were subsequently paid to the appellants, leaving a balance due to them of £19 13s. 5d.

That on the 26th January, 1861, Stalker, O'Brien & Co. delivered to appellants the said four boxes of tobacco as collateral security for the payment of said note of Newton & Jennings, not then due, and for the further claim of appellants against them, and that the tobacco was then valued at $66.95.

That on the 15th May, 1861, the appellants, viewing the insolvency of Stalker, O'Brien & Co., sold one box of the tobacco for the net sum of £3 17s. 8d., which reduced their claim to £15 15s. 9d., for payment of which they hold the tobacco as security, and offer to give up the tobacco on being paid this sum, and pray that it be adjudged that they have a right to hold the tobacco till the said sum be paid them, and that the plaintiff's action may be dismissed.

4.—That respondent has never had delivery or possession of the tobacco, has never rendered any account to the creditors of Stalker, O'Brien & Co., and that appellants have only three boxes of the tobacco now in their possession which are of the value of only $50.

5.—The general issue.

To these pleas general answers were filed, and the cause was inscribed for hearing in law, and for *enquête* and hearing on the merits at the same time.

The respondent filed a copy of the deed of transfer and assignment, at the foot of which appears a written approval and acceptance signed by the appellants and over twenty other creditors of Stalker, O'Brien & Co., and which is in the following terms:—

"We, the undersigned creditors of the bankrupt firm of Stalker, O'Brien & "Co., after having taken communication of the above deed of assignment, hereby "approve of, ratify, confirm and accept the same, consenting that the said "assignment be carried out according to its dispositions. The undersigned "further consent, agree and give full authority to the said James Henderson "to dispose of the stock in trade and book debts of the said firm, in the man-"ner he shall deem most advisable, in the interest of the creditors generally, "hereby ratifying any sale which he may affect thereof—in block at so much "in the pound—after publication upon tenders, or otherwise, promising to hold "such sale good, and binding ourselves not to trouble the said James Hender-"son; the proceeds to be distributed among the several creditors in proportion "to their several claims, *au marc la livre*."

The Court below (Monk, A. J., 4th March, 1863) rendered the following judgment:

"The Court having heard the parties by their Counsel, as well upon the *défense au fonds en droit*, pleaded by the said defendant to the action and *demande* of the said plaintiff as upon the merits of this cause, and also upon the motion of the said defendants, that the evidence and deposition of John S. Stalker, a witness produced and examined by the said plaintiff, be rejected and set aside; having examined the proceedings, proof of record, and deliberated, doth reject the said motion of the defendants. And considering that the *défense en droit*, pleaded by the said defendants to the present action is, under the circumstances of the case, as set forth in plaintiff's declaration, unfounded in law.

Considering that the said defendants have not proved by legal and sufficient testimony the material allegations of their pleas, secondly, thirdly, and fourthly pleaded, or established their sufficiency in law. And seeing particularly that it is not proved that the four boxes of tobacco sought to be recovered by the present action were placed in the possession and custody of the said defendants, and pledged to them for the causes, goods sold, debts and liabilities, and in the manner and form as alleged in the plea thirdly pleaded by defendants, doth dismiss the said *défense en droit*, and the pleas, secondly, thirdly and fourthly pleaded by the defendants, and proceeding to adjudge upon the merits of the plaintiff's action and *demande*;

Considering that the plaintiff hath proved by legal and sufficient evidence the material allegations of his declarations, and particularly, that the four boxes of tobacco, sought to be recovered by the present action, were and are included in the stock in trade of the late firm of "Stalker & O'Brien," mentioned in the pleadings in this cause, and were the property of the said firm of Stalker & O'Brien, on the twelfth day of February, one thousand eight hundred and sixty-one, and were transferred, assigned and made over to the plaintiff by the said firm of "Stalker & O'Brien," in and by the deed of assignment by the said firm made on the twelfth day of February, one thousand eight hundred and sixty-one. Considering that the said defendants became parties to the said deed of assignment, ratified, confirmed and signed the same, together with the other creditors of the said firm of "Stalker & O'Brien," and gave full authority to said plaintiff as the assignee of the said firm for the benefit of the creditors of "Stalker & O'Brien";

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Considering that the said defendants bound and obliged themselves not to obstruct, molest or trouble the said plaintiff in the performance of his duty as such assignee; and considering that by the said assignment, the said plaintiff had a right and became bound to take possession of all the stock in trade of the said firm of "Stalker & O'Brien," and among other goods, wares and merchandise, of the four boxes of tobacco, for the purpose aforesaid, and that all the parties became bound to facilitate the execution of the said deed of assignment;

Considering further, that the said defendants have wholly failed to prove that at the time of the institution of the present action, or at the time of the execution of the aforesaid deed of assignment, the said four boxes of tobacco belonged to them, or that they, the said defendants, had any right, title, or claim whatever to hold and retain the same, as security or pledge, for any debt, liability or obligation on the part of the said "Stalker & O'Brien," or on the part of any other person or persons, whomsoever, but, on the contrary, it doth appear from the evidence adduced that the retention, by the defendants, of the said four boxes of tobacco was and is wrongful, and wholly contrary to law, and in violation of the said deed of assignment; seeing, therefore, that under the circumstances of this case, according to law and the proof adduced therein, it is not competent for the said defendants to contest the right, title and authority of the said plaintiff to institute and maintain the present action, for the recovery, in due process of law, of the said four boxes of tobacco; seeing that it appears from the declaration of the said defendants in their pleas to this action, that they have sold and disposed of one of the said boxes of tobacco, and, namely, the box described in the writ of *Saisie Revendication* issued in this cause as "One box Bulmer tobacco, numbered 137," and this previous to the issuing of the said writ; and considering that the said plaintiff hath established by legal and sufficient evidence that the said three boxes of tobacco seized in this cause were, at the time of said seizure, of the value of ninety-eight dollars and thirty cents, and that the said box of tobacco, so sold by the said defendants, was at the same period of the value of thirty-five dollars and sixty cents. The Court doth declare the attachment *Saisie Revendication* made in this cause of said three boxes of tobacco, to wit: "two boxes Sunflower tobacco, numbered 151 and 155 respectively, and one box Ruckeyer tobacco, numbered 135," good and valid; and it is considered, ordered and adjudged that the said defendants do, within three days from this day, deliver up to the said plaintiff the said "two boxes Sunflower tobacco, numbered 151 and 155, respectively, and one box Ruckeyer tobacco, numbered 135," seized in this cause as aforesaid, and do pay and satisfy to the said plaintiff the sum of thirty-five dollars and sixty cents currency, as and for the value of the box of tobacco disposed of by the said defendant as aforesaid, and in default of the said defendants delivering up the said three boxes of tobacco to the said plaintiff, within the above delay, the said defendants are hereby jointly and severally adjudged and condemned to pay and satisfy to the said plaintiff the further sum of ninety-eight dollars and thirty cents, current money of this Province of Canada, as and for the value of the said three boxes of tobacco, with interest upon the said sum of thirty-five dollars and sixty cents, and in case of the non-delivery of the said three boxes of tobacco,

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upon the further sum of ninety-eight dollars and thirty cents, from the twenty-third day of September, one thousand eight hundred and sixty-one, day of the service of process in this cause, until actual payment and costs of suit, *distraits* in favor of Messrs. Abbott & Dorman, the attorneys of the said plaintiff."

This judgment was confirmed by the Court of Appeals, Mr. Justice Mondelet dissenting.

BADGLEY, J., said:—"The first difficulty arises at the threshold; it is the question of law, as to the respondent's right, in law, to institute an action *in rem* for the recovery from the appellants of the tobacco, part of the stock in trade of the late firm, and then in their possession.

With reference to this connection solely, and to the legal objection raised by the appellants against the respondent's right of action, it must be observed that the demurrer of course brings both parties into Court upon the deed and upon the contract therein set forth, to which, on the one hand, the respondent was a party, and to which, on the other, the appellants had unconditionally assented, whereby the latter had contracted and agreed that he should receive and dispose of the said entire stock in trade of the dissolved firm, and of which stock the tobacco formed a part as alleged.

The appellants could not legally object against their own contract; and if it were sufficiently set out in the declaration, they could not demur to the exercise of the respondent's demand thereby, for the recovery of the firm's stock, a right in him which the appellants themselves had fully recognized and assented to.

The demurrer, under these circumstances, was not justified, and was properly rejected by the Circuit Court.

The second and remaining point is upon the merits. *In limine* it must be stated, that as well in the declaration as in the plea, the tobacco is recognised as of the stock or property of the dissolved firm, but it is alleged by both parties to have been *held as security* by Starke & Co. The parties differ, however, upon this question of security.

The respondent asserts that the deposit was special and temporary only until the renewal note of Newton & Co. could be given to the appellants.

The appellants assert that the deposit was general to cover the balance of account due them by Stalker, O'Brien & Co.

The evidence upon this point is to be found in the testimony of the two partners, Stalker and Tibbets *alias* O'Brien, and of Baxter.

An objection was raised against the testimony of Stalker, on account of interest. The Statute, sub.-sec. 2, par. 14, cap. 82, C. S. L. C., has provided that any person challenged as a witness on the ground of interest may give evidence, but his evidence shall have its weight with the judge, according as he is deemed entitled to credibility. The action is in the respondent's name, and, whatever the result might be, Stalker could derive no benefit from it. Legally, his evidence could not be rejected. The only question is as to the credibility of his testimony."

J. A. Perkins, jun., for appellants.

Abbott & Dorman, for respondent.

Judgment confirmed.

(W. E. B.)

MONTREAL, JUNE 9TH, 1864.

Coram DUVAL, C. J., MEREDITH, J., MONDELET, A. J., and BADGLEY, A. J.

No.

ASAPH A. KNOWLTON *et al.*,

(*Defendants in Court below,*)

APPELLANTS;

AND

DAME MARGARET CLARKE *et vir.*,

(*Plaintiffs in Court below,*)

RESPONDENTS.

HELD:—That a sworn land surveyor appointed an *expert* by rule of Court, in a petitory action to establish certain land boundaries, must be sworn before acting as such, and, in default of his so being sworn, his report will be set aside even without any special motion on that ground. 2. A possessor in good faith is entitled to his ameliorations, and is not liable for the rents, issues and profits accrued previous to service of process.

This was an appeal from a judgment of the Superior Court at Montreal in a petitory action at the suit of the respondents, to recover from the appellants a portion of lot No. 10 in the eighth range of the township of Ely.

The appellants pleaded, that they were the proprietors of the lot of land adjoining said lot No. 10; that no division line existed between their property and that claimed by the respondents; that they (the appellants) had in no way encroached on the lot claimed by the respondents; that on the property occupied by respondents they and their *auteurs* had erected mills and other valuable improvements; and that if such mills and other improvements were really on the respondents lot (which they, the appellants, were not aware was the case, and denied), the appellants were entitled to their ameliorations and improvements, and to retain possession of the land till they were paid.

On the 27th March, 1862, the Superior Court (presided over by the HON. MR. JUSTICE SMITH) ordered an *expertise* by "a sworn surveyer," for the purpose of establishing the true line of division between the appellants' property and that claimed by the respondents, and Henry M. Perrault, a sworn land surveyor, was subsequently appointed by the Court to carry the interlocutory order into effect.

The *expert* never was sworn specially as such, and fyled his report on the 17th of June, 1862, which the respondents moved should be homologated, and which the appellants moved should be rejected, for various reasons set forth in the motion, in none of which, however, was any allusion made to the fact that the *expert* had not been sworn.

The final judgment was rendered by MR. JUSTICE SMITH, on the 31st of October, 1862, homologating the report of the *expert*, maintaining the respondents' action and declaring the appellants' claim for improvements compensated by the rents, issues and profits.

The Court of Appeal confirmed the judgment of the Court below, so far as it declared the respondents the proprietors of the land in dispute, but set aside the report of the *expert*, on the ground that he had not been sworn and reversed that portion of the judgment by which the improvements were declared compen-

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sated by the rents, issues and profits, on the ground that the appellants were in good faith and consequently entitled to their improvements, without being liable for any of the rents, issues and profits up to the bringing of the action.

MEREDITH, J.,—On the question of improvements and rents, issues and profits, referred to the following authorities:—

Guyot.—Rep. Vo. Améliorations—p. 346; Rec. de la Jur. (Lacombe)—Vo. Impenses—p. 342. 3 Troplong, priv. and Hyp. p. 513 No. 839; Demolombe, Distn. des Biens—p. 630 No. 680; 2 Marcadé p. 411 No. 3.

The following are the portions of the judgment of the Court of Appeal, on the points specially reported:

"The Court * * * * * * * * * *

And seeing that Mr. H. M. Perrault, the *expert* named in pursuance of the said judgment, does not appear to have been sworn, before he acted as such *expert*, the Court doth set aside his report made in this cause, without however setting aside the plan prepared by him, the correctness of which is established by the legal evidence of Record. And this Court doth also set aside and reverse the judgment of the Superior Court rendered in this cause on the thirty-first day of October, one thousand eight hundred and sixty-two, founded on the said Report of the said Perrault:

* * * * And seeing that the said appellants and their predecessors Louis Gravelin and William Gravelin, in good faith, erected the mill and buildings mentioned in the pleadings in this cause, and made other improvements upon that part of the said west half of the said lot number ten, which adjoins the said line A B, it is in consequence ordered, *avant faire droit* thereon, that by three *experts*, whereof one to be named by the appellants, one by the respondents, and a third by one of the judges of the said Superior Court, and in default of either of the parties naming an *expert* as hereby ordered, within twenty days from the service of the present judgment to be made at the instance of either of said parties, appellants or respondents, defendants and plaintiffs aforesaid, then by a judge of the said Superior Court, the amount of the said improvements, *impenses et améliorations*, made by the appellants, and their said predecessors Louis Gravelin and William Gravelin, on the said west half of the said lot number ten, previously to the institution of the present action, shall be ascertained, and also of the rents, issues and profits of the said part of the said west half of the said lot number ten, in the possession of the said appellants, from the date of the service of process in this cause, to wit, the twentieth day of August, one thousand eight hundred an fifty-six, until the time when the said *expertise* shall take place, and the said *experts* shall also ascertain whether the said mill and buildings, on the said west half of the said lot number ten, or any and which of them, have been built from timber cut off the said west half of the said lot number ten, and the value of the said timber, and it shall be the duty of the said *experts* to state, in detail, each item of the improvements estimated by them, and the extent to which each of the said improvements, at the time of the said *expertise*, increases in value the said west half of the said lot number ten, and

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also to state in their report the grounds upon which they based their estimate of the said rent, issues and profits, and further to state in their report, the several annual values of the mill seat and location upon which the said mill and buildings have so been constructed, from the said twentieth day of August, one thousand eight hundred and fifty-six, until the time of the said *expertise*; and further to make a valuation of the said part of the said west half of the said lot number ten, of which the defendants are in possession without title, apart from the increased value which the said mill and other improvements have given to the said property, and that, for the purposes aforesaid, the said *experts* shall take into consideration the evidence already adduced in this cause, and shall examine such other witnesses as either party may deem in his interest to produce before them, such witnesses having been previously sworn before the said *experts*, and the said *experts* shall, without delay, make a detailed and particular report in writing to the said Superior Court of their said operation, accompanied by the evidence in writing given by the said witnesses, in order that such proceedings be had in the said Superior Court on said report, as to law and justice may appertain."

Judgment of Superior Court re-formed.

A. & W. Robertson, for appellants.

Mackay & Austin, for respondents.

(S. B.)

MONTREAL, DECEMBER 9th, 1864.

In appeal from the Court of Quarter Sessions, District of Montreal.

Coram DUVAL, C. J., AYLWIN, J., MEREDITH, J., DRUMMOND, J., and MONDELET, J.

Regina vs. *Lebœuf.*

A, the proprietor of a quantity of broom corn, delivered it to B under the agreement that when B should have manufactured it into brooms, he should not sell them, but that A's clerk should sell them on A's account; that A should deduct his advances from the proceeds of the sale of the brooms, and B should have the balance. B supplied the smaller material requisite in working up the broom corn into brooms. B did not keep his agreement with A, but manufactured the brooms and converted them to his own use. Held, that A's delivery of the broom corn to B was a bailment to him, and that B's fraudulently converting it to his own use was larceny in the terms of Cons. Stat. of Canada, sec. 55, cap. 92.

This was a case reserved from the Court of Quarter Sessions.

The prisoner, Lebœuf, was indicted at the Court of General Sessions of the Peace for the District of Montreal for the crime of larceny under the provisions of sect. 55 of chap. 92 of the Cons. Stat. of Canada, which enacts that "if any "person, being a bailee of any property, fraudulently takes or converts the same "to his own use, or the use of any person other than the owner thereof, although "he shall not break bulk or otherwise determine the bailment, he shall be guilty "of larceny."

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The indictment was as follows, to wit:

"The Jurors for our Lady the Queen upon their oath present that Gilbert "Lebœuf, late of the city of Montreal, trader, on the 13th October, 1863, at the "city of Montreal aforesaid, in the District aforesaid, feloniously did steal "26,144 pounds in weight of broom corn, of the value of $1916.26 of the goods "and chattels of the Hon. Louis Renaud, against the form of the statute in such "case made and provided and against the peace of our Lady the Queen, her "crown and dignity."

It was proved at the trial before the Court of Quarter Sessions on the 3rd September, 1864, that the prisoner had applied to the Hon. Louis Renaud, the prosecutor, in the early part of October, 1863, to procure for him a large quantity of broom corn, representing himself as a manufacturer of corn brooms.

Mr. Renaud communicated with his agent at Chicago respecting the price of broom corn, and entered into an agreement with the prisoner that he would import the broom corn, upon the condition that the prisoner would manufacture it into brooms during the winter, and not sell any of them and that he, Mr. R., should send his clerk the following spring to sell the brooms on Mr. Renaud's account so that he, Mr. R., might repay himself advances, and the balance should be paid over to the prisoner. This the prisoner consented to, stating that he had all the other materials necessary for the manufacture of brooms, and he would supply the same.

Mr. Renaud accordingly imported from Chicago in his own name and at his own costs the quantity of broom corn mentioned in the indictment, and on its arrival here delivered it to the prisoner, after insuring it as his own property. The prisoner removed the broom corn to premises leased by him.

It was established in evidence, according to the reserved case transmitted by Mr. Justice Coursol to the Court of Appeals, that the prisoner subsequently and during several months fraudulently converted the whole of the broom corn to his own use, manufacturing the greater part of it into brooms and disposing of them below the wholesale market price; and that the prisoner never returned to Mr. Renaud any portion of the broom corn, or the same converted into brooms, in conformity with the aforesaid agreement.

At the trial before the Quarter Sessions the prisoner's counsel, Mr. Kerr, urged that there was no proof of a bailment and also the following question of law, (which is the only point reserved), that as the prisoner was not bound to return the broom corn in its original state, but in its altered condition, converted into brooms, the case was not one of bailment within the meaning of the act.

Mr. Justice Coursol was of opinion that the prisoner could be found guilty, if the jury were satisfied that the evidence established that there was a bailment of the broom corn made by Mr. Renaud to the prisoner, and that there had been also a fraudulent conversion of it by the prisoner.

The jury returned a verdict of guilty, the question of law above stated being reserved for the Court of Queen's Bench, and the prisoner being retained meanwhile in custody.

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The reserved case was argued before the Court of Queen's Bench, and on the 9th December, 1864, judgment was pronounced by that Court.

AYLWIN, J., *dissentiens*, said: The case stated was defective. The question of bailment was not the only question, nor the main question. It comprehended further the cardinal point whether there was any larceny at all; the charge was larceny of broom corn; the proof was the sale by the prisoner of corn brooms manufactured by himself. The fact stated in the case reserved, was "that the broom corn was manufactured by the prisoner, upon the condition that he should not sell any of the brooms, and that Mr. Renaud should send his clerk to the prisoner the following spring, to take the brooms and sell them on Mr. Renaud's account with the right to pay himself his advances, and pay over what might be left to the prisoner; this the prisoner agreed to, stating that he had all the other materials necessary for the manufacture of the corn brooms, and would supply the same; this fact was conclusive that there could be neither stealing, taking, nor carrying away of the broom corn, charged in the indictment The change in the article which occurred by the operation of the manufacturer had altered the article originally bailed. By *specification* under the law of Lower Canada, which was the Civil Law, the prisoner, by the fact of the manufacture, became the owner of the chattel originally bailed.

The question of bailment did not arise at all, as in the case reserved. His Honor was therefore clearly of opinion that there was no larceny at all, and that the conviction was wrong. He had therefore to dissent from the judgment of the Court.

DRUMMOND, J.—The question reserved was this, whether as the prisoner was bound to return the broom corn in an altered condition, the transaction could be considered as a bailment within the meaning of the statute. To determine this question it was necessary to ascertain the meaning of the term *bailment*, and it was to the English books that we must go for this purpose.

Bailment had been defined, to be the giving of any property to any person for any purpose whatever. His Honor after referring to the various kinds of bailment, said the present case might come under the class of *locatio operis faciendi*. He thought it was clear the evidence showed that this was a bailment, that the prisoner was a bailee, and that he had converted the property to his own use.

DUVAL, C. J.—The statute under which the prisoner was indicted was one which experience had loudly call for, and the Legislature had been compelled to interfere, to protect persons from the frauds of their clerks and agents.

He admitted that under the old law the indictment in the present case could not be sustained.

But under the new law the prisoner was rightly charged as a bailee, who had received a certain quantity of broom corn to manufacture into corn brooms, and had converted the property to his own use.

Judgment to be entered up according to verdict.

Edward Carter, Q. C., for Crown.
W. H. Kerr, for Lebœuf.

(F. W. T. & W. E. B.)

MONTREAL, MARCH 9TH, 1865.

In appeal from the Superior Court, District of Montreal.

Coram DUVAL, C. J., MEREDITH, J., MONDELET, A. J., and BADGLEY, A. J.

THE MAYOR, ALDERMEN, AND CITIZENS OF THE CITY OF MONTREAL,

(*Defendants in Court below,*)

APPELLANTS;

AND

JAMES MITCHELL *et al.*,

(*Plaintiffs in Court below,*)

RESPONDENTS.

1°.—The respondents procured from the appellants, the Corporation of the City of Montreal, permission to construct a private drain leading from their cellar into the Corporation drain in Common street. An upright shaft extending from the Corporation drain to the surface of the street became choked with mud from the street, and occasioned a reflux of water through the private drain into respondents' cellar. Held, that the appellants were liable to indemnify the respondents for damages occasioned by the reflux of water, such reflux being clearly attributable to the state of the shaft, and the appellants' negligence in allowing it to become choked.

2°.—Owing to the reflux of water the respondents were obliged to remove a quantity of sugar from their cellar and procure other storage for it. Held, that the expense of additional storage was an item of damage sufficiently proximate to the cause of damage to fall within the liability of the Corporation.

The declaration set forth that the respondents were lessees and occupants of a two storey stone store, in Water street, in Montreal.

That the street drains in Common or Water street, and the shaft running into the same, had been made by and were under the jurisdiction of the appellants, who were bound to keep them in order and repair,—that the respondents were taxed and paid assessments for that and other purposes—and that the appellants were bound to keep the drains and shaft free from obstructions, and to prevent water and other filth from flowing backward into the premises of the respondents. The storing of the sugar in the cellar was set up, and it was alleged that owing to the negligence of the appellants, on or about the first or second of October, one thousand eight hundred and fifty-five, water flowed into the cellar from the drain, and damaged the sugar, to the extent of £547 7s. 8d. currency—that a survey was held upon the sugar, and the same was sold for £258 5s. 2d., after deduction of the expenses £5 6s. 9d—the previous value of the sugar having been £805 12s. 11d.

The respondents also claimed a sum of £100 for expenditure made by them in storing their goods elsewhere, in consequence of having lost the use of the cellar.

The appellants by their plea denied the allegations of the respondents, or that they had caused the damage, and declared *that at the said time the drains belonging to the Corporation were in good order*, and that if the respondents suffered damage it was not the fault of the appellants, but their own fault, or that of the proprietors of the store, and owing to the bad construction and bad order of the private drains.

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The Superior Court (Mr. Assistant Justice Monk) rendered the following judgment:

"The Court having heard the parties upon the merits of this cause, examined the proceedings and proof of record, and having deliberated thereon; considering that it is established by the evidence adduced that the loss and damage sustained by the plaintiffs, and mentioned and complained of in the declaration and demand, in this cause made and fyled, resulted from the obstruction in the shafts and drain of the defendants in Common or Water street, of the City of Montreal, as alleged in the plaintiffs' declaration; considering that the said loss and damage so complained of was caused by the neglect and default of the said defendants, and not by reason of any default, neglect, or omission of the said plaintiffs; seeing that the plaintiffs have proved the material allegations of their said declaration, doth adjudge and condemn the said defendants to pay and satisfy to the said plaintiffs—1st, the sum of £547 7s. 8d., current money of the Province of Canada, for loss and damage to the sugar of plaintiffs, mentioned in their said declaration; and the sum of £68 15s. 2d., for storage and rent of other stores which the plaintiffs were obliged to pay in consequence of the flooding and inundation of their cellars, as stated in their declaration; the said two sums making together £616 2s. 10d. said currency, with interest upon the said sum of £616 2s. 10d. from this day until actual payment, and costs of suit distraits in favor of Messrs. Torrance & Morris, the attorneys of the plaintiffs."

There was an appeal from this judgment to the Court of Queen's Bench.

Stuart, for appellants, said:—It is established that the Corporation have a drain in Commissioners street intended to carry of the water accumulating in the street, after rain, into to the drain. The respondents thought proper for their own use and benefit to introduce a private drain leading from their warehouse, and laid below the level of the floor of their cellar; by doing so they must be presumed to have known that they were liable to the risks attached to the condition of the drain, or from any flooding which might occur in consequence of heavy rains.

In the present case it will appear that a very heavy fall of rain had occurred, and that the drain in the street was incapable of discharging the water in sufficient quantity to prevent the reflux and entry into the cellar of the respondents.

By an examination of the plan, it will be seen that the private box drain leading into the public drain was laid most improperly, and by its position led to obstructions, and contributed to the accident in question.

Mr. Drake, one of respondents' witnesses, when employed to repair and replace the private drain after the accident placed it in a different manner, and asserts that by the skillful mode thus adopted there is no danger of a recurrence of the flooding of the cellar, even though the shaft should hereafter be choked with mud. It is clear, therefore, that if the respondents' private drain had been laid in a proper manner, and a connection made in the way subsequently adopted by Mr. Drake, the accident could not have occurred, and no attempt would then have been made to render the Corporation responsible for the respondents' negligence and want of care in the construction of their own drain.

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The appellants' pretensions are :—

1.—That the Corporation are not liable to indemnify parties for any damage caused by the reflux of water in their drains entering into private drains.

2.—That the respondents are guilty of gross negligence and want of care in laying their private drain and connecting it with that of appellants, and consequently under no circumstances could be entitled to damages from them.

Torrance, for respondent, said :—At enquête it was clearly proved by the respondents that the damage arose from water which flowed into the cellar from the Corporation drains through the private drain, and that such flow took place owing to the appellants' shaft, which was erected over the said public drain, having become choked with mud, &c. The shaft drains a large surface of ground, including Youville street, "which was very muddy," (Cliff) and the shaft was not properly protected. Duffield says: "I have seen the mud from the street descending the upright shaft through the grating, which is a large outside grating. There was no grating underneath in that upright shaft to prevent mud and stones from the street from filling it up. To prevent the filling up the shaft in this way, there ought to have been a strainer underneath the grating to intercept the coarser particles." The shaft was very likely to get choked (Forsyth). And in fact the flooding was caused by the choking of the shaft, as has been established by the evidence of the respondents' witnesses. The amount of the loss, the value of the sugar before and after the flooding, and the amount paid for storage elsewhere in consequence of the loss of the use of cellar, was also clearly established. It was also proved that the cellar in question was a proper place of storing sugar, it being better kept there in certain seasons, and that it, as well as adjoining cellars, were so used.

The damage in question resulted from a reflux of water arising from the choking and improper construction of a shaft belonging to the appellants. They are liable for their negligence, and ought to reimburse the respondents in the loss they have sustained, and which is directly traceable to the tort and negligence of the appellants.

The legal responsibility of the Corporation for the injury sustained, is, the respondents submit, beyond question. In England, an action on the case would lie against a corporation for a neglect of a corporate duty, as for not repairing a creek which they were bound to do. Angell & Ames on Corporations, §382.

In our jurisdiction, in similar circumstances, the Corporation of Montreal has been condemned to pay such damages, and has admitted the liability by submitting to the condemnation: VIDE *Kingan* et al. vs. the *Mayor*, &c., *coram* MONDELET, J., 2 L. C. Jurist, 78, and *Walsh* vs. the *Mayor* et al. *coram* SMITH, J., 5 L. C. Jurist, p. 335, & Beliveau vs. Corporation, 6 L. C. Reports, 487.

In Upper Canada, in a somewhat similar action, the Corporation of Toronto was held liable for damages caused by water and filth flowing into a cellar, owing to the improper construction of the drain leading into the main sewer. Reeves vs. Corporation of the City of Toronto, U. C. Law Journal, vol. 8, p. 35.

BADGLEY, J., said: The respondents in 1855 were lessees of a store on Com-

mon or Water street of this city, in the cellar of which were stored twenty-eight hhds and twenty-eight barrels of sugar. On the 1st or 2nd of October of that year, the water flowing back from the store drain into the cellar greatly damaged the sugar and compelled the respondents to pay for the rent and storage of other premises for their merchandize.

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The damage suffered by the sugar was	£547 7s. 8d.
That for extra rent and storage	68 15s. 2d.
Amounting together to the full sum of	£616 2s. 10d.

For which the respondents obtained judgment from the Superior Court, and which is now under appeal.

The evidence adduced satisfactorily establishes these amounts, and the fact of the damage and the outlay for extra storage.

The declaration charges the occasion of the loss upon the negligence of the appellants, and the defectiveness of their shafts and drains; these charges are denied by the plea, which asserts the efficiency of shaft and drain, and imputes the loss to the negligence of the respondents, or their lessors of the store, and to the bad construction and bad order of the private drain; that is, the drain from the store.

It is proved that the overflow into the cellar proceeded from the deposit of mud and filth in the shaft which received the street water after a heavy shower of rain, and prevented the regular flow of the water to the river through the Harbour Commissioners drain, and backed it up until it flowed back into the cellar, through the store drain which had formed a junction with the harbour drain a few feet above the shaft above-mentioned. A branch drain in connection with the shaft below the level of the harbour drain casts the drain water into the river.

It appears that the store drain was made only after this shaft and branch drain had been made for some time by means of a square wooden box which entered the harbour drain and projected into it about eighteen inches.

It is manifest that the shaft being between the store drain and the river outlet of the harbour drain, whenever the shaft should become clogged or choked with mud and rubbish, the harbour drain water finding no outlet would flow backwards, and, if in a sufficient quantity, would necessarily force itself into the cellar.

It was a fault on the part of the appellants, whose special duty it necessarily is to have their shafts and drains in good effective order at all times, to have a shaft of the description in question, subject or likely to be choked at overflows of rain, from the water rushing to the shaft charged with quantities of mud and filth from the streets drained by it and choking the outlet of the shaft.

The evidence as to the faulty construction of the house drain is by Quinlan, the appellants' witness, who says that the drain *was not made in a proper manner at all*, and by Drake, the respondents' witness, who made a new connection for the wooden drain, by carrying it to a point beyond the shaft, and nearer the river, which he had no doubt would avoid any future flooding of the cellar; but it is clearly proved that when the outlet of the shaft is clear, there could not

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possibly be any backing of the water into the store. The making of the shaft was to carry off the drainage, and if it was so made [illegible] answer the purpose, but to cause damage, the Corporation must be liable because individuals cannot control their acts. The evidence of the faulty construction of the shaft is in the testimony of Forsyth, a civil engineer of ability, who expressed his disapprobation of the mode of its construction, and was of opinion that [illegible] get choked, and to endanger the whole drain for want of a [illegible] into which the mud might subside; it is singular, if not suspicious also, that neither the city surveyor Quinlan nor the assistant city surveyor McKenzie have a good word to say in favour of the shaft, and in fact the witnesses generally speak of its defectiveness. The private drain was constructed after the shaft had been made, but the Corporation was paid for the permission of placing it in their brick drain; it was not faulty in itself, because it drained when the shaft was not clogged, and it was this clogging alone which caused damage throughout. It has been observed that the evidence has established the injury to have been caused by the choking of the appellants' shaft; and it only remains to ascertain whether that cause of [illegible] too remote, or whether in fact the damage complained of has not [illegible], as required by the test of law, *naturally, legally and directly, from the fact of the choking of the faulty shaft*. The test for determining whether any particular damage is too remote or not is quite accurate in its application in this case, because the overflowing of the cellar was the natural and distinct consequence of the stoppage of the flowing of the water caused by the choking of the shaft. Yet, although the above test for determining whether any particular damage was too remote or not is quite accurate, it must also be applied very cautiously, for an action is maintainable where the damage does not at first sight appear to flow either naturally or directly from the alleged wrongful act; as is given in the case of Powell and Salisbury, 2 Young and Jarvis, 391; the action was held good against defendant for not repairing his fences, *per quoad*, the plaintiff's horses escaped into defendant's close, and were there killed by the falling of a haystack. The Court held that the damage in that case was not too remote; surely in this case, with the principle settled by that authority, there can be no doubt of the proximate cause of damage, and the old rule of law becomes strongly applicable, *sic utere tuo ut alienum non lædas*.

The judgment of the Superior Court should be maintained.

Judgment confirmed.

Henry Stuart, for appellants.

Torrance & Morris, for respondents.

(F. W. T.)

(W. E. B.)

COURT OF QUEEN'S BENCH.

MONTREAL, JUNE 1ST, 1865.

In Appeal from the Superior Court, District of Bedford.

Coram DUVAL, C. J., MEREDITH, J., DRUMMOND, J., MONDELET, J., and BADGLEY, J.

SAMUEL HERRIMAN ET UX.,

(Plaintiffs in Court below,)
APPELLANTS;

AND

SAMUEL RICHARD TAYLOR,

(Defendant in Court below,)
RESPONDENT.

A fraudulently obtained from B. his mother-in-law, for an insufficient consideration, an assignment of all her right and interest as heiress-at-law in the real and personal estate of her daughter who had died childless and intestate. The instrument of assignment was drawn up by a lawyer and the original passed into and remained in the possession of A.

After B discovered the fraud which had been practised upon her, she brought an action against A, concluding that the assignment be declared null, and that he be condemned to render her an account of all the real and personal estate of which her daughter died possessed, and also of the rents and revenues which had accrued to him from the said estate since her daughter's decease. B filed as an Exhibit a copy of the assignment paper, certified to be such, and to be exact, by the lawyer who drew the original. She also brought up the lawyer at enquête to prove that the said Exhibit was a true copy.

HELD, 1st.—That the said assignment, being obtained by fraud and false representations, would be annulled and set aside.

" 2nd.—That the English rules of evidence requiring "notice to produce" have not the force of law in Lower Canada, and that the following articulation of fact submitted to the defendant by plaintiff: "Is it not the fact that the original paper writing, sale and assignment, which "is set forth in the plaintiffs' declaration, is now, and has been since the execution thereof "in the defendant's possession; and that the paper writing filed by the plaintiffs as their "Exhibit No. 12 is a true and exact copy thereof," was a sufficient notice to defendant that plaintiffs would produce a copy of the said paper writing at enquête, and then prove it to be true, and also a sufficient notice to defendant to produce the original thereof if he thought fit.

SEMBLE.—That if the defendant A intended to rely upon the absence of the "notice to produce," he should have objected to the adduction of secondary evidence at enquête to prove the correctness of the pretended copy.

This appeal is from a judgment of the Superior Court (Mr. Justice McCord) in the district of Bedford rendered on the 19th of September, 1862.

The action was instituted to recover the succession of the deceased daughter of the female plaintiff, Lavina Fordyce.

The declaration relates the marriage of Lavina Fordyce to Hosea Briggs, on or about the 19th March, 1821.

Of this marriage there was a daughter named Drusilla, born 5th January, 1822, and married on the 5th March, 1850, to Jeremiah Shufelt, without contract, under *communauté régime*.

Hosea Briggs died 24th August, 1836, and on the 12th September, 1839, Lavina Fordyce married the plaintiff Herriman without contract, thereby creating a *communauté*.

On the 21st November, 1853, Shufelt made his will, constituting Drusilla Briggs his universal legatee, and died 3rd August, 1856, leaving in the community a farm, part of lot 23, range 6, Durham, of the value of $2000, and moveables value $1000, which Drusilla Briggs enjoyed up to the 10th April,

Herriman et ux and Taylor.

1860, when she married the defendant, their marriage being preceded by a contract, which provided—1st. For the non-liability of the parties for each other's debts. 2ndly. Power to defendant to collect the wife's (Drusilla Briggs) revenues and apply them. 3rdly. No dower. 4thly. No right was given to defendant to the real property of the wife. 5thly. Community was not excluded, and therefore existed, into which entered the $1000 of personal property of Drusilla Briggs, and $500 worth belonging to defendant, who, after the marriage, went to the above farm of Drusilla Briggs to live with her as her husband, and there possessed and enjoyed her property, drawing the rents and revenues up to her death. In the meantime there was acquired to the community property to the amount of $1000 currency. She died intestate on the 28th May, 1860, leaving no issue, being at the time owner of the above described farm and premises, and there being property of the community with the defendant to the value of $1500 currency, since which time the defendant has possessed, used, and enjoyed the whole thereof as his own, without causing any inventory or statement whatever to be made. That by the death of Drusilla Briggs, her mother, Lavina Fordyce, inherited said farm as well as her said daughter's share in the community with the defendant.

About the 25th and 29th days of June, 1860, defendant, with intent to defraud and cheat Lavina Fordyce out of said farm and share of said community, and to procure an assignment of said successive rights, went to Norfolk, in the State of New York, where plaintiffs lived, and there knowingly, falsely, and fraudulently represented to the plaintiffs that by his marriage contract with Drusilla Briggs he was entitled to one-half of said real property, as well as of the real and personal property acquired during the marriage, the other half being the share of said Lavina Fordyce; and further that the full value of the whole of said property was but $1000; that it was necessary he should have an assignment and transfer thereof executed to him at once, inasmuch as one Bell, the brother-in-law of said Lavina Fordyce, had commenced a suit against him to eject him from the farm; that said suit was to be tried immediately, and that, unless he had the assignment to produce at the trial, he would lose the suit and be ejected; by means of which false and fraudulent representations, which the plaintiffs at the time believed, they were by the defendant induced to sign an assignment *sous seing privé*, of date the 25th June, 1860, of all their interest in the real and personal estate left by said Drusilla Briggs, for the alleged consideration of $525, therein stated to be paid, which document was delivered to and remained with the defendant.

That for said $525 plaintiffs received two notes, dated at Norfolk, the 29th June, 1860, signed by the defendant and one Ruiter, payable to Lavina Herriman or bearer—one for $200, payable 25th August following—the other for $325, payable 1st February, 1862.

That no suit was at the time or at any time pending between Bell and the defendant, and the latter well knew the falsity of all his representations; plaintiffs were wholly ignorant of the facts, and of their being at the time deceived, but have since discovered the fraud and deception practised upon them.

That it was the duty of the defendant to have rendered the plaintiffs an

account of the community between him and Drusilla Briggs, and of the revenues of her estate, which he never did. That not only was the assignment void for fraud, on which ground plaintiffs had a right to have it declared null, and the defendant ousted from any pretended right thereunder, but the same was wholly null and void as containing no authorisation by the husband, plaintiff, in favour of his wife, as required by law, more especially for the alienation of real estate.

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That Lavina Fordyce, as heiress-at-law of Drusilla Briggs, was entitled to her succession, consisting of the real estate above mentioned and her community rights.

That on the 6th July, 1860, plaintiffs had made a notarial protest, demanding their rights of the defendant as above explained, and tendering back the notes; notwithstanding all which defendant refused to proceed with a *partage*, or restore to Lavina Fordyce her rights and property.

Plaintiffs concluded that the *sous seing privé* assignment of the 25th of June, so far as deemed necessary, might be rescinded and annulled and declared null and void, and defendant *déchu* from any pretensions thereunder; that it be declared that the tender of the notes was good and valid, and *acte* granted of its repetition in the suit; and further that it be declared that Lavina Fordyce, as the sole heiress-at-law of Drusilla Briggs, became at the death of the latter, and now is proprietress of the farm whereof the defendant be ordered to qu[illegible] restore and deliver up to her the possession, and to pay $500 rents, issues and profits, and be condemned to render to plaintiffs a just and true account of the prop[illegible] of the community between him and Drusilla Briggs, with an account of the re[illegible] issues and profits of the land with usual sequence in case of refusal.

The plaintiffs produced all the documentary evidence specially mentioned in their declaration, together with extracts of the marriages, births and deaths, so far as procurable, supplying the assignment procured by the defendant by a copy shewing it to be an extremely irregular document containing no authorisation whatever of the wife by her husband, and containing no specification of the real estate. Also documentary evidence to prove the acquisition of the real estate by Jeremiah Shufelt.

The defendant pleaded that at the time of his marriage he was po[illegible] of large property, both real and personal, but more especially personal pr[illegible] to an amount exceeding $500, and Drusilla Briggs owed large amounts especially in payment of the real estate to which no title had been secured, in payment whereof defendant's means were absorbed, causing a confusion of rights for which he had a claim for indemnity to secure compensation, for which he went to the plaintiffs, and bargained with them to be allowed $500 for the same; but after the agreement, plaintiffs, finding that the arrangement would involve a removal of the[illegible]idence from the State of New York to an encumbered property in Cana[illegible]luntarily offered to surrender all their rights in the succession for $500, which defendant agreed to, and the assignment referred to in plaintiffs' declaration was accordingly executed without fraud or misrepresentation on the part of the defendant; that said assignment was made in accordance with the laws [illegible] the State of New York, and as such is a valid conveyance, according to

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its purport exonerating the defendant from rendering any account of Drusilla Briggs' estate or of said community. That plaintiffs, well aware of the value of the [illegible] satisfied with the justice and fairness of their bargain—the pr[illegible] not instituted in their interest but through the malice of one [illegible] and one John Bell, the former of whom had made an express journey to plaintiffs' residence, to induce them to lend their names to it, and had become security for costs; and Bell had frequently declared that defendant should never possess the lands in peace, and that the suit had been instituted by Bell, Sargent, and one Brinkerhoff of Norfolk aforesaid, for the purpose of harassing the defendant.

There was besides a *défense en fait.*

The judgment of the Court below was as follows:—

The nineteenth day of September, 1862.

PRESENT:

The Honorable Mr. Justice McCord.

The Court, having heard the parties by their counsel on the merits of this cause, examined the pleadings, proceedings, and evidence of record, and on the whole maturely deliberated, considering that the deed of assignment sought to be set aside by the plaintiffs' action, and to be declared null by this Court, has not been produced nor the loss thereof shown, and that no notice was given to the defendant to produce the same, and considering that the secondary evidence adduced by the witness Brinkerhoff is insufficient and illegal, and that this Court is therefore without any deed of assignment upon which to adjudicate, doth in consequence hence dismiss the action of the said plaintiffs, saving to the said plaintiffs their future recourse in the premises.

Gross, for appellants, said:—

The relation of the parties to each other and right of inheritance of Lavina Fordyce as the mother of Drusilla Briggs have been established in the manner customary under the circumstances of the case.

The fraud and deception have been proved in a manner as specific as they were alleged in such wise as is submitted, as will leave no doubt on the subject in the minds of the Honorable Judges of this Court. The appellants believe none was entertained by the Honorable Judge of the Court below.

It would appear by the opinion of the Court below, that the failure of justice in this case resulted from the inobservance of the technical rule of giving the opposite party notice to produce a document in his possession before the reception of proof of its contents.

It is not certain that such a rule has ever been admitted to have the force of law in this country, but supposing the law and practise of the Courts in England to be adopted, it is not a case to which that law, much less our own law, would apply to exclude the major part, if it would any part of the plaintiffs' conclusions.

If the document in question were not relied upon by the defendant, it was perfectly immaterial whether or not it was in any way noticed by the plaintiffs either in allegation or in proof. If relied upon by the defendant, as it certainly was, as will be manifest from his affirmative plea, then it was not only admitted by

him, but was an essential part of his case, which he was bound to prove, or in default thereof to lose all benefit that might result from the execution of the document.

Further: In the plaintiffs' declaration it was *alleged* as an absolute *nullité*, therefore entirely useless, as a barrier to the action. The allegation even fell short of an admission that the defendant was possessed of an invalid title which he was bound to justify.

The document had never been placed of record, even in the registry office.

Admitting for argument's sake that the question of notice was involved and had to be tested by the English rule, the following reasons would exclude its application:—

1st. By the declaration, the defendant was charged with the possession of the document.

2nd. By his plea, and otherwise, defendant admitted its existence and raised no issue thereon save to justify its execution.

3rd. It never became matter of record, and defendant might have elected not to avail himself of it.

4th. No objection was taken to the evidence as to the document and its contents at the time it was tendered, and afterwards it was too late to make any objection available.

Doherty, for respondent, said:—

The appellants base their claim upon the allegations that the female appellant is the legitimate mother of the said Drusilla Briggs, by her former alleged husband, Hosea Briggs. That the said Jeremiah Shufelt was proprietor of the lands in question, and that he bequeathed them to said Drusilla, and that respondent fraudulently induced them to make the deed thereof in question, and that the consideration in said deed is much less than the value of said property, and that the same was obtained from them by respondent by fraud, and was and is fraudulently made. All this respondent has put in issue by his exception and defence, and submits that appellants have failed to prove any of the material allegations of their declaration and action.

Firstly: There is no legal proof of the marriage of Hosea Briggs and Lavina Fordyce. This position is manifest by the paper No. 48, of record, produced by appellants themselves, as a copy of the Statutes of the State of Vermont, relating to the powers and duties of justices of the peace in regard to the solemnization of marriages and the duty of Town clerks in recording such marriages, and more particularly by the 6th section thereof, which gives the form prescribed by said Statutes, and in which the record of a marriage "*shall be kept and recorded.*"

That the requirements of this law have not been complied with, appears by paper No. 4, produced by appellants, as the only proof of record of such marriage, and which, for aught that it shows, may refer to the marriage of any other persons calling themselves Hosea Briggs and Lavina Fordyce, there being no description of the persons as required by said section, nor by which they might be known or identified.

Secondly: There is no proof whatever that Drusilla Briggs spoken of was born of the said marriage or that she was the child of Lavina Fordyce, there

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being no reference to her in the evidence until she is about sixteen years of age, as stated by the witness Hunt, in paper No. 32, of the record, and no legal evidence of her birth or baptism; nor is there any evidence that the Hosea Briggs and Lavina Fordyce in question were the persons of these names, who, it is alleged by appellants, were married in the State of Vermont by a justice of the peace. But the most obvious reason why the judgment appealed from should be affirmed, is found in the fact, that the principal object of the action is to annul and have declared void an alleged deed of sale as against the respondent, and which the appellants allege they made and delivered to him; and yet said deed is not produced, nor the loss thereof shown, *nor was there any notice whatever given to the respondent to account for or produce the same* at any stage of the proceedings in this cause; nor at the Court any knowledge of the form, tenor, or existence of said deed except through the verbal evidence of the witness Brinkerhoff, who is evidently interested in the event of the suit. The Court below had no deed before it upon which to adjudicate, nor any legal evidence of the existence of such a deed, nor of notice to produce it, and had no alternative but to dismiss the action. The respondent would remark *d'abondant* that the farm in question was but partly paid for by Jeremiah Shufelt, and that he never had nor was entitled to have title to more than the half of it, if that, and hence the rights of Lavina Fordyce therein, as derived from him through his wife Drusilla Briggs, would be of far less value than that referred to in appellants' evidence, and there is no definite evidence of the value of movable property upon which to have a judgment, nor of fraud upon the part of respondent.

In support of the position here taken, and more particularly of the necessity of notice to produce the alleged deed in an action of this kind, the respondent would most respectfully refer to the following authorities:—

Taylor on Evidence, vol. i., § 110 and § 419, 420, 422, '3, '4, '5, '6, '7.
Greenleaf on Ev., vol. i., § 56.
Archbold's Nisi Prius, vol. i., p. 84.
Starkie on Ev., London Edit., 1842, vol. i., pp. 400, 403, 404.
Eng. Law & Eq. R., vol. xxix., p. 473, Boyle *vs.* Wiseman.

Respondent submits, that appellants do not come within any of the exceptional cases referred to, or provided for by law, and that no evidence could be legally adduced by them in regard to the alleged deed or assignment in question, without opening the door to such evidence by the *notice to produce* referred to; and that the Court below, having neither the deed in question before it, nor any legal evidence that it ever existed, had nothing whatever upon which to base a judgment in favor of appellants.

MEREDITH, J., said:—The plaintiffs by their declaration allege—that Drusilla Briggs, the daughter of the female plaintiff, and the wife of the defendant, died intestate on the 28th of May, 1860, leaving as her heiress-at-law her mother, the female plaintiff. That, at the time of her death, the said Drusilla Briggs was possessed of a valuable farm, which belonged to her, *en propre*, and also to her share in the property of the *communauté*, which had existed between her and her husband, the defendant.

That the defendant, within a month after the death of his wife, went to Nor-

folk, in the State of New York, where the plaintiffs lived, and there, by means of false and fraudulent statements, and for an utterly insufficient consideration, induced the female plaintiff, his mother-in-law, to assign to him all her interest in the property, real and personal, belonging to the succession of her late daughter, the wife of the defendant.

The declaration further alleged that the assignment was made by an instrument *sous seing privé*, bearing date the 25th day of June, 1860, which was *delivered to*, and *remained with the defendant*, and concluded by praying *inter alia*, that the said *sous seing privé* assignment, so far as deemed necessary, might be rescinded and annulled, and declared null and void—that the defendant should be condemned to deliver up to her (the female plaintiff) the real estate described in the declaration as having belonged *en propre* to the said Drusilla Briggs, and that the defendant should be condemned to render to the plaintiffs a just and true account of the property belonging to the said *communauté de biens*. The plaintiffs, in the course of their *enquête*, in my opinion, proved satisfactorily their own rights, and the fraud that had been practised on them by the defendant, and, as a part of their evidence, they produced a copy of the assignment which they impugned, and which they proved to be a correct copy, by Mr. Brinkerhoff, a barrister resident at Norfolk, by whom the assignment was drawn.

By the judgment of the Superior Court, the action of the plaintiffs was dismissed, and the reasons assigned in support of the judgment are as follows:

After giving to this case the best consideration in my power, I am unable to view it in the light in which it has been regarded by the learned judge of the Superior Court.

The plaintiffs in their declaration alleged, and have proved, that after the execution of the instrument impugned, it passed *into the possession* of the defendant. On the return of their action, they produced a copy of that instrument, certified as such by the attorney who drew it up. And in their articulation of facts, "headed statement of facts which plaintiffs will prove if denied by defendant," the defendant was asked:

"Is it not the fact that the original paper writing, sale and assignment, which is set forth in the plaintiffs' declaration, is now, and has been since the execution thereof, in the defendant's possession; and that the paper writing filed by the plaintiffs as their exhibit No. 12 is a true and exact copy thereof?" and to the question thus submitted the defendant answered:

"It is not the fact."

The defendant therefore was formally notified of the intention of the plaintiffs to prove that the paper produced by them was a copy of the original in his possession, and consequently there could not, possibly, be any misapprehension as to the evidence to be adduced by the plaintiffs. The English rules of evidence have not the force of law here with respect to cases such as the present; and it seems to me that a French lawyer, not acquainted with the English rules as to the giving notice to produce papers, would hardly think it possible to object to the course pursued in this case by the plaintiffs, which seems

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to me as fair, and as well calculated to promote justice, as any that could have been pursued.*

But even if the English rules of evidence were applicable in this case, it would have been the duty of the respondent to object to the secondary evidence offered by the appellants, and this was not done. And here it may be observed that, under our system of *enquête*, there is not the same reason for the service of a formal "notice to produce" that there is in England. Taylor says,† "The object of the "notice is not, as was formerly thought, to give the opposant party an opportu-"nity of providing the proper testimony to support or impeach the document, "but it is merely to enable him to produce it at the trial if he likes, and thus to "secure the best evidence of its contents."‡ In England a jury trial rarely lasts more than a day or two, and therefore if a notice to produce were not given, a party might be deprived of an opportunity of producing a paper in his possession. But, with us, independently of the time occupied by the plaintiff's *enquête*, a day, whenever necessary, is given to the defendant for the examination of his witnesses, and therefore the want of notice to produce, in a case in which the depositions are taken in writing, cannot have the effect of depriving a defendant of the opportunity of producing any papers in his possession. For instance, in the present case, the secondary evidence of the contents of the assignment was adduced by the plaintiffs on the 14th day of February, 1861; and nearly a year afterwards, namely on the 11th day of February, 1862, the defendant voluntarily declared that he had "no *enquête* to make." Now bearing in mind that the reason for requiring a notice to produce is merely to afford the opposite party "a *sufficient opportunity*" to produce the paper himself if he pleases to do so—it seems to me sufficiently plain that the defendant has no reason to complain of not having had an opportunity to produce the paper, had he wished to do so. Moreover, even if, as was formerly thought in England, the reason for requiring a notice to produce was to give the opposite party "an opportunity of providing the proper testimony to support or impeach the document," § it is ob[vious] that the defendant had such an opportunity in the course of the delay, of a [year] less three days, to which I have already averted. For these reasons I am of opinion that the judgment of the Superior Court in this cause, rejecting the secondary evidence of the contents of the assignment, for want of a notice to produce the original paper, must be reversed.

And as, I think, the plaintiffs have satisfactorily proved their case as alleged, I am of opinion that judgment should be rendered in their favour.

* For after giving to the defendant ample notice of the evidence they intended to adduce, the appellants, without attempting to keep back any evidence of a higher nature, produced the best evidence in their power. After they had done so, the defendant must have known whether the copy of the assignment produced was correct or not, if correct—then the defendant has no reason to complain; and, if it be incorrect, then he has only himself to blame, for not producing the original.

† Taylor on evidence, Vol. 1, p. 405, § 426.

‡ See Parliamentary Dwyer vs. Collins, 7. Welsby, Hurlstone & Gordan, p. 639, cited by Taylor note 2, page last mentioned.

§ Taylor on Evidence. Vol. 1, p. 405, No. 426. Note (1) and numerous cases there cited.

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BADGLEY, J., said:—Hosea Briggs and the said Lavina Fordyce were married in the State of Vermont, in 1821, before Hibbard, a justice of the peace of that State, who is certified to have been in that office, by certificate under the State seal. They had issue one daughter, Drusilla, born in 1822; the father, Hosea, died in August, 1836. His widow, Lavina, afterwards in 1839, married the said Samuel Herriman, and they are the appellants, plaintiffs in the suit. The daughter, Drusilla Briggs, in 1850, married at Dunham, in this Province, Jeremiah Shufelt, of that place, who died there in 1856, appointing by his will, executed in 1853, his widow, the said Drusilla, his universal residuary legatee of his estate, consisting of real property of the value of from $1900 to $2000, and personal property, cattle, farm stock, etc., of about $700 in value, which came into her possession. On the 10th of April, 1860, she married the respondent, and died on the 28th May following. This last marriage was preceded by a marriage contract, executed before notaries on the day preceding the marriage, whereby she reserved her real property to herself, but authorised the respondent to collect and apply her revenues, and in effect, established between them a community as to the personal property, which consisted of her personalty as above, and as alleged of record of his personal property valued at $500. The respondent had previously resided at Shefford, but upon his marriage settled himself upon his wife's property at Dunham. His wife died childless from either marriage, and intestate, leaving her mother, the female plaintiff, her sole heir. No inventory of her estate was made by the respondent, who remained in possession of the whole. The action was substantially and mainly *en petition d'hérédite*, instituted for the recovery from the respondent, defendant below, of his late wife's estate, also for an account of the community between them, and in the usual manner of such actions, praying that the female plaintiff might be adjudged to be the heiress and representative of the deceased Drusilla, and proprietrix of her real estate; that respondent be held to deliver up to her possession of the same, and to render an account of the issues and profits thereof, &c., &c. As an incident to the action, circumstances were detailed at length in the declaration, charging the defendant, upon which special conclusions were taken, and which created the chief and really only contention between the parties. The incident is explained and proved of record, and the circumstances in relation to it are as follows: It appears that a few years after the marriage of the female plaintiff, with Herriman in 1839, they removed from Dunham, their then residence, to Norfolk, in the State of New York, leaving Drusilla at Dunham, where she was employed as a school teacher. All intercourse between the parent and child ceased after this, and the plaintiffs were in entire ignorance not only of her marriage with the respondent, but of her death, until informed of both by himself. He appeared to have taken prompt measures to secure to himself his wife's property, and having discovered at last the plaintiffs' residence, he in person communicated to them at Norfolk the death of Drusilla, his marriage with her, and the fact of the existence of the marriage contract between them, but stating his rights thereunder upon the estate of his late wife, and the value of it, in such manner as to lead them to consent to the execution of an agreement, whereby they were to assign and convey to him all the rights and interest of the

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female plaintiff in her late daughter's estate; the deed was executed therefor on the 25th June, 1860, for the consideration therein stated of $525, payable by his two promissory notes, the one for $200, on the 25th of August following, and the other for $325 on the 1st of February, 1862, without interest, or any mortgage security for their payment.

It is this agreement which forms the incident and contention above referred to, and which the plaintiffs conclude may be adjudged to be resiliated and rescinded, as obtained by him by his fraud, and fraudulent representations to them of the nature and extent of Drusilla's property, and of his larger rights and claims by law upon it, in virtue of the marriage contract, all which are detailed and set out in the declaration.

The defendant has pleaded by peremptory exception, to the foregoing special matter, that the agreement in question was honestly made by him without fraud or fraudulent intentions, and has also pleaded the general issue and denegation to the action generally.

With respect to this contention with reference to the agreement, it is only necessary to observe that the fraud practised by the respondent, and his fraudulent representations, have been fully established; it is also proved that he received possession of the original agreement executed between them, and that the copy thereof produced by the plaintiffs was fully proved by Mr. Brinkerhoff, the counsellor at law, who drew up the agreement. The inheritable quality of the female plaintiff as the sole heiress of her daughter, and the extent and value of the estate of the latter, have also been established, and have indeed not been disputed, leaving as already observed the real contention only upon the agreement; upon this point the declaration has set out all the particulars surrounding the transaction, which the plaintiffs conclude formed a gross fraud upon them.

The defendant, respondent, by his pleading admits the particulars, but denies that they constitute fraud. What is the case then between them?

The female plaintiff says, I am the mother and sole heiress of my child, who is deceased, possessed of the real and personal property described and mentioned, which I demand in my quality of her heiress, which you have acknowledged, and thereby admit my title to her estate. I have proved my title in this respect, but having been cheated by you into the execution of the agreement, whereby I was fraudulently induced to transfer to you my interests in her estate, I demand that the agreement be set aside, and held for naught, and the possession of her property given up to me. The defendant answers, yes, I have no title under my marriage contract to my late wife's property, but you transferred it to me for a sufficient consideration, by the deed of agreement which was honestly executed by me without fraud, and I hold by this title, which cannot be disturbed, and under which I hold as proprietor. It is plain, therefore, that the only question in dispute between the parties is the fact of fraud or no fraud in the getting up of the agreement; the agreement itself and its terms, as set out in the declaration, and as proved by the draft copy produced by the plaintiffs, is not questioned, and the other facts of the cause having been established, the issue is narrowed to the small compass of the fact of fraud or otherwise; as already observed, the fraud has been fully proved, and the requirements of law are plain

and indisputable, that *actes* when *entachés de fraude*, such as this, cannot be allowed to exist longer.

But it is objected that the general denegation has put in issue every fact and allegation of the declaration, notwithstanding the peremptory exception, and that the produced copy of the agreement was not the legal equivalent of the original deed which not being produced, and not notified to be produced, could not be acted upon, or resiliated by the Court. Upon this point there can be no doubt, and I quite concur in that respect with Judge Meredith, who clearly established that the copy of the agreement produced by the appellants was good evidence, inasmuch as the respondent did not judge proper to file of record the original agreement which was in his own possession, and did not adduce any evidence to rebut that brought forward by the appellants.

Mrs. Herriman has established her heirship to her deceased daughter, and under the common law brochure *le mort saisit le vif*, the property of her daughter, from the moment of her decease, was the property of her mother, and no better title to it having been shown by the respondent, the female plaintiff's legal title stands unimpeached, and, as a wrongful holder of the property, the respondent must give up what he has acquired, and what he holds so fraudulently.

The agreement between the parties must be declared to be fraudulent, and in consequence adjudged to be resiliated and annulled, and the respondent ordered to submit to the conclusions of the plaintiff's demand. Under these circumstances the judgment of the Court below must be set aside with costs.

The Court, * * * * * considering that a community of property, *communauté de biens*, existed between the said late Drusilla Briggs, in the pleadings in this cause mentioned, widow of the late Jeremiah Shufelt, and the said Samuel Richard Taylor, the said respondent, in virtue of their contract of marriage, by them executed at the Township of Stanbridge in Lower Canada, on the 9th of April, 1860, before Dickenson and his colleague, notaries, and in virtue of their subsequent marriage on the following day, to wit, the 10th of the said month of April; considering that at the time of her said marriage, the said late Drusilla Briggs was possessed as proprietor of real and personal estate, the latter of great value, and the former consisting of a farm in the Township of Dunham in Lower Canada aforesaid, forming the centre portion of lot number twenty-three in the sixth range of the said Township of Dunham, bounded, the said piece or parcel of land to the north, by land occupied by Edward Ellison, to the south by the land of W. S. Baker, to the east by the land of Jacob Shufelt, and to the west by the land of Richard Ellison, and containing one hundred acres more or less, with a dwelling house, barn, and other farm buildings thereon erected; considering that by the death of the said late Drusilla Briggs, intestate and without issue, at the said Township of Dunham, on the 28th of May, in the year last aforesaid, the said Lavina Fordyce, widow by her first marriage of Hosea Briggs, her mother, the female appellant, became and was the legal heiress of her said daughter the said Drusilla Briggs, and became and was vested by law from the time of the decease of the said Drusilla Briggs, in her real and personal property by her then left, to wit, the said real property hereinbefore described, and the right, title, interest, and share of her,

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the said Drusilla Briggs, in the said community of property theretofore existing between her and the said respondent, of which said real and personal property and estate the said respondent hath, since the decease of the said Drusilla, continued to be and remain in the possession and enjoyment of the same; considering that, on the 25th of June, 1860, at Norfolk, in the State of New York, the said Lavina Fordyce and the said Samuel Herriman, then and still her husband, the said appellants did execute an agreement *sous seing privé* for the assigning and conveying to the respondent of the said real and personal estate and property left as aforesaid by the said late Drusilla Briggs, the original of which said agreement was taken into possession of and held by the said respondent, and was so by him possessed and held at the institution of this suit, and during the pendency of this action, a copy of which said agreement was produced, and fyled in evidence in this cause by the said appellants, due notice whereof was given to the said respondent of the production of the said copy, if he thought fit and the said respondent did not think proper to produce the said original agreement, but closed his case without making any enquête to rebut the said evidence so produced by the said appellants; considering that it has been established in evidence that the said appellants were induced to execute the said agreement by and through the fraud practised upon them by the respondent, and by his false representations to them made; considering that the said appellants have brought into Court in this cause, to be returned to the said respondent, the said two promissory notes by him given to them as the consideration of the said agreement, and which said notes the said respondent is hereby authorised to take and receive from the record in this cause, upon its return to the Inferior Court, in which the said action was adjudicated; considering that the said agreement *sous seing privé* so made as aforesaid was false and fraudulent, and did not in law assign or convey to the said respondent the said real property above mentioned, or any right, title, interest or share of the said Drusilla Briggs in the said community of property, and that the said agreement should be annulled and rescinded and the said assignment and conveyance therein contained be set aside; considering that there is error in the judgment of the Superior Court rendered at Nelsonville on the 19th of September, 1862; and proceeding to render the judgment that should have been rendered in the said cause,—this Court doth rescind and annul the said agreement *sous seing privé* executed as aforesaid at Norfolk on the 25th of June, 1860, and doth set aside, revoke and annul the assignment and conveyance therein contained, and doth declare the same to be null and void, and of no effect; and the said respondent *déchu* of all right or title, by or through the said agreement to the property and estate real and personal of the said late Drusilla Briggs, and this said Court doth declare the said Lavina Fordyce, the female appellant, to be the heiress-at-law of the said Drusilla Briggs, and vested at and from her decease as proprietor in and of the said real property above described, and of her said right, title, interest and share of the said community of property such as the same existed in her at her said decease; and the said respondent is therefore ordered to quit and abandon the said real property, and to deliver up and restore the possession of the same to the said Lavina Fordyce with all the deeds and documents relating thereto and the appurtenances thereto belonging within the period of fifteen days

from the service upon him, the said respondent, of a copy of this judgment, failing which, said respondent shall pay to the said appellants the sum of three hundred dollars as damages for such detention, and, moreover, the said appellants shall be put into possession of the said real property in the manner provided by law; and the Court doth order that the said respondent shall, within the said delay, make and render to the said appellants a just and true account of the rents, issues and profits by him received and taken of the said real property of the said Drusilla Briggs since her decease, and also make and render to them a just and true account according to law of all the moveable property pertaining to the said community as property which existed as aforesaid between him and the said Drusilla Briggs, and also of the fruits, profits, and revenues thereof accrued and to accrue from her decease, and on failure to render such account within the time aforesaid, the said respondent shall be and is hereby therefore adjudged and condemned to pay to the appellants the sum of one thousand dollars as and for the *reliquat* of the said account, the whole with costs, etc.

A. Cross, for appellants.

M. Doherty, for respondent.

(W. E. B.)

MONTREAL, 9TH MARCH, 1864.

In Appeal from the Superior Court, District of St. Francis.

Coram DUVAL, C. J., MEREDITH, J., MONDELET, J., and BADGLEY, J.

No. 88.

JAMES. A. SEWELL,

(*Petitioner in Court below,*)

APPELLANT;

AND

AARON B. VANNEVAR *et al.*

(*Plaintiffs in Court below,*)

RESPONDENTS.

HELD:—That a defendant who has been arrested by virtue of a writ of *capias ad respondendum*, and who has given bail to the sheriff for his appearance at the return of the said writ, may put in special bail or security at any time, and, even after judgment rendered in the original suit, upon special application therefor, and sufficient cause shewn for extending the time of putting in such bail.

2nd. That in default of the defendant putting in such special bail, his sureties, who have given bail to the sheriff for his appearance, may do so at any time, upon application for that purpose, and sufficient cause shown.

This appeal was from a Judgment rendered in a cause instituted in the Superior Court, in the district of Saint Francis, wherein the respondents were plaintiffs, and one Justin M. De Courtenay, defendant, refusing the application of the appellant, one of the defendants' bail to the sheriff, praying leave to put in special bail. It is recorded in these terms:—"The prayer of Petitioners to put in special bail is 'rejected with costs.'"

The action in which this petition of the appellant was denied, commenced by a writ of *capias ad respondendum* against the body of the said De Courtenay. He had, sometime previous to the issuing of the writ, been a resident in the said district of St. Francis, but had removed therefrom; and at the period of the suing out of the process against him, was domiciled at the parish of St. Foy, in the district of Quebec.

The writ issued out of the Court at Sherbrooke, returnable there, on the first

day of October, 1861; it was addressed to the sheriff of the district of Quebec, who arrested the defendant at his residence in the said parish of St. Foy.

Upon the earnest solicitation of the defendant, and to prevent his imprisonment, the appellant consented to become bail to the sheriff, and thereupon entered into the usual bond. On the 9th of the month of October, De Courtenay applied to the Court at Sherbrooke for permission to put in special bail, and prayed leave to do so at Quebec, setting forth in his petition for that purpose that under the writ of *capias* he had been arrested in the district of Quebec, and had there given bail to the sheriff of that district; that the condition of the bond by him and his bail entered into, was, that on or before the return day of the said writ, or within eight days thereafter, he should give security as by law provided, or put in special bail to the action; that in discharge of his said bail in the sheriff, he was desirous of either giving the said security, or of putting in special bail, but that he was unable to furnish such security or special bail to the district of St. Francis, but was prepared to give it before the Court in the district of Quebec, where he was then residing, and he prayed that he might be permitted to put in such security or special bail before one of the Judges of the Court, or the Prothonotary, at Quebec, on such day as the said Court at Sherbrooke might be pleased to appoint.

The truth of the facts set forth in this petition was established by the defendant's affidavit. The presentation of the petition to the Court at Sherbrooke in the district of St. Francis, took place within the eight days next after the return day of the said writ of *capias ad respondendum*.

The judgment of the Court there, upon the application to enter into a security or bail bond at Quebec, is in these words: "Parties are heard on petition; petition is 'rejected with costs.'"

The respondents prosecuted their action against the defendant, and, on the 17th June, 1862, obtained judgment for the sum of $1,307. 62 cents, with interest from the 4th September, 1861, and costs.

The appellant, subsequently learning his position, and the liability he had incurred towards the respondents, was advised to present to the Court sitting at Sherbrooke, a memorial, asking permission to put in special bail in discharge of his previous bond to the sheriff. This he did on the 13th March, 1863, and in it he represented that he had always proposed such bail should be given, and had, in the month of October, 1861, within the time pointed out by law, caused the defendant to petition the Judge at Sherbrooke for leave so to do, and from that period had been under the impression that special bail had in fact been received, and therefore he had given the matter no further thought. These averments were supported by his own affidavit, as well as by that of the defendant; notwithstanding this, however, his prayer was refused by the Court below, the judgment, thereon being, as before stated, that his petition was rejected with costs.

It may be remarked that neither the judgment disallowing the memorial of the defendant for leave to give security or bail in the district of Quebec, nor that rejecting the petition of the appellant for permission to enter special bail in Sherbrooke, discloses any reasons; and therefore the appellant is uncertain as to

the motives upon which those determinations so adverse to his interest were founded; he finds, however, in reference to the judgment appealed from, which is reported in the Lower Canada Jurist, vol. 7, page 120, that, from the remarks therein stated to have been made by the learned judge, on delivering his opinion, the petition appears to have been rejected because the Court below considered it had been presented after the period fixed by the statute, and that there was no room left for a consideration of the statute, but that the Court was bound by its letter.

Andrews, for appellant, said:—The appellant respectfully submits to this Honorable Court that he is aggrieved by these decisions of the Court below, which fasten upon him a liability towards the respondents, to so large an amount as a sum exceeding $1300. He believes the policy of the law at this period, whatever it may have been in former years, is entirely adverse to such an interpretation of the statute, and at variance with its spirit; he sees that the proceedings against a debtor, formerly so rigorous in England, from which country the process of *capias ad respondendum* was introduced into Canada, as to permit the arrest of the person in almost every case, were, at the earliest period of Canadian legislation, after the cession of the colony to the British Crown, so far modified, that the arrest before judgment was not permitted, except upon an affidavit that the defendant was on the point of leaving the Province, whereby the plaintiff might be deprived of his remedy against him. (17 Geo. 3, chap. 2, and 25 Geo. 3, chap. 2.)

Indeed the legislation upon the subject has been in England, as well as in this country, for a series of years past, constantly and steadily leading to the protection of the person of the debtor from imprisonment, while, at the same time, it aims to make his property available to his creditors:—we have seen additional facilities from time to time afforded for the taking of the absconding debtor, but such arrest is not sanctioned unless there be a fraudulent intention in leaving the Province; and whereas, formerly, the imprisonment of the body in execution for debt was permitted in all cases where the *capias ad respondendum* had issued, as well as in satisfaction of all judgments given in commercial matters, now, in Canada at least, the execution against the body, or *capias ad satisfaciendum* is abolished. We now find that by means of the security bond which the law allows the defendant to give, he cannot be constrained even to remain in the Province, if he has committed no fraud as regards his estate, but has fairly given it up for the benefit of his creditors. Thus the entire aim of the law at the present day is, that property shall be liable for debts, but that the person shall be free, so long as the debtor is not guilty of fraud in respect of his estate; consequently the arrest of the body is permitted under the writ of *capias ad respondendum* entirely with this view; and the bond required to be given to the sheriff is also to the same end, that the estate of the debtor shall be delivered honestly to the creditor; and nothing else is demanded of the debtor or his bail.

The early *ordonnances* of Canada (17 Geo. 3, ch. 2, and 25 Geo. 3, ch. 2,) regulating the process of attachment against the body, directed that the sheriff should hold the defendant to bail, or commit him to prison until special bail should

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be given, or until two days after execution might be obtained by the plaintiff. The condition of the special bail then was, that the party arrested would surrender himself in execution, his body being, as before remarked, then liable to imprisonment in execution in all cases, where the writ of *capias ad respondendum* had issued, as well as in satisfaction of judgments in commercial matters, but at a later period it was enacted (5 Geo. 4, ch. 2), that the recognizance of special bail should be, that the defendant should not leave the Province without paying the debt: at first the debtor had to pay, or remain in gaol in execution; afterwards, instead of being confined in prison, he was only held to give bail to remain in the Province; and now he is permitted to enter into a security bond which permits him to go where he will, so long as he conducts himself honestly.

The same statute which provided that the recognizance of special bail should be, that the defendant should not leave the Province without paying his debts, and which corrected the evil of imprisonment in default of payment, expressly provided that such bail might be put in at any time, either before or after judgment, thus distinctly shewing that, at that period, the law intended merely that the creditor should have a right to the presence of his debtor in the Province, and nothing more, and that the bail should at no time be held to secure him any thing but this.

The 12 Vic. ch. 42, in its preamble, declares that imprisonment for debt, were fraud is not imputable to the debtor, is not only demoralizing in its tendency, but is detrimental to the true interest of the creditor. And it is this act which first permitted the giving of the security bond, whereby the debtor is at liberty to range the world, if he faithfully put his creditors in possession of his estate. This latter statute is re-enacted in the Consolidated Statutes of Lower Canada, ch. 87, sec. 3, and contains the following clause, exception and proviso, which have given rise (as appears, as before stated on the report of the case now under consideration), to the refusal of the prayer of the appellant's petition in the court below. The act in its 12th section declares that nothing therein shall prevent any person arrested under any writ of *capias ad respondendum* from putting in special bail to the action, as permitted by the law of Lower Canada then in force. *Excepting* only that such special bail shall not be received unless put in on the return day, or at any time before the return day, or within the eight days next after the return day, *provided always* that it shall be in the power of the court, upon special application, and sufficient cause shown, to extend the time for putting in such special bail.

Now the Court below appears to have considered itself precluded by the *exception* in this statute, and therefore rejected the appellant's application, because the period of eight days next after the return day of the action had elapsed, before the permission to give special bail was sought; the Court conceiving itself tied and bound by its literal construction of the enactment of the exception, and that no relief could be granted under the provision of the act immediately following it.

The appellant trusts this honorable Court will view the matter in a different

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light, and afford him that relief which was denied him by the learned judge in the Court below.

He confidently expects this, not only from the equity of his prayer, but because he conceives a construction of the statute according to its spirit is favourable to his pretensions; and because the question now submitted has several times come before the Courts in the districts of Quebec and Montreal, and so far as the appellant is informed, has always been so decided, as to give relief to parties similarly circumstanced. The judges before whom the point has been argued, have held that the delay of eight days is not so fatal to the bail as the Court below seems to have supposed it. In the case of Miles and Aspinall, decided by Mr. Justice Monk, presiding in the Superior Court, at Montreal, since the ruling of the judge in the court below, special bail was permitted to be given after the expiration of the period mentioned in the statute: this case is reported in the Lower Canada Jurist, vol. 7, page 124. A similar application was, made some few years since to the late Mr. Justice Chabot, sitting in a cause which is also reported in the 8th vol. of the Lower Canada Reports, page 138, of Begin et al. vs. Bell et al.; and that learned judge, although he refused the application, did so solely for the reason that no special grounds were set forth in support of it, and not because it was too late to grant it; that judge stating the terms of the statute required such a request should be special, and only granted upon sufficient cause shown. In another cause, the report of which is to be found both in the 3rd L. C. Jurist, page 117, and the 9th L. C. Reports, page 49, Lefebvre vs. Fallie, Mr. Justice Badgely held that special bail may be put in even two years subsequent to the judgment, and after the bail to the sheriff had been sued upon their bond, and this he permitted to be done on petition of the bail themselves, that honourable judge stating it to be true, that the reason assigned in the case before him by the bail, namely, that they were ignorant of the law, was certainly a weak one, but that as the application could do no harm to the plaintiff, who had still his security as provided by law, he could grant the application. The question was also brought before the Superior Court at Quebec, presided over by Mr. Justice Meredith, when special bail was received by him seven months after judgment, and after action on the bond to the sheriff had been instituted. The correctness of this proceeding came to be argued before this honourable Court, sitting in appeal, when the judgment permitting the special bail to be given was not disturbed. The report of this case in appeal will be found in the 9th vol. L. C. Reports, page 74, Cambpell v. Atkins et al. It is true that in this last mentioned case, which was a peculiar one, and presented questions that the present one does not, the Court composed of four judges was equally divided, and thus the decision of Mr. Justice Meredith remained affirmed. The Honourable Sir Louis Hypolite Lafontaine, chief justice, expressed an opinion that the application to extend the delay ought properly to be made before the expiration of the period which it was desired to extend, or at least that it should be so before the rendering of the final judgment in the suit; now if it could be under any circumstances allowed after the expiration of the eight days then the Court is not irremediably bound by the strict letter of the statute; and if the bail could not be received after the final judgment in the cause it must

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[illegible] other reasons, not to be found in the statute. The Hon. Mr. Justice Caron, who pronounced the judgment in this honourable Court in the last mentioned case, stated that one of the questions to be decided was, whether the application had been made in time or not; the appellant, to establish that it had not been, refers the Court to the 12th Vic. ch. 42, sec. 12, requiring that the bail shall be put in within eight days after the return day of the *capias*. The respondent in answer says this delay may be extended by the Court, on cause shewn; to this the appellant replies: the application to extend the period should be made before such period has elapsed. In this reply, the learned judge adds, there is some plausibility, and the terms of the proviso seem to lend themselves to such an interpretation of the statute, but when the spirit of the law is considered, which is entirely in favour of the liberty of the subject, and means to restrain as much as possible imprisonment for debt, we (remarked the judge) come to the conviction that the power of the Court to extend this delay is not limited to the time during which the delay lasts.

Where so much has been said by the able judges before whom this question has come, it may be thought presumptuous in counsel to offer further remarks, yet the hardship of forcing their client to pay a debt not his own, to enrich the respondents, they trust may be their excuse when they further submit that the ruling of the Court below seems to be a sacrifice of the spirit of the law, and of justice to the mere letter of the law. They respectfully contend that if the decision of the Court below be maintained by this tribunal, debtors hereafter will be most injuriously affected, if, not having given bail to the sheriff, they further, from any ignorance of the law, want of means, or friends, anxiety of mind, or other cause, omit the giving of special bail until after the expiration of eight days after the return day of the writ, for then they must hopelessly remain in prison until they are able to satisfy their creditor. If to enable themselves properly to defend their interests, and to avoid imprisonment, they decide to give bail to the sheriff, how difficult will it hereafter be, even for the most honest man, to procure such bail, when the risk of ruin by an error or mistake on his part in letting pass the fatal eight days, becomes generally known.

If there is a discretionary power vested in the Court, there was a failure of justice in refusing to exercise it, and the appellant believes that, with every desire in the learned judge in the Court below to soundly interpret the law, he has failed to do so; the construction put upon the statute by the other judges who held a different view on the question, is certainly not opposite to the spirit of the law, but in accord with it, while the literal construction of the statute would lead to great hardship, because if, under no cause shewn, no peculiar circumstances, special bail could be received after the period of eight days from the return day of the writ, then no error of fact or law, no mistake or deception, no dangerous illness, no unavoidable absence, or even deception, fraud or violence, whereby special bail was omitted to be put in or prevented, would be of any avail either to the unfortunate debtor in prison, or to his bail to the sheriff, if such there were. If the Court is absolutely restrained and prohibited, as the Court below seems to have ruled, then no matter what the cause shewn the decision must be the same. But the interpretation, both before and since the judgment of the Court below,

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put upon the statute by the other judges to whom the question has been submitted, is one which affords relief against the abuse of the law, by allaying the rigour of its letter, while at the same time it does not contradict or overturn, but on the contrary upholds its spirit, and mantains its grounds and principles.

The appellant believes the Court below has erred in its decision and confidently expects he will be relieved from its [illegible] ruinous effects, by the reversal of the judgment of which he compl[illegible]

For the respondents it w[illegible] from the question as to the power of the Court to have g[illegible], the same was properly rejected for several other reasons.

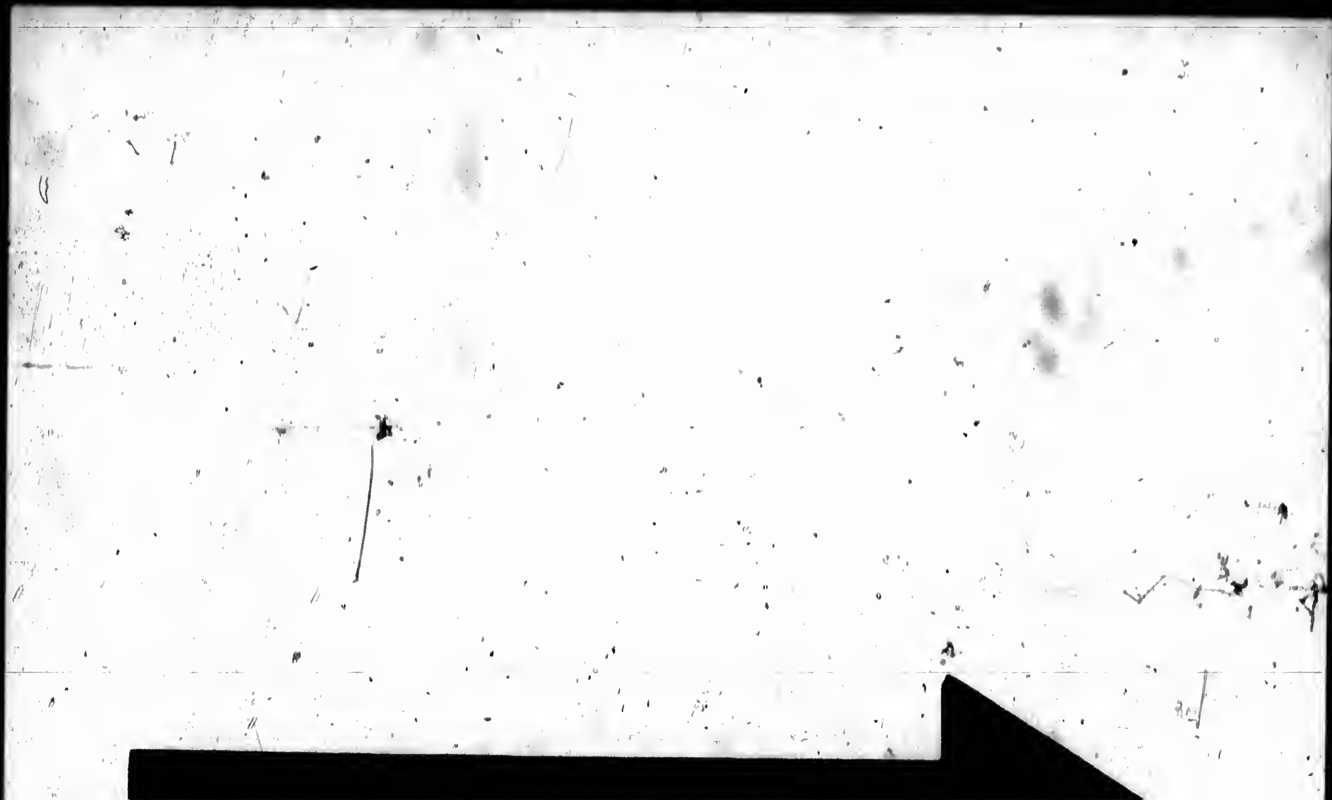
1st. the petitioners, of whom [illegible] were not parties to the original cause, and there is nothing in the r[illegible]w that they ever gave bail to the sheriff, except their affidavits produced [illegible] said petition, and the return of the sheriff to the *capias* shows that defendant was in his custody, but does not state that he was in the custody of the bail.

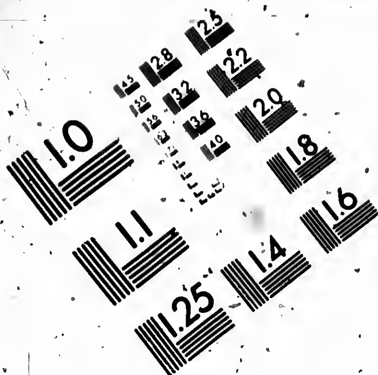
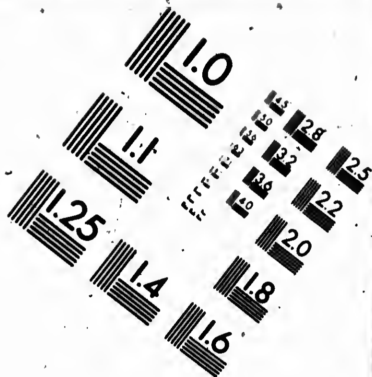
2nd. If a petition to put in special bail were made, it could only have been made by the defendant, who did not petition, and the provisions of the 21st section Consolidated Statutes of Lower Canada, cap. 87, and of the 3rd. subsection of section 1st of same Act, only provide for a defendant's being allowed to put in special bail, under certain circumstances.

3rd. The conditions of the bond to be taken by the sheriff, are that defendant shall give security to the Court, while petitioners allege that the conditions of the bond given by them were, that they, petitioners, should, within the time provided, give security required by law, or should put in special bail to the action. No such bond could have been taken by the sheriff, and would have been illegal.

4th. The petitioners asked that they might be permitted to put in special bail; this, if granted, could not be carried into effect; it is the defendant who gives the bail, and no legal bond could be executed to which he would not be a party, and he did not join petitioners, nor express any desire to join them in giving security.

As to the question whether special bail can be given after judgment rendered, the respondents respectfully submit that under the provisions of our statute law as it now is, the Courts have only the descretionary power of extending the time for putting in such bail upon special application and cause shown while the suit is pending; that after final judgment has been rendered in any cause, the Court are no longer permitted to exercise that power, and have no jurisdiction in the matter of putting in bail. The terms of the Statute are positive upon that point, and the powers conferred upon the Court cannot be extended. The application in the present instance was to put in special bail, and the only provision of law now in force with regard to such bail declares that such bail shall not be received unless put in within a certain number of days, but that the Court may extend that period, upon application made, and sufficient cause shown. No application was made to extend the time prescribed, and defendant has forfeited his rights under the law. In fact in this case the defendant never has made any application whatsoever to be relieved from his default. By defendant's failure to put in bail he



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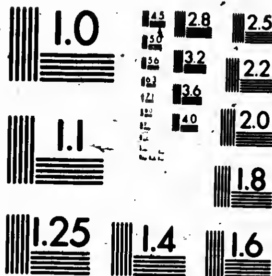
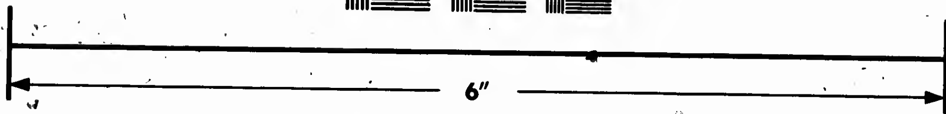

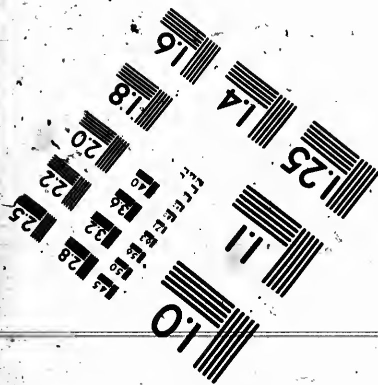
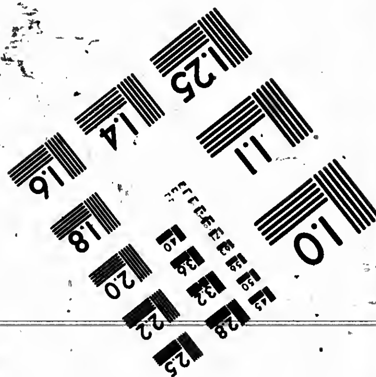

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has relieved himself from the obligation to make the statement which otherwise, under the 12th section Con. Stat. Lower Canada, cap. 87, he would have been bound to make, and respondents have been deprived of the benefit of that statement and the effect of declaring that a party arrested, or his bail, may at any time, after judgment has been rendered, apply to and obtain permission to put in special bail from the Court, would be that the provisions of the law regulating defendant's arrest for fraud, could not be carried into effect, unless defendant chooses to perform what his bail bound themselves he should perform—and if bail were allowed to be put in after judgment, the provisions of the 12th section of the Act could not be carried into effect.

This case differs entirely from the case of Campbell vs. Atkins, (Lower Canada Reports, vol. 9, page 74, in which case the question as to the right of putting in bail was fully discussed,) inasmuch as in that case the permission of the Court had been granted to the defendant upon his application, while here he has made no application; and respondents contend that the petitioners could not legally make the application in their own right and names.

MONDELET, J. said:—The petitioner having applied to Honourable Judge Short to be permitted to put in special bail for one De Courtenay, who had been arrested on *capias ad respondendum* at the suit of respondents, who subsequently obtained judgment against him, Judge Short rejected the petition. No reasons are assigned. But it is surmised that he considered himself bound by L. C. Cons. Statutes, ch. 87, sec. 3, inasmuch as the application was made too late, that is, after judgment rendered.

Now, if it be once conceded that the sureties who had first entered a security for defendant's appearance, have a right themselves to apply to the Court to give special bail, then I see no difficulty, because the law does not limit the time at which the special bail shall be given, (see ch. 87, sec. 3).

It is altogether discretionary—the rule is, that it should be given on the day of the return of the writ, or at any time before the return, or within the eight days next after the day of such return.

But the Court may, upon especial application, and sufficient cause shown, extend the time of putting in such special bail.

The above shews that the judge is not tied down to any time. All depends upon the special application, and sufficient cause shewn.

The putting in of special bail does plaintiffs no harm, and as the statute is one for the relief of debtors, and the liberty of the subject being at stake, it should be carried out on principles of humanity, were there a doubt in the wording of it. However, the section admits of no doubt, therefore the question simply is as to whether the petitioners shewed sufficient cause to entitle them to the conclusions of their petition. I think they have made out a sufficient case, and that they should have been allowed to put in special bail.

The several decisions by Judges Badgley, Monk, Chabot, Meredith, and the confirmation of the judgment of the latter by the circumstance of the Court of Appeals being equally divided, seem to me to be correct.

I am of opinion that the judgment appealed from should be reversed, and the petitioner allowed to put in special bail.

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BADGLEY, J., said:—By writ of *cap. ad resp.*, issued out of District Court at Sherbrooke, and thereto returned 1st Oct., 1861, the defendant De Courtenay was arrested at his residence at Quebec, and gave bail to the sheriff there by whom the writ had been executed.

On the 9th Oct., 1861, defendant petitioned the Court at Sherbrooke to enter special bail, but his petition was rejected absolutely, without time granted or modification of application. On the 17th June, 1862, plaintiffs obtained judgment against defendant.

On the 13th March, 1863, the sheriff's bail applied to the Court at Sherbrooke to be allowed to put in special bail for the defendant, upon grounds shown, supported by affidavits; and on the 14th March, 1863, the petition was rejected, the supposed ground being that the statute was positive, and left no room for construction.

This appeal is from that judgment.

The statute law of L. C. has been gradually removing the asperities of the personal imprisonment proceedings against debtors, and at the same time abolishing the speculations upon relatives and friends to pay the debtor's liability, under the barbarous argument of the imprisonment of his body.

The present law desires that a debtor should be at large under security to his creditor, rather than that his body should be confined in prison for that security, and in practice the law has provided times within which bail above should be put in, but the passing beyond the limits of the statute itself is not exclusive of the privilege, if good cause can be shown for the extension, the indulgence of which in this country is provided for by the statute. The English enactments have also a time limited for the purpose, without our statutory provision for the extension of the time, but in England that extension is obtained by the practice of the Court, and a judge will always give time upon cause shewn. See 3 Chit. General Practice, p. 372. The purpose of our legislation is to put an end to the barbarity of corporeal imprisonment, but at the same time to provide means for the securing, as far as may be, of the debtor's property for the benefit of his creditors, and finally for punishing him under the justice of the law, not under the vindictiveness of the creditor, for any fraud committed by him against the requirements of the statute in giving up his entire property.

The modern imprisonment for debt, Act 12 Vic. ch. 38, has provided new legislative remedies for the cases which come within its purview and provisions; it has not abolished the former law with respect to special bail, as permitted by the then law of Lower Canada, the statutory time in that respect being also extendible on good cause shown, so that the former law and the new provisions under the 12 Vict., are both in force, and may be adopted, according to the circumstances of the case.

The defendant having failed by the rejection of his personal application to obtain his rightful relief under the law, any further application on his part to the same tribunal, made as it must have been beyond the supposed concluded statutory limit, would have been altogether idle; but his bail conceived that they were not thereby excluded from relief, and as sheriff's bail they made application

to the same Court, also for the purpose of putting in bail for the defendant, and were as unsuccessful as the defendant himself.

The defendant's application appears to have been in time, and also appears to have been incorrectly rejected.

The question now is, can sheriff's bail themselves put in special bail? Such is the practice in England, from whence we draw our bail proceedings. If the defendant fails to put in bail in due time, the sheriff, or the parties to the bail bond, or the attorney who has undertaken to put in bail, may do so for their own protection, *and by their own attorney*, but it seems not without defendant's consent, before he has made default. Lush, practice, Sup. Cr. at Westminster, p. 614, see also Archbold's prac., p. 736. As to the sheriff it was held in Hamilton v. Jones, Pitt et al, 6 Bing, p. 628, "that the sheriff may, even after he is in contempt for not bringing in the body, put in bail," &c. Ch. J. Tindal says, "the question, therefore, is, whether the practice of the Court allows the sheriff to put in bail to protect himself, where the defendant has failed, and there are several cases which establish his power to do so. Such has been the invariable practice," &c. So, as to defendant's bail, see Haggett vs. Argent 7, Taunt 47, "where the bail were permitted to appear by their own attorney," &c. The authorities justify this application of the sheriff's bail; therefore no legal objection could exist to the reception of the petition in this case. In England, even without our special enactments in such cases, the bail may be put in as of right, at any time, either pending the action, or after verdict, and before the defendant has been actually charged in execution, so as to enable the defendant to obtain his release, 3 Chit. Gen. pr., p 372. With the advantage of our law, the defendant has greater latitude, and the bail should not be treated with more severity than the debtor could be.

The only question remaining is [illegible]use shewn; was it sufficient? it would seem so; under all these circumsta[illegible]the petition should have been granted, because the statute was subject to construction, not as to time, as supposed by the Court below, but as to the sufficiency of the ground given, which that Court does not appear to have objected to. The judgment of this Court will direct the mode and manner of giving the security required by the statute, which has almost in effect abrogated the personal liability of the bail, except of course in the case of the wilful breach by the debtor of the condition of the bond. The object is not to make his bail personally liable for his debt. The object of the law is remedial, and should in all cases be construed with the view of excluding imprisonment. The 21st section of the cap. 87 provides not only that nothing shall prevent any person arrested under *cap. ad resp.*, from putting in special bail to the action, within the times therein mentioned, but goes further, and provides, "but the Court may upon special application extend the time for putting in special bail, and also upon special application to allow the arrested person who has given bail to put in security for his surrender, as provided by the 10th section of the Act, even after the period in that behalf prescribed by that section;" and as Chief Justice Tindal said in Hamilton vs. Jones supra, "it must be immaterial to the defendant, whether he is surrounded by one set

of bail or the other," and if to the defendant, it must be equally so to the plaintiff. The appeal should be maintained.

MEREDITH, J., said:— As the main question raised in this cause was fully discussed in the case of Campbell and Atkins, (1) (9 L. C. Rep., p. 74,) I shall not attempt to go over the ground covered by the very able judgment pronounced in that case by Mr. Justice Caron, but shall confine myself to a brief statement of the reasons which prevent me from concurring in the opinion expressed by the learned judges who were disposed to reverse the judgment of the Superior Court, in the case just mentioned. According to the opinion of those learned judges, a debtor arrested under the 12 Vic. cap. 42, has not a right to give special bail by a bond such as permitted by the 5th Geo. IV., cap. 2, that being the law in force on the same subject before the passing of the 12 Vic. cap. 42.

On the contrary, according to the opinion of the same judges, as I understand it, every debtor arrested under the 12 Vic. cap. 42, and condemned to pay £20, or more, is bound, if he cannot pay the judgment, to file a statement of his assets and liabilities, such as mentioned in the 4th and 5th sections of the statute, in order that, thereupon, the proceedings for the winding up of the estates of insolvent debtors established by the Act may be had with respect to his property.

This opinion, I must say, although I do so with much deference, does not seem to me to be justified either by the letter or spirit of the law.

The primary object of the 12 Vic. cap. 42, as stated in the title, is "*to abolish imprisonment for debt;*" and in the preamble of the statute the Legislature have declared that they thought "*desirable to soften the rigor of the laws*" affecting the relation between debtor and creditor, as far as a due regard to the interests of commerce will permit.

This declaration sufficiently shews, and I believe it is generally admitted, that the intention of the Legislature in passing the 12 Vic. cap. 42, was not to deprive insolvent debtors of the means which the laws previously in force afforded them of avoiding imprisonment for debt *by giving bail*, but, on the contrary, to afford to insolvent debtors, suffering imprisonment *for want of bail*, the means of recovering their liberty, on giving up their estates for the benefit of their creditors.

That such was the intention of the Legislature, is, I think, very plain from the whole tenure of the Act; but more particularly from the provisions contained in the 12th section.

In order, however, to see that section in its true light, it is necessary to keep in mind the general bearing of the other sections of the statute. I shall therefore briefly allude to them.

The 1st and 2nd sections determine in what cases writs of *capias ad respondendum* may issue; and, also, do away with the writ of *capias ad satisfaciendum*.

The 4th and 5th sections authorize proceedings by means of which any debtor arrested under a *cap. ad resp.*, upon filing a statement of his assets and liabilities, and giving up his property, may, after a certain time, obtain his liber-

ation from gaol, without paying the debt for which he was arrested, or giving security of any kind.

The 6th and 7th sections provide for the sale of the property given up under the other provisions of the Act.

The 8th section makes provisions for debtors not arrested by *capias ad respondendum*, but who, were it not for the passing of the Act, could be proceeded against by *capias ad satisfaciendum*, and affords to those persons also, on giving up their property, the means of obtaining their discharge from imprisonment.

The 9th and 10th sections have reference to persons arrested before the passing of the Act.

The 11th section declares that the discharge of the person of a debtor, under the statute, shall not extinguish his debts.

Then we arrive at the 12th section, upon which the present case turns, and which I propose to give at full length, without referring to the remaining five sections of the statute, which have no bearing upon the present case.

Section 12 is as follows:

" And be it enacted, that nothing in this Act contained shall prevent any person " arrested under a writ of *capias ad respondendum from putting in special bail to " the action, as permitted by the laws of Lower Canada now in force*, excepting " only that such special bail shall not be received unless put in on the return " day, or at any time before the return day, or within the eight days next after " the return day; provided always, that it shall be in the power of the Court, " upon special application and sufficient cause shewn, to extend the time for put- " ting in such special bail; and it shall also be in the power of the Court, upon " special application and sufficient cause shewn, to allow any defendant arrested, " and who shall have given bail for his appearance at the return of the writ, to " put in security that he will surrender himself as provided by the third section " of this Act, even after the period in that behalf prescribed by the said third " section of this Act."

Thus we see that the Legislature after having, by the first two sections of the statute, declared in what cases a writ of *capias ad respondendum* may be sued out; then by the next nine sections provided means, by the observing of which any debtor arrested under a *capias ad respondendum* can, on giving up his property, regain his liberty although the claim for which he may have been arrested remain unsatisfied.

The Legislature have, by these provisions, as they intended, very materially " softened the rigor " of the law as regards that class of debtors who were liable to be confined in prison for want of bail; but there was another, and every lawyer knows, a much more numerous class of debtors, who, previously to the passing of the Act, had the means of avoiding imprisonment by giving *special bail to the action;* and as it certainly was not the intention of the Legislature to make the more numerous class of debtors suffer, in order to afford indulgence to another and less numerous class, the framers of the statute, true to the intention of *softening the rigor* of the law, proclaimed in the preamble, caused the nine sections of the statute, (from 3 to 11 inclusively) which afford relief to one class of

debtors, to be followed by the twelfth section, which prevents the previous sections from increasing the severity of the law, as against any class of debtors.

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Were it not that a contrary opinion is entertained by persons for whose views I have the highest respect, I should think it beyond doubt that, under the 12th section of the 12th Victoria cap. 42, a debtor arrested has now a right to put in special bail *exactly as he could have done*, and with *precisely the same effect*, as if that statute had never been passed; excepting of course that by the proviso in that section the time for putting in such special bail is limited.

What other meaning, I ask, can be given to the words, "That nothing in this "Act contained shall prevent any person arrested under any writ of *capias ad* "*respondendum* from putting in special bail to the action, as permitted by the laws "of Lower Canada now in force,"—the law then in force and applicable in such cases being, as shewn by Mr. Justice Caron, and, as is quite certain, the 5th George IV, cap 2.

Do not we see that the Legislature in one part of the section speak of "*special bail to the action*," a proceeding which, for centuries, has been familiar to all English lawyers, and that towards the close of the section the Legislature speak of "*security to surrender*," "as provided by the third section of this act;" a proceeding established for the first time by the act itself.

Do we not, also, see that the Legislature have thought fit in one part of the section to limit, subject to a proviso, the time within which *special bail to the action* is to be put in, and in another part of the same section to limit, subject to a proviso, the time in which *security to surrender* "under the third section of this act" is to be given. How then can we be asked to hold, as I understand we are, that the old proceeding of "*special bail to the action*," and the new proceeding, "*security to surrender*" under the third section of the act, are in effect one and the same proceeding—or, at any rate, that a defendant arrested under a writ of *capias ad respondendum* cannot now put in *special bail* to the action, as he could have done before the passing of the statute.

It may, however, be said, and, indeed, has been said, that although the Legislature have declared that special bail to the action may be put in, yet that they have not said that such special bail shall be received *instead of security to surrender*, as provided by the third section of the statute, or that special bail shall have the effect of discharging the bail to the sheriff. But in my opinion such a declaration was altogether unnecessary.

The Legislature having expressly reserved to a debtor arrested the power of putting in special bail, and having given the court the power of enlarging the time allowed for that purpose, did not mean and could not by any possibility have meant that the putting in such special bail should be an idle, purposeless formality; on the contrary, the special bail which the Legislature have thus permitted to be put in, must have the legal effect which such bail always had, namely, that of discharging the bail to the sheriff.

As this part of the case, according to my view, is sufficiently plain, I shall now pass to the consideration of some of the points to which our attention was particularly drawn in the course of the argument before us.

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It was contended by the respondent, that, after final judgment rendered in the original suit, the Court had no longer power to allow bail to be put in.

But there is not one word in the statute tending to subject the power of the Court to the limitation thus contended for, and it is plain that if this pretension of the respondent be well founded, it would follow, that if a defendant thought fit to confess judgment, the parties to the suit might, even during the eight days allowed by the statute, deprive the bail to the sheriff of any opportunity of applying for an extension of the time to put in special bail.

It was also argued that the application to extend the time for putting in special bail ought to have been made before that delay had elapsed, and that after that time had gone by, the Court had *no power* to allow special bail to be put in. This objection was strongly urged and formally overruled in Campbell and Atkins; and in addition to the reason given by Mr. Justice Caron, in that case, I may observe that the interpretations which the respondents wish us to put upon the proviso in the 12th section of the 12th Victoria cap. 42, is contrary to the interpretation which our Courts have invariably put upon other provisions of law of the same character.

For instance, in the 25th section of the 12 Vict. cap. 38, it is declared: "the defendant shall be allowed *eight clear days* from the appearance to plead to "the declaration;" and in the next section it is declared "that the delay for "pleading *may be enlarged* by the Superior Court, or by any judge thereof, on "special application."

Now I am not aware that it has ever been held, or even contended, that an application to *enlarge* the time to plead must be made within the statutory delay of eight days; and we know that the uniform practice of all the Courts is against such a pretension. I may, as to this point, add, that if the view now being considered be well founded, then, if the bail to the sheriff were prevented even by sudden sickness, or by the fraud of the plaintiff, from asking for an enlargement of the delay within the eight days allowed by the statute, the Court would be *without power* to afford them relief.

The respondents, naturally anxious to take this case out of the ruling in Campbell and Atkins, have said that the present case differs entirely from Campbell and Atkins, inasmuch as, in that case, "the permission of the Court had been granted to the defendant, upon his application, while here he has made no application."

The difference thus pointed out between the present case and the case of Campbell and Atkins is unimportant, because it is indisputable that bail to the sheriff have a right to put in special bail for their own protection. Petersdorff * expressly says so at p. 282; at the close of the same page, the author adds, "and it is now a settled principle that the *bail below* may appear and justify by their own attorney."

The objection urged at the argument, that the appellants are not parties in the original suit, does not seem to me of importance, because it is sufficient for the appellants to show that they are aggrieved by the judgment of which they complain.

* Petersdorff on Bail, p. 282.

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Upon the whole the case seems to me to be, in principle, the same as the case of Campbell and Atkins, and believing, as I do, the judgment in that case to be in all respects well founded, I think that the judgment now under consideration, which is opposed to it, must be reversed.

The judgment of the Court of Appeals was recorded as follows:

Considering that by the law in force in Lower Canada a defendant who has been arrested by virtue of a writ of *capias ad respondendum* issued out of a Court of competent jurisdiction, in Lower Canada aforesaid, and who has given bail to the sheriff for his appearance at the return of the said writ, may put in special bail or security at any time, upon a special application therefor to the Court out of which such writ issued, upon sufficient cause shown to the satisfaction of the said Court for extending the time for putting in such bail; considering that by the law aforesaid the condition of the recognizance of the said bail or security is that the cognizors thereof shall not become liable unless the defendant shall leave Lower Canada aforesaid without having paid the debt, interest, and costs for which the action shall have been brought; considering that the bail to the sheriff given by such defendant arrested as aforesaid, have by law a right to put in such bail or security aforesaid upon the failure or default of such defendant to put in the same; considering that in the judgment pronounced by the Superior Court for Lower Canada, sitting at Sherbrooke, on the 14th day of March, 1863, rejecting the petition and application of the said appellant, petitioner in the Court below, to put in bail and security for the said De Courtenay, the defendant in the Court below, in the action referred to, and mentioned in the said petition, the said action, instituted by the said respondents, plaintiffs in the Court below, against the said defendant, and in which the said respondents, plaintiffs aforesaid, obtained judgment from the said Court below, against the said defendant, there is error; this Court doth reverse and set aside the said judgment, and proceeding to render the judgment which should have been pronounced by the said Court below, upon the said petition and application of the said petitioner, doth maintain the same, and doth order that the said petitioner shall be at liberty at any time of the first regular session of the said Superior Court at Sherbrooke aforesaid, sitting after one month from the pronouncing of this judgment, to put in before the said Court special bail or security to the satisfaction of the said Court, for the said De Courtenay, defendant aforesaid; the condition of the recognizance therefor to be, that the said bail or security shall not become liable unless the said defendant shall leave Lower Canada without having paid the debt, interest and costs for which the said judgment has been rendered against him, at the suit of the said respondents, plaintiffs aforesaid, &c.

Judgment reversed.

Andrews & Andrews, for appellant.

Sanborn & Brooks, for respondents.

(J. L. M.)

MONTREAL, 30TH JUNE, 1865.

Coram BERTHELOT, J.

No. 273.

Ex parte, the Mayor, &c., of Montreal, and Notre Dame Street, and Bissonette, party interested, and Grant, opposant en sous ordre to Bissonette.

HELD :—That an opposition *en sous ordre*, which is not based on a judgment, cannot be maintained.

This was a motion by the opposant *en sous ordre*, who was the proprietor and lessor of certain property expropriated for the widening of Notre Dame Street, to be paid the amount claimed by his opposition, as rent due by Bissonette, *who* was his tenant, out of the moneys awarded by the commissioners by way of damages to Bissonette. The motion was resisted.

Per Curiam :—The opposition *en sous ordre* is not based on a judgment, and there is, therefore, no executory instrument justifying the attachment of the moneys claimed. The opposant must take nothing by his motion.*

Motion for moneys rejected.

J. Bleakley, for opposant *en sous ordre*.
Bondy & Fauteux, for Bissonette.
(S. B.)

COUR DE CIRCUIT.

MONTRÉAL, 20 SEPTEMBRE, 1865.

Coram BERTHELOT, J.

No. 4225.

Tancrède C. DeLorimier vs. *Hurtubise.*

JUGE :—Qu'une exception à la forme basée sur ce que l'huissier instrumentant, lors de la signification au défendeur, du bref de sommation et de la déclaration y annexée, n'a pas informé ce dernier du contenu des pièces signifiées, ne peut être maintenue.
2o. Que l'article de l'ordonnance requérant telle information est en desuétude.
3o. Que telle exception à la forme sera rejetée sur motion à cet effet.

Le demandeur poursuivait le défendeur pour une somme de $15.50, montant à lui dû pour honoraires et déboursés, comme avocat et procureur.

Le défendeur produisit une exception à la forme, se basant sur ce qu'il n'avait pas été, lors de la signification de l'action, informé par l'huissier instrumentant du contenu des pièces signifiées.

Motion fut faite par le demandeur concluant au rejet de cette exception, sur le principe que la pratique et la jurisprudence de nos tribunaux étaient contraires aux termes du statut et que cette formalit était tombée en désuétude.

La cour, par son jugement non motivé, maintint les prétentions du demandeur et débouta l'exception à la forme sans frais. Exception déboutée sans frais.

L'honorable juge en prononçant son jugement déclara que leurs honneurs les juges Badgley et Monk partageaient son opinion sur ce point.

J. & W. A. Bates, avocats du demandeur.
E. U. Piché, avocat du défendeur.
(CHS. C. DE L).

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* Vide Stirling et al. vs. Darling and Fowler, opposant, *en sous ordre.* 1. L. C. Jurist, p. 161.

QUEEN'S BENCH, 1864.

MONTREAL, 6TH SEPTEMBER, 1864.

Coram DUVAL, CH. J., AYLWIN, J., MEREDITH, J., DRUMMOND, J., MONDELET, A. J.

No. 47.

JAMES MACDONALD,

(*Plaintiff in Court below*,)

APPELLANT;

AND

JAMES LAMB,

(*Defendant in Court below*,)

RESPONDANT.

HELD:—1°—That during the interval that the Crown held a property surrendered by a seignior for the purpose of commutation under the Statute 6th Geo. 4th, ch. 59, before the issuing of the letters patent re-granting the same, prescription ran in favor of a mere squatter in actual possession of such property, but without any title whatever thereto.

2°—That the possession of such squatter during such interval could legally avail, in favor of a party succeeding him in the possession of the property, under a plea of thirty years' prescription.

3°—That such junction of possession does not require a title, in itself *translatif de propriété*, from the one possessor to the other, but any kind of informal writing *sous seing privé* supported by satisfactory verbal evidence, will suffice.

This was an appeal from a judgment rendered by THE HON. MR. JUSTICE SMITH, in the Superior Court, at Montreal, on the 28th day of June, 1862, dismissing the appellant's action with costs.

The action was a petitory one, and sought to recover possession, from the respondent, of lot No. 16 in the 5th range of Russeltown, in the seigniory of Beauharnois.

The appellant's title was a deed of sale from the Right Hon. Edward Ellice, the Seignior of Beauharnois, executed on the 2nd day of October, 1855, before J. J. Gibb and colleague, N. P., and the title of Mr. Ellice was traced back in the declaration to certain letters patent from the Crown granted on the 10th day of May, 1833, in favor of Mr. Ellice, of all ungranted lands in Beauharnois, including the lot in question; and these letters patent were alleged to have been so granted, after the lands had been surrendered by Mr. Ellice, as far back as the 20th day of October, 1832; such surrender having been made in order that Mr. Ellice might receive a grant of the lands in free and common soccage.

The respondent pleaded in effect, firstly, that at the date of the letters patent the respondent was, and for more than twenty years previous had been, "publicly "and peaceably in possession of the said lot of land sought to be recovered by this "action and hath ever since continued to be in possession thereof as aforesaid, "*animo domini*, adversely to the claim of the said Edward Ellice," and that the said lot of land never formed part of the ungranted or unconceded lands of Beauharnois. Secondly, that the Seigniory of Beauharnois was conceded by King Louis the XIV. of France, to Charles Marquis de Beauharnois, on the 12th of April, 1729, and that the lot in question never was included within the limits assigned to the seigniory in the original deed of concession. Thirdly, that in 1807, one David Goodwin was in possession of the lot in question, and continued

so until the 21st of September, 1833, when he put respondent in possession of the lot, and "by deed of quit-claim, bearing date at Russeltown aforesaid, "on the day and year last aforesaid, duly signed and executed by the "said David Goodwin in presence of witnesses, did quit-claim, convey, "give up and make over to the said defendant all right, title and claim "of him the said David Goodwin, which he could have," in the lot in dispute; and that "the said defendant thereupon immediately entered upon, and "took possession of, and hath ever since possessed and occupied the same openly, "peaceably, uninterruptedly and in good faith and still doth so." Fourthly that neither appellant nor any of his *auteurs* ever had any right of property in, or possession of, the lot in question. Fifthly, that respondent is, at all events, entitled to be prepaid the sum of £1000 currency for *impenses et améliorations utiles et nécessaires*; and lastly, that all the allegations of the declaration are untrue.

The appellant joined issue generally, except as to the 5th plea, to which he replied specially to the effect that all improvements made were done in bad faith, the parties well knowing that the lot in question formed part of the ungranted lands of Beauharnois, and were moreover more than compensated by the value of timber cut down and felled by respondent and his pretended *auteurs*, and by the rents, issues and profits of said lot; and concluded accordingly, and for an *expertise*.

The following is the judgment which was rendered in the Court below:—

"The Court * * * Considering that the said defendant hath fully proved the material allegations of the said exceptions, and that at the time of the surrender by the said Right Honorable Edward Ellice to the Crown of the unconceded lands lying and being in the said Seigniory of Beauharnois, for the purpose of effecting a change in the tenure thereof under the authority of the statutes in such case made and provided, that he, the Right Honorable Edward Ellice was not in possession of the lot number sixteen in the fifth range, of Russeltown, as he, the plaintiff, hath alleged in his said declaration, but that he, the said David Goodwin, the *auteur* of the said defendant, was in the actual occupation and enjoyment thereof as proprietor and had been in possession thereof from the year one thousand eight hundred and seven, as stated in the exception of the said defendant in this cause pleaded, and that by reason of such adverse possession by the said David Goodwin as aforesaid, the surrender so made by the said Right Honorable Edward Ellice to the Crown could not, by law, be made so as to enable the said Right Honorable Edward Ellice to obtain a re-grant thereof from the Crown in free and common soccage, under the authority of the law authorizing such surrender, and was, in fact and in law, inoperative, null and void. And further, considering that by reason of such adverse possession by the said David Goodwin of the said lot number sixteen aforesaid, the letters patent obtained by the said Right Honorable Edward Ellice, in virtue of such surrender, no title could pass to the said Right Honorable Edward Ellice under the said letters patent, which could in any way effect the possession of the said David Goodwin as such proprietor in possession as aforesaid, nor could the said Right Honorable Edward Ellice ac-

quire thereby any right whatever to claim the possession of the said lot number sixteen as proprietor thereof under the authority of the letters patent aforesaid which were for that purpose illegal, altogether inoperative, null and void; and further, considering that the possession of the said David Goodwin of the said lot number sixteen, which lot, it is alleged, in the plaintiff's declaration lay within the limits *enclave* of the Seignory of Beauharnois was a possession as proprietor under the law regulating the seigniorial tenure then in existence; and that the said Right Honorable Edward Ellice, as proprietor of the Seigniory of Beauharnois, permitted the said David Goodwin to enter upon and occupy the said lot number sixteen, lying within the *enclave* of the said seigniory, the possession of the said David Goodwin was in law a possession as proprietor liable to all the obligations imposed on all possessors of land lying within the said seigniory, and that it was not competent to the proprietor of the said seigniory to eject the said David Goodwin from the possession of the said lot by an action of ejectment, but that the sole right, in law, of the said Seignior, was to claim from him such rights and dues as he, the said David Goodwin, could be compelled to render towards the said seignior, and to which the said lot was liable under the seigniorial tenure aforesaid, and no other; and further, considering that the said plaintiff claims title from the said Right Honorable Edward Ellice, under and by virtue of the letters patent aforesaid alone, and seeing from what has been stated that said letters patent did not in law confer any title whatever to the said Right Honorable Edward Ellice beyond what he in reality had and possessed at the time of the surrender aforesaid to the crown of the unconceded lands aforesaid, and that the said Right Honorable Edward Ellice never possessed the said lot number sixteen under the letters patent aforesaid; and further, seeing that the said defendant hath fully proved and established his possession as proprietor of the said lot as deriving title from the said David Goodwin, and that such possession operates as a bar to any claim of the said plaintiff as set forth in his said action and declaration, and that thereby the said plaintiff is without title to bring the present action, the same is hereby dismissed with costs."

Bethune, Q.C., for appellant:—The judgment appealed from rests on three propositions; firstly, that the letters patent conferred no title whatever on Mr. Ellice beyond what he had at the time of the surrender: secondly, that the surrender and patent were valueless, because Goodwin was in possession of the lot at the time they were respectively made and granted; and thirdly, that the respondent was in the legal rights of Goodwin, and that his and Goodwin's possession "operates as a bar to any claim," of the appellant.

Apart from the fact that no concession deed or other species of grant or conveyance from the seignior is produced, antecedent to plaintiff's deed from the seignior, it is proved by the seignior's agent that the lot was ungranted up to the time of the execution of that deed, and the letters patent from the Crown to the Seignior from whom the plaintiff derives title declare that the whole of Russeltown was ungranted at the date of such letters patent.

The date of the letters patent is the 10th of May, 1833, and the date of the surrender by the seignior to the Crown is the 20th of October, 1832.

The surrender of the property in question was absolute and unconditional,

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and was made by the seignior (as the patent states) "to the intent that he might receive a grant thereof in free and common soccage," and was preceded by public notice of the seignior's intention, so to surrender and apply for such grant, which was published for the space of three calendar months, as required by the Statute 6th George the 4th, ch. 59. The notice thus required by the Statute called on all persons who might "have, or claim to have, any present or contingent right, interest, security, charge or incumbrance, either by mortgage, (*hypothèque*), general or special, express or implied, or under any other title, or by any other means whatsoever, in or upon" the property in question, to make known their "assent or dissent" to such surrender and grant in the manner specified in the said Statute.

As matter of law the appellant respectfully submits:—

1st. That a patent has at all times been held to be *primâ facie* evidence that it was regularly issued, and that all things preliminary had been performed and complied with. "*Omnia præsumuntur rite et solenniter esse acta donec probetur in contrarium.*"

2nd. That a Patent is a record, and unless it is absolutely void on its face, it cannot be assailed in a collateral action, such as an action of trespass or ejectment, but only in a proceeding directly for the purpose, namely, by a *scire facias*, and this even though it were issued by mistake, or obtained by fraud or misrepresentation; for being a record, (as Lord Coke says,—Coke upon Litttleton, 117 p.) "it importeth in itself such absolute verity, that it cannot receive any trial by witness or by jury, but only by itself."

The people vs. Mauran, 5th Denio's Reports, P. 398, 399, 400.—Jackson vs. Marsh, 6 Cowen's Reports, p. 281.—The People vs. Livingston, 8 Barbour's S. C. Reports, p. 253.—Comyn's Digest, *verbo* Patent, (F. 1.) p. 350. 1. Stephen's Com., P. 570.—Burton on Real Property, p. 159, 160.

It is contended that one Goodwin was in possession of the lot in question, at the dates both of the surrender and the patent, but it is submitted that this fact, even if proved, can have no legal effect in the case. According to the authorities above cited, the patent establishes conclusively, that the seignior was the proprietor of the lot at the time of the surrender, and that it was then in his possession ungranted, that the crown held it absolutely and unconditionally from the date of the surrender to the date of the patent, that all the requirements of the Statute preliminary to the granting of such patent were fulfilled, and that the crown granted it to the Seignior in free and common soccage, of its own "especial grace, certain knowledge and mere motion." Moreover, the possession of Goodwin, who was admittedly a mere squatter, was a mere holding for the rightful owner. "Is possidet cujus nomine possidetur; qui autem in possessione sunt, "alienœ possessioni prœstant ministerium," Vinnius on L. 18, pp. ff. de acq. vel amit. poss.

It is contended that Goodwin being in possession had a right to a concession deed from the seignior, and could not be ejected by him in a petitory action, and the cases of McCallum vs. Grey, and Boston vs. Grey are cited in support.

Now the *considérant* of the judgment in the former case (3 vol. Seign. Doc., P. 114) states, "it appearing to this Court that the defendant William Grey had "been by the late James McCallum, heretofore plaintiff in this cause, *solicited*

"*and induced* to occupy and possess the lots of land in question, and to cultivate and improve the same, *under a promise* on the part of the said James "McCallum, that he would give and grant to the said William Grey and to his "heirs, *a good and sufficient title and deed of conveyance* of the said lot of "land." * * And in the latter case the successor of McCallum, governed as he was by the judgment in the former case, tendered a concession deed in terms of the verbal contract between McCallum and Grey, and prayed that in default of acceptance thereof he should be declared the lawful owner of the property, and that Grey should be ejected. Mr. Boston's action was *au pétitoire*, and Grey having refused to accept the proffered deed, Boston was declared to be *the owner*, and Grey was condemned to deliver up the property, unless he chose within a specified delay to take the deed tendered to him. Not only do neither of these cases sustain the proposition they were cited to maintain, but on the contrary the latter case establishes, that even where there has been an agreement to concede, the seignior remains *proprietor*, until the actual execution of the deed.

By the answer of the Seigniorial Court to question number 17, (L.C. Rep. Seign. Ques. Vol. A. p. 62 a.) *all* the judges, with the exception of the Hon. Mr. Justice C. Mondelet, adjudged that the seigniors "had the full and entire property (*dominium plenum*) in the ungranted lands in their seigniories," but that they could not alienate them, in the first instance, otherwise than by deed of concession. The only pretension that could be advanced, with any show of reason or legal basis, is, that when the seignior gave notice of his intention to surrender, Goodwin might possibly have had a right to oppose the surrender and application for a grant in free and common soccage of the lot he claimed to be in possession of, although it is much to be doubted that any such opposition would have availed, in the absence not only of any actual legal proceedings on his part to obtain a concession deed from the seignior, but even of a *simple demand* of such deed. Any such right either to oppose the surrender and grant in free and common soccage, or to claim a concession deed, was clearly waived or foreclosed under the circumstances. And, once the tenure was changed, as it undoubtedly was by force of the patent and the statute under which it issued, any pretence to the exercise of such a right was completely debarred. Moreover, in the present case, there is not only no demand even for a concession deed, but the defendant pretends that the lot in dispute *never was in the seigniory, but the adjoining township of Hemmingford.* And the utter futility of which pretension is completely established, firstly by Lalanne's survey (defendant's Exhibit A.) that the boundary was ascertained to be where it still is as far back as 1793. 2ndly, by Barret's evidence, which proves the existence of a boundary in the same spot, at the time he surveyed, with the year 1830 marked on it, and lastly by the patent itself, which declares the whole of Russeltown to be within the seigniory; the patent on this point, being conclusive evidence. Moreover, whether the lot be in Hemmingford or Beauharnois is no business of the defendant, who never had or pretended to have a title to it, the land being either the Seignior's or the crown's at the date of the patent, and the issuing of the patent determined all question on this point in favour of the seignior.

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The only other objection taken to the appellant's title is, that the Seignior's power of attorney to Mr. Keith, authorising him to sell, was executed about two months before the deed of sale from Mr. Colville and others (who held the seigniory a short time) to Mr. Ellice was passed, and refers to a title in favour of Mr. Ellice, of date some four months previous to the execution of the power of attorney. This objection is plainly untenable. Mr. Ellice claimed, at the time he granted the power to Keith, to be proprietor, and whether he was actually such proprietor, or did not really become so until two months after, is of no legal moment. Moreover, the power of attorney itself distinctly alludes to the probable execution of another deed to Mr. Ellice, beside the one it referred to, in the following words:—" or of any other deed that may be passed the more effectually to conform to the said laws of Canada."

The real defence rests on the plea of 30 years' prescription, the 30 years' possession being claimed to be made up of the possession of Goodwin, which the defendant pretends to have existed for many years prior and up to the 21st of September, 1833, and of his own possession, which he asserts followed immediately that of Goodwin, and continued uninterruptedly to the present time. And the right to avail himself of Goodwin's possession is claimed by the defendant in virtue of a paper, of which the following is a copy:—

Russeltown, September 21st, 1833.

This may certify that I do this day sell, convay, and give up all my right title and clame that I have or ever had to the lot of land that I know recicde on, to James Lamb, beining lot No. sevenetheth in the third section.

(Signed) David Goodwin.

(Signed) James Richardson, Patrick Mahon, } *Witnesses.*

On this branch of the case the appellant submits firstly:—That even supposing this paper were a sufficient conveyance in law of Goodwin's pretended title by possession, and that the defendant really succeeded him in the possession of the lot and maintained such possession continuously to the bringing of the present action, Goodwin's right to prescribe could only have begun on the 10th of May, 1833, the date of the letters patent; the crown having been the owner of the lot in question for more than the seven months immediately preceding that day. The present action was returned into Court on the 5th of April, 1856, and consequently but 22 years and some months of the required 30 years had run up to that time.

Secondly:—Presuming, for argument's sake, that the possession of Goodwin counted during the time the Crown was proprietor, and that more than 30 years consecutive and uninterrupted possession by Goodwin and the defendant were completed before this action was instituted, the paper invoked by defendant is not sufficient in law to entitle the defendant to join Goodwin's title (if any) by possession to his own; such junction of possession requiring a title *translatif de propriété* from Goodwin to the defendant. On this point the appellant would refer the Court to the following authorities,—G. C. 2 Vol. p. 435,—remarks of M. Le Camus on the 118th Art. of the custom,—" nous avons rédigé cet article

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"en la manière qui suit,—si aucun a joui et possédé un héritage ou rente ou au-"tres choses prescriptibles, publiquement en qualité de propriétaire continuelle-"ment par lui *ou ceux dont il a le droit et cause.*"

Auzanet, p. 105, on the Art. 118,—"au lieu du mot de *prédécesseurs* mettre "*ceux desquels il a le droit et cause.*"

Despeisses, 1 vol. p. 788,—"et non seulement la possession propre de celui qui "prescrit lui sert, mais aussi celle de son auteur, soit qu'il lui ait succédé par "*contrat* ou par dernière volonté; et on conjoint le tems des deux possessions "pour parfaire la prescription."

Bourjon (1 vol. p. 183), in writing on the 118th article, says that it was framed on the rule of the civil law, and so say all the other commentators on the same article. Now the rule of the civil law as laid down in the pandects (as translated by Pothier) vol. 17, p. 129, is, "on l'accorde (la réunion des posses-"sions) à ceux qui ont succédé à d'autres *en vertu d'un contrat* d'un testa-"ment,"—page 141,—"par *auteur* on entend celui de qui l'on a reçu quelque "chose en vertu de son testament, *ou de quelque contrat passé avec lui,*"—"mais pour que quelqu'un soit mon auteur, *il ne suffit pas que sa possession ait précédé la mienne.*"

21 Vol. Duranton p. 379. No. 240, —"le successeur * * * tire son titre à "la possession *de son contrat* ou du legs qui lui a été fait, *et ne représente son* "*auteur* que relativement a l'objet même que celui-ci *a transmis.*"

1 Vol. Vazeille, Traité de la pres. p. 74, No. 69, * * * "Le possession se transmet *legitimement* d'une personne à une autre par succession, donation, legs, vents et echange. *Par ces voies,* l'on reçoit avec les choses *la possession* de ceux qui les détenaient, et, en la continuant, on peut achever la prescription, c'est la décision des lois du Dig. 11 and 14 §1, and 15 § 1, de divers. temp. prœsc, 25 § 20, proempt. 76 § 1, de cont. empt. 13 § 10 and 11. et seq, vel. amitt, poss. et 11, c. de prœsc. long. temp."

1 Vol. Troplong, Traité de la Pres. p. 570, No. 435,—"Il faut qu'il y ait en-"tre le possesseur actuel et le précédent possesseur une relation *juridique*, car s'ils "se trouvaient juxtaposés, *sans un lien du droit,* l'union *ne pourrait* s'opérer."

Pothier, in his Traité de la Pres. (No. 111.) says that the union of possession is made either *à titre universel,* as by right of heirship, or *à titre singulier,* and at No. 119 he says, in describing the latter,—"*tel qu'est un acheteur, un dona-*"*taire,* ou un légataire d'un certain héritage," and, in stating the reason why such union is allowed, he says, at the latter end of the same number,—"la raison "est, que par la traditi on qu'on fait à quelqu'un d'un chose, en exécution d'un "titre, *qui est de sa nature translatif de propriété,* on a intention de lui "transférer tout le droit qu'on a tant dans cette chose que par rapport à cette chose." And at No. 123, in referring to the legality of joining several possessions, he says, —"*bien entendu, pourvu que toutes ces possessions soient de justes possessions,*" —and at No. 124 he describes a "*juste possession*" to be that "*qui procède d'un juste titre.*" And in his traité de la possession, at No. 6, Pothier describes a "*juste titre*" to be *un titre qui soit de nature à transférer la propriété, tels que le titre de vente, échange, de donation &c.*" It may be said that these remarks apply only to the possession of ten and twenty years, of which Pothier is more in-

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mediately treating, but at No. 174 of his Traité de la Pres. he says,—" *la possession pour la prescription de trente ans doit avoir les mêmes qualités que celles qui sont requises pour la prescription de dix ou vingt ans.*

Dunod, Traité de la Pres., pp. 19, 20.

Marcadé, Traité de la Pres., p. 100.

The paper invoked here, which on its face is only a certificate, is so obviously wanting in all those characteristics which the law requires in a contract of sale, which the defendant's counsel affects now to call it, that the appellant refrains from either reasoning or citing authority on the point. Moreover, the paper, being an *acte sous seing privé*, has in law no date, as regards the appellant who is a stranger to it. Before leaving this branch of the case, however, it is proper to remind the Court, that the pretended signature of one of the witnesses (Patrick Mahon) to the paper in question, was written by the other witness, (James Richardson) Mahon being a mere boy at the time, and not being able either then, or when he gave his evidence, to write or sign his name, the rule, therefore, of *unus testis nullus testis*, applies as well to the mere execution of the paper itself as to the proof of its execution. And the attention of the Court is also drawn to the fact that the lot in dispute (No. 16, in the 5th range of Russeltown) is in no way alluded to in the paper now under consideration.

And lastly:—That the defendant has failed to prove that his possession *immediately* followed that of Goodwin.

The rule as laid down by Vazeille, 1 vol., p. 76, No. 71, is, it is respectfully submitted, strictly in accordance with the law governing the case. He says, " Faut-il que la possession du successeur suive *immédiatement* celle de son auteur, pour que ces deux possessions puissent être réunies. On s'est accordé à dire, glosant la loi 15, § *ff* de divers temps prœsc., et la loi 29 ff de usurp; et usucap. *qu'elles doivent se suivre sans interruption.*"

1st witness, PORCHERON,—Only swears in a general way, that he has known the lot for forty-five years, and that he never knew anybody else possess it but Goodwin and Lamb; also, that Lamb stopped at Goodwin's some time previously to the date, when he says: " Goodwin lui a cédé le lot," but he in no way pretends to have been present when Goodwin left or Lamb took possession, nor does he any where state in terms that Lamb's possession *immediately* followed that of Goodwin.

2nd witness, ALLARD,—Although he does not even pretend to have been present when the one left and the other took possession, yet he hazards the statement that " the defendant succeeded Goodwin in the possesion of the said lot, and the defendant has always lived on it ever since Goodwin left, and he also says generally, that he has known the lot for forty-six years and never knew any one but Goodwin and defendant on it."

Now this witness, in the course of his examination, stated he was absent from Canada for about two years, which he put down as 1835 and 1836. In his deposition, *made* two *or* three *days after* in the case No. 1235, (an authentic copy of which is fyled in this cause) he says, on being asked whether the two years of his absence were 1848 and 1849, and if not, *what two years they were?* "I cannot really recollect," and being then asked, " Is it not true thatwithin the last two or three

"days you have stated under oath, in the other case of McDonald against Lamb, "in which you have been examined as a witness, what those two years were?" he answered, "*Not to my knowledge or recollection now;*" and being further asked if those two years were not 1833 and 1834, he answered, "To come exactly to "the point I would not dare say. I am not prepared to say indeed, whether I can "think those to be the years," and being further asked whether he would swear that these were *not* the two years he was absent from Canada, he answered, "*I would not say at the present time.*"

From the above explanation alone, it is obvious either that the man's memory had so entirely failed, that no importance can be attached to his evidence, or he wilfully misstated what he really did know, but, on carefully criticising his evidence, especially his cross-examination, in the two cases, and comparing his two depositions together, one is irresistibly driven to conclude that his statements generally are wholly unworthy of belief.

3rd witness, ROBIDOUX,—Admits that 2, 3, or 4 years elapsed between the time he last saw Goodwin on the lot, and the first time he saw Lamb there.

4th witness, BEAUVAIS,—States generally that Lamb succeeded Goodwin, but on being pressed to state when he saw Lamb there for the first time, he says it was "a little while *after* he bought it."

5th witness, Stafford,—Says in general terms that Lamb succeeded Goodwin in 1833, but in cross-examination he admits that he cannot say when he saw Goodwin there for the last time.

6th witness, Mahon,—Proves nothing.

7th witness, Richardson,—*Thinks* that defendant was residing in Goodwin's house when the paper in question was signed.

The only other point in this case is the right of *retention* claimed by defendant, until his *impenses* be paid, and the case of Lawrence and Stuart (6 L. C. Law Rep. p. 275) is relied on. In that case the defendant and his *auteurs* held for twenty-one years under a lease from the crown, and continued in possession after that time almost by tacit reconduction, and the Court of Appeals held (although the Superior Court ruled otherwise), that the defendant, under the circumstances, might exercise the *droit de retention.* But this case has plainly no analogous application to the present one, where the defendant and his predecessors were mere squatters. Moreover, the Superior Court here has held, *since* the rendering of that judgment, that a possessor such as the defendant has no right to a *retention* for his improvements. *Vide* Lane and al, vs. Delogé, 1., L. C. Jurist, page 3.

Robertson, Q.C., for respondent, submitted the following points:

1. That the prescription of thirty years, as well by Goodwin as by defendant, from 1807 to the date of the institution of the action, is clearly established.

On this point the attention of the Court is directed to the evidence of record, and to the epitome of the leading statements of the witnesses examined in both cases, as quoted in the *factum* in the other case. It will be seen that the houses in which Goodwin and Lamb resided were on the upper part of the lot, namely on lot 16, but that the possession of both extended down to the line of Hemmingford. That the lot 16 was sub-divided into two lots by Livingston, at the request of Brown, the agent of the Seignior, some time about 1834.

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The position of lot 16 will be best seen on looking at the plan and survey of the seigniory, fyled in this cause, annexed to the copy of the petition of L. G. Brown, made in 1831. The situation of lot 16 on the English River will at once be seen, and it is manifest that Russeltown was then divided into three sections; that the lot shown on said plan, being the land in dispute in these two cases, was lot 16 in the 3rd section. The lot 17 did not then exist.

The ruling of the Court, which prevented the defendant from showing as fully as in the other case the extent of the defendant's possession down to the Hemmingford Line, and the fact that no line or division fence or boundary ever existed, cutting the lot 16 into two lots at right angles with the side lines, is not of so much consequence, seeing the dismissal of the action, but it is submitted that the rulings are in manifest opposition to the law of facts as disclosed in the pleadings.—See, as to prescription, Ferriere, 118 Art., Cout., p. 425; 1 Duplessis, p. 500; Troplong Privilèges, p. 919; Vazeille Pres., p. 42; 1 Troplong Privilèges, No. 187.

2. That the powers of attorney and titles of plaintiff and his alleged auteurs, Ellice and Colville *et al* are not legally established.

Gibb, notary (31 of record), produces the power of attorney, A. and B.—the one A. of the 20th July, 1851, from E. Ellice to S. Gerrard and L. G. Brown—the power C. being from Andrew Colville and others to the same parties, dated 22nd August, 1851, stating that "they formed part of plaintiff's Exhibit No. 4,"—the Exhibit 4 being the deed from *Ellice* to the *plaintiff*.

The deed to plaintiff from Edward Ellice, through James Keith, his attorney, under which the deed to plaintiff (No. 6 of Record) was passed the 2nd of October, 1855. Mr. Keith's power is declared to be "by letter of attorney executed at London aforesaid, on the 6th February, 1852." This power of attorney from Ellice to Keith (copy fyled in this cause marked A. 32 and 33 of Record) declares that the sale from Andrew Colville and others to Edward Ellice was passed before Gibb and Colleague, N.P., *on the 20th October*, 1851. The plaintiff's declaration alleges the deed to have been passed on the 8th May, 1852, as appears by No. 5 of Record. So that Ellice is not shewn to have been proprietor at the time of his power of attorney to Keith.

No. 29 of Record purports to be power of attorney to Eden Colville and James Keith, of the 20th November, 1841, from Edward Ellice, to convey the seigniory to Andrew Colville *et al.*, who, by No. 30 of Record, name the same attorney to accept the conveyance. The only evidence as to the execution of these powers of attorney is that of James Keith (No. 30 of Record) who speaks to the signature of Edward Ellice to the powers of atttorney A. and C., and to the signature of his uncle, James Keith, on C. The paper 32 and 33 of Record is a copy (certified by the prothonotary) of the power of attorney, of 6th February, 1852. The original powers of attorney, C. and D., are detached from the notarial minutes of H. Griffin.—See Deposition (26 of Record.)

It is submitted, that the Consolidated Statutes of Lower Canada, chap. 90, sect. 12, 13, and 14, ought not to be held applicable to this case, and that even if held applicable, the provisions of the Act have not been complied with.

3. That the letters patent to EDWARD ELLICE could convey, and were in

tended to convey, no new territory, and afford no such evidence of his title as to enable plaintiffs to sustain the action.

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It is submitted:

That the "Act to provide for the extinction of feudal and seigniorial rights and burdens on lands held *à titre de fief* and *à titre de cens* in the Province of Lower Canada, and for the gradual conversion of these tenures into the tenure of free and common soccage" (6 Geo. 4, c. 59), made provision in express terms for the surrender to his Majesty of such "parts and parcels of fiefs as might remain in the possession of the seigniors *ungranted*, and not held *à titre de fief*, or *à titre de cens*," and for a "*fresh grant* of such parts and parcels in free and common soccage."

That the letters patent make a fresh grant in the very same words as to limits, boundaries, and extent, as are contained in the deed of surrender (a copy of which deed is fyled by the defendant) and this *ex necessitate*, the surrender being made for a special object, that of effecting a change of tenure.

That after the re-grant, Mr. Ellice's title to the seigniory as proprietor, remained, as to its extent, precisely as before the surrender; and that as to the territorial limits of the seigniory, Mr. Ellice could not change them by a surrender which was strictly his own *voluntary* act.

That in this action and on the issues tendered by the pleas, the plaintiffs were bound to produce and prove Mr. Ellice's prior titles, and that nothing in the record shows Mr. Ellice even to have had *any title whatever* to any part of the seigniory, unless indeed it can be held that Mr. Ellice by his own act could make a title for himself, or modify it, or destroy the rights of third parties setting up prior adverse titles.

That all such third parties, whatever be the nature of their title, whether held from an adjoining seignior, or as *censitaire*, or by purchase or prescription, are entitled to raise issues of fact in a petitory action, such as that brought by plaintiff as to whether the land claimed is situated within the limits of Mr. Ellice's titles previous to the surrender, and to put the plaintiff to proof of his own title and of Mr. Ellice's title anterior to, and irrespective of, the letters patent.

That the plaintiffs' counsel strained and misapplied the maxim *omnia præsumuntur*, &c., in contending—1. That the Court were bound to presume from the letters patent to Mr. Ellice, that he was proprietor in fact and incontrovertibly before the surrender, of all the land therein mentioned as *ungranted*.

2. That the old limits of the seigniory must be taken as identical with those given in the deed of surrender and letters patent, and cannot be inquired into as is claimed by the defendant.

3. That Mr. Ellice had a valid title prior to the surrender, although none is fyled.

The pretension of a substantive direct grant from the Crown to Mr. Ellice of all the territory from the St Lawrence to the Hemmingford Line, be it more or less than the whole limits, strongly insisted on by plaintiffs' counsel, is expressly contradicted, as well by the terms of the deed of surrender and of the patent, as by the plaintiff's declaration. And besides, the wild lands of the Crown could not be granted under the Act for the extinction of feudal burdens. The allega-

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tion of valuable consideration having been paid by Mr. Ellice to the Crown for such substantive direct grant is wholly unsupported by evidence, the letters patent acknowledging merely the receipt of "a just and reasonable sum of money" for the commutation of seigniorial rights, duties and dues vested in the Crown. The Crown received a consideration for the surrender of its rights, and Mr. Ellice an equivalent for his money in the change of tenure, but there is not a word in the patent, or in the proof in this cause, of a fresh substantive grant to Mr. Ellice of wild or other lands belonging to the Crown.

4. That under the pleadings and proof in this cause, AN ARPENTAGE must have been ordered to ascertain whether Russeltown and the lots in dispute fall within the limits of the seigniory, as owned by Mr. Ellice at the date of the surrender, and as originally conceded.

The Court is referred to the plan of LALANNE and BARRETT, the copy of the deposition of Lalanne and Walsh produced in this cause, and to Mr. Barrett's deposition. It is not pretended that the question of the limits is established *beyond dispute* by the evidence of record. It cannot be decided by examination of witnesses at *Enquête.* Mr. Barrett's deposition established that in 1843 he and another sworn surveyor, Mr. Lalanne, since dead, surveyed the front of the seigniory, six leagues along the river St. Lawrence, and that they found the extent of the Gore on the west side of the seigniory to consist of 8,000 acres, and of the Gore in rear of over 24,000 acres beyond the six leagues by six, mentioned in the original grant. The survey was made by scaling along the river.

The plan shows two lines, one parallel with the line of Hemmingford, the other not, either of which would give Ellice six leagues by six, but would not include the lots in dispute. It will be seen also that the rear line of the seigniory, if established according to the pretensions of the plaintiff, would be upwards of *twenty* miles in length instead of eighteen. The west side line of the seigniory, *starting from the point B in the plan*, is stated as being ten arpents less than six leagues. It is submitted, that the main question raised by the pleadings,—by the allegation in defendant's plea on the one hand, "that at the date of the surrender the "seigniory was comprised within the original limits before mentioned, and did "not comprise or comprehend any part or portion of the tract of land known as "Russeltown,"—is not to be settled at *Enquête*, by parole evidence, nor by presumption, nor by the sworn survey and plan of Lalanne and Barrett, nor by indirect recognitions of particular boundaries to be found in surveyor's reports, nor by the voluntary surrender of Mr. Ellice, followed by letters patent, but must be settled in the usual course of law, by a judicial decision rendered on conclusive evidence, and after a report of surveyors named by the parties, and in default thereof by the Court.

This point only becomes of importance, as shewing that in any event the pretension thus formally raised should be submitted to experts.

How this report is to be made, in what way the boundaries are to be run, whether in one or other of the several modes referred to by Mr. Barrett, is to be determined hereafter, in case the cause should be sent back to the Superior Court. But the question of limits must be judicially determined, and indeed, notwithstanding the views earnestly expressed by the Counsel in the case as to the effect

of the deed of surrender and the letters patent, the Court mya be disposed to say, that the *controverted point* as to the limits, must be first ascertained: that the Court must have the means of deciding whether it is *a fact* that Mr. Ellice surrendered and obtained a re-grant of some 30 or 40,000 acres of land more than was covered by his (*presumed*) titles, as derived from the original proprietors of the seigniory. The *fact* being ascertained, its *effect* and consequences on the validity or invalidity of the surrender and patent may then be decided upon.

5. That the judgment appealed from is correct, in holding that since Goodwin was in possession from 1807, to the date of the letters patent in 1832, and the defendant since that date, " the sole right of the seignior was to claim from " him such rights and dues as he, the said Goodwin, could be compelled to render " towards the seignior, and to which the said lot was liable under the seigniorial " tenure aforesaid and no others." See No. 113, McCallum vs. Grey, decided in K. B., Montreal, 18th April, 1828, where amongst other considerations of the judgment will be found the following:—

" Et considérant que, par les lois, usages et coutume de cette province, et afin de faciliter et encourager l'établissement des terres incultes tenues en fief et seigneurie dans la dite province, tout sujet de Sa Majesté a droit de demander et obtenir de tout seigneur possédant des terres incultes et non concédées dans la seigneurie, un lot, ou concession d'une partie des dites terres incultes et non concédées pour être par tout tel sujet, ses hoirs et ayant cause, tenu et possédé comme leur propre bien-fonds, pour toujours, à la condition de cultiver et améliorer les dites terres incultes et de payer à chaque seigneur les rentes, droits et reconnaissances raisonnables, accoutumés et ordinaires, qui par la tenure féodale en force en cette province, doivent être payés, faits et accordés à tels seigneurs par leurs locataires ou censitaires, pour tels ou semblables lots de terres; le dit James McCallum en sa qualité de seigneur de la dite seigneurie de St. Jacques, ni les demandeurs par reprise d'instance ses représentants légaux, ne pouvaient maintenir la présente action pour ôter au dit William Grey la possession et l'occupation par lui obtenues des dits lots de terre, mais que le dit William Grey par et en vertu du consentement et la promesse susdits du dit feu James McCallum, *et par la possession et l'occupation susdites par lui, le dit William Grey tenues et possédées comme susdit*, il (le dit William Grey) a acquis, et a maintenant le droit de retenir et posséder le dit lots de terre dans la dite seigneurie de St. Jacques, et d'obtenir des dits demandeurs par reprise d'instance, ou autres représentants légaux du feu James McCallum, un bon et suffisant titre de l'acte de transport du dit lot de transport à lui, le dit William Grey, ses hoirs et ayant cause, à la condition que le dit William Gray paiera et allouera aux dits demandeurs par reprise d'instance ou représentants légaux du dit feu James McCallum, étant seigneurs et propriétaires de la dite seigneurie de St. Jacques, les rentes, redevances, profits, et reconnaissances raisonnables, accoutumés et ordinaires qu'ont droit par la loi de demander et obtenir comme considération légale pour les dits lots de terre les dits demandeurs par reprise d'instance ou autres représentants légaux du dit feu James McCallum comme seigneur et propriétaires susdits; et il est en conséquence considéré et jugé que la présente action soit

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renvoyée avec dépens au dit William Grey, sauf aux dits demandeurs par reprise d'instance leurs recours tel qu'ils seront conseillés." See 3rd No. Seigniorial Pamphlets, p. 82.

Also, No. 1664, Judgment K.B., Montreal, of 20th June, 1833, Boston *vs.* Grey; confirmed in the Court of Appeals 20th January, 1834.

Seigniorial Rep., A, p. 154, Questions 8, 9, 10, 11, 12, 16, 21; *Arrêts* 1711, 1732.

Nouveau-Denisart *vs. cens.*, sect. 2, Nos. 5, 6.

In answer to this, it was asked why such deed was not demanded; but in this action it could not be demanded, and, in the next place, the Gore of Russeltown had never been recognised as being within the seigniory, nor were the legal dues which censitaires were bound to pay ever finally settled.

The attention of the Court is directed to the papers fyled at *Enquête*, as per list (43 of Record), and to admission (No. 60 of Record).

The papers "D" contain copy of declaration, exceptions, answer, and judgment, in a case (No 1716, Richardson, curator to Ellice, *vs.* Manning,) brought in 1828.

This was an action by the Seigniors, demanding of defendant "to pass titre "*nouvel et reconnaissance des droits seigneuriaux*," and was contested on the ground that the lands on the Gore were not included in the seigniory. The judgment of the 14th February, 1831, dismisses the action, without assigning any motives; but the nature of the pleas, and the copies of depositions fyled, shew the contest to have been on the question of whether the lands were within the seigniory. See "F," deposition of Lalanné, surveyor; and "G," copy of plan fyled therein.

See also "L," copy of declaration and proceedings in a petitory action, Right Hon. Edward Ellice *vs.* Jeremiah Dunn.

The deposition of James Keith, one of plaintiff's witnesses (No. 31 of Record), shews clearly, that it was only by general and voluntary settlement, that the inhabitants of Russeltown, in 1853, agreed to take deeds at nominal rates from the seigniors. No kind of evidence is produced in this cause to show that, prior to this, the seigniors had ever been able to enforce any seigniorial rights or pretensions at law within that Gore. It is to be noticed, that in the petitory action, the title of Ellice is traced no farther back than the letters patent; and Mr. Keith admits he is not aware how the seignory or the lots in question became vested in Mr. Ellice.

6. That the plaintiff has shewn no tradition to himself, and no possession of the lots in Ellice, anterior to or since Goodwin's possession, and this was necessary to enable him to maintain his action.

Pothier Propriété, No. 317, 2 L. C. R., p. 7; Brochu *vs.* Fitzback, 12 do., p. 98; Gibson *vs.* Weare, 12 do., p. 200; Foisy *vs.* Demers, 10 do., p. 22; Osgood *vs.* Kellam, 2 Rev. de jur, p. 102; Bowen *vs.* Ayr, 3 L. C. Rep., p. 310; Stuart *vs.* Bowman.

The letters patent from the Crown cannot in this cause be held to have vested Mr. Ellice with the rights of a patentee or grantee of Crown lands, not with any of the prerogatives of the Crown as to prescription, or as to waste lands vesting in the Crown.

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This is not directly pretended by the pleadings, but is done in argument by assertions such as these—"You cannot claim prescription against the Crown; if there was a *Gore* it was Crown Land, and the Crown has recognised the plaintiffs' rights. You have neither paid the Crown for the land nor will you pay us. You are a spoliator and intruder, and have no right to dispute our title. The *Crown* must take proceeding if the plaintiffs have more land than they are entitled to. The possession of the defendant and his co-trespassers was not only in defiant disregard of the plaintiffs' right of property but of law, since the tract, if not belonging to the plaintiffs, was the property of the Crown.

Were any answer required to pretensions such as these, it might be given in the language of the law, "*Nullum tempus, &c.*, is the KING's plea; *Vigilantibus non dormientibus, &c.*, the SUBJECT's." "The king's grantee cannot under grant from the king invoke the king's prerogative in an action in his own name." "To take advantage of the prerogative the suit must be in the KING's name." "In all cases where a common person is put to an action, there, upon office found, the king is put to his *scire facias*, for an office entitles the king to an action only and not to an entry."

See 2 Blackstone 258.

Bacon's Ab. vs. "Prerogative," p. 465, 467, 520.

1 Duplessis, p. 512, 522.

Traité de la Souveraineté du Roi, p. 93–95.

As against the Crown Mr. Ellice could not have pleaded the re-grant as shewing that any *Vuide* or *Gore* had become vested in him. The answer would have been that nothing was intended to be reconveyed but the lands in the seigniory, the tenure of which was commuted.

7. The respondent submits, that he is entitled to invoke, with strictness, every rule of law in his favor, in a case like this. The evidence of Mr. Keith shews that the plaintiff, when he bought the land, was well aware of the dismissal of Mary Ball's suit of the settlement of the Russeltown difficulties. He bought with his eyes open, and with a knowledge of the weakness of the seigniors' title, and with the special clause, "that, if it shall be necessary to do so, the said "purchaser shall at his own risk, costs and charges, take proceedings against any "squatter or others who may have usurped or taken wrongful possession of the "said land, and that the said vendor shall incur no responsibility or warranty in "respect of, or touching the result of any such proceedings, or the purchasers "*obtaining possession of the said lot.*" He speculated upon getting the improvements of the defendant for less than the twentieth part of their value, and of enriching himself at his expense.

MEREDITH, J.:—The first question to be considered in this cause is, as to whether it is established that the lot in dispute, being No. 16 in the 5th range of Russeltown, forms part of the Seigniory of Beauharnois.

I am of opinion that the letters patent from the crown, bearing date the tenth of May, 1833, which expressly admit that Russeltown is within the limits of the Seigniory of Beauharnois, are sufficient proof of that fact as against the respondent, who, according to his own showing, is the representative of a person who is proved to have entered upon the lot in question without any title.

It is true, that in a petitory action the plaintiff cannot recover merely upon a

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deed from a private person, executed during the adverse possession of the defendant, but in such a case there would be no presumption that the person making the grant was proprietor; on the contrary, the presumption of ownership would be in favor of the possession. But the case is otherwise when the action is founded on letters patent from the crown; for in contemplation of law the sovereign was originally the owner of all the land in the colony, and is still the owner of all ungranted land; and when, by letters patent under the great seal, the right of a subject to any land within the colony is admitted, there is, to say the least, a strong presumption in favor of the legality of the grant, and there is the less difficulty in acting upon that presumption in the present case, because the defendant is the representative of a person who, it is certain, went upon the land in question without any title.

At the same time, however, that I hold the letters patent to be *primâ facie* evidence in favor of the Seignior and his representatives, of the extent and limits of the Seigniory, I also hold that these letters patent cannot defeat or impair the rights of any other person in relation to land within the limits of that Seigniory. And this brings me to the consideration of the second question presented by the case, namely:—

Had David Goodwin, the person from whom the respondent alleges he holds the lot in question, obtained any right to that lot at the date of the letters patent in favor of Mr. Ellice, which could prevent a commutation of the tenure by which it was held?

The judgment of the Seigniorial Court establishes, "That before the session of "this country the laws obliged the seigniors to grant (conceder) their lands *on* "*demand* at a rent charge *à titre de redevance* (1) and that those laws were in "force at the passing of the Seigniorial Act of 1854."

But in the present case David Goodwin went upon the land in question without any permission, either express or implied, from the Seignior, and never either directly or indirectly made any *demand* of a concession, and as I think such a demand was absolutely necessary, in order to give a settler a claim of any kind to the land upon which he settled, I am of opinion that at the date of the letters patent the lot of land in question (the concession of which no demand had been made) formed part of the "ungranted lands" within the limits of the Seigniory of Beauharnois, and therefore the tenure by which the lot was held was lawfully commuted by the letters patent.

The next part of the case to be considered is, the defendant's plea of prescription. As to this point the appellant contends that the crown, for more than seven months before the date of the letters patent, had been in possession of the lot in question, and the ownership of the lot by the crown prevented the possibility of prescription.

I do not think this contention can be maintained; because the object of the statute was simply to change the tenure, and the proceedings under it cannot, as already observed, be allowed to defeat the rights of third parties.

The appellant also contends that the paper pleaded by the respondent is not

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sufficient in law to entitle the defendant to join Goodwin's possession to his own; such junction of possession requiring a title "*translatif de propriété*" from Goodwin to the defendant.

The paper upon which the respondent relies is in the following words:—

"Russeltown, Sep, 21, 1833. This may certify that I do this day sell, convey, "and give up all my right, title, and claim that I have or ever had to the lot of "land I now reside on, to James Lamb, being lot No. seventeen of the third "section."

(Signed) DAVID GOODWIN.

(Signed)

JAMES RICHARDSON,
PATRICK MAHON, } *Witnesses.*

This paper is subject to two objections, Firstly, being *sous seing privé*, it has no date as regards third parties. It therefore does not show that it was executed before the commencement of the defendant's possession, or even before the institution of the appellant's action, and consequently it does not appear that the respondent, during his possession, was as such possessor the *successor à titre particulier* of Goodwin, the former possessor. This objection struck me forcibly at the argument, and even now I am not prepared to say that in strict principle it is unfounded. We find however that, according to the very high authority of Pothier, a paper *sous seing privé* may be a sufficient title to support a prescription of ten years. (1) Pothier says:—"Si la vente qui a été faite, de l'héritage au "possesseur ou tout autre juste titre, d'où procède sa possession, avait été fait "par un acte sous signatures privées, le possesseur justifierait suffisamment de ce "titre, par le rapport de l'acte." But he adds "mais comme les écritures privées "font bonne foi même contre le tiers, que les actes qu'elles contiennent sont "intervenues, mais qu'elles ne font pas également foi contre les tiers du temps "auquel ils sont intervenus à cause de la facilité qu'il y a de les antidater "comme nous l'avons vu dans notre traité des obligations No. 749, le possesseur "qui justifie du titre d'où sa possession procède, par le rapport de l'acte sous "signatures privées qui en dépasse, doit d'ailleurs prouver par témoins le temps "qu'a duré sa possession qui a procédé de ce titre."

Pothier cites, as confirming his view, an *arrêt* rendered according to the conclusions of Mr. Fleury, Avocat General, on the 29th December, 1716. (2)

Toullier (3) also says, (speaking of acts) "*sous seing privé*," mais quoique les actes ne font pas preuve de leur date contre les tiers *on a toujours pensé* qu'ils forment un commencement de preuve écrite suffisant pour faire admettre à prouver la date par témoins, ainsi l'acquéreur de bonne foi qui oppose à l'action de revendication un contrat d'acquets *sous seing privé* d'une date antérieure aux dix ans requis pour la prescription peut être admis à prouver par témoins que la possession qui procède de son titre remonte au delà de ces dix années" and he refers to the opinion of Pothier and the arret of 1716.

Troplong (4) on the other hand, condemns this doctrine. He admits "that an

(1) Pothier, prescription No. 99.
(2) Journal des Audiences, 6 Vol. p. 347.
(3) Toullier, vol. 8, No. 240, p. 366.
(4) Troplong, prescription, No. 913.

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"acte *sous seing privé* may be the basis of a plea of prescription, but," he adds, "mais le tiers ne devra étre obligé d'y avoir égard qu'à partir du jour de l'enrégis- "trement ou de l'évènement qui lui a donné date certaine. Article 1328 "c. c.—s'il en était autrement un usurpateur aurait mille facilités désastreuses "pour se faire souscrire par le premier complaisant un acte antidaté. Le point "initial de la présentation décennale et vicennale est trop important à discuter "soit sous le rapport du titre soit sous le rapport de la bonne foi pour qu'on le "fasse dépendre d'une date sans certitude."

And he refers to Vazeille in refuting (what he terms) the error of Pothier.

The reasons urged by Troplong seem to me, I must say, in harmony with the general principle of our law, respecting acts *sous seing privé;* still, required as we are, in the absence of any express provision of law bearing on this subject, to choose between the doctrine supported by Troplong and Vazeille, and that of Pothier and Toullier, I think we ought to be guided by the latter, because I believe it has long and generally been regarded as a true exposition of our law on this subject,* (the words of Toullier are: *on a toujours pensé*) and further, because a deviation from that doctrine would subject a numerous and deserving class of our population to very hurtful, not to say unjust, consequences.

We know that in a large portion of this Province, I refer to the Townships, the settlers were for many years compelled, as a matter of necessity, to resort to *actes sous seing privé* in disposing of their property, and were it to be held that such instruments could not be used even to support a plea of prescription, wide spread confusion and injustice could not fail to be the result. There are therefore reasons that may be urged in this country which could not have been urged in France for admitting the *sous seing privé* as evidence in support of pleas of prescription.

Adopting then, as I am disposed to do, the opinions of Pothier and Toullier, I hold that the instrument produced by the respondent for the purpose of connecting his possession with that of Goodwin, ought not to be declared insufficient namely on the ground that it is *sous seing privé.*

Before leaving this branch of the case, I may observe that the opinions of Troplong and Vazeille, to which I have adverted, refer particularly to *actes sous seing privé* offered as the basis of a ten years' prescription, and it may be thought that the documentary evidence offered in support of a prescription of thirty years ought to be viewed with more indulgence than the documentary evidence offered in support of a prescription of ten years, but to me it seems that the objection as to *actes sous seing privé* being without date as to third parties, could hardly be maintained in the one case and rejected in the other.

The second objection to that paper is, that in truth it is not a conveyance, and is in fact nothing more than a certificate.

The answer to that objection is that the paper is a good *commencement de preuve par ecrit* more particularly, supported as it is by a long possession; and that in such a case the title required for *prescription* may be supported by parol evidence. Pothier says:

"Le possesseur n'est pas reçu à la preuve testimoniale de la vérité ou tout "autre titre d'où il prétend que procéde sa possession; sinon en trois cas."

And the second of the three cases is "Lorsqu'il a déjà un commencement de preuve par écrit." *

In the present case the paper and the parol evidence taken together satisfactorily establish the sale from Goodwin to the Respondent.

The appellant also objected to the paper produced, on the ground that it does not give the correct number of the lot in dispute. But the property sold is described as that on which the vendor resided; and the fact of the vendor having resided on the same lot for a number of years, and of his never having resided on any other lot in the same township, removes all doubts as to the identity of the lot.

It was also contended that the defendant failed to prove that his possession followed immediately that of Goodwin, but I think the evidence as to this point is as conclusive as could be expected, considering the length of time that has elapsed since Goodwin left the property.

Moreover, there is no reason for contending that any party possessed between the possession of Goodwin and that of the respondent,† which is a point of great importance. The objection that the execution of the paper is not sufficiently proved ought not, I think, to be maintained. It is true the signature of Mahon was written by the other witness Richardson, but Mahon recollects that he was in Mr. Goodwin's employ at the time that he was called in as a witness, that he saw both of the parties to the instrument, and he also recollects seeing Mr. Richardson write. He thus confirms the evidence of Richardson, which is corroborated by the indisputable facts of the case.

In fine it was said that a *censitaire* cannot prescribe against his seignior. That is true as regards the *domaine directe* but not as regards the *domaine utile*.

Upon the whole I am of opinion that the execution of the paper in question is legally proved, and I am disposed to hold that that paper is sufficient to connect the possession of the respondent with that of Goodwin; and if this be admitted, then as the fact of thirty years' possession is clearly established in this case, the plea of prescription ought to be maintained, and the judgment confirmed on that ground.

The Court of Appeal confirmed the judgment of the Court below, on the sole ground of prescription, and declined to adopt the reasons assigned in that judgment, the wording of the judgment in Appeal being as follows:—"The court,* * * * * considering that the defendant's plea of peremptory exception fyled in the Superior Court, alleging that he, the defendant, hath held and possessed publicly and in good faith, for more than thirty years immediately before the institution of this action of the said James MacDonald, hath been proved by the evidence adduced in this cause, and that by reason of such possession the defendant, respondent in this Court, hath acquired a title by prescription to the said land; and that in the judgment pronounced by the Superior Court of Montreal, on the twenty-eighth day of June, one thousand eight hundred and sixty-two, dismissing the action of the said plaintiff, appellant in this Court, with costs, there is no error, this Court doth confirm the said judgment, and doth

* Pothier's Prescription, No. 100.

† Dunod's Prescription, p. 20.

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condemn the appellant to pay to the respondent the costs by him incurred in this Court."*

Judgment of the S. C. confirmed.

Strachan Bethune, Q. C., for appellant.
A. & W. Robertson, for respondent.
A. A. Dorion, Q. C., counsel.
(S B.)

MONTREAL, 1st JUNE, 1864.

Coram DUVAL, C. J., MEREDITH, J., MONDELET, J., DRUMMOND, J., and BADGLEY, J.

DAME ROSALIE JARRY & *Vir*,
Adjudicataire in Court below,
APPELLANTS;

AND

THE TRUST AND LOAN COMPANY OF UPPER CANADA,
Opposant in Court below,
RESPONDENTS.

FOLLE ENCHÈRE.—MARRIED WOMAN.

HELD.—That a rule for *folle enchère*, obtained against a married woman separated from her husband as to property, and which has been served upon the husband, is good and valid and will be declared absolute, even though in the proceedings on the application for *folle enchère* the husband was not *mis en cause*, nor any mention made of him for the purpose of authorising his wife.

This is he second appeal which has taken place in this cause. The facts of the case and the first appeal are reported at 8 L. C. Jur., p. 29, and the only difference between the former and latter cases consists in the fact that in the former case reported as above, the rule for *folle enchère* was not served upon the husband, and for that reason was set aside by the Court of Appeals as invalid; while in the latter case, now reported, the rule for *folle enchère was* served upon the husband.

The judgment of the Court below, from which the present appeal was made, was recorded as follows:—

" La Cour après avoir entendu la dite opposante, la Compagnie de Dépôt et de Prêt du Haut-Canda et la dite Rosalie Jarry, adjudicataire, par leurs avocats, au mérite de la règle pour une folle enchère, avoir examiné la procédure et avoir délibéré, déclare la dite règle absolue, en autant qu'il appert par la réponse et déclaration écrite du shérif de ce District faite et produite en cette cause le vingt septième jour de Novembre mil huit cent soixante et un, à la motion des opposants, le requérant de montrer cause pourquoi il n'avait pas payé aux dits opposants les différentes sommes d'argent qui leur ont été accordées parle jugement de distribution, tel que réformé et dûment homologué suivant la loi et livré selon le cours ordinaire de la procédure et de la loi au dit shérif, que la dite dame Rosalie Jarry, la demanderesse et adjudicataire de l'immeuble ci-après décrit, a négligé et refusé et néglige et refuse de payer au dit shérif le montant du prix d'adjudication du dit immeuble, savoir: la somme de cinq cent vingt-cinq louis quatre chelins et sept deniers, cours actuel, ainsi qu'elle était tenu de

* This cause is now before the Privy Council, having been appealed to Her Majesty in Her P.C.

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faire par la loi et par la dit jugement de distribution tel que reformé, le dit immeuble étant designé dans la cédule au rapport fait par le dit shérif au writ d'exécution *Fieri Facias de Terris* émané en cette cause et marqué A comme suit, savoir :

"No. 1. Un lot de terre sis et situé en la cité de Montréal de la contenance "de quarante pieds de largeur sur quatre-vingt-dix-neuf pieds de profondeur, "tenant par devant à la rue Ste-Catherine, en arrière par les héritiers Guy, du "côté Ouest appartenant aux dits héritiers Guy et Frederick Finlay, et du côté "Est à Pierre Labelle, avec une maison en briques à un étage et une écurie en "briques dessus construites : "

Ordonne qu'il émane suivant la loi un writ de *Venditioni Exponas* ordonnant au dit shérif de procéder aprés les avis et publications ordinaires à la vente *de novo* du dit lot de terre adjugé comme susdit à la dite dame Rosalie Jarry, à la folle enchère, frais et charges de la dite dame Rosalie Jarry, le tout avec dépens."

The pretensions of the appellants urged before the Court of Appeals were as follows :

La nouvelle régle pour folle enchère qui a été déclarée absolue le dix-huit février 1863, a bien, il est vrai, été signifiée au mari de l'appelante; mais ce dernier n'a jamais été assigné dans la régle même, à autoriser son épouse à répondre à cette instance.

Rien, dans le libellé de la règle, indique que le mari est assigné ou mis en cause dans la demande en folle enchère : pas un mot qui fasse voir pourquoi cette règle lui est signifiée.

L'assignation d'une partie ne consiste pas seulement dans la signification des pièces qui lui est faite; mais elle exige aussi qu'il soit fait mention dans la procédure même du nom de l'assigné et des raisons pour lesquelles cette signification lui est faite.

Dans une action que l'on voudrait diriger contre une femme mariée, il ne suffirait pas de signifier une copie de l'action au mari sans l'appeler en même temps dans la déclaration et le bref de sommation à autoriser son épouse dans l'instance : il en doit être de même de la demande pour folle enchère qui est une instance immobilière.

Dans le cas actuel, la règle pour folle enchère aurait dû mentionner que l'époux de l'appelante était appelé et mis en cause à l'effet d'autoriser cette dernière à répondre à cette instance : sans cette assignation formelle, le mari n'était pas tenu de comparaître et n'a pas, de fait, comparu sur le retour de la règle.

Toute la procédure pour folle enchère se trouve donc avoir été débattue entre l'intimée et l'appelante seule, sans la participation ni l'autorisation du mari de cette derniere : elle est par conséquent, d'une nullité absolue.

Même en admettant que les appelants auraient été régulièrement assignés sur la règle pour folle enchère, cette règle était prématurée et ne pouvait pas être déclarée absolue.

L'appelante, aux termes de la loi, ayant retenu entre ses mains le prix de son adjudication en donnant le cautionnement reduis dans ce cas, a le droit de garder cet argent jusqu'à la distribution définitive du produit de la vente.

Or, cette distribution définitive du prix d'adjudication n'a jamais été légale-

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ment faite; car il se trouve encore dans le dossier quatre autres contestations de la collocation de l'appelante, qui sont encore pendantes.

Le jugement par lequel le protonotaire de la Cour Supérieure a homologué en vacance le nouveau rapport de distribution, sans égard aux quatre contestations actuellement pendantes, est une nullité absolue: 1°. Parce qu'un rapport de distribution ne peut être homologué avant que les contestations de ce rapport n'aient été décidées par la Cour; 2°. Parce qu'un rapport de distribution contesté ne peut être homologué qu'en terme, Cour-tenante, et non en vacance. Cette usurpation du pouvoir judiciare par le protonotaire ne méritait pas l'honneur et les frais d'un appel; c'est un procédé tellement illégal et arbitraire que la nullité doit en être déclarée de suite et de plein droit, du moment où il se présente sous les yeux de la Cour, à quelqu' étage de la procédure que ce puisse être.

D'ailleurs la règle pour folle enchère a été déclarée absolue prématurément, sans aucune inscription à l'enquête pour mettre l'appelante en demeure de prouver le paiement de son prix d'adjudication, qu'elle alléguait avoir fait.

It was contended on behalf of the respondent that the reasons of Appeal were wholly insufficient, and that the Appeal was brought for the purpose of enabling the appellant Dame Rosalie Jarry to retain possession for a short time longer of the property which was adjudged to her on the 21st November, 1859, and to receive and enjoy the rents during that time to the detriment of the rights of the collocated creditors.

MONDELET, J., *dissentiens*, said:—Le mari n'est pas en cause, il eut dû l'être par assignation, mais son nom n'étant pas dans la règle, il n'a pu être assignée, il ne l'a pas été. Tout est nul. Ceci devrait être par conséquent, infirmé; la folle enchère, dans l'état de la cause, ne pouvait pas juridiquement être accordée: l'appelante, cela va sans dire, devrait avoir les frais.

Mais la majorité de la Cour, est d'avis de confirmer le jugement.

BADGLEY, J., said—This is an appeal from a judgment of the Superior Court making absolute a rule for the issue of a writ of *Venditioni exponas*, for the sale of the defendant's lands, against the female plaintiff, the adjudicataire of the same at the decret.

The opposants were mortgaged creditors of the defendant for moneys advanced to him, and upon the seizure of his real property at the female plaintiff's suit, filed their *opposition à fin de conserver* to be paid out of the proceeds.

The female plaintiff, the appellant, had obtained judgment *en séparation de biens* against her husband the defendant, and in execution thereof, seized his real property, which she purchased at the sheriff's decret, having been thereto specially authorised by her husband the defendant, under his power and authority for that express purpose, consented to by him in the notarial act, deposited with the sheriff at the decret, and returned by that officer with his proceedings upon his writ of fi. fa. de terris.

As plaintiff in the cause, she gave the statutory security to pay the adjudication money if required, and a judgment of distribution having been ordered, whereby the proceeds returned were collocated to the opposants, she failed to pay the amount after notice therefor, and thereupon the opposants obtained in the usual course

a rule against her as non-paying adjudicataire, for a writ of *Venditioni exponas* for the resale of the adjudicated property at her *folle enchère*: the rule did not demand *contrainte* against her. The return upon the rule shows that a copy of it was duly served upon her, and also upon her husband the defendant.

She appeared to the rule and answered in writing, setting out amongst other grounds of informality, to which she alleged that the rule was obnoxious, the following principal one: "Que d'ailleurs la demanderesse adjudicatrice n'est pas "légalement assignée par la règle pour la folle enchère en cette cause;" the defendant, her husband, did not appear to the rule: upon this allegation, the contestation turned, and the judgment of the 18th Feb., 1863, therein was rendered granting the rule. It is from that judgment that this appeal is presented to the Court.

Now from the circumstances above detailed, and from the facts of record, it will be seen that the contestation has arisen in a cause in which the plaintiff duly authorised therefor, obtained judgment *en séparation de biens* against her husband, the defendant, a known usual domestic proceeding between husband and wife; that thereupon she caused his real property to be sold under her writ of fi. fa. de terris, that upon its decret by the sheriff, she was the highest bidder, and secured an adjudication thereof to herself, by producing and fyling with the sheriff, a special instrument, conveying to her power and authority from her husband for that very purpose, executed before notary. and which adjudication moreover was signed for her by her husband the defendant acting as her attorney and agent under the authority of that instrument.

The only question, is, was she authorized by her husband to purchase and thereby subject herself and property to the legal results of the rules adjudged to be absolute against her simply for the issue of the writ of *venditioni exponas*, at her *folle enchère*, for the resale of the adjudged property, and nothing more; no *contrainte par corps* against her having been demanded.

A few cases have been reported having connection with the matter of this contestation; in the 11 L. C. R., p. 6, McDonald vs. McLean, and Wilson opposant, and Doyle, adjudicataire, a rule for *contrainte par corps* was asked for against the adjudicataire, a married woman, for the difference of price of the property sold at her *folle enchère* but refused, *quia* she was not a party to the original cause, and her husband was not notified of the rule against his wife.

In the present case, a previous rule to the same effect made absolute, against the female plaintiff adjudicataire, was also set aside by the Court of Appeals, on 1st September last, for want of formal notice thereof served upon the defendant, although he was the defending party in her cause, and actually authorised her by notarial act to become the adjudicataire of his property.

In a case, 10 L. C. R., p. 457, Cloutier and Cloutier defendant, and Rheaume, opposant, Dion, wife of the defendant, adjudicataire; she was *séparée de biens*, and the rule for *venditioni exponas*, simply at her *folle enchère*, but it was set aside for want of notice to her husband; he was a party in the original cause and record, but she was not.

In the more recent case, 12 L. C. R., p. 33, *Jordan*, appellant, and *Ladriere*

dit *Flamand*, it was held that a motion for *folle enchère* against a married woman *séparée de biens*, the adjudicataire of real estate, and acting therefore under her husband's authority, will be rejected, unless notice of the motion shall have been given to her husband. In this case, Judge Meredith considered that both the wife, adjudicataire, and her husband should have an opportunity of being heard. And Judge Mondelet observes that the wife *séparée de biens* cannot be condemned to *folle enchère*, "*à moins que l'avis de la motion n'ait été signifié à son* "*mari, sans l'autorisation duquel, ou à son refus, celle de la Cour, elle ne peut* "*être entendu.*" The motif of this judgment is, "*à moins que l'avis de la* "*motion n'ait été signifié à son mari.*" Doubtless, the husband should be duly informed of the proceeding, and the wife should be duly authorized to appear in Court, either by her husband or by justice, *quia* the notification to the husband is not the equivalent of his marital *autorisation*, and the interested party ruling her to appear upon his application for *folle enchère*, can neither compel her to appear nor to require *autorisation*, either marital or from justice for the purpose.

This difficulty does not exist here. The plaintiff and defendant, husband and wife, are parties to the cause, and continue such parties until the final completion and realization of the judgment *en séparation*, which she has obtained against him. The *writ de terris* has issued at her suit as plaintiff against his property as defendant, to carry out the judgment between them as parties thereto, both remaining in the cause; as party, defendant, and as her husband, he authorises her, the plaintiff, his wife, to purchase at the decret, the property seized under her writ *de terris* against him, and in fact, as her agent, he purchases for her and in her name, his own property, and signs her name as the purchaser in the usual manner, the adjudication to her having been made under the authority of her husband's special authority therefor in her name deposited by him with the sheriff as her authority to purchase. The case is not terminated here. As plaintiff and party in the cause and as adjudicataire under her husband's authority, she gives the statutory security for the payment by her of the purchase money; and upon her failure to pay the price, the rule issues against her, in her own cause against the defendant her husband, and a copy of the rule is duly served upon both parties respectively. Under these circumstances, it would be difficult to know in what particular the opposants have failed in their proceeding, or upon what grounds the appeal can be sustained. I think it would be dismissed.

Before closing my remarks, I may observe, speaking solely for myself, that my view of the effect of an adjudication subject to *folle enchère*, being a title to the purchased property, does not concur with that of some of my colleagues. The adjudication of real estate is a conditional title, and only becomes absolute upon the payment of the price for which it was adjudged; until then, it is no legal title, it is a mere facultative right, subject to be defeated by the neglect of the ajudicataire to pay the price, and until then no property can pass from justice to the latter; it remains in the hands of justice, subject to resale, or more properly a continuance of the *enchère* of the adjudicataire, which the law holds to be *folle*, or in other words without consideration; another adjudication being thereupon made. The order for the proceeding under the *venditioni exponas*, does not require a re-seizure, it is a matter of procedure only, to con-

tinue the interrupted *décret*, and the penalty imposed by law upon the *folle* adjudicataire of paying the difference between the two adjudications, is really a punishment for his wilful and intentional interruption of judicial proceedings.

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Under our present jurisprudence, it is questionable whether a woman could be subjected to bodily *contrainte* for such *folle enchère*.

MEREDITH, J., said—On a former appeal, in this cause, a judgment obtained by the respondent against the female appellant, was set aside on the ground that a rule for a *folle enchère* against her, although served upon herself, was not served upon her husband. The *considérant* of the judgment of this Court being as follows: "Considérant que la demande ou règle pour *folle enchère* obtenue "contre l'appelante n'a pas été signifiée au mari de la dite appelante, et que par "conséquent toute le procédure sur la dite demande pour *folle enchère* est entachée de nullité, &c., &c."

The defect which caused the first judgment to be set aside, has been remedied in the present instance by a regular service of the rule upon the husband.

This is not denied. On the contrary the appellants, in their factum, say "La "nouvelle règle pour folle enchère qui a été déclarée absolue le 1er Février 1863, "a bien, il est vrai, été signifiée au mari de l'appelante; mais ce dernier n'a "jamais été assignée, dans la règle même à autoriser son épouse à répondre à cette "instance."

And in another part of the factum the appellants contend that: "Le règle "pour folle enchère aurait dû mentionner que l'époux de l'appelante était appelé, "et mis en cause à l'effet d'autoriser cette dernière à répondre à cette instance; "sans cette assignation formelle, le mari n'était pas tenu de comparaître et n'a "pas, de fait, comparu sur le retour de la règle.

These objections seem to rest upon the erroneous supposition, that it was necessary that the female appellant should have been *expressly* authorised either by her husband or by the Court.

Our custom distinguishes between extra judicial proceedings,(*) and judicial proceedings; (†) making it necessary that the wife should be expressly authorised with respect to the former, and not with respect to the latter named articles, Doubts, it appears, did at one time exist as to whether an express authorisation was not necessary even in the case of judicial proceedings (‡), but the weight of authority is in favour of the opinion that in such cases the presence of the husband is sufficient. Auzanet, in his commentary on the 12th art. of the Custom says: "de cet article il s'ensuit que la seule présence du mari en jugement suffit pour la "validité de l'obligation de la femme dans le même jugement, *sans autorisation* "*express*." (§) Ricard also hold that the presence of the husband is all that is necessary; and Ferrière, although he refers to Charondas as being of a contrary opinion, seems to view the matter in the same light as Auzanet and Ricard, and explains the reason for holding the presence of the husband to be sufficient in

(*) Art: of Custom, No. 123.
(†) Art: of Custom, No. 124.
(‡) Ferrière Vol. 3, p. 176, com. Custom of Paris. Art. 124 glose 1er No. 16.
(§) Auzanet com. on Art. 124, p. 162, Grand Coutume, Vol. 3, p. 177. Ricard, opinion cited. Vied also Pothier Puissance de mari No. 75.

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judicial proceedings, as follows; " La raison de la différence est fondée sous l'auto " rité des jugements afin qu'ils ne soient pas nuls, sous prétexte d'une simple for- " malité non observée."*

In the present case the husband and wife are in the cause; both are mentioned in the rule, which has been regularly served upon each of them; and for my part, I am not aware of any irregularity in the proceedings of the respondent which makes it necessary for us to disturb the judgment of the Court below.

Bondy et Fauteux, for appellants. Appeal dismissed.

H. Judah, Q. C., for respondents.

(W. E. H.)

MONTREAL, SEPTEMBER 8th, 1865.

In Appeal from the Circuit Court, District of Montreal.

Coram DUVAL, C J., AYLWIN J., DRUMMOND, J., AND MONDELET, J.

DAVID SINCLAIR *et al.*,

(*Plaintiffs in Court below*,)

APPELLANTS;

AND

WILLIAM HENDERSON *et al.*,

(*Defendants in Court below*,)

RESPONDENTS.

HELD:—That a note given by an insolvent to one of his creditors for the purpose of obtaining his signature to a deed of composition cannot serve as a ground of action against such insolvent, and that the giving of such a note will be considered a fraud upon the other creditors.

Semble—That parol evidence will not be admitted to prove that such a note as the above was given after the signing of the deed of composition, nor to establish anything relating thereto inconsistent with the terms of such deed of composition.

In the month of June, 1861, the respondents declared themselves insolvent. At their instance a deed of composition was drawn up, wherein they bound themselves to pay to their creditors seven shillings and sixpence in the pound on their liabilities, by three instalments, in 6, 12 and 18 months, with interest thereon, from the *thirteenth of June*, 1861, and for which instalments they gave their promissory notes, indorsed by the Honorable Louis Renaud.

Among their creditors was John Sinclair, of Montreal, merchant, to whom the respondents were indebted in the sum of $1123.76.

It appears by the evidence of record, that John Sinclair refused to accept the terms of the deed of composition.

On the 13th of June, 1861, one of the respondents called upon John Sinclair, at his office, and in the presence of his clerk, William Norris, unsuccessfully entreated Sinclair to accept their offer. Sinclair then consented to accept of ten shillings in the pound; the respondents accordingly agreed to pay him at the rate of ten shillings in the pound. As some of the respondents' creditors had then accepted the deed of composition, Henderson urged Sinclair to sign it, and promised him a note, payable in two years from the 13th of June, 1861, for the

(*) Ferrière, Grande Coutume, Vol. 3, page 177, art. 124, glose 1er No. 17.

additional two shillings and sixpence, over the amount of seven shillings and sixpence promised by the deed.

A note was accordingly drawn up by Norris at the request of and in favor of Sinclair for the additional sum, and signed on the 13th of June, 1861, by the respondents,—the amount of this note is $140.50, and for the payment of which the present action was brought. In consideration of this note, and under an express agreement that it should be paid in addition to the seven shillings and sixpence mentioned in the deed, Sinclair, on the day he received the note, namely on the date aforesaid, went to the office of Jas. Smith, notary, and signed the deed.

On the 16th June, 1863, the note matured, and was protested for non-payment.

Subsequent to its maturity, John Sinclair, for valuable consideration, transferred his note to the appellants.

On the 22nd of October, 1863, they sued out the present action against respondents for the payment.

To this action, the respondents pleaded, that by this deed of composition, dated Montreal, 2nd of July, 1861, the said John Sinclair declared himself willing to accept a composition of seven shillings and sixpence in the pound for the full payment of all claims; that this composition has since been paid to him; that the deed, bearing a date subsequent to that of the note, thereby extinguished the note; and that as the note came into the appellant's hands after its maturity they have no greater rights under it, than had Sinclair himself.

The respondents, by their special answer, replied, that John Sinclair signed the deed, *not* on the 2nd July, 1861, but on the 13th June, the date of the note, and on the day the note was given him by the respondents; that at the time he so signed the deed, it had not been signed by several of respondents' creditors, and that as they did not all sign until the 2nd of July, it was accordingly not closed or dated until that day, as is usual and customary in such cases; that at the time of his signing the deed, the respondents were indebted to him in $1123.76; and that Sinclair signed the deed as aforesaid, under and by an express agreement with respondents, that he should be paid the said note in addition to the composition mentioned therein.

At Enquête, the appellants examined three witnesses, viz: James Smith, the notary, who executed the deed, John Sinclair and William Norris. The respondents adduced no witnesses.

Smith the notary adduced at Enquête the original deed. He stated that it may have been a month, it was certainly *many days* that the deed was drawn and signed by some of the creditors previous to the said 2nd of July, and he adds:—"I know the said John Sinclair signed the said deed, and that he signed "it some days previous to its date, but I cannot now recollect when." He says in another part of his deposition—"Have sometimes had deeds of composition "partially signed for two or three months previous to their dates, because we "never date them until they are completed." In cross-examination, he adds, "I swear positively that John Sinclair did *not* sign his name on the deed of "composition on the 2nd of July, 1861."

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Sinclair deposes that the note on which the present action is brought was given him on the day it bears date, 13th June, 1861, by the defendent, to induce him to sign the deed of composition, and that he signed the deed on that day, in consideration of and under a distinct agreement with respondents, that the note should be paid in addition to the money stipulated by the deed.

William Norris states that he recollects that about the beginning of June, 1861, William Henderson, one of the respondents, called on Sinclair at his office while he, Norris, was present. He heard Henderson urging Sinclair to sign the deed, and Sinclair replying that he would not accept less than ten shillings in the pound. He understood from the conversation which ensued between them that the respondents agreed to pay this sum, namely, seven shillings and sixpence by the deed, and to give their note, payable two years from that date, for the balance. Accordingly he, Norris, drew up the note for the balance, and that note is the one in issue.

At argument the respondents' attorneys moved to reject certain portions of the evidence in so far as they tended to contradict the deed of composition.

On the 14th March last, the Honorable Mr. Assistant Justice Monk rendered the following judgment in this cause: "The Court having heard the parties by their counsel upon the merits of this cause, and upon the motion of the defendants of the eleventh February last, that the objections by them made to certain portions of the evidence of the witnesses in the said motion named be maintained with costs, having examined the proceedings and evidence of record, and having deliberated, doth grant the said motion, and doth reject from the record such portions of the evidence of John Sinclair, James Smith, and William Norris, as was objected to at Enquête by the defendants; and considering that the defendants have by legal and sufficient evidence established the essential allegations of their plea, doth dismiss the plaintiffs' action with costs."

On the 8th September, 1865, the Court of Appeal gave judgment confirming the judgment of the Circuit Court.

Duval, C. J., said:—That by all laws, the transaction in question was considered a fraud upon the creditors. It was considered a fraudulent act, giving rise to no action whatever. The English authorities put it upon the broad ground of being a fraudulent act. It had been stated, that previous to the Code Napoleon, this was not the *law in* France, but such a statement was incorrect.

The Court concurred entirely in the judgment of the Court below.

Judgment confirmed.

J. Popham, for appellants.

Leblanc, Cassidy & Leblanc, for respondents.

(W.E.B.)

Note.—The leading English case, supporting the decision of our Courts upon the point in question, is Cockshott vs. Bennett, 2 D. and E. Term. Rep, p. 765.

Vide *contra* Greenshields vs. Plamondon, 8 L. C. J., p. 194.

COURT OF QUEEN'S BENCH.

MONTREAL, DECEMBER 9TH, 1864.

In Appeal from the Circuit Court, District of Montreal.

Coram DUVAL, C. J., MEREDITH, J., DRUMMOND, J., MONDELET, J., AND BADGLEY, J.

WILLIAM STEPHENS, ET AL.,

(*Plaintiffs in Court below,*)

APPELLANTS;

AND

TANCREDE M. BOUTHILLIER,

(*Defendant in Court below,*)

RESPONDENT.

HELD:—1st. Under C. S. C. cap. 17, sec. 91. That money paid to a collector of customs as duty upon goods to be imported upon the condition that a certain portion of the money so paid shall be remitted by him, in the event of the goods arriving before a rise of duty takes place by virtue of an act about to come into force, is not in the nature of a deposit placed in the hands of a private individual, but is so paid to him in his capacity of collector, in the performance of his duty as such, and therefore in such case the above section applies and the collector is entitled to a month's notice.

This was an appeal from a judgment rendered in the Circuit Court, Montreal, on the 11th December last, dismissing the action of the now appellants with costs, on the ground that one month's previous notice of action was not given to the respondent, as collector of customs at Montreal. The appellants contended that under the facts of the case, and the form of action no such notice was necessary, as appears from the declaration and proof of record.

The action was brought against Tancrede M. Bouthillier, described as "of "Montreal, Esquire," defendant, and was in the ordinary assumpsit form, alleging an indebtedness to plaintiffs in the sum of $150, "for moneys had and "received by the defendant, to and for the use of the plaintiffs," "for moneys "paid to the defendant, to and for the use of the plaintiffs," and for so much money being a balance unjustly "withheld and kept by the said defendant out "of a larger sum of money by the said plaintiffs handed over to the defendant "and delivered to him, and which were to be applied to the payment of the "duties on certain goods at Montreal, and which were to be returned after pay- "ment of the said duties on the said goods," setting up a promise to pay, and a refusal to pay. To the plaintiffs' damage of $150. Conclusion for $150.

First Plea.—That the moneys were received by the defendant, as collector of customs, at Montreal, for duties on goods, and in the execution of his duty as collector, and that, therefore, he was entitled to the month's notice of action.

Second Plea.—Sets up, that defendant was collector of customs at the time mentioned in the declaration; that about the 26th March, 1859, the plaintiffs made an entry at the customs of seven packages of goods, which goods "sur la

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representation de dits demandeurs que les dites marchandises etaient arrivées, ou arriveraient en cette Province du Canada," were admitted at 15 per cent. instead of at the new duty of 20 per cent—the defendant, however, receiving from plaintiff a deposit, *dépot* of 5 per cent. additional, in case the goods should not arrive until after the new tariff went into operation.

That the defendant, about the 12th April, 1859, on the representations of the plaintiff, that the goods had arrived before the operation of the new tariff, gave back the additional five per cent.; but that afterwards it turned out, that only two out of the seven packages had arrived before the coming into force of the new tariff, and that consequently there were duties due on the five packages to the extent of $62.65.

That true it was there was due to the plaintiffs for overpaid duties on damaged goods (in 1860).......................................$118.00
And for duties on 2 bales, first item in plaintiff's account, the sum of 19.10

Making in all the sum of $137.10

"tel et ainsi qu'il appert à l'etat produit par de defendeur," and that after deducting the $62.65, there remained the sum of $74.45, which the defendant was always ready to pay, and offers to pay.

Conclusion, for compensation to the extent of $62.65, and offer to confess judgment for $74.45, offered before action brought.

Answer to 1st Plea.—That the defendant was not entitled to a month's notice for any of the causes, matters and things in the plaintiffs' declaration above set forth.

Answer to 2nd Plea.—That the moneys sought to be recovered were due to the plaintiff; that no compensation could be claimed by the defendant, who was sued in his own individual name and right, and that any debt due to her Majesty, such as that set up in the plea, could not be so set off, but must be enforced by legal means. The plaintiffs also prayed *acte* of the defendant's admission that he had in his hands the sum of $137.10, which he had promised to return to them.

A general answer was also fyled.

The judgment appealed from was in the following terms (Monk, J.,) 11th December, 1862:

"The Court having heard the parties by their counsel upon the merits and upon the law issue raised in this cause, examined the proceedings and evidence of record, and having deliberated: considering that it appears and is clearly established by the evidence of record, that the causes, matters and things upon which the present action rests, and for and on account of which the said action has been instituted against the said defendant, arose out of, and were for acts and things done by the said defendant in the exercise of his office of collector of customs of Her Majesty at the port of Montreal: Considering that at the time of the institution of the present action, the said defendant was still collector of Her Majesty's customs, at the said port of Montreal, considering that by law, no writ

could be legally sued out or any action maintained until one month after notice in writing had been delivered to the defendant, or left at his usual place of abode, in which notice should have been clearly and explicitly contained, the cause and causes of action stated in plaintiff's declaration, and by him proved in this cause.

"And considering that no notice whatever in writing made as required by law was delivered to the defendant, by the said plaintiff, or left at his usual place of abode, doth maintain the exception firstly pleaded by the said defendant, and hath dismissed, and doth hereby dismiss, the plaintiff's action with costs."

Robertson, for appellants, said :—The evidence in the case need not be much dwelt upon. It will be found to establish that the sum of $62.65, deposited with the defendant as the additional duty on certain goods, payable in case they were brought into the Province after the new tariff came into force (on the 26th March, 1859), was handed back to the plaintiffs, and that some time in the following year the defendant refused to give up the $118 deposited in his hands in excess of duties really payable by the plaintiffs on goods imported in 1860 without deduction of the $62.65 previously handed back in 1859. It is submitted that these pretensions are unfounded in fact and in law.

The moneys deposited with Mr. Bouthillier, in excess of duties on imports for 1860, he is bound to restore to the plaintiffs. If, as the plea alleges, there is a sum of $62.65 due for duties not charged in March, 1859, the right to recover that sum lies in the Crown. Nor can it be fairly contended, as a matter of equity, that an error—even if such error existed, which is denied—which must have been discovered shortly after the 26th March, 1859, should not have been complained of, or notified to plaintiffs until the following year, long after the goods had been sold, and at a time when the plaintiffs could not protect themselves by adding an additional price to the goods to cover the additional duty. It would appear that nearly a year elapsed before any notice of the pretended error was given to the plaintiffs.

The retention of the excess of money deposited, was the act of Mr. Bouthillier himself. It was not an official act, which the law can recognize as such, so as to protect him against an ordinary action to recover it back. Nor was the action an action of damages in which alone the officer, defendant, has a right to tender amends.

The clause of the statute invoked by the respondent in his first plea, and upon which alone the judgment was rendered, is in the following terms:

"No writ shall be sued out against any justice of the peace, or other officer "or person fulfilling any public duty, for anything done by him in the perfor"mance of such public duty, whether such duty arises out of the common law, "or is imposed by Act of Parliament either Imperial or Provincial; nor shall "any judgment or verdict be rendered against him, unless notice in writing of "such intended writ, specifying the cause of action with reasonable clearness has "been delivered to such justice, officer or other person, at least one month before "suing out such writ."—Consolidated Sts. L. C., c. 101, sec. 1.

This clause is not applicable to the facts disclosed in the record.

The Defendant, in 1860, had in his hands, as he admits in his plea, $118, overpaid as duties by the appellants, on goods imported that year.

The respondent pretends first to have a right to a notice of thirty days before he can be sued for the amount, which he admits belongs to the appellants; and next, he wishes to keep in his hands, in an action against himself personally, a sum of money alleged to have been erroneously and on appellant's misrepresentations restored to him, in 1859, by the defendant in his capacity of collector of customs. In other words, he pleads to a demand made against him individually and personally, want of notice and compensation by a debt alleged due to the Crown

It is submitted, that the construction given by the Canadian Courts, as well as by the English Courts on similar Statutes in England, is against the respondent's pretensions.

In Price *vs.* Percival, (Stuart's Reports, p. 179,) it was distinctly held that "in an action against a collector of customs to recover moneys exacted as fees "of office, he is not entitled to one month's notice of action." The reason given by Chief Justice Sewell (p. 182,) was, that the statute intended only to protect the public officer in the fair execution of his duty, and that the action in question was not brought to recover back moneys due *to the public,* but which were claimed to be retained by the collector for his own use. The same reason is applicable here with stronger force; for in this case the defendant seeks to retain the appellants' moneys, not even under pretence of their being due to him as fees of office, or in any other way, but on pretence of a previous alleged debt to the Crown.

In the case of Irwin *vs.* Boston, in Appeal, (7 L. C. Rep., p. 433,) it was settled after full discussion, that the statute invoked by the respondent "has "reference only to actions brought for damages, *dommages interets,* and not to "actions where damages are claimed for the non-fulfilment of a contract or obli-"gation imposed either by law or by stipulation." This manifestly covers the principle contended for by the appellants in this case. The defendant got the appellants' moneys in advance, to be applied to the payment of duties. He was bound by law as well as by the tacit agreement made, to apply the moneys, or to pay them back in case the duties did not amount to the sum paid over. He is sued, in an action of assumpsit, and in defence to such action says he is a public officer and invokes the statute as entitling him to a month's notice of action. But in answer to this it may well be urged, that in keeping the moneys of the appellants in his pocket he was "not acting in the performance of such public duty," but in violation of it. He was entrusted with the moneys as a matter of convenience and arrangement. He took them as a private individual, agent or *mandataire* of the appellants, charged with applying them in a particular way, that is, to the payment of duties. Although he happened to be collector of customs, he has no more right to keep the moneys than a messenger or porter in the Custom-house would have had, or any clerk to whom, in the absence of the collector, the appellants might have entrusted their moneys. The reasoning of Chief Justice **Lafontaine** in the case of Irwin vs. Boston is therefore applicable equally in this case:—

"Il me semble évident d'après la teneur et les termes mêmes du statut, qu'il "ne s'agit que *d'actions qui ont uniquement* pour objet des dommages, interets "et non pas d'actions dans lesquelles une demande des dommages, interêts n'est

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" qu'accessoire à une demande principale fondée sur l'inexécution d'une contrat, "ou d'une obligation imposée *soit par convention*; *soit par la loi*. Il ne s'agit "que d'actions dont l'officier public, peut devenir passible par suite *d'un fait* " qui constitut un tort, un délit, une injure, si l'on veut, par conséquent d'un " fait illégal et non justifiable *commis* (c'est l'expression même du statut), par " cet officier *dans l'exercice de ses devoirs publics*, en un mot, *d'une offense dont* " *on se plaint*, *c'est encore là le langage de statut*, *sec.* 8, *version Francaise.*"

" Cela résulte encore clairement des mots employés dans la troisième section " pour indiquer l'espèce de condamnation qui devrait être prononcée sur telle " action. La Cour, ou le Jury, y est-il dit, rendra son jugement ou verdict en " faveur du demandeur, avec tels dommages qu'il jugera convenables. "

So in the case of Esinhart *vs.* McQuillan, decided in appeal—6th L. C. Rep., p. 456—it was held that a defendant acting under the orders of an inspector of roads could not, when sued in an action of trespass for opening a road on plaintiff's farm, claim the month's notice, inasmuch as the inspector was not acting within the scope of his duty in giving such order.

By the seventh section of the statute, "no such suit or action shall be brought " against any justice or other person *acting* as aforesaid, for anything done by " him in the performance of a public duty, unless commenced within six months " after the act committed."

If the statute in question is applicable to this case, then Mr. Bouthillier may keep the moneys in his pocket, the prescription of six months having cut off any action by the appellants. Thus, the statute, instead of protecting a public officer when sued in damages, for acts done in the performance of his duty, by giving him a month's notice that he might tender amends, would authorise any public officer to retain moneys entrusted to him whilst holding such office, and after six months, would screen him effectually from an action to account for, or pay back the moneys.

The duty of the defendant was to have handed to appellants the moneys held by him for them, moneys which did not belong to the public, and which, as collector he could not legally retain. Even if the moneys were held by him in his capacity of collector of customs, as a public officer, the law imposed upon him the obligation of handing back moneys once paid. In retaining them, he was guilty of a breach of the law, or at least of negligence in not fulfilling his duty, and the action was well brought against him.

The form of the action is sufficient, for even in the case of an action to recover back a sum of money exacted by a collector of customs, it was held that the moneys could be recovered under a count for " moneys had and received. " (Stuart's Reports, p. 189.)

In the present case there is a count for " moneys had and received, " and also a special count for moneys overpaid for duties and not returned, and the judgment below should have dismissed the first plea, and given judgment for the appellants.

BADGLEY, J., said:—By the amending Customs Act of 1859, five per cent. additional to the existing duty of fifteen per cent. was imposed upon dry goods coming into the province, on and after the 26th March of that year, which there-

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by might affect such goods coming by the Canadian steamer, expected to arrive at Portland, about that time. The consignees by that vessel, desiring to escape the additional duty, offered their entries to the collector before the notification of arrival of the steamer, at the old rate of duty, which the collector, Mr. Bouthillier, refused to receive without the payment of the additional five per cent. in the event of the importation of the goods after the limited time. As no entries could legally be made without the payment of duty, the twenty per cent. was accordingly paid to and received by the collector, as such customs duty. The appellants were in the number of those so situated, and paid the twenty per cent. upon several packages received by them by that steamer. Subsequently, on the 12th April, they represented to the customs officer here, in particular charge of the entries department of the office, that all their packages had arrived within time, and the officer, trusting to the truthfulness of their statement, remitted and paid back to them the additional five per cent. duty paid by them at the time of making the original entry; within a few days afterwards it was discovered at the office, however, that the representations were false with respect to four of the six packages upon which the full duty had been paid, and that the additional five per cent. upon those four packages, amounting to $62.65, had been improperly remitted to the appellants who, had, by their incorrect representations, and their receipt back of this money, benefited themselves for that amount, at the expense of the customs and the public, and thereupon urgent applications were made by the customs officers to the appellants for their repayment of the amount improperly remitted to them as stated, to which the appellants declined to accede, upon the ground "that the mistake could not "be corrected without their suffering loss;" that amount, therefore, remained in the possession of the appellants.

After the delivery of these packages into the appellants' warehouse, some of their contents were found to have been damaged on the voyage of importation, and the appellants claimed from the collector the statutory remission from the amount of the full duty paid upon them as sound and undamaged goods. This claim was entirely legal, and may here be properly explained cursorily before entering upon the discussion of the real point in contention between the parties.

The law assuming that goods are imported sound and in good order, exacts the duty upon them as of such condition, and the importer of course pays duty as upon sound goods, and thereupon receives his goods into his warehouse. But the possibility of the goods being found to be damaged has been provided for by the customs statute, which, after enacting "that no goods shall be unladen until due entry has been made of them, and unless the goods are to be warehoused the duties paid down on the making of the entry," "provides that if goods imported "by water are found to be damaged; then upon their survey by three merchants "called in to inspect them, and upon their report of valuation of the damage "done," "the customs' officer shall make and repay a proportionate allowance to "the importer by way of abatement of the duties which have been actually paid "upon the same." The delivered goods having been surveyed and reported upon to the customs officer, the appellants claimed the statutory abatement from the full

duty originally paid upon them to the officer according to law; and their bill of particulars filed in the cause gives the several items of the amounts claimed for the remission and abatement of the duties upon the damaged goods and an item claimed as overcharged duty paid to the officer upon a previous entry. These are the grounds of the appellants' demand, which is entirely inconsistent with the amount of the additional duty remitted to them by error, as they allege. Simply, then, the action is brought for the recovery of the amount of these abated and overcharged duties, or as they are denominated in the act, paid duties, and not for moneys deposited in the hands of the defendant individually, unless it can be said that all duties paid to the officer are such deposits, which would be absurd.

These details necessarily introduce the action which is directed against the defendant as an individual, notwithstanding his office, and the declaration is in the common assumpsit form of the money counts and account stated with a final count, which is peculiar, but probably intended to be special, "and for so much "money being a balance unjustly withheld and kept by the said defendant *out "of a larger sum of money by the said plaintiffs handed over to the defendant "and delivered to him, and which were to be applied to the payment of the duties "on certain goods at Montreal, and which were to be returned after payment of "the said duties on the said goods,"*—setting up a promise to pay, and a refusal to pay. To the plaintiffs damage of $150.

The respondent, defendant, pleaded two pleas to the action. 1st. That the moneys demanded from him had been paid to and were received by him from the appellants as public moneys, duties of customs, and that therefore he was entitled to the statutory notice of action; and 2nd. A special plea, setting out the circumstances above detailed, connected with the incorrect representation made by the appellants and their unjust receipt and retention of the $62.65 duty payable by them: this plea need not be enlarged upon here, as the contention turned altogether upon the first plea, namely, the defendant's right to the previous notice of action, claimed by him as an officer of customs for an act done in the performance of his duty.

It must be manifest, from the facts stated above, and from the appellants' bill of particulars wherein he is charged as collector of customs, that the *qualité* of "gentleman," given by them to the defendant in their writ and declaration, and their use in the latter of assumpsit money counts, do not show the substantial cause of action, which, it may here be observed, cannot be altered from its true nature, by the adoption of this course of practice, or by the mere use of any general form of declaration. Although the English forms of assumpsit are of frequent adoption, our procedure is really always in *case*, to use the English term, showing the real nature of the action. In England, where the assumpit forms prevail, the substance of the action is established in the evidence and facts proved, which invariably govern the demand; yet although our own system of procedure has not been followed here, the mere use of the English forms will not be permitted to mislead the decision of the court, upon the cause of action which will be sought for and found in the facts and evidence of record.

Our own procedure in this particular is very clearly and perspicuously ex-

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plained by Ponset in his Treatise upon Actions where he says at page 142, "pour "connaître la véritable position des parties dans la cause et les droits ou les obli- "gations que cette position doit produire, il faut savoir quelle est leur qualité "respective. Ainsi la première chose à faire en toute cause c'est de régler les "qualités des parties quand elles n'en sont point d'accord," and at No. 117: "Je dis substantiellement, la saine logique nous apprend, et nous ne pouvons "trop répéter, que ce n'est ni à de vaines apparences, ni à des circonstances "accidentelles, mais à l'objet direct et à la nature d'une action qu'il faut princi- "palement s'arrêter si l'on veut parvenir à la connaître distinctement sans équi- "voque, sans confusion," and again at 127: "Une action ne peut être véritable- "ment qualifiée et distinguée que par son objet et sa nature."

These authorities are plain enough to show that the real nature and substance of the action must govern, whatever the form of the declaration or the *qualité* applied to the party: hence in this case, it appears that the defendant is in fact the collector of customs at Montreal, and that the moneys sought to be recovered from him were a portion of paid duties of customs legally received by him as such customs officer in the performance of his duty as such collector. As this action is therefore manifestly against an officer of the customs for a thing done in the exercise of his office, it is plain that the appellants by their factum have mistaken the statute upon which the respondent has rested his right to notice of action; they have sought for his statutory protection in the public officers' protection act, which is inapplicable to the case, whilst he rests upon the customs Act which provides that "no writ shall issue or copy of process be served upon "any officer of customs for any thing done in the exercise of his office, until "one month after notice of action, &c., &c.," limiting the proceedings to three months after the act done by the officer, and further to three years for the recovery back of over charges of customs by officers or over payment to them. The difference between the two statutes referred to by the parties respectively is plain and manifest.

But the appellants are also in error, in holding, that their applied *qualité* of gentleman, not customs officer, and their adoption of the assumpsit counts have deprived that officer of the protection claimed by his plea because it is a clear principle of law, that the real substantial cause of action cannot be controlled, nor the statutory protection controverted, by the misapplication of a *qualité* to the defendant or a use of the form of declaration in itself not descriptive of the nature or cause of the action.

Now it is quite true that the exaction of fees without right by an officer, for his own advantage, would be an excess of authority by him; and their recovery back from him would come within the money counts, because in such case the officer would have received what did not belong to him, and the implication of the assumpsit would at once arise against him for their payment back by him as having been received to the payer's use. This was the contention between the parties in the well known cause of Price *vs.* Percival, Stuart's Rep., p. 179, where the moneys sought to be recovered had been received by the officer *as his own fees*, his own property, not as public moneys, and had been exacted by him without legal authority. The distinction was very ably stated by the present Hon. Mr.

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Black, the plaintiff's counsel, who maintained that the defendant had no right to the protection of notice of action in the suit against him, although an officer of customs, because the exaction as for his own fees, being unwarranted by law, did not fall within the statutory protection, which would have applied had the suit been for the recovery of money paid to the defendant as public moneys. And Chief Justice Sewell fully and explicitly concurred in the rule laid down by Mr. Black. This case was citied by the appellant *arguendo*, but it has clearly no connection with this case in the special fact of the moneys sought to be recovered here, nor have the other causes of Wright, Boston and Esinhart & McQuillan any reference to this contestation except in the mere particular that pleas of want of notice under the Public Officers' Protection Act were pleaded by the defendants in those cases.

The appellants have confounded the assumpsit form of action with the contract implied in the assumpsit, and have thence concluded that the right to the notice of action cannot be pleaded to assumpsit demands. They are in error; this notion originated in the case of Irving *vs.* Wilson, 4 T. R., p. 487, in which Justice Grose said: "I admit that in an action of trespass or tort the officers are "entitled to notice under the 23 Geo. 3, because they ought to have an oppor-"tunity of tendering amends, but the Act does not extend to actions of assumpsit." The appellants have rested upon this ruling without reference to subsequent decisions which have put aside that opinion and without considering that the form of the assumpsit remedy is not the assumpsit contract. The true explanation is to be found in the subsequent case of Waterhouse *vs.* Keen, 4 Barn & Cr., p. 209, an action against a toll collector to recover back overpaid toll. The declaration, as in this case, was in money counts, the plea the general issue; and the defendant applied for the dismissal of the action for want of notice: the application was allowed by the court, and it was so adjudged in the cause, Justice Bayley saying, "it is true that many of the expressions (of the special Act) seem to point "to actions of tort, but it is material to consider the substance rather than the "form of the action. In many cases the subject matter of the action is substan-"tially tort, but the plaintiffs may waive that and bring assumpsit. If an action "be brought in consequence of a thing done substantially in pursuance of an act "of parliament, it is a case within the Act. The substantial part of the enact-"ment is that notice shall be given, &c., &c. Nor can it in substance make "any difference that the plaintiff, instead of bringing an action on the case, has "thought proper to waive the tort and to bring the assumpsit." Judge Bayley then reviews the cases cited, and says of Irving vs. Wilson above referred to, "the "late Chief Baron Thompson, a very able lawyer, overruled the law as laid down "by Judge Grose in Irving *vs.* Wilson, and this Court (K. B.) afterwards con-"firmed the decision" of the Chief Baron. He then continues, "Upon these "grounds the notice ought to have been given: our duty is to give effect to such "clauses of the act of parliament with reference not to the form of the action, but "to the substance of the thing done; and that being so, I think that this action "is brought substantially in respect of a thing done by the defendant in pur-"suance of the act of parliament, and consequently that he is within the protection, "and therefore ought to have had notice." And Mr. Justice Holroyd, concurring

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and sustaining Greenway vs. Hurd, 4 P. R., p. 553, says: "The question therefore "is, was this action brought against the defendants for an act done in pursuance "of the act according to the legal meaning of the terms? The action in form is "for money had and received to the plaintiff's use; but in substance it is brought "to recover money alleged by plaintiff to have been unlawfully taken as toll by "the defendant under colour of the Act. The demanding and taking was an act "done in pursuance of the Act. This is a case therefore within the words of the "Act; it is also within the mischief intended to be avoided by the Act. The "same mischief would arise from the neglect to give the notice in such an action as "this, if it were an action of tort. On principle therefore the notice is necessary." In a previous case of Whitbread *vs.* Brooksbank, Cowp., p. 49, Lord Mansfield, a better authority than Judge Grose, broadly held that "an action for money had "and received would not lie against an excise officer for an over payment to "him, and Mr. Phillips in his Work on Evidence, p. 437, 3 vol., says, "It has "been considered that officers of customs and excise are only entitled to "notice in actions of trespass and tort, and that the statute does not extend to "actions of assumpsit. This doctrine has been questioned in subsequent cases, "and is incorrect."

In this case, it is unquestionable that the defendant was an officer of customs, that the money demanded of him in this cause was paid to and received by him as duties of customs, and under and in pursuance of our Customs Act. It is almost waste of time to inquire whether this act was a thing done by him in the exercise of his office. The appellant's "bill of particulars" states so, and the record proves the fact. His receipt therefore of the money from the appellants under these circumstances entitles him to notice of action, and the authorities leave no doubt upon the point. In Greenway *vs.* Hurd, a case somewhat similar with the present, which was an action for money had and received against a customs or excise officer to recover back from him duties paid to him under misconstruction of the law, Lord Chief Justice Kenyon says, "here *the* "*defendant acted as officer of excise when he received the money, and the plain-* "*tiff paid it to him in that character;*" and he therefore held the notice to be necessary. And again in Waterhouse *vs.* Keen, the words of the act there acted upon, are, "no action, etc., shall issue against any person for any thing done in pursuance of the act," which are the precise terms of our customs statute; and the judges in this last cited case sustained Lord Kenyon's decision above, and said, "it "is said that the clause applies to the case of tort, inasmuch as it speaks of defen- "dant pleading the general issue, and tendering amends; but these expressions are "by no means sufficient to restrain the language of the prior part of the clause, "which is sufficiently large to comprehend any species of action against a toll "collector for an act done *colore officii.*" So also held in Cooke vs. Leonar, 6 B. and Cr., 351, "where the statute gives protection to persons acting in ex- "ecution of it, all persons acting under its provisions are entitled to have pro- "tection," and "if any officer does any act, part of which is and part of "which is not authorised by the statute, &c., the mere excess of an authority, "in either case, does not deprive the officer of that protection which is conferred "upon those who act in execution of it, &c." "These cases," the judges remark

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"fall within the general rule applicable to the subject, namely, that where an act "of Parliament requires notice of action before action brought in respect of *any-* "*thing done in performance or in execution of its provisions;* these latter words "are not confined to acts done strictly in pursuance of the act, but extend to all "acts done *bonâ fide which may reasonably be supposed* to be done in pursuance "of it." So also in the case of Morgan *vs.* Palmer, 2 B. and C., 729.

The generality of the words of the statute, "acts done by the officer in the exercise of his duty," and their comprehensiveness of all things by him done as such officer, are abundantly sustained by the authorities, and the receipt by the defendant, the customs' officer, of the money paid to him as duties of customs, being an act done by him in the exercise of his official duty, assures to him the statutory protection of the notice of action when that money or part of it is sought to be recovered back from him, being duties paid to him as such officer, at the time of their payment. It would be mere waste of time to consider such abatement in the character of a *deposit,* because neither by the customs statute nor yet by the understanding of the parties at the time of payment, was that payment so contemplated. Under all the circumstances of fact and law in this cause, inasmuch as the moneys in contestation were paid by the appellants as public moneys, and were received by the defendant in the execution of his duty as customs' officer, and inasmuch as the official character of his receipt of the money cannot be changed by the particular form of action adopted against him for its recovery back from him, and there is no law for the conversion of the official payment into a mere private contract of mandate, as alleged in the special count, without absolutely setting aside the plain and precise enactment of the customs' act, and inasmuch moreover as no approach to evidence in support of that count has been adduced, the first plea of the respondent is completely within the law, and the appellant's action was well dismissed for want of notice of action. The appeal should be dismissed with costs.

Judgment confirmed.

A. & W. Robertson, for Appellants.
F. P. Pominville, for Respondent.

MONTREAL, SEPT. 8th, 1865.

In Appeal from the Superior Court, District of Montreal.

Coram DUVAL, C. J., AYLWIN, J., DRUMMOND, J., and MONDELET, J.

THE REV. JOHN CORDNER,

(*Plaintiff in Court below,*)
APPELLANT;

AND

ROBERT MITCHELL,

(*Defendant in Court below,*)
RESPONDENT.

HELD:—That a lessor's knowledge, without protest, of his lessee's having sub-let, contrary to a clause inserted in the deed of lease stipulating that the lessee should "not sub-let without the consent of the said lessor or his representative first had and obtained for that purpose in writing," will be construed as an acquiescence in such sub-letting, and as a waiver of such

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prohibitory clause, on the part of the lessor, and will deprive him of the right to rescind the said deed of lease contravened by such sub-letting.

SEMBLE:—That a house agent, vested with a general authority by his principal in respect of leasing houses and receiving rents therefor, has an incidental authority to consent to his principal's lessee's sub-letting even though there be a formal clause in the deed of lease prohibiting the lessee to sub-let without the consent of such principal.

This action was brought by the appellant to set aside a lease made by him to the respondent, on the 3rd March, 1862, for breach of a clause in the lease, by which respondent was bound, and agreed "not to sub-let the said house and premises, nor any part thereof, without the consent of the said lessor or his representatives, first had and obtained for that purpose in writing."

By judgment rendered 28th Feby., 1865, (Berthelot, Justice,) the lease was rescinded, but on the case being taken into the Court of Review, that judgment was reversed with costs.

The fact of the sub-letting appears by the notarial lease, from Robert Mitchell to Aaron H. David, of the 3rd Feby., 1863, and it was admitted on both sides at the argument, that by law the sub-letting against the clause in the lease was a good ground for the rescinding of the lease.

The point raised by the defence, and upon which both judgments turned, is a question of fact as to whether the appellant had consented to the sub-lease, or had so acted as to waive any right of rescision.

The plea set up, that by letter of the 8th January, 1863, the plaintiff referred the defendant to Charles Tuggey as his (plaintiff's) agent, and that "thereupon "the defendant applied to the said Charles Tuggey, and obtained *his consent* "to sub-let the said house to the said Aaron H. David, Doctor of Medicine, and "that it was in fact by the agency and ministry of the said Charles Tuggey that "the said house was sub-let, the said Charles Tuggey having sub-let the said "house to the said David in the name of the said defendant, in the beginning of "February, 1863, of all which the said plaintiff was well aware, *and consented* "*thereto;*" then follows the allegation of David's "occupancy of the house as sub- "tenant of the defendant, and with the knowledge and consent of the said plain- "tiff, and who has received and collected the rent, and placed the same to the "credit of the defendant, and that by reason of the premises, *the plaintiff has* "*waived all right to object to the sub-letting* of the said house to the said David, "and had and has no legal objection thereto." No *defense en fait* was fyled.

By his answer, the plaintiff denied the allegations of the pleas, and alleged that the letter referred to therein had no reference to any consent to sub-let, adding "that the plaintiff had never given any such consent, and never authorized "the said Tuggey to consent that defendant should sub-let the said premises," and that Tuggey, although employed generally in respect of letting houses and receiving rents, had no authority to give, nor did he give, any such consent as that referred to.

The following is the judgment rendered in the Superior Court.

(BERTHELOT, JUSTICE.)

28th February, 1865.

The Court, having heard the parties, &c., * * * Considering that there is no sufficient proof of the plaintiff's acquiescence, directly or otherwise, to the sub-

lease entered into between the defendant and Aaron H. David, mentioned as well in the plaintiff's declaration as in the defendant's pleas, doth dismiss the said pleas; and adjudging upon the merits, doth rescind, cancel, and annul, *à toutes fins, que de droit*, the deed of lease of the premises mentioned and described in the said declaration passed between the said parties in this cause before Maître Smith and his colleagues, notaries public, on the 3rd day of March, 1862, and doth condemn the defendant to restore and deliver up the possession of the said premises to the said plaintiff within *two months* to be reckoned from the date of this judgment, and in default thereof that the said plaintiff be put in possession of the same in due course of law with costs.

The case was then taken into the Court of Review, and the following judgment rendered therein, reversing the judgment of the Superior Court.

(BADGLEY, BERTHELOT and MONK, Justices.)

31st May, 1865.

The Court here sitting as a Court of Review, having heard the parties, &c., * * * Considering that the defendant has established the material allegations of his plea, and that there is sufficient proof of record of the plaintiff's acquiescence to the sub-lease entered into between the defendant and Aaron H. David, mentioned in the pleadings in this cause, doth revise and reverse the judgment of the said Superior Court, on the 28th day of February, 1865, and doth maintain the defendant's said pleas, and finally doth dismiss the plaintiff's action with costs against the plaintiff, as well in the Superior Court as in the proceedings had in the Court of Review.—The Honorable Mr. Justice Berthelot *dissentiente*.

The case was then taken to the Court of Appeals.

Robertson, for appellant said:—It is quite true, as stated in the factum of the now respondent in the Court of Review, that "the *only* question really at "issue is whether the defendant sub-let with the consent of the plaintiff."

The evidence in the case consists of letters from the plaintiff, and the depositions of the plaintiff and of Charles Tuggey, and it is submitted that no proof is to be found therein, or in any part of the Record, to establish the consent in writing required by the lease, nor any waiver equivalent to such consent.

The letters, defendant's exhibits 1 and 2, are in the following terms:

No. 1.—(No date.)

DEAR SIR,

I o'd arrange to meet you at the house, if any special purpose required it; but as Mr. Tuggey has been intrusted with charge of the house, and has always done the business connected with it, I am unwilling to interfere with what I regard as his business.

Yours truly,

(*Signed*,) JOHN CORDNER.

ROBT. MITCHELL, ESQ.,
&c., &c.

No. 1.

8th Jany., 1863.

On consulting Mr. Tuggey *about what you said concerning the house*, I come to the conclusion that it would only complicate matters if I should interfere in bu-

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siness arrangements which I have confided to him. As he is now furnished with full power of attorney to act for me *in such matters*, it will be more convenient for all parties if you will address him directly.

Yours truly,

(*Signed*,) JOHN CORDNER.

ROBERT MITCHELL, ESQ.

It was strongly urged on behalf of the respondent that these letters had references to the *sub-letting*, but it will be found that they refer to questions of repairs, and complaints about the drainage, &c., made by the defendant, and with which the appellant did not wish to interfere. The letting of the house, the collection of rent, and the settlement of any questions as to repairs may be held to be under the control of Tuggey, who is a known advertised house broker or house agent; but no authority is given by the letters to consent to sub-letting. The appellant examined by the respondent says: "The letter fyled in this "cause as defendant's exhibit No. 1, is in my hand-writing, and signed by me. "I don't recollect the date at which the said letter was written, but *think it* "*had reference to some repairs about the house in question.*" The plaintiff had probably been asked to go and meet the defendant, but did not wish to go; he says: "*I could arrange* to meet you at the house," but did not wish to do so, and refers his tenant to Tuggey, the settlement of these matters being "his business." And so with letter number *two*. The plaintiff says, "I do not re- "collect having any conversation with the defendant respecting the said house, "except in relation to reimbursements for repairs made by himself."

Tuggey states in his deposition, "the reason, that is, one reason, the defendant "gave for wishing to leave the house was that he found it too small; he complain- "ed also of the drains being in bad order. I am aware that on several occasions "when the defendant applied to the plaintiff *for some allowance for repairs*, he "was referred to me by the plaintiff." This was the matter in respect of which the defendant wanted to meet him at the house, and for which he was referred to Tuggey. Indeed by the lease itself, it was agreed "that the said John Cordner shall not be called upon or compelled to make or do any repairs to the premises leased, save and except such repairs as may be necessary to keep the said premises wind and water tight, and in good tenantable order;" and it was probably on this account that the matter was left in Tuggey's hands, the plaintiff not being willing to recognize any right in the defendant to be reimbursed for repairs. No power of attorney to Tuggey is produced, and it is plain that the ordinary powers of a house agent or house broker would not extend to the setting aside, without reference to his principal, of an express clause in a lease. The consent must be shewn to be that of the lessor or his agent, and must be *in writing*. No such consent is proved.

It will be seen that Mr. Cordner admits that he was informed by Tuggey that Dr. David occupied the house, but he says, "I don't think Mr. Tuggey said "anything to me about Dr. David's taking the house until it seemed to be set- "tled between Mr. Mitchell and Dr. David that the latter should occupy the "house."

The plaintiff then asked;

QUESTION.—Did you make any objection either to the defendant, or to Mr. Tuggey, to Dr. David's occupying the house from 1863?

ANSWER.—" I offered neither approval nor disapproval to the defendant, "*having had no conversation with him on the subject.*" * * "I never made "any protest against Dr. David's occupying the house, nor took any steps in re-"gard to it until about the time of the institution of this action, *because I did* "*not wish to make any trouble, and believing the lease would expire in May,* "1865, having no recollection or knowledge of the clause permitting the exten-"sion of the lease for two years longer."

It will be seen that by this clause it was agreed "that the said lessee shall "have the right of continuing the said lease for a further period of two years "longer, on the same conditions, and for a like rent, by the lessee giving to the "said lessor notice in writing of such, his intention, on or before the 1st Feby., "1865."

Now, Mitchell after finding that the appellant had made no protest against David's occupation for the two years up to May, 1865, as per his lease, gave a notice to the plaintiff, signed by notaries, on the 28th Jany., 1865, that he re-quired the premises for two years longer, up to May, 1867, after he, Mitchell, well knew that *the plaintiff had sold the premises to Dr. Howard.* Mr. Tuggey says: "I was employed by plaintiff to effect a sale of the premises to Dr. Howard "some time last fall, and had agreed to give possession on the 1st May next, "1865, not being aware of any difficulty, or of the clause in the lease extending "the lease."

This gives the clue to the whole case. The plaintiff employed Tuggey to ob-tain a tenant, and signed the lease without noticing the clause as to extension or sub-letting, and rather than "disturb Dr. David," or make trouble, remains quiet during David's occupancy as sub-tenant of Mitchell. But the defendant, after he had abandoned the house for two years, and after it was sold, thinks fit to demand an extension for two years longer, with a view to coerce the plaintiff either to pay for repairs which the defendant had made although bound to make them by his lease, or to suffer damages from being unable to give possession to Dr. Howard at the time agreed upon, 1st May, 1865.

It was this that made the case of importance to the appellant, and accordingly four days after the protest was served upon him by the defendant, the plain-tiff instituted his action in ejectment, not to eject Dr. David before *his lease* came to an end, but to guard himself if possible against the obligation of his deed of sale, in case the respondent really intended to hold the premises for two years longer, and were entitled to do so under the judgment of the Court of Re-view, a judgment in which the appellant cannot acquiesce, involving consequen-ces so serious to himself under the circumstances of the case.

It is submitted that the letters copied above form no consent in writing, and no commencement *de preuve par ecrit*, to let in verbal evidence. The plaintiff expressly denies ever having arranged with defendant as to sub-letting. But even if verbal evidence is admissible, Tuggey, the only other witness examined, says: "To the best of my recollection, the negotiations of the leasing of the

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"house to Dr. David *was done by the defendant himself. I refused to accept* "*Dr. David as a tenant*; and when the first quarter's rent was due, there was a "difficulty for some weeks about the rent, Mr. Mitchell wishing me to take the "rent from Dr. David *on account of Mr. Cordner, which I refused*, and it was "subsequently arranged by Dr. David, Mr. Mitchell, and myself, verbally, to "save trouble, that the accounts were made out against the defendant and "receipted by me to him, the moneys coming as I have already stated. *I never* "*consented to the sub-letting* to Dr. David on behalf of the plaintiff."

Here then we have Mr. Cordner's oath that he never had any conversation with the respondent as to sub-letting, and neither gave, nor authorized a consent —and Tuggey, the only other witness, swearing that he *refused to consent* to take Dr. David as a tenant. The defendant therefore failed to establish the consent pleaded in his plea, that is to say, Tuggey's consent ratified by the appellant.

But it was argued that the six receipts for rent fyled by the defendant show consent to the sub-lease. Of these receipts, three are signed by Charles Tuggey, the plaintiff's agent in collecting rents, and three of them by Charles H. Tuggey, the son of Charles Tuggey. But no knowledge of any of these receipts is brought home to the plaintiff. Charles Tuggey says, "I paid the plaintiff by my own "cheques." So that as a matter of fact the plaintiff did not see the form of receipt, nor is he bound by it, nor does the form of receipt prove any consent to the sub-letting, or any waiver by the plaintiff or his agent of his right to enforce the clause preventing sub-letting. The receipts as drawn make *against the plaintiff's pretensions*, and show that Tuggey never acquiesced, and would not recognise the sub-lease.

The following is a copy of the first receipt referred to in the deposition of Tuggey, above quoted:

Montreal, Sept. 7, 1863.

"Received from Robert Mitchell, Esq., by the hands of Dr. David, the sum of one hundred dollars, being the amount of rent to 1st August, 1863.

(*Signed*,) JOHN CORDNER,
Per C. TUGGEY."

The other receipts are in the same form, and they all would seem to indicate the agent's intention to hold Mitchell to his liability towards the plaintiff, and to confirm Tuggey's assertion made on oath, that he refused to recognize Dr. David as plaintiff's tenant. In fact no authority existed in Tuggey to set aside any clause in the lease. He could give receipts for rent, and administer or manage the property for plaintiff, but could no more change the clause prohibiting subletting, than he could change the clause stipulating the amount of rent to be paid. Nor did Tuggey make any such change or consent to the sub-letting. He distinctly swears that he refused to do so, and says he thinks Mitchell leased the house himself to Dr. David.

In the Court below, great stress was laid upon the fact that Tuggey seems to have charged Mitchell ten dollars for leasing the house to Dr. David, as per his receipt, which is in the following terms:

(Defendant's Exhibit 3.)

R. MITCHELL, ESQ.,

TO CHARLES TUGGEY,

Commission on renting house in No. Beaver Hall, to Dr. David, and Jesse Joseph .... $10.

Received payment, CHAS. TUGGEY.

Per CHARLES H. TUGGEY.

Feb. 6, '63.

As to this receipt plaintiff knew nothing, and the only witness who refers to it is Tuggey, who says, "the defendant's exhibit 3 contains my charge for acting *for Mr. Mitchell* to get a tenant for the said house, and according to my "usual habit, I charged a commission, *although he let the house himself*. I am "not positive that I had anything more to do with Dr. David than that he came "to me several times, requesting me to accept of him as a tenant in the place of "Mr. Mitchell, *which I refused to do*. * * * The commission was paid to me "after the house was sub-let to Dr. David, the defendant objecting at first to pay "it, because the sub-lease was not made by me. I know, and was all along "aware, that Dr. David, since May, 1863, occupied the said house as defendant's "sub-tenant, although I was not aware till January, 1865, that a lease had been "passed between them." But if Mr. Tuggey acted improperly in acting for Mitchell, this was not in any sense the fault of the appellant. No evidence is brought to show he consented to the arrangement, or was aware of any commission being paid, or agreed to be paid by Mitchell to Tuggey.

In acting for Mitchell, Tuggey could not be held as the agent of the plaintiff. He was the paid agent of the defendant, who now seeks to prove appellant's consent by the acts of Tuggey when employed as the defendant's own agent.

On looking at that lease, (No. 4 of Record,) there will be found a clause whereby Mitchell obtained security from Jesse Joseph who bound himself jointly and severally with Dr. David for the rent, and "the said Jesse Joseph hereby "further guarantees the said Robert Mitchell against all claims which may be "preferred against him by the Reverend John Cordner for sub-letting the prem- "ises described in this lease." This clause affords the strongest presumption under the defendant's own hand, that no consent had been given either by Tuggey or the plaintiff to the sub-letting,—else why stipulate security against claims for sub-letting? It shews the defendant had no such consent, and knew he had none, and took precautions accordingly.

It is submitted that the judgment of Mr. Justice Berthelot is in accordance with law, and with the justice of the case; that the judgment of the Court of Review ought not to be maintained. The main ground of the judgment in review was that the plaintiff knew the fact of Dr. David occupying the house, that this was a sort of *semi-acquiescence* in the sub-lease, that this semi-acquiescence might be looked upon as an express consent, and if express, it was equivalent to a written consent, and that to preserve his rights, the plaintiff should have formally declared that he would not consent, and notified his agent and the defendant by protest. —See report of case, *Law Journal*, *Vol.* 1, *p.*28.

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Three facts only are proved in the case, tending to show any kind of consent of plaintiff's to sub-letting: *first*, that the appellant knew Dr. David to be in possession; *second*, that Tuggey, the agent, received the rent for two years, giving the receipts in the form indicated above; *third*, that the appellant remained silent during the occupancy of Dr. David, neither approving nor disapproving, and, as appellant says, without being aware of the clause as to the prolongation of the lease, and not wishing to create trouble or disturb Dr. David.

Are these facts sufficient to shew the consent in writing required under the lease? It is respectfully submitted that they are not; that the principle of law regulating this matter is, no one is presumed to waive his rights; but that such waiver, or renunciation, must be clearly and distinctly proved; that the burden of proving consent to sub-lease fell upon the defendant, on the principle *ei incumbit probatio qui dicit;* and that the doctrine of a sort of semi-acquiescence from silence being equivalent to an express consent is unfounded in law; and that the judgment of the Court of Review being based upon this erroneous principle, and on a mistaken view of the facts, ought to be reversed with costs.

It is submitted also that the Court of Review had no jurisdiction to set aside a judgment rendered in vacation by one judge under the Lessor and Lessee's Act, and that there should have been an appeal direct to the Court of Queen's Bench from the judgment of Mr. Justice Berthelot.

See Con. Stat. of L. C., Chap. 40, Sect. 15; 25th Vict., Chap 10; 27 and 28 Vict., Chap. 39, Sect. 20.

Dorman, for respondent, said:—The question at issue is, whether respondent sub-let the house to Dr. David without the consent or acquiescence of the appellant.

The respondent submits that he has established by legal evidence the consent of the appellant to the sub-letting, and his perfect acquiescence therein for almost two years after Dr. David took possession of the house.

The appellant leased the house to the respondent for three years, from 1st May, 1862, with the privilege to the lessee of continuing the lease two years longer, by giving notice in writing of his intention to do so, on or before the 1st February, 1865.

In January, 1863, the respondent became desirous of leaving the house and sub-letting it, and had a conversation with the appellant, in reference to which the appellant wrote and sent to respondent the letter, defendant's exhibit No. 2. The respondent says, the conversation related to his sub-letting the house. The appellant's recollection about the matter seems to have been very imperfect. When examined as a witness, being asked whether he did not have such a conversation, and whether the said letter was not his reply to what respondent had said upon that occasion, he replied, "I have no recollection whatever of it—I will not say that it did not take place."

This answer, taken in connection with the subsequent acts of the parties, can leave no doubt that the letter referred to the matter of sub-letting; the appellant will not say that it did not. It was dated the 8th January, 1863, and, in reply to what respondent had said to appellant about the house in question, requests respondent to address Mr. Tuggey, who had full power to act in such matters.

Now it is clearly proved, that about the date of said letter respondent did apply to Tuggey upon the subject of sub-letting the house, and Tuggey not only consented, but undertook the task of finding a tenant and sub-letting it himself; and immediately after the execution of the sub-lease, charged respondent $10 for renting the house to Dr. David, which sum was paid to him by respondent three days after the passing of the sub-lease.

It will be seen that Tuggey (ample as his power is shewn to have been by the letters and by the deposition of appellant) did not act without consulting his principal. Mr. Cordner says: " Mr. Tuggey informed me in 1863 that the " defendant was desirous of leaving the house, and sub-letting it. I don't think " he said anything to me about Dr. David's taking the house, until it seemed to " be settled between Mr. Mitchell and Dr. David that the latter should occupy " the house." He says, he offered neither approval nor disapproval to Dr. David's taking the house, " *the arrangement having been left with Mr. Tuggey.*" What arrangement ? Manifestly the arrangement by which the house was sub-let to Dr. David.

Appellant further admits that he never made any objection to the arrangement till the last quarter of two years' occupation by Dr. David, during all this time receiving the rent of the house from Dr. David, always treating him as a sub-tenant occupying under respondent. The very receipts for the rent clearly show this; one of which, dated 3rd November, 1863, is as follows:—

" Received from Mr. Robert Mitchell, (through Dr. David), the sum of one " hundred and thirty-five dollars, being rent of house occupied by Dr. David, " No. 1 Beaver Hall, as per statement below :

" One quarter's rent, due 1st November..................	$100.00
" Assessments paid Corporation...........................	35.00
	$135.00

" Montreal, November 3rd, 1863.

" (Signed,) JOHN CORDNER,
per C. TUGGEY."

Thus the appellant, whilst recognizing and approving the occupation of the house by David, and receiving the rent from him as occupying under Mitchell, took the precaution to so word the receipts as not to release Mitchell from the liability, as principal tenant, to pay the rent. In fact the only difficulty that arose from the first was, whether the appellant would accept Dr. David as his tenant in place of Mitchell, and to the discharge of the latter, which he refused to do.

The respondent submits that appellant's consent to the sub-letting is fully established by the evidence of record. There could not be a more complete consent on the part of Tuggey than is shewn by his receipt for ten dollars, the amount charged by him for his services in effecting the sub-lease in question. The fact that appellant was informed by Tuggey of the arrangement of sub-letting the house, and made no objection, but left the matter wholly in Tuggey's hands, together with his perfect acquiescence, for almost two years, in the occupation by Dr. David, affords the strongest possible presumption of his entire consent.

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On the 8th September, 1865, the Court of Appeals gave judgment confirming the judgment of the Court of Review, and reversing that of the Superior Court.

A. & W. Robertson, for appellant.

S. W. Dorman, for respondent.

(J. L. M.)

SUPERIOR COURT.

MONTREAL, 30TH JUNE, 1865.

Coram BADGLEY, J.

No. 2268.

DAVID MOSS ET AL.,
Plaintiffs;

VS.

JOHN ROSS,
Defendant;

AND

JOHN ROSS,
Plaintiff en désaveu;

VS.

JOHN MONK,
Defendant en désaveu.

HELD: —1st, That a bailiff's return, remaining of record, unimpeached by testimony, will be conclusive.

2nd. That proceedings *en desaveu* are in the nature of a *proces* between client and attorney, and the matter to be adjudged is, had the attorney a right or authority to act?

3rd. That the attorney, (*officier*) *porteur de pieces* is not required to justify or prove his authority, but the presumption is that he has a general mandate from the party for whom he acts.

4th. That a party, plaintiff *en désaveu*, is bound to prove all the allegations of his *desaveu*, and particularly that no authority or power to act was conferred by him upon the attorney.

By an action returned 20th June, 1863, plaintiffs claimed from defendant, who resides in the district of Joliette, $242, with interest, amount of the over due note of defendant. The return of serving bailiff, written on writ and fyled, was as follows: I, the undersigned bailiff of the Superior Court for Lower Canada, acting in and for the district of Montreal, do hereby certify and return, that I did on the sixth day of June instant summon the within-named defendant to be and appear on the day and at the place within mentioned, to answer as this writ of summons demands and requires, by leaving a true copy of this writ and subjoined declaration thereunto annexed, *at his office or general place of business in the city of Montreal, with John Ross, Junior, a grown and reasonable person, being the defendant's son, who, having power of attorney from the said defendant, duly authorizing him the son to receive any documents whatsoever addressed to him and issued out of any Court for Lower Canada*, and further return that the distance, &c., &c., is less than one mile.

T. A. MARTIN,
B. S. C.

Montreal, 6th June, 1863.

JOHN MONK, ESQ., appeared for defendant, who was foreclosed from pleading, and judgment was rendered by the prothonotary in vacation in favour of plaintiffs,

upon an Exparte Inscription, 7th July, 1863. An execution *de bonis* addressed to the sheriff of the district of Joliette was returned by him the 26th August, 1863, as having been suspended under an opposition fyled by defendant the 21st August, 1863, to the judgment in vacation, as allowed by the sec. 115, Cons. Statutes, L. C., cap. 83. The required formalities appear to have been fulfilled, and the grounds of opposition urged were the same as those of opposant's proceedings *en désaveu* against his attorney, that day commenced, and in effect alledging: "Que le dit John Monk, a, en sa qualité d'avocat et procureur comparu par "écrit dans la dite cause pour son nom au dit John Ross, le 22 juin dernier, "sans aucun pouvoir de comparaître pour lui et en son nom dans la dite cause, "ni de le représenter en façon quelconque en la dite cause." The *acte de désaveu* was signed by said John Ross, and *acte de denonciation de désaveu* by his attorneys, concluding that the appearance fyled and all proceedings be declared null, and the *désaveu* be maintained with costs. The defendant *en désaveu* answered and pleaded.

"That (protesting against losses and damages, and declaring the proceedings frivolous, vexatious and unfounded) he acted as attorney of this Court and an advocate in Lower Canada, and in perfect and full good faith, and to the knowledge of John Ross, (plaintiff *en désaveu*). That he herewith fyles authentic copies of writ and declaration given to him at Montreal about the 6th day of June, and under said documents appeared and acted in said cause.

That said John Ross had previous to suit called at office of plaintiff's attorneys, and requested a suspension of the suit, and then and there declared he only wanted delay, and that his son hereafter named was his attorney, and could and would accept service of suit. The said authentic copies of suit were so given him, defendant *en désaveu*, by the son of John Ross, one David Ross, of Montreal, clerk, then accompanied by one J. B. Ross, who was and acted as agent for his said father, and accepted service of said action by the writing fyled and referred to by these presents.

The defendant *en désaveu* appeared in the cause to the knowledge of John Ross, who was cognizant of his son's acts, and of his attorneys' acts, and ratified same, and declared himself therewith satisfied.

That plaintiff *en désaveu* has not and never had any good defence to this action, but requested delay and even now only seeks delay.

That he had at Montreal previously told defendant *en désaveu* his son would accept service of the suit, and only required delay, and requested delay, and for such purpose employed him as attorney.

That defendant *en désaveu* acted in all such circumstances in good faith, and not in fraud in any manner, and hereby offers his oath in support hereof, and prays acte thereof.

Wherefore, &c., &c.,—Also *défense au fonds en fait.* With these pleadings were fyled the documents referred to therein.

Plaintiff *en désaveu* replied specially.—That service was bad, that he never received copies, was not aware of suit, had no agent or attorney in Montreal, or any office or place of business in Montreal, and never gave power or authority to appear, and denied allegations of the answer to proceedings *en désaveu.*

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The 23rd September, 1863, plaintiff *en désaveu* by his attorneys specially endowed with power for such purpose moved to be allowed to prescribe *en faux* against the bailiff's return, which motion was resisted as premature; that the proceeding was useless, and that Mr. Monk being still attorney, there could be none other, and no power of attorney could be granted or given. The 29th September, 1863, judgment was rendered "*renvoyant la motion avec dépens; quant* "*à présent.*" The 27th October, 1863, a similar application was made, and judgment 31st October, 1863. "Take nothing by motion." The defendant *en désaveu* inscribed cause for *enquête*, and the 2nd April, 1864, at *enquête* sittings (presided by His Honour Judge Berthelot), the following deposition was taken: James Ross, junior, of the city of Montreal, clerk, aged 25, sworn—examined for plaintiff *en désaveu* says: "I am not in the employ of any of the parties. I am not interested in the event of this suit. I am grandson to defendant, plaintiff *en désaveu* in this cause, and am well acquainted with him.

Question.—Is it not to your knowledge that the defendant and plaintiff *en désaveu* has no domicile nor place of business in the city of Montreal, and had no domicile or place of business here in June, 1863, viz., on the sixth of June, 1863?

(Objected by defendant *en désaveu* as not in issue on proceedings *en désaveu* and as irregular, illegal and irrelevant). Objection maintained.

Question.—Is it not true that plaintiff *en désaveu* had no son by the name of John Ross or John Ross, junior, residing in the city of Montreal on the 6th day of June, 1863, and is it not further to your knowledge that the said plaintiff *en désaveu* has no son by the name of John Ross?

(Same objection, and further, as proving by parol testimony against a bailiff's return, the truth or untruth of which has nothing to do with proceedings *en désaveu*).

Objection maintained.

The defendant *en désaveu* has no questions to ask witness sworn, &c., &c.

(Signed,) JAMES ROSS, JUN.

The *enquête* was declared closed, plaintiff *en désaveu* not proceeding, and cause inscribed for hearing on the merits the 18th April following (*Coram* SMITH, J.,) in term, when plaintiff *en désaveu* moved, First: That Inscription *au mérite* be discharged. Second: That rulings at *enquête* be revised, and foreclosure of *enquête* be removed. Third: That plaintiff *en désaveu* be allowed to inscribe *en faux* against bailiff's return. All three motions were rejected with costs instanter, and cause argued upon the merits. The 30th April, 1864, His Honor discharged *délibéré*, and ordered a rehearing upon the point as to how far the bailiff's return justified an appearance, and if proof of authority, under such return, was not incumbent upon defendant *en désaveu*.

In May, 1865, (a year and a day having expired) defendant *en désaveu* reinscribed for argument, when *L. Bélanger*, for plaintiff *en désaveu* (after fully detailing the circumstances of the cause and the evidence afforded by documents produced) said: That the bailiff's return itself proved that the action was never served upon defendant, and no presumption could thereunder arise in the attorney's favour of delegated authority by the client. Any such presumption was

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destroyed by the very return which stated service upon an agent at a place of business. These facts were denied in the pleadings, and it was incumbent upon the defendant *en désaveu* to prove his authority, and at least the fact of there being an agent. The bailiff went beyond his power to certify under oath that there was any agent acting, and his return could not be considered authentic in that respect. Relied upon Toullier, T. 10, page 400 *au bas*.

J. A. Perkins, Jun., submitted.—That a year having elapsed from dates of decisions interlocutory, and there having been no appeal taken, such decisions should be considered as final and well rendered. There was now no means of reviving the demands therein made, and no proof of record to substantiate proceedings *en désaveu*. The defendant had fyled the copy of writ and declaration served in cause, which was presumption and even proof of authority, and served as complete mandate for an attorney to act, and under the circumstances of cause there was nothing to require the attorney to prove any special authority for his actions—cited McKercher and Simpson,

3 Jurist, p. 235. La Société de Construction vs. Lamontagne—Actes de Notoriété. Denizart, p. 16, foot Note—Guyot, 1o. désaveu, p. 514, 515, (sec. 2, p. 17). Denizart, coll. de décisions, 1o. désaveu, sec. 2, No. 7, and other authorities.

His Honour Mr. JUSTICE BADGLEY, in rendering judgment, remarked that the return upon the writ having remained of record effective, it was the duty of the party, defendant and opposant, to support his *désaveu* of the attorney who had appeared for him. This he had not done, but had formally closed his *enquête* without the adduction of any evidence either to support his declaration of *désaveu* or to rebut the presumption against him of authority, in his attorney as being *porteur de procès*; that presumption was fortified by evidence, and the defendant has rested satisfied with it as it stands. What is the *désaveu*? it is the declaration of a party in a suit that he has not authorized the attorney to appear for him; this must be so pronounced to be effective, and the complaining party therefore in law becomes plaintiff *en désaveu* against his attorney, defendant *en désaveu*. This is a regular *procès* between them; it is not sufficient to allege that the attorney had no authority, the *désaveu* must be adjudged to be valid, at the instance of the plaintiff *en désaveu*. Now the law requires that the officer for his justification should establish, "l'une de ces deux choses, ou qu'il "a agi en vertu d'un pouvoir ou que ce qu'il a fait était une conséquence néces- "saire de la remise qui lui a été fait des pièces: alors il n'est pas obligé de rap- "porter d'autre pouvoir que ces pièces.", 1 Pigeau, 364, again: "l'officier "ministériel est présumé avoir un mandat général de la partie au nom de "laquelle il agit et il l'oblige, et cette présomption est fondée sur la confiance "qu'il inspire par son caractère, etc., autrement, les tribunaux seraient forcés à "payer à la vérification des pouvoirs une grande partie du temps qu'ils doivent "consacrer à l'expédition des affaires. Si le mandat général existe et s'étend "aux actes ordinaires de l'instruction, etc. Les pouvoirs de l'avoué résultent de "la remise du procès." Bioche, désaveu, etc. Avoué, 127. The legal presumption of the attorney's authority therefore has been sustained by his possession of the *pièces*, and further supported by the evidence adduced on his behalf, and the plaintiff *en désaveu* having rested his case there, and not attempted to

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rebut the presumption of law. Under such circumstances that presumption is in favour of the attorney, and the declaration *en désaveu* must be dismissed with costs.

Désaveu dismissed.

Day and Day, for plaintiffs.
Bélanger and Desnoyer, for opposant and plaintiff en désaveu.
Perkins and Stephens, for defendant en désaveu.
(J. A. P., JUN.)

MONTREAL, 16TH APRIL, 1851.

Coram DAY, J., AND MONDELET, J.

No. 757.

Poustie et al. vs. *McGregor.*

HELD :—1st. That the observance of the required formalities preliminary to a sale of land belonging to minors, as, for example, that the required publications of such sale were duly made, cannot be established by verbal testimony.

2nd. That in such a case as the above, where the required publications of the sale were not legally proved to have been made, the sale would be adjudged to have been inoperative and null, and the purchaser of such land at a public sale will be condemned to restore the same to such minors.

This was a petitory action brought in the Superior Court, district of Montreal, on the 4th December, 1849, to set aside the deed of sale of a certain lot of land executed while the plaintiffs were minors, on the ground that the sale had not been attended with the requisite formalities, and that the land had been sold for less than a moiety of its value.

The plaintiffs in their declaration alleged:

That their father, the late William Poustie, died in 1832, intestate, leaving him surviving his widow, Marion Gordon, and three children, issue of the marriage of the said William Poustie with the said Marion Gordon, to wit, James Poustie, Elizabeth Poustie, and Agnes Poustie, to wit, the plaintiffs in this cause.

That at the time of his death the said William Poustie owned a certain lot of land situate in Williamstown, in the seigniory of Beauharnois and district of Montreal, and that this lot of land was a part of the property of the *communauté de biens* which had existed between the said William Poustie and the said Marion Gordon, and that upon the death of the said William Poustie the said Marion Gordon became and was seized as proprietor of an undivided half or moiety of the said lot of land, and in her capacity of tutrix to her said three minor children, the plaintiff was seized as a proprietor of the remaining undivided half or moiety of the said lot of land.

That on the 8th of November, 1833, the said Marion Gordon presented a petition to the Honourable George Pyke, one of the Justices of the then Court of King's Bench for the district of Montreal, whereby she alleged that the moveable property left by the said William Poustie was insufficient to pay his debts, and that the amount which the said lot of land would realize might be absolutely necessary for the support of the said minor children during the then coming winter, and by reason of these and other premises the said Marion Gor-

Poustie et al. vs. McGregor.

don prayed to be permitted to take an *avis de parents*, and sell the said lot of land; and the said Honorable Justice, granting the petition, ordered that the said Marion Gordon should be authorized to sell the shares of the said minors in the said property jointly with her own share, and to cause a deed of such sale to be made in due course of law, and this nevertheless, after three publications at the church door where the said property was situated, during three successive Sundays after divine service in the morning.

That on the 10th of February, 1834, the said Marion Gordon, authorized as aforesaid, and whilst the said plaintiffs were still minors, did sell the said lot of land to the defendant in this cause, for a sum of £18, but without observing the formalities mentioned in the order of the said Court of King's Bench, given as aforesaid upon her said petition, and without observing the formalities in that behalf by law required.

That the said lot of land was so sold for less than one half of its real value at the time, and that the said pretended sale and the pretended deed of sale passed by the said Marion Gordon to the defendant were, by reason of the premises and by law, inoperative, null, and void *quoad* the plaintiffs.

The conclusions of the declaration were, that the plaintiffs be declared the true and lawful proprietors of the said lot of land, that the said defendant be condemned to restore and deliver up to plaintiffs the possession of the said undivided half or moiety of the said lot of land, together with the rents, issues and profits of the same from the time of his unjust and illegal possession thereof, and that the defendant be condemned to pay the plaintiffs the sum of £200 on account of rents, issues, and profits of the said lot of land, accrued to the benefit of defendant, and costs of this action.

To the action of plaintiffs, the defendant pleaded that all the formalities required by the order of the said Honourable George Pyke, and by law, were complied with before the said sale of the said lot took place, and that *inter alia* the three successive publications required by the said order were made in manner and form as required, by one Constant Buissant, a bailiff of the then Court of King's Bench; a *procès verbal* or certificate of the proceedings in the matter of the said publications was produced by defendant with his pleadings, (according to an allegation therein contained), the said *procès verbal* being certified and signed by the said bailiff.

The defendant also filed with his pleas the said deed of sale from Marion Gordon to him, and alleged that the said sale was made fairly, openly, and publicly, and that the price at which the same was adjudged was the fair and just value thereof at the time. The defendant further pleaded, in explanation of the certificate mentioned in the said deed of sale as being thereto annexed, that it was a return or *procès verbal* of the proceedings of the said bailiff, Constant Buissant, of the publications, sale, and adjudication of the said lot of land, but that the said certificate had been lost and mislaid, and could not then be found.

The defendant further pleaded that he was willing to rescind and cancel the said deed of sale, on condition of being reimbursed what he had paid for seigniorial dues, and what he had expended in fencing, ditching, clearing the land

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and making roads, in excess of the rents, issues and profits of the said lot received by him, to wit, the sum of £63.

Issue having been joined, the parties went to evidence.

The defendant produced eight witnesses, all of whom were either present and were bidders (*enchérisseurs*) at the sale of the lot of land in question, or were at the time well acquainted with the lot, and they were unanimous in the opinion that the price paid by the defendant was the full value of the said lot of land, that the sale was public and without fraud, and that it took place after the required publications.

The most important evidence adduced by the defendant was that of Constant Buissant, the bailiff who made the publications, and cried the said lot on the day of the sale. In his cross-examination he deposes as follows in reference to the said publications, and his *procès verbal* of the same, alluded to above, as mentioned in defendant's pleas:

" Je ne pourrai pas dire en quel mois j'ai fait les annonces mentionnées dans " mon examen en chef, Et je ne puis dire si c'était dans le mois de novembre, " décembre ou janvier. Mais je suis certain que c'était dans l'un de ces trois " mois, et au meilleur de ma connaissance, c'était dans le mois de novembre. Je " n'ai aucune connaissance de l'année dans laquelle j'ai fait les dites annonces, " et quand je dis dans mon examen en chef que j'ai pensé que c'était en mil " huit cent trente-trois, je l'ai dit parce que j'ai vu les papiers qui m'ont été " montrés, et qui sont filés en cette cause, qu'il était bien probable que les dites " publications ont été faites dans cette dite année. J'ai fait les dites publica- " tions par la lecture de certains documents qui m'ont été donnés par un homme " que je crois être John Bryson ou par son ordre. Mais je ne me rappelle pas " du tout, du contenu de ces documents. Et je ne puis pas dire qu'il y avait " une ordonnance d'un juge contenu dans ces dits documents. Je ne puis pas " me rappeler si j'avais une ordonnance d'un juge signé par lui ou par un gre- " fier ordonnant le dites publications."

" Je ne me rappelle pas au juste à quel prix j'ai adjugé la propriété à McGregor, " mais au meilleur de ma connaissance, c'était ou dix huit louis ou moins ou dix-sept " louis et quelque chose de plus. Je ne me rappelle pas d'avoir jamais dressé de " procès verbal de ces dites publications et de la dite vente excepté que je me " rappelle d'avoir dressé un mémoire ou certificat que j'avais fait les publications " et la vente, ainsi que le prix de la vente, et l'acheteur, quand je dis dans " mon examen en chef que j'ai signé le procès verbal chez M. Doucet, je ne " désirerais pas dire que c'était vraiment le procès verbal de la dite vente que " j'ai signé, tout ce que je puis me rappeler à cet égard est que j'étais chez M. " Doucet et qu'il a dressé un procès verbal d'une vente faite par moi, fondée " sur un certificat que je lui ai donné, mais je ne puis pas me rappeler si c'était " un procès verbal de la dite vente à McGregor ou d'une autre."

All the evidence adduced by the defendant was objected to by the plaintiffs, on the ground that it tended to prove by parol what could be legally proved only by documentary evidence.

It should be observed here that the bailiff's *procès verbal* of his proceedings, in the matter of the publications and sale in question, which the defendant alleged

in his plea, was produced therewith, is not now in the Court record of this cause, and cannot be obtained by the reporter, so that this report is in so far defective, since it does not appear whether the said *proces verbal* was drawn up by the bailiff at the time of or shortly after the sale in question, or whether it was so drawn up by him from memory after the institution of this action, and fifteen years after the time of the said sale.

It is, however, manifest, from bailiff's own deposition given in this cause, that he did not make any *proces verbal* of the said publication and sale at or about the time of the sale.

He deposed that he did not remember to have made such a *proces verbal*, but he did remember to have made a memorandum (*memoire*) of such sale, and afterwards to have signed a *proces verbal* of the same at the office of Doucet the notary in Montreal, but he could not remember whether it was the *proces verbal* of the said sale to McGregor or of a sale to some other person.

It is clear, then, that the defendant relied upon parole evidence to establish the fact that the said sale had taken place after the required publications.

The judgment rendered on the 16th April, 1851, was recorded as follows:

"The Court * * * * * * * considering that the plaintiffs have legally established the material allegations of their declaration, and that the sale by the said Marion Gordon in her capacity of tutrix to the said plaintiffs, of their undivided half in the said easterly half of lot ninety (here follows the description of the lot in question), without the formalities prescribed by the judge's order in the said declaration mentioned, and by law, having been observed, was, and is inoperative and null—Doth dismiss the exceptions of the defendant in this cause pleaded as not being established by evidence, and doth declare the said James Poustie, Elizabeth Poustie and Agnes Poustie to be the true and lawful owners and proprietors of the said undivided half of the said easterly half of said lot ninety hereinbefore described, and doth declare the said deed of sale of the 10th February, 1834, mentioned in the declaration in this cause to be inoperative, null, void, and of no effect as respects the said James Poustie, Elizabeth Poustie and Agnes Poustie, and doth adjudge and condemn the said defendant, within one month, after due service upon him of this judgment, to restore, quit, abandon, and deliver up to the said plaintiffs in their said names and capacity, the possession of the said undivided half or moiety of the said easterly half of the said lot number ninety; and the Court doth condemn the defendant to pay the costs of this action.

And as to the rents, issues and profits derived from the said undivided half or moiety of the said easterly half of the said lot number ninety, by the said defendant, during the time of his unjust and illegal possession thereof, up to the day of service of process in this cause, the Court doth order *avant faire droit* thereon; that by *experts* to be named by the parties, and in their default by this Court *ex officio* or by one of the judges of this Court in vacation, the said rents, issues and profits, as well as the said improvements be estimated and valued, which said *experts* shall be sworn before their operation according to law and the practice of this Court, with power to the said *experts* to choose a third or umpire

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in case of difference of opinion—and which said *experts* shall make their report to this Court, in the premises on the first day of September now next.

Bethune & Dunkin, for plaintiff.

A. Cross, for defendant.

MONTREAL, 30th JUNE, 1865.

Coram BERTHELOT, J.

No. 1119.

Raphael vs. *McDonald.*

HELD:—That the fact that defendant purchased a quantity of flour from plaintiff for cash, to be paid immediately after delivery, and then obtained advances on the flour, and pledged the same for such advances, and wholly failed to pay the vendor, asserting as his reason for not doing so that he was insolvent, is a sufficient ground for the issuing of a writ of *capias ad respondendum.*

This was a motion by the defendant, to quash a writ of *capias ad respondendum* on the ground that the affidavit did not disclose sufficient grounds for the issuing of the writ.

The affidavit was dated the 30th of May, 1865, and claimed the writ on the ground that the defendant had secreted his property for the purpose of defrauding his creditors generally, and the plaintiff in particular. The following were the special circumstances detailed in the affidavit:—

"That the said defendant purchased the said one hundred barrels of flour "from the deponent, at the said city, on the twenty-fifth day of May, now "instant, for cash, and took delivery of the said flour then and there, and then "and there led the plaintiff to believe he was solvent and in good credit; that "on this day the defendant informed the said deponent that he was insolvent "and could not pay him; that thereupon, on this day, the deponent sent his "bookkeeper, John Craig, to the defendant to obtain payment, or the re-delivery "of the said flour; that to-day the said John Craig informed the deponent that "he had seen the said defendant this day, when the defendant admitted to him "that he knew he was insolvent at the time he had purchased the said flour for "cash, and that immediately after purchasing the said flour, he the defendant "had hypothecated the said flour, and that he had obtained advances upon it, "and that the said flour was now in the store of James Holiday, of the said "city, warehouseman; and that the warehouse receipt for the said flour had "been given by the defendant to Elisha Lyman Mills, of the said city, who had, "as the defendant stated, made to the defendant the said cash advances on the "said flour; that this deponent this day visited the store and place of business "of the said defendant, and could find no stock of goods in the said store."

The Court rejected the defendant's motion, remarking, that the affidavit was not only amply sufficient, but disclosed such a fraudulent assignment of property as is rarely brought under the notice of the Court.

Motion to quash *capias* rejected.

John Popham, for plaintiff.

A. & W. Robertson, for defendant.

(S. B.)

LISTE

DES JUGEMENTS RENDUS PAR LA COUR DU BANC DE LA REINE, (EN APPEL), POUR L'AN 1865.

TERME DE MARS 1865.

MONTREAL.

	APPELANTS.	INTIMÉS.	DATE.	JUGES.	JUGEMENTS.
12	Jordan	Cardinal	1 Mars.	Juge en Chef, Aylwin, Meredith, Drummond, Mondelet	Motion pour faire déclarer Appel au Conseil Privé, abandonné—Accordée.
30	Foley	Forrester	“ “	“ “ “ “ “	Motion pour faire renvoyer l'appel faute de rapport de Bref—Accordée quant aux frais vu le rapport du Bref depuis la signification de la dite Motion.
57	Watt	Gould	“ “	“ “ “ “ “	Do.
83	Corporation of Milton	Watchorn	“ “	“ “ “ “ “	Motion de l'Intimé pour faire déclarer appel déserté vu la non-enfilure des factums et concluant au renvoi de l'appel avec dépens—Accordée
1	Gosselin	Racette	“ “	“ “ “ “ “	Motion pour Appel à Sa Majesté en Son Conseil Privé—Désistement de l'Intimé sur icelle motion.
10	Young	Pollock	“ “	“ “ “ “ “	Inscription déchargée à la demande de l'Intimé.

	APPELANTS.	INTIMÉS.	DATE.	JUGES.	JUGEMENTS.
62	Greene	Greene	2 Mars.	Juge en Chef, Aylwin, Meredith, Drummond, Mondelet	Motion pour faire déclarer Appel abandonné et concluant à ce qu'il soit renvoyé, et tous les droits et réclamations du dit Appelant fondés sur le dit Appel déclarés forfaits avec dépens vû le laps de plus de 40 jours écoulés depuis la date du jugement de la Cour de Circuit et la négligence du dit Appelant à poursuivre son appel—Accordée.
78	Guertin	O'Neill	" "	" " " " "	Acte accordé à l'Intimé de sa déclaration qu'il n'entend pas répondre aux Griefs d'Appel filés en cette cause.
32	deMorochond	Gauthier	" "	" " " " "	Motion de l'Intimé pour permis aux parties d'aller à la preuve sur les faits allégués en l'Exception Péremptoire ou fin de non recevoir produite par lui en cette cause—Accordée.
32	deMorochond	Gauthier	" "	" " " " "	Motion de l'Appelante pour faire renvoyer l'Exception Péremptoire ou fin de non recevoir produite par l'Intimé—Rejetée.
35	Foley	Charles	3 "	" " " " "	Motion de l'Intimé pour Bref de *Certiorari*—Accordée.
	The Queen	Leboeuf	7 "	" " " " " Juge en Chef, *diss.*	Jugé que M. Carter, comme Conseil de la Reine et comme Greffier de la Couronne, avait le droit d'être entendu de la part de la couronne.

No.	Appelant	Intimé								Juges	Jugement
11	Gilmour	Wishaw	"	"	Juge en Chef,				"	Mondelet	Conf.
2	Allen	Corporation of the Tnship of Onslow	"	"	"	"	"	"		{Juge Aylwin, " M[illegible]} diss. Drum[illegible]	Inf. chaque partie payant ses frais.
22	Bouvier	Reeves	"	"	"	"	"	"			Conf.
43	Dessaulles	Higginson	"	"	"	"	"	"			"
33	Cullen	Hagan	"	"	"	"	"	"		[illegible]elet{ diss.	Inf.
44	Quin	Bail Printemps	"	"	"	"	"	"			"
55	de la Salle	Bergevin Langevin	"	"	"	"	"	"		{J. Drummond, " Mondelet,} diss. quant aux frais.	
18	Legendre *et vir*	Fauteux	"	"	"	"	"	"		Drummond, Mondelet	"
									"	"	Admissions produites par les Appelants du consentement de l'Intimé, comportant un offre par l'Intimé aux Avocats des Appelants après l'enfilure des Griefs en cette cause d'un désistement du Jugement jusqu'à concurrence de Cinquante louis et les frais sur le présent Appel encourus jusqu'à l'enfilure des Griefs d'Appel inclusivement.
	The Queen	McKenzie	8	"	"	"	"	"	"	"	Cas reservé—Verdict confirmé.
45	Dumont	Dumont	"	"	"	"	"	"	"	"	Motion pour discontinuer l'Appel—Accordée de consentement.
	Exparte	P. Robert	"	"	"	"	"	"	"	"	Motion pour Bref de *Certiorari*—Rejetée.
	Foley	Tarratt	9	"	"	"	"	"	"	"	Motion pour appel d'un jugement interlocutoire—Rejetée avec frais.
	Hudon	Painchaud	"	"	"	"	"	"	"	"	Motion pour appel d'un jugement interlocutoire—Rejetée

	APPELANTS.	INTIMÉS.	DATE.	JUGES.	JUGEMENTS.
2	Fye	McDonald	9 Mars.	Juge en Chef, Aylwin, Meredith, Drummond	Motion pour Appel à Sa Majesté en Son Conseil Privé —Rejetée.
96	Marion	Glassford	"	" " " " Mondelet	Inf.
65	Mongeau	Lafontaine	"	" " " " " Drummond, J. Mondelet {Juge Aylwin, " Drummond,} diss.	"
22	Ramsay	Walker	"	" " " " " " {J. Aylwin, " Mondelet,} diss.	Conf.
50	Atwell	Browne	"	" " " " Mondelet	Inf.
3	Selby	Mulholland	"	" " " " " Drummond, Mondelet {Juge Meredith, " Drummond,} diss.	"
1	Peutré	Lazure	"	" " " " " "	Conf.
35	Foley	Charles	"	" " " " " " "	"
71	Disney	Nordheimer	"	" " " " " " "	"
61	McKenzie	Taylor	"	" " " " " " Mondelet, diss.	Inf.
35	Foley	Charles	"	" " " " " " Mondelet	Motion pour Appel à Sa Majesté en Son Conseil Privé —Rejetée.
93	Malo	Perrault	"	" " " " " " "	Motion pour discontinuation d'appel—Accordée de consentement.

QUEBEC.

	APPELANTS.	INTIMÉS.	DATE.	JUGES.	JUGEMENTS.
67	Chapman	Price	20 Mars.	Juge en Chef, Meredith, Drummond, Mondelet, Badgley	Inf.
91	Chabot	Poiré	"	" " " " " "	" *in partibus.*
13	Bank of U. C.	Bradshaw	"	" " " Meredith, " "	"
1	Anderson	Cartier	"	" " " " " " Mondelet {Juge Aylwin, diss.}	Conf.
10	O'Brien	Stevenson	"	" " " Aylwin, " Drummond, Mondelet {Juge Aylwin, " Drummond,} diss	Inf.
	Regina	Blais	"	" " " " " " "	Cause réservée—Jugement ordonnant un nouveau rapport.
23	Regina	Hickey	"	" " " " " " "	Cause réservée—Verdict confirmé.

No.	Appelant	Intimé	Date	Juges	Jugement
	McArthur	Arthur	“ “ “ “	“ “ “ “	Motion pour renvoi de l'appel faute de cautionnement suffisant—Permis à l'Appelant de donner nouveau cautionnement.
87	Chapman	Price	“ “ “ “	Meredith, Drummond, Mondelet, Badgley	Motion pour Appel à Sa Majesté en Son Conseil Privé —Accordée.
13	Bank of U.C	Bradshaw	“ “ “ “		
1	Anderson	Cartier	“ “ “ “	Aylwin, Meredith, Mondelet, Badgley	Do.
81	Brown	Gugy	“ “ “ “	“ “ Drummond, Mondelet	Do.
				“ “ “ “	Application de l'Intimé pour ordonner à un nommé Cassels de remettre au Greffier de cette Cour une Copie du Jugement du Conseil Privé qu'il avait en sa possession —Accordée.
81	“	“	“ “ “ “	“ “ “ “	Motion de la part de M. Holt pour arrêter les procédures —Rejetée.

TERME DE JUIN 1865.

MONTREAL.

No.	Appelant	Intimé	Date	Juges	Jugement
	Senécal	Compagnie du Richelieu	1 Juin.	Juge en Chef, Aylwin, Meredith, Drummond, Mondelet	Motion pour Appel d'un Jugement Interlocutoire—Accordée—Délai pour émanation du Bref au 1er Août.
43	Bouvier	Tetro Ducharme	“ “ “ “	“ “ “ “	Motion pour renvoi de l'Appel vu le non-rapport du Bref et du dossier—Accordée.
32	deMorochond	Gauthier	“ “ “ “	“ “ “ “	Avis de motion pour Enquête produit par l'appelante—Enquête ordonnée pour le 2 Juin courant.
	Reid	McDonnell	“ “ “ “	“ “ “ “	Motion pour Appel d'un Jugement Interlocutoire—Accordée—Délai pour émanation du Bref au, ou avant le 8e jour de ce terme.

	APPELANTS.	INTIMÉS.	DATE.	JUGES.	JUGEMENTS.
61	McKenzie	Taylor	1 Juin.	Juge en Chief, Aylwin, Meredith, Drummond, Mondelet	Motion pour Appel à Sa Majesté en Son Conseil Privé—Règle déchargée avec dépens, avec le consentement des parties.
11	Gilmour	Wishaw	"	" " " " " " "	Do.
21	Dufaux *et al*	Herse *et vir*	3	" " " " " " "	Motion pour Bref de *Certiorari*—Accordée de consentement.
23	deMorochond	Gauthier	"	" " " " " " "	Exception Préliminaire rejetée avec dépens.
9	Soc. de Construction	Scallon *et al*	5	" " " " " "	Motion de M. Ducondu et autres pour reprendre l'instance au lieu et place de Edward Scallon, l'Intimé en cette cause, décédé—Accordée.
65	LaFontaine	Cusson	6	" " " " " " "	Conf.
33	Mahoney	Howley	"	" " " " " " "	"
45	Fleck	Brown	"	" " " " " " "	Inf.
2	Barré	Dunning	"	" " " " " " "	Conf.
13	Brough	MacDonnell	"	" " " " { Juge en Chef, " Drummond, } *diss.* Drummond, Mondelet	Inf.
61	Massue	Dansereau	"	" " " " "	"
70	Watson	Spinelli & Fullum	"	" " { Juge Aylwin, " Drummond, } *diss.* Drummond, Mondelet	"
90	Lacroix	Moreau	"	" " " " " { Juge en Chef, " Aylwin, } *diss.* Drummond, Mondelet	Conf.
3	Coupal	Bonneau	"	" " " " " " "	Inf.
80	McFaul	McFaul	"	" " " " " " "	Conf.
15	Quintin Dubois	Butterfield	"	" " " " " " "	"
55	Duplessis	Dufaux	"	" " " " " " " { Juge en Chef " Meredith, } *diss.*	Inf.
41	Foley	Godfrey	"	" " " " " "	Conf.
42	Edmonstone	Childs	"	" " " { Juge Aylwin, " Meredith, } *diss.* Drummond, Mondelet	Re-argument ordonné.
54	Buntin	Hibbard	"	" " " " " { Juge Meredith, }	Inf.

										{ Juge en Chef { " Meredith, } *diss.*	
41	Foley	Godfrey	"	"	"	"	"		" "	Conf.
										{ Juge Aylwin, { " Meredith, } *diss.*	
42	Edmonstone	Childs	"	"	"	"			Drummond, Mondelet	Re-argument ordonné.
54	Buntin	Hibbard	"	"	"	"			"	Inf.
										{ Juge Meredith, { " Mondelet, } *diss.*	
3	Lavoie	Gagnon	"	"	"	"	"	"	Drummond,	"
										{J. Mondelet, } *diss.*	
4	"	"	"	"	"	"	"	"	" Mondelet	Conf.
1	Fallon	Smith	"	"	"	"	"		"	Inf.
										{ Juge Meredith, { " Mondelet, } *diss.*	
36	Dorion	Kierzkowski	"	"	"	"	"	"	Drummond, Mondelet	Ordonné que deux points dont l'un celui de l'imputation seront soumis par écrit aux parties.
98	"	"	"	"	"	"	"	"	" "	Do.
30	Foley	Forrester	"	"	"	"	"	"	" "	Motion pour renvoi de l'appel faute de non-enfilure du factum de l'Appelant—Accordée quant aux frais seulement vû l'enfilure du factum depuis la signification de la dite Motion.
18	Legendre	Fauteux	7	"	"	"	"		"	Inf.
										{ Juge Meredith, { " Mondelet, } *diss.*	
88	Gregory	Boston & Sandwich Glass Co.	"	"	"	"	"	"	Drummond, Mondelet	Conf.
71	"	Ireland	"	"	"	"	"	"	" "	"
56	Monette	Phaneuf	"	"	"	"	"	"	"	Inf.
										{ Juge Mondelet, { " Mondelet, } *diss.*	
14	Harrower	Wilkie	"	"	"	"	"	"	Drummond, {Juge Mondelet, } *diss.*	"

APPELANTS.	INTIMÉS.	DATE	JUGES.	JUGEMENTS.
95 Martin	Brigham	7 Juin.	Juge en Chief, Aylwin, Drummond, Mondelet	Motion pour discontinuation d'appel sans frais—Accordée de consentement.
51 The Queen	Ellice	" "	" " " " "	Exception Préliminaire filée par l'Intimé—Rejetée avec dépens.
Duchesnay	Ontario Bank	8 "	" " " " "	Motion pour appel d'un Jugement Interlocutoire—Rejetée.
90 Lacroix	Moreau	" "	" " " " "	Motion pour Appel à Sa Majesté en Son Conseil Privé—Rejetée.
56 Mulholland	Benning	9 "	" " " " "	Motion pour faire déclarer appel à Sa Majesté en Son Conseil Privé abandonné avec dépens—Accordée.
84 Benning	Mulholland	" "	" " " " "	Motion pour faire déclarer Appel à Sa Majesté en Son Conseil Privé abandonné, avec dépens—Accordée.
50 Delisle	Bank of Montreal	" "	" " " " "	Motion pour discontinuation d'appel en cette cause sans frais—Accordée de consentement.

QUEBEC.

APPELANTS.	INTIMÉS.	DATE	JUGES.	JUGEMENTS.
67 Chapman	Price	12 Juin.	Juge en Chef, Aylwin, Drummond, Mondelet	Motion pour faire déclarer Intimé déchu du droit d'Appel à Sa Majesté faute de cautionnement—Accordée.
34 McArthur	Hart	" "	" " " " "	Motion pour faire rejeter Appel faute de cautionnement suffisant—Accordée.
1 Anderson	Cartier	16 "	" " " Meredith, " "	Motion pour faire déclarer appelant déchu du droit d'Appel à Sa Majesté en Son Conseil Privé, faute de cautionnement—Accordée.

									offres qu'ils font de lui rembouser le montant n'excédant par $200 et qui sera prouvé avoir été réellement payé aux dits Intimés ainsi que ses frais et loyaux couts et permis aux Appelants de prouver le montant réellement payé par le dit P. G. Lemoine et qu'il soit enjoint aux dits Intimés et au dit P. G. Lemoine de comparaître devant cette Cour au jour et heure fixés par le jugement de cette Cour pour fournir un état sous serment du montant ainsi payé et des frais encourus par le dit, P. G. Lemoine et pour y être interrogé sur le montant et les circonstances sous lesquels ce paiement a été fait avec dépens dans le cas où les dites parties contesteraient les présentes—Rejetée.
Ranson..............................	Le Maire, &c. de Mont'l.	"	"	"	"	"	"	"	Motion pour appel du Jugement Interlocutoire—Rejetée sauf recours
Champagne..........................	Hon. D. M. Armstrong.	"	"	"	"	"	"	"	Motion de l'Opposant—Appelant Champagne pour l'émanation d'une règle adressée au Demandeur—Intimé Armstrong, rapportable le 9e jour de Décembre courant, à l'effet de donner ses raisons pourquoi il ne serait pas accor-

APPELANTS.	INTIMÉS.	DATE.	JUGES.	JUGEMENTS.
				dé un Bref d'Appel du Jugement Interlocutoire rendu le 30e jour de Novembre dernier, octroyant la Motion du Demandeur, demandant réforme du Rapport de Distribution en cette cause de la manière y mentionnée en autant que le dit Opposant Champagne y est concerné—Bref pour appeler du Jugement Interlocutoire accordé.
Regina	Blossom	" "	" " " " " "	Order for advisement to be discharged and a re-hearing to be had at Quebec on the 2nd day of the next Term of the Court, and the Prisoner to be detained until that day, and the Gaoler of the District of Montreal ordered to produce the body of the said Blossom then and there.
			QUEBEC.	
88 Crevier	Rocheleau	20 Dec.	Meredith, Drummond, Mondelet, Badgley, {Juge en Chef,} *diss.*	Inf.
42 McArthur	Carbonnau	" "	Juge en Chef, Aylwin, Meredith, Drummond, Mondelet	Conf.
39 Patton	Morin	" "	" " " " "	Inf.
52 Vaufelson	Mann	" "	" " " " "	Conf.
52 Billly	Joly	" "	" " " " " {Ju. Mondelet,} *diss.*	Motion pour appeler d'un Jugement Interlocutoire—rejetée.
46 Gugy	Brown	" "	" " " " " " "	
Rankin	McCrae	" "	" " " " Mondelet	

Exparte	Roberts	" "	" " " " "	Motion pour obtenir un Bref *d'Habeas Corpus*—Accordée
Exparte	Strauss	" "	" " " " "	Motion pour obtenir un Bref *d'Habeas Corpus*—Rejetée.
Roy	Nadeau	" "	" " " " "	Motion pour permission d'entrer un Appel de la Cour de

No.	Appellant	Respondent	1	2	3	4	5	6	7	Judges	Dissent	Judgment
	Exparte	Roberts	"	"	"	"	"	"		"		Motion pour obtenir un Bref *d'Habeas Corpus*—Accordée
	Exparte	Strauss	"	"	"	"	"	"		"		Motion pour obtenir un Bref *d'Habeas Corpus*—Rejetée.
	Roy	Nadeau	"	"	"	"	"	"		"		Motion pour permission d'entrer un Appel de la Cour de Circuit après les délais—Rejetée.
	"		"	"	"	"	"	"		"		Motion pour faire renvoyer l'Appel—Accordée
	Delery	O'Farrell	"	"	"	"	"	"		"		Motion pour permission d'appeler d'un Jugement Interlocutoire—Rejeté.
	Common	"	"	"	"	"	"	"		"		Do.
57	Canning	Gibsone	"	"	"	"	"	"		"		Motion pour faire renvoyer l'Appel de Circuit pour causes et irrégularités dans la Requête—Accordé.
23	Regina	White	"	"	"	"	"	"		"		Cause réservée de la Beauce—Ordered that the Verdict be arrested and the said Prisoner discharged from custody.
	Exparte	Blossom	21	"	"	"	"	"	"	Juge Aylwin, " Mondelet,	diss.	Ordered that the Petitioner Wayne W. Blossom be released from custody in the common gaol of the District of Montreal, on his giving good and sufficient bail for his personal appearance in Her Majesty's Court of Queen's Bench, sitting at the City of Montreal, on the first juridical day of the term to be holden in the Month of March next, for the trial of criminal offenses, to answer the charges con-

tained in the indictment found, by the Grand Jury of the said Court of Queen's Bench, at Montreal, at the Session thereof, holden in the month of September last past. The Bail-Bond to be entered into, and signed before one of the Honorable Judges of this Court, or of Her Majesty's Superior Court, at Montreal, the said Wayne W. Blossom binding himself, for his said personal appearance, in the sum of five hundred pounds of lawful current money, and four sureties, each in the sum of one hundred and twenty-five pounds of like current money, or two sureties, each in the sum of two hundred and fifty pounds of current money aforesaid, at the option of the Petitioner, to the satisfaction of the Honorable Judge, before whom such Bail-Bond is signed.

83 Crevier	Rocheleau	"	"	"	"		"	"		
34 Leason	Morisette	17	"	"			"	"	"	Re-audition ordonnée.
91 Chabot	Poiré	20	"	"	"Drummond, Mondelet, Badgley,	Juge Meredith,				Motion pour faire rejeter Appel faute de cautionnement suffisant—Accordée.
90 Quinn	Quinn	"	"	"	" Aylwin [illegible]	[diss.]	Inf.			

No.	Appelant	Intimé	Date	Juges	Jugement	Remarques
83	Crevier	Rocheleau	"	" " " " "		
34	Leason	Morisette	17	" " " " "		Re-audition ordonnée.
91	Chabot	Poiré	20	" " " Drummond, Mondelet, Badgley, { Juge Meredith, [*diss.*		Motion pour faire rejeter Appel faute de cautionnement suffisant—Accordée.
90	Quinn	Quinn	"	" " " Aylwin, " " { Juge Drummond, [*diss.*	Inf.	
31	Bourassa	Dupont	"	" " " "	Conf.	
32	Bourassa	Lacasse	"	" " " " Meredith, Drummond, Mondelet.	Inf.	
15	Lagueux	Casgrain	"	" " " " " { Juge Drummond, " Mondelet. } *diss.*	Conf.	
12	Evanturel	Evanturel	"	" " " " " Drummond, Mondelet.	"	
2	Dion	Dion	"	" " " " " { Juge Drummond, " Mondelet. } *diss.*	Inf.	
3	Dion	Dion	"	" " " " " Drummond, Mondelet	"	
16	Gugy	Brown	"	" " " " " " "	"	
30	Larochelle	Mailloux	"	" " " " " " { Juge Aylwin, { *diss.* Mondelet	"	Motion pour faire renvoyer l'Appel.—Rejetée.
20	Dawson	Gale	"	" " " " " " "		Motion pour renvoi d'Appel faute de service du Bref d'Appel et de l'avis du Cautionnement—Accordée.
	Reed	Mignot	"	" " " " " "		Motion pour renvoi de l'Appel de la Cour de Circuit faute du rapport de la Requête en Appel—Accordée.

TERME DE SEPTEMBRE 1865.

MONTREAL.

No.	Appelant	Intimé	Date	Juges	Jugement	Remarques
29	Mailloux	Doré	1 Sept.	Juge en Chef, Aylwin, Meredith, Drummond, Mondelet		Motion pour substitution.—Accordée.
19	de Beaujeu	Deschamps	"	" " " "		Motion des Avocats de l'appelant, demandant qu'il leur soit donné acte de la déclaration qu'ils font du décès de l'appelant et production de son extrait mortuaire—Accordée.

APPELANTS.	INTIMÉS.	DATE.	JUGES.	JUGEMENTS.
20 de Beaujeu	Lalonde	1 Sept	Juge en Chef, Aylwin, Meredith, Drummond, Mondelet.	Motion des Av[illegible] l'appelant demandant qu'il leur soit donné acte de la déclaration qu'ils font du décès de l'appelant et production de son extrait mortuaire—Accordée. Requête de John Fraser en intervention—Rejetée avec frais.
36 Dorion	K[illegible]kowski & Fraser	"	" " " " "	Do.
98 "	"	"	" " " " "	
95 Walker *et vir*	Le Maire et Conseil de Sorel	4	" " " " "	Motion pour renvoi de l'Appel vû qu'il s'est écoulé plus d'un an entre la date du prononcé du Jugement final dont est appel en cette cause rendu le 12 Janvier 1854, et celle de l'émanation du Bref d'Appel en cette cause, le 17 Mars dernier, et en autant que le délai accordé pour interjeter un tel Appel était passé et écoulé lors de l'émanation du dit Bref d'Appel, et en autant enfin que les appelants ne peuvent aucunement se prévaloir d'aucune incapacité légale—Rejetée avec dépens.
100 Ouimette	Gamache	"	" " " " "	Requête d'Augustin Guertin en reprise d'instance au lieu et place de l'appelant décédé—Accordée.
19 de Beaujeu	Deschamps	"	" " " " "	Motion de l'Intimé pour obliger l'appelant à reprendre l'Instance—Rejetée.
9 Wardle	Bethune	"	" " " " "	Motion de l'Intimé pour permis de plaider le présent Appel et qu'autorisation soit donnée au Greffier de la Cour de donner à l'Avocat de l'Intimé communication

9	Wardle	Bethune	"	"	"	"	"	"	"	"	Motion de l'Intimé pour permis de plaider le présent Appel et qu'autorisation soit donnée au Greffier de la Cour de donner à l'Avocat de l'Intimé communication du dossier pour cette fin—Permis à l Intimé de plaider le présent Appel en écrit sans délai et autorisation accordée au Greffier de la Cour de donner à l'Avocat de l'Intimé communication du dossier pour cette fin.
54	Buntin	Hibbard	"	"	"	"	"	"	"	"	Motion pour Appel à Sa Majesté en son Conseil Privé—Accordée.
4	McDonnell	Reid	"	"	"	"	"	"	"	"	Motion pour renvoi de l'Appel avec dépens, vû le non-rapport des Bref et Dossier de la Procédure en Cour de première instance—Accor.
44	Crebassa	Massue	"	"	"	"	"	"	"	"	Motion pour renvoi de l'Appel vû la non-enfilure du Factum de l'appelant—Accordée quant aux frais seulement vû l'enfilure du Factum de l'appelant depuis la signification de la dite Motion.
2	Nye	McDonnald	"	"	"	"	"	"	"	"	Motion pour qu'il soit donné ordre au Protonotaire de la Cour Supérieure de transmettre de suite à cette Cour le dossier dans la cause ci-dessus, vû le premis d'appeler à Sa Majesté en Son Conseil Privé, donné à l'appelant—Accordée de consentement.

	APPELANTS.	INTIMÉS.	DATE.		JUGES.					JUGEMENTS.
73	Dupont	Grange	1	Sept.	Juge en Chef.	Aylwin,		Drummond,	Mondelet.	Inf.
			"	"	"	"		"	"	
97	Grand Trunk R. W. Co.	East. Townsh. Bank	"	"	"	"		" { Juge en Chef, } diss	Mondelet	"
66	Sinclair	Henderson	"	"	"	"		"	"	Conf.
13	Corp. St. Liboire	Compagnie du Grand Tronc	"	"	"	"		"	"	"
53	Christie	Monastesse	"	"	"	"		"	"	"
99	Morrison	Ducharme	"	"	"	"		"	"	"
29	Martin	McFarlane	"	"	"	"		"	"	"
86	Bove	McDonald	"	"	"	"		"	"	"
15	Giffin	Trudelle	"	"	"	"		"	"	"
15	Doutre	Walsh	"	"	"	"		"	"	"
22	Kiernan	Kiernan	"	"	"	"		"	"	Inf.
54	Ouellette	Badeaux et at	"	"	"	"		"	"	Conf.
69	Girard	Hall	"	"	"	"		"	"	"
77	Taylor	Buchanan	"	"	"	"		"	"	"
57	Patoille	Desmarais	"	"	"	"		"	"	"
71	Cordner	Mitchell	"	"	"	"		"	"	"
3	Ritchie	Wragg	"	"	"	"		"	"	"
23	Demers	Christin St. Amour	9	"	"	"		"	"	"
23	Lamère *et al.*	Guevremont	"	"	"	"		"	"	Inf. avec dépens en Cour de première Instance contre les appelants et en Appel contre l'Intimé.

QUEBEC.

	APPELANTS.	INTIMÉS.	DATE.		JUGES.					JUGEMENTS.
	Donaghue	Doran	12	Sept.	Juge en Chef,	Aylwin,	Meredith,	Drummond,	Mondelet	Motion pour renvoi de l'Appel faute du Rapport du Dossier et de la Requête—Accordée.
41	Pacaud	Roy	13	"	"	"	"	"	"	Re-audition ordonnée.
28	Brown	Gugy	"	"	"	"	"	"	"	Conf.
	Cressé	Baby & Baby	"	"	"	"	"	"	"	Motion de l'Intervenant Wm. Baby pour reprendre l'Instance au lieu et place de son père décédé—Accordée.
	Canning	McConnell	16	"	"	"	"	"	"	Motion de l'appelant pour qu'il lui soit permis de déposer les timbres nécessaires pour l'entrée de sa Requête et du dossier Ac—

No.	Appelant	Intimé	Date	Juges	Jugement
	Canning	McConnell	16	“ “ “ “ “ “ “ “	Motion de l'appelant pour qu'il lui soit permis de déposer les timbres nécessaires pour l'entrée de sa Requête et du dossier Ac— Accordée.
4	Grenier	Lemaire et al.	18	“ “ “ “ “ “ “ “	Conf.
33	Taylor	Neill	“	“ “ “ “ “ “ “ “	Inf.
21	Simard	Mercier	“	“ “ “ “ “ “ “ “	Conf.
17	Cook	Clint	“	“ “ “ “ “ “ “ “	“
22	Sevigny	Crochetière	“	“ “ “ “ “ “ “	“
26	Tanswell	Ledroit	“	“ “ “ “ “ “ “	“
35	Côté	Donaghue	“	“ “ “ “ “ “ “	“
68	Talbot	Fabrique de Berthier	“	“ “ “ “ “ “ “	“
9	Hart	Vadeboncœur	“	“ “ “ “ “ “ “	“
45	Côté	Masse	“	“ “ “ “ “ “ “	“
	Burns	Connell	20	“ “ “ “ “ “ “ “	Inf. Motion pour Appel d'un Jugement Interlocutoire—Accordée.
	Bérubé	Richardson	“	“ “ “ “ “ “ “ “ “	Do.
28	Brown	Gugy	“	“ “ “ “ “ “ “ “ “	Motion de l'appelant pour permission d'appeler à Sa Majesté du Jugement final en cette cause du 13 courant—Refusée.
37	Aylwin	Venner	“	“ Meredith, Drummond, Mondelet, Badgley	Inf.
36	de Lery	Campbell	“	“ “ “ Aylwin, Meredith, Drummond {Juge en Chef} diss.	“
18	Caspar	Hunter	“	“ “ “ “ “ {Juge Mondelet, diss.}	“
14	Lefebvre	Lefebvre	“	“ “ “ “ “	“
25	Wood	Swinburne	“	“ “ “ “ “ Mondelet {Juge en Chef, “ Meredith,} diss.	“
92	Tourangeau	Renand	“	“ “ “ “ Drummond {Juge Meredith, “ Mondelet,} diss.	“

	APPELANTS.	INTIMÉS.	DATE.	JUGES.	JUGEMENTS.
19	Banque Nationale	Guay	20 Sept.	Aylwin. Drummond, Mondelet	Inf.
23	Regina	Blais	" "	Juge en Chef. " " {Juge en Chef, } diss. Mondelet	"
14	Evanturel	Evanturel	" "	" Meredith. " "	"
12	Evanturel	Evanturel	" "	" " " " {Juge en Chef, } diss. quant aux frais. Drummond, Mondelet	Motion de l'Intimé pour permission d'appeler à Sa Majesté en son Conseil Privé—Renvoyée.
	Rae	Sewell	" "	" " " " " "	Motion pour renvoi d'appel de Circuit, faute de rapport du dossier, &c.—Accordée.
	Sanschagrin	Lecompte	" "	" " " " " "	Motion de l'Intimé pour renvoi de l'Appel faute de cautionnement suffisant—Ordonné à l'appelant de déposer $100 entre les mains du Greffier des Appels pour tenir lieu du dit cautionnement—sinon l'Appel renvoyé à la Cour Inférieure avec les dépens de cette motion.

TERME DE DECEMBRE 1865.

MONTREAL.

	APPELANTS.	INTIMÉS.	DATE.	JUGES.	JUGEMENTS.
39	Ricard	Fabrique de Ste. J. F. de Chantal	1 Dec.	Juge Aylwin, Meredith, Drummond, Mondelet	Motion de l'Appelant pour permis aux parties de procéder *instanter* à la preuve sur l'Exception Préliminaire des Intimés et sur la Réponse à icelle—Accordée de consentement.
2	Grant	Lochead	" "	" " " " "	Motion de l'appelant pour Bref de *Certiorari*-Accordée.
19	de Beaujeu	Deschamps	" "	" " " " "	Motion de Dame A. C. Aubert

de Gaspé *èsqual* et autres pour reprendre l'Instance

No.										
29	de Beaujeu	Lalonde	"	"	"	"	"	"	"	de Gaspé *èsqual* et autres pour reprendre l'Instance au lieu et place de l'Hon. de Beaujeu décédé—Accordée.
57	McDonald	Nivin	"	"	"	"	"	"	"	Do.
	La Reine	J. Bte. Daoust	2	"	"	"	"	"	"	Motion de l'appelant pour obtenir un Bref de *Certiorari*—Accordée.
	Benning	Compagnie de Caoutchouc *et al.*	4	"	"	"	"	"	"	Cause reservée—Ordonnée qu'elle soit remise au premier jour du Terme prochain.
	Regina	Blossom	5	"	"	"	"	"	"	Motion pour Appel de Jugement interlocutoire—accor.
	Lanctôt & *al.*	Marier	"	"	"	"	"	"	"	Requête pour obtention d'un Bref *Habeas Corpu*—Accor.
71	McGillivray	Brad	"	"	"	"	"	"	"	Motion des Défendeur en cette cause appelants pour émanation d'une Règle adressée au Demandeur Intimé à l'effet de donner ses raisons pourquoi un Bref d'Appel ne serait pas accordé de Jugement Interlocutoire du 30 Nov. dernier, rejetant la Motion du Défendeur pour une Commission Rogatoire—Rejetée sans frais.
										Motion on the part of the Appellant that the papers omitted in the Record sent from the Court below being Exhibits of appellant and respondent be annexed to the Record in this cause and that they be allowed to fyle same—Granted with consent of the respondent.

APPELANTS.	INTIMÉS.	DATE.	JUGES.	JUGEMENTS.
Regina	Blossom	1 Dec.	Juge Aylwin, Meredith, Drummond, Mondelet	Ordered that the prisoner be remanded until 10 of the clock in the forenoon to-morrow.
"	"	7 "	" " " " " "	Ordered that the prisoner be remanded until Saturday the 9th at 10 of the clock in the forenoon.
32 de Morochond	Gauthier	" "	" " " Mondelet, Loranger	Conf.
26 Foley	Tarratt	7 "	" " "	Motion pour renvoi de l'Appel en cette cause vû le non rapport du Bref avec le Transcript du dossier de la Cour Inférieure—Accordée quant aux frais seulement vû le rapport du Bref et du Transcript depuis la signification de la dite Motion.
47 Spalding	Holmes	9 "	" " " " "	Conf.
1 Bowker	Fenn	" "	" " " " "	Conf.
79 Rothstein	Dorion	" "	" " " " " {J. Aylwin} diss.	Reformé.
37 Bronsdon	Drennen	" "	" " " " "	Conf.
94 McPhee	Woodbridge	" "	" " " " "	"
100 Ouimette	Gamache	" "	" " " " "	"
78 Guertin *exparte*	O'Neill	" "	" " " " "	Inf.
[illegible] Giard	Lamoureux	" "	" " " " "	"
[illegible] Grand Trunk R. W. Co.	Cunningham	" "	" " " " "	Conf.
96 Mont. Ass. Co.	McPherson	" "	" " " " "	Inf.
75 Société Construction	Scallon & Ducondu *& al*	" "	" " " " " {J. Meredith} diss.	Conf.
Allan	Scatcherd	" "	" " " " "	"
				Motion pour appel d'un Jugement Interlocutoire—Accordée.
21 Dufaux & *al*	Herse *& vir*	" "	" " " " "	Motion des Appelants pour qu'il leur soit permis de retraire les droits litigieux cédés par les Intimés à Pierre G. Lemoine aux

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TO THE PRINCIPAL MATTERS IN THE NINTH VOLUME

OF THE

LOWER CANADA JURIST.

COMPILED BY

STRACHAN BETHUNE, Q.C.

PAGE

ACTION EN GARANTIE :—Where the defendant in an, confesses judgment for a portion only of the principal demand, and contests the principal action as regards the balance, and judgment is rendered for the amount confessed, the defendant *en garantie* must nevertheless pay all the costs of both demands, including those of contestation, and that according to the class of the original demand. (Mongenais vs. Pilon, & Pilon, plff. *en gar*, vs. Brasseur, deft. *en gar.*, S. C.).. 88

ACTION EN NULLITÉ DE DÉCRET :—*Vide* DÉCRET.

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" *petitoire* :—*Vide* EXPERTISE and IMPROVEMENTS.

" " :— " PRESCRIPTION.

ADJUDIÇATAIRE :—A wife *séparée de biens* who has become an, is not liable to *contrainte par corps*, on the mere return of the Sheriff on the writ of execution, that she was duly authorized by her husband to become such *adjudicataire*. (Les Commissaires d'Ecole pour la Municipalité de la Ville de Sorel vs. Crébassa, & Walker, *adjudicataire*, S. C.)........ 23

ADVOCATE OR ATTORNEY, T. S. :—*Vide* PRACTICE.

APPEAL :—A writ of, will not be allowed, from an interlocutory judgment of the Superior Court, rejecting a motion by a defendant to unite four separate actions, on promissory notes, between the same parties, in which the pleas are precisely similar, where the application is resisted by the plaintiffs. (Foley et al., applts., and Tarratt et al., respdts., Q. B.)........ 108

ARBITRATEURS, *et amiables compositeurs* :—An award of, not signified to the parties interested, until after the delay limited by the *compromis* for the rendering of award, is null and void; notwithstanding such award may have been rendered within the prescribed time. (Chapman vs. Hodgson, C. C.).. 112

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ARBITRATEURS, *et amiables compositeurs* :—A report of, will be set aside and annulled, on motion, when it appears that a material witness gave evidence before the arbitrators, without having been previously sworn; and such evidence afterwards reduced to writing and signed, and sworn to by the witness, is irregular and cannot be fyled of record or used, even when two or three arbitrators consent to such a course. (O'Connell vs. Frigon, C. C.) 173

" :—When two of the, change the place of meeting or deliberation, notice of such change should be given to the third. (Do.) 173

ASSIGNEE :—An, under a deed of assignment, executed with the approval of all the creditors of an insolvent, before the Insolvent Act of 1864, can exercise the same remedy *in rem* that the insolvent could otherwise exercise. (Starke et al., applts., and Henderson, respdt., Q. B.) 238

ATTORNEY :—An, at law has no right of action against his client for costs of suit, until the suit is ended. (Atwell, applt., and Browne, respdt., Q. B.) 155

" :—An, at law may recover a retaining or counsel-fee, where the client impliedly admits that he will pay him more than taxable costs. (Beaudry vs. Ouimet et al., S. C.) 158

" :—An, at law is not liable for damages, when the suit he has been conducting is dismissed for want of proceedings during three years, in default of proof of negligence on his part. (Do.) 158

" :—Where an, presents a petition to the Court, on behalf of a number of Bailiffs, and conducts the same to judgment, he has no right of action for his fees, against one of the signers of the petition (on the ground of *solidarité* of liability), in the absence of proof, that such signer ever employed the attorney to act for him. (Doutre vs. Dempsey, C. C.) 176

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BIRTH :—*Vide* EVIDENCE.

BORNAGE :—The existence of a fence for upwards of 40 years, as a dividing line between two properties, will not prescribe either the right to institute proceedings *en bornage* or the right of the lawful owner to such portion of the property as may have been improperly enclosed by such fence. (Les Curé et Marguilliers de L'Œuvre et Fabrique de L'Isle Perrot vs. Picard, S. C.) 99

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CAPIAS AD RESPONDENDUM :—The statement in an affidavit for, that the defendant is truly and personally indebted to the plaintiff in the sum of £300, "for the balance of an account for various transactions which the said defendant had with the plaintiff in their business as wood merchants, which sum defendant hath acknowledged to owe the plaintiff," is a sufficient statement of the cause of debt to entitle the plaintiff to the writ. (Kenny vs. Keown, S. C.) 104

" :—An affidavit for, is sufficient, if it contains all the allegations required by the Statute, although in a different order. (Gregory, applt., and Ireland, respdt., Q. B.) 131

" :—The cause of action is sufficiently set forth in an affidavit for, where it alleges that the deponent was agent at Montreal of the plaintiffs, and that the defendant was justly, truly and personally indebted to the plaintiffs, in a sum exceeding forty dollars, to wit, in the sum of $2,500 being as and for the price and value of a large quantity of glass sold by the deponent, as agent of the plaintiffs, to the defendant, (Gregory, appellant, and the Boston and Sandwich Glass Co., respondents, Q. B.) 134

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CAPIAS AD RESPONDENDUM :—*Vide* CAUSE OF ACTION.

" :—A writ of, may issue on Sunday, on sufficient cause shown. (Redpath vs. Giddings, S. C.) ... 225

" :—A claim for unliquidated damages for alleged personal wrongs, is a sufficient cause of indebtedness to justify the issue of a writ of *Capias ad Respondendum*. (Do.) ... 225

" :—In the case of arrest under a writ of, special bail may be put in at any time, even after judgment, on application to that end either by the defendant or by one of his bail to the Sheriff. (Sewell, appellant, and Vanneyar et al., respondents, Q. B.) ... 265

" :—The fact that the defendant purchased a quantity of flour from plaintiff for cash, to be paid immediately after delivery, and then obtained advances on the flour, and pledged the same for such advances, and wholly failed to pay the vendor, asserting as his reason for not doing so that he was insolvent, is a sufficient ground for the issuing of a writ of *Capias ad Respondendum*. (Raphael vs. McDonald, S. C.) ... 336

CARRIERS:—A passenger's return ticket, stated on its face to be "good for day of date and following day only," can legally avail on a subsequent day when it is proved that the carrier habitually neglected to enforce the condition. (Cunningham, vs. the Grand Trunk Railway Co., S. C.) 57

CAUSE OF ACTION :—Where the contract for the sale of goods is made in Montreal, through the agent there of the vendor, residing in a foreign country, and the goods arrive consigned to such agent, so as to provent the purchaser obtaining the goods from the Customs without the agent's consent, the cause of action will be held to have arisen in Montreal, notwithstanding that the goods may have been at the risk of the purchaser the moment they were shipped, (Gregory, appellant, and the Boston and Sandwich Glass Co., respondents, Q. B.) ... 134

" :—When a party resident at Toronto, and having no domicile nor property in Lower Canada, orders goods by letter from a merchant in Montreal, and gives verbal orders for goods to the merchant's travelling agent at Toronto, which the agent transfers to his principal at Montreal, the cause of action will be held to have arisen in Montreal. (Clark vs. Ritchey, S.C.) ... 234

CENS ET RENTES :—The *Cadastre* is conclusive evidence of the amount of, payable in respect of any lot therein specified. (Rieutord vs. Ginnis, C. C.) ... 109

CERTIORARI :—*Vide* JUSTICE OF THE PEACE.

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COMMENCEMENT *de preuve par écrit* :—Where a party, employing a Notary to perform certain services, writes to the Notary (in doing so) that he understands another party has arranged with him as to his remuneration, and the Notary, in reply, does not contradict this statement, the correspondence is a sufficient *commencement de preuve par écrit* to enable the party, so employing the Notary, to prove that the latter agreed to look to the other party for his fees. (Thomas, appellant, and Archambault, respondent, Q. B.) ... 203

COMPOSITION :—A note given by an insolvent (before the Insolvent Acts of 1864 and 1865) to one of his creditors, for the purpose of obtaining his signature to a Deed of Composition, cannot serve as a ground of action against such insolvent; such note, so given, being considered a fraud on the other creditors. (Sinclair et al., appellants, and Henderson et al., respondents, Q. B.) ... 306

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CONSTITUTED RENTS :—The *Cadastre* is conclusive evidence of the amount of, payable in respect of any lot therein specified. (Rieutord vs. Ginnis, C. C.)........ 109

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" :—A new trial will be granted, in a case of felony, on an application supported by affidavit, based on the discovery of new evidence. (Regina vs. D'Aoust, Q. B.)........ 85

" :—The provisions of Sec. 73 of Ch. 77 of the Cons. Stat. of L. C. do not debar a Clerk of the Crown, being a Queen's Counsel, from appearing in open Court and conducting a case on behalf of the Crown, but must be construed to mean that the person holding the office of Clerk of the Crown cannot practice for individuals. (Regina vs. LeBœuf, Q. B.)........ 197

CURATOR :—The law allows a, six months to find an investment of trust funds, but the Curator is liable to pay interest on all funds proved to have been applied to his own use, even within the six months. (Mackenzie, appellant, and Tayler, respondent, Q. B.)........ 113

" :—Where a Curator deposits the trust funds to his own private credit in a bank, and afterwards checks out the funds, he will be presumed to have applied such funds to his own use, in the absence of proof to the contrary. (Do. and do.)........ 113

" :—A, cannot legally purchase from himself individually, nor can he do so indirectly, with the assistance of a *prête nom.* (Do. and do.)........ 113

" :—In any litigation, between the party interested and the Curator, in connexion with such illegal purchase, it is not necessary that all the parties to the transaction should be in the cause. (Do. and do.)........ 113

CUSTOMS, *Collector of,* is entitled to the notice of action prescribed by Ch. 17 of the Cons. Stat. of Canada, S. 91, in the case of an action to recover back from the Collector moneys paid to him for duty, on condition that so much thereof as should not be legally exigible should be remitted. (Stephens et al., appellants, and Bouthillier, respondent, Q. B.)........ 309

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" :—An action for, lies directly against the Corporation of Montreal, for injuries sustained by the upsetting of a vehicle in one of the public streets of the city, caused by certain building materials obstructing the road. (Humphries vs. The Corporation of Montreal, S. C.)........ 75

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DÉLÉGATION :—In the case of a simple, of payment in a deed of sale where the vendee, in the course of proceedings for a judgment of ratification, deposits the total amount of purchase money in Court, the vendee is completely exonerated from all further responsibility to pay the amount, stipulated to be paid to the creditor *délégué*, even if such creditor receive nothing in the distribution of the moneys so deposited. (Dubuc vs. Charron, S. C.) 79-106

DÉSAVEU :—An Attorney who is *porteur de pièces* is presumed to have had full authority to act, and, in the absence of proof to the contrary, will be held to have had such authority. (Moss et al. vs. Ross, and Ross, plaintiff *en Des.* vs. Monk, defendant *en Des.*, S. C.) 328

DISTRIBUTION :—An hypothecary creditor, having a special *hypothèque* in the property sold by the Sheriff, has a right to be collocated, in preference to a prior hypothecary creditor whose claim extends over other property not yet seized or sold, on giving security, that he will refund the amound of his collocation in case such prior creditor be not paid in full out of such other property. (De LaGrave vs. Dessaulles & De LaGrave, opposant, and Dénéchaud, opposant, and De LaGrave contesting, S. C.) 89

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" :—The delivery in the Post Office, at Montreal, of a newspaper published there, addressed to a subscriber residing in the country, is sufficient proof of delivery. (Penny et al. vs. Berthelot, C. C.) 104

" :—Where a defendant is examined by the plaintiff, as his own witness, evidence may be adduced by the defendant to establish that he, the defendant, is a person of very feeble intelligence and limited memory. (Delisle et al. vs. Décary, S. C.) 107

" :—An entry of a baptism in a non-authentic register, where mention is made of the date of the birth of the person baptized, signed by both parents, is only *primâ facie* proof of the birth at that date, and such date may be contradicted and disproved by oral testimony. (Sykes, appellant, Shaw et al., respondents, Q. B.) 141

" :—A physician is not exempt from disclosing information acquired by him confidentially in his professional character. (Brown vs. Carter, S. C.) 163

" :—*Vide* PROMISSORY NOTE.

" :— " COMMENCEMENT DE PREUVE PAR ECRIT.

" :—A witness cannot be examined in a cause until after the return day of the writ of summons, even though such witness be about to leave the Province. (Benning vs. Malhiot, S. C.) 213

" :—The English rule of evidence, requiring notice to produce an original document, in the hands of the adverse party, does not obtain in a case instituted to rescind a Deed of Assignment of hereditary rights, and a copy of such document can be proved, when the articulation of facts indicates that it is the intention of the party producing the same to prove it to be a true copy. (Herriman et ux., appellants, and Taylor, respondent, Q. B.) 253

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EXPERTISE :—A sworn land surveyor appointed an *expert*, by rule of court, in a petitory action, to establish certain land boundaries, must be sworn before acting as such, and, in default of his so being sworn, his report will be set aside even without any special motion on that ground. (Knowlton et al., appellants, and Clarke et *vir*, respondents, Q. B.)........ 243

EXTRADITION :—The Imp. Stat. 6th and 7th Vic. Ch. 76, which was suspended in this colony by the Queen's Proclamation of the 28th day of March, 1850, was not revived by the passing of either of the Province Acts, 22d Vic. Ch. 29, and 24th Vic. Ch. 6, and, consequently, a judge of the Superior Court for L. C. has jurisdiction over the several classes of offences enumerated in the Treaty between Great Britain and the United States, commonly known as the "Ashburton Treaty." (Regina vs. Young et al., S. C.)........ 29

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FINDER :—The Captain and not the owner of a vessel, in the weighing of the anchor of which a lost anchor has been recovered, will be held to be the finder, within the meaning of the Prov. Stat. 22d Vic. Ch. 12. (Maguire vs. The Trinity House of Montreal, and Cunningham et al., int. parties, C. C.)........ 111

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" :—*Vide* COMPOSITION.

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" :—In a case heard before three Justices of the Peace, judgment may be rendered by two of them. (Exparte Trowley for *certiorari*, and Côté, prosecutor, S. C.)........ 169

LAND SURVEYOR :—*Vide* EXPERTISE.

LARCENY :—When a proprietor of a quantity of broom corn places the same in the hands of a manufacturer, to be converted into corn brooms, which were to be delivered to the party owning the corn, and the manufacturer, instead of so delivering the manufactured brooms, sells and converts the same to his own use, he will be held guilty of larceny, within the meaning of the Cons. Stat. of Canada, Ch. 92, Sec. 55. (Regina vs. Lebœuf, Q. B.)........ 245

LESSOR AND LESSEE :—Where a lessor receives rent from a sub-tenant, and it is otherwise proved that he had knowledge of the sub-lease and in no way protested against it, the lessor cannot claim to rescind the original lease, on the ground that the sub-lease was effected without his consent in writing, in contravention of a stipulation in the lease, requiring such consent in writing. (Cordner, appellant, and Mitchell, respondent, Q. B.)........ 319

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parties in the cause who has become *adjudicataire*, and who is apparently entitled to receive the amount eventually, even on giving good and sufficient security. (Stansfield and *vir* vs. Stansfield, Tutor, S. C.) 103

MANDAMUS:—The place of meeting of a Municipal Council having been selected and fixed *de facto* in a certain place in the Municipality, at the time of the original organization of the Council, it is not necessary to fix the place of meeting subsequently by Bye-Law, and the office of the Secretary-Treasurer is, by law established where such place of meeting is established. (Pigeon vs. the Corporation of the Parish of St. Jean Baptiste, S. C.) 92

" :—A writ of, addressed to the "Secretary-Treasurer of the Corporation of the Parish of St. Antoine" is null, inasmuch as no such Public officer exists by law. (Gravell vs. Marcotte, S. C.) 94

" :—*Vide* SEPARATION DE CORPS ET DE BIENS.

MARRIED WOMAN:—*Vide* REMPLOI DE PROPRES.

" :—A renunciation by a, of all matrimonial rights, in favour of a creditor of her husband, is not an undertaking as security for the debt of her husband and is, therefore, valid. (Armstrong vs. Rolston, cur., and Duchesney, oppt., and the Trust & Loan Co. of U. C. oppt., S. C.) .. 16

" :—When the property of a, separated from her husband as to property has been alienated, without other consideration than the payment of a debt due by her husband to the purchaser, she has a right of action to cause the sale to be rescinded. (Walker et *vir* vs. Crebasse, S. C.) 53

" :—A judgment of *Separation de Biens* duly executed exempts the wife from any liability, by her previously incurred, as security for her husband. (Plessis dit Belair vs. Dubé, S. C.) 76

" :—The legal *hypothèque* of a, *séparée de Biens*, for total sums received during the marriage, with respect to which no registration has been effected, will rank after all the duly registered *hypothèques* on the property of her husband. (Beaugrand dite Champagne vs. Lavallée & Trigge et al., oppts., S. C.) 215

" :—A rule for *folle enchère*, against a married women *séparée de biens*, and served on her husband is good and valid and will be declared absolute, even though the husband be not *mis en cause*, nor mention be made of him in the proceedings for the purpose of authorizing his wife. (Jarry et vir, appellants, and the Trust & Loan Co. of U. C., respondents, Q. B.) 300

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MINOR:—A, aged 19 years and upwards may be emancipated, as regards the administration of her property. (Exparte Shaw & Cooper, Tut., S. C.) 166

" :—Where the property of a, has been sold by his Tutor, under judicial authority, proof of the necessary publications cannot be made by oral testimony. (Poustie et al., vs. McGregor, S. C.) 332

MONTREAL, CORPORATION OF:—*Vide* Damages.

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Motion *to unite causes*:—*Vide* Practice and Appeal.

Opposition *à fin d'annuler*, alleging previous seizure, and claiming that *saisie sur saisie ne vaut*, will not be set aside on motion. (Fraser vs. Burnstein, Burnstein, opp., S. C.) 215

" :—Founded on the allegation that the Bailiff had no right to be accompanied by a *recors* will be dismissed on motion. (La Banque du Peuple vs. D'Aoust, and D'Aoust, oppt., S. C.) 215

" :—*en sous ordre*:—In the absence of allegation of insolvency in an, and of proof of that fact, the Court will dismiss the opposition with costs, although no distinct issue on the point be raised by the contestation fyled. (Charbonneau vs. Gladu, and Paquette et al., oppts. *en sous ordre*, S. C.) 107

" :—An, not based on a judgment, cannot be maintained. (Exparte The Mayor, &c., and Notre Dame Street, and Bissonette, party interested, and Grant, oppt. *en sous ordre*, S. C.) 280

Partnership property cannot be attached for the payment of an individual debt of one of the partners, in the absence of proof of fraud. (Richardson vs. Thompson and Thompson et al., C. C.) 20

" :—A direct action can be maintained, at the instance of a partner, for setting aside a judgment rendered upon the confession of his co-partner, made after the dissolution of the partnership. (Moore vs. O'Leary et al., S. C.) 164

Peremption d'Instance:—The death of one of the plaintiffs interrupts the effect of. (Brewster et al. vs. Childs et al., S. C.) 21

" :—The death of one of the defendants interrupts the effect of. (Howard et al. vs. Childs et al., S. C.) 22

" :—The demand for, must be served on all the parties who have intervened in the cause. (Moreau *et vir* vs. Leonard, and Lapierre, int. party, S. C.) 100

Practice:—The declaration, on oath, of a defendant, that he had paid the debt demanded by a " contra account," which he admitted " he had not made up, but always supposed that the plaintiff was in his debt," will not support a plea of prescription based on the obligation of payment, and will of itself afford a sufficient admission of the plaintiff's demand. (Thayer, appit., and Wilscam, respdt., Q. B.) 1

" :—A defendant, foreclosed from pleading to a writ of *saisie arrêt* after judgment, will, on special motion, be allowed to answer the plaintiff's contestation of a *tiers saisi's* declaration made in obedience to such writ, if he has an interest in the matters raised by the contest. (Kingston vs. Torrance, and Torrance et al. T. S., S. C.) 20

" :—*Vide* Peremption d'Instance.

" :—Where two Justices of the Peace hear a cause, they must both concur in the judgment. (St. Gemmes, appit., and Cherrier, respdt., C. C.) 22

" :—*vide* Adjudicataire.

" :— " Security for Costs.

" :— " Transfer.

" :— " Saisie Gagerie.

" :— " Decree.

" :— " Notwithstanding that the defendant resides in a different district to that in which a *saisie conservatoire* has issued, the proceeding is nevertheless legal, if the fraudulent circumstances which gave rise to the *saisie* occurred there. (Coulombe vs. Lamieux, S. C.) 73

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PRACTICE :—*Vide* CRIMINAL PRACTICE.

" :—An Advocate and Attorney, *tiers saisi* in a cause, cannot refuse to declare what moneys he may have in his hands belonging to a defendant in the cause, on the ground that his doing so would be a betrayal of professi[illegible] c[illegible]nce. (Mackenzie et al. vs. Mackenzie and Mackenzie [illegible]) 87

" :—*Vi*[illegible]

" :— " [illegible]

" :— " F[illegible]

" :— " SA[illegible]

" :— " LIC[illegible]

" :— " EVIDENCE.

" :— " CAPIAS AD RESPONDENDUM.

" RULE OF 105

" :—*Vide* OPPOSITION EN SOUS ORDRE.

" :—Where the pleas are precisely similar to four separate actions, between the same parties, on promissory notes matured at different dates, the Court will not entertain a motion by the defendants to unite the causes, if the application be resisted by the plaintiffs. (Foley et al., appellants, and Tarratt et al., respondents, Q. B.) 108

" :—*Vide* ATTORNEY.

" :— " REVIEW.

" :— " RECORD.

" ACTION *in formâ pauperis*.

" :— " OPPOSITION *à fin d'annuller*.

" :— " EXPERTISE.

" :—It is not necessary that the Bailiff serving process should inform the defendant of the contents of the writ and declaration. (DeLorimier vs. Hurtubise, C. C.) 280

" :—*Vide* CUSTOMS, *Collector of*.

" :— " DÉSAVEU.

PRESCRIPTION :—*Vide* PRACTICE.

" :—During the interval that the Crown held a property surrendered by a Seignior, for the purpose of commutation under the Statute 6th Geo. 4th, Ch. 59, before the issuing of the letters patent re-granting the same, prescription ran in favour of a mere squatter in actual possession of such property, but without any title whatever thereto. (McDonald, appellant, and Lamb, respondent, Q. B.) 281

" :—The possession of a squatter as above could legally avail, in favour of a party succeeding him in the possession of the property, under a plea of thirty years' prescription. (Do.) 281

" :—Junction of possession such as above does not require a title, in itself *translatif de propriété*, from the one possessor to the other, but any kind of informal writing *sous seing privé*, supported by satisfactory verbal evidence, will suffice. (Do.) 281

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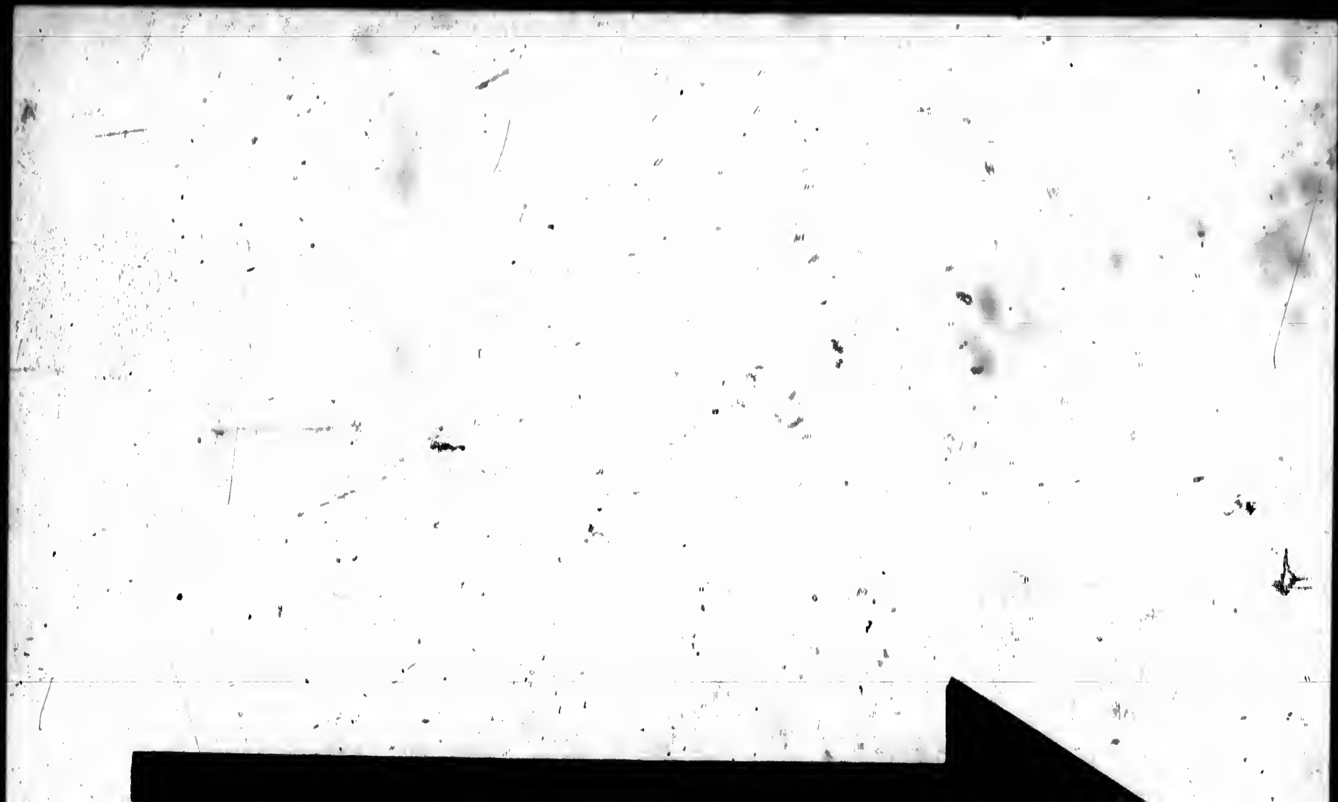

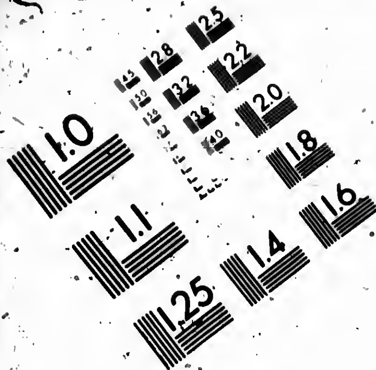

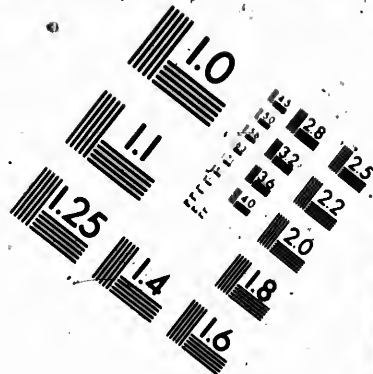

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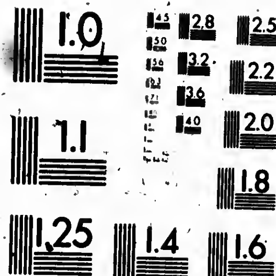

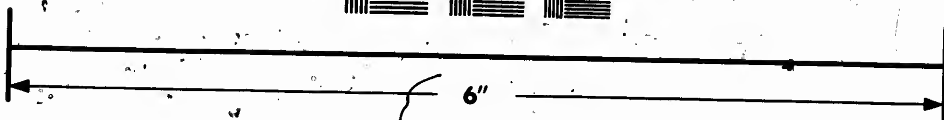

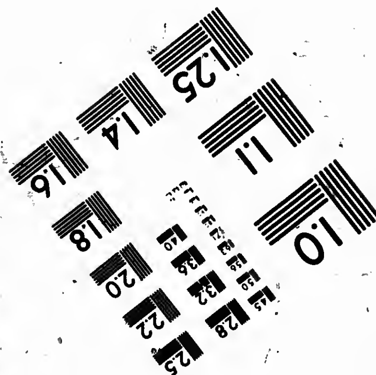

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" :—When the signature to a, is denied, *Experts-vérificateurs* may be named, on motion of one of the parties, and their report will be homologated and conclusive. (Lord vs. Laurin et al., C. C.)........ 171

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" :—The making and loss of a, may be established by parol evidence, and the variance between the declaration (stating maturity of note to be in September) and the proof (establishing it to be in November) is immaterial, when the evidence establishes acknowledgment of the note by the maker, subsequent to his knowledge of its loss. (Carden, appellant, and Ruiter, respondent, Q. B.)........ 217

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" :— " REPRISES.

" :—The certificate of, of a deed is not insufficient because written on a separate paper from the deed. (Foley, appellant, and Godfrey, respondent, Q. B.)........ 154

" :—Where a deed of mortgage and a deed of sale, executed after the passing of the Registry Ordinance, are deposited in the Registry Office, the former on a Sunday and the latter on the Monday morning following, at nine o'clock, they will be held to have been registered simultaneously; and, as the mortgage was consequently not registered *before* the sale, the mortgage will be held to be inoperative as against the purchaser. (Chaumont, appellant, and Grenier, respondent, Q. B.)........ 209

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" :—A judgment dismissing an attachment under the Insolvent Act of 1864 is subject to Review before the Superior Court. (Johnston et al. vs. Kelly, S. C.)........ 156

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REVOCATION:—A deed must stand unrevoked and good and valid in law until revoked in the presence of all the parties thereto. (Sykes, applt, and Shaw et al., respdts., Q. B.) 141

SAISIE ARRÊT:—*Vide* PRACTICE.

" :—In the case of a, before judgment, the words "*may* be deprived of his remedy and *may* lose *his debt and sustain damage*," in the affidavit, are not sufficient to justify the issuing of the writ. (Ferres vs. Rutherford et al., and The Montreal and Champlain R. R. Co., T. S., S. C.) ... 102

" :—In the case of a, *en main tierce*, where the seizure in the hands of the *tiers saisie* is effected *corporeally*, the seizure is null, but an intervening party cannot, by motion made immediately after he is allowed to intervene, and before any issue is joined on the intervention, claim the quashing of the seizure. (Fleck, applt., and Brown, respdt., Q. B.) 216

SAISIE CONSERVATOIRE:—*Vide* PRACTICE.

SAISIE GAGERIE:—The declaration in a case commenced by, must be either served within the ordinary delays prescribed for writs of summons, or be left at the office of the Clerk of the Court within the delay prescribed by the Statute. (Ward vs. Cousine, C. C.) 28

SECURITY:—*Vide* WAREHOUSEMAN.

" :—In the case of a joint and several, the creditor is not bound to use diligence against the principal debtor. (Quinn vs. Edson, S. C.) 101

SECURITY FOR COSTS:—Where the plaintiff has left the country subsequent to the institution of an action, security for costs may be demanded although it be shown, by affidavits, that he has a place of business, containing valuable stock, and a domicile in this city, and that his absence was believed to be only temporary, namely, about three months. (Davis vs. Jacobs, C. C.) 25

SEIGNIORIAL RENT:—*Vide* CADASTRE and CONSTITUTED RENT.

SÉPARATION DE BIENS:—*Vide* MARRIED WOMAN.

" DE CORPS ET DE BIENS:—Where in an action of, an order for alimentary allowance has been granted during the pendency of the suit, and the parties become reconciled, the order lapses although the parties again separate. (Reid vs. Robinson and Robinson, oppt., S. C.) 103

SERVITUDE:—*Vide* COUPE DE BOIS.

STOLEN PROPERTY:—*Vide* REVENDICATION.

SURETY:—A, has a right of action against the principle debtor, after the term of credit has expired, to compel him to produce receipts from the creditor, or pay him (the surety) the amount for which such surety is responsible to the creditor. (McKinnon vs. Cowan, C. C.) 175

TRANSFER:—An action based on a deed of, without allegation of signification, will be dismissed on demurrer. (Mignot vs. Reeds, C. C.) 27

" :—A *cessionnaire* may execute a judgment transferred to him, in the name of the *cédant*, although no special authority to do so be conferred by the deed of assignment, Bergevin dit Langevin et al. vs. Persillier dit Lachapelle, et *vir*, and the same oppts., et Meloche int. party, S. C.... 78

" :—While an action upon a transfer not signified may be maintained against the original debtor, an hypothecary action against a *tiers detenteur* upon such transfer cannot be maintained, without previous signification of the transfer upon the debtor. (Aylwin, applt., and Judah, respdt., Q. B.) 179

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TRANSFER :—Partial payments by a debtor, on account of a debt transferred, or papers *sous seing privé*, showing that the debtor had a knowledge of the transfer, are equivalent to a signification of the transfer only as between the *cessionnaires* and the debtor, and not as between the *cessionnaire* and a third party. (Do.) 179

" :—In order to sustain a hypothecary action, the debt set up by the plaintiff must be due and exigible (Do.) 179

TRUSTEE :—*Vide* CURATOR.

WAREHOUSEMAN :—A loan to a, may be secured by the warehouseman granting a warehouse receipt for goods in his possession belonging to himself. (Molsons Bank vs. Janes et al., S. C.) 81

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