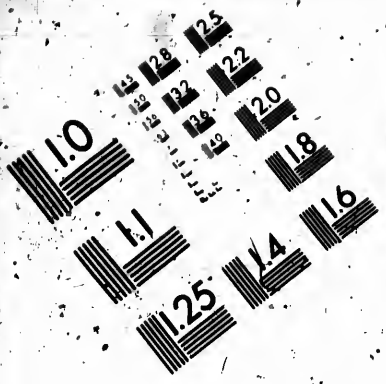


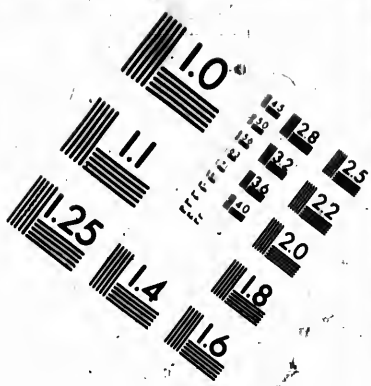
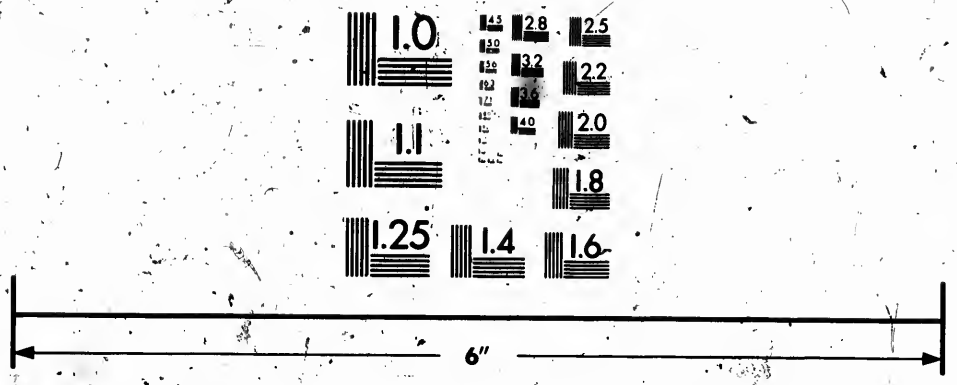
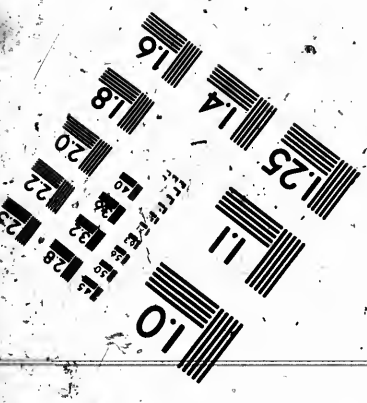
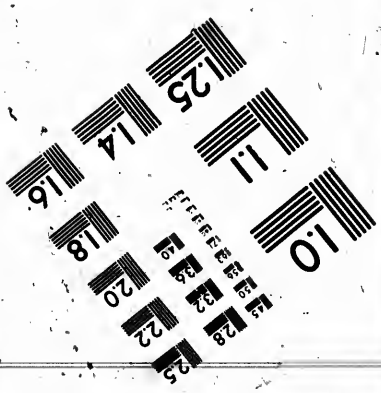


IMAGE EVALUATION TEST TARGET (MT-3)







Photographic Sciences Corporation

23 WEST MAIN STREET
WEBSTER, N.Y. 14580
(716) 872-4503

Technical and Bibliographic Notes / Notes techniques et bibliographiques

The Institute has attempted to obtain the best original copy available for filming. Features of this copy which may be bibliographically unique, which may alter any of the images in the reproduction, or which may significantly change the usual method of filming, are checked below.

L'Institut a microfilmé le meilleur exemplaire qu'il lui a été possible de se procurer. Les détails de cet exemplaire qui sont peut-être uniques du point de vue bibliographique, qui peuvent modifier une image reproduite, ou qui peuvent exiger une modification dans la méthode normale de filmage sont indiqués ci-dessous.

- [ ] Coloured covers/ Couverture de couleur
- [ ] Covers damaged/ Couverture endommagée
- [ ] Covers restored and/or laminated/ Couverture restaurée et/ou pelliculée
- [ ] Cover title missing/ Le titre de couverture manque
- [ ] Coloured maps/ Cartes géographiques en couleur
- [ ] Coloured ink (i.e. other than blue or black)/ Encre de couleur (i.e. autre que bleue ou noire)
- [ ] Coloured plates and/or illustrations/ Planches et/ou illustrations en couleur
- [ ] Bound with other material/ Relié avec d'autres documents
- [x] Tight binding may cause shadows or distortion along interior margin/ La reliure serrée peut causer de l'ombre ou de la distorsion le long de la marge intérieure
- [ ] Blank leaves added during restoration may appear within the text. Whenever possible, these have been omitted from filming/ Il se peut que certaines pages blanches ajoutées lors d'une restauration apparaissent dans le texte, mais, lorsque cela était possible, ces pages n'ont pas été filmées.

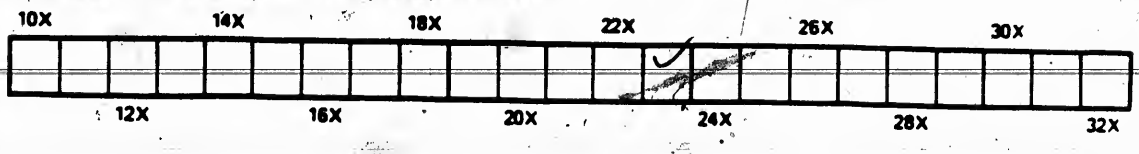
- [ ] Coloured pages/ Pages de couleur
- [ ] Pages damaged/ Pages endommagées
- [ ] Pages restored and/or laminated/ Pages restaurées et/ou pelliculées
- [x] Pages discoloured, stained or foxed/ Pages décolorées, tachetées ou piquées
- [ ] Pages detached/ Pages détachées
- [x] Showthrough/ Transparence
- [ ] Quality of print varies/ Qualité inégale de l'impression
- [ ] Continuous pagination/ Pagination continue
- [ ] Includes index(es)/ Comprend un (des) index

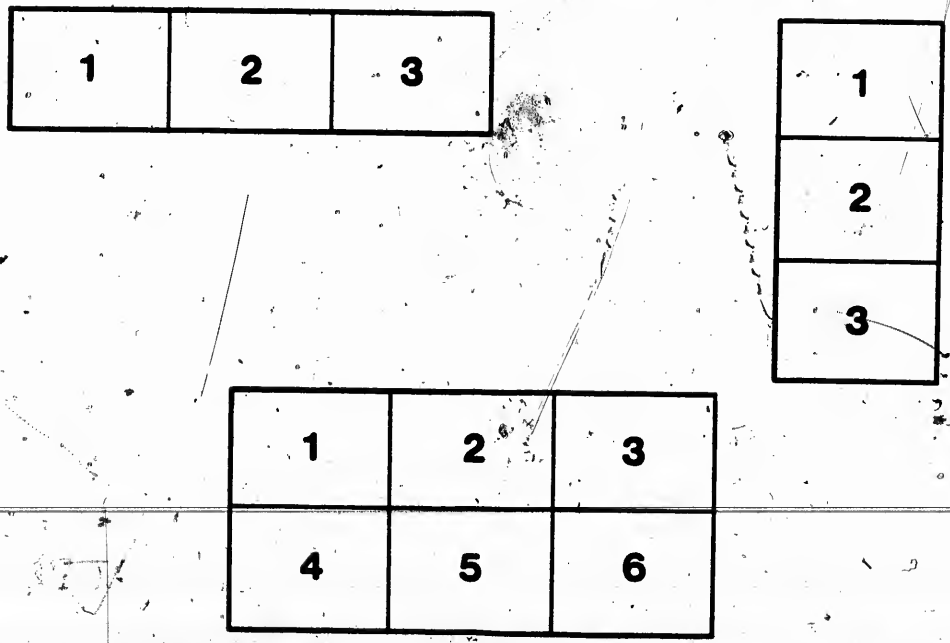
Title on header taken from:/ La titre de l'en-tête provient:

- [ ] Title page of issue/ Page de titre de la livraison
- [ ] Caption of issue/ Titre de départ de la livraison
- [ ] Masthead/ Générique (périodiques) de la livraison

- [x] Additional comments:/ Commentaires supplémentaires: Various pagings. There are some creases in the middle of pages. Pagination multiple. Il y a des plis dans le milieu des pages.

This item is filmed at the reduction ratio checked below/
Ce document est filmé au taux de réduction indiqué ci-dessous.





S

PR

THE

LOWER CANADA

Jurist.

COLLECTION DE DECISIONS

DU

BAS-CANADA.

VOL. XX.

Editorial Committee:

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

THE INDICES:

BY S. BETHUNE, Q.C.

Montreal:

PRINTED AND PUBLISHED BY LOVELL PRINTING AND PUBLISHING CO.

1876.

TABLE OF CONTENTS.

	PAGE
Names of Contributors	IV
Index to Cases	V
Report of Cases	1-336
Index to principal matters in Reports	I-XI

Contributors to Vol. XX.

STRACHAN BETHUNE, Q.C.
JOSEPH DOUTRE, Q.C.
WILLIAM H. KERR, Q.C.
JOHN L. MORRIS.
JAMES KIRBY, D.C.L., LL.D.

J. G. D'AMOUR.
J. J. MACLAREN.
A. BRANCHAUD.
L. E. PANNETON
F. S. LYMAN.

INDEX

TO CASES REPORTED IN THE TWENTIETH VOLUME

OF THE

LOWER CANADA JURIST.

	PAGE
Abbott, et al., Applts., & Fraser, et al., Respdts	197
Ætna (The) Life Ins. Co., Applt., and Brodie, Respdt	286
Bank (The City) vs. Lafleur	131
" (The Mechanics) vs. Seale	196
" (The) of Commerce vs. Papineau	306
Beaudoin vs. Ducharme, and Bellefleur, T. S.	223
Beaudin, Applt., and Roy et al., Respdts	308
Beaudry vs. Denis	254
" et al. vs. Fleck	304
Beaufoy, Applt., and Feek, Respdt	182
Bell, Applt., and Arnton, Respdt	281
Belle vs. Dolan	302
Blanchard, Applt., and Richer, Respdt	146
Boucher vs. Girard et al.	134
Brewster et al., Applts., and Chapman et al., Respdts	295
Brooke et al., Applts., and Dallimore, Respdt	176
Brossard, Applt., and Bertrand, Respdt	125
Brossoit, Applt., and Turcotte, Respdt	141
Brown, Applt., and The Imp. Fire Ins. Co., Respdt	179
" " and le Curé et al., de Montréal, Respdts	228
Brown et al. vs. Lionais et al., and Lionais et al., Oppts	280
Buchanan et al. vs. McMillan et al.	105
Butters et al. vs. Allan et al.	137
Canada (The) Tanning Extract Co. vs. Foley	180
Charbonneau, Applt., and Davis et al., Respdts	167
Charlebois *et ux.* vs. Cabill	27
Compagnie (La) de Coton de V. Hudon, Hochelaga, vs. Valois	299
" (La) de Navigation Union vs. Rascony	306
Curé (Le) de Beauharnois vs. Robillard	294
Décary vs. Poirier	167
DeLaRonde vs. Walker et al.	297
Devlin vs. Morgan	132
Doyle, Applt., and Gaudette, Respdt	134
Dufaux, Applt., and Robillard, Respdt	288
Evanturel, Applt., and Evanturel et al., Respdts	218

Ex parte Dufaux, Petr., and Robillard, *mis en cause* 305
Farmer vs. O'Neill, and Farmer, Petr 185
Foley, Applt., and Stuart, Respdt 183
Furniss, Applt., and The O. and R. F. Co. et al., Respdts 26
Gareau vs. Gareau 303
Gaudin vs. Starnes 192
Greene et al. vs. Blanchette 196
Grothé vs. Lebeau, and Lacroix, Petr., and Beausoleil et al., T. S 300
Inglis (In the matter of) Ins., and Prowse et al., Crs. contesting 184
Ireland, Applt., and Henry et al., Respdts 327
James et al. vs. The Sun Mutual Ins. Co. of N. Y 194
Jetté et al., Applts., and MacNaughton, Respdt 255
Kane vs. The Montreal Telegraph Co 120
King, Applt., and Tunstall et al., Respdts 49
Lafleur, Applt., and Bertrand, Respdt 1
Lalonde, Applt., and Lynch et al., Respdts 158
Lang vs. Clark, and Clark, Petr 184
Lepine, Applt., and The Permanent Building Society of Jacques Cartier, Respdt 300
Leroux, Applt., and Leroux, Respdt 223
Liggett et al., Applts., and Tracey, Respdt 313
Lionais vs. Lamontagne et al., and E. Contra 303
Longpré et al. vs. Pattenaude 28
Longtin vs. The Mount Royal Permanent Building Society 297
Lussier vs. Anderson 279
McKay vs. The Mayor et al., of Montreal 221
Mallette, Applt., and Lenoir, Respdt 293
Molsons (The) Bank vs. Converse 302
Ostell vs. Péloquin 48
Owens et al. vs. Cushing 86
Pierreville (The) Steam Mills Co., Applt., and Martineau, Respdt 225
Railway (The) and Newspaper Adv. Co. vs. Hamilton et al 28
Raymond, Applt., and Larocque, Respdt 175
Regina vs. Lynch 187
" vs. Jennings 291
" vs. Huddel 301
Renaud dit Blanchard, Applt., and Richer, Respdt 146
Richard et al. vs. Piché, and La Soc. Can. Frse. de Cons. de Montréal, T. S 290
Richelieu (The) Co., Applt, and Anderson, Respdt 219
Ritchot vs. McGill et al 139
Robertson et al. vs. Fontaine, and Fontaine, Oppt 195
" " vs. Overing 299
Rodier vs. McAvoy 305
Rosenbaum, *in re* on demand of U. S. Government for extradition 165
Rutherford, Applt., and the G. T. R. Co, Respdt 11
Ryan et al., Petrs., vs. Devlin, Respdt 77
School (The) Commissioners of Hochelaga vs. Hogan et al 298
Simmons et al., Insolvents, and Fulton, Assignee, and Bevington et al., Contestants 296
Société (La) de Construction Métropolitaine vs. Bourassa 304
Sœurs (Les) de la Charité de L'Hopital Général de Montréal, Applts., and Yuile et al., Respdts 329
Sorel (The Mayor, &c. of,) Applts., and Armstrong, Respdt 171
Tough et al., Applts., and The Prov. Ins. Co., Respdt 168
Toupin, Applt., and The Ontario Bank, Respdt 5
Union St. Jacques de Montréal, Applt., and Belisle, Respdt 29
White et al., Petrs., and Mackenzie, Respdt 22
Workman vs. The City of Montreal 217
Yuile et al. vs Munro et al 25

THE

LOWER CANADA JURIST.

COURT OF QUEEN'S BENCH, 1875.

MONTREAL, 17TH MARCH, 1875.

Coram DORION, Ch. J., MONK, J., TASCHEREAU, J., SANBORN, J.

No. 34.

LAFLEUR,

AND

BERTRAND,

APPELLANT;

RESPONDENT.

HELD:—That the subrogation in the hypothecary rights of a creditor, granted to the universal legatee of the debtor who pays his share of the hypothecary debt, cannot avail against the hypothecary rights of a subsequent hypothecary creditor whose hypothec has been duly registered.

This was an appeal from a judgment rendered by the Superior Court at Sorel, in the District of Richelieu, (ROUTHIER, J.) on the 10th of March, 1874, under the following circumstances:—

On the 12th October, 1863, by obligation before T. Doucet and his colleague, notaries, Louis Couturier dit Verville, Felix Bertrand dit Durocher and Pierre Bertrand dit Durocher, the elder, acknowledged to have borrowed $1,000 from the Trust and Loan Company of Upper Canada, and obligated themselves jointly and severally for the payment of the loan. Felix Bertrand dit Durocher hypothecated a lot of land in the Eighth Concession of Saint Pie de Guir of one arpent and a half in width, which belonged to him and is the property first described in the Sheriff's minutes of seizure and advertisement; and Pierre Bertrand dit Durocher, the elder, hypothecated another lot of land in the same concession, which belonged to him, and of which the property of one arpent in width secondly described in the above mentioned minutes of seizure and advertisement formed part. The obligation was registered on the 16th October, 1863. Although the obligation was joint and several, the loan was made for two of the co-debtors, viz: Louis Couturier dit Verville and Felix Bertrand dit Durocher, half or $500 for each; and Pierre Bertrand dit Durocher only became a party to give them the benefit of his credit. This fact was acknowledged by the three co-debtors in a Deed of Declaration, passed before Mtre. P. Payan and his colleague, notaries, on the 9th November, 1863, and registered on the 18th June, 1873.

By a particular legacy in his will received on the 29th October, 1866, by P. Payan and his colleague, notaries, Pierre Bertrand dit Durocher, the elder, gave the above mentioned lot of land of one arpent in width, being part of that which he had hypothecated in favor of the Trust and Loan Company of Upper

Lafleur et Bertrand.

Canada, to his son and co-debtor Felix Bertrand dit Durocher, and he then appointed the respondent, another son of his, as his universal legatee. Shortly after the date of this will, Pierre Bertrand dit Durocher, the elder, died without revoking or altering it. Felix Bertrand dit Durocher thereupon became the owner of the lot of land of one arpent in width; and Pierre Bertrand dit Durocher, the younger, acquired the rest of the testator's property, and succeeded to all his rights and to all his liabilities.

Subsequently, on the 3rd November, 1871, Louis Conturier dit Verville and Pierre Bertrand dit Durocher, the younger, each paid one half of the loan of $1,000 to the Trust and Loan Company of Upper Canada; and by acquittance passed before Mtre. A. D. Jobin, notary, on the same day the company discharged Louis Couturier dit Verville and released his property, and subrogated Pierre Bertrand dit Durocher, the younger, in all its rights against his brother and father, the two other co-debtors, and upon their property described in the obligation. This deed was registered on 5th November, 1871. It appears from this deed of acquittance and subrogation, which is accepted and signed by Pierre Bertrand dit Durocher, the younger, that he did not inform the company that his father was dead and that he was his universal legatee.

On the 8th February, 1867, the appellant obtained judgment against the defendant in this cause, Felix Bertrand dit Durocher, for $251.61, with interest and costs; and he registered his judgment on the 2nd November, 1871, with a notice describing the two lots of land above mentioned as the property and as being in the possession of the defendant. The appellant afterwards sued out execution; and the Sheriff seized and on the 23rd June, 1873, sold the two lots of land in question, the one originally owned by Felix Bertrand dit Durocher for $415, and the other, being part of that which originally belonged to Pierre Bertrand dit Durocher, the elder, for $294.

On the Sheriff's return, the Prothonotary drew a report of distribution. After collocating the costs of collocation, execution and suit, he awarded the balance of the proceeds of both the lots of land, $551.69, to Pierre Bertrand dit Durocher, the younger, as subrogated in the hypothecary rights of the Trust and Loan Company of Upper Canada.

This collocation, being article No. 5 of the report, was contested by the plaintiff and appellant, on the ground that Pierre Bertrand dit Durocher, the younger, being the universal legatee of Pierre Bertrand dit Durocher, the elder, could not obtain the subrogation under virtue of which he was collocated. The respondent answered that a contestation could only avail to the extent of the contestant's claim, and that the respondent having paid the half of the loan due by Felix Bertrand dit Durocher, had been duly subrogated in all the rights of the Trust and Loan Company of Upper Canada against him. The appellant replied that his claim amounted at the date of the report of distribution to $483.92, and that he had interest to that extent to contest the fifth article of the report.

The only testimony adduced was that of Louis Couturier dit Verville, who proved the truth of the declaration of the 9th November, 1863, and that the Trust and Loan Company of Upper Canada had subrogated the respondent in

its rights against Félix Bertrand dit Durocher, because he had paid the latter's half of the loan.

Lafleur et Bertrand.

The following was the judgment of the Court below:—

"La Cour ayant entendu les parties par leurs avocats sur le mérite de la "contestation de l'Item cinquième du rapport de collocation fait en cette cause; "vu les procédures et la preuve de record et sur le tout délibéré; Considérant "que Pierre Bertrand dit Durocher, père maintenant décédé, aux termes de "l'acte de déclaration, produit en cette cause comme exhibit du Colloqué No. 1, "et passé devant Mtre. Payan, Notaire, le 6 Novembre, 1863, n'était par rap- "port à ses co-débiteurs, que caution, pour la somme de $1,000 alors due par "ses co-débiteurs et due à la *Trust and Loan Company of Upper Canada*, en "vertu d'un acte d'obligation consenti par lui et par Louis Couturier dit Ver- "ville et Félix Bertrand dit Durocher, le défendeur en cette cause, devant "Mtre. T. Doucet, Notaire, le 12 Octobre, 1863, et rapporté au certificat du "registrateur produit en cette cause; Considérant qu'en vertu de la loi et du "dit acte de déclaration, la dite somme de $1,000 était due, moitié par le dit "Louis Couturier dit Verville et moitié par le défendeur en cette cause, par "rapport aux co-débiteurs entre eux; Considérant que Pierre Bertrand dit "Durocher, fils, le colloqué, est le légataire universel de son père sus-nommé, "Pierre Bertrand dit Durocher, en vertu du testament de ce dernier, reçu à "St. Michel d'Yamaska, devant Mtre. Payan, Notaire, et témoins, le 29 Oc- "tobre, 1866; Considérant que le dit Pierre Bertrand dit Durocher, fils, col- "loqué, a payé à la dite Compagnie *Trust and Loan* la part due par le défen- "deur dans la dite somme de $1,000, savoir: $500 et les intérêts, ainsi qu'il "appert à l'acte de quittance et subrogation, produit en cette cause comme son "exhibit No. 2, et passé à Montréal devant Mtre. Jobin, Notaire, le 3 Novem- "bre, 1871; Considérant qu'en effectuant ce paiement le dit colloqué a été "subrogé, tant en vertu de la loi, que par le dit acte de quittance, aux droits "de la dite Compagnie *Trust and Loan*, contre le défendeur, et que, partant, "il avait droit d'être colloqué ainsi qu'il l'a été en cette cause, et pour le mon- "tant mentionné en la dite collocation; Considérant que le demandeur n'a "pas établi les allégués de sa contestation, et que sa position n'a pas été "changée par la subrogation sus-alléguée, Renvoie la dite contestation avec "dépens et maintient, dans sa forme et teneur, la collocation contenue en le "Cinquième Item du rapport de collocation, fait et produit en cette cause, avec "frais, distraits en faveur de Mtre. Germain, avocat du Colloqué."

TASCHEREAU, J., delivered the judgment of the Court as follows, remarking that the question involved in the appeal was one purely of law:—

"La Cour *** considérant que le 12 Octobre 1863, par acte fait et passé à Montréal pardevant Maitre Doucet, Notaire Public, les nommés Louis Ver- ville, Félix Durocher et Pierre Durocher, père, consentirent conjointement et soli- dairement entre eux une obligation de mille piastres en faveur de l'association appellée "Trust and Loan Company of Upper Canada," et par laquelle le dit Félix Durocher, défendeur, pour la sûreté du paiement de la dite somme en capital et intérêt, hypothéqua l'immeuble saisi et vendu en cette cause, et le dit Pierre Durocher, père, hypothéqua l'immeuble dont partie sous numéro deux est saisi

same rule must apply to all. They cannot capriciously and arbitrarily refuse to carry goods for one person which they are accustomed to carry for another, or to carry one class of goods and refuse another of the same nature. Is cedar timber goods? This the Company have sufficiently determined, if the Act did not declare it, when they carry all sorts of timber except this, for this man, and they carry this kind of timber when it suits them to do it. Timber is one of the most common kinds of merchandize in a new country like ours. It cannot be held, with any regard for the rights of the community, that when a franchise is given to Railway Companies which changes the whole mode of doing business, causes ordinary modes of transport to cease, and gives rise to new industries, that power should be given to these monopolists of the carrying business to refuse, to any individual they may please, to carry his goods, without valid excuse for so doing. This would place it in their power to ruin one man and build up another, and disturb trade by destroying competition. In this case it must be observed, as has been remarked by the Chief Justice, that the Court decides nothing as to the liability of the Company to carry any species of timber or other goods where special reasons of excuse may be urged for not carrying it. No question arises here as to appellant's willingness and readiness to pay the freight, and there can be no pretence upon the facts proved that the species of timber sought to be carried, differed from any other, or that the Company were not in a position to carry it. Under these circumstances we say they were bound to carry it, and, refusing to do so, they must be held for the damages proved to have been

donner droit d'être colloqué sur les deniers en cette cause en préférence à l'appelant, et qu'en acquittant cette dette de $500 il ne faisait qu'acquitter la dette de son auteur dont il était responsable comme son représentant légal;

Considérant qu'il y a erreur dans le jugement de la Cour Supérieure pour le District de Richelieu prononcé le dixième jour de mars 1874, en ce qu'il renvoie la contestation par l'appelant du rapport de distribution fait et préparé en la dite cause et maintient la collocation en faveur de l'intimé sous l'Item No. 5 avec dépens, casse et annulle le dit jugement, et rendant le jugement que la dite cour aurait du rendre, maintient la contestation du dit Item No. 5, du dit rapport, faite par l'intimé, et déclare que l'intimé ne doit pas être colloqué en préférence à l'appelant, et ordonne que le dossier en cette cause soit renvoyé à la dite Cour Supérieure du dit District de Richelieu pour y être procédé à un rapport de distribution suivant les droits des parties tels que déterminés par le présent jugement, avec dépens contre l'intimé, tant devant la dite Cour Supérieure que ceux sur le présent appel.

Judgment of Superior Court reversed.

Judah & Wurtele, for appellant.
A. Germain, for respondent.
(S. B.)

fabriqué que l'appelant a reçu l'avis qu'à l'avenir l'intimée ne transporterait plus de ce bois. Je ne vois rien dans la conduite de l'intimée pour justifier son refus. Il n'y a pas d'empêchement physique, le bois n'est ni trop long ni trop gros ni trop pesant, les frais de chargement et de déchargement sont à la charge de l'appelant, et l'intimée ne motive son refus que par l'expression d'un refus, c'est sa volonté, et il a fallu à l'appelant s'y soumettre. D'après notre droit Canadien qui est exprimé en l'article 1673 du Code Civil l'intimée ne pouvait se refuser au transport de ce bois. L'article dit: "Ils (les voituriers) sont tenus de "recevoir et transporter aux temps marqués dans les avis publics toute personne "qui demande passage, si le transport des voyageurs fait partie de leur traffic "accoutumé, et tous les effets qu'on leur offre à transporter, à moins que dans "l'un et l'autre cas il n'y ait cause raisonnable et suffisante de refus."

De plus, je considère l'intimée obligée par sa charte et l'acte général des chemins de fer en Canada de transporter toutes personnes qui se présentent et toutes marchandises qui lui sont offertes pour transport dans un temps raisonnable aux stations.

Le chapitre 66 des statuts refondus du Canada contient la refonte de l'acte général des chemins de fer auquel l'intimée s'est soumise expressément par sa charte 16 Viet. ch. 37, et on trouve aux sections 96,97,98, 119 et 7 du statut ch. 66 ci-dessus les décrets et ordonnances qui suivent, savoir:

Sec. 96. "Les trains partiront et voyageront à des heures régulières et "contiendront assez de place pour le transport de tous les passagers et objets "qui se présenteront dans un temps raisonnable avant l'heure du départ."

be allowed to make a drain in the street sufficiently deep from the appellant's property to the sewer in Notre Dame street. Although a drain of nine inches in diameter would have sufficed for the appellant's wants, the City Inspector required the drain to be made of two feet in diameter.

In or about the year 1863 the respondents constructed a new building on their lot, and laid a drain from the new building to the drain made by the appellant.

An action was instituted by the appellant, praying that it be declared that the respondents had no right to use the drain in question, that they be ordered to discontinue the use of the same, unless they chose to pay £22 10s. 0d. for one half of its cost, and £12 0s. 0d. for damages, and that in default of such non-user or of such payment, the appellant be authorized to cut off the respondent's drain at the expense of the latter, and the latter condemned to pay the damages above mentioned.

The respondents pleaded the general issue, denying the appellant's right of action.

les propriétaires du sol mais à la condition de contribuer à l'établissement du pays et au bien-être matériel de ses habitants, en facilitant le transport des personnes et des objets de leur commerce. La charte qui permet à l'intimée de refuser de transporter des effets d'une nature dangereuse, ne permet-elle pas d'inférer que l'intimée ne peut refuser le transport du bois?

Je crois les prétentions de l'intimée insoutenables et je dois la condamner à indemniser l'appelant des dommages qu'il a souffert par suite de son injuste refus.

The judgment is as follows :—

" The Court, &c. :—

" Considering that the respondents are by their Act of Incorporation subject to the provisions contained in the Act respecting Railways (Chap. 66 of Consol. Statutes of Canada) with reference to the rules and regulations concerning the traffic of Railways;

" Considering that, by the last mentioned Act, it is amongst other things provided that trains shall start and run at regular hours to be fixed by public notice, and shall furnish sufficient accommodation for the transportation of all such passengers and goods as are within a reasonable time previous thereto offered for transportation at the place of starting, and at the junctions of other Railways, and at usual stopping places established for receiving and discharging way passengers and goods from the trains, and that such passengers and goods shall be taken, transported and discharged, from and to such places, on the due payment of the toll, freight or fare legally authorized therefor;

chemins du dit Conseil aura le pouvoir, dans tous les cas où il y a un égout commun dans aucune rue ou chemin public, de forcer tout propriétaire de terrain attenant à, ou avoisinant telle rue ou chemin public, ou son agent, à faire un canal suffisant à partir de sa maison, cour ou emplacement, chaque fois que dans l'opinion du Comité la chose sera nécessaire, etc.

La section 9e. du même règlement, p. 393, dit qu'il faudra une permission pour faire entrer son égout particulier dans aucun égout commun.

La section 10e. dit que les égouts particuliers seront placés d'après la direction de l'Inspecteur de la Cité, etc, (voir aussi sect. 11e.)

La section 12e. donne pouvoir à l'Inspecteur de donner à ceux qui lui en feront la demande, la permission de construire des égouts privés se reliant aux égouts publics et d'en prescrire les conditions, etc.

Dans le second volume (1870) ou supplément des lois municipales, à la page 185, on trouve un autre règlement du Conseil de la Cité concernant les égouts, passé le 15 mars 1870, et qui contient les mêmes dispositions quant aux égouts privés.

of any description, although they professed, and gave openly to the public to understand, that they would carry other description of lumber, and did in fact during the said winter and spring of 1873 carry on their Railway to Montreal and other places lumber of all kinds except cedar ;

" Considering that under their said Act of Incorporation and the said Act respecting Railways, the said respondents had no right to make the above discrimination, but were bound to carry all goods of the same class as were offered at any of their Railway Stations on payment of the tariff rates ;

" And considering that it is proved that, by the refusal of the respondents to carry the said seven car loads of lumber from the Acton Station to Montreal as required by the said appellant, he, the said appellant, has suffered damages to the extent of $280 ;

" Considering that there is error in the judgment of the Superior Court sitting at Montreal, rendered on the 30th day of December, 1873, whereby the action of the said appellant was dismissed ;—

" This Court doth quash and reverse the said judgment, and, proceeding to render the judgment which the said Superior Court should have rendered, doth condemn the said respondents to pay to the said appellant the sum of $280, or the damages claimed in and by his said action, with interest from the said 30th December, 1873, and costs incurred by the said appellant, as well in the said Superior Court as on the present appeal."

Judgment reversed.

F. E. Gilman, for the appellant.
H. F. Rainville, for the respondents.
(J.K.)

~~to make the drain~~ in question, it is proved that he intended that it should be public, as he stipulated that it should be made suitable for that purpose. The appellant has no right of ownership in the drain, and therefore any assumption of such right is a trespass.

The action in this cause has not been brought for the recovery of a proportionate share of an amount expended for the common good of both properties ; it demands that the respondent be compelled to cease using the drain, and pay damages for the past, leaving the option of paying one-half of the cost and the damages to the respondent, should the latter desire to continue its use.

In negatory actions the defendant is bound to prove his right ; but the plaintiff is first obliged to prove his quality to bring the action, and that is, that he is the owner of the land on which the right contested is claimed to be exercised.

In the present case the appellant has failed to prove his ownership of the drain which he wants to restrain the respondent from using ; and it has been established, on the contrary, by his own witnesses, that it is in the Municipal Domain.

He is therefore not entitled to the conclusions of his action against the

immediately concerned in the management of the case have always remembered the decorum which should continually characterize the administration of justice. While counsel have faithfully and zealously supported the pretensions of their respective clients, their advocacy has always been kept within due bounds, and I can remember no jar or unpleasantness to disturb the harmony of those whose aim it should be only to seek the truth, and desire that justice be done. We live under a constitution in which the administration of justice has always occupied an honorable place, and it depends much upon the gentlemen of the bar, by their independence, gentlemanly firmness and learning, that the administration of justice should always be honorably maintained, without arrogance or violent partizanship, which would render both difficult and unpleasant the mission of the magistrate sitting on the Bench.

The first question to be disposed of is that of corrupt practices, on the part of the petitioner's agents, which prevent him from having the seat, even though the majority of votes was in his favor. The first case argued before the Court is that of John Bolton. He was a voter and rendered services for Mr. White's Committee, but was told that the services must be gratuitous—that he would be paid nothing. After the election he sent in an account for $10 and was (he says) to his surprise paid. This payment may affect the validity of his vote, but I do not see here any corrupt practice or the giving of a bribe by Mr. White's agents.

The next case charged is that of Michael Harrington. It is argued that he was an agent of Mr. White; that he hired a carter and treated voters with a

respecting him, the drain being upon the public highway. From this judgment the present appeal is instituted. Two questions arise: 1. Has appellant any exclusive property in this drain? 2. If yes, has he brought the proper action to enforce his right?

I am of opinion that the judgment is correct. The drain or sewer of appellant was made only by permission of the city inspector and in accordance with his orders. This is a subject that is acknowledged to be under the control of the city authorities. It is not a matter that should be subject to private control or the incidents of private property as a servitude. Such drains are not merely or mainly for private convenience but are made in the interest of the public on sanitary grounds. The connection is made on city property and at a place where it is even doubtful if appellant's written permission allowed him to place it. The action is negatoire, and asks that the Court order the connection of respondents' drain to be closed by judicial authority in default of its being done by respondents. The Court cannot legally make such order, as it is not upon property upon which he can have a servitude. I am quite aware that the authorities, under the French law, are divided upon this question. Daubanton in his Code

statement of a man of notoriously indifferent character against that of a man against whom not a word of reproach is cast, except that he bribed and was an experienced agent. Does the evidence of Thomas Coghlan help us? He frequently saw Armstrong and McKenzie together, and had an impression that McKenzie was to get something, but that impression is explained by him as based upon the fact that McKenzie's vote had been paid for at previous elections, and upon the belief that without a bribe McKenzie would not vote. I am not entirely satisfied that Armstrong was guiltless of being a briber on this occasion, as he had bribed previously, but I have no right to hold him to be guilty without positive proof. In a case of doubt, he should have the benefit of the doubt. I should here make a general remark with respect to the general expenditure of money charged against the petitioner White, that I find him singularly free from reproach. I must make the same observation with respect to his agents, that they were peculiarly cautious to keep within the limits of the statute against corrupt practices at elections, such were the instructions carefully and generally given. Upon the Christmas present of groceries of the value of seventy cents, I lay no stress at all. It was of no value as compensation to McKenzie for a purchased vote. It would have irritated rather than pleased McKenzie as payment for his vote.

The next case that I would refer to is that of Martin Mansfield, who treated and made presents to Owen Kinna. Mansfield was a supporter of petitioner, canvassed for him, took voters to the poll, and had been in the Craig Street Committee rooms. There is no doubt he treated Kinna on election day; there is

---

où ils étaient avant l'empiétation de l'intimée, si mieux n'aime l'intimée payer à l'appelant £23. 2. 0, pour moitié du coût de cet égout. L'appelant conclut en outre à £12 de dommages.

L'intimée a répondu à cette demande par une dénégation générale. A l'argument, son avocat a ingénieusement prétendu que la rue appartenait à la Corporation, que l'appelant n'était pas propriétaire de l'égout qu'il avaient construit, et que n'en étant pas propriétaire il ne pouvait exercer une action négatoire comme celle qu'il avait intenté.

Cette défense est mal fondée. L'appelant a construit dans la rue un canal pour l'égout de sa maison. Il l'a fait avec l'assentiment de la Corporation qui avait le droit de le lui permettre.

Cet égout est un égout privé reconnu tel par les règlements de la Corporation concernant les égouts. Personne n'a le droit de le troubler dans la possession exclusive de cet égout, si ce n'est la Corporation, et elle lui a donné la permission de le construire. L'intimée n'a pas plus le droit de se servir de la partie de l'égout qui passe devant sa propriété qu'elle n'aurait droit de se servir de la partie que l'appelant a construit de sa maison au milieu de la rue.

laid down in the Act. With regard to defective voters' lists of which Mr. Glackmeyer has spoken, I am of opinion that the respondent is too late now to object to them.

First, as to the rejected ballots, I find that I should give the respondent two votes which were rejected, and to the petitioner, White, twenty votes which were rejected. I should also add to the votes of the respondent, the votes of C. C. Snowdon and Moïse Rochon. I have no doubt about this. I have also concluded to reject from the accepted ballots of respondent, as improperly marked thirty-four votes, and from the accepted ballots of the petitioner, White, fifty-five votes. I also strike from the votes given for the respondent, those of James McShane, Sr., and James McShane, Jr., William Blackmore, Œdippe Dandurand, Charles F. Hill, Isaac Ebbitt, John Mattingly, Patrick Coleman, W. H. Edson, John Michaels—10 in all. I also strike from the votes polled for petitioner those of Martin Mansfield, Owen Kinna, Michael O'Donohue, William Wilson, John Bolton, Joseph McKenzie, Moses Harrington—7 in all. This would make forty votes to be deducted from the votes announced to have been cast for respondent, and 42 votes from the votes said to have been cast for the petitioner. I find the majority for the respondent to have been *nine* in place of seven as announced by the Sheriff. The petitioner, therefore, would not have been entitled to the seat, as not having received the majority of votes, even though no charge of corruption had been brought home to his agent, but seeing the charge of corrupt practices which I hold to be proved

---

[illegible] the corporation for interfering with the right given by themselves.

The judgment is recorded in these terms:—

La Cour, etc.

Considérant que les parties possèdent des héritages voisins situés sur la partie ouest de la place d'Armes dans la cité de Montréal;

Considérant que durant l'année 1860, l'appelant a obtenu de la Corporation de la Cité de Montréal la permission de construire un canal sous la rue pour égouter sa propriété, et qu'il a construit ce canal depuis sa propriété jusqu'à l'égout public dans la rue Notre Dame en passant vis-à-vis la propriété de l'intimée;

Considérant que vers 1862, l'intimée, sans permission ni autorité quelconque, a percé vis-a-vis sa propriété le canal fait par l'appelant, et qu'elle a établi une communication entre le canal servant à égouter sa propriété et celui construit par l'appelant, et que sans aucun droit, elle s'est servi pour égouter sa propriété du canal construit par l'appelant;

Considérant que l'appelant est bien fondé à faire déclarer que l'intimée n'a

and made an assignment under the Insolvent Act of 1869 on the 23rd September, 1874. His creditors subsequently agreed to a composition with him on the 23rd December of the same year. Plaintiffs were creditors for the sum of $3163.34, and accepted the composition. By its terms the insolvent deposited with the assignee his own notes endorsed by the other defendant, Hector Munro, for 25 cents in the dollar on the amount of the several claims. These notes were distributed to the creditors who would take them, and the plaintiffs received their notes, and the note sued upon is one of them. Meanwhile the insolvent, as was his duty, applied to the Superior Court for a confirmation of the composition and discharge on the 23rd March last, and his application was contested by one of his creditors, George J. Gebhardt. The contestation is not yet finally disposed of. The Superior Court dismissed the contestation on the 30th June last, about *three* weeks after the plaintiffs instituted the present action, and the contestant then took out his writ of appeal from the Judgment, returnable the 4th October last. The appeal is still undisposed of. The defendants plead 32 & 33 Vic., c. 16, s. 96, in these words: "And if such deed of composition and "discharge be contested, and pending such contestation, any payment or in-"stalment of the composition falls due under the terms of such deed, the payment "thereof *shall be postponed* till after the expiration of *ten* days after final "judgment upon such contestation; and if proceedings for revision or appeal be "commenced, then until after the expiration of ten days after the judgment in "revision or in appeal, as the case may be."

Their pretension is that until the appeal has been adjudicated upon or discontinued, and for 10 days afterwards, the plaintiffs have no action.

(*Plaintiff in the Court below,*)

APPELLANT;

AND

THE GRAND TRUNK RAILWAY COMPANY,

(*Defendants in the Court below,*)

RESPONDENTS.

Railway Companies—Refusal to carry goods—Railway Act, C.S.C. cap. 66.

HELD:—That Railway Companies subject to the provisions of the Act respecting Railways (C.S.C. cap. 66), are bound to carry all goods that are offered at any of their stations to any other station on their line of railway, unless some valid reason be assigned for refusing to do so. The Canadian Railway Act is compulsory and not permissive only. Under it Railway Companies are made common carriers, and it is not in their power to limit their obligations by a notice stating that they have ceased to carry any particular class of goods, without assigning a sufficient reason for such refusal.

This appeal was from a judgment rendered by the Superior Court, Montreal, JOHNSON, J., dismissing an action for damages brought by the plaintiff, in consequence of the defendants' refusal to carry a quantity of sawn cedar on their

No. 38.

FURNISS, APPELLANT;

AND

THE OTTAWA AND RIDEAU FORWARDING COMPANY, ET AL., RESPONDENTS.

HELD:—That an appearance for the respondents need not be fyled in the clerk's office, to enable the respondents to move to dismiss the appeal for want of return of the writ.

DORION, CH. J:—These are motions by the respondents to quash the appeal, on the ground that the writ has not been returned. Objection was taken by the appellant, that no appearance had been fyled in the office of the clerk of this Court, on behalf of the respondents. The articles of the Code of Civil Procedure bearing on the question are 1128 and 1129. By the former, the appearance is required, "if the writ is returned within the proper delay," and by the latter the respondents are entitled to judgment of *non pros*, and to be discharged from the appeal "in default of the writ and the record being returned on the day fixed." Under the circumstances we are clearly of opinion that an appearance by the respondents is not necessary. The motions are, therefore, granted with costs. ::

Motions to quash granted.

Perkins, McMaster & Panneton, for appellant.

Abbott, Tait & Wotherspoon and *A. & W. Robertson*, for respondents.

(S. B.)

:: A similar judgment was rendered in No. 20, Simpson, appellant, and Claxton, respondent.

carriers to take this lumber or not; for the defendants say, that they were not bound because, 1st, on the 25th Oct., 1872, they gave public notice, and also personally notified the plaintiff that they would not thereafter carry lumber of this description, and have, in fact, never since then, carried any of it; and, secondly, that they were not bound by law to carry it. The evidence was heard before me on the second of this month; and it shows that in October, 1872, the plaintiff received this notice, as he admits himself, when examined as a witness:

'Dear Sir,—I am instructed by the general freight agent to notify all 'shippers that cedar of any description will not be carried by this Company 'under any circumstances. Yours truly, H. H. DUBRULE.'

"Now, it is quite true that an exception was made afterwards in favour of the plaintiff as regards 19 loads; and also that the general notices and conditions of carriage printed on the back of the advice notes under No. 18 contain the words: '18. Lumber, lath, shingles and tan bark will be conveyed at the owner's risk,' &c; but, in the first place, these advice notes concern precisely these 19 car loads

by the female plaintiff: that Luke Moore died on or about the 30th July, 1874, leaving a will dated the 8th February, 1872, by which he named as his testamentary executors John Hatchette, John H. Semple, and M. P. Ryan, and leaving considerable property: that said persons accepted the charge of executors: that on the 1st February, 1875, there was due to the defendant a sum of $600, and to the female plaintiff a sum of $100: that the defendant has received from the executors the said sum of $600 and the plaintiffs are entitled to claim from her the said sum of $100.

The defendant pleads that prior to the death of her husband, by *acte* passed before Isaacson, Notary, on the 27th June, 1872, the said Luke Moore released her from the payment to the female plaintiff of the said sum of $200, and she is entitled to receive for her exclusive benefit the said sum of $1200.

The only question between the parties is whether the female plaintiff without having accepted the donation under the marriage contract before the death of Luke Moore, is entitled to claim the sum of $200 payable to her under the marriage contract, and whether the registration of the marriage contract is equivalent to an acceptance of the donation by the female plaintiff. I would here remark that the *acte* of 27th June, 1872, pleaded by the defendant, is in fact a codicil to the will of Luke Moore, and could only operate in her favour from the date of his death, and it had no validity during his life. The question still presents itself whether the registration of the contract of marriage is tantamount to an acceptance by the female plaintiff of the $200 per annum. The plaintiffs have cited in favour of their pretension, Dupuis *et vir vs.* Cedillot and Kelly, 10 L.C. Jur. 338; Pothier, Oblig., No. 72.

principles in such cases, Shelford refers to the case of Johnson *vs.* The Midland Railway Company. That case is to be found in the 4th vol. Exchequer Reports, page 367, and it decides, upon an exhaustive argument, that these clauses are permissive only; and a railway company is subject to no greater liability than attaches to carriers at common law, and that, therefore, such a company is not bound to carry every description of goods; but only such as they have publicly professed to do. That case laid down another principle arising from the peculiar facts under which it arose; viz., that a company was not bound either to carry on every part of its line, nor unless it had conveniences for the purpose; but those questions are not raised here. The point upon which the present case depends is that the company is bound to carry only what it publicly professed to carry. That it neither professed nor consented at any time, save exceptionally, to carry cedars. That, as regards its published rules and conditions, they do not reach or include the particular description of lumber here in question; and that, if they did, the plaintiff could not be misled as he had previous express notice on the subject. The action of the plaintiff is, therefore, dismissed with costs."

This judgment was reversed in Appeal

L. N. Benjamin, for defendants.
(J.K.)

SUPERIOR COURT, 1875.

MONTREAL, 3RD NOVEMBER, 1875.

Coram TORRANCE, J.

No. 1303.

Longpré et al. vs. *Pattenaude.*

HELD :—That a *mandat* to an attorney *ad litem* to fyle an opposition to a seizure cannot be proved by verbal evidence without a *commencement de preuve par écrit.*

PER CURIAM :—This is an action by two attorneys, members of the Corporation of the Bar, to recover their costs and expenses in connection with the fyling of an opposition to the seizure of the defendant's effects. An attempt was made by the plaintiff to prove the *mandat* by parol, which was not allowed by the Court. The defendant was then examined as a witness, and he admitted that he had authorized Antoine St. Germain, his brother-in-law, to resist the seizure under a judgment rendered against the defendant, and the *mandat* as given by the said Antoine St. Germain is duly proved. The Court gives judgment for $69.40.

Judgment for plaintiffs.

Longpré & Dugas, for plaintiffs.
Ouimet & Ouimet, for defendant.
(J.K.)

" by public notice, and shall furnish sufficient accommodation for the transport-
" ation of all such passengers and *goods* as are within a reasonable time pre-
" vious thereto offered for transportation at the place of starting, and at the
" Junctions of other Railways, and at usual stopping places established for
" receiving and discharging way passengers and *goods* from the trains."

Sec. 97 says: " Such passengers and *goods* shall be taken, *transported* and
" discharged at, from and to such places, on the due payment of the toll, freight
" or fare legally authorized therefor."

Sec. 98 says: " The party aggrieved by any neglect or refusal in the pre-
" misses, shall have an action therefor against the Company."

Sec. 7, sub. sec. 9, says: " The word '*Goods*,' shall include things of
" every kind conveyed upon the Railway, &c."

Sec. 119 mentions what goods the Company are exempt from carrying.
Secs. 20, 27, 28, and 151, regulate the question of tolls or freight.

These sections make it imperative on the Company to furnish sufficient accommodation for the transportation of all such passengers and goods as are, at a reasonable time, offered for transportation at the usual

Imperial Parliament, known as the *British North America Act*, 1867.

The question arose in this way. The respondent, on the 25th of August, 1870, sued the appellant society in the Circuit Court for the District of Montreal, to recover an instalment of an annuity to which she was admittedly entitled under the rules of the Society. By special plea, the appellant pleaded that by the Provincial Act in question it was authorized to pay to the respondent the sum of $200 in lieu of the benefits which she was entitled to receive from the Society, and if she refused to accept it to place the sum in deposit, and pay to the respondent the interest, viz. $12 a year monthly in advance during her life, or till her second marriage; and that the Society had, at a general meeting, on the 10th of March, 1870, resolved to avail itself of the Act, and that it had always been ready and willing to pay the arrears to that date. The respondent answered, that the Provincial Act should be declared illegal and unconstitutional. The Court, TORRANCE, J., on the 30th of November, 1870, gave judgment overruling the appellant's plea: vide 15 L.C. Jurist, p. 212. This judgment was affirmed on the 20th of September, 1872, by the Court of Queen's Bench (DUVAL, C. J., DRUMMOND and MONK, JJ., CARON and BADGLEY, JJ., dissenting). The majority of the Judges considered that the Provincial Legislature in passing the Act, had legislated on a matter coming within the class of "insolvency," which belonged under the 91st section of the Imperial Act to the exclusive authority of the Parliament of Canada.

The following observations were made by the learned Judges of the Court of Queen's Bench, in pronouncing the judgment:

"goods as shall be offered to them for that purpose, and to make such reasonable "charges in respect thereof, as they may from time to time determine upon, not "exceeding the tolls by the special Act authorized to be taken by them."

It was held that this clause enabled, but did not compel a Railway Company to act as a common carrier, and that as soon as a common carrier publicly professed to carry goods, he was bound to carry the goods of any one, if he had room in his conveyance and the price of carriage was tendered when the goods were offered. It was further held that by virtue of this enabling clause they were not bound to undertake the business of carriers altogether and on every part of their line, and might restrict their business to through traffic and to light goods only. Johnson and Midland Counties Railway Co., 6 Railw. C. 61, 4 Exch. 397.

The difference between the English Act and the Canadian Act is that the one is permissive and the other compulsory. Under the English Act Railway Companies may become common carriers, but they are made so by the Canadian Act, and this as to all goods they are requested to carry except such as are mentioned in sect. 119, and being by the law so made common carriers, it is not in their power to limit their obligations as to any particular class or description of goods. The reason for this difference between the English Act and

after the assets of the Society should reach ten thousand dollars. The proposition was at once accepted by two of them, and upon the refusal of the others, the Provincial Legislature of Quebec, formerly Lower Canada, upon the application of the Society passed the Provincial Act, 33 Vict., ch. 58, "An Act to relieve the Union St. Jacques of Montreal," which gave effect to the proposition above mentioned in respect of its beneficiary widows. The widow Bélisle, one of the refusing widows, thereupon instituted an action against the Society for her weekly allowances claimed to be due to her since the first of February, 1870, the date of the passing of the Provincial Act, to the following first of August, for $43.50, to which the Society pleaded the Provincial Act in bar of the action. The Circuit Court over-ruled the plea upon the grounds, first, that the legislative authority of the Dominion Parliament extended over all matters of insolvency, and second, that the Provincial Legislature had no power to legislate, as by this Act, by which the respondent, *in view of the inability of the Society to meet their engagements was compelled to compound her said claim of seven shillings and six pence per week, during her widowhood, for the sum of two hundred dollars, once paid.*

Two questions follow upon this contestation; the first, the right of the Provincial Legislature of Quebec to pass the Act in question, which is alleged to involve the insolvency of the Society, and the second, the jurisdiction of the Circuit Court to annul a Provincial Act, sanctioned by the constituted authority in the Dominion for that effect, and not disallowed in the manner provided by the Dominion Act, the Constitution of the country.

---

their business.

It is said that Railway Companies are in no worse position than other common carriers, and that they cannot be compelled to carry otherwise than as they please. At common law this is perfectly true; but, again, the charters of Railway Companies and the Acts affecting them may seriously alter their position. Thus the Sec. 96 of the Railway Clauses Consol. Act [illegible] enacts that Railways shall carry *all goods*. The refusal, then, [illegible] throws on every Railway subject to this Act the necessity [illegible] the refusal to carry any goods brought. The English system is somewhat different from ours and less rigorous to the companies. But even in England such a proceeding as that now attempted would not be permitted. I do not believe the Railway system [illegible] country could sanction it. If a Railway Company could create monopolies [illegible] the propriety of giving them such enormous powers as they possess, [illegible] them up by such subsidies, would become a very doubtful policy

[illegible] damages should be the difference in value between Montreal and Acton, less the freight and charges.

the provisions of the Dominion Act; amongst others, to their sanction by the Governor General in the name of the Crown, His Excellency's reservation of acts for the signification of the Royal pleasure thereon, and their Imperial disallowance within two years after their receipt by the Imperial Secretary of State. In like manner, the Dominion Act has provided for the legislative powers of the several provinces, and the same care has been taken to specify their extent and objects, which necessarily are simply local and not within the general Dominion powers. The Provincial Legislatures within their own boundaries freely exercise the powers intrusted to them under the Dominion Act, which gave them their provincial constitutions, and in which and for which they are as supreme and exclusive as the general Legislature itself, but like the Dominion, the Provincial Legislatures are likewise subject to the reservations in respect to their legislative acts, namely, the assent to them by their local Governor, their reservation for the assent of the Governor-General, instead of the Sovereign, and their disallowance by the Governor-General, not the Sovereign, within one year, not two as provided for the Dominion Acts. Beyond these reservations the legislative Acts of the Provincial Legislature within the enumerated local matters for their action, are supreme and coercive upon all within the extent of the Province. These Provincial powers are as exclusive as those of the Dominion; when not disallowed therefore by the Governor-General, Provincial legislation is supreme and binds as law throughout and within the provincial purview.

Our examination of the Dominion Act, and of its intended scope and purpose, indicates the necessary Legislative theory upon which its provisions in this respect are founded. The establishment of the general Dominion Government

---

owners and owe to the public a general duty independent of any contract in the particular case."

This is conformable to English law. Jones on Bailments, Appendix, p. 10; "By the general custom of the Realm, that is, the common law (1 Roll. Abr. 2 C., pl. 1; 2 Bl. Comm. 67; Rushforth vs. Hadfield, 6 East 525) a common carrier is bound to carry the goods of the subject for a reasonable reward, and if he refuse to do so, having convenience and being tendered satisfaction for carriage, he will be liable to an action, unless he has reasonable ground of refusal." This principle is recognised in many English cases and particularly in the cases of Crouch vs. The London and North Western Railway Co., 25 Eng. Law & Eq. R. 287, and Brotherton vs. Wood, 6 Moore 141. It was decided in the Supreme Court of the United States in the case of the New Jersey Steamboat Nav. Co. vs. Merchants' Bank, 6 Howard 344, "that a common carrier is bound to receive and carry all goods offered for transportation, subject to all the responsibilities incident to his employment, and is liable to an action in case of refusal."

The common law doctrine on this subject, as respects the liability of com-

Rutherford and Grand Trunk Railway Co.

mon carriers, is incidentally recognized as the same as our law prior to the Code, in the case decided in this Court in 1863 of Torrance *vs.* Allan, 8 L. C. J. 57, and is affirmed by Pardessus, vol. 3, p. 199, No. 726; also see Vanhuffel, Louage et Depot, p. 9 and p. 189. Our own law is too explicit to render it necessary to resort to the general law applicable to common carriers, except to show that it is not exceptional in principle. The Grand Trunk Railway Company was incorporated in 1852. The General Railway Act, 14 and 15 Vic., c. 51, is declared to apply to all Railway Companies incorporated since August, 1851. Section 7, sub-section 9, says "the word 'goods' shall include things of every kind conveyed upon the railway." Section 119 mentions the goods which the Company are exempt from carrying, in which timber is not included. Section 96: "The trains shall start and run at regular hours to be fixed by public notice, and shall furnish sufficient accommodation for the transportation of all passengers and goods as are within a reasonable time previous thereto, offered for transportation at the place of starting, and at the junctions of other Railways, and at usual stopping places established for receiving and discharging any passengers and goods from the trains." This Company, as in fact have all Railway Companies of any note, have passenger trains at stated hours and freight trains at regular intervals, and subject to the rules of the Company as to delivery of goods for transportation and within the limit of the Company's ability to do it, and, with the facilities at their disposal to accomplish it, the Company is bound to carry goods for all comers. The same rule must apply to all. They cannot capriciously and arbitrarily refuse to carry goods for one person which they are accustomed to carry for another, or to carry one class of goods and refuse another of the same nature. Is cedar timber goods? This the Company have sufficiently determined, if the Act did not declare it, when they carry all sorts of timber except this, for this man, and they carry this kind of timber when it suits them to do it. Timber is one of the most common kinds of merchandize in a new country like ours. It cannot be held, with any regard for the rights of the community, that when a franchise is given to Railway Companies which changes the whole mode of doing business, causes ordinary modes of transport to cease, and gives rise to new industries, that power should be given to these monopolists of the carrying business to refuse, to any individual they may please, to carry his goods, without valid excuse for so doing. This would place it in their power to ruin one man and build up another, and disturb trade by destroying competition. In this case it must be observed, as has been remarked by the Chief Justice, that the Court decides nothing as to the liability of the Company to carry any species of timber or other goods where special reasons of excuse may be urged for not carrying it. No question arises here as to appellant's willingness and readiness to pay the freight, and there can be no pretence upon the facts proved that the species of timber sought to be carried, differed from any other, or that the Company were not in a position to carry it. Under these circumstances we say they were bound to carry it, and, refusing to do so, they must be held for the damages proved to have been

Rutherford and Grand Trunk Railway Co.

sustained by appellant, $280. The appeal should be maintained and the judgment of the Court below reversed with costs.

TASCHEREAU, J.:—L'appelant, par son action contre l'intimée se plaignait que cette compagnie avait refusé de transporter sur sa ligne de chemin de fer une certaine quantité de bois de cèdre qu'il destinait au commerce de Montréal, et ce sans cause ni justification quelconque et à son dommage d'au moins $1000 00.

L'intimée a rencontré cette action par une défense dans laquelle elle allègue qu'elle n'était pas dans l'habitude de transporter du bois de cèdre à moins d'un contrat spécial, qu'elle ne le transportait que comme faveur, qu'elle avait donné avis à l'appelant qu'elle ne transporterait plus aucun bois de cèdre, que l'appelant avait eu connaissance de cet avis aussi comme donné au public, et enfin que la loi ne l'obligeait pas à transporter ce bois.

Les prétentions de l'intimée me paraissent exorbitantes, non fondées en fait, contraires à leur charte et au droit commun.

Les défendeurs ne sont que des voituriers; ils ont donné avis qu'ils transporteraient toute espèce de bois, en ces termes "Lumber, lath, shingles, tan-bark, &c.," à certains prix. Cet avis est général et n'exclut aucun bois, et de fait ils ont transporté jusqu'en 1872 toute espèce de bois y compris du cèdre de l'espèce et dimension de celui que l'appelant leur a offert pour transporter et qu'ils ont accepté. Sur la foi de cet avertissement l'appelant a fabriqué son bois et l'a transporté à la station du chemin de fer; ce n'est qu'après que le bois eut été fabriqué que l'appelant a reçu l'avis qu'à l'avenir l'intimée ne transporterait plus de ce bois. Je ne vois rien dans la conduite de l'intimée pour justifier son refus. Il n'y a pas d'empêchement physique, le bois n'est ni trop long ni trop gros ni trop pesant, les frais de chargement et de déchargement sont à la charge de l'appelant, et l'intimée ne motive son refus que par l'expression d'un refus, c'est sa volonté, et il a fallu à l'appelant s'y soumettre. D'après notre droit Canadien qui est exprimé en l'article 1673 du Code Civil l'intimée ne pouvait se refuser au transport de ce bois. L'article dit: "Ils (les voituriers) sont tenus de "recevoir et transporter aux temps marqués dans les avis publics toute personne "qui demande passage, si le transport des voyageurs fait partie de leur traffic "accoutumé, et tous les effets qu'on leur offre à transporter, à moins que dans "l'un et l'autre cas il n'y ait cause raisonnable et suffisante de refus."

De plus, je considère l'intimée obligée par sa charte et l'acte général des chemins de fer en Canada de transporter toutes personnes qui se présentent et toutes marchandises qui lui sont offertes pour transport dans un temps raisonnable aux stations.

Le chapitre 66 des statuts refondus du Canada contient la refonte de l'acte général des chemins de fer auquel l'intimée s'est soumise expressément par sa charte 16 Vict. ch. 37, et on trouve aux sections 96,97,98, 119 et 7 du statut ch. 66 ci-dessus les décrets et ordonnances qui suivent, savoir:

Sec. 96. "Les trains partiront et voyageront à des heures régulières et "contiendront assez de place pour le transport de tous les passagers et objets "qui se présenteront dans un temps raisonnable avant l'heure du départ."

Rutherford and Grand Trunk Railway Co.

Sec. 97. "Ces passagers et objets seront pris, transportés et débarqués moyennant le paiement du fret."

Sec. 98. "Toute personne lésée par quelque défaut ou refus à cet égard aura une action contre la compagnie."

Sec. 119. "Nul n'aura le droit de transporter ou d'exiger que la compagnie transporte sur son chemin de fer, de l'eau forte, huile de vitriol, poudre, allumettes chimiques, et autres objets qui au jugement de la Compagnie seraient dangereux de leur nature."

Sec. 120. "La compagnie pourra refuser de recevoir des paquets qu'elle suppose contenir des objets dangereux de leur nature, ou exiger qu'ils soient ouverts pour s'en assurer."

Sec. 7. Sous-section 8. "Le mot effets comprend les choses de toutes sortes transportées sur le chemin de fer, etc."

Les sections ci-dessus étant impératives en ce qu'elles ordonnent et défendent, imposent à l'intimée une obligation complète de transporter les personnes et les effets, tant que la compagnie existera; l'article 15 du titre préliminaire du Code Civil, Version Anglaise, énonce que le mot "*shall*," is to be considered as imperative and the word *may* as permissive."

Si l'intimée peut refuser de transporter les marchandises, elle peut également refuser le transport des personnes. Je ne puis accepter cette interprétation de la charte de l'intimée à qui la Législature l'a accordée avec pouvoir d'exproprier les propriétaires du sol mais à la condition de contribuer à l'établissement du pays et au bien-être matériel de ses habitants, en facilitant le transport des personnes et des objets de leur commerce. La charte qui permet à l'intimée de refuser de transporter des effets d'une nature dangereuse, ne permet-elle pas d'inférer que l'intimée ne peut refuser le transport du bois?

Je crois les prétentions de l'intimée insoutenables et je dois la condamner à indemniser l'appelant des dommages qu'il a souffert par suite de son injuste refus.

The judgment is as follows:—

"The Court, &c.:—

"Considering that the respondents are by their Act of Incorporation subject to the provisions contained in the Act respecting Railways (Chap. 66 of Consol. Statutes of Canada) with reference to the rules and regulations concerning the traffic of Railways;

"Considering that, by the last mentioned Act, it is amongst other things provided that trains shall start and run at regular hours to be fixed by public notice, and shall furnish sufficient accommodation for the transportation of all such passengers and goods as are within a reasonable time previous thereto offered for transportation at the place of starting, and at the junctions of other Railways, and at usual stopping places established for receiving and discharging way passengers and goods from the trains, and that such passengers and goods shall be taken, transported and discharged, from and to such places, on the due payment of the toll, freight or fare legally authorized therefor;

"And considering that it is further provided by the said Act that the word 'goods' includes things of every kind conveyed upon the Railway, and that the party aggrieved by any neglect or refusal to comply with said provisions shall have an action therefor against the Railway Company in default;

"Considering that the said appellant, plaintiff in the Court below, has proved the material allegations of his declaration, and, namely, that for several years previous to the year 1873 the said appellant, who is a lumber merchant, was in the habit of sending every year a quantity of cedar lumber to the station of the Grand Trunk Railway Company at Acton, in the Province of Quebec, which was conveyed to the Montreal market by the said Grand Trunk Railway; and that in the winter and spring of 1873, the said respondents, after conveying for the appellants nineteen car loads of similar timber, refused, without assigning any valid reason or cause for their refusal, to convey the remainder of the appellant's lumber then at the said Acton Station, and consisting of about seven car loads, notwithstanding the offer made by the appellant to pay freight at the usual tariff rates;

"Considering that the only reason assigned by the respondents (for refusing) to transport the said lumber of the appellant was that they had previously, to wit, during the month of October, 1872, notified the lumber merchants on their line of railway that they would not transport on their Railway any cedar lumber of any description, although they professed, and gave openly to the public to understand, that they would carry other description of lumber, and did in fact during the said winter and spring of 1873 carry on their Railway to Montreal and other places lumber of all kinds except cedar;

"Considering that under their said Act of Incorporation and the said Act respecting Railways, the said respondents had no right to make the above discrimination, but were bound to carry all goods of the same class as were offered at any of their Railway Stations on payment of the tariff rates;

"And considering that it is proved that, by the refusal of the respondents to carry the said seven car loads of lumber from the Acton Station to Montreal as required by the said appellant, he, the said appellant, has suffered damages to the extent of $280;

"Considering that there is error in the judgment of the Superior Court sitting at Montreal, rendered on the 30th day of December, 1873, whereby the action of the said appellant was dismissed;—

"This Court doth quash and reverse the said judgment, and, proceeding to render the judgment which the said Superior Court should have rendered, doth condemn the said respondents to pay to the said appellant the sum of $280, or the damages claimed in and by his said action, with interest from the said 30th December, 1873, and costs incurred by the said appellant, as well in the said Superior Court as on the present appeal."

Judgment reversed.

F. E. Gilman, for the appellant.
H. F. Rainville, for the respondents.
(J.K.)

SUPERIOR COURT, 1875.

MONTREAL, 16TH AUGUST, 1875.

Coram TORRANCE, J.

MONTREAL WEST CASE.

Thomas White, Jr., et al., petitioners, vs. *Frederick Mackenzie*, respondent.

HELD:—1. That under the Dominion Election Act of 1874, ballot papers marked with the cross to the left of, or below the name, or with two distinct crosses, or with an asterisk, or other peculiar mark which might serve as a private signal between a briber and bribed voter, are bad. But if the cross is placed immediately after the name, though not in the square allotted to it, the vote is good.

2. The absence of the initials of the deputy returning officer to the ballot paper is not a fatal defect.

Quære as to corrupt practices.

The respondent, Frederick Mackenzie, having admitted bribery by agents, the case was proceeded with on the claim of the petitioner, Thomas White, to the seat. A scrutiny of the ballots having taken place, and evidence having been adduced on the recriminatory case against petitioner, the following judgment was rendered :—

TORRANCE, J :—

Before I give the reasons of my judgment, I desire to express the gratification which I have experienced in the conduct of this case by the counsel engaged therein. The question concerning the franchise of a large constituency has excited a lively interest in many persons, but the gentlemen immediately concerned in the management of the case have always remembered the decorum which should continually characterize the administration of justice. While counsel have faithfully and zealously supported the pretensions of their respective clients, their advocacy has always been kept within due bounds, and I can remember no jar or unpleasantness to disturb the harmony of those whose aim it should be only to seek the truth, and desire that justice be done. We live under a constitution in which the administration of justice has always occupied an honorable place, and it depends much upon the gentlemen of the bar, by their independence, gentlemanly firmness and learning, that the administration of justice should always be honorably maintained, without arrogance or violent partizanship, which would render both difficult and unpleasant the mission of the magistrate sitting on the Bench.

The first question to be disposed of is that of corrupt practices, on the part of the petitioner's agents, which prevent him from having the seat, even though the majority of votes was in his favor. The first case argued before the Court is that of John Bolton. He was a voter and rendered services for Mr. White's Committee, but was told that the services must be gratuitous—that he would be paid nothing. After the election he sent in an account for $10 and was (he says) to his surprise paid. This payment may affect the validity of his vote, but I do not see here any corrupt practice or the giving of a bribe by Mr. White's agents.

The next case charged is that of Michael Harrington. It is argued that he was an agent of Mr. White ; that he hired a carter and treated voters with a

corrupt intent. Harrington was foreman of the Montreal W. W. Department, and admitted that he brought up four voters. He had hired a carter for the performance of his duties as foreman, and "in order to go to his dinner, get to the works, and come into town again, was obliged to take a sleigh." He drove out to the works, and had been there some time when he was told that some of the men wanted to vote. He drove four of them to the polls, and afterwards stopped with two of them at a tavern on St. Urbain street, treated them, and then paid the cabman to drive him back to the works. Harrington had been asked by Mr. McCord, Mr. White's agent, to call at the Committee room, probably that he might be induced to take some part in the election, but he declined to go, and subsequently had no communication with Mr. McCord. I am not satisfied that I find agency here. As to the sleigh, I find that it was originally hired for Harrington's own purposes, and there was a payment made on account of the voters to drive them to the poll, and from the tavern back to the works. I am by no means satisfied that Harrington did not here transgress the law, nor am I satisfied that there was not a corrupt intent, under the Act, in his treating the voters, but he was not, as I have said, proved to have been an agent of the petitioner.

The next case is that of Robert J. Armstrong and Joseph McKenzie. If we take McKenzie's evidence, he was bribed to vote for the petitioner, and if we are to believe the evidence of Armstrong, he, Armstrong, did not bribe directly or indirectly. There is here oath against oath. More than this, there is the statement of a man of notoriously indifferent character against that of a man against whom not a word of reproach is cast, except that he bribed and was an experienced agent. Does the evidence of Thomas Coghlan help us? He frequently saw Armstrong and McKenzie together, and had an impression that McKenzie was to get something, but that impression is explained by him as based upon the fact that McKenzie's vote had been paid for at previous elections, and upon the belief that without a bribe McKenzie would not vote. I am not entirely satisfied that Armstrong was guiltless of being a briber on this occasion, as he had bribed previously, but I have no right to hold him to be guilty without positive proof. In a case of doubt, he should have the benefit of the doubt. I should here make a general remark with respect to the general expenditure of money charged against the petitioner White, that I find him singularly free from reproach. I must make the same observation with respect to his agents, that they were peculiarly cautious to keep within the limits of the statute against corrupt practices at elections, such were the instructions carefully and generally given. Upon the Christmas present of groceries of the value of seventy cents, I lay no stress at all. It was of no value as compensation to McKenzie for a purchased vote. It would have irritated rather than pleased McKenzie as payment for his vote.

The next case that I would refer to is that of Martin Mansfield, who treated and made presents to Owen Kinna. Mansfield was a supporter of petitioner, canvassed for him, took voters to the poll, and had been in the Craig Street Committee rooms. There is no doubt he treated Kinna on election day; there is

White vs. Mackenzie.

no doubt also that he gave him the piece of cloth and the old clothes, and it is impossible for me to disconnect these acts with the vote or agency of Mansfield. I find, therefore, this act of corruption by an agent of the petitioner, and it is the only one I find distinctly proved. The case of Desrouisseau, said to have been bribed by Choquette and Biron, and of Giguère, said to have had an offer of a bribe from C. S. Rodier, I do not find proved. The agents admit nothing, and though the bribed swear against them it is oath against oath, and there is no corroborative testimony.

It remains to me to remark on the scrutiny of votes. I have already intimated, during the progress of the case, some of the rules by which I should endeavor to be guided during the scrutiny. I hold the Wigtown case to be a useful guide. I would reject ballots with the cross to the left or below, or with two distinct crosses, as being against or beyond the directions of the Act; I would also reject ballot papers marked with an asterisk, or other peculiar mark which could not be called a cross, or might serve as a private signal between briber and bribed voter. As regards the uninitialed ballot papers cast for either party, no doubt the want of the initials of the returning-officer is contrary to the directions of the Act, but the Act does not say that the want of the initials shall be a nullity. In addition to this Mr. Abbott has called attention to the direction of Sec. 55, which directs what ballot papers shall be rejected, and is silent as to the uninitialed ballot papers, and sec. 80 enacts that mistakes of form shall not be fatal, if the election was conducted in accordance with the principles laid down in the Act. With regard to defective voters' lists of which Mr. Glackmeyer has spoken, I am of opinion that the respondent is too late now to object to them.

First, as to the rejected ballots, I find that I should give the respondent two votes which were rejected, and to the petitioner, White, twenty votes which were rejected. I should also add to the votes of the respondent, the votes of C. C. Snowdon and Moïse Rochon. I have no doubt about this. I have also concluded to reject from the accepted ballots of respondent, as improperly marked thirty-four votes, and from the accepted ballots of the petitioner, White, fifty-five votes. I also strike from the votes given for the respondent, those of James McShane, Sr., and James McShane, Jr., William Blackmore, Œdippe Dandurand, Charles F. Hill, Isaac Ebbitt, John Mattingly, Patrick Coleman, W. H. Edson, John Michaels—10 in all. I also strike from the votes polled for petitioner those of Martin Mansfield, Owen Kinna, Michael O'Donohue, William Wilson, John Bolton, Joseph McKenzie, Moses Harrington—7 in all. This would make forty votes to be deducted from the votes announced to have been cast for respondent, and 42 votes from the votes said to have been cast for the petitioner. I find the majority for the respondent to have been *nine* in place of seven as announced by the Sheriff. The petitioner, therefore, would not have been entitled to the seat, as not having received the majority of votes, even though no charge of corruption had been brought home to his agent, but seeing the charge of corrupt practices which I hold to be proved

against Martin Mansfield, I set aside the election of the respondent, reject Mr. White's claim for the seat, and order that each party pay his own costs.

White vs. Mackenzie.

Election set aside.

C. P. Davidson, for the petitioners.
Hon. J. J. C. Abbott, Q.C., counsel.
Trenholme & Maclaren, for the respondent.
W. H. Kerr, Q.C., counsel.

(J.K.)

SUPERIOR COURT, 1875.

MONTREAL, 20th NOVEMBER, 1875.

Coram TORRANCE, J.

No. 2366.

Yuile et al. vs. *Munro* et al.

HELD :—That where the payment of a sum of money is postponed by Statute pending legal proceedings, the institution of an action to recover payment before the termination of such proceedings is premature.

PER CURIAM :—The action is to recover $397.94 from the maker and endorser of a protested note. The defendants resist the demand of payment.

They say that the payment is suspended under the following circumstances. It appears that the maker of the note, Alexander Munro, became insolvent and made an assignment under the Insolvent Act of 1869 on the 23rd September, 1874. His creditors subsequently agreed to a composition with him on the 23rd December of the same year. Plaintiffs were creditors for the sum of $3163.34, and accepted the composition. By its terms the insolvent deposited with the assignee his own notes endorsed by the other defendant, Hector Munro, for 25 cents in the dollar on the amount of the several claims. These notes were distributed to the creditors who would take them, and the plaintiffs received their notes, and the note sued upon is one of them. Meanwhile the insolvent, as was his duty, applied to the Superior Court for a confirmation of the composition and discharge on the 23rd March last, and his application was contested by one of his creditors, George J. Gebhardt. The contestation is not yet finally disposed of. The Superior Court dismissed the contestation on the 30th June last, about *three* weeks after the plaintiffs instituted the present action, and the contestant then took out his writ of appeal from the Judgment, returnable the 4th October last. The appeal is still undisposed of. The defendants plead 32 & 33 Vic., c. 16, s. 96, in these words: "And if such deed of composition and "discharge be contested, and pending such contestation, any payment or in-"stalment of the composition falls due under the terms of such deed, the payment "thereof *shall be postponed* till after the expiration of *ten* days after final "judgment upon such contestation; and if proceedings for revision or appeal be "commenced, then until after the expiration of ten days after the judgment in "revision or in appeal, as the case may be."

Their pretension is that until the appeal has been adjudicated upon or discontinued, and for 10 days afterwards, the plaintiffs have no action.

Yalle vs. Munro.

The plaintiffs, on the other hand, say that their action is rightly brought, and that defendants should have pleaded an *exception dilatoire* suspending their proceedings temporarily. I don't entertain the pretension of the plaintiffs. The statute says the payment shall be postponed. Now if the defendants cannot be compelled to pay, there can be no action. Pigeau says, Livre II, Tit. 1, Chap. 1, p. 35: "On a quelquefois une action que l'on ne peut exercer qu'après un certain temps, parce qu'il y a un terme apposé par la loi ou la convention."*** Le terme apposé par la loi fait que l'on ne peut jamais exercer l'action avant son accomplissement," p. 36. "Si l'on exerçait une action avant l'échéance du terme ou l'événement de la condition, on serait déclaré non-recevable, *quant à présent*, dans sa prétention, sauf à l'intenter dans son temps."

This is an elementary rule. The only difficulty might be in its application. Here I find none, and maintain the exception of the defendants.

Action dismissed.

Perkins & McMaster, for plaintiffs.
Gilman & Holton, for defendants.

(J.K.)

COURT OF QUEEN'S BENCH, 1875.

MONTREAL, 16TH SEPTEMBER, 1875.

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

No. 38.

FURNISS, APPELLANT;

AND

THE OTTAWA AND RIDEAU FORWARDING COMPANY, ET AL., RESPONDENTS.

HELD:—That an appearance for the respondents need not be fyled in the clerk's office, to enable the respondents to move to dismiss the appeal for want of return of the writ.

DORION, CH. J:—These are motions by the respondents to quash the appeal, on the ground that the writ has not been returned. Objection was taken by the appellant, that no appearance had been fyled in the office of the clerk of this Court, on behalf of the respondents. The articles of the Code of Civil Procedure bearing on the question are 1128 and 1129. By the former, the appearance is required, "if the writ is returned within the proper delay," and by the latter the respondents are entitled to judgment of *non pros*, and to be discharged from the appeal "in default of the writ and the record being returned on the day fixed." Under the circumstances we are clearly of opinion that an appearance by the respondents is not necessary. The motions are, therefore, granted with costs. ::

Motions to quash granted.

Perkins, McMaster & Panneton, for appellant.
Abbott, Tait & Wotherspoon and *A. & W. Robertson*, for respondents.

(S. B.)

:: A similar judgment was rendered in No. 20, Simpson, appellant, and Claxton, respondent.

SUPERIOR COURT, 1875.

MONTREAL, 3RD NOVEMBER, 1875.

Coram TORRANCE, J.

No. 503.

Charlebois et ux. vs. *Cahill.*

HELD:—That the parties to a marriage contract followed by marriage and the registration of said contract, whereby a sum is payable by the wife to a third party, cannot annul the clause by which said sum is payable to the third party without the consent of the last.

PER CURIAM:—This an action by Peter G. Charlebois and his wife against the wife's sister, Dame Louisa Agnes Cahill, the widow of the late Luke Moore. The declaration sets up the marriage of the two plaintiffs at Montreal on the 12th January, 1864: that on the 7th February, 1872, Luke Moore and the defendant passed a marriage contract whereby the future husband gave to the defendant in the event of her surviving him the annual rent of $1200 to be paid to her by the executors of Luke Moore by semi-annual payments of $600 each, on condition that the defendant should pay to her sister, the female plaintiff, out of said annual rent of $1200, the annual sum of $200 by semi-annual payments of $100 each; that subsequently on or about the 13th February, 1872, the said Luke Moore and the defendant contracted marriage: that the said contract of marriage was duly registered at Montreal on the 7th March, 1872, which registration was in law an acceptation by the female plaintiff: that Luke Moore died on or about the 30th July, 1874, leaving a will dated the 8th February, 1872, by which he named as his testamentary executors John Hatchette, John H. Semple, and M. P. Ryan, and leaving considerable property: that said persons accepted the charge of executors: that on the 1st February, 1875, there was due to the defendant a sum of $600, and to the female plaintiff a sum of $100: that the defendant has received from the executors the said sum of $600 and the plaintiffs are entitled to claim from her the said sum of $100.

The defendant pleads that prior to the death of her husband, by *acte* passed before Isaacson, Notary, on the 27th June, 1872, the said Luke Moore released her from the payment to the female plaintiff of the said sum of $200, and she is entitled to receive for her exclusive benefit the said sum of $1200.

The only question between the parties is whether the female plaintiff without having accepted the donation under the marriage contract before the death of Luke Moore, is entitled to claim the sum of $200 payable to her under the marriage contract, and whether the registration of the marriage contract is equivalent to an acceptance of the donation by the female plaintiff. I would here remark that the *acte* of 27th June, 1872, pleaded by the defendant, is in fact a codicil to the will of Luke Moore, and could only operate in her favour from the date of his death, and it had no validity during his life. The question still presents itself whether the registration of the contract of marriage is tantamount to an acceptance by the female plaintiff of the $200 per annum. The plaintiffs have cited in favour of their pretension, Dupuis *et vir vs.* Cedillot and Kelly, 10 L.C. Jur. 338; Pothier, Oblig., No. 72.

Charlebois vs. Cahill.

The Court also refers to Durand *vs.* Durand, No. 809, at Montreal, A.D. 1849, Law Rep., pp. 59, 60; and Bissonnette *vs.* Bissonnette, Law Rep., pp. 61, 62. On these authorities the Court is of opinion that plaintiffs should have judgment.

Judgment for plaintiffs.

Duhamel & Rainville, for the plaintiffs.
B. Devlin, for the defendants.
(J.K.)

SUPERIOR COURT, 1875.

MONTREAL, 3RD NOVEMBER, 1875.

Coram TORRANCE, J.

No. 880.

The Railway and Newspaper Advertising Company vs. *Hamilton* et al.

HELD:—Where the contract, though bearing date at Montreal, is proved to have been made at Toronto, in Ontario, that the cause of action arose in Ontario.

PER CURIAM:—The plaintiffs sue the defendants here who are resident at Toronto. They plead by an exception declining the jurisdiction of this Court. The action is based upon a contract bearing date at Montreal but in reality made at Toronto. Upon the facts of record the exception should be maintained.

Action dismissed.

Gilman & Holton, for plaintiffs.
L. N. Benjamin, for defendants.
(J.K.)

SUPERIOR COURT, 1875.

MONTREAL, 3RD NOVEMBER, 1875.

Coram TORRANCE, J.

No. 1303.

Longpré et al. vs. *Pattenaude.*

HELD:—That a *mandat* to an attorney *ad litem* to fyle an opposition to a seizure cannot be proved by verbal evidence without a *commencement de preuve par écrit.*

PER CURIAM:—This is an action by two attorneys, members of the Corporation of the Bar, to recover their costs and expenses in connection with the fyling of an opposition to the seizure of the defendant's effects. An attempt was made by the plaintiff to prove the *mandat* by parol, which was not allowed by the Court. The defendant was then examined as a witness, and he admitted that he had authorized Antoine St. Germain, his brother-in-law, to resist the seizure under a judgment rendered against the defendant, and the *mandat* as given by the said Antoine St. Germain is duly proved. The Court gives judgment for $69.40.

Judgment for plaintiffs.

Longpré & Dugas, for plaintiffs.
Ouimet & Ouimet, for defendant.
(J.K.)

PRIVY COUNCIL, 1874.

8TH JULY, 1874.

Coram LORD SELBORNE, SIR JAMES W. COLVILE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, AND SIR ROBERT P. COLLIER.

L'UNION ST. JACQUES DE MONTREAL,

(*Defendant below,*)

APPELLANT;

AND

DAME JULIE BELISLE,

(*Plaintiff below,*)

RESPONDENT.

Distribution of Legislative Power—Legislature of Quebec.

HELD:—1. That the Act of the Legislature of Quebec (33 Vict. c. 58), which purported to relieve by legislation the appellant society, appearing on the face of the Act to have been in a state of extreme financial embarrassment, is within the legislative capacity of that Legislature.

2. The Act in question related expressly to "a matter merely of a local or private nature in the province," which, by the 92nd sect. of the *British North America Act*, 1867, passed by the Imperial Parliament, is assigned to the exclusive competency of the Provincial Legislature; and does not fall within the category of bankruptcy and insolvency, or any other class of subjects by the 91st section of the last mentioned Act reserved for the exclusive legislative authority of the Parliament of Canada. (6 P. C. 31.)

The question decided in this appeal was whether the Act of the Legislature of Quebec, 33 Vict. c. 58, is repugnant to the provisions of the Act of the Imperial Parliament, known as the *British North America Act*, 1867.

The question arose in this way. The respondent, on the 25th of August, 1870, sued the appellant society in the Circuit Court for the District of Montreal, to recover an instalment of an annuity to which she was admittedly entitled under the rules of the Society. By special plea, the appellant pleaded that by the Provincial Act in question it was authorized to pay to the respondent the sum of $200 in lieu of the benefits which she was entitled to receive from the Society, and if she refused to accept it to place the sum in deposit, and pay to the respondent the interest, viz. $12 a year monthly in advance during her life, or till her second marriage; and that the Society had, at a general meeting, on the 10th of March, 1870, resolved to avail itself of the Act, and that it had always been ready and willing to pay the arrears to that date. The respondent answered, that the Provincial Act should be declared illegal and unconstitutional. The Court, TORRANCE, J., on the 30th of November, 1870, gave judgment overruling the appellant's plea: vide 15 L.C. Jurist, p. 212. This judgment was affirmed on the 20th of September, 1872, by the Court of Queen's Bench (DUVAL, C. J., DRUMMOND and MONK, JJ., CARON and BADGLEY, JJ., dissenting). The majority of the Judges considered that the Provincial Legislature in passing the Act, had legislated on a matter coming within the class of "insolvency," which belonged under the 91st section of the Imperial Act to the exclusive authority of the Parliament of Canada.

The following observations were made by the learned Judges of the Court of Queen's Bench, in pronouncing the judgment:

L'Union St. Jacques and Dame Julie Bélisle.

BADGLEY, J. (*dissentiens*) :—

Several years before the Imperial Enactment of 1867, which constituted the present Dominion Government of Canada, out of the then four British American Provinces, a Friendly Society had been established at Montreal, in Lower Canada, called *Union St. Jacques de Montréal*, by charitably disposed persons, having or its "object the aid of its members in cases of sickness and the ensuring of like assistance to the widows and children of deceased members." Bye-Laws expedient and necessary for the interests and administration of the affairs of the Society were made which fixed the relief to be given and the classes of its beneficiaries to receive it, amongst whom were, during their widowhood, the widows of deceased members of a certain standing in the Society. The funds were derived from the periodical contributions of its members, whilst connected with the Society. The Institution had been in operation for some years when its members applied to the Provincial Legislature of the time, and obtained an Act of Incorporation for the Society, under its original name and formation and for the original purpose and object of a merely eleemosynary Society. The Act of Incorporation merged the original Society into the Incorporated Institution. The diminished resources of the Society preventing the continuance to its beneficiaries of their then allowances, and amongst them those of the four widows borne upon the funds of the establishment, the Society proposed to them to convert their allowances into the fixed sum of $200, to be once paid to each of them with the right to receive their full allowance if thereafter the assets of the Society should reach ten thousand dollars. The proposition was at once accepted by two of them, and upon the refusal of the others, the Provincial Legislature of Quebec, formerly Lower Canada, upon the application of the Society passed the Provincial Act, 33 Vict., ch. 58, "An Act to relieve the Union St. Jacques of Montreal," which gave effect to the proposition above mentioned in respect of its beneficiary widows. The widow Bélisle, one of the refusing widows, thereupon instituted an action against the Society for her weekly allowances claimed to be due to her since the first of February, 1870, the date of the passing of the Provincial Act, to the following first of August, for $43.50, to which the Society pleaded the Provincial Act in bar of the action. The Circuit Court over-ruled the plea upon the grounds, first, that the legislative authority of the Dominion Parliament extended over all matters of insolvency, and second, that the Provincial Legislature had no power to legislate, as by this Act, by which the respondent, *in view of the inability of the Society to meet their engagements was compelled to compound her said claim of seven shillings and six pence per week, during her widowhood, for the sum of two hundred dollars, once paid.*

Two questions follow upon this contestation ; the first, the right of the Provincial Legislature of Quebec to pass the Act in question, which is alleged to involve the insolvency of the Society, and the second, the jurisdiction of the Circuit Court to annul a Provincial Act, sanctioned by the constituted authority in the Dominion for that effect, and not disallowed in the manner provided by the Dominion Act, the Constitution of the country.

L'Union St. Jacques and Dame Julie Bélisle.

The first question, the extent of the powers intrusted to the Provincial Legislature, necessarily requires reference to the legislative power intrusted exclusively to the Dominion Legislature. Now, by the Dominion Act, it is common knowledge that the several provinces which compose the Dominion Government have each of them local Legislatures, and that by the Act, under which these exist as well as that of the Dominion itself, the powers and rights belonging to each have been defined and established and are in that sense constitutional. It may be observed that the Dominion Legislative powers, are, to use a common expression, supreme in all matters of a general nature which are specifically confided to the action of the general or Dominion Legislature, subject only in its legislative acts to the Imperial reservations contained in the Imperial Act for the Dominion, and amongst others to the signification of the pleasure of the Sovereign as to its legislative enactments, and their disallowance within two years as expressly provided by the Dominion Act. Beyond this, the legislative powers of the Dominion are supreme throughout the Dominion, and acknowledge no power, judicial or otherwise, to interfere with them when applied to the general matters enumerated as exclusively within the Dominion Legislative purview. Its legislative powers within the limits are exclusive, and govern and extend over the provinces composing the Dominion. These matters are plainly and explicitly indicated as classes of matters of a general nature, and the Dominion Legislative Acts as to these, are only subjected to the provisions of the Dominion Act; amongst others, to their sanction by the Governor General in the name of the Crown, His Excellency's reservation of acts for the signification of the Royal pleasure thereon, and their Imperial disallowance within two years after their receipt by the Imperial Secretary of State. In like manner, the Dominion Act has provided for the legislative powers of the several provinces, and the same care has been taken to specify their extent and objects, which necessarily are simply local and not within the general Dominion powers. The Provincial Legislatures within their own boundaries freely exercise the powers intrusted to them under the Dominion Act, which gave them their provincial constitutions, and in which and for which they are as supreme and exclusive as the general Legislature itself, but like the Dominion, the Provincial Legislatures are likewise subject to the reservations in respect to their legislative acts, namely, the assent to them by their local Governor, their reservation for the assent of the Governor-General, instead of the Sovereign, and their disallowance by the Governor-General, not the Sovereign, within one year, not two as provided for the Dominion Acts. Beyond these reservations the legislative Acts of the Provincial Legislature within the enumerated local matters for their action, are supreme and coercive upon all within the extent of the Province. These Provincial powers are as exclusive as those of the Dominion; when not disallowed therefore by the Governor-General, Provincial legislation is supreme and binds as law throughout and within the provincial purview.

Our examination of the Dominion Act, and of its intended scope and purpose, indicates the necessary Legislative theory upon which its provisions in this respect are founded. The establishment of the general Dominion Government

L'Union St. Jacques and Dame Julie Bellisle.

necessarily carried with it exclusive legislation by the Dominion upon the general classes of matters affecting the Dominion of the four Provinces, whilst the establishment of the several local or provincial legislatures as necessarily drew to each its legislative power upon local matters within each province. The theory of the general legislative powers of the Dominion is expressly general in the enactment of general laws upon its exclusive subjects enumerated for its action. The 91 Section of the Act provides for the legislative authority of the Parliament of Canada, *to make laws for the peace, order and good government of Canada in all matters not coming within the classes* of subjects assigned exclusively to the Provincial Legislatures, and for greater certainty that authority is declared to extend to all matters coming within the classes of subjects enumerated in the Dominion Act, namely, amongst others:—The Public Debt and property, Regulation of Trade and Commerce, Postal Service, Navigation and Shipping, Currency and Coinage, Weights and Measures, Patents, Copyrights, Naturalization, &c., Bankruptcy and Insolvency, the Criminal Laws and Procedure, and any matters coming within any of the enumerated classes of subjects in this Section. The principle of the theory of the Dominion Legislation for general subjects exclusively, stands out in bold relief by merely going over the list of the enumerated general subjects attributed to the general Legislature. The 92 Section enacts that in each province the Legislature may exclusively make laws in relation to matters coming within the classes of subjects therein enumerated, namely, amongst others, Direct Taxation within the Province, the Amendment of the Provincial Constitution, Public Lands of the Province, Reformatory prisons; 7. The establishment, maintenance and management of Hospitals, Asylums, Charities and eleemosynary institutions in and for the Province, other than Marine Hospitals; 11. The incorporation of Companies with provincial objects; 13. Property and civil rights in the Province; and 16, generally all matters of a merely local or private nature in the Province. Looking to the enumerated subjects of legislation exclusively belonging to each Legislature, the division between the general and local subjects is apparent and manifest.

Now, with reference to the contested provincial enactment, looking to its object and intent and comparing these with the legislative powers entrusted to the Local or Provincial Legislature of Quebec, it cannot be denied that the appellant, the Corporation of the Union St. Jacques, is of *the eleemosynary character, classed in the 7th sub-section, that it does fall within the terms of the* 13th *Section as to property and civil rights in the province*, and that it is not excluded from the general terms of "*a matter of a merely local or private nature in the province*." As included then manifestly within these local subjects, the Provincial Legislature has passed this Act, simply as a settlement of claims upon the diminished funds of the Society, between the Society and its beneficiaries, with the view of the maintenance and management of the Union as a continuing corporation, the Act involving in its provisions private property and civil rights in the province, and a matter of a merely local or private nature, which its provisions have regulated between the parties in the manner proposed and contemplated by its managers, as a settlement enforced under the provisions of

the Act. I would merely add that, as between the Corporation and the recalcitrant beneficiaries, including the respondent, considering the Act of Incorporation as nothing more *than a legislative contract* touching property and rights between them, even as such and to that extent, the Act is manifestly within Provincial Legislative powers, which do not in the compulsory settlement of the contract between the parties, necessarily fall within the exclusive powers of the general legislature, as for bankruptcy and insolvency. The objection raised upon this point is the only one which has a shadow of plausibility about it, and yet it is manifestly untenable and unfounded.

L'Union St. Jacques and Dame Julia Beliste.

This kind of legislation has been by no means uncommon. The Statute Books of the former Legislature of Lower Canada, now Quebec, and of the united provinces of Upper Canada and Lower Canada are full of Statutes of this private nature for settling of Estates, construing terms and conditions of Wills and Testaments, explaining Contracts, &c., &c., and none of them have ever given rise to doubts as to their constitutionality or to litigation on that head before the Provincial Courts of Justice, after they had been duly sanctioned by proper authority.

The Provincial Act in itself may also be tested with reference to its subjection of the enumerated exclusive subject of Bankruptcy and Insolvency attributed exclusively to the Dominion Legislature, by the fact, that the Dominion has made a general law upon the Statutory subject, the provisions of which apply to this contention. A Statutory Bankruptcy and Insolvent Legislation had been in force in the two Canadas since the first Insolvent Act of 1864, which was continued with amendments to the time of the making of the Dominion Law for Insolvency in 1869, which repealed the Provincial enactments and substituted a general Dominion Law upon the subject. By the Provincial Act of 1864, the first section specially enacts that "*the Act should apply in Lower Canada to traders only,*" "and in Upper Canada to all persons whether traders or not," and this provision was not interfered with in the subsequent statutory amendments of that Provincial Act.

By the Dominion "Act respecting Insolvency" of 1869, the Lower Canada statutory restriction is extended throughout the Dominion of the four Provinces, and it is enacted by the first section of the Dominion Act of 1869, "This Act shall apply to traders only." Now it is nothing but just to read the general subject of Bankruptcy and Insolvency by the light of the Dominion Legislature itself, as indicating the intent of that Legislature as to the enumerated subjects for its action, and it becomes undeniable therefore, that the Society, the appellant, here comes within the express limitation and restriction of the general law, and being neither in character nor purpose commercial nor a trader, and solely and simply what it has always been, a charitable and eleemosynary institution in and for the Province of Quebec, the Provincial enactment for its relief can, under no circumstances, be brought within the operation of the laws of Bankruptcy and Insolvency attributed to the Dominion Legislature, and as explained by its own general enactment.

It is not my intention to examine the special provisions of the Act in question, because, assuming the Act to be within the local legislative powers, and

L'Union St. Jacques and Dame Julie Belisle.

as to its subject matter or inducement not conflicting with the general exclusive power of the Dominion as to the general laws of bankruptcy and insolvency, it is necessarily constitutional, and therefore, as a necessary result, its provisions must be obeyed and observed even by Courts of Justice, as being within the class of matters within the action and powers of the Provincial Legislature. I will merely add that it has received its proper sanction by the Provincial Governor, it has not been disallowed by the Governor General—the only constitutional authority capable of setting it aside or invalidating it—and that it stands recorded amongst the provincial statutes of Quebec as an effective provincial statute and law, with legal attributes for its existence within its province, equal to those of any Dominion or Imperial statute in the Dominion or in Great Britain. In the face then of these supreme powers within the purview of its jurisdiction, the Province of Quebec, what legal authority has been given to the Provincial Courts of Justice or to their judges individually to deny to the Provincial Legislature the supreme power in its result, to enact and pass this Provincial Act? It is manifest that the Provincial Act in question here, like all other Legislative Acts which come before the constituted judiciary, are only subjects of interpretation, and only as such can be examined and treated by Courts of Justice, which are stopped at interpretation, because any beyond that as to Legislative Acts is legislation, which it is idle to say Courts of Justice have no authority to exercise. Their mission ends where legislation begins, and, therefore, it is of primary importance to keep Courts of Justice within the bounds limited by law for subjects such as these. The powers of judiciary in such a case can only be interpretative, certainly not disallowing, and as this Act was within the local powers and did not conflict with the general powers, and was not disallowed by the Dominion Executive, the only competent or qualified authority for that purpose, the judgment of the C. C. is nothing less than an unauthorized judicial repeal of the Legislative Act. It is objected that it is an interference with the law of contracts between the society and the beneficiary, but even in that case the judiciary have no repealing power; they may interpret, but cannot ignore or set aside a legally constituted law, in such case the judiciary are powerless. It may not have been a right thing to do, it may even have been unprecedented; of this I am not called upon to express my opinion, but the Provincial Legislature notwithstanding had the power to do it, and acted upon their powers. The parties interested had their recourse, they should have applied in time to the Dominion Executive to exercise its power of disallowance; there is no other legal mode of evading an existing Act, and if that course is not applied for or not adopted, the Act, of necessity, stands supreme as a law. Assuming then, that the Act is, in all respects, valid and constitutional, the rules for the guidance of the judiciary, as applicable in Great Britain in respect of Legislative Acts, also govern here. Dwarris, at page 647, says, "The general and received doctrine certainly is, that an Act of Parliament, of which the terms are explicit and the meaning plain, cannot be questioned, or its authority contradicted in any Court of Justice." Even in the United States, where the Constitution has given to the Judicature the power and right of examining their Legislative Acts, that power is restricted to the discovery of violations of the Constitution or of

its provisions; but at the same time they all admit, as a settled principle, that the Legislature is the supreme power in the State, and if the Act be within the Constitution, in other words, within the powers attributed to the exercise of the action of the Legislature, it is paramount to all judicial authority, and perforce must be obeyed by Courts of Justice, who are only the ministers and expounders and not the makers of existing laws. It is within the principle of the supreme power of the Legislature that what are denominated private Acts of Parliament, introduced and passed for the settlement of particular matters or estates, are not only considered but at the same time upheld as common assurances amongst those interested in their provisions, but do not go beyond to strangers or parties not interested in them, the rule being founded in wisdom and justice, because as it is laid down "every person is considered as assenting to a public Act, yet he is not so far a party as to give up his interest." It is true this Act may be called a private Act, although it is designated as a public Act by the Legislature, yet it may be observed that however supreme the power of the Legislature may be in such cases of binding private rights by Acts of Parliament, caution should be duly exercised in reference to them. Still, whether public or private, the Act is existing law, and in a case of an Act of the Legislature of Ontario, such a private Act as this was upheld by the Court of Appeals for that Province. There, it was an Act by which an important condition of a duly executed and recognised will was set aside and controlled by an Act of that Legislature, which, like this, was assented to and stood allowed. I refer to the case of the will of the late Hon. Mr. Goodhue. Chief Justice Draper and five other Judges of the Court concurred in opinion as to the legislative validity of the Act, although they differed as to the expression and interpretation of the terms enacted in it. I cannot do better than repeat some of the citations made in that case as to the assumption by Courts of Justice to override a legislative Act. In Logan *vs.* Burslem, 4 Moore, P. C. C. 296, Lord Campbell says: "As to what has been said as to a law not binding if it be contrary to reason, that can receive no countenance from any Court of Justice whatever. A Court of Justice cannot set itself above the Legislature. It must suppose that what the Legislature has enacted is reasonable, and all therefore that we can do is to try to find out what the Legislature intended. If a literal translation or construction of the words would lead to an injustice or absurdity, another construction possibly might be put on them, but still it is a question of construction—there is no power of dispensation from the words used by the Legislature." Mr. Sedgwick, in his Treatise upon statutory and constitutional Law, argues unanswerably that the judiciary have no right whatever to set aside, or arrest or nullify a law passed in relation to a subject within the scope of legislative authority, on the ground that it conflicts with their notions of natural right, abstract justice or sound morality, p. 187. And Chancellor Kent, 1 Com. 408, writes, "Where it is said that a statute is contrary to natural equity or reason, or repugnant, or impossible to be performed, the cases are understood to mean that the Court is to give them a reasonable construction. They will not, out of respect and duty to the law giver, presume that every unjust or absurd consequence was within the contemplation of the law, but if it

L'Union St. Jacques and Dame Julie Bellele.

should happen to be too palpable to meet with but one construction, there is no doubt in the English law of the binding efficacy of the statute." To the opinions of these able men might be added those of other eminent jurists, Sir W. Blackstone, for example, amongst the number who fully corroborate what is above stated. Now, if unreasonable Acts of Parliament are not thus, by authorities cited, allowed to be set aside by Courts of Justice, because, as old Chief Justice Hales, cited by Dwarris, says "it was *magis congruum* that Acts of Parliament should be corrected by the same pen that drew them, than be dashed to pieces by the opinion of a few judges;" or, as observed by Lord Chancellor Ellesmere, "that when the three estates have spent their labour in "making a law, three judges on the bench shall destroy and frustrate their "pains, advancing the reason of a particular Court above the judgment of all "the realm," it is manifest that an Act within the precise power of the Provincial Legislature to enact, cannot be ignored by our Courts of Justice.

There is nothing, therefore, to sustain the opinion that the Provincial Courts have jurisdiction to override or set aside Provincial Legislative Acts coming within the classes of matters as above enumerated in the 92nd section of the Dominion Act. And here I may be again permitted to say, that as to the object of the Act in question falling within the exclusive power of Dominion Legislation as being a matter of bankruptcy and insolvency reserved for the Dominion Legislature, Judge Caron has fully answered this objection, and I shall not further remark upon it. Upon the whole I consider that the Statutes of the Quebec Legislature are binding upon all the residents in the province, when made in relation to the matters within the Provincial Legislature, that the Statute in question in this case is valid and binding upon the parties affected thereby and upon this and all Courts of Justice of Quebec, and that the judgment of the Circuit Court, to use its own expression, is unconstitutional, and in effect and fact an unauthorized judicial repeal of the Act and an illegal assumption of disallowance only left to the Governor General; and therefore that the Judgment appealed from is incorrect and ought to be set aside.

CARON, J., *dissentiens*:—

L'Acte d'Incorporation dont il s'agit en cette cause n'a rien d'extraordinaire; il contient les clauses que l'on trouve généralement dans les actes de cette espèce, et il est certain que la Législature qui l'a passé avait juridiction pour le faire. Or, si elle avait cette juridiction, elle avait également le droit de le modifier à la demande des Intéressés, à moins que ce pouvoir lui eût été enlevé par une autorité supérieure à la sienne.

C'est ce que prétend l'Intimée, appuyée dans cette prétention par le Jugement dont est appel, lequel déclare que le Statut Impérial (l'Acte d'Union) a ôté à notre Législature le droit de statuer sur les sujets réglés par l'Acte d'Incorporation, invoqué par l'Intimée: l'Appelante soutenant le contraire, la question à décider est celle de savoir si cet Acte Impérial a de fait enlevé à notre Législature le pouvoir de faire à l'Acte d'Incorporation en question les changements et modifications dont se plaint l'Intimée et qu'elle soutient être nuls et de nul effet.

Je suis d'avis que non. En passant l'Acte dont se plaint l'Intimée, l'on n'a

pas touché aux lois de Banqueroute sous l'empire desquelles, la Société en question n'est jamais tombée. Il paraît absurde de prétendre qu'une Société fondée dans le but de celle-ci, soit de nature à se trouver en Banqueroute ou en Faillite. Non, cette Société de bienfaisance, fondée dans le but de pourvoir aux besoins des pauvres membres qui en font partie, s'est aperçue après quelques années d'expérience que les conditions qu'on leur avait imposées sur leur demande étaient trop onéreuses et détruiraient la Société et le but qu'on se proposait en la fondant, et alors les membres ont demandé à la Législature de faire les changements qu'ils ont suggérés, de nature à remédier à l'état de malaise et d'embarras dans lequel elle se trouvait. La Législature locale en accordant ce qui était demandé n'a sûrement pas touché les lois générales, réglant la faillite, la banqueroute et l'insolvabilité; c'est un Acte particulier qui n'a rien de commun avec les lois générales sur ces différents sujets.

Quand même, il en serait autrement, et que, de fait, l'Acte en question aurait trait à cette sorte de loi, rien ne constate que la Société qui demandait la passation de cet Acte était vraiment dans un état de faillite et de déconfiture; ce n'était pas se déclarer dans un tel état que de demander des changements de nature à améliorer sa position. Chaque jour l'on voit des incorporations demandant à la Législature des changements, des amendements à leur charte, sans qu'il put venir en tête à qui que ce soit de prétendre que c'est un signe de faillite ou de déconfiture.

Il en est de même dans le cas actuel. La Société a représenté que les obligations qu'elle a à remplir sont onéreuses et peuvent entraver sa prospérité et sa durée, mais ce n'est pas là alléguer qu'elle soit dans un état de déconfiture.

Je renverserais donc le Jugement et renverrais l'action de la Demanderesse.

Lors de la nouvelle audition qui a eu lieu en cette cause, l'on a suggéré que c'était moins par suite du Statut Impérial que la Législature locale était sans juridiction sur le sujet dont il s'agit, mais que c'était parce que l'Acte d'amendement fait par la Législature locale contient une déviation aux droits conférés aux membres de la Société St. Jacques, par leur Acte originaire d'Incorporation; qu'en vertu de cet Acte, l'Intimée avait des droits acquis auxquels l'Acte d'amendement portait atteinte, ce qui le rendait nul en autant que l'Intimée y était concernée.

Cette prétention me paraît outrée; si elle était admise, les banques et autres sociétés une fois incorporées ne pourraient plus obtenir de changement à leur charte, pour la raison donnée dans le cas actuel, c'est à savoir que ces changements, tout avantageux qu'ils pourraient être au plus grand nombre des actionnaires, pourraient affecter les droits et les intérêts de quelques uns d'eux et que partant, dans cette appréhension, la Législature ne devrait jamais accorder d'amendement aux Actes d'Incorporation.

Une autre observation à faire est que si véritablement la Société est en faillite ou déconfiture, la loi passée par la Législature locale et dont se plaint l'Intimée, est tout à fait dans l'intérêt de l'Intimée, puisque en acceptant ces dispositions, l'Intimée pourra recevoir de suite la somme fixée, au lieu de sa rente, tandis que dans ce cas elle courrait le risque de ne pas être payée de cette rente.

L'Union St. Jacques and Dame Julie Bellele.

Je persévère donc dans l'opinion que le Jugement doit être infirmé et l'action de l'Intimée renvoyée avec dépens.

DUVAL, CH. J. :—

It is undoubtedly true that the authority of the Imperial Parliament is supreme, and, in its exercise, cannot be controlled by the judicial power. Such is the received doctrine in England. But can this be said of the Legislature of the Province of Quebec, whose powers are conferred by an Act of the Imperial Parliament, defined and limited in language generally admitting of little doubt? Unquestionably not. When the authority is supreme, it cannot be questioned, but when it is limited it is the duty of the Judges to see that the limits prescribed have not been exceeded.

The powers conferred on our Provincial Legislature are defined by the Imperial Act, 30–31 Victoria, Chapter 3, Paragraph 92 and the following.

On the subjects set forth in these paragraphs it may *legislate*, but no power is given to it to impair the obligation of contracts,—a power which has ever been considered as contrary to every principle of sound legislation. In a free State, every man has a right to dispose of his property on his own terms, provided these are not contrary to law. The contract once made is as binding on the Legislature as it is on the individual. Applying this to the present case, I ask what would be said of an Act of the Legislature of Quebec, enacting that a man who had sold his house for fifteen hundred pounds should accept twelve hundred in full payment? And yet this is precisely the case before the Court. The Union St. Jacques entered into a contract with the husband of the respondent, by which it bound itself to pay a certain sum of money to the latter after the death of her husband, should she survive him. It is this amount which the widow claims, and which the Union St. Jacques refuses to pay.

Let not the authority of Blackstone be invoked, and his opinion expressed in volume one, page 90, be referred to, "that *if* Parliament will positively do what is wrong, he knows of no power in the ordinary form of the Constitution that is vested with the authority to control it.

To this the limited power of our Legislature above mentioned is a conclusive answer. Admitting that the judicial power in England cannot interfere but must blindly submit to superior and unlimited authority, can the same be said of a legislature, whose powers are defined and expressly limited? Another answer may be given, equally conclusive in my opinion. Judges are not to reason and lay down rules on suppositions, gratuitously made, for the purpose of creating embarrassment in the administration of justice. Mr. Justice Blackstone says: "If the Parliament does wrong, he knows of no power that can afford relief." I ask when has the Imperial Parliament interfered with private contracts? When State necessity has compelled such an interference, has not the contracting party been fully indemnified? Instead, therefore, of indulging in suppositions never realized, it is prudent for judges to reserve their opinions to be pronounced when the Legislature has committed the injustice, and not until then. From the above remarks, it is evident to me that the Legislature of Quebec has exceeded the boundary of legislation prescribed to it.

The question now to be decided is, can this Court interfere? I can have no

hesitation in answering "Yes." The same law which has prescribed boundaries to the Legislative power, has imposed upon the judges the duty of seeing that that power is not exceeded. Were it otherwise, the Courts of this country must enforce a compliance with an Act of the Local Legislature of Quebec in a matter expressly and exclusively delegated to the Parliament of Canada. Take, for instance, an Act of the Local Legislature on a matter within the classes of subjects set forth in the 91st paragraph, the Criminal Law among others,—would any judge sentence a man to the Penitentiary in virtue of an Act of the Local Legislature? Further, would the Courts acknowledge the binding obligation of an Act of the Local Legislature, on bankruptcy or insolvency, or in an Act conferring on a foreigner the rights of a natural born subject? Decidedly not. Then, where is the line of distinction to be drawn? What Acts of the Local Legislature are the Courts of Justice of this country bound to enforce, and what not? Their duty, in my opinion, is clearly and distinctly pointed out in the Act of the Imperial Parliament above referred to.

L'Union St. Jacques and Dame Julie Beaulieu.

It has been argued that the power of disallowing Acts of the Local Legislature is given by the Imperial Parliament to the Governor General, and therefore that the Courts of Justice have no other duty to perform than that of yielding obedience to the Act. I confess that the extreme weakness of the argument on this point struck me as soon as the words were spoken. I could not believe that the Imperial Parliament had vested in the Governor General the right of deciding on the legality of a law and at the same time denied this right to the Judges of the land. Such, I was certain, was not the spirit of English legislation. On reference to the Imperial Act, I find it affords not the slightest ground for such an argument.

MONK, J:—

I agree with my colleagues the Chief Justice and Mr. Justice Drummond in this case.

At the time of the argument, I was inclined to the opinion expressed by Judges Caron and Badgley, but, upon careful consideration, I think we have the right, and that, in fact, it is our duty, to disregard a law of the Local Parliament if it be in conflict with the Imperial Act which confers a Constitution upon the Dominion. It is satisfactory to me to know that my brother Caron is also of that opinion, though he differs from the Court upon the ground that there is no conflict in this case. Several learned Judges of the Dominion and many text-writers, whose decisions and authority are applicable to this case, uphold this view of our powers, and I therefore readily yield to what appears to be the more approved doctrine.

It is said that our decision will lead to consequences of the gravest character. If this be so, the fault is not ours; we have the Imperial Act, which undoubtedly we are bound to obey and to enforce. If we find a local law in conflict with its provisions, we have no more right to give that effect, than we should a bye-law of the Corporation contrary to a local law.

But, assuming this doctrine as to the powers and duties of this Court to be sound, does this Act trangress the Dominion Act? Does there exist the conflict contended for by the respondent?

L'Union St. Jacques and Dame Julie Beliste.

It is argued and with considerable force, I think, that only general legislation on insolvency was reserved to the Dominion or Federal Parliament, and that this Act not possessing that character, it does not come within the prohibition. The law, however, does not, expressly or by clear implication, make that distinction, and, in that case, this Court would not probably feel justified in doing so. The local Act says in plain English that the *Union St. Jacques*, being insolvent, unable to meet its liabilities and engagements, and not being able to induce the respondent and other ladies to accept a composition, the power of the Local Parliament is invoked to legalise a reduction of the claims, in other words, to compel the interested parties to accept a forced composition. All this is said and enacted, in less precise, in milder words, yet, this is a concise statement of the case. The whole Act means insolvency and forced composition; nothing more and nothing less.

If this be true, then the letter of the Imperial Act is plainly violated and, although I have some doubts as to whether that statute meant to prohibit the Local Parliament from legislating on insolvency in matters of the nature brought before us, yet there is a judgment of the Court below, and my doubts are not strong enough to induce me to disturb it, more especially under the circumstances of this case.

DRUMMOND, J.:—

This is a case deserving more than ordinary consideration, not from the amount of money at stake, but from the importance of the constitutional question involved in it:—namely whether the Courts of this country have power, I would not say, in formal terms—to annul—but to refuse obedience to the commands of the manifold Legislative Bodies of this Dominion when they issue in matters with which the Imperial Parliament has given them no authority to deal, or inhibited them from interfering.

To explain the facts of the case and the grounds upon which the judgment appealed from was given, I avail myself of the observations made by his Honor Mr. Justice Torrance because they express my opinion,—my view of the whole matter, in clear and concise terms.

(His Honour read the remarks of TORRANCE, J., for which see 15 Jurist, p. 212.)

Remains the question, as to how the Tribunals of Federal Governments should deal with enactments made by the divers Legislatures beyond the limits of the legislative powers assigned to them respectively, by the Charters or Constitutions to which they owe their existence. I do not hesitate to say that the duty of the Courts is to disregard, or refuse obedience to, all such enactments, as null and void.

In support of this position, I quote, in the first place, the opinions of some great Publicists and Jurisconsults who have defined the duties of Judges, in relation to the conflicting laws of Federal, or Composite Governments, organized by social compact between Independent States:

Austin, one of the most profound of all writers in the English language, on the philosophy of Law and Jurisprudence, says:—

"To illustrate the nature of a composite state, I will add the following

remark, to the foregoing general description.—Neither the immediate tribunals of the common or general government, nor the immediate tribunals of the several united governments, are bound, or empowered, to administer or execute *every* command that it may issue. The political powers of the common or general government, are merely those portions of their several sovereignties, which the several united governments, as parties to the federal compact, have relinquished and conferred upon it. Consequently, its competence to make laws and to issue other commands, may and ought to be examined by its own immediate tribunals and also by the immediate tribunals of the several united governments. And if, in making a law or issuing a particular command, it exceed the limited powers which it derives from the federal compact, all those various tribunals are empowered and bound to disobey."

I. Union St. Jacques and Dame Julie Bellisle.

"And since each of the united governments, as a party to a federal compact, has relinquished a portion of its sovereignty, neither the immediate tribunals of the common or general government, nor the immediate tribunals of the other united governments, nor even the tribunals which itself immediately appoints, are bound, or empowered, to administor or executo *every* command that it may issue. Since each of the united governments, as a party to the federal compact, has relinquished a portion of its sovereignty, its competence to make laws and to issue other commands, may and ought to be examined by all those various tribunals. And if it enact a law or issue a particular command, as exercising the sovereign powers which it has relinquished by the compact, all those various tribunals are empowered and bound to disobey.....

For every political power conferred on the general government, is subtracted from the several sovereignties of the several united governments. From the sovereignty of that aggregate body, we may deduce, as a necessary consequence, the fact which I have mentioned above: namely, that the competence of the general government, and of any of the united governments, may and ought to be examined by the immediate tribunals of the former, and also by the immediate tribunals of any of the latter. For since the general government, and also the united governments, are subject to that aggregate body, the respective Courts of Justice which they respectively appoint, ultimately derive their powers from that sovereign and ultimate legislature. Consequently those Courts are ministers and trustees of that sovereign and ultimate legislature, as well as of the subject legislatures by which they are immediately appointed. And, consequently, those Courts are empowered, and are even bound to disobey, wherever those subject legislatures exceed the limited powers which that sovereign and ultimate legislature has granted or left them." [Vol. II, p. 261]

Alexander Hamilton,—one of the most eminent statesmen and publicists this Continent has produced,—in No. 78 of the Federalist, wrote: "There is no position which depends on clearer principles than that every act of a delegated authority contrary to the tenor of the commission under which it is exercised is void. No legislative act therefore contrary to the Constitution can be valid. To deny this would be to affirm that the deputy is greater than his principal; that the servant is above his master; that the representatives of the people are

L'Union St. Jacques and Dame Julie Bellele.

superior to the people themselves; that men acting by virtue of powers, may do not only what their powers authorize but what they forbid."

In the case of *Marbury* v. *Madison*, 1 Cranch, 137, Marshall, C. J., of the Supreme Court of the United States, made use of the following expressions in giving judgment: "The original and supreme will organises the government and assigns to different departments their respective powers. It may either stop here, or establish certain limits not to be transcended by those departments.

"The government of the United States is of the latter description. The powers of the Legislature are defined and limited, and that those limits may not be mistaken or forgotten, the Constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed are of equal prohibition. *It is a proposition too plain to be contested, that the Constitution controls any Legislative act repugnant to it, or that the Legislature may alter the Constitution by an ordinary act.*

"Between these alternatives there is no middle ground. The Constitution is either a superior paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and, like other acts, is alterable when the Legislature shall please to alter it.

"If the former part of the alternative be true, then a legislative act contrary to the Constitution is not law; if the latter part be true, then written Constitutions are absurd attempts on the part of the people to limit a power in its own nature illimitable.

"Certainly all those who have framed written Constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be that an act of the Legislature repugnant to the Constitution is void.

"This theory is essentially attached to a written Constitution, and is consequently to be considered by this Court as one of the fundamental principles of our society. It is not, therefore, to be lost sight of in the further consideration of the subject."

Having established the supremacy of the Constitution, and the nullity of all legislative acts passed in contravention of its principles, Marshall, C. J., thus continued his judgment:

"If an act of the Legislature repugnant to the Constitution is void, does it, notwithstanding its validity, bind the Courts and oblige them to give it effect? Or in other words, though it be not law, does it constitute a rule as operative as if it was a law? This would be to overthrow in fact what was established in theory; *and would seem at first view an absurdity too gross to be insisted on.* It shall, however, receive a more attentive consideration. It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases must of necessity expound and interpret that rule. If two laws conflict with each other, the Courts must decide on the operation of each.

L'Union St. Jacques and Dame Julie Bellale.

"So if a law be in opposition to the Constitution; if both the law and the Constitution apply to a particular case, so that the Court must either decide that case conformably to the law disregarding the Constitution, or conformably to the Constitution disregarding the law, the Court must determine which of these conflicting rules governs the case." This is of the very essence of judicial duty.

"If then the Courts are to regard the Constitution, and the Constitution is superior to any ordinary act of the Legislature, the Constitution, and not such ordinary act, must govern the case to which they both apply.

"Those then who controvert the principle that the Constitution is to be considered in Court as a paramount law, are reduced to the necessity of maintaining that the Courts must close their eyes on the Constitution and see only the law.

"*This doctrine would subvert the very foundation of all written Constitutions. It would declare that an act which according to the principles and theory of our government is entirely void, is yet in practice completely obligatory.* It would declare that if the Legislature shall do what is expressly forbidden, such act, notwithstanding the express prohibition, is in reality effectual. It would be giving to the Legislature a practical and real omnipotence, with the same breath which professes to restrict their powers within narrow limits. It is prescribing limits and declaring that those limits may be passed at pleasure."

These incontrovertible propositions, admitted as undoubted by Kent, Sedgwick, by—in one word—all the great legal writers of the neighbouring Republic,—seem to acquire, if possible, more force when applied to exorbitant acts which English Colonial Legislatures assume to pass in defiance of the restricted charters granted to them, not by mutual concessions, but by the behest of the Imperial Parliament,—the source of all power,—Executive, Legislative and Judicial within the Realm. And that Sovereign power, in its Supremacy, has said to each of the Legislatures of this Dominion: "Thus far shalt thou go and no farther."

On the few occasions when the judges of the Dominion have been called upon to decide this question, they have been unanimous, with one exception. I therefore, in the second place, refer to the opinions pronounced by them in similar cases.

In New Brunswick in the case of *The Queen vs. Chandler in re Hazelton*, the Supreme Court rendered judgment on June 11th, 1869, maintaining its right, and consequently that of all courts throughout the Dominion, to disregard the provisions of an Act of a Local Legislature passed in violation of the B. N. A. Act, 1867. In that case, Ritchie, C. J., in giving the apparently unanimous judgment of the Court made use of the following expressions: "The British North America Act entirely changed the Legislative Constitution of the Province. The Imperial Parliament has intervened, and by virtue of its supreme legislative power, has taken from the subordinate legislative body of the Province the plenary power to make laws, which it formerly possessed, by depriving it of the right to legislate on all matters coming within certain enumerated classes of subjects, and has within the Dominion of Canada, delegated the sole

L'Union St. Jacques and Dame Julie Beliveau

right to deal with such matters to the exclusive legislative authority of the Parliament of Canada. Insolvency being one of these subjects, and the Local Act the validity of which is now questioned, treating of matters in our opinion directly within that subject, the Act in question being an Insolvent Act in the strictest sense of the term, there arises an undoubted conflict between the Statute of the Imperial Parliament and such Act of the Local Legislature, and presents the case suggested by Mr. Justice Parker, *where we are bound to pronounce our opinion on the validity of the Local Act.*

"The Imperial Statute says that the Parliament of Canada shall exclusively legislate on Bankruptcy and Insolvency; in other words, that the inhabitants of the Dominion shall be bound only by laws passed after the 1st July, 1867, within the Dominion, on these subjects by the Parliament of Canada. The subordinate legislative body of the Province, *in defiance* of this Statute, has undertaken to legislate on this subject, and by so doing seek to bind the inhabitants of this portion of the Dominion by their Act. Their right to do so is now contested, and under these circumstances can there be any doubt as to what we are bound to do? We think not. We must recognize the undoubted legislative control of the British Parliament, and give full force and effect to the Statute of the Supreme Legislature, *and ignore the acts of the subordinate, when, as in this case, they are repugnant and in conflict.* . . . . . The Constitution of the Dominion and Province is now to a great extent a written one, and where, under the terms of the Union Act, the power to legislate is granted to be exercised exclusively by one body, the subject so exclusively assigned is as completely taken from the others as if they had been expressly forbidden to act in it; and if they do legislate beyond their powers or in defiance of the restrictions placed on them, *their enactments are no more binding than rules and regulations promulgated by any other unauthorised body.* The fact of this Act having been confirmed by the Governor-General was much relied on as giving it a binding force and effect, but we fail to see how this can be. No power is given to the Governor-General to extend the authority of the Local Legislature, or enable it to override the Imperial Statute, which would be the necessary results if the Local Legislature could, by assuming their right to legislate on a prohibited subject, have their action legalised and validity given to their acts by the simple confirmation of the Governor-General, thus making the individual act of the Local Legislature or of the Governor-General, or of their united acts, superior to the Parliament of Great Britain."

My judgment in *Ex parte Papin* for writ of *habeas corpus*, I find substantially well reported in these words: "The enactments of the B. N. A. Act, 1867, 30 and 31 Vict., c. 3, s. 92, sub. sec. 15, are as follows: 'The imposition of punishment by fine, penalty, or imprisonment, for enforcing any law of the Province made in relation to any matter coming within any of the classes of subjects enumerated in this section.' Therefore the punishment imposed by Local Legislatures on an offence cannot be cumulative; it must be either fine, penalty, *or* imprisonment; it cannot be fine *and* imprisonment. This provision therefore limits the whole of the powers of imposing punishment by Provincial Legislatures, and they cannot grant to Corporations any greater powers of punishment than

they possess themselves, so that the 32 Vict., c. 70, s. 17, is clearly *unconstitutional*, in so far as it assumes to authorize the imposition of punishment by fine *and* imprisonment for an infraction of a bye-law of the City of Montreal. This sect. 17 of the 32 Vict., c. 70, being the clause relied on to maintain the commitment and conviction in this matter, Papin having been condemned to pay $20, *and* to be imprisoned for two months, it is clear that both conviction and commitment are null and void. The petitioner must therefore be discharged."

Mr. Assistant Justice Ramsay whilst holding the Court of Queen's Bench, Crown side, at Sherbrooke, in the case of *Pope* and *Griffith*, said, in giving judgment dismissing the appeal: "The grounds of the appeal are substantially that the conviction is not supported by the evidence, and that the Act, in so far as it prescribes any criminal procedure, is beyond the powers of the Legislature of the Province of Quebec.

"With regard to the second of these questions, I have no doubt that it is competent for this Court, or indeed for any Court in this Province, incidentally to determine whether any Act passed by the Legislature of the Province be an Act in excess of its powers. This is a necessary incident of the partition of the Legislative power under the British North America Act, without reserving to any special Court the jurisdiction to decide as to the constitutionality of an Act of any of the Legislatures."

I wish it to be clearly understood that, however repugnant to morality the Act under consideration may be, as annulling private contracts, and violating acquired rights, this Court did not require to be taught, by a wasted display of legal lore, that Judges have no power to set aside, arrest, or nullify a law passed in relation to a subject *within the scope of legislative authority*, on the ground that it conflicts with their ideas of natural right, abstract justice, morality or honor.

The question under consideration is not the moral character of the Act, but the power,—the authority of the framer.

The decision of this Court does not tend to impair the supremacy of the Imperial Parliament, but to maintain it, in its full power.

Undoubtedly the relative position of the several Legislatures in this Dominion and the Judiciary at the present moment is unsatisfactory.

But the remedy for the evil is obvious and of facile application.

If we wish this Dominion Government to become successful and prosperous, we must organize a special Tribunal. Let it be called by any name except "a Court of Appeal." We have already too many of that class. Give it exclusive power to decide all constitutional questions, and invest it also with exclusive jurisdiction to deal with all litigious difficulties arising between the Federal and Local Governments.

Whenever, in any case, the constitutionality of a law is called in question, let it be immediately evoked to the Supreme Tribunal, under such checks as would be necessary to prevent abuse, and thus you will avoid the *inconvenance* of allowing every Judge, from the Chief Justice of this Court, to the Justice of the Peace, or the Commissioner of small causes, to refuse obedience to a law solemnly passed by a Legislative body, as he is now bound to do, whenever he

L'Union St. Jacques and Dame Julie Beliele.

believes that it is opposed to the behests of the Imperial Parliament. The state of things now existing might be termed Legislative and Judicial Anarchy. A change must be made.

No Federal Government can long maintain its existence without a Court such as the Tribunal suggested.

The Government of the United States might have fallen into dissolution, ere now, had it not been saved by the Supreme Court, which is, perhaps, the greatest despotism in the world; but it is the beneficent despotism of the law.

The Imperial Parliament, however, is alone vested with the power of passing a law such as that, the enactment of which I venture to advise.

Sir. *W. Harcourt*, Q.C., and Mr. *Bompas*, for the appellant.

Mr. *Benjamin*, Q.C., and Mr. *F. W. Gibbs*, for the respondent.

The judgment of their Lordships was delivered by

LORD SELBORNE:—

The sole question in this appeal is this: whether the subject matter of the Provincial Act (33 Vict., c. 58), is one of those which by the 91st section of the Dominion Act are reserved exclusively for legislation by the Dominion Legislature. The scheme of the 91st and 92nd sections is this. By the 91st section some matters—and their Lordships may do well to assume, for the argument's sake, that they are all matters except those afterwards dealt with by the 92nd section—their Lordships do not decide it, but for the argument's sake they will assume it; certain matters, being upon that assumption all those which are not mentioned in the 92nd section, are reserved for the exclusive legislation of the Parliament of Canada, called the Dominion Parliament; but beyond controversy there are certain other matters, not only not reserved for the Dominion Parliament, but assigned to the exclusive power and competency of the Provincial Legislature in each province. Among those the last is thus expressed: "Generally all matters of a merely local or private nature in the province." If there is nothing to control that in the 91st section, it would seem manifest that the subject matter of this Act, the 33 Vict., c. 58, is a matter of a merely local or private nature in the province, because it relates to a benevolent or benefit society incorporated in the city of Montreal within the province, which appears to consist exclusively of members who would be subject *prima facie* to the control of the Provincial Legislature. This Act deals solely with the affairs of that particular society, and in this manner:—taking notice of a certain state of embarrassment resulting from what it describes in substance as improvident regulations of the society, it imposes a forced commutation of their existing rights upon two widows, who at the time when that Act was passed were annuitants of the society under its rules, reserving to them the rights so cut down in the future possible event of the improvement up to a certain point of the affairs of the association. Clearly this matter is private; clearly it is local, so far as locality is to be considered, because it is in the province and in the city of Montreal; and unless, therefore, the general effect of that head of sect. 92 is for this purpose qualified by something in sect. 91, it is a matter not only within the competency, but within the exclusive competency of the Provincial legislature. Now sect. 91 qualifies it undoubtedly, if it be within any one of

the different classes of subjects there specially enumerated; because the last and concluding words of sect. 91 are: "And any matter coming within any of the classes of subjects enumerated in this section shall not be deemed to come within the class of matters of a local or private nature comprised in the enumeration of the classes of subjects by this Act assigned exclusively to the Legislatures of the provinces." But the *onus* is on the respondent to show that this, being of itself of a local or private nature, does also come within one or more of the classes of subjects specially enumerated in the 91st section.

Now it has not been alleged that it comes within any other class of the subjects so enumerated except the 21st, "Bankruptcy and Insolvency;" and the question therefore is, whether this is a matter coming under that class 21, of bankruptcy and insolvency? Their Lordships observe that the scheme of enumeration in that section is, to mention various categories of general subjects which may be dealt with by legislation. There is no indication in any instance of anything being contemplated, except what may be properly described as general legislation; such legislation as is well expressed by Mr. Justice Caron when he speaks of the general laws governing Faillite, bankruptcy and insolvency, all which are well known legal terms expressing systems of legislation with which the subjects of this country, and probably of most other civilized countries, are perfectly familiar. The words describe in their known legal sense provisions made by law for the administration of the estates of persons who may become bankrupt or insolvent, according to rules and definitions prescribed by law, including of course the conditions in which that law is to be brought into operation, the manner in which it is to be brought into operation, and the effect of its operation. Well, no such general law covering this particular association is alleged ever to have been passed by the Dominion. The hypothesis was suggested in argument by Mr. Benjamin, who certainly argued this case with his usual ingenuity and force, of a law having been previously passed by the Dominion Legislature, to the effect that any association of this particular kind throughout the Dominion, on certain specified conditions assumed to be exactly those which appear upon the face of this statute, should thereupon, *ipso facto*, fall under the legal administration in bankruptcy or insolvency. Their Lordships are by no means prepared to say that if any such law as that had been passed by the Dominion Legislature, it would have been beyond their competency; nor that, if it had been so passed, it would have been within the competency of the Provincial Legislature afterwards to take a particular association out of the scope of a general law of that kind, so competently passed by the authority which had power to deal with bankruptcy and insolvency. But no such law ever has been passed; and to suggest the possibility of such a law as a reason why the power of the Provincial Legislature over this local and private association should be in abeyance or altogether taken away, is to make a suggestion which, if followed up to its consequences, would go very far to destroy that power in all cases.

It was suggested, perhaps not very accurately, in the course of the argument, that upon the same principle no part of the land in the province upon the sea

L'Union St. Jacques and Dame Julie Belisle.

coasts could be dealt with, because, by possibility, it might be required for a lighthouse, and an Act might be passed by the Dominion Legislature to make a lighthouse there. That was not a happy illustration, because the whole of the sea coast is put within the exclusive cognizance of the Dominion Legislature by another article; but the principle of the illustration may be transferred to Article 7, which gives to the Dominion the exclusive right of legislating as to all matters coming under the head of "militia, military and naval service, and defence." Any part of the land in the Province of Quebec might be taken by the Dominion Legislature for the purpose of military defence; and the argument is, if pushed to its consequences, that, because this which has not been done as to some particular land might possibly have been done, therefore, it not having been done, all power over that land and therefore over all the land in the province, is taken away, so far as relates to legislation concerning matters of a merely local or private nature. That, their Lordships think, is neither a necessary or reasonable, nor a just and proper construction. The fact that this particular society appears upon the face of the Provincial Act to have been in a state of embarrassment, and in such a financial condition that, unless relieved by legislation, it might have been likely to come to ruin, does not prove that it was in any legal sense within the category of insolvency. And in point of fact the whole tendency of the Act is to keep it out of that category, and not to bring it into it. The Act does not terminate the company; it does not propose a final distribution of its assets on the footing of insolvency or bankruptcy; it does not wind it up. On the contrary, it contemplates its going on, and possibly at some future time recovering its prosperity, and then these creditors, who seem on the face of the Act to be somewhat summarily interfered with, are to be re-instated.

Their Lordships are clearly of opinion that this is not an Act relating to bankruptcy and insolvency, and will, therefore, humbly advise Her Majesty that this appeal be allowed, that the judgment of the Court of Queen's Bench (Canada) ought to be reversed, and that the suit be dismissed. There will be no costs of this appeal.

Judgment reversed.

Bischoff, Bompas & Bischoff, solicitors for the appellant.

Wilde, Berger, Thorn & Wilde, solicitors for the respondent.

(J.K.)

SUPERIOR COURT, 1875.

MONTREAL, 31st MAY, 1875.

Coram TORRANCE, J.

No. 692.

Ostell vs. *Peloquin*.

HELD:—That an affidavit for *capias*, alleging in the alternative that the defendant has secreted *or* made away with his property and effects, is insufficient.

PER CURIAM:—This case comes up on a petition to be released from custody under a *capias ad respondendum*. The following is the judgment of the Court:—

"Having heard the parties upon the petition presented and fyled by defendant on the third day of April last, praying, for the causes and reasons therein mentioned, that the *capias ad respondendum* issued in this cause and all proceedings had thereunder be quashed and annulled, and that he be discharged and liberated from said *capias*, having examined the proceedings, the evidence adduced and deliberated;

"Considering that the affidavit upon which the said *capias* issued charges against the defendant, in the alternative, that, "le dit Denis Peloquin a caché "*ou* soustrait ses biens meubles et effets," is defective, I, the undersigned judge, do grant the conclusions of said defendant's petition, and do order that he be discharged from custody under the said *capias* with costs against plaintiff, *distraits* to Messrs. Trudel & Taillon, attorneys for petitioner, save and except the costs of *enquête* which are divided between the parties and payable one half by each."

Petition granted.

Dugas & Longpré, for plaintiff.
Trudel & Taillon, for defendant.
(S. B.)

PRIVY COUNCIL, 1874.

21ST JULY, 1874.

Coram THE LORD JUSTICE JAMES, SIR MONTAGUE E. SMITH and SIR ROBERT P. COLLIER.

H. I. S. KING, APPELLANT;

AND

MARY ELIZABETH TUNSTALL ET AL., RESPONDENTS.

Wills—Gift to Adulterine Bastards—Substitution.

HELD:—1. The conjoint operation of the Imperial Act (14 Geo. 3, c. 83) and of the Canadian Act (41 Geo. 3, c. 4), is to abrogate the old law which prohibited gifts by will to adulterine bastards.

2 Under the old law, derived from the Roman law, and subsequently incorporated into the Canadian Code (see art. 838), wherever there is a limitation by way of substitution, the time when the substitution opens is the time with reference to which the capacity of the substitute to take is to be determined. (6 P. C. 55.)

This was a consolidated appeal from the judgments of the Court of Queen's Bench for the Province of Quebec in four actions of ejectment brought by the appellant to recover from the respondents four fiefs or seigniories in the said Province of Quebec, which were in their possession. For the purposes of this appeal, the facts and pleadings in the four cases were identical and undisputed, and the sole question raised was whether upon the facts next hereinafter stated the appellant or the respondents were legally entitled to the seigniories.

The four seigniories in question, called respectively Delery, Sabrevois, Lacolle or Beaujeu, and Noyan, were at the end of the last century the property of a general in the English army, named Gabriel Christie, who had been for several years stationed in Canada.

Gabriel Christie duly made his will in England in English form on the 13th

King and Tunstall.

of May, 1789, and by it he devised the seigniories according to the following limitations:—

"To the use of my said eldest son Napier Christie Burton and the heirs male of his body lawfully begotten or to be begotten; and for default of such issue, to the use of the heirs male of the body of me, the said Gabriel Christie, lawfully begotten or to be begotten; and for default of such issue, to the use of my said natural son James Christie and the heirs male of his body lawfully begotten; and for default of such issue, to the use of my said natural son Gabriel Plenderleath, and the heirs male of his body lawfully begotten, he, the said Gabriel Plenderleath, and the heirs male of his body taking upon himself and themselves and constantly using the surname and arms of Christie, and not otherwise; and for default of such issue, to the use of my natural son George Plenderleath and the heirs male of his body lawfully begotten, he, the said George Plenderleath, and the heirs male of his body taking upon himself and themselves and constantly using the surname and arms of Christie, and not otherwise; and for default of such issue, to the use of my said natural son, William Plenderleath and the heirs male of his body lawfully begotten, taking upon himself and themselves, and constantly using the surname and arms of Christie, and not otherwise; and for default of such issue, to the use of my said brother William Christie and his heirs for ever."

The testator died without revoking his will, in the year 1799, leaving his wife surviving him, and three legitimate children, viz., one son, Napier Christie Burton mentioned in the will, and two daughters, Katherine and Sarah.

By a notarial deed, dated the 8th of August, 1800, between Napier Christie Burton, in his character of residuary legatee, and the widow and daughters of Gabriel Christie, the widow agreed to accept certain legacies in the will in lieu of dower, and certain arrangements were made as to the mode of payment of the legacies to the widow and daughters mentioned in the will. And Napier Christie Burton then took possession of all the property of Gabriel Christie, and *inter alia* of the four seigniories in question, in accordance with the will.

Napier Christie Burton died in the year 1835, leaving no son. William Christie, to whom the final remainder in the will was limited, died during the lifetime of Gabriel Christie without children, and the three natural children of Gabriel Christie, James Christie, and Gabriel and George Plenderleath had also died without children during the lifetime of the testator's son, Napier Christie Burton, before the substitutions in their favour opened, and the only devises over in the will which had not lapsed before the death of Napier Christie Burton was that in favour of William Plenderleath.

William Plenderleath named in the above will was an adulterine bastard son of Gabriel Christie, the testator. The appellant claimed the seigniories in question (the subject of the above limitations), under the will of Napier Christie Burton, who it was admitted was entitled absolutely, if each successive substitution failed by reason of the death of the substitute before the substitution opened; the respondents claimed under the will of William Plenderleath, and the issue of law between them was whether the above limitation in favour of William Plenderleath was valid. William Plenderleath, on the death of Napier

Christie Burton, in 1835, assumed the name and arms of Christie by royal license, and took possession of the seigniories, and remained in possession till his death in 1845.

Napier Christie Burton, by his will, which was duly made in England, and in English form, and bore date the 20th of December, 1853, devised his real estates in Canada and elsewhere to an illegitimate daughter, Christiana Harmar, and in the event (which subsequently happened) of her death without issue, and without having sold the said real estates, he devised them absolutely to the appellant in the following terms:—

"Then I do give, devise, and bequeath, limit, and appoint all and every the said several estates and seigniories, and all my right and interest therein, and all other my real estates in possession, reversion, remainder, or expectancy, unto the said Henry John Styring King, his heirs and assigns, absolutely for ever, wishing that he and they do thereupon take and use my surname, Christie, and no other, and do use the arms of Christie, alone or together with his own, in case the requisite authority for taking the said surname and bearing the said arms can be obtained."

The will contained no devise over in case the appellant did not take the name and arms of Christie.

William Plenderleath Christie, by his will and codicils, which were made in Canada, and dated respectively the 16th of March, 1843, and the 31st of March, 1845, devised the said seigniories to various persons, who accepted the devises so made in their favour, and under those devises the respondents obtained possession thereof.

The actions in which this appeal was brought were commenced by the appellant in the Superior Court for the Province of Quebec, Canada, on the 14th of July, 1864.

The appellant in each of his declarations claimed the said seigniories under three counts. In each of his three counts he claimed as the devisee of Napier Christie Burton.

In the first count Napier Christie Burton was in effect alleged to have been entitled as heir-at-law to Gabriel Christie.

In the second count the title of Napier Christie Burton was deduced as devisee under the will of Gabriel Christie, and the appellant alleged that the substitutions in favour of Gabriel Christie's four natural sons, James Christie, Gabriel Plenderleath, George Plenderleath, and William Plenderleath, were void, they having been, as was alleged, adulterine bastards, and that (the said William Christie, the ultimate devisee, having died before the testator), Napier Christie Burton became, immediately after the death of Gabriel Christie, the absolute proprietor and possessor of all his real estate, and as such entitled to devise the same to the appellant.

In the third count of the declaration the title of Napier Christie Burton was deduced as having been, at the time of the death of William Christie, who was the ultimate devisee or substitute under the will of Gabriel Christie, the heir-at-law of William Christie.

The respondents filed three demurrers, eight special pleas of great length, and the general issue.

King and Tunstall.

The first demurrer was a formal one to the whole declaration, on the ground that the counts were inconsistent with each other and could not be relied on together; this was subsequently decided in the appellant's favour, and the respondents did not appeal.

The second demurrer was to the second count, on the grounds that the Imperial Act, 14 Geo. 3, c. 83, and the Lower Canada Act 41 Geo. 3, c. 4, removed the disabilities of adulterine bastards, and that though the latter Act was subsequent to the death of Gabriel Christie, it was prior to the opening of the substitution in favour of William Plenderleath, who was by it rendered capable of taking the estate on the death of Napier Christie Burton, who was not therefore entitled to more than a life interest in the estate, and could not devise it by will.

The third demurrer was to the third count, and was on the grounds that Gabriel Christie, and not Napier Christie Burton, was the heir of William Christie, and further, that William Christie, having died during the lifetime of Gabriel Christie, the devise in his favour failed.

The first two special pleas alleged in effect that the devise by Napier Christie Burton to the appellant was conditional on his taking the name and arms of Christie, and that the appellant was not entitled to sue till he had done so.

The third, fourth, and fifth pleas set up the notarial deed of the 8th of August, 1800, between Napier Christie Burton and the widow of Gabriel Christie as estopping the appellant from alleging Napier Christie Burton to have been entitled as heir and not under the will.

The third and fourth pleas also set out the title of the respondents under the will of William Plenderleath, and alleged that the devise in favour of William Christie lapsed by his death in the testator's lifetime, and that William Plenderleath was entitled to the property absolutely.

The sixth and seventh pleas set up a prescription of twenty and ten years respectively.

The eighth plea alleged that the possession of the respondents was *bona fide*, and that they were not, therefore, liable to repay the mesne profits, and were entitled to set off sums expended in good faith upon the property amounting to £5000.

The ninth plea was the general issue.

To these pleas the appellant filed joinders in demurrer, and joinders of issue, and he also demurred to the first two pleas.

It was subsequently ordered by the Court that, before adjudicating upon the issues of law, the parties should proceed to evidence, and that questions of law should be reserved for adjudication till the case was heard on the merits.

On the 21st of February, 1870, the Court of first instance (TORRANCE, J.) (in a judgment reported in 14 L. C. Jurist, p. 197), dismissed the appellant's actions.

The appellant appealed in every case from this judgment to the Court of Queen's Bench for the Province of Quebec, Canada. The appeals were heard together, and on the 19th of September, 1872, the Court (DUVAL, C.J., CARON, BAGG-

LEY, MONK, and BOSSE, JJ.;—MONK, J., dissenting) confirmed the judgment of the Court below.

King and Tunstall.

The judgment of BADGLEY, J., to which DUVAL, C.J., and CARON, J., assented, contained the following passages:—

"The second count avers that General Christie's will being null in relation only to William Plenderleath Christie as being an adulterine bastard, Napier Christie Burton, as the only son of the testator, became entitled in fee simple or absolutely to his residuary real estate. In other words, that Napier Christie Burton became the owner of the seigniories under his father's will at his death, the substitution to William Plenderleath Christie being a nullity.

"As each count of the declaration declares a *distinct* cause of action the points of contention and the personal interests involved in this second count, which are various and important, will now be examined.

"The appellant's proposition, as stated in his factum to this Court, is as follows: 'A bequest to an adulterine bastard, other than as mere alimentary allowance, is a nullity, and therefore William Plenderleath Christie was not merely incapacitated by law from receiving General Christie's bequest, but the bequest itself, from the moment of its inception, was a nullity, and produced no more effect in law than if it had not been made.' In other words, the bequest was an absolute nullity, both in the devisor and in the devisee.

"A few words may be premised upon this matter of nullities generally. It is trite to say, and it is so well recognised as a rule of maxim of our law as not to need an appeal to authorities to support it, that nullities must be so declared by law. 'C'est un principe constant que les nullités n'ont pas lieu de droit, et l'on n'a jamais connu en France d'autres nullités que celles qui sont textuellement prononcées par les ordonnances; c'est ce que Mornac a enseigné avec précision sur la loi 1er ff., de procurat. et defens., s'il n'est dit sur peine de nullité *ut vulgo loquimur*;' and again, 'Il est vrai que les nullités ne se suppléent pas, elles doivent être textuellement prononcées par la loi.' So also Solon, des Nullités, pp. 133, 134. Not only must the existence of the nullity have been enacted, but it must have been so adjudged in the particular to give it operative effect, 'car les nullités ordonnées par les lois doivent être prononcées par les magistrats,' and this upon objections made by those who have legal right and interest to make them. Solon, in his Tr. des Nullités, says, 'Les nullités doivent être prononcées par jugement. Les actes sont présumés valides jusqu'à ce que la nullité ait été déclarée par jugement, et cela sans aucune exception.' He adds, 'that it is a legal remedy given to him whom the contravention has injured. It would be abuse of the law to accord the remedy to one who has not suffered from the act.' Now, it is asserted without hesitation that no such nullity has been enacted in the edicts and ordonnances of the French kings, nor is it to be found in the articles of the custom for this particular. It has no place in the Civil Code of this province.

"Referring to the objection stated in the proposition of the appellant, it applies first to the devising capacity of General Christie at the so-called inception of his bequest, presumably, at the time of the making of his will, and also at the time of his death, when it is averred that the will took effect, Napier

King and Tunstall.

Christie Burton then becoming the alleged owner of the seigniories under the will. The impugned bequest at both times will be treated as one event as to the devising capacity of the testator, and in explanation, a brief reference must be made to the old French law under the *Coutume de Paris* from which our common law is principally derived.

"By the customary law of old France generally, and particularly by that of the custom of Paris, testamentary dispositions were not favoured, owing to the intricacies caused by the numerous legal divisions of property and inheritances, which Malleville, a modern commentator upon the French Code, calls a '*pépinière de procès*,' and also by the limitation upon the devising power, from the policy of preserving estates in families, allowing the free devise of moveables, and acquired immoveables, *acquêts et conquêts immeubles*, property by purchase, but only of one-fifth of the *propres*, immoveable property by descent, although all the property, moveable and immoveable, *propres et acquêts*, might be freely given by donation. By the 292nd Article of the Custom, four-fifths of that class of immoveables, *les propres*, property by descent, were strictly reserved as *légitime* for the *héritier du sang*, the natural heir, which the testator, by the text of the Custom, was expressly prohibited from disposing of by last will, and this brought with it, into general practice, the rule of the immediate seisin of the heir by the ancestor at his death, *le mort saisit le vif son hoir plus proche et habile à lui succéder*, the effect of which was to continue in the person of the natural heir the possession and seisin of the ancestor *of all his estate*, compelling devisees and legatees to demand by action at law or otherwise from the heir, a delivery to them of their legacies and bequests, before they could take possession of them or exercise any right over them. This right, which was attended with great inconvenience and annoyance to devisees and legatees, was required in the sole interest of the heir to prevent a possible violation of the prohibition in his favour, and to shew that his legal rights, his proportion of heritable property, had not been exceeded by the testator.

"By the 292nd Article of the Custom, it was declared that 'all persons of sound mind and of age to exercise their civil rights, might devise their moveables, acquired immoveables, and one-fifth of their *propres*, and no more,' all which, however, with the reserved four-fifths of the *propres* as *légitime*, for the natural heir, were in his possession and seisin by the mere death of the ancestor, and could become beneficial to the devisees and legatees only by the *délivrance de legs* made by the heir.

"By Royal Edict of April, 1663, the law of the Custom of Paris, as it then was in France, was established in French Canada as the municipal law of the colony, to be administered under the supervision of the *Conseil Supérieur de Québec*, also constituted under the said Edict, and subject to be altered only by Royal legislation for the colony when received and registered by the *Conseil Supérieur* in the province, which became, by the force of the Edict, to all intents of like independence as to its law and jurisprudence as any of the provinces *de Droit Ecrit*, or *de Coutume*, into which France was then divided, and in fact as independent in that respect as the parent *Coutume et Prévôté de Paris*. The law as to last wills and testamentary capacity and the seisin of the heir con-

tinued to be the law of the colony until its cession to Great Britain by the Treaty of 1763.

"The Imperial Act of 1774, 14 Geo. 3, c. 83, known as the Quebec Act, established a civil government for the conquered province, up to which time the old French law was on sufferance only, and at the same time restored the old laws of Canada, to be thenceforward the civil laws of Canada, and amongst others the customary law regulating last wills and the extent of the testamentary capacity, but specially attaching to these the particular proviso of the 10th section of the Act, overriding the 292nd Article, and expressed as follows: 'That every person, owner of lands, goods, credits, &c., in the province, having a right to alienate the said lands, &c., &c., in his lifetime by deed of sale, gift, or otherwise, might devise or bequeath the said lands, &c., &c., at his death, by his last will and testament, any law, usage, or custom heretofore or now prevailing in the province to the contrary in any wise notwithstanding, such will being executed according to the laws of Canada, or according to the forms prescribed by the laws of England.'

"This statutory proviso upon the reintroduced law of the Custom in the particular stated was in fact the substitute for the 292nd Article of the Custom, in that respect, to be read for it, and became our municipal law in place of the old article. It gave the power of devising without reserve or limitation, and this entire freedom and enlarged capacity of devisors to devise the whole of their property necessarily did away with the policy of the old jurisprudence, and by force of the existing law, and by the force of the last will, the restricted capacity of devisors was removed, and the claim and seisin of the heir over the devised property were abolished, as he no longer could have interest in the estate unless as legatee and devisee under the will; the devisees and legatees concerned in the estate having immediate seisin without the intervention of the natural heir.

"It was held in the cause of *Durocher* v. *Beaubien*, appealed from the Provincial Courts here to the Privy Council, and there decided on the 13th of May, 1828, that the statute 14 Geo. 3 extended the subject over which the devisor had rights, and applying that decision in this case it may be added to it, that the subject was so extended without any reserve, the words of the statute being without limitation. In 1789, the time of the so-called inception of the bequest, when General Christie made his will, he exercised his free right under the terms of the existing law to devise his whole estate, which he did by his will executed in the English language in England, and according to the forms prescribed by the laws of England. In 1799, the time of his decease, he devised his whole estate by his said will, at his death, under the authority of the same existing law, which recognized and carried with it no restriction or limitation upon his devising capacity; wherefore the objection of the absolute nullity of General Christie's bequest, in question, at either of these times is unfounded. Since the statute there has never been any doubt as to the unreserved devising capacity of testators.

"In the next place, a similar objection of incapacity, from averred absolute

King and Tunstall.

nullity, is alleged against William Plenderleath Christie as absolutely excluding him from General Christie's bequest in his favour at all times.

"It has been seen that General Christie had perfect capacity to make his bequest, and that it was not a nullity as to him; it only remains to ascertain if the alleged incapacitating nullity was absolute against William Plenderleath Christie for all time, and if not, at what time the incapacity ceased to have operative effect.

"As for the devisor so for the devisee in the particular in question, no such absolute nullity has been enacted by the French kings, the only legislative power then known in France competent to make nullities, nor does it exist specially in the Custom against the capacity of illegitimate children to receive gifts or devises from their natural parents, although that capacity has been a subject of unsettled jurisprudence for many years with alternate results in *arrêts* or judgments.

"The rigour of the later Roman law became in time tempered by the canon or ecclesiastical law which influenced the French Courts, and which, as Swinburne says, p. 370, is more agreeable to nature, equity, and humanity, even in the case of incestuous children, and which was generally expressed in the old customary law maxim, reported by Loysell in his *Institute Coutumiers*, *Lib.* 1, *Reg.* 41, '*Qui fait l'enfant le doit nourrir, fût-ce ex nefario coitu.*' Under this humanizing influence, what Swinburne calls *needful and convenient sustentation*, and known in France under the general name *aliments*, might be given by parents to their illegitimate children, without distinction, whereby their capacity to receive from their parents became the rule of the law, and was no longer a doubtful question, and ceased at last to be a judicial question of aliments altogether. Since the Reformation of the Custom of Paris in 1580, the jurisprudence of the Custom has been persistent in acknowledging in principle the capacity of illegitimate children to receive from their parents, and has varied only as to the extent of the gifts or devises. From the absence of general royal legislation uniformly to guide and control the Courts in the various and conflicting civil law and customary provinces of France, in litigations before them, they assumed a moral and social censorship and exercised extraordinary so-called equitable powers without law, but simply as a kind of self-adopted practice or procedure, *à l'arbitrage des juges*, by which they settled contracts, interpreted wills, and in the interest of marriage modified bequests and gifts of parents to their illegitimate children. This judicial power was entirely arbitrary and without legislative sanction, and the Court *arrêts* were not so much those of Judges of the law as of judicial members of society, yet in all their divergencies the capacity of illegitimate children to receive from their parents was not denied.

Ricard, in his Tr. des Donations, pp. 104, 105, and his Annotator, pp. 106, 107, exhibits those differences of judicial opinion. Ricard's practice in the Courts enabled him to refer to a series of *arrêts* or judgments by the Courts and *Parlement de Paris* which establish, he says, that 'pendant un temps considérable, il s'y était établi une jurisprudence suivant laquelle on ne doutait plus que les enfants naturels ne fussent capables de recevoir *toutes sortes*

de donations et de legs universels de leur pères et mères comme des étrangers en auraient pu faire.' He cites *l'Avocat Général le Bret, Tr. de la Souveraineté du Roi, lib. 2, ch.* 11, and adds, that 'les donations et les legs des pères et mères à leurs "enfants bâtards n'avaient point d'autres limites que ceux des autres." Ricard refers to an *arrêt* of the 17th of March, 1584, which confirmed *un legs universel* by a parent to his bastard child, and gives others to the same effect in his own time in 1648, 1652, and 1655, upon the conclusions, the two former of *Avocat Général Talon*, and the latter upon those of *Avocat Général Bignon*, both celebrated and eminent French lawyers.' To which may be added another to the same effect on the 17th of July, 1665, mentioned by Pothier, *Tr. des Substitutions*, No. 152, who refers to it as reported by Soefve, 1 vol., *centurie* 4, *ch.* 99, and which he says 'a confirmé une disposition universelle par un père au profit d'un bâtard légitimé par lettres.' But it is admitted that these *lettres* have no other effect *que pour les honneurs*, and do not change the natural quality of the person as a bastard. Furgole in his 1st. vol. *des Testaments* refers to these same *arrêts* and adds others omitted by Ricard. Furgole says at p. 424, 'Le premier arrêt, qui a déclaré les bâtards capables de dispositions universelles de la part de leur père et mère, a été donné dans la Coutume d'Auxerre le 27 mars 1584, et fut prononcé en Robee rouges (the Supreme Court). Le second est du 5 février 1614. Le troisième du 25 mai 1618. Le quatrième donné à l'Audience de la Grande Chambre (en appel) le 9 mars 1648, au rôle de Paris rapporté au 1er tome du Journal des Audiences. Le cinquième du 8 mars 1652, rendu sur les conclusions de M. l'Avocat Général Talon qui dit que les bâtards étaient capables de toutes sortes de legs, et de donations, sans que pour cet effet, il fût besoin de lettre de légitimation. Le sixième fut prononcé à huis clos le 17 juillet 1655, conformément aux conclusions de M. l'Avocat Général Bignon.' After these follows the *arrêt* of the 17th of July, 1665, to the same effect, mentioned by Pothier out of Soefve. Ricard and Furgole both add, that *postérieurement, les arrêts ont changé cette jurisprudence*, and ignored general dispositions, the change being first applied to donations *entre vifs, inter vivos*. It was manifestly a fixed jurisprudence up to 1663 and afterwards, but even after the change began in France, the jurisprudence both for donations and last wills sustaining the principle of the capacity of natural children to receive gifts from their parents, not alone mere aliment, assumed the right to reduce their amount. Ricard cites *arrêts* in which such reductions were made, but always *à l'arbitrage des juges*. The *Coutume et Prévôté de Paris* did not regulate all the other Customs of France; they were independent of each other in that respect, and amongst others, Auvergne, Tours, Bourgogne, and Melun had favourable provisions for bastards, and admitted their receiving capacity from their parents. In fact no general law for such matters existed in France, and each *Coutume* supported its own local customs and its local jurisprudence. In adverting to such subjects as occurring in the Customs of Orléans and Paris, Pothier and other writers of about the beginning of the eighteenth century, commenting on these matters, treated them as subject to the local jurisprudence of the Custom at the time they wrote. Up to, and indeed after April, 1663, when the *Coutume de Paris* was established, and

King and Tessetall.

the *Conseil Supérieur de Québec* was constituted in French Canada, the previous Parisian jurisprudence of free and universal dispositions by last will prevailing in Paris came with the *Coutume* into Canada, and the subsequent jurisprudence, as to the reduction or the opinions of the commentators upon that existing jurisprudence, could of right have no controlling or paramount effect here. Since 1663 that previous jurisprudence has not been disturbed by any contradictory jurisprudence to be found in the French Colonial Archives, nor is it probable that such cases would occur in the Colony up to the time of its conquest or of its after cession to Great Britain in 1763; certainly, if such general dispositions to bastards were made in the colony, they were not interfered with by colonial jurisprudence, and no such cases have been reported in the records of the French Colonial Courts. No such jurisprudence against general dispositions to bastards has been made since 1774. Whatever might have been the local jurisprudence of the *Prévôté de Paris*, the Colonial Courts were under *no obligation to change* with the changing jurisprudence in Paris, nor unless required by royal edict therefor, duly received and registered in the *Conseil Supérieur* at Quebec, when it would have become a general colonial law, but none such appears.

"The arbitrary nature of the French *arrêts* is shewn in those referred to by Ricard and his annotator. As early as May, 1663, the Courts at Paris rendered an *arrêt* by which they confirmed a devise to a bastard child by his father of 600,000 livres without reduction, upon the sole ground that the latter had left a large fortune, and there are several others, in more modern times, of the reduction of such legacies from 18,000 livres to 8000, 60,000 to 11,000, 20,000 to 10,000, and others, in all which the annotator shews conclusively that the measure was not upon the principle of mere aliment, but according to the means of the parent, for distribution amongst his children generally; he says, 'On les mesure moins par leurs besoins absolus (as aliments) que par les facultés de leur père naturel;' or as Furgole says: 'En égard aux biens que le testateur a laissé,' as by *arrêt* of 1709; or as Swinburne says: 'According to the wealth and ability of the parents.' The annotator adds finally: 'Du rapprochement de ces arrêts, il résulte la confirmation du principe, que les legs faits aux bâtards par leurs pères et mères sont sujets à la réduction s'ils sont excessifs, mais que la mesure de la réduction est absolument à l'arbitrage des juges.' Ferrière, an authority of the eighteenth century, as above, in his commentary upon the 292nd Article of the Custom, says 'that illegitimate children, by the jurisprudence of the time, might freely receive *des dispositions particulières*, but not dispositions *universelles*;' and Pothier, in his Tr. des Donations, p. 359, is to the same purpose, saying, 'Ils sont capables de donations des choses particulières quoique considérables.' The *devise à l'arbitrage des juges* had by that time lost all its original supposed element of *aliments*, and had become a mere gift or legacy proportioned to the fund lying for distribution amongst the children generally, and it was held that where there were no legitimate children or lineal descendants of the deceased, the universal disposition would hold good for the natural child to the exclusion of the parents of the deceased father. The modern French law under the Code has adopted this last rule, and besides has enlarged the capacity

of natural children, giving them fixed proportional parts of the general estate with the legitimate children in successions and by last will, favouring equally the adulterous and natural children, but excluding the incestuous, except from aliments.

"The later jurisprudence of France was never acted upon or prevalent in this French colony, nor could by any possibility exist here since 1774, and therefore could never establish the testamentary nullity or incapacity of William Plenderleath Christie, after the 14 Geo. 3, c. 83. It cannot, therefore, be denied that such illegitimate children, not incestuous, had receiving *capacity for gifts and devises from their parents*, not merely as alimentary allowances, and had, therefore, the passive capacity of the books, *pour pouvoir demander, recevoir et conserver les libéralités*, as Furgole, des Testam., says, and are incapable only when so 'déclarés par la loi, les ordonnances, statuts ou coutume,' p. 317, indicating the non-existence of the alleged absolute nullity which the annotator of Ricard qualifies as follows: 'Au reste l'incapacité [illegible] pour recevoir des dispositions universelles ou trop étendues n'est [illegible] capacité relative,' only as to their parents; and Furgole, distinguishing [illegible] incapacities to receive, classifies them as *absolute*; as by aliens, persons civilly dead, &c., being personal to these: *respective*, as by tutors, curators, physicians, &c., under the *Ordonnance* of 1539, from their pupils, patients, &c., being under their influence: and *relative*, as by illegitimate children for *certaines libéralités* from their parents, p. 359. So Pothier, Donat. Testam., 152, says they were 'capables de recevoir des legs particuliers quoique considérables et en propriété.'

"Upon the whole it is plain that there was no such nullity whatever under the old French jurisprudence, that by that law there was only a restrictable capacity to receive, and that not *de droit*, but only on legal demand, therefore, of those concerned in the estate and entitled to demand the reduction. Solon, Tr. des Nullités, says that by the Code Nap. nullities are those enacted by legislation and so adjudicated, and nullities by action at law, but that these distinctions did not exist in the jurisprudence of the Customary and Civil Law Provinces of old France, unless there established textually [illegible] the Royal Ordinances or the Articles of the Custom, or they were *de pure faculté*; that there were no nullities *de non esse*, but they must be demanded: he then says relative nullity was merely *une faculté que le législateur avait voulu accorder à une personne* to interfere with *actes et procédures inattaquables par toutes autres personnes*;' that a relative nullity can never become absolute, 'parce qu'elle n'a de force que par la déclaration de ceux en faveur desquels elle est établie.' Without a charge of such nullity and incapacity, and its resulted adjudication as such, the deed or will stands good and valid, whatever the disposition, whether particular or general, when it becomes operative for the devisee, and repeating Solon, already cited, Nullities must be pronounced by judgment, *actes* are presumed to be valid, 'jusqu'à ce que la nullité ait été déclaréo par jugement et ce sans aucune exception.' It is a legal remedy given to one whom the contravention has injured, it would be an abuse of the law to accord the remedy to him who has not suffered by the *acte*, or shown that he has suffered. In these cases the appellant has not asked for a judgment

King and Tunstall.

of nullity, which cannot be given, therefore, *ex mero motu* by the Court. Perrin, Tr. des Nullités, says, at p. 462, 'Nullities are covered by prescription; whoever might claim the annulment of an *acte* or deed which appears against him, and keeps silence, seems to acknowledge the justice and validity of the title, or at least he shews that he has no intention to demand the nullity.' The silence becomes a legal presumption, when such a delay occurs, that public order in some degree is interested in putting an end to such actions, *il doit y avoir un temps après lequel la partie est censée renoncer à l'action en nullité.*' The prescribing period is thirty years, and counting from the testator's death in 1789, to the death of Napier Christie Burton in 1835, forty-six years have elapsed, and up to the institution of these actions in 1864, seventy-five years have elapsed. The respondents have pleaded the absolute prescription of thirty years against the actions, which is a legal *fin de non recevoir* against them.

"It is evident that the law of France did not limit the devising capacity of the devisor except for the *légitime*, the four-fifths, of the *propres*, immoveables by descent, and even that limitation was abolished here by the Act of 1774. Now, in France the limitation affected only the *propres*, but did not affect *acquêts et conquêts immeubles*, immoveables by purchase, which were at the full disposal of the devisor, as were therefore necessarily these seigniories, which were all *acquêts*, acquired by purchase, by the testator. His devising capacity, therefore, under any circumstances, was not limited, either when he made his will or when he died. The receiving capacity of the devisee, in France, might also be limited by the reduction of the Courts, when legally demanded and adjudicated upon at the instance of an interested party against it, but otherwise the will or *acte* is presumed to be valid, and stands good, but no such demand has been made nor adjudication been asked for in these cases. Under the existing law of Canada, therefore, at the death of General Christie, the capacity of the devisee to receive was not more limited than that of the devisor to give.

"It will be noticed that General Christie devises to William Plenderleath Christie and his other illegitimate sons, by name, as his *natural* sons, designated as such in the terms used denoting the persons so named; these terms have different significations by the law of England and the law of France, and, therefore, need explanation. As to this, Story lays down the rule, p. 402, as follows: 'Whenever words of ambiguous signification, or different significations in different countries, are used in a will, they are to be understood in the sense in which they are used in the law of the testator's domicile, with which he may be presumed to be either most familiar or to have adopted.' Burge, vol. iv., No. 590, is to the same effect as to such words. It is quite clear that in such cases the inquiry is not as to whether there was a devise or substitution, or of what estate or interest, which are of course subject to the law of the situation of the devised real property, but as to the persons denoted by the terms *natural sons*, applied to them by the will. Now, the will purports to be that of General Christie, as follows: 'I, Gabriel Christie, residing in Leicester Square, in the parish of St. Martin-in-the-Fields, in the county of Middlesex, in England, Colonel Commandant in the second battalion of His

Majesty's Sixtieth or Royal American Regiment of Infantry, now in the province of Quebec, in North America, and Major-General in His Majesty's army, do make this my last will and testament in manner following,' &c. The will was made and executed in England, in the English language, with the technical terms used there for such purposes by that law, and specially for his intended disposition of his real property, and it was there attested as required by that law for the devise of such property. By the will the testator devised his real property in North America, &c., by the dispositions therein mentioned, and, after others, over to his *natural sons* named in the will, in tail male successively, including the last named *natural son*, William Plenderleath. Now, by the law of England, the common terms 'natural children' designate all children born out of marriage, comprehending all without distinction; by the French law of Canada, '*enfants naturels*,' the translation of the English terms, denote distinct and different classes as *bâtards simples; adultérins et incestueux*, with different capacities of each, whereas by the English law the general term 'bastard' includes under one term all those distinctions of the Civil Law retained in France, and being the synonym of the term natural son, admits not of the distinctions of the French law. Swinburne, part 5, sect. 7, a rigid civilian of his time, after explaining the Civil Law distinctions above, at p. 370 says: 'The fourth limitation to the Civil Law rule is grounded on the laws of the realm, which do permit every man both by deed made and executed during their lives, and also by their last wills and testaments to be executed after their deaths, to give and to devise to any of their bastards, *without distinction*, all their lands, tenements, and hereditaments *without restraint*.' So it is natural to infer that the terms *natural son* must be understood in the sense of the law of England, where the will was made, and where the testator declared his then domicile to be, the terms used being general and without distinction. This count has charged the terms *adulterine bastard* against the said natural son, William Plenderleath Christie, affirmatively, although not to be found in the will, and the appellant not only has omitted to prove them, but actually contradicted them by his own admission, shewn in the 13th Articulation, and his answer thereto: 'It is true that Napier Christie Burton died in 1835, leaving no heir male, and that upon his death William Plenderleath Christie, a natural son of Gabriel Christie, (General Christie) then took possession of the estate,' and even if the fact had been admitted by the devisee against himself, his admission could not be legally received as evidence of the fact, nor could that evidence be legally made by the appellant. Troplong, vol. ii., Donats-Test, p. 35, declares: '*Si la qualité d'enfant adultérin est le résultat d'un acte de reconnaissance volontaire*, it is not allowed against him. *La reconnaissance d'un enfant adultérin n'est pas admise: l'article la repousse afin d'étouffer le scandale de l'inceste ou de l'adultère. Il n'en doit donc rien rester, elle est proscrite d'une manière absolue.*' So also Solon, p. 77. Now this merely reproduces the old French jurisprudence, as shewn by Furgole and others, and by both laws the proof of such social or family scandals was prevented.

"It has been shewn by Swinburne that in English law there was no distinction in the general quality of natural children, and that general dispositions

King and Tunstall.

might be made to them without restraint; now, recurring to the Imperial Statute of 1774 (14 Geo. 3, c. 83), the Quebec Act, which established, as stated, civil government and laws in the province of Quebec, and by the 10th section specially enacted a proviso against a particular law of the Custom amongst those re-established generally by the statute; assuming the proviso to be the substitute for the 292nd Article of the Custom to be read in its place, the proviso would seem to have been intended by its makers in England to have a more general extending operation than merely to extend the subject for devising, as stated in the case of *Durocher* v. *Beaubien*, and this conclusion will be shown by bringing the two laws into juxtaposition:

'Art. 292.—All persons of sound mind, of age to exercise their civil rights,

May devise their moveables, acquired immoveables and one fifth of their *propres*, and no more.'

'*Au profit de personnes capables.*'

'Sect. 10.—Every person, owner of lands, goods, &c., in the province, having right to alienate the said lands, &c., by deed of sale, gift, or otherwise,

May devise or bequeath the same at his death by his last will and testament.'

'Any law, usage, or custom heretofore or now prevailing in the said province, to the contrary hereof in anywise notwithstanding, such will being executed according to the laws of Canada, or according to the forms prescribed by the laws of England.'

"Reading the proviso as the substitute for the article, and considering its English origin, where entire freedom was observed in favour of devisees without distinction, the proviso could only have contemplated for this province the same enlarged power as was practised in England in such matters, and demonstrated the intent by omitting the qualifying words of the article as to the devisee, leaving the devisor free to give to whomsoever he might think proper to receive his liberality, and necessarily giving to these capacity freely to receive without restraint. This proviso was the only change effected upon the old re-introduced law, and seemed to be intended to make testacy in Canada as extended and beneficial as in England; for such purpose the enlarged power of the devisor must be complete and free in its execution, by enabling him at his decease to give his property effectively to any person whomsoever by his will; otherwise the power would be something more than inconsistent with common sense and justice, in extending unreserved freedom of devising over the whole property, but at the same time nullifying that freedom by preventing the devisee from receiving it. '*Cuicumque aliquis quid concedit, concedere videtur et id sine quo res ipsa esse non potuit.*' So '*Cui jurisdictio data est, ea quoque concessa esse videntur sine quibus jurisdictio explicari non potest.*' This construction places the subject on the footing of jurisprudence of the Paris *Coutume* at the time of its introduction into French Canada in April, 1663, and which, as

already observed, has not been disturbed by any contradictory colonial judgment. The opinion expressed herein by Chief Justice Duval upon the construction of the statutory provision appears to be conclusive for the capacitating effect of the law, and for the removal from the devisee of all incapacities to receive the disposition in his own favour. In effect conforming with the French jurisprudence above adverted to.

"It has been objected against the enlarging effect of the enactment to remove the previous incapacity of devisers to make such a bequest, that the previous law, the French law, was a law of public order and morality, and could not be set aside except by express terms specifically innovating upon the terms of the old law. It is sufficient to say that it was not a law so known, it was merely a French jurisprudence at any time, and, as shewn above, such bequests by parents were protected by the Parisian jurisprudence up to and after April, 1663, when the law of the Custom was established here, at which time such bequest was not held to be against public order or morality as then known and practised in the *Prévôté de Paris*. It will likewise be borne in mind that the statutory provision originated in England, where such freedom of devise prevailed, and where neither law nor public order nor morality incapacitated bastards, without distinction, from receiving bequests without restriction from their parents; and the same capacity exists in the common law in the United States; see Kent, Com. vol. ii., p. 209, et seq.; Redfield on Wills, vol. i.; and by the decision of the Privy Council in Durocher's Case, it was held that the alleged incapacity of testators was removed by the Act of 1774. This Act was in force in the province of Quebec in 1789, the date of the will and bequests in favour of the testator's natural son, William Plenderleath, and has not been repealed."

In a later part of the judgment, having pointed out that the law requires of the *substitué* the capacity to receive when the substitution opens for him, because, as Furgole (vol. ii. p. 257) says, the principal effect of the happening of the condition is to purify the testamentary disposition, and to enable the *substitué* to take action upon the disposition subject to the condition, and to attribute to himself an irrevocable beneficial right in the substituted property, Mr. Justice Badgley proceeded as follows:—

"The only real question that remains is, therefore, the capacity of the substitute, William Plenderleath Christie, to take the substitution when it opened for him in 1835, by the death of Napier Christie Burton without having had lawful male heirs of his body. The books abound with authorities upon this point, some few of which will be referred to, but it must previously be borne in mind that the capacity of William Plenderleath Christie to take upon that event, was demonstrated by the previous observations upon the existing laws under the Acts of 1774 and 1801, as adopted by the Privy Council in *Durocher v. Beaubien*, and expressed by the Master of the Rolls, that the disposition over, by the Act of 1801, 'to any person whatever, was unlimited, and taking the words according to their common sense, that Act would sanction a devise to any person, although previous to the passing of the Act, such person was prohibited by the law of France from receiving such devise.' The observations of the codifiers of our Civil Code are important as to this question of capacity, and

King and Tunstall.

fix the rule of law manifestly in favour of the devisee, William Plenderleath Christie. Their observations were in the nature of judicial reasons for the law which they recorded in the Code, because their chief mission was to declare what was the existing law at the time of their labour. They observe, at p. 171 of their Report upon Wills, 'As a general rule the capacity to receive by will is considered relatively to the time of the testator's death, that being the period at which the will most usually takes effect. If, however, it take effect only at a subsequent date, the capacity has to be considered with respect to such later date. Such is the tenor of the article which, as regards the person benefited, also lays down the rule, that he need only be in existence at the time at which he is called to receive, and be then identified as the person designated by the testator, although at the time of the will or at the death of the testator, he was neither named nor born.' The codifiers then referring to existing differences between gifts *inter vivos* and last wills, as to certain incapacities of the former for *concubinaires, adulterous and incestuous* children, which the codifiers say they have maintained in some respects for such donations, though at the time they have restrained them within more equitable limits, they then add, '*as the actual law with regard to wills makes no distinction, it must be admitted that those incapacities do not exist in wills in the matter of devises and legacies.*' The article referred to by the codifiers above is the 838th of the Code, as follows: 'The capacity to receive by will is considered relatively to the time of the death of the testator; in legacies the effect of which remains suspended after the death of the testator, whether in consequence of a condition or in case of a legacy to children not yet born, or of a substitution, this capacity is considered relatively to the time at which the right comes into effect.' This is enacted as being the old existing law certainly from the Act of 1774 declared by the Act of 1801 *sur le sujet*. Now both these laws, the proviso of 1774 and the Act of 1801, although general in their terms, apply to a purpose of merely municipal law, involving no public or political rights, and independent of constitutional restraint, as they have been united together in the explaining Act of 1801, which clearly and sufficiently expresses the retrospective intention; they should also, therefore, be taken together in construction as they have been in the section of the Consolidated Statutes, and in the Article of the Code; without this, there is difficulty in realising the possibility of a testator having unlimited right to dispose without such right including the unlimited power to receive even under the law of 1774, but under the existing law, the limitation of the right to receive would much look like a limitation of the right to dispose, and would annul the effect of the law of 1774, which could not be; hence, according to our existing law from those statutes, capacity is the rule and incapacity the exception both to give and to receive. Both statutes being general in their terms for devisors and devisees, they can be controlled by no limitations or exceptions, unless specially declared. This rule is expressed by Ricard in his Tr. des Donations, No. 126, where, adverting to the capacity of giving by last will, he lays down the maxim, which translated literally is as follows: 'We should labour upon the principle, that the law or the custom of the country permitting dispositions of property by last will, all persons subject to the law may use that power, either to give or to receive, un-

less particularly excluded by some prohibitive law, &c., which is founded upon this reason, that the permission being general, it can only be restrained by laws that contain limitations, because the law which is expressed in general terms includes all cases and all persons if they are not specifically excepted.' Now the laws above adverted to fall completely within the above rule; both are expressed in general terms, and both are without limitation or exception, establishing general capacity to give and to receive, and removing all disqualifications upon either power; and hence the disqualification imputed to William Plenderleath Christie was plainly removed by the effect of the laws referred to. This subject has already received the consideration of the Provincial Courts, in the case of Hamilton and others, executors *par reprise* of Napier Christie Burton, in a suit instituted by him in 1834, under General Christie's will *en nullité de legs*, against the said William Plenderleath as being under the adulterine incapacity above referred to. In that case the defendant pleaded the capacitating effect of the existing law under the statutes above mentioned, and the Court, composed of three Judges, by their unanimous judgment in October, 1839, sustained the plea and dismissed the action. The original plaintiff having died in 1835, his executors, Hamilton and others, continued the cause and carried it to judgment, which being adverse to them, they brought it before the Court of Provincial Appeal, where they urged the defendant's disqualification, under the old law of France at the execution of the will and at the death of the testator, as an absolute nullity of the bequest to the defendant, the proviso of 1774 extending only the power of devisors, and the Act of 1801 not applying to the testator who had died before that law was enacted. The judgment of the Court in 1845, composed of four Judges, among others the presiding Judge, the late Chief Justice Bowen, giving particulars, stated that with respect to the effect of the Provincial Statute 41 Geo. 3, c. 4, decisions of some of the Courts were not wanting, which went the length of considering it to be declaratory of the 14 Geo. 3, and as having a retrospective effect, thereby removing all the disabilities of the French law, as well with relation to devisors to make wills as to devisees to accept bequests and legacies. But, that it would be sufficient to shew that the Act of 41 Geo. 3 had removed the previously existing incapacities in devisees, which he established by reference to the judgment of the Privy Council in the case of *Durocher* v. *Beaubien*. As to the capacity of the devisee being sufficient at the time of the opening of the substitution, he said, 'no doubt existed in the minds of the members of the Court, that the claim of the plaintiff to set aside the legacy was unfounded, and that if the legal representatives of Napier Christie Burton had resumed the instance instead of his executors, the judgment of the Court below would have been affirmed.' Both Courts agreed upon the merits of the action, 'holding that a devise made to a *bâtard adultérin* not competent by the French law when the will was made or when the testator died, to accept such bequest, was good and valid if it were a conditional one as a substitution, and if at the opening of the substitution, or when the entail took effect, the disqualification of the devisee had been removed.' The cause was sent back only on account of the wrong parties before the Court. Although not according to present practice, there was nothing to prevent the

King and Tunstall.

King and Tunstall

Court of Appeals from expressing its opinion upon the merits of the cause, following French precedents in such cases, as tending to put an end to litigation, and which had the effect in that case, as the plaintiffs proceeded no further in the cause, and it was finally dropped from that time. The cause in appeal is reported in Revue de Législation, vol. ii. p. 1 *et seq.*, a provincial law publication.

"It seems evident, therefore, that the alleged incapacity of William Plenderleath Christie, if it existed, had been removed by the effect of the general capacitating law existing in the province long anterior to 1835, the time of the opening of the substitution for his benefit, and enabled him to receive the bequest as any person whatsoever, and this is established by an undisturbed legislative and judicial concurrence, which may be resumed as follows:—First: Legislatively, by the statutory enactments of 1774 and 1801, continued and confirmed in the 3rd section of chapter 34 of the Consolidated Statutes of Lower Canada of 1861, which enactments continued and adopted *in ipsissimis verbis* into the Civil Code, which has been promulgated in 1866, and still in force, the whole without limitation as to the time when upon the devisor to give or the devisee to receive. Secondly, Judicially, by the judgment of the Provincial Court of Appeal, in *Sanders* v. *Sanders* in 1826, composed of five Judges, and confirmed by the judgment of the Privy Council in 1828, which has not since been disturbed; again, by the judgment in *Hamilton* v. *Christie* in the King's Bench in 1839, composed of three Judges, and supported on the merits by the unanimous opinion of the Provincial Court of Appeals, in 1845, composed of four Judges; then by the opinion of the three judicial Codifiers, as expressed in their Report upon Wills in January, 1864, referred to above; then again in this cause, by the considered judgment of the Court below, composed of one Judge, from whose judgment this appeal to this Court has been taken; and, finally, by this Court, composed of five Judges, four of whom are in concurrence, and the fifth, Mr. Justice Monk, dissented mainly upon the non-retroactivity of the Act of 1801, which, he admitted, removed disqualifications in devisees from that time. It would be difficult to present a more uniform and consistent legislative and judicial concurrence of interpretation in favour of the pretensions of the devisee litigated in this cause, and of his capacity to receive the bequest in his favor when his receiving power became legally effective.

"It only remains to ascertain from authority if his capacity legally existed when he entered into possession of the seigniories at the death of Napier Christie Burton in 1835. A few accredited authorities will establish that right. 1 Furgole des Testaments, p. 304: 'Si le fidéicommis est conditionnel, soit que la condition se trouve expresse ou littérale ou qu'elle soit seulement tacite et implicite, comme quand la restitution doit en être faite à jour certain, ou en faveur d'enfants à naître dont la naissance est une condition impérative, dans ce cas, on ne doit considérer la capacité du [illegible] fidéi-commissaire, qu'en égard au temps de l'échéance de la condition, [illegible] ouverture du fidéi-commis comme l'accident Ranchin, Cujas, et plusieurs autres auteurs. Que si l'on exigeait la capacité en un autre temps, il [illegible] qu'on ne pourrait point admettre au fidéi-commis les enfants qui ne [illegible]

que longtemps après la mort du testateur, lesquels étaient bien clairement incapables lors du testament et lors de la mort du testateur, ce qui serait contre les règles et l'usage constamment reçu dans tous les tribunaux du Royaume.' At p. 309, the same author observes:—'Quand le legs est conditionnel il suffit au légataire d'être capable lors de l'échéance de la condition, sans examiner, s'il était capable lors du testament ou lors de la mort du testateur, parce que la Règle Catonienne, qui est la raison fondamentale pour laquelle la capacité est requise lors du testament, cesse à l'égard des dispositions conditionnelles. D'ailleurs, la loi permettant de faire des institutions et des legs pour être recueillis lorsque l'héritier ou le légataire serait capable, *cum capere potuit*, il est clair que soit que la condition soit expresse ou simplement tacite, il suffit que le légataire soit capable lorsque l'échéance du legs arrive, sans examiner le temps du testament ou celui de la mort du testateur. Il y a cette considération particulière au cas des legs conditionnels, que la prévoyance du testateur n'a lieu que pour le temps auquel il a voulu que sa volonté eût son effet, c'est-à-dire lors de l'événement de la condition qu'il a marqué, de sorte que quand le légataire serait incapable lors du testament, on pouvait présumer que le légataire pouvait acquérir la capacité dans l'intervalle du temps qui se passerait entre l'époque du testament et celle de l'événement de la condition, tous ses soins et sa volonté dans cet ouvrage n'étaient attachés qu'à la considération du temps futur et non pas de celui auquel il agit. Ainsi, ne voulant faire la libéralité que dans le cas que la condition arrivera, le legs, à proprement parler n'a son commencement ou du moins sa perfection à l'égard du légataire, que quand il a son effet, ainsi que le remarque Ricard, des Donations, No. 830, et comme les legs et les fidéi-commis sont en tout égaux, parce que les legs et les fidéi-commis par testament ne different que de nom, on doit appliquer aux fidéi-commis particuliers ce que nous avons dit ci-dessus au sujet de la capacité des légataires, par rapport au temps où l'on doit considérer cette capacité, selon la nature des legs conditionnels.' Ricard, des Donat., No. 830, is to the above effect, and it is unnecessary to repeat him. Lacombe, vo. Testament, p. 312, says:—'Le temps entre le testament et la mort du testateur ou l'événement de la condition n'est considéré; il suffit que le substitué soit capable au temps du décès du grevé.' Pothier has pointed out the distinction between donations *inter vivos* and last wills, which contain a substitution in relation to the time at which the capacity to give and receive is to be considered, in No. 41 of his Tr. des Donations entre vifs, he says, 'in donations *inter vivos*, the act or deed of donation receiving its perfection at the time of making it is necessary that the capacity of the donor to give and of the donee to receive should exist at that time; but, at No. 42, not so in cases of substitution, in which the capacity to receive is not to be tested at the time either of the making of the will or of the testator's death, but when the substitution takes effect, *lors de l'ouverture de la substitution*.' So also, in his Tr. de la Substitution, sect. 6, Art. I., § 1, he shews the distinction between pure or unconditional legacies and substitutions, which take effect at the death of the testator, and conditional legacies and substitutions, which, he says, only take effect at the happening of the condition or of the opening of the substitution. Lorsque la substitution est faite sous quelque condition, elle

King and Tunstall.

n'est ouverte que lors de l'accomplissement de la condition: le terme d'un temps incertain tient lieu de condition: on appelle temps incertain même celui qui arrivera certainement, pourvu qu'il soit incertain qu'il arrivera ou non du vivant du substitué, tel est le temps de la mort du grevé, telles substitutions sont conditionnelles et ne sont ouvertes que lors de cette mort,' when the capacity of the substitute is required and takes effect. Ricard, Part I., No. 814, des Donations, says:—'Quant aux dispositions conditionnelles, lorsque la condition s'étend au-delà du décès du testateur, le droit romain n'exigeait la capacité du donataire qu'au tems de l'accomplissement de la condition, parce que c'est à cette époque que le droit est ouvert et que le testateur est censé avoir prévu que le donataire pouvait devenir capable avant l'événement de la condition. C'est comme s'il avait dit, je donne à Titius, s'il est capable de recevoir lorsque telle condition arrivera. Les auteurs les plus accrédités enseignent que cette règle est suivie dans le droit Français.' See, also, to the same effect, Nos. 829, 830. Bourjon, vol. ii., Droit Commun de la France, p. 173, Titre des Substitut. No. 11, says:—"Il suffit que le substitué soit capable de recueillir au temps de l'ouverture de la substitution. L'incapacité au temps du décès du testateur, n'est d'aucune considération par rapport à son droit à la substitution, parce qu'il y a lieu de présumer que le testateur n'a fait le substitution au profit d'un incapable, que sous la condition que l'incapacité cesserait lors de l'ouverture de substitution, c'est dans ce dernier temps qu'il faut considérer: c'est équitable et juridique interprétation.' He instances the case of Frenchmen settled in foreign countries, and children there born to them being within the incapacity, preventing their profiting by the substitution, but that their incapacity would be removed, if, at the opening of the substitution, they had returned to France. So, also, in the case of an alien in France, his incapacity was absolute, but was removed, if, at the opening of the substitution, he had become a naturalised subject. D'Essaule says, No. 101:—'Si l'on objecte qu'on ne peut être capable de recevoir avant d'exister, la réponse est que la capacité ne se considère qu'au temps où la substitution prend effet, et se réalise sur la tête du substitué.' No. 503: 'La raison dicte que pour acquérir droit au fidéi-commis, il faut être capable de recevoir la libéralité qu'il renferme.' No. 504: Mais à quelle époque faut-il que l'appel soit capable? No. 505: 'Puisque comme on l'a vu au chapitre précédent l'ouverture est le moment où le fidéi-commis prend effet, il doit s'en suivre que la capacité soit requise à cet instant. Non oportet prius de conditione cujus quam quæri quam hereditas, legatumve ad eum pertineat.' Telle est la suite de la loi, 51 ff. de legat. 2°, also citing Ricard, 829, 830; and at No. 507, D'Essaule adds, 'Et quand le fidéi-commis est conditionnel, comme le sont presque toutes les substitutions, il faut que l'appelé soit capable au moment de l'échéance de la condition qui est pareillement celui de l'ouverture, la mort du grevé.' Perrin, a modern author, in his Tr. des Nullités, says, at p. 151, that by the old laws, the capacity to receive conditional institutions and legacies is required only at the event of the condition, par le motif que c'est seulement, 'lors de l'événement de la condition que la disposition commence à exister;' and, at p. 152, adds, the same principle still subsists, 'car le Code Civil maintient le principe que le légataire conditionnel

nel n'était saisi de rien avant l'accomplissement de la condition, Nos. 1014, 1040, or, dès que le légataire ne peut rien acquérir qu'après cet événement, il serait inutile qu'il fût capable plutôt, et son incapacité *ab invito* doit être couverte par la capacité postérieure.' It is evident, therefore, that the legal capacity of William Plenderleath Christie to receive the substitutionary bequest when it opened in his favour upon the death of the *grevé*, Napier Christie Burton, can admit of no discussion."

The appellant obtained leave to appeal in every case to Her Majesty in Council, and on the 26th of January, 1874, an order was made that the said appeals should be consolidated.

Mr. *Benjamin*, Q.C., and Mr. *H. M. Bompas*, for the appellant.

Mr. *H. Mathews*, Q.C., Mr. *Kenelm Digby*, Mr. *Barnard*, and Mr. *Maitland*, for the respondents.

Mr. *Benjamin*, Q.C., contended that the judgment appealed from was wrong in law, inasmuch as after having decided in favour of the appellant upon various points raised in the Court below, it finally dismissed his suit upon the sole point that by the effect of the Imperial Act (14 Geo. 3, c. 83), which empowered testators to dispose of all their property by will, though it did not remove any existing incapacity on the part of their intended donees, taken in conjunction with the Canadian Act (41 Geo. 3, c. 4), which removed such incapacity (except in certain cases under the law of mortmain), the devise by Gabriel Christie in favour of William Plenderleath was valid. He contended that the said devise was void *ab initio*, and that the provincial statute (41 Geo. 3, c. 4) had no retrospective effect, and could not be construed so as to confer any new right in the seigniories (the subject of suit) upon Plenderleath, or to cure the invalidity of a devise made prior to its coming into operation: see *Durocher* v. *Beaubien* (1). The statute of 14 Geo. 3, might have swept away all restrictions on a testator's power of disposition; it did not in any way affect the devisee or remove any incapacity on his part to take. The judgment of Mr. Justice Badgley contained two misstatements of facts, on which his conclusions mainly rested; first, that the respondent had pleaded the prescription of thirty years, whereas there was no such plea on the record, or even mentioned in the respondent's case in the Court below, and a plea of prescription cannot be added by the Court; secondly, that it had not been shewn that William Plenderleath was an adulterine bastard, though this appeared from the respondent's own admission, and was assumed throughout the case in the Court of Queen's Bench.

A bequest to an adulterine bastard, other than as mere alimentary allowance, is a nullity. For the provisions of the civil law with regard to adulterine bastardy, see *Corpus Juris Civilis*, *Cod.* book v., tit. 27, sec. 8. The Roman law punished adulterous offences as crimes, see 89th Novel, ch. 15; compare Furgole, vol. i., pp. 416-418; [illegible], sec. 7, and p. 420. See, also, *Code Napoléon*, which is the origin in [illegible] parts of the Canadian Code, arts. 331, 334, 335, 762. Nothing can legally be given in his lifetime by a father to his adulterine bastard except for maintenance: see *Code Napoléon*, arts. 980, 768, 911, and Canadian Code, secs. 774, 1131 and 1133; Demolombe, vol. v. [ed. 1866], art. 341

(1) Stuart's Low. Can. Rep., p. 307.

King and Tunstall.

et seq., tit. "*Legitimation.*" Further, a gift by will to an adulterine bastard by his father is an absolute nullity. It was so decided by the Court of Cassation in France: see also a case [redacted]'s Reports, vol. lxiv., part ii., p. 11; Demolombe, des Suc[redacted]., arts. 6-10, and 122; Demolombe, Donations et Testaments, vol. xviii., arts. 624, 625-627, and 532. A gift of more than is valid is reducible to the proportion of the estate which is within the power of the testator to dispose of in favour of the particular legatee: Denisart, Collection de décisions nouvelles, *v°.* "Bâtard," sec. 4. In the judgment of Mr. Justice Badgley are collected [redacted] authorities which bear upon bastards not adulterine, he does not venture to deny the incapacity of an adulterine bastard. [THE LORD JUSTICE JAMES:—The question of alimentation is the same, to whatever class of bastards it applies.] Our case is not so much that of incapacity of the legatee to receive, as that of a prohibited gift which is absolutely null and void in itself. The prohibition is based on its being *contra bonos mores* and against public policy.

As to the effect of the Canadian Act of 1801 on the legatee's capacity to receive, it was a provincial Act, and its effect upon the previous imperial Act of 1774 (14 Geo. 4, c. 83) must be considered. [THE LORD JUSTICE JAMES said that he saw no difficulty in a local parliament passing an Act to explain an imperial statute.] Even supposing the Canadian Act of 1801 had repealed the prohibition against the gift, still this gift was invalid at the time it was made and could not be cured by the subsequent statute. [THE LORD JUSTICE JAMES:—No, the gift did not take effect until after the local Act of 1801.] To give it validity you must do the act in question (invalid under the old law) over again under the new law: see Merlin's Répertoire, *tit.* "Promesse de changer de nom." Here there was an actual incapacity to make the gift at the time that it was made. [SIR ROBERT P. COLLIER:—No, the incapacity was solely in the recipient, and that incapacity ceased after 1801.] We put it higher than a mere incapacity in the recipient, it was an absolute nullity of donation: *Coutume de Paris*, art. 292; Ferrière, vol. iv., p. 171; and see *Coutume de Paris*, arts. [redacted] 26, 27, 44, and 272, and Ferrière, vol. iii., p. 1161. Moreover, any incapacity on the part of the legatee to take must be considered not at the date of the gift taking effect, that is in this case of the substitution of the ultimate legatee for the original legatee, but you must look to the date of the original gift. With regard to the questions of estoppel, as to the deed of 1800 mentioned above, having estopped the appellant from alleging Napier Christie Burton to have been entitled as heir and not under the will, and to the pleas of continuous and peaceable possession by the respondents and those from whom they claimed title for twenty years and ten years respectively, he submitted that twenty years was insufficient. The bastard died in 1843, and appellant's writ was issued in 1864, and, therefore, the parties actually sued were not in possession twenty years. He denied that Plenderleith had such a possession as could form the basis of prescription, so that his possession could be added to the respondent's subsequent possession, and thus make up the twenty years pleaded. More than twenty years had not been pleaded, and no prescription or limitation is allowed in

Canada unless pleaded, see Civil Code, art. 2188; *Coutume de Paris*, arts. 113, 118. Plenderleath was incompetent to acquire title by possession or prescription; at least he did not obtain possession under such circumstances as would enable him to do so: Ferrière, vol. ii., p. 330, art. 113; see also sections of arts. 113, 23, et seq.; Pothier, Traité de la Prescription, part I., c. iii., art. 7, No. 85; see also Pothier *tit.* "Testament," art. 6. In chap. i., sec. 1, par. 6, he speaks of concubines and bastards. In chap. iii., art. 3, of the prohibition to testators to give, the personal incapacity to give is clearly laid down: see also Traité de Personne, tit. iv., part i. [THE LORD JUSTICE JAMES:—Take the case of a man marrying again *bona fide* believing his first wife to be dead, is he incapacitated by civil law from making provision for his issue?] Yes, except for maintenance. [THE LORD JUSTICE JAMES: —The dicta you have been quoting are not of law givers but of law expounders. SIR MONTAGUE E. SMITH:—It is their testimony of what the law is.] See, again, Pothier, Traité de la Prescription, part. i., c. iii., art. 7, No. 85. Our case is that of a man with legitimate wife and children, a concubine living in adultery with him, by whom and by reason of what the civil law calls a *damnatus coitus* he has an adulterous bastard. Because there was no substitute in existence before 1801 who was capable of taking, therefore the institute took absolutely, and if he had sold would have passed a good title; and we say that the Act of 1801 could not take away that absolute property and absolute power of disposition which existed before 1801.

Mr. *H. M. Bompas* on the same side:—

With regard to this testamentary gift being against public policy in Canada, it does not appear that there is any judicial decision as to the capacity of adulterine bastards; but the Canada Civil Code, Art. 768, expressly regulates it, and the view taken in respect to it by the Commissioners who framed the Code may be seen in the 2nd volume of their report, p. 155. The Canadian Act of 1801 was in some respects an explaining Act, in other respects an amending Act. Two questions arise: first, whether, apart from Acts of Parliament, this disposition in favour of Plenderleath was void *ab initio*, or was a conditional proviso which might or might not be void when it arose; secondly, was the gift, if void *ab initio*, validated by the Canadian Act of 1801? With regard to the old law upon the capacity of devisors and devisees with regard to the subject of adulterine bastardy, the *arrêts* of the French Courts under the kings are of the highest authority, binding on all Courts except this. The *Coutume de Paris* is subject to this consideration, that the French law is founded upon the Roman law; it is only where they differ that any express provision is to be found in the *Coutume de Paris*. The decisions of the French Courts and the treatises of French writers developed the Institutes of Justinian in a manner suitable to the circumstances and wants of the French people and country. The authorities, therefore, to rely upon are the great French writers who cite the decisions of the French Courts. See Ricard, vol. ii., p. 112, ch. 4, treat. 2, No. 88, where charges and conditions are distinguished. In vol. i., p. 95, ch. 3, s. 8, Ricard speaks at No. 397 of Roman law regarding concubinage, and distinguishes between two classes of it, namely, concubinage between those who might after-

King and Tunstall.

wards lawfully contract a marriage and concubinage between those who might not. Compare the passages from Ferrière, cited by Mr. Benjamin. See also Ricard, vol. i., p. 100, ch. 3, s. 5, No. 418, and also p. 101; cf. Charondas le Caron, Réponses et Décisions du Droit François [A.D. 1637], book x., c. 75, where are cited two decisions to the effect that you could not give to an adulterine bastard, its husband, wife, or child. In Furgole, vol. i., p. 422, such gift to be valid is limited to mere alimony. The principle on which testamentary gifts to bastards are avoided does not involve merely the question of incapacity in the devisee, but the question of public policy and of incapacity in the devisor. The main object of the adulterer was considered to be to found a family, and the main object of the law was to prevent his doing so; and hence the restrictions upon the devisor's power of disposition. See Ricard, vol. i., p. 101, No. 422; p. 187, No. 720; p. 194, No. 749; Œuvres de M. Antoine D'Espeisses [1750], vol. i., pp. 394, 395, where two decisions to that effect are cited, and other authorities: see also Domat, des Testaments, tit. I., sec. I., § vii. The disability of tutors in regard to transactions between tutors and pupils is not merely a disability of the tutor to receive, but involves also the disability of the pupil to give: see Ricard, vol. i., p. 205. And so also in regard to bastards, and the disability in respect of them. [The Lord Justice James:—The disabilities you speak of in reference to tutors and pupils depend upon the law which controls the exercise of undue influence, and questions which depend upon undue influence cannot bear upon anything else.] Merlin, in his Répertoire de Jurisprudence, Institution d'Héritier, s. v., § 2, p. 400, gives a list of persons in whom incapacity of giving or receiving is only relative, and the same author points out that where on grounds of public policy any disposition by will is declared illegal, it is null absolutely.

As regards the Acts of 1774 and 1801, the law which sect. 10 of the former was intended to alter is laid down in the *Coutume de Paris*, Arts. 218, 249, 251, 292 and 298. Section 8 of the same Act reintroduced the old Canadian law. No doubt to this there were some exceptions. Thus, section 19 provides that it should not apply to lands held in common socage; but where exceptions are not expressly stated then the old law applies. The Court will hesitate so to construe the Act of 1801 as to take away a vested right, that is the right vested in the heir before that Act by reason of the nullity of the legacy.

The counsel for the respondents were not called upon.

The judgment of their Lordships was delivered by

The Lord Justice James:—

Their Lordships have listened with great attention and interest to the very able arguments which have been addressed to them by both the learned counsel in support of the appellant's case. Their Lordships will assume for the purpose of disposing of this appeal that the old law was exactly as stated by the learned counsel; that is to say, that according to the *Coutume de Paris*, which was planted in Canada by royal authority as the law of Canada under the French dominion, the gift in question to Plenderleath would be an absolutely null and void gift by reason of the doctrines of that law as to adulterine bastardy. They will assume that it was proved in point of fact that Plenderleath was an ad-

ulterine bastard; and that he would have been incapable under the old law of receiving such a gift as this, that is to say, a gift by way of substitution of the family estates, as to which it could not well be predicated that they were given by way of sustentation or aliment. King and Tunstall.

Their Lordships assume further for the purposes of this decision, that the doctrine of prescription would not apply to a case of this kind; although if it were necessary to determine that point, they would have required further argument. It would have required further consideration to determine whether possession openly taken under a claim of right under an instrument of this nature, and under one construction of an Act of the Legislature, such possession being held during the whole of the lifetime of the person who had so taken it, and afterwards for a great many years by the successor, would or would not be brought within the description of possession under a *juste titre*. Their Lordships assume, however, that the doctrine of prescription would not apply to this case.

The matter then resolves itself into a question which the Courts in Canada have decided upon more than one occasion, and after a great interval of years, as to what was the conjoint operation of the English Act and the Canadian Act, and of the provision of the Canadian law which is embodied in the Code as to the period at which the capacity of a substitute is to be ascertained.

At the time when the English Act was passed, it is clear that in the settlement of Lower Canada the Sovereign Legislature did not think fit to establish the old Canadian law without several notable exceptions.

One notable exception to which our attention was called very late in the argument was this, that no part of the old Canadian law would apply to lands given in common socage, from which it would follow apparently that, with regard to lands in common socage, it was perfectly within the power of the owner, whether by a gift *inter vivos*, or by a testamentary disposition, to give them to any person whatever, without any restriction arising from the character of the donee. It would be singular that there should be one law based upon the grounds of public morality and public policy which would make a gift of anything but lands in common socage void, but which would make gifts of lands held in common socage perfectly good. It would be difficult to conceive how any principle of public morality or public policy could make the disposition as to one class of property void upon those grounds, and not void as to another class of property. But beyond that, the law of England having from the earliest period, from the time when testamentary dispositions were introduced, given absolute power to a testator to deal as he liked with his property, wholly regardless of any moral or natural claims upon him, the English Legislature introduced that law into Lower Canada. It is not immaterial to observe, as was pointed out by Mr. Justice Badgley, in an argument which has been attacked for inaccuracy in some respects, but is nevertheless a very able and very learned argument, that in the old *Coutume* as to testamentary power, the power to the extent to which it then existed is expressed to be a power which could be exercised in favour of "*des personnes capables*." Those are the words. When the English Legislature came to deal with it, those words were left out—their Lordships do not say intentionally

King and Tunstall.

—but the omission is a matter that deserves observation and consideration, and might well have been observed and considered by the Canadian Legislature in passing their subsequent Act. To the owner of property was given unlimited and unqualified testamentary power, so far as he is concerned, and so far as his children, or other persons who would under the old law have had paramount rights of succession, are concerned. But then a doubt arose, or might have arisen, as to whether that removed any personal incapacity on the part of the donee or legatee to take. The Canadian Act (which was, however, not passed until after the death of the testator in this case) put an end to such doubt as to the capacity of donees or legatees. It was argued, indeed, by the counsel for the appellant, that the incapacity under the old *Coutume* was an incapacity of the testator; that a man was to be deterred from or punished for adultery by making it impossible for him to make any provision for his adulterine bastard, beyond a bare subsistence; that therefore it was the adulterer's capacity to *give* to his adulterine issue, not the capacity of the latter to *take* from his adulterous sire, that was extinguished by the old law; and that such incapacity was not dealt with by the new law.

If that were clearly made out, then it appears to their Lordships that the first Act did everything that was necessary. If the capacity of the testator was alone to be dealt with, the first Act had given unlimited and unqualified capacity to every testator. But the old law had not only said, it shall not be lawful for the testator to give, but had gone on to say in terms frequently repeated, it shall not be competent for the off-spring of the adulterous intercourse to take. Indeed, these persons were declared to be the issue of a *damnatus coitus*, and strong expressions of that kind were used, from which it might be inferred and probably declared, that not only the testator was prohibited from giving, but that they were prohibited from receiving. Hence, when the English statute came, doubts and difficulties might well arise. Doubts and difficulties did, in fact, arise before the passing of the Canadian Act, not exactly in this particular case, but on the general question as to whether not only the capacity of a testator had been established, but whether the incapacity of a donee to receive had been removed. It seems to have been held that the incapacity of a donee to receive had not been removed when it arose from a special principle of law, such as the incapacity of the guardian to receive from a pupil or ward a gift by a testamentary instrument. The object of such a principle of law could not of course have been to inflict any disability on the pupil, but to prevent a guardian from abusing the influence which he had in obtaining the gift. Therefore it might well have been held that such a restriction, based upon the necessity of preventing the undue exercise of a peculiar influence could not have been within the purview of the English Legislature, which simply removed the general testamentary incapacity, the incapacity of making a testament to the disherison of the heirs. And the same question or a similar question might well have arisen as to the restriction on gifts to adulterine bastards. In this state of things the Canadian Legislature, having before it the English law, passed an Act which professed to explain as well as to amend the English Act; and it proceeds to recite that doubts and difficulties had arisen with respect to the construction of

the English Act. These doubts and difficulties it was perfectly within the competency of the Canadian Legislature to deal with as they thought fit, being a mere matter of disposition of property in the colony, not affecting any Imperial policy. They recite the difficulties, and then they go on to declare and enact that it shall be lawful for a testator to give to any person or persons whomsoever, with the single exception of gifts in mortmain.

The effect of this legislation upon the very will in question has been repeatedly considered by the Canadian Courts. In the year 1834 a suit was instituted disputing the title of Plenderleath, who had been in possession for many years. In that suit it was held by the Court of first instance that the Canadian Act had had the effect of removing any incapacity of Plenderleath to take under the substitution in his favour. The Court of Appeal reversed, or, rather, discharged the judgment of the Court below upon a technical ground, that is to say, they said that no judgment ought to have been given at all, because the plaintiffs had not made out any right to sue. Although they had in fact the very character in respect to which the present suit is brought, they had not so pleaded and so proved it as to render it possible, according to the view of the Supreme Court, to come to a final decision. The Court said it was a suit between persons who had not shewn themselves to have any *locus standi* to claim a decision at all.

The Court of Appeal, however, took great care to give an elaborate judgment (1), in which they adopted exactly the same view of the main question in the cause as that taken by the Court of first instance. That was a great many years ago, and until the institution of the present suit no further attempt was made to disturb the possession under the testamentary gift in question. In the present case the Court of first instance has taken the same view. The Court of Appeal by a majority, takes the same view, and that has been the law apparently understood in Canada from the time when the matter was first mooted in this particular case, and has been received during the greater part of this century. It would appear to be the view of the law which the Commissioners took when they framed the Code, leaving the law so to stand as to testamentary gifts, although they preserved or re-enacted the old French law so far as regarded gifts *inter vivos* to adulterine bastards.

It appears to their Lordships there is great ground for holding that view as to the effect of the Canadian law; and their Lordships feel that they ought on the construction and effect of a Canadian Act affecting the law of real property there to be very much governed by that which has been the concurrent decision of the Courts in Canada during the lapse of years. No doubt a difficulty arises from the general principle of law that an Act should never be construed as retroactive or retrospective, unless express language or necessary inference compel such a construction. It is, however, to be observed that the Canadian Act is a declaratory Act as well as an enacting one, or, more properly speaking, it is in this respect strictly declaratory. For although the words in the English version of the Canadian Act are words of futurity, "It shall be lawful," in the

(1) See *Hamilton v. Plenderleath, Revue de Législation*, vol. ii. p. 1; and see *ante*, p. 65.

King and Tunstall.

French version (French being the language of the people) it is, "*Il est et sera loisible;*" and if it was then lawful it must have been always lawful under the English Act, although some had doubted it. Moreover, it appears to their Lordships, that the difficulty (if any) is entirely removed in this case by the peculiar provision of the old law derived from the Roman law, which has been incorporated into and now forms part of the Canadian Code (s. 838), to the effect that wherever there is a limitation by way of substitution, the time when the substitution opens is the time with reference to which the capacity of the substitute to take is to be determined. It is difficult to say to what class of cases that would apply if not to this. It is suggested indeed that the provision was inserted in the Code with regard to the possibility that the intended substitute might not be in existence, or might not have acquired a particular character or qualification at the date of the will or at the death of the testator, and that it applied in such cases only. There is no such limitation expressed in the Code, and it was conceded, and properly conceded, that if the incapacity were clearly a personal incapacity of a general character (as distinguished from an incapacity to take from a particular person), for instance, as that of a felon, a person *civiliter mortuus*, an alien, or a person under any peculiar personal incapacity of that kind, then in that case, if the incapacity were removed before the substitution opened, the question would have to be determined with reference to the moment when the substitution opened. In the judgment in the original case to which reference has been made a great number of authorities are cited, and there is a passage from Ricard (1), in which it is thus stated:—"Quant aux dispositions conditionnelles lorsque la condition s'étend au delà du décès du testateur, le droit romain n'exigeait la capacité du donataire qu'au tems de l'accomplissement de la condition, parce que c'est à cette époque que le droit est ouvert et que le testateur est censé avoir prévu que le donataire pouvait devenir capable avant l'événement de la condition. C'est comme s'il avait dit, je donne à Titius, s'il est capable de recevoir lorsque telle condition arrivera." It would be difficult to say that this doctrine would not apply to the present case, the case of an Englishman, who, giving to his natural child a Canadian property, might well be supposed to say, "I give it to him, if, as I hope, the Canadian law has been or shall be assimilated to the law of England and his incapacity be removed before the gift takes effect." The matter is very fully discussed in Ricard, but it is not necessary to read more than has been quoted.

Indeed it was said that such a principle is not to be applied to this case; that the attempt to make this gift is such a violation of law on the part of the testator, that it is to be struck out just as if it were a gift *pro turpi causa* or *contra bonos mores*. Their Lordships are unable to take that view. Nobody surely can suppose that it is a crime in a man to express by his will his wishes as to what should be the devolution of his property after his death, or that it should go in a particular direction, even although that direction should be in favour of an adulterine bastard;—leaving it open to the law to say whether the wish shall or shall not take effect. There is nothing immoral, nothing wrong in the expression of such a wish, nothing to prevent the ordinary application of the ordinary principles.

(1) See Ricard, partie 1ère, No. 814; Furgole, ch. C, Nos. 44, 45, 46.

of law to the case. And, therefore, even if the old incapacity of adulterine bastardy had not been effectually removed by the English Act, it had before the substitution opened been removed by the intervening Canadian legislation.

King and Tunstall.

Their Lordships are of opinion that the decisions of the Canadian Courts ought not to be disturbed, and they will humbly recommend to Her Majesty that the judgment of the Court of Queen's Bench ought to be affirmed, and this appeal dismissed with costs.

Ritchie, Morris & Rose, for the appellant. Judgment affirmed.
H. W. Austin, for the respondent.
(J.K.)

COURT OF REVIEW, 1875.

MONTREAL, 5th NOVEMBER, 1875.

Coram JOHNSON, J., TORRANCE, J., BEAUDRY, J.

MONTREAL CENTRE CASE.

Ryan et al., Petitioners, vs. *B. Devlin*, Respondent.

HELD:—1. That the Dominion Controverted Elections Act of 1874, imposing on the Judges of certain Provincial Courts the duty of trying election petitions, is within the power and jurisdiction of the Parliament of Canada.

2. Evidence to disqualify a candidate should be such as would justify a conviction on an indictment.

3. The decision of the trial judge as to the credibility of a witness will not be disturbed unless a manifest error can be pointed out.

4. In the application of circumstantial evidence as to the candidate's knowledge of corrup acts, the circumstances proved should be susceptible of no explanation inconsistent with guilt.

The trial of the case having been commenced before Mr. Justice MACKAY, the respondent, after certain evidence had been adduced, admitted that the election must be voided in consequence of corrupt practices by agents. The petitioners pressed the case upon the personal charges and the trial proceeded. The Court, MACKAY, J., having dismissed the personal charges, the petitioners appealed.

BEAUDRY, J., *dissentiens*:—Cette cause-ci a été inscrite pour audition et a été entendue devant la Cour Supérieure siégeant en Révision sous le statut Provincial et le Code de Procédure du Bas Canada.

C'est une pétition ayant pour objet de faire déclarer nulle, une élection pour le Parlement de la Puissance et faire déclarer le défendeur déqualifié, le tout suivant l'Acte des élections fédérales de 1874.

L'Hon. Président de cette Cour ayant refusé de siéger, se fondant sur ce que le Parlement de la Puissance a excédé ses pouvoirs dans plusieurs des dispositions de cet acte, je crois de mon devoir d'examiner si véritablement je puis prendre connaissance de ces matières, et me convaincre que cette Cour peut s'immiscer dans ces matières, avant de prononcer sur le fond du litige.

J'ai déjà eu, dans une autre circonstance, occasion d'exprimer mon opinion sur l'acte des Elections contestées de 1873 et de maintenir la juridiction conférée par cet acte. Mais ce statut a été entièrement rappelé et remplacé par celui de 1874, avec des dispositions qui s'éloignent des dispositions fondamentales de l'acte de 1873. Il faut donc voir si ma première décision peut également s'appliquer à la loi maintenant en force.

Ryan et al. vs. Devlin.

Il est étonnant qu'aucune des parties n'a soulevé d'objection à la jurisdiction, et d'un autre côté le Gouvernement Provincial, dont le devoir semble être de veiller au maintien et à la conservation des droits, prérogatives et franchises provinciales, ne paraît pas s'être occupé de cet acte et n'a pas invoqué le veto Impérial pour en arrêter la mise à exécution. Peut-être attend-il l'initiative des tribunaux.

Il ne reste donc que les tribunaux de la province qui puissent élever la voix, et suivant moi, il leur incombe d'examiner et juger si les dispositions de la nouvelle loi de la Puissance ne répugnent pas aux dispositions de l'Acte de l'Amérique Britannique du Nord, et ne sont pas en contradiction des lois qui régissent le Bas Canada et doivent être observées de préférence. Je ne pense pas pouvoir me soustraire à ce devoir, et quelque soit le respect que je doive à la Législature de la Puissance, une autorité supérieure s'impose à moi, c'est celle du Parlement Impérial auquel le Parlement de la Puissance est également soumis. Cet examen est d'autant plus nécessaire que plusieurs autres matières pourront susciter semblable objection; aujourd'hui c'est la loi des élections contestées, demain ce pourra être la loi concernant la faillite, et plus tard, aussi peut-être, le Statut créant la Cour Suprême; il est donc urgent de s'en occuper.

Ainsi que je viens de l'observer, le Statut de 1874, (37 Vict. c. 10), diffère considérablement de celui de 1873. Ce dernier créait, de fait, une Cour spéciale pour la contestation des élections et composait ce tribunal, si le Gouvernement Provincial y consentait, des juges des Cours Supérieures dans chaque province, et à défaut de ce consentement, le Gouverneur de la Puissance nommait les juges de cette Cour, et le Statut réglait la procédure à suivre devant cette Cour d'une manière uniforme pour toute la Puissance. Cette création d'un tribunal était conforme au pouvoirs donnés au Parlement de la Puissance par l'Acte de la Confédération dont la section 101 permet à ce Parlement de créer des tribunaux pour la meilleure administration des lois qu'il était autorisé à faire. En même temps le privilège provincial était sauvegardé par la clause insérée dans l'acte de 1873 qui requérait le consentement du Lieutenant-Gouverneur de chaque province pour permettre aux juges de cette province de faire partie de la cour d'élection. Ces dispositions ne se rencontrent pas dans le Statut de 1874. Cet acte, loin de là, s'empare des juges provinciaux, de même que s'ils étaient créés par le Gouvernement Fédéral; il leur impose des devoirs et dans cette province de Québec, leur prescrit un code différent de celui qui doit régir leur procédure. A la Cour Supérieure dont la jurisdiction, l'organisation et la constitution et le maintien est exclusivement sous le contrôle du Gouvernement Provincial, cet acte confère une jurisdiction spéciale avec un mode particulier de procéder et des devoirs mêmes, qui ne sont pas consentis ni autorisés par le Parlement Local. Voyons quels sont les pouvoirs accordés par l'Acte de la Confédération."

L'i sec. 91 déclare que la Reine, de l'avis et du consentement du Sénat et de la Chambre des Communes, peut faire des lois pour la paix, l'ordre et le bon gouvernement du Canada concernant toutes les matières qui ne sont pas comprises dans les classes de sujets *attribués exclusivement* aux législatures des Provinces et que nonobstant l'autorité législative du Parlement du Canada

s'étend à toutes les matières énumérées dans cette section et au nombre desquelles : 27° La loi criminelle, excepté *la constitution des cours de jurisdiction criminelle*, mais y compris la procédure en matière criminelle ; et 29°. Toutes les catégories de sujets qui ne sont pas exclusivement attribuées aux législatures provinciales.

La section 101 déclare que le Parlement du Canada peut, nonobstant toute chose contenue dans l'acte, pourvoir à la constitution, maintien et organisation d'une cour générale d'appel pour le Canada, et pour l'établissement de toutes cours additionnelles pour la meilleure administration des lois du Canada.

D'un autre côté, la section 92 statue que dans chaque province la législature a exclusivement le pouvoir de faire des lois sur les matières y énumérées, au nombre desquelles se trouve :—"14. L'administration de la justice dans la pro-"vince, y inclus la constitution, le maintien et l'organisation des cours provin-"ciales tant de jurisdiction civile que de jurisdiction criminelle, ainsi que la "procédure en matières civiles dans ces cours."

Telles sont les principales dispositions qui doivent nous guider dans la décision de la question qui nous occupe.

La dernière disposition n'est pas susceptible d'ambiguité : c'est au Gouvernement Local qu'appartient le droit de constituer les cours de justice de quelqu'espèce que ce soit et d'en régler l'organisation, le Gouvernement du Canada n'ayant que la nomination des juges des cours Supérieures et de comté, et la procédure en matière criminelle, avec de plus le droit de constituer des tribunaux pour l'exécution des lois générales de la Puissance, s'il jugeait convenable d'en établir ; mais si le Gouvernement de la Puissance ne jugeait pas nécessaire de les créer, il devait laisser l'exécution de ses lois aux tribunaux provinciaux tels qu'établis et réglés par les lois provinciales.

Si donc la Chambre des Communes était disposée à renoncer au privilége de vérifier elle-même les pouvoirs de ses membres et de juger la contestation de leur élection, deux moyens se présentaient : créer un tribunal à cet effet, et c'est là ce qui a été fait par l'acte de 1873 ; ou bien laisser ces contestations suivre le cours ordinaire, et être déterminées par les cours qui avaient jurisdiction en semblable matière, et sur ce point je n'ai pas besoin de dire que notre code de procédure civile pourvoit à un mode aussi expéditif que possible pour juger des litiges de cette espèce. L'acte de 1874 ne crée aucun nouveau tribunal : mais s'emparant des juges provinciaux, comme de fonctionnaires sous son contrôle, et des cours de justice provinciales, comme si elles étaient de sa création, leur impose des devoirs nouveaux, et une procédure étrangère à leur organisation, et nullement autorisée ni permise par la législature provinciale. Il suffit d'énoncer ce fait pour en rendre manifeste l'illégalité et convaincre le premier venu que ces dispositions de l'acte des élections contestées de 1874 excèdent les pouvoirs accordés au Gouvernement du Canada par la constitution. Le Parlement de la Puissance ne peut pas plus prescrire de formes de procédure aux tribunaux civils des provinces, que les Provinces ne pourraient régler la procédure en matière criminelle. Tous les parlements sont sur le même pied en fait de législation, en ce sens que tous dérivent leurs pouvoirs législatifs du même titre, savoir l'acte de l'Amérique Britannique du Nord, qui a divisé et

Ryan et al. vs. Devlin.

réparti ces pouvoirs législatifs en attribuant les uns au gouvernement général et les autres aux gouvernements provinciaux, et limitant ces pouvoirs ainsi qu'on l'a vu plus haut. Il est bien vrai que dans la section 91 de l'Acte Impérial, énumérant les matières sur lesquelles le Parlement de la Puissance peut légiférer, on trouve entre parenthèse, ces mots: "notwithstanding anything in this act," mais ces mots et cette restriction ne peuvent s'entendre que des matières ainsi mises sous le contrôle exclusif du Parlement de la Puissance, et ne peuvent limiter le pouvoir exclusif conféré aux législatures provinciales; autrement on pourrait étendre le §27 ci-dessus cité, et dire que l'exception qui y est contenue ne signifie rien, car cette exception n'est pas plus formelle que la disposition qui donne aux législatures locales le pouvoir exclusif d'organiser leurs tribunaux et d'en régler la procédure. L'acte de 1874 ne contient ni plus ni moins qu'un code de procédure à suivre, sur des matières partie civile et partie de nature criminelle. Pour la matière civile en ce qui regarde la simple contestation de l'élection, ce code de procédure ne pouvait être fait par le Parlement de la Puissance. Pour la partie de nature criminelle à raison des pénalités, privation des droits civils, &c., la jurisdiction n'en pouvait être attribué par le parlement du Canada aux tribunaux civils. Comment serait-il donc possible aux tribunaux provinciaux d'accepter cette législation et s'y soumettre?

On dira peut-être, que les juges l'ont déjà acceptée et ont prononcé sous l autorité de ce statut. Il n'y a pas à le nier, mais cet exercice de fonctions ne peut rendre la loi constitutionnelle, et l'on peut dire que la jurisdiction exercée par les juges en vertu des deux statuts n'était qu'une jurisdiction qu'on peut appeler gracieuse, telle que pratiquée en certaines matières à l'égard des lois des pays étrangers, et que nous fesons nous-mêmes exercer en pays étranger, comme par commission rogatoire, ou par des commissions, ou autres modes pour assermenter des dépositions ou authentiquer des écrits ou documents, ou même encore le St. Imp. des 22 & 23 Vic., ch. 63. Ces fonctions ne sont pas obligatoires, néanmoins les actes faits ont leur valeur pour le gouvernement qui les requiert. Le gouvernement fédéral ne pourrait peut-être pas répudier ces actes, puisqu'il les a autorisés, mais de là à pouvoir les imposer, il y a loin.

Ce sont ces actes qui sont maintenant soumis à la Cour Supérieure siégeant comme cour de révision, et l'on nous demande de prononcer sur la pénalité imposée à une partie dans une de ces causes et refusée dans l'autre. On veut ainsi faire remplir à cette cour qui est une cour civile, une fonction qui d'après nos lois n'appartient qu'aux tribunaux de justice en matières criminelles! Pour ma part je ne vois pas comment cette cour peut se prêter à une pareille demande; ce serait un renversement de tout l'ordre judiciaire auquel je ne puis concourir. Je dois ajouter, sur la suggestion d'un de mes hon. confrères que le ch. 12 des Statuts passés dans la même session du Parlement de la Puissance reconnaît de la manière la plus formelle ce droit des législatures provinciales. Ce statut qui a pour objet de régler la *Pétition de droit*, dans sa sec. 17, attribue la jurisdiction aux Cours Supérieures des Provinces, mais ajoute qu'aucune de ces cours ne prendra connaissance des matières mentionnées en cet acte à moins que la législature de la Province dont cette cour dépend, ne l'ait autorisée à administrer les droits conférés par cet acte conformément à la procédure qui y

est prescrite. Je serais en conséquence d'opinion de rejeter l'inscription pour révision et cela sans frais.

JOHNSON, J.—Strictly and technically, this point is not before the Court; but a sense of duty under rather peculiar circumstances, as well as a sense of courtesy due to the member of the Bench who has just expressed his opinion upon the statute under which we are acting in this case, required of course that all the judges who sat in these cases should give their attention to the subject which has just been noticed by Mr. Justice Beaudry. It is not new. It is not perhaps too much to say that it must have attracted the notice in some degree of every judge and every professional man who was called upon to act under this law. But I think I may say, as far as the judges of this Province are concerned, they have endeavoured to act with all the caution for public and for individual interests that their position requires. When cases were fixed for trial, without any objection being made as to the jurisdiction of the Court, except as to the time of trial having been fixed in vacation,—a point on which we were unanimous among ourselves, and also with the judges of Ontario, who have to administer the same law, we took those trials at the sacrifice of most, if not all of the interval of partial rest incident to our office; and we proceeded with them, as we would have done in any other matter where our jurisdiction was left unquestioned by the parties. We felt, however, that in performing that very disagreeable duty we were not as we are now, called upon to determine finally upon questions not only of great public importance in themselves and in their results, but involving also in some cases, personal penalties and degrading punishment. We exercised in those cases, and at that time, with the acquiescence of the parties concerned, at all events, a jurisdiction that was subject to an appeal, powers of which an erroneous use could be rectified here. We feel ourselves now, however, very differently situated. We have to pronounce, perhaps without appeal or remedy, upon the rights and franchises of our fellow citizens, whether candidates or electors; to determine not only who are the legal representatives of the people in Parliament, but to apply to individuals laws of a highly penal character. Therefore, as will be remembered no doubt, when this case came on here, and when one of the honorable and learned Judges, whose years and services entitle him to the highest respect, withdrew on the expressed ground of want of jurisdiction, before the others who subsequently heard the case would proceed with the hearing, they suggested to the parties the very question which has just been treated by Judge Beaudry, and invited them to be heard upon it, if they wished. We are painfully aware of the novelty of our situation, but we are neither able nor willing to decline the responsibility of it. This law is found in the statute book. It is passed by the joint authority of the three branches of the Legislature: the Commons, the Senate, and the Queen. Therefore, if the Judges of Lower Canada have power to set aside and dispense with the supreme Legislative authority of the Dominion, if such a duty can be cast upon them by any one; or if, without its being imposed on them by the parties, it is necessary or proper for them to take it on themselves, it must be at once acknowledged, no doubt, that a very grave subject is before us, and that we must deal with it now, for one of the members of the Court that heard this case is of

Ryan et al. vs. Devlin.

opinion that we cannot execute this law, and either his opinion is right, in which case the majority would have no power to give judgment, or it is wrong, and in that case the majority is bound to exercise the authority of the Court. Now the Parliament of the Dominion have certainly, in plain language, conferred on certain Courts in each Province, powers for the trial and determination of certain matters, viz., controverted elections of members of the House of Commons. The determination of these matters, until very lately, always belonged to the House of Commons itself, as one of its most exclusive privileges over which no Court or other body had or could exercise any jurisdiction whatever, except under some act of the three constituents of the Dominion Legislature, viz., the Queen, Senate and Commons: for it is idle and out of the question to suppose for a moment that any Provincial authority could have meddled with the privileges of the House of Commons. Such an Act has been passed, "*to make better provision for the trial of election petitions, and the decision of matters connected with controverted elections of members of the House of Commons.*" For this sole purpose the Act is framed. It is not an Act for "the constitution, maintenance and organization of a Supreme Court," neither is it an Act for the establishment of "any additional Court." Section 101 of the British North America Act of 1867 may therefore be treated as inapplicable. That section reads: "The Parliament of Canada may, notwithstanding anything in this Act, from time to time provide for the constitution, maintenance and organization of a General Court of Appeal for Canada, and for the establishment of any additional Court for the better administration of the Laws of Canada." These powers have not been exercised by this Statute in a direct manner as was done by the Statute of 1873, which did create an additional Court, as woman was formed out of man, by taking some of the materials of the Superior Court and making them into what that Act called an "Election Court." That has not been done in the Statute of 1874, and the argument is that, not having made an additional Court *eo nomine*, the Legislature could not impose new duties on a Provincial Court already existing, without violating the provisions of section 92, which assign to the Provincial Legislature "the administration of justice in the Province, including the constitution, maintenance and organization of *Provincial* Courts, both of civil and criminal jurisdiction, and including procedure in civil matters in those Courts." It will be observed that the local Legislature can only create *Provincial Courts*. How any Provincial Court could be created, having jurisdiction over the election of members of the House of Commons it is difficult to see, unless the House of Commons gave such Provincial Court the necessary power, as they have done. It may be admitted, however, that the 101st section and the 92nd section, taken by themselves, and looked at without reference to the rest of the Confederation Act, are literally susceptible of the interpretation given to them by the learned Judge. I say that would, perhaps, appear to be the literal construction; but we may sometimes remember with advantage the maxim: "*Qui hæret in litera hæret in cortice.*" But if the Dominion Parliament has disregarded the provisions of the 101st section, and apparently, at first sight, over-ridden the rights reserved to the Provincial Parliaments, there must be some presumable reason for what they

have done. Courts of Justice are not to look at Statutes with a view to defeat them, but with a view to give them effect. We must not presume that the Canadian Parliament has proceeded without intelligence or discrimination; we must see if there is not some other power given in the Confederation Act which they meant to exercise, besides that of creating "additional courts." Now there is clearly such a power given by section 91—a power that they could exercise without any restriction by those enumerated as belonging even to themselves, much less by those belonging to the different Provinces, a power which is expressly conferred by that section: "*Notwithstanding anything contained in this Act.*" That section is in these words: "It shall be lawful for the Queen, by and with the advice and consent of the Senate and House of Commons, to make laws for the peace, order and good government of Canada, in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the legislatures of the Provinces, and for greater certainty: *but not so as to restrict* the generality of the foregoing terms of this section, it is hereby declared that (*notwithstanding anything in this Act*) the exclusive legislative authority of the Parliament of Canada extends to all matters coming within the classes of subjects next hereinafter enumerated." Then follows the enumeration of classes of subjects belonging to the Federal power to deal with. There are, therefore, two kinds of things which the Confederation Act of 1867 says are within the exclusive rights of the Dominion Legislature. Some of them are expressed in the list or enumeration of subjects that follows: others are not expressed, but are reserved in the body of the section, and are said to relate to "all matters not assigned to Provincial legislation," and, with respect to those matters, the Dominion Legislature has the exclusive power to make laws for the peace, order, and good government of Canada, and these powers so reserved exclusively to the Dominion are much more general and extensive than those which were susceptible of enumeration. In other words, as it was obviously impossible for any foresight to provide beforehand, and in detail for every case in which Dominion legislation might be required, the Imperial Act seems in effect to have said:—"Notwithstanding anything in this Act, notwithstanding that we have enumerated the most salient subjects on which the Dominion Legislature may make laws, it must be clearly understood that there is nothing at all to prevent them from legislating for the whole Dominion in matters not to be found in the list of those given to them, and not assigned to the Provinces." Now, undeniably, there are a great many matters not within the classes of subjects belonging to the Provinces, and not enumerated among those belonging to Canada, and in relation to which the Dominion Legislature, therefore, has express power given to it by the 91st section to make laws, with a view to the peace, order and good government of Canada. Could it rationally be maintained, for instance, that the trial of controverted elections for the House of Commons is not one of them? or can it be asserted that it has been assigned exclusively to the Provincial Parliaments? If not it is inevitably "a matter in relation to which," the 91st section says, "that it shall be lawful for the Queen, by and with the advice and consent of the Senate and House of Commons, to make laws, &c., &c."

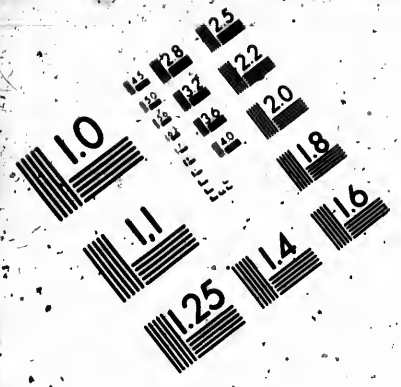
The criminal law belongs exclusively to the Dominion Parliament, except as to

Ryan et al. vs. Devlin.

the constitution of criminal courts. So the law relative to the election and the return of members to the House of Commons is of the exclusive right of that House. Yet the Parliament could add a new offence to the criminal law, leaving the trial of it to the Provincial Criminal Courts, and if so, why may it not denude itself of its exclusive jurisdiction as to the trial and final determination of controverted elections, and transfer these matters, and the *lex Parliamenti* as belonging to them, to the tribunals having general jurisdiction over civil rights in the respective Provinces? The extension of the jurisdiction of these Courts, by enabling them to dispose of such cases, might, perhaps, as I have already said, be literally deemed an interference with the administration of justice; but it seems rather a technical than a substantial objection, and it would be rather straining a point to hold that extending jurisdiction, *where the Provincial Parliament could not extend it, as in this case,* was interfering with their exclusive powers. For how are they interfered with if they have no right themselves to touch the matter at all? Yet they have no such right, as is doubly certain, both by the reservation of the subject to the Dominion Parliament by the 91st section, and by the express exclusion of their own power to constitute or to regulate any courts but *Provincial Courts.* Moreover, the 101st section certainly warrants the establishment of any additional court for the better administration of the laws of Canada, and if the *lex Parliamenti* forms a part of those laws, and an election court might be created for the better administration of it, it would seem strange that, having courts in every respect competent for the purpose, the [illegible] of the Act should render necessary the erection of new tribunals. [illegible] is a highly remedial statute, and we ought to advance the remedy. [illegible] produced a most salutary change. The Grenville Act was (as the late Mr. Justice Coleridge observed) justly celebrated for the wisdom and utility of its provisions. It failed, notwithstanding, to eradicate bribery and corruption. The new system seems more effectual here as well as in England, whence we borrowed it; but if the Dominion Parliament cannot enact it, how can the local Legislature? Therefore, though the powers of the local Parliaments are expressly and carefully given, and though we recognize their rights, we think this was a subject on which they had no power, and which belongs to the Federal Parliament as legislating of right for the whole Dominion; and we think, this being our view of the point of jurisdiction, we have to pronounce on the merits of the case. It brings one part of the judgment only into review—that part of it relating to the disqualification of the candidate who was petitioned against. Although on this part of the case Mr. Justice Beaudry is, of course, precluded by the view he takes of the Statute from giving a judicial opinion on the merits, I have not understood him to intimate that he entertains any doubt on that part of the case which was fully heard before him.

The questions dealt with by the learned judge who sat at the trial, were two questions of fact merely. One of them regarded the credibility of a witness of the name of Murphy, brought up to prove a promise made to him by the candidate who was petitioned against. The other regarded the proof made of an alleged corrupt payment with the candidate's knowledge and consent. It was contended that the first question depended upon positive evidence, viz., that of

Murphy himself, and that if what he said was true, the respondent made him a promise that must be held to be an inducement for his services, and which would be sufficient under the law to disqualify the candidate. But whether Murphy's evidence is sufficient evidence of the fact de[illegible] to be proved, depends upon a variety of circumstances of which [illegible] Judge who heard the evidence given, and saw the witness, was, no do[illegible] in to form an opinion. Nevertheless, some of these circu[illegible] Court, without hearing the evidence, is just as well ab[illegible] learned Judge was. The first thing we can appreciate ju[illegible] who heard the witness swear to it is the precise extent and [illegible] it was that Murphy swore to. He was cross-examined at great len[illegible] his words are: "I asked the respondent as a favor to try and do somethi[illegible] for me, as I was out of employment, and living on my children, and the respondent said he would try and do his utmost to get me something. The respondent did not say he would do something: he said he would do his best: that was all that took place, with the exception of asking for Mr. Hoenan." We think we must have clear evidence on which to disqualify, as clear as would justify a conviction on an indictment. If all that Murphy swore to be true, we should hesitate to declare that it ought to disqualify the candidate. But, besides this, the judgment of the learned Judge rests in great part, as far as this part of the case is concerned, on the incredibility of Murphy. That is a subject in which we are unwilling to interfere with his discretion, unless it could be pointed out that any obvious error had been made. The pretension that it was the respondent's duty to call witnesses to contradict Murphy in the several points in which he was open to contradiction if he did not speak the truth, does not extend to validate what he said if his contradictions and demeanor produced on the Judge at the trial a conviction of his incredibility. Then, as to the payment to Larin by McShane, it is clearly proved, and the only remaining question would be the knowledge of the candidate. We attach no importance to what was said as to the use of the word "actual." Whatever it may mean, it is useless where it is, because there is also the word "consent" which admits of no doubt as to its meaning. My own opinion as to these words, "actual knowledge" was intimated at the hearing, and I have not changed it. There can be no knowledge in the possessor of it that is not actual, unless in the sense of illusion or insanity. Constructive knowledge is merely an expression applied to the knowledge of a fact that has to be ascertained constructively by the Court. With respect to the candidate's knowledge of the payment by McShane to Larin it is to be gathered from the circumstances. It may or may not be true; and it is a rule in the application of circumstantial evidence that the circumstances proved should be susceptible of no explanation inconsistent with guilt. That is obviously not the case here. My decision in the Argenteuil case was pressed upon the Court at the hearing, as well as that of the Court of Common Pleas in Ontario in the London case, and both of those cases are cited in the *factum*. The principle acted on in the latter was, no doubt, that personal knowledge and consent as to corrupt practices at elections could be ascertained like any other offence by circumstantial evidence, admit-



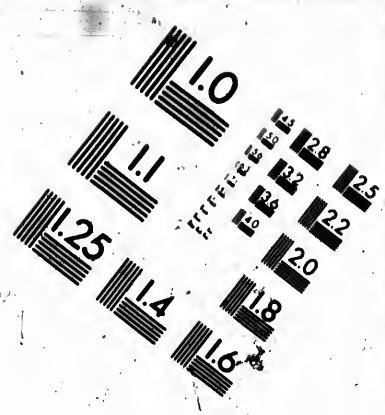
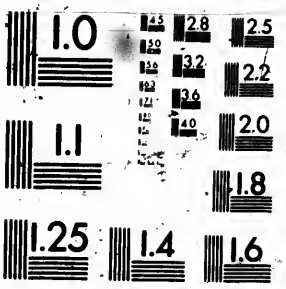
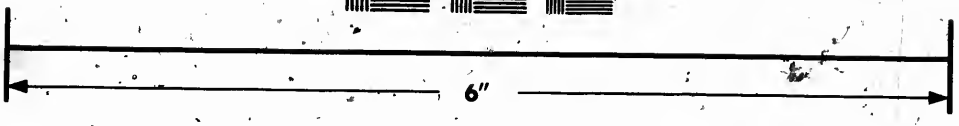
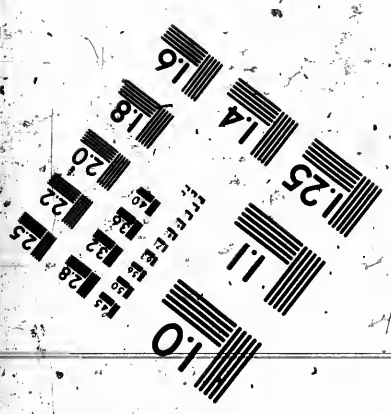
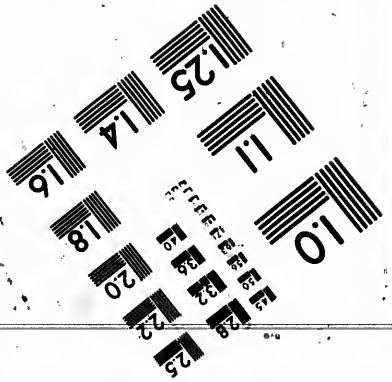


IMAGE EVALUATION TEST TARGET (MT-3)









Photographic Sciences Corporation

23 WEST MAIN STREET
WEBSTER, N.Y. 14580
(716) 872-4503

Ryan et al. vs. Devlin.

ting of no other reasonable application. In the Argenteuil case I should not have hesitated to act on the same rule, although I did not do so altogether. I do not wish to enter upon that case here, as it is now before the other judges, and it would be improper to do so; but here, in the case before us, we have to apply the rule acted on in the London case, and we do it. It was there held that the evidence was such that the candidate must have known. We do not see that to be the necessary conclusion here, and we refuse to convict without reasonable certainty.

I do not go into the case of knowledge and consent as to the trenting, because it rests on the same evidence as that of the corrupt promise. We say that, as regards the latter, the judge who tried the case had doubts, and acted upon them, and we cannot say that that was unreasonable or improper. We think there is no necessary connection between the letter and the alleged previous promise, and we therefore confirm the judgment with costs in this Court.

TORRANCE, J., concurred.

Judgment affirmed.

N. Driscoll, for the petitioners.
Hon. J. J. C. Abbott, Q.C., and *J. J. Curran*, counsel.
Trenholme & Maclaren, for the respondent.
E. Carter, Q.C., and *W. H. Kerr*, Q.C., counsel.
(J.K.)

COURT OF REVIEW, 1875.

MONTREAL, 5TH NOVEMBER, 1875.

Coram MACKAY, J., TORRANCE, J., BEAUDRY, J.

ARGENTEUIL ELECTION CASE.

Owens et al., Petitioners, vs. *Lemuel Cushing*, Respondent.

HELD:—1. The Dominion Controverted Elections Act of 1874 is constitutional *(ante p. 77.)*
2. Election trials under that Act may take place in vacation, between 9th July and 1st September. *(Vol. 19, p. 193.)*
3. A voided election and the election rendered necessary by such avoidance are one and the same election as to the personal acts of candidates, and the acts of agents of candidates done with the knowledge and consent of the candidate. 38 Vict. (Canada) cap. 10, sec. 5.
4. The payment of illegal accounts with the knowledge and consent of a candidate after the avoidance of the first election, and with a view to influencing votes in his favour in the election rendered necessary by such avoidance, is a corrupt practice, within the meaning of the Election Act.

This appeal was by the respondent Cushing from a judgment rendered by Mr. Justice Johnson at St. Andrews on the 21st of July, 1875, the reasons of which were stated as follows:

JOHNSON, J:—From what took place during the trial of this petition last week and the week before, it will not now be necessary for me to say anything about that part of the case that is limited to merely voiding the election, except that it was admitted in the course of the trial by the respondent that the corrupt practices of his agents, without his knowledge or consent, had been sufficiently proved to render that result inevitable; and, therefore, as regards that part of the case, the judgment of the Court becomes a matter of course to that

extent; but evidence was afterwards proceeded with upon the personal charges, and at great length, and upon facts which required careful examination, and sufficiently warranted the adjournment which has taken place, in order that the evidence and the authorities might be looked at, and maturely considered; and I am now to give judgment upon the whole case, not only as to that part of it which has become merely matter of form, in consequence of the evidence of the witnesses, and the admission of the party, but also upon the much more important part of it which, as it is contended, affects not only the seat, but the qualification and ability of the respondent to be elected to, or to sit in, the House of Commons, or to vote at elections, or to hold office under the Crown.

Perhaps the first thing I ought to notice is the contention on the respondent's behalf, that the trial cannot take place in the vacation. With respect to that objection, I gave my own opinion, and acted upon it at the trial. If I felt now any difficulty at all on this head, it would be removed by the fact that in the present case the trial actually began before the vacation, and was continued *de die in diem*, as required by the statute of 1875. But I must candidly say, notwithstanding all the fuss that has been made about it, that I have never felt any difficulty at all upon the subject. The legislative authority of 1867 (that is, the Code), no doubt said that the Courts then existing should not sit between the 9th of July and the 1st of September; but subsequent legislation created this Court by enacting that the Superior Court should be an Election Court, and by the 11th section of the Act of 1874, the Judges are told to fix times and places for trials in these new Courts, and as to these times and places they are to be unrestricted, for they are to be such as are "*convenient*," that is the word used in the Act of 1874; and by the 13th section, the Judge may "adjourn the trial from time to time, and from one place to another, *as to him* "*may seem convenient*." There is, therefore, I believe, not the slightest pretext for saying that the Code was dealing with Election Courts at all; and it would be absurd to contend that the legislation of 1867 was irremediable and binding on all posterity.

Then we come to the Act of 1875 amending that of 1874, and we find that where the Respondent's presence is thought necessary, there shall be no trial during a session of Parliament, and that, subject to that provision, and further, subject to the provision that, "*it shall not be commenced or proceeded with during any term of the Court of which the Judge trying it is a member, the trial* is to commence within six months of the fyling of the petition, and shall be proceeded with *de die in diem*, until it is over. Now, as it may safely be said that in most, if not in all cases, the respondent's presence is necessary (and I may say I have never seen a case in which it was not), and as, therefore, there is to be no proceeding for half the year, or for whatever time Parliament may choose to sit, and as there is also to be no proceeding in term, and further, as, according to the respondent's counsel (I believe all these profound questions have been raised on the side of respondent), as, according to these gentlemen, I say, the trial cannot be had in vacation, there may, perhaps, be considerable difficulty in saying when the trial can take place at all, unless we use our common sense a little, and say what every one must admit to be true, that this Court and these election

Owens et al. vs. Cushing.

cases were never reached or contemplated at all in 1867 by the code which dealt with the courts then existing, and that to use the terms of the law this is the most "convenient" time, indeed the only possible time for trying the case at all. I say "convenient," as regards the exigencies of the law, and by no means as regards the judges themselves, for whom all considerations, even of common humanity, seem to be out of the question. Therefore, at the sacrifice of every personal feeling, I came here to try this case, as the law and my duty required I should do: and I have seen and heard nothing to alter my opinion, (not even the strange, and if I may coin a word the *Beecherous* newspaper law published while the point was under consideration by another Court and which somebody had the goodness to send me; but it does not alter my opinion the least in the world.) I must continue my arduous duty to the end. I am sworn to do it and do it I must.

I have before stated that we are now concerned with that part of the case only which relates to the personal acts of the respondent or to acts done with his knowledge and consent; and those acts are to be considered, not with reference to the avoiding of the election merely, for which purpose the acts of agents, either with or without the respondent's personal participation, are undoubtedly sufficient. This is a matter of very great gravity and importance to the public and to the parties more immediately concerned, and I am afraid I shall have to observe both upon the law and the facts of this case at some length. Before entering, however, into these questions, I should notice an objection that was made on the respondent's behalf, to making these personal charges the subject of evidence at all, on the ground that there was no distinct allegation in the petition of the acts of bribery and corruption by his agents having been committed with his knowledge and consent. I overruled the objection at the time; but the subject was again mentioned in the final argument, and in a matter of so much importance I have been careful again to go over the allegations, and there can be no doubt whatever that even if the averment that the candidate did these things himself, or by his agents, were not sufficient (and I think I should hold them to be quite enough, even if there were nothing more, for an averment that a man is acting through another, implies and includes his assent to what that other does), still there is the expression (in the 11th and 15th paragraphs particularly) that what the candidate is charged with having done was done "knowingly" and "in violation of the statute"; and the conclusion, which is as much a part of the petition as the rest, asks that it may be determined and reported, "that the respondent by his "agent or agents at the election, both with and without his actual knowledge and consent," was guilty of the corruption alleged. Therefore, I must enter fully and at once upon all that bears upon this very grave question, and state the conclusions at which I have arrived, and the evidence and reasons on which those conclusions are based. Now I think I may quite fairly to every honest pretension in this case, either on one side or the other, say at once that the personal disqualification of the respondent can only be made to prevail by force of the circumstances and payments that have been proved as affecting the October and November election, either taken by itself or taken in connection with the previous election

in January, 1874, and which was avoided in October following. I say this not only because I have not understood the petitioners' counsel as insisting on any effect of that sort being given to the more direct evidence of Thomas Campbell, which was given on the second day of the trial, or to the evidence of Daniel Stone, which was given on a subsequent day, but also because I am fully convinced that no such effect ought to be given to the evidence of those persons. As regards Stone I said so at once, as soon as I had heard the evidence brought up to contradict the material facts that he swore to; and, as regards Campbell's evidence, I shall merely say that the connection of the respondent with Campbell's house, or rather his presence in the house when some liquor was being freely used, that had been brought there in an earthen jar by a man of the name of Boyd, does not necessarily imply a knowledge that an open house was being kept there, which, in fact, Campbell denies, nor even that Mr. Cushing saw the drinking that was going on. On the contrary, Campbell says that he saw no liquor when Mr. Cushing was present, and that Mr. Cushing was not talking to him when he was having a drink. Campbell himself was evidently under the effect of liquor when he was giving his evidence, and owned as much himself, when I asked him; in fact he, and, I am sorry to add, at least three other witnesses in the same state, exhibited a spectacle which I have rarely seen in a court of justice, and hope never to see again; and, even if his evidence had been direct as to Mr. Cushing's knowledge, I should have hesitated very much to accept it as conclusive. As it is, I consider that part of the case as amounting to nothing.

Then we must examine the facts affecting the only, and by far the most important part of this case. There had been an election in January, 1874, at which the candidates were the respondent on one side, and Mr. Abbott on the other, the latter being returned by a majority of four votes, and his election was immediately petitioned against, and the petition was tried in October following, and the election declared void on account of the informalities of the voters' lists. The transcript of the proceedings at that trial fyled here, with the admissions as to formal matters, shows that the present respondent was the petitioner, and claimed the seat, and that charges of corrupt practices on both sides were at issue; but as far as that petition was concerned, those charges were withdrawn, and the petitioner there withdrew also his claim to the seat, so that if corruption was used at that election it was not enquired into in that case at all; and judgment was given and a report and certificate made that Mr. Abbott's election was void by reason of the illegality of the voters' lists. This was on the 6th October, 1874, and as soon after as it could be done, the new writ must have issued, for we find that the nomination took place on the 28th of October, and the polling on the 4th of November. At this last election the candidates were the respondent, and Mr. William Owens; and the respondent was returned as duly elected by a majority of one hundred and four votes. Then came the petition that we have now been trying, and after the usual skirmishing in the way of preliminary objections the matter at last arrived at issue, and that issue is now to be treated as a general one, because almost all the rest was in the first place mere repetition of the preliminary objections that had been finally dealt with already; and as regards the

Owens et al. vs. Cushing.

one and only question of fact raised about the other candidate not having been eligible it was obviously immaterial, and was not even entered upon at all at the trial.

The allegations embrace almost every conceivable form of corruption by the respondent himself, and by his agents, both with and without his privity, and both as regards the first election, and the second one, and the two taken together, as forming in law one and the same election; and no doubt it has always been considered as a matter of law, that the two are one and the same election; and as a matter of practice it is said that these questions of bribery and other corrupt practices do not only often, but almost always, present themselves in this way, which no doubt may be readily accounted for when we consider the nature of bribery itself, and that it is not a thing to be entirely consummated by any cautious person until he thinks himself fairly beyond the reach of danger: though he may have gone a long way in committing it while he is in the wood, if I may use a common figure, he waits till he is out of the wood before he hollas and thinks himself sure of his game. As late as June last year, I find Lord Coleridge, in the Launceston case, using this language: "In every case which I have been able to refer to, the bribery "relied upon as creating a disqualification is bribery committed by the candidate "at the election which was avoided, and it has been held, no doubt, that such "bribery is a disqualification for a candidate at the second election rendered ne- "cessary by such avoidance. It could not be held otherwise, for the second "election under those circumstances is but a continuation of the first, the "exigency of the writ not being satisfied until there is a good return; and by suppo- "sition the candidate found guilty of bribery is not a good return; and there "must, therefore, be a return of some one else. The cases in which a man guilty "of bribery, in fact, at an election declared void has been held disqualified on the "second election, though his bribery had not been enquired into under the first "petition, fall under the same principle. On this point the decisions have been "uniform, though as to the consequences to the voters of such disqualification, the "decisions seem conflicting. The principle of all the earlier cases will be found "very well discussed in a note in 1 Luders, 69; and there is nothing in the "later cases at all to qualify the law as there laid down." Then we come to our own declaratory Act of 1875, and there can be no doubt that the 5th section, for all the purposes of the present enquiry, distinctly recognizes that these two elections were one and the same, for though, for other purposes, they are to be taken as separate, express exception is made "as to the personal acts "of the candidates, and the acts of agents of the candidates, done with the knowledge and consent of such candidates;" and we need not enquire whether there is any difference in other respects between our own Statute and the old law of England, for it is sufficient for the present purpose that they are the same in this. The law of England may perhaps go further; but our own, if there is any difference, certainly goes far enough, if there has been any personal act of corruption by the candidate, or if he has been privy to any such acts by his agents, and that is all that is contended for here. This then is the matter of fact that must be enquired into, and it is wholly immaterial if

there has been such corruption used, whether the act done, supposing it to have the character of corruption, was done at the first, or at the second election, if only it was done by the candidate, or with his knowledge and consent. Such, I take it, is the law on this subject as applicable to the present case.

We must now come to the facts proved, and as regards this part of the case they are neither numerous, complicated nor doubtful. I have only hitherto noticed these facts up to the time of the judgment annulling the first election, this was on the 6th of October. The nomination was on the 28th of October, and the respondent became a candidate again, having received a requisition in the interval. Being himself examined he says: "I was a candidate at the last "two elections; I have no idea what they cost; I paid no money out myself, "except to a carter at the second election to drive me round; I do not know "where the money came from, except what I have heard here now from my "brother; from what I heard here it must have cost a good deal; when I went "into the first election I thought it would cost a good deal; to my recollection "I made no provision for the cost thereof. There was a good deal of difficulty "when I first came out. I do not remember saying, when I first came out, that "I would pay all expenses; but that if I was a candidate, I would have to pay "all legal expenses. I have not paid any expenses beyond what was deposited "with the registrar at Lachute, and some bills I have paid him."

This is the position usually, and I should be sorry to think it was not honestly taken by candidates in all cases, or to insinuate that it was not honestly intended by Mr. Cushing to abide by it, if he could; but how far he actually did abide by it, and how soon afterwards be allowed himself to be personally compromised we shall presently see. He says immediately afterward: "I met some man "at the back of Grenville, and he said he had a bill, and I said: I do not know "anything about it, and he said it was a bill he ought to be paid for in the "January election, and I said I never asked you to work for me, and I do not "know anything about it. I do not remember telling him to go to my brother. "He said he had sent in a bill, but I do not remember to whom he had sent it "in. He had sent in a bill somewhere, and I told him if he had sent it in to "the proper parties he should see about it. I think the bill was about $100. "I have not seen the man since about it." At this time the respondent was canvassing for the second election. After referring to the subject of open houses in the January election, of which he says he was not aware, though he heard there were some, the respondent goes on to say: "I believe my brother fur- "nished all the money for these expenses as far as I know. After the election "was annulled, I heard there were bills and expenses incurred, but never sug- "gested to any one that these things should not be brought to my knowledge." He then said, as it was first taken down: "I said to my brother and Mr. 'Meikle,' if there were expenses they would look after them, as they had under- "taken to look after them. I was not aware of bills being paid before the Nov. "election. I understood that they were being paid, and I heard that they were. "On the day of the judgment, I am not sure who, but some one asked Mr. "Kerr if bills due in the January election could be paid without affecting me, "and I overheard some statement from him that they could be paid at once. I

Owens et al. vs. Cushing.

"think I heard him say that; that is all I heard. I took no part in that conversation, "but I do not know but what I asked him myself if bills of January could be "paid until after the judgment was rendered. Whether I asked him myself, "or whether I heard it, I do not remember. The reason that they had not "been paid before was that they would affect the election, the answers having "been that corrupt practices had been used by me." Then the day after the judgment, that is on the 7th, the respondent says he went out into the Gore, and he was asked if he would be a candidate again, and he said he would not, without a requisition, and on the 13th, being in Montreal, he formally accepted the candidature by telegraph. In the interval he was evidently looked upon as the candidate of his party; and the day after he went to the Gore, he says, there was a meeting, and though he is not sure whether he had a requisition himself, he thinks that the man who drove him had one, and Mr. Meikle says he always looked forward to Mr. Cushing becoming a candidate. Now, so far as what he said to Mr. Meikle and Mr. James Cushing about the payment of the January bills is concerned, it is proper to observe that the respondent, the next day, asked leave to explain and alter what he had said, and he then added that he had made no reference to these bills either to Mr. Meikle or to Mr. James Cushing, but he also made the rather remarkable statement that no other conversation took place, except that such bills existed and that the existence of them was a matter of general conversation. Leaving aside, then, the question whether, as far as respondent's admission goes, there is evidence of his direct authority to pay the January bills, we see him immediately after the judgment which annulled the first election, acting as if he was, or hoped to be, a candidate at the next—a position which he formally accepts on the 13th of the month; and we further see by his own admission that he is thoroughly aware of the illegality of these January bills, and has no other pretext for not having paid them before, than that they were illegal, and that the payment of them, before the decision on the first petition, might have affected the seat which he, as petitioner, asked for in that case. If even this express admission were wanting, it would be extremely difficult for any one in the position of a judge holding the balance evenly, or at all events trying to do so, to prevent the preponderance on the side of the candidate's knowledge of the existence of these bills and of their true character; for no good reason can possibly be assigned—the respondent does not himself attempt to assign any—for their non-payment during all the interval from January till the middle or end of October, except that to have done so would have affected his election; but, though no good reason can be assigned for waiting until the second election before settling all these bills, I am afraid a very bad reason can readily be given—a reason which perhaps may have weighed with the respondent and his friends, and which, though it is a very unfortunate reason, and if it actuated them, was a very fatal calculation indeed, yet it must be confessed that it would have been a very cogent reason with persons anxious to win an election, and it may well have been that these parties thought, not only that it would not do to settle these demands prematurely for fear of the effect of such a step on the trial of the case, but that, by deferring the settlement till the next election or until the very eve of it, they were acquiring a hold on the electors which

would be very useful to them in their struggle. Now though the respondent was evidently, from the moment that the first election was annulled, feeling his way, and desirous of being the candidate at the second, yet he tells us that he refused to decide positively until he should get a requisition; and Mr. James Cushing, his brother, says, as indeed we have other evidence of, that he sent out the amounts "immediately" after the trial. Why, it may be asked, such haste, if not in view of the coming election? Again, Mr. James Cushing says:—"These monies were all paid while it was uncertain who would be the candidate." This is a fact that gives tremendous significance to these sudden payments, for it shows that Mr. Cushing was eager to run, and payments of this kind would certainly popularise him and create a corrupt influence in his behalf among the people. If, therefore, these payments were made, and made at that time, which they most certainly were, and we have the clearest evidence of the fact, it would be difficult to deny that they have all the character of bribery, and even of admitted bribery committed at the second election. Of course it makes no difference if the respondent's knowledge is proved, whether it was committed at the first or at the second, for both are in law one and the same, as far as the personal acts of the candidate are concerned; but what I wish to point out, for there seems to be some haziness about this subject, is, that the law only intended that bribery committed at the first election will not void the second, nor disqualify the candidate without his personal knowledge of it; but that is a very different thing from saying that bribery may be effectually committed at the second election, and its consequences be avoided by the pretext that it was only committed at the first. The payments made by Noyes must have had the character of corrupt payments for the first election or for the second, or for both. I am strongly inclined to the latter view; persons engaged in forwarding an election do not of course say, here's money; it is given to you as a bribe; but the character of the payments is admitted by the respondent himself, and no reasonable man can have the slightest doubt about it. But, as I have said before, it is immaterial at which of these elections the bribery is held to have been committed, if it was committed at all. As to the payment, it is useless to waste words to show that it is proved. Mr. James Cushing says so himself, and it is distinctly proved by others. He admits some of the bills were paid for open houses. He sent Rodrique $300 or $400 for a bill which Meikle shows was altogether for liquors, and it was refused as not enough. This must have been in October, as only then were any monies paid subsequent to the January election. He sent this money for all the bills forwarded by committees although "he was informed that open houses "were kept throughout the county." The reason given in cross-examination for not sooner paying these bills is a distinct admission of their illegality, the knowledge of which was shared by the respondent. He says in another place that before the election he advanced not more than $1200. I should be sorry to put an unfair meaning upon this word "advanced," but I must put its natural meaning. He may have paid more than $1200 to those to whom it was due; that would not be an "advance." To whom could it be "advanced" in the ordinary sense, but to his brother, the respondent?

Owens et al. vs. Cushing.

Between relations it is not natural that there should be divergence and discord, —but rather the contrary; it may no doubt seem, but it is not to be presumed, and there is everything here to heighten the natural presumption of identity of wish and knowledge in such a matter as this. An English judge, in an election case very lately, presumed the existence of an intimate agency in such a case between father and son, and when it was remarked that it had not been proved, answered that the voice of nature proved it, and that a judge must be held to have resigned the attribute of common sense to doubt it. There is everything here to fortify the presumption, if presumption were necessary, after the respondent's own admission, of an intimate agency and common knowledge of all these things between him and his brother. Upon this subject, as far as my own mind is concerned, I should not want another word to be said. I have already quoted the language of the respondent himself under oath; it was as painful for me to hear as it must have been for him to speak; but as to its effect there can surely be but one opinion. He says, he understood the January bills were being paid in October. He heard that they were; and the fact of their illegality was not only known and admitted, but was systematically acted upon; and whether we take what he said to Mr. Meikle and Mr. James Cushing, either as it was given at first, or as it was afterwards corrected, there is still a distinct knowledge on the part of the candidate proved from his own mouth. This alone would be conclusive under that head of inquiry, but there is more. There is the admission of what passed between the candidate and the man he met at the back of Grenville, which must be considered, I think, a distinct admission of knowledge on the part of the respondent. There is the blood relationship between the candidate and one of his foremost agents. There is the admission of that relation that he advanced the money, which I think, can only have one meaning; and, not to proceed further with the details of this business, there is the peculiar mode of payment which was adopted, and evidently adopted for a purpose, a matter that I have not before referred to. There is the evidence of Mr. Noyes and of some of those who received those sums of money, that it was placed in envelopes, the actual knowledge of the contents being withheld from him, though he has no doubt they contained money; these envelopes were then left at the different houses, and received by those they were intended for with that sort of studious *naiveté* that seems to be considered by some people as quite sufficient to impose upon a court of justice. The latter proceeding of course only affects the character of the proceeding, and not the candidate's knowledge, which is another thing, and is proved by other evidence. I will not go any farther into this case; it is not necessary to notice the pretension that some of this money went to pay teams, and that such payments though illegal do not amount to corrupt practices. In the Stroud case that point occurred, and I borrow Baron Bramwell's words, which are singularly applicable to the present case, and I say that "the mischief of it was not limited to the mere illegality; but it was perfectly certain "that sums in excess of such expenses would be paid, as they have been, to a "very considerable extent." So too with what some of these poor people call being paid for their time. I again adopt the language of the same judge in the same case, and I say it is perfectly certain that it would be abused, and it

is perfectly certain that it would affect men who have no sense that they are doing wrong in taking money in this way. I do not now speak of those shameless persons who came as witnesses here and said that they had offered to vote for the man who would pay them most; but of others less reprehensible who spoke of getting their day's wages paid as a condition of voting, I say that is a state of things very much to be deprecated, and I see no present remedy for it but compulsory voting, and none in the future, if voting is not compulsory, but the moral improvement of the people. I will say no more. It is in my heart and on my lips to say much more about that baneful and degrading abuse of high-wines of which we have heard so much in this case, and for which some of the respondent's agents are directly responsible; but it is useless. It only remains for me to give the judgment of the Court, which must be that for corrupt practices proved to have been committed by his agents both with and without the knowledge and consent of the respondent, he be declared to have been not duly elected or returned, and his election and return be set aside and declared void, and further that he be during the seven years next after the date of this judgment incapable of being elected to and of sitting in the House of Commons, and of voting at any election of a member of that House, or of holding an office in the nomination of the Crown or of the Governor, in Canada; and I further order the respondent to pay the costs. I shall have to make a very serious report to the Speaker on matters that properly form no part of the judgment. My duty is now done here. It is not for a judge, strictly speaking, to express or to feel either regret or pleasure at anything his office calls on him to do. I shall only say that the duty cast on me in this case has been an intensely disagreeable one, and that I have performed it to the best of my judgment with all the anxiety the subject must inspire.

The respondent having inscribed the case for review the following judgment was rendered:—

BEAUDRY, J., handed in the same dissent as to the jurisdiction, as was fyled in the Montreal Centre case. (*Ante, p. 77.*)

MACKAY, J.:—The respondent was elected to the House of Commons from Argenteuil in November, 1874. His election, or return, was contested on the ground of corrupt practices by himself and agents, with his actual knowledge and consent, at that November election, and at an earlier one of January, 1874, voided on the 6th of October, 1874. On the 21st of July, 1875, at St. Andrew's, judgment was rendered against Cushing by Mr. Justice Johnson, and his election was annulled "on the ground of bribery and corrupt practices by agents, both with and without the actual knowledge and consent of the said Lemuel Cushing, the younger." The respondent, by his *factum*, says:—"It is only from that part of the judgment which declares that corrupt practices were committed at the election in question by the agents of respondent with his knowledge and consent, and the consequences thereof, that the present appeal is taken." The respondent at the trial, on the 12th of August, fyled the following admission:—"The counsel for the respondent, at this stage of the proceedings, admits that the respondent has been compromised by his agents, to the extent of rendering his election void, but not beyond." In consequence of this admission, the petitioners

Owens et al. vs. Cushing.

only sought thereafter to produce facts affecting the personal disqualification of respondent. Only respondent and his brother James were examined after the declaration referred to had been put on record. Owens' petition, among other things, alleged that respondent personally, and by agents, was guilty of corrupt practices at the first or January election, and that, after the first contest, illegal and corrupt payments were made, in execution of promises at it—that is, at the voided January election—to induce voters to vote at the November one for Cushing. We need not refer at much length to what passed at the January election, as it appears from the proofs of record; suffice it to say, that bribery and corruption ran rampant; open houses were kept—perhaps by both candidates—some certainly were kept by order of agents of Cushing; highwines were distributed by their orders to and among the voters, immense sums of money spent, and debts incurred by them. At that election Mr. Abbott was declared elected; Mr. Cushing petitioned against him for corrupt practices; Mr. Abbott had made recriminatory charges against him; but the case was not gone into on the merits, the voters' list having been discovered to be irregular. That election was voided in October, 1874, and at the new one rendered necessary Mr. Cushing again presented himself, and was returned elected. As said already, this election has been annulled by the judgment now appealed, which entails, by law, disqualification upon Cushing. The question before us is this: Were bribery and corrupt practices resorted to or done by agents of Cushing, the respondent, with his actual knowledge and consent at the election in question? The judgment complained of does not state particulars, but both parties seem to agree that it was based principally upon the circumstances attending the payment by the respondent's agents, immediately after the judgment that voided the first election, of bills and accounts for expenditures and debts incurred at or in and about that first election. As to the respondent's agents paying numerous debts of the January election immediately after the judgment that voided it, there is clear evidence. James Cushing was respondent's chief agent. Meikle was another, a sub-agent; Thomas C. Noyes was another, and even Beaton may be seen to be another. All these men may be seen to have bribed, and committed corrupt practices. The payment of the accounts connected with the January election was corrupt practice by these agents and sub-agents. The description, by Hutchins and Noyes, of the manner in which the payments were made shows that the payments were not of debts honest and due *bona fide*. The delay, too, from January to October and November, until after the judgment in the Januffy election case, shows that the agents, knowing the character of the accounts, feared to pay them. *Meikle* says:—"I suppose they were afraid to pay the money before the election was voided." The time, also, of the payments raises suspicions; they commenced immediately after the October judgment, on the very day of it. I have not time to read at full length what Hutchins says as to the $268 that James Cushing on the 6th of October gave him to pay over to people, giving him no instructions about the money; "he just told me to give it to those I was to give it to. I told them I was ordered to give them the money." "Lemuel Cushing was out as a candidate then," says Hutchins.

Thomas C. Noyes, a bailiff, says: "Before the nomination in the November election, I had envelopes placed in my hands, five or six days before; I think I received them from Mr. James Cushing; there was money in them, I suppose; he told me to leave them with the parties they were addressed to; he did not tell me what they were for, nor why I was a messenger to those different parties they were addressed to; I do not know why he gave me those envelopes—brought them to me; I think Mr. McTavish got one of those letters, he lives at Harrington. I did not say anything to him; it is likely I spoke to him, but not about the letter, as I did not know the contents; I gave Alexander Beaton a letter; McKenzie, I don't know his first name; he lives at Arundell; I gave one to Burns, I think his first name is Thomas, he lives at Arundell; Finlay McGibbon, of Chatham; I received no instructions whatever, except the naked envelope; this was before the nomination, after the judgment had been delivered annulling the election.

"By the Court—These envelopes were sealed, and they were addressed; on my oath, I think they contained money.

Of the money that Beaton got, he gave part to one Archie Cameron, in payment of a claim from the January election, and after Archie got the money he said, in answer to question by Beaton, that he thought he would vote for Cushing at the November election.

James Cushing says: "Previous to the November election I could not say how much I paid out; I keep a cash book, but I do not enter it there; I may have paid out $1,500 or $1,800—not more than that, that I recollect of; I do, in election times, pay out money without keeping account of it; it is my own money; to my recollection, I do not think before the November election I gave out more than $1,500 or $1,800; I was subpœnaed to bring my books, but I did not keep any; I had no conversation with my brother with reference to the settlement of these accounts; I did not discuss with my brother the advisability of settling the previous election accounts; I had legal advice on it; I could not tell you what these two elections cost; I could not furnish an account."

On cross-examination, he says:—"Those accounts of which I have spoken of paying were for the January election.

"*Question.*—Can you explain to the Court why these bills were not paid by you or some one else, sooner than they were?

"*Answer.*—I can. The reason that the bills were not paid was, I took legal advice on it, and was told I had better not settle then, until after the judgment of Abbott and Cushing was rendered, was otherwise it might be brought in as evidence in that trial; I did not get the advice from my brother or Mr. Macfarlane, but it was good legal advice; the bills that were passed I was not personally aware of; I took all that were approved by local committees, and sent out the exact amounts, immediately after the trial annulling Mr. Abbott's election; I had not a personal knowledge of the bills of those people, but took whatever was approved by the local committees or workers; I asked for no further proof; those payments at that time had nothing to do with the coming election, or with my brother as the candidate; they would have been paid had there never been another election; at the time they were paid it was not certain

Owens et al. vs. Cushing.

who would be the candidate, and if my brother had not been a candidate afterwards they would all have been honorably paid."

Other things go to show that the respondent's agents, and principally his brother James, were committing corrupt practices, for instance, their incapability and failure to render any account of what the bills were that were paid. James presumably knew, once, all about them, having had them in possession, approved by local committees. Though invited to explain them he can't do so, or will not; in fact has not done so; he has suppressed papers that might have made things clear. Meikle, in a less degree, is guilty of suppression of papers. Honest bills are usually preserved, for they cannot but help people; they can't imperil persons or seats in Parliament. The respondent might well admit, on the 12th of August, that his agents had committed corrupt practices. As to *them* the case is clear as can be. But the question before us is not that, but whether the respondent is so connected with what was done that we must hold that the corrupt practices of the agents were committed with the actual knowledge and consent of the respondent. The petitioners claim that they have made this out by what is proved (before referred to by me) and by the respondent himself. Now, as to the respondent himself. After polling day of the January election he was informed by Mr. Tait that there had been open houses. After the January election was annulled he heard that there were bills and expenses incurred. "I said to my brother and Mr. Meikle if there were expenses they would look after them, as they had undertaken to look after them." (This speech is afterwards disavowed by the respondent in a later part of his deposition.) "I understood that bills were being paid before the November election." "I heard that they were; on the day of the judgment, I am not sure who, but some one, asked Mr. Kerr, who was up, if bills due in the January election could be paid without affecting any future election, without affecting me, and I overheard some statement by him that they could be paid at once: I think I heard him say that: that is all I heard; I took no part in that conversation, but I do not know but what I asked him myself if bills of January could be paid until after the judgment was rendered; whether I asked him myself or whether I overheard it, I do not remember; the reason that they had not been paid before was that they would affect the election, the answers having been that corrupt practices had been used by me; I do not remember suggesting or advising anything special about the bills being paid after the election; my brother may have spoken about it." "When I heard the conversation about the bills being paid I did not ask about them or warn my brother to have them scrutinized, and that if these bills were for open houses they should be scrutinized. I had nothing to do with the bills, they had nothing to do with me. I heard subsequently. I stated I had conversation at different times; and supposed and knew there were bills out and unsettled." "After this conversation with Mr. Kerr I was not aware that my brother was paying those bills; I heard on the road that the bills were being paid. I was aware from a person on the roadside as I went back to the Gore. He told me he had heard that the bills of the January election were being paid; he told me he had heard that." "So far as I remember, I made no reference to these bills to either Mr. James Cushing or

Mr. Robert Meikle. No other conversation took place between us other than that such bills existed. I understood generally that there were bills that had not been paid; I had heard, it may be from them, but I cannot say positively; it was a matter of general conversation; I think this was after the January election." "I had heard generally that there were bills, and that they were paying them; once, on my way to the Gore; I do not remember anything beyond that." "I have heard my brothers talking that there were expenses; I could not say when that was, but many times; I have heard my brothers say they were willing to bear their share, and I stated I was willing to bear my share. Nothing was said beyond my brothers stating that they would join me with the expenses; as I stated I would bear the legal expenses with my brothers; I stated that I did hear the bills were being paid. I do not remember it being stated that that election would be carried, even though it cost ten thousand dollars, by any member of my family that I remember of. I will swear that no statement to that effect was made to my knowledge or in my presence that I remember of. I have heard some such statements; probably there was, probably there was not; I do not know, I do not remember any time when such a statement was made. I say there may have been such a statement of which I do not remember having heard; some one on the other side, Mr. Abbott's friends, told me they had heard such a statement; I may have heard such a statement but I do not know. There may have been friends of my own who said such a thing, but I cannot specify any time or place as being mentioned; it may have been; I cannot say when it was mentioned."

While the bills were being paid, in October say, was it contemplated that the respondent should run again as candidate? It is hard to believe that it was not. The respondent as to this says:

"The day of the judgment, after it was rendered, I had promised the people that I would go and see them, and I went out on the day after the judgment into the Gore and held a meeting, simply telling the people of the case that had been, and recounting all that had taken place, and said a judgment had been rendered annulling the election. I was asked if I would come out as a candidate, and I said, 'If I come out it will be at the request of the electors of the County, and not you; I merely came to report the decision in the case,' and then left, and that I would not become a candidate without such a requisition as would justify me in thinking it would be the wish of the people. I do not know if my brother then went out and canvassed for me. I do not think I had a requisition in my pocket; there may have been one in the hands of the driver on the day after the judgment. There was no date to that; he got that from Lachute; it was written then and not printed; there was no printed one extant at that time; I do not know from whom the driver received that requisition; when I started out with him I knew there was a requisition in his hand; when I called at that meeting there was no requisition produced, but after the meeting it was; I do not remember going round among the people and asking them to sign the requisition; I do not think I asked any man to sign the requisition; I stated if they wanted me, they would sign; I was at a number of meetings after the judgment; there may have been a number of requisitions out in my

Owens et al, vs. Cushing.

favour. I had a meeting the next day after that at noon; I do not think I took a requisition out of my pocket, but the driver may have had one: I am satisfied that I told them at every meeting that I would be a candidate if I received such a requisition as I wanted."

The Judge *a quo* is reported to have found that the respondent was aware of the existence of the January bills, and that they were being paid in October and November; that if they were not paid before the decision avoiding the January election, it was because, and respondent knew it was because, they were illegal, and that the payment of them before might imperil the seat which he claimed in that case; "payment of this kind would certainly popularize him," the Judge is reported to have said. The Court here unanimously hold that, considering the proofs that had been made against him, the respondent had to show that the bills paid were for legal expenses. Neither he nor his agents can explain them. If they were honest bills why ask lawyers whether they could be paid before the judgment was rendered? While on this part of the case, I would observe that I think I see that, at the times of those payments, respondent and his friends were ignorant of the principle that a voided election and one rendered necessary by the avoidance of one, were and might be held to form but one and the same election. It was not until February, 1875, that the first decision in Lower Canada was rendered (by myself) to that effect, in White and Mackenzie's case.

The Court unanimously hold that those payments in October and November, 1874, were in violation of the Act of 1874. They were meant to act, as in fact they did, in favor of the respondent, at the last election. See how the payment by Beaton to Archie Cameron acted upon him! The respondent, knowing what he did, ought to have interfered and stopped the payments that he knew were going on. We are bound to hold that he must be held to have known the character of the bills referred to, and to have been consenting party to the payment of them.

It is too much to ask us to believe that when the respondent's agent and brother, James Cushing, Meikle, and respondent were speaking together of those bills, "such bills," the respondent remained ignorant of the character of them. The bills were matter of general conversation, says the respondent himself. The respondent's examination was evidently embarrassing to him, and some of his statements are strange, for instance, this one:—Probably there was a statement in my hearing that that election would be carried through if it cost ten thousand dollars; probably there was *not* that statement; I may have heard such a statement, but I do not know, &c." The Court unanimously find that the judgment complained of was inevitable, seeing the proof made, and considering those omitted to be made, and it is confirmed. We will merely strike out that part of the judgment that reads as pronunciation of sentence against Mr. Cushing; that must be left to the law's pronunciation. As to the costs, the respondent must bear all costs in the original Court and here.

TORRANCE, J.:—In a case of such grave importance I feel bound to add a few words, explaining my view of the facts. The County of Argenteuil was the scene of two elections for the Dominion Parliament in 1874. The former

took place in January, 1874, when the Hon. J. J. C. Abbott and the present respondent were candidates, and the latter took place in November, 1874, when Thomas Owens, in place of Mr. Abbott, and the present respondent, were candidates. In connection with the January election, the most conspicuous feature I find was the keeping of open houses, at which spirituous liquors, called highwines, were freely circulated by the friends of the respondent:

Robert Meikle, one of his agents, says:—I am aware of liquors and provisions having been furnished on polling and nomination days in January—on nomination day, I cannot say for polling day. I cannot recollect. On polling day, at Lachute, there was an open house kept by Moise Jereux. I am not sure whether Roderick kept an open house. *I have reason to suppose elsewhere and generally throughout the County, on respondent's behalf, open houses were kept.* I gave orders for liquors as I stated, but no liquors personally.

Robert McCulloch says:—I voted at the first election, and I voted for Mr. Cushing. I had canvassed for him previous to the election, himself requested me to do so, I had no conversation with Mr. Meikle about it. I was not a member of the committee at Lachute. I had refreshments and liquors at the first election; I had highwines and bread and cheese. *To the best of my opinion about six gallons of highwines for myself.* I got this after the nomination, and before polling day. I did not pay for it myself. I got an order from Mr. Meikle for it. I said that I was wanting some stuff to treat any man that came in, and Mr. Meikle or some of the agents gave me an order, I think it was Mr. Meikle. I do not know if Mr. Meikle is a temperance man. I am myself sometimes, when I cannot get it. I got the highwines at Mr. Roderick's at Lachute; I then took them to my own house. I do not keep a tavern. *I drank a good deal of it myself,* and people who came in I treated them until it was all used; I treated all my neighbors round, as they came in. Probably there was talk about the election. They had an idea of where the highwines came from. I am quite satisfied *that they knew it came from Mr. Cushing.* On the day of polling I was away at the poll all day. The woman was in charge of my house. I guess my house was open during the polling day. The liquor was about finished during the polling day.

William Boyd says:—I supported respondent; I saw him before the election. * * * * There was some talk about the election; he did not know I was canvassing for him, but I did canvass for him; I got refreshments and liquors, some of it I suppose from Mr. Roderick, by an order from Mr. Robt. Meikle; I got *the liquor to give to everybody I met, and so I did;* I really could not tell how much liquor I got; I got three or four gallons anyway, or five may be; it was highwines; I got loaves of bread and cheese.

Thomas Campbell, of Milleisle, blacksmith, over 21, sworn, says; I did not work for any man at the last election; I canvassed a little; Mr. Cushing was at my house; he called to see me, if I remember rightly, I think once or twice before the January election; I had no liquor myself, but there *was liquor in my house; I could not say who it belonged to; Mr. Boyd brought it there; it was his own I suppose; he had no hired room there; I made no contract there for a room; he brought his liquor into my house;* I do not know how much he

Owens et al. vs. Cushing.

brought; I did take some liquor myself; I do not remember who was there when Mr. Cushing called; *I think Boyd* was there that evening; there *were different gentlemen*; got some work done, and they *had some liquor*; they were talking *about something, likely* speaking about the election; there *was liquor brought out*; the liquor was highwines; *the liquor was in the shop when I saw it; that is where I drank it; it was in an earthen jar; I think Mr. Cushing was there that day; he was not talking with me when I was having a drink; he was standing aside, that was all; he was in the shop, standing towards the door; William Boyd had the liquor then, carrying round the jar; I think the drinking was all in the shop that evening, and I think there was some drinking in the house and some out of it;* the night before the election there were some people in.

Let us now look to the expenditure in connection with the January election. James Cushing, the respondent's brother, is asked as to the cost of the January election, and cannot say if it cost $5,000. He does not think that he gave out more than $1,500 to $1,800 before the November election. In connection with the January election, bills were sent in, and some of them were for keeping open houses. James Cushing says:—"In the January election I paid bills for keeping open houses, and for liquor, and cheese and bread furnished." Some of the accounts were unpaid before the month of October. This was nine months after, and James Cushing gives the reason for the delay.

The respondent also tells us why:—"The reason they have not been paid before was that they would affect the election. The answer, that is Mr. Abbott's answer to respondent's petition, having been that corrupt practices had been used by me." We see here a remarkable harmony and coincidence between the respondent and his brother James, as to why the unpaid accounts had not been paid. Can we doubt but they were both familiar with the facts? The respondent is a man of superior intelligence and a lawyer. The respondent knew about the open houses in January; he knew, also, that the unpaid accounts were being paid. At first he declares his ignorance, but afterwards makes admissions. He says:—"I was not aware of bills being paid before the November election; I understood that they were being paid; I had heard that they were, on the day of the judgment. I am not sure who, but some one, asked Mr. Kerr who was up, if bills due in the January election could be paid without affecting any future election, without affecting me, and I overheard some statement by him that they *could be paid at once*; I think I heard him say that; this is all I heard. I took no part in that conversation, but I do *not know but what I asked him myself if bills of January could be paid until after the judgment was rendered;* whether I asked him myself or whether I overheard it, I do not remember." Further on he says:—"I understood generally that there were bills that had not been paid; I had heard, it may be from them, that is, James Cushing or Robert Meikle, but I cannot say positively; *it was a matter of general conversation.*" On the 6th October the contest between the respondent and Mr. Abbott terminated, and that very day Mr. James Cushing took steps for the payment of these accounts. He

was one of the respondent's chief agents. Thomas Noyes, a bailiff of Chatham, says:—

"Previous to the November election I did not distribute any amount of money to my knowledge; I took envelopes, and in them there might be money, and there might not."

To the Judge:—"I do not intend that what I say shall compromise any one; I intend that it will be the truth, and nothing but the truth; I handled no money previous to that election. Before the nomination in the November election, *I had envelopes placed in my hands* five or six days before; I think *I received them from Mr. James Cushing.* There was money in them, I suppose; he told me to leave them with the parties they were addressed to; he did not tell me what they were for, nor why I was a messenger to those different parties, they were addressed; I do not know why he gave me these envelopes, brought them to me."

Further on he says:—

"I think Mr. McTavish got one of those letters; he lives at Harrington; I did not say anything to him; it is likely I spoke to him but not about the letter, as I did not know the contents; I gave Alexander Beaton a letter. McKenzie, I don't know his first name; he lives at Arundell; I gave one to Burns, I think his first name is Thomas; he lives at Arundell; Finlay McGibbon, of Chatham, that was all I delivered. I don't think I gave these parties more than one envelope each; I might have done. I had not any money to leave at any of the houses; I had nothing to do with the envelopes but just to deliver them. I was not instructed not to say a word about them. I received no instructions whatever, except the naked envelope. This was before the nomination, after the judgment had been delivered annulling the election; I may have given two envelopes to Beaton, I did not give three to my knowledge; I did not give Mr. Butler any money; I had no conversation with him about the election; I think I have given all the names of persons I have promised money to; that is Larocque, Fagen and Fleuront. These offers had nothing to do with the election; I do not know how many people I canvassed; I did not leave any money in the village of Grenville, nor at Chatham; I think I only left one envelope with McTavish; not two to my knowledge; Mr. Cushing did not tell me what was in the envelopes, nor to take care of them; I did take care of them; I have never lost any papers.

No cross-examination.

"(By the Court)—These envelopes were sealed and they were addressed. On my oath I think they contained money."

The payment by sealed envelopes is a most significant one. No questions were to be asked. I agree with Mr. Justice Mackay that the respondent and his friends regarded the new election as something totally distinct from the election annulled. They thought that it could not be affected by corrupt practices which began in January. It is now well understood that as regards personal charges, the two elections are one. Let us now see what the respondent says: *After this conversation with Mr. Kerr I was not aware that my brother was paying these bills. I had heard on the road that the bills were being paid. I was aware*

Owens et al. vs. Cushing.

from a person on the roadside as I went back to the Gore. He told me he had heard that the bills of the January election were being paid; he told me he had heard that." Complaint has been made of the construction put by Mr. Justice Johnson upon the statement of the respondent, as to his meeting a man in the back of Grenville, and referring him to the proper parties for payment of his bill. The bill was for $100. It was a circumstance upon which the Judge fairly commented. By itself, the circumstance was insignificant, but in connection with other circumstances, it might have importance. Further on in his deposition, the respondent says of the unpaid bills, "I was not aware of bills being paid before the November election." Then he adds, "I understood they were being paid; I had heard that they were." Why this uncertainty and hesitation? It is important now to know whether the respondent was then a candidate. I don't think we can say the respondent allowed the grass to grow under his feet after the judgment of the 6th October. The day of the judgment, after it was rendered, he promised the people to meet them, and he went out the day after. He knew then the driver had a requisition in his hand. He had a meeting the following day, and he says he told the people at every meeting he would be a candidate if he received a satisfactory requisition. He was asked in his examination in Court about the bills, and he says: "When I heard this conversation about the bills being paid out, I did not ask about them or warn my brother to have them scrutinized, and that if these bills were for open houses they should be scrutinized. I had nothing to do with the bills; they had nothing to do with me. I heard subsequently. I stated I had conversation at different times, and supposed and knew there were bills out and unsettled."

What should we say of all these facts? We have a painful duty to perform, but I have had no difficulty as to what that duty was on the facts put before the Court. On the whole case, I am satisfied that there was a corrupt expenditure of money immediately after the judgment in October, and I am satisfied that the respondent knowingly acquiesced and participated in that corruption, and the judgment has correctly pronounced. It has been complained of the petition that it does not cover the facts found by the judgment, but I find that the 4th, 12th, 13th and 15th clauses are abundantly large. Counsel have also contended that the words of the disqualifying clause, section 102 of chapter 9, A. D. 1874, "actual knowledge and consent," are not in the petition, but that section only refers to the proof before the Judge. The clauses of the petition are such as are given in the forms used in England. I am of opinion that the judgment should be confirmed, but I would strike out that part which pronounced the disqualification, while at the same I think the report to the Speaker should be that we find corrupt practices by the respondent and by his agents with his knowledge, in the words of section 30 of chapter 10: A. D. 1874, the Act under which we are acting here.

Judgment affirmed.

J. A. N. Mackay (with him *C. P. Davidson*), for the petitioners.
Trenholme & Maclaren, for the respondents.
W. H. Kerr, Q.C., counsel.

(J. K.)

SUPERIOR COURT, 1874.

MONTREAL, 30TH JUNE, 1874.

Coram JOHNSON, J.

No. 34.

Buchanan et al. vs. *McMillan et uxor.*

A husband fraudulently and without value contrived with his wife to convey his real estate through a third person into her name, giving her at the same time a notarial power of attorney or mandate by which he authorised her "to sell, transfer and dispose of her immoveable property situated "in the City of Montreal or elsewhere." She then owned no other real estate except that so transferred to her. Acting under the mandate she mortgaged the property so conveyed to her and then standing in her own name. After receiving the money on said mortgage the husband and wife, by means of another third party and another set of deeds, contrived to have the property transferred back into the name of the husband. The husband being sued, pleaded that she was not authorized, and that the mandate was general and insufficient to bind him.

HELD:—1. Under the circumstances the husband mortgaged his own property, through his wife as mandatory, and he cannot plead his own fraud to deprive his mandate of effect.

2. Although the subject upon which a power in a *mandat* is to be exercised be general, the special reference of the power may be fixed by the facts proved, and it then becomes what our law recognises as a "*mandat exprès par le fait.*"

3. If a *mandat* in general terms authorizes the mandatory to sell, transfer and dispose of her immoveable property, and if it be proved that at the time of the granting of the *mandat* the mandatory only owned one immoveable property conveyed by the mandator at the time when the *mandat* was granted, then the power is rendered special by that fact, and is a "*mandat exprès par le fait*" applying to that property only.

4. Our law recognises a tacit express *mandat* as of equal authority to a written express *mandat.*

5. All facts denoting approbation and even silence upon the part of the mandator knowing the acts of the mandatory, involve ratification, and are equivalent to express ratification. Ratification is retroactive, and covers all that has been done by the mandatory.

6. The power to "sell, transfer and dispose of" includes the power to mortgage.

7. Under the above circumstances the lender did not require to bring an action to set aside the fraudulent deeds by which the husband, through a third person conveyed his property into the name of his wife, as the husband and wife by another set of deeds had reconveyed the property back into the name of the husband, and a direct action against the husband will lie on the deed of mortgage passed by the wife while she held the property, and husband and wife so conspiring fraudulently to obtain money will be jointly and severally condemned to pay back the amount, and the mortgage will be held good as against the property of the husband.

The declaration was very special, alleging that John McMillan and his wife, Elizabeth McCormick, plotted and conspired together to obtain money fraudulently. That with that object they agreed that the husband's real estate should be transferred to the wife, and that a written authority, or power of attorney from the husband should be given her, with which she would borrow money, pretending to give the security of immoveable property therefor, and thereafter refuse to repay the same, upon the ground that she had no legal or sufficient authority from her husband. That they successfully carried out their fraud in the following way:

On the 11th November, 1867, John McMillan, the husband, passed a deed of sale before Simard, N.P., of his immoveable property to Joseph Senez, clerk, under the Number 12076, for the stated price of £1400 paid in cash, and immediately on the execution thereof, Senez passed a deed of the same property back to Elizabeth McCormick, the wife, her husband signing to authorize her, under the next Number 12077, for the stated price of £1400 paid in cash.

Buchanan vs. McMillan.

That no cash was paid, but the sales were not *bonâ fide*, and were made as part of the above fraudulent plan.

That at the same moment of time, under the Number 12075, the husband gave her the power or authority above mentioned, being first an authority to act for him in all respects, and secondly an authority to her in regard to her own affairs, in the words following, to wit: "And for and in the name of the said constituent to *sell, transfer, and dispose* of all and every such *immoveable property situated in the City of Montreal*, or elsewhere, belonging and appertaining to the said Elizabeth McCormick his said wife, and the immoveable property which shall belong and appertain to her by future, by and in virtue of title of purchase, or by any other way whatsoever, the said Elizabeth McCormick being duly and specially authorized by the said constituent to sell and dispose of her said immoveable property without further authorization on the part of the said constituent, and finally for and in the name of the said constituent to execute and perform all and every act, deed and thing needful and expedient in and about the premises, hereby ratifying and confirming all, and whatsoever the said attorney shall lawfully do or cause to be done by virtue of these presents."

That the immoveable property mentioned in the said power of attorney as immoveable property situated in the City of Montreal or elsewhere belonging to the said Elizabeth McCormick was the immoveable property so at even date with said power of attorney transferred to said Elizabeth McCormick by said John McMillan, and she then held no other immoveable property.

That on the 19th June, 1868, as part of the said conspiracy, upon the representation that she was fully authorized under said power of attorney, she obtained from the plaintiffs a loan of $3,000 and signed a deed of obligation therefor, hypothecating the property which had been so transferred to her by her husband.

That she then acted as the mandatory of her husband, as part of said fraudulent conspiracy, in concert and collusion with him, at his instigation and really and truly though nominally in her own name mortgaged his property, with the design of obtaining money fraudulently; that having so far succeeded in their fraudulent designs, they again went to Simard's office, and she, assisted by her husband, transferred the property so hypothecated, with warranty, free and clear, to one Perrault, for the stated sum of £1400 cash, and then and there Perrault transferred the same back to McMillan the husband, with warranty, free and clear, for the sum of £1400 stated to be paid in cash, but no cash was in reality paid, and the sales were not *bonâ fide*, and only made as part of the above fraudulent plan.

That further to carry out said fraudulent design, by agreement with the husband McMillan, the wife, on the same representations as before, and under the same power of attorney, borrowed two other sums of $2000 each on other immoveable property to her belonging, at the corner of Sherbrooke and Cadieux streets, Montreal, and executed deeds of obligation and mortgage for the same before Lighthall, notary, respectively on the 15th September and 5th November, 1868.

That said John McMillan and his wife had profited, benefited, and been enriched by the said sum of $3000, and the said sums of $2000 each, and the said sums had turned and gone to their advantage and profit, and the property on Sherbrooke and Cadieux streets had been specially benefited and increased in value by the erection thereon of four three-storey brick houses, and two others partly thereon erected, the whole having been paid for out of said sums. That said McMillan and wife occupy one of the houses as their domicile, rent free, as do also their daughter and son-in-law. That she refuses to pay the interest due or the principal, and both she and her husband defy the plaintiffs to recover the same, asserting that she had no legal authority to borrow the money or mortgage.

That with the further design of defrauding plaintiffs she and her husband on 14th August, 1869, made a pretended and fraudulent sale of the property on Sherbrooke and Cadieux streets to Mr. V. P. W. Dorion, of Montreal, Advocate, passed before Papineau, N. P., and free and clear of said mortgages, for the stated consideration of $8000, on account of which said Mr. Dorion obliged himself to pay to the Corporation of Montreal £56 1s. 11d.; to George Martin £66 14s.; to Les Religieuses Sœurs Hospitalières de St. Joseph de l'Hotel Dieu de Montreal £628 7s. 8d., and interest, in all amounting to $3195.90, and the balance of $4804.10 to be paid to said Elizabeth McCormick, which balance she pretended to have received as stated in said deed by means of "*aux moyens des*" five promissory notes of said Dorion for $960.82, each dated the 14th of August, 1869, and payable respectively at La Banque du Peuple, in Montreal, in 12, 15, 18, 21, and 24 months after date.

This said sale was not *bonâ fide* or for any good or legal consideration, and no money was paid by Mr. Dorion, who was protected in the matter and never intended to pay the notes, and was guaranteed against them and against having to pay any of the claims against the property.

The said Mr. Dorion also at time of said sale well knew of the mortgages in favor of the plaintiffs, and had due notice thereof, the same being registered.

That, by reason of the premises and by law, the plaintiffs had a right to have McMillan and his wife jointly and severally condemned to pay said sum of $3000 with interest and costs, and to have the property declared mortgaged and hypothecated for the payment of said sum of $3000, with interest as aforesaid.

McMillan, the husband, pleaded that the mortgage in question was null because the power of attorney set up was illegal and insufficient.

The wife also pleaded to the same effect.

Morris, J. L., for plaintiffs:—

All the allegations of the declaration are fully proved. The attempted fraud upon the part of both husband and wife has been proved by their own admissions.

The real questions are: 1st. Was McMillan's property fraudulently put by him in her name in order that she might borrow money on it? 2. Was the power of attorney given by him for that purpose? 3. And did he approve of her acts? If so, the Court will not uphold their attempt at fraud, but will declare that she acted as his mandatory, and that the mortgage is valid as against him and

Buchanan vs. McMillan.

his property. Their object in having the property passed without consideration from the husband to the wife, through Senes, and the power of attorney given to her at the same time, must have been that for which they afterwards used the property and power of attorney, viz., obtaining money, or it must have been something else. If something else, then the defendants ought to have been able to explain it. But instead of doing so they made matters worse for themselves. They both, when examined, came prepared with the same story, which proves to be a deliberate lie. It does not hold together for a moment, fraud appears upon the face of it. Being asked his object in so passing his property to her, he says: "I wanted her to have the house, so that I would have it as well myself as long as I lived, and the children wanted her to have the house after my death." Then to the question if he wanted to prevent his children from getting the property he says: "yes, till after her death." This does not agree with what he stated before, that the children wanted her to have the house after his death; if they wanted her to get it, why had he to do this to prevent them from getting it? Then again, he says they had made no claim to the property. Then being asked upon oath if there was no other reason, he did not dare to say no, but said, "There is no use to give any other reason." This story about the fear of their children did not seem very plausible, and a glance at their marriage contract, fyled of record, will show that it was utterly untrue. By that document the usufruct was secured to her, so that the children could not have touched the property while she lived. But the contents of the power of attorney itself prove the untruthfulness of her story. It gave her power to transfer, sell and dispose of her immoveable property situated in Montreal. Now, if it be proved that the property in the power of attorney was the same as that which he says he transferred to her to hold as long as she lived, then his story is false, for if he wanted her only to have the usufruct, he would not have given her power to sell. This is abundantly proved. He admits in his deposition that it was this property that by the power of attorney he gave her authority to sell, transfer and dispose of, and says there could be no other property, p. 3. Then he admits, p. 3½, that he gave her the power so that she could buy and sell without his having any power over her. Afterwards being asked what was the immoveable property which he intended his wife to deal with under the terms of the power of attorney he said, "I don't remember." Here by this answer he admits that he did intend her to deal with certain property under the power. Then, after this, he admits that when he gave the power to her, she had no immoveable property in Montreal but that then transferred to her. This fixes the reference of the power of attorney. The immoveable property which he gave her power to sell and dispose of was his, and he therefore swore to a lie when he stated that it was put in her name to hold during her life, for fear of the children. Both he and his wife ought to be committed for perjury. It is clear that the power of attorney was given by McMillan to his wife, for the purpose of borrowing money on his property in the way that she did, and that she, therefore, acted as his mandatory. It is equally clear that the mortgage being effected, McMillan approved of the acts of his mandatory and ratified them. There was first a direct mandate and, secondly, a complete ratification, and, to use the words of Troplong, "Ratification

équivaut à un mandat." This consent and ratification appear from McMillan's deposition. Being asked, "when did you first know of the said mortgage for $3000," he said: "I could not tell the date; it must have been some days afterwards. I saw her with money in her hands in my shop; she came into my shop with the money in her hands. I asked her where she got the money; she told me she had mortgaged the said property in St. Paul street. I was not well pleased to hear of this. I told her to send the money home to whoever gave it to her; she said her debt would never give me any trouble,—that she would pay it herself without giving me the least trouble. I do not remember doing anything more. I was satisfied with her explanation that I would not be troubled.

Question.—Were you then satisfied to let matters remain as they were, in reference to the said mortgage on the property upon the assurance by your wife that you would not be troubled?

Answer.—Whether or not I was satisfied, I had to put up with it. I was satisfied because I looked for no trouble; she had never given me any trouble before. I never would have done anything with the property in the way of taking it back again if she had not threatened to mortgage it a second time. It was a good while after that first mortgage that she told me she was going to mortgage the property again." Then, in another part of his deposition, p. 9, being asked if he did not allow the mortgage for $3000 to remain on his property until his wife threatened to mortgage it again, he says: "I did allow it to remain because I could not help myself. She said she would pay it herself." So we have it clearly proved that, after explanations from his wife, he was satisfied with what she had done and he allowed the mortgage to remain. Here, therefore, is consent, approval, ratification. But more, he acted otherwise so as to show consent. He did not notify the plaintiffs that he had any objections to the mortgage; he did not revoke the power of attorney; he took no measures to make his wife give back the $3000; he admits all this;—in fact, he was satisfied.

But he pleads, supposing all this to be true, the *mandat* is general and, therefore, by law is null. He relies upon art. 1703 of the C. C. which says that the mandate "for the purpose of alienation and hypothecation, and for all other acts of ownership, other than acts of administration, must be express." In answer to this plaintiffs say: 1. The written mandate in this case fyled is *special* for the particular property in question. 2. The law recognizes a *tacit* express mandate as well as a written express mandate. 3. Ratification *équivaut à un mandat.* 4. The special reference of a *mandat* may be fixed by reference to the facts proved and thus the law recognizes "*un mandat exprès par le fait.*" 5. If there be intended fraud the parties cannot invoke the law made for honest people, and the best and only remedy is to maintain this contract made by them.

Now, as appears above, McMillan admits that the power of attorney had reference to his property, therefore it is special and "*exprès par le fait.*" Then by its terms it applies to the whole of his immoveable property in Montreal, therefore it is express. Duranton, No. 227; Troplong, mandat, No. 120, *exprès par le fait.* Ib. No. 121 says that art. 1985 of the C. Nap. has not abolished tacit *mandat.* Our article is in substance the same as art. 1985 of the C. N.; No. 101, consent alone required; 102, 103, 114, 115, 116, manner of acting suffi-

Buchanan vs. McMillan.

cient, silence, &c. 117, Pothier, No. 29, tacit *mandat*, ratification; Troplong, Mandat, No. 619; 601, 602, 604, 610, 612, 613, 617. Ratification retroactive and covers all that has been done. Even in the case where there has been no consent by the husband (which is not this case) a wife can always be personally condemned if the moneys borrowed by her have turned to her profit or benefit, and she will not be allowed to plead nullity of contract without returning the money. In this case she built four houses with the money, as she admits, and she subsequently sold them to Mr. Dorion. The money did not disappear, but is represented by the houses. It is all there still. She even says she spent three thousand dollars more on the houses, which sum she borrowed from her son-in-law, Joseph A. Whyte. It is evident, therefore, that the houses must be worth much more than the $3000 in question here. Mr. Dorion proves this, for he says he thought his purchase a good bargain, even although the plaintiffs were to gain their suit. He could only mean by these words that at the price he paid, he could pay the plaintiffs' claim, and still make money by the property.

It thus appears that the whole $3000 turned to the wife's profit and advantage. Pothier, Puissance du mari, 51,52; Demante, mariage, art. 217, p. 2424. No. 300, bis.; 2 Denisart, p. 788, (12); Teullet, p. 55, No. 55; Lahaie, p. 77, No. 201.

It is clear from the above authorities that even where there has been *no authorization or consent whatever*, or collusion on the part of the husband (a case very different from this one), the wife can be personally condemned if she benefited by the money borrowed.

McMillan, the husband, is also personally responsible because he acted fraudulently with her, because he knew of her acts and did not disavow them, and because he acquiesced, and benefited by the money. He has been living in one of the houses, rent free, ever since. He admits he handled some of the money, as he says, when she was paying the men. He also took possession of the notes given by Mr. Dorion. He admits he never objected to her mortgaging the property. In the exercise of his "puissance maritale" he might have prevented her getting or retaining the money; but he did not. He is *particeps criminis* with her.

Pothier, de la puissance du mari, 52.

Pothier, Obligations, says, "Une autre espèce d'obligation [illegible] celle des pères de famille qui sont responsables des délits de leurs [illegible] mineurs et de leurs femmes, lorsqu'ils ne les ont pas empêchés ayant été en leur pouvoir de le faire. Ils sont présumés avoir pu empêcher le délit, lorsqu'il a été fait en leur présence. Lorsqu'il a été fait en leur absence il faut juger par les circonstances si le père a pu empêcher le délit. Par exemple, si un enfant a eu une querelle avec son camarade, et l'a blessé d'un coup d'épée, quoique hors de la présence du père, le père peut être tenu de ce délit, comme ayant pu l'empêcher en ne lui pouvait faire en ne permettant pas à son fils de porter l'épée, surtout s'il était naturellement querelleur."

Here the case is even stronger, for the husband gave the wife the instrument that caused the damage (if there be any), viz., the power of attorney, and knew she mortgaged under it, but allowed her to keep it until she got more

money—never cancelled or revoked it. It was in his power to have prevented her getting these two second and third loans of $2000 each, by informing plaintiffs that he considered she had acted without his authority in borrowing the first sum of $3000, and by revoking the power, but he did not.

Sourdat, *de la responsabilité*, 858; 850, 851.

It was pretended that a power to sell did not include a power to mortgage; but the authority in question gives power to "*sell, transfer, and dispose of.*"

These powers include everything.

Pothier shews that the power to dispose gives power to mortgage. Pothier, Hypothèque, p. 428.

The plaintiffs would here remark that even if it were true (which they deny) that the wife in this case acted purely and simply under a general authorization, the law is not applicable. The law that the wife cannot act without the authorization of her husband, and that general authorizations are null, was framed in favor of the husband for the maintenance of the "puissance maritale." Pothier, *Traité de la puissance du Mari*, sec. 1, No. 3: "La necessité de l'autorisation du mari n'est donc fondée que sur la puissance que le mari a sur la personne de sa femme, qui ne permet pas à sa femme de rien faire que dépendamment de lui."

Here the wife did not act independently of the husband, but in fraudulent collusion with him, so that the law invoked does not apply to this case. The law clearly applies only to the case of the honest husband, that his authority over the person and property of his wife may be maintained. It aids him only. It cannot be violated. But if the husband and wife are both acting in bad faith, as in this case, with the deliberate design of defrauding their neighbours, will the law aid them? Has it been violated? Has his marital authority been prejudiced? Surely not. The law cited is therefore not applicable to this case. The law sanctions public order but never private swindling. Were the abstract text of law cited by the defendants, (which has been shewn to be intended for an entirely different set of circumstances than those in the present case,) to be applied as the defendants wish, then the reason and theory of the law would indeed be violated, and another and higher law destroyed, viz., that parties cannot plead their own fraud, and that fraud never will be sanctioned by law.

The defendants will probably cite authorities in the same sense as the Article of the Code, but so far as the plaintiffs can ascertain, there is not a single case reported or put by the authors, identical with this, in so far as fraud and collusion upon the part of the husband is concerned. The authors are all great sticklers for the maintenance of the marital authority, and rightly so. They all discuss the question arising where the wife has acted without authority or has employed fraudulent manœuvres without the knowledge or participation of the husband. They all take it for granted that the husband is honest, and that his authority has been attempted to be overturned by the designing wife. And it is upon this principle alone, viz., the principle that the honest husband's authority has been set at naught, that the abstract rules are founded.

Even then they go the length of saying that if the wife has employed fraud, the *best remedy is to maintain the contract*, for the law never sanctions fraud,

Buchanan vs. McMillan.

a fortiori, when as in this case there is proved a deliberate fraudulent conspiracy, and where the evidence shews that the husband's authority was not violated. Demolombe 2, Mariage, No. 328.

Much more is this applicable when the husband countenances the wife in her fraudulent manœuvres. In this case both husband and wife agreed to plead that the document was worthless, and yet she with his sanction and approval deliberately employed it to obtain the $3000 and mortgage the property, representing that it was a good and sufficient authorization and consent in writing.

Even when there is no fraud pretended upon the part of the husband, it is held, 2 Denisart, p. 788 (12) if the moneys borrowed by a woman turn to her advantage, *she cannot plead* (exciper) want of authorization. It is important "de ne pas canoniser le dol et la fraude."

Lahaie, p. 77, No. 201: "Lorsque la femme ou ses héritiers demandent la nullité du contrat, *ils doivent restituer* ce dont elle a profité par suite du contrat."

Art. 1011, Code of Lower Canada: "When minors, interdicted persons, or married women are admitted in these qualities to be relieved from their contracts, the reimbursement of that which has been paid in consequence of these contracts during the minority, interdiction, or marriage cannot be exacted, unless it is proved that what has been so paid has turned to their profit."

1 Bedarride, du dol, &c., No. 86, holds that the contract ought to be maintained where there is a fraud. Civil Code, L. C., Art. 1038: "An onerous contract made with intent to defraud on the part of the debtor, but in good faith on the part of the person with whom he contracts, is not voidable."

The doctrine that the rules of law are made in the interest of the honest husband upon the supposition that there has been fraud as against him, but that this presumption can be destroyed, appears clearly by Bedarride, du dol, vol. 2, No. 805, 806.

It is clearly left to the Court to judge from the evidence and from all the facts and circumstances whether or not there has been a consent upon the part of the husband.

Some of the authors even say that where there is no writing, the admission of the husband that he was a consenting or approving party, is sufficient. *Vide* Demante, Mariage, Art. 217, p. 2424, No. 300, *bis*. He writes upon the Code Napoleon, Art. 277, which is the same as our 177, so that his remarks are in point. He says, "Le consentement du mari substituée avec raison par la loi à l'autorisation formelle exigée dans l'ancien droit, doit être par écrit, c'est à dire que l'écriture est exigée *pour la preuve*, et le conséquence est qu'on ne pouvait le prouver par témoins ou présomptions, mais l'esprit de la loi ne permet pas de considérer l'écriture comme condition de la validité du consentement, et je n'hésite pas à dire que *le consentement* non prouvé par écrit pouvait être utilement *par l'aveu de la partie* ou la délation du serment."

There is no doubt that the above is sound reasoning, and conformable to Art. 251 of our Code of Civil Procedure, which says: "Any party to a suit may be subpœnæd, examined, cross-examined, and treated as any other witness, but his evidence cannot avail himself," and to the latter part of the article: "The

answers given by a party thus examined as a witness may be used as a *commencement of proof in writing*."

So here if there were really any defect in the written consent in this case, if there were any doubts as to its applicability as a consent to the acts in question, it is available as a commencement of a written consent, and the evidence supplies the rest. The fraud and collusion as well as the consent and approval of the husband are proved.

Sirey, 1791, 1850. Mot autor. de femme mariée, No. 310: "Les juges peuvent sans violer aucune loi décider *d'après les faits et circonstances* qu'il y à eu concours du mari et de la femme pour exécuter et ratifier un acte nul, faute d'autorisation maritale."

Much more can the judges without violating any law in this case, where there is authorization and consent in writing, decide from the facts and circumstances that the wife had the full consent and approval of her husband.

Independently of the question of fraud, the written consent or authorization was special. It gave the wife authority for and in the name of the said constituent to *sell, transfer* and *dispose* of all and every such immoveable property situated *in the City of Montreal* or elsewhere, belonging and appertaining to the said Elizabeth McCormick, his wife, and the immoveable property which shall belong and appertain to her by future, by and in virtue of title of purchase, or by any other way whatsoever, the said Elizabeth McCormick being duly and specially authorized by the said constituent to sell and dispose of her said immoveable property without further authorization on the part of the said constituent, and finally, for and in the name of the said constituent, to execute "and perform *all and every act, deed and thing* needful and expedient in and about the premises, hereby ratifying and confirming all and whatsoever the said attorney shall lawfully do or cause to be be done by virtue of these presents."

Both husband and wife admit that she had at the time of the execution of the said power of attorney no other immoveable property in Montreal or elsewhere except that of the husband, then transferred into her name. The authorization and consent, therefore, was special, and related to that property, and when the Court remembers the fraudulent conspiracy, the sanction of the husband, and his evidence that he "did not object to her mortgaging the property," and knew she was acting under the power and never cancelled it but approved of everything,—the plaintiffs are confident that the Court, without disturbing the general principle that general authorizations are null, will hold that, in this particular case, in view of all the circumstances, the authorization and consent was sufficiently special.

An authorization to alienate immoveables in a certain locality is sufficient. Duranton du Mariage, vol. 2, No. 449.

The action No. 41 where Judge Mackay gave judgment, and which is pending in Appeal, is entirely different in the essential points from this. Here the question is as to whether the husband mortgaged his own property through a mandatory; there the question was as to the sufficiency of a power of attorney to authorize the wife to mortgage her own property. The law in regard to authori-

Buchanan vs. McMillan.

zation to married women, referring to their own property, is much more strict than that regulating acts of individuals who have the free exercise of all their rights.

The plaintiffs are confident Judge Mackay's judgment was erroneous. At the argument in Appeal the judges said if there was fraud on the part of the husband in any case the mortgages must be maintained.

In the case referred to by defendants, when plaintiffs demanded an assignment under the Insolvent Act, Judge Mackay held that these same obligations were null, but the Court of Appeals reversed his judgment.

Defendants say the building of the houses was a ruinous speculation—the plaintiffs have nothing to do with that. Besides the fact is that she built four houses—three-storey brick houses—with the money. The deed from Doane fyled shows that she paid only about $3500 for the property, and she sold it to Mr. Dorion for $8000.

Finally, plaintiffs say, if the Court finds fraud and collusion and consent and ratification on the part of the husband, it can only in justice maintain the mortgage and declare McMillan responsible for the act of his agent and his property affected with the mortgage.

JOHNSON, J. :—This action is brought by the widow and three of the children of the late Dr. McCulloch, to recover jointly and severally from the defendants, John McMillan and Elizabeth McCormick, his wife, a sum of $3139 and interest, borrowed by the wife as his agent, on the security of certain real estate which she mortgaged under a power of attorney from her husband; and also to have the real estate in question declared hypothecated for the payment of the amount borrowed and the interest. The plaintiffs allege a very peculiar series of facts. They say that, in 1867, the defendants conceived a trick by which they could raise money: that the husband owned some real estate, and that he and his wife agreed that it should be transferred to the wife, Elizabeth McCormick, and that she should procure money, pretending to give security thereon, and afterwards replace it in her husband, without having, in fact, created any hypotheque; they went together to a notary's office, and, on the 11th November, 1867, an illegal deed of sale of said property was made to one Senez for £1400, alleged to be paid in cash.

That, immediately thereafter, under the next number in the notary's minutes, another illegal deed of sale of said property was made by Senez to Elizabeth McCormick, the wife, for £1400, alleged to be paid in cash.

That no money was paid down *bonâ fide* at either of said illegal sales.

That at the same time, as part of said plot, McMillan, the husband, gave the wife a notarial power of attorney, then drawn by the same notary, by which he gave her full power to act for him in all things, and to manage his estate, and to transfer, sell and dispose of all the immoveable property belonging or thereafter to belong to her, situated in the city of Montreal, or elsewhere, in the same way as if he were personally present.

That she had then no other real estate standing in her name in Montreal, except that just then transferred to her by said illegal deeds.

That on the 19th of June, 1868, producing said power of attorney, and re-

presenting that she was duly authorized, she obtained a loan of $3000 from the plaintiff and mortgaged said property by deed of that date, passed before Hunter, N. P., duly registered.

That in the borrowing of the said sum, and the mortgaging of said property, with the approval of her husband, she acted as the mandatory of her husband.

That, having so far succeeded in their fraudulent design, McMillan and his wife, on 31st August, 1868, again went to the office of the notary Simard, and by the aid of one Perrault, re-transferred said property to the husband, McMillan, first by a deed from the wife, McCormick, to Perrault, and then by deed from Perrault to the husband, McMillan, the consideration being as before in each deed stated to be £1400 paid in cash, and the property being stated to be free and clear, *franc et quitte.*

That no money was *bonâ fide* paid.

The declaration then sets up that, on the 15th day of September, 1868, and the 5th of November, 1868, as part of the said plot, the wife making the same representations as before as to authority from her husband, obtained a further loan of $4,000 from the plaintiff on other property in Montreal, which she had purchased in part with the money obtained first from the plaintiff, and passed mortgages for the same. That she built six houses with the money on the property, and the defendants are living rent free in one of the houses, and their daughter and son-in-law in the other.

That both husband and wife have profited and benefited by said money lent to them.

That they now refuse to pay the interest overdue, and both openly assert that the wife had no legal or sufficient authority to borrow any of said sums of money, and defy the plaintiff to recover or to hold the properties liable and mortgaged. That one of the properties has since been transferred by a pretended deed of sale to a pretended *tiers détenteur* who is not a *bonâ fide* purchaser, and was fully protected, and has no interest in this contestation.

The present case seeks to enforce the plaintiff's rights under the obligation for $3,000 merely, and refers to the other two mortgages only to show the continued intent to defraud; and the prayer of this demand is that the defendants, McMillan and his wife, may be summoned to hear the property declared mortgaged for the said sum and interest, and that they be jointly and severally condemned to repay it, and that the husband be adjudged to have been all along owner of the property mortgaged for the $3000, and that the deed of the 19th of June was made in reality by the husband acting through the wife, his mandatory. The declaration is unnecessarily prolix and confused; but the pretensions of the plaintiffs are discernible, and the defendants have pleaded to them separately. McMillan contends that there is no mortgage; that the power of attorney under which it was given by the wife was insufficient, and the mortgage created without his consent or knowledge. McCormick, the wife, pleads that there was no fraud; that the plaintiffs had full knowledge of the deeds from McMillan to Senex, and from Senex to her, and, by a previous hypothecary action, had admitted the legality of those transactions; and that she was never authorized by her husband to borrow the money. I have had this case before

Buchanan vs. McMillan

me for some time ; first I put it aside, because I was under the impression that the other case, in which Mr. Justice Mackay had decided against the sufficiency of the power of attorney, and which is now in Appeal, presented the same question as this, and I thought it right and decent under such a system as ours, where every fact may be questioned in every jurisdiction, to take all the means in my power of ensuring uniformity ; and latterly the pressure of business has left me no day for considering it, except those which all the world, except judges, may, take as holidays. I have now given the case all the attention in my power, and I find that the main question before me is essentially different from that decided in the other case by Judge Mackay. In that case the point was the sufficiency of a power of attorney to authorize the wife to mortgage her own property, in which the law is very strict, as it is in all matters referring to the separate property of married women. Here the real question is whether the husband mortgaged his own property through a mandatory, and whether his own fraud can be pleaded to deprive his mandate of effect; and it is to be regarded by the rules that govern the ordinary acts of individuals who have the free exercise of all their rights.

There are two points to be considered : the fraud of the defendants, and the sufficiency of the authority given by the husband. The first is a question of fact, and of itself would probably be decisive of the whole case ; for it could hardly be contended that McMillan could plead his own fraud as effectual to prevent the existence of the mortgage which he contrived as a means of obtaining the money.

There is no room to doubt, under the evidence, the fact of fraud of the blackest kind. Both of these people have been examined as witnesses ; and human nature never made a more abject appearance than they do in striving to hide the truth which nevertheless they are both at last obliged to confess. To refer now at any length in their testimony would be useless and loathsome : repeated in every form of cunning, and varied in very attitude of mendacity, their denials and their pretexts are all alike admitted to be lies at last, either directly, or by inference from other statements of which the truth could not co-exist with their story. I will merely ask what possible object there could have been in passing about this property by all this dirty jugglery of deeds and reconveyances without money and without pretext, unless it be the object alleged by the plaintiffs, and which, when pressed, the wife herself will not even deny ? It must have been this, or some other. In the names of justice and common sense, if it was any other, why can it not be even suggested by the parties themselves when they have the chance of saying what they please ?

I should be ashamed if I felt myself obliged to confess that the law of this country was powerless to detect and defeat such a flagrant fraud ; but I think it is not so : I think that nowhere is the fraud of these wretched people more apparent than by their own act in undoing all these deeds again as soon as they had got the money, an act which in itself is decisive in my mind of the fraud of the first set of deeds, and which relieves the plaintiffs from asking that they be set aside.

Buchanan vs. McMillan.

Then as to the abstract question of law as to the authority to hypothecate. It is said that by the Code the authority must be express. Art. 1703 says: "For the purpose of all acts of ownership other than acts of administration, the "mandate must be express." I should like to ask how it could be more express, as far as the power is concerned; as regards the subject upon which that power was to be exercised we may have to go farther; but not much farther: not farther than the admissions of the parties themselves when examined as witnesses, for they are obliged to admit that she had no other property at the time the power of attorney was given than the one that she had, on the same day, been fraudulently and nominally invested with by her husband. This fixes the reference of the power of attorney. The only property on earth that she had any power over by that instrument is ascertained; and that property was his, and remained his, though he called it hers for the purpose of effecting this robbery, for in common language and common sense it is nothing else. But more than this; he ratified what she had done. When he was told of it, he says himself that he was satisfied: that he never notified the plaintiffs that he was not; and after explanations from his wife, *he allowed* the mortgage to remain. Here therefore is consent, approval, ratification; what more is wanted?

The mandate then is express, and it is special for the particular property in question, because there was no other property to which it could possibly apply. But the law recognizes a tacit express *mandat* as well as a written one. The special reference of a mandate may be fixed by the facts proved, and it becomes what the writers call a "*mandat exprès par le fait.*" Troplong, *mandat*, No. 120, refers to this, and gives somes examples of it; and at No. 121 says that the modern French Code has not abolished *tacite mandat*, which may be said with equal certainty of our own Code. At No. 101 he says: "il n'y a pas de "paroles sacramentelles pour exprimer la valonté du mandat; comme il prend "sa force dans le seul consentement, il suffit que ce consentement soit certain "pour que le mandat demeure ferme et assuré."

Again at No. 116: "Rien n'est plus raisonnable et juste. Vous avez sous les "yeux une personne qui prend la question de vos interêts. Vous pouvez l'empê- "cher, exprimer un dissentiment; mettre une opposition, et vous ne le faites "pas. Qu'y a-t-il de plus certain que votre adhésion à ce que fait cette "personne? et cette adhésion, n'equivaut-elle pas à un consentement exprès? "Qu'est-il besoin de paroles ou d'écrits pour attester ce qui ressort nécessaire- "ment de votre manière d'agir." And "Pothier," he says at 117, does not hesitate to give tacit, the same authority as express mandate. And at No. 619, "Ratification équivaut à un mandat." 610, "All facts denoting approbation involve ratification, and are equivalent to express ratification." 612, "If he keeps silent he ratifies." 617, "Ratification is retroactive, and covers all that has been done."

I need not say that the power to sell, transfer and dispose of included the power to mortgage. (Pothier, Hyp., 428.) I do not notice either, the argument that a previous action *en déclaration d'hypothèque* recognized the simulated deeds to Senez, and from him to McCormick; because the fraud was evidently

Buchanan vs. McMillan.

not then discovered. The conclusions of the demand are therefore all granted. I see no room for doubt, or even for plausible argument in the case. The fraud is certain. The authority is express—the object is ascertained, and the confirmation admitted. The only remaining questions would seem to be whether the deceit is to be effectual to shield the deceivers, and the law powerless to protect the victims. The operation is nothing but a theft effected by conspiracy, if not a theft in the technical sense; at all events a theft in every moral aspect and practical result:—a theft in which the accessory before the fact, who is in law also a principal, has the hardihood to say, as it were: "I pointed out the house. I gave you the instruments to pick the lock: I share the plunder; but I am not liable because I told you to do it on your own account, and not on mine. True that in telling you so, I was only shamming; but the sham was good enough to get the money, and I hope it may be strong enough to defy the law."

The judgment was *motivé* as follows:

The Court, &c., considering that, by deed of obligation, of the 19th of June, 1868, before Hunter, notary public, at the city of Montreal, the defendant, Elizabeth McCormick, duly and sufficiently authorised thereto by power of attorney from the said John McMillan, the other defendant, of date the 11th of November, 1867, made and executed at Montreal, before Simard, notary public, did acknowledge and confess herself to be well and truly indebted to Dame Janet Buchanan, widow of the late Michael McCulloch, deceased, in his lifetime of Montreal, Esquire, physician and surgeon, acting in her own name as having been *commune en biens* with her said late husband; Janet McCulloch, Jane McCulloch and Elizabeth McCulloch, spinsters, *filles majeures, et usant de leurs droits*, and Agnes McCulloch, wife of John L. Morris, Esquire, Advocate, by her said husband duly authorised, all of Montreal, therein acting in their own names and right, as assignees of their brothers, Michael McCulloch and Andrew A. McCulloch, therein represented, acting and accepting by the said Michael McCulloch, their duly authorised agent and attorney, in the sum of $3,000, and for security for the payment thereof to the lenders (who in the present case are now represented by the plaintiffs) did specially mortgage and hypothecate the real estate in the declaration mentioned and described as follows, to wit [here follows the description];

And considering that the said deed of obligation was so made and executed by the said Elizabeth McCormick, as aforesaid, under special power and authority from her husband, the other defendant, and at his special instance and request, and considering that, before the making of the said deed of obligation, the said defendants had fraudulently conspired together, and with others, to obtain the said sum of money, and other sums; and, for the purpose of effecting their fraudulent design, had illegally, fraudulently and without consideration, by a pretended deed of sale of the 11th November, 1867, from the said McMillan to one Joseph Senez, and by another pretended deed of sale of the same date from the said Joseph Senez to the said Elizabeth McCormick, contrived to make it appear that the said real estate hereinbefore described was sold and transferred to the said Elizabeth McCormick;

And considering that the said pretended sale and transfer thereof to the said Elizabeth McCormick, in manner last aforesaid, was a mere trick and artifice, contrived by the said defendants, for the purpose of deceiving those from whom they hoped to get money, and that it had not by law the effect of depriving the said McMillan of his property therein, or of vesting the same in his wife, the other defendant;

Considering that, on the same day as last aforesaid, at Montreal aforesaid, the said John McMillan did execute a power of attorney to and in favour of his said wife, before Simard, notary public, to sell, transfer and dispose of all and every such immoveable property, situated in the City of Montreal or elsewhere, belonging and appertaining to the said Elizabeth McCormick, his said wife, and the immoveable property which should belong to her by future, and by and in virtue of title of purchase, or by any other way whatsoever, the said Elizabeth McCormick being duly and specially authorized by the said John McMillan to sell and dispose of her said immoveable property without further authorization on the part of the said John McMillan;

Considering, further, that at the time of executing the said power of attorney, and at the time of executing the said deed of obligation of the 19th of June, 1868, the said Elizabeth McCormick had no other property or real estate, to her belonging or pretended to belong, except that which had been so pretended to be sold and transferred to her by her said husband;

Considering that the said power of attorney of necessity applied to the said hereinbefore described property, and was, therefore, to all intents and purposes an express mandate;

Considering that, in the circumstances of gross fraud and conspiracy concocted by and between the defendants, as proved in the present case, they cannot nor can either of them be permitted to avail themselves of such fraud and conspiracy, for the purpose of avoiding payment of the said obligation, by pleading the insufficiency of the said power of attorney;

Considering that after the said defendants had, by the fraudulent means aforesaid, succeeded in getting the money, for the recovery of which the present action is instituted, they undid the said pretended deeds of sale and transfer, and by a deed first from the wife to one Perrault, and then by a deed from Perrault to McMillan, the husband, without any consideration, and with a view of completing the said fraudulent design, the said property so hypothecated was re-transferred to the said McMillan, who in reality has never ceased to be owner thereof;

Considering, further, that the said defendant McMillan confirmed and ratified all that his wife had done under the said power of attorney;

Considering that defendants have profited and benefited by the said sum of $3000;

Considering, therefore, that the defendants are jointly and severally indebted to the plaintiffs in $3139 with interest on $139 from the 4th of November, 1869, day of service of process in this cause, and on $3000, at eight per cent. per annum from the 19th of June, 1868, and that the said sums are due and exigible by the express terms of the said deed of obligation of the 19th of June,

Buchanan vs. McMillan.

1868, and produced and fyled by the plaintiffs. And the said property hereinbefore described was under the said deed of the 19th of June, 1868, (which was duly registered) hypothecated for the payment thereof, doth declare the said hereinbefore described immoveable, so hypothecated under said deed of the 19th of June, 1868, for the payment of the said sum of $3139, with interest as aforesaid, and doth adjudge and condemn the said defendants jointly and severally to pay and satisfy to the now plaintiffs, to wit, Dame Jane Buchanan, Jane McCulloch and Elizabeth McCulloch, the sum of $3139, with interest, &c., and costs of suit, distraits, &c.*

Judgment for Plaintiffs.

J. L. Morris, for the plaintiffs.
J. A. Perkins, for the defendant.
(J. L. M.)

SUPERIOR COURT, 1876.

MONTREAL, 19TH JANUARY, 1876.

Coram MACKAY, J.

No. 2731.

Kane vs. *The Montreal Telegraph Co.* et al.

A shareholder in a corporate body having applied to a Judge in Chambers for a writ of summons to the Corporation and its directors to appear before a Judge in Chambers on a day and at an hour to be named, and for an injunction to restrain the Corporation and its directors from declaring a specified dividend for the past six months, the Judge ordered that a writ of summons should issue returnable before himself or some other Judge in Chambers on a day and at an hour named, and ordered further that the defendants be restrained from declaring the said dividend. No summons issued in the terms of said order, but an ordinary writ of summons only:

HELD:—1. That notice should have been given to the defendants of the application for an injunction.

2. That the issue of an ordinary writ of summons, commanding the defendants to appear in the Superior Court on the day named was not a compliance with the terms of the order.

3. That in the affidavit in support of an application for an injunction it is not sufficient to allege grounds of information and belief merely.

This was an application to set aside an injunction order, on grounds which will be apparent from the following:—

Motion on behalf of Peter Redpath, one of the defendants, that the order of Hon. Mr. Justice Mondelet, granted in this case, on the 21st day of December last, upon the petition in this cause fyled, be vacated and set aside, for the following amongst other reasons:

1st. Because the said order was made and granted improvidently and without notice to the said defendants or any or either of them.

2nd. Because in and by the said order it was and is ordered by the said Judge that a writ of summons do issue against the defendants, returnable before him the said Judge or some other Justice of the Superior Court in Chambers in the Court House on the fifth day of January then next, at the hour of eleven

* The above judgment was not appealed from, and the litigation between the parties was settled by payment of the plaintiff's claim in full. *Vide* 14 Jurist, p. 19; 16 Jurist, p. 243; 17 Jurist, p. 13; 19 Jurist, p. 29. (J. K.)

o'clock in the forenoon to answer the said petitioners, and no such writ of summons has been issued.

3rd. Because the writ of summons annexed to the said petition was issued illegally and without the order of any Judge authorising the issue of the same, and the said writ is not in conformity with the said order of Mr. Justice Mondelet, but requires the defendants to appear before Her Majesty in Her Superior Court, to answer the *demande* of the said petitioner, contained in a declaration alleged to be annexed to such writ, and no such declaration was or is annexed to the said writ.

4th. Because in and by his said petition, the petitioner asks that an interim or temporary order be made, restraining the defendants as thereby prayed for during the pendency of this suit, and no such interim or temporary order has been made, and the said order of the said Judge is not an interim or temporary order, but is absolute and unlimited as to the time during which the same is to remain in force.

5th. Because the said petition is vague and insufficient, and does not allege any matters of fact sufficient to warrant the granting the said order of the said Judge, and the said petition is not supported by any sufficient affidavit.

6th. Because (as appears by the affidavits herewith fyled) the petitioner caused to be transferred to him the four shares of the capital stock of the said Montreal Telegraph Co. mentioned in his petition, on the seventeenth day of December last, to wit, only one day before the date of the said petition; that prior to the said seventeenth day of December last, the said petitioner was not a shareholder in the said Company; that he, the said petitioner, caused the said four shares of stock to be transferred to him for the sole purpose of taking the proceedings adopted by him in this cause, and with the sole object of improperly affecting the price of the shares of the said Company, and of enabling other persons acting in concert with the petitioner to save themselves from loss in respect of their dealings in the shares of the said Company, at the expense and to the damage of other shareholders of the said Company, or of other persons having dealings in the shares thereof, and that the proceedings of the petitioner have not been adopted in good faith, but are illegal and vexatious.

7th. Because the petitioner illegally and vexatiously, after obtaining the said order of the said Judge, on the twenty-first day of December last, withheld it from the knowledge of the defendants, and only caused it to be served upon them on the twenty-ninth day of the same month, the day preceding (as the petitioner well knew) the regular day for declaring a dividend upon the capital stock of the said Company, the whole with costs, *distraits* to the undersigned attorney.

MACKAY, J.:—This suit was commenced on the 23rd of December, on which day the plaintiff's attorneys lodged a *fiat* in the prothonotary's office for a writ of summons of the usual kind. In the margin of the *fiat* is the word "Injunction." The writ was made out in the usual form for summonses, and commanded the defendants to appear in the Superior Court on the fifth of January, to answer the plaintiff's demand contained in the declaration annexed. The word "Injunction" is nowhere in the writ.

Kane vs. The Montreal Telegraph &c.

The writ has been returned, and the defendants are in no default upon it. They have all tyled appearances.

It appears that the petitioner, or plaintiff, on the 17th of December, had bought four shares, each of forty dollars, of stock in defendants' Company; the whole capital of which is one million nine hundred and twenty-five thousand dollars, all paid up; and that, the next day, he had presented a petition to the Hon. Mr. Justice Mondelet, at his house or in Chambers, alleging the Company's incorporation, that the other defendants were directors of it; that he, the petitioner, was owner of four shares in the capital stock of the Company; that by its charter and by law the defendants were bound to declare half-yearly dividends on profits made, as to the majority of the said directors might seem advisable, but that the said directors are forbidden by law and the said charter to declare dividends beyond the profits made during the period for which such dividends are to be declared; that petitioner was credibly informed and had reason to believe that the directors, defendants, intended to declare a half-yearly dividend of five per cent., being a rate of ten per cent. yearly.

And the petition went on to say that your petitioner is also credibly informed and has reason to believe that the said Company's profits and earnings for the last six months do not justify such a dividend, and that, if such contemplated dividend be based upon future expectations of profits, its declaration would be not only contrary to law but without reasonable foundation;

That during the last six months every kind of business has been in a state of stagnation, etc., and that consequently the earnings of the Company defendant have been on the scale of the universal depression;

That former dividends may have been justified, but that the directors have no reasonable grounds for continuing to pay a dividend out of proportion with the earnings of the Company;

That for several years past the Company has issued new stock and thereby increased its capital in a ratio disproportionate with the increase of its business and the building of new lines and offices (*sic*), such new capital being partly applied to repairing old plant when such repairs should have been borne by the regular earnings of the Company, and that with such increase of capital, in the depressed state of affairs above described, a five per cent. half-yearly dividend would at this period go beyond the earnings of the Company, and affect and diminish its capital;

That your petitioner is credibly informed that in order to justify such a dividend, and to exhibit larger assets than the said Company possess, the directors, defendants, intend to submit to the shareholders in their next report statements at variance with the exact state of affairs of the Company, one of which altering the cost price of the plant under pretence of altered prices in the value of labor and material;

That the capital invested in the present plant of the said Company cannot be altered in value by the fluctuations in prices of labor and material, and that the contemplated inflation of the cost value of the plant would constitute fictitious assets calculated to deceive the public on the financial condition of the Company;

That, owing to a departure from sound principles, &c., great public disasters, &c., have taken place in Montreal within the last twelve months, and in order to prevent the Company defendant from falling into similar errors and ruin, and for his own and his co-shareholders' protection, petitioner is well founded in resorting to the remedy of an injunction to restrain the defendants from declaring a dividend disproportionate with the past earnings of the Company.

The conclusions were:—Wherefore your petitioner prays that the said Corporation, &c., and the said directors be summoned to appear before any one of the Justices of the Superior Court in Chambers, in the Court House, at eleven o'clock in the forenoon on such day as any one of your Honors appoint, and that they severally be restrained from declaring any half-yearly dividend exceeding the earnings and profits of the Company, for the half-year ending in the course of the present month, and that they be ordered and enjoined not to declare a dividend of five per cent. for the past six months; and further your petitioner prays that an interim or temporary order be made, restraining the defendants as prayed for and during the pendency of this suit, &c., &c.

There is an affidavit by petitioner at the end of the petition, to the effect that the allegations of it are, to the best of his knowledge, information and belief, true. Upon the petition referred to His Honor Mr. Justice Mondelet made the following order: "Having seen the foregoing petition and the above "affidavit, it is ordered that a writ of summons do issue, as prayed for, against the "defendants, returnable before me, or some other Justice of the Superior Court, "in Chambers, in the Court House in this city, on the fifth day of January next, "at the hour of eleven o'clock in the forenoon, to answer the said petition; and "it is further ordered that the said several defendants named in the said petition "be, and they are hereby severally restrained from declaring a half-yearly divi- "dend of five per cent., and any dividend beyond the earnings and profits of the "said Company during the last six months. Montreal, 21st Dec., 1875."

No writ has issued such as contemplated by that order of Judge Mondelet; the defendants never have received command to appear before any Judge in Chambers on any day. Yet in Chambers, on the 5th of January, the defendants were called, and default against them recorded by His Honor Mr. Justice Mondelet.

We have, now, in this suit, No. 2731, in this Superior Court, annexed to the writ, Kane's petition that I have just read, with the Judge's order at the end of it. The defendants, excepting Andrew Allan, have regularly appeared, and have severally moved in this Court that that order of Judge upon the petition in this case fyled, be vacated and set aside for the following, among other, reasons:

1. Because the order was made improvidently and without notice;

2. Because it was ordered by the Judge that a writ of summons should issue, returnable before him or other Judge in Chambers on the fifth of January at eleven o'clock to answer the petitioner, but no such summons has issued;

3. Because the petition is vague and insufficient, and not supported by sufficient affidavits.

They fyle with their motions an affidavit by James Dakers, well qualified from his knowledge and position to speak of the condition of the Company defendant,

Kane vs. The Montreal Telegraph Co.

by which statements of the petitioner are shown to be untrue, and his information on material points is shown to be unjustifiable and inaccurate, to use no harder word about it.

Before adjudging upon these motions the Court is compelled to say how it views the petitioner's proceedings before Mr. Justice Mondelet. The Court sees those proceedings to have been towards an injunction; a temporary injunction was prayed for.

The Judge ordered a writ to go, to be returnable before him, or other Judge, in Chambers, and restrained the defendant, &c., &c. It would be wrong to hold that the learned Judge meant by his order to make a perpetual injunction. Evidently he meant a temporary one, accessory to the writ that he was allowing to issue. The order was meant to be within the scope of Kane's petition or bill.

As Kane's petition was first presented to myself, and I had intended to take it up without any delay, and as we are in our infancy in the matter of injunctions (our Code containing nothing on the subject), I may say that I had intended, had the petition been proceeded upon before me, to have inquired into the *bonâ fides* of the petitioner, to have examined him, particularly as he did not tender himself to be sworn before me, but got sworn before the Prothonotary. I meant to seek information on both sides, and weighing the oaths and statements, to have allowed a temporary injunction, or to have refused it, according to the circumstances.—Certainly, upon such a petition, and the mere *exparte* statements of the petitioner, I would have refused his petition. He has not yet stated any names of his informants; without the affidavits of these informants, in addition to the petitioner's unsatisfactory one, I would not have issued even an interim injunction. In those countries in which injunctions have longest been in use, none is allowed upon allegations of information and belief merely. It is hardly necessary to say why. It is because informations may be untrue, dishonest and meant to work illegalities and oppressions; they may be part of conspiracies; of course they may be true, and sometimes are. Examination of the informants can alone certify as to the value and honesty of informations. Rascals like Fisk, in the neighboring States, can command informations of any kind, and have resorted to them for nefarious purposes.

At first sight of the petition, I saw want of equity in it. "For want of equity on its face, a bill of injunction is bad, and may be dismissed on motion without an answer," says Hilliard, ch. 1, § 19. It looks strange, now, that with informations such as petitioner says he had, he should have invested in the stock of a company whose directors were acting unreasonably, exposing the company to ruin, &c., &c. It looks strange, too, that not one day passes after petitioner becomes a stockholder before he commences law proceedings, the costs on which may be four-fold, even ten-fold, more than the total of his investment.

As to this Court being warranted in receiving these motions, I have no doubt Judge Mondelet has never been particularly seized of this suit. And what law or rule prevents it? None; but in so far as an injunction order can be seen in this case, the practice in all countries in which injunctions are allowed favors it.

Kerr, on Injunctions, pp. 626-627.; also Hilliard, ch. 1, § 19.

Believing that the Court has jurisdiction to take up these motions in this case

as in a case of injunction it does receive them, and they are granted, for the first, second and fifth reasons of them.

These reasons all find support in what the Court has already said. The writ ordered by His Honor Mr. Justice Mondelet not having issued, the second reason stated in these motions is good, and no harm can be done by vacating the total order of the Judge in Chambers; part of it has long ago ceased to be able to be worked, owing to lapse of time, and the restraint put upon the defendants they ought to be freed from, as it never could have been meant to have force beyond the existence of the writ that was in the mind of the Judge who ordered the writ which never had existence.

After dissolutions of injunctions plaintiffs are often sued for damages.

Suppose the plaintiff sued for damages for having gotten an injunction against the defendants, he might plead that, though he got it he never used it, and that now in the present suit he is only asking for one.

"The operations of large companies ought not ordinarily to be arrested by injunction without notice," says Hilliard, chap. 15, § 2. This also supports the first reason of the defendants' motions.

All the motions are granted, with costs.

Motions granted.

Doutre, Doutre & Hutchinson, for the plaintiff.
Ritchie & Borlase, for the Corporation, defendants.
Abbott, Tait, Wotherspoon & Abbott, for the Directors, defendants.
(J. K.)

COURT OF QUEEN'S BENCH, 1875.

MONTREAL, 15th FEBRUARY, 1875.

Coram DORION, C. J., MONK, J., TASCHEREAU, J., SANBORN, J.

No. 167.

MOISE BROSSARD,
(*Plaintiff in the Court below,*)
APPELLANT;

AND

MAGLOIRE BERTRAND,
(*Defendant in the Court below,*)
RESPONDENT.

HELD:—The sureties of a defendant arrested on *capias*, who have bound themselves under article 825 of the C. C. P., that defendant will surrender himself when required to do so by an order of the Court or Judge within one month from the service of such order upon defendant or his sureties, and in default pay the debt, will not be held liable because of the service of a copy of judgment, served upon the defendant and them, rendered upon the contestation of the statement filed under art. 764 and under art. 776, condemning defendant to be imprisoned for three months, and the service of such copy of judgment is not service of an order such as mentioned in the bond or required by art. 825.

The judgment appealed from was rendered by the Superior Court, Montreal (JOHNSON, J.), on the 30th September, 1873.

The following remarks were made by the learned Judge in pronouncing judgment:

Brossard et Bertrand.

"These two cases (Brossard *vs.* Bertrand and Brossard *vs.* Poupart) are directed against two gentlemen who were bail for one Alexis Poupart, who had been arrested under a *capias ad respondendum* at the suit of the plaintiff. After the return of the writ, it was contested by petition and quashed by judgment of the Court. This judgment was, however, reversed in review, and the case proceeded to judgment on the merits against the defendant for $358.40, interest and costs. This judgment was rendered on the 31st October. On the 28th of the same month, the defendant in that case (Alexis Poupart) made a judicial abandonment of his property under the law, and this was contested by the plaintiff on the ground of secretion. This contestation was held to be valid, and the defendant was condemned on the 26th April, 1872, to suffer three months' imprisonment; and on the same day this judgment was signified to Alexis Poupart and to the two defendants in the present case. The plaintiff contends that this state of facts entitles him to judgment against the bail, on the ground of their liability to pay debt and costs by reason of the non-surrender of Alexis Poupart, the defendant in the first case, to the Sheriff, under the judgment of the 26th April. The defendants, by their plea in the present case, raise a variety of questions. First, they demurred to the declaration, and that demurrer came before me and was dismissed. I am bound to say, however, that upon reconsideration of the case, now that the whole of it is before me, and I have had occasion to refer to the law affecting the whole subject, that I have serious doubts whether that decision was right. The ground upon which principally the demurrer was argued is, however, substantially available to the defendants on the merits; and I think is decisive of the case in their favor. Whether it was necessary to allege it in the declaration or not there can be no doubt that under the law, and the very terms of the bail bond, the defendant in the first case was only bound to surrender himself to the Sheriff when required to do so by an order of the Court or Judge, within one month of the service of such order upon him or upon his sureties. No order was ever served at all upon any one, nor indeed was any ever made in the case. The condemnation pronounced by Judge Beaudry is one thing, the order to surrender is quite another, and none was made. The creditor was little interested in having this unfortunate man lodged in jail for fraud. What he wanted was an order to the Sheriff, as a violation of that order under the 825th article of the Code of Procedure instantly fixed the bail. The judgment, therefore, dismisses both actions with costs, on the ground that no liability was incurred by the bail unless an order had been served on them or on the defendant, nor under one month from the service of such order, the action having been instituted three days after the judgment of imprisonment, and after simple notice of that judgment to the parties."

The facts of the case appear by the following extract from the respondent's factum:—

"Voici le jugement qui fait le sujet du présent appel:

"Considering that by the bail bond executed by the defendants on the twenty-ninth October, 1870, in the case wherein Moïse Brossard was plaintiff and Alexis Poupart was defendant, they, the said defendants, became liable to pay the debt, interest and costs, in that case, only if the said Alexis Poupart should

fail to surrender himself into the hands of the Sheriff, when required to do so, by an order of the Court, or Judge, within one month of the service of such order, upon him or upon his sureties;

"And considering that no such order was served upon the said Alexis Poupart, nor upon his sureties, the defendant and another;

"Doth dismiss the present action with costs."

"Le 29 octobre 1870, l'intimé s'est, de concert avec un nommé Louis Poupart, porté caution d'un nommé Alexis Poupart, arrêté sur *capias*, dans une cause No. 2258, C. S., Montréal, où le dit Alexis Poupart était défendeur, et Moïse Brossard, savoir: l'appelant en la présente cause, était demandeur.

"Ce cautionnement, pris et reçu par le Protonotaire de la Cour Supérieure de Montréal, se lit comme suit:

"Magloire Bertrand, marchand, de la cité de Montréal, dit district, et Louis Poupart, cultivateur, de St. Hubert, dit district, présents en personne, promettent et stipulent solidairement pour et de la part de Alexis Poupart, le défendeur en cette cause, que lui, le dit Alexis Poupart, se livrera ès-mains et à la garde du Shérif du dit district de Montréal dès qu'il en sera requis par un ordre de la dite cour ou d'aucun juge d'icelle, émané en vertu de la loi, ou *sous un mois après le service de tel ordre* sur lui, le dit défendeur, ou sur eux les dits Magloire Bertrand et Louis Poupart, et qu'à défaut de soumission à tel susdit ordre, le dit défendeur paiera au dit demandeur sa créance avec intérêts et dépens; et que, dans le cas où le dit défendeur ne se livrerait pas tel que requis, ou ne paierait pas le demandeur tel que susdit, qu'alors, eux, les dits Magloire Bertrand et Louis Poupart, s'engagent et promettent solidairement payer au dit demandeur, sa dite créance avec intérêts et dépens, et les dits Magloire Bertrand et Louis Poupart ont signé les présentes, après lecture faite.

Pris et reconnu à Montréal, ce vingt-neuvième jour d'octobre mil huit cent soixante-et-dix. } MAGLOIRE BERTRAND. LOUIS POUPART.

HUBERT, PAPINEAU & HONEY.

P. C. S.

"Le défendeur Alexis Poupart demanda, par requête, que ce *capias* fût cassé, ce qu'il obtint d'abord de la Cour Supérieure; mais l'appelant ayant demandé la révision de ce jugement, la Cour de Révision l'a réformé et maintenu le dit *capias*, par son jugement du 30 septembre 1871.

"Le 31 octobre 1871, le dit appelant, procédant *ex parte*, obtint de la même cour un jugement condamnant le dit Alexis Poupart à payer le montant de sa créance.

"Trois jours auparavant, c'est-à-dire le 28 octobre 1871, le dit Alexis Poupart avait déposé son bilan entre les mains du Protonotaire de la Cour Supérieure de ce district, dans le but de bénéficier des dispositions de la loi énoncées dans l'article 763, du Code de Procédure Civile.

"Le dit appelant contesta ce bilan pour l'une des raisons qui avaient motivé l'émanation de son *capias*, savoir, parceque le dit Alexis Poupart, étant insolvable, avait vendu son fonds de magasin; et, à même le produit de la vente, avait remboursé à son père, l'un de ses plus forts créanciers, une somme de deux cents

Brossard et Bertrand.

piastres que ce dernier lui avait confiée quelques semaines auparavant, à titre de dépôt, dont le dit Alexis Poupart avait disposé pour payer quelques accomptes à ses créanciers.

"Le dit Alexis Poupart, prétendant que le remboursement de ce dépôt était légitime, ne comprit pas cette somme dans son bilan; le dit appelant au contraire, considérant comme nul ce remboursement que le dit Alexis Poupart avait fait à son père étant insolvable, prétendit que ce paiement devait être considéré comme non avenu, et que le dit Alexis Poupart aurait dû mentionner cette somme dans son bilan, comme partie de son actif. C'est ce qui fit la matière de la contestation du bilan du dit Alexis Poupart.

"Sur cette contestation, la Cour Inférieure a donné gain de cause à l'appelant; et par son jugement du 26 avril 1872, la dite Cour a condamné le dit Alexis Poupart à un emprisonnement de trois mois, pour n'avoir pas inclu la dite somme de $200, dans son bilan et n'en avoir pas rendu compte, suivant les dispositions des articles 773 et 776 du Code de Procédure Civile du Bas-Canada.

"Le même jour, 26 avril 1872, l'appelant fit signifier une copie de ce jugement au dit Alexis Poupart et au dit intimé, et, dès le 30 du même mois, c'est-à-dire, quatre jours seulement après la reddition du dit jugement et *quatre jours avant l'expiration du délai que le dit Alexis Poupart avait, d'après la loi, pour demander la révision du dit jugement*, le dit appelant a intenté la présente action contre l'intimé, comme caution du dit Alexis Poupart, pour le faire condamner à payer la dette du dit Alexis Poupart, avec intérêt et tous les frais résultant des différentes contestations mues entre les dites parties.

"Nonobstant l'institution de la présente action, Alexis Poupart a, dans les délais fixés par la loi, inscrit la dite cause en révision du jugement rendu sur contestation du bilan, savoir: le 3 mai 1872. Motion de l'appelant fût faite pour faire radier cette inscription, laquelle motion fût rejetée. La dite cause fût plaidée devant la dite Cour de Révision, vers le 22 mai 1872, et le 28 juin de la même année, la Cour de Révision a rendu son jugement, en sorte que la présente action, qui est basée sur une condamnation à l'emprisonnement sur contestation du bilan, a été intentée deux mois avant la reddition du jugement final intervenu sur cette contestation de bilan.

"Depuis le moment où l'intimé a consenti le cautionnement ci-dessus, jusqu'à la date du présent appel, Alexis Poupart n'a jamais laissé la cité de Montréal, a continué à y travailler comme commis; n'a jamais rien fait pour se soustraire à aucune arrestation, ni à l'exécution d'aucun ordre ou jugement d'aucun tribunal; l'appelant a toujours connu le lieu de sa résidence et sa place d'affaires, et n'a jamais rien fait pour le faire arrêter. De plus, immédiatement après la reddition du jugement final le condamnant à l'emprisonnement, il est allé se livrer entre les mains du Shérif de ce district, et sur refus de ce dernier de le recevoir sous sa garde, il a fait dresser procès-verbal de sa comparution et offre de se livrer, et notifier le Shérif du lieu de sa résidence et de sa place d'affaires.

"Le défendeur a plaidé les faits ci-dessus, dans une exception péremptoire à la présente action, avec une défense en droit.

"La défense en droit peut se résumer comme suit:

"Il appert à l'action: 1o. Que Poupart ne devait se livrer au Shérif que

Brossard et Bertrand.

lorsqu'il en serait requis, et qu'il n'y appert pas qu'il ait jamais été requis de se livrer, ni qu'aucun ordre ni bref d'emprisonnement ait été donné par la cour ; ni que le dit Poupart ait jamais refusé d'obéir à tel ordre, ni se soit soustrait à son exécution, soit en fuyant, soit en se cachant.

"2o, Que Poupart avait droit au bénéfice d'un mois, à compter du jugement pour payer ou se livrer, et que ce délai ne lui a pas été donné.

"3o. Que l'intimé n'avait cautionné que l'obligation, par Alexis Poupart, de se livrer sur un jugement intervenu dans l'instance où l'intimé avait cautionné, et non qu'il ait jamais cautionné sa livraison sur jugement dans une autre instance.

"4o. Que le délai pour s'inscrire en révision du jugement invoqué, non plus que le délai accordé par la loi et celui stipulé pour la mise à exécution du dit acte de cautionnement n'étaient pas expirés, et que, à tout événement, le droit réclamé par l'appelant n'était pas un droit encore échu ni acquis.

"Il ne suffit que de jeter un coup d'œil dans le dossier de cette cause pour voir de suite que l'étrange prétention de l'appelant est mal fondée en tous points, que la Cour Inférieure a bien jugé en déboutant son action et que son jugement doit être confirmé.

"Cette action eût dû être déboutée sur la défense en droit, ainsi que l'a reconnu l'honorable juge qui a prononcé sur le mérite.

"L'action n'est basée sur aucun ordre d'emprisonnement inexécuté ou non obéi auquel le débiteur se soit soustrait. Elle établit que le délai pour appeler du jugement, en demander la révision ou l'exécution, n'était pas échu ; elle était, à tout événement, *évidemment prématurée.*

"L'exception péremptoire à l'action n'est pas moins bien fondée. L'action ne relate pas correctement le cautionnement qui fût contracté par l'intimé, mais au contraire, en omet les principales clauses, le dit intimé ne s'étant pas obligé de payer le montant de la dette et des frais à défaut par Alexis Poupart de se livrer au Shérif *dès qu'il* en serait requis, purement et simplement, ainsi qu'il est allégué faussement dans la dite action ; mais au contraire, l'intimé n'avait contracté cette obligation que si le dit Alexis Poupart ne se livrait pas "dès qu'il en serait requis par un ordre de la dite cour ou d'aucun juge d'icelle, "émané en vertu de la loi, *ou sous un mois après le service de tel ordre sur lui "dit défendeur,*" ou s'il ne payait pas, (sous le même délai) le demandeur.

"Il est évident que les cautions ne peuvent être atteintes qu'après l'expiration du délai d'un mois stipulé au cautionnement pour la livraison du débiteur ou paiement fait par lui de la créance ; ce délai même n'eut-il pas été stipulé, qu'il appartiendrait de droit au débiteur et à ses cautions, en vertu de l'article 825 du Code de Procédure Civile ; à plus forte raison, est-il évident que ces dernières ne pouvaient être poursuivies avant le jugement final et avant le délai pour inscrire en révision. Poupart ayant inscrit, son inscription avait l'effet de mettre les parties dans la même position que si aucun jugement n'eût été prononcé, et il n'y a eu jugement dans la cause que lors du jugement final de la Cour de Révision.

"Il est également clair que Poupart ne pouvait être arrêté que sur un mandat

Broward et Bertrand.

d'exécution du jugement (art. 545, Code de Procédure Civile), et que les cautions ne pouvaient être atteintes que sur défaut, par Poupart de se livrer, sous un mois de l'émanation de tel mandat, dans l'instance où les dites cautions avaient cautionné. Ce cautionnement était un contrat dont aucun pouvoir au monde ne pouvait augmenter ni étendre, malgré les obligations y stipulées.

" D'un autre côté, qui ne comprend que la vraie portée, l'esprit du cautionnement n'est que de garantir le créancier que le débiteur ne se cachera pas, et ne se soustraira pas à l'emprisonnement ou à l'atteinte du créancier et que, après jugement intervenu, s'il y a lieu d'emprisonner le débiteur, il n'aura pas besoin de le chercher ni de courir après, mais le trouvera sous sa main prêt à subir l'effet du jugement. Le créancier ne peut prétendre que l'acte de cautionnement lui donne plus de droit, plus d'avantage, un recours plus efficace, plus de sûreté pour sa créance que si le débiteur fût demeuré en prison.

" S'il en était autrement, si les prétentions de l'appelant était bien fondées et que le créancier acquît un droit d'action contre les cautions pour sa dette avec intérêt et tous les frais, dès le moment que copie du jugement serait servi, malgré que le débiteur n'eût pas bougé et fût resté sous les yeux de son créancier et à portée de tous procédés qu'il lui plairait de prendre, le cautionnement, qui n'est qu'un service demandé à la bienveillance d'un ami, et qui ne s'accorde que si le débiteur offre des garanties qu'il ne se sauvera pas, deviendrait un guet-à-pens odieux que la loi tendrait à la bonne foi et à la générosité des cautions. L'usage du *capias* deviendrait une excellente spéculation ; et il ne suffirait, pour les créanciers, que de faire assaut de ruse et tendre à l'ami d'un malheureux un piége habilement dissimulé, pour acquérir d'excellentes cautions pour paiement de créances qui autrement eussent été complètement perdues. Des prétentions aussi étranges ne peuvent être encouragées par les tribunaux.

"L'article 776, sur lequel s'appuie l'appelant, ne fixe pas de délai au bout duquel les cautions deviennent responsables ; il ne peut non plus, avoir l'effet de changer les termes du cautionnement et détruire l'article 825.

" Dans la cause de Lynch et Macfarlane, 12 L. C. Jurist, p. 1, la Cour d'Appel a fixé la jurisprudence à l'interprétation qu'il faut donner à la clause du cautionnement fixant le délai à l'expiration duquel les cautions deviennent responsables. Dans cette cause, le créancier n'a songé à s'adresser aux cautions qu'après qu'il eût été constaté, par un retour de *non est inventus*, sur bref de contrainte par corps, que le débiteur ne pouvait être trouvé et arrêté.

" Le cautionnement donné en la présente cause est, en tout point, celui indiqué dans la section 11 du chap. 87, des S. R. B. C., p. 828, et la cour ne peut l'interpréter autrement qu'en donnant aux cautions le bénéfice du délai d'un mois y stipulé.

Dans la cause ci-dessus citée, un avis ou requisition de livrer le débiteur avait été servi avec la copie de jugement condamnant à l'emprisonnement ; et le délai d'un mois n'a compté que de la date du service de tel avis. On ne peut faire autrement que d'inférer, du rapport de cette cause, que cet avis était nécessaire. Or, dans le cas actuel, un tel avis n'a pas été donné."

Archambault, for appellant :—

L'intimé a plaidé à cette action par une défense en droit qui a été déboutée,

puis par une exception par laquelle il prétendait que par le cautionnement qu'il avait donné, le dit Alexis Poupart avait un mois, à compter de la signification d'un ordre, pour se livrer entre les mains du Shériff; que tel ordre n'avait jamais été signifié et que s'il l'avait été, l'appelant aurait dû attendre qu'un mois se fût écoulé avant de prendre son action qui ne lui compétait pas avant cela.

Brossard et Bertrand.

Cette exception contenait plusieurs autres moyens, mais qui ne découlaient que de celui-là et s'y rattachaient, en sorte que nous n'aurons à nous occuper que de ce point pour ainsi dire, et qui est celui sur lequel s'est appuyée la Cour Supérieure (Honorable Jugo Johnson) qui a renvoyé l'action de l'appelant, en disant que par le cautionnement plus haut relaté, l'intimé n'était tenu de livrer Alexis Poupart que sous un mois, à compter de la signification d'un ordre d'un juge de se livrer, et que tel ordre n'avait jamais été signifié.

Cette dernière partie du jugement n'est pas exacte et nous devons faire remarquer de suite que le seul ordre ou document que nous pouvions faire signifier aux parties intéressées, était le jugement ordonnant l'emprisonnement du nommé Alexis Poupart et il est prouvé que cela a été fait.

Toute la question, suivant nous, se résume à ceci, savoir: Quelle interprétation faut-il donner aux arts. 825 et 776 du Code de Procédure Civile.

L'intimé prétend que l'art. 776 ne veut rien dire et qu'il doit être régi par l'art. 825, et de son côté l'appelant prétend que l'art. 825 n'a d'application que dans les cas où pendant l'instruction de la cause et procédure sur le *capias* même il émane, pour une raison ou pour une autre, un ordre enjoignant au défendeur de se livrer entre les mains du Shérif, mais dans les cas comme dans l'espèce, lorsqu'il intervient un jugement sur une contestation de bilan, c'est l'art. 776 qui doit être suivi à la lettre.

Or cet article disant formellement et clairement, sans même exiger de signification, que lorsqu'un tel jugement est rendu, faute par le défendeur de se livrer immédiatement entre les mains du Shérif, ses cautions sont tenus de payer le jugement, en capital, intérêts et frais, l'appelant prétend, qu'en vertu de cet article, il a porté en temps opportun son action, qui aurait dû être maintenue.

The judgment of the Superior Court of 30th September, 1873, was unanimously confirmed in appeal.

Judgment confirmed.

Archambault & DeSalaberry, for appellant.
Trudel & Taillon, for respondent.

(J.L.M.)

SUPERIOR COURT, 1875.

MONTREAL, 24TH DECEMBER, 1875.

Coram MACKAY, J.

No. 1790.

The City Bank vs. *Lafleur.*

HELD:—That the maker of a promissory note, though a mijor, may be sued upon a note, the consideration of which was goods purchased by him for use in his trade.

This was an action upon a promissory note made by defendant in favor of Scott & Whyte, sewing machine dealers, and endorsed by them to plaintiff before maturity.

City Bank et al. Lafleur.

The defendant pleaded, 1st. That, at time note was given, he was a minor; 2nd. That the note was obtained by fraud; and 3rd. That long before maturity of the note he paid the amount, less the discount, to the original payees, Messrs. Scott & Whyte. The allegations of fraud were not proved; the note was given by defendant to Scott & Whyte, on the purchase of two sewing machines. It was proved that the defendant received leather in a certain state from the manufacturers, and employed girls to "finish" or "fit" boots and shoes, for which purpose the sewing machines bought of Scott & Whyte, and for which note in question was given, were used; it was also proved that defendant lived in his father's house, or that they all lived together, that there was no sign over the door but he was called a "cordonnier". It was also proved that, before maturity of the note, but after it was discounted by Scott & Whyte, the defendant paid the amount of the note to Scott & Whyte, and received their receipt for the same.

The judgment of the Court was substantially as follows: Considering that defendant, though a minor, was bound towards Scott & Whyte, mentioned in plaintiff's declaration, by his act of trading with them—buying from them sewing machines for his, defendant's, trade and profit in his business, for the price of which machines the said defendant gave note now sued upon to said Scott & Whyte; that these sewing machines were not sold or bought by him to his, defendant's, hurt or disadvantage, and that note sued upon signed by defendant was a valid security to Scott & Whyte at one time, to wit, when they parted with it, as they did to plaintiff for valuable consideration, before maturity;

Considering that defendant had and has free exercise of his rights for all acts relating to his trade, and may sue for them and enforce them, and be sued, that this suit has a relation to an act of trading by defendant, and that according to jurisprudence that we have, defendant is well sued by plaintiff (Dorion *vs.* Coté, 5 L. C. Reports);

Considering, further, that defendant has attained majority since action brought, and during enquête was major; that no fraud has been practised as alleged in plea, doth adjudge and condemn, &c.

Judgment for plaintiff.

Dunlop & Lyman, for plaintiff.
A. Dalbec, for defendant.
(F.S.L.)

COURT OF REVIEW, 1875.

MONTREAL, 30TH SEPTEMBER, 1875.

Coram MONDELET, J., JOHNSON, J., TORRANCE, J.

No. 2389.

Devlin vs. *Morgan.*

HELD:—That where commutation became due, *although not exigible*, under the position of the Act, ch. 41 of the Consol. Stat. of L.C., having reference to the Seminary of St. Sulpice of Montreal, the person who owned the property during that period is liable to indemnify the person to whom he sold the property against such commutation—the payment whereof became exigible by reason of such sale.

This was a hearing in Review of a Judgment rendered by the Superior Court at

Montreal (BEAUDRY, J.), on the 30th of April, 1875, condemning the defendant to pay to the plaintiff the sum of $162.50 cy., besides interest and costs.

The above amount was claimed under the following circumstances:

One Thomas Morgan acquired a property in the Seigniory of Montreal by will of Patrick Morgan, executed 3rd June, 1869, and sold it to the plaintiff on the 15th May, 1874.

The defendant is the executor of Thomas Morgan's will, executed 10th June, 1874.

Under the provisions of the Act, ch. 41 of the Consol. Stat. of L. C., having reference to the Seminary of St. Sulpice of Montreal, the mutation created by the will of Patrick Morgan gave rise to the payment of commutation money in respect of said property, to the Seminary; but such commutation money was not really exigible until the expiration of the ten years following the death of the testator, Patrick Morgan.

The sale by Thomas Morgan made the commutation money exigible, and the plaintiff, who was the purchaser, had to pay the Seminary for such commutation the sum of $162.50 cy.

The plaintiff, contending that the defendant, as representing the estate of Thomas Morgan, was bound to guarantee and indemnify him *quoad* such commutation money, sued the defendant for the amount so paid to the Seminary.

The defendant pleaded that the estate he represented was not liable under the circumstances.

The Superior Court condemned the defendant to pay, assigning the following reasons:—

"Considérant que sous les dispositions du Chapitre 41 des Statuts Refondus pour le Bas-Canada, l'immeuble acquis par le demandeur du défendeur en vertu de l'acte entre eux reçu le 18 Mai, 1874, devant Maître Messier, notaire, a été dès le 4 de Mai, 1859, affranchi des droits de lots et ventes, mais sujet seulement à un droit de commutation de tenure payable au Séminaire de St. Sulpice de Montréal, à la première mutation de propriétaire du dit immeuble après le dit 4 jour de Mai, 1859;

Considérant que le dit défendeur est devenu propriétaire du dit immeuble en vertu du testament de feu Patrick Morgan, son frère, le dit testament fait et exécuté le 10 Juin, 1874, devant J. E. O. Labadie, notaire, et que cette mutation de propriétaire a donné lieu au droit de commutation en faveur du dit Séminaire de St. Sulpice, et que le défendeur était tenu à ce droit de commutation et devait en garantir le demandeur, et que l'action de ce dernier à cet égard est bien fondée."

The Court of Review unanimously confirmed this judgment, Torrance, J., remarking that he doubted as to its correctness, but not sufficiently so to make him dissent.

Judgment of S. C. confirmed.

Doutre, Doutre & Hutchinson, for plaintiff.

Dorion & Geoffrion, for defendant.

(S.B.)

COUR DE CIRCUIT, 1875.

SHERBROOKE, MAI, 1875.

Coram DOHERTY, J.

Boucher vs. *Girard* et al.

JUGE :—Qu'il ne suffit pas de plaider minorité à une action sur billet promissoire consenti par un mineur, mais qu'il faut aussi plaider lésion.*

Hall, White & Panneton, pour le demandeur.

Ives & Brown, pour le défendeur Dussault.

(L.E.P.)

COURT OF QUEEN'S BENCH, 1875.

MONTREAL, 22ND MARCH, 1875.

Coram DORION, C. J., MONK, J., TASCHEREAU, J., RAMSAY, J., and BELANGER, J., *ad hoc*.

No. 14.

JAMES DOYLE, APPELLANT;

AND

FLAVIEN GAUDETTE, RESPONDENT.

HELD:—1. That the obligation sued upon in this case was a collateral security and not a principal obligation.

2. That payments made by the debtor of two debts, both due, but one of which is secured by a collateral obligation, must be applied upon the debt secured, although at the time the payments were made the collateral obligation was not due.

The appellant brought this action upon a notarial obligation signed by respondent in appellant's favor, dated 21st February, 1871, for $918.75 and interest.

This obligation, purporting to be a direct and absolute obligation from respondent to appellant, was signed by respondent under the following circumstances:—

One L. E. Lalanne, a trader of Sherbrooke, after several years of commercial dealings with appellant, who carried on business at Montreal, found himself in February, 1871, unable to meet his liabilities. He then made an offer to his creditors of 3s. 9d. in the £, to be paid $200 cash and the balance by weekly payments of $50 each, and furnished the name of respondent as his security. The voluntary composition was prevented by the refusal of one of Lalanne's creditors; and thereupon appellant, who was the largest creditor, advised an assignment to compel the unwilling creditor to accept the terms proposed.

The creditors favorable to this arrangement addressed a special letter of instructions to J. A. Archambault, official assignee of Sherbrooke, requesting him to keep insolvent's store open as there would be a compromise effected. An assignment was made.

In promotion of this arrangement Lalanne had sent to Doyle, who acted for him in Montreal, eight promissory notes signed by him in favor of Gaudette

*Il en a été ainsi décidé par le Juge Loranger dans la cause de Cartier vs. Pelletier, Revue Légale, Vol. 1, p. 46.—L. E. P.

and endorsed by Gaudette. These, not being found satisfactory, were sent back, and the obligation and mortgage sued upon given instead.

On the 28th of March, 1871, after the payment of the $200, Lalanne renewed his commercial dealings with appellant, and continued the same until his subsequent purchases established a new debt against him of $1018.77. Being unable to meet his later liabilities, Lalanne made a second assignment.

In addition to the $200 paid cash, Lalanne had remitted weekly to appellant $50, which weekly payments amounted to $994.44, thus extinguishing the amount secured by respondent's obligation.

To this action respondent pleaded:—

1.—That, as direct and absolute, the obligation was void.

2.—That, as security for Lalanne's debt, it was no longer valid, the principal debt having been paid by Lalanne.

The judgment of the Superior Court rendered at Sherbrooke by the Honorable Mr. Justice Dunkin was as follows:—

"The Court having heard the parties by their Counsel, examined the record, and deliberated; considering that the defendant hath sufficiently established by evidence the material averments of his pleas in this cause filed, and more particularly considering that it is proved that the obligation whereon this suit rests, to wit, the obligation in the declaration in this cause filed mentioned, and which purports to be a direct acknowledgment of indebtedness by the plaintiff in favor of the defendant, was given for no real consideration whatever between them, and that in fact no such indebtedness subsisted; and considering further, that even if, on the supposition that the same may have been meant by them to cover an engagement of suretyship on the defendant in behalf of Lalanne in the pleadings in this cause mentioned, such engagement of suretyship is shewn to have been fully discharged by means of the payments which the said Lalanne afterwards made to the said plaintiff, and which he, defendant, is entitled to require, shall be imputed in favor of himself as such surety, doth dismiss the plaintiff's action with costs in favor of defendant, distraction of which is awarded to Mr. Pannetton, his attorney."

John A. Perkins, for appellant:—

There is no question whatever that the release and discharge of Lalanne by appellant upon notes endorsed by respondent is a valid and binding consideration to and in favor of respondent.

Appellant's Exhibit No. 2 shews that, after receiving the security in question, Lalanne had other dealings with the appellant amounting to $1,018.77, Lalanne paying in the interval $994.44, leaving a balance due of $24.33.

No imputation of payment was made by Lalanne upon respondent's debt. Where are the receipts for the monies? No imputation such as contended for could be made, for the very simple reason that the obligation of respondent was not due and did not become due till the 21st February, 1872. (Civil Code, articles 1158, 1159, 1160 and 1161.)

The appellant made the imputation as he had a right to do upon debts due, and the law declares such imputation to be the only legal and proper imputation.

James Doyle and Gaudette.

The law and the facts of record are against respondent. Sued upon a solemn contract respondent seeks to evade liability. What does the respondent say to his own written admission of indebtedness in the obligation? Nothing whatever. One of the questions is: Has respondent by himself or Lalanne paid this obligation? Verbal testimony cannot prevail as against the written document, or be at all admitted in this cause, and therefore appellant believes the judgment appealed from to be erroneous.

L. E. Panneton, for respondent:

L'obligation sur laquelle la poursuite a été intentée, est nulle si on la considère comme obligation principale, et n'est plus valide si on la considère comme sureté donnée pour la dette de Lalanne.

Pour qu'elle soit valable, comme obligation principale, il faut qu'il y ait eu novation en substituant l'intimé à Lalanne comme débiteur principal. (Art. 1169 Code Civ.) La preuve établit que Lalanne n'a jamais été déchargé de cette obligation, mais qu'au contraire l'appelant l'a toujours considéré comme son débiteur.

Comme sureté de la dette de Lalanne, cette obligation est éteinte, Lalanne ayant payé la dette principale.

Les faits, tels que prouvés par Kerr, le témoin du demandeur, démontrent que Lalanne se trouvait à devoir à l'appelant $918.70 garanties par l'hypothèque de l'intimé lorsqu'il ouvrit le nouveau compte. Il paie $994.14 en différents temps. Doit on appliquer ces paiements sur la dette garantie ou sur le compte courant? L'art. 1161 C.C. dit: "A défaut de convention speciale, "les paiements doivent être imputés à la décharge de la dette actuellement dûe "et que le débiteur a le plus d'intérêt à payer." Pothier, Obligations, No. 530, corrollaire 5. "L'application doit plutôt se faire sur la dette pour laquelle le "débiteur a donné caution que sur celle qu'il doit seul." La raison donnée par Pothier est qu'en déchargeant la dette garantie, le débiteur se libère de deux créanciers, du principal créancier et de la caution qu'il était obligé d'indemniser. Un débiteur a plus d'intérêt à se libérer de deux créanciers que d'un seul. Sur ce point l'intimé soumet les autorités suivantes:—

Lalonde vs. Rolland, 10 L. C. Jurist, 321.
Cochin, Tom. 4, pp. 614 et 615.
Guyot, Rep. mot, Hypothèque, p. 91.
Merlin, Rep., Tom. 6, p. 20.
Toullier, Tom. 7, No. 176.
Symmes vs. Perkins, 1 L. C. R., p. 136.
Canon vs. Thompson, 1 L. C. J., p. 156.
Clegg vs. Brooks, L. C. R., Vol. 12.

Il est bien vrai que l'obligation de l'intimé n'était pas dûe au temps que ces paiements ont été faits par Lalanne. Mais quelque plausible que cette objection puisse paraître au premier abord, elle n'a cependant aucune force. Etant prouvé que l'obligation n'est qu'une sûreté d'une dette principale, qui était la composition de Lalanne, cette composition était dûe et payable par Lalanne lorsqu'il faisait ces paiements. La caution peut être obligé d'une manière moins onéreuse que le principal, art. 1933 C.C. Dans le cas présent, l'obligation de l'intimé n'était payable qu'une année après sa date, tandis que la composition de

Lalanne était payable par versements, dont les derniers devenaient dû à l'échéance de l'obligation de l'intimé.

D'ailleurs, Lalanne jure positivement que les paiements on été faits par lui sur la dette pour laquelle l'intimé était responsable.

L'obligation principale étant éteinte la caution est déchargée.

TASCHEREAU, J., dissident :—Gaudette avait donné une obligation de $900 pour Lalanne, l'un des débiteurs de Doyle. Etant poursuivi, il se défendit en disant qu'il y avait défaut de cause valable dans l'acte, qu'il n'était que la caution de Lalanne et que celui-ci avait payé cette créance. Il n'y a aucun doute qu'il y a eu cause valable. Comment le paiement est-il prouvé ? Par Lalanne, qui s'est sauvé aux Etats-Unis, et y a été entendu devant un commissaire qui ne paraît pas avoir été assermenté. C'est une bien pauvre preuve. L'un des témoins de Doyle dit que Lalanne lui a payé environ $900, mais c'était à compte de marchandises vendues à Lalanne après sa faillite. L'obligation de Gaudette dont le terme était d'une année n'était pas alors due et d'après la loi l'imputation doit se faire sur la dette la plus récente parce qu'elle était due et l'autre ne l'était.

DORION, Juge en chef :—La majorité du tribunal est d'opinion que Doyle a été payé, non pas d'après le témoignage de Lalanne, mais d'après celui même du commis de Doyle lui-même. La lettre de Doyle au syndic à Sherbrooke ne laisse aucun doute que Gaudette n'était qu'une caution. Il obtint du délai mais non pas Lalanne. Lorsque ce dernier paya Doyle cette dette existait déjà ; or, étant la plus ancienne, c'est sur cette dette que devait se faire l'imputation de paiement.

Jugement confirmé, Taschereau, J., dissident.

Perkins, Macmaster & Préfontaine, pour l'appelant.

Hall, White & Panneton, pour l'intimé.

(L.E.P.)

COURT OF REVIEW, 1875.

MONTREAL, 28TH JANUARY, 1875.

Coram JOHNSON, J., TORRANCE, J., BEAUDRY, J.

No. 2037.

Butters et al. vs. *Allan et al.*

HELD :—1. That the question, whether the damage to a cargo which the defendants agreed to carry to Glasgow "was capable of being covered by insurance," is a question of law and not one purely of fact.

2. That the evidence of witnesses about to leave the Province taken *de bene esse*, in the form of deposition, may be read to the jury as evidence in rebuttal, although on the face of the depositions it is not stated whether the evidence is taken in chief or in rebuttal.

3. That evidence tending to show that the defendants were not guilty of negligence, as pleaded by them, cannot legally be offered in sur-rebuttal.

This case arose out of the sinking of the S.S. St. Patrick at her berth in the port of Montreal, and was tried before a special jury.

The action was brought to recover the value of a quantity of wheat, Indian corn, peas and grain which had been shipped on board the vessel, to be carried to Glasgow.

Butters et al., vs. Allan et al.

During the loading, the defendants, with a view to discover whether or not a certain portion of the rudder required repair, and to repair a certain other portion of the rudder, caused the vessel to be sunk by the bow, and whilst in that position she suddenly capsized, and the goods shipped by the plaintiffs were greatly damaged by water.

The jury found that the accident "was occasioned by the fault, gross negligence, imprudence, and want of skill and care of those employed by the defendants."

The defendants pleaded, amongst other things, that, according to the usual form of their bills of lading (in view of the granting of a bill, in which form the jury found the goods had been shipped), they were not liable, if the goods were "capable of being covered by insurance," and that the loss which occurred was one "which could have been insured against." And the plaintiffs in answer alleged that the goods could not have been legally insured under the circumstances, as the vessel at the time the goods were shipped and the accident occurred was not staunch, sound, seaworthy and portworthy, and in a condition to take in cargo and put to sea. And the jury, in answer to the tenth question put to them, found that the vessel was not staunch, sound, seaworthy and portworthy, &c., as so pleaded by the plaintiffs.

The defendants moved for judgment *non obstante veredicto* and for a new trial, and plaintiffs moved for judgment on the verdict.

JOHNSON, J:—This case was tried by a jury, and a verdict rendered, upon which the plaintiff now moves for the judgment in his favor. The defendant makes two motions, the first for judgment *non obstante veredicto*, and the other for a new trial. If the defendants' motions should fail, that of the plaintiffs would be granted as a matter of course; therefore they must be looked at first. The motion for judgment, notwithstanding the verdict, rests, as indeed it must do, under the law, upon only one ground, viz., "that the allegations of the plaintiff "are not sufficient to sustain his pretensions;" [433 Code de Proc.], and though this ground is urged in the motion in various forms and colors, so to speak, yet the basis of the motion is that, and only that. The different ways in which this pretension is urged are: 1st, That the declaration does not aver that the plaintiffs were proprietors of the wheat and other grain that were alleged to be lost; and, 2ndly, That there was no consideration alleged for which this contract was entered into by the defendant. There are other forms of putting it also in this motion; but they are irregularly mixed up with argument derived from the findings of the jury in certain particulars; and they do not embrace any other substantial point on which the declaration is contended to be insufficient. We have carefully referred to the declaration fyled in the case, and we find that it alleges a contract between the defendants and the plaintiff to carry grain from Montreal to Glasgow; and if that allegation is true, a liability would result on the defendants' side to fulfil the contract, or to pay to the person with whom they contracted damages for the breach of it, independently of the kind of interest, whether of ownership or otherwise, which such person might have had in the thing to be carried. With respect to the consideration, it is distinctly alleged to have been agreed to receive this grain, and to carry it to Glasgow for a reasonable rate of freight; and it is not necessary to consider

what was urged by the plaintiff's counsel at the argument, viz: that a carrier is in some cases liable for negligence, even where he is carrying gratuitously. The defendants therefore will take nothing by their motion for judgment in their favor, notwithstanding the verdict. The motion for a new trial embraces four grounds. 1st, the insufficiency of the assignment of facts submitted to the jury; 2nd, improper admission of evidence at the trial; 3rd, improper rejection of evidence; and lastly, that the verdict is against evidence, and without evidence to support it. The first ground would be a good one if it were supported by the record. The assignment of facts must under the law (426 C. de P.) comprise "all the facts necessary to be proved," that is, necessary to be proved under the issues joined. The defendant contends that one of the facts necessary to be proved in this case was that the loss of the grain was not a risk capable of being covered by insurance; but that is not purely a fact. It is a proposition of law resulting from the facts that are proved in the case; and the question, as far as it can be said to be a question of fact, is in reality involved in that of negligence or no negligence on the part of the defendants, which is the only point apparently or at all events the main point on which the present action depends. The admission of illegal evidence which is complained of relates not to the character or kind of proof admitted, but merely to the order in which it was allowed to be given. This evidence had been taken *de bene esse*, the witness being about to leave the Province, and it was allowed to apply as evidence that had the effect of rebutting, instead of being received at first as evidence in support of the demand. The evidence that was rejected was that of Creighton, who was offered by the defendants as a witness in rebuttal to prove that the defendants had tried to get the services of a diver—a point which if it was meant to affect any material part of the case, could only apply to the question of the defendant's fault and negligence, and therefore should have been proved as part of the defence. These are the points raised by the motion, and it is of course unnecessary to say more upon them than that they cannot prevail. The general question of want of evidence to support the verdict is all that remains. The case was one depending entirely upon the fact of negligence, which has been distinctly found, and found in accordance with the entire weight of the evidence. The motions of the defendants are dismissed; and the plaintiffs' motion for judgment is granted.

Defendants' motion rejected and judgment recorded for plaintiffs.

L. N. Benjamin, for plaintiffs.

Strachan Bethune, Q.C., counsel.

Ritchie, Borlase & Rose, for defendants.

(S.B.)

SUPERIOR COURT, 1875.

MONTREAL, 23RD NOVEMBER, 1875.

Coram JOHNSON, J.

No. 2124.

Ritchot vs. *McGill* et al.

HELD:—In an action commenced by *saisie arrêt avant jugement* upon plaintiff's own affidavit of secretion, &c., by defendant, that, though defendant in his plea denies the secretion, &c., and the facts of declaration and affidavit, the facts sworn to are to be held proven, and the onus of proving the contrary is on defendant.

Ritchot sued McGill for $250 upon an overdue note, and upon his own affida-

Ritchot vs. McGill, et al.

vit of secretion, &c., obtained a writ of *saisie arrêt avant jugement*. Under this writ the defendant's goods were attached and heavy costs of seizure incurred. Defendant appeared and offered to confess judgment of debt and common costs, but not for those of the attachment, which he alleged was without justification. He filed this confession with his plea, which denied all the allegations of the declaration and affidavit as to secretion. Plaintiff answered generally, and at enquête made no proof of his allegations, and defendant attempted no evidence to destroy them, contending that the duty of proving by other witnesses the truth of his own allegations was upon the plaintiff, and that defendant could not, without such previous enquête, be called upon to prove the negative allegation. The case was argued in this sense, and the pretensions of the parties appear from the judgment.

PER CURIAM :—It is admitted in this case that judgment ought to go for the debt, for which the defendants, indeed, in their plea offered to confess judgment, and fyle a confession with costs up to that time, but without costs of the attachment. The pretension of the defendant is that it was the plaintiff's business to prove the truth of the affidavit as soon as it was contested ; but that is untenable. By Articles 819 and 854 of the Code of Civil Procedure, the onus is on the defendant to rebut the statements of the plaintiff's affidavit. The case of Prefontaine and Provost, 1 Jurist, 104, was cited. That was an attachment before the debt was exigible, on the ground of fraud. It was held by the four Judges in appeal—1st, that the plaintiff need not prove the fraud on which the exigibility of the debt depended if it became due in the course of the action; 2nd, that the affidavit of the plaintiff was sufficient to establish the grounds on which the attachment issued, and the defendant could not call upon him to establish them further.

The defendant here contends, however, that upon the authority of one of the judges in Leslie *vs.* Molsons Bank (8 L. C. J. 7) the case of Prefontaine and Prevost is incorrectly reported. What was said, as I find it in the note to the report, is, that that case does not correctly convey the views of the judges with respect to the point under discussion. The point under discussion in the first case was whether present exigibility could be proved either by the plaintiff's affidavit, or by the debt becoming due in the course of the suit. The point under discussion in Leslie and the Molsons Bank was whether the defendant could quash the attachment by an exception *à la forme*. Neither of those cases touched the obligation of the defendant to adopt the necessary proceeding to set aside the attachment, and to produce the necessary proof. Judgment for plaintiff, and maintaining *saisie arrêt* with costs.

Duhamel & Rainville, for plaintiff.

R. A. Ramsay, for defendant.

(J. J. M.)

COURT OF QUEEN'S BENCH, 1875.

MONTREAL, 22ND JUNE, 1875.

Coram DORION, C. J., MONK, J., TASCHEREAU, J., RAMSAY, J., and SANBORN, J.

No. 174.

THOMAS BROSSOIT,

(*Plaintiff in Court below,*)

APPELLANT;

AND

REV. LOUIS TURCOTTE,

(*Defendant in Court below,*)

RESPONDENT.

HELD:—1. That notwithstanding the Statute (Quebec) 31 Victoria, cap. 7, sect. 10, articles of the Civil Code and Code of Procedure may be affected or repealed by subsequent legislation, without express mention being made of the articles so affected or repealed.

2. Defamatory words spoken by a Roman Catholic *curé*, warning a parishioner not to employ an advocate in his professional capacity, are actionable.

3. Where the defendant's conduct was clearly reprehensible, though actual damages may not have been proved, sufficient exemplary damages should be allowed to give the plaintiff his costs.

The action was brought by the plaintiff, an advocate, claiming £500 damages from the defendant, the *curé* of Isle Perrot, for injurious expressions uttered by the latter, with intent to cause the plaintiff damage. The defendant filed a *défense en fait*. After proof, the Superior Court, BEAUDRY, J., on the 26th September, 1873, rendered the following judgment:—

La Cour, après avoir entendu les parties par leurs avocats sur le mérite, examiné la procédure et la preuve et délibéré: Considérant que le Demandeur a prouvé suffisamment que le Défendeur a proféré les paroles injurieuses alléguées dans la Déclaration, mais n'a pas établi de dommages réels par lui soufferts; condamne le Défendeur à payer au Demandeur par forme de dommages intérêts la somme de huit piastres et frais taxés au même montant, suivant la loi."

The plaintiff inscribed in review, but the Court, holding that the case was not susceptible of review, dismissed the inscription, 31st October, 1873. The present appeal was then brought.

In appeal, the counsel for the appellant submitted:—

L'Appelant se croit bien fondé à demander l'infirmation de ce jugement qui est contraire à la preuve et à la loi. En effet, la Cour de première instance a reconnu (et il n'en pouvait être autrement) que les paroles diffamatoires dont se plaint l'Appelant avaient été prononcées par l'Intimé tel qu'il est allégué dans la déclaration. Cependant, dit le jugement, comme il n'a pas prouvé avoir souffert de dommages *réels*, il ne peut exiger qu'une condamnation pour la forme.

D'après la preuve, il est incontestable que les paroles injurieuses dont se plaint l'Appelant, ont été dites publiquement. Elles avaient donc tout ce qui est requis pour constituer une injure grave. La diffamation a été accomplie sans pro-

Brossoit and Turcotte.

vocation de la part de l'Appelant, avec le dessein évident de lui nuire, puisque l'Intimé conseillait à une personne de ne plus l'employer comme Avocat; la publicité était suffisante par le fait qu'il y avait plusieurs personnes présentes.

En examinant seulement la déclaration et le jugement, il est clair que ce dernier est erronné. Serait-il nécessaire pour obtenir un recours en dommages et intérêts pour diffamation que le poursuivant fut tenu d'établir qu'il a souffert par cette diffamation des pertes dans ses affaires ou une diminution dans sa clientèle au montant qu'il réclame?

Il est bon de remarquer que l'Appelant s'est attiré ces injures pour avoir écrit une lettre à l'Intimé, c'est-à-dire pour avoir exercé sa profession. C'est là la seule provocation de sa part.

La Cour de Révision en rendant jugement s'est fondé sur le statut de la Province de Québec, 36 Vict. Chap. XII, Sec. 4.

L'appelant soumet humblement que cette clause du statut n'a pu abroger l'article 494 du Code de procédure civile. En effet cet article se lit comme suit:

"Il y a lieu à Révision:

"1. De tout jugement final susceptible d'appel;

"2. De tout jugement interlocutoire qui ordonne de faire une chose à laquelle "il ne peut être remédié par le jugement final;

"3. De tout jugement interlocutoire qui règle en partie la matière en litige;

"4. De tout jugement interlocutoire qui retarde sans nécessité l'audition "finale ou la décision du procès;

"5. De tout jugement ou ordonnance rendu par un juge sur des matières "sommaires conformément aux dispositions contenues dans la troisième partie "de ce code."

Il n'y a aucun doute que l'appelant avait d'après cet article le droit de porter la cause devant la Cour de Révision. La clause 4 du Chap. XII de la 36 Vict. dit:

"Aucune cause ne sera censée être inscrite pour révision, si, dans le cas où ce "serait une action personnelle, le montant réclamé excède cinq cents piastres, "ou, s'il s'agit d'une action personnelle ou mixte, n'est pas allégué que la matière "qui fait le sujet de la contestation n'excède pas cinq cents piastres en valeur, et "si cette allégation n'est pas prouvée, la partie qui l'aura faite n'aura droit à "aucun frais dans la Cour de Révision."

Cette clause tendait évidemment à amender l'article du Code de procédure civile plus haut cité.

Mais nous voyons la clause suivante dans l'acte de Québec, 31 Vict. Chap. 7, Sec. 10.

"Le Code Civil du Bas-Canada et le Code de procédure civile du Bas-Canada "tels qu'imprimés avant l'Union par l'Imprimeur de la Reine de la ci-devant "Province du Canada, ont été et sont en force de loi dans cette Province; et nul "acte ou nulle disposition de la législature en aucune manière aura force à l'en- "contre de quelqu'article de l'un ou de l'autre des dits Codes, *à moins que tel "article n'ait été spécialement désigné dans tel acte.*"

Il est bien évident par cette clause que la législature ne pouvait pas amender un article aussi important que celui cité plus haut et changer complètement la

Brossoit and Turcotte.

juriadiction d'un tribunal important sans se conformer aux provisions du statut que nous venons de citer qui détermine avec une grande précision la manière de faire ces amendements. Cependant, il n'y a rien dans l'acte qui change la juridiction de la Cour de Révision, qui désigne spécialement aucun article du Code de Procédure, et par conséquent cet acte est en contradiction directe avec l'acte d'interprétation cité en dernier lieu.

L'appelant soumet humblement que l'acte qui change la juridiction de la Cour de Révision n'est pas applicable dans la pratique, vû qu'il n'a pas les conditions requises par le législateur lui-même, pour lui donner force de loi. Si la clause de l'acte d'interprétation était une mesure inutile et qui put devenir lettre morte sans inconvénient, on devrait sans doute s'en tenir à l'acte qui amende le Code de Procédure; mais la clause qui exige une mention spéciale de l'article amendé est non-seulement sage, mais indispensable à l'existence du Code de Procédure, comme recueil complet des lois sur la procédure et comme faisant autorité en ces matières. En effet, si les articles amendés sont mentionnés spécialement, il sera toujours facile de constater les changements que les circonstances nécessiteront. Au contraire, si la législature peut sans ordre et arbitrairement créer des dispositions qui annullent ou amendent des articles importants du Code de Procédure, l'intention du législateur sera évidemment frustré, le Code de Procédure ne sera plus qu'un labyrinthe où il sera impossible de se retrouver et les travaux [illegible]ificateurs deviendront inutiles. Pour ces raisons, l'appelant croit qu'il est lésé par les deux jugements rendus par les tribunaux de première instance et en demande l'infirmation.

For the respondent it was contended:—

La preuve démontre clairement que le défendeur n'a pas proféré les injures mentionnées dans la déclaration. Les paroles prononcés par le défendeur n'étaient pas de nature à causer de dommages au demandeur, et de fait ne lui en ont causé aucun, car le demandeur n'a pas établi en preuve qu'il eut souffert en aucune manière, dans l'exercice de sa profession, en raison des paroles qu'il reproche au demandeur. Il est établi, au contraire, que le demandeur se vantait qu'il allait humilier les Prêtres, qu'il allait réduire le défendeur et qu'il avait déjà réduit le Curé de sa Paroisse. Le défendeur se vantait d'appartenir à l'Institut Canadien. Il se vantait d'être *Rouge*. En sorte que quand le défendeur disait du demandeur qu'il appartenait à l'Institut Canadien et qu'il était un *Rouge* il ne faisait que répéter ce que le demandeur disait de lui-même.

Les témoins du demandeur, Joseph Bourdon et Delphis Goyette, disent que Joseph Turcotte, le témoin du défendeur, n'était pas présent au magasin de Lalonde, lorsque le défendeur a parlé du demandeur, mais ils sont tous deux contredits par Joseph Turcotte lui-même, et Damien Lalonde (frère de Hyacinthe Lalonde, témoin du demandeur) qui disent positivement que Joseph Turcotte était présent, et celui-ci a rapporté, ainsi que Damien Lalonde, comment le défendeur s'est exprimé dans l'occasion. Ces deux mêmes témoins disent que ces paroles du défendeur ont été dites, dans l'après-midi, et ils sont encore contredits par les autres témoins qui jurent positivément que c'était dans l'avant-midi, sur les onze heures—les contradictions diminuent considérablement la preuve du demandeur, et il semble qu'il y avait suffisamment pour renvoyer l'action du demandeur, et

Brossoit and Turcotte.

le demandeur ne peut assurément prétendre à un autre Jugement que celui qui a été prononcé dans la cause.

L'autre Jugement dont est appel, est un Jugement interlocutoire prononcé par la Cour Supérieure siégeant en Révision, le 31 Octobre, 1873. Le demandeur inscrivit sa cause en Révision, et le défendeur fit motion que l'Inscription fut rayée parceque la cause n'était pas susceptible d'être entendue ni jugée par la Cour Supérieure, siégeant en Révision—cette motion du défendeur fut maintenue, et l'Inscription rayée.

La question est de savoir si ce Jugement est fondé en loi. Le statut passé par la Législature de Québec, en 1872 (36 Vic. c. 14, Sec. 4 et 5) règle la matière en déclarant qu'aucune cause ne sera censée inscrite pour Révision si le montant réclamé excède cinq cents piastres, dans le cas où ce serait une action personnelle. Les articles du Code de Procédure en contradiction avec l'acte sont amendés par le statut.

Le demandeur par son action réclame £500 (cinq cents louis, cours d'Halifax), il ne pouvait donc porter la cause en Révision, il ne pouvait venir que devant la Cour d'Appel.—C'est ce qu'il a fait—le demandeur doit être satisfait, c'est avec confiance que le défendeur demande que les jugements dont il y a appel soient confirmés.

DORION, C. J.:—Cette action est pour injures verbales. Les dommages réclamés sont de £500.

L'appelant est avocat. Il réside à Beauharnois où il exerce sa profession.

L'Intimé est le curé de la paroisse Ste. Jeanne de l'Isle Perrot, vis-à-vis Beauharnois.

Le 26 Janvier, 1872, l'Intimé s'est rendu, à Beauharnois, chez un marchand du nom d'Hyacinthe Lalonde, et lui ayant demandé s'il lui avait fait écrire une lettre par l'appelant, Lalonde lui aurait répondu que oui. Sur cette réponse, l'Intimé lui aurait dit: "Lalonde, vous avez tort d'employer Brossoit, comme "votre avocat; ne savez-vous pas que, si vous continuez à l'employer, tous les "prêtres déserteront votre magasin et que peu à peu les honnêtes gens en feront "autant; ne savez-vous pas qu'il a poursuivi son curé *et que ce n'est pas un "honnête homme;* ne savez-vous pas qu'il est excommunié et qu'en l'employant "vous vous exposez à être excommunié vous-même; ne savez-vous pas qu'il "est membre de l'Institut Canadien; Lalonde, je vous le dis, si vous continuez "à employer Brossoit, comme votre avocat, vous ne réussirez pas dans vos "affaires." Il y avait plusieurs personnes présentes et la preuve ne laisse aucun doute que l'intimé s'est servi de ce langage à l'égard de l'appelant.

La Cour Supérieure (M. le Juge Beaudry, siégeant) l'a reconnu par son jugement dans les termes suivants: La cour considérant que le défendeur a proféré les paroles injurieuses alléguées dans la déclaration, mais n'a pas établi de dommages réels par lui soufferts; condamne le défendeur à payer au demandeur par forme de dommages et intérêts, la somme de $8 et frais taxés au même montant suivant la loi.

L'appelant peu satisfait de ce jugement a inscrit la cause pour révision. (Art. 494 *Code de Procédure.*) La cour siégeant en révision a rejeté l'inscription parceque la somme demandée excédait $500. (36 Vict. c. 12, s. 4).

Brossoit and Turcotte.

L'appel est du jugement de la Cour Supérieure et de celui de la cour de Révision.

L'appelant a prétendu que l'acte 36 Vict. c. 12 s. 4 n'avait pas changé l'art. 494 du Code parcequ'il n'y refère pas d'une manière spéciale, ce qu'exige l'acte d'interprétation 31 Vict. c. 7 s. 10 chaque fois qu'il s'agit de rappeler ou de modifier soit un art. du Code Civil ou du Code de Procédure. Nous avons déjà décidé à Québec que cette prétention n'était pas fondée. En effet la législature n'a pas pu par l'acte d'interprétation restreindre à un mode particulier de législation pour l'avenir. Sur le mérite, la Cour Supérieure a reconnu que l'appelant avait eu raison de porter cette action, et cependant, par son Jugement, elle ne lui accorde que $8 de dommages et $8 de frais, en tous $16, et lui fait payer le surplus des frais d'une action de première classe, en Cour Supérieure. L'appelant qui a été injurié, tout en gagnant sa cause se trouverait par là à payer de $80 à $95 de frais. C'est là une injustice que cette Cour doit devoir réformer en accordant à l'appelant $50 de dommages avec les dépens tant en Cour de première instance que sur l'appel.

RAMSAY, J:—A case which has been referred to here came before me in Beauharnois, and I allowed only twenty shillings damages and twenty shillings costs, because it was of a trivial character. This is a far more serious case, for the *curé* went about attempting to take away the plaintiff's character. Yet the judgment in the first Court was for so small an amount that the plaintiff was actually punished for defending his reputation.

The judgment is recorded as follows:—

La Cour, etc...considérant que l'appelant a prouvé les principaux allégués de sa déclaration, et notamment que l'intimé a proféré à son égard avec malice et dans le but de nuire à son caractère professionnel des paroles injurieuses, ainsi qu'allégué en la déclaration, et que ces paroles étaient de nature à lui causer des dommages notables;

Considérant que si l'appelant n'a pas établi d'une manière précise que les propos de l'intimé lui aient causé des dommages réels, la conduite de l'intimé n'en doit pas moins être réprouvée, et la condamnation être suffisante pour réprimer à l'avenir des pareilles tentatives de sa part;

Considérant qu'il y a erreur dans le jugement rendu par la Cour Supérieure à Montréal le 26ème jour de Septembre, 1873, qui en ne condamnant l'intimé à ne payer que $8 de frais, a par là rejeté sur l'appelant la plus grande partie des frais de la demande;

Cette Cour casse, &c., et procédant à rendre le jugement qu'aurait dû rendre la dite Cour Supérieure, condamne le dit intimé à payer à l'appelant une somme de $50 de dommages et les frais encourus en Cour Inférieure à être taxés comme dans une cause de dernière classe, et à lui payer en outre les frais sur le présent appel.

Judgment reversed.

Laflamme, Huntington, Monk & Laflamme for the appellant.
Moreau, Ouimet & St. Pierre, for the respondent.

(J.K.)

COURT OF QUEEN'S BENCH, 1876.

MONTREAL, 22ND MARCH, 1876.

Coram DORION, C. J., MONK, J., RAMSAY, J., SANBORN, J., and TESSIER, J.

No. 17.

REV. C. RENAUD DIT BLANCHARD,
(*Defendant in the Court below,*)
APPELLANT;

AND

DAMASE RICHER,
(*Plaintiff in the Court below,*)
RESPONDENT.

HELD:—That, while ministers of religion are amenable to the civil tribunals for slanderous expressions uttered by them from the pulpit or elsewhere, an action of damages for slander will not be sustained against a priest for admonishing his congregation, on pain of being deprived of the sacraments, not to go near the shop of certain people in the parish who were in the habit of scoffing at religion—where no injury was proved, and it did not appear that the words were spoken maliciously or with intention to injure any particular individual, though they were generally understood by the congregation to apply to the plaintiff.

The action was brought by a blacksmith, of the village of Upton, claiming $100 damages from the *Curé* of the Parish, for injurious and malicious expressions used, in a sermon, respecting the plaintiff.

The action was dismissed by the Circuit Court, sitting at St. Hyacinthe. SICOTTE, J., who presided, made the following observations:—

"Le Demandeur fait découler son droit aux dommages qu'il réclame de deux accusations qu'il prétend avoir été portées contre lui par le Défendeur comme prêtre et curé de la paroisse. La première est ainsi formulée:

"Le Défendeur, par haine contre le Demandeur, dans le but de lui faire tort, peine et dommage, dans le but d'empêcher les habitants d'employer le Demandeur, illégalement et malicieusement, sans aucune raison et motifs justifiables, pour blesser le Demandeur dans ses sentiments comme citoyen et honnête homme, ternir sa réputation et le désigner au mépris, a prêché contre lui, l'a dépeint et indiqué comme indigne de la confiance publique, un malhonnête homme, un mauvais catholique, un mauvais chrétien et citoyen, et de plus a ordonné et intimé dans la même prédication comme prêtre et curé, sous peine de privation des grâces de l'Eglise, de ne plus employer et faire travailler le Demandeur comme forgeron ou autrement.

"Toutefois, d'après la preuve, la partie du sermon qui est incriminée se réduit à ce qui suit: Si l'on continue à fréquenter telle boutique, où l'on parle habituellement contre la religion et les prêtres, je priverai des sacrements ceux qui la fréquenteront.

"Evidemment, il n'y a rien dans cette admonition et cette injonction contre le caractère, contre l'honneur et la réputation du Demandeur. Il n'y a dans ces paroles du prêtre ni malice, ni injure, ni diffamation, ni médisance, ni calomnie; rien qui mérite censure et condamnation.

"L'autre accusation n'est mise en avant que comme chose subsidiaire, plutôt pour démontrer la malice de la prédication et enlever à cette prédication son

caractère essentiellement religieux. Elle est formulée dans les termes suivants :— Que dès longtemps avant la date ci-haut spécifiée, dès le premier Janvier 1870, chaque semaine et mois depuis durant tout l'hiver, tout le printemps, tout l'été et tout l'automne, le Défendeur, toujours, par haine contre le Demandeur, dans le but de lui faire tort et dommage, illégalement, malicieusement, sans provocation et motifs justifiables, se serait plu à dire et répéter, à, et en présence de plusieurs personnes, que le Demandeur était indigne d'être encouragé, était un mauvais citoyen, mauvais catholique, mauvais chrétien, sans principe, sans honneur, sans probité, qu'un bon citoyen ne devait pas faire travailler un pareil homme, et aurait ordonné et intimé, en sa qualité de curé à ces personnes, de ne plus employer le Demandeur sous peine de privation des sacrements de l'église catholique romaine."

Le juge donne lecture de la preuve sur cette accusation et continue :

" Sur ce point, comme sur l'autre, aucune des allégations de la demande, quant à la probité, à l'honneur, à la réputation, au caractère privé du Demandeur n'est justifiée. Il n'en est pas question du tout.

" Tout ce qu'il y a réellement dans et de cette accusation, est l'avis donné par le Défendeur à quelques fidèles, dans le secret de l'intimité, sous le sceau de la confiance que commandait sa position, et d'après le droit découlant de son état qu'attendu que le Demandeur était dans l'habitude de parler, dans sa boutique, contre la religion et les prêtres, il ne devait pas être encouragé.

" Dans toute cette conduite du prêtre, il n'appert aucune malice, aucun dessein d'offenser, aucun motif personnel, aucune volonté de faire une chose mauvaise en soi. Il y a un conseil, donné pour un motif religieux et pour un but religieux, de ne pas contenancer telle personne, et de ne pas l'encourager.

" S'il y a dans ce conseil, une injure, elle est dirigée contre les biens, et non contre la personne. Et l'injure n'existerait que s'il y avait preuve de quelque perte, d'une diminution quelconque dans les biens, d'un dommage actuel quelconque. Cette perte, ce dommage serait la mesure de la condamnation.

" Le conseil peut pêcher contre la charité, mais il n'a pas encore été statué, que tout péché contre la charité, quoique coudamnable, était actionnable. La *sensibilité* des biens n'est pas encore déclarée base légale d'une action civile.

" Le Demandeur n'a souffert aucun tort, n'a pas perdu de clientèle : tous l'ont employé comme auparavant.

" Voilà le côté matériel de la cause. Il y a toutefois un autre point de vue qui a beaucoup plus d'importance. C'est celui de la liberté de la prédication, de l'indépendance religieuse, en présence de ces attaques contre la direction religieuse donnée par le prêtre, soit publiquement, soit personnellement. Là-dessus je n'ai rien à retrancher aux doctrines et aux opinions émises dans la cause de Poulin contre le curé Tremblay. Et je crois bon de lire quelques extraits des notes de ce procès.

" Ce langage était propre à blesser les sentiments du Demandeur ; mais la question est toujours celle que j'examine de suite. Le prêtre était-il dans son droit de censure religieuse ?

" L'église catholique dans certains cas, excommunie, c'est-à-dire sépare du corps des fidèles, celui qu'elle proclame coupable et indigne.

Blanchard and Ritchie.

"Il y a des églises protestantes, où les fautes s'avouent et se dénoncent publiquement, où l'on fait aussi la séparation des bons et des indignes : c'est de la doctrine.

"Les tribunaux vont-ils intervenir et déclarer que telle personne a été injustement séparée des autres membres de l'Eglise, et la réintégrer de par le droit du plus fort ; et de plus, condamner à des dommages ceux qui par cette séparation ont blessé les sentiments de cette personne ?

"Ce serait bien le procédé de toutes les tyrannies, le système de toutes les persécutions ; la force contre la liberté ; la contrainte contre la tolérance, une autorité qui annonce le droit de commander l'opinion religieuse, sous peine d'amende, et de forfaiture, même de la liberté.

"Lorsque la partie se contente d'admonitions dont la cause est l'examen de faits publics, au point de la doctrine et des idées religieuses, la justice n'a pas droit d'intervenir. Si elles sont injustes, l'examen libre et impartial en fera justice.

"Il y a l'intolérance religieuse ; une intolérance fait naître l'autre. Chacun veut être persécuteur à son tour, pour se venger d'abord, et pour montrer qu'on est fort. On blâme le droit de la force : mais ceux qui se débattaient contre elle hier, la mettent demain à leur remorque, s'ils le peuvent. Si les tribunaux interviennent il y aura une intolérance de plus.

"Je ne suis pas de cette tendance.

"La preuve dans la cause qui nous occupe, rend inutile toute discussion sur ce point, car il n'y a rien dans les faits prouvés, qui ressemble à la diffamation, à des dires injurieux ou diffamatoires.

"Toutefois je ferai observer que le droit de contredire était égal et le même pour chaque partie, quant aux faits dont il s'agit.

"Le prêtre n'aurait pas d'action contre le forgeron, parce que ce dernier trouvait ridicule, ainsi que nous l'apprend un témoin, de faire dire des messes pour les biens de la terre, et que le prêtre eut dit, que si on ne faisait pas dire des messes, les épis seraient courts.

"Le forgeron n'a pas droit d'action contre le prêtre, parce que ce dernier dit, qu'on ne doit pas aller l'écouter, et que sur les matières religieuses, le forgeron n'en connaît pas assez pour les discuter.

"Le Demandeur parle contre le prêtre, contre la religion ; il trouve ses enseignements ridicules ; le prêtre recommande aux fidèles de ne pas aller entendre ses discours. Il est assez étrange de voir ce Demandeur qui critique librement et publiquement le prêtre, qui exerce sans gêne son droit de censure contre son curé, et, par-là veut empêcher qu'on fréquente l'église, se plaindre qu'on déclare qu'il ne doit pas être écouté. Il veut avoir toute liberté de critiquer, de censurer ; mais il trouve mal que les autres aient la même liberté, surtout si elle est exercée par le prêtre.

"Toute la cause est dans ce mensonge, dans cette contradiction quant à l'exercice du même droit.

"L'action doit être déboutée."

The judgment was *motivé* as follows :—

"Considérant qu'il est constant que le Défendeur n'a, par aucuns discours

Blanchard and Richer.

injurié ou diffamé le Demandeur, qu'il n'a, en aucune manière attaqué ce dernier dans son caractère privé, dans sa probité ou son honneur; mais qu'il a seulement intimé et conseillé de ne pas fréquenter la boutique du Demandeur, parce que ce dernier était dans l'habitude d'y parler contre la religion et contre les prêtres; considérant que le Défendeur, comme le curé de la paroisse, était par son état, chargé de la direction religieuse des Catholiques, et avait droit comme devoir de les conseiller sur leur conduite, et les moyens de conserver leurs croyances contre toute attaque et danger; considérant qu'il est constant que le Demandeur n'a souffert aucun tort et dommage dans ses biens; considérant que le Demandeur n'a pas justifié son action et le Défendeur au contraire a justifié sa défense, déboute le Demandeur de son action, avec dépens."

The case being taken to Review, the judgment was, on the 31st March, 1875, reversed. The following are in substance the remarks made by the learned Judges on the occasion:—

BERTHELOT, J., *dissentiens*, considered that the judgment was right, and should be confirmed. It was a case where the Court below was in a better position to appreciate the evidence than the Judges of this Court, and he was always reluctant in such cases to disturb a judgment based upon evidence.

MONDELET, J., entered at some length into the pleadings and evidence. The action had been dismissed on the ground that the defendant had not attacked the plaintiff's private character, but had only advised his flock not to frequent the plaintiff's shop. It was true that the ministers of religion had the right to give advice and to warn their flock against dangerous principles, but it must be done with charity. He considered that the defendant had gone much too far in the present case, and that the judgment dismissing the plaintiff's action was wrong. It would therefore be reversed, and judgment would go in the plaintiff's favor for $100 damages, with costs of both Courts.

TORRANCE, J.:—The complaint of the plaintiff is that the defendant, the Curé of his parish, during the divine service on the 13th November, 1870, speaking evil of the plaintiff as wanting in religion and a bad Catholic, enjoined upon his parishioners, under penalty of being deprived of the sacraments, not any longer to consort with the plaintiff or frequent his shop or employ him as a blacksmith (*forgeron*.) Pierre L. Larose deposes as follows: The Curé said in effect: there was a certain shop where controversy was preached; that it was not people who had been at college in the same class for eight years who were able to argue; that what surprised him most was that respectable people frequented this shop, &c.; that if they continued he should refuse them the sacraments. The witness adds that it was generally understood that the plaintiff was meant, for he was the only blacksmith who had been at college. Victor Paquette says he was at the sermon and knew the plaintiff was meant by the words of the defendant. The Curé said there was a certain shop in which it was said there was no purgatory, and he warned his parishioners not any longer to support the proprietor of this shop under penalty of being deprived of the sacraments. All the world knew that the plaintiff was intended. These are samples of the testimonies. I don't see in the evidence any proof of the charges of the Curé against the plaintiff. Was the Curé right in his denunciations? Was there a wrong

Blanchard and Richer.

done to the plaintiff and an *injure* for which the law holds the defendant responsible? I have said that the Curé has not proved his charges against the plaintiff. The plaintiff was his parishioner, one of his flock, entitled to his protection and support. It is difficult to exaggerate the influence of a zealous and earnest minister of religion in the parish where he labours, and not difficult to realize the potency of the threats that the man employing the plaintiff in the exercise of his lawful calling should be deprived of the benefits of the sacraments—the sacraments of baptism and marriage, the holy communion, and the sacrament of extreme unction so dear to every devout Catholic that would go to meet his God without fear. What parishioner would be so bold as to hold for nought the threatened deprivation of the sacraments? It was excommunication *pro tempore*. How likely that in a parish consisting chiefly or wholly of the parishioners of the defendant, the plaintiff might find himself, by the influence of his clergyman, deprived of the means of a livelihood, and obliged to abandon his domicile. It was interdiction from fire and water—*interdictio ignis et aquæ*. When a minister of religion, who is supposed not to confer with flesh and blood, uses the spiritual weapons at his command,—the weightiest artillery in the world—against an individual, it is at least required that the rules of the Church, as well as the maxims of the law, should sanction his action. It is not sufficient to say, "Sic volo, sic jubeo; stet pro ratione voluntas"—My will is law. There is no difficulty in arriving at the conclusion that the defendant has, without apparent justification, inflicted upon the plaintiff a wrong for which the law of the land, to which all must bow, and before which all are on a level, holds the wrongdoer as responsible. Then comes the question of the assessment of the damages. We are all agreed that there is no proof of special damages. Yet there may be damages payable. In the case of Rolland v. Jodoin, 2 L. C. Law Journal, 20, the plaintiff complained of the defendant that the latter met him in the street and calling him by name, to which plaintiff made no answer, exclaimed, "Paie tes dettes, paie tes dettes." The Superior Court considered the matter so trifling that the action was dismissed. In the Court of Appeals the judgment was reversed, and, though the matter was regarded of small importance, $80 and costs were awarded. In the case of Leger dit Parisien *v.* Leger dit Parisien, 2 L. C. Law Journal, 60, the plaintiff, after giving his testimony as a witness in the Superior Court, was accused by the defendant of falsehood and perjury. The Court awarded him $50 and costs. He was not satisfied, and in appeal the judgment was set aside, and the damages for the slander were assessed by the Court of Appeals at $200 and costs. I have no hesitation in saying here that the gravity of the present case is such that the assessment at $100 should be regarded as moderate.

The judgment in review was *motivé* as follows:—

La Cour Supérieure siégeant à Montréal, présentement comme Cour de Révision, ayant entendu les parties, par leurs conseils respectifs, sur le Jugement rendu et prononcé par la Cour de Circuit, dans, et pour le District de St. Hyacinthe, le 27 octobre, 1873, ayant examiné le dossier, la procédure dans cette cause et pleinement délibéré:—

Considérant que bien qu'il soit du devoir du ministre de l'Evangile d'aviser

ses ouailles contre les tentatives qui seraient faites pour porter atteinte à leurs principes religieux, leurs mœurs, et leur bien-être en général, il doit, néanmoins, dans l'exercice de son ministère sacré, agir avec prudence, modération et charité;

Considérant que le défendeur, au lieu de se borner à donner à ses paroissiens les avis qu'il était, dans l'exercice de sa mission sublime et civilisatrice, tenu de leur offrir, s'est, le 13 novembre, 1870, du haut de la chaire, dans l'Eglise Paroissiale de la Paroisse de St. Ephrem d'Upton, dans le diocèse de St. Hyacinthe, dans le district de St. Hyacinthe, dont il est le curé, permis d'insulter le Demandeur et l'injurier, sans cause et raison et même sans prétexte, et a, avec effet, défendu à ses dits paroissiens de fréquenter le Demandeur et sa boutique de forgeron, et, de plus, au moyen de ses menaces hautement déplacées et lancées sans droit et autorité de refuser les sacrements à ceux qui fréquenteraient le Demandeur ou sa boutique de forgeron, a causé au Demandeur un dommage que la Cour estime à cent dollars courant:—

Considérant que le Demandeur a fait preuve des allégations essentielles de sa déclaration, mais que le défendeur a failli d'établir sa défense, elle est déboutée;—

Considérant qu'il y a erreur dans le Jugement dont est appel, savoir, le jugement rendu par la Cour de Circuit du District de St. Hyacinthe, le 27 Octobre, 1873, cette Cour infirme, annule et met à néant le dit jugement, et rendant celui qu'aurait dû rendre la dite Cour de Circuit, condamne le Défendeur à payer au Demandeur la somme de cent dollars de dommages et intérêts pour les causes énoncées en la déclaration du Demandeur, avec intérêt sur la dite somme de cent dollars, à compter de ce jour, et les dépens tant de la dite Cour de Circuit que de cette Cour de Révision, distraction desquels est accordée à MM. Fontaine, Mercier et de Cazes, Procureurs des Demandeurs."

"Il est ordonné que le dossier soit remis à la Cour de la première instance."

"L'Honorable Juge Berthelot ne concourt pas dans ce jugement."

In Appeal, the judgment of the Court of Review was reversed.

SANBORN J., *dissentiens*:—This is an action by the respondent, who is a blacksmith at Upton, against the appellant, the Curé there, alleging that the appellant in the church on the 13th November, 1870, publicly, in presence of the parishioners assembled, denounced respondent as a person unworthy of confidence, and that those of his parishioners who continued to frequent his shop would be refused the sacraments of the Church; and, further, that he repeated this elsewhere in private conversation, and that respondent was injured in his good name in business thereby. The charge, as respects the Church, I think sufficiently proved. Appellant is proved to have alluded to a certain shop where a person, educated at the college, was wont to wage religious controversy and disparage the Catholic Religion, and that he should refuse the sacraments to those who frequented or continued to frequent this shop. The witnesses produced by appellant said he spoke of shops, not one shop, but some ten witnesses state distinctly that he spoke of a certain shop, and his allusion to the proprietor of the shop as one educated at the college leaves no doubt to whom he referred; and his observations in private, which are proved, while not sufficient to constitute defamation, serve to confirm

Blanchard and Richer.

the general belief that he referred to respondent in his public discourse. The witnesses say it made a marked impression upon the audience. To accuse a person of being contentious and of provoking religious controversy and disparaging the teaching of his priest, or the teachings of any religious instructors, is not of itself defamatory. The gravamen of the charge is that appellant endeavored by his observations to destroy respondent's business, by intimidating his parishioners under penalty of deprivation of church privileges, from employing respondent in his lawful business. The place and time, when and where the utterances are made, may render language defamatory which otherwise would not be so. This was said on Sunday, in presence of the congregation, when the priest is expected to be careful and deliberate in his utterances, and where his counsel and admonitions are entitled to the greatest weight. Doubtless a priest or minister has the greatest latitude in denouncing vice or what he considers heresy, in fact, evil habits of life and conversation and bad companionship. He is permitted to warn and enjoin upon his hearers, and particularly the members of his charge, against all things, which he believes contrary to good morals and religious life, but this must be of a general character. His sacred calling does not permit him, any more than it does any other man, to single out an individual and denounce him as unworthy of confidence, and enjoin upon his hearers, under severe penalties, not to visit or frequent his place of business. No person, whatever be his position, has a right thus arbitrarily to deal with individuals, and interfere with the free exercise of their calling. If any man violates the law he may be prosecuted, civilly or criminally, before the Courts. If he exposes himself to church discipline, he can be visited with such spiritual penalties as his relations to a church necessarily involve, according to the rules and modes of trial which are adopted in the church to which he belongs; but no one has the right to take the matter into his own hands, without trial or perhaps jurisdiction to try, and to disparage a man by words or deeds in the free exercise of the business whereby he lives. Every man is entitled to immunity from injuries of this kind. If a man makes himself by his habits or conversation displeasing to his neighbors or to society, unless he commits acts which expose him to punishment of the law or the censure of his church by proper mode of trial, he must be left to be appreciated by the common sentiment of men. No person can interfere with him, except by some competent, legal mode of complaint for a wrong done, for which he may be subjected to trial.

" Un curé peut bien s'élever dans la chaire de vérité contre tel ou tel vice, contre tel ou tel crime, mais jamais il ne se doit permettre de désigner ceux de ses paroissiens qu'il croit enclins au vices qu'il combat ou qu'il croit coupables du crime à l'occasion duquel il prêche. La publicité de ses sermons pastorals leur donnerait essentiellement un caractère de diffamation, si la réputation et l'honneur des particuliers n'y étaient pas respectés".

Nouv. Den. Tom. 6. Mot Diffamation, p. 401.

This principle was recognized in Derouin *vs.* Archambault, 19 L. C. J., 157.

Si l'injure ne portait que vis-à-vis de simple particuliers, il est sans difficulté que l'ecclésiastique devrait encore être traité avec plus de réserve. Cependant,

Blanchard and Richer.

pour ce qui aurait trait au dommages intérêts, il ne mériterait pas plus de faveur qu'une personne du monde, car tout ce qui pourrait être ordonné contre lui à part ce qui blesserait la décence de son état, serait régulièrement ordonné." 1 Dareau, "Injures" 317, 318.

Cases are cited in Dareau where a Curé used the occasion of his sermon to hold up the seignior of his parish to obloquy, where he was deprived of his functions for five years and muleted in fine and compelled to retract and apologize. This was because it was a seignior and of the spirit of insubordination it would excite among the people towards the seignior. A case of a private person is reported whom, without apparent cause, other than that he had taken a seat which the Curé ordered him not to take, he ordered to leave the church, and, when the parishioners declined to put him out, he refused to say mass. In this case the priest was condemned to pay 50 livres damages and costs. This was in an age when distinctions in social [illegible] were more regarded than now, consequently there was greater disparity in the [illegible]ence for calumniating a seignior and an ordinary parishioner than would accord with the genius of our age and society, but the principle of the law is the same. If this were subject to English law, there would be more difficulty in [illegible]ining respondent's claim without proof of special damages, as by the act of the Curé he is charged with no crime or any offence which would subject him to loss of office or status; but our law goes further and makes the use of language under circumstances where not warranted such as to bring a person into contempt or calculated to deprive him of the free exercise of his calling, an injury for which damages are presumed. The facts proved respecting the appellant, however, would constitute slander under the English law. Addison on Torts, p. 793.

Slander here is governed by civil law as respects private damages. This was determined in Belanger *vs.* Papineau, 6 L. C. R. 415; Bedarride "Responsabilité," No. 34. "La personne blessée dans ses affections, dans sa réputation, a le droit d'exiger une compensation particulière à sa souffrance, on la lui donne en argent faute de pouvoir faire mieux".

It has been adopted in our jurisprudence. The Courts have awarded damages estimated at discretion, without proof of special damages, according to the circumstances of the case, where an action lies under our law, though under the English law no action would lie without proof of special damages. Rochon *vs.* Gaspel, 1 L. C. L. J. 65; Leroux *vs.* Brunel, 1 L. C. L. J. 111. Lighthall *vs.* Walker, 2 L. C. L. J. 43.

It was held by this Court in the case Leger dit Parisien *v.* Leger dit Parisien, 3 L. C. L. J. 60, that where a slander exists the Court will award exemplary damages. It was also held in this Court, in the cause of Brossoit *v.* Turcotte, decided in June last, that substantial damages might be awarded where no special damages were proved.

That case was in some respects similar to this. The injury consisted there in the priest's threatening one of Brossoit's clients with loss of business if he continued to employ Brossoit as attorney. This case appears to me stronger, inasmuch as the threat was made in a more public manner and accompanied with the assertion that his parishioners would be deprived of privileges which

Blanchard and Richer

they regarded of a most important nature if they frequented respondent's shop. This was certainly taking the most direct and effective means to deprive respondent of his customers. There is proof that it had effect. Some of his customers are mentioned, who left respondent, and one witness says his business so diminished that he had to leave the parish. I think the judgment of the Court of Review, awarding against appellant $100 and costs, should be confirmed.

DORION, C. J.:—This is an action of slander. It appears by the evidence that in the parish of Upton a number of persons seceded from the Roman Catholic Church, and some time after a portion of the seceders came back again. On the next Sunday after their return, the appellant, who is the Roman Catholic priest in charge of the parish, announced the fact to the congregation, and at the same time he warned his parishioners of the danger of receiving books which were distributed through the parish. He then went on to say that there was a certain shop or there were certain shops in the village (it does not appear exactly what expressions he used) where the proprietors were in the habit of speaking against the Catholic religion and against the priests, and he recommended his parishioners not to frequent such shop or shops, and said that he would refuse the sacraments to those who continued to do so: to this he added, it was not sufficient to have been five or six years at college to be able to discuss matters of religion. The respondent was the only mechanic, in the village, who had been at college, and it was generally understood that the curé alluded to him. For this the respondent brought an action of damages. Judge Sicotte, while holding that the respondent was the person alluded to, dismissed the action. This judgment was reversed in review by JJ. Mondelet and Torrance, Berthelot, J., dissenting.

At the argument it was contended on behalf of the appellant that he was not amenable to this Court for what he had said in the pulpit. I must express my entire dissent from such a doctrine. A priest enjoys no immunity, and cannot free himself from the responsibility attaching to the use of slanderous language whether in the pulpit or elsewhere. But here the expressions made use of by the appellant were that the respondent, whom he did not designate by name, was in the habit of speaking against the priests and against the Catholic religion, and that he would refuse the sacraments to those who continued to frequent his shop. These are not slanderous expressions. It is no slander to say that a man speaks against all or any particular religion, and the words in themselves are not actionable. It is not shown that the appellant was actuated by malice when he used these expressions, and there is no injury proved. It never stopped anybody from going to the respondent's shop. On the contrary it is proved that a short time after he had more work than he could do, and he had to take another workman to assist him. There are here none of the elements necessary to sustain an action of slander, and the judgment in review must be reversed and the original judgment confirmed. The case of Brossoit *v.* Turcotte decided by this court in June last, was referred to. In this last case the defendant Turcotte went out of his parish to a merchant of the name of Lalonde, one of Brossoit's clients, and, in the presence of several persons, told him that Brossoit was a dishonest person, that he, Lalonde, should not employ him, and, if

he did so, the members of the clergy and respectable people would desert him. It is actionable to say of a professional man that he is dishonest, although it may not always be possible to prove that actual damages resulted from the use of such language. In Turcotte's case malice was proved by all the attending circumstances, and he was condemned. There is no analogy between the two cases. But, in concurring in the judgment dismissing the present action, I wish it to be distinctly understood that it is because I find that the words used are not slanderous, and that there is no malice and no damage proved, and not because the respondent might have used with impunity in the pulpit language for which he would be liable in damages, if he had used it elsewhere.

RAMSAY, J.:—From the argument at the bar we were led to apprehend that a delicate case, involving the relations of church and state, was to be submitted for our consideration. Fortunately we are not called on to decide any of those contentions, more irritating than useful, for the case is a very plain action for verbal slander. The declaration sets forth a perfectly valid ground of action, and the only defect I can see is that its allegations are not supported by proof. After setting up the motives of hatred and malice actuating the defendant, the plaintiff says that the defendant "a préché contre le demandeur, l'aurait depeint et indiqué comme un homme indigne de la confiance publique, un malhonnête homme, sans principes, sans religion, sans honneur, un mauvais catholique et un mauvais chrétien et citoyen, et aurait de plus intimé et ordonné comme prêtre et curé aux catholiques romains susdits dans l'enceinte de la dite église et autres, sous peine de désobéissance à leur curé et de privation des grâces de l'église de ne plus employer à l'avenir et de ne plus faire travailler le demandeur comme forgeron ou autrement, et aurait là et alors avec grande force et violence proféré, les dires faux, calomnieux, malicieux, et illégaux susdits et autres dans le même sens et dans le même but, et comportant les mêmes idées."

It was then alleged that "longtemps avant la date ci-haut spécifié (13 Nov. 1870) savoir au dit lieu dès le premier Janvier, 1870, et chaque semaine et mois depuis durant tout l'hiver, tout le printemps, tout l'été et tout l'automne derniers, le défendeur toujours par haine contre le demandeur, dans le but de lui faire tort et dommage illégalement et malicieusement, sans provocation ou raison justifiables, à St. Ephrem d'Upton susdit, se serait plu à dire et repéter à et en présence de plusieurs personnes que le demandeur était indigne d'être encouragé, était un mauvais citoyen, mauvais catholique, mauvais chrétien, sans principes, sans honneur et sans probité, qu'un bon catholique ne devait pas faire travailler un pareil homme, et aurait là et alors intimé et ordonné en sa dite qualité de curé aux dites personnes de ne plus employer le dit demandeur sous peine de privation des sacrements de l'église catholique romaine."

The plaintiff then goes on to say that as these private calumnies did not do plaintiff sufficient damage he proceeded to make the public denunciation first above complained of.

We have thus two distinct grounds of action alleged—slanders to individuals between the 1st January, 1870, and the 13th November, 1870; and the public denunciation on the 13th November.

Only three witnesses speak of conversations with defendant relative to plain-

Blanchard and Richer.

tiff. They are Abraham Desautels dit Lapointe, Joseph Pilon and Victor Clement.

Desautels states that what the curé said was "que l'on ne devait pas encourager un homme comme cela, car si on ne l'encourageait pas, il ne pouvait pas gagner sa vie et serait forcé de s'en aller de la paroisse. Le défendeur donnait pour raison que le demandeur n'était pas un homme d'exemple et qu'il parlait mal du clergé."

Pilon speaks of two conversations with the defendant, in one of which (the date is not given) he said plaintiff was not "un homme à fréquenter puisqu'il n'avait pas de respect pour son évêque et que très-souvent il était à parler dans sa boutique des prêtres et de la religion." The second conversation was some weeks before the 13th November, and then the defendant in his office told witness "que le demandeur était un homme qu'on ne devait pas encourager, et que le meilleur moyen de s'en débarrasser était de le prendre par la famine; qu'il espérait que les citoyens respectables de la paroisse cesseraient de l'employer." These were private conversations.

Clement says, that in answer to a question put to the defendant by the witness on one occasion, to which no date is given, the defendant said "que ce serait bien mieux pour nous de discontinuer à faire travailler cet homme là, que c'était un apostat, un homme qui parlait contre les prêtres et la religion."

In not one of these conversations do we find any repetition of the words laid in the declaration, and there is no *videlicet* or averment of any kind to help the case. But, moreover, they are not like even in substance to the very vigorous expressions of the declaration. Nor are the words proved accompanied by any threats of ecclesiastical censure, as is allèged. In addition to this, these conversations appear to be private and confidential conversations, and there is a total absence of malice. They take place between a *curé* and certain individual parishioners relative to another parishioner who is a notorious scoffer, and it is with reference to this very habit of the plaintiff that the defendant speaks. So much for the strict and technical view; but if we are to take a broader view, to what do the defendant's strictures amount? He says: "this blacksmith turns his shop into a place for discoursing against the religion which you profess, which he pretends to be his, and which I, under the sanction of the law, am placed there to teach, he is setting a bad example and he should not be encouraged. If respectable people were to cease to encourage him by giving him work he would be obliged to leave the parish." This is clearly the sense of these conversations, and I entirely fail to see any ground of action in them.

The next complaint is the sermon. The first question is as to whether the defendant indicated the plaintiff in a manner prohibited or not, and if so, whether and to what extent he was justified by the circumstances. The rule undoubtedly is that the denunciation must be general in its terms; but of course that has a limit. It would be extremely indecent to name or particularize any individual in the pulpit, but it does not follow that the priest must confine himself to the condemnation of what is wrong in general for fear the particular wrongdoer may be indicated by his sin.

Now this is precisely what it appears to me the defendant did in this instance.

He used language guardedly general; Pilon says: "Il n'a pas désigné directement le propriétaire de cette boutique." Blanchard and Richer.

He supposed it was plaintiff the defendant meant because of an allusion to being at college, and because he indicated a shop where there was speaking against religion and the priests. Ouimet gave similar evidence; Clement likewise.

The pretension, then, of plaintiff is that a priest must not denounce scoffing, because he is a scoffer, and so it might be of every vice. Certainly scoffing against his religion is not a thing to be tolerated or countenanced by a clergyman, whether he be a Roman Catholic or a teacher of the most insignificant sect. For example, let us change the scene and suppose the reverend defendant to be the rector of an English parish threatened with the invasion of celebrated revivalists, and that he warned his parishioners of the impropriety of attending heterodox and sensational religious services, and of the ecclesiastical censures that might ensue, could the two preachers of whom we have lately heard so much have had an action of damages against the rector? If an action would not lie in that case, it cannot lie in this one, unless our law is deplorably at variance with common sense. It is argued that the power of the priest or clergyman is very great, and that if he is permitted to denounce one person who disagrees with him he may denounce everyone so offending. The answer to that is, that the case put is not analogous, and that when it arises we shall deal with it on its own merits. The case before us is that of a blacksmith who chooses to combine shoeing horses and teaching theology. It is this joint occupation the *curé* alone condemned, and I think he was acting within the scope of functions which are not forbidden by law, but on the contrary are recognized. He acted in good faith, without malice.

But if the plaintiff's action is well directed, the defendant had good ground for compensation. If the denunciation of scoffing, and the employment of scoffers, by the priest, was actionable, the jokes of this philosophical blacksmith against the utility of masses and prayers were equally so. But what a storm we should have had if the curé had sued the blacksmith, alleging as special damages arising from these sarcastic misrepresentations that the returns from the altar were diminished!

I need hardly add that as regards this part of the complaint the words, even if actionable, are not proved as laid. At the argument the only allegation that seemed to me serious was that to the effect that under penalty of deprivation of the sacraments, defendant forbid his parishioners from the pulpit to give the plaintiff work; but the balance of the testimony, even of that produced by plaintiff, is that the curé forbid his parishioners to *frequent* the shop, not to give work to the person in question, whoever he was, who spoke against religion and the priests. This is a very different thing.

MONK, J., said the case was one of considerable importance, and in order to avoid any misapprehension as to the view which he took of it, he would make one or two remarks, premising them by saying that he entirely concurred in the judgment rendered by his colleagues. He did not think there was any slander or injury proved, and he was satisfied there was no malice. As remarked

Blanchard and Richer.

by the learned Chief Justice and Mr. Justice Ramsay, there did not happen in this case to be any proof to establish the charge. As to the right of the Court to award damages, if malice had been shown and an injury established, he had no hesitation in saying that what had been called a solatium might be allowed. As to the position of a minister in the pulpit, whatever words a priest uttered there in reproof of vice he was at liberty to utter. He might make his remarks general, or he might come down to a pretty palpable individuality; so long as he restricted himself to his proper function as spiritual guide and instructor he was not liable. But he did not wish to be misunderstood. If a priest went beyond what his sacred mission required, he became liable to answer in the tribunals for what he said. Here there was nothing that amounted to slander, and there was no injury established. The judgment of Mr. Justice Sicotte, which dismissed the action, had been reversed in Review, but it was to be remarked that Mr. Justice Berthelot dissented.

TESSIER, J., concurred in the view that there was nothing said that could be considered a slander, and that so far from the plaintiff being injured by the words spoken, it was proved that he had more work afterwards than previously.

The judgment is *motivé* as follows:—

"Considerant qu'il y a bien jugé dans le jugement rendu par la cour de circuit pour le District de St. Hyacinthe le 27e jour d'octobre, 1873, confirme le jugement, &c. (*dissentiente* l'honorable M. le juge Sanborn.)

Judgment of Court of Review reversed.

Mousseau, Chapleau & Archambault, for the appellant.

Doutre, Doutre & Hutchinson, for the respondent.

(J. K.)

COURT OF QUEEN'S BENCH, 1875.

MONTREAL, 18TH FEBRUARY, 1873.

Coram MONK, J., TASCHEREAU, J., RAMSAY, J., SANBORN, J., SICOTTE, J. *ad hoc*.

No. 63.

ARSENE LALONDE,
(*Plaintiff in Court below,*)
APPELLANT;

AND

OWEN LYNCH ET AL.,
(*Defendants in Court below,*)
RESPONDENTS.

HELD:—1. A hypothecary creditor has a right to an action *en déclaration d'hypothèque* against the vendee of the property hypothecated, even though such vendee may have re-sold the property, if such re-sale be not registered.

2. Where, in an action *en déclaration d'hypothèque* against the first vendee he pleads and proves a re-sale not registered, and that he is no longer *détenteur*, he will be condemned to pay the costs of action up to the time of fyling his plea, and the plaintiff will be condemned to pay the costs of contestation to defendant after plea fyled.

3. It having been pleaded to an action *en déclaration d'hypothèque* that the defendant was no longer *détenteur*, but by a deed not registered had re-sold to another, the plaintiff has a right by a new action under the same number to summon such other vendee and to have him condemned according to law as *détenteur*.

The facts of this case and the arguments of the appellant are stated in the factum of Messrs. Dorion, Dorion & Geoffrion, appellant's counsel, as follows:—

Lalonde and Lynch et al.

Le demandeur a intenté une action hypothécaire contre Owen Lynch.

Celui-ci a plaidé qu'il n'était pas propriétaire de l'immeuble qu'on lui demandait de délaisser, l'ayant vendu avant l'institution de l'action à son frère, Messire Michael Lynch.

Cet acte de vente n'a jamais été enrégistré, et Messire M. Lynch n'a jamais pris possession de l'immeuble en question, en sorte que l'action était bien dirigée contre Owen Lynch, qui était encore le détenteur et possesseur de l'immeuble.

Mais, pour plus de sureté le demandeur a mis le nouvel acquéreur en cause, et par ses conclusions a demandé que le jugement à intervenir lui fut déclaré commun, et à ce que dans le cas où Owen Lynch serait déchargé de l'action, lui, Messire M. Lynch fut condamné à délaisser.

Messire Lynch s'est contenté de plaider en droit à l'action dirigée contre lui.

Le demandeur a fait entendre un témoin qui prouve que c'est le défendeur Owen Lynch qui l'a employé comme son agent pour louer la terre en question, et que c'est à lui qu'il a rendu compte des revenus.

Les défendeurs n'ont fait aucune preuve.

Les deux causes qui n'en formaient qu'une, la dernière étant un incident de la première, ont été inscrites à l'enquête et au mérite ensemble, et entendues comme une seule cause.

La Cour a cru devoir rendre des jugements séparés.

Le 27 Juin 1872 elle a renvoyé l'action en déclaration de jugement commun, comme étant mal fondée en droit, et le 8 Juillet suivant elle a débouté l'action principale sous le prétexte que Owen Lynch avait vendu l'immeuble à son frère avant l'institution de l'action.

Voici ces deux jugements :

27 Juin 1872.

"La Cour etc., considérant que le demandeur n'a aucunement prouvé les allégations de sa déclaration, et que sa demande est mal fondée en droit, la déboute avec dépens &c."

Le 8 Juillet 1872.

La Cour, etc.

"Considérant que le demandeur n'a pas prouvé que le défendeur était à l'époque de l'assignation en cette cause, débiteur à titre de propriétaire de l'immeuble décrit en la déclaration en cette cause; Considérant de plus que le défendeur a prouvé qu'à l'époque de la signification en cette cause il avait cessé d'être propriétaire du dit immeuble, l'ayant vendu au Rev. Messire Michael Lynch, par acte reçu à Beauharnois devant J. Brossoit, Notaire, le 19 de Mai, 1870, et considérant qu'il n'y a aucune preuve que cette dite vente ait été simulée, tel qu'allégué par dit demandeur; Déboute l'action du dit demandeur avec dépens &c."

Le demandeur se plaint avec raison de ces deux jugements.

Sous l'empire du Code, art. 2098, celui dont le titre n'est pas enrégistré, ne peut pas être considéré comme propriétaire, vis-à-vis des tiers.

Il n'a pas droit de vendre, d'aliéner ou d'hypothèquer. Il ne peut pas avoir

Lalonde and Lynch et al.

plus le droit de délaisser en justice. Le délaissement ne peut se faire que par le propriétaire ayant qualité pour aliéner.

A quoi servirait donc notre système de publicité des droits réels, s'il fallait qu'un créancier hypothécaire fut exposé, comme dans le cas actuel, à ne jamais savoir contre qui diriger son action, car rien n'empêche que Messire Lynch n'ait lui aussi, revendu la propriété à quelqu'autre; et lorsqu'on nous indiquera ce dernier acquéreur, il se sera, à l'exemple de ses auteurs, démuni de la propriété pour frustrer les créanciers légitimes.

Mais s'il pouvait y avoir du doute, il semble évident que du moment que celui que l'on prétend être le propriétaire est mis en cause afin de voir le jugement déclaré commun avec lui, ce doute doit disparaître.

Si l'action avait été dirigée d'abord contre les deux hommes, elle aurait dû assurément être maintenue contre l'un d'eux. Or, qu'elle différence y a-t-il entre cette procédure ainsi adoptée dans la présente cause? L'appelant n'envoit pas de mauvaise foi, tous les jours et souvent même par ordre de la cour, l'on met en cause des tiers, qui auraient dû être assignées en premier lieu. A plus forte raison, lorsque la partie demanderesse ne connaît pas (comme dans le cas actuel), les parties qui peuvent avoir intérêt dans la cause.

Le procédé adopté par l'appelant dans la présente cause est formellement reconnu et sanctionné par l'Art. 2059 du code.

Ainsi, l'action principale était bien fondée. L'action en déclaration de jugement commun l'était également. C'est à tort que Messire Lynch l'a contestée. Le jugement devait condamner Owen Lynch à délaisser et déclarer le jugement commun avec Messire Lynch.

Loflamme, Q. C., for respondents:—

Quant à la première action, il n'est nullement prouvé que Owen Lynch en fut propriétaire, mais il est prouvé au contraire que Michael Lynch l'était longtemps avant l'institution.

La deuxième action contre Michael Lynch, en déclaration de jugement commun, ne pouvait non plus être maintenue pour plusieurs raisons:

1o. Aucun jugement n'avait été rendu contre Owen Lynch dans la première action; 2o. L'action intentée contre Owen Lynch, comme tiers détenteur de la propriété en question, était pour la même créance hypothécaire pour laquelle Michael Lynch est poursuivi, comme détenteur de la même propriété; 3o. Le demandeur ne pouvait poursuivre Michael Lynch par la même action que celle intentée contre Owen Lynch, (quoique la dite action fut signifiée subséquemment,) sans qu'il alléguat qu'ils avaient acqui la propriété ensemble et qu'ils étaient propriétaires conjoints; 4o. Le demandeur ne pouvait intenter la seconde action, avant d'avoir discontinué la première—ce qu'il n'a pas fait.

TASCHEREAU, J.:—Le présent appel est de deux jugements rendus par la Cour Supérieure à Montréal renvoyant l'action principale de l'appelant contre nommé Owen Lynch, et une autre action portée en la même cause contre nommé Michael Lynch en déclaration de jugement commun à la suite de l'action que fit Owen Lynch. Les faits donnant lieu à ces deux actions sont suivants:

Le 14 Novembre 1863, le nommé Moyse Lalonde reconnut [illegible] l'appelant suivant acte fait et passé par devant Mtre. J. O. Bastien et [illegible] No-

taires, la somme de $1787.70, et pour sureté il hypothèqua une terre désignée à l'acte qui fût régulièrement enrégistré. L'appelant n'ayant reçu que $7 à $800.00 acompte de sa dette, poursuivit l'intimé Owen Lynch en Mai, 1871, pour $954, plus certains intérêts, en déclaration d'hypothèque, comme détenteur de la terre hypothèquée et comme l'ayant achetée du débiteur principal, Moyse Lalonde, par acte du 19 Août 1869, reçu pardevant Mtre. Bastien, Notaire.

Le défendeur, Owen Lynch, plaida à cette action qu'il n'était plus propriétaire, ni en possession de la terre, vû que le 19ème jour de Mai, 1870, il l'avait vendu à l'intimé Michael Lynch, par acte exécuté pardevant Mtre. Brossard, Notaire.

Sur cette défense accompagnée de la production de l'acte de vente invoqué par Owen Lynch, l'appelant mit en cause l'intimé Michael Lynch, auquel par son action il dénonça toute sa procédure contre Owen Lynch. et la défense de ce dernier; et il concluait par son action de mise en cause à la reddition contre l'intimé Michael Lynch d'un jugement qui lui serait commun avec Owen Lynch, et sans dépens à moins de contestation de sa part.

L'intimé, Michael Lynch, par une défense en droit plaida que l'intimé Lalonde n'avait aucun droit d'action contre lui sous les circonstances, et notamment parceque l'appelant ayant poursuivi Owen Lynch pour les mêmes causes d'action, lui, Michael Lynch ne pouvait être poursuivi simultanément avec Owen Lynch sans alléguer qu'ils avaient acquis la propriété ensemble, et que lui, l'intimé, ne pouvait être poursuivi sans que l'action contre Owen Lynch fut discontinuée.

Notons ici qu'il n'y a aucune preuve que le titre d'acquisition d'Owen Lynch, non plus que celui de Michael Lynch aient été enrégistrés.

Le jugement de la Cour Supérieure rendu le 27 Juin, 1872, a renvoyé l'action en déclaration de jugement commun comme non fondée en droit.

Et le 8 Juillet, 1872, la cour a renvoyé l'action en déclaration d'hypothèque contre Owen Lynch sur le principe que lors de son institution le défendeur Owen Lynch n'était plus propriétaire de l'immeuble et qu'il l'avait vendu à l'intimé Michael Lynch.

La difficulté qui s'élève en la cause est, je crois, à raison du défaut d'enrégistrement des deux titres d'acquisition des Intimés, car il est évident que si Owen Lynch eût enrégistré son titre, il pouvait vendre à un tiers, et que si le titre de ce tiers eût été enrégistré, l'appelant n'aurait pu pour un instant ignorer qu'Owen Lynch s'était dégagé de toute responsabilité en vendant à Michael Lynch. Nous avons donc à considérer quelle était la position respective des deux parties (appelant et intimés) à l'époque de l'institution de la première action et de la seconde action. La preuve ne constate pas bien clairement qu'Owen Lynch était possesseur de facto; mais qu'il possédait soit en son nom, soit au nom de son frère Michael Lynch. Le demandeur appelant avait donc droit de diriger contre lui une action en déclaration d'hypothèque, et s'il est rencontré par un plaidoyer de la part d'Owen Lynch tel que celui que j'ai indiqué, on ne peut en faire un reproche à l'appelant, à moins qu'on ne soit fondé à lui dire que vû que le bureau d'enrégistrement n'indiquait aucune mutation du propriétaire originaire, il (l'appelant) devait porter son action contre Moyse Lalonde et faire saisir l'immeuble sur lui. Il me paraît impossible de croire

Lalonde and Lynch et al.

à la légalité de cette prétention, car je n'interprête pas l'article 2098 comme rendant absolument nul le titre de l'acquéreur, nouveau et non enrégistré. La nullité qui pourait être la conséquence de ce défaut d'enrégistrement n'est pas absolue. Le nouvel acquéreur est toujours devenu propriétaire même par le seul consentement suivant l'article 1472 du Code Civil, mais il ne peut prescrire, il ne peut vendre, ou hypothèquer l'immeuble au détriment de ses créanciers ni de ceux de son auteur, mais s'il possède de facto, il fait les fruits siens, il peut poursuivre en complainte, en reintegrande, il peut porter une action négatoire ou confessoire, il peut protéger sa possession par tous les moyens légaux (ainsi décidé en appel en 1872 dans la cause de Laterriere & Gagnon, en appel.)

Ainsi donc l'appelant n'était pas en défaut, il a fait ce qu'il lui était possible, et il porte une première action, et est informé que Michael Lynch est propriétaire et possesseur, et il le poursuit. Il est dans la position d'un propriétaire qui a poursuivi au pétitoire un homme qu'il trouve en possession de sa propriété mais qui plaide n'être que locataire et indique le nom du véritable détenteur à titre de propriétaire. Dans ce cas le demandeur a le droit de mettre en cause le propriétaire indiqué et la procédure se continue avec lui.

L'article 2059 du Code Civil sanctionne cette procédure, en disant au chapitre de l'action hypothécaire que "Lorsque l'immeuble est possédé par un usufruitier, l'action doit être portée contre le propriétaire du fonds et contre l'usufruitier simultanément ou dénoncé à celui des deux qui n'a pas été assigné en premier lieu." Nous avons fréquemment vu nos tribunaux supérieurs (cour d'appel cause Soucy *vs.* Tetu) ordonner même *proprio motu* la mise en cause d'une partie intéressée et que l'on avait négligé d'assigner en la cause : les autorités de Pothier au traité de l'hypothèque et du nouveau Denizart justifient cette procédure. Appuyé de ces autorités et de ces précédents l'appelant met en cause l'appelant Michael Lynch et le somme de venir y protéger ses droits à l'encontre de l'appelant.

Cet intimé, Michael Lynch, n'éprouve aucun tort de cette mise en cause, il n'était pas forcé de contester, il n'était tenu de le faire qu'autant qu'on aurait demandé contre lui une condamnation personelle. Il pouvait délaisser comme il pouvait vendre et en cela il ne rencontrait aucun obstacle dans l'article 2098 du Code Civil. A mon point de vue, il me paraît évident qu'avec un article du Code Civil tel que celui sous le 2098, la procédure adoptée par l'appelant était non seulement dictée par la prudence, mais justifiée par les règles de la procédure, les précédents et l'ensemble de notre système d'enrégistrement et notamment 1°. par l'article 2098 qui déclare que celui dont le titre d'acquisition d'un immeuble n'est pas enrégistré, ne peut vendre efficacement jusqu'à ce que son titre soit enrégistré. 2°. par l'article 2088 qui énonce que l'enrégistrement d'un "droit réel ne peut nuire à l'acquéreur d'un héritage qui alors (et avant la mise "en force du code) en était en possession ouverte et publique à titre de propriétaire, lors-même que son titre n'aurait été enrégistré que subséquemment." 3°. par l'article 1472 du Code Civil qui déclare que "La vente est parfaite par le "seul consentement."

Je crois qu'un Jugement tel que celui que sollicite l'appelant reconcilierait ce qui semblerait de prime abord contradictoire en les trois articles du code que je

viens d'indiquer. Notre système de publicité des hypothèques serait illusoire, comme l'appelant le dit dans son factum, s'il fallait qu'un créancier hypothécaire fut exposé à ne jamais savoir contre qui diriger son action, ou à payer une masse de frais avant que de pouvoir découvrir le seul détenteur réel de l'immeuble sur lequel il a des droits hypothécaires à réclamer.

Je suis disposé à renverser les jugements dont est appel et à accorder à l'appelant le bénéfice de ses conclusions.

SANBORN, J :—The plaintiff, (appellant) instituted against Owen Lynch, defendant, and one of the respondents, a hypothecary action, to recover the amount of a mortgage he held upon a certain immoveable. Owen Lynch pleaded that he had, prior to the action, alienated the immoveable in question to his brother Michael Lynch, and had ceased to be détenteur thereof.

The deed from Owen Lynch to Michael Lynch had not been registered when the action was instituted, nor is there any proof of actual delivery. The appellant made an incidental demand, calling Michael Lynch into the cause, and concluded against both Owen and Michael Lynch that they be held to pay or *délaisser*. Michael Lynch pleaded that such action or incidental demand could not be made against him as he was not joint proprietor or détenteur with Owen Lynch.

The judgment of the Court *a quo* dismissed as well the action against Owen Lynch as the incidental demand against Michael Lynch, the latter by judgment 27th June, 1872, and the former by judgment 8 July, 1872. From these judgments is this appeal. With respect to the incidental demand I think the judgment of 27th June, 1872, correct. It was not the proper subject of an incidental demand. Either Michael Lynch was the sole *détenteur* or he was not. If he was sole *détenteur*, an action should have been instituted against him alone. If he was not, certainly there was no ground for action against him alone or jointly with Owen Lynch. The pretensions of Owen Lynch were that Michael Lynch was the sole proprietor. If so the action against Owen Lynch should have been abandoned as misdirected, and a suit taken against Michael Lynch alone. Bioche says "Les tribunaux ne saurait admettre, comme demandes incidentes que celles qui sont nées depuis l'action principale, ou qui lui servent de repos ; ou enfin celles qui ont avec elle, une connexité évidente, et non celles qui devraient former une action principale, autrement on pourrait se soustraire au préliminaire de conciliation, et éterniser les instances." 4 Bioche, Dict. de Pro. 493, "incident."

The judgment of 8th July, 1872, appears to me erroneous, and should be reversed, and judgment should go against Owen Lynch. The alienation to Michael Lynch was never perfected by delivery. Under Art. 1027 C. C. taken in connection with Art. 2098 C. C. it seems that in the case of real property there must be actual delivery or registration to constitute alienation, so far as third parties are concerned. Under this view of the law, the action was properly directed against Owen Lynch, who was, as respects appellant, proprietor, and appellant had the right to treat him as such in a hypothecary action to enforce payment of his debt as against the property.

The Judgment was as follows:

"Considérant que l'appelant par son action en déclaration d'hypothèque en

Lalonde and Lynch et al.

Cour de première instance réclamait contre l'Intimé Owen Lynch, comme détenteur et possesseur de l'Immeuble ci-après désigné, une somme de $1,566.66, plus les intérêts à neuf pour cent. sur la somme de $950 et à six pour cent. sur une autre somme de $561.[illegible], et le tout acompte du 29me jour de Mai 1871, balance due [illegible] un montant de $1,787.70 consentie en faveur de l'appelant le [illegible] jour de Novembre, 1863, par le nommé Moyse Lalonde et Dame Virginie Lacombe, son épouse, et passé pardevant Mtre. J. A. Bastien et confrère, notaires publics, que les débiteurs s'obligèrent payer au demandeur le premier jour de Novembre, 1864, et pour sureté du paiement de laquelle somme, capital et intérêt du taux de neuf pour cent. après son échéance, les dits débiteurs hypothéquèrent [illegible] (here follows a description of the land);

Considérant que le dit Owen Lynch pour défense à cette action plaida qu'il n'était pas possesseur du dit immeuble ci-dessus, en second lieu désigné, ni propriétaire d'icelui, et qu'il l'avait vendu le ou vers le 19me jour de Mai, 1870, à l'Intimé, Messire Michael Lynch suivant acte de vente passé à Beauharnois par devant Mtre. Brossoit, notaire public;

Considérant que l'acte d'obligation ci-dessus mentionné a été bien et dûment enrégistré, mais que ni l'acte de vente par Moyse Lalonde au dit Owen Lynch, ni celui par le dit Owen Lynch au dit Messire Michael Lynch, de l'immeuble en second lieu ci-dessus désigné, n'ont été enregistrés;

Considérant que l'absence de l'enregistrement du dit acte de vente par Owen Lynch au dit Messire Michael Lynch, l'appelant Arsène Lalonde pouvait ignorer que le dit Owen Lynch se fut dessaisi de la propriété du dit immeuble en faveur du dit Messire Michael Lynch, et qu'il pourrait légalement instituer contre ce dernier l'action qu'il a incidemment portée contre lui;

Considérant que la preuve en cette cause établit que lors de l'institution de l'action de l'appelant, contre le dit Owen Lynch, ce dernier n'était plus possesseur *animo domini* du dit immeuble en second lieu désigné, et que le dit Messire Michael Lynch en était alors, et aussi au moment de l'institution de l'action de l'appelant, contre lui le dit Michael Lynch, propriétaire et détenteur;

Considérant qu'il y a erreur dans les deux jugements dont il est appel, savoir: l'un en date du 27me jour du mois de Juin, 1872, et l'autre en date du 8me jour de Juillet, 1872, de la Cour Supérieure siégeant a Montréal, renvoyant les deux actions de l'appelant avec dépens contre lui et en faveur des intimés;

Cette Cour casse et annulle les dits jugements, et rendant les jugements que la dite Cour Supérieure aurait dû rendre, renvoie l'action de l'appelant intentée contre le dit Owen Lynch et condamne ce dernier à payer à l'appelant ses frais d'action en la dite Cour Supérieure jusqu'au moment de la production de la défense du dit Owen Lynch, inclusivement, et condamne l'appelant à payer au dit Owen Lynch ses frais de défense depuis la production de sa dite défense, jusqu'à jugement inclusivement en la dite Cour Supérieure, et aussi la moitié des frais encourus par le dit Owen Lynch sur le présent appel.

Et cette Cour déclare l'immeuble ci-dessus désigné en second lieu affecté et hypothéqué en faveur de l'appelant au paiement de la dite somme de $1,515.66⅔ avec intérêt sur $954 à neuf pour cent., et sur $561.66⅔ à six pour cent. à compter

Lalonde and Lynch et al.

du 29me jour de Mai 1871, et des frais encourus sur la poursuite de l'action de l'appelant contre le dit Messire Michael Lynch en Cour Supérieure, et pour une moitié de ceux encourus par l'appelant sur son appel.

Condamne l'intimé le dit Messire Michael Lynch a délaisser le dit immeuble en second lieu désigné comme susdit pour être vendu en justice sur le curateur qui sera nommé au délaissement, suivant la loi, pour être l'appelant payé de son dû en principal, intérêt et frais susdits, suivant ses droits et hypothèques, si mieux n'aime le dit Messire Michael Lynch payer à l'appelant sa dette susdite avec les intérêts et frais susdits, ce que le dit Messire Michael Lynch sera tenu d'opter et accomplir sous quinze jours à compter de la signification sur lui du présent jugement, si non et le dit délai expire sans que le dit Messire Michael Lynch ait fait le dit délaissement ou effectué le paiement susdit, cette Cour le condamne personnellement à payer au dit appelant la dite somme de $1,515.66⅔ avec intérêt sur $954 à neuf pour cent., et sur $561.66⅔ à six pour cent., le tout à compter du 29me jour de Mai, 1860 et les frais ci-dessus adjugés. Et vu que le dit Messire Michael Lynch a contesté l'action du dit appelant tant en Cour Supérieure que devant cette Cour, icelle Cour condamne le dit Messire Michael Lynch personnellement dans tous les cas, à payer à l'appelant les frais et dépens encourus par lui en Cour Supérieure sur sa dite action et la moitié des frais encourus par l'appelant sur l'appel en cette cause, dont distraction est par le présent accordée en faveur de Messieurs Dorion et Geoffrion, ses Avocats.

Judgment reversed.

Dorion, Dorion & Geoffrion, for appellant.

Laflamme, Huntington, Monk & Laflamme, for respondent

(C.L.M.)

COURT OF QUEEN'S BENCH, 1874.

[IN CHAMBERS.]

MONTREAL, 10TH FEBRUARY, 1874.

Coram RAMSAY, J.

In re *Isaac Rosenbaum* on a demand by the U. S. Government for his extradition.

HELD:—That on a proceeding for extradition, the judge or magistrate acting in extradition has no authority to hear the prisoner's defence, though in the exercise of his discretion he may hear any evidence which may be tendered to show that the offence is of a political character, or one not comprised in the Treaty, or that the accuser is not to be believed on oath; or that the demand for the prisoner's extradition is the result of a conspiracy.

In the case of Isaac Rosenbaum, whose extradition was demanded by the Government of the United States, on a charge of arson, the following judgment was rendered on an application of the prisoner for leave to produce evidence generally on his behalf:—

RAMSAY, J.:—The evidence for the prosecution being closed, application is made on the part of the prisoner to have a further day fixed to produce evidence generally on his behalf. At argument it was stated by prisoner's counsel that

the evidence produced would go to establish an *alibi*. This application was resisted on the part of the prosecution, on the ground that the judge or magistrate acting in extradition has no authority to hear the prisoner's defence, and that his sole duty is to commit, if a *prima facie* case is made out. With the general doctrine laid down by the counsel for the United States I concurred; but as a different practice has prevailed to some extent, I desired to have the advantage of conferring with my learned colleagues, before laying down a rule which appeared, by comparison at all events, to be a hardship to the prisoner. I therefore ordered a re-hearing in presence of Mr. Justice Badgley and Mr. Justice Monk, and the opinion I have now to express, in giving judgment, meets with their full concurrence.

The words of the act authorizing the proceedings for extradition are these:—"It shall be lawful for such judge, commissioner, or other officer to examine, upon oath, any person or persons, touching the truth of such charge, and upon such evidence as, according to the laws of the Province in which he has been apprehended, would justify the apprehension and committal for trial of such person so accused; if the crime of which he was so accused had been committed therein, it shall be lawful for such judge, &c., to issue his warrant for the commitment of the person so charged," &c.

The wording of section 10 of the English Act does not in any essential vary this rule. Under the former Act I have always been of opinion that the duty of a judge or other officer was similar to that of a committing magistrate for a like offence committed in England. I cannot take the extreme view that it was more restricted. He is to inquire into the truth of such charge, and in his discretion he may examine, under oath, any person who can give evidence as to the crime, no matter by whom suggested. In the exercise of his discretion, he could not refuse to hear witnesses whose names were suggested by prisoner to show that the crime was a political one, or was not an extradition crime; and therefore the commissioner at New York was perfectly justified in refusing to hear the evidence of an *alibi* offered by Franz Muller; but I do not think he was without authority to hear such evidence, if he thought the interests of justice would be helped by his doing so.

This view of the case is further confirmed by Section 9 of the Imperial Act of 1870, which enacts that "the Police Magistrate shall hear the case in the same manner, and have the same powers, as near as may be, as if the prisoner were brought before him charged with an indictable offence committed in England." To this, however, there is a proviso; he is enjoined to hear any evidence which may be tendered to show that the crime of which the prisoner is accused, or alleged to have been convicted, is an offence of a political character. To this I may add that I would also receive evidence to show that the accuser was not to be believed upon oath, either by his infamy or because the demand could be clearly shown to be a conspiracy on the part of the witnesses to impute a crime to the accused.

This application for a further day to produce evidence, as sought on the part of the prisoner, is refused.

E. Carter, Q.C., for the U. S. Government. Motion rejected.
W. H. Kerr, Q.C., for the prisoner.

(J.K.)

COURT OF QUEEN'S BENCH, 1875.

MONTREAL, 14TH DECEMBER, 1875.

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

No. 62.

CHARBONNEAU,

AND APPELLANT;

DAVIS, ET AL., RESPONDENTS.

HELD:—1. That security in appeal cannot be legally given, in the absence of the opposite party, on a day different to that stated in the notice.
2. That a voluntary payment of a portion of the judgment appealed from is an *acquiescement*, and the fact may be established by affidavit.

DORION, CH. J.:—This is a petition to quash the appeal, on the double ground that the security bond is invalid, and that there has been an *acquiescement* in the judgment appealed from.

On the first point it appears that the security was put in on a day later than that stated in the notice served on the respondent's attorneys, who were not present when the security was given. Now, in Sullivan and Smith (2 Lower Canada Jurist, p. 160), it was held by this Court, that security put in on a day named in a notice served on the respondent's attorneys was bad, on the ground that that notice was held to have been abandoned, because subsequently to its service the appellant had served another notice on the respondent's attorneys fixing another day for the putting in of the security. We cannot therefore hesitate in holding that the security given in the present instance was irregularly and illegally put in.

Then on the second point, it is clear the payment was made without compulsion, and that fact being established by affidavit we must hold that there has been an *acquiescement*.

The petition to quash is, therefore, granted with costs.

Laflamme & Co., for appellant.
W. Prevost, for respondents.
(S.B.)

Appeal quashed.

SUPERIOR COURT, 1876.

MONTREAL, 11TH MAY, 1876.

Coram TORRANCE, J.

No. 892.

Décary vs. *Poirier dit Desloges.*

HELD:—That where it is intended to attack the credibility of a witness produced by the other side by proof that he has made statements out of court contrary to what he has testified at the trial, the witness must first be asked as to whether he made such statement, and all necessary particulars.

The plaintiff was proceeding with his *enquête* in reply to the *enquête* of the defendant on his plea of prescription. The plaintiff had already examined the

Decary vs. Poirier dit Deslogos.

witness Grenier, and was subsequently informed by Grenier that Octave Prévost, a witness examined by the defendant, had made avowals to him which destroyed the evidence of Prévost on the possession invoked by the defendant. The plaintiff now asked to be allowed to examine Grenier again with reference to the avowals made to him by Prévost.

PER CURIAM:—I think that the application is premature until Prévost has been examined with due particularity as to the alleged avowals in question. 1 Starkie on Evidence, pp. 212, 213, (Edition of 1843) says: "It is a general rule, that whenever the credit of a witness is to be impeached by proof of anything that he has said or declared, or done in relation to the cause, he is first to be asked upon cross-examination, whether he has said or declared, or done that which is intended to be proved," &c. So Phillips, Evidence, Vol. 2, pp. 925, 6. A. D. 1838. 1 Greenleaf, Evidence, § 462.

A. Ouimet, for plaintiff.

Lacoste, Q.C., for defendant.

(J. K.)

COURT OF QUEEN'S BENCH, 1875.

MONTREAL, 22ND JUNE, 1875.

Coram DORION, C. J., MONK, J., TASCHEREAU, J., RAMSAY, J., SICOTTE, J., *ad hoc.*

No. 48.

ROBERT TOUGH, *et al.*,
(*Plaintiffs in the Court below,*)
APPELLANTS;

AND

THE PROVINCIAL INSURANCE CO.,
(*Defendants in the Court below,*)
RESPONDENTS.

HELD:—In the case of an interim Insurance by an agent, in the following words:—"Received from Messrs. Tough & Wallace, Coaticooke (Post office, Coaticooke) the sum of $20, being the premium for an insurance to the extent of $2500 on the property described in the application of this date numbered :—subject, however, to the approval of the Board of Directors in Toronto, who shall have power to cancel this contract, at any time within thirty days from this date, by causing a notice to that effect to be mailed to the applicant at the above post office,"—that a notice by the company cancelling the contract, mailed to the applicants, at the post office, Toronto, within the 30 days, but not received in time for delivery by the Post office at Coaticooke until after the fire, had not the effect of cancelling the Insurance.

This was an appeal from the judgment of the Court of Review at Montreal, reported at pp. 305 *et seq.* of the 17th vol. of the L. C. Jurist.

DORION, Ch. J., *dissentiens*:—

The appellants sue for the recovery of $2,500, amount of insurance on certain property. The claim is made under an interim receipt which the agent of the Company gave them in the terms following:—

Provincial Insurance Company of Canada.

Head Office, Toronto.

"Provisional Receipt, No.——

Agency Office, Compton, March 19th, 1872.

"Received from Messrs. Tough & Wallace of Coaticooke [Post Office, Coaticook], the sum of twenty dollars, being the premium for an insurance to the

extent of twenty-five hundred dollars, on the property described in his application of this date, numbered——; subject, however, to the approval of the Board of Directors in Toronto, who shall have power to cancel this contract at any time within thirty days from this date, by causing a notice to that effect to be mailed to the applicant at the above Post Office. And it is hereby mutually agreed that, unless this receipt be followed by a policy within the said thirty days from this date, the contract of insurance shall wholly cease and determine; and all liability on the part of the Company shall be at an end. The non-delivery of a policy within the time specified is to be taken, with or without notice, as absolute and incontrovertible evidence of the rejection of this contract of insurance by the said Board of Directors. In either event, the premium will be returned on application to the local agent issuing this receipt, less the proportion chargeable from the time during which the said property was insured. Said insurance is for two months from date.

"$20.00 (Signed,) "JOEL SHURTLEFF,

"*Agent.*"

Notice was sent to the Directors at Toronto, and on the 23rd of March the manager of the Company wrote to Tough & Wallace, declining the risk, and stating that the premium would be returned. His letter was mailed at Toronto on the 23rd, and on the 25th, at midnight, a fire occurred, and the property was destroyed. The trains being delayed by a snow storm, the letter only reached Coaticooke next morning. The Company declined paying the amount of the insurance on the ground that the only thing they were bound to do was to mail the notice to the party. The appellants, on the contrary, contend that the letter should have been mailed at Coaticooke before the fire; that the insurance subsisted until the letter reached Coaticooke.

The case depends entirely upon the interpretation to be given to this interim receipt. The Judge who decided the case in the Superior Court said the letter should have reached Coaticooke in order to exonerate the Company. The Court of Review held that it was sufficient for the Company, whose principal office is at Toronto, to have mailed the letter at Toronto. The address of the party is mentioned as being at Coaticooke. I have the misfortune to differ from the majority of the Court here, and am disposed to confirm the judgment in review.

The words "*Post Office, Coaticooke,*" in the interim receipt, indicate the address of Tough & Wallace. It was at Coaticooke that they had their place of business. The Board of Directors of the Company had their office at Toronto. The contract was to be cancelled, not from the time the notice reached the parties insured, but from the moment such a notice addressed to them was put in the post office, whether it reached them or not, so that a notice reaching the Coaticooke post office on the night of the 25th of March before the fire, although delivered only after the fire, would have exonerated the Company. What was agreed upon was that in case the risk was rejected a notice to that effect addressed to the parties insured should be put in the post office, they taking the risk of its reaching them or not. The only question, therefore, is, which post office was intended? Was it the post office where Tough & Wallace resided, or that of the place where the Board of Directors carried on their business? If the

R. Tough et al. and Provincial Ins. Co.

former, why not deliver the notice at their place of business instead of at the post office? I think that under the circumstances the words, "*by causing a notice to be mailed to the applicant at the above post office,*" must be held to mean, "*by sending by mail a notice addressed to the applicant at the above post office,*" thus applying the Coaticooke post office as the place where the notice was to be addressed, and not the place from whence the letter was to be sent by the Toronto Directors. Two Judges of this Court are of this opinion.

SICOTTE, J., also *dissentiens*:—The interpretation of the contract to my mind is not susceptible of doubt. I cannot think it was intended that the insurance should remain in force until the letter reached Tough & Wallace.

MONK, J.:—The majority of the Court think that the judgment in review should be reversed. There can be no doubt that the case is one of great nicety and some difficulty, as may be inferred from the diversity of opinion. The Judge in the Court below gave judgment in favor of the plaintiffs. The Court of Review was unanimously of opinion that that judgment should be reversed. Now two Judges of this Court think the judgment in Review is correct. The bench, therefore, is about equally divided. As I view the case, if the Company wished to protect themselves, they should have guarded against ambiguity in their interim receipt. They should have said "mailed at Toronto." But I do not consider the receipt ambiguous, for it says the notice should be mailed "at the above post office." What post office was it? Plainly it was the post office at Coaticooke. Mails are sometimes detained a week or ten days by snow-storms in the month of March. Could it be pretended that the contract would be annulled by a letter mailed at Toronto, and that the party during all that time would remain uninsured? The Court has very little hesitation in saying that this view cannot be entertained.

TASCHEREAU, J., concurring, remarked that where the clauses which are framed by the companies are ambiguous, the interpretation least favorable to the Company should be followed.

RAMSAY, J.:—I concur with Judge Monk. The whole question is, what is the meaning of mailing at a post office? It must mean mailing at the place where the person is to whom the letter is addressed. There was no use in mailing at Toronto, because the object would not be attained; the parties would be left without knowledge that they were not insured.

Judgment of Court of Review reversed.

Doak & Fisk, for the appellants.
Ritchie & Borlase, for the respondents.

(S.B.)

COURT OF QUEEN'S BENCH, 1875.

MONTREAL, 21st DECEMBER, 1875.

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

No. 40.

THE MAYOR ET AL. OF SOREL, APPELLANTS;

AND

ARMSTRONG, RESPONDENT.

HELD:—That a writ of prohibition does not lie where no excess of jurisdiction appears on the face of the proceedings.

RAMSAY, J., *dissentiens*:—

This case, I think, brings fully up the question as to whether a writ of prohibition will lie to restrain a municipal corporation from proceeding to execute the property of a corporation, under the summary procedure allowed them for the collection of taxes.

The question is not without difficulty, for from the circumstances of the case no English authorities directly in point can be found, and we are therefore forced to have recourse to abstract reasoning as a guide to a conclusion. In performing this operation I have the misfortune to arrive at a result different from that of the majority of the Court.

The Act of incorporation of the Town of Sorel, 23 Victoria, Cap. 75, Sect. 37, Sub-sect. 3, enacts: "If any person neglect to pay the amount of assessments imposed upon him, for a period of thirty days, after he shall have been requested to do so as aforesaid, the secretary-treasurer shall levy the said assessments with costs, by a warrant under the hand of the Mayor authorizing the seizure and sale of the goods and chattels of the person bound to pay the same, or of all the goods and chattels in his possession, wherever they shall be found, within the limits of the said Town, addressed to one of the sworn bailiffs for the district of Richelieu, of the Superior Court for Lower Canada, who is hereby authorized to seize and sell the said goods and chattels in the ordinary manner; and no claim founded on a right or ownership or privilege upon the same shall prevent the sale or the payment of the assessments and expenses out of the proceeds of such sale." By Sect. 35, Sub-sect. 21, it is also enacted that the council shall have power to make by-laws "to compel the proprietors or occupants of lots of land in the said Town, having stagnant or filthy water upon them, to drain or raise such lands, so that the neighbors may not be incommoded nor the public health endangered thereby; and in the event of the proprietors of such lands being unknown, or having no representative or agent in the said town, it shall be lawful for the said council to order the said lands to be drained or raised, or to fence in and enclose them at their cost, if they are not already fenced in and enclosed; and the said council shall have a like power if the proprietors or occupiers of such lands are too poor to drain, raise or fence in the same; and in every case the sum expended by the said council in improving such lands shall

The Mayor et al. of Sorel and Armstrong.

remain as a special hypothec on such land, and have privilege over all debts whatsoever, without it being necessary to register the same."

And by Sect. 38, Sub-sect. 2, it is enacted that work of this kind done under a by-law by the corporation for the proprietor shall remain as an hypothec on the property, and shall be recovered in the same manner as taxes, *i. e.*, by the summary process of Sect. 37.

It appears by the evidence that respondent did not owe any sum whatever for a drain which it is pretended by the corporation was made for the benefit of certain lands, yet nevertheless his moveables were taken in summary execution by the Mayor's warrant, and were about to be sold. Thereupon respondent applied for and obtained a writ of prohibition, which was on cause shown maintained by the judgment of the Court. The corporation now seeks to have that judgment set aside.

As I have already said, the question seems to be, will the writ lie in such a case?

At the argument it was contended, first, that the appellants were not an inferior jurisdiction; second, that the corporation had not exceeded its jurisdiction; and it seems that this argument is to be further supplemented by the proposition that the excess of jurisdiction only appears by the evidence, and hence that the corporation seizing for a sum not due, is not an excess of jurisdiction but only an erroneous judgment.

The appellants rely in some measure on the wording of Art. 1031 C.C.P. By "Courts" it is taken for granted are meant regularly defined tribunals; but the authorities cited by the respondent show, if that be necessary, that by the word "Courts" jurisdictions are intended. It may be perfectly true that the corporation of Sorel is not properly a Court, but the power given to the Mayor to issue a warrant of distress is unquestionably a jurisdiction.

I assent most willingly to the proposition that generally an erroneous judgment does not lay a Court open to prohibition, but it is quite different where, as in this case, the right and the jurisdiction depend entirely on the absence of error.

And so, in the case of the Liverpool United Gas Light Co., and the Overseers of the poor of Everston (L. R. 6 C. P. 414) it was held in Common Pleas, "That where the recorder had assumed a jurisdiction by deciding that an appeal to Quarter Sessions lay not to the next sessions but to the next *practicable* sessions, it was held that it was competent for the Court to review the decision of the recorder upon a motion for a prohibition, and that he was wrong in holding the September sessions not to be the next practical sessions, and consequently that he had no jurisdiction to entertain the appeal at the October sessions." This then was a prohibition turning on an erroneous judgment, because the error went to the root of the jurisdiction.* Again in the case of the Mayor of London and Cox (L.R. 2 H. L. 239), Cox was proceeded against as a garnishee, and he declared in prohibition the plea did not set up anything to show the jurisdiction, and it was held that C. could proceed in prohibition without even pleading the absence of jurisdiction in the inferior Court. As Mr. Justice Loranger says, respondent was never within the jurisdiction of the Court. Again, I do not think it signifies whether the want of jurisdiction appears on the face

* See also Bistone and Rose, L. R. 4 Q. B. 4.

of the proceedings or by the evidence in so far as a case like this is concerned. That distinction is only important when it seems that the party seeking the prohibition has acquiesced. There is constantly an issue of fact on prohibition.

I, therefore, think the judgment should be confirmed.

DORION, Ch. J.:—This is a writ of prohibition taken by the respondent to restrain the Mayor of Sorel from executing a warrant of distress, issued for taxes to the amount of $77, imposed under the provisions of the Act of Incorporation of the town of Sorel. This writ was maintained by the Court below as to the sum of $8.12½, being the amount of a tax imposed for the cost of a drain, and included in the warrant as part of the $77 claimed. The ground on which the exemption of this tax was claimed by the respondent was that he was not the owner of the lots for which the tax was imposed. This might be a good ground for an action of trespass, or for claiming back from the corporation the money paid or levied for this tax, but it is no ground for interfering by writ of prohibition, which only goes to restrain inferior tribunals from exceeding their jurisdiction. In this case the corporation of Sorel had, under Sect. 35, Sub-sect. 26, of 23 Vict. Ch. 75, the right to impose the tax. It could also determine who was the owner or occupant of the lots chargeable with this tax. There may be error in the assessment, but there is no want of jurisdiction and therefore no ground for a writ of prohibition. Grant on Corporations, 520. Mayor, &c., and Cox, 2 Law Rep. House of Lords, 269 to 281. Ricardo and Maidenhead Board of Health, 2 Hurlston and Norman, 255. Manning and Farquharson, 6 Jurist, N.S. 1300.

If the respondent has been illegally assessed he must seek a remedy by some other proceeding than a writ of prohibition.

SANBORN, J.:—In this case a writ of prohibition was sought to prevent the Mayor and Council of the Town of Sorel from proceeding with a warrant for levying on respondent's goods for taxes. Several grounds were urged for this writ, which have been rightly held by the Court below not matters to be taken cognizance of under a writ of prohibition. The Court below maintained the writ so far as relates to taxes amounting to $8.12 for respondent's share in the making of a ditch.

In the first place the Court decides what is a moot question, that a writ of prohibition may issue to a municipal corporation when it exercises the attributes of a Court.

And secondly that the municipal council of the town of Sorel had no power to levy for a tax for making a ditch because they have not proceeded in conformity with the 21st Sub-section of Sec. 35, of 23rd Vict. C. 75, the Act of Incorporation of said Town, and Paragraph 2 of Sec. 38.

It must be observed that this is a public sewer running to the side of some streets and across others. Sub-section 26 of Section 35 permits the council to assess proprietors on particular streets for making and maintaining a ditch in which they are interested.

Sub-section 21 has reference to a different matter, viz., the compelling of proprietors to drain their lands, on which there is stagnant water, and as to the other provision referred to in the judgment, Sub-section 2 of Sect. 38 requiring parties to be notified of the work required to be done, it is to be remarked that

The Mayor et al. of Sorel and Armstrong.

respondent in his petition makes no complaint of want of notice to do the work, and the council were not required to prove it. He denies the right of the council to tax him for this ditch, because, he says, some of the lots did not belong to him, and others were not drained by this ditch or sewer. If the proceedings of the council prior to the issuing of a warrant are to be regarded as partaking of a judicial character, the council were only required to conform to the mode pointed out by their Charter, and could only assess upon the valuation roll. Section 26 requires the valuation to remain one month before ratification, in which an appeal may be made by any party interested.

Respondent appears to have been put down in the valuation roll as the party liable to pay taxes for lots 271, 272, 273, and 467; not having appealed from this he is in the position of a person who has acquiesced in the jurisdiction of a Court, and who cannot afterwards attack it by prohibition unless the want of jurisdiction appears on the face of the proceedings. Whether or not he was the proprietor of any of these lots, or whether they were drained by this sewer, are facts which were within the jurisdiction of the council to determine. A prohibition does not lie to an inferior Court for deciding contrary to proof where it has jurisdiction over the matter. It is the *defectus jurisdictionis* not the *defectus triationis* which forms the subject of prohibition.

It appears that a part of the ditch was verbalized under the old voirie laws in 1820, and was for the common benefit of the town, and especially for that part which it drained. Before assessing, the council, acting on the report of a committee appointed specially to enquire into the subject of drains, in 1864, made a by-law—54, which was duly published, and, by it, directed this sewer or ditch to be made by the parties whose lands were drained by it, and this was in conformity with the old procès-verbal, and this by-law directed the Secretary-Treasurer to make a distribution of the burden for making the ditch in question, placing the tax upon each lot, subject to assessment for the ditch, according to the valuation put upon such lot, and this was done, and this was followed by the assessment roll, which was duly published. Supposing the municipal corporation to be a kind of Court in putting into operation the law whereby a judgment, somewhat in the nature of a *jugement paré*, is obtained, I see no want of jurisdiction over the matter in question in this appeal whereby the writ of prohibition can be sustained. The general subject of respondent's petition is what pertains to appeal, and not what forms the grounds of prohibition. It is unnecessary, according to my view of the case, to determine whether a writ can go to a municipal corporation under any circumstances or not. The Court of Review, in the case of Blain vs. The Corporation of Granby, held that it could not. I am inclined to think that where municipal corporations exercise powers which are in their nature judicial, and usurp power not given them by law, a writ of prohibition may issue to restrain them from proceeding with such usurpation. In this case there appears on the face of the proceedings no excess of jurisdiction on the part of the municipal council of Sorel in the exercise of their Charter powers, and the Court can exercise no appellate jurisdiction over their discretionary and legislative action, exercised within the limit of their powers. Therefore the judgment ought to be reversed.

The following authorities are referred to in connection with these notes:

Ricardo *vs.* The Maidenhead Board of Health, 2 Hurlstone & Norman, R. 255.
Yates *vs.* Palmer, 6 D. and L. 283.
Manning *vs.* Farquharson, 6 Jurist, N.S., p. 1306.
Bunker *vs.* Veley, Ad. & E. 263.
Mayor of London *vs.* Cox, 2 L. R. Appeal Cases, 278.
Gardner *vs.* Booth, 2 Salk. 248.
3 Blackstone, Com. 112.
2 Chitty's Practice, 258.
Bishop of Chichester *vs.* Harwood et al., 5 Williams' Abridgement, p. 201.
Re Birch, 30 Com. & Eq. Rep., 559.
The State *vs.* Nathan, 4 Rich., 513.

The Mayor et al. of Sorel and Armstrong.

Judgment of Superior Court reversed.

Doutre & Co., for appellants.
Armstrong & Gill, for respondent.
Wm. H. Kerr, Q. C., counsel.
(S.B.)

COURT OF QUEEN'S BENCH, 1875.

MONTREAL, 22ND DECEMBER, 1875.

Coram MONK, J., RAMSAY, J., SANBORN, J., MACKAY, J., *ad hoc*, TORRANCE, J., *ad hoc*.

No. 113.

RAYMOND,

AND

LAROCQUE,

APPELLANT;

RESPONDENT.

HELD:—That where a party sues on a note in his possession, and never produces the same, he can not recover judgment thereon, even if he prove that the note once existed, but without proving that the plaintiff ever had possession of it.

RAMSAY, J.:—The action was taken nearly thirty years ago for the amount of a promissory note. It was brought as on a note in the possession of the plaintiff, but the note was not produced when the action was returned. The action was about to be prescribed when some industrious person discovered an allusion to the note in some paper, and it was supposed that this would be sufficient proof of the declaration. An application had been made to amend the declaration, in order to allege the loss of the note; and then another motion to amend, so as to make the declaration conform to the proof. The Court below refused to allow these amendments. This might seem strange at first sight, but, on examination, it appears that these judgments were unquestionably right. Before we could reverse the judgments on these motions it must first be established that the proof was clear on the point that the note was lost out of the possession of plaintiff. The Court does not deny for one instant that a note lost may be declared upon and recovered; but that is not the question here. The plaintiff declared upon the note as in his possession; then he tried to establish that it was lost. He has established that the note did exist, but he has not established that it was

Raymond and Larocque.

ever transferred to the plaintiff. He wishes the Court to take the whole case for granted. There is not a tittle of evidence to show that the note was ever in the possession of the plaintiff.

SANBORN, J., said the original action could not be changed to another of an entirely different character. There seemed to be an attempt here to change the nature of the action.

MACKAY, J., had no hesitation in agreeing with the judgment. If the Court below had granted the motions to amend, or if this Court were to do so, the cause of the plaintiff would not be advanced one jot, for all the circumstances showed that the plaintiff had no right of action at all. Whatever amendment might be allowed, the plaintiff could never get a judgment for the amount of the note. He had no legal right, and he had no equity either.

MONK, J., concurred.

Judgment of Superior Court confirmed.

Loutre, Doutre & Hutchinson, for appellant.

Dorion & Geoffrion, for respondent.

(S.B.)

COURT OF QUEEN'S BENCH, 1875.

MONTREAL, 21ST DECEMBER, 1875.

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

No. 55.

BROOKE ET AL., APPELLANTS;

AND

DALLIMORE, RESPONDENT.

HELD:—1. That, in the case of an appeal from a judgment ordering the appellant to render account, security for costs alone is sufficient.

2. That where the bond is completed in such a case, without justification, and in the absence of the opposite party, who was present, however, when the securities presented themselves (contending that they ought to justify for a considerable amount to cover the possible balance of account), the Court will not set aside the security bond as irregular or illegal, but will reserve to the appellant his right to attack the solvency of the sureties.

RAMSAY, J. (*dissentiens*), considered this as similar to the case of Sullivan and Smith, in the 2d vol. of the *Jurist*, p. 160. The principle in that case seemed to him this,—that if security was given behind the back of the respondent, in the absence of the other party, the security bond would be set aside. In this case the party came up on a notice to put in security, but the security was finally taken behind his back. The security was badly taken, and the party had a right to have the security bond set aside. That was what he asked. The Court had nothing to do with the question whether he had asked too much. It was said he had never asked for the sureties to justify, but how could he ask them to justify when the amount was much larger than was proper? Then again, it was said, you don't allege now that these sureties are not solvent, but it was only by their oath of justification that their solvency could be ascertained by the respondent. His

Brooke et al. and Dallimore.

Honor thought the Court was making a distinction without a difference between this case and Sullivan and Smith, and upon a point where a strict rule was easily laid down.

DORION, CH. J.:—On the [illegible] of October last past, pursuant to notice, the attorney for the appellants appeared at the Prothonotary's office, to put in security in the usual form for the prosecution of this appeal from a judgment ordering them to render an account of the estates of the late John and Thomas Brooke. The respondent's counsel claimed that the sureties should justify for a large amount, that is, the probable value of the property to be accounted for. Although the judgment contained no money condemnation, the Deputy Prothonotary ruled that the sureties should justify for the amount named by the respondent's counsel. The sureties being unable or unwilling to justify for such an amount, the attorney for the appellants gave on behalf of his clients the written declaration, required by Art. 1124 of the Code of Civil Procedure, that they did not object to the execution of the judgment, and requested that security be taken for costs only. The respondent's attorney objected, on the ground that this declaration should be signed by the appellants and not by their attorney. The Deputy Prothonotary was of opinion that the consent was insufficient, but at this stage Mr. Papineau, one of the prothonotaries, arrived, and the parties went to him to have the difficulty settled. Mr. Papineau, after the respondent's attorney had left, received the security offered without requiring any justification, being as he states under the impression that the parties had come to an understanding. Shortly after, the respondent's attorney returned and remonstrated about what had been done, and, at the suggestion of Mr. Papineau, put in writing his objections founded on the insufficiency of the consent given by the attorney for the appellants. Mr. Papineau then put in pencil on the bond the words, "suspended, there is some clerical error," and informed the respondent's attorney that there would be no return as the security had not been regularly given. All this appears by affidavit. However a return was made, and we have now to adjudge on a motion to quash the security as irregularly given and to reject the appeal. Two questions arise here: 1st. Were the sureties bound to justify for any sum beyond the costs; and 2nd. Was the consent given by the attorney for the appellant sufficient. The majority of the Court are satisfied that the sureties could not be called upon to justify for any amount beyond the costs, as there was no condemnation money mentioned in the judgment for which they could be liable. And I would go further and say, that the consent given by the attorney for the appellants was sufficient. This consent is only required to render valid the security tendered, and the attorney, who is authorised to put in the security, has impliedly all the power required to put in a valid security. It is not in virtue of the consent that the judgment is rendered executory, it is executory without this consent unless security be given for the appeal as required by law. Therefore the consent does not give to the judgment any force which it had not before, but merely renders valid a security which would be inoperative without it.

There is another and stronger ground for rejecting the motion. We have before us a bond in due form and regularly returned by the proper officer who received it. It is true that we have affidavits tending to show that this bond was taken

Brooke et al. and Dallimore.

under some misapprehension. But this bond is an authentic document signed by the official signature of Messieurs Hubert, Papineau and Honey, who are the joint Prothonotary. Can such a document be destroyed by affidavits? If so, a notary could annul any deed he might have received by declaring on oath that he did so under some misunderstanding. An *inscription de faux* is the only proceeding by which an authentic document can be impugned; and this course has not been adopted here. It is contended that the respondent had a right to require that the sureties should justify as to their sufficiency for the payment of the costs. No doubt he had that right, but he did exercise it; he asked for a much higher justification on grounds which the Court holds to be unfounded. If we were to reject this bond, we would very likely have to grant leave to the appellants to put in new security, in the very same form in which it has been put in, with the addition of a justification for the amount of the costs if that was required. Now we think we will best serve the ends of justice by rejecting the motion of the respondent without costs, and by reserving to him his right to contest the solvency of the sureties, if he thinks proper to do so.*

MONK, J., felt that the point was one of considerable difficulty. The Court were all agreed that the only security that could be required to be given here was for costs only, because the judgment condemned the party to render an account, without any amount being mentioned. The security, as given, was given for the only liability for which security could be given. With regard to the justification, no justification had been asked. The affidavits showed that there were irregularities, and the difficulty was that it might be said these irregularities should not be sanctioned; that the Court here should have a bond before it, regular in all respects. Upon the whole, however, his Honor considered that the best way of dealing with this case was by the course proposed by the judgment.

SANBORN, J., had found the practice of this Court go a great way in reaching the equity of the matter. Now, in this instance, the decision of the Court met the respondent's objections, and the decision was against him on his pretensions. For his part, his Honor would be disposed to adopt a rigid rule in these matters of procedure, as, upon the whole, better than considering the equities, but this had not been the practice of the Court.

Motion to set aside security rejected.

Ritchie & Borlase, for appellants.
Cross & Co., for respondent.
(S.B.)

* In the case of Mallette and Lenoir, which came up subsequently, on the 3rd of Feb., 1876, the Court of Queen's Bench ordered the prothonotaries to return the bail bond they had taken in the case, and which they had not returned, on the ground that it had been received under some misapprehension. And on the 22nd March last a petition to reject this same bond, supported by the affidavit of Mr. Hubert, one of the prothonotaries, was dismissed, the Court holding that the prothonotary could not by his affidavit destroy an authentic bond he had received; that in such a case an *inscription de faux*, as provided for by Article 159 of the C. of Pr., would be required.

COURT OF QUEEN'S BENCH, 1875.

MONTREAL, 14TH DECEMBER, 1875.

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

No. 131.

BROWN,

APPELLANT;

AND

THE IMPERIAL FIRE INSURANCE COMPANY,

RESPONDENT.

HELD:—That the service, within four days after issue joined, [illegible] of a notice of motion praying *acte* of the option of the mover to [illegible], and the making of such motion subsequently, are a sufficient compliance [illegible] requirements of Art. 350 of the Code of C. P.

This was an appeal from two interlocutory judgments of the Superior Court at Montreal, one of them rendered 20th June, 1873 (Beaudry, J.), and the other on the 18th September, 1874 (Berthelot, J.). The former judgment dismissed the motion (No. 40 of record) made by plaintiff; "that inasmuch as the said "plaintiff has in due course of law declared his option for a trial by jury in this "cause, that the inscription for *enquête* made by defendant be declared to be "irregular, null and void, and that it be held and ordered that plaintiff is not "obliged to proceed with his *enquête* under said inscription, but may in due "course proceed to trial by jury, as he hath elected in this cause, the whole "with costs."

The latter judgment rejected plaintiff's motion (No. 52 of record) for *acte* "of the declaration hereby made of his option for the trial of this cause by jury, "and that it be declared that plaintiff is entitled to such trial with costs."

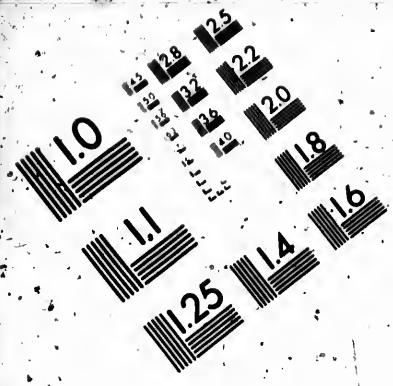
The option referred to in the first motion had been made in the plaintiff's answers to the defendant's pleas, and the latter was contained in a motion presented to the Court on the 17th of September, 1874, of which notice had been previously given on the 9th of that month.

The plaintiff had, with the permission of the Court, amended his declaration, and the defendant filed his pleas to the declaration as amended on the 25th October, 1873, and plaintiff having failed to answer these pleas, the defendant inscribed the case for *enquête* on the 27th May, 1874.

On the 9th July, 1874, the plaintiff was allowed by the Court to file answers to said pleas, and on the 8th September, 1874, the defendant filed a replication to these answers.

DORION, CH. J.:—(after reciting the facts)—The question raised by this appeal is two-fold in character. Can the option to have the case tried by a jury be made in the answers to pleas, and was the option contained in the notice of motion a sufficient compliance with the terms of the Article of the Code?

There seems to be no reason why the option for a jury trial could not be made by the plaintiff in his answers to the defendant's pleas, yet Art. 350 says it is done by the declaration, or in the pleas, or by special application. We are not, however, required to decide that question in this case, as we are all agreed



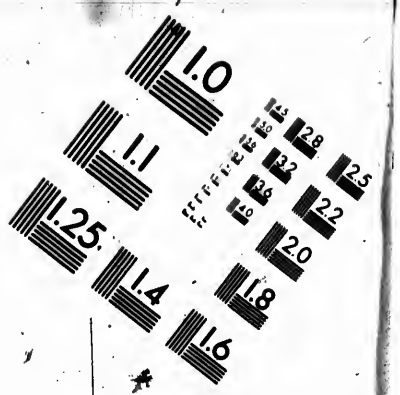
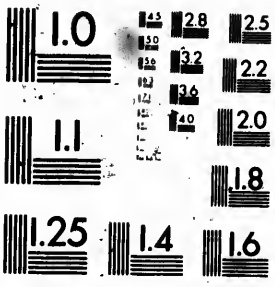
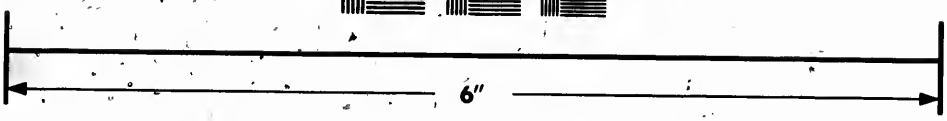
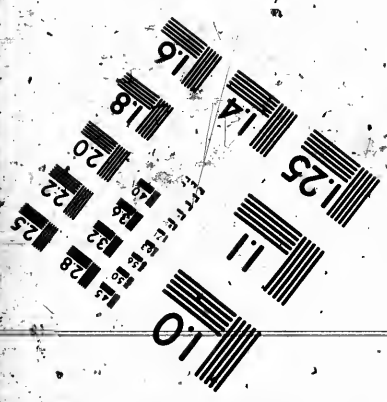
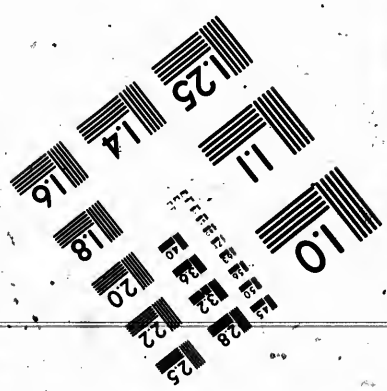


IMAGE EVALUATION TEST TARGET (MT-3)









Photographic Sciences Corporation

23 WEST MAIN STREET
WEBSTER, N.Y. 14580
(716) 872-4503

Brown and Imperial Ins. Co.

that the issue was only joined on the 8th September, 1874, and, consequently, that the option declared in the notice of motion for the nearest day in Term (the 17th) which was served within four days after issue joined, namely, on the 9th of September, was a complete compliance with the requirements of the Article of the Code. We are under the necessity, therefore, of reversing the judgment which dismissed the plaintiff's motion.

The following was the judgment of the Court:

"The Court * * * considering that the appellant, plaintiff in the Court below, has by his answer to respondent's pleas before issue joined, and also by motion made on the 17th of September, 1874, of which motion notice was given within four days after issue joined, declared his option to have said issue tried by a jury;

And considering that this case is one susceptible of a trial by jury under Article 348 of the Code of Procedure, that *acte* should have been granted of his said declaration, as prayed for by his said motion of the 17th of September, 1874;

And considering that there is error in the judgment rendered by the Superior Court on the 18th day of September, 1874, rejecting said motion, this Court doth quash and annul the said judgment of the 18th of September, 1874; and, proceeding to render the judgment which the said Court should have rendered, doth adjudge and declare that the said appellant is entitled to a trial by jury in this cause, and doth grant *acte* to the said appellant of the declaration made by his said motion of his option to have this cause tried by a jury, and doth condemn the respondents to pay the costs on the present appeal.

Judgment of Superior Court reversed.

A. & W. Robertson, for appellant.

G. B. Cramp, for respondent.

(S.B.)

COURT OF QUEEN'S BENCH, 1875.

MONTREAL, 14TH DECEMBER, 1875.

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

No. 1584.

The Canada Tanning Extract Co. vs. *Foley.*

HELD:—1. That a demand of plea to the merits, under Art. 131 of the Code of C. P., may be legally made, after the expiration of eight days after the filing of the preliminary plea, in the absence of any answer to such plea.

2. That a deposit of $100 as security for costs, after notice, and without objection by defendant, is sufficient, without any special allowance of its sufficiency by the Court, or a Judge, or the Prothonotary.

3. That an application for a *commission rogatoire* to adduce evidence against the validity of a power of attorney, not attacked by any pleading, cannot be allowed.

DORION, CH. J.:—Three separate motions to be permitted to appeal have been presented by the defendant.

The first motion complains of an interlocutory judgment, which declared a demand of plea to the merits, under Art. 131 of the Code of C. P., to be valid.

The defendant filed an *Exception dilatoire*, which the plaintiff abstained from

answering, and, after the expiration of eight days, the plaintiff served a demand of plea to the merits.

This demand the Court below held to be good and valid. The defendant contends, that as by not answering the exception within eight days the issue on the exception was held to be completed, under Art. 147 of the Code of C.P., the plaintiff was in the same position *quoad* the exception as if he had really answered it. We do not think so. The requirement of Art. 131 is simply that the plaintiff shall not answer the preliminary plea. So long, therefore, as the plaintiff has not actually filed an answer to that plea, he is entitled to demand a plea to the merits. This motion is, therefore, rejected with costs.

The second motion complains of an interlocutory judgment, which refused to declare invalid security for costs given by plaintiff in the following manner. The plaintiff, availing himself of the provisions of the Statute 33 Vict. ch. 18, s. 3, which allowed a plaintiff to put in security, without any previous demand on him, after one clear day's notice to the opposite party, notified the defendant's attorneys that security for costs would be given on a specified day, by depositing $100. On the day fixed the deposit was made without objection by the opposite party. The defendant contended that, as this particular form of security has not been sanctioned either by the Court, or a Judge, or the Prothonotary, it was invalid. We are all of opinion that the security given was, under the circumstances, a good and valid security. If the plaintiff considered the deposit offered insufficient in amount he should have objected. As he did not do so the amount must be held to have been sufficient. The interposition of the Court, or a Judge, or the Prothonotary, was not necessary to render the security valid. This second motion is, therefore, also dismissed with costs.

The third motion complains of an interlocutory judgment, refusing the defendant's motion for a *commission rogatoire* to England. The plaintiff being a foreign corporation its attorneys filed a power of attorney executed before witnesses. The stated object of the application was to disprove the genuineness of this power of attorney. But no plea attacking the power of attorney was filed, and there is, therefore, no issue raised in the case with regard to it. The rejection of the application was consequently perfectly right. And this third motion must share the same fate as the others, and is, therefore, rejected with costs.

Motion to appeal rejected.

Perkins & Co., for defendant.
Laflamme & Co., for plaintiff.
(S.B.)

COURT OF QUEEN'S BENCH, 1875.

MONTREAL, 16TH SEPTEMBER, 1875:

Coram DORION, C. J., MONK, J., TASCHEREAU, J., RAMSAY, J., SANBORN, J.

No. 115.

BEAUFOY,

(*Plaintiff in the Court below,*)

APPELLANT;

AND

FEEK,

(*Defendant in the Court below,*)

RESPONDENT.

HELD:—An exception *à la forme* which states that no proper service had been made upon the defendant is not *libellée* as required by law, inasmuch as it does not state the particular defect in the service which is complained of, and such *exception à la forme* should be dismissed.

The judgment of the Superior Court was as follows:

"The Court having heard the plaintiff and defendant by their respective counsel "as well upon the plaintiff's motion of the 17th of October instant as on said plain- "tiff's answer in law to the *exception à la forme* made and filed in this cause by "said defendant, having examined the record and proceedings had in said cause, "and on the whole duly deliberated, doth reject the said motion with costs; "and, considering that service of process upon the defendant is bad, having been "made between the hours of seven and eight o'clock in the afternoon, doth reject "the said answer in law and maintain said *exception à la forme*, in consequence "doth dismiss the present action, the whole with costs, *distraits* to Messieurs "Carter & Keller, defendant's attorneys, saving to plaintiff his right of action "upon more regular service of process in another suit."

The reason contained in the *exception à la forme* upon which the judgment was founded was "Because no proper or legal service was ever made upon the defendant."

The following is the judgment of the Court of Appeal:

Considering that the *exception à la forme* filed by the respondent in this cause, alleging that no proper service had been made upon him of the summons issued in this cause is not *libellée* as required by law, inasmuch as it does not state what is the particular defect in the service which is complained of by respondent so as to enable the appellant to answer such exception;

And considering that there is error in the judgment rendered by the Superior Court at Montreal on the 19th day of October, 1874, by which the appellant's action was dismissed while the said *exception à la forme* should have been dismissed:

This Court doth quash and reverse the said judgment of the 19th of October, 1874, and, proceeding to render the judgment which the said Superior Court should have rendered, doth dismiss the said *exception à la forme* of the said respondent, and doth condemn the said respondent to pay the said appellant the costs on the said *exception à la forme* in the Court below as well as the costs incurred on the present appeal.

Judgment reversed.

F. W. Terrill, for appellant.
Carter & Keller, for respondent.
(J.L.M.)

COURT OF QUEEN'S BENCH, 1875.

MONTREAL, 21st DECEMBER, 1875.

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

No. 6.

FOLEY,

APPELLANT;

AND

STUART,

RESPONDENT.

HELD:—That where a defendant, sued to render account and pay plaintiff the one-third of such balance as may be in his hands, files his account, in which he acknowledges having in his hands, besides a certain amount in cash, a number of shares in a Mining and Smelting Company, he cannot be condemned to pay one-third of the par value of such shares but only to deliver over and transfer to plaintiff his one-third of such shares, and, in default of so doing, to pay an amount equivalent to their par value.

DORION, CH. J.:—The appellant purchased lot No. 13, in the 14th range of the township of Leeds, for the purpose of disposing of it as mineral lands, and agreed to pay to the respondent one-third of the price he would realize by the sale. He subsequently disposed of the lot, and the respondent brought this action against him for an account of his share of the proceeds. The appellant contested the action on several grounds, which were declared unfounded by the Court below, and he was ordered to render an account, which he did. By this account the appellant admitted having sold the property for $10,000 gold and 800 shares of "The Leeds Copper Mining and Smelting Company," worth $5 per share par value. The appellant at the same time raised other objections to the right of the respondent to claim his share of the price of the property. The Court below rejected the contestation of the appellant, and condemned him to pay to the respondent $4,666.66, being one-third of the sum of $14,000. The appellant complains of both judgments. This Court considers that the several contestations of the appellant were properly rejected. The appellant has not, however, received $14,000 for the price of the property, but only $10,000 gold and 800 shares of the Mining Company; and as he is only bound to account for what he has received the judgment must be reformed, and appellant condemned to pay to the respondent $3,333.33⅓, and to convey to him 266⅔ shares in "The Leeds Copper Mining and Smelting Company in lieu of the $4,666.66 which he was condemned to pay by the Court below; and in default of transferring those shares to the respondent within a delay to be specified in the judgment, to pay a further sum of $1,333.33, with costs in the Court below, the respondent to pay the costs in appeal.

Judgment of Superior Court reversed.

A. & W. Robertson, for appellant.
Bethune & Bethune, for respondent.
(S.B.)

SUPERIOR COURT, 1876.

MONTREAL, 10TH MAY, 1876.

Coram TORRANCE, J.

No. 947.

In re *James Inglis*, Insolvent, and said *Inglis*, applicant for discharge, and *Prowse* et al., creditors contesting.

HELD:—That the prothonotary should not allow, on a contestation of the insolvent's application for discharge, a fee on articulations of facts or on appearance as counsel at *enquête* under the tariff in force under the Insolvent Act of 1869.

The contestant failed in his contestation of the application of the insolvent for his discharge under the Insolvent Act of 1869, and was condemned in costs. The bill taxed against him by the prothonotary allowed a fee on articulations of facts and for appearance of counsel at *enquête*. On application to revise the taxation, the Court struck out the items for articulations and for counsel at *enquête* on the ground that the tariff in force under the Insolvent Act of 1869 did not allow such items.

Motion granted.

Gilman & Holton, for petitioners.
Monk, Butler & Cruickshanks, for contestants.
(J.K.)

SUPERIOR COURT, 1876.

MONTREAL, 12TH MAY, 1876.

Coram TORRANCE, J.

No. 103.

Lang vs. *Clark*, and *Clark*, petitioner.

HELD:—That a *requête civile* after judgment may be served upon the attorney in the cause; C. C. P. 508.

After judgment rendered, the defendant presented a *requête civile*, which was served upon the plaintiff's attorneys and not upon the plaintiff. Upon motion by plaintiff to reject the *requête* for informal service, the Court maintained the service, under C. C. P. 508.

Motion rejected.

Davidson & Cushing, for plaintiff.
J. L. Morris, for defendant.
(J.K.)

SUPERIOR COURT, 1876.

MONTREAL, 27TH JULY, 1876.

IN CHAMBERS.

Coram JOHNSON, J.

No. 2547.

Farmer vs. *O'Neill, & Farmer*, petr. for *séquestre*.

HELD:—That, pending the proceedings in an action to compel the execution of a deed of sale of an immoveable, the plaintiff may obtain the appointment of a *séquestre* to receive the rents of the property, although the pleadings and evidence establish that the defendant had sold the property to another party prior to the service of the action, and was no longer in possession of the property, where there is reason to suspect that the sale to such other party was simulated.

This was a petition for the appointment of a *séquestre* to collect the rents of an immoveable, which the plaintiff alleged the defendant had sold to him.

The action was brought to compel the defendant to execute a deed of sale of the property in question, and was instituted on the 20th of June, 1876, but not served until the 24th of that month, and was made returnable on the 12th of July following.

On the 3rd of July, 1876, the plaintiff petitioned a Judge in Chambers, for the appointment of a *séquestre* to collect and receive the rents of the property, on the ground that, notwithstanding the sale of the property by the defendant to the plaintiff, he (the defendant) illegally retained possession of the property, and was collecting the rents and applying them to his own uses.

The defendant answered the petition, by alleging that he sold the property to Mr. Owen J. Devlin, by deed duly executed before a Notary Public on the 21st of June, 1876; that the deed was duly registered on the 23rd of that month; that Devlin had been in possession of the property ever since the execution of said deed, and that the defendant had not in any way possessed the property since that time.

To this pleading the plaintiff replied, that the deed to Devlin was simulated and fraudulent, and that the possession of Devlin was really that of the defendant, he being the mere *prête nom* of the defendant.

An authentic copy of the deed of sale, with the certificate of registration thereon, was filed with the answer to the petition, and Devlin (who was examined as a witness) swore to his being in possession of the property ever since the execution of the deed, and collecting the rents, and that his purchase and possession were real and *bonâ fide*.

JOHNSON, J.:—The plaintiff brought an action against the defendant, founded upon an alleged sale to him by the former, through the agency of Mr. Thomas, on the 30th May, 1875, and asked for a title. The action was served on the 24th of June last; and on the 30th of this month the plaintiff presented a petition for sequestration, founded on the fact of the pendency of the action, and also upon one other allegation only, viz., that the defendant retains possession of the property illegally. This petition was answered by the defendant by an allegation that he had sold the property to Mr. Devlin on the 21st June, by deed before Notary on that day, and registered on the 23rd of June. The

Farmer vs. O'Neill, and Farmer.

plaintiff replies that this sale to Devlin is simulated and fraudulent. There is a general replication to this special answer; and the parties have gone to evidence. I state it shortly in this way because that is the way it is presented just now. There was a demurrer by the plaintiff to the defendant's answer to this petition for sequestration, but that was dismissed; and the only question now is whether the facts of simulation and fraud are proved; because if th defendant has sold *bonâ fide*, and Mr. Devlin has a good title duly registered (and if nothing appears to the contrary, that much must be assumed), the grounds relied on to obtain the sequestration entirely fail. Now the ground stated in the petition, and the only ground stated there, is that the defendant illegally detains the property: that certainly does not appear; but the fact being disclosed by his answer that he had sold to another, the character of the sale is attacked as fraudulent and simulated, and made with the object of preventing this sequestration, and, therefore, if that were so, the allegation of the petition would be proved. It was said in argument that this cannot be true, because the sequestration had not been asked for; but the allegation is that the sale was simulated and made *pour se soustraire à la demande pour séquestre*, that is with a view of *avoiding* this demand. There appears to be no inconsistency in this. Now, Thomas, the agent who sold to the plaintiff, swears that he met Mr. Devlin on two occasions—first, about the 5th or 6th of June, and subsequently on the 10th. On the first occasion Thomas told him he had sold this property to Farmer, and the only remark Mr. Devlin made was that it was a considerable piece of land. On the second occasion, Devlin told Thomas that he had purchased the property. Thomas asked him how that could be, seeing what he had told him a few days before. The answer was that even at that time the sale had been completed. This does not satisfy me. It looks very much as if Mr. Devlin had kindly lent himself to accommodate Mr. O'Neill. As to O'Neill's knowledge of Farmer's pretensions to the property there can be no doubt whatever. Therefore, I think I am bound to order this *séquestre*, and the whole question can be gone into, with Mr. Devlin as a party to the case, and he can then defend his own rights, whatever they may be.

Petition for *séquestre* granted.

Doutre & Co., for plaintiff.

Bethune & Bethune, for defendant.

(S.B.)

COURT OF QUEEN'S BENCH, 1876.

MONTREAL, 22ND MARCH, 1876.

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

THE QUEEN vs. OWEN LYNCH.

Perjury—Venue—Indictment—Verdict—Arrest of Judgment.

Z. was indicted in the District of Beauharnois for perjury committed in the District of Montreal; there was no averment in the indictment that the defendant had been apprehended or in custody, or that he was in custody at the time of the finding of the indictment. The defendant neither demurred nor moved to quash, but after verdict moved in arrest of judgment on the ground that there was no averment in the indictment of his having been apprehended or in custody. The sitting Judge dismissed the motion in arrest of judgment, but reserved the point so raised.

HELD:—That the indictment was defective, that the defect was one which could not be amended, and, consequently, was not cured by verdict, and that the judgment be arrested and the defendant discharged.

This was a case reserved by JOHNSON, J., from the Court of Queen's Bench, Crown Side, District of Beauharnois. His Honor in reserving the case, Beauharnois, 8th March, 1876, made the following observations:—

REGINA vs. LYNCH.—On indictment for perjury committed in Montreal.

In the present case, in which a verdict of guilty was recorded last Saturday, two motions have been made:—one in arrest of judgment, and the other for a new trial. I have decided to reject both these motions. That for a new trial, which under our system is perhaps not practicable at all, is not, and never was anything more than an application to the discretion of the Court, and no ground seems to be here presented that calls for the exercise of that discretion in the way that is asked. The grounds are first that the verdict was partial:—that is to say that it was rendered on part only of a divisable count. The perjury charged was two-fold, but in one single count; and it was to the effect that the defendant had sworn two things, both of which were knowingly false: 1st, that there had been no deed of composition drawn for ten days after his assignment; and, 2nd, that he had never spoken to any of his creditors on the subject. It was as to the latter part that he was found guilty; and, under the clearest authority, the verdict of guilty in manner and form was the only verdict that could be recorded. Whether in perjury, larceny or any other offence, it has never been doubted, as far as I am aware, that swearing two things or stealing two things, if charged in an indictment, is a charge that is supported in law, if either of them be proved to have been sworn to, or to have been stolen. The subject will be found in Archbold, p. 71, & Bishop, vol. 1, 727. As to the other ground, viz., that the verdict is against, and without evidence:—the point mainly relied on was that the taking of the oath, and the authority of the assignee were not proved; but the law on proof of the ostensible capacity in which the assignee was proved to have acted presumes his authority; and it was proved that the party was sworn. The motion in arrest of judgment is far more important. I do not mean to grant that motion either; because the 32nd and the 78th sections of the Procedure Act prevent its being granted, and cure, as far as arrest of judgment, strictly considered, goes, all the defects complained of. But there is one subject of such very great importance brought under the

The Queen vs. Owen Lynch.

notice of the Court by this motion in arrest of judgment that I feel constrained to grant a case reserved. I refer to the question of *venue*. I have had time to consider it, and to consult authority, and I must say that it is a point of some difficulty. The indictment is found by the Grand Jury of the district of Beauharnois; and it alleges the offence to have been committed in the city of Montreal. As regards the offence of perjury and the place of trial, we must not confound the interchange of districts in one and the same Province with the same operation as between the different Provinces themselves. As regards the latter case, it was first provided for by the Statute of 1869 (32 and 33 Vict., c. 23, sec. 3); and it was by that statute said that persons committing perjury out of Canada could be "dealt with, indicted, tried, and convicted and sentenced in any part of Can-"ada, if they were apprehended or in custody there, and that the offence might "be laid to have been committed in the latter place."

That section of the statute was amended in the following year by the 33d Vic., c. 26, and perjuries committed in any Province of the Dominion were made triable in the other Provinces. Neither of those sections reached the present case, for here, both the perjury and the trial are in one and the same Province. It is therefore by a proper interpretation of sec. 8 of the statute 32 and 33 Vic., c. 23, that this point will have to be decided. Sec. 8 says: "any person "accused of perjury may be tried, convicted and punished in any district, county "or place where he is apprehended, or in custody." There is nothing here about his being dealt with or indicted, as there is in the sections relating to perjury committed in a different Province; therefore, unless the word trial technically includes the taking of the inquisition by the Grand Jury, as to which there is, according to the English books, a great deal to be said, it is doubtful if they could deal with the case or indict at all, and in any case they could only do so, if the person had been previously accused and apprehended or in custody; and therefore this Court would be without jurisdiction, for there would be no indictment before it. The point is not without difficulty. In England, the action of the Grand Jury has been held to be included in the term trial. This was in R. *vs.* Loader, 2 Russ. 122, on which there are also some observations in Roscoe in the chapter on Venue, p. 237. There is also a long note by Talfourd in his Edition of Dick's Q. S. upon this case, and the learned Editor maintains the correctness of Baron Rolfe's decision in Reg. *vs.* Loader: Then it is said,—and no doubt there is great weight in the observation,—that this is in the nature of a preliminary plea, and the 32 sec. of the Crim. Proc. Act has been cited, by which no arrest of judgment can be granted where there might have been a demurrer or a motion to quash; and also the 78th section, as to formal defects cured by verdict, among which is the want of a proper or perfect *venue*, which is just the point here; but I do not propose to grant the motion in arrest of judgment, which would strictly put an end to the case: I shall only postpone the judgment, as I am empowered to do by the statute, and state a case for the Court, and I feel more constrained to do this, because I perceive that the language of the 78th sect. of the Procedure Act, forbidding arrest of judgment for want of a proper venue, has added the words: "*Where the Court appears by* "*the indictment to have had jurisdiction over the offence.*" Now that is just the

point there upon which I am not sufficiently clear to proceed to pronounce judgment. The question will be whether the indictment shows that the Grand Jury of this District had jurisdiction to deal with and indict for this offence alleged in the indictment to have been committed in Montreal. I give no opinion upon it; I merely reserve it for the full Court. As to the necessity of its being averred in the indictment that the defendant was apprehended or in custody, I find that in the case of bigamy, which is analogous in respect of the place of apprehension conferring jurisdiction, that it is decisively held not to be necessary. See sec. 9 of the chapter on indictment in Archbold's pleading and evidence in criminal cases, where he cites, R. *vs.* Whiley, 1 C. and K. 150. I have had in my hand, too, an old report of 1791 of some proceedings on the commission for the trial of the rebels of 1746, by Sir Michael Forster. The Act under which the commission is sued empowered the Crown to issue it for trying persons then in custody, &c., and the question was whether the record showed that they had been in custody; and Chief Justice Lee held that it sufficiently appeared on the *record as it now stands though not indeed on the indictment* that the prisoners were in the custody of the sheriff; and his Lordship cited another case of which he had a note. If we can look in the present case to the Bench warrant, it was issued after the finding of the Grand Jury, and they would therefore have had no jurisdiction, if it be necessary that the defendant should have been in custody. There are some very strong cases as to the admission of the sufficiency of the indictment, and of the jurisdiction of the Grand Jury, by the plea of not guilty; but my business now is not to decide nor even to discuss; my business is to take every care in my power that an important point of law in a criminal case should be decided by the full Court; and I shall therefore order that the defendant give two good and sufficient sureties, to the extent of $500 each, and himself in $1,000, to appear in person before the Court of Queen's Bench, in Montreal, on the 11th of the present month, or, in default of such bail, that he be remanded to the common jail here, to await judgment in due course of law. Both the motions are dismissed, and the case will be stated and sent to the Clerk of the Court in Montreal, as the statute directs.

The Court of Queen's Bench sustained the objection, and quashed the conviction.

RAMSAY, J.:— The prisoner was indicted in the District of Beauharnois for perjury committed in the District of Montreal, and convicted. It was then moved in arrest of judgment that the indictment was bad, inasmuch as it did not appear that the Court had jurisdiction, and that the prisoner had been accused, apprehended or in custody when the indictment was found.

Mr. Justice Johnson, who heard the case, reserved the point on the following statement:—

"That the indictment appeared on the face of it to have been found by the Grand Jury of the District of Beauharnois for an offence committed in the District of Montreal, without its appearing in any manner that the defendant, before indictment, had been accused, apprehended, or in custody."

The difficulty arises out of section 8 of the Act respecting perjury, (32 and 33 Vict., cap. 23): "Any person accused of perjury may be tried, convicted and

The Queen vs. Owen Lynch.

punished in any district, county or place where he is apprehended or is in custody."

At the argument on the motion there seems to have been a question raised as to when it is to be considered the trial began; but that question the learned Judge before whom the trial was had did not reserve for our consideration, and probably rightly—but only whether the Grand Jury of Beauharnois could find a Bill which did not shew in any manner that the party accused was then in custody, or had been apprehended in the District of Beauharnois.

A number of cases have been collected by the diligence of the learned counsel for the prisoner to support the general proposition that where there is a special jurisdiction it must appear on the indictment.

In Forsyth's case, which is under Stat. 1, Jac. 1, c. 2, it does not appear how the indictment was drawn, and whether there was any averment of apprehension, but the prisoner was discharged, "as the warrant had not been produced, and it had not been proved that the prisoner was apprehended in the County of Middlesex," and therefore the Court had no jurisdiction to try him. 2 Leach, 286.

In Fraser's case, which is on the same Statute, judgment was arrested for want of the averment. 1 Moody, p. 407.

In Jordan's case the conviction was affirmed, but in the indictment the apprehension was alleged, and it was proved that, having been apprehended for another felony, he was in custody and detained for the offence charged, and this was held to be sufficient to give jurisdiction. R. & R., p. 48. The same, it appears, was decided in Lord Digby's case, reported in Hut., 1 Chitty 181, Cr. Law.

In James' case it was held that the averment was not necessary, but the fact was made to appear, 7 C. & P. 553; and Patterson, J., said while recognizing the authority of Fraser's that by 1 Will. IV, c. 66, s. 24, under which the prisoner was convicted, "the offence may be *laid* in the county where it did not arise."

The case of Reg. v. Whiley was cited as being perhaps against the defendant in this case, but in point of fact it only decides that it is sufficient if the jurisdiction appears by the caption.—In the present case the learned Judge who tried the case tells us that it does not appear in any manner whatever. In Berwick's case the objection taken was that it did not appear that the special commission appointed to try the rebels had jurisdiction to try the prisoner, because it did not appear on the record that the Court hath any jurisdiction over the prisoners. It seems in that case that it did not appear by the record that they were in custody prior to the 1st of January, 1746, and so the Court had jurisdiction. But in the case of Æneas McDonald, "since the whole proceeding against the prisoner was subsequent to January, 1746, the answer given there (in the cases of Berwick, Townely and the others) would not serve the present case." And the indictment without the averment was withdrawn, and "a new bill concluding with an averment *that he was apprehended* and in custody before the 1st of January, 1746, was preferred and found against him."—Foster, 59. By a note at p. 12 it seems that on the trials of Lords Kilmarnock, Cromartie and Balmenno, to guard against the objection in Berwick's case the warrants for their commitment were returned by the lieutenant of the Tower, read and

entered on the journals. That the averment should appear on the indictment appears to be supposed by Lord Sandrar's case, 9 Co. 118, by East 2, 353, and Hawkins 2, 29, s. 51.

The weight of authority seems to be rather in favor of the defendant's pretension—that the averment should appear on the face of the bill; but at all events the cases which are against this pretension go no further than this, that it is sufficient if the jurisdiction appears by the record.

The next question is as to whether this defect is cured by verdict.

The peculiar form of our Criminal Procedure Act of 1869 gives rise to some confusion, if not difficulty. We have to consider sections 23, 32, and 78.

By the 7 Geo. IV., c. 64, sect. 20, it was enacted that no indictment should be stayed or reversed after conviction by verdict, or otherwise, for certain defects, and among them "for the want of a proper or perfect venue where the Court appears by the indictment to have jurisdiction over the offence." This section was incorporated in "an Act for improving the administration of criminal justice in this Province." 4 & 5 Vict., c. 24, sect. 46.

By the Imperial Act, 14 and 15 Vict., cap. 100, sect. 24, the number of defects cured by verdict was increased, the phraseology was altered from no indictment "shall be stayed or reversed," to no indictment "shall be held insufficient," and the proviso "where the Court appears to have jurisdiction over the offence" was omitted.

By section 25 of the same Act it was enacted that if, notwithstanding this section, any formal objection should be taken it must be by demurrer, and the Court had power to amend the indictment in such particular.

In the 18 Vict., sect. 25 of the 14 and 15 Vict. was introduced into our law (cap. 92, sect. 26), but not sect. 24, and, when the Statutes of Canada were consolidated, the re-enactment of section 25 became section 46 of the Cr. Pro. Act (cap. 99), and our re-enactment of sect. 20 of the 7 Geo. IV. became section 84 of the Crim. Proc. Act.

When the Criminal Acts were amended in 1869, sect. 46 of cap. 99 C. S. C. was preserved, but not unaltered. The word "formal" was omitted, so that the section reads: "Every objection to any indictment, for any defect apparent on the face thereof must be taken by demurrer or motion to quash, etc.," and the words following were added: "and no motion in arrest of judgment shall be allowed for any defect in the indictment which might have been taken advantage of by demurrer, or amended under the authority of this Act."

Section 84 of cap. 99, Cons. Stat. Canada, was also preserved, with its proviso as to the jurisdiction, and section 24, 14 and 15 Vic., cap. 100, was thrown in.

These three sections are the 23rd, 32nd and 78th sections of the Act of 1869.

Under the common law, there can be no doubt that a defect of jurisdiction in the Court as "where a Statute directs that particular matter shall be determined only within a certain boundary, or by certain magistrates, this may be shown under the plea of not guilty." (1 Chitty, 438.) And this was not altered by the 7 Geo. IV., cap. 64, sec. 20, for the question of jurisdiction is specially reserved; and jurisdiction it was determined in Feargus O'Connor's case, "means local jurisdiction and not jurisdiction with reference to the nature of the charge."—

The Queen vs Owen Lynch.

(5 A. and E. 16.) In that case the objection was that there was no statement of venue, either by reference or otherwise.

The distinction of an imperfect venue, which is cured by the 7 Geo. IV., cap. 64, s. 20, and no venue at all was farther kept up in the cases of Reg. v. Albert, and Reg. v. Stowell, in the first of which the conviction was affirmed, and in the latter of which the judgment was arrested. The authority of the case of Stowell was admitted, in the case of the Queen v. Lord Ashburton and others. All these cases were in the same year (1843) and they are reported in the 5th Ad. & E. The authority of these cases was again invoked in 1847 in the case of Reg. v. Hunt and others, 10 Ad. & E., N. S. 927. It is said in Waterman's Archbold, after quoting section 24, 14 & 15 Vict., cap. 100 :—"Still, however, if it appear in evidence that the prisoner is on his trial in a wrong jurisdiction, and that the Court has not cognizance of the offence, he must be acquitted." The writer supports this statement on the authority of Hawkins, Bk. 2, c. 25, s. 35.

It only remains to enquire whether the alterations introduced into our Act have altered it, whether the omission of the word "formal" and the disallowance of the motion in arrest of judgment have deprived the defendant of all remedy.

It is unquestionable that the defect is in the indictment, and that it *might* have been taken advantage of by demurrer (Fearnley's case, Leach, 477), but it certainly could not have been amended, and sect. 32 must be read "might be taken advantage of by demurrer, and might be amended under the authority of this Act." If we were not thus to restrain this legislation, we should have to hold that a conviction for a capital felony at Quarter Sessions could not be interfered with. But, in addition to this, the point comes up not on a motion in arrest of judgment but on a reserved case.

I think, therefore, that the party ought not to have been convicted, and that the judgment should be arrested.

J. J. Curran, Q.C., for the Crown.

W. H. Kerr, Q.C., for the prisoner.

(W.H.K.)

COUR DE CIRCUIT, 1876.

BEAUHARNOIS, 1er JUIN 1876.

Coram BELANGER, J.

Le Révérend J. C. G. Gaudin vs. *L'Honorable Henry Starnes.*

JUGE :—Que la dîme n'affecte pas le fonds, et n'est payable que par celui qui récolte les grains, et qu'un propriétaire catholique d'une terre louée soit à un fermier catholique, ou à un protestant, à *prix d'argent*, n'est pas tenu de payer la dîme au curé de la paroisse pour les grains recoltés sur sa propriété, par son fermier.

L'action fût instituée en recouvrement des dîmes sur grains recoltés sur une terre appartenant au défendeur, située en la paroisse Ste. Philomène.

Pour défense à cette action, le défendeur allégua que sa propriété étant louée à un protestant à prix d'argent, il n'était pas tenu de payer la dîme réclamée.

L'honorable juge en rendant son jugement donna les motifs suivants :—

Pothier, du Louage, No. 213, impose l'obligation de payer la dîme à celui qui

perçoit les fruits, voici comment il s'exprime: "Il y a beaucoup moins de difficulté à décider que la dime doit être acquittée par le fermier, et non par le "propriétaire; car la dime n'est pas une charge du fonds, ce n'est pas un droit "foncier, c'est une louable coutume, qui par la force de la coutume a passé en "obligation, ce n'est donc pas une charge du fonds dont le possesseur doit être "tenu; mais c'est le fermier qui perçoit les fruits qui la doit acquitter, parce "qu'elle n'est dûe que sur les fruits et en vertu de l'usage dans lequel sont "ceux qui perçoivent les fruits de la payer."

"Guyot, Répertoire verbo Bail, p. 31, décide de la même manière: "Comme "celui qui loue son bien en conserve, non seulement la propriété, mais encore la "possession, puisqu'il possède par son locataire et que les loyers qu'il perçoit lui "tiennent lieu de jouissance, il faut en tirer la conséquence que c'est le propriétaire et non le locataire, qui doit acquitter toutes les charges imposées sur "les héritages loués, à moins que par une clause particulière du bail, le locataire "ne se soit expressément soumis à remplir cette obligation pour le propriétaire.

"Cependant ce n'est jamais ce dernier qui doit acquitter la dîme, et il est facile "d'en apercevoir le raisonnement; c'est que la dîme n'est pas une charge du fonds, "et qu'elle n'est due que sur les fruits en vertu d'une convention qui a passée en obli"gation; or, comme c'est le locataire qui perçoit les fruits, c'est lui qui est tenu "d'acquitter la dîme." Voilà la règle du droit commun qui était suivie en France quant à ceux par qui la dîme était payable. Quant au Canada, une ordonnance du 23 août 1667, contient les dispositions suivantes: "Nous, en vertu du pouvoir à nous donné par Sa Majesté, avons ordonné et ordonnons que les dîmes, de quelque nature qu'elle puissent être tant de ce qui naît en Canada par le travail des hommes que de ce que la terre produit d'elle-même, se lèveront au profit des ecclésiastiques qui desserviront les cures sur le pied de la 26ème portion.

"Et, attendu la disposition des habitations plantées sur une même ligne sous forme de communauté, ce qui ferait qu'en la perception du droit des dîmes, le coût l'emporterait sur le fruit, s'il n'y était pas pour nous pourvu—que les dites dîmes seront *payées par les propriétaires ou leurs fermiers*, conformément à l'estimation qui sera faite des fruits pendants en racine, et étant sur pied, dix jours avant la récolte, ou environ, par deux personnes à ce commises de main commune."

Par un réglement du Conseil Supérieur du 20 mars 1668, il est ordonné que le propriétaire et le fermier paieront les dîmes à proportion de ce que chacun d'eux retireront, à moins de convention contraire entr'eux.

Plus tard, par un acte du parlement anglais passé en 1774, pour préciser plus particulièrement la liberté accordée aux habitans du Canada par le traité de paix du 10 février 1763, de professer la religion catholique, il a été statué: "Que les sujets de Sa Majesté Britannique, professant la religion de l'Eglise de Rome dans la dite Province de Québec, peuvent avoir, conserver et jouir du libre exercice de la religion de l'Eglise de Rome, soumise à la suprématie du Roi, déclarée et établie par un acte fait dans la première année du règne de la Reine Elizabeth, sur tous les domaines et pays qui appartenaient alors ou qui appartiendraient par la suite à la Couronne Impériale de ce Royaume, et que le clergé de la dite Eglise peut tenir, recevoir et jouir de ses dus et droits accoutumés, *eu égard seulement aux personnes qui professent la dite religion.*"

Gaudin vs. Henry Starnes

D'après ce dernier acte, il est clair que le curé dans toute paroisse a droit d'exiger la dîme en conformité aux lois passées à cet effet avant la cession du pays; c'est-à-dire l'ordonnance du mois d'août 1667, et le réglement du Conseil Supérieur du 20 mars 1668, sauf toutefois quant aux habitans professant toute autre religion, qui ne pourraient y être astreints.

En France, comme le dit Pothier, la dîme se paye par celui qui recueille les fruits, c'est-à-dire par le locateur et le fermier, en proportion des fruits qu'ils recueillent respectivement, et par le fermier seul s'il recueille seul les fruits.

Ici nous devons suivre la même règle, à moins que l'ordonnance et le réglement cités plus haut n'y aient apporté quelque modification. Après avoir lu et relu cette ordonnance et ce réglement avec tout le soin possible, je ne puis arriver à cette interprétation. En effet, tout ce que j'y trouve tendant à déterminer par qui ces dîmes seront payées, c'est que dans l'ordonnance il est dit que les dîmes seront payées, par les propriétaires ou leurs fermiers; de quoi? "tant de ce qui naît en Canada par le travail des hommes (comme produit de la terre) que de ce que la terre produit d'elle même," et dans le réglement susdit, "que le propriétaire et le fermier paieront les dîmes à proportion de ce que chacun d'eux retireront." D'après cela, ici comme en France, c'est la personne et non la propriété qui est tenu au paiement de la dîme; conséquemment c'est lui seul qui recueille les fruits, qui est tenu d'en payer la dîme, et c'est évidemment guidés par cette idée que nos codificateurs ont accordé un privilège pour la dîme, non pas sur la propriété, mais seulement sur les récoltes qui en proviennent, c'est l'article 1997 qui contient cette disposition. Quant à la propriété, elle n'est affecté à la dîme qu'en ce sens que chaque fois qu'elle produit des fruits, celui qui les produit ou les recueille en doit la dîme au curé de la paroisse. De tout cela il me paraît clair que si le propriétaire a loué à prix d'argent, il n'est pas tenu à la dîme, soit qu'il l'ait louée à un catholique ou à un protestant, et je ne puis accepter la proposition contraire qui a été suivie par la Cour de Circuit d'Iberville en jugeant que le propriétaire catholique qui a loué sa terre à prix d'argent, est obligé de payer la dîme, soit que le fermier soit catholique ou protestant."

La Cour déboute l'action du demandeur avec dépens.

Duranceau & Seers, avocats du demandeur.

Judah, Wurtele & Branchaud, avocats du défendeur.

(A.B.)

SUPERIOR COURT, 1875.

MONTREAL, 28TH JANUARY, 1875.

Coram MACKAY, J.

Janes et al. vs. The Sun Mutual Insurance Company of New York.

HELD:—That the prescription on claims of a commercial nature is so absolute that a reserve of plaintiff's recourse, in a judgment rendered in appeal, after the lapse of the prescribing period, dismissing their action for the same debt brought within the prescribing period, will not avail against such prescription.

This was an action for a loss under a marine insurance, alleged to have been incurred between the 9th and 31st days of July, 1863.

For this loss the plaintiffs sued and recovered judgment against the defendant in the Superior Court at Montreal, on the 27th of October, 1865.

This judgment was reversed on appeal on the 4th Sept., 1869, reversing the judgment of the Superior Court, on account of informality in the service, and dismissing the plaintiffs' action; but reserving to the plaintiffs their recourse against the defendant, as they might be advised according to law.

Jones vs. Sun Mutual.

The present action was instituted on the said 4th September, 1869.

Amongst other pleas to the action, the defendant pleaded prescription, in answer to which the plaintiffs invoked their former suit and judgment in the Superior Court and the reservation contained in the judgment in appeal.

PER CURIAM:—The action was brought to recover for loss on a lot of grain which was coming down from the Upper Lakes in July, 1863. It appeared that the Sun was authorized by its charter only to make contracts in the City of New York. They were sued on a contract purporting to be made by Theodore Hart here, and they pleaded that it was not competent to make such contract. Mr. Hart had noted that a cargo was covered under an open policy. Mr. Hart stated that when he noted an insurance in this way, it was simply like receiving proposals of insurance. The Company pleaded their exemption rather ungracefully, but they were not without some equity, for it appeared that they had never received a copper of the insurance from Watt, though the latter had got the benefit of a quantity of insurance before this. Numerous witnesses had been examined and several nice points had been raised, but the Court was spared the necessity of entering into these questions, as the plaintiffs' action must be dismissed under the first plea of prescription of six years.

I therefore render the following judgment:—"Considering that plaintiffs' action was barred at date of institution of it, as is pleaded by defendant's first plea: The Court doth, maintaining the said first plea, dismiss said plaintiffs' action, as incapable of being maintained (2260 and 2267 Code Civil) with costs," &c.

A. & W. Robertson, for plaintiffs.

Abbott, Tait & Wotherspoon, for defendant.

Action dismissed.

(S.B.)

SUPERIOR COURT, 1876.

MONTREAL, 20TH MAY, 1876.

Coram TORRANCE, J.

No. 1835.

Robertson et al. vs. *Fontaine*, and *Fontaine*, Opposant.

HELD:—That an affidavit to an opposition sworn before a Commissioner for the District of Quebec, where the jurat does not show where the affidavit was sworn, is insufficient.

The plaintiffs moved the Court to reject an opposition *à fin d'annuler* made by the defendant, "because the said opposition was not sworn to before any "person having power to administer an affidavit in the District where the same "was made, nor does it appear to be on the face."

The jurat was in these words: "Assermenté devant moi soussigné, Commissaire "de la Cour Supérieure nommé pour le District de Québec le trois Mai, 1876."

(Signed,) "F. E. Hudon, Com. C. S."

The Court granted the motion.

Motion granted.

A. & W. Robertson, for plaintiffs.

Mackay & Turcotte, for defendant.

(J.K.)

SUPERIOR COURT, 1876.

MONTREAL, 12TH MAY, 1876.

Coram TORRANCE, J.

No. 1207.

Greene et al. vs. *Blanchette.*

HELD:—That the Court at Montreal has no jurisdiction to compel a defendant to answer a suit on a draft made at Montreal, but payable at St. Hyacinthe and accepted accordingly.

This cause was before the Court on the merits of an *exception déclinatoire* filed by the defendant. He was served with the summons in the District of St. Hyacinthe, which was his domicile, and required to answer in Montreal. He pleaded that the cause and right of action did not arise in the District of Montreal, but in the District of St. Hyacinthe. The action is based upon a draft made by plaintiffs on the 20th December, 1875, at Montreal, addressed to the defendant at St. Hyacinthe, and accepted by him, whereby the plaintiffs requested the defendant to pay to their order at the Merchants' Bank, St. Hyacinthe, $147.37. The draft was protested for non-payment.

The Court maintained the exception.

Macmaster & Hall, for plaintiffs.

Laflamme, Huntington, Monk & Laflamme, for defendant.

(J.K.)

SUPERIOR COURT, 1876.

MONTREAL, 3RD MAY, 1876.

Coram TORRANCE, J.

No. 2273.

The Mechanics' Bank vs. *Seale.*

HELD:—That a *défense en fait* to an action on a promissory note will not be rejected on motion of plaintiff as a violation of C. C. P. 143, in not being supported by an affidavit denying the signature to the note.

The plaintiff sued on a promissory note alleged to have been made by the defendant. The defendant pleaded the general issue (*défense en fait*).

E. Barnard, for the plaintiff, moved that the plea be rejected on the ground that it was not accompanied by the affidavit required by C. C. P. 145, which enacted that every denial of a signature to a note must be accompanied with an affidavit of the party making the denial, &c.

F. E. Gilman, for defendant, cited Lawder vs. Sturges, No. 724; S. C. (Beaudry, J., 29th November, 1875.)

The Court rejected the motion.

Motion rejected.

E. Barnard, for plaintiff.

Gilman & Holton, for defendant.

*** The same point came up in the same case of *Lawder* vs. *Sturges*, on demurrer to the *défense en fait*, and was decided in the same way by TORRANCE, J., 9th December, 1875.

(J.K.)

PRIVY COUNCIL, 1874.

26TH NOVEMBER, 1874.

Coram THE LORD JUSTICE JAMES, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER.

J. J. C. ABBOTT, ET AL.,

(Defendants in the Court below,)

APPELLANTS,

AND

J. FRASER, ET AL.,

(Plaintiffs in the Court below,)

RESPONDENTS.

H. F., a merchant of Montreal, by his will, dated the 23rd of April, 1870, devised and bequeathed his residuary estate to trustees in trust "to establish at Montreal an institution to be called the 'Fraser Institute,' to be composed of a free public library, museum, and gallery," and to be governed as therein mentioned; "and for that purpose to procure such charter or act of incorporation as my said trustees may deem appropriate to the purpose intended by me." After giving further directions as to the composition of the board of governors of the "Fraser Institute," he proceeded:—"And so soon as the requisite charter shall have been obtained containing all the powers necessary to carry out my design herein contained, I desire that the residue of my estate and effects, after deduction of the expenses of the management thereof, shall forthwith be conveyed over to the corporation, to be thereby formed, to be called 'the Fraser Institute', for the purposes herein declared."

In a suit by the respondents as the heirs and representatives of the testator to set aside the above disposition:—

HELD:—1. That it ought to be sustained. It was a disposition for a lawful purpose within the meaning of Art. 869 C. C.; while as to the bequest in favour of a corporation to be thereafter formed, there was no restriction against it to be found in the Code; and as to the devise, the prohibitions contained in Arts. 396 and 836 of the Code relate to the acquisition of immoveable property by corporations already formed. A devise by which property is given, not to trustees with power of perpetual succession, but simply to trustees directed to convey to a corporation only in the event of its being lawfully created with permission to possess it, is not within the scope of the said articles.

2. That the gift not having been made to a society not in existence at the testator's death, but to intermediate fiduciary legatees, whose appointment is permitted by Art. 869 of the Code, did not lapse. Under Article 838 the capacity of the substituted society to receive is to be considered relatively to the time when the right to receive comes into effect.

3. The second article of the Edict of 1743 is abrogated by the Civil Code of Lower Canada, as being contrary to or inconsistent with its provisions. But apart therefrom the gift being on an implied condition the fulfilment of which would render it lawful, is not illegal as a gift in mortmain. (6 P. C. 96.)

This was an action to set aside the provisions of the will of the late Hugh Fraser. The judgment of the Superior Court dismissing the action will be found reported in 15 L. C. Jurist, pp. 147–155.

On the 24th of June, 1873, the majority of the Court of Queen's Bench (Appeal Side), composed of DRUMMOND, MONK, and TASCHEREAU, JJ., (DUVAL, C.J., and BADGLEY, J., dissenting) reversed the judgment of the lower Court. The *considérants* of the judgment in appeal were as follows:

Considering:

1stly. That, in the eighteenth century, the leading European nations adopted a policy which tended to restrain the excessive accumulations of real estates held in mortmain, and by corporate bodies, whether Ecclesiastical or Lay: as evinced, in England, by the passing of the Act, commonly known as the Statute of Mortmain, in the ninth year of the reign of His Late Majesty King George the

Second (Chapter 36), and, in France, by several laws or ordinances as well antecedent as subsequent to the Edict or Ordinance hereinafter mentioned;

2ndly That Louis the Fifteenth, then King of France, of Navarre, and, amongst other outlying possessions, of several American Colonies, including this Province of Quebec, wielding absolute power, legislative and executive, in pursuance of the said policy, promulgated an Edict or Declaration bearing date at Versailles, the twenty-fifth day of November, one thousand seven hundred and forty-three, and duly registered in the Superior Council, *Conseil Supérieur*, at Quebec, by which it was, amongst other things, decreed and enacted as follows:

Article I. "Conformably to the Ordinances pronounced, and the rules made, for the interior of Our Kingdom, We ordain (*voulons*) that there shall not be made, in Our Colonies of America, any *foundation* (*fondation*) or *new establishment* of houses, or religious communities, or of hospitals, asylums, *congregations, confraternities, colleges, or any other corporation, or community, either Ecclesiastical or Lay*, unless under and by virtue of Our express permission, conveyed by Our Letters Patent, to be registered in Our Superior Councils, of the said Colonies, in the form which shall be hereafter prescribed."

Article II. "We forbid the making of any bequests by last Will or Testament, for the *foundation* (*fondation*) *of any new establishment* such as those mentioned in the preceding article, *or for the benefit of any persons who might be intrusted with the formation of any such establishment*, the whole under pain of nullity (*à peine de nullité*); *which shall be observed even when the bequest is made upon the condition* (*à la charge*) *of obtaining Our Letters Patent.*"

Article IX. "We declare to be null all establishments of the kind described (*de la qualité marquée*) in the first Article, which shall not have been authorized by Our Letters Patent, registered in Our said Superior Councils (*Conseils Supérieurs*) as also all dispositions and acts made in their favor, directly or indirectly, notwithstanding any prescriptions or consents expressed or implied (*exprès ou tacites*) which might have been given at or to the execution of any such dispositions or acts, by the parties interested, their heirs or assigns."

3rdly. That when the definitive Treaty of Peace was concluded between Great Britain and France, on the tenth day of February, one thousand seven hundred and sixty-three, under which Canada, with all its dependencies (including this Province of Quebec), was ceded by the Crown of France to the Crown of Great Britain, the said Edict or Declaration was unrepealed, unaltered and in full force and vigor.

4thly. That by the Imperial Statute passed in the fourteenth year of the reign of His late Majesty King George the Third, Chap. 83, commonly known as the Quebec Act, it was, amongst other things, enacted:

"That all His Majesty's Canadian subjects within the Province of Quebec, the religious orders and communities only excepted, may also hold and enjoy their properties and possessions, together with all customs and usages relative thereto, and all other their civil rights; ....that in all matters of controversy, relative to property and civil rights, resort shall be had to the laws

" of Canada, as the rule for the decision of the same; and all causes that shall " thereafter be instituted in any of the Courts of Justice shall, with respect to " such property and rights, be determined agreeably to the said laws and cus- " toms of Canada, until they shall be varied or altered," viz.: in the due course " of Legislation."

Considering:

5thly. That the only Laws or Statutes subsequently passed or enacted which could affect, either directly or indirectly, the said Edict or Ordinance of the twenty-fifth day of November, one thousand seven hundred and forty-three, or any of its provisions relating to testamentary bequest to any of the persons or corporations therein mentioned, are the following:

1st. The Tenth Section of the precited Imperial Statute passed in the fourteenth year of His late Majesty George the Third, by which it was enacted as follows:

" That it shall and may be lawful to and for every person that is owner of " any lands, goods or credits, in the said province, and that has a right to " alienate the said lands, goods, or credits, in his or her lifetime, by deed of " sale, gift or otherwise, to devise or bequeath the same at his or her death, by " his or her last will and Testament: any law, usage, or custom, heretofore, or " now prevailing in the Province, to the contrary, whereof, in any wise notwith- " standing; such will being executed, either according to the laws of Canada, " or according to the forms prescribed by the laws of England."

2nd. The Provincial Statute of Lower Canada passed in the forty-first year of His said late Majesty George the Third, for the purpose of removing doubts and difficulties which had arisen touching the said last mentioned Imperial Act.

By this Provincial Act it was, amongst other things, enacted:

" That it shall and may be lawful, for all and every person or persons, of " sound intellect and of age, having the legal exercise of their rights, to devise or " bequeath by last will and testament, whether the same be made by husband or " wife, in favor of each other, or in favor of one or more of their children, as " they shall seem meet, or in favor of any other person or persons whatsoever, " all and every his or her lands, goods or credits, whatever be the tenure of such " lands, and whether they be *propres, acquêts or conquêts*, without reserve, res- " triction or limitation whatsoever, any law, usage or custom to the contrary " hereof in any way notwithstanding. Provided always that it shall not be " lawful for a husband or wife, making such last will and testament, to devise " or bequeath more than his or her part or share of their community, or other " property and estate, which he or she may hold, or thereby to prejudice the " rights of the survivor, or the customary or settled dower of the children."

" *Provided also, that the said right of devising, as above specified and* " *declared, shall not be construed to extend to a devise by will and testament, in* " *favor of any Corporation or other persons in mortmain, unless the said Cor-* " *poration or persons be, by law*, entitled to accept thereof."

3rd. The following Articles of the Civil Code of Lower Canada, now the Province of Quebec, promulgated on the first day of August, one thousand eight hundred and sixty-six:

Abbott et al and Fraser et al.

Article 356, respecting the disabilities of corporations, which reads as follows: "The disabilities arising from the law are

1. "Those which are imposed on each corporation by its title, or by any law "applicable to the class to which such corporation belongs.

2. "Those comprised in the *general laws of the country respecting mortmain* "*and bodies corporate, prohibiting them from acquiring immoveable property, or* "*property so reputed, without the permission of the Crown, except for certain* "*purposes only*, and to a fixed amount and value.

3. "*Those which result from the same general laws imposing, for the alienation or hypothecation of immoveable property held in mortmain or belonging* "*to corporate bodies, particular formalities, not required by the common law.*"

Article 831. "Every person of full age, of sound intellect, and capable of "alienating his property, may dispose of it freely by will, without distinction as "to its origin or nature, either in favor of his consort, or of one or more of his "children, or of any other person *capable of acquiring and possessing*, and "without reserve, restriction, or limitation; *saving the prohibitions, restrictions,* "*and causes of nullity mentioned in this Code, and all dispositions and con-* "*ditions contrary to public order or good morals.*"

Article 836. "*Corporations and persons in mortmain can only receive by* "*will such property as they may legally possess.*"

Article 838. "The capacity to receive by will is considered relatively *to the* "*time of the death of the testator.*"

"Persons benefited by a will need not be in existence at the time of such "will, nor be absolutely described or identified therein. It is sufficient *that* "*at the time of the death of a testator they be in existence, or that they be then* "*conceived, and subsequently born viable, and be clearly* known to the per-"sons intended by the testator."

Article 864. "The property of a deceased person which is not disposed of by "will, or concerning which the dispositions of his will are wholly without effect, "remains in his abintestate succession, and passes to his lawful heirs."

Article 869. "A testator may name legatees who shall be merely fiduciary or "simple trustees for charitable or other lawful purposes *within the limits per-* "*mitted by law*; he may also deliver over his property for the same object to "his testamentary executors, or effect such purposes by means of charges im-"posed upon his heirs or legatees."

Considering:

6thly. That the said Provincial Statute of the forty first year of His late Majesty King George the Third was enacted for the triple purpose of explaining, extending, and modifying the Imperial Act above cited, which must be construed in connection therewith, and that in and by its last proviso it excepted, from the otherwise unlimited power of bequest, *all devises and bequests by will and testament in favor of any Corporation or persons in mortmain, unless the said Corporation or persons were by law entitled to accept thereof*;

That the Legislature of Canada, by the Articles of the Civil Code of Lower Canada above quoted (which are merely declaratory of the pre-existing laws in so far, at least, as the said Edict or Ordinance of the twenty-fifth day of Nov-

ember, one thousand seven hundred and forty-three, the said Imperial Act, 14th Geo. III, and the said Provincial Statute, 41st Geo. III, (concern this case) hath expressly excepted from the otherwise unlimited power of bequests, *all persons incapable of acquiring and possessing*, hath excluded all bequests, contrary to law, or contrary to the prohibitions, restrictions and causes of nullity mentioned in that Code, and all dispositions and conditions *contrary to public order*; hath decreed that Corporations can receive by will only such property as they may legally possess, and that a testator may name fiduciary or simple trustees for charitable or other purposes *only within the limits permitted by law*; hath acknowledged the existence of a law or laws respecting mortmains, and prohibiting them, and bodies corporate, from acquiring immoveable property without the permission of the Crown, and hath declared, conformably to our common law,

"That the property of a deceased person which is not disposed of by will, or "concerning which the dispositions of his will are wholly without effect, remains "in his ab intestate succession and passes to his lawful heirs."

Considering:

7thly. That the said Edict or Ordinance of one thousand seven hundred and forty-three was and is a law of public policy, of public order, *Loi d'ordre Public*, —that its validity and efficacy has been acknowledged by the jurisprudence of the Courts of Lower Canada; *that it is the only Law relating to mortmains or to the acquisition of immoveable property, through bequest or otherwise, by bodies Corporate without the permission of the Crown ever promulgated in this country*, and that it was at the time of the making of the will and testament of the late Hugh Fraser, mentioned in the declaration of the plaintiffs, and at the time of the decease of the testator, and it is still unrepealed, unaltered and in full force and vigor;

Considering:

(In view of the arguments urged against the validity of the said Edict or Ordinance of 1743, on the ground that it never was enforced under the *Ancien Régime*, and that it is opposed to the policy of the New):

8thly. That laws are made, not to be violated, but to be observed. Therefore the fact that no judgment was ever pronounced for a violation of the Edict in question, if true, merely tends to prove either the wisdom of the law or the law-abiding temper of the people for whom it was enacted, if not both;

That the law *is what is*, and Courts of Justice, so long as it remains unrepealed and unaltered, whether *it is or is not* what it should be, are bound to interpret and administer it, according to the true intent and meaning of the legislator by whom it was enacted, without regard to its policy, either at the time when it was promulgated or when the judge is required to apply it;

Considering:

9thly. That the mode of manifesting the will of sovereign power under the absolute monarchy of France by letters patent, in all such matters as those contemplated by the said Edict or Declaration of 1743, was and is superseded, under our system of constitutional monarchy, by special Acts of our Legislature;

Considering:

Abbott et al. and Fraser et al.

10thly. That by his last will and testament, executed before J. C. Griffin and H. J. Meyer, notaries public, at Montreal, on the twenty third day of April, one thousand eight hundred and seventy, the said Hugh Fraser, therein described as of the City of Montreal, Esquire, merchant, after making several special bequests therein enumerated, did nominate and appoint the Honorable John J. C. Abbott and John Cowan, two of the defendants in this cause, his executors for the purpose of carrying out the provisions of his said will, and did divest himself in their hands of his moveable estate and effects, to the end that they should pay the said legacies, and should immediately afterwards transfer the balance of the moveable estate to a certain fund vested by the will in certain proposed fiduciary legatees and trustees, in terms which, in so far as they affect the issue raised, are as follows:

"17th Clause. I nominate and appoint the said Honorable John J. C. Abbott "and John Cowan my executors for the purpose of carrying out the provisions "of this my will, and I divest myself in their hands of my moveable estate and "effects, to the end that they may pay the foregoing legacies, raising the neces"sary funds therefor in the most convenient manner without any unnecessary "sacrifice, and immediately thereafter to transfer over the balance of my move"able estate to the fund which, by the provisions of this my will, is vested in "my trustees and fiduciary legatees hereinafter named.

"18th Clause. I give, devise and bequeath the whole of the rest and residue "of my estate, real and personal, moveable and immoveable, of every nature and "kind whatsoever, to the said Honorable John J. C. Abbott and to the said "Honorable Frederick Torrance, hereby creating them my universal residuary "fiduciary legatees, and it is my will and desire that they do hold the same in "trust for the following intents and purposes, namely, *to establish at Montreal, in "Canada, an institution to be called the 'Fraser Institute,' to be composed of a "free public library, museum and gallery, to be open to all honest and respect"able persons whomsoever, of every rank in life, without distinction*, without "fee or reward of any kind, ... and, for that "purpose, to procure such charter or act of incorporation as my said trustees "may deem appropriate to the purpose intended by me . . . . . "and so soon as the requisite charter shall have been obtained containing all the "powers necessary to carry out my design herein contained, I desire that the "residue of my estate and effects, after deduction of the expenses of the manage"ment thereof, shall be forthwith conveyed over to the corporation to be there"by formed, to be called the 'Fraser Institute,' for the purposes herein "declared," &c.

Considering:

11thly. That the codicil made to his said last will and testament by the said late Hugh Fraser, at Montreal, on the second day of May, one thousand eight hundred and seventy, has no bearing on the issue raised in this cause;

Considering:

12thly. That the object of the said last mentioned intended bequest in the said last will and testament of the said testator (the annulment of which is sought by the action of the plaintiffs) being to devise the residue of all his

estate, real and personal, moveable and immoveable, for the establishment or foundation (*fondation*) of a lay corporation, having at the time of the execution of his said last will and testament and at the time of his decease, no existence, either under letters patent from the Crown, or by virtue of any act or charter of the Legislature of this Province, the said intended bequest was made in direct violation of the said Edict or Declaration of the twenty-fifth day of November, one thousand seven hundred and forty-three, and therefore was, and is, illegal, null and void.

Considering moreover:

13thly. That under the rule of our common law (declared and confirmed by the 838th Article of the Code hereinabove recited) as quaintly expressed by the old French maxim "*Le mort saisit le vif*," the right of property cannot remain in suspense. Some person, some power, some body corporate, competent to receive it, must become seized thereof simultaneously with the demise of the owner.

If there be no will it passes to the heir at law, or to the Crown, in case of escheat, if there be a will, it devolves by bequest on some person or some body corporate actually in existence and capable of receiving it.

Whereas, if the bequest impugned in this cause were confirmed, the right to the property, which the testator intended to bequeath to a Corporation *in posse* not *in esse*, never having been vested in the said trustees or fiduciary legatees who, for a certain remuneration in money, were intended to act solely as instruments for the purpose of conveying the same to such contemplated Corporation, would remain floating in void until the creation of such Corporation;—depending for its final resting place upon the doubtful Will of the Legislature. So that, even if the said Edict or Declaration of 1743 had never been promulgated, the bequest in question would have been equally illegal, null and void:

Considering:

(In view of the pretension that the said intended trustees or fiduciary legatees were entitled to act as mandataries of the testator, for the purpose of vesting the property in the said "Fraser Institute" when incorporated):

14thly. That no mandate can be created to take effect after the death of the mandator;

That the mandate expires with the mandator, except in so far as the mandatary is obliged after the extinction of his mandate, by the death of the mandator, to complete business which is urgent and cannot be delayed without risk of loss or injury.

Considering, for all these reasons,

15thly. That in the judgment appealed from there is error:—

This Court doth reverse, set aside and annul the same; and proceeding to pronounce the judgment which the Court below should have rendered,

This Court doth dismiss the exceptions and pleas of the defendants, and maintaining the action of the plaintiffs (except in so far as, by the conclusions thereof, compensation in money is demanded in the event of the executors failing to render to the plaintiffs an account of the estate of the said late Hugh Fraser, the value whereof has neither been proved by the plaintiffs, nor admitted

Abbott et al. and Fraser et al.

by the defendants), doth declare that all that part of the said will of the said Hugh Fraser whereby the said testator wishes his said executors to transfer over the balance of his moveable estate after payment of the legacies therein mentioned to the trustees and fiduciary legatees therein named, with the intent of their declaring and bequeathing the rest and residue of his estate, real and personal, moveable and immoveable, to the said Honorable John J. C. Abbott and Frederick Fraser, to establish at Montreal an Institution, fundation, to be composed of a free public Library, Museum and Gallery, under the name of the "Fraser Institute," and all and every the dispositions connected therewith, together with the proposed establishment of the said trust and of the said fiduciary legacy, is and are illegal, null and void, and is, and are, hereby set aside and cancelled. Doth further declare that the said plaintiffs (including George Chapman in his capacity of tutor to the minor children, issue of his marriage with the late Catherine Fraser), as heirs at law of the said late Hugh Fraser, were at the time of the institution of this action, and still are, the sole owners and proprietors of all the property, real and personal, moveable and immoveable, belonging to and left by the said late Hugh Fraser, at the time of his decease, except such parts thereof as are covered by the bequests made by him in his said last will and testament which are not included in the intended legacy impugned in this action, hereby declared to be null and void, doth order the said Honorable John J. C. Abbott and John Cowan, in their capacity of executors of the said last will and testament of the said late Hugh Fraser, within two months from the service upon them of this judgment, to render a true and faithful account of the estate of the said late Hugh Fraser, and of all the rents, issues and profits accrued therefrom, and of their administration thereof, and to deliver up and abandon to the plaintiffs all the rest and residue of the estate, real and personal, of the testator, after deduction of the said unimpugned bequest,

And this Court doth further order, that, in the event of the said account not being rendered and filed in this Court within the delay above granted, the plaintiffs may take such further conclusions as to law and justice may appertain, the whole with costs, &c.

The defendants appealed to the Judicial Committee of the Privy Council.

Mr. *Kay*, Q. C., for the appellants, in reference to the clauses of the will, the subject of this litigation, and upon the question whether the provisions therein contained were void by Canadian law or not, referred to Arts. 831, 832, 837, 838 of the Canadian Civil Code. And upon the question of the disability of corporations to receive property and otherwise, he referred to Arts. 836, 766, 364-6 of the same Code. He argued that there was nothing in any of those sections to affect the validity of this will, and of the particular provisions referred to. There was nothing in the Code equivalent to the English statute of 9 Geo. 2, c. 36. Upon the capacity of corporations to receive property he also referred to the Revised Statutes of Canada, cc. 71 and 72; the Statutes of Canada, 23 [illegible] existing Act relating to joint-stock companies.

The respondents relied upon the Edict of Louis XV. in 1743, which they say was registered in Canada in the same way as other statutes relating to civil

rights, and had been recently decided in the case of *Chaudiere Gold Mining Company v. Desbarats* (1) to be still in force in Canada. With regard to that the Edict does not affect to limit the power of taking, but only the power of giving. Moreover the Edict is included in the provisions of the 2611th article of the Civil Code of Lower Canada, which repeals all laws expressly or impliedly inconsistent with it. And further, the case of *Chaudiere Gold Mining Company v. Desbarats* was decided, not with reference to the provisions of the Edict but with reference to Art. 336 of the Lower Canada Civil Code. (2)

Abbott et al. and Trustees of etc.

With regard to the Old French law before the Ordinance of 1743-1749, Bacquet, s. 26, lays it down as follows. Aussi pour maxime et vrai fondement de droit, il est besoin de tenir pour certain, ferme et stable, que par les anciennes ordonnances, lois et statuts du Royaume, de tout temps inviolablement gardées en icelui, il est défendu à gens d'église, communautés et autres gens de main morte d'acquérir, tenir et posseder aucuns héritages, etc., dedans le Royaume, sans permission, congé ou licence des Rois de France." And Pothier (des Personnes), p. 231, explains what is meant by the "défense d'acquérir," the very words used in Art. 366 of the Code. "Avant l'édit de 1749 les communautés n'étaient point absolument incapable d'acquérir des héritages; elles acquéraient valablement, sauf à pouvoir être, comme nous l'avons vu, contraintes à vider leurs mains dans un certain temps de ce qu'elles avaient acquis. C'était plutôt la faculté de retenir qui leur manquait, que la faculté d'acquérir."

He also cited Pothier, Traité des Personnes, sect. 7., No. 1, Ricard, des Donations, No. 599, 1 Ricard, Nos. 829 and 830, No. 643; 4 Furgole des Testamens, ch. 1, sect. 4, No. 37.

Art. 836 of the Canada Civil Code enables corporations to receive property which under the Edict they could not take. Both the Code and the Edict, although inconsistent with each other, apply both to the corporations existing at the dates of their respective enactments, and also to corporations thereafter to be established. [SIR MONTAGUE E. SMITH:—Who will take on failure of the capacity of the corporation to take?] The heirs of the testator. [THE LORD JUSTICE JAMES:—Is there such a thing as a resulting trust by the law of Canada?] See Civil Code Arts 833, 961, 964.

On the 10th of February, 1763, Canada was ceded to the British Crown, and the effect of the cession was to do away with the Edict of 1743, a great part of which was applicable only under French law and procedure. He analyzed the provisions of the Edict, and shewed that clauses 3 to 9 imposed certain formalities to be observed by those who founded corporations, that other provisions referred to the old Council General, and thus limited the power of the Crown with regard to issuing letters patent, and generally that the provisions of the Edict were inapplicable, in great part, to the altered state of things in Canada since the cession.—The Imperial Statute, 14 Geo. 3, c. 83, in regard to wills, and Provincial Act, 31 Geo. 3, c. 4, enlarging the testamentary power, are both inconsistent with the Edict, suppress all mention of it, and impliedly repeal it.

(1) Law Rep. 5 P.C. 277.
(2) Law. Rep. 5 P.C. 294.

Abbott et al. and Fraser et al.

The articles of the Code, moreover, 353, 358, 566 and 766, are inconsistent with the Ordinance of 1743 being in force, at least to the extent contended for on the other side. See *Durocher* v. *Beaubien*. (1) As for Art. 366, though the terms of it, taken literally, do not exclude the possibility of the Edict being in force, the fair construction of them is that they refer to the general mortmain laws which were in force before the Edict passed. It was a limitation on the right to hold rather than on the right to acquire which Art. 366 had chiefly in view. He cited *Des Rivières* v. *Richardson* (2), *Fraleigh* v. *Seymour* (3).

Mr. *F. W. Gibbs*, on the same side, contended that the bequest was for a "lawful purpose," under Art. 869 of the Civil Code; that, if unlawful, it was made so by the Ordinance of 1743; that this Ordinance (by Articles 1 and 2 especially) was a limitation of the prerogative of the Kings of France as to the creation of corporations in Canada, and therefore ceased to be law on the cession of Canada to England, as such limitations could not bind the English Crown; that this was shewn by constitutional practice, corporations having been created since the cession without the formalities of the Ordinance; (a), by letters patent of the Crown, *e.g.*, Bishopric of Quebec, A.D. 1793; Smith's Hist. of Canada, vol. ii., p. 230; (b), by the Imperial Parliament, 6 Geo. 4, c. 75; and (c), by numerous provincial statutes; that this was shewn also by the Quebec Act, 14 Geo. 4, c. 83, s. 10, in relation to the religious orders and communities; see Parliamentary Papers, 1813–1814, vol. xiv. 1; "Official Papers relating to Roman Catholics in several States of Europe and British Colonies," &c.; that this was the view entertained at date of cession, Cugnet, Lois et Ordonnances, 1774, and that the ordinance was not mentioned by the codifiers: Reports, vol. i., p. 229, c. "Of Corporations;" that it followed that its prohibitions were not parts of the general laws of the country respecting mortmains intended in Art. 366, No. 2, of the Civil Code; that the bequest did not violate Art. 366, No. 2, because it contemplated obtaining the previous "permission of the Crown." For precedents, see 58 Geo. 3, c. 15 (colonial statute), An Act to establish a House of Industry in the City of Montreal;" and in England the case of *Downing College, Attorney-General* v. *Bowyer* (4); and that the property vested in the trustees till the creation of, and conveyance to, the corporation: Arts. 869, 964.

Mr. *Benjamin*, Q.C., for the respondents, contended that the Edict of 1743 was still in force, and that the judgment of Mr. Justice Badgley was the first judgment in which the contrary had ever been held. The legacy in this case was for the establishment of a corporation, and was therefore null and void as a direct violation of the Edict of 1743. In France, after several ordinances and letters patent issued on this subject, Louis XV. re-published in 1749 an edict which, as the preamble declares, is but a re-enactment of the previous ordinances relating to the establishment and acquisition of corporations or *gens de main-mort*; see Merlin's Répertoire, vo. "Main morte (gens de)"; Collection de décisions

(1) Stuart's Can. Rep., p. 307.
(2) Stuart's Can. Rep., p. 218.
(3) 5 Low. Can. Rep. 492.
(4) 3 Ves. 724.

Abbott et al. and Fraser et al.

by Denisart, p. 581. The disputed provisions of this will clearly attempt to establish a corporation of trustees and create a perpetuity. [The LORD JUSTICE JAMES:—They are drawn according to the common form for giving to trustees. They do not make them or attempt to make them a corporation.] The terms of the treaty of 1763, by which Canada was ceded to the British Crown, reserved to the inhabitants of the ceded provinces their old laws, and a series of proclamations guaranteed those laws. Then followed the Imperial Acts of 14 Geo. 3, c. 83 (of which see especially sects. 4 and 8) and 33 Geo. 3, c. 31, and the local Act of 1801 (41 Geo. 3, c. 4). As to the publication of Cugnet, who was said on the other side to have published an abstract of all laws in force in 1774, and who omitted the Edict of 1743, there is, on the other hand, a publication in 1803 of all the laws then in force, and that again included the Edict. The Civil Code does not, it is true, refer to the Edict in express terms, but it refers to Pothier, who deals with the Edict of 1749, which was the same for France as the Edict of 1743 was for the colonies: Pothier's Traité des Personnes, pt. i., tit. 7, art. 1: la Prescription, No. 275. The Courts have repeatedly decided that the Ordinance of 1743 was law, and that its dispositions were in force: see *Desrivières* v. *Richardson* (1), a case in which a special Act of the Provincial Parliament (41 Geo. 3, c. 17) was passed, but for the interposition of which the Edict would have been applied. No one suggested in that case that the Edict was not in force: see also *Freligh* v. *Seymour* (2), in which none of the Judges treated the Edict as not in force: *Kierskowski* v. *Grand Trunk Railway Company of Canada* (3); *Chaudière Gold Mining Company* v. *Desbarats* (4), in which the judgment refers to the Edict "which has never been abrogated or repealed." The Edict of 1743 was the latest mortmain law passed before the cession; its repeal was never effected; if it had been, the other mortmain laws would have gone too, and there would be no mortmain laws in existence in Canada. There was nothing in the later laws repugnant to the Edict, and nothing in the Acts of 1774 and 1801 against this proposition, that if a will establishes a mortmain it is bad. Moreover, the Civil Law knows nothing of English trusts, and there is no machinery in Canada for carrying out the execution of trusts. Throughout the Code there is no reference to the words "trust" and "trustee" in their technical meaning. There is a vital distinction between the French and English texts. The word "trustee" is simply used in the English text because the translator had no other word to correspond to the French word. See Article 964, where "trustee" is used meaning nothing but a sub-executor. Trusts cannot be introduced into Canada without violating the spirit and substance of the arrangement made in 1763. Here the gift is to the Fraser Institute, which is non-existent. It cannot be a case of substitution, for there is no institute. Arts. 838, 925, 929, 944 of the Civil Code.

With regard to the disability of corporations under the Code, that enactment

(1) Stuart's Can. Rep., p. 218.
(2) 5 Low. Can. Rep., p. 492.
(3) 4 Low. Can. Jur., p. 86; and see also 8 Low. Can. Rep., p. 3.
(4) 15 Low. Can. Jur., p. 54; see also Law Rep., 5 P. C. 277.

Abbott et al. and Fraser et al

was only intended to apply to existing corporations. New corporations could not be called into existence without the assent of the law giver. He contended, therefore, that the bequest, having been made to the appellants for the purpose of forming a corporation, was illegal and void. The powers of creating corporations for the purpose of free libraries given by the Consolidated Statutes of Lower Canada do not affect the provisions of the Edict of 1743, or give to testators any powers not previously possessed by them of disposing of their property in favor of free libraries. Even if the testator's intention to form the Fraser Institute corporation could be carried out by a perpetual succession of trustees, such trustees would be within the provisions of the Edict and the law with regard to mortmain.

Mr. *H. M. Bompas*, on the same side, contended that the nature of trusts was foreign to the law prevailing in Canada. According to the principles of the Civil Law, first, there is no such thing as an "estate." [SIR MONTAGUE E. SMITH: That does not necessarily exclude the notion of a trust.] Secondly, whereas under English law there are heirs to take realty and executors or administrators to take personalty, the Civil Law gives no title to the executors, and makes no distinction between realty and personalty. The right which executors take under the Civil Law is to interfere with the owners in order to administer the assets; until a curator was appointed the heir had seisin, and the executor a customary right to deal with the property in order to carry out the directions of the will. Thirdly, no means exist for the creation of a perpetual succession of trustees. He referred to Arts. 869 and 891 of the Civil Code of Canada, and Ricard's Substitutions, vol. ii., pt. i., 753. Perpetuities in England were created either by means of corporations or by using the machinery of the Court of Chancery in aid of charitable purposes. By the law of France no perpetual succession can be created except by the will of the sovereign. See *Merlin's Répertoire, vo. "Main-mort."* He referred also to *Demolombe*, book III., tit 2, Part I., Nos. 610, 611, 612.

Mr. *Kay*, Q.C., in reply, referred to the Canadian Statute, 58 Geo. 3, c. 15, as strong legislative authority to shew that this will is good. He cited *Meikle John v. Attorney-General of Lower Canada* (1), and also the case of *Downing College, Attorney-General v. Bowyer.* (2)

The judgment of their Lordships was delivered by

SIR MONTAGUE E. SMITH:

The questions in this appeal relate to the validity of a devise in the will of Mr. Hugh Fraser, a merchant of Montreal, by which he devoted the bulk of his property, moveable and immoveable, to the purpose of establishing at Montreal an institution, "to be called 'The Fraser Institute,' to be composed of a free public library, museum, and gallery."

The will bears date the 23rd of April, 1870, and Mr. Fraser died on the 15th of May in that year.

The devise in question is in the following terms:—

"I give, devise, and bequeath the whole of the rest and residue of my estate,

(1) Stuart's Can. Rep., p. 581; 2 Knapp, 328.
(2) 3 Ves. 724.

real and personal, moveable and immoveable, of every nature and kind whatsoever, to the said Hon. John J. C. Abbott and to the said Hon. Frederick Torrance, hereby creating them my universal residuary fiduciary legatees; and it is my will and desire that they do hold the same in trust for the following intents and purposes, namely, to establish at Montreal, in Canada, an Institution to be called 'the Fraser Institute,' to be composed of a free public library, museum, and gallery, to be open to all honest and respectable persons whomsoever, of every rank in life without distinction, without fee or reward of any kind, but subject to such wholesome rules and regulations as may be made by the governing body thereof from time to time, for the preservation of the books and other matters and articles therein and for the maintenance of order; and for that purpose to procure such charter or act of incorporation as my said trustees may deem appropriate to the purpose intended by me, namely, to the diffusion of useful knowledge, by affording free access to all desiring it to books, to scientific objects and subjects, and to works of art; and to the procuring such books, subjects and objects, as far as the revenue of my estate will serve, after acquiring the requisite property and erecting appropriate buildings, and after paying expenses of management, making always the acquisition and maintenance of a library the leading object to be kept in view. And it is my desire that three persons should be named by my said trustees to compose with them the first board of governors of the Fraser Institute, which it is my desire shall always be composed of five persons, professing some form of the Protestant faith, with power to them to supply any vacancy caused by death or resignation, or by crime or offence, the conviction whereof shall vacate the tenure of office of the offender. And it is further my will and desire that my friend the Hon. John J. C. Abbott shall be the first president of the Fraser Institute, and shall retain that position during his life. And so soon as the requisite charter shall have been obtained, containing all the powers necessary to carry out my design herein contained, I desire that the residue of my estate and effects, after deduction of the expenses of the management thereof, shall be forthwith conveyed over to the corporation, to be thereby formed, to be called the 'Fraser Institute,' for the purposes herein declared. In order to prevent any difficulty arising in the conduct of the business of the trust hereby created it is my will and desire that Mr. Abbott, as the senior trustee, shall have a second or decisive voice, in the event of any difference of opinion between him and his co-trustee; and in the event of a vacancy occurring in the said trust from any cause whatever, whereby the number of trustees is reduced from time to time to one, it shall be the duty of the other, and he is hereby authorized to name a trustee to fill the vacancy so occurring by a notarial instrument to that effect, and thereafter the senior trustee shall have a second or decisive casting vote, in case of difference of opinion. And I hereby confer upon my executors hereinbefore named full power to settle and adjust all matters connected with my moveable property, and upon my trustees hereinbefore named power to sell and realize such of my estate and effects as they shall deem expedient to acquire property wherein to construct suitable buildings, and to construct such buildings, and to proceed in all respects with all diligence in the carrying out of my desires hereinbefore expressed, up to such time as the property and estate

Abbott et al and Fraser et al

hereby devised to them shall be conveyed over to the Fraser Institute. I desire that the term of office of my executors be continued beyond the term limited by law, and until the duties hereby imposed upon them in the payment of special legacies be completed."

The suit which gives occasion to this appeal was brought by the respondent, as the heirs and representatives of the testator, to set aside the above bequest. The Judge of the Superior Court, Mr. Justice Beaudry, dismissed the suit, but his decree was, by a majority of three Judges to two, reversed on appeal by the Court of Queen's Bench.

The principal objections to the validity of the gift, relied on at the bar, were:—

1. That dispositions by will made to found a corporation were prohibited by law, and the whole devise, therefore, failed. In support of this objection, the 2nd article of an Edict of Louis XV., published in 1743, which, it was contended, had still the force of positive law, was relied on.

2. That if this were not so, the devise of the immoveable property was void, as being a gift in mortmain.

3. That the gift was to a society of persons, the Fraser Institute, and that the society not being in existence at the death of the testator, the whole gift failed.

The Civil Code (which was promulgated before the date of Mr. Fraser's will) is the primary source from which the law of Lower Canada is now to be drawn. When this Code contains rules on any given subject complete in themselves, they alone are binding, and cannot be controlled by the pre-existing laws on the subject, which can then be properly referred to only to elucidate, in cases of doubtful construction, the language of the Code. On the other hand, when the Code refers to existing laws, not formulated in its articles, or in so far as on any subject it is silent, inquiry is permissible into the old law, and it will in many cases become a question of construction what and how much of that law remains in force, or is abrogated as being contrary to or inconsistent with the provisions of the Code. (See Article 2613.)

"Every person of full age, of sound intellect, and capable of alienating his property, may dispose of it freely by will, without distinction as to its origin or nature, either in favor of his consort or of one or more of his children, or of any other person capable of acquiring and possessing, and without reserve, restriction, or limitation, saving the prohibitions, restrictions, and causes of nullity mentioned in this Code, and all dispositions and conditions contrary to public order or good morals."

The restriction mentioned in the Code relating to corporations is contained in Article 836:

"Corporations and persons in mortmain can only receive by will such property as they may legally possess."

The capacity of persons to acquire by testamentary disposition is subsequently defined in a series of articles under the head, "Of the capacity to receive and give by will." (Title 2, ch. 3, sect. 1.)

The Code appears to embody the legislation, having for its object the freedom of testamentary disposition, which was contained in the Quebec Act, 14 Geo. 3, c. 83, and the Provincial Statute 41 Geo. 3, c. 4. It was held by this tribunal in a late case, King v. Tunstall et al. (1), that the combined effect of these statutes was to abrogate the old law which prohibited gifts by will to adulterine children.

Art. 869 was also strongly relied on by the appellants, as being specially designed to meet such a bequest as the present. It is as follows:

"A testator may name legatees, who shall be merely fiduciary or simply trustees for charitable or other lawful purposes within the limits permitted by law. He may also deliver over his property for the same objects to his testamentary executors, or effect such purposes by means of charges imposed upon his heirs or legatees."

It could not be denied that the establishment of a public museum, library and gallery, was in itself, andapart from the manner of its foundation, "a lawful purpose." But it was contended for the respondents that, as the disposition of the property in favor of the institution was ultimately to be carried into effect by means of a corporation to be thereafter created, the purpose to be thus carried into effect was not "within the limits permitted by the law."

It is to be observed that the testator does not attempt to create or found a corporation, but, having devised his property to trustees to establish the institute, directs them to procure for that purpose legal incorporation by means of a charter or an Act of Parliament.

Now there is no express prohibition to be found in any article of the Code against such a testamentary disposition; although there are express provisions defining the restrictions and disabilities to which corporations are subject with regard to acquiring and holding immoveable property.

Thus Art. 836, already cited, which is found in the chapter on wills, allows corporations to receive by will only such property as they may legally possess.

Then under the head of "Disabilities of Corporations," is—

"Art 366. The dissabilities arising from the law are—

"1. Those which are imposed on each corporation by its title, or by any law applicable to the class to which such corporation belongs.

"2. Those comprised in the general laws of the country respecting mortmains and bodies corporate, prohibiting them from acquiring immovable property or property so reputed, without the permission of the Crown, except for certain purposes only, and to a fixed amount and value.

"3. Those which result from the same general laws imposing, for the alienation or hypothecation of immoveable property held in mortmain, or belonging to corporate bodies, particular formalities, not required by the common law."

The counsel for the respondents, however, did not rely on this part of the case upon the provisions of the Code; but insisted, and this was their main contention, that the second article of the King's Edict of 1743 was still in force, and rendered the whole devise null.

(1) 6 P. C. 55.

Abbott et al. and Fraser et al.

That article is as follows:—

"Défendons de faire aucunes dispositions par acte de dernière volonté pour fonder un nouvel établissement de la qualité de ceux qui sont mentionnés dans l'Article précédent, ou au profit des personnes qui seraient chargées de former le dit établissement, le tout à peine de nullité; ce qui sera observé quand même la disposition serait faite à la charge d'obtenir nos lettres patentes."

The establishments mentioned in the preceding article are—

"Aucune fondation ou nouvel établissement de maisons ou communautés réligieuses, hôpitaux, hospices, congrégations, confréries, colléges, ou autres corps ou communautés ecclésiastiques."

It was contended that, notwithstanding the statutes relating to wills already referred to and the Code, this edict was still the governing law upon the subjects to which it relates, and, in support of this contention, some decisions in the Canadian Courts, and the case of *Chaudière Gold Mining Company* v. *Desbarats and others* (1), recently before this tribunal, were referred to.

The question in those cases, however, turned upon the capacity of existing corporations to acquire and hold immovable property without the licence of the Crown. Art. 10 of the edict prohibited such acquisitions without the express permission of the king, signified in a particular manner, viz., by his letters patent registered in his *Conseils Supérieurs* of the province. But in their Lordships' view it is not necessary to resort to this article of the edict for the law on the point decided in the cases referred to. Art. 366 of the Code contains in itself a distinct rule on the subject. It no doubt refers to "the general law of the country respecting mortmain and bodies corporate;" but it the same time interprets that law by the following words: "Prohibiting them from acquiring immoveable property or property so reputed, without the permission of the Crown." This general law may have been originally founded on the tenth article of the edict, but the law is now virtually contained in the Code itself, into which the article of the edict has been transferred.

In the case of the *Chaudière Gold Mining Company* v. *Desbarats* (1), indeed, the counsel on both sides argued on the assumption that Art. X. of the edict was still in force. But their Lordships were then much disposed to take the view that the Code was, on the question then under discussion, declaratory of the law.

It is said in the judgment:—

"Their Lordships, however, cannot consider it to be their duty at this day to construe the edict as alone containing the law of Canada on the subject of mortmain, because a legislative declaration of that law is, in their opinion, contained in the Code, which is free from ambiguity."

It is true that Arts. I. and II. of the edict are not in like manner reproduced in the Code; but the question arises whether, even if they survived the cession of the province to the English Crown, they continue to have, since the Statutes on Wills above referred to and the Code, the force of law.

(1) Law Rep. 5 P. C. 277.

(1) See Law Rep. 5 P. C. 277.

It is open to considerable doubt, whether the first nine articles of the Edict, which all relate to the foundation of corporations, retained the force of law after this cession; first because the forms and regulations they prescribed then became out of place; and secondly, for the substantial reason that the articles, which had for their object to put fetters on the king's own power, could not, it may fairly be contended, be of force to control the sovereign will of the English Crown, whose prerogative it would be, after the cession, to establish corporations. And it is be observed that no instance has been shewn where, since the cession, the law of these articles has been put in force.

But however this may be, their Lordships cannot but think that the second article of the Edict is abrogated by the Code, as being contrary to or inconsistent with its provisions.

The free testamentary power of disposition in Art. 831 is given, "saving the prohibitions, restrictions, and causes of nullity *mentioned in this Code*."

It has already been observed that no restriction directed against such bequests as the present is to be found in the Code, unless the prohibitions relating to gifts of immoveable property in mortmain (to be hereafter considered) can be held to apply to them. There is no such restriction with regard to moveable property.

Again, the introduction of the prohibitions with respect to immoveable property leads to the implication that no other restrictions, relating to gifts to corporations, or for the purpose of founding them, beyond those expressly mentioned, were intended to be imposed or retained.

It is impossible to suppose that if the provision of the Edict in question was really in force at the time of the Code, and it was intended to preserve it, that the Code in dealing, as it does fully, with testamentary dispositions, and in a series of articles under a distinct head with "the capacity to receive and give by will" (see title 2, ch. 3, s. 1), should have omitted all mention of it. Their Lordships, therefore, think they cannot treat the second article of the Edict as a part of the existing law of the province relating to wills, and if this be so, there is nothing in that law, so far as the objection now under consideration is concerned, to affect the validity of the bequest of the moveable property.

But it is contended, secondly, that as regards the immoveable property the devise falls within the direct prohibition contained in Arts. 366 and 836 of the Code. Art. 366 is limited by its terms to the acquisition of immoveable property only; and Art. 836 must be limited by construction to such property.

It is to be observed that Art. 836 appears to be founded on ch. 34, sect. 3, of the Consolidated Statutes of Lower Canada, which section embodied the provision of 41 Geo. 3, ch. 4, s. 1.

Both articles relate to gifts to corporations already formed. And the question is, whether a devise like the present, by which the property is given to fiduciaries, and is to pass from them to a corporation only in the event of its being lawfully created with permission to possess it, is within their scope. The devise in this case is to trustees for the primary purpose of establishing an institute, and for effecting that purpose they are to obtain a charter or act of incorporation.

Abbott et al. and Fraser et al

It is said that this is, in effect, devising indirectly lands to a corporation having no licence from the Crown or other legal power to hold them. But is this really the case? The devise is, in the first instance, to the trustees, and under it they are empowered, at least for a time, to hold and administer the property for the purpose of the trust, and until, in further execution of the trust, a corporation is created with authority to administer it. If a corporation with power to hold the property should be granted, the acquisition of it by such corporation would, before it vested, be sanctioned by law: whilst if it were not created, there could be no infraction of the law against holding in mortmain.

Apart, therefore, from the second article of the Edict, there would seem to be nothing in principle or in positive law to render such a gift as the present illegal as a gift in mortmain. The direction to the trustees to procure a charter or act to incorporate a body empowered to hold the property and carry into effect the objects of the gift, necessarily implies a condition to be fulfilled previously to the vesting of the property: and the permission of the Crown to hold the lands would of necessity precede their acquisition by the corporation, and render it lawful.

Commentators of high authority on French law have treated such dispositions, apart from the Edict, as clearly good, and numerous passages from their treatises to this effect are collected in the judgment of Mr. Justice Badgley. It is sufficient to cite one: Ricard, "Traité des Donations," No. 613, says:—

"Lorsque les donations et legs sont faits pour l'établissement d'un monastère, on ne pourrait pas opposer le défaut des lettres patentes; ce qui est juste, parce que ces sortes de dispositions sont présumées faites sous condition, et pour avoir lieu, au cas qu'il plaise au Roi d'agréer l'établissement."

The same doctrine was sanctioned, and the grounds on which it rests were fully expounded by Lord Eldon in the case of Downing College, which in its circumstances bore some analogy to the present: *Attorney-General* v. *Bowyer* (1).

What the position of the trustees would be in case they failed to obtain a charter or act of incorporation, was the subject of some discussion at the Bar. If consistently with the intention of the testator they could carry into effect the purpose of the devise, and establish and perpetuate the institute by means of a perpetual succession of trustees, which their Lordships are not satisfied could be done by the law of Canada, it might be a question whether in such case the trustees would not be "*gens de le main-mort*," and the devise, therefore, of the immoveable property *ab initio* void by virtue of Art. 836 of the Code. In that case Art. 869 might not avail to protect the devise. It is true that by this article a testator is empowered to appoint fiduciary legatees for charitable or other lawful purposes, but only "within the limits permitted by law." Now the Code undoubtedly prohibits the devise of immoveables in mortmain, and if the will had created trustees with power of perpetual succession, it might, as already observed, have been questionable whether the devise of the lands to such trustees would not have infringed this prohibition, and be, therefore, beyond the limits permitted by law.

(1) 3 Ves. 724.

But their Lordships think that this is not the character of the devise. It appears to them that the devise to the trustees was meant to be limited and transitory, the property remaining in them only until they could execute the ultimate purpose of the devise. It is true the primary trust is to establish the institute, but it is a cardinal part of the trust that, "for that purpose," the trustees are to procure a charter or act of incorporation, and as soon as it shall have been obtained they are directed to convey the property to the corporation. There is no direction to convey to new trustees. The trustees are, indeed, empowered to sell such of the property as they deem expedient, to acquire property and to construct buildings, and to proceed to carry out the testator's designs, but only "up to such time as the property hereby devised to them shall be conveyed over to the Fraser Institute."

Art. 964 of the Code provides for the case of a "Legatee who is charged as a mere trustee to administer the property and to employ it or give it over in accordance with the will, in the event of the impossibility of applying such property to the purpose intended;" and directs that, in such a case the property, unless the testator has manifested an intention that it shall be retained by the trustee, shall pass to the heir. Their Lordships consider that an impossibility to apply the property in accordance with the will would in this case arise, if the trustees failed, after the lapse of a reasonable time, to obtain a charter or act of incorporation, and that in that event the property would pass to the heirs under the above article.

It was suggested that new trustees might be appointed in succession so long as the execution of the will should last under Art. 923 of the Code, which is as follows:—

"The testator may provide for the replacing of testamentary executors and administrators, even successively and for as long a time as the execution of the will shall last, whether by directly naming and designating those who shall replace they himself, or by giving them power to appoint substitutes, or by indicating some other mode to be followed, not contrary to law."

But it was not in this manner the testator designed that the purpose of his will should be permanently carried into execution. It is true that he directs that three persons to be named by his trustees should compose with them the first board of governors of the institute, which he desired should always be composed of five persons, and of which Mr. Abbott was to be president for life, with power to them to supply any vacancy caused by death or resignation; but this is the scheme he provides for the governing body of the intended corporation, as is shewn by the direction which immediately follows it, viz., "that so soon as the requisite charter shall have been obtained, containing all the powers necessary to carry out my designs herein contained," the property should be conveyed to the corporation. Their Lordships having regard to the scheme of the will, cannot think it was the intention of the testator to create, or attempt to create, a board of governors in perpetuity without the authority of a charter or statute, and so endanger his devise, at least as regards the immoveables, as being an unauthorized gift in mortmain.

Abbott et al and Fraser et al.

The third and remaining objection is that the gift failed, being a gift to a society not in existence at the testator's death.

If the devise had been to a society or a corporation to be afterwards called into existence or created without the interposition of fiduciary legatees or trustees, this objection might have given occasion to difficulties of great weight.

It was said by the Court of first instance in Des Rivières v. Richardson (1):—

"It may be admitted that if by a will an immediate devise is made to a corporation not in existence, it will be void, as there is no such corporate body to receive, and it would be equally void even if the corporation were afterwards created without some special and express law to take the case out of the general principle."

But it was also said in the same case in the Court of Appeal:—

"The second ground of objection is also untenable, for although it is admitted that a legacy is lapsed (*i.e.*, '*caduque*') when left to an individual, or to a body politic and corporate, not *in esse*; yet the principle does not apply to this case, inasmuch as the trustees were all alive when the testator made his will and they received the bequest for the benefit of the Royal Institution, as soon as it should please the Provincial Government to give to airy nothing 'a local habitation and a name.'"

That case no doubt differed in some of its facts from the present, as the Royal Institution had been, in some sense, incorporated before the date of the will; but the principle is asserted in it that the intervention of trustees will, in some cases at least, prevent a lapse.

Their Lordship on this point, having regard to Art. 869, which permits the appointment of fiduciary legatees for charitable and other lawful purposes, and to Art. 838, which, in the case of legacies suspended after the testator's death, in consequence of a condition or substitution, declares that the capacity to receive is to be considered relatively to the time when the right comes into effect, are of opinion that there has been no lapse in this case, and that the trustees may carry the purpose of the testator into effect if and when the corporation of the Fraser Institute is duly incorporated. The transfer of the property to the corporation is directed to be made by conveyance from the trustees, who, in then making it, will execute the lawful purpose for which the property was entrusted to them.

It is evident that the charitable and lawful purposes mentioned in Art. 869 were not meant to be confined to such trusts only as may be created for the benefit of some definite persons. The use of the word "purposes" indicates that bequests may be made to uses for general and indefinite recipients so long as the purpose be charitable or lawful, and the bequest be within the limits permitted by law.

Their Lordships, for the reasons given, think that the devise in question complies with these conditions and ought to be sustained; and they will humbly advise Her Majesty to reverse the judgment of the Court of Queen's Bench, and direct that the suit be dismissed. But, considering that the law of Canada

(1) Stuart's Rep. 218.

on the questions arising upon this will was in an unsettled state, their Lordships thinks that the heirs of the testator might reasonably dispute its validity, and that the parties, therefore, should pay their own costs of the litigation below and of this appeal. Abbott et al and Fraser et al

Wilde, Berger, Moore & Wilde, solicitors for the appellants.
Bischoff, Rompas & Bischoff, solicitors for the respondents.
(J. K.)

SUPERIOR COURT, 1876.

MONTREAL, 19TH SEPTEMBER, 1876.

Coram TORRANCE, J.

No. 299.

Workman vs. *The City of Montreal.*

HELD:—That the City of Montreal will not be obliged to dispossess itself of an assessment roll in order that the same may be fyled as evidence in the cause.

The defendants were required to produce at *Enquête* an assessment roll. The judge presiding ordered the official who produced the document on behalf of the defendants to deposit the same in Court.

R. Roy, Q.C., for the defendants, now moved that the order be rescinded. He cited 37 Vict. ch. 51, sec. 63: "Generally all *certificates, deeds and papers signed* "by the Mayor," &c.; 2 Dillon, Municipal Corporations, No. 684. In this country the records, public books and by-laws of municipal corporations are of a public nature, and if such corporation should refuse to give *inspection* thereof to any person having an interest therein, a writ of *mandamus* would lie to command the corporation to *allow* such inspection, *and copies to be taken*, under reasonable *precautions to secure the safety of the originals.* 1st Greenleaf, Evidence, No. 477–484, after mentioning assessment rolls, &c., says: "In short the rule may be considered as settled, *that every document of a public nature, which "there would be an inconvenience in removing*, and which a party has a right "to *inspect*, may be proved by a duly authenticated copy." Angell & Ames, Corporations, No. 707, p. 710, "So a corporator, &c." 3 Term Reports, p. 579; King *vs.* Babb, Willcock, Corporations, Part 2, No. 7 and No. 22. 1st Phillips, Evidence, p. 424, 431–433, How to obtain inspection and copy. Tapping, Mandamus, p. 52–94–95. 2 Strange's Reports, p. 1223. Grant, Corporations, p. 311, 312, 314, 315, and note. Inspection for the purpose of *fishing for a defence*, *i.e.*, asking generally for all papers, documents, &c., not allowable, p. 318. Public corporations never compelled to produce books and documents.

E. Barnard was heard against the application.

The Court granted the motion.

E. Barnard, for the plaintiff.
R. Roy, Q.C., for the defendants.
(J. K.)

Motion granted.

24th JULY, 1874.

Coram Sir James W. Colvile, Sir Barnes Peacock, Sir Montague E. Smith, and Sir Robert P. Collier.

EVANTUREL,

APPELLANT;

AND

EVANTUREL ET VIR,

RESPONDENTS.

A testatrix, by her will dated the 15th of May, 1861, gave the usufruct of the estate to her son, the appellant, charged with certain annuities in favor of her daughters and sisters, subject to the following condition:—

"Je veux et ordonne et ma volonté expresse est que si mes dites filles ou aucune d'elles, venait à faire soit directement ou indirectement aucune démarche quelconque pour contester mon présent testament, qu'alors et dans ce cas mes dites filles, ou aucune d'elle qui voudraient ainsi chercher à contester mon présent testament, soient privées ou soit privée de tous droits quelconques dans ma dite succession, et de la rente viagère susdite, et que quant à celles ou celle qui voudrait contester mon dit testament le legs à elle fait de la dite rente soit non avenu et cadue; car telle est mon intention expresse."

One of the said daughters, her husband being co-plaintiff with her *pro forma*, by protracted litigation, unsuccessfully impugned the said will, as not having been duly executed, and as having been obtained by fraud and captation, and undue influence of the appellant. They obtained a decree of the Superior Court, avoiding the will on the ground of informal execution, which was reversed by the Court of Queen's Bench; the Superior Court then on remand dismissed the suit, having decided the issues as to fraud and undue influence against them. Those issues were finally abandoned by their counsel in oral argument before the Privy Council.

In an action brought thereafter by the respondents (the said daughter and her husband) to recover from the appellant, in respect of the annuity charged upon the estate as above, in which the appellant pleaded a forfeiture thereof by the female respondent under the penal clause by reason of said litigation:—

HELD:—1. That on the evidence the suit which impugned the will was the suit of the wife, acting as a free agent, in respect of her separate *chose in action*.

2. That whether or not such penal condition attaches, if the contesting legatee desists from impugning the will before "*jugement définitif*," the Superior Court's decree of dismissal was such "*jugement définitif*."

3. That according to the true construction of the clause, it was neither void for uncertainty, nor contrary to good morals, nor prohibited by any positive law, nor contrary to public policy.

The 760th and 831st articles of the *Civil Code of Canada* must be read together; and by virtue of their provisions all conditions in a will, unless according to the plain meaning and intention of the testator they be contrary to law, public order or good morals, are effective, and cannot be regarded as minatory only, or dependent, for their application upon the discretion of the Court. Such discretion is not conferred upon the Courts by the Code, and though exercised by the old French Parliaments, has been since authoritatively condemned and repudiated.

Such a condition as that contained in the said penal clause can only in practice be applied where a will has been unsuccessfully contested, and would, therefore, be ineffective to protect an illegal disposition, or to render operative an invalid testament. It is not against public order for a testator to protect his estate and representative against unsuccessful attempts to litigate his will.

This was an appeal from the judgment rendered by the Court of Queen's Bench for the Province of Quebec, at Quebec on the 8th June, 1872, reported in the 16th Volume of the L. C. Jurist, p. 258. The decision there reported was reversed by the Judicial Committee of the Privy Council. The final judgment will be found reported in 1 Quebec Law Reports, p. 74; and more fully in Law Rep. 6 P. C., pp. 1–30.

Judgment of Queen's Bench reversed.

Longlois, Angers & Colston, for appellant.

Larue & Remillard, for respondents.

(J. K.)

MONTREAL, 23RD MARCH, 1876.

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

No. 31.

THE RICHELIEU COMPANY,

(Defendant in Court below.)

APPELLANT,

AND

DICKSON ANDERSON,

(Plaintiff in Court below.)

RESPONDENT.

Held:—1. That notwithstanding Art. 469 C. P. C., the Courts cannot adjourn to any day between 9th July and 1st September (the long vacation) for the purpose of rendering judgment in cases heard and taken under advisement during term before such vacation.

2. That Art. 469 C. P. C. only gives the Court the right to adjourn for rendering judgment to a day upon which it is not prohibited by Art. 1 C. P. C. from sitting,—and that Art. 1 C. P. C. in effect absolutely prohibits this.

This cause was heard before the Hon. Mr. Justice Beandry in June term, 1875, and the Court was, on 27th June, adjourned in the usual way to 10th July, 1875, for the purpose of rendering judgments generally.

On that day his Honour disposed of several cases, including the present, wherein he gave plaintiff judgment for the amount claimed. The defendants appealed from this judgment, which they contended was wrong upon the merits, "but added to their reasons of appeal, this, "because the said judgment was ren-"dered on a non-juridical day."

Girouard, for appellant, when it came up in appeal, argued the merits of the cause, on which there was a serious contest, and also referred to this last point, quoting art. 1 C. P. C., which enacts that "Courts cannot sit on non-"juridical days, nor can they sit between the 9th of July and 1st of September, "except" in certain proceedings of which the present case was admittedly not one, being an ordinary summons.

Ramsay, for respondent, quoted art. 469 C. P. C. as controlling said art. 1. It reads that "the Court may, during term, appoint days out of term for rendering "judgment in cases taken under advisement." Art. 1, taken in connection with art. 469, means that the Courts cannot compel parties to proceed, cannot hear cases, during the long vacation, unless they are of the excepted classes; but that, having taking cases under advisement during term, the Courts may adjourn to any day out of term, and consequently even in long vacation, to render judgment, as was done in this case. He referred to C. S. L. C., ch. 78, ss. 16 and 17, §3 and 4, and ch. 82, s. 4, as indicating that the limitation was upon the Governor General fixing by proclamation *terms* so "that any part *thereof* shall be between 9th July and 1st September," but did not prohibit the adjournment for rendering judgments merely for which the same clauses, like art. 469 C. P. C. provide, to any day in that vacation. Further, the 10th July, 1875, was not a *non-juridical* day, as stated in reasons of appeal as the ground for reversal. For that reason the first part of Art. 1 does not apply. Appel-

The Richelieu Company and Dickson Anderson.

lant meant to invoke the latter part of the article, which refers to the long vacation. Art. 1 clearly makes a distinction between non-juridical days and the days of vacation. On the former absolutely no proceeding can be taken, but in vacation many things can be done, though in the words of art. 1, "Courts cannot sit" between those dates.

On 22nd March, 1876, the Court, without adjudging on the merits of the appeal, reversed the judgment as being null, and sent the parties back to the Superior Court to proceed to have a judgment properly pronounced. No costs were, however, awarded as, in the opinion of the Court, neither party was to blame for the error of the judge below.

The following is the judgment entered:

The Court * * * Considering that by article 469 of the Code of Civil Procedure all judgments in contested actions, not otherwise provided for, must be rendered in open Court, and that, although the Court may during the term appoint days out of term for rendering judgments it can only appoint for such purpose those days out of term on which the Court is now by law prohibited from sitting;

And considering that by article 1 of the Code of Civil Procedure, it is expressly declared that, except in the cases therein specially provided for, Courts cannot sit between the ninth day of July and the first day of September, in each year;

And considering that the judgment rendered in this cause by the Superior Court sitting at Montreal was so rendered on the 10th July, 1875, being a day on which the Court could not sit, and to which it could not adjourn for rendering judgments, and that this is not one of the cases within the exceptions mentioned in said article 1 of the Code of Civil Procedure;

And considering that for the above reasons the said judgment so rendered by the Superior Court at Montreal on the 10th July, 1875, is nul and void.

This Court doth reverse the said judgment of the 10th July, 1875, and doth order that the record be remitted to the said Superior Court in order that the cause may be inscribed on the *rôle de droit* for hearing on the merits at the instance of either of the parties, and be heard and adjudicated upon as if the said judgment had never been rendered; each party paying his own costs on the present appeal.

Judgment reversed without costs.

D. Girouard, for appellants.
R. A. Ramsay, for respondent.
(J. J. M.)

MONTREAL, 1st MAY, 1876.

Coram MACKAY, J.

No. 1983.

Henry McKay vs. *The Mayor et al. of Montreal.*

HELD :—That under the Statute (Canada) 31 Vict. Cap. 40, Sect. 27, which enacts that the Active Militia shall be liable to be called out to aid the civil power in riots "or other emergency," and authorizes two Justices of the Peace to call them out, payment for the services of the Militia cannot be resisted by the municipality on the ground that there was no emergency which justified the Justices of Peace in calling them out.

MACKAY, J.—In June, 1871, an election was held in the Central Division of Montreal, when Mr. Holton was one candidate and Mr. Carter another.

The 22nd and 23rd were fixed to be the polling days.

On the 21st two Justices of the Peace wrote to Col. Osborne Smith, requesting him to be prepared as there was likely to be a disturbance.

Their letter read thus:

"From reliable information we have good reason for anticipating that the public peace will be disturbed and violence used by a large body of organized men, engaged to take possession of the polls on the 22nd and 23rd instant, in the Centre Division of Montreal. We have, therefore to request that you will have sufficient Militia, Force in attendance during those days to preserve the public peace, and to suppress any riots that may take place. Our information is that this organized body consists of not less than three hundred men."

Col. Smith on 21st issues his orders to plaintiff.

On the 22nd and 23rd plaintiff and officers and 100 men mustered and served as required.

A bill was made up by the plaintiff under our Act of Parliament, but defendants refused to pay.

The defendants pleaded that the two Justices issued their order without sufficient cause or reason;

That the civil power did not require the aid of any Militia force;

That in the absence of riot the Justices had no authority to call out the Militia, or to make the city liable to pay them.

The action is based upon the 27th Sec. of Cap. 40 of 31 Vict. A.D. 1868, which enacts that the Active Militia shall be liable to be called out to aid the civil power in riots "or other emergency," and authorizes two Justices of the Peace to call them out.

The 82nd Section of the same Act enacts: "Any officer, non-commissioned officer, or private, of the Militia, who, when his corps is lawfully called upon to act in aid of the civil power, refuses or neglects to go out or to obey any lawful order of his superior officer, shall incur a penalty, if an officer, not exceeding forty dollars, if a private not exceeding twenty dollars, for each offence."

"Where riot was merely anticipated or expected, until the law of 1873, 36 Vic., there was not the power in any two Justices to call out the Militia." (Say defendants.) No such thing; even before 31 Vict C. 40 there *was* the power, but who might have had charge to pay men called out might have been a question before the 31 Vict. C. 40. I have no doubt the Justices here might call out the Queen's subjects in case of riot "or other emergency," and I think that

H McKay vs. The Mayor et al

they having required the aid of the military, the latter were warranted in going out, and that the city has to pay them.

Justices of the Peace are required to keep the peace, and to see it kept, to restrain rioters and to prevent riots. If they fail in duty in these respects they may be indicted for neglect of duty.

Lord Mansfield in Kennett's case, A. D. 1781, who was Lord Mayor of London, said that by the common law, as well as by several statutes, Justices of the Peace are invested with great powers to quell riots, and as they may assemble all the King's subjects they may call in even the soldiers; but this should be done with great caution. Kennett was found guilty of neglect of duty.

In Pinney's case, A.D. 1832, who was Mayor of Bristol, Ch. J. Tindal with reference to the English Act 1 and 2 Wm. 4, c. 41, talks of it as having been passed just in order to prevent any doubt, *if doubt could exist* (he says), as to the power of Justices of the Peace to command the assistance of all the King's subjects *by way of precaution*.

That Act, 1 and 2 Wm. 4, expressly authorizes the Justices to call out the King's subjects when tumult or riot is only likely to take place, or is reasonably apprehended. It was hardly called for according to the Judges on Pinney's trial.

Surely Justices of the Peace having the duty of suppressing riots are not to be refused the right and power to prevent them.

Before any riot, Pinney, Mayor of Bristol, had called upon the people to aid him towards preventing any. Two days before the riot he swore in hundreds of special constables.

Littledale, J., who charged the Petit Jury at the trial, said: This was what the defendant was bound to do. Defendant was acquitted, partly from having taken such precautions.

I have satisfaction at pronouncing this judgment; though having myself to bear part of the burden of the condemnation.

The militia military going out ought to be encouraged.

The 31 Vict. Cap. 40, I think ought to be interpreted liberally. I think it may be read as follows:

"The corps composing the Active Militia shall be liable to be called out in aid of the civil power in case "of riot or other emergency requiring such services, whether such riot or emergency occurs within or without the Municipality in which such corps is raised or organized;" * * * * * * * "and the officers and men when so called out shall, without any further or other appointment, and without taking any oath of office, be special constables;" * * * * * * "and they shall, when so employed, receive from the Municipality in which their services are required the following rates of pay, that is to say;" * * * * * "and the said sums, and the value of such lodging if not furnished by the Municipality, may be recovered from it by the officer commanding the corps in his own name," &c.

The twelve lines defining the duty of the Deputy Adjutant General of the District appearing in the body of the Sec. 27 may be read (I think) as if they had been always at the end of that Section.

The Militia ought to be encouraged to go out readily, when called upon to aid

the civil power. Else order in society will disappear, and rowdyism be encouraged to go rampant, more rampant than at present. In the absence of a regular military force in the country we are constantly in danger. People do not reflect enough upon this. The power of the Executive to enforce the law is poor enough, except theoretically, of which we in Montreal have recently had examples.

If it be that the Justices of the Peace in the case before us issued their requisition for Militia without sufficient cause, let the defendants go against them.

I hold that as between plaintiff and the defendants this question is of a lesser importance; the plaintiff was called out, and it was not for him to catechise the Justices; as well might each of his hundred men have claimed the right to do so.

Judgment for plaintiff, with costs against the defendants. *

R. A. Ramsay, for the plaintiff.

Rouer Roy, Q. C., and B. Devlin, for the defendants.

(J. K.)

COURT DE CIRCUIT, 1876.

MONTREAL, 16 SEPTEMBRE 1876.

Coram RAINVILLE, J.

No. 6782.

François Beaudoin, demandeur, vs. Felix Dycharme, défendeur, et Zéphirin Bellefleur, tiers-saisi.

JUGE :—1o. Que le tiers-saisi qui ne fait pas sa déclaration dans les délais prescrits par la loi, est cependant recevable à la faire en tout temps, même après jugement, en payant seulement les frais occasionnés au demandeur par tel défaut.

2o Qu'en dépit des dispositions de l'art. 624 du Code de Procédure, le tiers-saisi n'est pas tenu, pour se faire relever de son défaut, à *tous les dépens encourus sur la saisie-arrêt* mais seulement à ceux en premier lieu mentionnés.

Le tiers-saisi en cette cause, n'ayant pas fait de déclaration, le demandeur prit jugement contre lui par défaut. Ce jugement lui fut signifié au désir de la loi et il fit aussitôt motion pour qu'il lui fût permis de faire sa déclaration.

La motion fut accordée, en par le tiers-saisi payant au demandeur, tels frais que de droit.

Le tiers-saisi fit alors taxer les seuls frais occasionnés par son défaut, et le demandeur les trouvant insuffisants, présenta à cette honorable cour le 9 septembre courant, la requête ci-après, pour en faire reviser la taxation.

"A cette honorable cour:—

"François Beaudoin, demandeur en cette cause, par sa requête, expose respectueusement:

"Que le tiers-saisi sus-nommé, n'ayant pas fait de déclaration au désir de la loi, a été condamné par défaut, comme débiteur personnel du requérant.

"Que subséquemment, il a obtenu de cette cour la permission de faire sa déclaration, en payant tels frais que de droit.

* The following cases were cited at the hearing:—Rex v. Pinney, 3 B. & Ad. 946; 5 C. & P. 254. Rex v. Kennet, 5 C. & P. 282. Rex v. Neale, 9 C. & P. 431.

Beaudoin vs. Ducharme.

"Que les frais par lui offerts au requérant afin de faire sa dite déclaration, n'ont été taxés qu'à la somme de $2.95, lesquels sont insuffisants, ne comprenant pas *tous les dépens encourus sur la saisie-arrêt*

"Pourquoi le requérant conclut à ce que la taxe des dits frais, soit revisée par cette cour, de façon à ce que *tous les dépens encourus sur la saisie-arrêt* en icelle, y soient inclus, suivant les dispositions de l'art. 624 du Code de Procédure civile; avec dépens."

La Cour prit cette requête *en délibéré* et le 19 septembre déclara les frais offerts par le tiers-saisi suffisants et rejeta la dite requête.

Par ce jugement la cour a décrété qu'en dépit des dispositions formelles de l'art. 624 du C.P.C., il est permis au tiers-saisi en défaut, de faire sa déclaration en ne payant que les seuls frais occasionnés par son défaut.

J. G. D'Amour, Proc. du Demandeur.
Langpré & Dugas, Procs. du T. S.
(J.G.D.)

COURT OF QUEEN'S BENCH.

MONTREAL, 22ND DECEMBER, 1875.

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

No. 19.

LEROUX, APPELLANT,
AND
LEROUX, RESPONDENT.

HELD: That a customary dower created by a contract of marriage, executed before the coming into force of the registry ordinance, did not require to be registered.

DORION, CH. J.:—

Cette action est pour un douaire coutumier créé par contrat de mariage en date du 11 mai 1822. Moitié de l'immeuble possédé par le mari, lors du mariage, appartient à ses héritiers et l'autre moitié à un tiers dont le titre a été régulièrement enregistré. La Cour Inférieure a maintenu l'action quant à la moitié de l'immeuble possédé par les héritiers et l'a renvoyée quant à la moitié possédée par les tiers, parceque ce dernier avait enrégistré son titre et que le contrat de mariage n'avait pas été enrégistré,

Ce jugement doit être infirmé et voici pourquoi. Le douaire coutumier est un droit de propriété. L'action qu'il donne est une action pétitoire. Or, ni l'ordonnance d'enrégistrement de 1841, ni aucun des actes subséquents n'exigent l'enrégistrement des droits ou titres de propriété antérieurs à l'ordonnance. 4 Vic., ch. 30. (Voir section 4.)

L'appelant n'était donc pas obligé de faire enrégistrer son titre, (le contrat de mariage de ses père et mère) pour intenter son action, et il pouvait le faire comme si l'ordonnance n'eut jamais été passée. Le jugement de la Cour Inférieure doit être infirmé et l'action de l'appelant maintenue en totalité.

Cette décision est du reste conforme à la jurisprudence établie dans les causes de Nadeau & Dumont, 2 Rap. Jud. B. C. 196 Sims & Evans, 10 Rap. Jud. B. C. 401, et Parent & Latreille, 13 L. C. Jurist, 231.

C. A. Geoffrion, for appellant. Judgment of Superior Court reversed.
Doutre & Co., for respondent.
(S. B.)

MONTREAL, 21st DECEMBER, 1875.

Coram MONK, J., TASCHEREAU, J., RAMSAY, J., SANBORN, J., SICOTTE, J. *ad hoc.*

No. 24.

THE PIERREVILLE STEAM MILLS CO., APPELLANT;

AND

MARTINEAU, RESPONDENT.

HELD:—That appellant was liable for damages caused to a navigating vessel by the construction of booms in the River St. Francis, notwithstanding that the Statute which authorised the construction of these booms in such a way as not to obstruct the navigation of the River required that the plan and proposed site of the booms should be first submitted to, and be approved by the Governor in Council, and that the plan and site of the booms had been actually approved of by the Governor in Council, when the evidence established that these booms really did form an obstruction to the navigation of the river.

SICOTTE, J., (*dissentiens*).

Les appelants ont construit des *bômes* dans la rivière St. François, en conformité à la charte qui leur fut octroyée par la 29, 30 Vict., chap. 115. La condition était que ces *bômes* en gêneraient pas la navigation, et que le plan et le site des travaux seraient préalablement soumis à l'inspection et à l'approbation du gouvernement. Le 4 nov. 1871, un batcau, appartenant à l'intimé, a frappé sur un poteau du *bôme*, et fit une voie d'eau, qui nécessita le déchargement et des réparations.

La première chose à examiner est la concession faite aux appelants. La construction qu'elle autorise, est une empiétation sur la voie publique, et ne pouvait se faire, sans former une obstruction, plus ou moins grande; mais la concession porte, que nonobstant les travaux permis, la voie publique restera ouverte, et dans un état de viabilité suffisante. L'autorité ne doit autoriser les travaux qu'après s'être assurée que le mode déterminé n'entravera pas la navigation.

Cette autorisation obtenue, les concessionnaires ont droit, pour exploiter la concession, de prendre telle portion de la voie publique qui leur est indiquée, et d'y faire les travaux sanctionnés par l'autorité. Leur droit est égal à celui qui compète à tout citoyen de passer dans la voie publique. La sanction qui en garantit l'usage est la même pour les deux; l'exercice repose sur le même principe, celui de l'intérêt public

Si Martineau peut empêcher l'exploitation légitime de la concession c'est lui accorder un pouvoir exclusif contre toute la société. Toute la preuve démontre que la charte a été exploitée dans les limites de la concession de l'autorisation du gouvernement; de plus le fait que l'accident dont se plaint l'intimé est le seul survenu durant plusieurs années, prouve complètement que les travaux n'ont pas gêné la navigation.

Il doit être remarqué que la preuve constate également, que le courant et des battures rendent la navigation difficile à cet endroit. Voici ce que dit Desmarais, le pilote employé par l'intimé: "Il passe chaque jour beaucoup de bateaux à l'extrémité des *bômes*, et je n'ai jamais entendu dire, qu'il y avait eu d'autres naufrages en cet endroit."

The Pierreville Steam Mills Co. and Martineau.

Côté, un autre témoin de l'intimé, dit : " Depuis que ces poteaux sont là, j'ai bien souvent passé en cet endroit avec un batiment tirant 5½ pieds d'eau, et je n'ai jamais frappé sur les poteaux."

Caron, témoin des appelants, affirme, " que l'établissement des *bômes* n'a pas changé le chenal, et qu'un homme qui le connaît, passe assez près de terre, qu'il n'y a pas moyen de se tromper."

Millette constate, " que la navigation se fait aussi facilement qu'avant la construction des *bômes*, que le chenal est près de terre, et que les *bômes* et les poteaux ne gênent pas la navigation."

Aucune négligence ne peut être imputée aux appelants. Le piloto Desmarais, admet, " qu'au temps de l'accident, le *bôme* avait été enlevé, et que l'endroit où il était ordinairement placé était indiqué par des bouées attachées aux divers poteaux destinés à le tenir dans sa position."

Vassal, agent des appelants, dit : " Nous étions ce jour-là occupés à enlever " les *bômes* pour les mettre en hivernement : je me trouvais avec des hommes à " travailler à environ trois cents pieds de l'endroit où était le chaland. A ma " connaissance il n'y a jamais eu de plainte de la part des navigateurs, par rapport " aux poteaux en question, ces poteaux sont placés à environ 300 pieds d'une " batture qui se trouve plus haut, et un batiment qui descendrait le chenal, dans " les eaux ordinaires en évitant la batture se trouverait à éviter les poteaux. " Habituellement lorsque les *bômes* sont enlevés, nous mettons une bouée pour " tenir nos chaînes, et qui indique en même temps où sont les poteaux. Lorsque " le demandeur a frappé sur les poteaux, la bouée y était, nous l'y avions mise " une heure ou demi heure avant." Il ressort de ces faits et de toute la preuve que les appelants ont fait tout ce qui était requis et prescrit par la lettre comme par la nature de leur charte. Le tort souffert par Martineau ne peut leur être imputé, ils étaient dans l'exercice légitime d'un droit égal à celui qu'avait Martineau de se servir de la voie publique. L'accident a été causé par la difficulté de la navigation, et par l'impéritie du pilote. Martineau lui-même en a fait l'aveu au témoin Caron, en disant à ce dernier, qui lui demandait comment il se fesait qu'il avait été se jeter sur les poteaux : " qu'il pensait que c'était parce que celui qui le pilotait ne connaissait pas suffisamment le chenal."

D'après ces considérations et cette preuve, je suis d'opinion que l'action aurait dû être renvoyée.

Quant aux dommages, je crois devoir dire que, dans des cas comme celui qui nous occupe, la responsabilité ne s'étend qu'au dommage actuel, direct. Dans l'espèce, le jugement attaqué accorde indemnité pour des dommages indirects, indéfinis et trop éloignés ; et ils me paraissent trop considérables.

RAMSAY, J.—There are two questions, firstly the right of action, and secondly, as to the evidence. First, as to the right of action, there is little difference between Judge Sicotte, who dissents, and the majority of the Court as to the principles of law which govern the case. There can be no sort of difficulty that if the Legislature allowed a man to bar the branch of a river, the obstruction would be a legitimate operation, and there would be no remedy for a loss sustained by running a boat against it. Here there is a branch of the river which was allowed to be barred—upon that question there can be no difficulty. But

when the Court comes to examine what the Legislature allowed this Company to do, it appears that they are allowed to construct booms so as not to obstruct the navigation of the river or interfere with the lumber business thereof. Therefore the rights of the public are to be left totally without interference. But it is said, that the Executive Government is rendered the complete judge whether the Company has complied or not with this requirement. I quite agree with the dissenting Judge that such a power might be delegated to the Lieutenant-Governor, but here there is a reservation of the rights of the public, and it is only said that a plan should be submitted to the Lieutenant-Governor.

That is not removing the restriction in Section 8; it is, on the contrary, making that restriction more effective. So jealous was the Legislature of any interference with the rights of the public that it said, you shall not drive a pile till what you have done has met with the *prima facie* approbation of the Lieutenant-Governor in Council. Therefore the right to interfere does not come up, because the Legislature had decided the whole thing from beginning to end. It is for the Court, therefore, to decide on the evidence whether the Company was in fault.

There was doubtless room to pass the posts in the river, but the question is whether the posts were an obstruction. There can be no question that they rendered the navigation extremely difficult, the current being rapid. It was true that experienced persons might pass and did pass safely. But people navigating rivers are not supposed to have the highest possible skill. It is also in evidence that the boom might have been fixed on the piles driven into the ground, and it was owing to the fact that these posts were not driven into the ground, the accident occurred when they were covered at high water. There was a buoy, but it did not indicate the exact position of the piles. The fault and negligence of the Company are therefore established. Now, as to the damages awarded. They are very considerable, and part of them remote. The question arises whether the latter should be taken off. I do not think them too remote. The plaintiff has sustained loss through not being able to use his boat in the spring of the year, when the water was highest. The damages are perhaps a little too high, but the Court would not be justified in disturbing the judgment, more especially as in that case the costs would fall on the respondent, and would absorb more than the entire amount, thus actually punishing him for having had the misfortune to meet with the accident through the appellant's negligence.

MONK, J., regretted that the Court below found it necessary to give such high damages. His Honour would have been inclined to give $250 instead of $450. But he was not disposed to reverse the Judgment, it being beyond all doubt that the plaintiff has suffered a certain amount of damages.

Judgment of Superior Court confirmed.

Dorion, Dorion & Geoffrion, for appellant.

Rainville & Rainville, for respondent.

(S.B.)

PRIVY COUNCIL, 1874.

21st NOVEMBER, 1874.

DAME HENRIETTE BROWN, APPELLANT;

AND

Les Curé et Marguilliers de l'Œuvre et Fabrique de Notre Dame de Montréal, RESPONDENTS.

Status of the Roman Catholic Church in the Province of Quebec—Ecclesiastical Interment—Mandamus—R. C. Judges.

HELD:—1. That a writ of summons which in substance called upon the defendants, the *Curé et Marguilliers* of a *Fabrique*, to show cause why a writ of mandamus should not be issued directing them to bury a body comformably to usage and law, and to enter such burial in the civil register, is in proper form according to the Code of Civil Procedure of Lower Canada.

2. A Roman Catholic parishioner who had never been excommunicated *nominatim*, and had never been adjudged or proved to be "a public sinner" within the meaning of the Quebec ritual, was not at the time of his death under any such valid ecclesiastical sentence or censure as would, according to the Quebec ritual, or any law binding upon Roman Catholics in the Province of Quebec, justify the denial of ecclesiastical sepulture to his remains.

3. That the Fabrique, who were sued in their corporate capacity as holders of land and administrators of the cemetery, were bound, on payment of the accustomed dues, to give to the remains of deceased, burial in that part of the cemetery in which Roman Catholics are usually buried with the rites of the Church, and in which the graves are consecrated, and that a peremptory writ of mandamus should be issued accordingly.

4. Although the Roman Catholic Church in Canada may, after the cession, have ceased to be an established Church in the full sense of the term, it nevertheless continued to be a church recognized by the state, retaining its endowments and continuing to have certain rights enforceable at law.

5. Although the Civil Courts in Canada may not be competent to entertain a suit in the nature of the "*appel comme d'abus*," yet the jurisprudence and precedents relating to such a suit may be considered as evidencing the law of the Roman Catholic Church in the Province of Quebec.

6. Even if the Roman Catholic Church in the Province of Quebec were to be regarded merely as a private and voluntary religious society resting only upon a consensual basis Courts of Justice are still bound, when due complaint is made that a member of the society has been injured as to his rights in any matter of a mixed spiritual and temporal character, to enquire into the laws and rules of the tribunal or authority which has inflicted the alleged injury, and to ascertain whether the act complained of was in accordance with the law and rules and discipline of the Roman Catholic Church which obtain in the Province, and whether the sentence, if any, by which it is sought to be justified, was regularly pronounced by competent authority.

7. Roman Catholic Judges, in a case involving the right of the Civil power to entertain an "*appel comme d'abus*," cannot be recused on the ground that they acknowledge the Roman authority.

This was an appeal from the judgment of the Court of Queen's Bench reported in the 17th L. C. Jurist, pp. 89–139.

The petitioner, Dame Henriette Brown, obtained leave to appeal to the Queen in Council, and a petition of appeal was accordingly presented, dated 12th June, 1872.

On the 24th March, 1873, Dame Henriette Brown, the appellant, died, having by her will, dated 22nd October, 1870, devised to the *Institut Canadien* all her moveable and immoveable goods, corporeal and incorporeal rights, names, claims, rights of action, and other goods of whatever kind, appointing them her universal legatee.

The *Institut Canadien*, at a meeting held the 2nd April, 1873, resolved to accept the said legacy under benefit of inventory, and to continue the appeal, and benefit of inventory was duly granted to them by an order of the Superior Court on the 15th April, 1873.

The *Institut Canadien* accordingly presented a petition to Her Majesty in Council for leave to continue the appeal, and by an order in council, dated 26th June, 1873, it was ordered that the *Institut Canadien* should be allowed to continue the appeal without prejudice to any question which might be raised on the hearing thereof, as to the competency of the *Institut Canadien* as universal legatee of the late petitioner to continue the appeal, and the appeal was revived accordingly.

The appeal was argued at great length before their Lordships on the 27th and 30th of June, and on the 1st, 2nd, 4th, 7th and 8th of July, Mr. Joseph *Doutre*, *Q.C.*, and *Mr. Bompas* for the appellant; and Mr. *Matthews*, Q. C., and Mr. *Westlake*, Q.C., for the respondents. (See Law Rep. 6 P. C., 172–222) The right of the *Institut Canadien* to continue the appeal was not contested.

On the 2nd of December, 1870, when the cause was before the Court of Queen's Bench in Montreal, the appellant presented petitions of recusation against four of the Judges about to hear the cause, viz., Duval, C.J., Caron, Drummond and Monk, JJ., as being disqualified for hearing it under art. 176 of the C.P. The petition suggested *inter alia* that the Judges acknowledged the authority of the Roman power; that the Roman power had decreed that it is necessary, under pain of anathema and excommunication, to believe that the civil power has not the right which is designated under the name of "*appel comme d'abus*"; that one of the questions in this case is whether the civil power has such a right. The petitions demanded of the Judges to declare whether these and the other statements contained in them are true.

Upon the petitions being presented, Duval, C.J., Caron, Badgley and Monk, JJ., being in Court, took time to consider what course to pursue, and on the 9th of December, the same Judges being present, refused to receive the petitions, or allow them to be entered in the register of the Court.

At the hearing before their lordships, the respondents, were not called upon to sustain the propriety of this judgment, Lord Selborne remarking that none of their Lordships had the least doubt about it.

The Judgment of their Lordships was delivered by

SIR ROBERT PHILLIMORE:—

This is an appeal from a judgment of the Court of Queen's Bench for the province of Quebec, in Canada, confirming a judgment of the Court of Review, which latter reversed a judgment of the Superior Court in first instance.

The question which was the subject of these different judgments related to the burial of the remains of Joseph Guibord, one of Her Majesty's Roman Catholic subjects, who died at Montreal on the 18th of November, 1869.

His widow and representative, Dame Henriette Brown, instituted and prosecuted the suit in the Canadian Courts, and was also the original appellant

Brown and Fabrique de Montréal.

before their Lordships. She died on the 24th of March, 1873, and by her will devised her property to the *Institut Canadien*, and also appointed them her universal legatees.

This Corporation, having accepted the appointment, applied for leave to continue this appeal, which leave was granted by their Lordships on the 26th of June, 1873.

This leave was granted without prejudice to any question which might be raised as to the competency of the Institute to continue the appeal. It appeared that the widow had been condemned in the costs in the Canadian Courts, and her universal legatees were therefore, of course, interested in procuring the reversal of these sentences; and the objection to their competency, though mentioned in the "reasons" of the Respondents, was not insisted upon in the arguments before us.

The suit on behalf of the representative of Guibord was for a mandamus to *Les Curé et Marguilliers de l'Œuvre et Fabrique de Montréal*, upon receipt of the customary fees, to bury his body in the parochial cemetery of members of the Roman Catholic Church at Montreal, entitled the *Cemetery of La Côte des Neiges*, conformably to usage and to law, and to enter such burial in the civil register.

La Fabrique de Montréal is a corporation consisting of the *curé* and certain lay church officers called *marguilliers*, whose relation to the church and churchyard is analogous to that of churchwardens in an English parish. This corporation manages the temporalities of the Church, which temporalities are also sometimes designated by the title of *La Fabrique*.

La Fabrique de Montréal had the control of this particular cemetery.

The cemetery is divided into two parts, the smaller part being separated from the larger by a paling. In the smaller part are buried unbaptized infants and those who have died *sans les secours ou les sacrements de l'Eglise;* and (as appears from the evidence) persons who have commited suicide, and criminals who had suffered capital punishment without being reconciled to the Church. In the other and larger part are buried ordinary Roman Catholics in the usual way, and with the rites of the Church.

Neither portion of the cemetery is consecrated as a whole; but it is the custom to consecrate separately each grave in the larger part, never in the smaller or reserved part.

The cemetery is thus practically divided into a part in which graves are, and into a part in which they are not, consecrated.

The circumstances which led to this litigation were as follows:

Guibord was a lay parishioner of Montreal. He appears to have been of unexceptionable moral character, and to have been, both by baptism and education, a Roman Catholic, which faith he retained up to the time of his death.

In the year 1844 a literary and scientific institution was formed at Montreal for the purpose of providing a library, reading room and other appliances for education. It was incorporated by a provincial statute (16 Vict., c. 261), under the name of the *Institut Canadien*.

The preamble of this statute recites:—

Brown and Fabrique de Montréal.

"Whereas several persons of different classes, ages, and professions, residing in the city of Montreal and elsewhere, have formed a literary and scientific association in the said city, under the name of the *Institut Canadien*, for the purpose of establishing a library and reading room, and of organizing a system of mutual and public instruction by means of lectures and courses of instruction."

It then states that the number of members already exceeded 500, that they had a library of 2000 volumes, and a reading-room provided with newspapers and periodical publications. Then follows a prayer to be constituted a legal corporation. The prayer was granted by the Legislature, and the statute incorporates the association, and directs, among other provisions, that the corporation is to make an annual return to the Government of their estates, real and personal.

Guibord was one of the original members of this Institute.

In the year 1858 certain members of the Institute proposed a committee for the purpose of making a list of books in the library, which in their opinion ought not to be allowed to remain therein.

An amendment, however, was carried by a considerable majority to the effect that the Institute contained no improper books, that it was the sole judge of the morality of its library, and that the existing committee of management was sufficient.

On the 13th of April in the same year the Roman Catholic Bishop of Montreal published a pastoral which was read in all the churches of his diocese, in which he referred to what had taken place at the meeting of the Institution, and, after praising the conduct of the minority, pointed out that the majority had fallen into two great errors: first, in declaring that they were the proper judges of the morality of the books in their library, whereas the Council of Trent had declared that this belonged to the office of the bishop; secondly, in declaring that the library contained only moral books, whereas it contained books which were in the Index at Rome. The bishop further cited a decision of the Council of Trent, that any one who read or kept heretical books would incur sentence of excommunication, and that any one who read or kept books forbidden on other grounds would be subject to severe punishment; and he concluded by making an appeal to the Institute to alter their resolution, alleging that otherwise no Catholic would continue to belong to it. He says:—

"Car il est à bien remarquer ici que ce n'est pas nous qui prononçons cette terrible excommunication dont il est question, mais l'Eglise dont nous ne faisons que publier les salutaires décrets."

The resolution of the Institute was not rescinded.

In 1865 several of the Roman Catholic members of the Institute, including Guibord, appealed to Rome against this pastoral.

They received no answer to their application. But in the year 1869 the Bishop of Montreal issued a circular—

"Publiant la réponse du Saint Office concernant l'Institut Canadien et le Décret de la Sainte Congrégation de l'Index condamnant l'Annuaire du dit Institut pour 1868."

This circular was dated from Rome, July 16th, 1869. He also sent a pastoral

Brown and Fabrique de Montréal.

letter from Rome, dated in August of that year, which contained two inclosures, one the sentence or answer of the Holy Office, as printed in the case before us:

"Illme. ac Rme. Dne.

"Cum in Generali Congregatione S.R. et U. I. habita feria IV. die 7 curr. Emi. ac Rmi, Generales Inquisitores jamdiu motam de Instituto Canadensi controversiam ad examen revocassent, singulis mature ac diligenter expensis, A: uæ significandum voluerunt, rejiciendas omnino esse doctrinas in quodam annuario quo dicti Instituti acta recensentur, contentas, ipsasque doctrinas ab eodem Instituto traditasprorsus reprobandas. Animadvertentes insuper laudati Emi. ac Rmi. Patres valde timendu messe ne per hujusmodi pravas doctrinas Christianæ juventutis institutio et educatio in discrimen adducatur, dum commendandum expresserunt zelum ac vigilantiam a te huc usque adhibitam excitandam eamdem [the next word is a misprint] jusserunt ut una cum tuæ dioecesecs clero omnem curam conferas, ut Catholici ac præsertim juventus a memorato Instituto, quousque perniciosas doctrinas in eo edoceri constiterit, arceantur. Dum vero laudibus prosequuti sunt alterum societatem *Institutum Canadense Gallicum* nuncupatam, nec non ephemeridem dictam '*Courrier de St. Hyacinthe*,' utramque fovendum adjuvandamque mandarunt ut ita iis damnis ac malis remedia quærantur, quæ ex alio præfato Instituto haud dimanare non possunt. Quod a tuo pro mei muneris ratione communicans omni cum observantia maneo.

"Romæ ex Æd. S.C. de P.F. die 14 Julii, 1869, &c."

The other inclosure was a *Decretum* of the "*Congregatio*," to whom the care of the Index was committed, it was as follows:—

"*Decretum.*

"*Feria II., die* 12 *Julii*, 1869.

"Sacra Congregatio Eminentissimorum ac Reverendissimorum Sanctæ Romanæ Ecclesiæ Cardinalium a Sanctissimo Domino Nostro Pio Papa IX. sanctaque Sede Apostolica Indici librorum pravæ doctrinæ, eorumdemque proscriptioni, expurgationi, ac permissioni in universa Christiana republica præpositorum et delegatorum, habita in Palatio Apostolico Vaticano, die 12 Julii 1869 damnavit et damnat, proscribit proscribique, vel alias damnata atque proscripta in Indicem Librorum Prohibitorum referri mandavit et mandat opera quæ sequuntur."

Then the names of several works unconnected with the Institute are mentioned. And then—

Annuaire de l'Institut Canadien pour 1868, *célébration du* 24*me anniversaire de l'Institut Canadien le* 17 *Décembre*, 1868. (Decr. S. Officii Feria IV. die 7 Julii, 1869.)

"Itaquo nemo cujuscumque gradus et conditionis prædictæ opera damnata atque proscripta, quocumque loco, et quocumque idiomate, aut in posterum edere, aut edita legere vel retinere audeat, sed locorum ordinariis, aut hæreticæ pravitatis Inquisitoribus ea tradere teneatur sub pœnis in Indic reliborum vetitorum indictis.

"Quibus Sanctissimo Domino Nostro Pio Papæ IX. per me infrascriptum

S. I. C. a Secretis relatis Sanctitas Sua decretum probavit, et promulgari præcepit. In quorum fidem, &c.

"Datum Romæ, die 16 Julii, 1869."

The pastoral letter containing this inclosure drew attention to the fact that two things were especially forbidden by this *Decretum* :—1. To belong to the Institute while it taught pernicious doctrines. 2. To publish, retain, keep or read the *Annuaire* of 1868. And the bishop also pointed out that any person who persisted in keeping or reading the *Annuaire*, or in remaining a member of the Institute, would be deprived of the Sacrament, "*même à l'article de la mort.*"

The Institute held a meeting on the 23rd of September, 1869, and resolved :—

"1. Que l'Institut Canadien, fondé dans un but purement littéraire et scientifique, n'a aucune espèce d'enseignement doctrinaire, et exclut avec soin tout enseignement de doctrines pernicieuses dans son sein.

"2. Que les membres Catholiques de l'Institut Canadien, ayant appris la condamnation de l'Annuaire de 1868 de l'Institut Canadien par décret de l'autorité Romaine, déclarent se soumettre purement et simplement à ce décret."

These concessions produced no effect.

The bishop in a letter, the last which appears in the case, dated Rome, 30th of October, 1869, to the administrator of the diocese at Montreal (which that officer received, he says, on the 17th of November, the day before Guibord's death), denounces these concessions as hypocritical, and gives five reasons why they are insufficient, the third of which is—

"3. Parce que cet acte de soumission fait partie d'un rapport du comité approuvé à l'unanimité par le corps de l'Institut, dans lequel est proclamée une résolution tenue jusqu'alors secrète, qui établit en principe la tolérance religieuse qui a été la principale cause de la condamnation de l'Institut."

The letter concludes—

"Tous comprendront qu'en matière si grave il n'y a pas d'absolution à donner, pas même à l'article de la mort, à ceux qui ne voudraient pas renoncer à l'Institut," qui n'a fait qu'un acte d'hypocrisie, en feignant de se soumettre au Saint Siége."

It is right to observe here that this "principal ground of condemnation" of the Institute, viz., that it had passed a resolution which established the principle of religious toleration, was entirely new, does not appear in any former document, and, further, it would seem, could not have been known by Guibord.

It should also be mentioned, in order to complete the necessary history of the case, that Guibord, about six years before his death, being dangerously ill, was attended by a priest, who administered unction to him, but refused to administer the Holy Communion unless he resigned his membership of the Institute, which Guibord declined to do.

Guibord having died, as has been stated, on the 18th of November, 1869, suddenly, of an attack of paralysis, on the 20th of November the widow caused a request to be made on her behalf to the *Curé* and to the clerk of the Fabrique, to bury Guibord in the cemetery, and tendered the usual fees.

Previously to this application M. Rousselot, the *curé*, having heard of the

Brown and Fabrique de Montréal.

death of Guibord, and knowing that he was a member of the Institute, had applied to the administrator of the diocese for his directions. He replied that he had yesterday received a letter from the Bishop of Montreal directing him to refuse absolution "*même à l'article de la mort*," to members of the Institute; he could not, therefore, permit "*la sépulture ecclésiastique*" to Guibord. The *Curé*, having received this letter, refused to bury Guibord in the larger part of the cemetery, where Roman Catholics were ordinarily buried, but offered to allow him interment in the other part, without the performance of any religious rites.

It seems that the agent of the widow offered to except burial in the larger part without religious services; but this offer was rejected.

On the 23rd of November the widow presented a petition to the Superior Court, setting out the facts, and prayed that a mandamus might issue as above stated.

On the 24th one of the Judges of the Superior Court ordered a writ of mandamus to issue; but it must be observed that the writ issued was a writ of summons calling upon the defendants to appear and answer the demand which should be made against them by the plaintiff for the causes mentioned in the said petition thereto annexed. The proceeding was in substance the same as a rule to shew cause why a writ of mandamus should not be issued. The defendants appeared and filed a petition, praying that the writ might be annulled for irregularity, upon the ground that it was a writ of summons and not a writ of mandamus, and also upon other technical objections. The defendants, at the same time, filed a traverse of the plaintiff's petition and three pleas. The first plea was to the same effect as the petition of the defendants, and set up the same alleged grounds of irregularity, and pointed out the same defects as those mentioned in that petition.

The second plea in substance denied that the respondents had refused to bury the deceased, and alleged that they were entitled to point out the place in the cemetery where he should be buried, and that they were ready to do so, and to give him such burial as he was entitled to.

The third plea averred that the service (*culte*) of the Roman Catholic religion in Canada is free, and the exercise of its religious ceremonies of whatever nature is independent of all civil interference or control; that, for the purpose of assuring the freedom of that religion, the law recognises the respondents as proprietors of the Roman Catholic parish church of Montreal, and of its parsonage, cemeteries, and other dependencies, which are all Roman Catholic property, devoted to the exclusive use and exercise of that religion, and subject to the exclusive control and management of the respondents, and of the superior Roman Catholic ecclesiastical authority; that the respondents, in such capacity, had for more than ten years been proprietors and in possession of the Roman Catholic cemetery in question, and are empowered by law to point out the precise spot in the cemetery where each burial is to be made; that, besides their above-mentioned capacity the respondents are also civil officers within certain limits, having to fulfil certain duties defined by law, and are legally responsible in that capacity and sphere only; that the respondents, in their double capacity thus

Brown and Fabrique de Montreal.

existing, are, by the Roman Catholic religious authority and by the law, set over the burial of persons of Roman Catholic denomination dying in the parish of Montreal, and are responsible to the religious and civil authorities respectively for the religious and civil portions of such functions: that the respondents for the execution of their double duty, and in accordance with the immemorial custom of the Roman Catholic parishes throughout the country, have assigned one part of the cemetery for the burial of persons of Catholic denomination and belief who are buried with Roman Catholic religious ceremonies, and another part for the burial of those who are deprived of ecclesiastical burial; that Joseph Guibord was a member of a literary society at Montreal called the Canadian Institute, and as such was at the time of his death, and had been for about ten years previous, notoriously and publicly subject to canonical penalties resulting from such membership and involving deprivation of ecclesiastical burial; that immediately after the death of Joseph Guibord, the Rev. Victor Rousselot, Roman Catholic priest, and curate of the parish of Montreal, submitted the question of his religious burial to the Rev. Alexis Frédéric Truteau, Vicar-General of the Roman Catholic diocese of Montreal, and administrator of the diocese, with supreme ecclesiastical authority therein, in the absence of the bishop, by virtue of the rescript of the Pope, dated the 4th of October, 1868; and that the said administrator replied by a decree declaring that, since Joseph Guibord was a member of the Canadian Institute at the time of his death, ecclesiastical burial could not be granted to him; that the plaintiff, by her agents, having required M. Rousselot and the respondents to give to the body both religious and civil burial in the cemetery in question, they repeatedly informed the said agents of such decree of the administrator of the diocese, and that, in consequence thereof, ecclesiastical burial could not be granted and was refused, but that they were ready as civil officers to bury the remains civilly, and authenticate the death according to law, which offer was never accepted by the plaintiff or her agents, and that, having regard to the above facts, the plaintiff could not claim from the respondents for the remains of her late husband more than civil burial, and that under the conditions laid down by the ecclesiastical laws of the Roman Catholic Church, which the respondents had never refused. The plea then concluded by saying that the respondents had refused nothing but ecclesiastical burial, for the refusal of which they were responsible only before the religious and not before the civil authority.

The widow filed several answers to these pleas, some in the nature of demurrers, some of traverses of the facts alleged, and to the third plea also a special answer, setting out the facts with respect to the dispute between the Institute, the bishop, and the Court of Rome,—which have been already mentioned.

The respondents joined issue on these answers, and also, by leave of the Court, filed a special replication to the petitioner's third answer to the respondent's third plea; in which, after repeating that the Civil Courts were incompetent to question a decision of the ecclesiastical authorities on ecclesiastical matters, and could not inquire into the grounds upon which ecclesiastical burial had been refused to Guibord, they, nevertheless, cited the decrees of the Council of Trent with regard to the Index and the proceedings relating to the Institute, and

Brown and Fabrique de Montréal.

concluded by an averment that, in consequence of the premises, Guibord at the time of his death must be considered as "*un pécheur public*," and, as such, obnoxious to the canonical penalties imposed by the Roman Catholic ritual, among which was privation of sepulture.

That the members of the Institute having refused to obey the pastoral, and persisted in their refusal, "*le jugement de l'Evêque imposant la peine canonique sus mentionnés est demeuré en pleine force et effet.*"

It then avers, after stating the proceeding relating to an appeal to Rome, that the Administrator-General taking into consideration all the facts relating to Guibord, "*comme membre du dit institut*," had *justement rendu le décret qui l'a privé de la sépulture ecclésiastique ;*" and, further, "*que ce décret, rendu dans la forme où il se trouve, est d'ailleurs un décret nominal.*"

Issue was joined on this special replication.

It is to be noticed that in this replication it is for the first time alleged that, on the ground of his being "*pécheur public*," Guibord was disentitled to ecclesiastical burial.

The case was argued before Mr. Justice Mondelot in the Superior Court, on the demurrers and on the merits.

The Court gave judgment for the widow on the merits, and on the demurrers to the first and third pleas, and ordered a peremptory writ of mandamus to issue; but declared that it did not pay any regard either to the widow's special answer to the third plea or the special replication, which it seems to have considered as improperly pleaded.

There was an appeal to the Court of Revision, before three Judges, who reversed the judgment of the Court below, quashed the writ originally issued, and dismissed the writ of mandamus with costs.

From this judgment the widow appealed to the Court of Queen's Bench, and presented petitions of recusation against four of the Judges, which the Judges refused to admit. It is unnecessary to enter upon this part of the case, as in the course of the argument their Lordships fully expressed their opinion that these petitions could not be sustained.

The Court of Queen's Bench affirmed the judgment of the Court of Revision; but the Judges did not agree as to the grounds upon which their decision was founded. They discussed at some length the matters raised upon the third plea; but they decided against the appellant upon the questions as to the form of the writ and the regularity of the proceedings.

The questions of form, which are not unimportant, may be disposed of before the graver questions which arise out of the third plea are considered.

And first, is the mandamus bad upon the ground of uncertainty, or upon any other ground?

Their Lordships are of opinion that the writ was in proper form according to the Code of Procedure for Lower Canada; the procedure therein pointed out, though called a mandamus, was not a writ of mandamus in the first instance, but, in effect, a summons to answer a petition praying for an order upon the defendants to do certain specified acts. The first thing to be done by the defendants was not, as in the case of a writ of mandamus in England, to make a

return to the writ, but to appear to the summons, and plead to the petition. The sections of the Code of Procedure bearing upon this point are 1023, 1024, and 1025. Article 1023 evidently contemplates a writ of summons. It says the application is made by petition, supported by affidavits setting forth the facts of the case presented to the Court or a Judge, who may thereupon order the writ to issue, clearly meaning a writ of summons, for it goes on, "and such writ is served in the same manner as any other writ of summons." This is rendered more clear by Article 1024, which directs the subsequent proceedings to be had in accordance with the provisions of the first chapter of that section. That refers to Articles from 997 to 1002, both inclusive; which, in cases similar to *quo warranto*, require an information to be presented to the Court or a Judge supported by affidavits, upon which the issue of a writ of summons may be ordered. The writ of summons commands appearance upon a day fixed, and is to be served in the manner pointed out. The defendants are to appear on the day fixed (Article 1011), and to plead specially to the information (Article 1012). In the case of mandamus under the Code, therefore, the parties are not to make a return to the summons; the pleadings are to commence with a plea to the petition, and not a plea to the return to the writ. In our opinion, therefore, the objection to the writ, so far as it related to its being a mere writ of summons, and not a writ of mandamus, was untenable, and the practice of the Court in this respect, which has always been adopted, is in compliance with the directions of the Code. The other technical objections to the writ have no substantial foundation. Three of the Judges of the Court of Queen's Bench held that the writ was correct in point of form, although one of them, Mr. Justice Badgley, being of opinion that the writ asked for too much, held that a peremptory writ could not issue commanding the defendants to do the one thing only, viz., to bury, which, according to his view, they were legally bound to do. The procedure therefore requiring a petition and plea to the petition, it appears to follow that the applicant for the writ is not so strictly bound by the prayer of his petition as he is in this country to the command contained in the first writ of mandamus, and that the Court may mould the order for the peremptory writ in the same manner as the Court here may mould the rule for a mandamus. There being no rule which requires a peremptory writ of mandamus to be granted in the precise terms of the first writ, it seems to follow that the general rules applicable to pleadings, either in equity or at common law, may be acted upon. According to them, a plaintiff may generally obtain a decree for less than that for which he asks, and for relief in a more distinct and specific form than that for which he has prayed, provided it is within the scope of the prayer.

In the present case the prayer of the petition was — that the defendants might be commanded to bury or cause to be buried the body of the deceased Joseph Guibord in the Roman Catholic cemetery, conformably to usage and to law. That was, doubtless, as pointed out by the Court of Review, extremely vague.

The objection to issuing a peremptory writ in that form was clearly stated by Mr. Justice Mackay.

Brown and Fabrique de Montréal.

"Under such vague conclusion," he observes, "the point really meant to be tried is hidden. That the defendants are bound to bury Guibord in the Roman Catholic cemetery, according to the usages and the law, is indisputable, and is not disputed. Peremptory mandamus to do this would nevertheless leave things just as unsettled between plaintiff and defendants as they were the day before the plaintiff presented the *requête*."

But if the principle above laid down be acted upon, the Court may, in a peremptory writ, specify distinctly what they consider the defendants are bound to do according to usage and law, and may peremptorily command the defendants to do it. If they consider that the defendants are bound to provide ecclesiastical burial with the rites and ceremonies of the Roman Catholic Church, they may say so. If they consider that the defendants are bound to bury the body in that part of the cemetery in which bodies of those interred with ecclesiastical burial are usually buried, the peremptory writ may be worded accordingly. If they think the defendants are bound to register the burial, the writ may go on to order such registration; or, if they think that the defendants are not bound to register the burial, they can order the burial alone.

The next point of form relates to the question, who are the defendants to this writ. Are they the *curé* and *marguilliers* personally, or in their corporate capacity? The name used in the conveyance of the land for the cemetery, and that used in the plaint and writ of summons are identical. And their Lordships upon the whole are clearly of opinion that the writ was against "*les curé et marguilliers*," for the same being, in their corporate capacity as holders of the land and administrators of the cemetery; and that the *curé* in his individual or spiritual capacity is not a party to this suit.

It now becomes necessary to determine the merits of the case, and the grave questions of public and constitutional law which are raised by the third plea, and the subsequent pleadings.

In order to do this, it is desirable to consider shortly the *status* of the Roman Catholic Church in Lower Canada, both before and after the cession of the Province of Quebec in 1762.

It is certain that before the cession the Established Church of that province, as in the Kingdom of France itself, was the Roman Catholic Church; its law, however, being modified by what were known as "*les libertés de l'Eglise Gallicane*." There seem also to have been regular Ecclesiastical Courts, and besides them there was vested in the Superior Council of Canada the jurisdiction recognised in French jurisprudence and enforced by the Parliaments of France as the "*appellatio tanquam ab abusu*," or the "*appel comme d'abus*."

In Dupin's "*Manuel du Droit Public Ecclésiastique Français*," ed. 1845, the celebrated work of Pithou is set forth, with notes of the learned editor, in the 79th Article. Pithou's treatise defines the "*appel comme d'abus*" as that—

"Appellation précise que nos pères ont dit estre quand il y a entreprise de jurisdiction ou attentat contre les saincts décrets et canons receux en ce royaume, droits, franchises, libertez, et privilèges de l'Eglise Gallicane, concordats, édits, et ordonnances du Roy, arrests de son Parlement: bref, contre ce qui est non-seulement de droit commun, divin ou naturel, mais aussi des prerogatives de ce royaume et de l'Eglise d'iceluy."

Brown and Fabrique de Montréal.

The following are the public documents which shew how the Roman Catholic Church in Lower Canada was dealt with on the conquest and cession of the Province:—

The 27th Article of the Instrument of Cession is in these terms:—

"Le libre exercice de la religion Catholique Apostolique et Romaine subsistera en son entier, en sorte que tous les états et le peuple des villes et des campagnes, lieux et postes éloignés, pourront continuer de s'assembler dans les églises et de fréquenter les sacrements comme ci-devant, sans être inquiétés d'aucune manière, directement ou indirectement. Ces peuples seront obligés par le Gouvernement Anglais à payer aux prêtres qui en prendront soin les dîmes et tous les droits qu'ils avaient coutume de payer sous le Gouvernement de Sa Majesté Très-Chrétienne. Accordée pour le libre exercise de leur religion, l'obligation de payer les dîmes aux prêtres dépendra de la volonté du Roi." (Page 15, "Actes Publics.")

Again in the Treaty of 1763 it is said:—

"Sa Majesté Britannique consent d'accorder la liberté de la religion Catholique aux habitans du Canada, et leur permet de professer le culte de leur religion, autant que les lois de l'Angleterre le permettent."

And lastly, by an Act of Parliament passed in 1774 (14 Geo. 3, c. 83), intituled, "An Act for making more Effectual Provision for the Government of Quebec in North America," it was declared by sect. 5 that, for the more perfect security and ease of the minds of the inhabitants of the said province, His Majesty's subjects professing the religion of the Church of Rome of and in the said province of Quebec might have, hold, and enjoy the free exercise of the religion of the Church of Rome, subject to the King's supremacy, declared and established by an Act made in the first year of the reign of Her Majesty Queen Elizabeth, over all the Dominions and countries which then did, or should thereafter belong to the Imperial Crown of this realm; and that the clergy of the said church might hold, receive, and enjoy their accustomed dues and rights with respect to such persons only as should profess the said religion.

And by the 8th section it is enacted:—

"That all His Majesty's Canadian subjects within the province of Quebec, the religious orders and communities only excepted, may also hold and enjoy their property and possessions, together with all customs and usages relative thereto, and all other their civil rights, in as large, ample, and beneficial manner as if the said Proclamation, Commisssons, Ordinances, and other Acts and Instruments had not been made, and as may consist with their allegiance to His Majesty, and subjection to the Crown and Parliament of Great Britain; and that in all matters of controversy, relative to property and civil rights, resort shall be had to the laws of Canada as the rule for the decision of the same," &c.

From these documents it would follow that, although the Roman Catholic Church in Canada may on the conquest have ceased to be an Established Church in the full sense of the term, it nevertheless continued to be a Church recognised by the State; retaining its endowments, and continuing to have certain rights (*e. g.*, the perception of "*dimes*" from its members) enforceable at law.

Brown and Fabrique de Montréal.

It has been contended on behalf of the appellants that the effect of the Act of Cession, the Treaty, and subsequent legislation, has been to leave the law of the Roman Catholic Church as it existed and was in force before the cession, to secure to the Roman Catholic inhabitants of Lower Canada all the privileges which their fathers, as French subjects, then enjoyed under the head of the liberties of the Gallican Church; and further, that the Court of Queen's Bench, created in 1794, possessed, and that the existing Superior Court now possesses, as the Superior Council heretofore possessed, the power of enforcing these privileges by proceedings in the nature of *appel comme d'abus*. Considering the altered circumstances of the Roman Catholic Church in Canada, the non-existence of any recognised Ecclesiastical Courts in that province, such as those in France which it was the office of an *appel comme d'abus* to control and keep within their jurisdiction; and the absence of any mention in the recent Code of Procedure for Lower Canada of such a proceeding, their Lordships would feel considerable difficulty in affirming the latter of the above propositions. Mr. Justice Mondelet, indeed, refers in his judgment to various cases of a mixed character (1) in which the Civil Courts appear at first sight to have recently exercised a jurisdiction somewhat analogous to that exercised in the *appel comme d'abus*. But on examination these cases prove to be suits of a different character, actions for damages against spiritual persons for wrongs done by them in their spiritual capacities.

Their Lordships do not, however, think it necessary to express any opinion as to the competence of the Civil Courts to entertain a suit in the nature of the *appel comme d'abus*, as they agree with Mr. Justice Mackay and other Judges of the Court of Revision, that in such a suit the procedure must be different from the present, and that at least it would be necessary to bring the proper ecclesiastical authorities before the Court as defendants.

It is another and a different question, to be considered hereafter, whether the jurisprudence and precedents relating to the *appel comme d'abus* may not be considered by their Lordships as evidencing the law of the Church in Canada, by the maladministration of which the appellant complains that he has been wronged.

Nor do their Lordships think it necessary to pronounce any opinion upon the difficult questions which were raised in the argument before them touching the precise *status*, at the present time, of the Roman Catholic Church in Canada. It has, on the one hand, undoubtedly, since the cession, wanted some of the characteristics of an Established Church; whilst, on the other hand, it differs materially in several important particulars from such voluntary religious societies as the Anglican Church in the Colonies, or the Roman Catholic Church in England. The payment of *dimes* to the clergy of the Roman Catholic Church by its lay members, and the rateability of the latter to the maintenance of parochial cemeteries, are secured by law and statutes. These rights of the Church must beget corresponding obligations, and it is obvious that this state of things may give rise to questions between the laity and clergy which can only

(1) *Wurtele* v. *Bishop of Quebec*, Déc des Tribunaux, Tom. ii. p. 68; *Jurret* v. *Sénécal*, 4 Low. Can. Jur. 213; *Larocque et vir* v. *Michon*, 1 Low. Can. Jur. 181.

Brown and Fabrique de Montréal.

be determined by the Municipal Courts. It seems, however, to their Lordships to be unnecessary to pursue this question, because even if this Church were to be regarded merely as a private and voluntary religious society resting only upon a consensual basis, Courts of Justice are still bound, when due complaint is made that a member of the society has been injured as to his rights, in any matter of a mixed spiritual and temporal character, to inquire into the laws or rules of the tribunal or authority which has inflicted the alleged injury.

In the case of *Long* v. *Bishop of Cape Town*, their Lordships said:—

"The Church of England, in places where there is no Church established by law, is in the same situation with any other religious body—in no better, but in no worse position; and the members may adopt, as the members of any other communion may adopt, rules for enforcing discipline within their body which will be binding on those who, expressly or by implication, have assented to them. It may be further laid down that where any religious or other lawful association has not only agreed on the terms of its union, but has also constituted a tribunal to determine whether the rules of the association have been violated by any of its members or not, and what shall be the consequence of such violation, the decision of such tribunal will be binding when it is acted within the scope of its authority, has observed such forms as the rules require, if any forms be prescribed, and, if not, has proceeded in a manner consonant with the principles of Justice." (1)

Their Lordships will bear in mind these principles in the judgment which they are about to pronounce.

Now what is the question to be here decided? It is the right of Guibord to interment in the ordinary way in the cemetery of his parish, a right enforceable by his representative. It may be observed that the *curé* and *marguilliers* are only proprietors of the parochial cemetery in the sense in which a parson in England is the owner of the freehold of the churchyard, that is to say, subject to the right of the parishioner to be buried therein. The respondents do not contest that Guibord had that right, but say that they have refused nothing but ecclesiastical burial, for the refusal of which they are responsible only to the religious, and not to the civil authority. They admit, however, that the consequence of the refusal of ecclesiastical burial is that the remains of the deceased can be interred only in the smaller or reserved portion of the cemetery. It cannot be doubted on the evidence that this qualification of the general right of interment, this separation of the grave from the ordinary place of sepulture, implies degradation, not to say infamy.

That forfeiture of the right to ecclesiastical burial, involving these consequences, may be legally incurred is not denied by the appellants. Their contention is, that it was not so incurred by Guibord; that, according to the law of the religious community to which he belonged, he retained at the time of his death his right to be buried in the larger portion of the cemetery in the usual manner.

Their Lordships are disposed to concur, with one qualification, in the opinion

(1) 1 Moore, P. C. (N.S.) Cases, 461.

Brown and Fabrique de Montreal.

expressed by Mr. Justice Berthelot as to the mixed character of these questions. He says:—

"Le baptême, le mariage et la sépulture sont de matière mixte, et les ecclésiastiques ne peuvent se refuser de les administrer à ceux de leurs paroissiens qui y ont droit, comme résidants dans l'enclave de sa paroise, à moins cependant qu'il n'y ait des peines ecclésiastiques prononcées contre eux par l'évêque ou autre autorité ecclésiastique compétente."

If this passage is to be taken to imply that it is competent to the bishop to deprive a Roman Catholic subject of his rights by pronouncing against him *ex mero motu* ecclesiastical penalties, their Lordships are of opinion that the proposition is too wide. They conceive that, if the act be questioned in a Court of Justice, that Court has a right to inquire, and is bound to inquire whether that act was in accordance with the law and rules of discipline of the Roman Catholic Church which obtain in Lower Canada, and whether the sentence, if any, by which it is sought to be justified was regularly pronounced by an authority competent to pronounce it.

It is worthy of observation, as bearing both upon the question of the *status* of the Roman Catholic Church in Lower Canada, and the manner of ascertaining the law by which it is governed, that in the Courts below it was ruled, apparently at the instance of the respondents, that the law, including the ritual of the Church, could not be proved by witnesses, but that the Courts were bound to take judicial notice of its provisions.

The application of this ruling would be difficult, unless it be conceded that the ecclesiastical law which now governs Roman Catholics in Lower Canada is identical with that which governed the French province of Quebec. If modifications of that law had been introduced since the cession they have not been introduced by any legislative authority. They must have been the subject of something tantamount to a consensual contract binding the members of that religious community and as such ought, if invoked in a Civil Court, to be regularly proved.

It seems, however, to be admitted on both sides that the law upon the point in dispute is to be found in the Quebec Ritual, which was certainly accepted as law in Canada before the cession of the province, and does not differ in any material particular from the Roman ritual also cited in the Courts below. The Quebec Ritual is as follows:

"On doit refuser la sépulture ecclésiastique,—1°, aux Juifs, aux infidèles, aux hérétiques, aux apostats, aux schismatiques, et enfin à tous ceux qui ne font pas profession de la religion Catholique. 2° Aux enfants morts sans baptême. 3° A ceux qui auraient été nommément excommuniés ou interdits, si ce n'est qu'avant de mourir ils aient donné des marques de douleur, auquel cas on pourra leur accorder la sépulture ecclésiastique après que la censure aura été levée par nos ordres. 4° A ceux qui se seraient tués par colère ou par désespoir, s'ils n'ont donné avant leur mort des marques de contrition; il n'en est pas même de ceux qui se seraient tués par frénésie ou accident, auxquels cas on la doit accorder. 5° A ceux qui ont été tués en duel, quand même ils auraient donné des marques de repentir avant leur mort. 6° A ceux qui,

sans excuse légitime, n'auront pas satisfait à leur devoir pascal, à moins qu'il n'ayent donné des marques de contrition. 7° A ceux qui sont morts notoirement coupables de quelque péché mortel, comme si un fidèle avait refusé de se confesser, et de recevoir les autres sacrements avant que de mourir, s'il était mort sans vouloir pardonner à ses ennemis, s'il avait été assez impie pour blasphémer sciemment et volontairement sans avoir donné aucun signe de pénitence. Il ne faudrait pas user de la même rigueur envers celui qui aurait blasphémé par folie ou par la violence du mal, car en ce cas les blasphèmes ne seraient pas volontaires, ni par conséquent des péchés. 8° Aux pécheurs publics qui seraient morts dans l'impénitence; tels sont les concubinaires, les filles ou femmes prostituées, les sorciers et les farceurs, usuriers, etc. A l'égard de ceux dont les crimes seraient secrets, comme on ne leur refuse pas les sacrements, on ne doit pas aussi leur refuser la sépulture ecclésiastique. Pour ce qui est des criminels qui auront été condamnés à mort et exécutés par ordre de la justice, s'ils sont morts pénitens, on peut leur accorder la sépulture ecclésiastique, mais sans cérémonie. Le curé ou vicaire y assiste sans surplis, et disent les prières à voix basse. Quand il y aura quelque doute sur ces sortes de choses, les curés nous consulteront ou nos grands vicaires."

The refusal of ecclesiastical burial to Guibord is not justified, and could not have been justified by either the 1st, 2nd, 4th, 5th, or 7th of the above rules.

To bring him within the 3rd rule it would be necessary to shew that he was excommunicated by name. That such a sentence of excommunication might be passed against a Roman Catholic in Canada, and that it might be the duty of the Civil Courts to respect and give effect to it their Lordships do not deny. It is no doubt true, as has already been observed, that there are now in Canada no regular Ecclesiastical Courts, such as existed and were recognized by the State when the province formed part of the dominions of France. It must, however, be remembered that a bishop is always a *judex ordinarius*, according to the canon law; and, according to the general canon law, may hold a Court and deliver judgment if he has not appointed an official to act for him. And it must further be remembered that, unless such sentences were recognized, there would exist no means of determining amongst the Roman Catholics of Canada the many questions touching faith and discipline which, upon the admitted canons of their Church, may arise among them. There is, however, no proof that any sentence of excommunication was ever passed against Guibord *nominatim* by the bishop or any other ecclesiastical authority. Indeed, it was admitted at the Bar that there was none; their Lordships are therefore relieved from the necessity of considering how far such a sentence, if passed, might have been examinable by the Temporal Court, when a question touching its legal effect and validity was brought before that Court.

It should be borne in mind that an issue was distinctly raised by the pleadings upon the fact of such a sentence; and the necessity of such a sentence to justify the refusal seems to be, to some extent, admitted by the allegation in the defendant's pleading that *le décret*, as it is there called, of the Administrator-General, was *un décret nominal*.

In the course of the argument it was suggested, rather than argued, that

Brown and Fabrique de Montréal.

the refusal of ecclesiastical burial in Guibord's case might be brought within the 6th of the above rules, and justified on the ground that, without legitimate reason, he had failed to communicate at Easter. But upon this their Lordships have to observe that this failure was not the ground on which ecclesiastical burial was denied to him; and that, so far from wilfully abstaining from receiving the sacraments of the Church, those sacraments were refused to him when he desired to receive them, simply because he continued to be a member of the Institute.

The cause of refusal finally insisted upon was that *Guibord* was "*un pécheur public*" within the meaning of the 8th rule.

This defence was set up for the first time in the replication.

The Administrator-General's evidence upon the point should be noticed:—

"Question.—Pour quelle raison feu Joseph Guibord, comme membre de l'Institut Canadien, ne pouvait-il pas être admis aux sacrements de l'Eglise?

"Réponse.—Parce que, comme tel, il est considéré comme pécheur public. On entend par pécheur public celui qui, pour une raison connue publiquement, ne peut participer aux sacrements de l'Eglise. M. Joseph Guibord, en appartenant à l'Institut Canadien, appartenait à un Institut qui se trouvait, comme il se trouve encore, sous les censures de l'Eglise par la raison qu'il possède une bibliothèque contenant des livres défendus par l'Eglise sous peine d'excommunication, *latæ sententiæ* encourue *ipso facto*, et réservée au Pape, par le fait de la possession des dits livres. Cette espèce d'excommunication s'encourt par le fait même, dès que l'on connaît la loi de l'Eglise qui en défend la lecture et la retenue, dès que cela parvient à la connaissance de ceux qui les possèdent. Cette excommunication a atteint M. Guibord par le fait même qu'il était membre l'Institut. Lorsqu'on est sous l'effet de la dite excommunication, quoique l'on puisse continuer à être membre de l'Eglise Catholique, et que, de fait, l'on continue à en être membre, l'on est privé de la participation aux sacrements, ce qui entraîne la privation de la sépulture ecclésiastique. Voilà pourquoi cette espèce de sépulture a été refusée à M. Guibord."

The evidence continues—

"Question.—Le dit feu Joseph Guibord, comme membre de l'Institut Canadien, était-il sous l'effet de l'excommunication, en vertu de quelque régle générale de l'Eglise seulement, ou en conséquence de quelque décret particulier?

"Réponse.—Il y était d'abord en vertu de la loi générale de l'Eglise, et en vertu de l'application qu'en a faite l'Evêque de Montréal par son mandement."

The evidence further continues—

"Question.—A quel mandement faites-vous allusion?

"Réponse.—C'est à celui produit en cette cause comme l'Exhibit B. de la Demanderesse.

"Question.—Est-il déclaré quelque part dans aucun mandement ou lettre pastorale émanant de l'Evêque de Montreal que le fait d'appratenir à l'Institut Canadien entraîne l'excommunication; et si vous répondez affirmativement, veuillez indiquer les termes qui décrètent telle chose?

Brown and Fabrique de Montréal.

"Réponse.—Ceci est déclaré dans l'annonce de Monseigneur de Montréal, que, en ma qualité d'administrateur, j'ai fait publier le quatorze Août mil huit cent soixante-et-neuf, laquelle annonce est produite comme pièce D. de la Demanderesse. Voici dans quels termes ceci est déclaré: 'Ainsi, nos très-chers frères, deux choses sont ici spécialement et strictement défendues, savoir: 1, de faire partie de l'Institut Canadien tant qu'il enseignera des doctrines pernicieuses; et 2, de publier, retenir, garder, lire l'Annuaire du dit Institut pour 1868. Ces deux commandements de l'Eglise sont en matière grave, et il y a par conséquent un grand péché à les violer sciemment. En conséquence celui qui persiste à vouloir demeurer dans le dit Institut, ou à lire ou seulement garder le sus-dit Annuaire, sans y être autorisé par l'Eglise, se prive lui-même des sacrements, même à l'article de la mort, parce que, pour être digne d'en approcher, il faut détester le péché, qui donne la mort à l'âme, et être disposé à ne plus le commettre.'

"Question.— Etre privé des sacrements et être excommunié, est-ce la même chose?

"Réponse.—Dans le cas présent c'est la même chose.

"Question.—L'excommunication, peut-elle être prononcée sans qu'il soit même fait usage du mot?

"Réponse.—Je ne suis pas prêt à répondre à cette question."

It is impossible wholly to avoid a suspicion that it had originally been intended to rely on an *ipso facto* excommunication, and that this subsequent defence of "*pécheur public*" was resorted to when it became manifest that a sentence of excommunication was necessary, and that none had been pronounced.

What is this category of "*pécheur public*" to include? Is the category capable of indefinite extension by means of the use of an *et cætera* in the Quebec Ritual? Or if the force of an *et cætera* is to be allowed to bring a man within the category of persons liable to what in ecclesiastical law is a criminal penalty, must it not be confined to offences *ejusdem generis* as those specified? Guibord's case did not come within any of the enumerated classes.

Some argument was raised as to the effect of the words, "*quand il y aura quelque doute sur ces sortes de chose les curés nous consulteront ou notre grand vicaire*;" but their Lordships are of opinion that these words can at most imply a duty on the part of the *curé* to consult the ordinary as to the application of the law in doubtful cases, not a power on the part of the ordinary to enlarge the law in giving those directions, or to create a new category of offenders.

To allow a discretionary addition to, or an enlargement of, the categories specified in the Ritual, would be fraught with the most startling consequences. For instance, the *et cætera* might be, according to the supposed exigency of the particular case, expanded so as to include within its ban any person being in habits of intimacy or conversing with a member of a literary society containing a prohibited book; any person visiting a friend who possessed such a book; any person sending his son to a school in the library of which there was such a book; going to a shop where such books were sold; and many other instances might be added. Moreover, the Index, which already forbids Grotius, Pascal, Pothier, Thuanus, and

Brown and Fabrique de Montréal.

Sismondi, might be made to include all the writings of jurists and all legal reports of judgments supposed to be hostile to the Church of Rome; and the Roman Catholic lawyer might find it difficult to pursue the studies of his profession.

Their Lordships are satisfied that such a discretionary enlargement of the categories in the Ritual would not have been deemed to be within the authority of the bishop by the law of the Gallican Church as it existed in Canada before the cession; and, in their opinion, it is not established that there has been such an alteration in the *status* or law of that Church founded on the consent of its members, as would warrant such an interpretation of the Ritual, and that the true and just conclusion of law on this point is, that the fact of being a member of this Institute does not bring a man within the category of a public sinner to whom Christian burial can be legally refused.

It would further appear that, according to the ecclesiastical law of France, a personal sentence was in most cases required in order to constitute a man a public sinner.

Jean de Pontas (Article 2, *des Cas de Conscience, vo. Sépulture*, A.D. 1715). says:—

"Un homme en France n'est point censé pecheur public, et ne peut être traité comme tel, à moins qu'il n'y ait une sentence déclaratoire rendue par le jugement ecclésiastique, contre le coupable.

"A propos d'un concubinaire public, pendant près de dix ans mort endurci dans le crime, sans avoir voulu se confesser, Pontas décide que 'le curé doit enterrer cet homme en observant toutes les formalités pratiquées par l'Eglise sans pouvoir ni s'absenter, ni feindre de refuser la sépulture ecclésiastique, sous prétexte d'intimider les autres pécheurs semblables, ni enfin ordonner à un autre prêtre de l'enterrer sans observer les cérémonies ordinaires.'"

Durand de Maillane (*Droit Canonique*, t. 5, p. 442) says:

"On ne reconnaît pour véritables excommuniés à fuir, que les Païens et les Juifs, ou les hérétiques condamnés et séparés ainsi totalement du corps des fidèles. Les autres coupable de différents crimes qu'ils n'expient point avant leur mort ne sont privés de la sépulture que lorsqu'ils sont dénoncés excommuniés, ou que leur impénitence finale est tellement notoire qu'on ne peut absolument s'en déguiser la connaissance. Le moindre doute tire le défunt hors du cas de privation, parce que chacun est présumé penser à son salut.

"Suivant les maximes du royaume, on ne prive de la sépulture ecclésiastique que les hérétiques séparés de la communion de l'Eglise, et les excommuniés dénoncés. La notoriété sur cette matière n'est pas absolument requise, parce qu'il y a des cas où il est très-nécessaire de faire respecter à cet égard les saintes lois de l'Eglise; mais elle n'est pas aisément reçue, à cause des inconvénients qui pourraient en résulter; car le refus de la sépulture est regardé parmi nous comme une, telle injure, ou même comme un tel crime, que chaque fidèle, pour l'honneur de la religion, et la mémoire ou même le bien de son frère en Jésus-Christ, est recevable à s'en plaindre. Cette plainte se porte devant des juges séculiers, parce qu'elle intéresse en quelque sorte le bon ordre dans la société, et l'honneur même de ses membres."

Héricourt (Lois Ecclésiastiques, p. 174):—

"Avant de dénoncer excommunié celui qui a encouru une excommunication *lata sententia*, il faut le citer devant le juge ecclésiastique, afin de justifier le crime qui a donné lieu à la censure et d'examiner s'il n'y aurait pas quelque moyen de défense légitime à proposer."

No personal sentence, such as is contemplated by these authorities, was, as already pointed out, ever passed against Guibord.

It is also to be borne in mind that no sentence, whatever might have been its value, was passed even after Guibord's death. There is indeed a letter called a *décret* of the Administrator-General to the *curé*, which, after referring to a letter of the bishop, written before Guibord's death, refuses ecclesiastical sepulture to him as a member of the Institute. The representatives of Guibord were neither summoned nor heard. This so-called *décret* had none of the essential elements of a judicial sentence.

It remains for their Lordships to co[illegible] the substantive law upon which the respondents rely in support o[illegible]tion that Guibord is to be considered a public sinner within the ter[illegible]ebec Ritual.

They appear to place their principal reli[illegible] on Rule X. of the Council of Trent.

"Omnibus fidelibus præcipitur ne quis audeat contra harum regularum præscriptum, aut hujus Indicis prohibitionem libros aliquos legere aut habere.

"Quod si quis libros hæreticorum vel cujusvis auctoris scripta ob hæresim vel ob falsi dogmatis suspicionem damnata, atque prohibita legerit vel habuerit, statim in excommunicationis sententiam incurrat."

Various observations arise on this citation, which seem to deprive it of all authority in the present case.

In the first place it is a matter almost of common knowledge, certainly of historical and legal fact, that the decrees of this Council, both those that relate to discipline and to faith, were never admitted in France to have effect *proprio vigore*, though a great portion of them has been incorporated into French *Ordonnances*. In the second place, France has never acknowledged nor received, but has expressly repudiated, the decrees of the Congr[illegible] of the Index.

Gilbert, in his Institutes, says that the *ipso facto* excommunication inflicted by the Council of Trent as the punishment of reading or possessing prohibited books would have no effect in France *dans le for extérieur*. Dupin, a jurist already mentioned, denies the authority in France of the decrees of the Congregation. He says:—

"En effet, en consultant les précédents, on trouve un célèbre arrêt du Parlement de Paris qui l'a jugé ainsi en 1647, après un éloquent plaidoyer de l'Avocat-Général Omer Talon:—

"'Nous ne reconnaissons point en France,' dit ce magistrat, *l'autorité, la puissance, ni la juridiction des congrégations qui se tiennent à Rome; le Pape peut les établir comme bon lui semble dans ses Etats;* mais les décrets de ces congrégations n'ont point d'autorité ni d'exécution dans le royaume . . . *Il est vrai que dans ces congrégations se censurent les livres défendus, et dans*

Brown and Fabrique de Montréal.

icelles se fait l'index expurgatorius, *lequel s'augmente tous les ans ; et c'est là où autrefois ont été censurés les arrêts de cette cour rendus contre Chastel, les œuvres de M. le Président de Thou, les libertés de l'Eglise Gallicane, et les autres livres qui concernent la conservation de la personne de nos rois et l'exercice de la justice royale,'" &c.* (Dupin, Droit Public Ecclésiastique, avertissement sur le 4me édition.

No evidence has been produced before their Lordships to establish the very grave proposition that Her Majesty's Roman Catholic subjects in Lower Canada have consented, since the cession, to be bound by such a rule as it is now sought to enforce, which, in truth, involves the recognition of the authority of the Inquisition, an authority never admitted but always repudiated by the old law of France. It is not, therefore, necessary to inquire whether since the passing of the 14 Geo. 3, c. 83, which incorporates (s. 5) the 1 Eliz. already mentioned, the Roman Catholic subjects of the Queen could or could not legally consent to be bound by such a rule.

The conclusion, therefore, to which their Lordships have come upon this difficult and important case is that the respondents have failed to shew that Guibord was at the time of his death under any such valid ecclesiastical sentence or censure as would, according to the Quebec Ritual, or any law binding upon Roman Catholics in Canada, justify the denial of ecclesiastical sepulture to his remains.

It is, however suggested that the denial took place, in fact, by the order of the bishop or his vicar-general; that the respondents are bound to obey the orders of their ecclesiastical superior; and, therefore, that no mandamus ought to issue against them. Their Lordships cannot accede to this argument. They apprehend that it is a general rule of law in almost every system of jurisprudence that an inferior officer can justify his act or omission by the order of his superior only when that order has been regularly issued by competent authority.

The argument would, in fact, amount to this: that even if it were clearly established that Guibord was not disentitled by the law of the Roman Catholic Church to ecclesiastical burial, nevertheless the mere order of the bishop would be sufficient to justify the *curé* and "*marguilliers*" in refusing to bury him in that part of the parochial cemetery in which he ought on this hypothesis to be interred; or, in other words, the bishop, by his own absolute power in any individual case, might dispense with the application of the general ecclesiastical law, and prohibit upon any grounds, revealed or not revealed, satisfactory to himself, the ecclesiastical burial of any parishioner. There is no evidence before their Lordships that the Roman Catholics of Lower Canada have consented to be placed in such a condition.

Their Lordships do not think it necessary to consider whether, if the parties and circumstances of the suit had been different, they would or would not have had power to order the interment of Guibord to be accompanied by the usual religious rites, because the widow finally forewent this demand, and Counsel at their Lordships' bar have not asked for it, and also because the *curé* is not before them in his individual capacity; but they will humbly advise Her Majesty that

Brown and Fabrique de Montréal.

the decrees of the Court of Queen's Bench and of the Court of Review be reversed. That the original decree of the Superior Court be varied, and that, instead of the order made by that Court, it should be ordered that a peremptory writ of mandamus be issued, directed to "*Les Curé et Marguilliers de l'Œuvre et Fabrique de Notre Dame de Montréal*," commanding them, upon application being made to them by or on behalf of the *Institut Canadien*, and upon tender or payment to them of the usual and accustomed fees, to prepare, or permit to be prepared, a grave in that part of the cemetery in which the remains of Roman Catholics, who receive ecclesiastical burial, are usually interred, for the burial of the remains of the said Joseph Guibord; and that, upon such remains being brought to the said cemetery for that purpose at a reasonable and proper time, they do bury the said remains in the said part of the said cemetery, or permit them to be buried there. And that the defendants do pay to the Canadian Institute all the costs of the widow in all the lower courts, and of this appeal, except such costs as were occasioned by the plea of *recusatio judicis*, which should be borne by the appellants.

Their Lordships cannot conclude their judgment without expressing their regret that any conflict should have arisen between the ecclesiastical members of the Roman Catholic Church in Montreal, and the lay members belonging to the Canadian Institute.

It has been their Lordships' duty to determine the question submitted to them in accordance with what has appeared to them to be the law of the Roman Catholic Church in Lower Canada.

If, as was suggested, difficulties should arise by reason of an interment without religious ceremonies in the part of the ground to which the mandamus applies, it will be in the power of the ecclesiastical authorities to obviate them by permitting the performance of such ceremonies as are sufficient for that purpose, and their Lordships hope that the question of burial, with such ceremonies, will be reconsidered by them, and further litigation avoided.

The following is a copy of the decree of the Privy Council which followed upon the above judgment:—

At the Court, at Windsor Castle, the 28th of November, 1874. Present the Queen's Most Excellent Majesty, Lord President, Earl of Derby, Mr. Secretary Cross.

Whereas there was this day read at the Board a Report from the Judicial Committee of the Privy Council, dated the 21st of November, instant, in the words following, viz.:

"Your Majesty having been pleased by your General Order in Council of the 3rd November, 1871, to refer unto this Committee the matter of a humble appeal between Dame Henrietta Brown, appellant, and the curate and churchwardens of the Parish of Montreal, respondents, and likewise, a humble petition of Dame Henrietta Brown, of Montreal, in the Province of Quebec, Canada, setting forth that the appellant's late husband, Joseph Guibord, died on the 18th day of November, 1869, and burial in the Roman Catholic Cemetery at Montreal having been refused to his remains, the appellant applied by petition to the Superior Court of the Province of Quebec, Canada, for a writ of Mandamus,

Brown and Fabrique de Montreal.

commanding the curate and churchwardens of the Parish of Montreal, on payment by the appellant of the usual fees, to inter or cause to be interred within eight days from the judgment to be rendered, in the Roman Catholic Cemetery of Côte des Neiges, under their control and administration, the body of the said Joseph Guibord, according to custom and law, and further to insert in the civil registers kept by them the certificate of the said interment of the said Joseph Guibord; that a writ was accordingly issued by order of a Judge of the said Court, commanding the said curate and churchwardens of the said Parish of Montreal to perform the said acts and duties, or to show cause to the contrary, which writ, together with the appellant's aforesaid petition, was duly served upon the said curate and churchwardens of the said Parish of Montreal; that the said curate and churchwardens duly appeared and pleaded, and issue having been joined and evidence taken, the whole case was heard upon the merits, and on the 2nd day of May, in the year of our Lord 1870, the Superior Court gave judgment in favor of the appellant, and ordered a peremptory writ of mandamus to issue, commanding the said curate and churchwardens to perform the said acts and duties hereinbefore set forth; that the said curate and churchwardens inscribed the case for review, and on the 10th day of September, in the year of our Lord 1870, the Court gave judgment reversing the said judgment of the 2nd of May in the year of our Lord 1870, and quashing the said writ of mandamus; that the appellant duly appealed from the said judgment to the Court of Queen's Bench for Canada, Province of Quebec; that on the 2nd day of December, in the year of our Lord 1870, the appellant presented petitions of recusation against four of the judges of the said Court of Queen's Bench; that on the 9th day of December, in the year of our Lord 1870, the said Court of Queen's Bench gave judgment declaring the said petitions inadmissible; that the four judges against whom the said petitions of recusation were presented took part in this judgment; that the said Court of Queen's Bench proceeded to hear the case on the merits, and on the 7th day of September, in the year of our Lord 1871, gave judgment dismissing the appeal with costs; that the four judges against whom the petitions in recusation were presented took part in the said judgment; that the appellant feeling herself aggrieved by the said judgment of the Court of Revision of the 10th day of September, in the year of our Lord 1870, and the said judgments of the Court of Queen's Bench of the 9th day of December in the year of our Lord 1870, and the 7th day of September in the year of our Lord 1871, applied to the said Court of Queen's Bench for leave to appeal to Your Majesty in Council, and the said Court of Queen's Bench granted such leave upon the usual terms, which have since been duly complied with, and humbly praying that Your Majesty in Council will be pleased to take her said appeal into consideration, and that the said judgment of the Court of Revision of the 10th day of September, in the year of our Lord 1870, and the said judgments of the Court of Queen's Bench of the 9th day of December, in the year of our Lord 1870, and the 7th day of September, in the year of our Lord 1871, may be reversed, set aside, altered or varied, or other relief in the premises.

"And Your Majesty having likewise been pleased by your General Order in Council of the 27th November, 1872, to refer unto this Committee a humble

petition of the Institut Canadien, setting forth that the petitioners are a body corporate, incorporated by a Canadian Statute, 16 Vic., c. 261; that on the 24th November, 1869, Dame Henriette Brown, the late appellant, now deceased, applied by petition to the Superior Court of the Province of Quebec, Canada, for a writ of mandamus, commanding the curate and churchwardens of the Parish of Montreal, on payment by the said Dame Henriette Brown of the usual fees, to inter or cause to be interred within eight days from the judgment to be rendered, in the Roman Catholic Cemetery of Côte des Neiges, under their control and administration, the body of Joseph Guibord, according to custom and law, and, further, to insert in the civil registers kept by them the certificate of the said interment of the said Joseph Guibord; that a writ was accordingly issued by order of a judge of the said Court, commanding the said curate and churchwardens of the said Parish of Montreal to perform the said acts and duties, or to show cause to the contrary, which writ, together with the petition of the said Dame Henriette Brown, was duly served upon the said curate and churchwardens of the said Parish of Montreal; that the said curate and churchwardens duly appeared and pleaded, and issue having been joined and evidence taken, the whole case was heard on the merits, and on the 2nd day of May, in the year of our Lord 1870, the Superior Court gave judgment in favor of the said Dame Henriette Brown, and ordered a peremptory writ of mandamus to issue, commanding the said curate and churchwardens to perform the said acts and duties hereinbefore set forth; that the said curate and churchwardens inscribed the case for review, and on the 10th day of September, in the year of our Lord 1870, the Court gave judgment, reversing the said judgment of the 2nd day of May in the year of our Lord 1870, and quashing the said writ of mandamus; that Dame Henriette Brown duly appealed from the said judgment of the Court of Queen's Bench for Canada, Province of Quebec; that on the 2nd day of December, in the year of our Lord 1870, Dame Henriette Brown presented petitions of recusation against four of the judges of the said Court of Queen's Bench; that on the 9th day of December, in the year of our Lord 1870, the said Court of Queen's Bench gave judgment declaring the said petitions inadmissible; that the four judges against whom the said petitions of recusation were presented took part in this judgment; that the said Court of Queen's Bench proceeded to hear the case on the merits, and on the 7th day of September, in the year of our Lord 1871, gave judgment dismissing the appeal with costs; that the four judges against whom the petitions in recusation had been presented took part in the said judgment; that the said Dame Henriette Brown obtained leave to appeal to Your Majesty in Council, and on the 12th June, 1872, a petition of appeal by the said Dame Henriette Brown against the said judgments of 10th September, 1870, 9th December, 1870, and 7th September, 1871, was duly filed, which appeal is now pending before this Committee; that the said Dame Henriette Brown died, and was buried on the 2nd April, 1873; that the said Dame Henriette Brown, by her will dated 22nd October, 1870, gave and bequeathed to the petitioners all her goods, movable and immovable, rights, claims and actions, without any exception; that at a meeting of the Board of Directors of the Institut Canadien, held the 2nd of April, 1873, it was resolved to except the

Brown and Fabrique de Montréal.

said legacy, and to continue the said Appeal hereinbefore mentioned; that on the 15th of April, 1873, probate of the said will, with benefit of inventory, was granted to the petitioners, by Mr. Justice Mackay, one of the judges of the said Superior Court for the Province of Quebec, Canada; that by the Code of Procedure for the Province of Quebec, Canada, it is provided by sections 436 and 437, that in case of the death of the party to a suit his attorney shall give notice thereof to the opposite party, and that the suit shall be suspended until its continuance by those interested; and by section 438 that a suit may be continued by the heirs or representatives of the deceased party, and humbly praying that Your Majesty in Council will grant leave to the petitioners to continue the said Appeal; and the lords of this Committee, having taken the said humble petition into consideration, and humbly reported to Your Majesty on the 20th May, 1873, as their opinion, that the said Institut Canadien ought to be allowed to continue the said appeal without prejudice to any question which may be raised before their Lordships, on the hearing of this Appeal, as to the competency of the Institut Canadien, as universal legatee of the late appellant, Dame Henriette Brown, to continue the appeal, and that on these terms the said appeal ought to be revived accordingly; and to stand in the same plight and condition as it was in at the time of the death of the said late appellant; and your Majesty having been pleased, by and with the advice of your Privy Council, to order, by Your Majesty's Order in Council of the 26th June, 1873, that the said 'Institut Canadien' be allowed to continue the said appeal without prejudice to any question which may be raised on the hearing thereof, as to the competency of the 'Institut Canadien,' as universal legatee of the late appellant Dame Henriette Brown, to continue the appeal, and that on these terms the appeal be, and the same was thereby revived accordingly, and should stand in the same plight and condition as it was in at the time of the death of the said appellants. The Lords of the Committee, in obedience to Your Majesty's said General Order of reference, have taken the said humble petition and appeal into consideration, and having heard counsel on behalf of the 'Institut Canadien,' and also on behalf of the said Curé and Marguilliers of the Parish of Montreal, in Canada, their Lordships do this day agree humbly to report to Your Majesty, as their opinion, that the decree or judgment of the Court of Queen's Bench for the Province of Quebec, of the 7th September, 1871, and the decree of the Superior Court in Review of the 16th September, 1870, ought to be reversed; and that the original decree of the Superior Court of the 2nd May, 1870, ought to be varied, and that instead of the said last mentioned decree, it should be ordered that a peremptory Writ of Mandamus be issued, directed to 'Les Curé et Marguilliers de L'Œuvre et Fabrique de Notre Dame de Montréal,' commanding them upon application being made to them by or on behalf of the Institut Canadien, and upon tender or payment to them of the usual and accustomed fees, to prepare, or permit to be prepared, a grave in that part of the cemetery in which the remains of Roman Catholics who receive ecclesiastical burial are usually interred, for the burial of the remains of the said Joseph Guibord; and that upon such remains being

Brown and Fabrique de Montréal.

brought to the said cemetery for that purpose, at a reasonable and proper time, they do bury the said remains in the said part of the said cemetery, or permit them to be buried there, and that the respondents do pay to the Canadian Institute all the costs of the widow in all the lower Courts, except such costs as were occasioned by the plea of *recusatio judicis*, which should be borne by the present appellants.

"And in case Your Majesty should be pleased to approve of this Report, and to order as is herein recommended, then their Lordships do direct that there be paid by the respondents to the present appellants the sum of one thousand and seventy-nine pounds eighteen shillings and four pence, sterling, for the costs of this appeal."

Her Majesty having taken the said report into consideration, was pleased, by and with the advice of Her Privy Council, to approve thereof, and to order, as it is hereby ordered, that the said decree of the Court of Queen's Bench for the Province of Quebec, of the 7th September, 1871, and the decree of the Superior Court in Review of the 10th September, 1870, be, and the same are hereby reversed with costs; and Her Majesty is further pleased to order that the original order of the said Superior Court of the 2nd May, 1870, be varied, and that, instead of the said Order, it should be ordered that a peremptory Writ of Mandamus be issued, directed to "Les Curé et Marguilliers de l'Œuvre et Fabrique de Notre-Dame de Montréal," commanding them, upon application being made to them by or on behalf of the "Institut Canadien," and upon tender or payment to them of the usual and accustomed fees, to prepare, or permit to be prepared, a grave in that part of the cemetery in which the remains of Roman Catholics who receive ecclesiastical burial are usually interred, for the burial of the remains of the said Joseph Guibord, and that upon such remains being brought to the said cemetery for that purpose, at a reasonable and proper time, they do bury the said remains in the said part of the said cemetery, or permit them to be buried there; and it is further ordered that the defendants do pay to the Canadian Institute all the costs of the widow in all the lower Courts, except such costs as were occasioned by the plea of *recusatio judicis*, which should be borne by the appellants; and likewise the sum of one thousand and seventy-nine pounds, eighteen shillings and four pence sterling, for the costs of this appeal. Whereof the Governor-General, Lieutenant-Governor, or Commander-in-Chief of the Dominion of Canada, for the time being, and all other persons whom it may concern, are to take notice and govern themselves accordingly.

(Signed,) E. HARRIS.

Few & Co., solicitors for the appellant.

Ashurst, Morris & Co., solicitors for the respondents.

(J. K.)

COURT OF QUEEN'S BENCH, 1876.

MONTREAL, 1st SEPTEMBER, 1876.

Coram DORION, C. J., MONK, RAMSAY, SANBORN AND TESSIER, JJ.

Beaudry vs. *Denis*.

HELD:—That in the cities of Montreal and Quebec, the Superior Court has original jurisdiction, to the exclusion of the Circuit Court in a case between lessor and lessee to rescind a lease, where the amount of rent or damages demanded exceeds $100.

DORION, C. J.—This is a motion, by the defendant, for leave to appeal from an interlocutory judgment of the Superior Court at Montreal, dismissing a declinatory exception. The action is to recover $120, balance of rent, and to rescind a lease. The exception alleges want of jurisdiction, because such a case falls within the jurisdiction of the Circuit Court under Article 1105 of the Code of Civil Procedure, and Art. 887, which expressly relates to actions for the rescission of leases, provides that these actions shall be instituted in the Superior Court or the Circuit Court according to the amount of rent or damages alleged. The Superior Court has jurisdiction in all cases in which exclusive jurisdiction is not given to the Circuit Court (Art. 28), and by Art. 1054 exclusive jurisdiction, subject to appeal, was given to the Circuit Court in all cases wherein the amount demanded is above $100 and does not exceed $200. This article has, however, been amended by 34 Vict. c. 4, s. 9, and by 35 Vict. c. 6, s. 31, so as to exclude from its operation the Circuit Court sitting in the cities of Montreal and Quebec. From the passing of these statutes the Circuit Court at Montreal ceased to have any jurisdiction in appealable cases, and sect. 25 of the Act last cited has gone to the extent of providing that proceedings in all appealable suits, then pending, should be continued in the Superior Court, and the books and records transmitted thereto. Art. 1105 is virtually repealed by the statutes already cited as regards the jurisdiction of the Circuit Court in the cities of Quebec and Montreal in appealable cases between lessors and lessees. We have so held it in the case of Bergeron and Beauchamp, decided in December, 1874. As the defendant could obtain no relief, his motion for leave to appeal is refused.

There is some confusion between Articles 887 and 1105, which has arisen from bringing up the law from the Statutes. In the original Statute as found in Consol. Stat. L. C., c. 40, the jurisdiction of the Court was determined by the annual value or annual rent without regard to the amount demanded. This was amended by 25 Vict. c. 12, s. 1, which seems to settle that the jurisdiction is determined by the amount of rent or damages sued for. Taking into consideration the law as it existed when the Code of Procedure was framed, and the difference in the terms made use of in Articles 887 and 1105, it is fair to determine the jurisdiction of the Court by the amount of rent or damages claimed, and not by the annual value or the rent as Art. 1105 might seem to indicate.

Motion dismissed.

A. Dalbec, for the plaintiff.

Longpré & Dugas, for the defendant.

(J.K.)

COURT OF QUEEN'S BENCH, 1876.

MONTREAL, 22ND SEPTEMBER, 1876.

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

No. 10.

LOUIS A. JETTÉ *et al.*,

(*Plaintiffs in the Court below,*)

AND APPELLANTS;

WILLIAM McNAUGHTON,

(*Defendant in the Court below,*)

RESPONDENT.

HELD:—1. That the sale of land in lots at public auction is governed by the French law.

2. That each adjudication of a lot is a separate contract.

3. By the majority of the Court (MONK, RAMSAY and TESSIER, JJ.):—That a single false bid on any lot sold destroys the consent of the purchaser of such lot and renders the sale null and void, even without proof of fraud and damage.

4. That the presence of false bidders who bid on some of the lots offered does not annul the sale of a lot on which there was no false or by-bidding, unless the purchaser of such lot alleges and proves fraud on the part of the vendor, and damage to himself by the enhancement of the price above the current value. (1)

By the minority (DORION, C. J., and SANBORN, J.)—That such by-bidding is a cause of nullity only where the purchaser shows that he has suffered damage therefrom. That in this case if there was by-bidding on any of the lots sold to the defendant, it caused him no damage, and therefore the sale should be enforced.

By RAMSAY, J.:—That by-bidding where extensively practised at an auction sale is a fraudulent breach of the contract implied in a sale by auction, and therefore annuls the adjudications even of lots on which there was no by-bidding unless the vendor clearly establishes that the purchaser was in no respect injured by the by-bidding at the sale generally.

This was an appeal from the judgment of the Superior Court, TORRANCE, J., reported in the 19th L. C. Jurist, 153–157.

The reasons of the judgment appealed from were as follows:—

The Court, having heard the parties by their counsel respectively, as well as on the motions of plaintiffs made at hearing to revise rulings at the trial, as upon the merits of this cause, examined the proceedings, proof of record and heard the witnesses in open Court, and on the whole maturely deliberated: doth reject said motions with costs, and

Considering that defendant hath failed to prove the allegations of his fourth and fifth pleas, namely, the pleas following immediately after the pleas hereafter maintained, doth overrule the same, and considering that before the institution of this action, the precise depth of the [illegible] mentioned in the second condition

(1) REPORTER'S NOTE.—While this report was passing through the press, the reporter was favored by the Hon. Mr. Justice Tessier with a note of the points decided by the majority of the Court, which, in view of the importance of the case, is here appended:—

DECIDE:—1o. Qu'une seule fausse enchère prouvée sur le lot vendu détruit le consentement de l'acquéreur et rend la vente nulle, sans qu'il soit nécessaire de prouver fraude et dommage.

2o. Que la présence de faux enchérisseurs qui enchérissent sur d'autres lots que le lot vendu, ou qui n'enchérissent pas du tout ne peut annuler cette vente qu'à la condition d'alléguer et prouver fraude du vendeur et préjudice à l'acquéreur en raison d'un prix au-dessus de la valeur courante de la chose achetée, ce qui n'a pas été prouvée dans le cas actuel.

Jetté et al., and McNaughton.

of the sale in question in this cause, had not been determined by the plaintiffs or by the Government of the Dominion;

Considering further that the plaintiffs before and at the sale of the lots of land had, on the tenth October last, represented that the purchasers should have right of communication to the Lachine Canal through said reserve which they had not;

Considering further that the plaintiffs illegally and fraudulently employed more than one by-bidder, or puffer, to bid up the price of the lots offered at the said sale, and that false bids were in consequence made at the said sale; Doth grant the conclusions of the defendant's first, second and third pleas, called respectively: First, "*Exception péremptoire au fonds en droit;*" second, "*Exception péremptoire au fonds en droit;*" and third, "*Exception péremptoire en droit,*" and doth in consequence annul and declare null the purchase made by the defendant of the lots in question on the tenth October last, and finally the Court doth dismiss plaintiffs' action and *demande* with costs *distraits*, etc.

The plaintiffs appealed from the above judgment.

SANBORN, J. (*diss.*) This is a case involving a considerable amount, and one that has elicited much interest. It is not mere idle compliment to say that it has been treated with unusual ability and research by the learned counsel on both sides. In dealing with the case the three questions that form the *motifs* of the judgment in the Court below are all that require to be considered. The fourth and fifth exceptions of respondent were overruled in the Court below, and this part of the judgment being favor of appellants, and not appealed against by respondents, may be considered as not before this Court. At all events, the respondent's counsel, at the argument, appears to have abandoned the grounds urged in these exceptions, as not sustained by proof.

With regard to the first *motif* of the judgment, that the precise depth of the reserve, made from the lots exposed for sale, for the enlargement of the canal, was not determined by the appellants or the Government, which formed one of the conditions precedent to the purchaser's taking title, I would observe that the conditions of sale, as I understand them, contain an alternative. The purchaser may, at the time of the sale, declare his option to have one of two things. He may take the lot or lots, for which he is the highest bidder, down to the reserve for widening the canal, or he may take the whole, including the reserve, with the right to the indemnity for the portion expropriated, the settlement of expropriation to be between the Government and the appellants. The stipulation in the conditions of sale respecting the determining of the exact width of the reserve has reference to the sale accepted under the first condition of the alternative, that is, the purchase of the lots, the reserve to be taken out. The purchaser declaring his option to purchase lots, from which the reserve was to be decucted, would require to have the exact depth of the reserve determined before he could be compelled to accept a deed. It would be, in fact, a necessity to the fixing of the consideration as the lots were sold by the foot. The necessity of separating the reserve portion from the rest, when the purchaser declares his option to take the whole, ceases. The widening of the canal was a contingency, hat depended upon the action of the Government, directed by motives of public

policy. It might take place soon, or late, or never, and might or might not be on the side of the canal where these lots were. Neither party can be supposed to have acted upon a certainty as to what the Government might do in the matter. It was only the probabilities, from the apparent facts upon which they could act. It would be a corrupt agreement that should be based upon the assurance that the Government had bound itself to settle a matter of public policy or interest in some certain way to subserve private purposes. Neither of the parties can be understood as contracting, so far as the subject of the contract depended upon the course the Government would pursue as to the widening of the canal, or the time or manner of doing it, otherwise than upon the probabilities from the facts known to each. Any other supposition would imply on the part of both parties a disposition to make a corrupt contract, which cannot be presumed.

As to the second *motif*, namely, that the purchasers, according to the conditions of sale, should have a right of communication to the Lachine Canal, which they had not; referring to the terms of sale, as read by the auctioneer, before and at the time and place of sale, this is found in the French language, "*jusqu'a l'expropriation, les acquéreur auront le droit de communiquer à la barge du canal par la réserve sus-mentionée.*" In the notice in English the expression is, "up to the date of expropriation the purchasers shall have the right of communication with the bank of the canal, through such reserved portion." According to my view of this condition, it is immaterial which version is taken, if there is any difference in the meaning, because I do not consider that the object of this condition was to give any right over public property. What the vendors here bound themselves to do was to allow the purchasers to pass through the reserve. It could only have effect, in case the reserve was retained by the sellers. It certainly cannot be understood as binding the sellers to allow the purchasers to pass through their own property, which would be the case if it applied to the contingency of the purchasers choosing to buy the reserve. If it were susceptible of any other interpretation, and this Court were bound to determine whether the terms did not bind the sellers to guarantee communication over public property to the canal proper, I should say for reasons already given, that such an intention cannot be presumed. This canal, and the land contiguous to it and accessory to it, the Government hold as a great highway, which the whole Dominion has a right to use, subject to such rules and conditions as shall be determined in the interest of all. No private individual could have any servitude upon it. It must be understood that the purchasers took their chances of making terms with the Government, and were expecting to get only such advantages as the lots presented, as contiguous to the canal property, and such privileges as could be granted by the Government, subject to, and subordinate to, the rights and interests of the general public.

The third *motif*, "that the appellants illegally and fraudulently employed more than one by-bidder or puffer to bid up the price of the lots offered at the said sale," affirms that the employment of by-bidders or puffers generally at the sale, vitiates every separate sale, even where the actual purchaser is not affected by such by-bidding, and the price is not enhanced by the bids of more than one puffer against him. This renders the consideration of the question whether each

Jette et al., and McNaughton.

individual purchase is a separate contract, of considerable importance in this case. Though it has been q[illegible] now well settled in English law, that the purchase of each [illegible] when knocked down to the same purchaser, is a separate and distinct contract. (See Smith's Mercantile Law, p. 317. 1 Parsons on Contracts, 417. Roots *vs.* Lord Dormer, 4 B. and Ad., 77.) In this case it is not proved that any but real *bona fide* purchasers bid against McNaughton, unless it be upon lot No. 12. As to this last mentioned lot, Frigon, who ran up the price competing with respondent, has been examined, and he says he was bidding for himself in good [illegible] If he was a puffer he was the only one, as respects this lot. Does the employment of puffers at a sale of many lots, vitiate the sale of separate lots to purchasers, where puffers have not bid or enhanced the value of the property? This may be answered in the affirmative or negative, as one interprets the law. The affirmative is not necessarily approved by the authorities cited from English and American decisions, supposing them to be declaratory of the principles of our law. In the famous case of Bexwell *vs.* Christie, the question arose in this way. An auction of a gentleman's property took place, and Bexwell sent to this auction a horse to be sold, with charge to the auctioneer not to sell it for less than £15. It was sold for £7 and Bexwell sued the auctioneer for the difference. Lord Mansfield held that he had no right to make such a stipulation, that it involved by-bidding and a fradulent enhancement of the price of the property to the purchaser. In the case of Howard *vs.* Castle, the sale was of one immoveable, and the sale was held bad, because the price had been enhanced by false bidding. In the case of Wheeler *vs.* Colyer, there was only one property sold, and there were two puffers, and Lord Kenyon decided that the sale was fraudulent, because two false bidders made bids against the purchaser. In the case of Connelly *vs.* Parsons the complaint was the same, the bidding of puffers against the purchaser. In this case Lord Chancellor Rosslyn refused to accept the dictum of Lord Mansfield in Bexwell *vs* Christie, as too philosophical and abstract for the practical business of the world. In the case of Smith *vs.* Clarke, one by-bidder was held not to vitiate a sale, when the bidding was to prevent the property being sacrificed. In this case the bidding of the by-bidder was against the purchaser on the property sold. Sir William Grant adopted a middle ground between that of Lord Mansfield and Lord Rosslyn, and remarked that Lord Mansfield went much further in Bexwell *vs.* Christie, in the assertion of abstract principles than the particular case required. In the case of Veasey *vs.* Williams, in the Supreme Court of the United States, the auctioneer bid against the purchaser, and ran up a mill property some $[illegible],000 more than was bid by any disinterested person. This was held a fraud on the purchaser. None of these cases are like this, and cannot, even if considered as illustrative of the principles of our law, be held as conclusive precedents in this case. Lord St. Leonards, in his work on Sales, p. 9, says "although great authorities have differed on the subject, yet the better opinion appears to be that a bidder may be privately appointed, in order to prevent the estate from being sold at an undervalue. Clearly the same rule ought to be adopted at law and in equity." If the sale of the lots not purchased by respondent had been made on a previous

day, and puffers had attended and bid on divers lots for appellants, and the sale was adjourned to the next day and no puffers bid against respondent, would his sale be voided because puffers attended and bid the day before on lots in which he had no interest? At all events the common law cases cited only go the length of saying that the purchaser can complain of false bidding to increase the value of the property which is adjudged to him. It is what has operated to his disparagement, that he has legal interest to complain of. This case must be determined by our law, applicable to contract of sale. See art. 1568 C. C. Article 993 declares fraud to be a cause of nullity, when the artifices practised by one party, or with his knowledge, are such that the other party would not have contracted without them, it is never presumed and must be proved. This positive law does not require explanation. It is specific. It is not new law; very old. The distinction is clearly laid down in the Roman Law, between *dolus malus* and *sglertia*, which is recognized by Pothier when he speaks of what is binding in the *for intérieur* and the *for extérieur*; the one as Mr. William Story, in his work on sales, p. 145, says means conscience, which is governed by principles of morality only, while the other means the Courts of Law. We find in the digest Lib. 4, Tit 4, sec. 16, "*In pretio emptionis et venditionis naturaliter licet contrahentibus circumvenire.*" In regard to the [illegible] governed by the *for extérieur*, Pothier gives the doctrine of the law very fully in his treatise on Obligations, Nos. 30 and 31, which is precisely that enunciated in our Code, art 993. The doctrine as given by Pothier is, that where the fraud is merely incident to the contract, that is, when a party intending previously to contract is merely deceived *in modo contrahendi*, the contract is not thereby vitiated, but the party defrauded has a claim of damages to the extent of his injury. Story tell us that "this distinction does not, however, obtain in the Common Law, nor is it admitted in equity." This is an important distinction to be borne in mind in weighing the English authorities as bearing upon this case. Demolombe, vol. 24, No. 176, gives, in the clearest manner, the law upon this subject in the same sense as Pothier. Pothier makes the same distinction between the *for extérieur* and the *for intérieur*, in case of concealment by the seller, of facts which might influence the buyer in not giving so a high price. Contrat de vente No. 242, referring to Cicero de Officiis speaking of the case of a merchant having arrived at Rhodes in time of scarcity, before a great number of vessels laden with corn, exposes his own cargo for sale. Cicero enquires whether this merchant is obliged to inform the buyers that there is a great number of other vessels upon the point of arriving. Cicero answers in the affirmative. Pothier remarks, this question belongs to the forum of conscience, for there is no doubt that in the exterior forum, the buyer is not entitled to complain that the seller has not informed him of circumstances extrinsic to the thing sold, however much he may be interested in knowing them, and he adds that the decision of Cicero meets with much difficulty even in the forum of conscience. The greater number of those who have written upon natural laws have regarded it as going too far. If we are to take writers upon the Stoic philosophy as authority upon practical questions of law, we might as well go back to Diogenes, who, an earlier exponent of that philoso-

Jetté et al. and McNaughton.

phy, decides this question in a sense quite adverse to Cicero. But if our decisions are to be upon abstract principles of morality, in a country whose laws are based upon the maxims of Christian morality, we have an authority higher than any of the Stoic philosophers, who has said, "whatsoever ye would that men should do to you, do ye even so to them." On this subject of concealment, the Common Law appears to be in accord with the Civil Law. In a case of Laidlaw *vs.* Organ, 2 Wheaton 178, where one Shepherd, interested with Organ, and in treaty with a member of the firm of Laidlaw & Co., at New Orleans, for a quanity of tobacco, had secretly received intelligence over night of the peace of 1815, between England and the United States, which raised the value of the article from 30 to 50 per cent, Organ called on Gerault on Sunday morning a little before sunrise, and was asked if there was any news by which the price of it might be enhanced, but there was no evidence that Organ had suggested or asserted anything to induce a belief that such news did not exist, and, under the circumstances, the bargain was struck. Chief Justice Marshall delivered the opinion of the Court, to the effect that the buyer was not bound to communicate intelligence of extrinsic circumstances which might influence the price, though it were exclusively in his possession, and that it would be difficult to circumscribe the contrary doctrine within proper limits, where the means of intelligence are equally accessible to both parties.

Applying the test of our positive law as to the effect of fraudulent artifices to the case before us, I can find no evidence in the record to establish that McNaughton was influenced in his purchase of the lots in question by the artifices that were used at the sale generally. By his own evidence and his admissions to McLellan, it appears that he purchased upon his own judgment, as to the value of them. He bought with a definite purpose, and as to the extrinsic facts relating to the action of the Government, the knowledge of them was as accessible to him as to appellants. There was no guaranty and could be no guaranty respecting them. Besides, he has brought an action claiming large damages, alleging that appellants are not in a position to convey to him the lots purchased, with their accessories, according to the terms of the sale as he understands them. This certainly negatives the pretensions that he was induced to give a higher price for these lots, because of the pretence of false bidders at the sale. There is also the fact, which bears forcibly on this matter of inducement so far as by-bidders are concerned that he was recognizant of the practice at such sales generally, and that he himself had acted recently as a by-bidder at another sale. However censurable the practice is in a moral point of view, he appears to have been an adept in it, and was not deceived thereby. This appears by the deposition of Barsalou. In this connection I would observe that to determine whether the artifice of using by-bidders was such as would influence the respondent in his purchase, it is important to know whether such practice is usual at such auction sales, and that respondent was cognizant of this fact. This evidence was tendered, and I think it ought to have been allowed, to enable the Court to judge upon a very material question at issue. The action of respondent for damages for non-execution of the contract is a species of confirmation of the contract, and precludes the respondent from afterwards seeking to rescind it by reason of

fraudulent practices as an inducement to entering into it. Parsons, in his work on Mercantile Law, p. 57, says, "If the purchaser, with knowledge of the fraud, offers to perform the contract on conditions which he had no right to exact, this has been held so effectual a waiver of the fraud that he cannot set it up in defence if sued on the contract." This is quite consonant with the principles of our law. See Dalloz, Dict. de Droit, mot "Rescision," p. 216, Nos. 41 and 42. If the demand in his action were granted, he would recover of appellants $20,000, because they could not carry out the contract made by them, and if his plea to this action is sustained, the contract is declared null, as made to respondent's prejudice, induced thereto by fraudulent practices of appellants. It cannot be pretended, from the evidence, that respondent was not as well aware of the presence of by-bidders at the sale generally when he brought his action as when he pleaded their artifices to this action.

In conclusion, I think the first two grounds of the judgment now in appeal are not founded upon a correct interpretation of the conditions of sale; and, as respects the third ground, the English and American cases cited have no absolute pertinence to the facts of this case, and, if they had, they are not of binding force under our law; that the contract must be determined by our law of contract of sale, which renders fraudulent practices a ground of rescinding a sale only when they form in part, or in whole, an inducement to the purchase, and that it does not appear that in this case they formed any part of the inducement. And further, I think the respondent has waived the right to complain of the pretended artifices, by claiming damages for the non-fulfilment of the contract, with conditions which he has no right, from the terms of the sale, to exact, and, consequently, the judgment is erroneous. I would reverse the judgment and condemn McNaughton to take all the lots. In this the Hon. Chief Justice and myself are in minority, in going so far. However, four judges adopt generally the principles of law, stated as applicable to the case, but think the evidence establishes by-bidding on lot 12, so as to vitiate the sale as respects that lot only.

DORION, C. J., *dissentiens*:—I hold that this case must be decided according to the principles of the French law and by no other. It is the case of a sale of real estate, and is subject to the rules applicable to all contracts. The only grounds for which contracts can be annulled under the Civil Code are "error, fraud, violence or fear, and lesion." (Article 991.) Fraud, which is the only ground on which it is claimed this sale should be set aside, is, according to Article 993, a cause of nullity when the artifices practised by one party, or with his knowledge, are such that the other party would not have contracted without them. It is never presumed, and must be proved. These two Articles are specially made applicable to contracts of sale by Article 1473, which says that the contract of sale is subject to the general rules relating to contracts and to the extinction of obligations, &c., unless otherwise specially provided. Now we have to consider what constitutes fraud. Bedarride, Vol. 1, section 16, says:—

"On doit considérer comme dol punissable toute espèce de manœuvres, de finesses, d'artifices, employés pour entretenir une personne dans l'erreur *qui la détermine à une convention préjudiciable à ses intérêts.*"

Idem, No. 22. "La première de ces conditions est que les manœuvres et artifices aient été *de nature à faire illusion à la personne trompée.*"

Jetté et al., and McNaughton.

Idem, No. 31. "La seconde condition, pour que le dol annulle le contrat, est que sans son emploi il n'eût pas existé de convention. Qu'il ait été dès lors la cause *unique et déterminante* du consentement, *dans causam contractui*."

Idem, No. 37. "Enfin la quatrième condition pour l'imputabilité du dol, c'est *qu'un préjudice ait été causé*. Le dol, avons nous dit, nécessite une peine et une réparation. Il n'existe donc que lorsqu'il y a fait illicite chez l'un, *préjudice chez l'autre*. L'intérêt étant la mesure de l'action, et *l'intérêt n'existant qu'autant qu'on est lésé, l'impossibilité de justifier de l'existence d'un préjudice quelconque rendrait la partie plaignante non recevable dans son action*."

Idem, No. 40. "Le dol n'existe que lorsqu'il y a réellement préjudice. Conséquemment si le défendeur soutient qu'il n'en a causé aucun, *le demandeur aura l'obligation de prouver celui dont il se plaint*."

1 Chardon, Traité du dol, No. 75. "Il faut qu'il résulte du traité auquel une partie a été déterminée par des manœuvres frauduleuses, un tort et que ce tort soit important. On conçoit facilement que s'il ne résultait aucun préjudice du traité; *si*, par exemple, *la chose vendue ne l'avait été que pour un juste prix et à une personne à qui elle pouvait convenir, tout dommage cessant, toute idée de dol s'évanouirait*; quand même il serait vrai que des moyens auxquels la délicatesse doit répugner, auraient été mis en œuvre pour amener la convention."

These rules, applicable to fraudulent transactions, are so well expressed by Story that I do not think it out of place to refer to a short extract from his work on "Equity Jurisprudence." At paragraph 203 he says:

"And in the next place the party must have been misled to his prejudice or injury, for Courts of Equity do not, any more than Courts of law, sit for the purpose of enforcing moral obligations, or correcting unconscientious acts which are followed by no loss or damage. It has been very justly remarked that, to support an action at law for a misrepresentation, there must be a fraud committed by the defendant, and a damage resulting from such fraud to the plaintiff. And it has been observed with equal truth, by a very learned Judge in Equity, that fraud and damage, coupled together, will entitle the injured party to relief in any Court of Justice.

Applying these principles to the present case, I do not find that a case of fraud has been made out to enable a court of justice to interfere, by cancelling the contract entered into by the parties. The respondent has not proved, nor even alleged that he suffered any prejudice. In the first place the false bidding if proved only applies to lot No. 12. Respondent first bid upon lot No. 7, which was adjudged to him, at the price of 35 cents. He immediately declared as he was entitled to by the conditions of the sale, that he took lots 8, 9, 10, and 11, at the same price. These were entered to his name in the auctioneer's sale book, and he signed it. After a short interval lot 12 was put up, and respondent returned and asked to take that lot at the same price as the others. The auctioneer told him that he was too late, as it had already been put up and bid upon. The respondent was, therefore, willing to take it at 35 cents, and expressed a wish to do so. The bidding went on and it was adjudged to him at 39 cents. The difference of the price [illegible] willing to give before any false bidding took place on lot 12 and that of the

purchase was only four cents a foot. It must be observed that the only proof of false bidding on that lot is by Pierre Frigon, who says he thinks he did not bid over thirty-five cents, and that the bidding continued after he had ceased bidding. Then, after the sale, the respondent represented to Mr. McLellan that he was well satisfied with his purchase, and intended to build a dry dock on the lots, so that it was evident that he went to the sale for the purpose of purchasing those lots for carrying on a large enterprise, and he must therefore have made up his mind as to the value of those lots before he went to the sale. Then a few days afterwards he tendered to the appellants a sum of $10,000 as the first payment which he was to make on his purchase, and requested the vendors to give him a title. He followed that by instituting an action for $20,000 damages against them for not fulfilling their contract in not giving him a deed in accordance with his pretensions, which this Court declares to be unfounded. The appellants having brought this action to compel the respondent to execute a deed according to the conditions of sale, he pleaded a variety of grounds which have already been alluded to, but not that at the sale false bidders had bid upon the property. It was only several months after that by leave of the Court, he was allowed to make that plea. Since the plea has been fyled he has been examined as a witness, and has declared that he persisted in his action for $20,000 damages, and that he would still be willing to take a deed, if appellants would fulfil their obligations as he understood them to be. The action is still pending. This shows, evidently, that the respondent did not feel aggrieved or prejudiced by the fact that bids were made on the lot by false bidders. His pretension, that fraud has been committed towards him, is deprived of one of the essential conditions for which a party is, according to the Code, and the authorities cited, entitled to relief, on the ground of fraud. That is, he does not show injury, and while these proceedings were going on, he has, by his own proceedings and declarations, acknowledged that he had suffered none. The evidence in the case does not show that the price of lot 12 was enhanced by the false bidding of Frigon, in fact Frigon states that he only bid 35 cents, and the lot was sold for 39. There must, therefore, have been some bids in the interim by intending purchasers, as Frigon positively says bidding was continued after he had ceased bidding. It is also proved that the price at which the lots were sold was not excessive, since several other lots of the same block of land were sold, both at private sale and at auction, at a higher price than that paid by the respondent. I, therefore, conclude that there was no error on the part of the respondent as to the value of the lots sold; no prejudice to him, as far as the evidence shows, and, therefore, there has been no fraud to annul the contract. All the authors agree with those already cited as to the conditions required to annul the sale and, therefore, I cannot conceive how, according to the French law, the sale should be set aside. At the argument I asked counsel on both sides if they had any text of law, any judgment, or, if any allusion could be found to the text writers on this subject of false bidding, and I was answered that there was none. My own researches led me to the same conclusion; and, therefore, the general principles above alluded to are our only guide in this matter.

Jetté et al. and McNaughton.

In the Court below reference has been freely made to the English rules of law as sanctioned by the jurisprudence of that country, and the judgment was mainly based on English decisions. As I have already stated I do not think these decisions have anything to do with the present case, which must be decided by our own law. But an historical review of the decision in England shows that it was not without great difficulty that the Courts there arrived at the conclusion that one single by-bidder was sufficient to annul an auction sale. The first case reported on that point is the case of Bexwell vs. Christie, decided by Lord Mansfield just a hundred years ago. The great authority of Lord Mansfield made it a leading case. Immediately after, Lord Rosslyn strongly dissented from that decision, in the case of Connolly and Parsons, which was not brought to a final decision, the parties having settled while it was pending. Then Lord Kenyon, in Howard and Castle, where the case before him was that of a mock auction, the only real bidder being the purchaser, followed the precedent of Bexwell and Christie. The learned judge, however, remarked that if the question had come before him for the first time he would have had great difficulty, but the master mind of Lord Mansfield had decided the point most satisfactorily, and he would follow that decision. Then Sir William Grant, in another case, decided adversely to the decision given by Lord Mansfield, and from that time till 1867 the Court of Equity and the Courts of Common Law in England have followed a somewhat different jurisprudence, Courts of Common Law deciding that any false bidding annulled the sale, while Courts of Equity admitted the sales to be valid when only one false bidder had taken part in the sale for the purpose of protecting the vendor and preventing the property from being sacrificed. The difference was so marked that at last, in 1867, Parliament had to interfere, and an Act was passed, which declared that all Courts should follow the practice adopted by the Common Law Courts. And in looking at the works of Judge Story and Chancellor Kent, their opinions seem to be strongly in favor of the view taken by the Equity Courts of England, as against that of the Common Law Courts. All this shows that this voiding of sales, on the ground of false bidding, is not one which appeared clear to the ablest Judges, even in England, and why, therefore, should we here decide this case according to rules which it required an Act of Parliament in England to settle—which Act of Parliament has no force of law here. It seems that if false bidding had been a cause of nullity in France without any evidence of those ingredients which authorize courts of justice to interfere, such as prejudice or lesion, something would be found in the French authors, for although auction sales are not, perhaps, so frequent in France as in some other countries, they are yet of daily occurrence in the case of sales of minors' property, both real and personal. And while the authors freely speak of combinations not to bid and thereby keep down the price of real estate, not a word is said of the case of false bidding to increase the value of property, and the reason of the difference may, perhaps, be found in this that, under the French law, before the Code lesion was a cause of nullity in favor of the vendor, but not of the purchaser, and, therefore, the vendor who was obliged to sell the property was protected while the purchaser had to protect himself by his own vigilance. I admit that if injury or prejudice had been

proved I would have required but slight proof that the price had been enhanced by false bidding to annul the sale, and I would go further and say that if a purchaser had been deceived by false bidding on other lots than those he purchased, and had been thereby induced to purchase at prices which he otherwise would not have given, I would hold the sale null, although no false bidding had taken place on the lots he purchased, for I would find there the essential conditions of fraud, *deception* and *injury*. It is because these conditions entirely fail in this case, that I would reverse the judgment which has been given by the Court below, and I would order the respondent to take title as prayed for.

TESSIER, J.—En septembre, 1874, les appelants étaient propriétaires conjoints d'un terrain d'une considérable étendue près du canal Lachine, en la paroisse connue sous le nom de la paroisse de Montréal.

Les appelants firent dresser un plan du dit terrain, le divisèrent et l'annoncèrent pour être vendu par lots le 10 octobre 1874, par l'entremise de Benning & Barsalou, encanteurs.

Le 10 octobre cette vente eut lieu à l'enchère publique, il y avait un grand nombre de personnes présentes; le procès-verbal contenant les conditions de la vente fut lu, la criée de plusieurs lots eut lieu; l'adjudicataire était appelé à signer le cahier d'adjudication, s'il était le dernier adjudicataire, ce cahier contenant le procès-verbal des conditions.

Ces conditions étaient entr'autres que sous 30 jours de la vente l'adjudicataire devait payer 10 par cent. sur le prix avec en outre la commission de l'encanteur et passer contrat devant notaire.

Le présent intimé McNaughton se rendit adjudicataire de six lots savoir: No. 7, 8, 9, 10, 11, et 12 du terrain en question. Il est bon d'observer que l'adjudication de ces lots eut lieu dans l'ordre suivant: Le lot No. 7 fut d'abord mis à l'enchère, et après quelques enchères fut adjugé à raison de 30 cents par pied superficiel à M. McNaughton, l'intimé, qui réclama de suite le privilège de prendre les quatre lots suivants au même prix; ce qui lui fut accordé, savoir les lots No. 8, 9, 10, 11. Quant au dernier lot, savoir le lot No. 12, il fut mis à l'enchère séparément, il y eut plusieurs enchères sur ce lot, qui fut finalement adjugé au même M. McNaughton à raison de 39 cents par pied.

Le prix entier des 6 lots forme la somme de $97,057.50, et le défendeur M. McNaughton est poursuivi pour le 1er versement du prix, un dixième de cette somme, et les frais de commission de l'encanteur, savoir pour $10,700.32.

Le défendeur a présenté plusieurs plaidoyers, mais les chefs d'exception sur lesquels l'intimé a fondé sa défense peuvent être résumés dans les trois points suivants:

1o. Les appelants ont annoncé que les lots en question communiquaient avec le canal Lachine, or les vendeurs ne peuvent pas leur garantir cette communication, donc en raison de cela la vente est nulle et doit être annulée.

2o. Les appelants ont annoncé et promis que le canal Lachine serait élargi ou fait de nouveau en totalité du côté nord du canal actuel sur le terrain ainsi vendu; et à défaut par les vendeurs de fournir une garantie que cela se fera, la vente est nulle.

3o. La présence et l'emploi de faux enchérisseurs à la dite vente a eu l'effet d'annuler ou de rendre annulable la dite vente.

Sette et al., and McNaughton.

L'intimé ajoute que ces fausses représentations et ces fausse enchères ont eu lieu par fraude et dol pour induire l'intimé et autres à enchérir. La Cour inférieure a résolu ces trois propositions dans l'affirmative.

Sur la première question, la Cour est unanime à dire qu'il n'a pas été fait de représentation frauduleuse au sujet de la communication du terrain en question au canal Lachine. Cette représentation n'équivaut pas à une garantie, de manière à faire annuler la dite vente. Le fait que le canal Lachine appartient au Gouvernement du Canada et que personne ne peut se servir de ce canal en aucune manière quelconque que suivant les règlements faits et promulgués par le Gouvernement ou avec la permission spéciale du Gouvernement est de notoriété publique. M. McNaughton devait donc savoir qu'il ne pouvait avoir cette communication au moyen des terrains en vente autrement qu'avec la permisson du Gouvernement; les Appelants n'ont annoncé qu'une chose fort plausible et probable savoir, que leur terrain avoisinant le Canal donnait droit au propriétaire d'obtenir du Gouvernement tous les avantages de communication avec le canal Lachine que le Gouvernement a coutume de donner, mais rien de plus. Quant à l'objection que l'annonce en anglais désignait le terrain "with the right of communication with the Canal," et en frnçais avec la berge du canal, cela ne paraît pas avoir trompé l'intimé. Il ne peut pas y avoir de canal sans une berge ou des bords qui sont nécessaires à son usage, il me semble que tout le monde pouvait et devait comprendre que cette communication était avec le canal en la manière que ce droit peut être obtenu du Gouvernement, mais il n'y avait pas en cela une garantie. Les appelants n'ont pas stipulé qu'ils avaient déjà obtenue ce privilège du Gouvernement et pouvaient le transférer aux acquéreurs.

Sur la 2me question, savoir: que le Gouvernement se proposait de prendre une lisière de ce terrain pour élargir le canal; les appelants n'ont fait que communiquer au public le sens de l'information officielle qu'ils venaient de recevoir à ce sujet. Si les appelants n'eussent pas reçu cette information, ils seraient coupables de dol, mais il se sont clairement disculpé à ce sujet par la production de la lettre suivante du secrétaire du Département des Travaux Publics.

Cette lettre se lit comme suit:—

"Public Works Department.

"Ottawa, 7th October, 1874.

"Sir, Referring to that part of your letter of the 17th ult. addressed conjointly by "yourself and others, offering to sell to the Government a strip of land for the use "of the proposed new line of the Lachine Canal, between the Grand Trunk "Railway bridge and the Côte St. Paul road, I am directed to inform you that "the Chief Engineer, to whom the matter was referred, reports that a space of "at least from 225 to 250 feet in width will be required for the new canal at the "place above mentioned.

"I take this opportunity to say in regard to the other subject matters referred "to in your letter, that they are still under consideration.

"I have the honor to be, Sir,

"Your obt. servant,

"F. BRAUN, *Secretary.*"

Sur la 3me question de savoir si de fausses enchères annulent une vente publique, il se présente des considérations bien importantes.

La question a été traitée avec beaucoup d'habileté et de profondes recherches par les savants avocats, mais on n'a pas trouvé un seul précédent sur ce point dans nos annales judiciaires, et la question est nouvelle devant ce tribunal.

Ce point doit être décidé d'après nos lois, et c'est en examinant les principes de la vente tels qu'ils sont énoncés dans notre Code que la cause doit être décidée.

Qu'est-ce que la vente? La définition du droit romain s'applique à celle de notre droit, mais elle est plus simple. Les élements constitutifs sont, qu'il y ait *res, pretium, consensus.*

Code Civil No. 1567. "L'adjudication d'une chose à une personne sur son "enchère et l'entrée de son nom sur le livre de vente complète la vente."

"Le contrat de ce moment est régi par les dispositions applicables au contrat "de vente."

"L'adjudication a lieu au plus haut et dernier enchérisseur." C. P. C. 685.

Pothier, Vente, No. 18. "Le prix doit être un prix sérieux et convenu avec "intention qu'il pourrait être exigé.

Pothier, Vente, No. 34. "Le consentement qui forme le contrat de vente, doit "intervenir; 1o. Sur la chose qui fait l'objet du contrat; 2o. Sur le prix; "3o. Sur la vente même."

Merlin, Répertoire, vo. Vente, No. 10. "On ne peut acheter par soi-même, ni "par personnes interposées, les choses qui font partie des biens dont on a l'admi-"nistration."

En Angletorre la doctrine de répudier les ventes publiques dans lesquelles on employait de faux enchérisseurs a prévalu depuis la fameuse cause de Bexwell & Christie, Cowper Reports, p. 395 décidée en 1776 par Lord Mansfield.

La question a été finalement réglée par le Statut Impérial de 1867, 30-31 Victoria ch. 48, qui répudie ces ventes. Si la question eut été soumise aux tribunaux Français, je ne doute pas que l'expression de ces tribunaux eut éte plus forte contre de pareilles ventes. Sur cette matière il faut décider si la vente de tous ces lots a formé une seule vente, ou s'il y a deux ventes distinctes, savoir, 1o. Une vente des lots No. 7, 8, 9, 10, et 11 réunis ensemble par un même prix d'adjudication et la signature de M. McNaughton au cahier de la vente. 2o. Une vente distincte et séparée du lot No. 12.

Story, on sales, No. 464: "In respect to what constitutes an entire contract "of sale by auction, the same rules apply as to a common contract of sale. If "the consideration be entire, and not distinctly susceptible of apportionment by "the very terms of the contract, the contract is entire, and not otherwise. "Where, therefore, several lots of goods, or several things are put up as "distinct things, and are knocked down to the purchaser for distinct "sums, for which his name is marked in the catalogue against each lot or thing, "by the auctioneer, there is a distinct contract as to each thing. But if they "all be marked down to him at one sum, or as one lot, the contract is entire."

Smith's Mercantile Law, p. 517, 518.

Parsons on Contracts, p. 418.

Jetté et al., and McNaughton.

La majorité de la Cour pousse le principe plus loin que le Juge de la Cour Inférieure, qui s'appuie comme l'un des considérants du jugement sur ce qu'il a été employé plus d'un faux enchérisseur. Nous disons : une seule fausse enchère est suffisante, si elle est prouvée, pour détruire le consentement et annuler la vente.

Supposons que le premier de tous les lots mis à la criée ait été adjugé à M. McNaughton sur sa seule et unique enchère n'est-ce pas une vente séparée? Il me semble qu'elle l'est aussi bien que la vente de plusieurs autres lots à différents acquéreurs.

Ayant établie que ce sont deux ventes distinctes, considérons, maintenant, la preuve sur fausses enchères.

Il n'est pas prouvé qu'il y ait eu de fausses enchères sur les lots Nos. 7, 8, 9, 10, et 11.

Il est vrai qu'il est prouvé qu'il y avait quelques personnes qui ont acheté des lots et qui les répudient, mais ceux là ont enchéri sur d'autres lots que ceux de M. McNaughton. Quant à ceux-ci les témoins Barsalou et Frigon seuls en parlent. M. Barsalou dit; page 6 de l'appendice des appelants: "Les "personnes que j'ai nommées comme ayant acheté pour protéger la propriété "n'ont pas enchéri sur les lots achetés par le défendeur."

M. Barsalou examiné de nouveau par l'intimé dit, page 104 du factum de l'intimé. "Question.—Qui a mis contre le défendeur sur les différents lots achetés par lui?

Réponse.—"Je crois que c'est M. Frigon; M. McNaughton avait plusieurs "compétiteurs entr'autres M. Frigon, je ne me rappelle pas du nom des autres." Plus loin il ajoute. "Il y avait à peu près deux cents personnes présentes."

La preuve quant au lot No. 12 est différente.

Pierre Frigon, page 75 du factum de l'intimée, dit: "J'ai enchéri sur ces lots, "sur deux principalement. *Je ne pense pas d'avoir enchéri sur d'autres*, mais "je n'en suis pas positif. J'ai enchéri sur le lot No. 12 acheté par le défen- "deur et sur le lot No. 13." Il ajoute. "J'ai été le dernier enchérisseur du "No 13. M. Cassidy m'a dit, si on vous adjuge un lot, signez le livre, ne "dites rien et tout ira bien."

M. Barsalou ajoute p. 105. "A l'encan en question le défendeur a d'abord "enchéri sur le No. 7. Ce lot a été vendu avec privilége pour l'acquéreur d'en "prendre un ou plusieurs, et lors de l'adjudication il a déclaré qu'il en prenait 5, "c'est-à-dire, les lots No. 7, 8, 9, 10, et 11. Il n'y a pas eu de nouvelle enchère "pour les lots 8, 9, 10 11. Le lot No. 12 a été vendu ensuite séparément."

Après cette observation sur la preuve, considérons, si la présence seule de faux enchérisseurs est suffisante pour annuler le contrat?

Supposons qu'il y ait eu de faux enchérisseurs présents, et qu'ils n'aient pas enchéri, cela annulera-t-il la vente? Il est évident que non.

A toutes les ventes publiques il y a des spectateurs, des gens qui ne s'y rendent pas pour enchérir, mais par simple curiosité ou amusement, dira-t-on que leur présence peut vicier une vente d'immeuble faite au plus haut et dernier enchérisseur? Non.

Sur qui retombe la preuve que des enchères fausses ont été proposées? Les

nullités et la fraude ne se présument pas, c'est à celui qui les les allègue de les prouver. C'était donc à l'Intimé de les prouver. Il ne l'a pas fait.

En résumé il s'en suit que lorsque de fausses enchères ont été données par connivence avec les vendeurs, le dernier enchérisseur, à qui l'on fait l'adjudication a droit d'invoquer la nullité de la vente et elle sera annullée sans autre preuve. C'est la règle qui s'applique à l'adjudication du lot No. 12, sans qu'il soit nécessaire pour l'acquéreur d'allèguer et prouver que l'immeuble a été vendu au dessus de sa valeur et que l'acquéreur a souffert dommage et lésion.

Il en est autrement pour l'adjudication des autres lots; il n'y a pas eu preuve de fausses enchères. Si la présence ou le langage des faux enchérisseurs a pu l'induire en erreur sur son consentement à l'adjudication, il eut fallu prouver que cette présence et la conduite des faux enchérisseurs (puffers) ont induit l'Intimé en erreur, de manière qu'il n'eût pas acheté sans ces artifices, C. C. 993, que cela a été fait par fraude et dol des vendeurs, et que cette fraude et ce dol ont causé préjudice et lésion à l'Intimé. "Il n'y a dol que lorsqu'il y a préjudice," 1 Bédarride No. 40. Mais il n'y a aucune preuve dans le dossier que l'Intimé ait souffert aucune lésion, et il n'est pas prouvé que le prix auquel les cinq premiers lots lui ont été adjugés était au dessus de leur valeur réelle à l'époque de cette vente.

Il faut donc en venir à la conclusion que la vente et adjudication des cinq premiers lots, No. 7, 8, 9, 10, et 11 à l'Intimé est valable, mais que la vente et adjudication du lot No. 12 sur lequel il y a eu de fausses enchères est nulle et annullée. C'est le jugement de la majorité de cette Cour.

RAMSAY, J.—I almost owe an apology to the Bar for the length of the remarks I am under the necessity of making. Much that I have to say has been already said better than I can say it, but I cannot undertake to morsel my notes without the risk of becoming obscure, and the differences of opinion on the Bench, and my peculiar position in concurring in the judgment of the majority of the Court, prevent my remaining silent. Before entering on the case I would observe that in the use of the word fraud, I intend only legal fraud, for we sit here to administer the law and not to indulge in moral admonitions. If the word is used, then, to express the moral obligations, it is only so far as the moral rule is the motive or explanation of the law.

It seems to me the opinions of the Court involve four views of the question on which we disagree. One is that the English cases cited by respondent do not apply. The second, that puffing at an auction sale is not against the French law, unless there be absolute proof that it actually caused damage to the purchaser. Third, the view which forms the judgment of the Court; namely, that each sale of a lot at an auction is a separate contract, and that there must be proof of false bidding as to the particular lot to make the sale null. Fourthly, there is my individual opinion that at an auction sale where there are several lots put up for sale, the whole may be annulled on the ground that there was such an atmosphere of false bidding as was likely to mislead.

I have thought it my duty to yield my particular opinion, which, however, remains unchanged, reserving to myself the right to explain it. I desire also to make known the reasons which justify me, in the public interest, in concur-

Jetté et al., and McNaughton.

ring in the reversal of a judgment which I consider substantially correct. In the first place, the parties are entitled to a judgment, and there must be some way of their getting it. In England, when there is a dead-lock of this sort, the junior judge retires. In this particular case it would be of no use to adopt this rule, for it would still leave a tie on the bench. In the second place, the judgment saves the principle for which I contend, and there remains only the question of its application—a question of minor importance.

The defendant resists the demand on four distinct grounds:—

1st. That the vendors have not determined the extent of a reserve of land required by the Government for the enlargement of the Lachine Canal;

2nd. That they cannot make good certain warranties;

3rd. That there were false representations made;

And 4th. That the price was inflated by bidders employed by plaintiffs to make fictitious bids.

The first of these grounds has no force in the defendant's mouth, for it appears he agreed to take the whole land subject to expropriation over the head of plaintiffs, consequently he cannot oppose any delay to taking his deed on the ground that the land required by government was not determined.

The second really turns on this, that by the description of the lands in the advertisement, it is held forth in the English version that the land sold is "on the canal," while in the French version the description is the "*berge du canal*."

It is pretended on the part of the defendant that this is a warranty, if we take the English version, that the land is bounded by the bed of the canal, and, if we take the French version, that by the canal embankment.

It does not appear perfectly clear that the word "berge" only means the embankment; but perhaps it is not very important to discuss the philological question, for the defendant tells us that his knowledge of French is so limited that if he had followed the French version he must have asked the meaning of the word *berge*, as he only knew it as signifying barge. He admits, then, that he was guided by the English version, and, with a copy of the plan in his hands, and knowing the ground well, it is pretended he believed that the plaintiff's land on the canal meant a property bounded by the water-bed of the canal. It is difficult to understand how any one of ordinary intelligence could possibly believe that private property could come down to the water of an artificial work, as a private property comes down to a river; but how any one knowing the place well, and with a plan in his hands, could overlook the indications of the canal road and the Government property is inconceivable, and to do Mr. McNaughton justice, he does not say that he did believe that the lots in question were bounded by the waters of the canal. Even if he had been so deceived, I do not think the defence good in a general reference such as that contained in the second condition, especially when accompanied by a plan. "On the canal" means on the land used for the purposes of the canal. Besides this it is impossible to read the whole paragraph without seeing that the canal means the Government property, for the reserve for the widening was to be "measured *from the actual line of the Government property*." The learned judge in the Court below, who thought there was a warranty expressed in the second condition of a right of

way to the waters of the canal, was evidently attracted by the words "up to the date of expropriation, the purchasers shall have the right of communication *with the canal through this reserve.*" But this sentence, it appears to me, has no influence on the question, for it is not a description. It is only a reference to the right of way over the reserve, if the purchaser did not make his option to take the lot, reserve and all. Now, defendant is not in this category and therefore it does not affect him; and, even if it did, it would be no defence to the action, for there is no question of refusal on the part of plaintiffs to give this right of communication over the reserve to those who did not purchase the reserve, and this right of way is all the words quoted guarantee.

The third ground is based on the special notice, which is in these words:—

"SPECIAL NOTICE—Property of Messrs. J. L. Cassidy, L. A. Jetté, T. "Arpin, R. Laflamme & al. The proprietors having been notified that a strip "of this land of from 225 to 250 feet in width is required for the widening of "the Lachine Canal, the public is respectfully informed that the plans of the "property have been altered in consequence, and that a reserve of the above-"mentioned depth shall be made at the sale, on each of the lots fronting on the "canal. Up to the date of expropriation the purchasers shall have the right of "communication with *the bank of the canal* through such reserved portion. "Deduction made of such reserve the lots remain of a depth varying from 200 to "250 feet.

"BENNING & BARSALOU."

Is this a warranty or is it a fraud? It clearly is not a fraud, for Mr. Braun's letter distinctly says that "from 225 to 250 feet in width will be required for the new canal at the place above mentioned." And this is not at all affected by the evidence of Mr. Mackenzie, who tells us that, so far as Mr. Braun's letter implied any decision at the time being given, it was a mistake; for it does not appear that the plaintiffs were cognizant of the mistake. It does not seem to me to be a warranty, for a warranty cannot go beyond its terms, and in this case what plaintiffs say is that they were notified, and that is true.

The fourth objection is more open to difficulty, and it is as to it alone that there is a division in the Court.

I shall not endeavor to combat the pretension that the English authorities do not condemn puffing. The cases have been carefully collected by the respondent in his factum, and it appears to me that they are explicit beyond the possibility of misconstruction. The exception of one puffer by the Chancery Courts serves only to make the general rule more conspicuous; but both in Chancery and at common law wholesale puffing, or even two puffers, would render the sale null. The cause of the difference of the Chancery and common law rule has been a puzzle. I think it may be explained by the same class of reasoning as induced some writers to think that the *vileté de prix* was a *cause de nullité de décrêt*, and which arose out of a misapplication of the [illegible] of lesion. It is further argued that there is a difference between the effect of fraud in the English and French systems—that in the former any fraud will be ground to set aside a contract, while in the latter that the party complaining must show absolutely an injury. French and English authors express themselves very differ-

Setlle et al., and McNaughton.

ently; but I see no room for such a distinction. It is scarcely possible to suppose that the English law would set aside a contract for a fraud which had no effect on the parties interested; it seems hardly easier to believe that the probable result of the fraud should not be taken into account in the French law, especially when the absolute proof is difficult or impossible.

I trust it will not be considered I use too strong an expression in saying that it appears to me almost a libel on the French law to contend that in principle it does not absolutely condemn puffing at an auction sale. It is condemned by the common law of England, in the United States where the common law prevails, and in Louisiana which derives its law from the same source as we do. The silence of the law in France as to such an artifice is not a reason for supposing the artifice to be legal. So to interpret its silence would be offering a premium for the invention of new forms of fraud. The principles of our law abundantly condemn all artifices which lead contracting parties into error. What can be the object of having puffers at an auction but to inflate the bidding and mislead the audience? In Mortimer and Bell (L. R., 1 Ch. 10), Lord Cranworth said that the employment of such people could have no object but to give fictitious value to the property. Far from supposing it is sanctioned by the French law, I consider the presence of one puffer illegal.

I understand it is not contended by any of the learned judges that a sale at mock auction would be valid. We have no definition of a mock auction, and so this admission does not serve us much. I think, however, it may reasonably be understood to be an auction where false bidding was so general as to render it wholly valueless as any test of the value of the thing sold. Now, if this be a fair application of what is meant by a mock auction, it seems to me that the one in question comes within the description. The auctioneer tells us that he learned from Mr. Beique, *after the sale*, that Crevier, Pariseau, and Tolmosse were *enchérisseurs pour la forme*. Mr. Beique, in his evidence, says Pariseau and Crevier were, and perhaps Mr. Edmond Beauvais. Frigon was invited by Mr. Cassidy to come in a similar capacity. Mr. Careau, an advocate from St. Johns, also was a false bidder.

With regard to Tolmosse, he swears positively that the lots adjudged to him were bought in good faith, and he denies having been asked by the defendants to bid in or on any of the lots for them. We may therefor esay that Mr. Barsalou was in error in including him in the number of *enchérisseurs pour la forme*. But there is no such doubt about Crevier, Pariseau, Frigon, Beauvais Leduc and Careau. They were all *enchérisseurs pour la forme*, and they actually bid on 19 lots out of 57 put up.

Now let us look at it in another way. Ostensibly there were seventeen bidders; of those five were present for the purpose of false bidding only. One Careau combined the qualities of real and spurious bidder, and Mr. Hogan bid only for Mr. Laflamme; Mr. Hudon bid for a joint speculation for himself and one or more of the plaintiffs. Mr. Molson made a false bid in the interest of the plaintiffs (an operation ratified by them), and Mr. Turgeon refuses to be bound by his bid.

The bidding of Mr. V. Hudon and Mr. Hogan would not of themselves

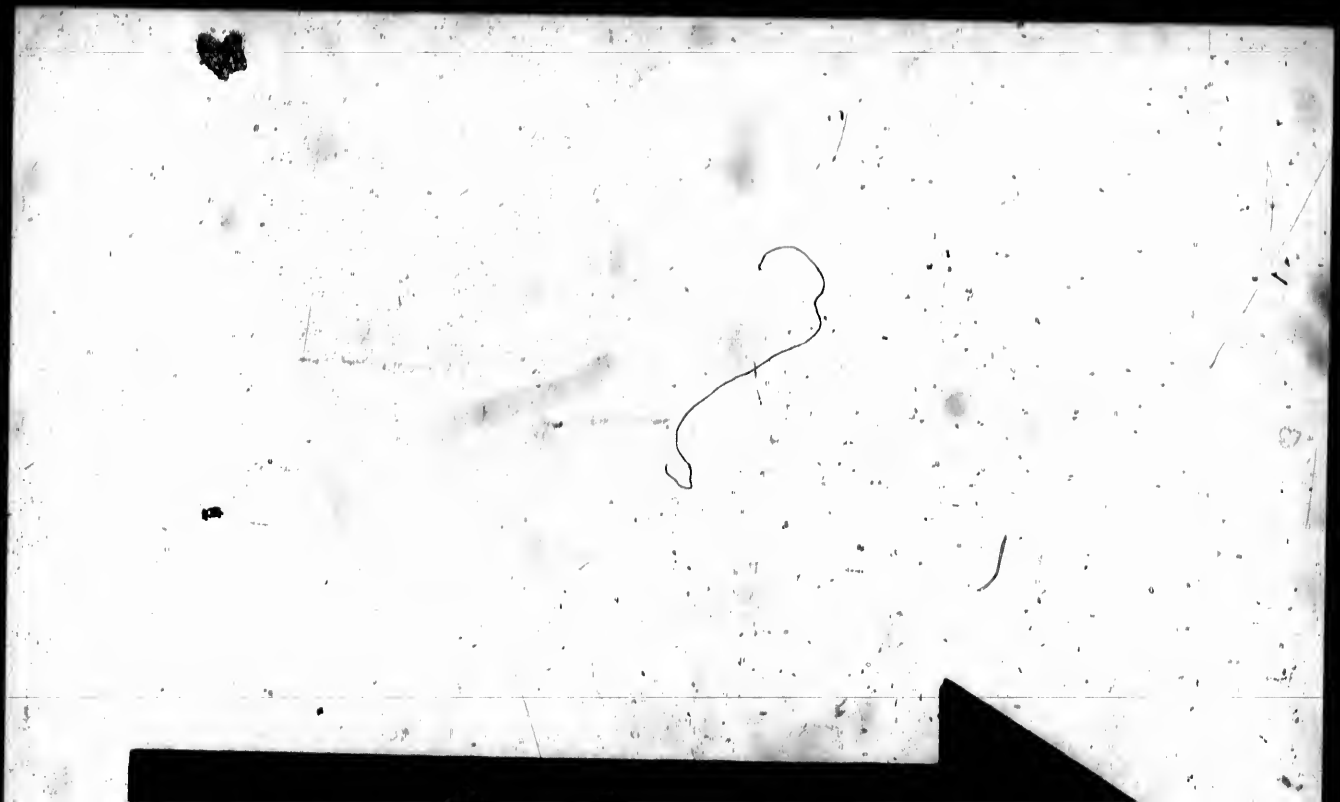
establish puffing to my mind, nor do I think the fact that Mr. Laflamme has not paid his partners for the lot changes the matter; but, taken with the false bidding, it reduces the number of bidders *bona fide*, [illegible] own name, to eight, just a half, if we count Mr. Careau on both [illegible] 27 lots put up, only 27 were sold to *bona fide* bidders in their [illegible]

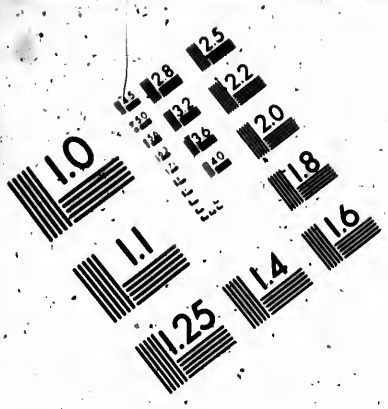
It is, however, said that where there is no absolu[illegible], such sale would be good. And this, as I have said, is the po[illegible]tween the opinion of my brothers Monk and Tessier and m[illegible] I have thought it my duty to yield under the circumstances. A[illegible] then, this as the rule of evidence, only one lot sold to defendant—lot N[illegible]—was sold by mock auction.

One Frigon, evidently a false bidder, and not a very scrupulous witness, if he is to be judged by the contradictions of his testimony in this case, admits he was invited to go to the auction by Mr. Cassidy, and that being there he was told to sign the book if a lot was adjudged to him, say nothing, and all would be well. He bid on two lots, 12 knocked down to the defendant and 13 knocked down to witness. He does not remember if he bid on other lots, and he insists that he was a purchaser in good faith of lot 13. The point is unimportant, perhaps, still it may be remarked that he was not sure what price he promised to pay for it, he has not signed his deed, he refused to sign it, and he seems only to have been asked to sign it for form's sake, for the excuse he says he gave one of the defendants was that the lots were misdescribed in the advertisement. Since then the appellants have not importuned him. But what is of importance in Mr. Frigon's testimony is that he actually bid on lot 12, which was adjudged to defendant. The appellants did not venture to ask him whether this was a true bid. On the contrary, he said he bid on only two lots—12 and 13; that he was a true bidder in one sense, and not in another; and that he was a true bidder on 13; and he was silent as to 12. Yet he is brought up as a witness of appellants *in rebuttal*, and he has the impudence to swear he was a true bidder on lot 12 and wanted to have it because it was opposite a street. He says he also wanted 10, but defendant took it without any bidding. In what sense, then, was this witness a false bidder? Still he admits in his first examination he was a false bidder.

It has been said that Art. 993 C. C. decides the case. That is a very narrow view of the article, and placing the mere cast-iron form of types and ink against the broad meaning of the law, as it has always been understood. But I go further, and say it is not critically the construction of the article. What is the contract of a vendor by an auction sale? It is to sell to the highest amongst honest bidders. It cannot be presumed that any one ever consented to buy at auction with simulated bidders. My brother Tessier has explained most lucidly the doctrine of the Roman law, and shown that the essence of the contract—consent—was wanting. To this I will add that another essential—price—was wanting. There was at most an appearance of a price; there was none in reality. The real price was the highest bid amongst *bona fide* bidders, and we don't know what that was.

It has been also said that there is no proof that respondent paid more for the





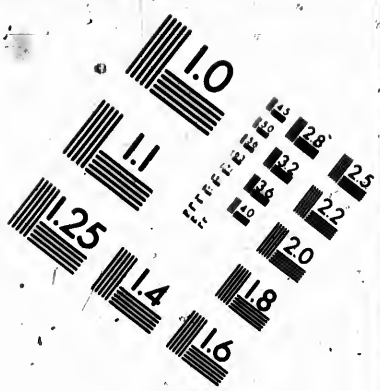
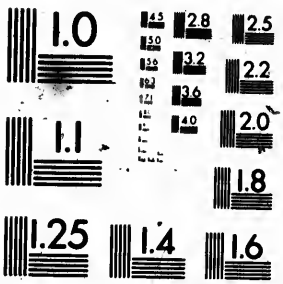
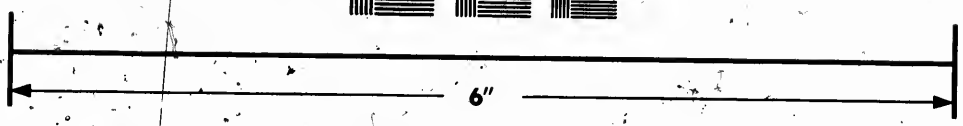
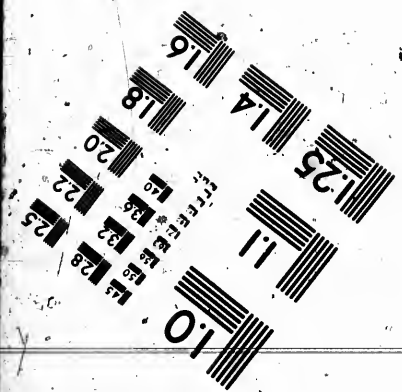
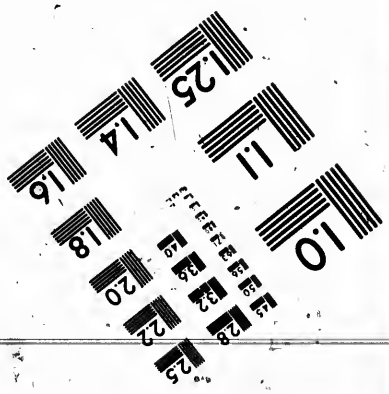


IMAGE EVALUATION TEST TARGET (MT-3)



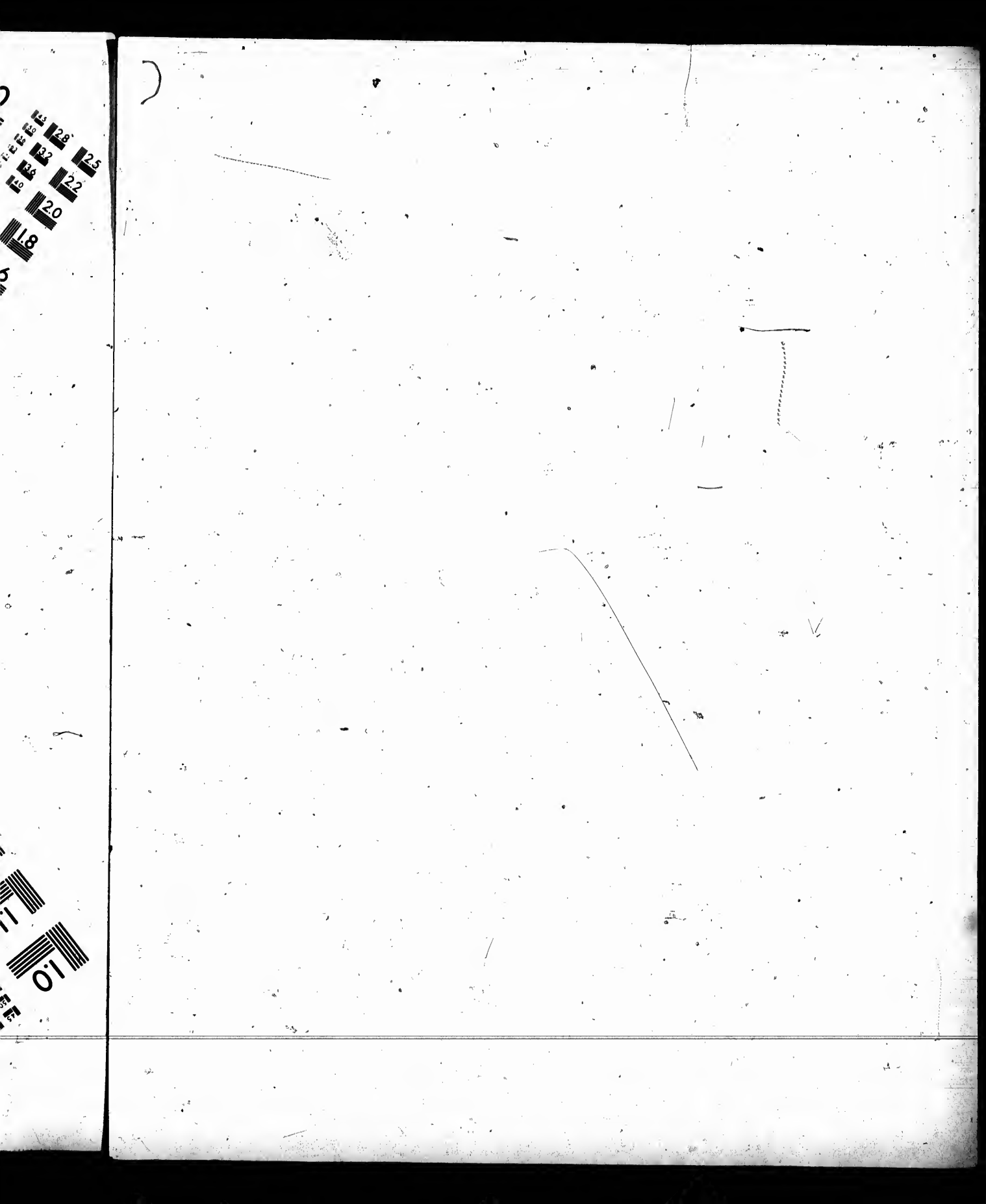






Photographic Sciences Corporation

23 WEST MAIN STREET
WEBSTER, N.Y. 14580
(716) 872-4503



Jetté et al., and McNaughton.

lot than its value. What is the meaning of value? At an auction sale it is the price at which it is estimated by the public called to be present and bid.

Reference has been made to a suit instituted by the respondent, McNaughton, as a bar to this action, and it is said that as a witness he said he was going on with that suit. I really cannot conceive what that suit has to do with this case. It was brought by McNaughton to call on plaintiffs to give him a deed for these lots on certain conditions, to which he—erroneously it would seem—thought he was entitled. Mr. Frigon thought so too, and the Court below thought so also. We have expressed a different opinion, but that could not govern Mr. McNaughton's rights at the time he brought that action or now for that matter of it, although our judgment to-day may be a convenient hint to him as to the view this Court is likely to take of such a suit if it comes before us. Then as to McNaughton's evidence in this case, amounts only to this, that with the concession of the warranty he claims he would still take the lots, notwithstanding the false bidding, at the prices they were knocked down to him. This may be true or it may be false, but it is not an admission that he is wrong in this action. I concur in the judgment of the majority of the Court.

MONK, J.—After what has been said by my learned colleagues, both by those dissenting from the judgment of the Court and by those who have so fully explained the decision of the tribunal, I do not propose to enter into extended, perhaps irrelevant, repetitions of statements setting forth the law and the facts of the case; it is not necessary that I should do so. As the cause, however, is one of some importance, it is proper that I should offer a concise exposition of the view I take of this matter, and to advert very briefly to the principles of law upon which my opinion rests. The action was instituted in the Court below, as has been stated, to compel McNaughton to take from appellants a deed of sale of certain lots which they allege they sold him by public auction on the 20th October, 1874, and also that he be condemned to pay them $9,705.75, the tenth part of the purchase money or price of the lots, $970.50 amount of the auctioneer's commission, and $24 cost of the measurement of the land in question, these several items amounting together to a total of $10,700,32. It is in evidence that on the 10th October, 1874, a number of lots at and near the Lachine Canal, after notices and advertisements of a very conspicuous and attractive character, were sold at public auction by the plaintiffs. At this sale McNaughton bought lots Nos. 7, 8, 9, 10 and 11 at 35 cents the foot, and No. 12 at 39 cents per foot, making together the sum of $97, 057.50, amount of the entire purchase money. He first bought No. 7 as the last and highest bidder at 35 cents the foot, and then, as was his right according to the conditions of sale, he selected Nos. 8, 9, 10 and 11 at the same rate, and thereupon, he signed his name in the auctioneer's book as the purchaser, he, fact, subscribed to the conditions of sale. As I view and understand this transaction it was a closed and completed purchase of the lots, and, for the purposes of this case, must be regarded as such. The majority of the Court are of opinion that this was a purchase separate from No. 12. It would appear, however, that he was desirous of owing No. 12 also; he desired to have it added to those already purchased; but he was informed that he was too late to make a choice of No. 12.

In this decision he acquiesced, and the lot was then put up for sale. McNaughton and one Frigon bid upon it and against each other, and the lot was finally adjudged to McNaughton for 39 cents the foot. He seems to have been quite satisfied with the whole affair, and so expressed himself on that very day and afterwards. It may be remarked, moreover, that this satisfaction was effectually evinced by the fact that after the delay for receiving his deed had expired he instituted an action claiming from the plaintiffs in this cause $20,000 damages because they could not and would not give him a title to the lots in question according to the conditions of the sale. Strange to say, this latter cause was pending when the present suit was instituted to force him to take a title. Although this discloses a rather unusual divergence in the views of parties prosecuting pretensions in the Courts of law, yet, in my opinion, and, I believe, in that of two of my colleagues, McNaughton's case, just adverted to, has no material, or at most no decisive bearing on the judgment now under consideration. It was contended by the plaintiffs that it had, but the Court holds that it has not. Without now referring to minor pleas in resisting the present suit, the defendant's main grounds of defence may be succinctly stated to be as follows:—

1. It was stipulated that the Government reserve on the bank of the Lachine Canal should be determined before the deed of sale was executed. This has not been done.

2. Communication through and over this reserve from the lots purchased by defendant to the Lachine Canal was guaranteed; in this plaintiffs have failed.

3. Misstatements and fraudulent representations, and even warranties, that the lots purchased, or parts thereof, would be required by the Government of the Dominion for the enlargement of the Lachine Canal.

4. False bidders and fraudulent bidding.

We are unanimously of opinion that the first three grounds of defence to this action are untenable, and that the pleas in which they are embodied must be overruled, and they are disposed of accordingly. In the reasons assigned by my learned colleagues for so deciding I entirely concur. On the fourth, however, we are not agreed, and further I may add, not without regret, that we widely differ in our appreciation of the law and the facts on this point, and upon which the judgment of the Court must rest. After careful and prolonged deliberation this difference of opinion has been found to be insuperable—irreconcileable. The majority of the Court have, therefore, to declare and determine whether the plaintiffs did or did not employ false bidders at the sale in question, and whether there was or was not false bidding with their sanction on the sale of lot No. 12 to the defendant. If so, then to decide whether the sale was or was not thereby vitiated, null and void.

It is entirely beyond controversy that there were several false bidders and a considerable amount of false bidding at the sale; and that the plaintiffs or some of them were aware of it and sanctioned these proceedings, can admit of no dispute. It appears by the evidence of record that many—most auction sales of real estate in and about Montreal are conducted in this fashion. If this be so, the sooner a usage practised in flagrant violation of our law be declared illegal, the better. Whatever may be the general and prevalent notions on this sub-

Jette et al., and McNaughton.

ject, it would be a serious—sometimes an inconvenient—delusion to imagine that such a custom would be tolerated by our law, or be sanctioned by a Court of Justice in this or perhaps in any civilized country. The high authorities cited by my learned colleagues concurring in the judgment of the Court fully sustain this view. It would be a waste of time for me to repeat them; but they have received my careful consideration, proceeding as they do from great judges and from eminent writers and lawyers in France, England and America. We are, I believe, all agreed that this case must be and is governed by the French law. But it would appear that in this community the practice of false bidding is so general and so inveterate that for my part I would hesitate to characterize, with undue severity, the acts and conduct of men who had been heedlessly or otherwise betrayed into following it. We hear a great deal about the customs of trade, usages of business and moderate compromises with the law of the land—but these are not always justifiable, on the contrary, are sometimes reprehensible in the eyes of the law. Men are prone, or, at all events, are generally ready to adopt advantageous facilities in conducting business, and when obvious expedients for successfully carrying out financial or other similar operations have been long recognized and acted on as usual and allowable—though in many cases erroneously—it is not very surprising that they should sometimes lose sight of that which strict law forbids and what it inculcates. Courts of justice are organized for the purpose, among other things, of checking abuses and of vindicating the law of the land in its integrity, and that indispensable duty, that imperative obligation, is imposed upon us in this case. In applying the strict principles of law which govern the decision of this case, it is necessary to consider very carefully whether the precise facts proved justify the Court in declaring the sale of Lot No. 12 to McNaughton null. For my part, I am of opinion, and it is also that of two others of my colleagues, that they do. Undoubtedly, as two of us think, no great importance should be attached to evidence of false bidding on other sales. This testimony, however, is significant, and is calculated to give rather an unfavorable complexion to the manner in which many of the lots were bid up and adjudged. In regard to lots Nos. 7, 8, 9, 10 and 11, however, no imputation of surprise, unfairness or deception can be maintained against the plaintiffs. This was a sale of lots apart and separate from No. 12, which was adjudged for another and a higher rate. This last adjudication, therefore, must stand alone, and be judged on its own merits. The majority of the Court consider the proof of false bidding on the lot against Mr. McNaughton to be conclusive. My learned colleagues have set forth and commented that evidence at length—I need not repeat their remarks, but I entirely concur in their appreciation of this testimony. It may be said that this is a small matter. But by setting aside the sale of this lot, the purchase money on the whole transaction is reduced by a sum of over $19,000, and even if it were less the law would apply as we understand it; and as, according to our view, when property is sold by a public auction at which, through the instrumentality of false bidders, whether one or more under our law, with the knowledge of the vendor, a purchaser has engaged to pay a higher price than he would have undertaken to pay had he had to contend with serious and honest bidders only,

the sale is vitiated and is null in the eyes of the law. The purchaser may waive the consequences of the unfair advantage if he choose, otherwise he may oppose them as valid reasons for not taking his deed. It is plain that the position of the parties should not be rendered unequal by any unfair manœuvering or deception. Without referring to legal authorities or citing decisions of other tribunals, all this must be obvious to the common sense, and be approved by the moral opinion of every one; but it is satisfactory to know that in cases like the present this doctrine has been held and consecrated by great names and high authority. Those referred to by my learned colleagues, clearly establish this position. The defendant invokes these principles as affording grounds of nullity of this sale, and we think according to the evidence that he has a right to do so, and that his plea must prevail as to lot No. 12.

It may be observed that parties wishing to sell by public auction may take precaution against the sacrifice of their property—such a course is reasonable—they may fix an upset price, or make arrangements, duly rendered public, for withdrawing it unless a certain price be offered; or they may have recourse to any other honest device which their ingenuity of their interests may suggest—but the law discountenances, prohibits, false bidding; all this may be very inconvenient, and may interfere with speculating or other more serious operations, but the law is there and we must abide by it. The sale of lot No. 12 is, by the Court, adjudged to be null, and that of Nos. 7, 8, 9, 10 and 11 is maintained.

The judgment is recorded in the following terms:

The Court, etc., *** Considering that it was not necessary before and at the time of the institution of the present action, that the precise depth and extent of the Reserve mentioned in the second condition of sale in question in this cause should have been determined by the plaintiffs (appellants here), or by the Government of the Dominion of Canada; and seeing that the defendant was not justified in refusing to take his title on that ground;

Considering that the said plaintiffs were not bound by the sale of the 10th October, 1874, in question in this cause, before or at the time of the institution of the present action, to give or procure for defendant greater right of communication with the Lachine Canal through and over the said Government Reserve than is mentioned in said sale and conditions thereof; and that the defendant's pretension in that behalf as set forth in the pleadings in this cause was and is unfounded;

Considering that the Government Reserve between the lots purchased by defendant and the Lachine Canal was expressly mentioned in the conditions of sale signed and agreed to by defendant, and that he is bound by such conditions;

Considering that the plaintiffs did not, before or at the time of the said sale, by the conditions thereof or otherwise, give to the defendant any legal guarantee that the said lots or any portion thereof would be required by the Government of the Dominion of Canada for the enlargement of the Lachine Canal;

And whereas it is not established by legal and sufficient evidence that there was any false bidder or bidders or fraudulent bidding on lot No. 7 when it was adjudged to defendant on the 10th October, 1874; and that in regard to lots Nos. 8, 9, 10 and 11, it is proved that after purchasing lot No. 7, the defendant

Jetté et al., and McNaughton.

selected and purchased these last mentiond lots at said sale without any bid had or taken thereon by himself or others as he had the right to do at the same rate and upon the same conditions as those of lot No. 7;

Considering that the defendant signed and subscribed the conditions of sale after the purchase of the said lots 7, 8, 9, 10 and 11, and that thereby the sale and purchase of the said lots were complete and perfected;

Considering that in applying the law relating to false bidders and fraudulent bidding to the sale and purchase of these lots, and in dismissing the plaintiff's action in so far as it related thereto, there was error in the judgment of the Court below;

But seeing that it is established by legal and sufficient evidence adduced in this cause that in regard to the purchase of lot No. 12, made after and separately from the sale above mentioned of lots Nos. 7, 8, 9, 10 and 11 by the defendant, there was false and fraudulent bidding to the detriment of the defendant, and with the knowledge and sanction of the said plaintiffs or of some one of them;

Considering that such false and fraudulent bidding under the circumstances of this case vitiates and renders null the said sale of lot No. 12, and that the defendant is not legally bound thereby;

And whereas, on the 12th November, 1874, some time previous to the institution of the present action the plaintiffs did by notarial demand, notice and protest, offer and tender to the defendant a deed of sale in the form and of the tenor and effect of the draft (*projet*) thereof produced by the plaintiffs in this cause, and that the said defendant refused and has hitherto refused to execute the same, either for lot No. 12, or for the lots Nos. 7, 8, 9, 10 and 11;

Doth reverse in part and reform the judgment rendered in this cause by the Superior Court at Montreal on the 31st May, 1875, dismissing plaintiffs' action, and proceeding to render the judgment which the said Court ought to have rendered, doth maintain plaintiffs' action as to lots Nos. 7, 8, 9, 10 and 11, and doth dismiss the same as to lot No. 12, and condemn the defendant within 30 days after the service upon him of the present judgment to sign and execute in due form of law a deed of sale of lots No. 7, 8, 9, 10 and 11 from plaintiffs to him of the tenor and effect of that produced in this cause, save and except as to lot No. 12; and in default of the defendant complying with order and adjudication of this Court in that behalf within the delay aforesaid, it is considered, ordered and adjudged that the present judgment shall be taken, held, and shall avail to all legal intents and purposes whatever as the defendant's title to the lots Nos. 7, 8, 9, 10, and 11 upon each, all and every the terms and conditions of the deed of sale offered by the plaintiffs to the defendant, save and except as to lot No. 12, in regard to which the judgment of the Court below is hereby confirmed, and doth further condemn the defendant to pay and satisfy to the plaintiffs the sum of $8,503.86 for the causes aforesaid, with interest, &c.

Judgment reformed.

Jetté, Beique & Choquet, for the appellants.

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

(J. K.)

SUPERIOR COURT, 1876.

MONTREAL, 30TH SEPTEMBER, 1876.

Coram TORRANCE, J.

No. 1052.

Lussier vs. *Anderson*.

HELD:—That the occupant of premises who invites persons to enter therein through a passage having a trap-door is liable in damages to such persons who, ignorant of the trap, fall into it and are injured.

PER CURIAM:—This is an action of damages against the defendant, who is charged with having, by his negligence, caused the plaintiff to fall through a trap-door into a cellar, whereby she suffered bodily injuries. The defendant is a clothier in St. James street, employing a number of hands. His workmen were in the habit of entering his workshop in rear of his premises through a passage which led from the side street known as St. Peter street, to a door of the premises which opened into a passage in the building conducting to different rooms. The latter passage had a trap in it a few feet to the right as you enter. I should here remark that the plans referred to by the witness are not so accurate as the one furnished by the surveyor. The trap was usually closed. On the morning of the 22nd January, 1875, the plaintiff entered into this passage in order to visit the defendant's rooms on business, accompanied by another woman, and as she entered, the trap-door being opened, she was suddenly precipitated through it into the cellar. The plaintiff is not shown to have been aware of the existence of this trap. It is in evidence that defendant required work people calling at his premises to enter them from behind, through the passage in question. The plaintiff was a sewing-woman who did work for defendant, according to her mother's account. A witness for the defendant says the mother only was employed by defendant, and that plaintiff only came to defendant's on behalf of her mother. Is the defendant liable in damages? "It is the duty," says Saunders on Negligence, p. 75, section 2, "of every one who has premises to which others may lawfully resort, to exercise all reasonable care against the occurrence of accidents." In Indermaur v. Dames (L. R., 1 C. P. 274; affirmed in the Ex. Ch. L. R., 2 C. P. 311), Willes, J., said, "We are to consider what is the law as to the duty of the occupier of a building, with reference to persons resorting thereto in the course of business, upon his invitation, express or implied. The common case is that of a customer in a shop; but it is obvious that this is only one of a class; for, whether the customer is actually chaffering at the time, or actually buys or not, he is, according to an undoubted course of authority and practice, entitled to the exercise of reasonable care by the occupier to prevent damage from unusual danger, such as a trap-door left open, unfenced, and unlighted." Campbell in the "Law of negligence," § 32, writes, "The same responsibility in regard to the safety of his premises, which a person owes to the public, being in places where they have lawful right, he owes to those who, by his invitation, come upon his own premises, in pursuit of a matter of common interest to both. I here exclude the case where the relation between the partie

Lussier vs. Anderson.

is one of contract, and the damage arises from a risk which the sufferer may be presumed to have contemplated as a risk incident to the contract. Being on the premises by invitation of the occupier is distinguished from being there by his mere license, in which case the occupier is liable, like any other person whom the licensee may meet upon his premises, for ordinary negligence only and such negligence would be inferred if there were anything in the name of a trap upon the premises, known to the owner, and of which he failed to warn the person who obtained his permission to go there. Southcote v. Stanley, 1 H. & N. 247." I have no hesitation here to say that I hold it to be the duty of the Court to find the defendant here liable in damages to the plaintiff, who has suffered through the opening of the trap-door. It is, however, not a case of punitive or exemplary damages. Taking into account the loss of the plaintiff in being deprived of the means of gaining a living for three months and her expenses for medical attendance, I fix the damages at $200.

Rinfret, for plaintiff.

T. C. Butler, for defendant.

(J. K.)

SUPERIOR COURT, 1876.

MONTREAL, 9TH SEPTEMBER, 1876.

Coram RAINVILLE, J.

No. 1915.

Brown et al. v. *Lionais* et al., and *Lionais* et al., opposants.

HELD:—That an opposition to an execution, on the ground that opposant has taken out a writ of appeal against the judgment sought to be executed, will be rejected, unless security for the appeal precede the opposition.

The property of the defendants was taken in execution by the plaintiffs for the payment of their judgment against the defendants. The defendants took out a writ of appeal from the judgment, and the same day filed an opposition to the seizure, on the ground that the effect of the writ was to suspend the execution until the Court had pronounced upon the appeal.

Benjamin, for the plaintiffs, moved the Court, on the 6th September, to reject the opposition, on the grounds that the simple issuing of the writ of appeal without security given did not suspend the execution, and that the opposition did not allege that security had been given.

The Court granted the motion.

Benjamin, for plaintiffs.

St. Pierre, for defendants.

*** A judgment to the same effect was given by TORRANCE, J., in the same Court and cause, on the 2nd October, 1876, on a second opposition which reiated the execution, on the ground that the defendants had taken out a writ of appeal against the judgment of Mr. Justice Rainville, without alleging security given.

(J. K.)

COURT OF QUEEN'S BENCH, 1875.

MONTREAL, 21st DECEMBER, 1875.

Coram DORION, C. J., and MONK, RAMSAY, and SANBORN, J J.

No. 129.

ADAM R. BELL,

(Defendant in the Court below,)

APPELLANT;

AND

JOHN J. ARNTON,

(Plaintiff in the Court below,)

RESPONDENT.

HELD:—That the *prima facie* proof of payment afforded by a receipt in writing can be destroyed only by the clearest and most positive evidence of error.

This was an appeal from a judgment of the Superior Court at Montreal, JOHNSON, J., 30th November, 1874, maintaining an action of the respondent for $250, balance alleged to be due, notwithstanding the production by the appellant of a written receipt for the amount.

The respondent, Arnton, an auctioneer, was intrusted by the Assignee of Downey, Doherty & Co. with the sale of the effects of the insolvent estate, and sold them at auction on the 1st September, 1874. The appellant, Bell, purchased goods to the amount of $1269.62.

Settlement had to be made at the respondent's office on the day after the sale, and in the morning the appellant went there and paid for his purchase to one of the respondent's clerks named Henry Harman. The payment was made, as he alleged, by $550 in bank notes of $5 each, and a cheque for $719.62, and Harman then receipted the appellant's bill of sale.

A few hours after the payment was made Harman pretended that he had made an error in receiving the money; that he had taken and counted fifty bank notes of $5 each for bank notes of $10 each, and that he had therefore received $250 less than the amount of the appellant's bill. Bell denied that any error had been made.

Arnton then instituted the present action to have the receipt set aside as having been given by error, and to recover the $250 which his clerk pretended had not been received.

The appellant pleaded the general issue.

At the *enquête* the appellant declared positively under oath that he had given one hundred and ten bank notes of the Stadacona Bank of $5 each to Harman, and that the latter counted them in his presence and found them correct; and he explained how he became possessed of $1500 of the notes of that Bank, of which those paid to Harman formed part.

Harman deposed that the respondent handed him a parcel of bank notes saying, "there is $500;" that they were bank notes of $5 each, but that he counted.

Bell and Araton.

them by mistake for tens; that the respondent then handed him ten more bank notes, and witness said "this is another hundred," to which the appellant replied: "no, fifty;" that afterwards, when making up his money to be deposited in the Bank, he found it $250 short, and that he had only $300 instead of $550 in notes of the Stadacona Bank.

The action was maintained in the Superior Court by Mr. Justice Johnson, who held that the receipt had been given by error. His Honor in rendering judgment made the following observations:—

"The action is a special one under these circumstances: The plaintiff, who is an auctioneer, sold to the defendant at auction goods to the amount of $1,269.62, and the following day the defendant went to the auctioneer's office to settle. The clerk, Mr. Harman, being told by the defendant that the latter was ready to pay, received from him a cheque and a parcel of bank bills. The cheque was for $719.62, and the question is, what was the sum paid in bills? The pretension of the plaintiff is that it was only $300, leaving $250 still due. The defendant contends he paid in full, and having in his possession the plaintiff's bill for the goods marked "paid," he has *prima facie* a strong case, no doubt; but the only point is in reality whether there was a mistake, for if there was, and the plaintiff has not been paid, of course he has an action and must recover, if he can make it plain that the sum actually received in bills was $300 and not $550, and the onus is on him to show this conclusively, a receipt being final, unless it can clearly be shown that there was error instead of payment.

"As I have said before, the action is on the case setting forth the facts, and asking that the receipt or statement of payment may be declared to have been given in error and set aside. No doubt he might have sued for the balance of his account, and on the production of the receipt a special answer might have set up the error; but the plaintiff has, I think, taken the better and fairer course, and the defendant is not called upon to show that he did not pay the money, but it is the plaintiff's business to show that he did not, which, in most cases, is a very difficult thing, and properly so, because if receipts for payments made in the course of business were easily questionable, great inconvenience and confusion would result. Where, however, the error can be clearly and incontrovertibly established, the Court must say that there has not been a settlement between the parties, but a mistake, and the fact itself, and not the erroneous statement of it, must govern the rights of the parties.

"Now in the present case there can be no possibility of doubt about the matter. The defendant pleads the general issue. He is put upon his oath, and he is asked by the 17th and 18th interrogatories whether the bills he gave to Harman were 60 in number and for $5 each. He answers,—no, it is not true; that the bills he paid to Harman were $5 bills, but that there were *one hundred and ten of them*. This, then, is his case. He swears to it, and I suppose he believes it. Is he right, or is he in error? I think there is the plainest evidence of facts that are absolutely inconsistent with the possibility of his being right. Harman swears in the clearest manner that what he received was first of all a bundle of bills, which the defendant handed him saying, there is $500,

and then another parcel of bills, saying there is another hundred, and immediately correcting himself and adding: "No, I mean fifty." Harman then handed him a blank cheque to sign for the balance, which was done, and the receipt was given in full. This took place at 10 a.m., and at 11 a.m. the error was discovered and the defendant was communicated with, but would not pay; insisted that he had already done so, though he could not then, and cannot now, show he could have paid consistent with other payments and deposits that he admits, for unfortunately he makes no entries of cash. Potter, another clerk at the plaintiff's, says that $8,000 was paid into the office that day on account of the sale of which the goods sold to Bell formed a part. Harman drew his attention to the fact that the payment made to him by Bell was $250 short, and he verified it by counting the bills, and found sixty fives and no more. But though this, unless it could be shown to be suspicious evidence, ought to settle the case, the defendant himself leaves no manner of doubt about the fact that in saying he paid one hundred and ten $5 bills, he was either saying what he ought to have known was not true, or else he has seen fit to change the grounds upon which he contests this demand; and, in either case, this would raise a strong presumption against him and tend very materially to confirm the account of the matter given on behalf of the plaintiff. In the first of his articulations of fact the defendant asks his adversary whether he, defendant, did not give him a cheque for $719.62, and *fifty-five bank bills for* $10 each. If he did, how can he swear that he gave 110 fives? If he did not, what was his object in putting forward a false case? We have evidence, then, which, under the rules governing such cases, ought to be weighed, as far as it rests merely on Harman's testimony, which, if there were the slightest suspicion attaching to it, I would at once reject, and hold the receipt to be final; but, at the same time, it is evidence which, if it is believed, as I think it ought to be, is decisive of the case. What Harman said to the defendant's witness, McCormick, viz., that he had lost $250, is quite consistent with what Harman himself deposes, and we must look to that in order to see the fair meaning of the words used. It would be directly in the teeth of his meaning to infer that he had lost part of the money after he had been paid in full, for he swears the very contrary. But we have more than this. We have the contradictory pretensions of the defendant himself at different times, and the inconsistency of both of these pretensions with a deposit which he says he made out of the same funds that he says he paid Arnton with, and we have the additional misfortune of not being able to see from the Defendant's books what were the cash payments he really made, because he makes no entries of such things.

"Under these circumstances, the plaintiff has shown clearly that there was error. The defendant, instead of clearing it up, adopts two inconsistent lines of defence, which cannot both be true, and which, taken together with the fact that he has made no entry of cash payments, tend to corroborate and confirm very strongly the plain account of the matter given by Harman and Potter. Judgment for plaintiff."

Bell and Arnton.

The defendant appealed, contending that error had not been proved. The following is an extract from the defendant's factum in appeal:—

"The case is a commercial one, and is therefore susceptible of proof by witnesses; but it requires the most positive, unimpeachable and reliable testimony to destroy the *primâ facie* evidence established in the appellant's favor by the written receipt held by him. And the interests of society require that a receipt should be considered sufficient, unless undoubted and overwhelming evidence is adduced against it; for otherwise, no person would be safe to take a receipt under private signature on making a payment without having reliable witnesses present to substantiate it if it should be afterwards disputed.

"In this cause two persons, who are equally interested in the issue, have been examined under oath; the appellant, whose interest is to sustain the receipt, and Mr. Harman, the respondent's clerk, whose interest is equally great to destroy it, as he is accountable and responsible for the money which was lost. True it is, that the appellant's evidence cannot avail for himself; but the respondent did not declare that he did not intend to avail himself of the appellant's testimony, and it therefore stands in the record and contradicts and nullifies Mr. Harman's evidence,—for the one swears positively that he paid one hundred and ten bank notes of five dollars each, and his evidence in other particulars is corroborated by the documents produced and by the other witnesses,—while the other swears that he only received sixty bank notes, and his evidence is contradicted on two points by the appellant's witnesses. Besides this, Mr. Harman, being personally interested to have the receipt set aside, is, although not incompetent, a suspicious witness, and one not entitled by law to entire credit."

The Court of Appeal held that error had not been clearly established, and reversed the judgment.

RAMSAY, J.:—This is a case which gives rise to some difficulty. The action is to set aside a receipt. The appellant, Bell, purchased at an auction sale by Arnton a quantity of goods, the price of which amounted to $1,269.62. On the following day Bell went to the place of business of Arnton and there paid to his cashier, Harman, a sum of money in bills and the balance by a cheque, and got a receipt. The bills were handed to Harman in two bundles; one was counted as containing $500 and the other $50. Some time afterwards Harman discovered that his cash was short $250. Then it struck him that he had been given only fifty $5 bills in the first package instead of fifty $10 bills, as he supposed he had counted them. He went to the appellant to speak to him about it, and the appellant assured him that he had given him one hundred $5 bills. The action is brought by Arnton for the $250 difference. The only evidence is that of Harman and Bell. Harman's pretension that there were only fifty $5 bills in the bundle is not well supported. It is true that Bell's evidence is not very satisfactory. In the first place, he keeps no regular cash book. He states in general terms that he got a certain sum of money, part of which he paid to Harman, and the balance he paid into the Bank; but he does not make this as clear as he might have done. On the other hand, Harman admits that he counted the money, and he admits also that a memorandum, showing a calculation of the amount of one hundred fives and ten fives, is in his handwriting;

but he says that it was merely a calculation to see what the balance would be for which the cheque was to be given. It comes to be a question whether this Court can sanction a judgment setting aside a receipt upon testimony of this kind. The receipt is an absolute receipt, stating that Bell had paid the money. If a receipt like this can be set aside, except upon the most conclusive evidence of error, receipts will be of no value at all. Although very reluctant to disturb a judgment upon a question of evidence, the Court cannot concur in this judgment.

Bell and Anston.

SANBORN, J., remarked that it was with a good deal of doubt that he acquiesced in the judgment now pronounced. He had his fears that it might be an unjust judgment, and that the decision reversed met the equity of the case; but he found himself unable to sustain any other judgment than that now rendered. Harman's particular business was to see that the money was properly paid to him. The value of a receipt was this: it is only given when a bookkeeper has carefully gone over the money and is sure that it is correct; it is then a voucher for the person who has paid it. It was impossible to say positively in this instance who had stated the truth. There were circumstances which seemed to indicate that the bookkeeper had acted in good faith, but the evidence was not clear enough to justify the Court in setting aside the receipt.

MONK, J., thought the case presented itself in such a way that the ordinary sense of any one could dispose of it. It was difficult to suppose that a mistake in counting could have occurred, for it was admitted that the cashier was a young man of great business ability. His Honor considered all the investigation that had been made into Mr. Bell's bank account to be irrelevant and out of place.

The judgment in Appeal is recorded in the following terms:—

"The Court, etc. * * * considering that there is no sufficient evidence to set aside the receipt given by Henry Harman, clerk of said respondent, to said appellant on the 2nd day of September, 1874, for the payment of $1269.62 to the extent of $250 alleged to be missing and not to have been paid by the said appellant to the said Harman for the said respondent, according to the tenor of the said receipt;

"Considering, therefore, that in the judgment appealed from, to wit, the judgment rendered by the Superior Court at Montreal on the 30th of November, 1874, there is error, doth reverse, &c."

Judgment reversed.

Judah & Wurtele, for the appellant.

Perkins, Macmaster & Prefontaine, for the respondent.

(J.K.)

COURT OF QUEEN'S BENCH, 1876.

MONTREAL, 16TH JUNE, 1876.

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

No. 25.

THE ÆTNA LIFE INSURANCE COMPANY, APPELLANT;

AND

BRODIE, RESPONDENT.

HELD:—That in commercial cases, parol evidence may be adduced to establish an alleged error in a written contract.

DORION, CH. J.:—This action is based on a policy of insurance for $2,000, payable at the death of the respondent or at the expiration of eight years, if he should live till that period.

The appellants pleaded error in the policy, alleging that the insurance had been effected for $1,000 only;—that it had first been proposed to insure the life of the respondent for eighteen years, and that the term was subsequently reduced from eighteen to eight years, as shewn by the application signed by the respondent, but that the amount of the proposed insurance had not been altered in the application, and that this caused the error in the preparation of the policy; that the proper amount of the insurance, to wit, $1000, and of the premium were mentioned in the margin of the application, and that this premium was that of an insurance for $1000, and not a policy for $2,000.

At *Enquête* the appellants offered to prove by witnesses the allegations of their plea, and the respondent objected on the ground *that parol evidence could not be adduced to vary a written contract.* The objection was maintained by the Judge, at *Enquête*, and also by the Superior Court on a motion to revise the decision at *Enquête.* The question submitted to this Court is whether appellants have the right to prove by parol testimony the error they have alleged in their plea.

The contract of insurance for a premium by persons carrying on the business of insurers is a commercial contract—(*Civil Code, Art.* 2470, 2471.) It is, therefore, subject to the rules of evidence applicable to commercial matters, that is, to the English rules of evidence introduced into this country by the Act 25 Geo. 3, Cap. 2, S. 10, re-enacted in S. 17 of Cap. 82 of the C. S. L. C.

The first paragraph of Art. 1233 of the Civil Code, taken in connection with Art. 1235, must also, in the absence of any evidence of an intention to alter the law, be considered as a mere re-enactment of the law of evidence with regard to commercial facts, as it existed previous to the Code. We must therefore look into English authorities to decide whether under the particular circumstances of this case, parol testimony is admissible or not.

In England the general rule is that parol testimony cannot be admitted to contradict, vary, add to or subtract from a valid written instrument—(2 Taylor on Evidence, § 1035.) Yet Courts of Equity have always received such evi-

dence. Taylor, vol. 2, § 1041, says: "Courts of Equity will also sometimes admit parol evidence to contradict or vary a writing when by some mistake in fact, it speaks a different language from what the party intended. . . . . In either of these cases, if the defendant, by his answer, denies the case, as set up by the plaintiff, and the latter relies simply on the verbal testimony of witnesses, and has no documentary evidence to adduce, such, for instance, as a rough draft of the agreement, the written instructions for preparing it, or the like, the plaintiff's position will be well nigh desperate; *though even here, as it seems, the parol evidence may be so conclusive in its character as to justify the Court in granting the relief prayed.*" See also § 1042.

Story, Equity Jurisprudence, Vol. 1, § 152–157, shows it is the practice of Courts of Equity to allow parol evidence to vary and reform written contracts and instruments, upon the ground of accident and mistake. Phillips on Insurance, 116, is also clear on this point.

It was contended on the part of the respondent that Art. 1234, in saying that "Testimony cannot in any case be received to contradict or vary the terms of a valid written instrument," was conclusive against the reception of parol testimony. This article, however, cannot apply to the cases specially provided for in Art. 1233, otherwise it would exclude parol testimony not only in commercial matters mentioned in the first paragraph, but in cases where a *commencement de preuve par écrit* exists, which are the subject of the seventh paragraph of the same article. If the interpretation put by the respondent on Art. 1234 was to be followed, parol testimony could not be received to explain or vary a written instrument, when a *commencement de preuve par écrit* was produced, nor even upon an *inscription de faux*. As already stated, the exclusion of parol testimony to vary a written instrument exists in England, and there the general rule is the same as that which prevails here under Article 1234 of the Code, yet we have shown that, notwithstanding, Courts of Equity except cases of error from its operation.

We hold that the rules of evidence in commercial matters have not been altered by the Code, and that in this case parol testimony is admissible as it undoubtedly would be if the case was pending before a Court of Equity in England.

We must, therefore, reverse the judgment. In doing so the Court does not express any opinion as to the effect of such evidence. Before obtaining the relief they ask, the appellants must conclusively show that an error was committed to their prejudice, in the policy they have themselves issued. The task is a difficult one, but the evidence may be so conclusive as to carry conviction, in which case alone will it be the duty of the Court to interfere.

The following were the reasons assigned in the written judgment of the Court:—

"Considering that the appellants have specially alleged in their exceptions in this cause certain facts to establish that there was error in the amount for which the policy of insurance on which this action is brought was issued;

"And considering that among other facts it is alleged that the said policy was issued on a certain application in writing of the respondent, and that said appli-

The Ætna Life Insurance Co. and Brodie.

cation contains on the face of it erasures and contradictory statements as to amount of insurance to be effected and the terms thereof;

"And considering that parol testimony is not, under the circumstances alleged in the appellants' pleas, inadmissible, but may be received in evidence to prove the error complained of, subject to the application hereafter to be made of such evidence by the court;

"And considering that there is error in the judgment rendered by the Judge presiding at *Enquête* which has rejected the four questions submitted at *Enquête* to the witness William H. Orr, on the 15th day of May, 1875, and in the interlocutory judgment rendered by the Superior Court at Montreal on the 19th day of June, 1875, rejecting the motion of the appellants to revise and cancel the order of the Judge at *Enquête*, disallowing the said four questions;

"This Court doth reverse and cancel, &c., &c."

Judgments of Superior Court reversed.

Trenholme & Maclaren, for appellant.

Cross, Lunn & Davidson, for respondent.

(S. B.)

COURT OF QUEEN'S BENCH, 1876.

MONTREAL, 27TH JANUARY, 1876.

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

No. 176.

DUFAUX,

APPELLANT;

AND

ROBILLARD,

RESPONDENT.

HELD:—That the father of an interdicted person ought of right to be appointed his curator, in the absence of any grave objection to such appointment, even when the majority of the *conseil de famille* thinks otherwise, and that insolvency is not of itself a legal objection to such appointment.

MONK, J., *dissented*, on the ground, that the father had been proved to be insolvent, and also to have been a maladministrator as executor.

DORION, CH. J.:—Sur Requête de l'Intimé pour faire interdire Joseph Dufaux, fils, son beau-frère, tous les parents et amis présents à l'assemblée se prononcèrent pour l'interdiction, mais ils se divisèrent sur le choix d'un Curateur,—trois des parents et un ami proposèrent Joseph Laramée et les trois autres dont un parent et deux amis recommandèrent l'appelant, père de l'Interdit. L'appelant a contesté cette nomination par une Requête devant la Cour Supérieure, mais sans succès. La Cour a exclus le père de la curatelle de son fils, sous le prétexte qu'il était insolvable. L'insolvabilité n'est pas prouvée et en supposant qu'elle le serait, ça ne serait pas une cause d'exclusion. Il faudrait en outre quelque preuve de mauvaise administration ou d'incapacité,

l'insolvabilité seule n'étant pas une cause d'exclusion. Code Civil, art. 282 et 285. 2 Pigeau, pp. 305-6: "On nomme ordinairement le père des mineurs &c. . . . . Il faut des raisons pour confier à d'autres le soin de veiller aux mineurs; et comme ce serait un affront au père ou autre ascendant vivant, il serait en droit de s'en plaindre et de demander la tutelle, &c."

En effet à moins de causes graves le père a droit à la tutelle ou curatelle de ses enfants et dans ce cas-ci il n'y a aucun motif d'exclure l'appelant.

Le Jugement de la cour inférieure doit être infirmé mais sans frais. L'appelant pourra cependant porter en dépense, les dépens qu'il a encourus dans cette cause dans l'intérêt de l'Interdit.

The following were the reasons assigned in the written judgment of the Court:—

"La cour * * * considérant que l'appelant est le père de Joseph Dufaux, fils, interdit par sentence d'interdiction prononcée en cette cause le 13 Septembre, 1873;

Considérant que le dit appelant a depuis un grand nombre d'années géré et administré les biens du dit Joseph Dufaux, fils, tant en qualité d'Exécuteur Testamentaire nommé par le testament de feu Joseph Roy de qui proviennent ces biens, puis comme Conseil Judiciaire et ensuite le procureur du dit Joseph Dufaux, fils:

Considérant qu'il n'y a pas de preuve que l'appelant soit insolvable et que d'ailleurs l'insolvabilité seule n'est pas une cause suffisante pour exclure le père de la curatelle de son fils;

Considérant que la preuve n'indique aucune malversation dans la gestion de l'appelant ni qu'aucune des causes de déqualification ou d'exclusion établies par la loi soit applicable au dit appelant;

Considérant que le juge qui a prononcé l'Interdiction n'était pas obligé de suivre l'avis de la majorité des parents et amis convoqués pour donner leur avis sur la nomination d'un curateur, tel avis n'étant qu'un mode d'instruction pour assister le juge dans l'exercice de ses attributions;

Considérant que dans les circonstances établies par la preuve faite en cette cause, l'appelant comme père du dit Joseph Dufaux, fils, devait être nommé son Curateur de préférence à Joseph Laramée qui est étranger à la famille de l'Interdit;

Considérant qu'il y a erreur dans cette partie de l'ordonnance du 13e jour de Septembre 1873, qui a exclus le dit appelant de la curatelle de son fils et nommé le dit Joseph Laramée Curateur, et qu'il y a également erreur dans le jugement rendu par la Cour Supérieure à Montréal le 31e jour d'Octobre 1873, qui a renvoyé la Requête du dit appelant pour faire annuler la nomination du dit Joseph Laramée, cette Cour casse et annule, &c."

Judgment of Superior Court reversed.

Lacoste & Drummond, for appellant.

Respondent, in person.

(S.B.)

SUPERIOR COURT, 1876.

MONTREAL, 2ND NOVEMBER, 1876.

Coram TORRANCE, J.

No. 2207.

Richard et al. vs. *Piché*; and *La Société Canadienne Française de Construction de Montréal, T.S.*

HELD:—That it is always admissible for a garnishee (*tiers-saisi*) to fyle a new declaration, on payment of costs occasioned by his alleged error, and that any new declaration may be contested as the original one could be.

TORRANCE, J:—This was an application by the *tiers-saisie* to make a new declaration. Their petition states that they made a declaration on the 9th June last in this cause, that they owed the defendant the sum of $1,264.30. This declaration was made by Louis H. Charbonneau, their secretary-treasurer, duly authorised to that effect by the directors; that the garnishees had made an error in declaring that they owed the defendant $1,264.30, inasmuch as at that time they owed nothing; that one Joseph Bouchard, a member of the said Society, had bought from it at a public assembly of members on the 30th March last, an appropriation of $2000, being under the number 333, being ten shares subscribed by the said Bouchard in the capital of said Society; that subsequently the secretary-treasurer was informed that said Bouchard had verbally bound himself to the defendant to transfer to him, for consideration, the amount of the said appropriation as well as all his rights under it; and that the defendant, trusting to the promise of the said Bouchard, had submitted an application to the directors, in which he asked that the said appropriation be granted and paid to him if the guarantee offered by him, the defendant, was judged sufficient; that the directors, not knowing that said Bouchard had not transferred in a legal manner the amount of said appropriation, but, on the contrary, thinking that all was regular, did, on the 10th May last, accept the guarantee of the defendant, and an obligation was passed by the defendant in favor of the Society and duly registered for the amount of said appropriation on the 26th May last; that, at the time of the passing of said obligation and its registration, said Bouchard had not legally transferred to defendant the amount of said appropriation; that, at the time of the passing of said obligation, said Charbonneau had neglected to enquire whether said transfer had been made; that, when the directors authorised their secretary-treasurer to make the declaration produced in this cause, and when the latter made the declaration, the directors and secretary were both in the best of faith and sincerely believed that they owed to defendant the amount mentioned in the declaration; that the defendant has never been vested in a legal manner with said appropriation, which has always been and still is the property of said Bouchard, so that the obligation passed by the defendant to said Society is without object and not binding, hence the prayer of the petitioners to be allowed to make the new declaration.

The plaintiff, resisting the petition, filed a written answer to the effect that all building societies lend on mortgage to persons who are not and do not

Richard et al. vs. Pichè; and La Société Canadienne Française de Construction de Montréal, T.S.

become shareholders in said societies; that it results from the allegations of said petition that the petitioner had taken a valid mortgage upon the property of the defendant, and was, at the time of the service of the *saisie-arrêt*, to pay to defendant the amount declared due; and that by law, and according to the alleged facts, the *tiers-saisie* was really debtor of the sum declared.

The parties have gone to evidence, and the plaintiff strenuously resists the application. The Court has no reason to doubt the good faith of the petitioner. It was decided by the Superior Court, on an appeal from the Circuit Court, at Quebec, nearly 30 years ago, in the cause of Andrews & Robertson, 1 L. C. R. page 140, that a *tiers-saisi* who had failed to make any declaration, and against whom a judgment had been rendered in consequence, could always be relieved from the consequences of his default and be allowed to make a declaration. That judgment was acquiesced in, since which time there has been no question as to its validity. And the same rule holds in France where a *tiers-saisi* may, subsequent to his declaration, and even in appeal, make the prescribed justifications, subject to the payment by him of the costs occasioned by his negligence; —Vide Rogron, C.C.P., on Article 577, page 1423. I do not see any difference between the case of the *tiers-saisi* failing altogether to answer the requirements of the writ and making an insufficient declaration, which is the case referred to in Rogron, and the case under consideration, where the *tiers-saisi* has made a mistake, and asks in good faith to be relieved from the consequences of it. It is always open to the plaintiff after the *tiers-saisi* makes a declaration to contest it within the usual delays, and the question will then come up fairly and regularly whether the declaration is untrue or otherwise. I have no hesitation therefore, under the circumstances, in granting the petition.

Charpentier, for petitioner.
J. Doutre, Q.C., for plaintiff.
(J.D.)

COURT OF QUEEN'S BENCH, 1876.

MONTREAL, 13TH OCTOBER, 1876.

Coram DORION, C. J.

Regina vs. *Jennings*.

HELD:—That, after the counsel for the prosecution has closed his case, and objection has been taken to some defect in the evidence, the Judge may recall witnesses and make further inquiries to meet the objection.

PER CURIAM:—The complainant, on a trial for rape, with considerable hesitation stated what had taken place, and concluded by saying that the prisoner had *carnally known her* on the occasion. She was not pressed with any further questions.

After the case for the prosecution had been closed, the counsel for the defence submitted that there was no evidence to go to the jury of the commission of the crime charged, inasmuch as the complainant had not stated in her

Regina vs. Jennings.

evidence, facts from which the jury could judge whether a rape had been committed or not, but had merely expressed her opinion or her own views on the main question at issue, thereby substituting her own judgment for that of the jury; that she might be mistaken in her appreciation of what constituted carnal knowledge, and that, therefore, there was no evidence of the crime. The Act 32 and 33 Vict., c. 20, sect. 14, was also cited to show what evidence was required.

The Chief Justice, after consulting with Mr. Justice Monk, recalled the witness to explain what she meant by her former statement.

This was objected to on the ground that, the case for the Crown being closed, no further evidence could be adduced. The objection was overruled, and several questions were put by the Judge to elicit the facts, and then the Counsel for the prisoner was asked if he had any cross-questions to put to the witness on this re-examination.

This course seems fully justified by authorities. In a case of larceny (Rex vs. Remnant, R. & R. 136) an objection was taken, after the case for the prosecution was closed, that the ownership of the property alleged to have been stolen was not proved, and, as there was some doubt about it, the Judge recalled the principal witness. An objection being taken to this course the Judge refrained from putting any questions. The prisoner was convicted, and the point as to the sufficiency of the evidence reserved. All the Judges except Rooke, J., who was not present, agreed that the evidence was sufficient, and that the prisoner was properly convicted.

The Reporter adds, "None of the Judges seemed to have any doubt but that "it was competent and proper for the Judge, if he had thought fit, to have "made further inquiry respecting the property after the counsel had closed their case." In Rex vs. Watson, 6 C. & P. 633, after witnesses for the defence had been examined, Taunton, J., recalled a witness for the prosecution and re-examined him, after which he enquired if the counsel for the prisoner had any questions to ask. These cases are cited in the text books in support of the discretionary power of the Judge to recall witnesses at any stage of the trial, (3 Russell on Crimes, p. 539) but this power should be exercised with great discretion, and only to prevent a failure of justice. 2 Taylor on Evidence, p. 1278.

The following reference to a similar case is made in 4 Blackstone, p. 355, note 8, Ed. 1809. "Upon trial for the murder of a male child the counsel "for the prosecution concluded his case without asking the sex of the child, "and the Judge would not permit him afterwards to call a witness to prove it, but, "in consequence of the omission, he directed the jury to acquit the prisoner. "But, to the honour of that Judge, it ought to be stated, that he declared "afterwards, in private, his regret for his conduct. This case is well remember-"ed, but it ought never to be cited *but with reprobation*."

Witnesses recalled.

(S. B.)

COURT OF QUEEN'S BENCH, 1876.

MONTREAL, 3RD FEBRUARY, 1876.

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

No. 85.

MALLETTE,

AND — APPELLANT;

LENOIR,

RESPONDENT.

HELD:—That after the Prothonotary has received the acknowledgment of securities to a bond, and signed and stamped the same, it is not competent to the Prothonotary to refuse to send up the record on the ground that the bond was executed by error and surprise.

DORION, CH. J.:—The respondent has moved for *congé d'appel*, for want of return of the record, and the appellant has moved for an order to the Prothonotary to return the record. It appears that the Prothonotary contends that the execution of the securi'y bond was the result of error and surprise. It is manifest that the Prothonotary cannot now undo what he has done. The bond has been signed and stamped, and is, therefore, completed, so far as the Prothonotary is concerned. Under the circumstances we render the following judgment:—

"La Cour après avoir entendu les parties par leurs avocats tant sur la motion de l'appelant pour l'émanation d'une ordonnance de cette Cour contre le Protonotaire de la Cour Supérieure pour le District de Montréal, lui enjoignant de rapporter le dossier sur tel délai qu'il plaira à cette Cour fixer, que sur la motion de l'intimé pour congé d'appel à défaut du rapport du Bref et du dossier au jour fixé, examiné les admissions des parties et du Protonotaire, et sur le tout mûrement délibéré;

Considérant qu'il appert d'après les dites admissions, que le Protonotaire refuse de rapporter le dossier pour certaines raisons énumérées dans les dites admissions, et attendu qu'il appert par ces admissions que l'appelant a fourni un cautionnement qui a été reçu par le Protonotaire et qu'il a payé les honoraires d'office sur le cautionnement et offert de payer les autres honoraires qui peuvent être exigés pour la confection et transmission du dossier,— Sans adjuger sur la validité du dit cautionnement et des procédés du dit appelant, accorde la dite motion de l'appelant et il est par le présent enjoint au Protonotaire de la Cour Supérieure pour le District de Montréal de rapporter le dossier sans délai, en par l'appelant payant préalablement les honoraires que le Protonotaire a le droit d'exiger pour ce dossier, et procédant à adjuger sur la motion de l'intimé l'accorde quant aux frais sur icelle, auxquels elle condamne l'appelant, la rejetant quant au surplus."

Motion against Prothonotary granted.

Bondy & Mathieu, for appellant.

Longpré & Dugas, for respondent.

(S. B.)

COURT OF QUEEN'S BENCH, 1876.

MONTREAL, 27TH JANUARY, 1876.

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

Le Curé, &c., de Beauharnois vs. *Robillard.*

HELD:—That an application for an appeal from a ruling at *Enquête*, which is manifestly wrong, will be rejected, when the granting of the appeal will have the effect of retarding the case.

DORION, C. J.:—This was an application for leave to appeal from an interlocutory judgment of the Superior Court, overruling an objection to evidence. The only ground on which an appeal was asked for was that the evidence admitted was illegal, but it was also manifest that if an appeal were granted it would retard the case to no purpose. His Honor thought it was not a case for allowing an appeal. There was no doubt that the evidence was illegal, and the objection should have been maintained. But a great many questions were put at *enquête* as to the admissibility of which it was difficult for a Judge to decide at the time, and in the haste of business questions were sometimes allowed which were improper, because where a Judge has any doubt he naturally allows the question to be put. But this was no reason why an appeal should be granted in such cases.

TESSIER, J., concurred, but with some hesitation, seeing the illegality of the question which had been objected to.

MONK, J., concurred in the judgment of the Court refusing the appeal in this case, but he had the same difficulty as Mr. Justice Tessier. There could be no doubt that the question was illegal. This was an interlocutory judgment, and seeing the illegality of the question the Court had to consider whether the matter complained of could be remedied by the final judgment. It would lead perhaps to a long, useless *enquête*, but it could not be treated as a matter which could not be remedied by the final judgment.

RAMSAY, J.:—The only question was whether the Court could exercise its discretion so as to allow an appeal upon every illegal question. It must be remarked that the parties were proceeding at *enquête* by consent. In that form of conducting an *enquête* it was impossible for any judge to give satisfactory decisions upon the admissibility of evidence, and it was often necessary for him to admit questions which might be illegal. The question was illegal, but it made no great difference. It would not be proper to allow an appeal from such decisions, unless the prolixity of evidence was carried to an extreme and the other party moved to put a stop to it.

Motion for leave to appeal rejected.

S. Pagnuelo, for plaintiffs.
Doutre & Co., for defendant.

(S.B.)

COURT OF QUEEN'S BENCH, 1876.

MONTREAL, 3RD FEBRUARY, 1876.

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

BREWSTER ET AL., APPELLANTS;

AND

CHAPMAN ET AL., RESPONDENTS.

HELD:—1. That the right to appeal to the Supreme Court does not exist, in respect of any judgment rendered prior to the coming into force of the Act creating that Court.

2. That where a record has been remitted by the clerk to the Court below, in consequence of the proper certificate not being lodged within six months after the granting of an appeal to Her Majesty in Her Privy Council, that the appeal had been lodged in the Privy Council, this Court cannot order the Prothonotary of the Court below to return the record.

DORION, C.J.:—In this case the judgment was rendered by the Court of Appeals in March, 1875. That was before the Supreme Court had been established—in fact, before the law was passed at all, for the Act establishing the Supreme Court was sanctioned subsequently to the date of the judgment. The appellants, who were unsuccessful, moved for an appeal to the Privy Council, and gave security for costs. The six months, however, within which they were bound to file in the Appeal Office a certificate that the appeal had been lodged in the Privy Council, elapsed without such certificate being produced. The clerk then returned the record to the Court below. Two applications are now made—a motion for leave to appeal to the Supreme Court, and another motion to order the Prothonotary of the Court below to return the record into this Court. The delay for appealing to the Supreme Court is fifteen days, but, by Sec. 26, it is permitted to this Court, or to a Judge of this Court, to grant leave to appeal after the delay has expired. I suppose the object of that clause is that if a party, by some unforeseen accident, has been deprived of an appeal within the time prescribed, the Judge may, in his discretion, allow him to take the appeal, notwithstanding the expiration of the delay. For instance, a party might have died soon after a judgment, and his estate might not be so settled as to allow the *instance* to be taken up within the prescribed delay. The party might in such case come up, and say, I have been prevented from appealing by causes beyond my control. It is to prevent this limitation of time from being a complete bar to appeal to the Supreme Court. But in this case the party when the judgment was rendered had no right at all to appeal to the Supreme Court. The only remedy he had was to appeal to the Privy Council. He has availed himself of that remedy and has given security to go there. If the appeal is pending, the present application cannot be entertained. If it is not pending there, it has been abandoned, and the only remedy which the law gave him is exhausted. This Court cannot revive a right which the party never had.

Motion rejected.

Ritchie & Borlase, for appellants.

Bethune & Bethune, for respondents.

(S.B.)

SUPERIOR COURT, 1876.

MONTREAL, OCTOBER, 1876.

Coram TORRANCE, J.

No. 784.

In re *Simmons* et al., Insolvents, and *John Fulton*, Assignee; and *Samuel Bevington* et al., Contestants.

Held:—That the creditor of an insolvent cannot claim upon the partnership of which the insolvent was a member for the price of goods sold to the insolvent before his partnership, upon the ground that the partnership afterwards got the benefit of the purchase.

This came up on a contestation of the reported distribution by Bevington & Morris, the contestants. The facts were that on or about the 1st February, 1875, the contestants, by their agents, Messrs. Soulthorpe & Pennington, sold to Simmons, one of the insolvents, at that time not a partner with Simpson, a quantity of mink skins. These goods were dispatched to Simmons, who at that time resided at St. Johns, and Messrs. Soulthorpe & Pennington drew, in the name of the contestants, a draft upon Mr. Simmons for that amount, which was duly accepted by him and returned to Messrs. Soulthorpe & Pennington. About the 1st May, 1875, Messrs. Simmons & Simpson entered into partnership, and Mr. Simmons put into the firm all the skins so by him bought from the contestants. These skins were afterwards made up into articles of wear by the firm of Simmons & Simpson, and were in their possession, as proved by Soulthorpe's evidence, at or about the time of their insolvency. The claim was upon the partnership estate.

Kerr, Q. C., for contestants, contended that the goods sold to Simmons were by him brought into the estate of the insolvents, and that that estate profited by them, and that it would be in the highest degree inequitable if Messrs. Bevington & Morris should be deprived of the right of ranking upon the proceeds of their own goods sold to one of the insolvents. McGuire & Scott, 7 L. C. R. 451, where a vendor sold to one of the partners in his own individual name, and upon his own credit and responsibility, and yet it was held, that inasmuch as the firm had benefited by the transaction, although the vendor at the time that he sold the goods was not aware of the partnership, he, the vendor, was entitled to recover against the firm.

Wotherspoon, for the assignee, *e contra*, cited Story on Partnership, §§ 146, 147; Gow on Partnership, p. 152.

PER CURIAM:—I am of opinion that credit was given to Simmons alone, and he alone is the debtor. The authorities from Story appear to be exactly in point. The case of *McGuire & Scott*, cited by Mr. Kerr, differs from the present in this that the sale was there to one of the partners pending the partnership. The contestation is therefore rejected.

Contestation dismissed.

Kerr & Carter, for contestants.
Abbott, Tait, Wotherspoon & Abbott, for assignee.
(J. K.)

SUPERIOR COURT, 1876.

MONTREAL, 2nd NOVEMBER, 1876.

Coram TORRANCE, J.

No. 1963.

De la Ronde vs. *Walker* et al.

HELD:—That personal service of a writ of summons on one defendant in the District will not give the Court jurisdiction over the other defendants who are non-resident in the District.

This case was before the Court on the merits of an *exception déclinatoire*. The defendants—five in number—were all of the village of St. Andrews, in the District of Terrebonne. One of them (John Webster) had been served personally in the city of Montreal. The others had been served at their domiciles in Terrebonne. Dame Ellen Walker and Isabella and Ellen Turner filed declinatory exceptions, declining the jurisdiction of the Court, on the ground that none of them being resident within the limits of the District of Montreal, the service upon John Webster, in Montreal, did not give the Court jurisdiction over the defendants declining the jurisdiction.

J. N. A. Mackay, for the defendants, cited C. C. P. 34, 38, and 1 Quebec Law Reports, page 88; Lemesurier vs. Garon et al.

Doutre, Q.C., cited same articles of C. C. P., and referred to C. S. L. C., cap. 82, sec. 26.

The Court maintained the exception.

Exception maintained.

J. Doutre, Q.C., for plaintiff.

J. N. A. Mackay, for defendants excepting.

(J.K.)

SUPERIOR COURT, 1876.

MONTREAL, 2nd NOVEMBER, 1876.

Coram TORRANCE, J.

No. 1659.

Longtin vs. *The Mount Royal Permanent Building Society.*

HELD:—That words in a plea charging generally grave errors and omissions in plaintiff's accounts, without specifying clearly what these errors and omissions were, will, on plaintiff's motion, be ordered to be struck out.

This case was before the Court on the motion of the plaintiff to strike out of the defendant's plea certain words as irregularly inserted, and, in general terms, finding fault with plaintiff's accounts. The plaintiff was secretary-treasurer of the defendants, and, having ceased to fill that office, brought his action to have a surety bond given by him in favor of the Society cancelled, and to have the hypotheque which he had given on his property, as a further security of $8,000 in the same matter, removed.

The defendant pleaded that by the by-laws of the Society, 2nd section of the 38th article, the plaintiff, as secretary-treasurer, was obliged to submit a com-

Longrin vs. The Mount Royal Permanent Building Society.

plete and exact statement of all the business of the Society for the year terminating the 28th February last; that by virtue of 3rd section of said article the said report should be certified by the majority of the auditors; that plaintiff had failed to comply with these rules. The defendant then went on to charge that there were grave errors and omissions in the accounts and books kept by the plaintiff; that the cash of the Society had not always been correctly balanced, and that important differences and contradictions existed between the books kept by the plaintiff and the deposit and other bank books of the Society, and that, seeing the said grave omissions and errors which were found in his books and accounts, the defendant is well founded in refusing the discharge of the surety bond and the removal of the hypotheque.

The plaintiff moved to have these words of the plea charging grave errors and omissions in his accounts struck out on the ground that these matters were not at issue under the pleading of the parties, and that the allegations were too vague and general for a *début de compte;* that the defendant was bound to specify in a clear manner the grave errors and omissions in the accounts.

The Court granted the motion.

Motion granted.

Doutre, for plaintiff.
Trudel, for defendant.
(J. K.)

SUPERIOR COURT, 1876.

MONTREAL, 18TH OCTOBER, 1876.

Coram TORRANCE, J.

No. 2433.

The School Commissioners of the Municipality of Hochelaga vs. *Hogan* et al.

HELD:—On an *exception déclinatoire*, that the Superior Court has no jurisdiction to hear suits for the recovery of school taxes.

The plaintiffs demanded from the defendants, proprietors in the municipality of Hochelaga, the sum of $780.15, as due by the defendants for [illegible] charged on their real estate within the municipality.

The defendants pleaded an *exception déclinatoire*, setting forth that the Superior Court was without jurisdiction, inasmuch as the recovery of sums due for school taxes was by article 1053 of the Civil Code of Procedure within the exclusive jurisdiction of the Circuit Court.

At the argument the plaintiffs did not appear, and the exception was maintained.

Exception maintained.

Monk, Campeau & Archambault, for plaintiffs.
Judah, Wilkie & Branchaud, for defendants.
(A. B.)

SUPERIOR COURT, 1876.

MONTREAL, 1st DECEMBER, 1876.

Coram TORRANCE, J.

No. 1601.

Robertson et al. vs. *Overing*; and *Overing*, Petitioner.

HELD:—That the sale of moveables by an insolvent debtor to a person for value received does not amount to secretion of his estate.

This was a hearing on the merits of a petition by the defendant to be discharged from arrest under a *capias*. He was charged with having secreted his estate with intent to defraud, etc. The plaintiffs were judgment creditors, and during the pendency of their suits, the defendant had sold for value then received his moveable effects contained in his dwelling house. The money was given him by Franc O. Wood in order to enable him to pay certain judgments against him.

Wood, for petitioner, contended that the facts did not amount to secretion. *Mercer* v. *Peterson*, 2 L. R. Excheq. 304; 3 L. R. Excheq. 105, 6; *Tremain* v. *Sansum*, 4 L. C. J. 48; *Gault* v. *Donnelly*, 1 L. C. Law Journal, 119.

Macmaster à contra.

The Court held that the facts did not amount to secretion, and referred to the authorities cited, also to *Journal du Palais*, A. D. 1875, p. 738; Journal du Palais, A. D. 1876, p. 128.

Petition granted.

Macmaster & Hall, for plaintiffs.

Franc O. Wood, for defendant.

(J. K.)

SUPERIOR COURT, 1876.

MONTREAL, 20TH OCTOBER, 1876.

Coram TORRANCE, J.

No. 1742.

La Compagnie de Moulins à Coton de V. Hudon, Hochelaga, vs. *Valois*.

HELD:—That an issue is completed by a declaration, exception and general answer.

Longpré, for defendant, moved that the inscription for *enquête* be struck as prematurely made before issue joined. The defendant had pleaded an exception to the action to which the plaintiff fyled a general answer. And the defendant contended that he had eight days from fyling of the answer by the plaintiff to reply, and until the expiration of that period the issue was not joined.

Jetté, for plaintiff, cited C.C.P. 139 and 148, contending that he had literally complied with the requirements of these articles.

PER CURIAM:—The position of the plaintiff is in accordance with the practice of the Court;—Cochrane *vs.* Bourne, 13 L. C. J. 168; Hutchins *vs.* Fraser, 14 L. C. J. 280.

Motion dismissed.

Jetté, for plaintiff.

Longpré, for defendant.

(J. K).

SUPERIOR COURT, 1876.

MONTREAL, 2ND NOVEMBER, 1876.

Coram TORRANCE, J.

No. 185.

Grothé vs. *Lebeau*, and *Jean Baptiste Lacroix* dit *Langevin*, petitioner; and *the Same*, seizing party, and *Beausoleil es qual.*, et al., garnishees.

HELD:—That the assignee to an insolvent estate cannot be held to appear before the Superior Court to declare what monies he has in hand belonging to the defendant.

Leopold Laflamme, for Beausoleil et al., moved to quash a writ of *saisie-arrêt* after judgment in the hands of the assignee Beausoleil. He cited Larocque vs. Lajoie, 17 L. C. J. 41.

Longpré è contra.

The Court granted the motion.

Motion granted.

L. Laflamme, for assignee.
Longpré & Dugas, for petitioner.
(J.K.)

COURT OF QUEEN'S BENCH, 1876.

MONTREAL, 27TH JANUARY, 1876.

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

No. 163.

LEPINE,

APPELLANT;

AND

THE PERMANENT BUILDING SOCIETY OF JACQUES CARTIER,

RESPONDENT.

HELD:—That a lease for 12 years, containing also a promise of sale, cannot be regarded as a lease giving rise to the summary proceedings provided for by Art. 887 *et seq.* of the Code of Civil Procedure.

The following was the judgment of the Court:—

"La Cour * * * considérant que par l'acte du 10 Aout 1874 sur lequel est fondée cette action, l'Intimée a promis de vendre à l'appelant les immeubles y designés pour le prix et somme de $13,864.64 courant, dont $140 payé comptant et la balance $13,724.64 payable en cent quarante-quatre paiements mensuels, que cet acte qualifié de bail ne contient aucune stipulation de loyer distincte du prix de vente convenu entre les parties;

Que d'ailleurs ce prétendu bail est fait pour douze années avec obligation de la part de l'appelant de faire des impenses considérables sur les immeubles qui y sont mentionnés, en sorte que ce prétendu bail ne peut tout au plus être considéré que comme un bail emphytéotique et non comme un bail ordinaire, et que

les actions qui en résultent ne donnent pas lieu aux procédés sommaires indiqués dans l'article 887 et les suivants de la Code de Procédure pour déterminer les difficultés entre locateurs et locataires;

Lépine and The Permanent Building Society of Jacques Cartier.

Considérant qu'il y a erreur dans le jugement rendu par la Cour Supérieure siégeant à Montréal le onzième jour de Février 1875; cette Cour casse et infirme le dit jugement du onze Février, 1875, et déboute l'action de l'Intimée avec dépens tant en Cour de première instance que sur le présent appel."

Judgment of S. C. reversed.

Doutre & Co., for appellant.
Trudel, Taillon & Vanasse, for respondent.
(S. B.)

COURT OF QUEEN'S BENCH, 1876.

MONTREAL, OCTOBER, 1876.

Coram DORION, C. J.

Regina vs. *Huddel.*

HELD:—That a prisoner will be allowed to withdraw his plea of *Guilty* and substitute a plea of *Not Guilty*, if it appears that he may have been under some misapprehension when he pleaded guilty, and might thereby suffer injury.

PER CURIAM:—The prisoner was charged with attempting to break prison, and pleaded guilty. When brought up, on the 21st October, and asked if he had anything to say why sentence should not be pronounced, he represented that since he had pleaded guilty his accomplice had been tried for the same offence and acquitted. Upon this statement, which was corroborated by the clerk, the prisoner was remanded without sentence being pronounced. On the 25th he was brought up again, and was informed by the Chief Justice that, having enquired into the circumstances of the trial which he had mentioned when brought up on a former occasion, he found that his accomplice had been acquitted by direction of the presiding Judge, who thought there was no offence proved; that as it was possible he might have pleaded guilty under some misapprehension, it was the duty of the Court to see that he was not condemned unjustly even on his own confession, and that under the circumstances he was at liberty to withdraw his plea of guilty and substitute a plea of not guilty; by doing so he would on his trial have an opportunity of making good any defence he might have.

The prisoner withdrew his plea of guilty and pleaded not guilty. He was tried on the same day and acquitted, the Crown prosecutor adducing no evidence against him. (1)

(S.B.) Plea withdrawn.

(1) Huddel and Vernier his companion, both convicts in the St. Vincent de Paul Penitentiary, had been found in the act of changing some of their clothes, probably for the purpose of escaping, but they had yet committed no overt act to establish an escape or an attempt to escape. They were not therefore guilty of the offence charged.

SUPERIOR COURT, 1876.

MONTREAL, 23RD OCTOBER, 1876.

Coram TORRANCE, J.

No. 2612.

The Molsons Bank vs. *Converse.*

HELD:—That during the sitting of the Superior Court in Montreal, a party may be compelled to proceed at *Enquête* sittings.

J. L. Morris, for defendant, moved to discharge the inscription for *Enquête* made for the second November then next, on the ground that the Court was then sitting, and that during the term the *Enquête* Court could not sit; C. C. P. 239.

Wotherspoon, for plaintiff, was not called on to answer the motion.

PER CURIAM:—The Act of December, 1871, 35 Vict. (Quebec) provided that the 1st to the 16th of the month of October and November *inter alia* should be *enquête* days, which was subsequent to the passing of the Code. Then came the proclamation of the Lieutenant Governor, altering the periods of the sittings of the Court, which appeared in October, 1875, and providing for the Court sitting from the 1st September to the 20th December inclusive. I do not consider that this new proclamation interfered with the previous statutory provision providing for the holding of *Enquêtes* in the first 16 days of the month. To grant the defendant's motion would be in effect so to hold, and would cause a complete stoppage of contested suits at the ordinary *Enquête*.

Motion dismissed.

Wotherspoon, for plaintiff.

J. L. Morris, for defendant.

(J.K.)

SUPERIOR COURT, 1876.

MONTREAL, 2ND NOVEMBER, 1876.

Coram TORRANCE, J.

No. 1123.

Belle vs. *Dolan.*

HELD:—That an *exception dilatoire* to call in a *garant formel* must show that the excipient is within the delays, and that he has taken the necessary steps to call in his *garant*.

The plaintiff's action was an hypothecary one against the defendant. The latter filed an *exception dilatoire* praying that proceedings be stayed until he had called in his *garant*, whom he named; but he did not show that he was within the delays, or that he had taken proceedings against his *garant*.

The plaintiff demurred to the exception, citing C. C. P. 123, and 1 Pigeau, 178 and 181.

PER CURIAM:—In the form given by Pigeau the dates are given; *vide* p. 181; and the demurrer is well founded. Demurrer maintained.

Belle, for plaintiff.

Gonzalve Doutre, for defendant.

(J.K.)

SUPERIOR COURT, 1876.

MONTREAL, 7TH OCTOBER, 1876.

Coram TORRANCE, J.

No. 577.

Gareau vs. *Gareau*.

HELD:—That the Court will not grant an order for the examination of a sick witness on behalf of plaintiff in a cause in which the action has been dismissed and is now pending in appeal.

A petition had been presented to a judge in chambers for the examination of a sick witness, and being unopposed by the defendant an order was made. Subsequently the defendant made a petition to revise the order on the ground that the record was not in the Court, the cause having been finally decided against the plaintiff on demurrer, and the record being in fact in appeal.

The Court after hearing counsel cancelled the order given, and cited Saint Jemmes vs. de Montigny, 12 L. C. J. 343; Meigs vs. Aikin, 14 L. C. J. 84.

Petition granted.

L. A. Jetté, for plaintiff.
A. Ouimet, for defendant.
(J.K.)

SUPERIOR COURT, 1876.

MONTREAL, 26TH OCTOBER, 1876.

Coram TORRANCE, J.

No. 1384.

Lionnais vs. *Lamontagne* et al., and E. Contra.

HELD:—That the Court will not reject as irregularly fyled an incidental demand fyled by the defendants along with their pleas, merely because the defendants had not petitioned the Court for permission to fyle the incidental demand (C. C. P. 150, 152.)

Longpré, for plaintiff, fyled an *exception à la forme* to the fyling of an incidental demand by the defendant without leave of the Court or a judge;—C. C. P. 150, 152. The defendants had fyled an incidental demand at the same time with their pleas, but without previously petitioning the Court or a judge to be allowed to do so.

Robidoux è contra for defendants.

The Court held that the course taken by the defendant was the practice which had always obtained in the district, and dismissed the exception.

Exception dismissed.

Longpré, for plaintiff.
Robidoux, for defendants.
(J.K.)

SUPERIOR COURT, 1876.

MONTREAL, 20TH OCTOBER, 1876.

Coram TORRANCE, J.

No. 2011.

La Société de Construction Métropolitaine vs. *Bourassa.*

HELD:—That the plaintiff in a hypothecary action is well founded in demanding a personal condemnation against the *tiers détenteur* unless he prefer to give up, &c.

Rochon, for defendant, demurred to the declaration on the ground that the defendant could not be condemned personally, citing Renaud and Proux, 16 L. C. R. 476.

Geoffrion, è contra, cited Homier vs. Lemoine, 14 L. C. J. 58.

PER CURIAM:—I entirely agree with the reasoning of Mr. Justice Mackay in Homier vs. Lemoine. Moreover, the plaintiff has exactly followed the form in 1 Pigeau, 593.

Demurrer dismissed.

Geoffrion, for plaintiff.
Rochon, for defendant.
(J.K.)

SUPERIOR COURT, 1876.

MONTREAL, 16TH OCTOBER, 1876.

Coram TORRANCE, J.

No. 1089.

Beaudry et al. vs. *Fleck.*

HELD:—That where one of two plaintiffs is resident abroad, and the other in this Province, the Court will not compel the absent plaintiff to give security for costs.

M. B. Bethune, for the defendant, moved that Toussaint G. Coursolles, one of the plaintiffs, being resident at Ottawa, in the Province of Ontario, should be held to give security for costs.

Beïque, for the plaintiffs, cited Fortier et al. v. Payment; C. C. Montreal, No. 10, 11th October, 1865, (Badgley, J.,) against the motion.

PER CURIAM:—The Court rejects the motion. The authority cited by the plaintiffs is in point. The English practice is the same. Fisher's Digest, Vol. 1, Vo. Costs, n. 8, p. 2032, Edition of 1870, and authorities there cited.

Motion rejected.

Jetté & Beïque, for plaintiff.
Bethune & Bethune, for defendant.
(J.K.)

SUPERIOR COURT, 1876.

MONTREAL, 31ST OCTOBER, 1876.

[IN REVIEW.]

Coram MONDELET, J., TORRANCE, J., and PAPINEAU, J.

No. 577.

Ex parte Dufaux, petitioner, and *Robillard, mis en cause.*

HELD:—That the Court of Review has no jurisdiction to hear an appeal from an order of a judge in chambers, empowering a married woman to borrow a sum of money on the security of real estate without the consent of her husband.

The *mis en cause* Robillard pleaded his case in person, and asked the Court of Review to rescind the order given by Mr. Justice Rainville.

Lacoste, for the respondent, contended that there was no appeal in such a case;—C. C. 178; C. C. P. 494, 1115, 1339, 1340.

The Court took time to consider, and decided that they had no jurisdiction; Mondelet, J., *dubitante*.

Petition dismissed.

Robillard in person, appellant.
Lacoste, for respondent.
(J.K.)

SUPERIOR COURT, 1876.

MONTREAL, 7TH OCTOBER, 1876.

Coram TORRANCE, J.

No. 1267.

Rodier vs. *McAvoy.*

HELD:—That the Court will grant the motion for a rule for *contrainte* against a guardian without previous notice.

The plaintiff moved for a rule for *contrainte* against defendant, who was guardian of effects and failed to produce them.

PER CURIAM:—I believe the practice is to grant the motion for a rule without previous notice in such a case as the present against a guardian; and it was so ruled in appeal in Whitney vs. Brook, 4 L. C. J., p. 279. But the practice is different in the case of a witness in default. In re Downey, and Lajoie, petitioner, and Doherty, *mis en cause*, 18 L. C. J., p. 283; and Roy vs. Beaudry, 6 L. C. J., p. 85.

Motion granted.

Mousseau, Chapleau & Archambault, for plaintiff.
Dorion & Curran, for defendants.
(J.K.)

SUPERIOR COURT, 1876.

MONTREAL, 25TH OCTOBER, 1876.

Coram TORRANCE, J.

No. 1810.

The Bank of Commerce vs. *Papineau.*

HELD:—That a foreign plaintiff is not bound to give notice of the fyling by him of a power authorising his attorney *ad litem* to act for him, in order to save himself from costs of an *exception dilatoire*.

The plaintiff was a foreign corporation, and sued the defendant to recover a sum of money. On the return day the summons was filed in due course with a duly certified power of attorney to Messrs. Bethune & Bethune, attorneys *ad litem* to institute the suit. The defendant first demanded security for costs, and when that security was given filed an *exception dilatoire* claiming that all proceedings in the suit be-stayed until a power of attorney had been produced. Upon this issue was joined, and the parties were heard on the merits of the exception.

M. B. Bethune, for plaintiffs, contended that the exception was unnecessary, as the power of attorney had been produced on the return of the action.

L. A. Jetté, for defendant, supporting the exception, said that the power of attorney having been produced the exception was now unnecessary, but that the plaintiff should pay costs on the exception which had only been fyled because the plaintiff had omitted to give notice to the defendant of its deposit.

The Court dismissed the exception with costs, holding that defendant should have taken cognisance of the documents fyled by the plaintiff at the return of his action.

Exception dismissed with costs.

Bethune & Bethune, for plaintiff.
Jetté, Beique & Choquet, for defendant.
(J.K.)

SUPERIOR COURT, 1876.

MONTREAL, 4TH OCTOBER, 1876.

No. 1938.

Coram TORRANCE, J.

La Compagnie de Navigation Union v. *Rascony.*

HELD:—That the Crown alone has the right of demanding that letters patent, granted under the great seal of the Province, be annulled.

The demand of the plaintiffs was for $500, being the amount of ten shares, alleged by plaintiff to have been subscribed by defendant in the capital stock

of the company and which stock was still unpaid by defendant. The plaintiffs alleged that they were incorporated, on the 6th August, 1874, under the provisions of the Statute of the Province of Quebec, providing for the incorporation of joint stock companies.

The defendant by his second plea said "that the subscription of the defendant and the letters patent of plaintiffs have been obtained fraudulently and by false and fraudulent representations, and more particularly by means of fictitious subscriptions for the greatest portion of the stock of said Company, the defendant especially putting in issue that the petitioner for said letters patent, or any other person, had not, in good faith, subscribed to one-tenth part of the said stock, and had not paid ten per cent. on their subscribed stock, or any portion on account of the said stock, either at the time of their application for letters patent, or at the time of the issuing of such letters patent, and ever since, and that, in fact, the said petitioners and shareholders have not been requested to pay the amount of their subscribed stock, as stated in the said letters patent, and that to the present time some of said paid (*sic*) stock is still due and unpaid;

That, in fact, the said petitioners, and especially the directors of the said Company, have been illegally and fraudulently let off by the Company for the greatest portion of their said subscription. That more than one-half of the said stock was never *bona fide* subscribed by the petitioners named in the said letters patent, and by many other pretended shareholders.

"Wherefore the said defendant prays that the said letters patent be declared null and void, and that this action be dismissed, &c."

The plaintiff pleaded for *réponse en droit* to this plea "qu'icelui plaidoyer est mal fondé en droit pour entre autres raisons les suivantes:—

1°. Parceque le défendeur n'a aucune qualité pour attaquer la validité des lettres patentes incorporant la demanderesse et pour en demander la nullité.

2°. Parceque ces lettres patentes incorporant la demanderesse ne pourraient être attaquées, et la nullité n'en pourrait être demandée que par le procureur général de cette Province, &c.

Jetté, for plaintiff, cited C. C. P. 1034 and Pacaud *v.* Rickaby, 1 Quebec L. R., p. 245, decided in appeal 7th Sept., 1875.

Robidoux è contra.

The Court maintained the *réponse en droit*.

L. A. Jetté, for plaintiff.

Robidoux, for defendant.

(J.K.)

COURT OF QUEEN'S BENCH, 1875.

MONTREAL, 30TH SEPTEMBER, 1875.

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

No. 16.

ALFRED BEAUDIN,

(*Defendant in Court below,*)

APPELLANT;

AND

ADOLPHE ROY ET AL.,

(*Plaintiffs in Court below,*)

RESPONDENTS.

HELD:—That a *Capias ad respondendum* may issue against a debtor after he has made an assignment under the Insolvent Act of 1869.

The plaintiffs alleged that Alfred Beaudin, the defendant, was indebted to them in $2,662.86; that, on the 7th of June, 1873, the defendant, by deed duly executed before Notary Public, assigned to D. A. St Amour, official assignee of the Parish and District of Beauharnois, in his quality and capacity of assignee, all his goods, debts, chattels, credits, effects and estates under the provisions of the Insolvent Act of 1869 and its amendments;

That the said defendant had secreted his property and estate, debts, credits and effects, with intent to defraud his creditors in general and the plaintiff in particular;

That at a meeting of the creditors of the said insolvent-defendant, held in the town of Beauharnois on the 27th of June, 1873, pursuant to notice according to law, the defendant failed to give his creditors any reasonable satisfaction or any satisfactory statements regarding his affairs;

That, at said meeting of creditors, a deficit of over three thousand dollars was found to have taken place in the affairs and business of the defendant during the three months immediately preceding his assignment as aforesaid, which deficit the defendant was unwilling or unable satisfactorily to explain or account for;

That the plaintiffs were, on the second of July, informed by employees of defendant, to wit, by Hormidas Beauregard and Zéphirin Giroux, both of the town of Beauharnois, clerks, that defendant had, within the fifteen days immediately preceding his assignment, sold and delivered goods to the value of about one hundred dollars currency and more; and that for the past two months the defendant had sold large quantities of goods and merchandize, and there did not appear in the statement of affairs any account thereof nor any promissory notes or cash to represent the price of said goods, and that large quantities of goods of defendant and divers sums of money had disappeared and were not accounted for by the defendant;

That, on the day of the defendant's assignment, he did remove and conceal a certain portion of his property, with intent to defraud the plaintiffs and the creditors of his estate in general;

That, at a meeting of the creditors of the insolvent, held at Beauharnois, the defendant was examined by his creditors, and attempted to account for part of his property, to wit, for a certain quantity of highwines, coal and olive oils by fictitious losses;

That, with intent to conceal the true state of his affairs and to defeat the object of the Insolvent Act of 1869, the defendant did wilfully and intentionally omit to make entries and statements in the books and writings relating to his trade, property, dealings and affairs;

That defendant was for a certain period immediately preceding his assignment in the habit of selling and disposing of his goods and effects at prices far below cost prices and actual value thereof, the whole in order to realise certain monies with intent more easily to defraud the plaintiffs and his other creditors.

That, by virtue of the premises and by law, the plaintiffs had a right to pray that a writ of *Capias ad respondendum* do issue in due course of law to seize and attach the body of the defendant, and that the defendant be condemned to pay them the sum of $2,662.86 and interest, and that in default of his so doing the defendant be imprisoned for such period as this Honorable Court might order.

The plaintiffs concluded in the usual form for a writ of *Capias ad respondendum*.

The defendant amongst other pleas fyled an exception à *la forme* and a *défense en droit*, giving in effect the following reasons:—

1. Because plaintiffs, alleging the assignment of defendant on the 7th of June, 1873, are without quality to institute the present action.

2. Because it was only in the name of the assignee to defendant's estate that any proceedings against the latter could be taken.

3. Because plaintiffs had sued for the full amount of their claim, and that a judgment in their favor would entail undue preference over the remaining creditors.

4. Because plaintiffs could not obtain a judgment against defendants save and except in the name of the assignee, either for the benefit of all the creditors, or for their own, if the assignee merely allowed them the use of his name as plaintiff in the proceedings.

The *défense en droit* was dismissed by the Superior Court on the 29th of November, 1873; and on the 31st January, 1874, Mr. Justice Torrance held that plaintiffs had proved all the allegations of their declaration and held the *capias* good and valid.

From these judgments the defendant appealed:

Doutre, Joseph, Q.C., for appellant:—

L'appelant dénia tous les faits allégués dans la déclaration, par une défense en fait.

La défense en droit, par suite d'un mal jugé qui sera bientôt démontré, eut le même sort que l'exception à la forme, et la cause fut inscrite au mérite.

Les intimés ne prouvèrent, de leurs allégués, que les billets et le compte. Il ne fut aucunement question des faits de fraude mentionnés dans la déclaration.

Alfred Beaudin, and Adolphe Roy et al.

L'Appelant prouva que lors de l'institution de l'action, il avait fait cession de biens, et que les demandeurs avaient produit leurs réclamations contre sa masse.

Sur cette preuve les intimés obtinrent contre l'appelant un jugement déclarant le "capias" bon et valide et condamnant l'appelant à payer aux intimés la somme réclamée par l'action, $2,062.86, avec intérêt et dépens.

L'appelant soumet humblement que les décisions trois fois répétées en cette instance sur l'exception à la forme, sur la défense en droit et sur le mérite, détruisent toute l'économie de la loi de faillite et conduisent à des conséquences si singulières qu'il est étrange que la Cour Supérieure n'en ait pas été frappée. Par la faillite, la liquidation des affaires du débiteur est concentrée entre les mains du syndic.

S'il n'y a pas de composition, comme dans le cas actuel, le débiteur n'a plus qu'un créancier: le syndic, qui agit au nom de la masse. Si les créanciers, nonobstant la faillite, demeuraient nantis de leurs créances et investis de tous leurs droits, il arriverait ce qui a eu lieu en cette instance: les créanciers toucheraient sur la masse une proportion considérable de leurs créances, savoir la totalité, et ils recouvreraient la totalité de leurs créances une seconde fois contre leur débiteur.

Ainsi, dans l'instance actuelle, la masse de l'appelant a pu acquitter une proportion de 12s 6d dans le £ de ses dettes. Les intimés ont obtenu un jugement pour la totalité de leurs créances, sans tenir aucun compte de ce que la masse a payé. Ce jugement durera trente ans, renouvelable même à perte de vue à la veille du jour où la prescription arriverait et pourrait être exécuté en totalité. L'appelant qui est un jeune homme, peut voir renaître la prospérité et la solvabilité,—une succession opulente peut lui échoir et si le jugement dont il se plaint est bon aujourd'hui, il le sera de tout temps.

La loi ne pouvait pas être aussi imprévoyante que d'exposer un débiteur déjà malheureux d'avoir à payer deux fois. Il semble qu'en l'absence même de toutes les dispositions législatives, le sens commun qui gît au fond de toutes les législations, suffisait pour protéger l'appelant contre la possibilité d'avoir à payer la totalité de ses dettes après avoir distribué la masse de sa faillite entre ses créanciers.

La loi de faillite contient la disposition suivante:

"45.—If at any time any creditor of the insolvent shall desire to cause any proceeding to be taken which in his opinion would be for the benefit of the estate, and the assignee shall under the authority of the creditors or of the inspectors refuse or neglect to take such proceedings after being duly required so to do, such creditor shall have the right to obtain an order of the Judge authorising him to take such proceeding *in the name of the assignee*, but at his own expense and risk, upon such terms and conditions as to indemnity to the assignee as the Judge may prescribe, and thereupon any benefit derived from such proceeding shall belong exclusively to the creditor instituting the same for his benefit, and that of any other creditors who have joined him in causing the institution of such proceeding; but if, before such order is granted, the assignee shall signify to the Judge his readiness to institute such proceedings for the benefit of the creditors, the order shall be made prescribing the time within which he shall do

so, and in that case the advantage derived from such proceeding shall appertain to the estate."

Alfred Beaudin and Adolphe Roy et al.

Avec une disposition de ce genre, la loi avait-elle besoin de dire qu'après un abandon volontaire ou forcé des biens d'un débiteur, les créanciers ne pourraient plus agir en leur nom personnel? Le législateur eût cru faire injure aux juges chargés de l'exécution de la loi, s'il eut prohibé ce qui était devenu impossible sous l'empire d'une interprétation sensée de cette clause.

Est-ce à dire que la loi a laissé les créanciers impuissants lorsque des faits de fraude de la nature de ceux mentionnés dans la déclaration ont été commis? Loin de là. La clause citée indique le mode de procéder si un syndic obstiné ou peut-être complice de la fraude refusait d'agir avec vigueur. Ce n'est pas au reste la seule disposition de l'acte de faillite de 1869. La section 150 semble avoir inspiré aux intimés les termes dont ils se servent dans leur affidavit et leur déclaration. Il est étonnant toutefois que, lisant cette clause, les intimés n'y aient pas vu que leur action appartenait au syndic et non à eux. Les intimés n'ont pas eu recours au "capias" ordinaire,—car jamais un demandeur n'a songé à demander l'emprisonnement d'un débiteur, même pour détournement de marchandises ou d'argents. Ce n'est que sur la contestation d'un bilan, fourni par un défendeur arrêté sur "capias" en vertu des dispositions du *Code de Procédure* que la demande d'emprisonnement peut être faite.

Pour demander l'emprisonnement *ab ovo* comme l'ont fait les intimés ils n'ont pu se guider que sur l'acte de faillite et sur la clause 150. Or, cette demande ne peut procéder que du syndic.

Il serait peut-être superflu de rappeler les conséquences légales des jugements dont est appel, si elles ne démontraient d'une manière si évidente l'illégalité du procédé. Si ces jugements et surtout le jugement final restent ce qu'ils sont, les intimés ont la chance d'obtenir trente-deux chelins et demi dans le £!

L'affirmation concernant la fraude de l'appelant, suffisante pour obtenir un "capias," s'il eut été poursuivi en vertu des dispositions du *Code de Procédure*, devait être prouvée, si l'on se prévalait de la section 150 de l'acte de faillite. Mais l'action n'ayant pas été portée par le syndic, il était indifférent qu'elle fût prouvée ou non, attendu que les intimés n'avaient pas qualité pour poursuivre, même une action ordinaire. L'absence de cette preuve n'était qu'une illégalité flagrante ajoutée à une illégalité choquante, et après avoir admis les intimés à recouvrer éventuellement 32s 6d dans le £, il eut été presque puéril de consulter la loi ou de la suivre sur aucun point.

L'appelant en est rendu au quatrième effort pour faire prévaloir, non pas des principes de législation délicate et compliquée, mais des notions inspirées par le sens commun. Il espère être mieux accueilli devant ce haut tribunal. Il a l'espoir que cette Honorable Cour revenant au point où la question débattue aurait dû, de prime abord, s'imposer d'elle-même, l'exception à la forme sera déclarée bien fondée, l'action déboutée et tous les procédés subséquents anéantis avec dépens contre les intimés.

Laflamme, Q. C., for respondent:—Appellant's pretension is that the provisions of the Code respecting the writ of *capias* are repealed by implication so far as they affect secretion, in a case where a defendant had placed himself under the

Alfred Brossin. and Adolphe Roy et al.

provisions of the Insolvent Act of 1869. It must be borne in mind, however, that the respondents' right of action has alone been demurred to; the grounds upon which the *capias* was issued, the fact of fraud and of secretion being apparently acknowledged, since the only mode recognized by law of resisting a proceeding of this description has not been resorted to by appellant, who, as before stated, never fyled a petition to quash.

Appellant has sought by every means that ingenuity could suggest to bring this case under the exclusive operation of the Insolvent Act. The mere fact of the defendant having made an assignment would seem to relieve him from any responsibilities or obligations under the common law, and sections 45; 147 and others of the Act have been cited to show that if proceedings were taken they should have been so in the name of the assignee, and that this formality having been complied with, punishment could only be meted out in conformity with the enactments of the Bankrupt law.

It must be borne in mind that, in the present instance, the provision of section 45 could not apply. This is not a *proceeding* as contemplated and intended by the Act. It is the insolvent who is taken to task for fraud and secretion committed before, concurrently with, and after his assignment. Could the assignee make the affidavit required? Could he take upon himself to swear to the personal indebtedness, and to the amount owed to each individual creditor, or to the whole collectively? Clearly not; and therefore, as far as this first ground of objection goes, of two things one, either the writ of capias, must be a dead letter for those who have shielded themselves behind the all-protecting influence of an assignment, after committing fraudulent and dishonest acts, or the only party entitled to claim this proceeding as a safeguard and protection, is the creditor to whose personal knowledge facts of undue preference or secretion have come, and who is prepared to assume the responsibility of an oath and the individual burden of the insolvent's punishment.

The "*proceedings*" to which the provision of the Act refers, respondents respectfully submit, are intended to mean proceedings against third parties, debtors to the estate, and cannot apply to a case in which the assignee could not be *plaintiff* in his *ex-qualité* capacity, except under the most exceptional cases of personal knowledge of insolvent's indebtedness,—a condition which is essentially wanting in the present instance. As to the second point:

There is nothing in the Insolvent Act that provides for the punishment of secretion by a debtor anterior to assignment, save sec. 147, which makes this offence a misdemeanor punishable by imprisonment for any period less than 3 years. This is a criminal proceeding and cannot have been intended by the Legislature to do away with the writ of capias in cases of this description. Numerous instances of this mode of proceeding having been resorted to by creditors, and sanctioned by our Courts, can be cited by respondents, and this is evidently the view taken of this matter in the Court below in the judgment rendered in favor of plaintiffs by the learned Judge presiding.

DORION, CH. J., observed that this was a *capias* issued against the debtor after he had made an assignment under the Insolvent Act. It raised the question directly, whether the creditor could take a *capias* out against a person after he

has made an assignment of his effects. The question had already been indirectly before the Court in several cases where fraud was alleged, and the *capias* had been maintained, but here the question was raised directly for the first time. In England there were numerous precedents of *capias* issued after the bankruptcy. The bankrupt had a right to ask for an order of protection for a certain time. The *capias* was properly issued and the judgment would, therefore, be confirmed.

Alfred Benadin and Adolphe Roy et al.

The judgment of the Court of Appeals is as follows:

The Court, etc., considering that there is no error in the judgment appealed from, &c., doth affirm the same, with costs to the respondents against the said appellant.

Judgment confirmed.

Doutre, Doutre & Hutchinson, for appellant.

Laflamme, Huntington, Monk & Laflamme, for respondents.

(J.L.M.)

COURT OF QUEEN'S BENCH, 1875.

MONTREAL, 21st DECEMBER, 1875.

Coram DORION, C. J., MONK, J., RAMSAY, J., SANBORN, J.

No. 79.

THOMAS LIGGETT ET AL., (*Plaintiffs in the Court below,*) APPELLANTS;

AND

MARTIN TRACEY, (*Defendant in the Court below,*) RESPONDENT.

HELD:—1. Where a vendor seeks to enforce the sale of a lot of land, and tenders a deed to the purchaser differing in several unimportant particulars from the acknowledge conditions of sale, the Court may vary and reduce the conditions sought to be imposed, and may order a deed to be executed, pursuant to the precise conditions of sale.

2. That an adjudication at auction on conditions signed by the purchaser completes the sale as between the parties; and where there is a stipulation that a deed shall be executed within ten days after a sale by auction, the failure of the vendor to tender a deed before the expiration of the delay does not *ipso facto* resolve the sale.

3. A stipulation in the conditions of sale by auction that the vendor shall be entitled to proceed to *folle enchère* if the purchaser makes default does not restrict the vendor's recourse to that remedy or exclude other actions.

This was an appeal from a judgment of the Superior Court (MACKAY, J.), rendered on the 23rd of June, 1874, dismissing an action brought by the appellants to compel the respondent to execute a deed of a certain lot of land. The facts were these:—

The appellants, on the 6th November, 1873, by deed of sale before W. A. Phillips, notary, purchased from Alexander M. Foster, lot No. 1206, of the St. Ann's Ward of the City of Montreal, for the sum of $90,000, of which $10,000 were paid cash; the balance was payable as follows: $2,241.25 to the Seminary of St. Sulpice, of Montreal; $4,800 to Charles Alexander Lusignan; $62,-958.75 to David Torrance and Theodore Hart, and $10,000 to the vendor.

Liggett et al. and Tracey.

It was agreed that the vendor's privilege for the sum due to Mr. Lusignan should be restricted to the north-west portion of the lot, and that the vendor's privilege for the sums payable to David Torrance and Theodore Hart, and to the vendor, should be limited to certain rates mentioned in the deed per superficial foot, and that, on a sub-division of the lot being made, deeds would be executed, giving, for convenience of reference, the amount for which each sub-division was liable according to the scale agreed upon.

On the 1st December, 1873, a sub-division of the lot was made and transmitted to the Commissioner of Crown Lands, and the plan and book of reference of the sub-division were deposited in the registry office on the 8th December, 1873.

On the 16th December, 1873, a deed was passed before W. A. Phillips, notary, declaring and fixing the amount for which each sub-divison was subject, with respect to the vendor's privilege, for the sum of $62,958.75, due to David Torrance and Theodore Hart, and, on the 20th December, 1873, another deed was passed before the same notary, also declaring and fixing the amount for which each sub-division was affected, with respect to the vendor's privilege for the sum of $10,000 due to Mr. Foster. Sub-division No. 40, by these deeds, which were made in conformity with the stipulation contained in the deed of sale, was declared to be hypothecated in favor of Messrs. Torrance and Hart for $8,060, and in favor of Mr. Foster for $1,209.

On the 29th December, 1873, the appellants paid the sum of $2,241.25 due to the Seminary, and a discharge and release was granted before E. Lafleur, notary.

Sub-division No. 30 forms part of the south-east portion of lot No. 1206, and was not effected therefore for the sum of $4,800 due to Mr. Lusignan; and, in consequence of the restriction above mentioned, after this payment, it was only hypothecated for the sums of $8,060, and $1,209, due to Messrs. Torrance and Hart, and to Mr. Foster respectively, as was established by the certificate of the Registrar, dated 15th January, 1874.

As additional security for the payment of the sum due to Messrs. Torrance and Hart, the appellants bound themselves to insure each of the three double houses on sub-division No. 40, for a sum of $2,000 and the single house for $1,000, and to transfer the policies to them. As additional security for the payment of the sum of $10,000 due to Mr. Foster, they also bound themselves to insure each of the double houses for $325 and the single house for $150, and to transfer the policies to him.

Mr. Foster had purchased lot No. 1206 from Messrs. Torrance and Hart, by deed of sale of the 6th October, 1873, W. A. Phillips, notary; and the latter had acquired the south-east portion (of which the sub-division No. 40 forms part) from the Seminary of St. Sulpice of Montreal, by deed of sale of the 29th November, 1853, Lafleur, notary; and these two deeds and the deed of sale from Mr. Foster to the appellants were duly registered. None of the owners were married or became widowers during their respective ownership, and the appellants held a perfect title for sub-division No. 40, free from dower and from all incumbrances, save the two restricted vendor's privileges above mentioned.

The property sold by the Seminary to Messrs. Torrance and Hart, was held by it under the tenure of *franc aleu roturier*, and the sub-division No. 40 was therefore not liable to any seigniorial burdens.

On the 3rd December, 1873, the appellants offered and put up for sale by auction in lots the lot No. 1206, including sub-divisions No. 40, containing 8,060 English feet in superficies, and, before taking the bids on the sub-division above mentioned, the auctioneer, John J. Arnton, publicly announced the conditions of sale to be:—

1st. That the dimensions were in English measure, and as shewn on a plan prepared by Joseph Riello, provincial land surveyor, of the said lot, number 1206, and dated at Montreal the 15th November, 1873.

2nd. That the said sub-division bore no number on the said plan, but contained 8,060 feet in superficies, and that it was designated on the sub-division plan and in the particular book of reference made and transmitted to the registrar for the said lot No. 1206, in conformity to article 2175 of the Civil Code, as sub-division No. 40.

3rd. That the title was perfect and the property commuted.

4th. That possession would be given forthwith, with the rents and revenue of the said sub-division from the 1st December then instant (1873).

5th. That the leases then in existence should be maintained by the purchaser.

6th. That a deed of conveyance should be executed within ten days, before M. Longtin, notary, and that the expenses thereof, with one registered copy for the vendors, should be paid by the purchasers.

7th. That the purchaser should pay to the auctioneer a commission of one per cent. on the purchase money.

8th. That out of the purchase money there should be retained by the purchaser to cover the mortgages or hypothecs, viz.: $8,060, payable one half in five years, and the other half in ten years, from the 1st July, 1873, and $1,209, payable in three years, from the 1st November, 1873, and that, after deduction of these two sums, the balance of the purchase money should be paid, one half on the passing of the deed of conveyance, and the other half in one year from the 1st December, 1873, with interest on the whole at the rate of seven per centum per annum from 1st December, 1873, payable semi-annually; and

9th. That the usual insurance covenant should be inserted in the deed of conveyance. It was also a condition that, if the purchaser should make default, he should be liable to a *Folle Enchère*, and that the appellants should have the right to re-sell the property.

The sub-division was adjudged by the auctioneer to the respondent, for the price of $1.50 per square foot, making $12,090; and immediately after the adjudication, the respondent, Thomas Liggett, for himself and the other appellants, and the auctioneer, signed a memorandum of the adjudication and sale, in the auctioneer's sales book.

At the time of the auction, the sub-division plan of lot No. 1206 had been prepared, although it had not been deposited in the registry office; but the deposit was made within ten days from the sale. At the auction, the plan pre-

Liggett et al. and Tracey.

pared by Mr. Rielle, dated 15th November, 1873, and shewing a division similar to that of the sub-division plan, was used, and lithographed copies were distributed among the audience. In putting up each lot, the auctioneer indicated it upon this plan, and also mentioned the number it bore upon the sub-division plan which was to be deposited. Sub-division No. 40 bears no number on Mr. Rielle's plan, or on the lithographed copies, but the measurements and superficies shewn on both plans are the same, and as it is at the corner of William and Guy streets, and has a block of buildings upon it, no misapprehension, the appellant contended, could arise as to the property offered for sale when it was put up and adjudged to the respondent.

Under the conditions of the sale, the price for which the appellant bought sub-division No. 40 was payable as follows, viz.: $8,060 to cover Torrance and Hart's claim in two equal instalments on the 1st July, 1878, and on the 1st July, 1883; $1,209 to cover Mr. Foster's claim on the 1st November, 1876; $1,410.50 on the passing of the deed of conveyance; and $1,410.50 on the 1st December, 1874, with interest on the whole amount, at 7 per cent., from the 1st December, 1873.

The appellants caused a deed of conveyance to be prepared by Longtin, the notary mentioned in the conditions of sale. By this draft the sum of $8,060 was delegated to Torrance and Hart, and, as the sum of $1,209 due to Foster was payable in three instalments, the draft stipulated that his claim should be paid by the appellants, and that the respondent should retain this amount until a release should be obtained. The draft also stipulated that the respondent should insure the three double houses for $2,325 each, and the single house for $1,150, and transfer to Torrance and Hart $2,000 on each double house, and $1,000 on the single house, and to Foster $325 on each double house, and $150 on the single house, in discharge of the appellant's obligation. These covenants were in general conformity with the conditions of sale. But the draft also provided that the respondent should pay $2 for the measurement of the property purchased, that he should fence at his own expense the part adjoining the appellant's, and that he should furnish two copies of the deed, with certificates of its registration; and these three charges were in excess of the conditions of sale, which did not mention either measurement or fencing of the property, and only charged the respondent with one copy af the deed.

This draft was given between the 17th and the 26th December, 1873, to the defendant, who refused to accept it, but gave no reasons, and did not specify his objections or request any changes. As he declined to sign the deed and pay the sum of $1,410.50, payable on its execution, the appellants, on the 3rd January, 1874, by the ministry of Longtin, notary, tendered the deed which they had had prepared, and had signed, to the respondent, and called upon him to accept it and pay the instalment above mentioned. The respondent refused to do so, but gave no reason, and asked for no modification of the deed tendered; and he made no counter tender of another deed, or called upon the appellants for one.

The appellants then instituted the present suit, praying that it should be declared and adjudged that the respondent had purchased from the appellants and become the owner of the sub-division No. 40, for $12,090, payable in the

manner above mentioned, and also in consideration of a commission of 1 per cent. to the auctioneer, and of $2 for the measurement of the property, and subject to the maintenance of existing leases and to the usual and customary insurance covenant; that he should be condemned to pay the sum of $1,410.50 payable on the execution of the deed to them; that he should be ordered to sign a deed of conveyance within fifteen days; and that in default the judgment to be rendered should serve and avail as a title, and that the respondent should be adjudged to insure the houses on the sub-division for the sums and in favor of the persons above mentioned.

The respondent pleaded that he never became the purchaser of the said lot of ground, and that the deed of conveyance, prepared by appellants and tendered by them to respondent, contained conditions at variance with and more onerous than those announced at the auction sale, and made special mention of the following:—

1st. That the lot of ground offered for sale was number twelve hundred and six of the Book of Reference of St. Ann's Ward, while the appellants offered to pass a deed of sale for a portion of the said number.

2nd. That the appellants had not a perfect title at the time of the sale. On the contrary the said lot of land was charged and encumbered with mortgages in favor of different parties, amounting to $70,000, and, although appellants were bound by the conditions of sale to prepare and execute a deed of conveyance within ten days from the date of the sale, they had not perfected their title; and at the date of the institution of the action the property was still charged with the said mortgages. The only approach to their removal was an arrangement, entered into without the consent of the respondent, between appellants and the mortgagees, by which it was arranged that the latter should receive the amount of their claims from the respondent. And even this arrangement was not concluded until long after the lapse of the ten days, within which the deed was to be executed.

3rd. The respondent made frequent enquiries of the notary commissioned to prepare the deed, during and after the ten days allowed as aforesaid for its preparation and execution, but could not obtain any information, nor was any deed prepared or executed by appellants until thirty days after the auction sale, and until respondent had a title he was thus prevented by appellants from renting the houses built upon the said lot of ground, and otherwise looking after and protecting his interests in the property.

4th. As regards the cost of the deed and its registration a grave discrepancy exists between the conditions of sale and the deed, which the appellants attempt to force upon the respondent, as the appellants demand in the said deed that the respondent shall bear the cost of *two* copies of the deed, instead of one, and with a certificate of registration on both. And moreover appellants further demand, in excess of the conditions of sale, that the respondent should furnish them with registered copies of all deeds of sale he should grant himself to other parties.

5th. As to the insurance clause, which was to be the usual one contained in deeds of sale, namely to keep the buildings insured and to transfer the policy or policies to the vendors, the appellants demanded that the respondent subject him-

Liggett et al. and Tracey.

self to the troublesome and vexatious undertaking of making three separate insurances of the whole premises, and transferring one of the three policies to each of the three mortgagees, and according to their respective interests in the property, each insurance being, moreover, subject every year to re-adjustment on account of the yearly diminution of the interest of these respective parties."

By the documents produced, and the evidence adduced, it appeared that the respondent really bought sub-division No. 40 at the auction,—that the appellant's title to the sub-division was perfect, and that it was incumbered only for the sum of $8,060 in favor of Messrs. Torrance and Hart, and for the sum $1,209 in favor of Mr. Foster; that notice was given at the auction of these incumbrances, and that it was a condition that out of the purchase money $8,060 should be retained to cover the first claim, and be paid in two equal instalments, in five and ten years from the 1st July, 1873, and $1,209 should likewise be retained to cover the other claim; and be paid in three years from the 1st November, 1873; that the respondent never called upon the appellant, or put him in default for a deed, and that, although he objected to the draft which had been given to him, he gave no reasons, and did not ask for any changes, and that when asked for it he did not give back the draft; and that the amount of insurance ask for was what is customary and usual.

On the 23rd June, 1874, the Superior Court (MACKAY, J.,) dismissed the appellants' action, the *motifs* being as follows:—

"Considering that plaintiffs have never offered deed to defendant such as he was bound, or can be held bound to submit to;

"Considering that all tenders by plaintiffs to defendant have been in excess of the rights of plaintiffs;

"Considering that no default is established against the defendant;

"Considering that plaintiffs have failed to fulfil their covenants towards defendant."

It was from this judgment that the present appeal was brought.

The appellants in their factum submitted the following propositions:—

1st. That the adjudication and memorandum in writing in the auctioneer's sales book constituted a perfect sale, with covenant to give a deed, and not a promise of sale; and that the respondent became by the adjudication and the memorandum in writing the owner of sub-division No. 40 of lot 1206, and liable for the price of adjudication, according to the conditions of sale announced by the auctioneer.

2nd. That no resolution of the sale was incurred of right by the expiration of the ten days within which the deed was to be passed; as there is no stipulation to that effect; and that no resolution has been obtained, as no demand in writing was made for a deed, and no suit has been instituted to obtain a judgment rendered, declaring the dissolution of the contract.

3rd. That the appellants had the option, but were not under obligation, to proceed to a re-sale, and that instead of using their right of re-sale, and thus dissolving the contract, they had the right to enforce it and compel the respondent to fulfil his obligations under it.

4th. That the appellents had a valid title, and that the respondent bought the

property, subject to the hypothecary claims due to Messrs. Torrance and Hart, and to Mr. Foster; and that like amounts should be retained out of the purchase money to cover them.

5th. That the amount of insurance asked for, is what is customary and usual.

6th. That before the institution of the action in this cause, a draft of a deed of sale was given to the respondent, and that he was called upon to execute a deed for his purchase, and refused to do so; and, while objecting to the draft submitted, he neglected to indicate what he objected to or to ask for and changes.

7th. That the appellants have not been put in default by the respondent with respect to any of their covenants.

8th. That the appellants had, in consequence of the premises, the right to institute the present suit to enforce and obtain a specific performance of the contract of sale entered into, and completed between them and the respondent.

9th. That the Court could not exceed but had the right to reduce the conclusions of the appellants' declaration; and that the judgment should have declared the existence of the sale, and have deduced and granted the other part of the conclusions in conformity with the conditions of the sale which were proved, instead of dismissing the action. By their conclusions, the appellants ask for neither fencing nor the cost of deeds, but they demand $2 for the measurement of the property: as this demand is in excess of the conditions of the sale, they abandon and withdraw it. The conclusions also demand that the respondent should be ordered to sign a deed similar to the one tendered to him, and that it should be adjudged in default of his so doing: that he was bound to pay $8,060 to the acquittal of the appellants to Messrs. Torrance and Hart, and to transfer the insurance to be effected to Messrs. Torrance and Hart, and to Mr. Foster, but the appellants declare and demand record of their readiness to modify the deed in such manner as may be ordered by this Honorable Court to make it conform strictly with the conditions of the sale, and to accept a judgment adjudging the respondent to pay the $8,060 to them, instead of to their acquittal to Messrs. Torrance and Hart, with the right of retention until a discharge of their hypothec be obtained, and to transfer the insurance to themselves, leaving them to deal with it in fulfilment of their own obligation.

The following authorities were submitted by appellants' counsel on the points mentioned:—

1st. The adjudication and memorandum constituted a perfect sale, with covenant to give a deed of sale, and not a promise of sale:—Civil Code L. C. Art. 1567; 1 Larombière, Art. 1138, No. 9, page 426; 3 Maleville, Art. 1589, page 306; 6 Marcadé, Art. 1589, Par. VII in fine, page 174, Ed. 1868; 7 Toullier, No. 448; 4 Zachariæ (Massé & Vergé), Par. 675, Note 6, page 266, Ed. 1858; 16 Duranton, Vente, No. 39, pages 48 and 49.

2nd. No default has been incurred by the expiration of the ten days, within which the deed was to be passed, as there is no stipulation to that effect, and as no demand in writing was made for the deed:—Civil Code L. C., Art. 1067; 1 Larombière, Art. 1139, Nos. 1 and 13; 4 Marcadé, No. 510; Pothier, Obligations, No. 114;

3rd. The vendors had the option, but were not under obligation to proceed to

Biggell et al. and Treacy.

a re-sale:—Civil Code L. C., Art. 1568; 2 Merlin, Rep., page 787, Verbo Clause Résolutoire, No. 2; 25 Demolombe, 2 Contrats, No. 513; 2 Larombière, Art. 1184, No. 16, pages 314, 317, 318, and No. 40; Petit, Surenchères, pages 151 and 156; 2 Boitard, Pro. Civ., No. 1003, page 393.

Doutre, Q.C., for the respondents:—Besides the conditions of sale mentioned in appellants' declaration it was also a condition of the said sale that purchasers failing to execute the deed and pay the amount payable in cash on the day specified would be liable to *folle enchère*. But this being one of the remedies provided by the common law in cases of public sales the mention of this remedy in the condition of sale had the effect of limiting the appellants' recourse in case of failure to take a deed on the part of the respondent to a *folle enchère* and, consequently, they have no action of the character of the present one.

The utmost that the appellants can in reality claim in the case is that the lot of ground and premises were adjudicated to respondent as the highest bidder at the auction sale, by the auctioneer, and that the respondent thereby became the owner of the property and is obliged to pay the price. But if, as respondent alleges, the appellants have failed to conform to the conditions of sale, their proving respondent the purchaser will not avail them, as it is a well known principle of law, as well as in accordance with common sense that "the party who claims, must show the performance of the condition on which his claim depends, —or that the opposite party prevented or waived the performance."—(See also Benjamin on Sales, p. 480.) No attempt has been made by the appellants to prove the latter alternative, and their failure, in fact refusal, to abide by the conditions of sale has been established by the most conclusive evidence; no other than an authentic copy of the deed of sale prepared at the instance of the appellants and signed by them. By comparing this copy of the deed of sale,—part of respondent's exhibit No. 2 and No. 19 of Record—with the conditions of sale, respondent's exhibit No. 1 and No. 18 of Record, the alterations which the latter seek to force upon the respondent will appear manifest. 1st. On page five of No. 19 of Record it will be seen that appellants offer to pass a deed for only a portion of lot 1206, the whole of which is mentioned in the conditions of sale—No. 18 of Record. And on pages six and seven of No. 19 the mortgages encumbering said property are set forth, and the obligation of respondent to pay certain sums due by hypothec on the premises, while by the conditions of sale the title was to be perfect.

The important alteration in the insurance clause already alluded to appears evident on reference to page 8 of the copy of said deed—No. 19 of Record. And on the back of page 8 of said copy the appellants seek to impose the following conditions upon the respondent, all in excess of what they are entitled to by said conditions, viz: that "the purchaser pay the sum of $2 for the measurement of said lots." "The purchaser will fence and enclose at his whole expense any part of the said lot adjoining the property of the vendors;" and "the purchaser will furnish the vendors with *two* certified copies of these presents with the certificate of registration thereon."

On referring to the deposition of John Franey it will be seen that on the 22nd December, nine days after the lapse of the ten days within which the deed of

sale was to be executed, the appellants had not even the deed prepared for signature. In fact it appears from the deposition of Michael Farmer—a witness examined on behalf of respondent—that, as late as the 17th December, no instructions had been given to the notary to prepare the deed, and no information could be obtained by the respondent as to when the deed would be ready for signature, although the respondent made frequent enquiries to that effect; and it was not until the 3rd January that a deed was actually prepared and tendered to respondent, and then a very defective one, as has been shown. The obligation to sign the deed within ten days was evidently binding on both parties, and the appellants having failed to conform to this condition cannot now compel the respondent to submit to it. If such a latitude were allowed the appellants, any amount of loss and hardship might result to the respondent. At the present time capitalists investing in real estate often do so with the expectation of selling immediately after; but if the convenience of the original vendors must be consulted, irrespective of the conditions of sale, what guarantee can such capitalists have that they will be in a position to re-sell within any specified time, or even to grant leases of the property, or protect their interests in the same in any respect whatever. Besides it is absurd to suppose that capitalists in the position of respondent should be obliged to keep their funds, which perhaps were realised for the occasion at a sacrifice, lying idle for an indefinite length of time, until it shall suit the tardy convenience of the vendors to conform to the conditions of sale.

Marcadé (5th edition) on Art. 1589 declares the expiration of the delay to be fatal; and cites Pothier No. 481, Troplong No. 117, Duvergier No. 127 and two decisions of the Court of Cassation.

The judgment was reversed in Appeal.

MONK, J., *dissentiens*, said that he was unable to concur in the judgment of the majority. A property was sold at public auction to the present respondent and there were certain conditions which the respondent signed. There could be no difficulty about the conditions. They were drawn up by the vendor with a precision and care which indicated that they were just what he desired. One of the express conditions was that a deed before notary should be executed within ten days, and was to embody the precise conditions on which this property was sold. His Honor said that if this was considered a sale, and not a promise of sale merely, it was manifest that in bringing the present action to force the purchaser to take a deed, the vendors must comply exactly with the conditions on which the property was purchased. He was disposed to consider it a sale. After the property was sold, the appellants waited, not ten days but a month; and finally on the 3rd January the deed was tendered. Tracey then said, "you have not complied with the conditions; I will not take the property." Under the circumstances, his Honor thought he had a right to say so. He purchased the property, but the seller had not given him a deed of it in the time fixed by the conditions, and therefore he was not obliged to take it at all. It was a matter of great importance that a man should have his property just at the time he contracted to get it. Besides there were some other conditions added. It was inserted in the deed that he was to fence the property. This established

Lamb et al. and Tracey.

a servitude upon property which he purchased free. He was also to pay for the measurement of the land; and for two copies of the deed. The moment there was a deviation from the conditions, the purchaser had a right to demur, and he did not doubt that Tracey was completely justified in refusing to take the deed. If it were a sale, the Court could not modify the conditions one dollar. If it were a promise of sale, the failure to comply with the condition as to the ten days justified the other party in refusing the deed after that time.

SANBORN, J.—This is an action to compel respondent to accept a deed of sale of a sub-division of lot 1206 of St. Ann's Ward, in the City of Montreal. The property was sold at auction 5th December, 1873, and respondent was the purchaser, at $1.50 per superficial foot. It is mentioned in the terms of sale as lot 1206, which is the cadastral number of the lot of which the parcel in question is a part. Reference is made to a plan of Joseph Rielle, provincial land surveyor, which was produced at the sale, and of which a lithograph copy was circulated among the audience, at the auction, in which it was stated to contain 8,060 feet English measure: and it was delineated as a *corps certain*. It was sold *en franc alleu roturier* with warranty of perfect title. A deed was to be made in ten days. Possession to be given forthwith; leases to be respected. One per cent. commission to be paid by the purchaser to the auctioneer. Out of the purchase money purchaser to retain, to cover morgagees, $8: 60, payable one half in five and the other half in ten years from 1st July, 1873; and $1209, payable in three years from November 1, 1873, and the balance of the purchased money to be paid, one half on passing the deed and the other half in one year from December 1, 1873. The usual covenants of insurance to be inserted in the deed, and there was a condition that, if the purchaser should fail to comply with the terms, he should be liable to the obligations of *folle enchère*. The respondent pleaded, 1, that appellants were not in a position to give perfect title; 2, that the time had elasped, 10 days, and he was not bound to accept a deed; 3, that the deed tendered him was not in the terms of the contract, but more onerous, requiring him to effect insurance in favor of two parties, and to furnish two copies of deed instead of one, and there was a stipulation that the purchaser should fence the lot, and, further, that the conventional liability was not that he should execute a deed but that, failing to do so, the property was to be re-sold at his *folle enchère*. It was also contended that he purchased the whole lot 1206 and he was asked to take a part.

It is true that the whole lot 1206 was, till 16th December, 1873, subject to a large mortgage, which was then reduced in the sub-division 40 (the parcel in question) to the amount contemplated in the purchase being left upon the property. This grievance thus disappears. If time is to be regarded as of the essence of the contract, the ten days having elapsed before appellant was in a condition to give a perfect title, respondent was released. It is contended that this was only a promise of sale and not a sale, and that time is not of *mode* but of essence of the contract, a condition precedent. This question whether a *synallagmatique promesse de vente* is a sale *de præsenti*, is the subject of much subtle reasoning among law writers.

The better opinion seems to be that, as between the parties, it is virtually a

sale. At all events, whether called a sale or not, there are mutual obligations entered into which are to be interpreted according to the intentions of the parties. Our article 1476 C. C. relates to a unilateral promise of sale. There is no article in our Code exactly corresponding with article 1589, Code Napoléon, which is as follows: "La promesse de vente vaut vente, lorsqu'il y a consentement réciproque des deux parties sur la chose et sur le prix." Our article 1472 covers the ground, *res pretium* et consensus make a sale. This was a sale. When appellants agreed within 10 days to give a deed, respondent was as much bound to ask for a deed as appellants were to give it—particularly is this so when he was to take possession at once. He does not appear to have taken possession, or to have put appellants *en demeure* to deed.

In such cases, under the English law, where time is not regarded as of the essence of the contract, and both parties are in default, Courts of Equity will order specific performance, if demanded within a reasonable time, and when something has to be done to clear the title, if reasonable despatch is used to do it. The seller will not be bound to the precise time mentioned in the contract. Sugden on Sales, pp. 12, 152 and 194. A reasonable construction is given to the agreement. The pretension that, if there was a sale, it was of the whole cadastral lot, is scarcely in good faith.

The description in the plan is specific. The land is at the corner of Guy and William streets, and is distinguished by figures 1206–40, indicating subdivision 40 of the cadastral lot 1206. There could be no mistake as to the identity of the land purchased. If this were the real grievance, why has not respondent demanded the whole lot? The deed tendered includes some trifling conditions which are not binding upon respondent, such as the furnishing of two copies of the deed and fencing the lot. The insurance clause is not unreasonable. It was contemplated by the contract, as there were two mortgages held by different persons, and the insurance was to be such as would secure both.

The fact that the appellant demands by his action the execution of a deed containing conditions not in the terms of sale is really the only doubtful point in the case. When the judgment must operate as a title, if the deed is not executed, it must be accurate, and if the demand here contained conditions of a serious character, and respondent refused to accept a deed by reason of such conditions, and was ready to accept a deed on the terms of the contract, I would dismiss the action. It is not so. The conditions are trifling, and when asked to accept the deed, respondent does not offer to do so on the terms of sale, but seeks to avoid his obligation altogether, by saying there are conditions involving a few dollars asked to be inserted in the deed varying from the terms of sale. The deed is substantially according to the terms of sale, and I think the Court can give judgment, ordering respondent to accept a deed with these trifling conditions removed, and that, in default of his doing so, the judgment operate such title, and that respondent pay to appellant the first instalment of $1410.50, which he undertook to pay on execution of the deed. Consequently the judgment must be reversed.

DORION, C. J.:—On the 3rd of December, 1873, the appellants sold at auction, J.J. Arnton being the auctioneer, several lots of land situated in the city

Liggett et al. and Tracey.

of Montreal. The respondent purchased one of these lots, and immediately signed a memorandum containing the conditions of sale. One of these conditions was that a title deed should be signed by the parties within ten days, and that a certain proportion of the price would be paid on signing the deed. After the ten days had expired, the appellants tendered to the respondent a deed of sale, which he refused to sign. Upon this refusal the appellants brought their action to compel him to sign a deed, the draft of which they have produced with their demand. They further claim that he be ordered to pay to them the sum of $1410.50, being the amount which, according to the conditions of sale, was made payable at the time the deed would be executed.

To this action, the respondent opposed several pleas, and relied principally at the argument on the following objections:—1st. That the lot of land described in the deed tendered to him was only part of the lot mentioned and adjudicated to him at the sale. 2nd. That the deed was to be passed within ten days from the date of the sale, and that the appellants having allowed those ten days to elapse could not now compel him to take a deed. 3rd. That the deed tendered was not in accordance with the conditions of sale. 4th. That the only remedy the appellants had in default of the respondent complying with the conditions of sale, was to proceed to a re-sale of the property, at the cost and charges of the respondent, as provided for by the conditions of sale.

The first pretention of the respondent, that the lot sold was not the same as the one described in the deed which appellants offered to execute, is not borne out by the evidence.

On the second point raised, which in effect is that the appellants not having offered to execute the deed within ten days after the sale, were now too late, it may be observed that the sale was perfect, as between the parties, by the adjudication made, on the 3rd of December, to the respondent, and by his signing at the time a memorandum of sale containing a description of the lot sold and a reference to the price and terms of sale.—Civil Code L. C., arts. 1564 and 1567. This sale was not depending on the condition that a deed of conveyance should be executed within ten days. The deed was only required for the convenience of the parties and the greater security of their rights. The default by either party to comply with this condition would only give the other party a right to compel the party in default to execute the deed, or to cancel the sale, but the mere expiration of the term of ten days could not of itself annul the sale which had been perfected by the signature of the parties to the memorandum of sale. In fact, it was only after the expiration of the ten days that either party could proceed to compel the other to execute the deed. An action instituted before would have been premature. (See Arrêts cited by Sirey, Code Civil Annoté—art. 1583. Notes 8, 9, 10, 11 and 11 *bis*.)

It may be further observed that, after the ten days had expired, the respondent requested the appellants to execute a deed of sale, and, after receiving the project or draft which had been prepared, he kept it for some time in his possession and finally declined to sign it. This would be a waiver of any objection on the ground of delay, were such objection otherwise well founded.

With regard to the third objection urged by the respondent, it is true that

the deed tendered with the action is not altogether in accordance with the conditions of sale. The difference, however, relates to minor details of slight importance. The main controversy between the parties is as to whether the respondent is bound to accept a deed according to the conditions of sale, and if, in carrying out those conditions in the form of a deed, any difficulty arises as to their purport, it is the duty of the Court to determine what was the meaning of the parties, and to settle the terms of the deed accordingly. The Court can therefore modify such portions of the deed as may require alteration to make it agree with the interpretation put on the conditions of sale.

This question has already been decided by this Court in the cause of Lacroix and Lambert dit Finon, reported in 12 L. C. Reports, p. 229, reversing the judgment of the Court below, which had dismissed the action on account of a small discrepancy between the allegations of the plaintiff and the admissions of the defendant in reference to some of the conditions of the sale, the sale being admitted by both parties.

The fourth and last objection is met by saying that the right of re-sale reserved by the conditions of sale, in default of the respondent fulfilling his obligations, is a cumulative remedy, and does not exclude the other actions which the appellants are by law entitled to exercise for the payment of the price of sale. Dallos, Dict. de Jurisprudence vo. vente No. 707; Rolland de Villargues, vo. Folle Enchère; Civil Code, Art. 1568.

The judgment of the Court below, by which the action of the appellants was dismissed, must be reversed, and, according to the practice of the Court, the respondent is ordered to execute a deed in the form given in the judgment within fifteen days from the service of a copy of the judgment, and in default of signing the deed within that delay, the judgment to stand in lieu of such deed of sale —the respondent being further condemned to pay to the appellants the sum of $1410.50, and interest from 1st of December, 1873, at the rate of 7 per cent., according to agreement; this sum of $1410.50 being the instalment of the price payable by the respondent on passing the deed.

The following is the judgment of the Court:

"The Court, etc:—

"Considering that on the 3rd day of December, 1873, at the city of Montreal, the appellants, through John J. Arnton, auctioneer, sold by auction and the respondent became *adjudicataire* and purchased a lot of ground, &c., at and for the price of $1.50 per superficial foot, subject to the following conditions, to wit: [conditions given above] which conditions were, immediately after the said sale and adjudication, signed by Thomas Liggett on his behalf and on that of his associates, the other appellants in this cause, and also by the respondent, and by the said John J. Arnton;

"And considering that the sale was perfect by the said adjudication, and is not depending on the condition that a deed of conveyance should be executed within ten days, which condition was for the convenience and for greater security of the rights acquired by the parties respectively under the said adjudication and sale, and that any default by either of the said parties to comply with this

Liggett et al. and Tracey.

condition of executing such deed of conveyance does not *ipso facto* resolve the sale, but only gives to the party aggrieved an action to compel the other party to execute such deed or to cancel the sale and to pay damages;

"And considering that the appellants were entitled to institute an action to compel the said respondent to execute a deed of conveyance, in accordance with the conditions of sale above referred to, and to pay that portion of the price of sale which was payable on passing of said deed, and that the stipulation of the right of re-sale by *folle enchère* is a mere faculty and does not exclude the other actions of the appellants;

"And considering that, although the deed of sale tendered by the appellants to the respondent in this case is not in strict conformity with the conditions of sale—the difference being in some minor details of slight importance—the Court below, instead of dismissing the appellants' action, should have ordered the respondent to execute a deed pursuant to the conditions of sale, and condemned him to pay that portion of the price due on passing the said deed, to wit, the sum of $1410.50, and that there is error in the judgment by the Court below rendered on the 23rd day of June, 1874, which has dismissed the action of the appellants;

"This Court doth annul and cancel the said judgment of the 23rd day of June, 1874, and, proceeding to render the judgment which the said Superior Court should have rendered, doth declare the sale made at auction on the 3rd day of December, 1873, by the appellants to the respondent, through the said John J. Arnton, of the said lot of land above described, good and valid, and granting Act to the said appellants of their offer to deliver to the said respondent the said lot of land, and to pay to the respondent such rents as they may have received from the 1st day of December, 1873, doth adjudge and order that, within 15 days from the service upon the said respondent of a copy of this judgment, the said respondent shall and do sign and execute before Mtre. Longtin, N.P., or such other public notary as may be agreed upon by the said parties, a deed of sale in accordance with the conditions above mentioned, the said deed to be in the form following, to wit [deed set out].

"And in default of the said respondent to sign the said deed of sale within the said delay of 15 days from the service of a copy of this judgment, it is hereby adjudged and ordered that the present judgment shall stand in lieu of such deed of sale, and all the conditions and obligations herein set forth be as binding on the said parties as if the said deed of sale was duly executed by them respectively, &c., &c.—Costs of both Courts against respondent.

Judgment reversed.

Judah & Wurtele, for the appellants.

Doutre, Doutre & Hutchinson, for the respondent.

(J.K.)

COURT OF QUEEN'S BENCH, 1876.

MONTREAL, 18TH DECEMBER, 1876.

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

No. 99.

JAMES H. IRELAND,

(*Petitioner in the Court below,*)

APPELLANT;

AND

WILLIAM HENRY ET AL.,

(*Intervening Parties in the Court below,*)

RESPONDENTS.

HELD:—1. The articles enumerated in Art. 1622 of the C. C. L. C. as exempted from the landlord's privilege are only illustrative of the description of effects which are exempted.

2. A piano stored with a piano dealer by a third party is only transiently on the premises, and, therefore, is not subject to the landlord's privilege for rent.

The following remarks of His Honor Mr. Justice Monk, in rendering judgment, clearly set forth the facts of the case.

MONK, J.—This case is of some practical importance in regard to the rights of lessors on the property of third parties, and which may be found and seized on the premises in possession of the lessee. The *lien* of the landlord in the majority of such cases has been acknowledged by the Courts, and is undoubted in law. The judgment of the Court applied the principle in this instance, and it now becomes the duty of this Court to determine in appeal how far this decision is in conformity with our Code and our jurisprudence, or whether it is not in contradiction of both.

On 29th September, 1875, a writ of compulsory liquidation, under the Insolvent Act of 1875, was issued against Freedom Hill, of Montreal, piano vendor, at the suit of the Exchange Bank.

On 2nd October, appellant Ireland, presented a petition, whereby he alleged that about 1st May, 1875, he, the petitioner, delivered to Hill, to be kept stored for six months, one piano, and that, under the above writ, the official assignee took and has possession not only of the insolvent's goods and effects, but also of the aforementioned property of petitioner. Petitioner therefore prayed that the assignee be ordered forthwith to deliver up to petitioner the piano, upon payment of any storage charges that may be due upon the same. This petition appellant supported by a short affidavit that it contained the truth.

The respondents, William Henry et al., intervened, alleging that on the 23rd September, 1875, said Hill was indebted to them in the sum of $322.12 for a balance of rent due under lease of premises dated May, 1875, and that respondents had seized the piano and other effects before the assignment. Upon this issue was joined between Henry and Ireland, and it was proved, among other things, that the piano was stored with Hill in May, 1875, at the rate of twenty dollars for six months. It was also established that Hill used the premises for warehouse, and that this use of the building was known to Henry. Upon this

Ireland and Henry et al.

issue and this evidence, the Court below declared the piano to be the property of Ireland, but at the same time declared it subject to a lien for Henry's rent to an amount of over $600 accruing and to accrue. Ireland was also condemned to pay his own costs and a part of Henry's on his intervention.

This Court is of opinion that the judgment must be reversed. Without now adverting to the old law, which, in the opinion of this Court, would not sustain such a decision, the 1622 Art. of our Code seems to dispose of the matter in terms that admit of every little doubt. It runs thus: "It (the lessor's privilege) "includes also moveable effects belonging to third persons and being on the "premises by their consent, express or implied, but not if such moveable effects "be only transiently or accidentally on the premises, as the baggage of a tra- "veler in an inn, or articles sent to a workman to be repaired, or to an auction- "eer to be sold." Now it is clear from the evidence that this piano was on the premises transiently, and therefore comes within the exceptions mentioned above. The fact of its being omitted in the cases given in the law by way of illustration we think does not preclude it from the operation of the Code. There is one case among many others well known to the profession, and that is Eastty vs. The Fabrique of Montreal. As we view this case, the law and the jurisprudence concur in compelling us to reverse this judgment, and it is reversed accordingly, with costs against Henry.

The judgment is as follows:

"Considering that the appellant has established the principal allegations of his petition, and, namely, that the piano claimed by his said petition was by him temporarily deposited with Freedom Hill, a piano dealer, and was only transiently in his possession for safe keeping for which the appellant had agreed to pay the charge for warehousing the same;

"And considering that, under these circumstances, the said piano was not subject to the privilege of the said respondents for the rent of the premises leased by them to the said Freedom Hill;

"And considering that there is error in the judgment rendered by the Superior Court at Montreal on the 2nd day of December, 1875;

"This Court does reverse the said judgment of the 2nd of December, 1875, and, proceeding to render the judgment which the said Court should have rendered, doth order the assignee of the estate of the said Freedom Hill to deliver over to the said appellant within fifteen days from the service of a copy of this judgment the piano claimed by him in and by his said petition, said piano bearing the number 13,920, and in default of delivering said piano within said delay doth reserve to the said appellant to take before the said Superior Court such recourse as to law and justice may appertain, and this Court doth further dismiss the petition in intervention of the respondents, and condemn the said respondents to pay the appellant the costs on the said petition in intervention, as well those incurred in the Court below as on the present appeal."

Judgment reversed.

John L. Morris, for appellant.

R. A. Ramsay, for respondents.

(J.L.M.)

COURT OF QUEEN'S BENCH, 1875.

MONTREAL, 20TH SEPTEMBER, 1875.

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

No. 187.

LES SŒURS DE LA CHARITÉ DE L'HOPITAL GENÉRAL DE MONTRÉAL,
(*Plaintiffs in the Court below,*)
APPELLANTS;

AND

WILLIAM YUILE ET AL.,
(*Intervening parties in the Court below,*)
RESPONDENTS.

HELD:—If there be a prohibition in a lease as to sub-letting, a sub-tenant cannot claim the benefit of Article 1621 of the Civil Code of Lower Canada, but under Article 1619 his effects will be liable for the whole rent due by the original tenant to the landlord.

This appeal was from the following judgment of the Superior Court, Montreal (Honorable Mr. Justice MACKAY):—

"The Court having heard the plaintiffs and the intervening parties by their counsel upon the inscription by plaintiffs for hearing as well upon the principal demand as on intervention made and fyled in this cause by said Yuile et al. (the defendants having made default), examined the proceedings, proofs of record and evidence adduced, and on the whole duly deliberated:

"Adjudging first upon the principal demand; considering that the plaintiffs have sufficiently proved the allegations of their declaration to warrant a judgment in their favor, to wit, the present judgment; doth, for the causes, matters, and things mentioned and set forth in plaintiff's declaration, rescind, resiliate and annul the lease of the premises thereinafter described, entered into between said plaintiffs and the said defendants, bearing date and executed at Montreal before Durand, Notary Public, on the 3rd of May, 1873, that is to say: That certain three-story cutstone and brick store, etc.

"And it is ordered that the defendants and the intervening parties do, within three days from the service upon them of this Judgment, quit, abandon, and deliver up to plaintiffs the possession of the aforesaid leased premises, and in default of their so doing within the said delay, that they be ejected therefrom under the authority of this Court, the goods and effects found therein put out *mis sur le carreau*, and the said plaintiffs placed in the peaceable possession and enjoyment of the said premises.

"And the Court doth condemn the said defendants, jointly and severally, to pay and satisfy to plaintiffs the sum of $417.52, currency, to wit, the sum of $225 for a quarter's rent of the said premises accrued and become due on the first February last, the sum of $106.90 for taxes and *cotisations*, the sum of $75 for one month of the said rent accrued on the first day of March last, and the further sum of $10.62, for interest at nine per cent., reckoning from the first November last to the first of May next, upon the amount expended by plaintiffs for the making of the two offices mentioned in the demand, with interest on $406.90 from the fifth of March, 1875, day of service of process, until paid, and costs of suit *distraits*, &c.

"And adjudging upon the said intervention; considering the allegations matérial of intervention proved, and that intervening parties are in no bad

Les Sœurs, &c., and Yuile et al.

faith, but innocent sub-tenants and not liable for more than they offer; that the distinction that plaintiffs would have the Court make in and by their *Réponse* cannot under the circumstances be allowed:

"Doth maintain the said intervention, and declare the tender and deposit made by the intervening parties with the said intervention of the sum of $243.07, good and valid, doth adjudge and declare the said intervening parties to be the only owners and proprietors of each, all and every the goods, chattels and effects seized and attached in this cause under the writ of *saisie-gagerie* therein issued; that plaintiffs had only privilege upon said effects to and for said amount of $243.07 deposited by the intervening parties, and no more, and that the said goods and chattels be released from seizure and be given over to said intervening parties; with costs against plaintiffs since contestation of intervention, but not of introduction of it.

"And the money deposited is ordered to be paid to plaintiffs on account of their claims."

The facts of the case appear from the factums of the parties.

Lacoste, Q.C., for appellants:—

Le 3 mai 1873, les appelantes ont loué aux MM. Armstrong, marchands de Montréal, un de leurs magasins sur la rue St. Pierre pour le terme de trois ans, à compter du 1er mai de cette année-là.

Le loyer fut fixé à $800 pour le première année et à $900 par année pour les deux autres, payable par quartiers, le premier des mois d'août, novembre, février et mai.

Les locataires s'obligèrent à payer les taxes imposées pendnat la durée du bail, et de plus à payer un intérêt de 9 par 100 sur le montant que les appelantes seraient appelées à débourser pour la confection *de bureaux* qu'elles se sont obligées par leur bail, à faire à la réquisition de leurs locataires, dans le magasin qu'elles louaient.

Le 2 mars 1875, les MM. Armstrong, ayant négligé jusqu'alors d'effectuer le paiement du loyer devenu échu le 1er février dernier, les appelantes intenterent contre eux la présente action en résiliation de bail et elles unirent à leur action, une demande

Pour le terme du loyer échu 1er février	$225.00
Pour loyer du 1er février au 2 mars 1875	75.00
Pour taxes de l'année courante	106.90
Pour intérêt sur le coût des bureaux ($236.00) du 1er novembre 1874 au 1er mai 1875	10.62
Pour dommages résultant de la résiliation du bail	150.00
Formant en totalité la somme de	$567.52

Les appelantes ont fait émaner avec leur action un bref de saisie-gagérie en vertu duquel elles ont fait saisir les meubles et effets mobiliers qui garnissaient les lieux.

Les défendeurs Armstrong ont fait défaut, et pendant l'instance, les intimés Yuile, marchands de Montréal, ont produit une intervention basée sur les faits suivants:

Dans le cours de septembre 1874, il paraîtrait que leur magasin, situé sur la rue St. Paul, serait brûlé. Alors, d'après eux, ils se seraient réfugiés dans le

magasin, loué à Armstrong qu'ils disent avoir été occupé dans le temps par le nommé Daniel Forward.

Le 30 septembre 1874, les intimés ont loué de Forward les lieux en question pour six mois à compter du 1er novembre 1874, ce dernier leur permettant de demeurer dans les lieux jusqu'au 1er novembre, sans payer de loyer. Le prix fut stipulé sur le pied de $700 per année, soit: $350 pour les six mois dont $174 payables le 1er février et $175 le 1er mai.

Les intervenants offrent par leur intervention $175 pour loyer dû, en vertu de leur bail le 1er février et $68.07 pour loyer du 1er février au 4 mars, date de la saisie, et ils demandent en conséquence main-levée de la saisie, alléguant que les effets saisis leur appartiennent et ne sont affectés au privilége de location des appelantes que jusqu'à concurrence de ce qu'eux-mêmes devaient à leur locateur, à l'époque de la saisie.

Les intervenants consentent à la résiliation du bail.

Les appelantes ont répondu que le bail qu'elles ont consenti aux MM. Armstrong contenait une défense de sous-louer et qu'en conséquence, ils n'ont pu sous-louer qu'en violation des droits des appelantes, ce qui rend nulle vis-à-vis d'elles la sous-location faite par eux à Forward et aussi celle de Forward aux intervenants.

Les appelantes n'ont pas pu prouver leur réclamation pour dommages, en conséquence, la somme du $150 a dû être retranchée du montant de leur action.

Le 8 avril 1875, la cour, présidée par Son Honneur M. le juge Mackay, a accordé la demande en résiliation de bail et a condamné les défendeurs conjointement et solidairement à payer aux demanderesses la somme de $417.52, et ensuite, procédant à adjuger sur l'intervention, elle en a accordé les conclusions en déclarant les offres faites par les intervenants bonnes et valables.

Nous croyons ce jugement erroné, en ce qui regarde l'intervention, et nous le soumettons à l'appréciation de cette cour.

Toute la question en litige se résume dans la suivante:

La sous-location faite pas les Armstrong à Forward et celle faite par ce dernier aux intervenants est-elle légale et peut-elle affecter le privilège des locateurs sur les meubles qui garnissent les lieux?

La défense de sous-louer contenue au bail des appelantes aux Armstrong, est dans les termes suivants: "It is expressly agreed by and between the said parties that the said lessees shall not transfer their right in the present lease or "sub-let the whole of the above rented premises, without the consent in writing "of the said lessors or their represensatives."

Par cette clause, les Armstrong ne pouvaient céder leur bail et louer les lieux, sans le consentement par écrit des appelantes.

Or, en violation de cette clause, ils ont loué à Forward le 1er avril 1874 pour deux ans et trois mois, à compter du 1er février alors dernier. Ce dernier bail contient également une défense de sous-louer dans les termes suivants: "The said "lessee shall not transfer his right in the present lease, or sub-let any part or portion of the above rented premises, without the consent in writing of the said "lessors or their representatives."

Nonobstant cette défense expresse, Forward a loué aux intervenants.

Il ne saurait y avoir deux interprétations sur la défense contenue à ces baux,

Les Sœurs, &c., and Yuile et al.

et dans l'un et l'autre cas, les locataires ont sous-loué sans droit, car cette clause du bail doit être exécutée à la rigueur. "Le locataire a droit de sous-louer ou de "céder son bail à moins d'une stipulation contraire," dit l'article 1638 de notre code, et il ajoute, "s'il y a telle stipulation, elle peut être pour la totalité, ou "pour partie seulement de la chose louée et dans l'un et l'autre cas, elle doit "être suivie à la rigueur."

Il est bien vrai que les intervenants allèguent dans leur intervention que la sous-location a été faite du consentement des appelantes, mais ils n'ont pas prouvé cet allégué.

D'ailleurs ce consentement à la sous-location doit être donné par écrit, d'après la clause du bail, et à défaut d'écrit, la preuve n'en peut être faite par témoins, d'après l'article 1233 de notre Code Civil, à moins qu'il n'y ait commencement de preuve par écrit. (Troplong, louage, art. 1717, No. 141.)

Or, tel commencement de preuve par écrit n'existe pas.

On a cherché à prouver que les appelantes avaient eu connaissance de l'occupation des lieux par les intervenants. Disons de suite que la connaissance que quelques-uns des membres de la communauté demanderesse ont pu avoir de cette occupation et même du sous-bail ne peut pas préjudicier à la communauté, et d'ailleurs la connaissance qu'un locateur peut avoir d'une sous-location n'implique pas son consentement.

La sous-location, en violation des clauses du bail, donne bien au locateur le droit de demander la résiliation de ce bail, mais elle ne l'oblige pas à le faire, et en ne le faisant pas, il ne perd pas son privilège sur les meubles des sous-locataires qui garnissent les lieux.

Prétendre le contraire serait mettre le locateur dans une position plus défavorable par suite de la fraude de son locataire. Armstrong et Forward se trouvent avoir loué une chose qui ne leur appartenait pas. Cette location les soumet à certaines obligations vis-à-vis de leurs locataires respectifs, mais elle ne saurait affecter les droits du propriétaire. (Pothier, louage, No. 20.)

En outre, nous voyons par l'article 1622 de notre code, que le privilège du locateur s'étend sur tous les effets mobiliers qui garnissent les lieux, même sur ceux des tiers qui s'y trouvent avec leur consentement exprès ou implicite, à l'exception, seulement, de ceux qui ne s'y trouvent qu'en passant ou accidentellement, ou qui, suivant l'usage notoire, n'appartiennent évidemment pas au locataire.

Or, dans ce cas-ci, les meubles saisis ont été mis dans le magasin avec le consentement exprès des intervenants et ils sont, par conséquent, devenus affectés au privilége des appelantes, et ils n'auraient pu, tout au plus, en devenir exempts, que par une notification régulière aux appelantes de la sous-location.

La notification est une nécessité. —"Seule elle permet de prouver d'une "manière précise que le locateur a connu l'état réel des choses, et que la "connaissance qu'il en a eue est exclusive de toute supposition autre que celle "de la renonciation à son privilège." (Paul Pont, Privilèges et Hypothèques, vol. 1er sur art. 2102, No. 122.)

Ainsi donc, les intervenants invoquent à tort l'article 1621 du Code Civil qui déclare que le privilège du locateur ne s'étend aux effets des sous-locataires que jusqu'à concurrence de ce qu'ils doivent au locataire, parce que le législateur n'a eu vue, dans cet article, que le sous-locataire légal qui a acquis le droit de jouir

des lieux et de les posséder, et non pas le sous-locataire *de facto* qui ne possède que par suite de la violation du contrat du locataire principal. Les Sœurs, & and Yuile

L'honorable juge semble avoir basé son jugement sur la prétendue bonne foi des intervenants.

"Considering" est-il dit dans le jugement, "that intervening parties are in "no bad faith, but innocent sub-tenants, &c, &c."

Voyons jusqu'à quel point allait la bonne foi des intervenants.

Dans le bail que leur a consenti Forward, ils se sont obligés de se conformer à toutes les conditions du bail en vertu duquel Forward possédait les lieux.

"The said lessees shall conform to and abide by all the terms and conditions of "the lease under which the said lessor holds the said premises."

Ils savaient donc que Forward n'était pas propriétaire, mais simple locataire. La prudence ne leur suggérait-elle pas de s'assurer tout d'abord du droit de Forward de sous-louer? Bien plus, puisqu'ils ont accepté les conditions du bail consenti à Forward, il est à présumer qu'ils ont pris communication de ce bail et qu'ils y ont vu la défense de sous-louer y contenue, et comme le bail des Armstrong à Forward réfère au bail des appelantes à Armstrong, les intervenants auraient pu et auraient dû s'assurer du droit d'Armstrong quant à la sous-location. Ils n'ont donc pas même le mérite d'être sous-locataires de bonne foi. Bien au contraire, ils savaient qu'ils sous-louaient de personnes qui n'avaient pas le droit de leur donner la jouissance des lieux. Ils ont accepté cette position, il faut conclure qu'ils ont soumis implicitement leurs meubles apportés dans le magasin au privilége des propriétaires.

La doctrine émise par l'Honorable Juge rendrait illusoire, dans un grand nombre de cas, le privilége des locateurs, qui au moment d'une saisie, se verraient privés de leur privilége, par la mauvaise foi de leur locataire.

La question est d'une haute importance. Ce n'est pas le montant en litige qui a engagé les appelantes à venir devant cette cour, mais elles désirent connaître l'opinion du plus haut tribunal de ce pays, afin de s'y conformer dans l'avenir.

Perkins, for respondents:—On or about the 25th or 26th of September last, the respondents, doing business as W. & D. Yuile, having a place of business No. 480 St. Paul street, suffered from fire, and were compelled to seek a temporary place of refuge to store the goods which were left to them after the fire. After making one or two applications they found a store in St. Paul street, to wit, the premises described in the declaration of the appellants. This store was vacant at the time, there was nothing whatever therein. There being a notice to let upon the premises, they applied to Mr. W. A. Hall, N.P., for a lease of the premises; the same premises had been advertised to let by Mr. Hall from and after the latter end of August. Mr. Hall being the agent of one Daniel Forward, was anxious to secure for his client all that he could from the premises for payment, the premises producing nothing—to find a tenant was profitable to the landlord, thereupon the lease, paper 11 of the record, was passed, being the lease of the 30th September by Daniel Forward to the respondents, for the sum of $700 per annum, payable $175 per quarter without taxes.

After the passing of the said lease, the respondents, W. & D. Yuile, placed in the premises thousands of dollars worth of goods. The appellants, the Ladies of Charity de l'Hopital General, knowing the possession of respondents,

Lee Sears, &c., and Yalle et al.

they having visited the premises on several occasions, remained quiet, and did nothing until the 3rd of March, 1875, when they issued a writ of *Saisie gagerie* and declaration praying rescision of the lease which they had conferred on the 3rd of May, 1873, to the defendants, Messrs. Armstrong Bros., of the same premises, at a rental of $900 per year and taxes. The lease was for three years. By their action they claim the sum of $567.52, and under a writ of *saisie gagerie* were seized divers effects belonging to the respondents. Armstrong Bros., as appears of record, are insolvent, and have made an assignment. Daniel Forward also is insolvent, and has assigned under the Insolvent Act of 1869. The respondents being either innocent intruders or sub-tonants, by intervention set forth the facts connected with their lease from Daniel Forward, and pray that they should be declared the proprietors of the articles seized, and that possession should be given them thereof, and they tender with their intervention the sum of $243.07, to wit, the amount due under their lease, from the date of the lease up to the 4th of March, date of seizure.

The appellants contest this intervention, alleging that the lease from the appellants to Armstrong Brothers was made with the prohibition against subleasing, and that therefore they had a right to claim from the present respondents the full amount of rent and taxes due both before the occupation of respondents and since the said occupation, for the entirety of the rent and taxes due them by Armstrong Brothers.

The respondents are not desirous of doing more than to recite the facts of this case. They believe that it is not possible under the law of this country, where innocent third parties finding a place vacant, take lease thereof, from the ostensible proprietor thereof, and place therein thousands of dollars worth of goods, that there can be any right against such innocent third parties to hold their goods and chattels responsible. The law of this country decides otherwise, and such is the interpretation thereof that has been given in this case by the Honorable Judge who rendered the decision maintaining such intervention with costs, costs of the introduction of such intervention against respondents, but with costs of contestation thereof against the appellants,—and the respondents submit, as the law of the land governing this case, the articles of our Code which certainly govern this matter, to wit, article 1639: "The undertenant is held toward the principal lessor for the amount only of the rent which he owes at the time of seizure." In this case there has been no payment made in advance. The truth is, the respondents paid nothing whatever to Forward, and therefore the appellants are gainers by so much, by the fact of the occupation of the respondents,—and the respondents also cite article 1621, to wit, "The right (payment of rent and privilege right upon the moveable effects which are found upon the property leased) includes also the effects of the undertenant in so far as he is indebted to the lessee." In this case the respondents were indebted to the lessee, Forward, only in the amount tendered by the present action, and therefore the appellants are really gainers *pro tanto*, for before the occupation of the respondents there was nothing in the place liable for the payment of the rent, and both Armstrong Brothers and Daniel Forward were insolvent. The appellants, provided the Armstrong Brothers did not garnish the premises in question, and finding, as they certainly did find, that

there was nothing therein providing for the payment of their rent, might have brought an action to rescind their lease. In such case the Messrs. Yuile would not have suffered, as they certainly do by defending the present action. Any such action might have been decided summarily in a very few days. But the respondents submit, that it is not the law of this or any other country that landlords can lie by and allow third parties to enter into possession, and the moment that they enter into possession make seizure for back rent and taxes. Were this the case, any landlord finding his tenant insolvent, and there is no law to prevent that tenant removing his property unless *saisie-gagerie* be practiced, might lie by and allow an innocent third party to enter upon the premises, and thereafter immediately make attachment for rent past due. If the landlord in such cases may attach the goods of the sub-tenant, then he may do so within an hour or a day after the entry upon the premises by such sub-tenant. The law is the same whether it be an hour's possession or a year's possession. And, therefore, the respondents, being in perfect good faith, and being willing to pay part of the debt of the appellants, as they offer to do by the conclusions of their intervention, respectfully submit that their case should receive the consideration of this Honorable Court, and they respectfully submit that in this case one of two things must occur, either they are sub-tenants coming within the articles of our Code 1621 and 1639, whereby their effects are liable only for the amount of rent which they owed at the time of their seizure (which fact is favorable to the plaintiffs), but if not sub-tenants they are mere trespassers upon the premises. In the former case they have complied with the obligation devolving upon them by law, in the latter case they owe nothing whatever to the appellants, their being no privity of contract between them and no law binding them to pay any sum of money, and therefore they are entitled to relief from the seizure effected in this cause. They prefer to act honorably and honestly, and therefore they admit a liability for a certain sum, which sum they have tendered by their intervention, which tender has been maintained by the Superior Court for this district, and the judgment rendered by that Court, it is respectfully submitted, is the only judgment possible under the circumstances, and they pray that the same may be confirmed.

DORION, C. J.—A question of law of some difficulty is presented by this case. The appellant seized the goods of a sub-tenant for rent due. The sub-tenant contends that he is responsible only to the extent of the rent unpaid by him to his lessor. This is the rule, but here the lease contains a prohibition against sub-letting. That condition has been disregarded by the lessee, and under the circumstances I come to the conclusion, not without some hesitation, that the judgment must be reversed, and the seizure of the goods of the sub-tenant maintained.

MONK, J., remarked that the sub-tenant was in bad faith though the Court below appeared to have viewed the evidence differently. Could the sub-lease, in violation of the prohibition contained in the lease, be considered a sub-lease at all? His Honor was disposed to say that it could not.

RAMSAY, J.—By Art. 1619 the general principal is laid down that the goods which garnish the leased premises are the *gage* for the rent. Then there is article 1621 which establishes the exception, that the effects of the sub-tenant

Lee Sears, &c., and Yule et al.

are only liable for his unpaid rent. Then Art. 1638 limits the right of sub-letting when a stipulation to the contrary is found in the lease. The exemption in favor of the sub-tenant only applies where sub-letting is not prohibited by the lease. If there had been an acquiescence in the sub-lease the case would be different, but their is nothing to prove acquiescence here.

The judgment of the Court of Appeals is as follows:—

"The Court, etc., Considering that the appellants are not bound by the lease of the 30th of Sept., 1874, made to respondent by one Daniel Forward, not having been parties thereto and not having acquiesced therein, the said Daniel Forward having leased said premises of Chas. N. Armstrong and Jesse D. Armstrong (Armstrong Brothers), by lease passed before Durand, notary, on the 3rd of May, 1873, in violation of the lease made by appellants to said Armstrong Brothers upon which their action is founded in this cause, and which did not confer the right upon said Armstrong Brothers to transfer their rights in said lease or sub-let the premises leased without the consent in writing of appellants;

"And considering that the appellants have by law for the payment of the said rent stipulated in their said lease a privilege on all the goods and effects in the premises leased, and that the said respondents are not entitled to the privilege secured by Article 1621 of the Civil Code to undertenants occupying premises with the assent of the proprietor;

"And considering that there is error in the judgment rendered by the Superior Court at Montreal on the 8th of April, 1875, in so far as the said Superior Court hath declared the tender and deposit made by the said respondents in this cause of the sum of $243.07 good and valid, and hath released the goods and effects of the said respondents from the *saisie-gagerie* effected in the premises leased at the instance of the said appellants;

"This Court doth reverse that portion of the said judgment of the said Superior Court, and proceeding to render the judgment which the said Superior Court should have rendered, doth adjudge and declare the said goods and effects seized by virtue of the writ of *saisie-gagerie* issued in this cause to be affected to the privilege of the said appellants for the balance of rent due them by the said Charles N. Armstrong and Jesse D. Armstrong, to wit, the sum of $417.52 with interest on $406.90, from the 5th of March, 1875, until paid, and costs of suit, and doth adjudge and order that the sum of $243.07 offered by the said respondents and by them deposited in the hands of the Prothonotary of the said Superior Court, be by the said Prothonotary paid unto the appellants in part payment of the said sum of $417.52, interest and costs as aforesaid, and doth further adjudge the said *saisie-gagerie* of the goods and effects so seized in the said premises leased good and valid, and order that the same be sold in due course of law to satisfy the balance due to the said appellants on their said judgment so rendered against the said Charles N. Armstrong and Jesse D. Armstrong unless said balance be paid within fifteen days from the rendering of this judgment. And the said respondents are hereby condemned to pay to the said appellants the costs incurred on their intervention in the Court below and on the present appeal. Judgment reversed.

Lacoste & Drummond, for appellants.

Perkins, Macmaster & Prefontaine, for respondents.

(J.L.M.)

INDEX

TO THE PRINCIPAL MATTERS IN THE 20TH VOLUME

OF THE

LOWER CANADA JURIST.

COMPILED BY

STRACHAN BETHUNE, Q.C.

PAGE

ACCOUNT :—In an action to render an, in which defendant is condemned to pay plaintiff one-third of such balance as may be in his hands, and wherein the defendant renders an account, acknowledging to have a certain balance on hand in cash and a number of shares in a mining and smelting company, he cannot be condemned, *quoad* such shares, to do more than transfer the third thereof to plaintiff, and, in default of so doing, to pay an amount equivalent to their par values. (Foley, appellant, and Stuart, respondent, Q. B.) 183

ACTION HYPOTHECAIRE :—When the defendant pleads that he is no longer proprietor, having sold the property by a deed not registered, the plaintiff may, by a side bar writ in the same case, and under the same number, summon the party thus indicated as purchaser, and have him condemned as the real *détenteur* of the property. And in such a case the original defendant must pay costs up to plea fyled, and if plaintiff contests, he must pay the costs of contestation. (Lalonde, appellant, and Lynch et al., respondents, Q. B.).. 158

ACTION NEGATOIRE :—*Vide* DRAIN.

ADULTERINE BASTARD :—*Vide* WILLS.

AFFIDAVIT :—An, to an opposition, is defective, if the *jurat* does not show where it was sworn. (Robertson et al. vs. Fontaine, and Fontaine, opposant, S.C.)... 195

APPEAL :—An appearance for the respondent need not be fyled in the clerk's office to enable the respondent to move to dismiss the appeal for want of a return of the writ. (Furniss, appellant, and the O. & Rideau Forwarding Co. et al., respondents, Q. B.)..... 26

" :—Security in, cannot be legally given, in the absence of the opposite party, or on a day different from that stated in the action. (Charbonneau, appellant, and Davis et al., respondents, Q. B.)..... 167

" :—A voluntary payment of a portion of the judgment appealed from is an *acquiescement*, and the fact may be established by affidavit. (Do.)..... 167

" :—In the case of an appeal from a judgment ordering the appellant to render account, security for costs alone is sufficient. Brooke et al., appellants, and Dallimore, respondent, Q. B.)..... 176

" :—Where the bond is completed in a case like the above, without justification, and in the absence of the opposite party, who was present, however,

PAGE

when the securities presented themselves (contending that they ought to justify for a considerable amount to cover the possible balance of account) the Court will not set aside the security bond as irregular or illegal, but will reserve to the appellant his right to attack the solvency of the securities. (Do.)..... 170

" :—After the Prothonotary has received the acknowledgment of securities to a bond, and signed and stamped the same, it is not competent to the Prothonotary to refuse to send up the record on the ground that the bond was executed by error and surprise. (Mallette, appellant, & Lenoir, respondent, Q. B.)..... 293

" :—An application for an, from a ruling at *enquête*, which is manifestly wrong, will be rejected, when the granting of the appeal will have the effect of retarding the case. (Le Curé, &c., de Beauharnois vs. Robillard, Q. B.)..... 294

" :—*Vide* Supreme Court.

" :—Where a record has been remitted by the clerk to the Court below, in consequence of the proper certificate not being lodged within six months after the granting of an appeal to Her Majesty in Her Privy Council that the appeal has been lodged in the Privy Council, the Court cannot order the Prothonotary of the Court below to return the record. (Brewster et al., appellants, and Chapman et al., respondents, Q. B.)..... 295

Arrest of Judgment:—*Vide* Venue.

Attachment:—*Vide* Saisie Arret.

Attorney *ad litem*:—*Vide* Practice.

Auction:—*Vide* Sale.

Bastard:—*Vide* Wills.

Burial:—*Vide* Mandamus.

" :—The body of a Roman Catholic not actually excommunicated nor adjudged to be a "public sinner," according to the Quebec Ritual, cannot legally be refused sepulture in that part of the burial ground where Roman Catholics are usually buried with the rites of the church, and in which the graves are consecrated. (Brown, appellant, and the *Curé*, &c., of Montreal, respondents, P. C.)..... 228

Capias ad Respondendum:—An affidavit for, alleging in the alternative that the defendant has secreted *or* made away with his property and effects is insufficient. (Ostell vs. Peloquin, S. C.)..... 48

" " " :—A judgment, condemning a defendant to be imprisoned for three months, after contestation of his statement and abandonment of property, is not an order to surrender himself within the meaning of Art. 825 of the code of C. P., and therefore a service of such judgment on the defendant and on his bail does not create any liability in the bail under said article. (Brossard, appellant, and Bertrand, respondent, Q. B.)..... 125

" " " :—The sale of moveables by a debtor, for value received, during the pendency of the suit of his creditor, does not amount to secretion of his estate. (Robertson et al. vs. Overing, S. C.)..... 299

" " " :—*Vide* Insolvent Act.

Carriers:—*Vide* Railways.

" :— " Jury Trial.

Codes, Amendment of:—*Vide* Quebec Legislature.

Commercial Cases:—*Vide* Evidence.

Commission Rogatoire:—An application for, to adduce evidence against the validity of a power of attorney, not attacked by any pleading, cannot be allowed. (The Canada Tanning Extract Co. vs. Foley, Q. B.)..... 180

Composition:—Where a deed of, under the Insolvent Act of 1869, has been contested, the composition cannot be exacted until after the delays specified in the Act shall have transpired. (Yuille et al. vs. Munro et al., S. C.)..... 25

PAGE

CONTRAINTE PAR CORPS:—*Vide* GUARDIAN.

COSTS:—*Vide* INSOLVENT ACT.

" " SECURITY FOR:—Where one of two plaintiffs is resident abroad and the other in the Province, the absent plaintiff cannot be compelled to give security for costs. (Beaudry et al. vs. Fleck, S. C.)..... 304

" " " :—A deposit of $100, after notice and without objection by defendant, is sufficient, without any special allowance of its sufficiency by the Court or a Judge, or the Prothonotary. (The Canada Tanning Extract Co. vs. Foley, Q. B.)..... 180

CRIMINAL PROCEDURE:—*Vide* VENUE.

" " :—After the Counsel for the prosecution has closed his case, and objection has been taken to some defect in the evidence, the Judge may recall witnesses and make further enquiries to meet the objection. (Regina vs. Jennings, Q. B.)..... 291

" " :—A prisoner will be allowed to withdraw the plea of *guilty* and substitute a plea of *not guilty*, if it appears that he may have been under a misapprehension when he pleaded guilty, and might thereby suffer injury. (Regina vs. Huddel, Q. B.)..... 301

CURATOR:—*Vide* INTERDICT.

CURE:—*Vide* DEFAMATION OF CHARACTER.

DAMAGES:—*Vide* DEFAMATION OF CHARACTER.

" :— " NAVIGABLE RIVER.

" :— " NEGLIGENCE.

DEFAMATION OF CHARACTER:—Defamatory words spoken by a R. C. *Curé*, warning a parishioner not to employ the plaintiff in his professional capacity as an advocate are actionable. (Brossoit, appellant, and Turcotte, respondent, Q. B.)..... 141

" " " :—In an action of damages for, where the defendant's conduct was clearly reprehensible, though actual damages may not have been proved, sufficient exemplary damages should be allowed to give the plaintiff his costs. (Do.)..... 141

" " " :—While ministers of religion are amenable to the civil tribunals for slanderous expressions uttered by them from the pulpit or elsewhere, an action of damages will not be entertained against a priest for admonishing his congregation, on pain of being deprived of the sacraments, not to go near the shop of certain people in the parish who were in the habit of scoffing at religion—where no injury was proved; and it did not appear that the words were spoken maliciously or with intention to injure any particular individual, though they were generally understood by the congregation to apply to the plaintiff. (Renaud dit Blanchard, appellant, and Richer, respondent, Q. B.)..... 146

DIME:—The, is not a charge on the land and is only payable by the person who raises the grain, and, consequently, the proprietor of the land, who is a Roman Catholic, is not liable for *dime*, when the land is leased to another party. (Gaudin vs. Starnes, C. C.)..... 192

DONATION:—The acceptance of a, contained in a contract of marriage, may be legally made by simply registering the contract during the lifetime of the donor. (Charlebois et ux. vs. Cahill, S. C.)..... 27

DOWER:—A customary, created by contract of marriage, executed before the coming into force of the Registry ordinance, did not require to be registered. (Leroux, appellant, and Leroux, respondent, Q. B.)..... 224

DRAIN:—A proprietor who, with the permission of the corporation of a city, has constructed a drain under the street to connect his property with the public sewer, has the exclusive ownership and possession of such drain, and the right of servitude thereby established in his favour entitles him to exercise the *action négatoire* to prevent others from using the drain, unless

PAGE

they contribute to the cost. (Toupin, appellant, and the Ontario Bank, respondent, Q. B.)..... 5

ELECTION :—Ballot papers, under the Dominion Election Act of 1874, marked with the x to the left of or below the name of the candidate, or with two distinct crosses, or with an asterisk, or other peculiar mark which might serve as a private signal between a voter and his briber, are null. But papers, with the x immediately after the name, though not in the square allotted to it, are good.' (White et al., petitioners, and Mackenzie, respondent, S. C.)..... 22

" :—The absence of the initials of the deputy returning officer to the ballot paper is not a fatal defect. (Do.)..... 22

" :—The Dominion Controverted Elections Act of 1874, which imposes on the judges of the Superior Court the duty of trying election cases, is within the jurisdiction of the Parliament of Canada. (Ryan et al., petitioners, vs. Devlin, respondent, C. of R.)..... 77

" :—Evidence to disqualify a candidate should be such as would justify a conviction on an indictment. (Do.)..... 77

" :—The decision of the trial judge as to the credibility of a witness will not be disturbed, unless a manifest error has occurred. (Do.)..... 77

" :—In the application of circumstantial evidence as to the candidate's knowledge of corrupt acts, the circumstances proved should be susceptible of no explanation inconsistent with guilt. (Do.)..... 77

" :—The Dominion Controverted Elections Act is constitutional. (Owens et al. vs. Cushing, C. of R.)..... 86

" :—Trials under the Dominion Controverted Elections Act of 1874 may take place in the vacation between 9th July and 1st September. (Do.)..... 86

" :—A voided election and the election rendered necessary by such an avoidance are one and the same election as to the personal acts of candidates and the acts of their agents with their knowledge and consent. (Do.)..... 86

" :—The payment of illegal accounts with the knowledge and consent of a candidate, after the avoidance of an election, and with a view to influence votes in his favour, in the election rendered necessary by such avoidance, is a corrupt practice within the meaning of the Election Act. (Do.)..... 86

ENQUÊTE :—During the sitting of the Superior Court in Montreal a party may be compelled to proceed at *Enquête* sittings. (The Molsons Bank vs. Converse, S. C.)..... 302

EVIDENCE :—*Vide* PRACTICE.

" :— " ELECTION.

" :— " JURY TRIAL.

" :— " SAISIE ARRET.

" :— " WITNESS.

" :— " PUBLIC RECORDS.

" :—The *primâ facie* proof of payment afforded by a receipt in writing can be destroyed only by the clearest and most positive evidence of error. (Bell, appellant, and Arnton, respondent, Q. B.)..... 281

" :—In commercial cases, parol evidence may be adduced to establish an alleged error in a written contract. (The Ætna Life Insurance Co., appellant, and Brodie, respondent, Q. B.)..... 286

EXCEPTION *à la forme* :—An, alleging simply that "no proper or legal service was ever made upon the defendant," without specifying any particular defect in such service, is not sufficiently *libellée* and will be rejected. (Beaufoy, appellant, and Feek, respondent, Q. B.)..... 182

EXCEPTION DECLINATOIRE :—*Vide* PRACTICE.

" " :—A defendant residing in St. Hyacinthe cannot be sued in Montreal, on a draft drawn in Montreal on the defendant as residing in St. Hyacinthe, and accepted by him and payable there. (Greene et al. vs. Blanchette, S. C.)..... 196

PAGE

EXCEPTION DECLINATOIRE :—*Vide* SCHOOL TAXES.

EXECUTION :—*Vide* OPPOSITION.

EXTRADITION :—In a proceeding for, the judge or magistrate has no authority to hear the prisoner's defence, though in the exercise of his discretion he may hear any evidence which may be tendered to show that the offence is of a political character, or was not comprised in the Treaty, or that the accuser is not to be believed on oath, or that the demand for the prisoner's extradition is the result of a conspiracy. (*Re* Rosenbaum, on demand of U. S. Government for extradition, Q. B.)..... 165

GARANT :—The exception to call in a *garant formel* must show that the excipient is within the delays, and that he has taken the necessary steps to call in his *garant*. (Belle vs. Dolan, S. C.)..... 302

GUARDIAN :—A rule for *contrainte par corps* against a, will be granted, without previous notice. (Rodier vs. McA[illegible]..... 305

HYPOTHECARY ACTION :—In a, the pra[illegible]al condemnation, in default of delivering up the property [illegible]*ice*, is in accordance with the well recognised practice of ou[illegible]ociété de Construction Métropolitaine vs. Bourassa, S. C.)..... 304

IMPUTATION OF PAYMENT :—Where no im[illegible] made by the parties at the time of payment, the payment will be held to have been made on account of the debt for which collateral security has been given, even when the collateral obligation is not yet due. (Doyle, appellant, and Gaudette, respondent, Q. B.)..... 135

INCIDENTAL DEMAND :—An, may be fyled by a defendant with his pleas, without previous leave to do so being asked and allowed by the Court. (Lionais vs. Lamontagne et al. & E. Contra, S. C.)..... 303

INDICTMENT :—*Vide* VERDICT.

INJUNCTION :—That an application for an, enjoining the directors of a company not to declare a specified dividend, must be preceded by notice; and the affidavit in support of the application will be held insufficient if it merely allege information and belief. (Kane vs. The Montreal Telegraph Co., S. C.).... 120

" :—*Vide* PROHIBITION.

INSOLVENT ACT :—*Vide* COMPOSITION.

" " :—On a contestation of an application for a discharge no fee will be allowed for articulation of facts or for appearance of counsel at *Enquête*. (*Re* Baylis, ins., and Browse et al., crs. contesting, S. C.)..... 184

" " :—The creditor of an insolvent cannot claim upon the e[illegible] of the partnership of which the insolvent was a member, for the p[illegible] goods sold to the insolvent prior to the formation of the partnership, upon the ground that the partnership afterwards got the benefit of the purchase. (*In re* Simmons et al., insolvents, and Fulton, assignee, and Bevington et al., contestants, S. C.)..... 296

" " :—The assignee cannot be summoned to declare as a *Tiers saisi* what moneys he has in his hands belonging to the defendant, of whose estate he is the assignee. (Grothé vs. Lebeau, and Lacroix, petr., and Beausoleil et al., T. S., S. C.)..... 300

" " :—A *capias ad respondendum* may issue against a debtor after he has made an assignment under the Act. (Beaudin, appellant, and Roy et al., respondents, Q. B.)..... 308

INSURANCE :—In the case of an interim insurance by an agent in the following words :—"Received from Messrs. Tough & Wallace, Coaticooke, (Post office, Coaticooke) the sum of $20, being the premium for an insurance to the extent of $2,500 on the property described in the application of this date numbered ——, subject, however, to the approval of the Board of Directors in Toronto, who shall have power to cancel the contract at any time within thirty days from this date, by causing a notice to that effect to be mailed

PAGE

to the applicant at the above Post office,"—a notice by the company annulling the contract, mailed to the applicant at the Post office, Toronto, within the thirty days, but not received in time for delivery by the Post office at Coaticooke until after the fire, had not the effect of cancelling the insurance. (Tough et al., appellants, and The Provincial Insurance Co., respondents, Q. B.)..... 168

INTERDICT:—The father of an, ought of right to be appointed his curator, in the absence of any grave objection to such appointment, even when the majority of the *conseil de famille* thinks otherwise, and the insolvency of the father is not of itself a legal objection to such appointment. (Dufaux, appellant, and Robillard, respondent, Q. B.)..... 288

JUDGMENT, *in vacation*:—*Vide* PRACTICE.

JURISDICTION:—*Vide* LESSOR AND LESSEE.

JURY TRIAL:—The question, whether the damage to a cargo agreed to be carried to a certain port "was capable of being covered by insurance," is a question of law and not one purely of fact. (Butters et al. vs. Allan et al., S. C..... 137

" " :—The evidence of witnesses about to leave the Province, taken *de bene esse* in the form of deposition, may be read to the Jury as evidence in rebuttal, although on the face of the depositions it is not stated whether the evidence was taken in chief or in rebuttal. (Do.)..... 137

" " :—Evidence tending to show that the defendants were not guilty of negligence as pleaded by them cannot legally be offered in sur-rebuttal. (Do.)..... 137

" " :—*Vide* PRACTICE.

LEASE:—*Vide* PRIVILEGE.

" :—If there be a prohibition in a deed of lease to sub-let, a sub-tenant cannot claim the benefit of Art. 1621 of the Civil Code, but, under Art. 1619, his effects will be liable for the whole rent due by the original lessee. (Les Sœurs de la Charité de l'Hopital Général de Montréal, appellants, and Yuile et al., respondents, Q. B.)..... 329

LESSOR AND LESSEE:—In the cities of Montreal and Quebec the Superior Court has original jurisdiction, to the exclusion of the Circuit Court, in a case between lessor and lessee to rescind a lease, where the amount of rent demanded exceeds $100. (Beaudry vs. Denis, Q. B.)..... 254

" " " :—A lease for 12 years, containing also a promise of sale, cannot be regarded as a lease giving rise to the summary proceedings provided for by Art. 887 and *seq.* of the Code of C. P. (Lepine, appellant, and The Permanent Building Society of Jacques Cartier, respondent, Q. B.)..... 300

LETTERS PATENT:—The Crown alone has the right of demanding that letters patent under the great seal of the Province be annulled. (La Compagnie de Navigation Union vs. Rascony, S. C.)..... 306

MANDAMUS:—A writ of, calling on the *curé* and churchwardens of a Parish church to show cause why a writ of *mandamus* should not be issued, directing them to bury a body conformably to usage and law, and to enter such burial in the civil Register, is in proper form according to the Code of C. P. (Brown, applt., and The *Curé* et al., of Montreal, respondents, P. C.)..... 228

MARRIED WOMAN:—A, authorized by her husband by power of attorney "to sell, transfer and dispose of her immoveables situated in the city of Montreal, or elsewhere," may lawfully borrow money on and mortgage the only immoveable property which she possesses. (Buchanan et al. vs. McMillan *et ux.*, S. C.)..... 105

MILITIA:—When the active, are called out, under the statute, on the requisition of two Justices of the Peace, the Municipality must pay the expense, whether the calling out was really justified or not by the actual circumstances. (McKay vs. The Mayor et al. of Montreal, S. C.)..... 221

MINOR:—A, engaged in trade, may be sued on a note given by him in connection with his business as trader. (The City Bank vs. Lafleur, S. C.)..... 1

PAGE

MINOR:—A mere plea of minority, in a suit to recover a debt, is not sufficient, without an allegation of lesion. (Boucher vs Girard et al., C. C.) 134

NAVIGABLE RIVER:—A party is liable for damage caused to a navigating vessel by the construction of booms on the River St. Francis, notwithstanding that the statute authorising the construction of the booms in such a way as not to impede the navigation of the river required that the plan and proposed site of the booms should be first submitted to and be approved by the Governor in Council, and that the plan and site of the booms had been actually approved by the Governor in Council, when the evidence establishes that these booms really did form an obstruction to the navigation of the river. (The Pierreville Steam Mills Co., appellant, and Martineau, respondent, Q. B.) 225

NEGLIGENCE:—The occupant of premises who invites persons to enter therein through a passage having a trap door, is liable in damages to such persons who, ignorant of the trap, fall into it and are injured. (Lussier vs. Adderson, S. C.) 279

OPPOSITION:—An, to an execution, on the ground that the defendants (opposants) have sued out a writ of appeal against the judgment sought to be executed, will be rejected on motion, unless security for the appeal has been put in prior to the fyling of the opposition. (Brown et al. vs. Lionais et al., and Lionais et al., opposants, S. C.) 280

PAROL EVIDENCE:—*Vide* EVIDENCE.

PAYMENT:—*Vide* EVIDENCE.

PERJURY:—*Vide* VENUE.

POWER OF ATTORNEY:—A foreign plaintiff is not bound to give notice of the fyling by him of a power of attorney to the attorney *ad litem* to sue for him in order to save himself from costs of an *exception dilatoire*, when such power is fyled at the return of the action. (The Bank of Commerce vs. Papineau, S. C.) 306

PRACTICE:—*Vide* APPEAL.

" :—Where the contract, though bearing date at Montreal, is proved to have been made at Toronto, the action will be dismissed on *exception déclinatoire*. (The Railway and Newspaper Advertising Co. vs. Hamilton et al., S. C.) 28

" :—The *mandat* of an attorney *ad litem* cannot be proved by parol evidence only. (Longpré et al. vs. Pattenaude, S. C.) 28

" :—*Vide* CAPIAS AD RESPONDENDUM.

" :— " INJUNCTION.

" :— " MINOR.

" :— " JURY TRIAL.

" :— " SAISIE ARRET.

" :— " ACTION HYPOTHECAIRE.

" :— " WITNESS.

" :— " PROHIBITION.

" :— " PROMISSORY NOTE.

" :—The service, within four days after issue joined on amended pleadings, of a notice of motion praying *acte* of the option of the mover to have a trial by Jury, and the making of such motion subsequently, are a sufficient compliance with the requirements of Art. 350 of the Code of C. P. (Brown, appellant, and the Imperial Fire Insurance Co., respondents, Q. B.) 179

" :—A demand of plea to the merits under Art. 131 of the Code of C. P. may be legally made, after the expiration of eight days after the fyling of the preliminary plea, in the absence of any answer to such plea. (The Canada Tanning Extract Co. vs. Foley, Q. B.) 180

" :—*Vide* COSTS, SECURITY FOR.

PAGE

PRACTICE:—*Vide* COMMISSION ROGATOIRE.
" :— " EXCEPTION A LA FORME.
" :— " ACCOUNT.
" :— " INSOLVENT ACT.
" :— " REQUETE CIVILE.
" :— " SEQUESTRE.
" :— " AFFIDAVIT.
" :— " EXCEPTION DECLINATOIRE.
" :—A simple *défense en fait* to an action on a promissory note, unaccompanied by affidavit denying the genuineness of the note, will not be rejected on motion. (The Mechanics Bank vs. Seale, S. C.) 196
" :—Notwithstanding Art. 469 of the Code of C. P., the Courts cannot adjourn to any day between the 9th July and 1st September for the purpose of rendering judgment; the Courts being prohibited under Art. 1 of the Code of C. P. from sitting for such a purpose at that time. (The Richelieu Co. appellants, and Auderson, respondent, Q. B.) 219
" :—*Vide* SAISIE ARRET.
" :— " MANDAMUS.
" :— " RECUSATION.
" :— " LESSOR AND LESSEE.
" :— " OPPOSITION.
" :— " SUPREME COURT.
" :—Where all the defendants reside in a district other than that in which the writ of summons is taken out, the personal service on one of the defendants in the last-mentioned district will not give jurisdiction over the other defendants. (De LaRonde vs. Walker et al., S. C.) 297
:—Words in a plea, charging generally grave errors and omissions in plaintiff's accounts, without specifying clearly what those errors and omissions were, will, on plaintiff's motion, be ordered to be struck out. (Longtin vs. The Mount Royal Permanent Building Society, S. C.) 297
:—*Vide* SCHOOL TAXES.
:—Issue is joined by the declaration, exception and general answer. (La Compagnie de Moulins à Coton de V. Hudon, Hochelaga, vs. Valois, S.C.) 299
:—*Vide* ENQUETE.
:— " GARANT.
:— INCIDENTAL DEMAND.
" :— HYPOTHECARY ACTION.
" :— " REVIEW.
" :— " GUARDIAN.
" :— " POWER OF ATTORNEY.
" :— " LETTERS PATENT.

PRESCRIPTION:—The, on claims of a commercial nature, is so absolute that a reserve of plaintiff's recourse, in a judgment rendered in appeal, after the lapse of the prescribing period, dismissing their action for the same debt brought within the prescribing period, will not avail against such prescription. (Jones et al. vs. The Sun Mutual Insurance Co. of N. Y., S.C.) 191

PRIVILEGE:—The, of a lessor does not extend to a piano stored with the lessee (a piano dealer) by a third party, and the enumeration of articles in Art. 1622 of the Civil Code as exempt from seizure is only illustrative and not limitative. (Ireland, appellant, and Henry et al., respondents, Q. B.) 327
" :—*Vide* LEASE.

PROHIBITION:—A writ of, does not lie where no excess of jurisdiction appears on the face of the proceedings. (The Mayor, &c., of Sorel, appellants, and Armstrong, respondent, Q. B.) 171

PROMISSORY NOTE:—Where a party sues on a, alleged to be in his possession, he cannot recover judgment thereon, even if he proves that the note once existed,

PAGE

but without proving that the plaintiff ever had possession of it. (Raymond, appellant, and LaRocque, respondent, Q. B.)..... 175

PROMISSORY NOTE:—*Vide* PRACTICE.

PUBLIC RECORDS:—The City of Montreal will not be obliged to dispossess itself of an assessment roll in order that the same may be fyled in evidence in a case pending in Court against the Corporation. (Workman vs. The City of Montreal, S. C.)..... 217

QUEBEC LEGISLATURE:—The, has power to pass an Act granting relief to a Union Association which has become embarrassed financially, and such an act is not one relating to Bankruptcy and Insolvency, within the meaning of the B. N. A. Act. (L'Union St. Jacques de Montréal, appellant, and Belisle, respondent, P. C.)..... 29

" :—The provision in the Interpretation Act, to the effect that no Article of the Codes shall be altered unless the Article be specifically referred to in the amending Act, does not invalidate an amendment or alteration made in a subsequent Statute without such specification. (Brossoit, appellant, and Turcotte, respondent, Q. B.)..... 141

RAILWAYS:—All railway Companies, subject to the Railway Act of the late Province of Canada, are bound to carry all goods that are offered at any of their stations to any other station on their line of railway, unless some valid reason be assigned for refusing to do so. They cannot, therefore, by a mere notice stating that they have ceased to carry any particular class of goods, rid themselves of their obligation to carry the same. (Rutherford, appellant, and The Grand Trunk Railway Co., respondent, Q. B.) 11

RECEIPT:—*Vide* EVIDENCE.

RECUSATION:—Roman Catholic Judges, in a case involving the right of the civil power to entertain an "*appel comme d'abus*," cannot be recused on the ground that they acknowledge the Roman Authority. (Brown, appellant, and The Curé et al. of Montreal, respondents, P. C.)..... 228

REGISTRATION:—*Vide* DOWER.

RENT:—*Vide* PRIVILEGE.

" " LEASE.

REQUETE CIVILE:—A, after judgment, may be served on the plaintiff's attorney of record. (Lang vs. Clark, and Clark, petitioner, S. C.)..... 184

REVIEW:—The Court of, has no right to revise an order of a judge in chambers, authorising a married woman to borrow money on the security of her real estate, when the husband has refused his authorisation. (*Exparte* Dufaux, petitioner, and Robillard, *mis en cause*, C. of R.)..... 305

SAISIE ARRET:—In an action commenced by, the *onus* of proving the falsity of the statements contained in the declaration and affidavit as regards secretion of property is on the defendant, notwithstanding that by his plea he specially denies the truth of the plaintiff's allegations in this respect. (Ritchot vs. McGill et al., S. C.)..... 139

" " :—The *Tiers Saisi* can make his declaration at any time, even after judgment, on paying such costs as his default to answer within the delay specified in the writ may have occasioned. (Beaudoin vs. Ducharme, and Bellefleur, T. S., C. C.)..... 223

" " :—The *Tiers Saisi* may at any time amend his declaration by making a new one, on payment of costs; such new declaration being subject to contestation in the same way as the original one could be. (Richard et al. vs. Piché, and La Société Canadienne Française de Construction de Montréal, T. S., S. C.)..... 290

" " :—*Vide* INSOLVENT ACT.

SALE:—A single false bid, on a lot offered for sale at public auction, destroys the consent of the purchaser of such lot, and renders the sale thereof null and void even without proof of fraud and damage. (Jetté et al., appellants, and MacNaughton, respondent, Q. B.)..... 255

PAGE

SALE:—Each adjudication of a lot at public auction is a separate contract, and, consequently, the presence of false bidders who bid on some of the lots offered does not affect the sale of a lot on which there was no false bid, unless the purchaser of such lot alleges and proves fraud on the part of the vendor and damage to himself by the enhancement of the price above the current value. (Do.) 255

" :—Where a vendor tenders to the purchaser a deed differing in several unimportant particulars from the acknowledged conditions of sale, the Court may vary and reduce the conditions sought to be imposed, and may order a deed to be executed pursuant to the precise conditions of sale. (Liggett et al., appellants, and Tracey, respondent, Q. B.) 313

" :—An adjudication at auction on conditions signed by the purchaser completes the sale as between the parties; and where there is a stipulation that a deed shall be executed within ten days after the sale by auction, the failure of the vendor to tender a deed before the expiration of the delay does not *ipso facto* resolve the deed. (Do.) 313

" :—A stipulation in the conditions of sale by auction that the vendor shall be entitled to proceed *to folle enchère* if the purchaser makes default does not restrict the vendor's recourse to that remedy or exclude other actions. (Do.) 313

SCHOOL TAXES:—The Superior Court has no jurisdiction to hear suits for the recovery thereof. (The School Commissioners of Hochelaga vs. Hogan et al., S. C.) 298

SECRETION:—*Vide* CAPIAS AD RESPONDENDUM.

SEIGNIORIAL COMMUTATION:—When it is really due, *although not exigible*, under the portion of the Act ch. 41 of the Cons. Stat. of L. C., having reference to the Seminary of St. Sulpice of Montreal, the person who owns the property during that period is liable to indemnify the person to whom he sells the property against such commutation; the payment whereof becomes exigible by reason of such sale. (Devlin vs. Morgan, C. of R.) 132

SEQUESTRE:—Pending the proceedings in an action to compel the execution of a deed of sale of an immoveable, the plaintiff may obtain the appointment of a *séquestre* to receive the rents of the property, although the pleadings and evidence establish that the defendant had sold the property to another party prior to the service of the action, and was no longer in possession of the property, where there is reason to suspect that the sale to such other party was simulated. (Farmer vs. O'Neil, and Farmer, petitioner, S. C.) 185

SERVITUDE:—*Vide* DRAIN.

SUBROGATION:—The subrogation in the hypothecary rights of a creditor, granted to the universal legatee of the debtor who pays his share of the hypothecary debt, cannot avail against the hypothecary rights of a subsequent hypothecary creditor whose hypothec has been duly registered. (Lafleur, appellant, and Bertrand, respondent, Q. B.) 1

SUBSTITUTION:—*Vide* WILLS.

SUPREME COURT:—The right to appeal to the, does not exist, in respect of any judgment rendered prior to the coming into force of the Act creating the Court. (Brewster et al., appellants, and Chapman et al., respondents, Q. B.) 295

TIERS SAISI:—*Vide* SAISIE ARRET.

VACATION:—*Vide* PRACTICE.

VENUE:—An indictment for perjury committed in a district other than that in which the indictment is laid is defective, if it fail to allege that the accused had been apprehended or in custody, or was in custody at the time of the finding of the indictment, and the defect is one which cannot be amended, and, consequently, is not cured by verdict, and the judgment will, therefore, be arrested, either on motion, or on a case reserved by the Judges. (*Regina* vs. Lynch, Q. B.) 187

PAGE

WILLS:—The conjoint operation of the Statutes 14th Geo. 3, and 41st Geo. 3, was to abrogate the law prohibiting gifts to adulterine bastards, and the rights of a substitute will be governed, *quoad* his capacity to take, by the law in force at the time the substitution opens. (King, appellant, and Tunstall et al., respondents, P. C.)..... 49

" :—A bequest contained in a will made since the Code to trustees, to establish a free public library, museum and gallery, and for that purpose to procure a charter or act of incorporation, and when such charter or act shall be obtained, to convey the property bequeathed to the Corporation, is perfectly valid in law. (Abbott et al., appellants and Fraser et al., respondents, P. C.)..... 197

" :—A clause in a will, prohibiting a legatee who contests the will from obtaining any benefit thereunder is perfectly valid. (Evanturel, appellant, and Evanturel et al., respondents, P. C.)..... 218

WITNESS:—The credibility of a, cannot be attacked by proof that he made statements out of court different from those sworn to by him, unless he has been examined as to such outside statements. (Décary vs. Poirier, S. C.)..... 167

:—The Court will not grant an order for the examination of a sick person on behalf of plaintiff in a cause in which the action has been dismissed and is pending in appeal. (Gareau vs. Gareau, S. C.)..... 303