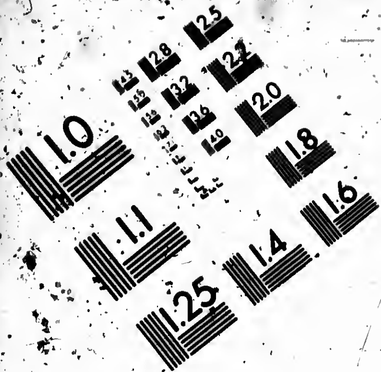
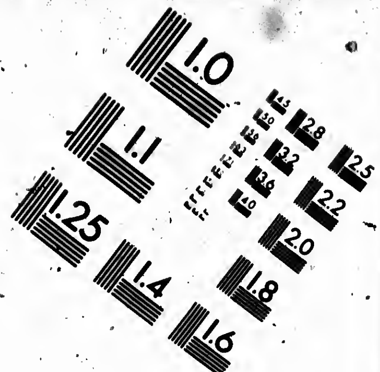

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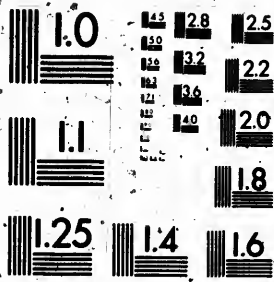
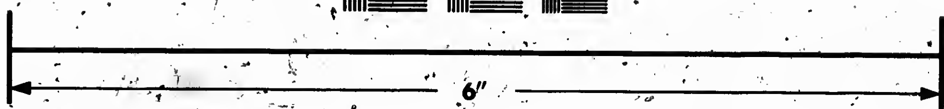

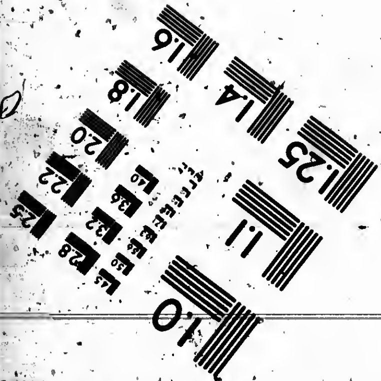
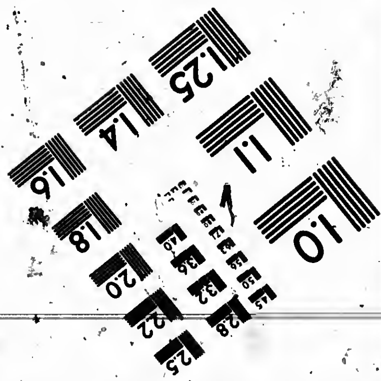

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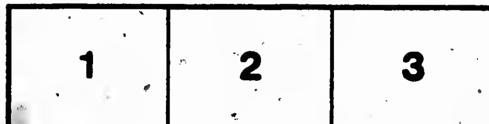

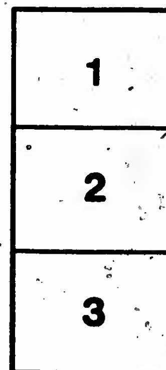

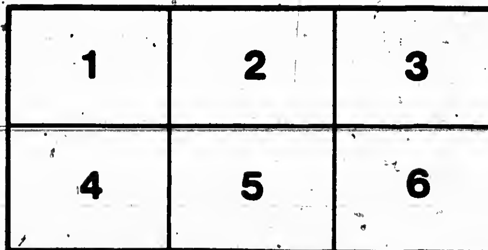

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THE

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Jurist.

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DU

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VOL. IV.

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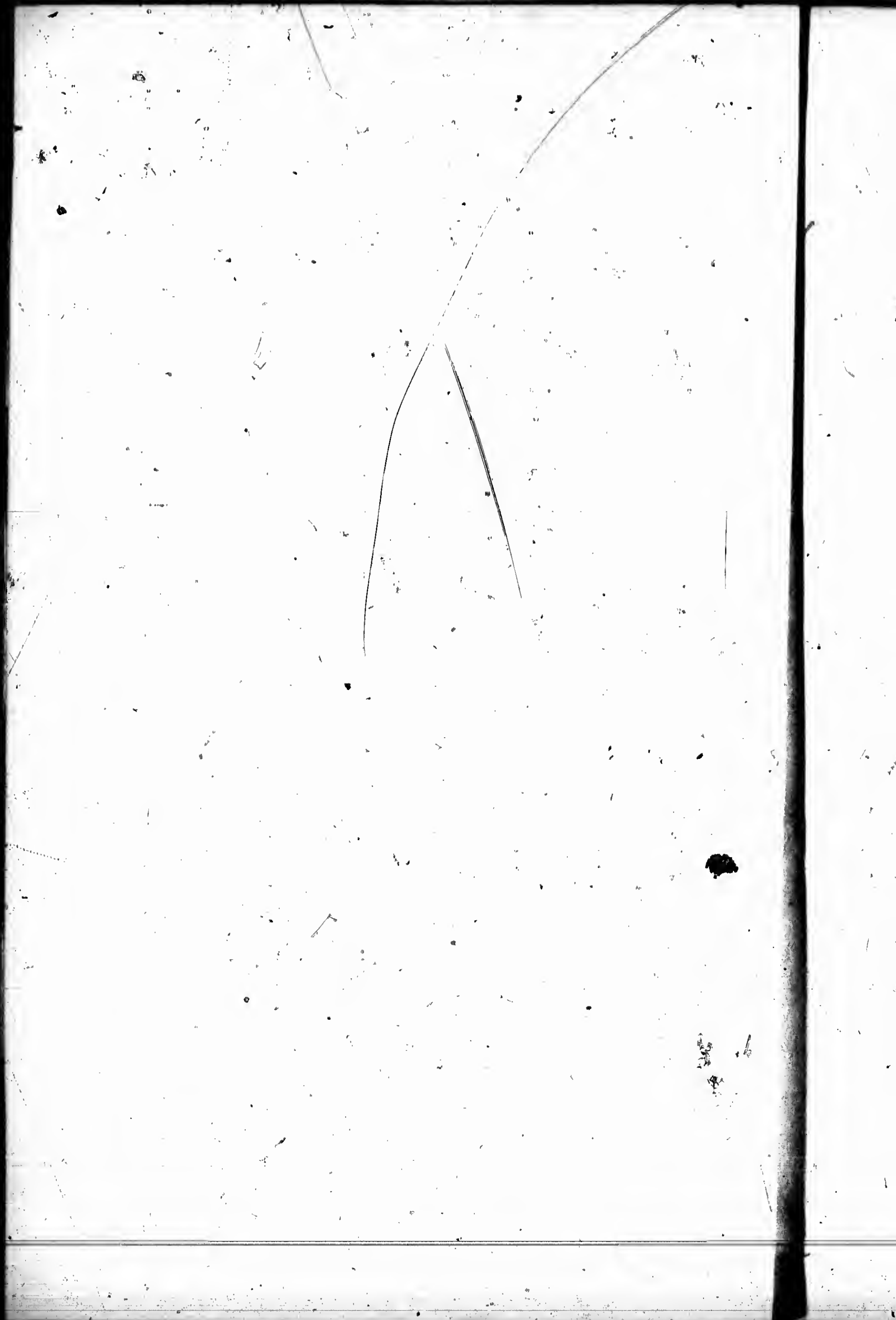

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In the Circuit Court.

FOR THE DISTRICT OF MONTREAL.

MONTREAL, 15th NOVEMBER, 1859.

Coram BADGLEY, J.

No. 447.

Harwood vs. *Shaw*.

Held, 1st, that the adjudication made by *décrêt* transfers the tradition *ipso jure*. 2nd, that the *adjudicataire* is entitled to receive the rents of the property so by him acquired, from the date of the adjudication.

The Plaintiff by his action claimed from the Defendant the sum of £45 for rent due up to 1st April, 1859, of a property sold the Defendant, and acquired by his *cédante*, Dame S. C. Shaw, at sheriff's sale on the 5th April, 1858. In his declaration the Plaintiff alleged, the purchase of the property from the Sheriff by Dame S. C. Shaw; that the annual value of the property is £45; that the Defendant by and with the consent of Dame S. C. Shaw, had since the date of her purchase occupied the said property; that a transfer duly served upon the Defendant had been made to him by Dame S. C. Shaw of the rent due, and he therefore claimed the said sum of £45, and issued a writ of *saisie-gagerie*.

The Plea put in to this action on the 5th May, 1859, by the Defendant is as follows:—

"And the said Defendant for Plea to the action and *demande* of the Plaintiff, saith; that he doth hereby expressly deny all and every the allegations, "matters, and things set forth in the declaration of the Plaintiff in this cause "fyled; and doth especially deny that the said Sarah Caroline Shaw "in the said Plaintiff's declaration mentioned, acquired at Sheriff's sale and "hath ever since been proprietor and owner in possession since the fifth day of "April, 1858, under title-deed given to her by the said Sheriff of the lot of "ground and two story brick houses and other buildings thereon erected, in the "said Plaintiff's declaration mentioned; and the said defendant also especially "denies that the said Dame Sarah Caroline Shaw did lease the said premises to "the defendant commencing the seventh day of April, 1858; the said Defen-"dant doth further especially deny that for his benefit and advantage, and by "and with the consent of the said Sarah Caroline Shaw as proprietor, he the "said Defendant has since the date of the said alleged purchase occupied for "his use and purposes the said property as the tenant of the said Sarah Caro-"line Shaw, or that the sum of £45 or any other sum of money is due to "her or to the said Plaintiff for any of the causes, matters, and things set forth

Harwood vs. Shaw.

"in the said Plaintiff's declaration; but on the contrary, the said Defendant "doth allege and declare that on the said 5th day of April 1858, and for many "years previously thereto, he the said Defendant was and had been in posses-"sion of the said houses and premises as proprietor, and he hath ever since "that date continued in possession thereof under the right and title by which "he had theretofore possession thereof as proprietor. That he has never been "legally divested of that possession or ever required to give up possession "thereof by any one claiming to have become proprietor thereof. That if the "said Dame Sarah Caroline Shaw, who is the daughter of him the said Defen-"dant, became the *adjudicataire* of the said premises at any time at any Sher-"iff's sale, she never paid the purchase money, nor had she acquired any "Sheriff's or other title to the same within any period previously to the bring-"ing of the present action by the Plaintiff, nor hath the Plaintiff produced or "fyled in this cause any title in support of his pretensions in respect of the said "Dame Sarah Caroline Shaw, being the proprietor thereof. That in fact the "said Defendant has never contracted any legal liability towards the said Dame "Sarah Caroline Shaw his daughter, as her tenant of the said property to sub-"ject him to the payment to her of the rent thereof."

"Wherefore the said Defendant prays judgment, and that the process or writ "of *saisie-gagerie* in this cause may be quashed, and the action of the Plain-"tiff dismissed with costs."

The Sheriff's deed in favor of Dame S. C. Shaw is dated 7th May, 1859, and was fyled with the articulation of facts on that day by the Plaintiff.

The Defendant fyled with his Plea, his title-deed, bearing date the 5th October, 1818.

The occupation by the Defendant of the property in question since the 5th April, 1858, and the annual value thereof were proved by witnesses. No lease was proved, the Plaintiff relying on the 16th section of the Lessor and Lessee's Act for the right of action.

BADGLEY, J. The question which arises in this cause is whether the *décret* has the effect of vesting the right of property in the *adjudicataire*, or in other words, whether the *décret* operates as tradition, without any other requirements of the law. I am of opinion that it does vest the proprietorship in the person of the purchaser absolutely. The authorities are conclusive on this point. Nouv. Denisart, *décrêt d'immeubles*, § V., Nos. 2 & 6; Pothier, Pro. civ.

I have therefore no hesitation in pronouncing judgment in favour of Plaintiff. The judgment is *motivé* as follows:

The Court * * * * considering that the effect of the adjudication made by *décrêt* of the property of the Defendant in the Plaintiff's declaration mentioned by the Sheriff of the District of Montreal to the said Sarah Caroline Shaw, in the said declaration mentioned, was to render her, the proprietor thereof, from the said adjudication, and considering that the Defendant hath occupied the said premises for the time in the Plaintiff's declaration mentioned, as her tenant and that the said tenancy was of the value claimed, in and by the said declaration, doth condemn the Defendant to pay to the Plaintiff, for the causes aforesaid,

the said sum of £45 with interest from 11th of April last, and costs; and the *saisie-gagerie* made in this cause is maintained. * * * * * * * *

R. & G. Laflamme, for Plaintiff.

Day & Day, for Defendant.

[P. R. L.]

Ha. rood vs. Shaw.

That judicial sale operates tradition, vide Rolland vs. Scott, in appeal in 1848; and Loranger and Boudreau, in Appeal: L. C. Reports, vol, 9, p. 385.

As to right of adjudicataire to sue for rent, 3 vol. L.C. Jurist, p. 42; Lacroix vs. Prieur, 29 May, 1858. In the case of Black vs. Lemieux, decided in Montreal, S.C., 11 January, 1853, it was held that it was the adjudication which created the right of property, and not the subsequent deed, if that deed was executed by the Sheriff in another person's name, and confirmed in Appeal, 12th July, 1854. P.R.L.

SUPERIOR COURT.

MONTREAL, 21st NOVEMBER, 1859.

Coram MONK, J.

No. 279.

Milne v. Ross et al.

Held that an affidavit for an attachment before Judgment concluding with the averment in the disjunctive that the plaintiff without the benefit of an attachment will lose his debt or sustain damage is not bad for uncertainty; also that although such an affidavit conforming to the 48th section of the 22nd Vic., c. 5, contains special reasons which are in themselves insufficient yet if there be averments to answer the requirements of the 10th sec., of the ordinance 25 Geo. 3, c. 2, or equivalent thereto the attachment will be supported under the latter law, notwithstanding it contains the allegations that the defendants continue to carry on their business.

In this case an attachment before Judgment was issued on the affidavit of the plaintiff alleging "that defendants, a trading firm are in possession of goods and "effects at the city of Montreal, and are about to secrete the same and their debts "and effects with intent to defraud their creditors and deponent, one of them; "that the said firm and the members of it is and are traders; that the said firm "is notoriously insolvent, has refused to compromise or arrange with its creditors "to make a *cession de biens* to them or for their benefit and said firm continues "to carry on its trade and is about to secrete its goods and chattels with intent "to defraud its creditors and the deponent."

The following special reasons were given in support of Plaintiff's belief:—

1st That defendants kept no bank account. 2nd Two of the partners admitted that the present firm had been formed for the purpose of these two partners evading their liabilities. 3rd. That they had fraudulently gotten into their possession a quantity of tobacco which they had pledged to plaintiff.

The defendants on their motion urged that inasmuch as the 28th section of the 22nd Vic., c. 5, in addition to the essential averments under the ordinance of 25 Geo. 3, necessitated special reasons in support of each of the new requirements of these found in the action of the statute in question, that the special reasons here given were wholly insufficient to support any one of the requirements of said statute, and the writ must be quashed; that the section of the statute in question under which the present proceeding was taken, created under certain circumstances, a presumption that the debtor was about to secrete his estate although literally such was not the case;—that a

Milne vs. Ross.

creditor could not invoke this law and be entitled to its protection and advantages, save on the condition of conforming to its requirements, which he had failed to do; that the affidavit was not framed in accordance with the requirements of the ordinance 25th George 3; that plaintiff could not have sworn to a secreting under that ordinance, his present affidavit to the effect that defendants continued to carry on their business, also that they had a large amount of tobacco, was wholly contradictory of a literal secreting of the estate; that if the proceedings were held good under the 25 George 3, the new enactment was utterly nugatory as to a *saisie arret*, the additional averments required by it being of no avail whatever, in fact useless; also that the concluding averment as to loss of debt or sustaining damage was insufficient under either law, being in the disjunctive; neither was certain, and the law intended that one at least of these conditions should be made out, in an absolute or positive form, to warrant the proceeding.

It was contended for the plaintiff that they had conformed in all respects to the requirements of the 10th section of the ordinance 25 Geo. 3, c. 2, on which they intended to rely; that the special reasons in no way vitiated the proceeding to which they had a right, as if the new law had not been passed. That the 25th Geo. 3, warranted the conclusion of the affidavit being in the disjunctive; that a debt could not be lost without the creditor sustaining damage; that therefore the two requirements were in a measure convertible terms.

Monk J., The defendants have objected to the affidavit in this case for not containing sufficient special grounds in conformity with the 48th section of the statute 22 Vic. c. 5. The plaintiff has taken his remedy to be good either under the statute referred to, or the 10th section of the ordinance 55 Geo. 3, c. 2. I am of opinion that it is perfectly good under that ordinance, and does not require the addition of any special reasons. It has been objected too, that the concluding averments in the affidavit should not have been in the disjunctive, but this is in conformity with the law itself, a debt cannot be lost without damage being sustained, these two requisites are in a measure the same, they are convertible, the motion is dismissed.

McKay & Austin for Plaintiff.
Cross & Bancroft for Defendant.
(A. C.)

CIRCUIT COURT.

MONTREAL, 2ND SEPTEMBER, 1859.

Coram Smith, J.

IN CHAMBERS.

No. 712.

Clairmont et vir v. *Dickson.*

IN EJECTMENT—JURISDICTION.

Held,—That where the term of the lease is less than a year, and the rent payable for that term does not exceed £50, the Circuit Court has jurisdiction, notwithstanding the 5th Section of the Lessors and Lessees Act (18 Vic., c. 108), and notwithstanding that the annual value or rent of the property leased would exceed £50, if the term extended to a period of one year.

The plaintiffs' declaration set out a lease for the space of five months, at the

Clairmont vs. Dickson.

rate of $150 for that term; which lease had expired, and that defendant refused to give up possession. Also, that defendant had used and occupied the premises, with plaintiff's permission, for the space of five months, and that the value of the premises was $150 for the said period; and that defendant was owing more than three months' rent—viz., $114, having only paid $36,—and concluded in ejectment and for $114.

This was met by the defendant with an *exception déclinatoire*, based on the following grounds, viz.:

1. Because it appeared by the declaration that the value or rent of the property for the space of five months was the sum of $150, making the annual value or rent amount to $360; and because by law, and the Statute in such case made and provided, the annual value or rent of the property leased, must determine the jurisdiction of the Court in such cases, the action should have been instituted in the Superior Court instead of the Circuit Court, the latter not having jurisdiction in cases over $200.

2. Because the action, being brought also for use and occupation, and under the 16th Section of the Act, the defendant was bound to pay the annual value or rent, and it appeared by the declaration that the value of the use and occupation for five months was $150, and consequently for one year $360,—the Circuit Court had no jurisdiction.

In support, defendant's Counsel cited sec. 5, 16 Vic., c. 108, which is as follows:—

"Actions under this Act shall be instituted in the usual manner in the Superior and Circuit Courts, and the annual value or rent of the property leased shall determine the jurisdiction of the Court, whatever may be the amount of damages and rent sued for"; and urged, that the proper interpretation of this section was, that the annual value of rent which the property would produce ought to be taken as the criterion, not the period of the lease, nor the amount sued for,—the object of the law being to draw the distinction between real property over which the Superior Court had jurisdiction, and real property over which the Superior Court only had jurisdiction.

The plaintiff's Counsel admitted the application of the argument in cases of a yearly holding or leasing, but denied that it could apply where the lease or occupation was for a period less than one year.

Per Curiam.—The Court does not consider that there is any allegation of use and occupation, except as subordinate to, and forming part of, the allegation of a specific lease. If the action had been based simply upon a use and occupation, the 16th section would undoubtedly hold good, and the exception must have been maintained upon that section and the 5th section cited. So, in the case of a lease, if it had been an annual lease, the argument of defendant's Counsel would have been irresistible. As in this case, however, an annual lease was never contemplated, it is impossible to conceive of the application of the 5th section; and the Court, therefore, has no hesitation in dismissing this exception.

Exception Déclinatoire dismissed.

Ouimet & Morin, for Plaintiffs.
W. A. Bovey, for Defendant.
(W. A. B.)

Fairmont vs. Dickson.

REPORTER'S NOTE.—This Judgment was appealed to the Queen's Bench, and the judgment confirmed in Appeal, December, 1859; Monk, J., however, concurred with Judge Smith on the point. The Reporter is informed that J. S. Sanborn, Esq., formerly member for Compton, the originator of the 18 Vic., c. 108, has expressed himself to the effect that his intention in drawing the 5th Section was different from that implied in the Judgment.

THE SAME CAUSE.

MONTREAL, 6TH SEPTEMBER, 1859.

Coram SMITH, J.

Held,—That an authentic copy of the defendant's answers to interrogatories in another suit, when produced with authentic copies of the writ and declaration and other pleadings in such other case, is sufficient evidence to support the allegations of the declaration, where such answers appear to coincide with such allegations, without the necessity of interrogating the defendant anew, either as to his identity, or as to the answers in question.

In this case it was alleged that in a former suit, which had been dismissed, the defendant had admitted, in his answers to interrogatories, that he had leased a house from the plaintiffs for the space of five months, and that the five months having expired, the plaintiffs were entitled to have possession. The defendant appeared and pleaded want of jurisdiction in the Court, but did not plead to the merits. The plaintiffs fyled with their declaration certified copies of the pleadings in the former suit, and a certified copy of the defendant's answers to interrogatories. Apparently the parties appeared to be the same, the names and description concurring; and upon examining the answer in question, it was to the effect, that the defendant had leased the house as alleged, but that the plaintiffs had not complied with the stipulations of the lease in not furnishing him with wood and other articles, which formed part of the lease. The plaintiffs established by two witnesses that the defendant had occupied the house, and that the furniture in it belonged to the plaintiffs. Upon this proof the plaintiffs relied for judgment.

Defendant's Counsel pretended that the copy of answers to interrogatories, although certified by the Prothonotary, could make no evidence against the defendant in this suit. That the defendant, being a party to the suit, and no apparent cause existing why he should not be interrogated in the present suit, it followed that it was necessary to interrogate him anew, not only for the purpose of identifying his person, and the subject-matter of the two suits, but because he should have an opportunity of explaining or making additions to his answers in the former suit. That a copy of the deposition of a witness in one suit, could not be taken as evidence in lieu of a new deposition, when no apparent cause existed why that witness should not be again produced. That the same rule applied with regard to answers to interrogatories. That besides this it was doubtful whether this copy could be taken in lieu of the original answers, it being only a secondary description of evidence. That even supposing the copy of answers should be taken as sufficient evidence, yet the answer of the defendant, being accompanied by a qualification that the plaintiffs had not performed an essential covenant of the lease, the answer could not be divided. That the evidence was therefore insufficient, and the action should be dismissed.

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Per Curiam.—The Court is of opinion that the evidence is sufficient, although at first the Court was inclined to believe that there was some foundation in the objection that the copy of answers made in the former suit, could not be taken in lieu of the defendant's answers in this suit. As to the copy itself, it is certified by the Clerk of the Court, and it has always been the custom to regard such copy as sufficient evidence. As to the objection that the answer was not unqualified, the defendant, not having pleaded the qualification, cannot now avail himself of it. It is to be observed that the plaintiffs have fyled certified copies of the whole of the record in the former suit; and the defendant, having appeared to the action, and not having pleaded to the merits, by the new Statute he must be regarded as having admitted the action. The judgment of the Court, therefore, dismisses the defendant's motion to reject the said copy of answers to interrogatories, and awards to the plaintiffs the conclusions of their declaration.

Judgment for Plaintiffs.

Ouimet & Morin, for Plaintiffs.
Bovey, for Defendant.
(W. A. B.)

NOTE.—This Judgment also appealed from, and the judgment confirmed in appeal, December, 1859.

SUPERIOR COURT.
IN APPEAL.

FROM THE CIRCUIT COURT AT SHERBROOKE,

SHERBROOKE, JULY, 1854

Coram BOWEN, C. J., SMITH, J.

No. 810.

Morkill vs. *Cavenagh.*

Held.—That in a hypothecary action, the Circuit within which the *détenteur* holds possession, not the Circuit where the original contract stipulating the hypothèque is made, is the place where cause of action arises.

This was an action *hypothécaire* against Cavenagh founded upon mortgage created by Contract between Morkill and one Peoples and his wife. The defendant Cavenagh afterwards purchased the land hypothecated from Peoples et uxor. Morkill sued Cavenagh, who resided in the Richmond Circuit., and impleaded him in the Sherbrooke Circuit, the contract between Peoples et uxor being within the latter Circuit. Cavenagh pleaded by *exception déclinatoire* that he could not be sued in the Sherbrooke Circuit inasmuch as the cause of action arose in the Richmond Circuit, the possession being there and he having been served there.

It was contended by Plaintiff that the cause of action arose where the original Contract between Morkill and Peoples et uxor, was made, and that this gave him the right of action against Cavenagh.

On the part of defendant it was contended, that the possession of Cavenagh was the only circumstance which gave rise to right of action against him; that the intrinsic rights of Morkill were the same as if the land had never been sold

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to Cavenagh, but his *remedy* as against Cavenagh was changed to a different jurisdiction.

SMITH, J.—It is clearly the contract between Cavenagh and Peoples and not the contract between Morkill and Peoples that gives Plaintiff right of action against defendant. This contract having been framed in Kingsey in the Richmond Circuit, and the defendant having taken possession of the land there, the cause of action arose there. We think the Judgment of the Court below dismissing the Plaintiff's action on this ground must be confirmed.

Judgment confirmed.

Edward Carter, for Appellant.
J. S. Sanborn, for Respondent.
(J. S. S.)

SHERBROOKE, 27th JANUARY, 1854.

Coram DAY, J., SHORT, J., CARON, J.

No. 591.

Hart vs. *McNeil.*

Held,—That an adjudicataire can maintain petitory action without having had possession, and that a petitory action, not a writ of possession, is the proper remedy for a plaintiff *adjudicataire* after the lapse of a year and a day after adjudication against the defendant, upon whom the immoveable is sold.

DAY, J.—Two questions arise in this case: can Plaintiff as adjudicataire without having had possession, maintain an action *petitoire*? We are clearly of opinion that the adjudication vests the property in the adjudicataire.

The next question is, should not Plaintiff have resorted to his writ of possession as his only recourse against defendant, he being the only person who has occupied, and the defendant in the cause where the land was adjudged to Plaintiff? If a year and a day had not elapsed since the adjudication, the Court would perhaps hold, that the writ of possession is the only recourse, but the defendant holding possession a longer time than a year and a day after the adjudication, has acquired an adverse possession.

The petitory action is the proper remedy.

Judgment for Plaintiff.

J. S. Sanborn, for Plaintiff.
W. L. Felton, for Defendant.
(J. S. S.)

COUR DU BANC DE LA REINE.

MONTREAL, 12 OCTOBRE 1842.

Côram VALLIÈRES DE ST. RÉAL, J. en chef, ROLLAND, J., GALE, J., DAY, J.

No. 265.

Blanchet et Ux., vs. *Charron.*

Jugé: Que le défaut de signification de la sentence arbitrale, en entraîne la nullité.

Les demandeurs réclamaient du défendeur £28 12s., 8d. montant a lui adjugé par la sentence arbitrale rendue le 25 Novembre 1838 en vertu d'un compromis

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prorogé jusqu'au 26 Novembre 1839. Cette sentence arbitrale n'avait été signifiée au défendeur que le 29 Mai 1841. Ce compromis portait un dédit de £12 10s:

Dans l'exception péremptoire plaidée par le défendeur, il alléguait entr'autres irrégularités et nullités concernant cette sentence arbitrale, que la sentence arbitrale était nulle parcequ'elle n'avait jamais été duement rendue et prononcée aux parties *nommément* au défendeur, que notamment elle n'avait jamais été signifiée au défendeur *régulièrement* et qu'en tout évènement, la dite sentence n'avait pas été rendue, prononcée et signifiée au dit défendeur dans le délai requis par la loi et celui fixé par le compromis.

Le demandeur répondit spécialement à cette exception que le défendeur aurait dû faire offre de payer la pénalité imposée par le compromis à celui qui refuserait d'acquiescer à la sentence arbitrale et qu'il ne pouvait être reçu à plaider ces irrégularités et nullités. (1.)

L'action du demandeur fut renvoyée sur le principe que la sentence arbitrale n'ayant pas été signifiée dans le délai fixé par le compromis elle était absolument nulle et de nul effet. (2.)

Ouimet et Sicotte, avocats du demandeur.

Cherrier et Mondelet, avocats du défendeur.

(P. R. L.)

COUR SUPERIEURE.

MONTREAL, 17 SEPTEMBRE 1859.

Coram SMITH, J.

No. 1141.

Duchesnay vs. *Giard.*

RAPPORT D'EXPERTS.

Jugé : Que nonobstant la défense apposée par des Experts sur leur rapport de ne pas l'ouvrir avant le paiement de leur frais, la Cour a le droit de l'ouvrir, quoique leur compte détaillé soit produit avec ce rapport.

Des Experts ayant été nommés en cette cause pour estimer et évaluer les charges contenues en un acte de donation, afin d'établir finalement le montant précis sur lequel les lods et ventes pouvaient être dûs au Seigneur, firent un rapport scellé, qu'ils produisirent devant la Cour avec défense écrite de ne pas l'ouvrir avant le paiement de leur frais, se montant à £46 0s. 1d. Un compte détaillé de ces frais accompagnait ce rapport.

Le 17ème jour de Septembre 1857 la demanderesse fit motion pour l'ouverture de ce rapport, nonobstant la défense des experts. Les frais des experts ne furent taxés que longtemps après le jugement rendu sur cette motion.

Per Curiam. Cette motion doit être accordée. Les experts et les arbitres n'ont pas le droit d'apposer une telle défense et d'arrêter le cours de la justice. Le greffier est autorisé à ouvrir ce rapport.

Cherrier Dorion et Dorion, avocats de la demanderesse.

Lafrenaye et Papin, avocats du défendeur.

(P. R. L.)

(1.) Sed vide 3 L. C. Reports, p. 482 Tremblay vs. Tremblay.
(2.) Rép. Merlin, Vo. arbitrage No. 34. 2 Biret, nullités p. 338. Guyot, Rép. Vo arbitrage p. 547, 549.

DISTRICT DE RICHELIEU.

SOREL, MAI 1859.

Coram BRUNEAU, J.

No. 45.

Filiatrault vs. *Archambault*.

Jugé : 1o. Que la dime doit se partager au *pro rata* du tems de la desserte de chaque curé ;
2o. Que la succession des curés est assujettie au même partage ;
3o. Que l'année ecclésiastique sous le rapport de la dime se compte de la St. Michel d'une année à la St. Michel de l'année suivante et devient due et payable à Pâques chaque année.

Cette action était instituée par le demandeur comme donataire de ses père et mère qui étaient héritiers mobiliers de leur fils feu Messire Thimothée P. P. Filiatrault décédé le 30 Mars 1858 en la Paroisse de la Visitation de l'Ile du Pads dont il était alors le curé desservant. Le Demandeur réclamait, $436 8 du défendeur qui avait succédé à feu Thimothée P. P. Filiatrault comme curé de cette Paroisse depuis le commencement de Mai 1858 ; pour cette partie de la dime échue à Pâques 1858 que le défendeur s'était appropriée et avait convertie à son usage lors de sa prise de possession de la cure de la Paroise. Entr'autres allégués dans sa déclaration le demandeur faisait les suivants :

Que le dit défendeur s'est emparé d'une partie des biens meubles de la susdite succession depuis le décès du dit feu Messire Timothée Prime Paul Filiatrault savoir :

78½ Minots de bled valant 90 centins le minot ;
81½ Minots de pois valant 80 centins le minot ;
1294½ Minots d'avoine a 37 centins le minot ;
10 Minots d'orge à 60 centins le minot ;
153 Minots de sarazin a 45 centins le minot ;
8 Minots de gabourage (avoine, pois etc :) à 75 centins le minot ;
2 Minots de bled d'Inde à 75 centins le minot ;

Argent collecté de Pierre Plante un dollar et trente-trois centins, formant six cent quatre-vingt-huit dollars et soixante-neuf centins, argent courant de cette Province et tel que le tout appert au compte produit.

Que sur le montant entier susdit le dit défendeur n'a encore remis que douze minots de pois valant trente-sept centins le minot, faisant quatre piastres et quarante-quatre centins dit cours et deux cent quarante huit-piastres et dix-sept centins cours susdit pour grains vendus à F. R. Tranchemontagne, commerçant de Berthier, dit District et que ce dernier doit payer au demandeur.

Que partant la balance restant due par le défendeur est de quatre cent trente-six dollars et huit centins, dit argent courant.

Que le défendeur a consommé tous les susdits grains et s'est approprié iceux et les a convertis à son usage depuis le décès du dit feu Timothée Prime Paul Filiatrault, lesquels n'existent plus en nature.

Que le dit défendeur a été souvent notifié et requis par le demandeur et ses cédants de leur remettre et restituer les dits grains et biens meubles et argents collectés et le dit défendeur a souvent reconnu le droit du dit demandeur et de ses cédants aux susdits biens meubles ; mais néanmoins il a toujours refusé de leur rendre et restituer iceux sans aucune cause ou raison.

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Que le dit défendeur est toujours resté en possession des dits grains et biens meubles depuis le décès du dit feu Timothée Prime Paul Filiatrault sans aucun droit à ce faire et sans aucun titre et contre le gré et la volonté du dit demandeur et de ses cédants et quoiqu'il connut bien le droit du dit Demandeur et de ses cédants au regard des dits grains et biens meubles.

Que le dit défendeur se refuse de payer au dit Demandeur la balance de la valeur des dits grains et biens meubles, savoir : quatre cent trente-six dollars et huit centins, argent courant de cette Province, ce qui oblige le dit demandeur à se pourvoir en Justice pour l'y contraindre.

Le défendeur plaida à cette demande par une exception peremptoire qui est comme suit :

Que d'après l'usage reçu et suivi constamment et de temps immémorial dans les Paroisses du Bas-Canada et notamment dans celles du Diocèse de Montréal, l'année ecclésiastique sous le rapport de la dime se compte de la St. Michel d'une année à la St. Michel de l'année suivante (du 29 Septembre au 29 Septembre) et la dime de chaque année commençant comme susdit à la St. Michel devient dûe et payable à Pâques chaque année.

Que la dime ainsi échue et payable au temps de Pâques chaque année est la dime pour l'année commencée à la St. Michel précédente.

Que les grains mentionnés en la déclaration en cette cause sont la dime de la récolte de la dite Paroisse de la Visitation de l'Isle du Pads pour l'année commençant comme susdit le vingt-neuf Septembre mil huit cent cinquante-sept et finissant le vingt-neuf Septembre mil huit cent cinquante-huit, lesquels grains ont été transportés à la demeure principale du curé de la susdite Paroisse pendant le carême de mil huit cent cinquante-huit par les habitants de la dite Paroisse.

Que le curé de la dite Paroisse de la Visitation de l'Ile du Pads, pendant la dite année ecclésiastique pouvait être le dit feu Messire Filiatrault ou tout autre Prêtre, et que de fait, le dit Messire Filiatrault étant décédé le trente Mars mil huit cent cinquante-huit, et le défendeur lui ayant aussitôt succédé comme curé de la dite Paroisse, la dite cure a été occupée et desservie pendant la dite année ecclésiastique moitié par le dit feu Messire Filiatrault, et moitié par le défendeur en cette cause, lequel est encore Curé d'icelle Paroisse.

Qu'en conséquence de ce que dessus le Demandeur qui est aux droits des héritiers mobiliers du dit feu Messire Filiatrault ne peut réclamer que la moitié de la dite dime de l'année commencée le vingt-neuf Septembre mil huit cent cinquante-sept et finissant le vingt-neuf Septembre mil huit cent cinquante-huit, et que le défendeur a droit d'avoir l'autre moitié

Et le défendeur allégue de plus : qu'après la mort du dit feu Messire Filiatrault, Paul Filiatrault son père et son héritier mobilier, nommé en la déclaration en cette cause, a partagé par moitié avec le défendeur tous les grains de la dime de la dite année en prenant pour bâse de tel partage un certain livre ou cahier tenu par le dit Paul Filiatrault et dans lequel il avait entré ou fait entrer les grains de la susdite dime, et qu'avant le dit partage le dit Paul Filiatrault qui demeurait au Presbytère de la dite Paroisse de l'Ile du Pads ainsi que sa femme avec leur dit fils Messire Filiatrault, et y a même demeuré quelque temps après,

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la mort de ce dernier, avait pris, consommé, vendu ou autrement dépensé pour au moins la valeur de quatre-vingt-huit dollars et sept centins sur les grains de la susdite dime de l'année commençant le vingt-neuf Septembre mil huit cent cinquante-sept et finissant le vingt-neuf Septembre mil huit cent cinquante-huit.

Qu'après le dit partage susmentionné le dit Paul Filiatrault s'est emparé et a disposé de sa part des dits grains à l'exception de sa part des dix minots d'orge mentionnés en la déclaration en cette cause qu'il a laissée au grenier du curé de la dite Paroisse de l'Ile du Pads, lesquels y sont encore en entier et en nature, et que le défendeur a toujours été et est encore prêt à livrer au demandeur, et que la valeur de la moitié des dix minots d'orge est de trois dollars, le dit orge étant estimé à soixante centins le minot par le demandeur même en sa déclaration.

Que le défendeur n'a pas collecté du nommé Pierre Plante la somme de un dollar et trente-trois centins, ni aucune somme, ainsi que faussement allégué en la déclaration en cette cause.

Que les sommes susmentionnées de quatre-vingt-huit dollars et sept centins, et trois dollars, valeur de la moitié des dits dix minots d'orge, ajoutées à celle de deux cent cinquante dollars et soixante et un centins que le demandeur reconnait avoir reçue ou qu'il doit recevoir forment ensemble la somme totale de trois cent quarante-trois dollars et soixante-et huit centins, laquelle dernière somme est la juste moitié du prix et valeur des grains susmentionnés formant la dime de la Paroisse de la Visitation de l'Ile du Pads pour l'année ecclésiastique commençant comme susdit à la St. Michel mil huit cent cinquante-sept et finissant à la St. Michel mil huit cent cinquante-huit, laquelle dite moitié a été reçue comme susdit par le dit Paul Filiatrault et le demandeur à l'exception de la moitié des dits minots d'orge susmentionnés qui a été laissée au grenier du curé de la dite Paroisse de l'Ile du Pads (le défendeur) et que ce dernier a toujours été et est encore prêt à laisser emporter par le demandeur.

Qu'en vertu de ce que dessus l'action du demandeur est mal fondée.

Le demandeur répondit spécialement à cette exception: " que la dime d'une année est due et échue aussitôt après la récolte des grains sujets à la dime; que la dime de l'année une fois reçue par le curé desservant la Paroisse, lui appartient exclusivement; que le défendeur avant de venir desservir la Paroisse de la Visitation de l'Ile du Pads a dû nécessairement retirer la dime dans la Paroisse qu'il venait de quitter.

Le défendeur produisit avec son exception le document suivant:

Evêché de Montréal, 10 Avril 1858: Monsieur, par la présente, je vous charge de la desserte de la Paroisse de la Visitation de l'Ile du Pads, où vous exercerez, jusqu'à révocation, les pouvoirs ordinaires aux Curés de ce Diocèse, avec le droit de percevoir les Dimes et oblations des fidèles de la dite Paroisse. Vos pouvoirs sur votre nouveau Bénéfice commenceront le Dimanche du Bon Pasteur, le dix-huit de ce mois; vous conserverez néanmoins à St. Janvier le pouvoir de confesser et de prêcher jusqu'à ce que vous ayez pris possession de votre nouvelle Cure. Je suis bien sincèrement votre très humble et ob. Serviteur, Ig., Ev. de Montréal.

Le Rev. Mr. U. Archambault:

Plusieurs témoins furent entendus de la part du défendeur sur l'usage par rapport au partage de la dime. Il appert par les dépositions de ces témoins; que l'année ecclésiastique sous le rapport de la dîme se compte de la St. Michel à la St. Michel est payable depuis les premiers battages jusqu'à l'Pâques, et que c'est la dime de la récolte de l'année précédente; qu'elle se partage entre curés au *pro rata* du tems de la desserte de chacun et qu'un curé venant à mourir, par exemple, au mois de Mai d'une année et ayant déjà perçu la dime de la récolte précédente, sa succession serait obligé de restituer au curé successeur au *pro rata* du temps qu'il aurait à desservir jusqu'à la St. Michel suivante.

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Lafrenaye pour le Demandeur:

Les Bénéfices n'existent pas en ce pays, comme l'on peut s'en convaincre par la lecture du procès verbal de l'ordonnance de 1667: titre XV. art. 1 Edits and Ord. 1 vol., p. 134 Ed. de 1803. Les successions des curés en Canada, ne doivent donc pas être réglées par les dispositions du droit canonique ou de cette partie de ce droit qui a trait aux droits bénéficiers. Par le droit civil, la succession des ecclésiastiques passe dans la personne de leurs parents; ca l'article 336 de la coutume de Paris dit: "Les parents et lignagers des Evêques "et autres gens d'Eglise séculiers, leur succèdent." Cet article fut rédigé, spécialement pour rejetter la distinction apportée par les canonistes dans la transmission des biens ecclésiastiques. La dime appartient exclusivement au curé par l'article 1 de l'Edit de 1679; en sorte que du moment qu'elle est perçue, elle forme partie de son patrimoine.

Ryan pour le Défendeur cita:

Lebrun, Traité des Successions liv: 2 chap: 7 sec: 4, des fruits par rapport au successeur à un bénéfice et aux héritiers du prédécesseur. Durand de Maillane, Dict: du droit canonique, vo: fruits, et prétendit que par le droit français et la jurisprudence, la dime doit se partager au pro rata du tems de la desserte de chaque curé.—Que c'est la loi du pays et qu'elle est aussi formelle qu'aucune autre loi sur la matière des successions.

Bruneau, J.—La défense que le défendeur a opposée à cette action doit être maintenue. La dime étant donnée aux curés pour la desserte des Paroisses doit nécessairement être repartie entre les différents curés qui peuvent se succèder dans le cours d'une même année dans une même Paroisse. Sans cette répartition il pourrait arriver qu'un curé qui n'aurait desservi une Paroisse qu'au tems de Pâques, à l'échéance de la dime; la recevrait toute entière pour quelques mois de desserte, tandis que les autres curés qui auraient été appelés à desservir ensuite cette même Paroisse, durant cette année là avant et depuis lui, seraient obligés de le faire sans rémunération, ce qui ne serait pas équitable; les habitants n'étant tenus qu'à la prestation d'une seule dime par année, quelque soit le nombre des curés qui auraient desservi la Paroisse durant l'année. Les lois ont nécessairement pourvu à ce cas, en faisant la répartition des fruits dépendants de la succession du bénéficier entre les héritiers et son successeur. Le défendeur avait le droit de retenir sa part de la dime sur les dimes qui ont été apportées au Presbytère, pour l'année ecclésiastique commençant à la St. Michel de l'année 1857 et à la St. Michel de 1858.

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En conséquence l'action du demandeur est renvoyée à l'exception d'une somme de 3s. [illegible] pour 5 minots d'orge provenant de la dîme des années précédentes ; restés dans le hangar.

Lafrenaye et Bruneau, avocats du demandeur.
Sénécal et Ryan, avocats du défendeur.
(P. R. L.)

MONTREAL, 28 OCTOBRE 1858.

Coram MONDELET, J.

No. 1368.

Valin, vs. *La Corporation du Comté de Terrebonne.*

Jugé : Que la requête civile ne peut pas être reçue à l'encontre d'un jugement final rendu par défaut lorsqu'il n'a pas été rendu en dernier ressort et duquel jugement il y a par la loi, appel.

La défenderesse ayant présenté une requête civile exposant qu'aucun exploit introductif de l'instance n'avait été émané en la cause, que conséquemment elle n'avait jamais été assignée devant aucun tribunal compétent et que la Cour qui avait rendu le jugement n'avait aucune juridiction à ce faire ; (1.)

Le demandeur rencontra cette requête civile par une défense au fonds en droit conçue en ces termes. 1°. Que la dite requête civile n'allègue pas d'ouverture de requête civile suffisante pour la faire admettre.

2°. Qu'aucun reproche de dol, artifice, surprise ou fraude n'est invoqué contre l'exploit introductif de l'instance et la procédure sur laquelle le jugement dont on demande la cassation fut rendu.

3°. Qu'il n'est pas allégué que le demandeur ait avancé des faits faux, que le jugement ait été rendu sur le fondement de ces faits faux, malgré la connaissance personnelle qu'il avait du contraire.

4°. Qu'il n'est pas allégué que les procédures n'ont pas été faites de la manière prescrite par les ordonnances et les statuts.

Le jugement de la Cour est motivé comme suit,

" La Cour, après avoir entendu les parties par leurs avocats sur la défense en droit du demandeur à la requête civile de la défenderesse, avoir examiné la dite requête, et les plaidoyers en cette cause, et avoir délibéré ; considérant :

Qu'il n'y a pas lieu, en loi ; à la requête civile, à l'occasion d'un jugement rendu par une Cour qui n'est pas un tribunal siégeant en dernier ressort ;

Considérant que le jugement que les défendeurs attaquent par leur requête civile, est, par eux allégué avoir été rendu par la Cour Supérieure siégeant à Montréal, le 27 Février 1858, pour la somme de £300 Cours d'Halifax, avec intérêt du 7 Février dernier et les frais ;

Considerant qu'il appert, par les allégués mêmes de la dite requête civile, que le jugement dont il est question a été rendu par cette Cour, duquel jugement il y a, par la loi, appel, et que consequemment, dans l'espèce, il n'y a pas ouverture à cette requête civile ;

Rejéte et renvoie la dite requête civile avec depens."

Requête renvoyée.

Loranger et Loranger, avocats du demandeur.
Lafrenaye et Papin, avocats de la défenderesse.
(P. R. L.)

(1.) Lors de la presentation de cette requête il n'existait aucun writ d'assignation dans le dossier; mais il parait qu'il était adiré.

MONTREAL, 31 OCTOBRE 1859.

Coram BERTHELOT, J.A.

No. [illegible]

Rodier, vs. Joly.

Jugé :—1o. Qu'un Bailleur a le droit de faire saisir gager par voie ordinaire et par droit de suite, les meubles, meubles-meublans, marchandises et effets mobiliers de son locataire sur lesquels il a acquis un droit de gage, et qui ont été enlevés des lieux loués, et que ces meubles &c., sont affectés au droit de gage et privilége en faveur du demandeur pour le paiement des loyers dus et à devenir dus en vertu du Bail :—

2o. Que dans une contestation soulevée sur le mérite d'une action pour loyer, un bref de saisie gagerie en vertu duquel les effets d'un locataire enlevés des lieux loués ont été saisis après leur enlèvement [illegible], quoique le bref n'indique pas l'endroit où ces effets ont été transportés.

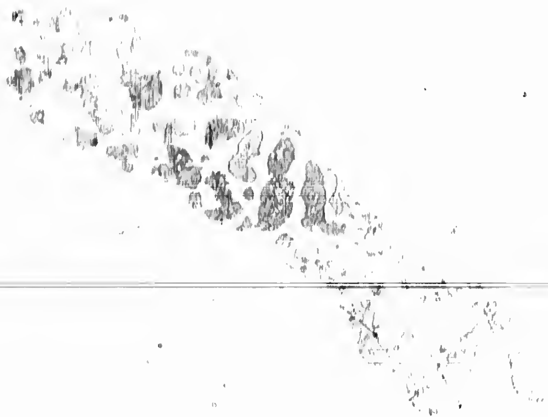
Le demandeur alléguait, par sa déclaration :

Que par Bail notarié, en date du 9 Mars 1859, il avait loué au défendeur un certain magasin, avec dépendances, pour le terme de deux ans, à compter du 1er Mai 1859, à raison de £125, par an, et les cotisations, le loyer payable par quartiers de £31 5s.

Que le défendeur avait pris possession des lieux, en vertu du Bail, à la date y mentionnée, et les avait occupés depuis lors.

Que le défendeur avait transporté et transportait ses meubles &c., hors de la dite maison en d'autres lieux dans le but de frauder le demandeur et de le priver de ses sûretés, en sorte que la dite maison, contrairement à la loi et aux stipulations expresses du Bail, se trouvait dégarnie; que le demandeur n'avait plus aucune garantie pour la sûreté du dit loyer et des cotisations, pendant le temps du Bail, et que, sans le bénéfice d'un Bref de saisie-gagerie pour saisir et arrêter les dits meubles &c., tant ceux qui se trouvaient encore dans les dits lieux que ceux qui avaient été ainsi transportés ailleurs, le demandeur se trouvait exposé à perdre le loyer des dites prémisses, pendant toute la durée du Bail, c'est-à-dire, la somme de £250, courant, et, en outre, les cotisations, ne pouvant être moindre de £18, pour les deux ans du Bail.

Enfin, le demandeur, concluait, pour les causes sus-dites, à l'émanation d'un Bref de saisie-gagerie pour saisir et arrêter tous les meubles meublans, marchandises et effets mobiliers qui se trouvaient dans le magasin, avec dépendances, sus-décrits, et, *par droit de suite*, tous les dits meubles &c., qui servaient à garnir le dit magasin &c., et qui avaient été transportés ailleurs, et ce sur l'indication du demandeur, et à ce que les dits meubles &c., demeurassent saisis jusqu'à ordre contraire; à ce que le défendeur fut tenu de comparaître pour entendre déclarer la saisie-gagerie bonne et valable et répondre à la demande du demandeur, que le défendeur, fut, en outre, condamné à lui payer la somme de £268, et dépens; enfin, que les dits meubles &c., ainsi saisis fussent vendus, suivant la loi, pour du produit d'iceux être le demandeur payé en principal et dépens, en tout ou en partie, suivant qu'ils produiraient; si mieux n'aimait le défendeur payer au demandeur les frais de l'action et le quartier échéant le 1er Août alors prochain avec les cotisations de cette année, formant £40 5s, regarnir les prémisses et donner caution au demandeur que le magasin, avec dépendances, resteraient garnis, suivant la loi, pour la sûreté du loyer, pendant la durée du Bail et que le loyer serait payé aux époques fixés par le Bail, ainsi que les cotisations, ce que



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le défendeur serait tenu de faire sous huit jours du jugement ou sous le délai à être fixé par la cour:—et que faute par le défendeur de ce faire, sous tel délai, la saisie-gagerie et la condamnation vaudraient pour £268.

Le Bref fut émané en cette cause le 28 Juillet 1859. Le premier quartier de loyer échéait le 1er Août suivant.

Le défendeur plaida que tous les allégués de la déclaration étaient faux, que le demandeur ne pouvait obtenir les conclusions de son action ni aucune partie d'icelles, ces conclusions étant mal fondées et illégales, et, qu'au temps de l'institution de cette action le défendeur ne devait rien au demandeur.

La réplique fut générale.

Des interrogatoires sur faits et articles furent soumis au défendeur pour établir la vérité des faits allégués, l'identité des meubles saisis avec ceux qui servaient à garnir les lieux, et, l'insuffisance des meubles restant dans la maison pour la garantie du loyer.

Le défendeur ne répondit pas aux interrogatoires, et, lors de l'audition, motion fut faite de la part du demandeur, que ces Interrogatoires fussent tenus pour avoués et confessés.

Le demandeur cita à l'appui de toutes ses prétentions la cause de Aylwin et al., et Gilloran, rapportée dans les Lower-Canada Reports, Vol. IV; p., 360.

La cour rendit le jugement suivant:

"La cour après avoir entendu les parties par leurs avocats, tant au mérite que sur la motion du demandeur pour que les interrogatoires sur faits et articles, soumis au défendeur soient tenus pour avoués et confessés et avoir examiné la preuve, a accordé la dite motion, et considérant que le défendeur, en vertu du Bail authentique du 9 Mars 1859, mentionné dans la déclaration en cette cause, est entré en possession le 1er Mai 1859 des lieux par lui pris à loyer du demandeur par le sus-dit Bail et désignés, comme suit; (suit la désignation des lieux), qu'il y a transporté ses meubles &c., qui ont garni les dits lieux jusqu'au 28 Juillet dernier, jour auquel le défendeur a laissé les dits lieux, et en a enlevé la plus grande partie des dits meubles &c., sur lesquels le demandeur avait légalement acquis un droit de gage, sans y en laisser suffisamment pour garantir les loyers du demandeur, et les a transportés dans une maison située &c., et qu'à raison de ce, le dit demandeur avait le droit de saisir gager par voie ordinaire et par droit de suite, ainsi qu'il l'a fait en temps utile, tous les dits meubles &c., mentionnés au procès-verbal rapporté en cette cause par le Shérif, ce qu'il a fait ainsi qu'il appert par la procédure, les déclare affectés au droit de gage et privilège en faveur du demandeur pour le paiement des loyers dûs et à devenir dûs en vertu du dits Bail et la cour condamne le défendeur à payer au demandeur la somme de £31 5s. cours actuel, pour le quartier ou terme des dits loyers dû et échu le 1er Août dernier en vertu du dit Bail, avec intérêt depuis ce jour là, et ordonne que les dits meubles &c., soient vendus, suivant les formalités requises, pour sur les deniers en provenant être le dit demandeur payé du présent jugement tant en principal que dépens, auquel, le défendeur est condamné.

La cour rejettant les autres conclusions du demandeur, mais, sans frais."

Belle et Germain, Avocats du Demandeur.

Lafrenaye et Papin, Avocats du Défendeur.

(J. A. A. B.)

MONTREAL, 30 NOVEMBRE 1859.

Coram BERTHELOT, Juge assistant.

No. 884.

Wilson, vs. *Perry*, et *Perry*, Tiers-saisi.

Jugé que la preuve d'un contrat fait dans un pays étranger, doit se faire devant nos tribunaux d'après la loi du pays où le contrat a été fait.

Le demandeur poursuivait le défendeur pour la jouissance et occupation d'une terre située dans le Haut-Canada et alléguait de plus une promesse de la part du défendeur de payer la somme reclamée.

Le défendeur opposait une dénégation spéciale de tous les allégués du demandeur.

Un témoin fut examiné dans le Haut-Canada sur commission rogatoire, et déposa des faits contenus dans la déclaration, et de plus, que d'après les lois en force dans cette partie de la province, la déposition d'un seul témoin *non contredite*, suffisait pour faire obtenir jugement au demandeur sur une reclamation de la nature de celle en question en cette cause.

Une admission fut aussi donnée par le défendeur, que telle était la loi du Haut-Canada.

A l'argument le demandeur prétendit qu'ayant prouvé la loi du Haut-Canada par l'admission qu'avait donné le défendeur, il n'était pas tenu de faire d'autre preuve que celle qu'il aurait eu à faire s'il eut porté son action devant une cour dans le Haut-Canada; que quoique généralement ce qui constitue la procédure proprement dite, doit se régler d'après les lois du pays où l'action est portée, il y avait une exception lorsque le fonds même de la matière en litige dépendait de cette procédure, ce qui était le cas dans la cause actuelle; qu'il fallait distinguer entre la forme de la preuve et la preuve elle-même, puisqu'en exigeant une preuve différente de celle du lieu où le contrat se fait, on fermerait la porte des tribunaux étrangers à ceux qui auraient intérêt à y porter leur demande car il n'était pas a présumer qu'une partie contractant dans un pays s'entourerait de toutes les formalités auxquelles il pourrait être assujetti dans les différens autres pays où le hasard le forcerait à reclamer l'exécution de son contrat; qu'enfin le demandeur ayant fait d'après les formes voulues par notre système de procédure, la preuve qui dans le Haut-Canada lui aurait suffi pour obtenir jugement, il n'était tenu à rien de plus. (1).

Le défendeur soutenait au contraire, que la preuve était matière de procédure et qu'en poursuivant dans le Bas Canada, le demandeur devait faire la preuve requise ici en pareil cas.

Les raisons invoquées par le demandeur prévalurent et Mr. le Juge Berthelot en prononçant le jugement dit: que cette cause devait être jugée d'après les lois

(1). Bouhier c. 21, §205. Louet et Brodeau Lettre 6. c. 42, No. 3. arrêt de 1596. Danty de la preuve, ad. sur c. 1. No. 11, Guyot Rep. vo. preuve. p., 573-4-5-6. Boullenois titre 4 c. 2, obs. 2. titre 2, p. 459—Pardessus, droit com. titre 5. No. 1490. Merlin quest. de droit vo. mariage §7 No. 1. Le même Rep. vo. *preuve* Sect, 2. §3. art 1. No. 3 Revue étrangère de Législation titre 6. p. 796. Sirey 1809-1-375-1813-2-310. Story §629-630-631-633-634-635 et 642. Burge titre 1. p. 29. No. 31. titre 3. p. 763.

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françaises et que là toutes les autorités étaient en faveur du demandeur, mais qu'en Angleterre il y avait divergence d'opinions.

Le jugement est motivé comme suit:

La Cour, après avoir entendu les parties, tant au mérite, que sur la motion du défendeur, en date du 17 Novembre courant, à l'effet de faire rejeter la preuve testimoniale faite en cette cause, examiné la preuve et vû l'admission du défendeur; considérant que les causes d'action qui font l'objet de la demande ont eu leur origine dans cette partie de la Province, appelée le Haut-Canada, où la dette qui fait l'objet de la demande est devenue dûe et exigible; et où le défendeur s'est reconnu endetté et devoir au demandeur dans cette dite partie de la Province appelée Haut-Canada pour le loyer et l'occupation de l'immeuble désigné en la déclaration du demandeur et qu'il y a preuve suffisante d'après la loi d'icelle dite partie de la Province appelée le Haut-Canada, que le défendeur doit au demandeur la somme de £75, cours actuel, pour l'usage et l'occupation du dit immeuble, ci-dessus désigné, depuis le 1er Mai 1851, au 1er Mai 1856: Considérant de plus, que par la loi du Bas-Canada, la forme probante des contrats ne doit dépendre que de la loi du lieu où ils sont passés et où la dette est devenue dûe, a rejeté la dite motion du défendeur et a condamné et condamne le dit défendeur à payer au demandeur la dite somme de £75, avec intérêt du 1er Septembre 1859, jour de la comparution du dit défendeur et les dépens.

Jugement pour le demandeur.

Cherrier, Dorion et Dorion, pour le demandeur.

A. et W. Robertson, pour le défendeur.

(A. A. D.)

IN APPEAL.

FROM THE DISTRICT OF BEDFORD.

MONTREAL, DECEMBER, 1859.

Coram Sir L. H. Lafontaine, Bart., C. J.; Aylwin, J.; Duval, J.; Meredith, J.; C. Mondelet, J.

GOULD, (*Defendant in the Court below,*)
Appellant.

AND

SWEET, (*Plaintiff in the Court below,*)
Respondent.

Held,—1. An action in the Circuit Court for less than £25, becomes appealable, if the Defendant sets up title to real estate in his plea.

2. An Appeal lies to the Court of Queen's Bench from Judgments rendered in the Circuit Court in vacation, under the Lessor and Lessee Act of 1855.

This was an appeal from a Judgment rendered by a Judge in vacation under the Lessor and Lessee act, maintaining an action for rent and in ejectment, instituted upon a lease for ten months, at a rent amounting in all to $50 for that period. The Defendant pleaded in the Court below, that on the day of, and after the execution of the lease in question, the Plaintiff agreed to sell

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to Defendant all his rights in the property leased, upon being paid $400 or *thereabouts*, and also upon the Defendant paying to Hiram S. Foster, (*supposed to be the real* proprietor of the property) the value of the soil. That he was ready to perform these conditions and had a right to retain the property.

Abbott for Respondent moved to reject the appeal:

1. Because there was no appeal to the Court of Queen's Bench from judgments under the Lessor and Lessee act, and

2. Because the sum demanded in the Court below did not exceed £25, nor did the action fall within the description of any other case susceptible of appeal.

On the first point he urged that an appeal in certain cases adjudged upon in the Circuit Court, created by the 12th Vict. c. 38, was granted by the 53rd, 54th and 55th sections of that Act, to the Superior Court; and that such right of appeal was limited amongst others to those cases where "the sum of money or value of the thing demanded should exceed £15 Cy," or in which "the *suit* "*or action* should relate to any titles to lands or tenements, &c., &c.

That by the Lessor and Lessee Act, 18 Vict., c. 108, § 15, an appeal was given *in all* judgments in suits instituted in the Circuit Court, to the Superior Court *as well if such judgments are rendered in vacation as in term.*

That by Judicature Act of 1857, §59, the 53rd, 54th, 55th and 56th sections of the Act of 1849 are repealed. That by §60 of the same Act, the appeal given from the Circuit Court to the Superior Court, by those repealed sections, is transferred to the Court of Queen's Bench; and the limit as to amount is fixed at £25, the other circumstances which give a case an appealable character being described as in the Act of 1849.

That the 15th section of the Lessor and Lessee Act is not mentioned or referred to in the Act of 1857, while the 53rd, 54th, 55th and 56th sections of the Act of 1849 are repealed therein by name and number.

That consequently the 15th section of the Lessor and Lessee Act not being repealed by the Judicature Act of 1857, the appeal remains as it was fixed by that Act.

To hold this doctrine would violate no rule of law, and would appear to be consistent with the spirit of the legislation, creating a tribunal with an exceptional jurisdiction for the trial of ejectments; while the reverse would be the case, were a contrary doctrine maintained.

For instance an appeal is given by the clause in question in all cases, whatever be the amount demanded. The Act of 1849 provided for an appeal in cases above £15. To take away this right under the Act of 1849, the *express* repeal of the section conferring it was thought necessary and wanted. Why is not the express repeal of §15, conferring a much more extended right of appeal than the Act of 1849, also necessary if its repeal be intended? But neither this §15 nor the statute it occurs in, is mentioned or referred to in the Act of 1857. If therefore the right of appeal in ejectment cases of £25 and under, be taken away, how is it done? By implication? The enactment that there shall be an appeal in cases above £25 from the Circuit Court in the exercise of its ordinary jurisdiction, does not seem necessarily to imply the taking away the right of the appeal in cases under that sum, adjudged upon by a judge in vacation, under a statute creating an exceptional jurisdiction, and at the same time granting a much more

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extended right of appeal than litigants before the Court ordinarily possessed. If it be contended that it does, then precisely the same pretension would compel the adoption of the system of articulations of facts and all the delay incident thereto, in the trial of ejectment cases, because the Act of 1857 requires them in all appealable cases in the Circuit Court: this requirement being thereby held, by implication, to repeal some of the salutary provisions of the Lessor and Lessee Act, as to rapidity of procedure; just as the salutary provision for an appeal of an extraordinary character, from an exceptional and arbitrary tribunal, would be taken away by implication by §60 of the Act of 1857. But the authorities are against the repeal of statutes or of clauses of statutes by implication. 2 Dwarris p. 674.

The same author says: "Nor has a latter Act of Parliament ever been con-"strued to repeal a prior Act, unless there be a contrariety or repugnancy in "them; or *at least* some notice taken of the former Act so as to indicate an "intention of the lawgiver to repeal it." The same doctrine is to be found in Sedgwick, pp. 123-127. Here no intention of the kind is manifested, but the contrary, for one appeal to the Superior Court is annihilated in express terms, while this other is in no way alluded to. Surely here is a fit occasion for the application of the rule, *inclusio unius*, &c. The difficulty lies in the other view, which necessitates either the violation of a well grounded rule of law in the construction of statutes, or the anomaly of appeals being had from the same tribunal to different Courts, as the amount may chance to exceed £25 or not.

But supposing for argument's sake, that appeals from judgments in vacation under the Lessor and Lessee Act, do lie to the Court of Queen's Bench, this is not one of the cases in which an appeal can be had. The sum demanded not being sufficient, the attempt to appeal must be based upon the supposition that the Defendant has acquired the right to appeal by pleading as he has done. In that respect it is submitted he is mistaken, for the law only gives it where the *suit or action* relates to title to real property, not where the Defendant has chosen to involve title in his plea. If the latter construction were adopted, a Defendant could make any summary ejectment case appealable to the Queen's Bench, by simply pleading an imaginary title, without either the disposition or the power to prove it, thereby rendering entirely nugatory the limit as to amount, affixed to such appeals, by the construction of the Act of 1857 now contended for.

Doherty for Defendant argued that the right of appeal to the Court of Queen's Bench existed under the Act of 1857, in all cases falling within the description contained in the 60th section. An appeal was thereby given in all cases wherein questions arose respecting title to real estate. This was one of those cases, for by the plea, the Defendant claimed title in himself, to the real estate from which he was sought to be ejected by the action in the Court below. It was thereby made a question in the cause, whether the real estate claimed by the action belonged to the Plaintiff or to the Defendant, and therefore it became absolutely impossible for the Judge to decide the case without at the same time deciding in whom the title lay.

The question might properly be viewed in another light, and would still

necessarily be answered in favor of the right of appeal. The Lessor and Lessee Act gave an appeal to the Superior Court in all cases: under the same rules and under the same conditions as other appeals are instituted from the Circuit Court. Now the appeal from the Circuit Court having been changed from the Superior Court, to the Court of Queen's Bench, the appeal under the Lessor and Lessees Act followed the ordinary appeal from the Circuit Court, inasmuch as the appeal under that Act was granted under the same conditions, as other appeals from that Court.

It was evident from the terms of the Statute of 1857, that it was the intention of that Act to transfer all appeals to the Court of Queen's Bench. That being plain, the obvious intentions of the law should be carried out, though no actual repeal of the existing appeal had been enacted.

Sir Louis Lafontaine, C. J.—The Court is of opinion that the action in the Court below related to title of real estate. The motion is dismissed.

Mondelet, J., dissentiont.

I am under the necessity of differing from the majority of the Court. The question arises upon a motion to reject an appeal from a judgment rendered in vacation, in a case in the Circuit Court at Nelsonville, under the Lessor and Lessee act. Mr. Abbott for respondent contends that no right of appeal exists; first, because in the abstract there is no appeal to this Court from judgments under that act; and second because had the judgment appealed from been rendered by the Circuit Court, in the exercise of its ordinary jurisdiction, neither the amount in issue, nor the nature of the suit, would have sustained a right of appeal.

Mr. Doherty maintains that there is a right of appeal to this Court from judgments under the Lessor and Lessee act: and that a question of title to property arises in this case which gives the right of appeal though the amount sued for is in itself insufficient.

I am unable to consider as of any weight the pretension which I believe is entertained by some persons, that this Court as the highest Court of civil jurisdiction in this Province, has the right of entertaining appeals, entirely apart from any statutory provision to that effect. I am clearly of opinion on this point, that to permit of an appeal to this Court, there must be some statutory enactment authorizing it, and that unless the present appeal be sustained by some such enactment it must be rejected. It therefore becomes necessary to examine the legislation on this subject.

By the 12 Vict. cap. 38, § 53 there is granted "Appel à la Cour Supérieure "dans toute poursuite ou action dans laquelle la somme d'argent ou la valeur de "la chose demandée excède £15 courant si le jugement a été rendu après la mise "en vigeur de la loi ou dans laquelle la somme d'argent ou valeur de la chose "demandée excède £10; et si le jugement a été rendu dans une poursuite ou ac- "tion intentée avant la dite époque, ou qui a rapport a des titres de terre ou "propriété foncière, où à toute somme d'argent due à Sa Majesté, honoraire "d'office, rentes ou charges, revenus, rentes annuelles, ou autres matières qui "pourraient affecter les droits futures des individus."

This action it must be remarked was instituted with *saisie-gagerie* for the

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recovery of $45 for rent of a lot of land under a lease for ten months; and of $5 for taxes, and also in ejectment of the appellant by the respondent.

By the 18th Vict. cap. 108, §15 it is enacted:

"Il y aura appel de tout jugement rendu dans une poursuite en vertu du "présent acte, dans la Cour de Circuit, à la Cour Supérieure, et dans les pour- "suites intentées dans la Cour Supérieure, à la Cour du Banc de la Reine, sous "les mêmes règles et aux mêmes conditions que les autres appels interjetés des "jugements des dites cours que les dits jugements soient rendus durant la "vacance ou pendant le terme."

By the Judicature Act of 1857 (20 Vict. cap. 44) §59: "Les 53e, 54e, 55e "et 56e sections de l'acte de 1849 cap. 38, sont par le présent abrogées, exceptés "quant aux causes sujettes à appel en Cour de Circuit dans laquelle jugement "aura été rendu avant que cette section soit mises à effet, cause auxquelles les "dites sections continueront de s'appliquer."

Now the sum sued for does not exceed £15, and it does not fall under the words "ou qui aura rapport à des titres de terre ou propriétés foncières," &c. (12 Vict. cap. 38 §53), for the law only gives appeal where the "suit or action" aura rapport, &c. Now the Defendant by raising a question of title in his plea clearly cannot change the nature of the "suit or action."

Besides §53, 54, 55, and 56 of 12 Vict. cap. 38 are repealed by 20 Vict. cap. 44, §59.

The appeal therefore created by the Act of 1855, which depended upon those sections as to the rules and conditions upon which it had existence, ceased with the repeal of those sections: and no provision having been made by the Act of 1857 for any appeal from the Lessor and Lessee Act, there exists no appeal from that act to this Court.

Under another view of the case, if the appeal granted by the Lessor and Lessee act was not entirely destroyed by the repeal of the above mentioned sections of the Act of 1849: and if it survived that repeal in any form, it could only be in the form in which it was originally created; namely to the Superior Court; as no provision is to be found in the Act of 1857, taking away the appeal granted by the Act of 1855, either directly by repealing the clause conferring the right: or indirectly by creating a new tribunal in appeal for causes under that act.

Under these circumstances I cannot but feel a strong conviction, that the present appeal ought to be dismissed, and the more I have reflected upon the matter, and examined it in its different aspects, the more thoroughly I am satisfied, that the view I have adopted is in strict conformity with the legal effect of the enactments on the subject. I must of course presume myself to be in the wrong, as I have the misfortune to differ from the majority of the Court, but my individual opinion is unshaken; the more especially as I have not had the satisfaction of hearing any reasons given for a contrary one, by the other members of the Court.

Doherty, for Appellant.

Abbott & Dorman, for Respondent.

(J. J. C. A.)

The solution of the main question presented for decision by this motion, is evidently

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not devoid of difficulty: and is one respecting which some interest was felt by the bar. It is much to be regretted, therefore, that the reasoning by which the decision of the majority of the Court was arrived at, was not made public.

SUPERIOR COURT.

MONTREAL, 30TH NOVEMBER, 1859.

Coram MONK, J.

No. 2279.

The Sun Mutual Insurance Company v. *Damase Masson et al.*, and *E.* contra.

HELD.—1. On a demand for indemnity under a policy of Insurance against the perils of the sea, it is necessary to prove that the damage claimed for was caused by some peril insured against.

2. The mere fact that the goods insured were damaged to a trifling extent by salt water, does not constitute such proof.

3. A survey of goods alleged to be damaged, made without notice to the underwriter, followed by a sale at nine o'clock in the morning of the second day after the survey, at which sale the claimant bought in the goods, is irregular, and such proceedings afford no criterion of the extent of damage the goods have sustained.

This was an action on a note for $251.25, given for premiums of Insurance, to be earned, under an open marine policy. The Defendants pleaded that the note was given for premiums to be earned under the policy in question, and that the premiums so earned only amounted to $71.98, which with the price of the policy amounted to $73.23. That among the goods upon which the said policy attached, there was a quantity of 30 bags of coffee, of which 7 bags, of the value of $161.33 were damaged to the extent of 10 p. c. upon their value, and upwards. That a survey was duly held upon them with the sanction of the Plaintiffs, and that the coffee contained in them was afterwards sold by public auction realizing only $22.92, shewing a balance of loss of $148.67, which under the policy the Plaintiffs were bound to pay; and the conclusions of their plea claimed compensation. The Defendants also fyled an incidental demand, based upon the alleged loss—claiming the difference between the earned premiums, and the alleged loss.

The Plaintiffs replied that the alleged damage was not caused by any peril insured against, and moreover was not one for which they were liable under the policy in question. That the survey and sale referred to in the plea were irregular, illegal and collusive, and were contrived by the Defendants fraudulently to enable them to acquire the coffee at the expense of the Plaintiffs, on the pretence of damage which did not exist.

Upon this answer to their pleas, and a plea of the same nature to their incidental demand, issue was joined by the Defendants, and the case went to *enquête* for the adduction of evidence on both sides.

The policy was admitted; and it appeared by its provisions that every $300 in order of invoice was to be considered separately insured, while amongst other things coffee was declared free of average under ten per cent, unless general

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By the evidence it appeared that the Company's Surveyor estimated the damage at less than five per cent on the value of the 7 bags coffee, and reported the loss as insufficient to warrant a claim under the policy; that their Agent Mr. Hart had on an application to that effect, himself concurred in the opinion of the surveyor, but had told the Defendants that if not satisfied they might call a survey at which the Company's surveyor would attend—and that they might have the coffee sold, if so ordered under the survey: that on the 27th of July the Defendants had called a survey, but without any notice to the Plaintiffs or their agent—and the surveyors they named, having declared the 7 bags of coffee to be damaged in excess of ten per cent, it had been sold for the price mentioned in the plea at nine o'clock on the morning of the 29th of July, after advertisement in two Newspapers; that it had been bought, nominally by Mr. Marchand, but really bought in by him for the Defendants at a very small price, he having been requested before the sale to purchase it for them: that on the day of the sale Mr. Shelton applied to purchase the coffee as damaged, but could not come to terms with the Defendants; they asserting that the coffee was not materially injured or lessened in value: that also on the day of the sale, having heard of it after its occurrence, Mr. Hart wrote to the Defendants offering on behalf of the Plaintiffs to take the damaged coffee at prime cost and charges, which was refused: and that in fact the damage consisted in the injury caused to two or three pounds in each bag of the coffee by a dripping or drop of some liquid upon it: (the evidence whether this liquid was salt water or not, being conflicting,) which had discolored a spot on each bag, of about three inches in diameter, and had injured the coffee lying in immediate contact with the spot discolored; and that it was of a very trivial character.

Abbott for Plaintiffs, argued that the Plaintiffs were not liable for any loss upon the coffee: 1st. Because it had not been shown that the loss had occurred by any of the perils insured against and 2nd. Because the loss actually sustained did not amount to a claim, in consequence of the limit contained in the memorandum.

It was a mistake to suppose that the mere fact of goods being injured on the voyage over sea, was sufficient to hold the underwriters for such injury, without any proof that it was caused by a peril of the sea. The contract was one of indemnity against loss from certain causes. If parties pretended that loss had occurred from those certain causes it was for them to show it, either by a necessary deduction from the nature of the injury, or by substantive evidence. Here no proof of the cause of loss could be deduced from the injury itself, or was attempted to be otherwise made. Supposing it to be proved that the damage was caused by salt water, (which it certainly was not) it was infinitely more like a damage caused by washing a leaky deck, than by the force of the winds or waves. If the damage arose from the first of those causes the insurers were not liable, if the Defendants pretended it arose from the second, they might at least have shown that the ship had met with stress of weather, but they had not attempted to do so. The authorities on this point are clear. "The Insurers only stipulate "to make indemnity for the *extraordinary* consequences of the *unusual* and "*extraordinary* operation of those perils." (of the seas) 1 Phillips No. 1099, p.

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649. Even if the ship be proved seaworthy at the beginning of the voyage, and is injured during the voyage, still "the burden of proof is on the assured otherwise "to prove the damage to have been the effect of the *extraordinary* operation of "the perils insured against," 2 Phillips, p. 697. 2 Sumner p. 366. The best French writers concur in this view, 1 Laget de Podio p. 412. Delaborde, avaries sur marchandises, pp. 49, et seq, defines the perils of the sea to be "*des cas fortuits ou d'évènements de force majeure*: and at pages 218, 221 he lays down the rule that the burden of proof is on the claimant, and that he must shew what the accident was which caused the damage. Mr. Stephens adopting the substance of the definition of a very able judge, says, "Losses by the perils of "the sea are restricted to such accidents or misfortunes only as arise *ex vi divinâ* "from stress of weather, winds and waves; from tempests, rocks and sands," "3 Stephens N.P. 2149, and both American and English authorities agree with Mr. Delaborde as to the burden of proof, 2 Greenleaf § 385, 1 Starkie 137, 5 L. Ann. Rep. p. 706. See also upon all these points 2 Arnould on Ins. pp. 793, 801, 1273, 1338, *et in notis*. Emerigon pp. 286 et seq. In this case there is not even proof that the damage was from salt water, and there has been no attempt to show in what way it occurred, or that it arose in any way from any of the causes which alone could have given rise to a claim on the underwriters.

But were the damage proved to have been caused by one of the perils insured against, it did not amount to enough to entitle the Defendants to claim from the Company. Three modes had been adopted for testing the amount of damage; 1st, by a survey; 2nd, by a sale by auction, and 3rd, by the testimony of persons who have examined it. It must be borne in mind that each $300 in order of invoice was to be considered as separately insured, and that coffee was warranted free of average under 10 p. c. unless general. The seven bags of coffee were of the value of about $160, and formed part of a lot of 30 bags of four times that value. The surveyors reported *these seven bags* to be damaged to the extent of ten per cent, which was clearly insufficient, as under the most favorable construction of the policy, they ought to have been damaged to the extent of $30 or about 19 p. c. on their value to entitle the Defendants to claim; while treating the lot as being separately insured, they would require to be damaged to the extent of 40 p. c. of their value to create a claim. Under the survey then, there was clearly no claim, totally irrespective of its irregularity, as having been called and held without notice to the Plaintiffs.

The sale by auction was no criterion of loss, under the circumstances. It was very slightly advertised, was held at an unusually early hour, and the coffee was adjudged to the Defendant himself. Had it been *bonâ fide* sold to a third party, there might have been a question, but as it was, the facts fully bore out the Plaintiffs' answer to the Defendants plea. The Defendants procured their own surveyors, held an *ex parte* survey by which they imagined the coffee was condemned, they procured their own auctioneer by whom the coffee was sold in the morning, at the extreme verge of business hours, and little more than 36 hours after the survey and they procured a friend of their own, to attend and buy it ostensibly

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for himself, but really for them, within one hour afterwards refusing to sell the coffee as damaged, and refusing to take cost and charges for it, from the Plaintiffs. Under these circumstances no weight whatever could be attached to the sale, as a criterion of damage, and the facts fully sustained the manner in which the whole transaction was characterised in Plaintiffs' answer.

The evidence of witnesses, as a criterion of damage was all in favor of Plaintiffs. No witness for the Defendant attempted to make out that the seven bags were damaged to an extent exceeding ten per cent upon their total value, while those of the Plaintiffs, and among them Mr. Shelton who attempted to buy the coffee of Mr. Masson within an hour of its sale by auction, prove it to have been of the most trivial character. By none of the three tests, then was the Defendant's position sustained.

The fact was that it had long been the custom among many persons in trade in Montreal to treat underwriters as fair game. The slightest injury to goods was seized upon as a pretence for a claim; a survey was called of persons who were the more easily satisfied, of the extent of the damage, from having frequently occasion for the services of the assured for a similar purpose. The goods were condemned, sold, bought in under a *prêt nom* by the claimant, for a song, and the whole affair placed beyond the possibility of investigation, long before the insurer could even hear of the transaction, and thus the importer stocked his shelves and his cellars at the expense of the underwriter. This was notoriously true, and the sooner for the credit of the city and the benefit of the honest trader, such practices were put a stop to the better.

Morin, for Defendants and incidental Plaintiffs argued that the claim was just and correct, and fully proved. He contended that the evidence was sufficient to shew that the damage was caused by salt water, one of the witnesses having tasted the damaged coffee, and being therefore competent to speak as to that fact. If then it was so damaged, the presumption that it was from a peril of the sea followed as a matter of course. If the Plaintiffs contended that salt water had come in contact with the coffee, otherwise than by a peril insured against, it was for them to show it. If further proof than the actual injury were required of the assured, they might suffer great injustice, and be placed at the mercy of the crew of the ship, who would be the only persons competent to testify as to the accident and might be indisposed to give fair testimony, or might be thousands of miles away when it was required. He urged therefore that having shown that the injury arose from contact with salt water, his case to that extent was made out.

As to the mode of estimating the damage, the Defendants had followed the instructions of the Plaintiffs' agent. He had told the Defendants that if they were discontented with the report of the Plaintiffs' Surveyor they might call a survey and sell the goods and they had done so. Though possibly Mr. Hart might not have known the precise time at which the survey was to be held, still he knew it was to take place and could have ascertained the time if he had thought proper. As to the sale, the pretensions of the Plaintiffs were wholly unfounded. If the Court would read the deposition of Mr. Marchand the auctioneer, they would be convinced that he had followed the regular course

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of trade by causing the sale to be properly advertised, and had made it as public as possible by the distribution of hand bills and by posting them upon the door posts of Defendant's store where the sale had taken place. He had sworn in the most positive manner, as his deposition would show, that there had been no collusion or improper practice in relation to the sale, that there were several persons present at it, and that he had several bids. Under these circumstances he did not think that the Court would countenance the line of defence adopted by the Plaintiffs, as it appeared to be a mere quibble (*chicane*) based upon the letter of the policy but wholly opposed to the spirit of such contracts.

MONK, J. This is an action instituted for the recovery of the amount of a premium note granted for premiums of insurance amounting to $251.25.

The Defendants pleaded:

That the consideration for the note was an open policy underwritten by Plaintiffs dated 19th May 1858.

That the only goods insured were a quantity of indigo, tallow and coffee.

That the amount of premium upon that insurance was only $73.23.

That Plaintiffs would have been entitled to no more than the latter amount under any circumstances but that this amount is more than compensated by damage done to the coffee, which damage amounts to $148.67, and the Defendants praying compensation ask for the dismissal of the action.

The Defendants also filed an incidental demand for the difference between $73.23 and $148.67, that is for $75.44.

The Plaintiffs answered that the coffee was not damaged by salt water, nor by any of the risks insured against.

That the survey held on the coffee by the instructions of the Defendants was not regular.

That the sale of the coffee (alleged to be on account of the underwriters) was fraudulent, and

That the coffee was not damaged. They also filed an express denial of the allegations of the Plea.

The Plea to the incidental demand is the same in substance as the answer to Defendant's plea.

There can be no doubt but that the thirty bags of coffee mentioned in the plea and valued in the policy at $654 were covered by the policy, that any damage arising from perils of the sea exceeding ten per cent. upon the lot would establish a claim upon the underwriters. It is equally beyond doubt that seven bags of the thirty were damaged. But upon these facts two important questions arise.

1st. Were these seven bags of coffee damaged by one of the perils insured against and if so;—

2nd. Did the damage amount to ten per cent upon the value of the whole thirty bags.

Upon the first point the evidence is conflicting. It is not even conclusively established that the damage was caused by salt water. I find no testimony to show that the damage was caused by a peril of the sea: in other words by one of the perils or risks insured against. The damage may indeed have been

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caused by salt water, but it is not shown that it was by a peril of the sea, and in the absence of such proof the Court will not presume it to be so. This however is not very material, because upon the

Second point, it is proved that the special damage done to the seven bags of coffee did not exceed or very slightly exceeded ten per cent upon the value of the quantity damaged.

The survey and sale were not very regular, and under the circumstances the sale cannot be regarded as any criterion of the extent of damage. I should not however characterize the survey and sale as fraudulent; but this again is not material. The surveyors prove the damage to be something over ten per cent upon the value of the seven bags and if we are to take their evidence as conclusive, it precludes the Defendants from recovering from the insurers under the policy, as the loss should have exceeded ten per cent upon the whole lot valued at six hundred and fifty four dollars. Judgment therefore must go for the Plaintiffs for seventy three dollars twenty three cents with costs on both demands.

Abbott & Dorman for Plaintiffs.

Ouimet & Morin for Defendants.

(J. J. C. A.)

PROVINCE DU CANADA, }
Bas-Canada, savoir: }

EN LA COUR DU BANC DE LA REINE,

EN APPEL.

Montréal, Mardi le sixième jour de décembre mil huit cent cinquante-neuf,

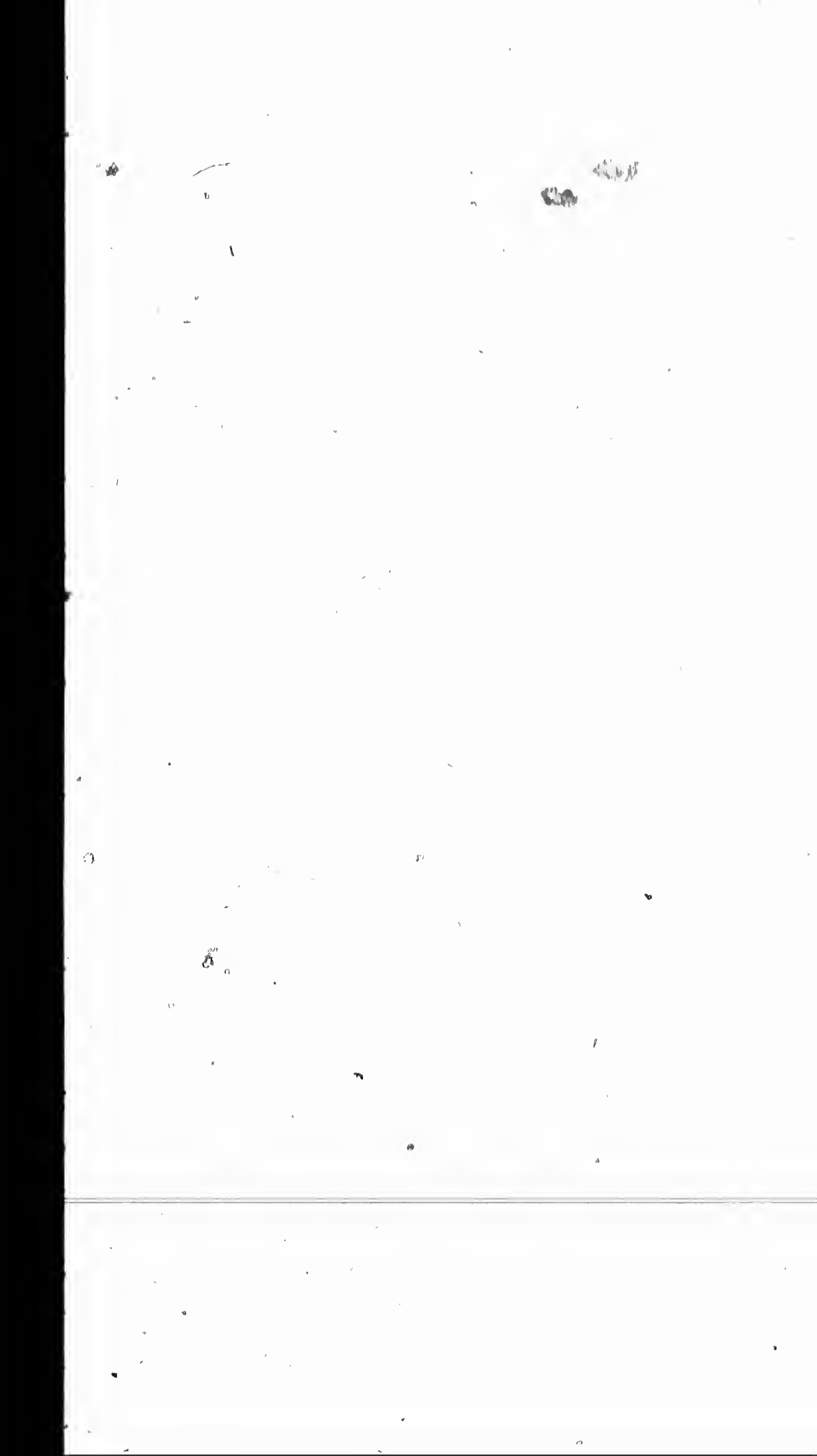
PRESENTS :

L'HONORABLE SIR LOUIS HYPOLITE LAFONTAINE, Bt., Juge en chef.
M. LE JUGE AYLWIN.
M. LE JUGE DUVAL.
M. LE JUGE C. MONDELET, Assistant.

REGULA GENERALIS.

1o. A l'avenir, sur les appels de la Cour de Circuit, les parties auront, chacune, à produire un factum imprimé, de la même manière, sous les mêmes délais et sous les mêmes peines, que prescrit et établit le règlement qui concerne les appels de la Cour Supérieure. La partie appelante ne sera pas obligée, à l'avenir, de fournir des copies de sa requête en appel. Le présent règlement ne viendra en vigueur qu'à la fin du présent terme (en appel.)

2o. A l'avenir, sur chaque appel, tant de la Cour Supérieure, que de la Cour de Circuit, le témoignage verbal recueilli dans la cause, sera imprimé et fera partie du Factum : c'est-à-dire, que l'appelant fera imprimer, avec son Factum, le témoignage qu'il aura recueilli lui-même en Cour de première instance, et l'intimé en fera autant, en ce qui le concerne. Le présent règlement ne sera en vigueur qu'à la fin du présent terme (en appel.)



SUPERIOR COURT.

MONTREAL, 30TH SEPTEMBER, 1859.

Coram BADGLEY, J.

No. 148.

Clark vs. *Lomer*, & *Clark et al.*, Plaintiffs par reprise.

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

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

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

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

The plaintiff instituted this action by an attachment, *saisie* revendication, against five cases of mitts and gloves, which he alleged to be his property, and unjustly detained by the defendant, and to be of the value of £500 cy.

The defendant met the demand by two pleas. By the first, he alleged that he had received the five cases of mitts and gloves in good faith from one Erastus Thrall as security for advances of money made the latter to the amount of £400 and upwards, for which he held the notes of said Thrall, the first of said notes being alleged to have been made among other things for custom duties paid by the defendant on said goods, and he prayed that in the event of the plaintiff establishing a right of proprietorship in the said five cases of mitts and gloves, he should only get delivery of them on payment of the claim of defendant.

The defendant's second plea was the general issue.

The plaintiff answered the defendant's first plea by alleging that the defendant received the said goods in bad faith from the said Thrall, knowing the same to be the goods and property of the plaintiff, and in receiving said goods, and making advances on them, was acting *malâ fide* as regards the plaintiff; and the defendant then had notice that the said Erastus Thrall, making such contracts as alleged in his plea, had no authority to make the same, and was acting *malâ fide* in respect thereof against the plaintiff as owner of said goods, especially as the said Thrall pledged the said goods for his own private purposes without the consent and knowledge of the owner thereof, as the defendant well knew, and the said goods were pledged by fraud and collusion between the defendant and said Thrall with an intent to defraud the plaintiff.

That the notes given by said Thrall, as mentioned in defendant's pleas, were by the defendant transferred for value to certain persons named in said answer

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and the lien alleged by the defendant to have been created by said Thrall on said goods was then immediately extinguished and discharged.

By a second answer plaintiff alleged that the defendant had no lien for the first note, for £76 5s. 3d.; that the defendant promised a lien under an agreement of date 26th March, 1857, and for no more than $1000; that the said Thrall had, prior to 1st August, 1857, deposited with the defendant skins of the value of $1016.68, which defendant had converted to his own use, and the plaintiff therefore had a right to compensate the value of said furs with the amount of the defendant's lien.

By a third answer, the plaintiff denied all the allegations of the defendant's first plea.

After issue joined, the parties went to evidence.

Badgley, J.—The contestation in this case appears in the following judgment:

This is an attachment by revendication at the plaintiff's suit, of five cases of gloves and mitts in the possession of the defendant. It appears that the plaintiff, resident in the State of New York, entrusted and consigned these goods to one Thrall for sale at Montreal, where, upon their arrival, they were seized by the Customs for short valuation and detained some months by the customs authorities. They were, however, finally admitted to entry upon their proper appraised value, through the exertions of Mr. R. H. Hamilton in the plaintiff's interest. Thrall, without intimation to defendant of Clark's interest or property in the goods, obtained from the defendant advances to pay the duties and the expenses incurred upon the goods, amounting to £76 5s. 3d, the duties being paid by defendant's check handed to Mr. Hamilton for the purpose, with which, and thereupon with Thrall's order, the goods were transferred from the customs warehouse into the store of the defendant. At this time the season for the sale of such furs had passed away, but within two or three days after their delivery to the defendant, he entered into a contract with Thrall who, for advances to be received from the defendant, was to purchase furs which were to be realized for the payment of the advances upon certain terms of commission and interest stipulated in the contract, according as the sales should be made by the defendant or by Thrall himself. As security for these advances, the latter pledged the goods above mentioned to the defendant, who at once made advances and continued to do so for some time afterwards, until a large quantity of furs had been collected, which, having remained on hand a long time undisposed of, the defendant finally ordered to be realized by public auction, in order to settle the account; but it is alleged that this was done without Thrall's directions, and in an irregular manner. A large balance remained against Thrall even after this transaction, for the security of which the defendant claims to hold the goods under the Factor's Act, 10 & 11 Vict. Ch. 10. Without at present adverting to the point raised respecting the alleged unauthorized sale, the chief points for present consideration are the pledge of the goods to the defendant, and his right to hold them for the balance of his advances upon them. The plaintiff's property in the goods, and Thralls's agency and consignment are established, but the proof in no way implicates the

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defendant's good faith in his contract with Thrall or impeaches his ignorance of Thrall's not being the owner of the goods, both of which points are put in issue by the plaintiff. The pretensions of the defendant rest upon the statute which was made up and collected together from the three several British Statutes *in pari materia*, and may therefore be fitly expounded by reference to British authorities. It is admitted that the Statute Law in this respect is at variance with the letter of the rule *nemo plus juris in alium transferre potest quam ipse habet*. The reasons and motives for the positive departure from this just and equitable legal principle are to be found in the exigencies and necessities of trade and commerce. Previous to such statutory legislation, a broker employed to purchase had, as such, no authority to sell, and his principal might repudiate any contract entered into by him beyond the scope of the authority of that class of agents, and reclaim his goods into whatever hands they had come, unless, 1st, It were a *bonâ fide* sale or market overt, which the policy of the law never allowed to be disturbed; or, 2nd, Where the principal himself had allowed the broker to mislead the party to whom the transfer had been made by enabling him to appear in the character of owner. A factor had as incident to his character as factor a right to sell, but he might not dispose of his principal's property in any other manner, whether by barter, pledge, &c., and if he did so, the principal might follow the property or the proceeds so long as they could be specifically traced, and recover them absolutely and free of all charges; for the transferree could not claim in right of the factor, nor in his own right, lien being a personal and untransferable right, because the possession out of which the lien must arise was, as against the owner, a tortious or wrongful possession. This rule could not be evaded by a colourable sale. The true nature of the transaction was looked into by the Court and adjudged upon accordingly. The reason was that persons engaged in mercantile transactions must be presumed to know what contracts are within the limits of the general authority of a factor or broker, and therefore before entering into a contract which was not of this character, they were bound to inquire into the real authority of the person with whom they were about to contract. It may be added that it was immaterial whether the pledgee knew he was treating with a factor or whether he acted under a *bonâ fide* impression that the holder of the goods was himself the real owner.

The rigid adherence to these rules by the Courts, notwithstanding the apparent hardship of particular cases, gave rise to loud complaints among mercantile men, and even by some of the judges themselves, when finally by the exertions of the moneyed capitalists whose interests were most affected by the then state of the law, the 4 Geo. IV, Ch. 83 was passed, which, after a trial of two years, was embodied in the 6 Geo. IV, Ch. 94, and which latter was subsequently amended by the 5 & 6 Vict., Ch. 39, all in connection with and for the regulation of this particular subject. However questionable might be the policy of some of these provisions, they have remained unaltered, and have been introduced into the legislation of several of the American States, and also in 1847 were made the law of Canada by the Act 10 & 11 Vict., Ch. 10. With reference to this last Act, it is sufficient to observe that it is a compendium of the

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British Statutes. The main provisions of our Statute which apply in this case are the following: 2nd Sect.—"That any such agent intrusted with the possession of goods and merchandizes shall be deemed and taken to be the owner of "such goods, &c., so as to entitle the consignee of such goods, &c., to a lien "thereon in respect of any money advanced by such consignee to and for the "use of such agent, to all intents and in like manner as if such person were the "true owner of such goods, &c., and so far as to give validity to any contract "or agreement by way of pledge, lien, or security *bonâ fide* made by any person "with such agent so entrusted, &c., as well for any original loan upon the security of such goods, &c., as also for any further or continuing advance in respect "thereof, and such contract shall be binding upon the owner of the goods, &c., "notwithstanding notice of Agency." And 4th Section provided, &c. The Act to be deemed to give validity to such contracts only as are mentioned in this Act, and to protect only such loans as "shall be made *bonâ fide* and without notice "that the agent making such contract has no authority to make the same, or is "acting *malâ fide* in respect thereof against the owner of such goods." The legislative history of the British Statutes and the motives which gave occasion for their existence will not be examined at length upon this occasion, as every particular in this respect is amply and fully detailed and explained, and will be found in Story on Contracts, §363 and Note (3) in extenso; in Dunlap's Paley's Agency, Ch. 3, part 1, §6 in extenso; Parsons on Contracts, pp. 79, 80; Russell on Factors, pp. 87, 88; and in the latest edition in 1858 of Addison on Contracts, pp. 318, 319, 320, 321, 322. After stating the strictness of the old rule, this last author sets out the modifications introduced by the British Statutes, and, after commenting upon them, concludes in the following terms: "Although therefore the owner of goods who entrusts them to a factor to sell "expressly prohibits the factor from pledging them, the prohibition will be of no "avail against a pledgee who has received the goods in pledge from the factor, "knowing that he was an agent for sale, but not knowing that he had been prohibited from pledging them." You may under this Act treat any agent whom you know to be so as owner in accepting any pledge from him, although you know the goods have been entrusted to him to sell, provided that you have not notice that the agent is acting *malâ fide* and disobeying his instructions. It may be observed that the present jurisprudence is in conformity with the modern law of France, and of all the States of Europe, and with that of the United States, which have adopted a legislation similar to that of England, nor was it opposed to the old law of France, see Pothier, Nantissement, No. 27; Basnage des Hypothèques, pp. 4, 6. The exposition of the law applicable to this case has been thus far confined to the opinions of the text writers upon the subject, without reference to reported cases, which, however, are referred to by those authors, but before closing my remarks, it is desirable to cite a recent case at some length, as it is conclusive as well as instructive of the matter involved in this contestation.

The case is Navelshaw vs. Brownrigg, 16 Jur. 897; 13 Eng. C. L. & Eq. Rep.; on Appeal in 1852, in which the Lord Chancellor, Lord St. Leonards, rendered the following judgment. He introduced the case as one of great mercantile importance and as dependent upon the construction of Statutes. He

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stated the rigidity of the common law which prevented dealing in England by way of pledge of goods committed to an agent without express authority to him to pledge. He observed that to meet this inconvenience, the Statutes (naming them) had been passed: that by 4 Geo. IV, C. 83, the pledgee only acquired the right of the pledgor; then by the 6 Geo. IV, Ch. 94, 1st, the agent as regarded third persons was enabled to sell or to pledge, provided the pledgee did not know that he, the pledgor, was not the actual and *bonâ fide* owner of the property: operating in the case of a person who was dealing with an agent not knowing him to be such, apparently as owner. And 2nd, Enabling a person to contract with any agent intrusted with goods or any consignee of them for the purchase of them, and to receive and pay for them; validating the contract against the owner, if that and the payment were made in the usual and ordinary course of business, and without notice at the time that such agent was not authorized to sell the goods and receive the purchase money. "Here although you "are dealing with an agent, if you do not know that he has not authority to "sell, you are perfectly safe in buying. As the law stands any one may safely "buy of an agent if he does not know, and it is absolutely necessary that he "should not, that the agent is not authorized to sell: and if the person selling "is known to be an agent, then the law gives to persons accepting goods in "pledge from known agents the interests of the person who makes the pledge."

The 6 Geo. IV. related only to purchases and pledges from agents known to be such, and to sales by agents who had not authority to sell. The 5 & 6 Vict., Ch. 39, repaired the omissions by validating against the owner any contract of pledge, lien, &c., *bonâ fide* made with an agent in possession of goods or documents of title as well for any original loan advanced, or for continuing advance, &c., notwithstanding the person claiming such pledge or lien might have had notice that the person with whom such contract or agreement was only an agent. "The Act says that in dealing with any agent in the pledge of property, you "may safely consider him as owner, if you are acting *bonâ fide*, though you "know he is the agent, and you are not bound to ask for his authority. It is "the usual course of business to take for granted that he has authority, and if "you do not know he has not authority, you are perfectly safe: he shall be "deemed the owner of the property, and you may deal with him as such, pro- "vided you are acting *bonâ fide*, though you know he is the agent, you may "deal with him as the owner." The proviso then follows upon which everything turns, and sustains the interpretation above given: "You may therefore treat "any agent whom you know to be so, as owner, in accepting any pledge of "goods from him which you know to have been deposited with or transmitted to "him as agent, if you are acting *bonâ fide* and have not notice that he is "making the contract either *malâ fide* or beyond his authority. It is presumed "it will be in the ordinary course of business."

The observations of the Lord Chancellor upon the three English Statutes considered together apply to our Statute, containing in itself similar provisions, and must necessarily operate against the plaintiff's pretensions, in matter of law, whilst as to matter of fact the defendant is free from *malâ fide*, and was without any notice that could bring him within the exception of the Statute.

The judgment was recorded in the following words:—"The Court having heard the parties by their Counsel, examined the proceedings of Record, and having deliberated thereon, considering that the said goods attached by the plaintiff under process of *revendication*, were, at the seizure thereof, legally in the defendant's possession, and by him legally held in pledge, and under *lien* and *gage* for the repayment to him of advances in money made thereon and by reason thereof, as stated in the pleadings in this cause, and already so adjudged and ordered by a judgment in this cause rendered on the thirtieth day of June last by the said Court; and further considering that, at the date of the said seizure, there was due and owing to the said defendant for the advances aforesaid, and for the necessary expenses of keeping the said goods, and which still remain due to the defendant, a sum exceeding the sum of four hundred pounds, and that neither the said plaintiff nor the said plaintiff *par reprise d'Instance* have repaid any part of said sum, or tendered or offered to repay the same, to the defendant, doth dismiss this action with costs *distraits* to Messrs. Day and Cramp, defendant's attorneys."

Clark vs. Lomer & Clark, et al.

Torrance & Morris, for plaintiffs.

Day & Cramp, for defendant.

(F. W. T.)

Action dismissed.

SUPERIOR COURT.

MONTREAL, 18TH FEBRUARY, 1860.

Coram SMITH, J.

No. 1191.

Browne vs. *Janes*.

TENANT—EXPULSION—INVOCATION OF ACT.

HELD:—That a tenant who owes a quarter's rent can be ejected by virtue of the 18th Vic., ch. 108, sec. 2, § 4, and that in order to institute an action in the Superior Court under the Lessor and Lessee's Act it is not necessary to invoke specially the said Act.

This action was brought in the Superior Court to recover the sum of sixty dollars, being the amount of a quarter's rent due by the defendant, who was in default six days.

The defendant filed an *exception à la forme* on the following grounds:

1. Because there was not between the day of service of writ upon defendant and the day of return thereof 10 days (of which neither the day of service nor the day of return shall be reckoned as one) as is by law required in cases arising in the Superior Court.

2. Because, as the sum of money claimed to be recovered by the action was only $60 with interest, the Superior Court could not take cognizance of the matters at issue, but could only have taken cognizance thereof if the action had been brought under the provisions of the Lessor and Lessee's Act, 18 Vic., chap. 108, and that there was nothing in the plaintiff's writ and declaration to shew that the action was brought in virtue of the said Act.

Browne vs. Janes.

3. The third ground of exception was, that the non-payment of a quarter's rent by a tenant (who was only six days in arrear) was not a legal ground for a rescision of a lease and ejectment.

J. L. Morris, counsel for defendant, contended that this was an exceptional proceeding, and that the said Act, 18 Vic, c. 108, ought to have been specially invoked in order to enable the Superior Court to take cognizance summarily of the matters at issue.

The question arising out of the two first grounds of exception was as to whether, in bringing actions in the Superior Court under the Lessor and Lessee's Act, it was essential that the said Act should be specially invoked.

In arguing the point arising out of the third ground of exception, as to whether a tenant could be ejected because in arrear six days for one quarter's rent, Mr. *Morris* cited the case of *Healy* vs. *Labelle*, 3 L. C. Jurist 45, in which it was held by Judge Badgley, that a tenant cannot be evicted in virtue of the 18th Vic., ch. 108, sec. 2, p. 4, on the ground that he had not paid his rent conformably to the conditions of the lease.

Smith, J.—In giving his decision remarked that, according to the old law, the non-payment of three months' rent was not a sufficient ground for rescision of a lease, but, since the passing of the 18 Vic., ch. 108, the contrary had already been decided by him, though some of the Judges differed from him on this point. The invocation of the Act was not essential to the validity of the proceedings, though it would have been more regular seeing the law gave two modes of proceeding.

The exception was dismissed with costs.

D. Browne, for plaintiff.

J. L. Morris, for defendant.

(J. L. M.)

COUR SUPERIEURE.

MONTREAL, 31 OCTOBRE 1859.

Coram Monk, J.

No. 1496.

F. Fillion et al., vs. *Joseph Binette*.

TEMOINS NECESSAIRES.

Jugé :—Que le parent cousin-germain peut-être entendu comme témoin pour établir des actes d'héritier. Ces actes ayant ordinairement lieu dans l'intérieur des familles et en présence des parents seuls, les parents sont en quelque sorte témoins nécessaires.

Le demandeur ayant produit Joseph Legault comme témoin ; qui déclarait sur voir-dire, que feue Françoise Legault, mère des demandeurs était sa sœur ; les demandeurs objectaient à l'audition du témoin parcequ'il était allié aux demandeurs au degré prohibé par la loi.

En réponse à l'objection, le défendeur déclarait qu'il entendait prouver par le témoin, des actes d'héritier faits par les demandeurs après le décès de leur

père, consistant en ventes de meubles de ménage et effets mobiliers de la succession de leur père et que les actes ayant eu lieu dans l'intérieur de la famille et entre des membres de la famille du dit feu Antoine Filion, le témoin était nécessaire et était le seul témoin de tels faits.

F. Fillion, et al., vs. Joseph Bluette.

Le 8 octobre, Son Honneur le Juge BERTHELOT, siégeant à l'enquête, a maintenu l'objection et décida que le témoin était incompétent.

Sur motion, par le défendeur, ayant pour objet de faire reviser et renverser la décision rendue, le jugement rendu aux séances d'enquête a été renversé.

MONK, J.—La motion est accordée.

Cherrier, Dorion & Dorion, pour les demandeurs.

R. & G. Laflamme, pour le défendeur.

(R.L.)

COUR SUPERIEURE.

MONTREAL, 31 DECEMBRE 1859.

No. 407.

Coram MONK, J.

Thurber vs. *Pilon.*

JUGE,—Qu'un associé n'a pas d'action d'assumpsit contre son ci-devant co-associé, pour dettes prétendues être dues ou argent retiré des fonds social, lorsqu'il y a eu dissolution de société entr'eux; dans l'espèce, le transport fait par Pilon ne donne pas droit d'action à ce dernier.

2o. La Cour jugera le mérite de l'action sur l'inscription pour audition sur une première exception péremptoire.

Le 2 décembre 1852, le demandeur et le défendeur contractent une société commerciale, ensemble, sous le nom de Thurber et Pilon, et ce, par moitié entr'eux. La société exista jusqu'en juin 1855. Le premier juin 1855, la société fut dissoute par acte notarié. Thurber s'obligeait de payer les créanciers de la société et restait seul propriétaire des fonds de la société. Pilon céda à Thurber tous ses droits, titres et intérêts dans la société, et autorisait Thurber de poursuivre, de collecter et de recouvrer, soit au nom de la société, soit en son propre nom, toutes dettes, propriété et effets appartenant à la société. Dans sa déclaration, le demandeur allègue: que Pilon est endetté envers la société en une somme de £1251, pour argents perçus dont il n'a pas rendu compte ou argents qu'il s'est appropriés pour acheter des propriétés, ou qu'il n'a pas entrés dans les livres de la société, ou dont il n'a pas encore rendu compte.

Les conclusions de l'action sont à l'effet de demander une condamnation pure personnelle contre le défendeur.

Le défendeur a plaidé: 1o. Une exception péremptoire dans laquelle il allègue: que par l'acte de dissolution de société du 1er juin 1855, Thurber s'est obligé de supporter les pertes de la société, indemniser et décharger Pilon (and save harmless the said Pilon) des dettes dues par la société aux créanciers d'icelle et aussi de toutes autres réclamations quelconques; que le demandeur ne peut poursuivre Pilon sans demander la nullité de cet acte de dissolution, et que l'action devait être l'action *pro socio* pour forcer Pilon à rendre compte.

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2o. Une autre exception péremptoire répétant les mêmes moyens, et de plus que Pilon ne devait pas ce qui lui était demandé.

3o. Une défense au fonds en fait.

Le demandeur répondit en droit à la première exception, mais cette réponse fut rejetée. Et de plus, il dit que par le transport à lui fait par l'acte de dissolution, il a droit d'action contre Pilon, comme cessionnaire de ce dernier. Le défendeur inscrivit la cause pour audition au mérite sur l'exception en premier lieu plaidée par le défendeur, et cela de consentement.

Per Curiam.—Le demandeur n'a reçu aucune cession du défendeur et celui-ci ne lui a fait aucun transport de droits contre lui. Le demandeur devait demander à ce que les parties fussent remises dans le même et semblable état qu'elles étaient avant l'acte de dissolution. Le demandeur ne peut exiger du défendeur les sommes qu'il réclame de la manière qu'il le fait par son action. Par la déclaration le demandeur se plaint que le défendeur ne lui a pas rendu compte, alors il faudrait une action à l'effet de lui faire rendre compte.

L. V. Sicotte, pour le demandeur. Action déboutée.

Ouimet & Morin, pour le défendeur.

(G.O.)

NOTE.—Pendant le délibéré, il fut signalé que la cause n'étant inscrite pour audition au mérite, que sur la première exception péremptoire, le jugement ne pouvait être rendu, car il fallait inscrire la cause sur le tout; mais la Cour a considéré l'inscription valable, telle que faite.

COURT OF QUEEN'S BENCH.

IN APPEAL.

FROM THE SUPERIOR COURT, DISTRICT OF MONTREAL.

MONTREAL, 5TH DECEMBER, 1859.

Coram Sir L. H. LA FONTAINE, Bart., C. J., DUVAL, J., MEREDITH, J., GUY, J. *ad hoc.*

No. 53.

RYAN et al., (*Plaintiffs in the Court below,*) APPELLANTS.

AND

THE MONTREAL and CHAMPLAIN R. R. Co., (*Tiers saisis in the Court below,*) RESPONDENTS.

HELD:—That the Secretary and accountant of "The Montreal and Champlain Rail Road Company" have no power to accept drafts on behalf of the Company, and consequently, that the moneys covered by such drafts may be legally attached by process of *saisie-arret*, notwithstanding such acceptance by such unauthorized officers.

This was an appeal from the judgment rendered by the Superior Court at Montreal, on the 27th day of March, 1858, reported at page 203 of the 2nd vol. of the L. C. Jurist.

DUVAL, J.—This case will be easily understood by the written admissions signed by the parties, which are in the following words:—

"The parties plaintiffs and *tiers-saisis* respectively admit, that the defen-"dant was a salaried clerk in the employ of the said Company *tiers-saisis*;

"that at the time of the service of the writ of attachment in this cause on "the said company, there was an amount of thirty-six pounds six shillings and "nine pence currency of such salary still in the hands of said company, but "that William A. Merry, Esquire, the secretary of said company, had in his "possession the draft for twenty-five pounds currency hereunto annexed, and "which the said William A. Merry, as such secretary, had in the month of "June last verbally agreed to pay to the payee thereof, and that the accountant "of the said company had also in his hands the draft for three pounds fifteen "shillings and ten pence currency hereunto annexed, which the said accountant "had also previous to the service of the said writ, verbally agreed should be "paid to the payee thereof. And that after the said attachment was so served, "the said company paid over the amounts of the said two drafts to the said "payees thereof respectively."

It will be observed that the admissions say it was *verbally* agreed. Here lies the whole difficulty. The question is this: could the secretary or accountant, by law, bind the company by a verbal acceptance or agreement? Such a proposition would be monstrous. Moreover, the mode of binding the company to pay a note or bill is especially provided by statute, and the course there pointed out has not been followed in the present case. The judgment of the Court below must therefore be reversed. The following is the judgment of the Court:—

"Considering that it appears by the admissions in this cause fyled, that the de- "fendant in the Court below was a salaried clerk, in the employ of the respondent, "*Tiers Saisis*, in the Court below, and that at the time of the service of the writ "of attachment in this cause, on the said respondent, there was an amount of "thirty-six pounds six shillings and nine pence of the said defendant's salary in "the hands of the said respondent, and that William A. Merry, Esquire, the "secretary of the said respondent, had in his possession a draft for twenty-five "pounds currency mentioned in the said admissions, and which draft the said "William A. Merry, as such secretary, had in the month of June prior to the "said service of the said writ of attachment upon the said respondent ver- "bally agreed to pay to the payee of the said draft; and that the accountant "of the said respondent had also in his hands the draft for three pounds fifteen "shillings and ten pence, also mentioned in the said admissions, which the "said accountant had also, previous to the service of the said writ, verbally, "agreed should be paid to the payee thereof, and that after the said attach- "ment was so served, that the said respondent paid over the amounts of the "said two drafts to the said payees thereof respectively; and, considering that "it does not appear that the said officers of the said company respondent had "any power to accept the said draft on account of the said company res- "pondent, and that the said company respondent, after the service of the said "writ of attachment, was not justifiable in paying over the amounts of the "said drafts to the said payees thereof, as aforesaid, and therefore that there is "error in the judgment of the Court below, which gives the respondent credit "to the prejudice of the appellants for the amount of the said two drafts so "paid as aforesaid; doth in consequence reverse and set aside the said Judg-

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"ment, to wit, the judgment rendered in this cause by the Superior Court at "Montreal, on the 27th day of March, 1858, with costs of this Court in favour "of the appellants and against the respondent; and this Court, proceeding to "render the Judgment which the Court below ought to have made and rendered "in the premises, doth condemn the respondent to pay to the appellants the "sum of thirty-six pounds six shillings and nine pence currency, with interest "from the 31st day of December, 1847, the date of the contestation by the ap-"pellants of the declaration made in this cause by the said respondent as *Tiers* "*Saisi*, and the Court doth condemn the respondent to pay to the appellants "their costs in the Court below on the said contestation. And it is ordered "that the record be remitted to the Superior Court sitting at Montreal."

Judgment of the Court below reversed.

Bethune & Dunkin, for appellants.
Rose & Monk, for respondent.
(S. B.)

CIRCUIT COURT.

MONTREAL, 12TH DECEMBER, 1859.

Coram BERTHELOT, J.

No. 3319.

Harris & al vs. *Edmonstone* & al.

CARRIER—LIABILITY.

HELD:—That the clause in a Bill of Lading that Carrier is "not liable for leakage, breakage and rust," does not relieve the Carrier from liability arising from negligence.

This was an action to recover of the defendants, owners of the Steamer "Indian," damages which the plaintiffs, merchants at Toronto, had suffered by the breakage of an Iron Boiler, lined with enamel, and intended for the boiling of acids, which had been imported in October, 1857, under a Bill of Lading signed at Liverpool, undertaking to deliver at Montreal.

The defendants set up various grounds of defence in their pleas, alleging among other things that if the boiler were broken, it was not by their negligence, but from causes and accidents for which they were not liable; that they took all proper care, and used all proper diligence, but the main reason set up by them was that by the express agreement alleged to be contained in the Bill of Lading, they were not bound for breakage.

The Bill of Lading contained among other things the following clause, "not liable for leakage, breakage and rust."

The facts as developed in the evidence were, that the boiler in question was landed in Montreal in a damaged condition from on board a barge of the defendants into which they had themselves transhipped it. On being landed on the wharf, the attention of the master of the barge was called by the party acting for the plaintiffs' shipping agents to the fact that a piece of the exit pipe was broken off, and thereupon he brought the broken piece from the barge,

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stating that he had received it broken from the ship. On after examination, when the cover of the boiler was taken off, the enamel inside was found to be broken on the inside, apparently from the effects of a heavy blow upon the outside of the boiler, so that it was rendered totally useless for the purpose for which it was intended; and being sold at auction after the usual proceedings, it brought a mere trifle.

Evidence having been adduced on the part of the plaintiffs, the defendants not adducing any evidence, the parties were heard, and judgment was rendered on the 12th day of December, 1859, maintaining plaintiffs' action.

The following is the substance of the remarks of the learned Judge who gave Judgment.

Action pour £21 13s. 9d., balance de la valeur *of a boiler*, que les demandeurs, comme *common carriers*, se sont chargés de transporter de Liverpool à Montréal, en vertu d'un connaissement ou *bill of lading*, contenant l'exception suivante, "not answerable, for leakage, breakage or rust."

L'objet en question, *the boiler*, est arrivé cassé à Montréal, sans qu'il paraisse comment.

Les défendeurs ont plaidés qu'ils devaient être absous de la demande, en vertu de l'exception susdite, contenue dans le *bill of lading*, et se reposant entièrement sur ce, ils se sont abstenus de faire aucune preuve pour montrer qu'on ne pouvait leur imputer aucune négligence, dans le transport de la chose.

Les demandeurs ayant fait faire l'examen de l'état du *boiler* en la manière ordinaire, il a été constaté qu'il était impropre à l'usage auquel il était destiné, et la vente en ayant été faite en la manière ordinaire, les demandeurs poursuivent pour la balance. La preuve du demandeur est complète quant à la valeur de la chose, et l'état et condition dans lequel elle a été livrée par les défendeurs.

Ces derniers ne sont pas exempts de responsabilité dans le cas actuel, nonobstant l'exception contenue au *bill of lading*.

Le commissionnaire ne peut stipuler qu'il ne répondra pas de sa faute, ou de ce que la loi suppose être sa faute.

Il n'y aurait que le cas de force majeure qui pourrait faire absoudre les défendeurs.

Ils auraient dû prouver ou au moins essayer de prouver que la boîte contenant l'objet avait été transportée et déchargée avec tout le soin convenable.

Si le dommage eut été occasionné par l'eau ou par un feu, il serait facile de supposer que ça n'a pas été par négligence des défendeurs, mais il en est autrement dans le cas actuel.

Autorités,—Pardessus, vol. 2, p. 542.

Angell, common carrier assimilated to an insurer.

§154. To prevent litigation, the law presumes against a carrier in every case, except such act as could not happen by the intervention of human means.

§156. The law presumes against the carrier, unless he shows *the injury could not happen by the intervention of man.*

§239. Common carriers cannot limit their liability, or evade the consequences of a breach of their legal duties as such, by an *express agreement*. And where common carriers, on receiving goods for transportation, gave the owner a me-

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morandum, by which they promised to forward the goods to their place of destination, "danger of *fire*, &c., excepted," they were liable for a loss by fire, though not resulting from negligence.

§267. It cannot be supposed, that the person sending goods, and the carrier who is to convey them, intended to enter into a contract for the letting and hiring of labour and care, and agreed, at the same time, to dispense with the exercise of such labour and care.

Cette autorité corrobore celle de Pardessus.*

Judgment for plaintiffs for the full amount claimed and costs.

Cross & Bancroft, for plaintiffs.

Rose & Ritchie, for defendants.

(H.B.)

COURT OF QUEEN'S BENCH.

IN APPEAL.

FROM THE SUPERIOR COURT, DISTRICT OF ST. FRANCIS.

MONTREAL, 7TH MAY, 1856.

Coram Sir L. H. LAFONTAINE, Bart., C. J., AYLWIN, J., DUVAL, J.

No. 16.

RICHARD, (*Defendant in the Circuit Court,*)
APPELLANT;

AND

DENISON, (*Plaintiff in the Circuit Court,*)
RESPONDENT.

HELD:—That the litigant parties to a suit cannot, after return of cause into Court, by consent change the nature of the action so as to render the action one of an entirely different character from that originally instituted.

This was an action originally brought in the Circuit Court at Richmond, by Denison against Richard, based upon a contract *sous seing privé* in the following terms:

"Know all men by those presents, that I, Peter Richard of the Township of "Shipton, County of Sherbrooke and District of St. Francis and Province of "Canada, miller, do hereby remise, release and quit claim unto Simeon M. "Denison of the Township of Shipton and Province aforesaid, farmer, all my "right and title, whatsoever, of a mill and mill privilege and all other immo- "vable property, whatsoever, lying, being and situated on lot No. 23 in the

* Plaintiffs' Attorney cited in addition Flanders, on Shipping, Sec. 457 to 462. Story on Bailments, sec. 549. Hart vs. Jones, Stuart's Reports, p. 589. Samuel vs. Edmonstone et al, Jurist 1 Vol., p. 89. Huston vs. Grand Trunk Railway Company, Jurist 3 Vol. 269.

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"8th Range of lots in the said township of Shipton, and that I the said Peter "Richard in and for the consideration of the sum of seven pounds and ten shil- "ings Halifax currency, already received in rent for property rented of said "Simeon M. Denison, do hereby remise, release and quit claim all right and "title whatsoever to all that property above described unto the said Simeon M. "Denison, his heirs and successors henceforth for ever. In witness whereof, I "hereunto make my mark in the presence of the undersigned witnesses. Thus "done at Shipton, this 22nd day of June, 1852."

(Signed,) PIERRE his + mark RICHARD.

SIMON M. DENISON.

(Signed,) WILLIAM R. PHILBRICK,
" DAVID his + mark GRAMMO,
Witnesses.

The *demande* was for possession of the mill and mill privilege and in default of giving possession to pay fifteen pounds damages.

The defendant Richard before pleading evoked the cause to the Superior Court at Sherbrooke, as involving questions of title to lands. After the evocation, Denison was advised that, inasmuch as he was proprietor of the mill and mill privilege by virtue of unquestionable titles, and as it was of far greater value than the damages claimed by his action, as brought, his rights might be seriously prejudiced by persisting in the action, unless it were in reality a petitory action, founded upon his titles. Consequently the following consent was made by the litigant parties:

"We hereby consent that the declaration *de novo* to be filed in this cause, be "grounded upon the plaintiff's (Denison's) titles as absolute proprietor of the "land, the possession of which, is sought to be recovered in this cause, without "reference to the declaration filed in the Circuit Court, and that the action be, "in fact, treated by the Superior Court as an action *pétitoire*.

SHERBROOKE, 6th July, 1853.

(Signed,) WILLIAM VONDENVELDEN,
Defendant's Attorney.

J. S. SANBORN,
Counsel for Denison."

Pursuant to this consent a new declaration *au pétitoire* was filed by Denison, and issue joined upon it, and proof had. Denison established his title to the immovable in question, and the following judgment was rendered at Sherbrooke in the Superior Court, on the twenty-seventh day of January, 1854, by the Honorable Judges Day, Short and Caron.

"The Court having examined the Declaration of Simeon Minor Denison, and "the Incidental Demand of Pierre N. J. Richard, and the documents, proceed- "ings, pleadings and evidence of record, and heard the parties by their Counsel "respectively, and upon the whole deliberated, considering that the said Simeon "Minor Denison has fully proved the material allegations in his said declaration

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"set forth, and that he is the lawful owner and proprietor of a certain Mill privilege, consisting of five acres of land, with a Mill, Dwelling House and Stable "thereon erected, situated upon and forming part of Lot No. Twenty-three, in "the eighth range of Lots in the said Township of Shipton, bounded on the "North, South and West respectively, by lands owned and occupied by the said "Simeon Minor Denison, in the said Township of Shipton, and on the East by "lands of the Honorable Sir James Stuart, Baronet, and that the said Pierre N. "J. Richard is in the possession of the same, and unjustly withholds the same "from the said Simeon Minor Denison, doth in consequence adjudge and con- "demn the said Pierre N. J. Richard to desist from, quit and abandon the pos- "session and occupation of the said Mill, Mill Privilege, House, Stable, Land "and Premises aforesaid, and every part thereof, and to restore and deliver the "same to the said Simeon Minor Denison, and to pay to the said Simeon Minor "Denison, the sum of seven pounds, ten shillings currency, as and for the rents, "issues and profits thereon, with interest thereon from this day, and costs of suit, "distraction of which is granted to W. Brooke, Esquire, Attorney of the said "Simeon Minor Denison, and the Incidental Demand of the said Pierre N. J. "Richard, for want of proof is dismissed, with costs."

From this judgment an appeal was instituted, by Richard to the Queen's Bench. The question as to the power of the parties by consent to change the nature of the original action was not raised in the argument before either Court; but the Court in appeal, upon examining the record, arrived at the conviction that the litigant parties had not such power and *motivéd* their judgment rendered the day first mentioned, in the following terms:

"The Court of our Lady the Queen, now here having heard the parties by "their counsel respectively, examined as well the record and proceedings in the "Court below, as the reasons of appeal filed by the said Appellant, and the "answers thereto, and mature deliberation on the whole being had; seeing that "the action brought by the respondent in the Circuit Court at Richmond was "one suing in damages, for alleged breaches of contract, entered into by the "appellant, with him *sous seing privé*, and was not either possessory or petitory "in its character, and that upon the removal of the record to the Superior "Court at Sherbrooke, pursuant to the evocation set up by the appellant, and "after the allowance of said evocation, by the Superior Court, by the consent of "the two parties litigant, the respondent wholly changed the nature of his "demand and filed a petitory action, founded upon an alleged title, under a "notarial deed of sale, to the certain lot in the Township of Shipton, in dispute "and seeking to obtain restitution of part thereof: Seeing that it was not com- "petent to the parties by their own act, to make such substitution of one action "for another, and that therefore in the judgment rendered in the said Superior "Court in favour of the respondent *au pétitoire* there is error: It is considered "by the Court now here, that the said judgment, to wit, the judgment rendered "by the Superior Court, at Sherbrooke, on the twenty-seventh day of January, "one thousand eight hundred and fifty-four, be and the same is hereby reversed; "and this Court, proceeding to render the judgment which the Superior Court "ought to have rendered, doth hereby set aside and annul and vacate all the

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"proceedings, orders and judgments in this cause taken, made and rendered, "since, from and after the sixth day of July, one thousand eight hundred and "fifty-three, the date of the consent paper entered into between the parties, and "it is hereby adjudged that the record be remitted to the Court below for such "further proceedings, as to law and justice appertain in the premises; And "lastly, seeing that both parties were equally in fault, in coming to such consent, "it is ordered that each party do bear his own costs in this behalf incurred and "laid out."

William Vondenvelden, attorney for appellant.
William Brooke, attorney for respondent.
J. S. Sanborn, counsel for respondent.
(J. S. S.)

SUPERIOR COURT.

MONTREAL, 30TH SEPTEMBER, 1859.

Coram BADGLEY, J.

No. 2159.

Routh et al. vs. *Macpherson.*

HELD:—That an affidavit, to the effect, that the lessee of a vessel to run between Montreal and Upper Canada has incurred liabilities on the vessel at a United States port, that he has become insolvent, *en déconfiture*, and that should he run the boat to Upper Canada she would in due course call at such port in the United States and be in all probability seized there for the payment of such liabilities, is sufficient to sustain an attachment, or *saisie revendication* of the vessel by the lessor.

This was a motion to quash a *saisie revendication* of a certain steamboat and appurtenances, on an affidavit made by one of the plaintiffs, on the 31st of August, 1859, as follows: "That on the twenty-first day of May now last past, by Deed of Lease executed on that day before Gibb and his colleague, Notaries Public, * * * (The plaintiffs above named) in their capacity of Trustees of the estate of the late firm of Hooker, Jsques and Company, of Montreal aforesaid, forwarding merchants, composed of Alfred Hooker, of * * * granted, let and leased to John McPherson, of the said city of Montreal, forwarding merchant, the defendant above named present and accepting, that certain steamboat or vessel formerly known as the "Alps" and then and now called the "Indian," belonging to and registered in the port of Montreal, together with all and singular the boats, sails, ropes, anchors, tackles, apparel, furniture and appurtenances whatsoever to the said vessel belonging or in any wise appertaining, for and during the navigation season of the present year 1859, reckoning say 7 months of the navigation of the said year to be computed on and from the first day of May now last past, the said defendant thereby promising and binding himself to make all repairs which might be necessary to the said vessel and all expenses of outfit. Which said lease was made subject to all and singular the conditions therein mentioned, and for and in consideration of the rent or sum of $1300 currency, during the said season, payable as follows, $433.33 on the 15th day of July, then next ensuing

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and now last past, the like sum on the 15th day of October next, and the remaining sum on the 15th day of December next. That the said defendant is now and for more than the two months now last past has been insolvent, *en déconfiture*, and that on the 23rd day of June last, or thereabouts, the said defendant stopped running the said vessel and laid her up in the said port of Montreal. That during the short period that the said vessel was running in virtue of the said lease the said defendant incurred liabilities for freight charges and fuel to an extent exceeding $600, in respect of which liabilities, or some of them, the said vessel is liable to seizure in the port of Cape Vincent, in the State of New York, one of the United States of America, and at the ports of Gananoque and Toronto in Upper Canada, should she touch at any of the said ports. That the said defendant hath wholly failed to pay the said rent which accrued and became due on the 15th day of July last, and hath generally neglected to comply with the conditions of the said lease. That notwithstanding the premises the said defendant, as deponent hath been credibly informed and verily believes, is immediately about to despatch the said vessel to Upper Canada, and should he do so the said vessel will in all probability touch at the said port of Cape Vincent and the said other ports in Upper Canada, in which case, owing to the fact of the insolvency of the defendant, the said vessel will in all probability be seized and be lost to the plaintiffs in their said capacities who are the owners and proprietors of the said vessel. That by reason of the premises deponent verily believes that without the benefit of a writ of attachment, *saisie revendication*, for the purpose of seizing and attaching the said vessel and her appurtenances, and thereby preventing the departure of the said vessel from the said port of Montreal, the said plaintiffs will lose the same or sustain damage."

The reasons assigned in the motion were: "because it appears by the said affidavit that the said defendant was legally in possession of the said steamboat and all the said appurtenances under a lease from the plaintiffs themselves, and had a right under the said lease to possess and use the said steamboat and appurtenances till the first day of September next. Because no legal cause is set forth or contained in the said affidavit to justify the issuing of the said writ or the seizure thereunder made, there being nothing in the said affidavit to show that the defendant was illegally in possession of the said steamboat and appurtenances at the time of the issuing of the said writ.

PER CURIAM.—It is true, that the defendant here is a holder by title, namely, a notarial lease, but in the affidavit it is stated that the defendant has incurred liabilities on the vessel which render her liable to seizure in a foreign port, in consequence of the insolvency of the defendant. Under the circumstances I think the plaintiffs are entitled to exercise their remedy by way of attachment so as to prevent the possibility of the vessel being so subjected to seizure. The motion to quash must therefore be rejected.

Motion rejected.

Bethune & Dunkin, for plaintiffs.
Abbott & Dorman, for defendant.
(S. B.)

MONTREAL, 30 NOVEMBRE 1859.

Coram BADGLEY, J.

No. 629.

Lavallée et al. vs. *Demontigny.*

JUGÉ :—Que sur une inscription de faux contre un testament solennel, les témoins instrumentaires peuvent être entendus comme témoins, mais que leur témoignage isolé et appuyé d'aucune autre preuve ou présomption, ne suffit pas pour maintenir l'inscription de faux.

Dans cette cause les demandeurs réclamaient du défendeur la part de leur mère décédée dans la communauté qui avait existée entr'elle et le défendeur, son époux survivant.

Le défendeur opposait un testament de la mère des demandeurs qui lui léguait la jouissance de ses biens. Ce testament fait devant un notaire et deux témoins.

Les demandeurs s'inscrivirent en faux contre le testament, prétendant entr'autres moyens de faux, qu'il n'avait pas été dicté et nommé en présence du notaire et des témoins.

A l'enquête, les demand[illegible]oduisirent les témoins instrumentaires, qui tous deux savaient écrire et a[illegible]igné le testament dans lequel il était déclaré formellement qu'il avait [illegible] et nommé en présence du notaire et des témoins.

Objection fut faite à l'audition des témoins comme étant incompétents. Cette objection fut réservée par le juge président aux enquêtes et les témoins étant examinés, déclarèrent tous deux que le testament n'avait pas été dicté et nommé en leur présence et qu'il avait même été rédigé hors de leur connaissance ; que néanmoins lorsque le testament fut lu à la testatrice, elle déclara qu'elle était satisfaite, pourvû que *ses biens retournassent aux enfans qu'elle avait eus avec le défendeur*, disposition qui était contenue dans le testament.

Avec cette preuve, la cause fut soumise pour jugement.

Lors de l'argument, le défendeur n'insista pas sur l'incompétence absolue des témoins instrumentaires, mais prétendit que leur témoignage isolé, appuyé d'aucune autre preuve, ne suffisait pas pour maintenir l'inscription de faux et annuler le testament, et cita plusieurs autorités à cet effet. (1.)

Les demandeurs prétendirent au contraire, que du moment que l'on admettait les témoins instrumentaires à déposer ; foi devait être accordée à leur témoignage et que leur preuve était complète ; que les autorités citées ne s'appliquaient qu'au faux principal et non au faux incident.

(1.) *Nouv Denisart*, Vo. Faux principal, P. 458, No. 10, P. 472. No. 4.
Guyot, Rep. Vo. Témoin, P. 60.
Domat, Lois civiles, Liv. 3, Tit. 6, Sec. 2, No. 7.
Style de Dumont, P. 104.
Danty, P. 104.
Serpillon, Code du faux, P. 430, 434.
Merlin, Rep. Vo. Témoins instrumentaires, § II, No. VIII, P. 73, 74, 75.
Id. Questions de droit, Vo. Témoins instrumentaires, § III, P. 246, 254, 255.
Toullier, Tome 9, No. 311, et suiv.
Carré et Chauveau, procédure civile, Tome 2, P. 428, No. 936.
Meunier et Cardinal, Montréal, C. S. No. 454.

Lavallée et al., vs. Demontigny.

Les prétentions du défendeur furent maintenues par la cour dont le jugement est motivé comme suit:

"The Court, &c., considering that tho plaintiffs have not established their "*moyens de faux* by them filed in this canse against the last will and testament "of the late Dame Marthe Godon executed before Filiatrault Notary and wit- "nesses, dated the 19th day of July, 1854, in the said *moyens de faux* mentioned, "doth set aside and dismiss the said *moyens de faux*, and doth also reject the "said *Inscription de faux* of the said plaintiffs, with costs.

Loranger et Frères, avocats des demandeurs en faux.

Cherrier, Dorion et Dorion, avocats du défendeur en faux.

(V.P.W.D.)

MONTREAL, 3RD FEBRUARY, 1860.

IN CHAMBERS.

Coram MONK, J.

No. 1047.

Tremain vs. *Sansum.*

PETITION TO QUASH CAPIAS.

HELD:—1. That fraudulent preferences to creditors by a defendant, after his insolvency, do not amount to "secretion," and therefore form no ground for Capias. 2nd. That the defendant's intention to go to Boston, and the fraudulent preferences he had shewn to his other creditors, and his treatment of the plaintiff's agent when he called upon him to make an assignment, by telling him not to bother him, were circumstances sufficiently strong to shew that his intention was to defraud the plaintiff.

The plaintiff's affidavit, upon which the writ issued, set up five allegations; —1st. That the defendant, in contemplation of bankruptcy, had, on the 23rd November, 1859, given a bill of sale of a large quantity of coals, forming part of his estate, to A. J. Maxham. 2nd. That at the meetings of his creditors, on the 5th and 6th days of December last, and afterwards, he refused to exhibit his books. 3rd. That on the 3rd of December last, he endeavoured to obtain a judgment of *separation de biens* on behalf of his wife. 4th. That on 28th Nov. last, Henry Chapman, one of his creditors, had issued a *saisie-arrêt* before judgment against the defendant. And, 5th. That the plaintiff was lately informed, by Samuel Senior, that the defendant was about leaving for Boston, in the United States, where he had procured a situation.

The defendant, by Petition, specially denied the truth of these allegations, with the exception of the first, viz., the bill of sale to Maxham, which he held was untrue as regards the plaintiff's statement of its being tainted by fraud.

Popham for Petitioner. The plaintiff has, in his affidavit, set up five grounds. The first is the bill of sale to Maxham. By *enquête* it is proved that this was not a bill of sale, but in reality a transfer of a less for a larger quantity of coals, which Maxham had alleged he had consigned to the defendant; and one of the defendant's creditors, and the defendant's book-keeper—both of whom were present when this bill of sale or transfer was given—declare it was given with

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their advice; and they prove that it increased instead of lessened the defendant's estate. The second allegation is met by evidence that at the meetings of the defendant's creditors those who were present were unanimously satisfied with his statement, with one exception, and that could not obtain a seconder to a motion for an examination of his books. And, further, it is proved that on the 28th December, the defendant, *in writing*, offered to make an assignment of his books and estate. The third allegation has been held by the Court to be no ground for capias. The fourth is valueless, as Mr. Chapman's grounds for making that affidavit have not been proved; and any presumption of its value is destroyed by the proven fact that, although the claim on which it issued is still unpaid, the action was never returned into Court, although considerable property had been seized. The fifth, as to the alleged information of Senior, that defendant was going to Boston: this point must also fall. The defendant examined Mr. Senior. He declares the statement in the affidavit "*to be a perversion*" of what he did say. He states that he never told Mr. Kerr (the plaintiff's agent, and who made the affidavit in question) that the defendant *was* going to Boston, but simply that he had *heard* from the defendant's clerk that he was applying for a situation vacant in Boston. The capias must stand or fall upon its own foundation. The plaintiff has limited his ground for his belief that the defendant was about to abscond upon the testimony of Senior alone. Now Senior's testimony conclusively destroys that foundation. In the first place, his evidence contradicts the statement of Kerr in his affidavit; and in the second, what he does say he said, simply amounts to *hearsay*, which is legally valueless, and which took place *two or three weeks previous* to the issuing of the capias! In addition to this, the defendant has brought evidence to show that he applied by letter, about the 16th of December last, for a situation of Canadian Agent for a Boston house, at the recommendation of some of his principal creditors; but that that situation was filled at the time of his application, and communicated to the defendant, and known to these recommending creditors a *fortnight before* this capias issued. This additional testimony, although legally inadmissible, as the sole ground upon which the plaintiff believed the defendant was about to abscond, must be considered as struck out of the affidavit by the evidence of Senior himself,—may, however, be taken *de bene esse*.

Carter, for plaintiff:—The transfer to Maxham was clearly in fraud of the defendant's creditors. The defendant's wife applying for an action of separation; the defendant's return of coals to Chapman which he had purchased from him; his failure to exhibit his books of a balance-sheet at the meeting with his creditors, and to account for his losses; his payment of two notes to a creditor named Martin,—are circumstances which, when taken together—and when it is remembered that they all occurred at the time of his bankruptcy, and within a few days of each other—go to show that the defendant's intention in these cases was a fraudulent one. A fraudulent preference constituted in law "secretion." If the preferences charged against the defendant are not in fraud of his other creditors, the *onus probandi* rested on him to prove it. It was clear that the defendant did intend going to the United States to procure his situation.

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It is proved that the plaintiff was informed of that fact, and there is no proof that he knew otherwise.

Stuart, for petitioner:—The statute under which the present capias issued permits arrest in two cases: first, where a party has "*secreted*" his estate with intent to defraud; and, secondly, where he is about to abscond with that intent. There are, therefore, two questions simply to be considered in the disposal of this case. First, whether these preferences, alleged to have been given by the defendant to some of his creditors, are fraudulent; and, if so, whether fraudulent conveyances are to be considered "secreting." And, secondly, whether it has been proved that the defendant was about to abscond with intent to defraud. As to the first question, he contended that preferences given to creditors could not be held to be fraudulent by the mere affidavit of the arresting creditor, but only by a formal judgment of a Court of Justice. That preferences proven to be fraudulent did not constitute "secretion," and therefore could not give right to a capias. Nor could it be supposed that the Legislature contemplated fraudulent conveyances under the head of "secretion," as the law otherwise provided a remedy than by capias.

As to the allegation of the defendant's intention to abscond, the proof in the record of his application for the situation in the United States at the recommendation of his principal creditors,—of the refusal of that situation a fortnight before the issuing of the capias, and of the "hearsay" testimony upon which the plaintiff's proof of this fact solely rests,—renders it unsusceptible of a moment's argument.

MONK, J.—The plaintiff's grounds for alleging that the defendant had secreted his estate, at most amount to fraudulent preferences. In consultation with my brother Judges, we are unanimous in opinion that fraudulent preferences do not constitute "secretion"; and, therefore, a capias would not lie upon these grounds. But upon the point of the defendant's intention to abscond, I am of opinion that the circumstances disclosed by this case warrant the belief that the plaintiff had sufficient reason for believing that the defendant was about to abscond. The defendant has himself proved his intention to go to Boston; and the fraudulent preferences he has shewn to his other creditors, and his treatment of the plaintiff's agent when he called upon him to make an assignment, by telling him not to bother him, were circumstances sufficiently strong to shew that his intention was to defraud the plaintiff.*

Petition rejected with costs.

Popham, for petitioner.
Stuart, counsel for do.
Carter, for plaintiff.
(J. P.)

* A motion to revise the above judgment, and a motion to quash, was subsequently made in this case; but the parties settled on the day fixed for the hearing of these motions.

IN APPEAL.

FROM THE SUPERIOR COURT, DISTRICT OF MONTREAL.

MONTREAL, 7TH JUNE, 1859.

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

No.

MERCILLE (*Plaintiff in the Court below*),

APPELLANT;

AND

FOCRNIER *et vir.* (*Defendants in the Court below*),

RESPONDENTS.

Held:—In an action on two notarial obligations signed by a wife *separée de biens* in which she acknowledges herself personally indebted to the plaintiff, that it is competent for her to plead, and prove by verbal testimony, that the statement of personal indebtedness contained in the obligation is false, and that, on the contrary, it was the husband who was really indebted, and that she was merely his security, on the ground that such contracts are in fraud of the law of the land.

This was an appeal from the judgment of the Superior Court, rendered at Montreal on the 30th of April, 1858, and reported at page 205 of the 2nd vol. of the Lower Canada Jurist.

The judgment of the Court below was confirmed, Mr. Justice Duval dissenting.

LAFONTAINE, Ch. J.—I concur in the judgment rendered by the Hon. Mr. Justice Smith, except as to the first obligation, as it appears that the respondent really received the value thereof from the appellant and applied it to the payment of her own debts.

DUVAL, J.—I dissent from the judgment which is about to be pronounced. It is evident that the respondent is in bad faith. According to the evidence so far she received full value for the first obligation, and there is no reason to suppose that her contestation of the second obligation is at all better founded than that of the first. Under the circumstances, therefore, I cannot consent to re-open an *enquête* which, in all probability, will result in nothing.

AYLWIN, J., regarded the law in question as one of the highest importance, and considered that every attempt to avoid its operation and effect was a fraud, which was susceptible of proof by oral testimony; otherwise it would be useless for the Legislature to make laws of that description, if, to avoid them, it were sufficient to cover up the fraud by executing a notarial instrument. In the present case there were abundant indications of fraud, such as the purchase of the wood by the husband himself, and, although the appellant pretends that this was done for the wife, yet he describes the husband as a "*marchand de bois*," and gives no quality of trader whatever to the respondent.

MEREDITH, J.—I am of opinion that the judgment of the Court below in this case ought to be confirmed.

The registry ordinance expressly declares "that it shall not be lawful for any "married woman to become security or responsible or incur any liability what-

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" ever, in any other capacity, or otherwise, than as *commune en biens* with her " husband, for the debts, contracts or obligations, which may have been con- " tracted or entered into by her husband, &c., also " that all suretyships, con- " tracts and obligations made or entered into by any married woman * * * * " in violation of this enactment shall be absolutely null and void to all intents " and purposes whatsoever; " now it would be most unreasonable to hold that parties wishing to violate this important provision of law, which was evidently framed from motives of public policy, could do so safely and effectually, simply by having their illegal conventions executed in the shape of a notarial instrument. This subject is discussed at some length by Chardon (Vol. 2, p. 45,) and the opinion of that author is " que tous genres de preuves, conséquemment " celles vocales sont admissibles............quand il s'agit de la violation fraudu- " leuse d'une prohibition d'ordre public." *

The general rule of the English law, as every one is aware, is that " parol " contemporaneous evidence is inadmissible to contradict or vary the terms of " a valid written instrument." † But that rule is not deemed to be violated by the admitting of parol evidence showing that the instrument is altogether void by reason of the " *illegality of the subject matter*," ‡ and according to the English law " Parol evidence may be offered to show that the contract was made " for the *furtherance of objects forbidden by law*." ||

I am also of opinion that in this case parol evidence may be adduced to prove the fraud of which the defendant complains; although I am not prepared to adopt without reserve the *considérant* of the Judgment of the Court below in this respect. According to that judgment verbal evidence is admissible " in all " cases of fraud either of the law or of the parties complaining of the fraud."

The line of demarcation between those cases of fraud in which verbal evidence is admissible, and those in which it should be excluded, seems to me to be clearly and accurately drawn by Chardon : " Les diverses manières dont le dol influe " sur les relations d'intérêts entre les personnes se reduisent a deux principales ; " l'une consiste en moyens secrets, qui *dans le moment même* du traité trompent " celui qui doit en être la dupe ; l'autre n'a rien de mystérieux *à l'instant* où " *se forme la convention*, et se borne à des promesses qui ne trompent celui qui " s'en contente que lorsqu'il en reclame l'exécution ; "—Chardon Vol. 2, p. 158, and at page 162 the same author continues thus " Ainsi lorsqu'une partie argue " de dol une convention, on doit examiner s'il a été en son pouvoir lors du traité " de se prémunir contre ce dol ; si elle a pu le prévoir et demander la preuve " écrite des promesses qu'elle articule, la preuve vocale doit lui être refusé....... " si les faits au contraire tendent à prouver qu'un des contractans a été induit " en erreur lors de la negotiation du traité, et n'y a consenti que par suite de sa " [illegible] on lui doit de l'admettre à le prouver par témoins. §

* See also same author Chardon, Vol. 2, p. 53, No. 22.

† Greenleaf, Vol. 1, No. 275.

‡ Greenleaf, 1 Vol. No. 248.

|| Same Vol. and No. and see numerous cases cited there.

§ See also Nouveau Denz. Vol. 9, p. 71. Pothier, obligations No. 799. Story Eq. Jur. Vol. 1, p. 171, No. 154.

See also Merlin Verbo, Preuve, Vol. 24, p. 450, cor. 1, Sect. 2. S. iii., Art. 1.

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The above reasoning suffices to show that fraud cannot in all cases be proved by parol evidence; but I nevertheless think that even according to the principles laid down by Chardon, parol evidence ought not to be excluded in the present case, because the defendant Edesse Fournier, in executing the obligations in question must be presumed to have acted under the influence of her husband, the other defendant, and therefore is not to be deemed blameable, and ought not to be allowed to suffer, for any untrue statement that may be made in the obligations respecting the consideration for which they were given.

For these reasons I think that the Judgment of the Court below admitting parol evidence must be confirmed.

Judgment of Court below confirmed.

L. Bétournay, for appellant.
J. Papin, counsel.
F. P. Pominville, for respondent.
H. Stuart, counsel.
(S.B.)

SUPERIOR COURT.

SHERBROOKE, 27TH JANUARY, 1854.

Coram DAY, J., SHORT, J., CARON, J.

No. 588.

Elwin v. *Royston.*

HELD:—That possession of a parcel of land acquired for a mill site, and once formally delivered, is not lost, and an adverse possession is not acquired, by such parcel of lands not being separated from the farm from which it is taken, and that a *trouble* in the possession dates from the time it is sought to appropriate it to such purpose as would deprive the purchaser of using it for the purposes for which it was acquired.

This was an action *en reintégrande* by the plaintiff to be reinstated in the possession of a parcel of land, three acres, for a mill site, which had been acquired by him of one Reed some eighteen years prior to the alleged *troubles*, and which had been delivered to plaintiff by Reed marking certain trees inclosing it. The parcel of land had never been separated from Reed's farm, and his cattle had pastured upon it in common with the rest of his pasture for eighteen years. The plaintiff having another mill site on the same stream upon which a mill was erected purchased this mill privilege to prevent a rival mill being built thereon. Plaintiff had never paid a balance of the purchase money for said mill site, and Reed, regarding himself in possession of it, conveyed it to the defendant Royston, who commenced to build a dam and erect a mill thereon. The plaintiff assuming this act to be a *trouble* of his possession instituted this action to have the possession restored to him.

CARON, J.—This is an action *de reintégrande* with the ordinary conclusions for the recovery of three acres of land including mill privilege. Defendant denies plaintiff's possession of a year and a day, and sets up no right of possession himself. The points for plaintiff to establish, are,—1st. His possession of a year and a day. 2nd. The dispossession of defendant. To establish possession plaintiff produces title from one Reed passed some nineteen years ago and proves

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that when said deed was passed Reed gave plaintiff possession by spotting some trees to denote the line. The land was bought for a mill privilege and plaintiff never fenced it out from Reed's lot. It has since remained without plaintiff's ever having given up possession. Reed indicates that he so viewed the matter by protesting Elwin the plaintiff after the institution of this action for non-performance of conditions of sale. The Court considers that plaintiff had all the possession of these three acres of which the nature of the property was susceptible. As he acquired it for a mill privilege, so long as he was not troubled in the possession of it as such, the fact of its being inclosed in Reed's land and his cattle being allowed to run upon it, cannot be regarded as an adverse possession by Reed. The evidence of plaintiff substantiates the fact that plaintiff has been reputed the owner of said three acres and privilege and of his having done several acts of possession at different times and recently. The Court considers that the defendant took possession of it to build a dam, the very purpose for which plaintiff acquired it. Judgment go for plaintiff to deliver up the land, and pay nominal damages, twenty shillings and costs.

J. S. Sanborn, for plaintiff. Judgment for plaintiff.
W. Brooke, for defendant.
W. G. Mack, counsel for defendant.
(J.S.S.)

MONTREAL, 30TH NOVEMBER, 1859.

Coram BERTHELOT, J.

No. 2419.

The Montreal City and District Building Society vs. *Kerfut et al.*

HELD:—1. That *abstention* from intermeddling with the affairs of a succession in the direct line does not discharge the heirs of succession from the *poursuite* of a creditor. But an *acte de renonciation* is required to exonerate them.
2. That the action against an heir, who had not renounced, but who appears and pleads a *renonciation* made after action brought, will be dismissed as to him, but with costs against him.
3. That a *renonciation* made before hearing on the merits is in time to discharge the heirs renouncing.

This action was brought by the Montreal City and District Building Society, who claimed from the defendants, viz.: the widow *commune en biens* and the heirs of the late William Kerfut, the amount of two certain obligations granted in the favour of the society by said Kerfut who had deceased, leaving a widow surviving him, and the defendants as his representatives.

The widow made default, but the heirs appeared and severed in their defense. The defendants, Fairbairn and wife, pleaded that they had not intermeddled with the estate, but subsequently fyled an act of *renonciation*. The defendant, W. Kerfut, pleaded an act of *renonciation* made after action brought. The defendant Philbin in his own capacity and as tutor to his minor children, pleaded that he had not intermeddled with the estate and succession of the said William Kerfut. After hearing of the parties, the Judgment of the Court was rendered condemning the widow of the deceased to pay her proportion of the indebtedness

and condemning also Philbin in his individual capacity, and as tutor, respectively in the proportions of the amount sued for, which were claimed from him as one of the heirs, and in costs.

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The Judgment of the Court further recognized the *renonciations* fyled by the other defendants, but condemned them in costs.

The Judgment was recorded as follows;—La Cour; * * * * * *

Considérant: que les défendeurs William Henry Kerfut, Charlotte Jane Kerfut et son mari John Fairbairn, ont renoncés à la succession de feu William Kerfut, savoir, le dit William Henry Kerfut, le 24 octobre 1857, par acte reçu devant M. J. E. O. Labadie et son confrère notaires, et la dite Charlotte Jane Kerfut et le dit John Fairbairn, le 21 septembre 1859, par acte reçu devant M. T. Doucet et son confrère notaires, a débouté l'action des demandeurs, quant à eux, mais attendu que les dites renonciations n'ont été faites et produites en cette cause que depuis l'introduction de la demande, ils sont condamnés aux dépens de leur contestation taxés à £5 contre les dits Charlotte Jane Kerfut et John Fairbairn et à deux louis dix chelins contre le dit William Henry Kerfut. Et considérant de plus que le dit Richard Philbin ne fait pas voir qu'il y a eu dissolution de la communauté qui a existé entre lui et feue Mary Ann Kerfut sa femme qui avait succédé au dit feu William Kerfut son frère et que par conséquent il doit y avoir continuation de communauté entre le dit Richard Philbin et ses dits enfants mineurs, ou qu'il ait renoncé en sa qualité de tuteur à ses dits enfants mineurs à la succession de leur dite mère, la dite Mary Ann Kerfut, a condamné et condamne la dite défenderesse Elizabeth Hanan *alias* Hannan, tant comme ayant été commune en biens avec le dit feu William Kerfut son mari que comme héritière de son dit fils Thomas Kerfut à payer aux demandeurs la somme de £93 15s. cours actuel, étant ⅝ de celle de £150 réclamé par les demandeurs pour les causes et raisons mentionnées en leur déclaration en cette cause, et nommément en vertu des actes d'obligation et hypothèque du 18 mai 1852, 25 septembre 1852, et du 8 février 1853, passés devant Mtres. Gibb et son confrère, Notaires, et faits et consentis par William Kerfut en faveur des demandeurs.

Et le dit Richard Philbin tant comme ayant été commun en biens avec la dite Mary Ann Kerfut à payer au demandeurs la somme de £9 7s. 6d. dit cours étant 1/16 de la dite somme de £150 0 0, et encore le dit Richard Philbin en sa qualité de Tuteur à ses dits enfans mineurs, à payer aux dits demandeurs la somme de £9 7s. 6d. dit cours, étant un autre 1/16 de la dite somme de £150 avec intérêt sur chacune des dites sommes depuis le 14 juin 1855, et dépens contre chacun dans les proportions ci-dessus, deux louis dix chelins de plus contre le dit Richard Philbin pour dépens de sa contestation, distraction desquels dépens est accordé à MM. Torrance et Morris, avocats des demandeurs, réservent aux demandeurs leurs recours pour le surplus de leur demande ainsi qu'il pourra leur appartenir.

Torrance and Morris, for plaintiff.

A. and W. Robertson, for defendant Fairbairn.

Monk and MacRae, for defendants Kerfut and Philbin.

(A.M.)

MONTREAL, 31st OCTOBER, 1859.

Coram SMITH, J.

No. 189.

O'Connell vs. *Corporation of Montreal.*

HELD:—That the attorney in a cause is *dominus litis*, and cannot be interfered with or controlled by any understanding or arrangement entered into with his own client by the opposite party or his attorney without his sanction.

SMITH, J., said there were several other cases in a similar position with this, and the same Judgment would be rendered in all. The plaintiff had been foreclosed from adducing evidence, and the cause was now inscribed for hearing on the merits by the defendants. A motion, however, was made by the plaintiff to set aside the inscription and foreclosure, and to be allowed to re-open the *enquête*, on the grounds stated in an affidavit of his counsel produced with the motion. The grounds were these:—that, before the closing of the plaintiff's *enquête*, he, the learned counsel, had an understanding with the Mayor, as representing the defendants, that all proceedings in the cause should be suspended for a time with a view to an amicable settlement, if possible, of the matters in dispute; that, acting upon this understanding, the plaintiff's counsel did not attend the *enquête;* that he was in fact ignorant of any further proceedings being taken, until he was served with a notice of inscription for hearing on the merits; and that he then discovered that the plaintiff's *enquête* had been declared closed in his absence, on the application of the defendant's counsel. The question is only important in so far as it touches the point whether a party to a cause or his counsel can make an arrangement with the other party, when the latter is also represented by counsel, without the sanction of the latter, and in such a manner as to stop, or control, the proceedings. Of course, as regards the debt, or other subject matter in dispute, the parties may make what agreement they please. The point now to be considered is only as to the proceedings in the cause. In his Honor's opinion, such an arrangement, or agreement, was not binding on counsel. It would be most inconvenient and irregular. The attorney is the *dominus litis:* he can not be interfered with in the management of a cause by any outside arrangement. Under these circumstances, the Court can not recognise the understanding referred to by the plaintiff; and the present application must accordingly be rejected.

The plaintiff's counsel called his Honor's attention to the endorsement on the notice of inscription in which some error occurred in the name of one of the parties, and contended that the cause had consequently not been regularly inscribed, and that judgment could not now be pronounced. His Honor said in reply that there were some irregularities in a record, of which the court was bound to take cognisance, whether pointed out or not. There were others of a more trifling kind, and this was one of them, which must be made the subject of a special motion, or otherwise brought specially under the notice of the Court. They were covered by silence. Action dismissed for want of proof.

B. Devlin, for plaintiff.

J. Papin, for defendants.

(A.H.L.)

MONTREAL, 31st OCTOBER, 1859.

Coram SMITH, J.

No. 2331.

Matheuson vs. Western Assurance Co.

HELD:—1o. That the insurance by a mortgage creditor of the house or building subject to his mortgage is not an insurance of the building *per se*, but only of the creditor's security for the payment of his debt.

2o. That to support an action on the policy, there must be a loss existing at the time of action brought.

3o. That if, before action brought, the premises be rebuilt, whereby the creditor's security is restored, he cannot recover as for a loss.

SMITH, J.—This was an action to recover the [illegible] £400, amount of a policy of fire insurance. The facts of the case were [illegible] In 1844, John Mathewson and wife as *communs en biens*, sol[illegible]d in Griffintown to Calvin P. Ladd, the price being a *rente consti*[illegible] £30 [illegible]r annum, for which a mortgage was given. Ladd further bound him[illegible] erect a building on the lot, of the value of at least £400, and to insure the same, and transfer the policy to the vendors, as collateral security until the *rente* should be redeemed. It appears, however, that he did not insure, but, in 1851, John Mathewson assigned the *rente* to the plaintiff, who afterwards, in March, 1853, effected the insurance on which the present action is brought. In June, 1853, the buildings insured were destroyed by fire. They were, however, rebuilt by Ladd before the plaintiff commenced his suit. The question now to be determined was, whether, on the facts just stated, the defendants could be held liable to pay the amount of the policy.

The defence rested upon three grounds: 1st, that there was no valid assignment; 2ndly, that there was no insurable interest; 3rdly, that there was no loss. As to the first two points, the Court was against the defendants. The third point, however, was a more difficult and important one. The question was, whether the rebuilding of the premises, before the institution of the [illegible] relieved the Insurance Co. from their liability. His Honor remarked th[illegible] question had never heretofore to his knowledge been determined in this Province. There was no statutory enactment bearing upon it; their only guide must be the common law. The contract of insurance has given rise to a great deal of discussion among the authors. There is a general unanimity as to the leading principles of the law, but great difference of opinion as to particular points. It may be stated to be the main and fundamental principle of insurance that it is a contract of indemnity. Unless there is a loss, there is no right to recover. The law of marine insurance will probably furnish us with more assistance in determining the present case than any other branch, for it has undergone a more thorough discussion, and its principles have been more accurately investigated and ascertained. Starting then from the principle just laid down, the question arises, what kind of loss must it be? Is it sufficient, if it be temporary only, or must it be permanent? The only fair ground to lay down is that the loss must exist at the time the action is brought. His Honor referred to the case of "Hamilton *vs.* Mendes," 2 Burr., 1198, where a ship had been captured by the enemy, but was afterwards re-captured and brought into the

port of Plymouth. Notice of abandonment was thereupon given by the plaintiff to the underwriters, and an action brought to recover as for a total loss. It was contended that, the loss being complete at the time of the capture, a vested right accrued to the party insured, which no event happening subsequently could take away; but Lord Mansfield, in delivering the opinion of the Court, said that the plaintiff's right to recover as for a total loss must be judged according to the state of the facts at the time of action brought, or at least at the time of abandonment; that, as at the time notice to abandon was given, the vessel had been recaptured and brought safely into an English port, no loss had actually taken place, and the defendant, consequently, was not liable except for salvage and costs and charges, that is, for an average loss. In the present instance, the subject matter of the insurance was not the whole house, but only the creditor's interest in the preservation of his security. That security was as good and complete at the time of action brought as it had been before the fire. The plaintiff therefore had suffered no loss, and the principle laid down by Lord Mansfield would apply. In the case of "Godsall *vs.* Boldero," reported in Smith's Leading Cases, the plaintiffs, who were coach-makers, and creditors of the Rt. Hon. William Pitt for the sum of £500, effected an insurance upon his life, for this amount, with the defendants. Between two and three years afterwards, Mr. Pitt died insolvent, but the plaintiffs were paid in full by the executors out of the fund voted by Parliament. They afterwards brought their action for the amount of the policy. At the trial, it was agreed that a verdict should be entered on the several issues, according to the direction of the Court, and the case reserved for the opinion of the judges. It was contended for the plaintiffs that, they having had an insurable interest in the life of Mr. Pitt up to the time of his death, and he having died insolvent, the sum insured had become due, and the payment of the debt afterwards by a third party could not alter the case, such payment being gratuitous. Lord Ellenborough, in delivering the judgment of the Court, said, "that the action was, in point of law, founded "upon a supposed damnification of the plaintiffs, occasioned by his (Mr. Pitt's) "death, existing and continuing to exist at the time of the action brought; and, "being so founded, it follows of course that if, before the action was brought, "the damage, which was first supposed likely to result to the creditors from the "death of Mr. Pitt, was wholly obviated and prevented, by the payment of his "debt to them, the foundation of any action on their part, on the ground of such "insurance, fails; and it is no objection to this answer, that the fund, out of "which their debt was paid, did not originally belong to the executors as a part "of the assets. * * * * * The damnification of the creditors, in respect of "which their action upon the assurance contract is alone maintainable, was "fully obviated before their action was brought." And his Lordship proceeded to quote the opinion of Lord Mansfield in "Hamilton *vs.* Mendes." Thus we find the same principle established both in regard to marine and life insurance. Let us refer now to an authority on the third, and remaining branch of the law, fire insurance. In Parson's Mercantile Law, p. 509, it is said,—"the mortgagee "has an interest only equal to his debt, and founded upon it; and if the debt be "paid, the interest ceases, and the policy is discharged; and he can recover no more

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"than the amount of his debt. And if a house, insured by a mortgagee, were "damaged by fire, even considerably or perhaps destroyed, it might be doubted, "on what we should think good grounds, whether he could recover, if it were "proved that the remaining value of the premises mortgaged was certainly more "than sufficient to secure his debt, and all reasonably possible interest, costs "and charges." And in a case reported in the foot-note, Gibson, J., said, "notwithstanding the form of the contract, therefore, a mortgagee insures, whe-"ther generally or specially, not the ultimate safety of the whole of the property, "but only so much of it as may be enough to satisfy his mortgage. It is not "the specific property that is insured, but it's capacity to pay the mortgage debt. "In effect, the security is insured." Ladd rebuilt before action brought; the security was therefore restored. What loss then has the plaintiff suffered which the defendants should be held to indemnify? Clearly none. On this ground, therefore, the action must be dismissed. An interesting point would have come up, if the judgment had been different, and the defendants condemned to pay. The policy was £400; the defendants, on payment, would have been entitled to an assignment, or subrogation, from the plaintiff; but, if they were to sue for this amount Ladd might plead that he was only liable to pay £60 per annum. He threw out this for consideration, in case the question should hereafter arise. His Honor then read the following propositions as resulting from the judgment:

1. That the contract of insurance being a contract of indemnity, it is the actual loss alone which can be the basis of compensation under the contract, and this loss must be determined by the actual state of the case at the time of action brought.

2. The insurance in the case of a mortgagee insuring the house, or *corpus* on which the mortgage rests, and in the possession of the mortgagor, as the owner thereof, at the time of effecting the insurance, is a special insurance of the interest of the mortgagee in the thing insured, and is limited to the interest specified in the policy itself.

3. The special interest thus insured by the mortgagee is not the safety of the whole property insured, but only so much of it as may be necessary to cover his mortgage debt.

4. That, in the present instance, the *constitut* which was insured to the extent of £400, on the buildings erected on the land sold, as a security for the payment of the *constitut*, is amply covered and protected by the value of the buildings erected by the debtor of the *constitut* on the land, after the fire had occurred, and before action brought; that the security of the plaintiff is not in any way impaired or diminished, and consequently no loss has in fact been sustained.

Rose & Ritchie, for plaintiff.

H. Stuart, for defendants.

(A. H. L.)

REPORTER'S NOTE.—Query, as to the effect of the fire on the policy itself? Is it thereby terminated, or does it continue for its full term on the new building?

EN APPEL.

DE LA COUR SUPERIEURE, DISTRICT DE MONTREAL.

MONTREAL, 5 DECEMBRE 1859.

Coram AYLWIN, J., DUVAL J., MEREDITH, J., GUY, J., BRUNEAU, J.

EUPHROSINE METRISSÉ, & AL. (*Défendeurs en Cour Inférieure.*)

Appelants.

ET

C. A. BRAULT, (*Demandeur en Cour Inférieure.*)

Intimé.

JUGE:—1o. Que l'autorisation d'une femme mariée, le mari étant présent, est valable, quoique d'après le style de l'acte, le Notaire exprime lui-même l'autorisation, au lieu de faire parler le mari.

2o. Que le mineur émancipé peut valablement aliéner ses biens meubles.

3o. Que l'hypothèque qui garantit le paiement d'un douaire préfix est un droit mobilier que la mineure, émancipée par mariage, peut aliéner, avec l'autorisation de son mari.

4o. Que pour se faire relever d'un acte passé durant la minorité, il ne suffit pas d'alléguer *lésion*; mais qu'il faut la prouver.

L'action, dans laquelle ce jugement a été rendu, a été instituée le 27 juillet 1844, par Alexis Dubord, comme ayant épousé Marguerite Marcoux, veuve en premières noces de feu Charles Brion dit Lapierre et en secondes noces de feu Toussaint Décary et la dite Marguerite Marcoux, contre Jean-Baptiste Bergevin dit Langevin père, tant en son nom que comme tuteur à Louis Narcisse Bergevin, contre Louis Félix Bergevin et Joseph Bergevin, absents, contre Jean-Baptiste Bergevin, fils, ces derniers étant les seuls enfants vivants du dit Jean Baptiste Bergevin, père et de feue Josephte Fortier, et contre Joseph Godin, tant comme tuteur à la substitution établie par le testament (19 août 1841) de la dite Josephte Fortier, que comme curateur à la succession vacante de feu Charles Brion dit Lapierre.

Durant l'instance, la demanderesse étant morte, l'intimé reprit l'instance, en se fondant sur deux transports à lui consentis, l'un par la demanderesse, le 23 décembre 1843, l'autre par Charles Brion dit Lapierre fils, le 9 novembre 1843.

Jean-Baptiste Bergevin dit Langevin père, étant aussi mort durant l'instance après avoir fait un testament contenant une substitution, l'instance fut reprise contre l'appelante, Euphrosine Métrissé dite Sansfaçon, veuve du dit Jean-Baptiste Bergevin tant en qualité de légataire universelle de son mari que comme tutrice à son enfant mineur, et contre Augustin Laberge, en sa qualité de tuteur à la substitution créée par le testament du dit Jean-Baptiste Bergevin, (10 juillet 1848).

LA DECLARATION alléguait:

Naissance de Marguerite Marcoux, 15 janvier 1804.

Mariage de Marguerite Marcoux avec Charles Brion dit Lapierre 1er mai, 1820.

Contrat de mariage de ces derniers, 29 avril 1820, devant Doucet, N. P., stipulant communauté, douaire préfix de £500, à prendre sur les biens les plus clairs et préciput de £250.

Acquisition pendant la mariage, par Charles Brion dit Lapierre de l'immeuble décrit dans la déclaration.

Echange du dit immeuble entre Charles Brion et Jean-Baptiste Bergevin père, un des défendeurs, le 26 mai 1821, Lukin, N. P., avec promesse réciproque et ordinaire de garantie.

Acte du 19 septembre 1821, devant Lukin, N. P., par lequel la Demanderesse, après avoir pris communication du contrat d'échange susdit, et après que lecture lui eût été faite du dit acte d'échange, a approuvé et ratifié le dit échange, voulant et entendant que le dit acte d'échange, sortît son plein et entier effet, suivant sa forme et teneur, s'obligeant même (la Demanderesse) solidairement avec son mari, un deux seul pour le tout aux clauses et garanties contenues au dit acte d'échange.

Nullité de ce dernier acte, pour les causes suivantes: minorité de la Demanderesse, impuissance de son mari à l'autoriser à le consentir, absence d'autorisation de la part du mari, lésion éprouvée par la Demanderesse.

Détention de l'immeuble décrit au dit jugement, par les Défendeurs.

Décès de Charles Brion, dans le Haut-Canada, le 1er août 1834, laissant un enfant auquel la Demanderesse a été nommée tutrice le 19 juin 1835.

Renonciation à la communauté, par la Demanderesse, 11 août 1835, Brault, N. P.

Renonciation à la succession de Charles Brion par la Demanderesse, comme tutrice duement autorisée, de son enfant mineur, 26 jan. 1836, Brault, N. P., insinuation de l'acte.

Ouverture du douaire de la Demanderesse, 1er août 1834, par le décès de C. Brion.

Intérêts échus, £297 10s, capital du douaire £500, préciput £250, £1047 10s. *Conclusions* hypothécaires pour cette dernière somme."

La Défense contenait différentes exceptions et moyens dont les suivants sont seuls en question dans cet appel. *Exception péremptoire*, alléguant que la Demanderesse aurait dû poursuivre la nullité de l'acte de ratification du 19 septembre 1821, et s'en faire relever dans les 10 ans de sa majorité, savoir à compter du 1er janvier 1825.

Autre exception alléguant que depuis le décès de Charles Brion, avant et depuis la renonciation faite à la communauté, la Demanderesse avait fait acte de commune, en demeurant en possession, tant des meubles que des immeubles qui avaient appartenu à la communauté; qu'elle avait retiré les loyers et revenus de l'immeuble, donné en contr'échange par Jean-Bte. Bergevin, père, et qu'elle l'avait occupé elle-même; qu'elle avait disposé de la presque totalité des meubles qui avaient appartenu à la communauté et qu'elle avait rendu sa renonciation nulle.

Autre exception alléguant qu'au temps de la mort de Charles Brion, ce dernier possédait un immeuble qui est resté dans sa succession: que les Demandeurs auraient dû se pourvoir préalablement contre cet immeuble et ne pouvaient en tous cas revenir que subsidiairement contre l'immeuble des Défendeurs.

Enfin Défense au fonds en fait.

Les Réponses des Demandeurs énoncent les prétentions suivantes: que la Demanderesse n'a pu se pourvoir dans les dix ans de sa majorité, vu qu'elle était sous puissance de mari et en communauté et que les dix ans n'ont commencé à courir qu'à la mort de Chs. Brion; que la Demanderesse ne s'est jamais immiscée dans la communauté, et que l'eût-elle fait, cela ne la priverait pas du droit de demander la nullité de l'acte du 17 sept. 1821 et de recouvrer ce qu'elle

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demande par son action ; qu'en supposant que les Demandeurs fussent tenus de discuter ce qui appartient à la succession vacante de feu Chs. Brion, ils ne peuvent y être tenus que sur l'indication que leur en feraient les Défendeurs, en par ces derniers fournissant les frais nécessaires pour cette discussion.

La Preuve que la Demanderesse s'est immiscée dans la communauté est faite par le témoignage de plusieurs témoins, qui établissent que depuis la mort de Charles Brion dit Lapierre, tant avant que depuis la renonciation faite à la communauté, la Demanderesse a perçu les fruits et revenus de l'immeuble que son mari avait reçu en échange de Jean Bte. Bergevin le 26 mai 1821, lequel immeuble se trouvait encore dans la succession vacante du dit Charles Brion dit Lapierre.

La Cour Supérieure, composée des honorables Juges Smith, Mondelet et Badgley, avait à l'unanimité des juges, maintenu l'action, par son jugement du 18 Novembre 1857.

La nullité de l'acte de ratification de la femme Marcoux (19 Sept. 1821) avait servi de base au jugement, dont le principal considérant est le suivant : " That the ratification of the said Marguerite Marcoux of the 19th Sept. 1821 " is informal, null and void, by reason of the absence of any authority on the " part of her husband to enter into and consent to the said ratification."

Appel étant interjeté de ce jugement, le *factum* des Appelants résume comme suit les moyens d'appel.

Avant d'énumérer les moyens de fond de leur appel, les Appelants attirent d'abord l'attention de la Cour sur la position de l'Intimé qui n'a aucunement justifié d'un titre valable pour se porter comme le cessionnaire et le représentant des Demandeurs originaires. En premier lieu le prétendu transport produit au soutien de sa demande en reprise d'instance ne porte aucun caractère d'authenticité, le notaire n'ayant pas certifié le document produit, comme étant la copie de la minute, si elle existe. En second lieu, ce prétendu transport n'ayant jamais été signifié aux débiteurs directs des choses cédées, ni à qui que ce soit, comment l'Intimé a-t-il pu être saisi des créances cédées vis-à-vis des Appelants, qui ne sont appelés qu'hypothécairement à les satisfaire ?

Mais en supposant que l'Intimé pût résoudre ces objections à la satisfaction de la Cour, il lui reste à faire raison des moyens de fond, sur lesquels les Appelants croient devoir compter pour l'infirmation du jugement rendu par la Cour Inférieure.

1°. L'un des moyens de défense des Appelants consistait dans une dénégation de tous les faits allégués dans la déclaration. A l'époque où l'action a été instituée, aussi bien qu'à celle où la défense a été produite, cette dénégation obligeait strictement les Demandeurs à prouver tous les faits allégués en leur déclaration. Or, l'un des faits essentiels sur lesquels reposait le succès de l'action, était celui de la mort de Charles Brion dit Lapierre, le mari de la douairière, Marguerite Eléonore Marcoux. Les Appelants soumettent que ce fait n'a pas été prouvé d'une manière légale, les Demandeurs s'étant contentés de produire des dépositions prétendues prises sous serment, devant un officier dont le caractère ne pouvait être reconnu par la Cour Inférieure, prises d'ailleurs *ex parte*. Cette mort et sa date étaient, pour ainsi dire, la pierre angulaire de cette action, et on la cherche en vain dans la procédure.

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2°. En supposant maintenant que l'Intimé soit dans des conditions à aborder les questions purement légales de la cause, les Appelants prétendent que la douairière, Demanderesse originaire, était leur garante contre sa propre action, en conséquence de la ratification par elle souscrite le 19 septembre 1821 de l'acte d'échange, passé entre Charles Brion dit Lapierre, son mari, et Jean-Baptiste Bergevin, père, le 26 mai 1821.

Cet acte de ratification est attaqué par l'Intimé, sur le double motif qu'il a eu lieu durant la minorité de Marguerite Eléonore Marcoux, et que cette dernière n'a pas été valablement autorisée à le consentir. A cela les Appelants répondent: 1°. que cette ratification était un acte par lequel la femme, quoique mineure pouvait valablement s'engager. 2°. Qu'elle s'en plaignait à une époque où les Appelants avaient acquis la prescription contre une demande en restitution de sa part. 3°. Que l'acte constate suffisamment la présence et l'autorisation du mari. 4°. Que par les faits ci-après relatés, d'immixtion dans la communauté de la part de la dite Marguerite Eléonore Marcoux, cette dernière a tacitement confirmé l'acte qu'elle attaque.

3°. Enfin, si tous les moyens qui précèdent étaient considérés comme insuffisants pour démontrer l'illégalité du jugement de la Cour Inférieure, les Appelants soumettent qu'il en reste un dernier qui doit triompher. Pour être admise à réclamer son douaire, la dite Marguerite Eléonore Marcoux devait avoir totalement répudié les obligations de la communauté qui avait existé entre elle et Charles Brion dit Lapierre. Liée par les obligations de cette communauté, elle était tenue de garantir l'acte du 26 mai 1821, qui était un pur acte de communauté et que son mari pouvait consentir seul, vu que l'immeuble qu'il aliénait était un conquet de cette même communauté.

La preuve établit d'une manière irrécusable que, nonobstant la renonciation faite par la dite Marguerite Eléonore Marcoux, le 11 août 1835, à la communauté, elle a tiré tous les profits et revenus du seul immeuble qui fût resté dans la succession de son mari. Elle seule pouvait dire ce qu'étaient devenus les meubles qui devaient se trouver dans cette succession, et elle n'en rend aucun compte. Il est donc à présumer qu'elle en a joui comme elle a fait de l'immeuble.

L'Intimé a cru pouvoir se libérer du poids de cette preuve, en prétendant que les faits portés à la charge de la dite Marguerite Marcoux, savoir: la perception des revenus de l'immeuble en question ainsi que son entretien, n'avaient été accomplis par elle qu'en sa qualité de tutrice à son enfant mineur. Outre que rien ne pouvait justifier cette interprétation de la conduite de la dite Marguerite Marcoux, l'Intimé oubliait qu'il avait lui-même prouvé un fait qui rendait cette explication impossible. En effet, la déclaration alléguait que, le 26 janvier 1836, la dite Marguerite Marcoux, en sa qualité de tutrice à son enfant mineur, et étant duement autorisée à ce faire, avait renoncé pour son pupille à la succession du dit Charles Brion dit Lapierre.

Lors de l'argument, l'avocat des Appelants, rappelant le fait que plusieurs de ces derniers avaient été condamnés par défaut, par la Cour Inférieure, il prétendit que, de la part de ceux-là, il avait le droit de soulever, en appel, toutes les questions de fait qui avaient pu être négligées par ceux des Défendeurs qui

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avaient contesté l'action ; que le décès de Charles Brion, mari de la Demanderesse n'avait pas été prouvé, ce fait n'étant établi que par deux dépositions prises *ex-parte* devant un juge de paix, dans le Haut-Canada ; que d'après la maxime que *jamais mari ne paya douaire*, aucune action ne pouvait naître pour réclamer un douaire, sans prouver la mort du mari. De la part de ceux qui avaient plaidé à l'action, il prétendit que la date de la mort du mari n'avait jamais été admise et que l'action n'ayant été instituée que trois jours avant l'accomplissement de la prescription décennale, en comptant d'après la date mentionnée dans la déclaration, tous les Appelants avaient droit d'exiger une preuve positive de l'époque du décès, pour voir si ce moyen victorieux de défense n'était pas ouvert en leur faveur.

Comme tous les autres moyens d'appel et de réponse se trouvent longuement développés et traités dans les explications données par les juges, il suffira d'y référer.

La cause fut arguée une première fois, M. le Juge Caron étant sur le banc ; mais l'honorable juge ayant été nommé [illegible] pendant le délibéré, elle dut l'être une seconde fois, M. le Juge [illegible] ayant remplacé M. le Juge Caron.

On doit à l'obligeance de l'honorable Juge Caron la communication des notes qu'il avait préparées et qui témoignent chez lui d'une conformité parfaite de vues avec la majorité de la Cour.*

Comme le sort de la cause dans les deux Cours, a dépendu de l'acte de ratifi-

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* *Notes de M. le Juge Caron.*

I. La ratification par la Demanderesse, du 19 septembre 1821, est-elle valable ? et si elle l'est, qu'elle est son influence sur la réclamation de la Demanderesse ?

II. Si cette ratification était nulle, pouvait-elle être, et a-t-elle, de fait, été rendue valable et obligatoire par les faits subséquents de la Demanderesse, après sa majorité, et le décès de son mari ?

III. Nonobstant la renonciation de la Demanderesse à la communauté, doit-elle être regardée et traitée comme commune, et dans ce cas, quel est le résultat de cette qualité, sur la présente action ?

Sur la première question ; la validité de la ratification, je tiens que si elle est nulle, ce n'est pas pour cause d'insuffisance dans l'autorisation du mari de la demanderesse ; la présence du mari à l'acte, et son autorisation sont suffisantes.

§ Merlin Rép., Autorisation, p. 187.

(Voir ce que j'ai écrit et les autorités collectées dans la cause de Laviolette et Martin.)

Le mot *autorisé*, s'il est nécessaire, se trouve à l'acte, qui est transcrit au long au factum de l'Intimé. Si donc cet acte est nul, c'est parceque, nonobstant l'autorisation du mari, la femme, en minorité, ne pouvait pas valablement ratifier un acte, qui avait pour résultat de lui faire perdre le droit d'hypothèque qu'elle avait sur l'immeuble échangé, pour la sûreté du paiement de ses douaire et préciput, qui sont des créances mobiliaires ; ce qui se résout à la question abstraite de savoir, " si une femme mineure " peut, avec l'autorisation de son mari, décharger un immeuble, qui lui est hypothéqué pour une créance mobiliaire, de ce droit d'hypothèque."

Cette question, qui est la principale, sinon la seule importante dans la cause, demande quelque développement.

L'on ne peut révoquer en doute que le mariage contracté par une mineure, ne l'émancipe, tout aussi bien et de la même manière, qu'il émancipe le mineur, et ne confère à

cation du 19 septembre 1821, on appréciera mieux la dissertation avec le texte de cet acte sous les yeux.

"[illegible]nant le dix neuvième jour de septembre, mil huit cent vingt et un, est comparante Marguerite Marcoux, épouse de Charles Brion dit Lapierre, journalier demeurant en la cité de Montréal, dénommé en l'acte ci-haut et des autres parts écrits, dûement assistée et d'abondant autorisée à ce présent, à l'effet qui en suit. Laquelle dite comparante après avoir pris communication du contrat d'échange ci-dessus, d'un emplacement sis au fauxbourg St. Laurent, et après que lecture lui en a été faite et qu'elle a dit bien avoir entendu et connoitre a par ces présentes, approuvé et ratifié le dit échange, veut et consent qu'il sorte son plein et entier effet suivant sa forme et teneur s'obligeant même la dite comparante par ces dits présentes solidairement avec son dit mari, un d'eux seul pour le tout sous les renonciations de droits accoutumées, aux clauses et garanties y contenus de la part de son dit mari voulant que le dit Jean Bte.

celle-là, quant à l'administration de ses biens, tous les droits qui résultent à celui-ci, de l'émancipation par mariage; ainsi cette femme mineure, avec l'autorisation de son mari, peut valablement faire tous les actes d'administration que le mari, lui-même, pourrait faire, quant à l'administration des siens, si, étant mineure, il eut été émancipé par mariage. Ce n'est que quant à la disposition ou aliénation de ses biens immeubles, que le mari ne peut pas autoriser sa femme mineure; pour cet objet, outre l'autorisation du mari, il faut l'adoption des procédures requises pour l'aliénation des biens immeubles des mineures. Or, si la femme mineure peut, avec l'autorisation de son mari, disposer de ses biens meubles, elle peut également, avec cette autorisation, disposer de ses droits mobiliers. Cela étant, (et pour l'établir il n'est nécessaire que de référer aux auteurs) l'on ne saurait disconvenir que, "quoique existant sur des immeubles, l'hypothèque est "mobiliaire, si elle a pour objet d'assurer le paiement d'une créance mobiliaire."

3 Dalloz, Hypoth. No. 6. Poth. commté. No. 76, où il dit:

"La créance d'une somme d'argent ou autre chose mobiliaire, quoiqu'elle soit accom-"pagnée d'un droit d'hypothèque, ne laisse pas d'être un droit mobilier."

Voir de plus, 19 Duranton, No. 241.

" I Troplong, mariage, No. 336.

Ces propositions une fois établies, reste à montrer d'abord, que la ratification du mois de septembre, (19 septembre 1821) invoquée par les Défendeurs, n'est rien autre chose qu'une renonciation à son droit d'hypothèque sur l'immeuble donné en échange par son mari; et ensuite que les droits, pour la sureté desquels elle tenait cette hypothèque, étaient de leur nature, des droits mobiliers.

Sur le premier point, nulle difficulté en ratifiant et approuvant cet acte d'échange, la demanderesse ne renonçait pas à ses douaire et préciput; elle pouvait les exiger encore, en temps opportun, sur tous les autres biens de son mari; seulement elle consentait à ne les pas réclamer sur l'immeuble que venait d'aliéner son mari, comme il avait le droit de faire, pour lui en substituer un autre qu'il croyait plus avantageux à la communauté; pour rencontrer les vues de son mari, elle donnait main levée de son hypothèque sur l'immeuble ainsi donné en échange, et rien de plus.

Quant au second point, il est également clair que le douaire préfix et le préciput, qui tous deux consistent dans le paiement des sommes d'argent stipulées, ne sont que des créances mobiliaires, en faveur de la femme, lui donnant une action personnelle et mobilière contre les représentants de son mari, et une action hypothécaire contre les détenteurs des biens qu'il aurait affectés à la prestation de ses droits.

Si ces principes sont corrects, et ils le sont très sûrement, l'application à notre espèce en est d'autant plus favorable, que ce n'est vraiment pas un abandon, une renonciation

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Bergevin dit Langevin, ou tous autres qu'il appartiendra soit autorisé de requerir acte de la présente ratification car ainsi, &c. Promettant et obligeant, &c. Renonçant, &c.

" Fait et passé à Montréal, étude de P. Lukin, les jour et an ci-dessus, et à la dite comparante signé avec nous Notaires, le dit Lapierre, ayant déclaré ne savoir le faire de ce enquis à fait sa marque ordinaire lecture faite.

(Signé,) MARGUERITE MARCOUX,

sa
CHS. BRION + DIT LAPIERRE
marque.

P. E. DAVELUY, N.P.
P. LUKIN, N. P.

Ainsi qu'il appert à la minute demeurée en l'étude du Notaire soussigné.

" P. LUKIN, N.P."

à son hypothèque, qu'a fait cette femme, en ratifiant l'acte en question, mais c'est seulement la translation de ce droit d'un immeuble sur un autre, de l'immeuble donné en échange sur celui reçu à la place.

En comparant la position de la femme mineure, à l'égard de son mari, à celle du mineur à l'égard de son tuteur, et en admettant que le mari a droit d'autoriser sa femme mineure, à faire tout ce à quoi le tuteur peut, lui, autoriser son mineur, l'on trouvera en référant aux autorités suivantes, que le tuteur a droit de son propre chef, de renoncer à un droit d'hypothèque, pour créance mobiliaire, appartenant à son mineur, sans autorité de justice.

Tarrible, Rép. Vo. radiation, page 83.
26 Merlin Rép. Vo. radiation, p. 382, No. II.
3 Troplong, hypth. No. 738 *bis*, pp. 282–283.

Les objections que M. Troplong fait contre ce système, qui est celui de M. Tarrible et de plusieurs autres, ne sont aucunement applicables au cas où nous sommes, où l'abandon de l'hypothèque n'a pas été *gratuit;* ce qui est la raison pour laquelle le tuteur ne peut pas, suivant Troplong, renoncer à l'hypothèque. Ce n'est, comme déjà dit, qu'une substitution de droits. 20 Duranton, Nos. 191-192-71-72.

L'on peut en dire autant en réponse à M. Grenier, II Vol. hypoth. p. 441.

Au reste, sur ce même sujet, l'on peut ajouter, que quand même, malgré les raisons ci-dessus, l'acte de ratification serait entaché de nullité, cette nullité ne serait pas une nullité absolue, comme l'était avant le code tout acte fait et consenti par la femme sans l'autorisation de son mari ; cet acte étant nul *ab initio*, ne pouvait pas être ratifié ni directement ni indirectement. Cette nullité ne serait tout au plus qu'une nullité relative, que le mineur pourrait invoquer ou non, à son gré, et dont il ne pourrait même pas se prévaloir sans alléguer et prouver la lésion, ou que l'acte a tourné à son préjudice.

Si donc la ratification en question était préjudiciable à la demanderesse, il aurait fallu faire cet allégué et le prouver, c'est ce qui n'a pas eu lieu ; car quand même l'immeuble pour lequel les défendeurs sont poursuivis, serait d'une plus grande valeur que celui qu'ils ont donné en échange, rien ne prouve que ce dernier ne serait pas d'une valeur suffisante pour satisfaire la demanderesse.

Pour toutes ces raisons, je suis d'avis que la ratification par la demanderesse, de l'acte d'échange, est valable, qu'elle contient main levée du droit d'hypothèque, que réclame la demanderesse, en sa présente action, et que partant, pour cette raison seule, cette action aurait dû être renvoyée, sans qu'il soit nécessaire d'entrer dans l'examen de l'autre question posée plus haut, savoir : " Si, d'après les circonstances de la cause, la de-

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Guy, J; dissentiens.—Je ne puis concourir avec la majorité de la cour, qui va infirmer le jugement de la Cour Inférieure, que je crois conforme à la loi. Je pense que la ratification du 19 septembre 1821, est nulle, pour insuffisance d'autorisation. Je ne trouve pas dans cet acte l'autorisation exigée par l'art. 223 de la coutume de Paris, tel qu'interprété par tous les auteurs et entr'autres par Pothier, puissance maritale Nos. 68,69 et par Dénizart dans ses Actes de Notoriété. Quoique l'immeuble échangé par Brion fût un conquet de communauté, le mari ne pouvait l'aliéner qu'à la charge du douaire. Ferrière, Coutume de Paris page 177.

BRUNEAU, J. La majorité de cette Cour est d'opinion qu'il y a mal jugé et que le jugement doit être infirmé.

Avant de venir à l'acte de ratification du 19 septembre 1821, déclaré nul à défaut d'autorisation de la part du mari, il faut lire un peu plus du contrat de ma-

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" manderesse, nonobstant sa renonciation à la communauté, ne devrait pas être traitée " comme commune, et quel serait le résultat de cette manière de voir, sur le sort de " l'action."

Ayant formé mon opinion que l'action doit être renvoyée sur la première question, je ne parlerai de cette seconde, que pour faire voir combien l'équité, dans le cas actuel, est d'accord avec la loi, et combien il est dur et inique de condamner les défendeurs à délaisser à l'intimé l'immeuble, pour lequel ils sont poursuivis, sous les circonstances que démontre le record.

L'intimé, M. Brault, qui est un notaire de Montréal, a été comme tel, requis d'agir ou s'est de lui-même, immiscé dans la succession du dit feu Lapierre, époux de la demanderesse, décédé, comme on le sait, le 1er août 1834; c'est l'intimé qui a fait les 20 juin et 8 juillet 1835, l'inventaire de cette succession. Cet inventaire n'est pas produit; tout ce que l'on en voit dans la cause, c'est ce qui en est dit dans l'acte de renonciation à la communauté, par la demanderesse, acte en date du 11 août 1835, aussi passé par M. Brault, aussi bien que l'acte de renonciation fait par la dite demanderesse, pour son fils mineur, à la succession de son père le 21 janvier 1836.

C'est après avoir prépa tous ces actes, et avoir, par ce moyen acquis une connaissance parfaite des droits et affaires des parties, que l'intimé s'est fait consentir, par la demanderesse, alors qu'elle était veuve de Décary, son second mari, le transport sur lequel est fondé son intervention, en date du 23 décembre 1843, (Martin, notaire) étant fait du douaire, £500, du préciput, £250, et des intérêts depuis le décès de Lapierre, et cela *pour valeur reçue avant les présentes, dont quittance.*

L'intimé se garde bien, et pour cause, de mentionner cette valeur qu'il a fournie; et, pour cause encore, il se fait autoriser à faire les poursuites nécessaires au nom de la demanderesse: aussi la présente action a-t-elle été portée au nom de la demanderesse, et aussi au nom du nommé Alexis Dubord, qu'elle avait épousé en troisièmes noces, depuis le transport qu'elle avait fait à l'intimé, qui à cet effet, s'était fait aussi autoriser par le dit Alexis Dubord à porter la dite action en son nom et celui de sa femme, par acte du 20 juin 1844, peu de jours avant l'institution de la dite action qui a été portée le 20 juillet 1844. Ce n'est que d[illegible] le décès de la demanderesse, arrivé pendant l'instance, que le dit intimé a été [illegible]e montrer qu'il était la seule partie intéressée dans la cause, ce qu'il a fait en intervenant et en continuant la procédure en son propre nom.

Il est à observer que lorsque l'intimé se faisait faire les dits transports, la demanderesse était dans la maison occupant partie de l'emplacement qui venait des défendeurs, et retirait des loyers de la partie qu'elle n'occupait pas, ce qu'elle a continué à faire

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riage de la Demanderesse, qui n'en fait connaître qu'une partie dans sa déclaration; c'était il est vrai, la seule qui l'intéressait, son douaire et son préciput, mais il se rencontre dans ce contrat une clause [illegible] droit commun, et qui affecte plus ou moins les droits de la [illegible] elle se lit comme suit : "Il y aura communauté de biens [illegible] époux, suivant la coutume "suivi en cette province, même dans les acquets et les propres qui leur appar- "tiennent actuellement, et qui leur écherront à l'avenir, à quelque titre que ce soit, "lesquels ils ameublissent à l'effet de les faire entrer dans la dite communauté, "dérogeant pour cet objet à la dite coutume."

Cette convention est des plus licites et permises dans l[illegible] mariage comme nous le dit Lebrun, en son traité des Propres, chap. 6, sect. 8, p. 316.

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subséquemment au transport, et même après l'institution de l'action, ainsi que le constatent les reçus produits et les témoignages rendus dans la cause. Or, tous ces faits, l'intimé ne pouvait les ignorer, puisque c'est lui qui avait fait l'inventaire, dans lequel cet immeuble, occupé par la demanderesse ne pouvait manquer d'être mentionné, avec le titre en vertu duquel il avait été acquis.

Telles sont les circonstances sous lesquelles ont été obtenus les transports qui servent de fondement au droit de l'intimé, et qu'a été instituée la présente action. Ces circonstances démontrent que c'est un procès, et un procès bien injuste, que l'intimé acquérait, et que sans lui, en toute probabilité, les défendeurs n'auraient jamais été troublés dans la possession d'un immeuble qu'ils avaient acquis et possédé de la meilleure foi du monde, et sans avoir raison de se douter que jamais ils seraient troublés dans leur possession. En effet, quelle a dû être leur juste surprise lorsqu'ils se sont vus assignés pour délaisser l'immeuble en question, au nom de la personne même qui était en jouissance et possession de l'emplacement qu'eux avaient donné en échange, pour ce qu'on voulait leur ôter.

Cependant si le droit de l'intimé était fondé en loi, tout injuste qu'il serait, il faudrait bien le lui accorder, en regrettant la nécessité qui y contraindrait la Cour, mais heureusement, il n'en est pas ainsi, pour la raison déjà énoncée, l'action de l'intimé doit être renvoyée *in toto*.

Indépendamment de celle-là, cette action devrait être renvoyée pour moitié, par ce que je trouve dans la preuve, des faits de la part de la demanderesse, suffisants pour la faire tenir et regarder comme commune ; ce [illegible] nonobstant sa renonciation, la rendrait garant des défendeurs, du moins pour une moitié des conséquences de l'éviction à laquelle ils sont exposés par cette action, ces faits sont les suivants :

Le nommé Lapierre, mari de la demanderesse, est décédé le 1er août 1834, dans le Haut-Canada, la demanderesse était à Montréal, [illegible] vivait séparée de son mari, dans la maison acquise des défendeurs, dont elle occupait partie, et louait le reste, dont elle recevait les loyers ; ce qu'elle faisait avant le décès de son mari, elle a continué à le faire après ; ce n'est que le 11 août 1835, plus d'un an après le décès, qu'elle renonce à la communauté, par acte de cette date, passé par l'intimé comme notaire.

Pour que cette renonciation vaille et puisse soustraire la demanderesse aux obligations de la communauté, deux conditions essentielles étaient [illegible] : que les choses fussent *entières*, et qu'elle eut fait un *bon* et *loyal inventaire*.

Quant à l'inventaire, il n'en est point produit dans la cause ; la seule chose que l'on sache à ce sujet, est [illegible] en est dit dans l'acte de renonciation, où l'on trouve l'énoncé qu'il a été procédé à l'inventaire par le même notaire, les 20 juin et 8 juillet 1835, près d'un an après le décès et peu de jours avant la renonciation.

Je suis d'avis que cet inventaire, s'il existe réellement, aurait dû être produit, afin de mettre les défendeurs à même de connaître quels étaient les biens de la succession de leur débiteur, et découvrir ce que ces biens étaient devenus. La production de cet

"On peut encore, dit-il, ameublir tous les immeubles, car comme il est permis "aux conjoints de se donner par contrat de mariage tous leurs biens, à plus "forte raison, leur est-il permis d'ameublir tous leurs immeubles; l'ameublisse- "ment a moins d'étendue que la donation entre vifs, car celui qui donne, aliène "et se dépouille, mais celui qui ameublit n'aliène pas tout-à-fait ses immeubles, "il les met seulement en communauté, et si elle augmente il participe dans l'aug- "mentation." Il est vrai qu'il fait un peu plus loin une distinction entre la femme majeure et la mineure, "car comme les mineurs, ajoute-il, ne peuvent aliéner leurs "immeubles, suivant la disposition du droit commun, ils ne peuvent aussi les "ameublir; ils le peuvent seulement dans certains cas, sur avis de parents et "autorité de justice," il est vrai qu'ici c'est le cas d'une mineure, mais je ferai

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inventaire, s'il existe, était d'autant plus facile que la minute doit en être entre les mains de l'intimé, qui a conduit la procédure et fourni les papiers. Le fait que cet inventaire ne soit pas produit, peut faire supposer qu'il n'a jamais eu lieu, ou bien que sa production conduirait à la découverte de certains faits qui ne serait pas à l'avantage de l'intimé. En un mot, la loi veut, (article 237) que pour renoncer, la femme commune fasse un inventaire; si elle veut justifier d'une renonciation valable, il lui faut prouver que cette condition indispensable a été remplie, or dans ce cas elle ne le fait pas, donc elle n'établit pas légalement qu'elle ait renoncé à la communauté.

Mais il y a plus, quand même, sous ce rapport, la renonciation ne devrait pas être regardée comme nulle, elle le serait cependant encore, pour la raison que lorsqu'elle était faite, les choses n'étaient plus entières, c'est-à-dire, elle s'était immiscée dans les biens et avait fait acte de commune, ce qui la privait du bénéfice de renoncer.

En effet, lors du décès de son mari, elle était dans la maison qui lui appartenait, elle a continué à y résider pendant plus d'un an après cette époque, et en a reçu les loyers. Après la renonciation, elle a fait la même chose : les quittances et les témoignages dans la cause établissent qu'elle a occupé la maison ou en a reçu les loyers jusqu'en l'année 1844. Rien ne constate en la possession de qui elle est maintenant.

Ce qui a été fait depuis la renonciation, si elle était valable, ne saurait rendre la demanderesse commune; mais ce qu'elle a fait avant, rendrait cette renonciation nulle, même quand elle aurait été précédée d'un inventaire. Or, elle a occupé pendant plus d'un an, depuis le décès et avant la renonciation, la maison en question, ce qui constitue un acte de commune.

"La femme peut rester dans la maison du mari, jusqu'à ce que l'inventaire soit achevé, "sans faire acte de commune, mais elle ne peut le faire ensuite, sans assumer cette "qualité."

(4 Nouv. Denis. page 726.)

Quant aux loyers, elle en a reçu entre le décès et la renonciation, (voir le reçu du 22 janv. 1835) à la vérité la somme n'était pas forte (£1 10s. seulement), mais le montant n'y fait rien, et ce n'est pas dans un cas comme celui-ci, que l'on se sent disposer à interpréter favorablement les actes d'une femme, qui consent à prêter son nom pour dépouiller les défendeurs de l'immeuble qu'elle leur a donné en échange, conjointement avec son mari, pendant qu'elle retient celui qu'elle en a reçu, s'y loge et vit à même les revenus qu'il rapporte.

Je ne me sens guères disposé non plus à donner une interprétation très favorable à la conduite, et aux dires et faits d'une femme, qui est demeurée en possession des biens de la succession de son mari, tant avant qu'après sa renonciation à la communauté.

L'on pourrait s'étendre davantage sur l'iniquité et la fraude qui sont apparentes et qui résultent des faits prouvés dans la cause, il suffit cependant de dire, que la renonciation de la demanderesse, faite sous les circonstances établies par la preuve, ne l'ont pas déliée des obligations auxquelles elle est tenue comme commune : je la tiens pour com-

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voir dans un instant, que la chose ne fait aucune différence dans l'espèce actuelle. Suivant Pothier l'effet de l'ameublissement, tel qu'on vient de le lire plus haut est comme suit : traité de la communauté No. 307. "Dans le cas "d'un ameublissement général, comme lorsque les parties en se mariant, ont "stipulé une communauté de tous biens, aussitôt que le mariage est célébré "tous les héritages et autres immeubles de chacun des conjoints, deviennent "effets de communauté ; pareillement lorsqu'il a été convenu que les successions "qui écherraient aux conjoints, durant le mariage, seraient communes, si durant "le mariage, il échet quelque succession à l'un ou à l'autre des conjoints, tous "les immeubles qui lui écherront de cette succession, aussi bien que les meubles "deviendront, dès l'ouverture de cette succession, effets de la communauté," et

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mune, et comme telle, elle est garanté pour moitié, de l'éviction à laquelle tend son action, laquelle partant, est pour moitié, repoussée par l'exception de garantie plaidée par les défendeurs.

Mais ce point est de nulle importance puisque l'action doit être renvoyée pour le tout par suite de la ratification de la demanderesse.

Jugement infirmé. Action renvoyée.

N.-B.—La lésion est alléguée dans la déclaration, mais ce n'est pas assez, il aurait fallu la prouver, or ça n'a pas été fait.

Il est très possible que l'immeuble reçu en échange, par le mari de la demanderesse, soit d'une valeur plus grande que celui aliéné ; au lieu de preuve de lésion, il y a preuve que la demanderesse a joui même après sa renonciation, de l'immeuble des défendeurs. (Voir les autorités, comme quoi la lésion doit être non-seulement alléguée mais prouvée.)

AUTORITÉS.

"L'acte fait par le mineur, non émancipé, pourvu qu'il ne pêche pas sous le rapport "des formalités requises, n'est pas nul de droit, il n'est que *rescindable* pour cause de "lésion."

20 Merlin, Rép. Vo. mineur, §1, p. 175.

Voir autorités collectées. Lahaie, Art. 1305, p. 566.

2 Fréminville, Tutelle et Cur. No. 857 et suiv. 864, p. 314.

7 Toullier, pages 682-688.

Ditto, Nos. 569, 571, 573, 575, 582, 583, 577, 579.

Meslé, chap. 14, No. 51, page 409.

Pocquet Livonière, règles de droit, pages 501, 502, 503.

1 Birret, nullités, p. 174.

3 Delvincourt, pages 301, 302.

Pothier, Oblig. No. 52.

4 G. Coutume, sur article 239, p. 513 et 514, No. 32.

11 Rép. Guyot, Vo. mineurs, page 519.

3 Dalloz, Vo. mineurs, Nos. 43, 44, 45.

Rolland de Villargue, Rép. Vo. rescision, Nos. 18, 82, 83.

1 Gin, analyse du droit français, pages, 271, 330, 331.

"Les mineurs capables de contracter, c'est-à-dire, émancipés, ne sont pas restitués, "non plus que les majeurs, pour la seule cause de lésion, telles sont les conventions "pour l'aliénation ou l'acquisition des choses mobiliaires."

(Pothier, Oblig. No. 41.)

"Le mineur émancipé par mariage ou par lettre du prince, acquiert le droit de dispo- "ser de ses biens meubles, et d'administrer ses immeubles."

(6 Pothier, page 622, T. des personnes.)

L'article 239 de la Coutume de Paris : "Homme et femme conjoints par mariage, sont

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au No. 309 il en tire le corollaire suivant: "le mari peut disposer par vente, "donation ou à quelque titre que ce soit, des héritages ameublis par sa femme "de même que de tous les autres effets de la communauté, sans avoir pour cela "besoin de son consentement." Il faut se rappeler toujours que dans le cas actuel, ce n'est pas un héritage de la femme, mais un bien acquis par le mari durant la communauté. Certainement d'après l'autorité qui vient d'être lue,

"réputés usant de leurs droits, pour avoir l'administration de leurs biens et non pour *vendre, engager* ou *aliéner* leurs immeubles pendant leur minorité."

Voir 3 G. Coutume sur cet article, pages 513, 514.

I Bourjon, page 71.

Article, Coutume de Paris, 272, permet au mineur de l'âge de 20 ans, de disposer de ses meubles.

Pouvoirs et incapacité des mineurs émancipés.

Voir Gin, pages 346, 347.

"La femme mineure mariée est également émancipée, et si elle devient veuve avant "sa majorité, elle reste émancipée."

Pandectes Françaises. Lahaie, page 24.

"La femme mineure étant émancipée par le mariage, (Art. C. P. 239. Art. 476, "Code Civil) son mari, s'il est majeur lui tient lieu de curateur, il peut l'assister dans "les instances qu'elle intente, ou portées contre elle."

7 Duranton, No. 131.

"Quant à la femme mariée et mineure, elle n'a pas d'autre protecteur que son mari: "la puissance maritale comprend tous les attributs de la curatelle." (Boileux. Voir Lahaie sur article 476, p. 24.)

"Le mari tient lieu de curateur à sa femme mineure, lorsqu'il est lui-même majeur."

3 Duranton, No. 678.

D'après les autorités d'autre part, il suit que la femme mineure, autorisée de son mari, est dans la même position que le mineur émancipé, et avec cette autorisation maritale, elle peut faire valablement tous les actes que le curateur peut autoriser le mineur émancipé à faire.

Sur la question de savoir quels sont les actes que peut faire le mineur émancipé, sans et avec l'assistance de son curateur. Voir 3 Duranton, de No. 665 à 701. I Gin, pages, 346-347.

Il faut bien remarquer que l'immeuble donné en échange par le mari de la demanderesse n'est pas un propre de celle-ci; mais bien un conquet de la communauté, que le mari avait droit d'aliéner sans le consentement de sa femme, et que partant la ratification qu'elle a faite de cet acte, n'était pas pour le valider; il était valable sans cela, mais seulement pour garantir l'acquéreur, qu'elle ne le troublerait pas à raison de l'hypothèque qu'elle avait sur cet immeuble, pour ses douaire et préciput.

La question soulevée, quant à la substitution de l'immeuble reçu en échange, à celui donné, devient inutile, d'après le point de vue sous lequel j'ai envisagé la première question traitée plus haut. Au reste, la preuve est à peine suffisante, dans ce cas, pour pouvoir élever cette question,—rien ne constatant ce qu'est devenu le dit immeuble reçu en échange depuis le décès de Lapierre.

J'ai élevé cette question sans succès, dans un cas où un immeuble, ayant été vendu et non payé, aurait ensuite été échangé par l'acheteur. Le vendeur, ayant poursuivi, pour son prix de vente, son acheteur, aurait, en vertu du jugement qu'il avait obtenu, fait saisir cet immeuble reçu en échange de celui qu'il avait vendu, en aurait reçu le produit, qui n'aurait pas suffi pour le payer. Qu'après il aurait poursuivi hypothécairement l'acquéreur de son immeuble vendu, et sur lequel il avait droit de bail de fonds, le défendeur aurait plaidé que le droit du vendeur était éteint, vû qu'en faisant vendre l'autre immeuble, il avait ratifié l'échange.

Je crois ce *plea* bien fondé, pourtant la Cour Superieure l'a renvoyé.

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et en en faisant l'application, à la clause d'ameublissement mentionnée plus haut, si cette autorité a quelque signification, la question du droit d'hypothèque sur l'immeuble ainsi échangé par le mari, durant la communauté, se trouverait bien affaibli, je pense; mais disons qu'il fallait la ratification de sa femme, pour la priver de son recours par droit d'hypothèque contre les détenteurs actuels de l'immeuble ainsi échangé, le cas posé, sera-t-elle dans une meilleure situation vis-à-vis des Défendeurs? Je crois que non.

J'admets sans restriction, dans toute son étendue, les autorités citées pour établir la nécessité où se trouve la femme mariée d'être autorisée de son mari pour pouvoir contracter valablement, et j'admets toute la justice du principe, c'est la loi du pays, et j'ai déjà eu occasion d'en faire l'application, et j'ai moi-même siégeant en Cour de Circuit ici à Montréal, déclaré nul un acte fait par une femme mariée, sans l'autorisation de son mari, quoique le mari eût donné son consentement à l'acte et l'eût signé, comme l'approuvant; mais le mot sacramentel *autorisé* ne s'y trouvait pas, et je déciderais de la même manière aujourd'hui, si le cas était semblable.

L'autorisation du mari est un des attributs essentiels de la puissance du mari sur la personne et les biens de sa femme; détruire l'un, c'est détruire l'autre, exemptez de l'autorisation, la puissance du mari disparait. Ce besoin d'autorisation du mari n'est certainement pas fondée sur la faiblesse de la raison de la femme, puisque la même personne, fille aujourd'hui, peut faire *toute* espèce de contrat, demain devenue femme mariée, elle ne peut le faire qu'avec l'autorisation de son mari, et le jour suivant devenue veuve, elle rentre dans ses droits et n'aura besoin de l'autorisation de personne; cette nécessité d'autorisation n'est donc fondée que sur la puissance du mari sur la personne et les biens de sa femme, et est requise, non en faveur de la femme, mais bien en faveur du mari, car eût-elle fait le contrat le plus avantageux pour elle, il n'en serait pas moins déclaré nul, à défaut d'autorisation de la part du mari.

Tous les membres de cette Cour sont d'accord sur la nécessité de l'autorisation, la question à décider est celle-ci: l'acte de ratification du 19 septembre 1821 comporte-t-il l'autorisation voulue par la loi, ou le contraire, ainsi que déclaré par le jugement dont est appel.

Je suis obligé d'admettre que cet acte de ratification est loin d'être un modèle de style et ne prouve pas beaucoup en faveur des connaissances légales et littéraires de celui qui l'a rédigé; mais s'il fallait mettre à néant tous les actes dont la rédaction ne serait pas sans reproche, il y en aurait certes bien peu qui sortiraient intactes de l'épreuve; il serait à désirer certainement que tous les notaires fussent qualifiés, mais il y en a quelques-uns d'entre eux, dont les connaissances légales, la clarté du style et de la rédaction, font une honorable exception; mais c'est malheureusement parceque le nombre de ces derniers est petit, qu'il se rencontre un si grand nombre d'actes qui mettent en danger les intérêts des parties y concernées; si c'était le contraire il y aurait beaucoup moins de procès; les tribunaux sont là pour les expliquer et leur donner leur signification légale, sans oublier toujours que leur premier et principal devoir est de rendre à chacun ce qui lui appartient; ils ne sont pas établis non plus pour décider des questions de droit purement abstraites, mais bien pour décider, suivant la

loi, les intérêts des parties dans les causes soumises à leur décision. L'on sait tous, que l'intérêt est la mesure des actions de telle sorte que les parties qui n'en montrent point, soit dans la demande soit dans la défense, la demande est de suite déboutée et la défense rejetée, sur une défense au fonds en droits; à plus forte raison donc le résultat doit-il être le même si par la preuve, elles ont failli d'établir et prouver cet intérêt; or dans la cause actuelle la Demanderesse pour montrer cet intérêt a été obligée d'alléguer qu'elle avait été lésée par l'acte du 19 septembre 1821, afin de ne pas voir son action déboutée sur une défense au fonds en droit; s'il était nécessaire de faire l'allégué, il était nécessaire également d'en faire la preuve, ici non seulement la Demanderesse a failli de prouver lésion, elle a elle-même par sa preuve écrite, établi le contraire, comme on va le voir dans l'instant.

Arrivé maintenant à la ratification, voyons d'abord ce qui y a donné lieu. L'on connait déjà le contrat de mariage, la clause de communauté de biens, celle d'ameublissement général et la stipulation de douaire préfix et préciput; douaire £500 0 0, préciput £250 0 0; mais on y cherche en vain sur quels biens du mari ces sommes d'argent devaient se prendre; disons le mot, ni l'un ni l'autre des conjoints ne possédait alors un pouce de terre, de meubles on n'en voit pas d'avantage, de sorte que voilà un douaire et un préciput, très considérables pour l'état des parties et qui n'est appuyé sur rien. Dans l'année du mariage on voit pour la première fois le mari faire l'acquisition de l'immeuble qui fait l'objet de la présente contestation; il est acheté à crédit, et c'est un emplacement non bâti, dans le faubourg St. Laurent. A peine l'a-t-il possédé quelques mois qu'il s'apperçoit qu'il vient de contracter des obligations au-dessus de ses forces, qu'il n'a pas les moyens de bâtir, qu'il ne pourra pas même rencontrer ses paiements et il sait qu'une poursuite judiciaire et un décrét forcé, absorberont le tout; que fait-il? En homme prudent, et probablement sur la suggestion même de la Demanderesse, il fait avec les Défendeurs un échange avantageux, il reçoit en contre échange, un emplacement plus petit, il est vrai, mais sur lequel [illegible] une maison de construite; il devait au bailleur de fonds £115 17s. 11d. ce sont les Défendeurs qui paient cette somme; il y avait de plus appliqué sur cet emplacement un constitut en capital de 800lbs. égal à £33 6s. 8d. ce sont encore les Défendeurs qui le paient; il reçoit comme soulte et retour £25 fesant une somme totale de £174 4s. 7d. pour payer ses dettes et encore £25 pour lui-même, et dont la Demanderesse n'a probablement pas manqué de prendre sa bonne part; or c'est cet acte d'échange qui a sauvé le mari de toutes ses difficultés, qui a conservé à la Demanderesse un emplacement bâti où elle a pu résider, dont elle a perçu les loyers, tant depuis la mort de son mari que depuis sa renonciation à la communauté, et sur lequel pour la première fois ses douaire et préciput se sont trouvés appuyés d'une manière solide, au moins jusqu'au montant de la valeur de l'emplacement, c'est cet acte d'échange si avantageux au mari et à la femme surtout, et qu'elle a ratifié par l'acte du 19 septembre 1821, et dont elle s'est portée garante, c'est ce même acte d'échange qu'elle voulait anéantir en demandant par son action à faire déclarer nulle la ratification qu'elle en a faite, pour défaut d'autorisation de la part de son mari, [illegible] état de mineure et la lésion qu'elle dit avoir éprouvée en conséquence.

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Il ne s'agit donc pas ici de l'héritage de la femme vendu par le mari durant le mariage; ce n'est pas non plus le cas de la riche héritière qui a apporté à son mari une fortune considérable, et que ce dernier, dissipateur vend pour subvenir à ses folles dépenses et laisser plus tard sa femme dans l'indigence, non; c'est l'héritage du mari, un bien par lui acquis et non payé et sur lequel la demanderesse n'eût pu réclamer ses douaire et préciput, qu'après le paiement de toutes les créances privilégiées sus-mentionnées, ainsi que les frais considérables qu'entrainent toujours les poursuites judiciaires et les décrêts forcés; que serait-il resté, je le demande? rien; voilà les circonstances qui ont amené l'acte de ratification du 19 septembre 1821. Il n'en est pas moins vrai néanmoins que si tel acte fût necessaire pour la sûreté des défendeurs, il doive être fait de la manière voulue par la loi, malgré toute l'injustice qui pourrait en résulter autrement. Il ne faut pas perdre de vue que cet acte ne va pas à faire ratifier par la femme la vente de l'un de ses héritages propres et ameublis pour entrer dans la communauté; ce n'est pas même une vente faite par le mari, c'est purement un échange, il ne s'agissait donc que de transporter l'hypothèque de la femme pour ses douaire et préciput, (si toutefois elle en avait une qui fut valide et effective) de l'emplacement donné en échange sur celui reçu en contre échange. Je vais maintenant lire l'acte de ratification, il est conçu dans les termes suivants: (Voir *supra* l'acte du 19 septembre 1821).

Cet acte a été attaqué de nullité par la demanderesse comme il a déjà été dit, pour cause de nullité, impuissance de son mari à le consentir, défaut d'autorisation de sa part, enfin lésion; les deux premiers moyens d'objections paraissent avoir été mis de côté par la Cour Inférieure elle-même, puisqu'elle ne déclare l'acte nul qu'à défaut de l'autorisation du mari, et en effet, ils étaient insoutenables, comme on le verra dans un instant.

Quoiqu'il soit vrai de dire que la vente d'un des héritages par la femme mineure, même duement autorisée de son mari, ne soit pas plus valide que celle faite par la mineure non mariée, et que cette vente puisse être valablement attaquée de nullité, néanmoins cette nullité ne serait que relative et non absolue, et en d'autres termes, il faudrait pour se faire relever, alléguer et prouver la lésion; mais une difficulté git encore ailleurs, le défaut d'autorisation. Après avoir lu cet acte de ratification on n'y trouve pas il est vrai, qu'il y soit écrit ces mots, les uns à la suite des autres "*et de son dit mari duement autorisée,*" j'admets cela, si ces mots s'y trouvaient écrits, dans cet ordre, il n'y aurait rien à décider; mais c'est exactement parce que la phrase ne se lit pas ainsi qu'on s'adresse au tribunal pour lui donner sa signification; si ce qui est écrit dit exactement la même chose, quoiqu'exprimé un peu différemment, il faut qu'il y ait l'autorisation voulue par la loi. Suivant moi, malgré le mauvais style, le vice de la phraséologie et même les fautes d'orthographe qui s'y rencontrent en assez grand nombre, il y est dit suffisamment que cette femme a été bien et duement autorisée par son mari. Le notaire, et c'est toujours lui qui parle pour les parties, ou plutôt ce sont les parties qui parlent par sa bouche, dit, que le dit jour, 19 septembre 1824, est comparue Marguerite Marcoux, épouse de Charles Tirion dit Lapierre, dénommée en l'acte ci-haut et des autres parts écrit. On voit par ces expressions que la ratification se trouve écrite au bas de la minute

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du contrat d'échange, *duement assistée* et d'abondant *autorisée à ce présent* à l'effet qui en suit. Jusqu'à présent qui voit-on partie à l'acte? la femme et son mari, il y est déclaré qu'elle y est duement assistée et d'abondant autorisée, qui donc de ces deux personnes pouvait duement assister et autoriser cette femme si ce n'est son mari, lui présent, comme il y est dit; non, dit la demanderesse, c'est une conséquence trop forcée, eh bien, si ce n'est pas son mari, c'est donc elle-même qui s'est autorisée, car il n'y avait aucune autre partie à l'acte; un raisonnement comme celui-ci me paraît faux et c'est pourtant là le raisonnement de la demanderesse. Immédiatement après la phrase que je viens de lire, le notaire continue "elle ratifie l'acte d'échange et s'en porte garante," et le notaire termine en disant "et la dite comparante signe avec nous notaires, le dit Lapierre ayant déclaré ne savoir le faire de ce enquis a fait sa marque ordinaire d'une croix." J'ai lu et relu cet acte, et j'y ai toujours vu cette femme assistée et autorisée par son mari, présent et partie à l'acte. Décider autrement serait rétrograder aux premiers siècles de l'ancienne Rome et faire revivre la gloire des formules de cette époque. On sait que les jurisconsultes du temps, tous de l'ordre des patriciens et des nobles, avaient imaginé pour tenir les plébéiens dans leur dépendance, certaines formalités compliquées et certains termes rangés suivant un certain ordre, dont il fallait nécessairement se servir, non seulement pour tous les actes qui se faisaient devant le magistrat, mais encore dans presque toutes les affaires où sa présence n'étaient pas nécessaire.

Non seulement chaque action avait sa formule propre, il en était ainsi pour toutes les autres parties de la plaidoirie; cependant on ne pouvait pas impunément errer dans la forme; ou l'on perdait son procès, ou l'on fesait un acte nul et qui n'attribuait aucun droit; ces jurisconsultes prévilégiés avaient apporté le plus grand soin à dérober au peuple la connaissance de leurs formules, en les tenant cachées au fond de leurs cabinets, comme autant de mystères interdits aux profanes. La nécessité des formules commença à se relâcher sous les empereurs et Théodose le Jeune les abolit entièrement.

Gardons-nous donc de tomber sous l'empire des formules; d'ailleurs s'il était resté dans notre jurisprudence quelques traces de ces dangereuses formules; notre loi de Judicature de 1849 leur a porté le dernier coup. On me pardonnera cette digression qui ne m'a pas parue tout-à-fait étrangère à la cause.

Pour toutes les raisons ci-dessus, je suis d'opinion que cette ratification est légale et valide; néanmoins s'il était vrai que la demanderesse fût lésée par cet acte, étant mineure, alors elle eut pû pour cette raison, réussir à en faire prononcer la nullité, mais il fallait prouver la lésion, ce qu'elle n'a pas fait; elle a fait plus: elle a elle-même détruit l'espèce de présomption qui pouvait exister en sa faveur, sous ce rapport, comme je l'ai fait voir plus haut.

La femme mineure duement autorisée de son mari peut légalement faire tous les actes que les autres mineurs peuvent faire; et nous trouvons dans la loi Romaine, cette maxime bien et duement établie, et ce en vertu d'une loi précise. *Pupillus omne negotium recte gerit,* mais ils peuvent être restitués contre tous les actes où ils souffrent de la lésion (Règles du Droit Français) et plus loin au même ouvrage, "quand l'aliénation des biens des mineurs, a été faite, sans les formalités voulues par la loi, les mineurs peuvent en demander la rescision, sans

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alléguer la lésion, ni être dans la nécessité de la prouver, ce qui veut dire que dans le cas contraire, il peut faire l'un et l'autre ; et à la page suivante il dit : " Quoique dans l'aliénation des biens des mineurs, on ait gardé les formalités " ci-dessus ; les mineurs n'en sont pas moins restituables, quand ils souffrent " lésion, mais il faut qu'en ce cas la lésion soit considérable ! Voyez l'Ancien Dénizart, verbo, lésion, p. 142 ; " si le mineur n'est pas lésé, il ne peut " se faire restituer car ce n'est qu'à cause de la lésion qu'on admet au bénifice " de la restitution ; dès que la lésion cesse, il n'y a pas lieu à la restitution ; en " ce cas, il n'a pas plus de prévilége que les majeurs, (*minor restituitur, non tanquam minor sed tanquam læsus.*)"

Suivant moi, ces deux points de la cause décidés, il ne reste plus rien pour appuyer l'action faute de base, le défaut d'autorisation et la lésion ; mais allons plus loin, et je suppose le cas hypothètique, que la ratification soit nulle à défaut d'autorisation, qu'il y ait lésion, que la demanderesse l'ait établie, et ce en temps utile, ou qu'elle doive se présumer par la nature même de l'acte comme il a été prétendu ; s'en suivra-t-il même alors qu'elle doive réussir ? Je pense que non ; cette action serait au moins prématurée.

Il ne peut être nié, que lorsque le mari, sans le consentement de sa femme, a aliéné durant le mariage un héritage sujet à son douaire, il ne continue de l'être, en quelques mains qu'il passe ; Pothier Douaire No. 84, rien de plus juste et c'est la loi ; mais aussi par les mêmes règles de justice et d'équité, ce principe reçoit un tempérament, voyez le même auteur No. 87, " Le principe " que nous venons d'établir, dit-il, reçoit un tempérament d'équité qui est que " les héritages que le mari a ainsi aliénés, ne continuent d'être sujets au douaire " que subsidiairement, dans le cas auquel la femme ne trouverait pas (c'est donc " à elle à chercher et à établir le fait) dans les biens sujets au douaire qui sont " restés dans la succession de son mari, de quoi lui fournir la portion qui lui " appartient pour son douaire, mais s'il y a de quoi l'en remplir, *la femme n'est " pas reçue à poursuivre son douaire contre les tiers détenteurs* des héritages " *sujets au douaire.* Et un peu plus loin en parlant de l'action *confessoria servitutis usus fructus* il continue : " l'ouverture du douaire coutumier donne lieu à " l'action *confessoria servitutis usus fructus.* Cette action est une action réelle, " par laquelle la douairière revendique le droit d'usufruit qui lui est acquis, par " l'ouverture du douaire, dans les héritages sujets au douaire pour la portion " qui lui en appartient," plus loin il ajoute " la douairière n'est reçue à don- " ner cette action contre les tiers détenteurs des héritages sujets au douaire, " que lorsque son mari n'a pas laissé dans sa succession, suffisamment pour rem- " plir la douairière de sa portion ; c'est le cas auquel elle peut par cette action " revendiquer son douaire contre les tiers détenteurs des héritages, dont l'aliéna- " tion a entamé la portion qui lui appartient pour son douaire."

Comme la marche de la douairière lui est tracée ! il lui faut d'abord chercher dans la succession de son mari, s'il n'y a pas là assez pour son douaire, c'est alors seulement, qu'il lui est permis de s'attaquer aux tiers détenteurs ; et non encore indistinctement, non, elle doit commencer par les derniers acquéreurs, et elle ne peut remonter aux autres qu'à défaut d'avoir trouvé jusque là, assez pour compléter son douaire ; il ajoute encore " à l'égard des héritages qui ont

" été aliénés les premiers, quoiqu'ils soient du nombre de ceux qui composent
" la masse dans laquelle la douairière doit avoir une portion, *elle n'a pourtant*
" *aucune action* contre ceux qui en sont détenteurs, si l'aliénation qui en a été
" faite n'a pas entamé cette portion, ceux qui restaient étant suffisants pour la
" fournir." Il est vrai que Pothier ne parle ici que du douaire coutumier et
non du douaire préfix, le premier donnant lieu à l'action réelle, et l'autre
ne donnant lieu qu'à l'action personnelle; je l'admets volontiers, mais s'il y a
parité de raison dans les deux cas, je ne vois pas pourquoi il faudrait déci-
der différemment.

Le douaire préfix de la femme, tout en comportant un droit d'hypothèque
sur les biens du mari, n'est pas toujours suivi d'effets, c'est une créance éven-
tuelle et qui ne peut être exigible d'abord qu'en cas de saisie par la femme
où les enfants, ou les uns et les autres, il faut que le mari prédécède, jus-
que là point de douaire; le mari même prédécédant, si la femme et les en-
fants sont institués ses légataires universels, point de douaire encore; car il y
a confusion, ils seraient créanciers et débiteurs en même temps; il n'est pas
nécessaire de multiplier les exemples, mais disons que dans un grand nombre
de cas la stipulation du douaire n'a pas son application et l'hypothéque qui
n'est qu'accessoire disparait avec le principal

Il est facile d'ailleurs d'apercevoir le motif de la loi qui a limité ainsi l'ac-
tion de la douairiére contre les tiers détenteurs; en effet de cette manière les
droits de la douairière sont préservés intacts et d'un autre côté on protége
les tiers acquéreurs de bonne foi contre les caprices et les vexations de la
douairière; en effets ces tiers détenteurs ne sont point censés connaître et
généralement ne connaissent jamais ni les forces de la communauté, ni celles
de la succession du mari, à qui ils sont parfaitement étrangers, la douairière
seule peut et doit les connaître; car elle n'a pu renoncer sans faire inven-
taire et c'est ce dernier acte qui l'a déterminée dans son choix; rien donc
de plus juste que d'obliger la douairière de s'adresser d'abord à la succession
de son mari, et ainsi de suite et de la manière qu'on vient de voir pour trou-
ver son douaire, avant de pouvoir s'adresser à des tiers détenteurs qui ne con-
naissent rien, ni de la communauté entre le mari et la femme ni de la suc-
cesson du premier; la marche contraire donnerait lieu à un circuit d'actions
en garantie les uns contre les autres, et il arriverait peut être qu'on trou-
verait assez, en dernier lieu, dans la succession du mari, qui serait le dernier
[illegible] pour indemniser tous ces tiers détenteurs des conséquences du trouble à
eux causés par l'action hypothécaire de la douairiére; et même dans ce der-
nier cas, qui se trouve plus favorable, ces tiers détenteurs ne seraient jamais
complètement indemnisés; mais supposant l'autre cas, et celui-ci devra arri-
ver nécessairement plus souvent, que la succession puisse payer le douaire,
mais rien de plus; la femme en intentant de suite son action hypothécaire contre
les tiers détenteurs, ferait supporter par ces derniers des frais considérables
dont ils ne pourraient être remboursés, mais qui eussent été épargnés si la
douairière se fut adressée directement à la succession de son mari; si cette
raison vaut dans le cas du douaire coutumier, et je n'en découvre pas d'autre,
elle limite également suivant moi dans le cas du douaire préfix et autres droits

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matrimoniaux de la femme; en donnant cette interprétation, je ne crois pas violer la loi et encore moins l'équité en l'appliqquant aux deux cas.

Les défendeurs ne sont donc pas obligés dans le cas actuel d'indiquer les biens ni d'avancer les frais nécessaires pour la discussion d'iceux. Le cas présent fait ressortir toute la justice et l'équité de ce tempérament; la demanderesse ne s'est point même donné la peine de produire l'inventaire qu'elle dit avoir fait avant sa renonciation; et ce défaut de production de sa part, est suivant moi une forte présomption contre elle et laisse à supposer qu'il y a dans la succession de son mari des biens qu'elle pouvait discuter, mais qu'elle refuse de le faire par caprice ou autrement. Il est une autre raison qui limite également contre les prétentions de la demanderesse, et qui se trouve appuyée sur ce même principe d'équité; c'est que c'est un échange et non une vente. Que dit encore Pothier à ce sujet au No. 89, "Pareillement "lorsque le mari a aliéné, à titre d'échange ou de bail à rente, un héritage "sujet au douaire de sa femme, quoique cette aliénation soit une aliénation "volontaire qui, selon la subtilité du droit, n'empêche pas l'héritage de de-"meurer sujet au douaire, néanmoins lorsque l'échange a été faite sans re-"tour et de bail à rente, sans deniers d'entrée et de bonne foi, *la femme doit* "*prendre son douaire sur la rente ou sur l'héritage reçu en contre-échange* qui "sont un juste équivalent de celui qu'elle aurait sur l'héritage;" dans le cas actuel il est vrai il y a eu une soulte de £25, mais en se rappelant les circonstances de l'échange, elle se trouvera peser légèrement et n'être d'aucun poids.

C'est encore ici le cas du douaire coutumier, mais j'oserais dire qu'il me parait peut être moins favorable que celui du douaire préfix, qui n'est qu'une simple créance mobiliaire, au lieu que le douaire coutumier est un droit réel; *jus in re;* d'après les autorités que je viens de lire la demanderesse n'eut-elle jamais ratifié l'acte d'échange en question, elle aurait certainement la plus mauvaise grâce du monde, (en eut-elle eu le droit) d'intenter la présente action contre les défendeurs ainsi qu'elle l'a fait.

Il n'était pas nécessaire d'examiner la cause sous tous ces rapports, vû que selon moi, la ratification étant déclarée légale, et aucune lésion n'ayant été prouvée, tout l'édifice devait s'écrouler; mais il m'a semblé juste que la partie succombant elle-même et la cour de première instance, qui lui avait donné gain de cause, puissent connaître tous les motifs qui ont forcé le présent tribunal à décider autrement.

J'ai la plus haute opinion des connaissances légales des savants Juges qui ont prononcé en première instance, et il a fallu la plus forte conviction, pour me déterminer à me prononcer en sens contraire. Je concours en conséquence dans le jugement de la majorité de cette cour tel que motivé.

DUVAL, J. La difficulté soulevée sur l'autorisation de la femme, dans l'acte du 19 septembre 1821 n'est pas susceptible, à mon avis de beaucoup de doute. Il importe peu que le notaire parle lui-même ou fasse parler les parties, pourvu que le contenu de l'acte exprime la volonté des parties. Ce point étant réglé, la femme Marcoux ne pourrait être relevée de la garantie qui repousse son action que par le fait de sa minorité. Le droit d'hypothèque, en lui-même,

n'est pas un *jus in re*, mais simplement *jus ad rem*, en d'autres mots l'hypothèque, était, dans le cas présent, un droit mobilier que la femme mineure, mais émancipée, pouvait aliéner. L'opinion exprimée par Pothier dans son traité posthume, et d'après laquelle l'hypothèque est qualifiée de *jus in re*, est contredite dans son traité de la Communauté. Il est probable que s'il eût mis la dernière main à son traité de l'hypothèque, il eût corrigé cette erreur. La minorité de la femme ne peut la protéger contre cet acte, à moins qu'elle ne l'attaque pour cause de lésion. Il ne suffisait pas pour elle d'alléguer la lésion, elle devait la prouver ; ne l'ayant pas fait, elle n'a plus rien pour justifier le jugement de la Cour Inférieure.

AYLWIN, J. La clause d'ameublissement contenue dans le contrat de mariage de la femme Marcoux, rendant tous ses droits mobiliers, elle pouvait disposer de tout ce qui lui appartenait, avec l'autorisation de son mari, et dans l'acte du 19 septembre 1821, cette autorisation est authentiquement constatée par ces mots : "duement assistée," et "le dit Lapierre, ayant déclaré ne savoir le faire (signer) de ce enquis a fait sa marque ordinaire," (signé) "Charles Brion dit Lapierre, sa marque." L'autorisation est également constatée, par ces mots "d'abondant autorisée à l'effet qui s'en suit." Qui donc pouvait autoriser cette femme, sinon son mari ?

Ci-suit le jugement :

La cour après avoir entendu les parties par leurs avocats, sur le mérite, examiné, le dossier de la procédure en cour de première Instance, les griefs d'appel et les réponses à iceux, et sur le tout mûrement délibéré :—Vû la clause d'ameublissement portée au contrat de mariage d'entre feue Marguerite Marcoux, demanderesse denommée en la déclaration en cette cause, et feu Charles Brion dit Lapierre son premier mari, devant Maître Doucet et son confrère notaires, à Montréal, le vingt neuf avril mil huit cent vingt.—Vû l'acte de ratification devant maître Lukin et son confrère notaires, à Montréal, le dix-neuf septembre mil huit cent vingt et un, que les demandeurs originaires ont attaqué par leur dite déclaration et dont ils ont demandé l'annulation ;

Vû que la dite ratification ne touche nullement à aucun droit immobilier de la dite feue Marguerite Marcoux, et que la demande formée par elle de son douaire prefix et de son préciput stipulés au dit contrat de mariage sus-daté n'était que d'une créance mobilière, et que par l'effet du dit acte de ratification l'hypothèque, qui assurait la dite créance n'a été transportée que d'un immeuble sur un autre ;

Attendu que la dite dame qnoique mineure pouvait sous l'autorisation de son dit mari, valablement faire et consentir la dite ratification—Attendu que dans l'espèce, il n'y a aucune preuve de dol ou de fraude pratiqué, envers la dite dame ni de lésion lui donnant droit à la restitution en entier par elle demandée en la dite déclaration ; Attendu qu'en parlant au dit acte de ratification, elle a été bien et suffisamment autorisée par son dit feu mari au désir de la loi et que partant la demande en déclaration d'hypothèque formée en cette cause, en son nom, est repoussée par l'exception de garantie résultant d'icelui, et qu'en conséquence, dans le jugement de la cour dont est appel, il y a mal jugé, en autant qu'il a été prononcé la nullité du dit acte, et que les conclusions en déclaration d'hypothèque, ont été accordées à la partie demanderesse.

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Il est adjugé et ordonné par la cour ici présente que le dit jugement, savoir : celui rendu entre les parties en cette cause par la cour supérieure siégeant à Montréal en date du dix-huit novembre mill huit cent cinquante sept, soit, comme par ces présentes il est infirmé et mis au néant, et cette cour rendant le jugement, que la dite cour supérieure aurait dû prononcer, déboute les parties demanderesses representées aujourd'hui par l'intimé Charles A. Brault pour avoir repris l'instance en leur lieu et place de la demande par elles formées en déclaration d'hypothèque, et sur ce met les parties hors de cours et de forces, avec dépens contre le dit Charles A. Brault, l'intimé, tant ceux encourus dans la cour supérieure, que du présent appel, et enfin il est ordonné remise du dossier.

L'honorable Mr. le Juge Guy, *dissentiente.*

Doutre et Daout pour les Appelants.

Mackay et Austin pour l'intimé.

A. A. Dorion, conseil pour l'intimé.

(J. D.)

AUTORITES DES APPELANTS.

I. Validité de la ratification du 19 septembre 1821.

Lebrun, Com. Edit. Folio, p. 171, No. 7, p. 188, No. 11,189, 1ère col.
Pothier, T. 3. Puissance du mari, Nos. 68, 70, 71, 72, 73, 75, *in fine*, 80,
Renusson, Com. p. 453, Nos. 5 *in fine* 6, 13, 19, 20, 21.
Toullier, T. 2, No. 633, 651, 654.
Cubain, Droit des femmes, Nos. 141, 146, 162, 163, 658.
Freminville, Minorité et Tutelle, T. 2, Nos. 922, 923.
Démolombe, Code Civil, T. 4, No. 195.
Duranton, T. 12, No. 536.

II. Nullité de la renonciation, faute d'inventaire.

Pothier, Com. 537, 538, 558, 559, 560, 563, 565, 566, 571, 745.
Dalloz, Jurisp. du Royaume, T. 12, p. 348, No. 23.
Cubain, Droit des femmes, Nos. 299, 300, 310.
Cout. de Paris, Art. 237.
Renusson, Com. p. 301, Nos. 10, 11, 18, 19, 20, 21, 23, 26, 28, 36, 37.
Duranton, T. 14, Nos. 442, 445.
Toullier, T. 13, Nos. 134, 136, 137.
Ferrière, Gr. Cout., T. 3, p. 444 et suiv., Nos. 9, 10, p. 447 No. 20 p. 453 No. 16, p 454 No. 21, p. 458 et suiv. Nos. 4, 5 *in fine*.
Duplessis, Communauté, p. 435, Note EEE, p. 436 et suivantes.
Merlin, Rép., Vo. Inventaire §V, 3o. p. 259. Opinion du Tribunat; et p. 530. Mais il ne suffirait pas de dire que le mari n'a rien laissé, etc.
Pothier. sur l'art 204 de la Cout. d'Orléans, p. 347 notes 6 et 7, p. 307, No. 96.
Lebrun, Com. p. 447, Nos. 2, 3, pp. 458, 459, 460, 461 *in fine*, 466.
Denisart Anc. Vo. Carence, Nos. 1, 2.
Décisions des Tribunaux, T. 6, p. 28 Orr vs. Fisher.

III. Lésion non prouvée. Nécessité de cette preuve.

Toullier, T. 7, Nos. 527, 573, 577, 578, 579, 582.
Merlin, Rép., Vo. Lésion §VI.
Delvincourt, Droit civil, T. 2, p. 183, Notes p. 592.
Solon, Théorie de la Nullité, T. 1, Nos. 278, 279, 280, 281, 284, 285, 287.
Perrin, Nullités de Droit, p. 102.
Freminville, Minorité et Tutelle, T. 2, Nos. 857, 859, 864, 865.
Proudhon, Traité des Personnes, T. 2, pp. 485 et suiv.
Dénisart Ancien, Vo. Lésion, N. 18.
Duranton, T. 10, No. 288.
Zachariæ, Droit Civil, T. 2, No. 335.

MONTRÉAL, 27 FEVRIER 1859.

Coram SMITH, J.

No. 2898.

Tavernier vs. Lamontagne.

MUR MITOYEN,—EXHAUSSEMENTS.

Jugé :—Que le voisin qui se sert des exhaussements du mur mitoyen faits par son co-voisin, est tenu de lui payer la moitié du prix et valeur de ces exhaussements.

Le Demandeur par sa Déclaration alléguait :" Que par acte de vente fait à Montréal devant Lamontagne, Notaire, (qui est le défendeur) et son confrère le 17 octobre 1850, Laurent Dufresne, Ecuier, de Montréal et Dame Marie Adelaïde Lamontagne, curatrice duement élue en justice de sieur Luc Dufresne du même lieu, son mari ; reconnurent avoir vendu et cédé pour le prix et la somme de £14. 9s. 3d. courant payée lors de la passation de l'acte, au demandeur présent et acceptant, le droit de mitoyenneté dans le mur de séparation ou pignon d'entre la propriété des dits Sieur et Dame Dufresne et une autre propriété adjacente appartenant au dit Sieur Tavernier, située sur la grande rue du Faubourg St. Laurent de la ville de Montréal susdite ; le dit droit de mitoyenneté comprenant tant le dit mur susdit que le terrain jusqu'à concurrence de neuf pouces de largeur sur trente deux pieds de profondeur sur lequel il se trouve construit, qui au moyen des présentes devront légalement être communs et mitoyens entre les parties, tel qu'il appert au dit acte que le dit demandeur produit avec les présentes et auquel il refère comme en faisant partie. Qu'il fut de plus entendu au dit acte que le demandeur se réservait tous ses droits dans les exhaussements qu'il ferait au dit mur ou pignon et qu'il devait faire faire à ses propes frais et que la moitié devait lui en être payée quand les dits Sieur et Dame Dufresne viendraient à en faire usage.

Que le dit demandeur a bâti subséquemment une maison sur le terrain voisin du terrain des Sieur et Dame Dufresne ; qu'en ce faisant il s'est servi du mur mitoyen qu'il avait acheté, mais qu'il a fait sur le mur des exhaussements d'une valeur considérable, et qu'il a fait en arrière du mur mitoyen une prolongation de ce mur sur une longueur considérable et d'une grande valeur.

Que par bail à loyer fait à Montréal, le 9 avril 1855, devant Weekes & son confrère, notaires, le dit Laurent Dufresne donna à loyer pour le terme de quinze années consécutives à compter du 1er mai 1855 au défendeur présent et acceptant ; "un lot de terre vacant situé dans cette cité de Montréal, au quartier St. Laurent, borné devant par la grande rue du dit faubourg St. Laurent, d'un côté au nord-ouest par Mme. Lamontagne ou ses enfants, de l'autre côté au sud-est par le Sieur François Tavernier, et par derrière par le Sieur Hubert Paré ; mesurant le dit terrain environ cinquante pieds de front sur une profondeur d'environ soixante-douze pieds avec les ruines d'une maison en pierres incendiée, qui se trouvent sur le dit terrain ;" laquelle maison est la même que celle par rapport à laquelle le demandeur avait acheté le droit de mitoyenneté, [illegible] le mur était devenu mitoyen avec le demandeur, sur lequel mur ce [illegible] a fait les exhaussements ci-dessus mentionnés.

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Que par ce bail fait pour £10 0 0 par année de loyer pendant les deux premières années, £15 0 0 pour les cinq dernières, le dit défendeur s'obligea de faire élever sur le dit terrain des bâtisses en briques ou en pierres de la valeur de cinq à six cents livres courant et à la fin du bail, le bailleur aurait le droit de garder ces bâtisses en payant deux cents livres courant d'indemnité au défendeur; et au cas contraire, mais à l'option du bailleur, le défendeur devait garder les bâtisses, payer six cents louis courant au bailleur et devenir propriétaire des bâtisses et du terrain, tel que le tout appert au dit bail produit avec les présentes.

Que le défendeur a, en conformité du dit bail, érigé une maison et dépendances; qu'il s'est servi non seulement du mur mitoyen entre le dit demandeur et lui, mais encore qu'il s'est servi des exhaussements faits par le demandeur, et de la prolongation du dit mur érigé sur le terrain du dit demandeur dans la cour; qu'ainsi il est tenu de payer pour la moitié de la valeur des dits exhaussements et prolongation de mur dont il se sert, la somme de £31 10s. 0d. courant qu'il doit légitimement au demandeur ainsi qu'il appert au compte et mesurage de J. B. Tison produit en cette cause par le demandeur auquel il réfère comme faisant partie des présentes, mais qu'il refuse cependant de lui payer.

Le défendeur contesta cette demande par une exception péremptoire qui est en ces termes:

Que le mur sur lequel les exhaussements ont été faits par le défendeur appartenait d'abord tout entier avant le 1er octobre 1850 à Laurent Dufresne, écuier de Montréal, et Luc Dufresne du même lieu, ainsi que le terrain sur lequel se trouvait construit le susdit mur.

Que le susdit mur formait alors le p[illegible] une maison, lequel pignon a trente deux pieds de profondeur, de plus s[illegible]ait comme il se prolonge encore, comme mur de séparation assis en[illegible]t exclusivement sur tout le terrain appartenant aux susdits sieurs Dufresne e[illegible]s laquelle prolongation du dit mur conséquemment le demandeur n'a aucun droit de mitoyenneté.

Que ce ne fut que le 17 octobre 1850, par l'acte de venté en partie récité en la dite déclaration que le dit demandeur a acquis un droit de mitoyenneté dans cette partie seulement du dit mur qui formait le susdit pignon de trente deux pieds de profondeur jusqu'à concurrence de neuf pouces seulement.

Que c'est par le dit acte que le défendeur a reconnu qu'avant cette époque tout le dit mur appartenait aux dits sieurs Dufresne et était bâti entièrement sur leur terrain.

Que le dit défendeur qui était aux droits des dits sieurs Dufresne, était en droit de faire des exhaussements sur le susdit pignon; attendu qu'il est mitoyen entre lui et le demandeur et que les exhaussements que le dit défendeur a ainsi faits l'ont été sur l'ancien pignon et sans se servir d'aucun des exhaussements faits par le demandeur, lesquels d'ailleurs ont été construits de manière à ne pouvoir servir aucunement au défendeur.

Que le dit défendeur était en droit de se servir du mur de séparation ou de clôture qui existe sur le terrain des susdits sieurs Dufresne d'aucune manière que ce puisse être, mais ne sert pas néanmoins d'icelui et nie de s'en être jamais servi.

Que le dit défendeur ne s'est jamais servi d'aucun exhaussement fait par le demandeur, et qu'il avait le droit de se servir de la prolongation du dit mur;

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(Supposé qu'il l'eut fait, ce qu'il n'a jamais fait néanmoins) et que pour ce, il ne doit rien au demandeur qui ne peut exercer aucun recours en loi, contre le défendeur, attèndu que le défendeur n'a fait que ce que tout propriétaire a droit de faire sur son propre sol.

Que le demandeur n'a pas exhaussé le dit pignon dans tout[illegible], mais seulement pour une largeur d'environ neuf pouces, q[illegible] bien fondé à faire des exhaussements sur le restant de la [illegible]

Que partant le dit défendeur n'a fait qu'user du droit [illegible] de bâtir sur le sol qui lui appartient, et en conséquence l'a[illegible] est mal fondée

Les parties ayant procédé à la preuve de leurs allégués [illegible] cour considéra qu'il était établi par l'enquête: que le défendeur s'éta[illegible]lement servi des exhaussements faits par le demandeur quant au pignon seulement et condamna en conséquence le défendeur à payer (1.) la moitié de leur valeur.

Le jugement est motivé comme suit :

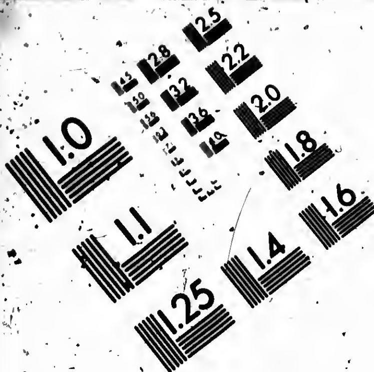
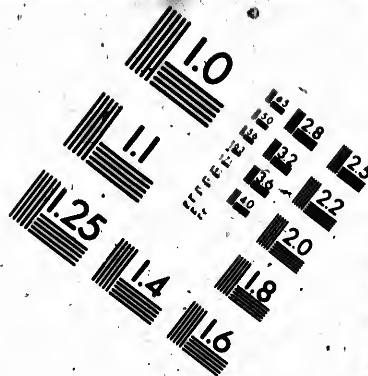
La cour après avoir entendu les parties par leurs avocats sur le mérite de cette cause, examiné la procédure et preuves et sur le tout délibéré, condamne le défendeur à payer au demandeur la somme de £6 11s. 0d. dit cours actuel prix et valeur du mur de séparation ou pignon d'entre la propriété de sieur et dame Dufresne et une autre propriété adjacente, appartenant au dit demandeur, situé sur la grande rue du faubourg St. Laurent de la ville de Montréal, le dit demandeur ayant acquis le droit de mitoyenneté dans le dit mur, par acte de vente entre lui et Laurent Dufresne, devant maître Lamontagne et son confrère, notaires publics, le 17 octobre 1850, et le dit défendeur s'étant servi du dit mur pour bâtir sur le terrain adjacent suivant un certain bail à loyer à lui consenti par le dit Laurent Dufresne par acte devant Maître Weekes et son confrère, notaires publics, le 9 avril 1855, avec intérêt, sur la dite somme de £6 11s. 0d. à compter du 17 janvier 1857, jour de l'assignation en cette cause jusqu'au paiement et aux dépens, comme dans une cause de la cour de circuit.

Loranger, Pominville et Loranger, avocats du demandeur.

Lafrenaye et Papin, avocats du défendeur.

(P.R.L.)

(1) Vide. Pothier, Contrat de Société, 1er appendice, No. 201.
Merlin, Rép. vo. Mitoyenneté, page 346, Pardessus des Servitudes. 1 vol. p. 346, No 153. Cout. de Paris, article 198.
Duplessis p. 124; liv: 2. ch. 4.
Desgodets. Ed: 1787. p. 155; No, 5, p. 192, No, 12.

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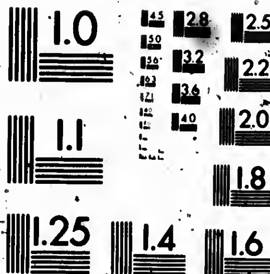
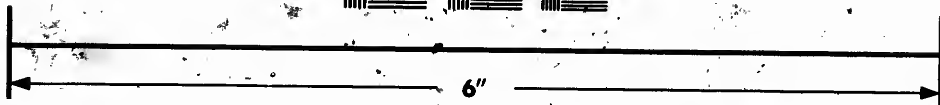

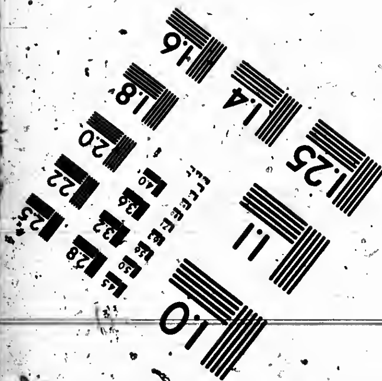
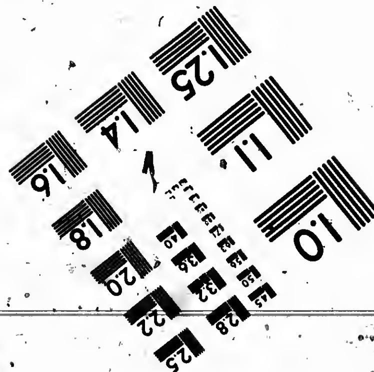

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MONTREAL, 12th DECEMBER, 1859.

Coram MONK, J.

No, 278.

Delisle vs. Couvrette et Clément dit Larivière, opposant.

VENDITIONI EXPONAS. OPPOSITION.

Held.—That an opposition *à fin de distraire* may be fyled to a writ *of venditioni Exponas de bonis*.

In this case the defendant's moveables having been seized under a writ of *Fieri Facias de Bonis*, an opposition *à fin d'annuler* was fyled by defendant which was dismissed, upon which the plaintiff sued out a writ of *Venditioni exponas*, the execution whereof was impeded by an opposition *à fin de distraire* on the part of the opposant revendicating the effects seized as his own property. The Plaintiff now moved that this opposition be set aside on the ground that no such opposition could be fyled to a *Venditioni Exponas.*

In support of the motion it was urged by *Bovey* that it was too late to discuss the validity of the seizure under an order to sell. That this writ, according to the law of England, whence its authority here was derived, was a peremptory mandate under which the sheriff or seizing officer was absolutely bound to have the proceeds before the court notwithstanding all impediments save those grounded on defects in the *Venditioni* itself. In Talon dit Lesperance *vs* Langevin p. 179. Vol. 1. L. C. Reports there had been two similar oppositions *à fin de recréance* or *revendication des effets* which were dismissed. A *venditioni* there issued ordering the sheriff to proceed to the sale after the customany formalities. An opposition *à fin d'annuler* was fyled to this, on the ground that the formality of the *Procès-Verbal of recollement* had not been observed under the 33 Title of the *Ordonnance* of 1667, articles 10 and seq.—Judge Vanfelson on rendering the Judgment of the court said that the only question to be considered was whether the formalities of the *Venditioni* had been complied with; that the *Recollement* was unnecessary, that no nullity existed therefore, and the opposition was dismissed. An application of the same principle in regard to real estate will be found in the case of Abbott and The Montreal Railway Company. p. 1. Vol. 1. L. C. Jurist (1857). On motion to set aside the opposition the court granted the motion because the opposition attacked defects in the seizure, holding that it was too late to attack the *Fieri Facias* which ought to have been attacked within the ordinary delay.

In the case of real estate the statute 41 Geo 3. ch. 7 forbids these oppositions to a *Venditioni;* how much more should they be discountenanced in the case of moveables where the interests are comparatively unimportant compared with the interests involved in Real Estate! It would seem as if the law were purposely silent on a matter which ought to be implied.

Under the 12th article of the 33rd. Title of the *Ordonnance* of 1667 a delay of eight days must elapse between the seizure and day fixed for sale, which delay is accorded by the law so say Jousse, Pigeau, and the rest of the commentators in order that the debtor may either pay the debt if he choose or else that he or third parties interested may be enabled to oppose the sale. An opposition being thus made

Delisle vs. Courvette.

and afterwards dismissed, the judgment dismissing it was termed a *sentence de passer outre*, that is to say, an order to proceed to the sale notwithstanding the opposition so made, and this judgment established against the opposant whose opposition had been so dismissed, a bar, preventing him from making a further opposition. Notwithstanding this however according to Pigeau, Vol. 1. Procédure civile p. 637, this *sentence de passer outre* did not prevent other creditors from afterwards making their oppositions to the sale and it was necessary to establish the *passer outre* against them also. The jurisprudence, as laid down by Pigeau, seems to have recognized only the following limit, viz, that at the second or third opposition the judgment orders the sale notwithstanding any oppositions made or to be made, (*faites ou à faire,*) which prevents further delays, and this on the ground that it often happens that those who make them do so without interest acting in concert with the defendant for the sake of delay. As the law established a delay during which these oppositions ought to be fyled, this jurisprudence seems manifestly inconsistent. The writ of *Venditioni Exponas* however is a very different thing from the simple *sentence de passer outre*, it is in fact the *sentence de passer outre, nonobstant toutes oppositions faites ou à faire.* It is to be remarked that the ordinance of 1785 25 G. 3. c. 2. is the law in force here with regard to the selling of moveables under execution. The statute first cited, in prescribing a delay on the case of real estate during which oppositions must be fyled to the writs of *Venditioni Exponas*, encourages the idea that the writ of *Venditioni Exponas* in this country is to be interpreted and governed by the rules which apply in similar cases in England. If the present opposition be regarded as valid, then the term of *Venditioni Exponas* becomes a term without signification, inasmuch as the old French jurisprudence provides another proceeding. According to the English law when a creditor once becomes entitled to this writ, he is assured of the certainty of the sale taking place and that nothing can prevent it save defects originating in the writ itself. If no other limitation exists in our law than that indicated by Pigeau, it is highly desirable on the grounds of utility that a limitation should be created. Upon these grounds therefore the plaintiff rests his motion.

Per Curiam.—The Court was at first inclined to believe this motion well founded, but inasmuch as it appears that in the case of moveables there is no express law forbidding the fyling of these oppositions to a *venditioni exponas*, the opposition must be considered as valid.

Bovey, for plaintiff. Motion rejected.

Bondy, & *Fauteux*, for opposant.

(W. A. B.)

MONTREAL, 23RD NOVEMBER, 1857.

Coram SMITH, J., MONDELET, J.. BADGLEY, J.

No. 2079.

Kierzkowski vs. The Grand Trunk Railway Company of Canada.

Held:—1o. That the Mortmain restrictions upon the acquisition of real estate by Mortmain corporations were caused by the acquired property thereby becoming inalienable, not by the existence of the corporations being perpetual or continuous.

2o. That these restrictions applied to corporations aggregate, the clergy in general, religious bodies, fraternities, municipal guilds, and others of like nature which form the class designated as Mortmain corporations, *gens de mainmorte*.

3o. That modern civil corporations established for commercial and trading purposes, as joint stock or incorporated banking manufacturing, Railway Companies &c. cannot be included in such class nor do mortmain restrictions apply to them.

4o. That two or more such civil corporations may unite to form one incorporated company, without such union being in itself a sale, or equivalent thereto, and without subjecting the resulting company to liability for the payment of Seigniorial or feudal dues.

5o. That the deed of agreement set out in the plaintiff's declaration was in law only in the nature of preparatory articles of union, not in itself a sale, or its equivalent and not *translatif de propriété* and in law could not and did not, by itself establish the resulting company as a corporation.

6o. That the defendant is not in law a mortmain corporation nor subject to mortmain restrictions, and does not in law hold the lands, in question in mortmain as alleged in the plaintiff's declaration.

7o. That the defendant the existing Grand Trunk Railway Company of Canada, was incorporated by the 18, Vic. ch. 33 when the Seigniorial act, of 1854 was in existence by which all Seigniorial dues were abolished and which relieved the defendant's acquisitions from all Seigniorial dues.

8o. That the sums of money claimed in this cause are not for arrears of Seigniorial dues, accrued to the plaintiff previous to the existence of the Seigniorial act of 1854, the recovery whereof is provided for by that act.

9o. That if the defendant were such mortmainor *gens de mainmorte* and had acquired as alleged the realty in question previous to the legal operation of the Seigniorial act, of 1854, the declaratory provision of that act applies retrospectively to such acquisition, and relieves the defendant as such mortmainor from liability to the Seigniorial *indemnité* claimed by the plaintiff for such acquisition made directly from another mortmainor.

10o. That the undertaking of the Grand Trunk Railway of Canada, is a work of public utility including therein the realty acquired and in question in this cause and, therefore not in law liable to the *lods et ventes* claimed by the plaintiff.

SMITH, J., *Dissentiens*;—*

This is an action brought by the Plaintiff, Kierzkowski, proprietor in possession of the Seigniory of St. François le Neuf, to recover from the Company, Defendant, the sum of £1852 3 2, being the amount of the *lods et ventes* (mutation fine) and indemnity due by the Defendant on the acquisition by the Defendant of the St. Lawrence and Atlantic Railway, passing through the Seigniory of the Plaintiff, together with the indemnity due to the Seignior, because the Defendant acquiring the said Railway is a body holding in mortmain.

The Declaration sets out the possession by the Plaintiff of the Seigniory of St. François le Neuf; the agreement by which the St. Lawrence and Atlantic Railroad Company became amalgamated with and incorporated into the Grand Trunk; the value of the Railroad passing through his Seigniory; and his right in law to obtain a judgment for the amount claimed.

The Defendants set up to this action four grounds of defence:

1°. That the Defendant is not a body holding in mortmain, and therefore the Plaintiff had no right in law to the indemnity claimed.

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* This case has been reported in 8 L. C. Reports, p. 3, but without the *dissent* of Mr. Justice Smith, through whose obligingness we are enabled to give his opinion in this ublication.—EDITOR'S NOTE.

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2°. That the agreement by which the St. Lawrence and Atlantic Railroad Company became amalgamated with the Grand Trunk Company is not an alienation by which any *lods et ventes* (mutation fine) became due; that it is a mere fusion or amalgamatión, and not an alienation operating as a transfer of the Road by sale or any act equivalent to a sale.

3°. That supposing that the Defendant is a body holding in mortmain, and that the amalgamation is a transfer or alienation carrying with it Seigniorial dues, that by the Seigniorial Act of 1854, Section 34, the action for the recovery of such dues was absolutely taken away.

4°. That the Company, Defendant, was incorporated for public purposes, and is a public Provincial work; and as such the Plaintiff cannot by law claim any *lods et ventes* (mutation fine) on the acquisition by the Defendant.

In support of the first proposition, it was contended by the Defendant that the Grand Trunk Company was a mere trading Corporation incorporated for commercial purposes, with perfect freedom in the acquisition and alienation of its property; that it in no respect partook of the nature and character of bodies holding in mortmain; that its corporate capacity was given for the sole purpose of enabling it to carry on the business of the Corporation; and that, as there was no restriction imposed on it in the alienation of its property, it did not fall within the scope and meaning of the Statutes of Mortmain, either in France or in England.

The Plaintiff contended, on the other hand, that it was a body holding in mortmain; that it was a body created with perpetual succession; that the very object for which the Corporation was created, that of constructing and maintaining a Railroad, necessarily involved a prohibition or incapacity to alienate it; and that the only test by which it could be ascertained, whether or not a body held in mortmain, was its characteristic of perpetual succession.

By the Common Law, as it existed in France and in England anterior to the Statutes of Mortmain, there was no restriction whatever to the acquisition of lands by bodies, now known as bodies in mortmain. All Corporations, either Ecclesiastical or Lay, sole or aggregate, could take and hold lands without limit. It was only after this unlimited power had become an abuse, that the Legislative authority interposed to check it. It became necessary to repress the grasping spirit of the Romish Church, which, by absorbing in *perpetuity* the best lands of the kingdom, prevented their transmission from man to man, withdrew them from the feudal services that were ordained for common defence, and curtailed the lords of the fruits of their Seigniories, their escheats, wardships, reliefs, and other feudal dues. They were called Statutes of Mortmain, because they were designed to prevent the holding of lands by the dead clutch of Ecclesiastical Corporations, which in early times were composed of members dead in law, and in whose possession property was for ever dead and unproductive to the feudal superior and the public. Anterior to the passing of the Statutes of Mortmain in England, the ordinances of the French Kings were promulgated to repress the same mischief. They were passed to limit the power of acquisition, *not of alienation*, and to render any acquisition of lands by such Corporations illegal without the sanction of the Crown. But this restriction was not confined

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to Ecclesiastical bodies: it was extended to all Corporations, Ecclesiastical, Civil, or Lay. And although by the Statute of 15 Ric. 2, chap. 5, this system of restraint was so extended to all Civil or Lay Corporations, as being within the mischief and prohibition, ***the name still remained;*** and in England, lands purchased by Corporations are liable to forfeiture, unless a license in mortmain from the King, as ultimate lord of every fee, be first obtained. In France this restriction extended to all bodies holding in perpetuity, and unless this authority to take was obtained from the Crown, the Seignior within whose *censive* such acquisition was made, no matter by what title, could compel the Corporation to dispossess itself of the property, *de vuider leurs mains.* It was only after the Corporation had obtained letters of *amortissement* from the Crown, that the Corporation could legally hold, and after such permission had been obtained, the Seignior then could not compel the Company to *vuider leurs mains*, as it was termed in the law but in lieu he was entitled to claim an indemnity for the loss of his casual rights, and this was fixed by the custom of Paris, at one-fifth of the value of the land so acquired. Hervé, 6 vol., p. 429: "Comme les autres corps qui sont perpétuels par leur institution et qui ont des propriétés, en tant que corps, ne les aliènent pas plus que le clergé n'aliène les siennes, parce qu'aucun membre d'un corps ne peut disposer de ce qui appartient à ce corps, et ce dont il n'a que la jouissance ou l'administration, on a trouvé que le préjudice était le même pour le Roi, quelque fut le corps qui fit l'acquisition, et on a étendu l'amortissement à *tous les corps* qui font des acquisitions. Tous les corps sujets au droit d'amortissement sont appelés du nom commun de gens de main-morte, sans doute parce que les biens qui leur appartiennent ne recevant plus ni mouvement ni circulation, sont dans un espèce d'état de mort relativement au commerce ou relativement aux profits casuels domaniaux et féodaux, dont ils sont affranchis par l'amortissement. Voyez Delaurière sur l'amortissement p. 179."

The mischief here spoken of is clearly the one arising from the perpetuity of succession in the Corporations. It was to restrain Corporations, that the Statutes of Mortmain in France and England were enacted. Without these Statutes of Mortmain the powers of those Corporations would have been precisely what they were before they were enacted. Before, they had an unlimited power to acquire, and by necessary consequence they had an unlimited power to alienate unless restrained by their charters of incorporation, or by the very objects for which the corporate rights were conferred. The absolute *jus disponendi* is the necessary consequence of the *jus acquirendi*, unless restrained by Statute or positive law, and it is difficult to understand how a Corporation, unrestricted by Statute or charter, in its power to acquire, could by any system of reasoning be said to be deprived of its power to dispose. That such restraints have been imposed on Corporations is undoubted, but these restraints do not and cannot affect the main question, that these disabling Statutes were enacted to remedy the mischief arising from the perpetuity of succession given to Corporations, by reason of which the profitable rights of the Seignior were lost. The French law is uniform on this point. The reason given by Domat and others is *parce qu'ils aliènent rarement.* Not that they *cannot* alienate, but because they do not, or

rarely alienate. Though *called Statutes of Mortmain,* they embraced every Corporation falling within the mischief intended to be remedied. Does the Grand Trunk fall within the mischief contemplated by these Statutes? It is contended that it does not. That it is a mere Joint Stock Company incorporated for trading purposes, and cannot be assimilated to the old Corporations within the disabling or mortmain Statutes. On this point I may observe that in the Act incorporating the St. Lawrence and Atlantic Company, which is a Corporation of a similar kind, the rights of the Seignior to indemnity are expressly reserved and saved. There is no such regulation to be found in the Act incorporating the Grand Trunk Railway Company. It is therefore contended that it was the intention of the Legislature to make a distinction between these two Companies, and that the non-reservation of their rights was a clear indication that, in the opinion of the Legislature, no such rights existed. I do not think so. The mere fact that no mention is made of these rights in the latter Act, could not take them away, if they existed by Common Law. That they did exist, supposing that company to hold in mortmain, is incontrovertible. The silence of the Legislature on the subject could not take them away. The rights of third persons would be left to the operation of the Common Law. The power given to the Company to take the lands necessary for the construction of the Road are given on condition of paying a full indemnity to the proprietors whose lands are taken. Why the Seignior should be excluded from receiving a full indemnity, I am at a loss to understand. His feudal rights are as much his property as the land which was taken, and are as fully secured to him as to any other proprietor, and he falls within the protection of the law as any other proprietor. As to the Company being a trading Corporation, I think can make no difference in the matter. The *object* for which corporate rights are given does not change the nature and legal effect of these rights on the property or rights of third persons. The privilege granted to the Corporation for purposes of trade or profit, or of any other kind, does not change the character of the possession of the defendant. The Statute authorised the Company to construct and maintain a Railroad, for purposes of trade, if you will; but if on constructing this Road the property of the Seignior is taken and held in perpetual succession by the Company, the Seignior loses his casual rights on the land taken, which is thereby put out of commerce; and until restored back to commerce by the dissolution of the Corporation, his rights are lost. What possible difference can it make that the Company construct their Road for trading purposes if the Corporation possesses it in perpetual succession so long as the charter exists? This is precisely what gave rise to the indemnity of the Seignior under the law of France. The indemnity was given to him because he lost for the time being his casual rights as Seignior, although under that law the Corporation had a right to alienate unless restrained by their charter, or by the very nature of the objects for which the charter was granted, and this indemnity nevertheless was due; for the same reason it ought to be due by the defendant, which takes and holds as the old Corporations did under the operation of the disabling Statutes.

It is contended also that by the Act incorporating the Grand Trunk Company,

the Company is wholly unrestrained in the purchase and alienation of all lands. The clause speaks of all lands necessary for the construction of the Road, but it does not follow that when once the Road is completed and finished that the company can alienate the Road. The very object for which the charter was granted necessarily implies an absolute incapacity to alienate or sell the Road. The object of the Law was to grant them power to maintain a Railroad, not to make a road and sell it. If it be contended that a Corporation is not restrained necessarily within the objects for which it was expressly created, then a charter of incorporation has no binding force on the body created. Mr. Angell says, "The privileges and immunities, the estates and posses-"sions of a Corporation, when once vested are vested for ever or until the end "of the period which may be prescribed for its duration, and this desirable "object is effected without any new transfer to succeeding members," (p. 8). The Road once made is vested in the defendants under the privileges and immunities of the charter, and they can no more sell the Road, than they can apply it to objects different from those for which the Corporation was expressly created.

Whether, then, defendants be considered as a body analogous to bodies in mortmain, by the principle or characteristic of its perpetual succession, or by its incapacity to alienate, it falls within the condition of the law, and must be held to be subject to all dues and duties to which bodies holding in mortmain are liable upon all acquisitions of land.

SECOND POINT OF DEFENCE.

The next point submitted by the defendants in the defence is that the deed of agreement entered into between the St. Lawrence and Atlantic Railroad Company and the defendants, is not an alienation from which any rights could accrue to the plaintiff as Seignior. That it was a mere fusion or amalgamation of corporate rights, subsisting as such in the agreement, producing no change of property or transmission of corporate rights and property from one body to another. On this point I would refer to the clauses of the agreement itself, in which I think the true nature of the agreement of amalgamation, as it is called, is to be found.

By these clauses it would appear—

1st. That the name of the Corporation of the St. Lawrence and Atlantic Company is taken away.

2nd. That the Stock of the St. Lawrence and Atlantic Company is surrendered and, consequently, cancelled.

3rd. The property of the Corporation of the St. Lawrence and Atlantic Railroad Company is vested in the Grand Trunk.

4th. A new Corporation is created, with new rights and powers, and under a new name.

5th. There are no longer any Corporators or members of the first body by whom the very objects for which the Corporation was created can be carried on.

If these circumstances do not dissolve a Corporation, I am at a loss to know how a Corporation can be dissolved. To suppose that a Corporation can con-

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tinue to exist as a Corporation, when all which goes by law to constitute a Corporation is gone, is to suppose an impossibility. It has always been held good law that, if an integral part of a Corporation be lost or destroyed, the whole ceases to exist, although subject, under certain circumstances, to be revived by a new charter. But in this case all is gone, the name, the property, the Corporation, and it surely cannot continue to exist if there be no members by whom the functions of the body can be carried on. But it is said that they all continue to exist but in the new Corporation which the statute authorising the agreement brought into existence. I do not think so, for the new Corporation is distinct from the old one, and the Corporators of the new body have ceased to be Corporators of the old. It is true the property, that is the Railroad, is possessed by the new body; but it is held not as the property of a body dissolved in law, but as the property of the newly-created body. It is a complete alienation for all legal purposes, unless it can be supposed that two distinct bodies can exist at one and the same time, possessing the same corporate rights in the same property, and exercising the duties and functions of the separate Corporations, when by the very terms of the agreement, the two bodies are made one. This I take to be clearly impossible. All that belonged to the St. Lawrence and Atlantic Company became merged in the Grand Trunk, and the former as a Corporation ceased to exist, and that such was the plain intention of the amalgamation is placed beyond doubt by the 4th, 5th and 6th clauses of the 6th Vic., ch. 39, which declares it in express terms.

It has also been contended that, as the 18th Vic. ch. 33, passed on the same day that the Seigniorial Act was passed, that the agreement took effect from that time, that the 34th clause of the Act of 1854 took effect concurrently with the Act ratifying the agreement of 1853. But I think this argument is not tenable, for the agreement was entered into by the two Companies, under the authority of a statute, and it required no ratification by the Legislature to give it effect. An Act confirming this agreement was passed for different purposes, it was to extend the power of the Grand Trunk Company, and although it indirectly or incidentally declared that the agreement of 1853 is confirmed, it was altogether unnecessary to give it the force of law. The force of law was given to the agreement by the 16th Vic. ch. 39, which gave full power to make the agreement, and it required no further confirmation. It has also been contended that the Act 16th Vic. ch. 39, which authorises the two Companies to unite, points out two ways of doing so: 1st. By amalgamation or union. 2nd. By purchase, and it is said that as the law pointed these two ways by which the Companies could unite, that it intended to make a distinction between a union or amalgamation and a purchase. I do not so read the statute. It was clearly necessary that Legislative authority should be given to the Companies to form one Company under any circumstances, for, without the sanction of the Law, no union could have been effected, either by purchase or amalgamation, and in giving this authority it was unnecessary to do more than to authorise the purchase if such union was to be effected by an out-and-out sale, where a mere money value was given for the purchase, leaving the Companies to determine between themselves the terms of purchase, should such form be taken, and to

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point out the conditions on which a union should be effected, if that form of acquisition were adopted. In forming a mere amalgamation it was absolutely necessary to point out the manner of doing so, to enable the conditions of such union to have the force of law. But in either case it was an alienation or transmission of all property and rights from one to another, and such authority was absolutely necessary to enable the one body to divest itself of its corporate rights and property, and to vest them in the other.

The fact, then, that the Statute authorised the agreement to be carried out in either way does not change the nature of the agreement. It in point of fact dispossessed the St. Lawrence and Atlantic Company of the Railroad belonging to that Company, and vested it in the Grand Trunk Company. The Stockholders of the former body had no power or authority to do this, for the Railroad was not the property of the Corporators, but the property of the Corporation, and any surrender of the Stock of the St. Lawrence and Atlantic Railroad Company to the Grand Trunk could only have had the effect of making the latter body Corporators of the first body, if such could have been done by law, but not to divest the Corporation itself of the Road. This could only be done by the Statute, and so soon as the Corporators had surrendered their Stock and the Corporation its road, the St. Lawrence and Atlantic Railroad Company ceased to exist as a body corporate, and its property and rights passed into the possession of the Grand Trunk for ever. To suppose that, because the Corporators of the St. Lawrence and Atlantic Railroad Company surrendered their Stock to the defendant, and took Stock in lieu thereof in the Corporation of the Grand Trunk, that the Road of the former Company passed with the Stock is clearly erroneous. The fusion or amalgamation of shares could not divest the St. Lawrence and Atlantic Company of the Road. This could only be done by an alienation by the Corporation itself, which, as a body, is quite distinct from the members of the Corporation, and this was done by the force of the Statute, which alone could do it, when it declared that the agreement, once completed, should have the effect of vesting the St. Lawrence and Atlantic Railroad in the Grand Trunk Company. In vesting the road in the Grand Trunk, the St. Lawrence and Atlantic Company was *divested* of the road and to suppose that it was a fusion or amalgamation, and not an alienation, is to suppose that the St. Lawrence and Atlantic Company still exists as a Corporation, and that it possesses conjointly with the Grand Trunk the road in question; and that is to suppose that two separate and independent Corporations can, at one and the same time, possess the same property, under distinct and separate charters.

Assuming, therefore, that the agreement in question imported an alienation by the St. Lawrence and Atlantic Railroad Company in favor of the defendant, was it such an alienation as gave rise to rights in favor of the Seignior. The rights claimed are: Firstly, the *lods et ventes* on the mutation; and, secondly, the right of indemnity, by reason of its being an alienation in favor of a body holding in mortmain. As regards the latter, it is beyond controversy, that an indemnity is due on every acquisition of property. No matter by what title a body in mortmain acquires, the indemnity is due, for the possession in

mortmain deprives the Seignior of his casual rights, and although the title by which the body acquires may not give rise to the mutation fine, viz., the *lods et ventes*, the Seignior is entitled to the indemnity because he is deprived of his rights for the future, and so long as it remains in possession of the mortmain body it is unproductive to the Seignior. He is during such possession deprived of his casual revenues. The indemnity therefore, I think, is due on all mutations of the land, as the law makes no distinction in the kind of title. But as regards the *lods et ventes*, the transfer or alienation must be a sale, or be equivalent to a sale, to enable the Seignior to claim. What, then, was the consideration given by the defendant for the transfer to it of the property of the St. Lawrence and Atlantic Company? As regards the transfer of their stock or shares the Seignior has nothing to do with that. The Corporators might dispose of their stock as they thought proper; it is a matter of indifference to the Seignior who the Corporators are; a change in the Stockholders could never give rise to Seigniorial dues. But, by the agreement in question, the defendants undertook to pay the debts of the St. Lawrence and Atlantic Railroad Company to the extent of £800,000, and also to pay to the Stockholders £75,000, as arrears of interest due on their stock. The obligation assumed by the defendants to pay these two sums is the consideration in money or price given by the defendant for the property transferred. This is, therefore, the money value on which the rights of the Seignior must be paid. The agreement imports a sale in law, for all that is necessary to constitute a sale is present in this agreement: 1st. A thing or land transferred. 2nd. The payment of the debts of the vendor; and 3rdly. The consent of the two contracting parties. It is to all legal intents an act equivalent to a sale, and as such it gives rise to *lods et ventes*, or mutation fine. The proportion which the Railroad within the Seigniory of the plaintiff bears to the whole property transferred, (I mean the real estate), must be the basis of the proportion which the whole sum paid bears to the value of the port passing through the Seigniory. On this point or proposition I am of opinion the Seignior is entitled to claim, as well for the *lods et ventes*, or mutation fine, as for the indemnity.

It is now necessary to refer to the law on the subject of the *droit d'amortissement*, payable by the law of France to the Crown, and the indemnity which is payable to the Seignior.

It seems that, in the opinion of some of the authors, the letters of amortissement have been confounded with the right of indemnity. This will appear by reference to the Declaration of King Louis XV., passed on the 21st November, 1724, and cited by Bacquet, Droit de Franc Fiefs, page 437. Reference is here made to the error which existed in the minds of some authors on this subject. The right of *indemnité* is entirely distinct from the *droit d'amortissement*. The latter is a permission given to the main morte by the King to acquire and hold lands, and is a mere matter of finance payable to the Crown for this permission. These letters were intended merely to remove an incapacity on the part of the Corporation to acquire and hold lands, and were in no way connected with the right of *indemnité* which was payable to the Seignior. The letters of the Prince removed an incapacity. The right of indemnity was settled by the customary

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law, and was due to the Seignior for the loss of his rights consequent on the acquisition of the land by the body in mortmain. In one respect they were alike in their legal effects, and in one only. They were personal in their operation to the parties themselves. The *lettre d'amortissement* once issued relieved only the body obtaining them, and all their effect ceased so soon as the Corporation alienated the land. So, also, the indemnity once paid to the Seignior within whose *censive* the acquisition was made, enured solely to the benefit of the body acquiring. All effect ceased in both instances on every alienation, and new letters of *amortissement* were required by each new body acquiring, and a new indemnity was payable if the new acquisition was made by a body in mortmain. No effect or privilege could be claimed by any Corporation arising out of anterior letters of amortissement or indemnity previously paid. Their effect in law absolutely ceased on every alienation made of the land. (6 Hervé, "Effets de l'Indemnité," p. 638. Bacquet. 2d vol., 411, ch. 46).

The effect of the payment of indemnity was purely suspensive: it in no way changed the tenure by which the land was held. It continued within the *mouvance* of the Seignior, and subject to all other feudal dues. It became like an *aleu* only in this respect, that the right of the Seignior to enforce further casual rights was suspended, not absolutely extinguished, for these casual rights became due and exigible if the Corporation sold or alienated the land. On this point it was contended that the effect of the payment of the indemnity to the Seignior by the Corporation obtaining the letters of *amortissement* was to convert the land sold from a land held *en roture* into an absolute *aleu* or freehold, and that as such it ceased to be liable to Seigniorial dues, and that, on the authority of Bacquet; but Bacquet does not say it was an *aleu*, or became an *aleu*, but that it was like an *aleu*, so long as it was held by the body which had paid the indemnity. This is an erroneous reading of the law. It was in its effects on the future casual rights like an *aleu*, that is, it was assimilated to an *aleu* so long as it was possessed by the body paying the indemnity, but it remained in the *censive* and within the *mouvance* of the Seignior, and on its alienation it resumed the character of lands *en roture*, and became again subject to all Seigniorial dues. This is the opinion of Dumoulin and all the other feudists, without one dissentient opinion (1.)

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(1). Hervé, 6th vol., p. 574 and 576. In discussing this point, in the passages cited he says:—" L'effet de l'amortissement est tellement passager et personnel que si une main-morte acquiert un bien déjà amorti, l'ancien amortissement ne lui profite pas." And p. 595:—" Il semblerait au premier aspect que Loiselle tenait à l'ancienne maxime, car il attribue le même effet à l'amortissement qu'au franc-aleu. Tenir en main-morte, dit-il, franc-alue ou franc-aumône est tout un, en effet. Mais il faut entendre cette règle non dans un sens absolu, mais dans un sens impropre et seulement pour la durée de l'amortissement. Car Loiselle lui-même ajoute, " terre sortant de main-morte rentre en la sujétion de féodalité et censive," expression qui prouve bien qu'il n'a pas entendu dire que l'effet de l'amortissement fut perpétuel et ineffaçable. Dumoulin s'est exprimé avec beaucoup plus d'exactitude quand il dit, per amortisationem non mutatur status et qualitas rei amortisatæ, quæ semper remanet feudalis vel censuaria et in dominio directo vel jurisdictione aut territorio domini ut prius."

The moment, therefore, the St. Lawrence and Atlantic Railroad ceased to hold the land, the payment of the indemnity by that body ceased to have any effect in law, and it passed into the possession of the defendant as if no previous indemnity had ever been paid. This acquisition by the defendant, and its legal effects must therefore be determined without reference to any previous payment of indemnity; and their incapacity to take and hold the land must be removed by a permission to that body to acquire; and the rights of the Seignior must be regulated by the acquisition itself. As well could the defendant, if not a body in mortmain, maintain that a payment of indemnity by any previous body in mortmain purchaser of the land, would exonerate such defendant from the payment of *lods et ventes* on its own acquisition and purchase; for if the payment of an indemnity had the effect of converting the land acquired into an *aleu*, no future *lods et ventes* could ever become due, a pretention which the defendant would not attempt to maintain. Under the common law, therefore, the rights of the Seignior and the defendant must be settled by the title of the defendant alone, and without reference to any antecedent title of the person or body from whom the acquisition is made. So soon, therefore, as the St. Lawrence and Atlantic Railroad Company transferred over to the Grand Trunk the Railroad, the legal effect of the original permission granted by the Statute to that body to acquire, and the indemnity paid by that body to the Seignior on its acquisition of the land within the Seigniory, had forever passed away; and the defendant by the common Law can no more invoke them in its favor to relieve itself from the payment of whatever dues would accrue to the Seignior on its own acquisition within the Seigniory of the plaintiff, than it could do if no such acquisition by the St. Lawrence and Atlantic Railroad Company had ever been made. The instant, therefore, that the defendant became the proprietor of the Railroad of the St. Lawrence and Atlantic Company, new dues accrued to the Seignior on the acquisition, and from that moment these dues became a right vested in the plaintiff, as the Seignior through whose Seigniory the Railroad passes of which he could not be deprived except by positive law.

THIRD POINT OF DEFENCE.

ACT OF 1854.

The third ground of defence set up by the defendant is that, admitting that the defendant is a body politic holding in mortmain, and that the Act of agreement entered into by the St. Lawrence and Atlantic Railroad Company imported an alienation in the nature of a sale, that the plaintiff cannot recover the *lods et ventes* and the indemnity claimed, because the right of the plaintiff is taken away by the 34th clause of the Seigniorial Act of 1854. The pretension is, that the Act of 1854 is in its nature a retrospective Act, and that it was the intention of the Legislature to destroy this right, or, if it were not the intention at all events that the clause in fact takes away the right.

The words of the clause are as follows:

"All lands upon which mortmain dues (des droits d'indemnité) have been paid to any Seignior, and which have not been sold or conceded since such pay-

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ment to parties holding otherwise than in mortmain, are hereby declared to be and to have been from the day of such payment, or of any Act (Acte) or Deed in writing, binding the owner to pay the same released from all Seigniorial dues and duties, and held *en franc aleu roturier*, but subject to the payment of a *rente constituée* equal to the *cens* and *rente* legally due thereon."

The first point to be determined is whether the clause is retrospective or not. If it is to be so construed, it must be clearly shown to be such in the clause itself. It must be so enacted. It is not enough to say that such is the clear *inference* to be derived from the clause, for no mere *inference* drawn from the clause is sufficient to make a statute retrospective, or to take away a vested right. It must be clearly expressed, for when a right at common law is clearly vested in any one, that right can only be taken away by positive statutory enactment, and in express terms. Are such words to be found in the clause.

The enacting part of the clause does not in express terms take away this right, for the defendant relies on the exception to the enacting part, which preserves a right to the Seignior in case of sales to parties holding *otherwise* than in mortmain, and it is therefore contended that, because an exception is made in cases of sales to parties holding otherwise than in mortmain, that *therefore* sales to bodies holding in mortmain carry no such rights. This I think is not logical. The most that could be said is, that the statute omitted to legislate on acquisitions made by bodies in mortmain from other bodies in mortmain. This is, moreover, mere inference, which is not sufficient to take away a vested right. The very terms of the enacting part of the clause must do so. The argument rests on the pretention that, because the land by this clause is converted into an *aleu* or freehold, and freed from all Seignioral dues, that at the time of the alienation by the St. Lawrence and Atlantic Railroad Company to the defendant of a land *en roture* and within the *mouvance et censive* of the Seignior, it was by the retrospective operation of the 34th clause passed more than a year after the sale, sold as an *aleu* or freehold and therefore free from all Seigniorial dues: this I think is contrary to every rule of interpretation of Statutes.

It has ever been held good law that nothing but a positive declaration of the Legislature can take away a right vested by common Law. It cannot be done by mere inference, however strong such inference may appear to be, although such inference might govern and would govern in all other cases, except in those where vested rights are jeopardised. Thus in the case of the Statute of Frauds, Chs. 2, the statute in express terms says that "no action shall be maintained." Yet the Courts unanimously maintained that an action would lie on a verbal promise made before the passing of the Statute and such decisions have never, either in England or in the United States, been called in question. On the contrary, the doctrine there maintained has been ever held sound. No language could be more express than *that no action should be maintained.* Yet it was considered that a verbal promise made before the statute was passed was a vested right, and that it could not be the intention of the Legislature to take away this vested right, as it had not said so. So, in this case, the Legislature has not taken away in express terms the right vested in plaintiff before the passing of the Act of 1854, and I cannot interpret the clause to have done so. I do not, how-

ever think it necessary to say more on this point, as I think the statute is not retrospective in its operation, and that, instead of taking away vested rights, if interpreted by the principles of the common Law, it confirms them.

Laying aside for the moment the exception contained in the clause that land sold to persons holding otherwise than in mortmain should be chargeable with Seigniorial dues, what does the enacting clause say: that all lands on which an indemnity has been paid, or for the payment of which an obligation shall have been given, shall be free, &c., &c...

The defendant invokes the benefit of this clause. To do so, it must clearly appear that the legislature not only intended, but in fact did, by the very terms of the clause, supersede the common law of the land. This clause however is silent on this point, and the common Law cannot be and is never supposed to be upset, unless it is so declared by the statute, or that the provisions of the statute are repugnant to the common Law, so that both cannot subsist together, in which case the common Law must yield.

In this clause there is nothing to justify such an interpretation. The statute, in my opinion, rather intended to confirm this view, by leaving the payment spoken of in the clause to be interpreted as the common Law would interpret it, viz., that it could avail the party paying it and no other. The legislature intended to legislate for persons and for things as they existed at the time the Act was passed. At the time of the passing of the Seigniorial Act the effect in law of any payment indemnity by the St. Lawrence and Atlantic Railroad Company, had ceased. The land had passed out of its possession, and the payment of indemnity could by the then law only enure to the benefit of the body paying it, and for such time only as that body possessed it. So soon as the land passed, the effect of the payment of the indemnity ceased, and it was as if no such indemnity had ever been paid. Can the Seigniorial Act, therefore, be said to apply to such a payment without its being so expressly declared, and can it be said that the statute intended to revive in law, and give effect and force to a payment contrary to the common law, without expressly declaring it. I think not. If it had intended to give the defendant the benefit of the payment of any indemnity which might have been paid by any previous holder, it would surely have said so. The indemnity payable to the Seignior for the loss of his casual rights was a personal debt due by the party acquiring, the benefit of which cannot pass with the land; and to suppose that the defendant can invoke the benefit of a payment personal only to the body making it when it has not in any way participated in such payment, and had no right whatever in the land on which such payment was made, is so repugnant to the principles of the common law as to lead to the conclusion that the Legislature could not have intended it to be so. At the time of the passing of the Seigniorial Act, the whole legal effect of the payment of indemnity by the Atlantic and St. Lawrence Company had passed away. The object had been fulfilled. The land, while in possession of that body, was unprofitable to the Seignior. It could not yield dues while in its possession, but it still remained within the *censive* and *mouvance* of the Seignior; and before the passing of the Seigniorial Act, it had passed into the hands of another body, subject to all dues arising from such alienation.

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If the Grand Trunk Company had paid their dues, or had given an obligation for them, then it would have fallen within the Statute; and, singular to say, such payment, according to the interpretation put by the defendant on the Seigniorial Act, could have been recovered back, for, if any anterior payment, made by any previous holder in mortmain, had the effect of making the land sold an *aleu*, then it is clear that any payment made on an *aleu* would not have been legal, and it could have been recovered back; and so on in reference to all anterior payments of indemnity, for the Seigniorial Act does not say which payment shall have the effect of freeing the land from future Seigniorial dues, and the first payment would have had that effect as well as the last, which is sufficient to show the confusion, if nothing more, which would result from such an interpretation. The words of the clause can only, I think, be held to mean that, whenever the body which had paid the indemnity, or not having paid it, should have given an obligation for the amount, and was found to be in possession of the land on which such indemnity had been paid, that from the time of such payment the land should be considered an *aleu*, and from that time freed from Seigniorial dues, but that if the land should be in the possession of a body in mortmain on which any indemnity had not been paid, nor an obligation given for it, that it should be left to the operation of the common Law, and consequently not freed from the burden of such Seigniorial dues as might be due and owing at the time the Act was passed. By giving this interpretation all rights are protected, and the statute receives an interpretation consonant to the principles of the common law. That it was not the intention of the Legislature to take away any vested right whatever, is clearly pointed out by the 36th clause of the Act, which in the most express terms preserves all rights existing at the time and vested by Law, as fully as if the Act had never been passed. If the Act has any meaning in law, it certainly means that all rights are preserved which are not in the most clear and positive terms taken away by the preceding section of the Act. The 34th clause does not do so, and, as I view the question, was not intended to do so, and the claim of the plaintiff is in no way affected by it.

FOURTH POINT OF DEFENCE.

In support of the last proposition, the defendant contended that the Grand Trunk Railway was a public undertaking and built in the public interest, that is, a national work; that, therefore, the plaintiff could claim no seigniorial dues or *lods* on the acquisition by the Grand Trunk Company of the St. Lawrence & Atlantic Railroad. To establish this proposition it is necessary to show that the Grand Trunk Railway is a work which was built for state or national purposes, (*pour l'utilité publique.*) A reference to the Charter will at once establish the contrary. This is a private undertaking, under a Charter granted to private individuals, for private purposes alone. The Road is vested by the Charter in private persons, for commercial purposes. It is true the Charter is granted for the public benefit, that is, in so far that it is for the benefit of the public that such a Charter should be granted, but in its very terms, and in its very scope and object, it is a private Charter.

It may be said that all Laws are passed and all Charters granted in the public interest, but these expressions are then used in their limited sense and meaning, and not in the larger sense, as used and understood by French authors, in the words *utilité publique.*

See Hannequin, *Traité de la Législation*, vol 1er., p. 294, Edition of 1838.
Valin, *Com. sur la Rochelle* 3e vol., *Addition au Com.*, Edition of 1768.
LeBert. *De la Souveraineté*, p. 744-5, and many others might be cited.

The true meaning of the words *utilité publique* in reference to the rights of persons in similar cases is when property is taken for purely state purposes, such as the public defence of the country or other pressing cases of a like nature, and even in such cases the best authors are of opinion that private rights must be respected. See the authorities cited in the case of Grant and the Principal Officers of the Ordnance. Not only is the indemnity due, which however is admitted, but the *lods et ventes* on such acquisition, are due also. The indemnity is to cover the loss of future rights alone, but the *lods et ventes* are due on the alienation.

It is almost unnecessary to dwell on a point so clear as this is. The defendant admits that the charter was granted for commercial purposes and to private persons for such purposes, and it is a pure contradiction in terms to suppose that in such a case the question of *utilité publique* could at all be available to the defendant. The one is repugnant in its very nature to the other, and in the consideration of this case, the question of public interest cannot enter. I am therefore of opinion that the *lods et ventes* are due as well as the indemnity.

Being of opinion that the agreement of the 12th April, 1853, effected a change in the ownership of the St. Lawrence and Atlantic Railroad, that this mutation of property was in favor of a body corporate holding in mortmain, and that the rights of the plaintiff to an indemnity accrued before the passing of the Seigniorial Act of 1854, are not destroyed by the 34th section of the said Act, I would have given judgment in favor of the plaintiff for the indemnity claimed, calculated on the value which the portion of the road lying within the plaintiff's Seigniory bore at the time, when the said agreement took place, to the value of the whole road, that is to say, the value of the land on which the road is built, and of all the improvements which by destination or incorporation are permanently attached to it, such as rails, buildings, &c.........And as I consider that this Railroad property can be said to be public property in so far only as the public has a right to use the said road subject to the conditions imposed by the charter, and that in every other respect it is private property, owned and managed by a private corporation for the benefit and advantage of its stockholders, I am clearly of opinion that it is not a work of that public character for which the proprietors could claim exemption from *lods et ventes*, and that therefore *lods et ventes* accrued to the plaintiff on the transaction of the 12th April, 1853. These *lods et ventes* are due on the price of the same portion of road on which the indemnity is due, with this difference however, that the indemnity being due on every mutation whatever may be the title by which it is effected, the indemnity must be paid on the whole value of the property which has come into the hands of the mortmainor, while the *lods et ventes* being due only on sales or acts

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equivalent thereto, the *lods* are only due on the price of sale, which, in this instance, does not include the stock furnished by the Grand Trunk Railway Company to the stockholders of the St. Lawrence and Atlantic Railroad Company in exchange for the stock they held in the latter Company, this stock being no element in the price of the road.

In order to ascertain the precise amount due for such indemnity and *lods et ventes*, I would have ordered a ventilation to be made by experts appointed in the ordinary manner, but, as the majority of the Court is of a contrary opinion, the action will be dismissed.

BADGLEY, J.—The plaintiff, as seignior of St. François LeNeuf, in the district of Montreal, has instituted this action against the defendant for the recovery of £1852 3 2 for seigniorial dues, namely £1307 5 9 for the feudal *indemnité* or double fine, and £544 17 5, for *lods et ventes*, both claimed under a deed of agreement between the St. Lawrence and Atlantic Railway Company and the Grand Trunk Railway Company of Canada were parties, whereby the St. Lawrence and Atlantic Railroad came into the possession of the Grand Trunk Company aforesaid, together with a strip of land passing through the plaintiff's seigniory and covered by that railroad, and upon the assumed value of which the above estimate for *indemnité and lods et ventes* respectively, has been calculated as demanded in this cause.

The *indemnité* is claimed specially by reason of the actual mortmain character of the defendant, it being alleged in the Declaration "that the land in question is now holden by the defendant in mortmain," and the *lods et ventes* are claimed due, by reason of the agreement between the Companies contracting, being of an onerous character and in the nature of a deed of sale.

The Peremptory Exceptions pleaded by the defendant deny generally and expressly the plaintiff's pretensions, repudiate the mortmain character attributed, negative the onerous nature of the agreement, assert the defendant to be a mere incorporated trading company and the agreement itself mere articles of association without sale ingredients, and, finally, firstly, set up the Seigniorial Act of 1854 as full legislative relief from all claim for *indemnité*, and secondly, the public utility and character of the Grand Trunk Railway undertaking, as a legal discharge from all claim for *lods et ventes*.

A brief preliminary review of the provincial legislation in relation to this matter is necessary for the proper elucidation of the pretensions of the parties, and for the explanation of the judgment.

In accordance with the general desire for the establishment of a continuous railway communication throughout the province, a bill, submitted in 1851 by the Executive to the Provincial Parliament, became law in that year, namely, the statute 14th and 15th Vict. ch. 73, "For the construction of a Main Trunk Line of Railway throughout the whole extent of the province," which was declared in the preamble "to be of the highest importance to the progress and welfare of the province, and that every effort should be made to insure its construction." In furtherance of this object, the Act provided for the immediate construction of the line from Quebec to Hamilton at the public expense, out of public funds, declared the work to be a *provincial* work, and

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empowered the Executive to purchase certain existing railway undertakings, and to take from their companies a surrender of their respective rights and properties for the public uses of the province. The Act also provided that a company might undertake the line, if its construction were found to be impracticable from the funds provided by the government, and extended to such Company and to existing railways, which should form part of the Main Trunk Line, the advantage of the provincial guarantee, at the same time specially authorized the Commissioners of public works to acquire and use the whole or part of the St. Lawrence and Atlantic Railway Company to form part of that Main Trunk Line, and for the public uses of the province.

In the following year, 1852, the statute 16th Vict. ch. 37 was passed which incorporated a company under the name of The Grand Trunk Railway Company of Canada, with the usual corporate and expropriatory privileges of railway charters, for the construction of a railway *from Toronto to Montreal*, "as tending greatly to promote the welfare of the province." To this company the provincial guarantee was extended.

In the same year, the statute chapter 39 was also passed, since commonly known as the Railways Union Act, which authorized either the voluntary uniting together as one company, of all present and future railway companies forming part of the Main Trunk Line, or the purchase of the one by the other, empowered the directors of the several companies to effect their consolidation and the amalgamation of their several capitals and contracts, upon terms to be settled by themselves, and allowed them by their agreement, to give a corporate name to the resulting general company after such union. This Act also specially pledged the Provincial Legislature to make such further legislative provision as should be required for giving full effect to the Act itself, and to any agreement made under its provisions to be afterwards ratified in the terms of the Statute. This Statute was extended by the 16th Vict. ch. 76, passed in 1853, to all railways intersecting the Main Trunk Line, or touching at the same places with that line, and it was thereby enacted and provided that the name of the united company should be "The Grand Trunk Railway Company of Canada," if the company, established by the 16th Vict. ch. 37, should be one of the united companies. The motive declared for the enactment of these union acts is stated in the preamble to be, "that it would be of provincial "advantage that the entire Main Trunk Line should be under the management "of one company, or as small a number of different companies as might be "practicable."

The last Statute in order is the 18th Vict. ch. 33, passed in 1854, specially to give effect to the agreement set out in the plaintiff's declaration, which was executed at London in April, 1853. Before referring to the provisions of this last statute, it may be premised that an agreement was made under the provisions of the Railways Union Act, by six existing provincial railway companies, including the Grand Trunk Railway Company of Canada and the St. Lawrence and Atlantic Railway Company; that it amalgamated the several railway undertakings of the companies together with that for the erection of the Victoria bridge by the Grand Trunk Railway Company, under the special Act

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16th. Vict. ch. 75; conditionally united them all under the name of the Grand Trunk Railway Company of Canada; formed one capital of the several contracting railway companies' capitals, together with the special capital and construction contract for the Victoria bridge, not contemplated as a railway and contracting company, and stipulated that the future legislation contemplated by the original Railways Union Act, 16th Vict. ch. 39, should be had for the purpose of confirming and legalizing such of the provisions of the agreement the legality of which might be doubtful, but subjecting its stipulations, to give it full effect, to the subsequent ratification of the shareholders of the several companies, which was, in fact, duly obtained before the passing of the Act of 1854, the Act last adverted to.

Thereupon followed this last Act of 1854, 18th Vict. ch. 33; the preamble of which reciting the special Acts of incorporation of the contracting companies, the special Act for the construction of Victoria bridge, the agreement above referred to with its subsequent ratification, and the stipulation thereby "that "the several railways and works of the companies, including the Victoria "bridge, should thereafter form one railway and work, to be called and known "as The Grand Trunk Railway of Canada; also reciting the legislative pledge of the Railways Union Act for the further legislation which might be required for giving full effect to that Act, and to any agreement made under it, declared "that it is expedient that further legislative provisions should be made *for enlarging the powers of the company, &c., and that the said agreement and the "amalgamation of the several companies intended to be effected thereby, &c., "should be confirmed*," and then enacted that the agreement should be confirmed, that the united companies formed by the amalgamation *should be known and designated by the name of The Grand Trunk Railway Company of Canada*," that the Railway Clauses Consolidation Act should be applied and extended to the said united company, provided for the conversion of the several companies' shares into a general capital stock, &c., &c., and effected a fusion of all the companies and works completed or not, including those of the Victoria bridge, for the purpose of one Grand Trunk Railway Company and Railway under one management.

It may now be observed that the St. Lawrence and Atlantic Railway Company was incorporated in the year 1845 by the statute 8th Vict. ch. 25, with the usual railway charter provisions; and it must also be remarked that the Railway Clauses Act, 14th and 15th Vict. ch. 51 of 1851 contained general provisions as well for the management generally of all provincial railways as for incorporating future railway companies, extended to them the usual corporate rights and incidents of incorporated companies, with power to acquire necessary real estate, together with powers for their special administration and direction.

Having adverted to the Provincial Railway Legislation in connection with this cause, the pretensions of the parties will now be examined as they have been submitted in argument with the authorities in support of their pretensions.

The plaintiff rested his claim to the *indemnité*: 1o. on the actual mortmain character of the defendant; and, 2o. on the sale character of the agreement. The first is based solely upon the character of *perpetuity* attributed by the

plaintiff to the defendant's corporation as the essential characteristic of a *mortmainor*, and upon this it would suffice to reply by a simple dissent as well from the proposition itself as from the conclusions deduced by the plaintiff's counsel, were it not for the great elaboration of the argument of counsel.

For this reason the mortmain question of perpetuity claims more observation than the importance attached to it deserves, and it may therefore be remarked that in the early period of the histories of France and England, the acquisition and disposal of real estate were unrestrained, and so continued until the rapaciousness of the clergy and of the religious bodies of those times caused special restrictions to be applied to *their* acquisitions. The royal revenue, as well as the feudal revenues of the great vassals and seigniors, became greatly affected by these spiritual holdings; the royal remedy was found in the *lettres d'amortissement* of France and the mortmain laws of England, whilst the seigniorial remedy was secured in France by the so called *indemnité*, paid by the mortmainor. As to England, Grant on Corporations, p. 98, observes: "But with respect to lands and tenements, the Legislature began "early to impose restrictions upon the right of corporations aggregate to acquire "and transmit them in succession, by various statutes called mortmain. These "restraints were first considered to be necessary in consequence of the extent "to which landed property was accumulating in the hands of the great religious "or ecclesiastical corporations, and the earliest of them is found in *Magna "Charta*. Feudal subjects granted in donations to churches, monasteries and "other religious or charitable corporations, and thereby all *casualties* to the "king and the mesne lords necessarily became lost where the vassal is a cor-"poration which never dies, or *because the property of those subjects is made "over to a dead hand which cannot transfer it to another*. Hence the doctrine "of taking lands to religious persons by perpetual or rather continuous succes-"sion, preventing all chance of escheat, was known as early as the early times "above mentioned in England, and had even then acquired the name of mort-"main." The necessity for similar restrictions was felt in France also very early. Montesquieu says that under the three races of the French kings, the clergy several times over acquired all the real property of the kingdom "*on a donné à plusieurs fois au clergé tous les biens du royaume.*" Renauldon, *Traité des Droits Seigneuriaux*, p. 127, remarks that St. Louis," fut effrayé de "voir que les biens des ecclésiastiques, *devenant inaliénables entre leurs mains*, "étaient hors de tout commerce et que le Clergé par les priviléges accordés à "cet Etat, étant exempt de tout service et de toutes impositions publiques, s'il "continuait d'acquérir, laisserait enfin aux peuples épuisés et dépouillés que "fardeau excessif des charges publiques......Les plus anciennes de ces lois sont "celles qui défendent aux ecclésiastiques d'acquérir aucune espèce de biens "dans le royaume, sans la permission du Roi......Depuis St. Louis jusqu'à Louis "XV, par son Edit de 1749, ces défenses ont été si souvent réitérées qu'on ne "peut plus douter de la parfaite incapacité que les gens de main-morte ont de "pouvoir acquérir aucuns biens dans le royaume sans la permission du Roi." The rights of the seignior were not interfered with by the royal licence, hence, the seignior in whose territory the *terres amorties* were situated also enforced

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his claim by the *indemnité* for the equivalent loss of his revenue; "Il est clair," says Renauldon, "que le seigneur éteint à son égard les droits casuels qui pouvaient lui revenir par de fréquentes mutations et autres accidents de fief; il a donc paru juste que le seigneur retirât quelque chose qui pût à l'avenir lui tenir lieu de récompenses de toutes ces pertes, et c'est ce qu'on appelle le droit d'indemnité." The Edict Louis XV of 1749 plainly declares the legislative and royal appreciation of the causes of mortmain restrictions, but applies them to the institutions recognized as mortmain, "les biens immeubles qui passent entre leurs mains cessent pour toujours d'être dans le commerce, en sorte qu'une très grande partie des fonds de notre royaume se trouve actuellement possédée par ceux, *dont les biens ne peuvent être diminués par les aliénations*, s'augmentant au contraire continuellement par de nouvelles acquisitions." To the same effect is the royal declaration of Louis XV, enregistered as law in Canada in 1743, which declares that the royal permission to acquire shall apply to all *communautés et gens de main-morte*, in the colony; *quelque faveur que puissent mériter les établissements fondés sur des motifs de charité et de religion*, il est temps que nous prenions des précautions efficaces pour empêcher, etc., que ceux qui y sont autorisés *ne multiplient des acquisitions, qui mettent hors du commerce une partie considérable des fonds et domaines* de nos colonies, et ne pourront être regardées *que contraires au bien commun de la société*."

It is unnecessary to quote the many jurists who all concur in the expression of opinion, that the *inalienability of the lands acquired by mortmain corporations, not the perpetuity of their corporate existence*, was the cause of the mortmain legislation; but, among the number of authors, Hervé Droits Seigneuriaux says that ecclesiastical and religious bodies are commonly known as *gens de main morte* because their property "est dans une espèce d'état de mort relativement au commerce, et qu'il ne leur est pas permis d'en disposer comme aux autres citoyens," and this general opinion was strengthened by the fact that the acquisitions were without limit. I need not observe that the mere perpetuity of corporations is in no way interfered with or abrogated by the mortmain legislation of either France or England, or the subsistence of that perpetuity in connection with the mortmain "*institutions*" to which that special legislation applies, inasmuch as both expressly declare the necessity for that legislation solely by reason of *inalienability of the property again by those mortmainors.*

It is useless to refer to English legislation upon this point, because the matter under discussion is purely of local law, but even in England the motive for mortmain restriction was the same as that of France, and Grant, p. 129 et seq. says "that *corporations aggregate* could not alien in fee," and that the power to alien was not inherent in them, that no authority of a decided cause is to be found to sanction the idea, and that as late as the 9th Geo. II ch. 36, intituled, "An Act to *restrain the disposition of lands whereby the same became inalienable*," both sides in the House of Lords, in the debates upon that Act, assumed most distinctly that corporations becoming possessed of lands could not alienate them, &c. This author's observations, though forcible upon the point involved in this part of the argument with reference to that class of corporations aggregate, cannot govern this subject.

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The fallacy in the plaintiff's argument lies in the assimilating of the old mortmain corporation with the modern incorporated trading company, in viewing both simply as abstractions, *corporations*, and in attributing to both the principle of perpetuity alone as their sole characteristic and criterion of constitution, without considering at the same time the practical establishment and purposes of the modern incorporated companies; Merlin Répertoire de jurisprudence Verbo, Gens de main-morte, says: "Il est vrai "qu'on appelle aussi gens de main-morte les communautés, corps et établisse- "ments publics, dont l'existence se perpétue par la subrogation toujours suc- "cessive des personnes qui les composent et qui les administrent." This definition of this ideal creation will be found to measure and describe the attributes of a *corporation proper, id est*, a corporation created *merely as a corporation*, without any restriction of purpose or limiting clause in the instrument of creation. But Grant remarks, "*It is not by any means true, however, that all existing corporations come up fully to the whole extent of the above definition, because corporations are the creatures of the Crown and Parliament, and consequently there is scarcely any limit to the variety of forms in which they may be produced.*" Kyd on Corporations, also observes: "That when it is said that a Corporation is immortal, we are to understand nothing more than that it is *capable* of an indefinite duration, and that the grant to the natural persons of the corporation made to them, in their corporate name, is not determinable on the death of the individuals, but continues as long as the corporation continues." The term perpetuity is an incident to, but not the constituent of, the corporate existence, and was attached in France to the class originally distinguished by the royal legislation, and by the jurists, as *main-mortables* or *gens de main-morte*, namely, ecclesiastical institutions, the clergy in general, colleges, hospitals, *confrairies* and eleemosynary institutions, which were held to be partly religious and partly civil, and afterwards lay institutions, such as municipalities and city guilds. See Merlin, Rep. de Jur. vo. Gens de main-morte, Hervé, Bacquet, &c. This classification is sustained by the language of the Royal Ediot and Declaration of Louis XV above referred to, which finds a parallel application in the *so-called corporations aggregate* in England, but in neither, though applying to certain lay mortmainors, not a word can be found applicable to any thing like the modern Joint Stock Company, a thing not created at that time or contemplated either by that Royal Legislation or by the Jurists of Old France.

The difference is evident between these institutions recognized as mort-main in character and name and subject to mortmain restrictions, and the civil corporations or *incorporated trading* companies of modern times, and that difference is thus expressed by Angell and Ames on Corporations: "These mort- "main corporations are altogether different from the civil corporations created "in modern times for an infinite variety of temporal purposes. The most nu- "merous, and, in a secular and commercial point of view, the most important "class of private civil corporations, and which are commonly called companies, "consist at the present day of banking, insurance, manufacturing and extensive "trading corporations, and likewise of turnpike, bridge, canal and *railroad* "*companies*, and others established for the promotion and engagement of in-

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"dividual adventure. The convenience of union and the aggregation of capital "for public advantage in the extension of commercial pursuits necessarily "require the great object of an incorporation, *namely, the bestowal of the "character and properties of individuality on a collective and changing body of "men.* By these means, perpetual succession of many persons are considered "as the same, and may act as an individual, thereby enabled to manage its "own affairs, and to hold property *without the perplexing intricacies, the hazar- "dous and endless necessity of perpetual conveyances for the purpose of trans- "mitting it from hand to hand.* The charter or act of incorporation, a law "peculiar to itself, not only specifies the particular undertaking or business to "which it is limited, but, to prevent monopolies, and to confine the action of "incorporated companies strictly within their proper sphere, the Acts incor- "porating them almost invariably limit, not only the amount of property they "shall hold, or their capital stock, but limit also their purchase of lands within "a certain amount, and frequently prescribe the purposes for which alone the "land shall be purchased and liable, and the mode in which it shall be applied "to effect these purposes." These authors, with others which need not be cited at length, also observe the distinction to be taken between trading corporations and common partnerships, the latter being obviously defective in the coercive authority required to render their rules obligatory, whilst the legislative impress of the former gives binding effect to their voluntary articles of association. This legislative confirmation is indispensable to enable the parties to the compact to sue and be sued *as a company by a general name, to act by a common seal, and to transmit their property by succession,* "whilst the principal ingre- "dient for procuring the act of incorporation is to limit the risk of the partners "by removing from them their liability, *in solido,* however small their interest "in the concern, to render definite the extent of their hazard, and to divide the "aggregate capital into shares easily susceptible of disposal." Wordsworth, in his Treatise on Joint Stock Companies, goes over the same ground, and observes, "that companies formed on the joint stock principle usually required "an Act of Parliament for limiting the responsibility of the members to the sum "subscribed by each individual, and that railway companies, formed for the "purpose of executing works that cannot be carried into execution without the "aid of legislation, are of this class, and require and obtain acts of incorpora- "tion. It may be added that, though the English statutes of mortmain "extend to every corporation, sole or aggregate, ecclesiastical or temporal," as old English authors of sixty years ago observed, modern railway companies are not even imagined to be within their provisions, and moreover the English winding up acts do not apply to any such corporations as can by any possibility be classed among the mortmain corporations of England. It is also manifest that these same Joint Stock Companies are mere commercial institutions and subject to the known rules of commercial law and jurisprudence in force in this province.

These incorporated companies upon the joint stock principle, and sanctioned by Parliament, are assimilated by Judge Story, in his Treatise on Partnership, to the French *société anonyme,* and French jurists sustain the similitude in every

particular of formation, purpose and management as well as in their requisite sanction by legislative authority; Walewski, Traité des Sociétés par actions, says of this *société* "dans laquelle toute individualité disparait pour faire place à une simple association de capitaux, les tiers trouvant leur garantie dans l'autorisation du gouvernement qui revise et approuve les statuts de ce genre d'entreprises." The French Code de Commerce has made special provision for such association as the creature of commercial wants." "Elle est qualifiée par la "désignation de l'objet de son entreprise, elle est administrée par des adminis- "trateurs à temps révocables, les associés ne sont passibles que de la perte du "montant de leur intérêt dans la société, ils ne laissent que le capital pour "répondre aux créanciers de l'association. Le capital se divise en actions d'une "valeur égale, représentant le droit qu'on a dans une société anonyme, et la "réunion de toutes les actions forme le capital de la société; enfin elle ne peut "exister qu'avec l'autorisation du roi, et avec son approbation par l'acte qui la "constitue, qui doit être donné dans la forme prescrite par les réglements d'ad- "ministration publique." See also Persil, Sociétés de Commerce, &c., &c.

Railway companies form no inconsiderable portion of these incorporated associations, and are authoritatively defined to be "Corporations having certain prescribed powers and privileges according to the statutes of their formation, and which vary in their provisions so as to suit the works and objects contemplated. A Railway Act is the instrument under which the partnership concerns are managed, and the rights of individuals coming in contact with the company are regulated. Their charter is a charter with the public: hence, the Queen's subjects are compelled to submit to the contract upon the notion that it will be for the public good." Moreover these companies are unmistakeably of a commercial character according to English law, and are "common carriers without "the sanction of any clause in their act of incorporation." So also by French law. Troplong, Traité des Sociétés, says: "Les sociétés commerciales sont "celles qui sont formées pour exercer un commerce, ou pour faire des actes de "commerce, c'est leur but qui leur imprime le caractère commercial. Et, quant "aux sociétés anonymes, leur intention se jugera par leurs habitudes, et par les "circonstances au milieu desquelles elles se sont formées. Lorsque des entre- "prises de transport se lient à des entreprises de construction, la société qui s'y "livre est une société commerciale; ainsi une société qui a construit un chemin "de fer, et qui ensuite exploite le transport des voyageurs et marchandises par "ses wagons, est une société de commerce," and Bousquet, Dict. de Droit, says: "l'exploitation d'un chemin de fer par une compagnie constitue une entreprise "de commerce, justiciable des tribunaux de commerce."

Again, this general commercial character, in connection with and affixed to such incorporated companies, is also settled by provincial jurisprudence in the case of The Seminary of Quebec, *vs.* The Quebec Exchange Association, a provincial Corporation of the joint stock character, chartered in the usual form and with the usual incidents in such cases, 3 L. C. Reports p. 76, in which it was held by the Superior Court at Quebec that the corporation was a Joint Stock Association, &c. "dont l'institution n'est pas perpétuelle, et qui n'est pas frappée de "l'incapacité d'aliéner," "*that it was not a mortmain institution, and that the*

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"*real estate purchased for the purposes of the institution did not give rise to* "*indemnity*," and that judgment stands uncontradicted.

In the particular case of the defendant in this suit, the act of incorporation of the company removes all doubt of its commercial character by enacting "that "all suits and actions at law by or against the corporation shall be subject to "the rules of evidence laid down by the laws of England, recognized by the "Courts in Lower Canada in commercial matters."

These observations have been necessarily extended for the purpose of shewing the entire dissimilarity between the ancient mortmain institutions and the modern incorporated trading companies, and of their absolute difference in constitution, character and existence. In the latter, we find the legislative incorporation, the limitation in the acquisition of realty and its alienability, the formation of a capital with its division into disposable shares, the interest of the shareholders in the property of the institution represented by the aggregate of the shares, the benefits appropriated to the public in general by the charter, the property and acts of the corporation being, however, for the sole advantage of the individuals interested in the stock and in *view of their individual benefit*, and, finally, being the private property and object of the corporation, all essentials of these incorporated companies; whilst the absolute converse of these particulars accompanies the real mortmain institutions, indicating the broad and distinguishing feature of distinction and difference subsisting between these two classes of corporations, and manifestly leading to the conclusion that the defendant is not the alleged mortmainor of the plaintiff, but "*a commercial partnership invested with corporate functions of considerable but* "*limited extent, in which the characters of partnership and corporation are legis-* "*latively combined*," and in absolute and direct contrast with the religious and eleemosynary or even lay municipal institutions to which the mortmain character was really attached by French jurists, and recognised in the legislative enactments of the French kings, including those of Louis the XV above referred to, and specially in his royal declaration enregistered as law in this province. It would be quite as sensible to apply this ancient mortmain character with its alleged ingredient of perpetuity to the various manufacturing and road and bridge and other such like companies to which our teeming legislature never refuses the corporate character and incidents as to bring the defendant [illegible] the alleged definition, or to deduce from the existence of roads with [illegible] such as they were in France in the time of St. Louis, the necessary [illegible] character of railway companies with those of railways and railway locomotives of present times.

It should be stated that neither the Railway Clauses Consolidation Act, nor the defendant's statutory charter adopting the Clauses Act, make mention of or refer to *lettres d'amortissement* or to mortmain itself, either in word or provision, and that the said Act empowers the defendant not alone "*to purchase, hold and take lands*," but also "*to alienate, sell and dispose of the same.*"

The mortmain character, therefore, as so known and distinguished, being manifestly inapplicable to the defendant, the allegation of the plaintiff's declaration that the *land* in question *is now holden by the defendant in mortmain*, or

in other words and by legal implication, that the defendant is a mortmainor, is not supported; upon this ground, therefore, mainly urged by the plaintiff, his claim for *indemnité* cannot be sustained.

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The *indemnité* is claimed also from the onerous nature of the above stated agreement as an actual *sale* by the St. Lawrence and Atlantic Railway Company to the Grand Trunk Railway Company of Canada. Now, it is an admitted proposition of law that the *acte* or deed of acquisition under which *indemnité* can alone be claimed, must in itself be *translatif de propriété*, and that the legal requisites of a deed of sale, the absolute transfer of the property sold and a price agreed upon for it, are legal qualities essential to the constitution of such acquisition.

A reference to the provisions of the Railways Union Act, and to the covenants of the agreement as set out, made and executed under those provisions, evidence the merely anticipatory or preparatory character of the latter as articles of union, and as only creative of elements for the general union of the railway companies and their respective railways, the aggregation of their capitals into one general stock, the adoption of the several companies' shareholders into one general company, the completion of the several lines of railway, and the assumption by the united company of the several construction contracts and liabilities of the several companies including, of course, interest due and unpaid to the shareholders of the companies, in all which the Victoria Bridge charter and contracts were included by the terms of the agreement. To assume the mere union of companies in itself to be a sale, or the transfer of equivalent shares in the united, for the shares in the several, companies, to be a legal ingredient of a sale is simply ridiculous, and it is equally so to make the payment by the united company of the interest due and payable to the several shareholders of the named companies, to be a consideration or price. Among the amounts of interest, that due to the St. Lawrence and Atlantic amounted to £75,000, and this is alleged to be the price or consideration of the agreement to unite that railway having a capital of £1,225,000, secured by provincial guarantee, and of which considerably more than half had been paid in, with the united company formed under the agreement. The agreement does not recognize this as a price or consideration, but assumes it as a debt due, as much as wages or materials purchased and remaining unpaid. The essential qualities of a sale or its equivalent *acte, the absolute transfer, de la pleine propriété d'un héritage moyennant un prix*, are wanting in this agreement. The *prix* or price of a thing must be the representative to a fair extent of the thing sold, *l'equivalent de ce que le vendeur livre ou s'oblige livrer:* that equivalent is chimerical in this case. The union effected was a consolidation of interests for a common and reciprocal advantage in so far as the several shareholders were concerned, and the agreement itself was only preparatory or provisional articles of association, for the common benefit of the general association, to be afterwards completely legally established in the same manner as similar provisional articles of association for a public or private undertaking might be entered into by individuals, to be completed and perfected afterwards for their private and personal advantage. The law no more prevents companies from aggregating

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themselves into one united company, than individuals from forming a co-partnership. Grant, p. 48, says: "a corporation may be compounded of several others," and without additional citations, it will be found in 3 Exchequer Rep., p. 320, "so two corporations may be made one by uniting one to the other, but the resulting corporation must have express power by statute to sue, etc." So also it is laid down "though corporations may unite, it appears that with respect to all corporate bodies, created by and in accordance with and in pursuance of Acts of Parliament, they cannot surrender but they continue united and act and are known as one corporation, but when a separation takes place they revive in their original formation." "An Act of Parliament will furnish the only means of removing the corporate charter from corporations created by charters passed in parliament." The distinction will be obvious between the surrender of the charter and the union of the chartered property with other chartered property for a common object, in other words, the union of these incorporated railway companies for the establishment of a common Main Trunk Line of Railway throughout the province and under one management. This was the object of the association but the charters of the individual aggregation Corporations did not cease to exist, they were merely suspended during the existence of the united Corporation and upon its dissolution the separate Corporations will revive. I will not stop to controvert the assertion resting on no authority that every transfer of shares would produce seigniorial dues; independent of the charter's provision, no law could contemplate such an absurdity, nor does our common law allow it. Seigniors have never yet supposed themselves entitled to claim *lods et ventes* on the value of the real estate of a partnership because of the incoming and outgoing of partners.

Considering these admitted principles and authorities of law in connection with the agreement in itself, independent of parliamentary sanction, and only as in the nature of mere articles of co-partnership, the plaintiff's Declaration not going beyond the agreement in its relation, and making no reference whatever in terms or otherwise to the provisions of the 18th Vict. ch. 33, the only enactment in connection with and subsequent to the agreement, it is evident, admitting the legality of the union and the non-removal or abrogation of the several charters by Act of Parliament, that the agreement in itself did not contain the attributes of an Act of sale, but simply professed to unite several independent companies, with their several undertakings, including the Victoria bridge construction, not contemplated or referred to in the Union Acts, into one, established an association of the individual companies as one general company and subjected them in that respect, under the stipulations of the agreement upon which the plaintiff rests, to the same principles and rules of law as properly apply to associations or partnerships of individuals; upon this point one or two authorities suffice, whilst the principle established by them will be found in numerous concurrent legal writers upon the subject. Troplong, Traité de Société, explains these: "Il est certain que pendant la durée de la société il y "a communication et aliénation. *Res continuo communicanter.* Seulement, "cette aliénation n'est pas absolue, et à la fin de la société chacun retire sa part. "Ce n'est pas une aliénation absolue comme celle qu'engendre la vente; l'associé

"n'abdique pas sa chose radicalement et à toujours. Le contrat de société est "fort différent de la vente, ainsi que les feudistes l'ont expliqué dans leurs "recherches sur les retraits ; jamais il n'a équipollé à la vente." And Pothier, Traité des Retraits, no 103 : "Le contrat de société est un contrat qui n'est ni "équipollent, ni ressemblant au contrat de vente," and Bacquet requires "une vraie vendition." As respects the Grand Trunk Railway Company, therefore, the individuality of the corporation partners survives the alienation of the property, the *mise* of each is not absorbed absolutely, and the criterion of price is absent. Moreover, the very statute which anticipated and enacted preparatory provisions for the union of the companies, the Railways Union Act itself, in contemplation of their possible amalgamation, specially enacted *to distinct and separate modes of effecting it*, 1o. by the voluntary union of the companies, or 2o. by the purchase by one from the others, or any of them, but with distinct and special provisions for each particular mode, for example, for the former, by providing for the aggregation of their capitals and shareholders, and authorizing the union to assume the liabilities, engagements and construction contracts of each and all, and for the latter, by authorizing the purchasing company to purchase out the other, and with this object to increase its capital to an amount sufficient to liquidate the purchase price, and to complete their own undertaking as well as that of the purchased railroad ; in the former, providing for a union by voluntary agreement upon equal terms, in the latter, providing the mode for raising a larger capital for the price of the purchase. The distinction has been drawn between the two modes broadly and unmistakeably by the Legislature itself in its own plain and unambiguous enactment, and the ageement moreover has adopted the former mode and repudiated the latter. Under all these circumstances the agreement does not assume the legal character of a sale, or its *acte équipollent*, nor support the plaintiff's pretention as being an *acte translatif de propriété*. It is also to be observed that none of the works of the aggregating companies was nearly completed, that large outlays were required for the purpose, that the means were to be obtained from abroad, and would rest mainly upon the profitable character and expectation of the undertaking itself, that each company had power to mortgage its stock and property to raise those means, and that the amalgamated company would necessarily be indued with the like powers of the contracting companies and with greater advantage from being administered as one company under one management, without rivals in the money or share market; hence, though the power to mortgage or pledge necessarily belongs to the general management, the contracting companies *inter se* remained with their rights as they were.

The argument deduced by the plaintiff from the language of, or terms employed in, modern French fiscal regulations, or from reasons given in support of special taxation in France upon such undertakings there, will not avail in this case. In that country a revenue is levied by taxation upon the excess of a capital, *mise*, brought by one partner into a concern more than by the other partner, and this tax is endeavored to be paralleled with the seigniorial *indemnité* of feudal France. In the same spirit the *Cour de Cassation* declared the old *droits de contrôle* and *insinuation* specially imposed and levied under the Royal Edicts

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of 1703, 1704 and 1708, to have been seigniorial, and therefore declared the legality of the fiscal impost of 1790, but at a time when seigniorial dues and rights had been abolished in France. It would be waste of time to enlarge upon this matter or to cite the numerous authorities and arrêts which combat and have overruled that declaration. State necessity in France has imposed state taxation upon an almost endless variety of useful objects, and even upon Railroads themselves, objects of the most positive public advantage, as Bousquet, "Dict. de Droit," says: "*Les chemins de fer sont soumis à un impôt,*" &c.

The modern use of ancient terms as *amortissement*, *impôt de main-morte*, has thus been employed to furnish support to the argument of the plaintiff. But Bousquet, in reference to the former term, explains the distinction between its ancient and modern application: "Anciennement on appelait ainsi la permission que le roi, moyennant finance, accordait aux gens de main-morte, tels que les religieux, les communautés, les confréries, etc., etc., d'acquérir des héritages, et comme ces héritages ainsi acquis n'étaient pas dans la commerce, *et ne pouvaient plus être vendus*, ce qui privaient les seigneurs des profits féodaux et casuels qu'ils percevaient à chaque mutation il leur était dû une indemnité. Aujourd'hui l'amortissement ne s'applique guère qu'au fonds consacré à l'extinction de la dette publique, (sinking fund) et à la caisse du bureau d'amortissement qui est chargé de cette opération."

With respect also to the modern terms, *impôt de main-morte*, this also is a tax like all taxes subject to increase or diminution or entire abolition, as state necessity might dictate, and is imposed upon *sociétés anonymes* which are declared, generally, to reach beyond the ordinary duration of mutations, and because "les associés se succèdent les uns aux autres sans payer de mutation." Championnière in his "Droits d'Enregistrement," in which he has classed the varieties of registration taxation in France, refers to this impost, and says that though most "*sociétés comportent* une durée fort longue, qu'il n'est pas vrai de dire, tel qu'à déclaré la législature, que les associés se succèdent," &c., he declares this ground false and unsound inasmuch as "les associés ne se succèdent pas les uns aux autres, que dans les sociétés dites *Tontines*, supposant toutefois que tels droits des survivants s'accroissent à titre héréditaire du droit des prémourants."

It is manifest that the use of the old French legal and juridical terms, as above, does not involve the recognition of the old mortmain institutions known in connection with those terms, nor should modern French judicial opinions control, when they are plainly opposed to those recognized and enforced in this province. Our courts from their constitution have always held the *droit de contrôle et insinuation* to be fiscal taxation not in force in this province, and in no respect seigniorial, and in this differing from the *Cour de Cassation*. It is needless to add that the necessities of French taxation can in no way affect our laws or institutions in the most remote degree.

Upon the whole, the mortmain character is not *legally* attributable to the Grand Trunk Railway Company of Canada, and the agreement is not in law *translatif de propriété*, and therefore the Declaration shews no legal claim to either *indemnité* or *lods et ventes* upon the allegations therein contained.

The reservation in the charter of the St. Lawrence and Atlantic Company

was adverted to as generally sustaining the claim for indemnité, but it must be observed that it conferred no right, made no allusion to mortmain, and merely assured such claims as might or might not legally be enforced: similar reservations were inserted in other charters for the same purpose, but it would be idle to suppose that they impliedly conferred rights where none existed.

On the other hand the special defence set up, in the event of the grounds of Exception above stated not being allowed must be considered; previous, and as preliminary, to the investigation of this defence, it is proper to become acquainted with the defendant in this cause, to ascertain the legal origin and present statutory existence of that incorporated company, and under what right or title it *now holds the lands in mortmain* as alleged in the plaintiff's declaration, which impleads the defendant as an existing Corporation by the name of "The Grand Trunk Railway Company of Canada," but without setting out in the declaration any charter of incorporation, either royal or legislative, under which it is supposed to have existence. A short review of the legislative acts above referred to will supply the omission.

The 16th Vict. ch. 37, incorporated a number of individuals, under the above name, for the construction of a railway from Toronto to Montreal. The Railways Union Act, of the 16th Vict. ch. 39, authorized the directors of the united companies to give a name to the resulting company to be formed by their union, with the pledge of future legislation, if required, to give this agreement of union full effect. The 16th. Vict. ch. 76 amended and extended the previous Act, and enacted that the resulting company should be The Grand Trunk Railway Company of Canada, if the Company incorporated by that name under the 16th Vict. ch. 37 should be one of the uniting companies. The parties to the agreement included the Victoria bridge undertaking and contracts in the union, and admitted the construction contractors of that work as parties to the agreement, though that undertaking was not in the contemplation of the Railways Union Act: all these parties nevertheless assumed to name the resulting company, with the stipulation of the express covenant and condition, however, contained in the agreement, for the future legislation above adverted to. Finally, the 18th Vict. ch. 33, after special recital of the statutory charters of the several companies, of that for the construction of the bridge, of the agreement and its covenants and of the provision for future legislation, declared the expediency, among other things, of confirming the agreement and of amalgamating the companies, &c., &c., enacted that confirmation, specially incorporated the composite or union company, and then embodied with this special Act, 18th Vict. ch. 33, the provisions of the Railway Clauses Consolidation Act 14th and 15th Vict. ch. 51, one of which enacts "the incorporation of every company established under any "special Act making it a body corporate under *such name as shall be declared* "*in the special Act*," &c., and finally provided that "the *united company shall* "*be known and designated by the name of "The Grand Trunk Railway Com-* "*pany of Canada*." Now, the law declares "the name of a corporation to be in all cases an essential part of the metaphysical creation, and that which operates more than any other property of a corporation, to give it the appearance of continuous identity," so, also, "the general rule with respect to the name of the

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Corporation is that every charter of incorporation ought to name the Corporation." "In the case of statutory Corporations the name must be given by the Act of Parliament constituting the Corporation. See Angell and Ames, Grant, Wilcocke.

The appropriation of a name in the agreement by the contracting parties to the resulting company, intended to be established thereby, could in law give no legal corporate denomination to that company as an existing corporation, nor could the corporate name attached to that company by the amending Railways Union Act have that legal effect, inasmuch as operations not contemplated by the Railways Union Act were introduced into and formed part of the substance of the agreement. The 18th Vict. ch. 33, alone, therefore, gave that quality or name to the companies' amalgamation, swallowed up, as it were, the individual existence of the previous charters, and gave corporate existence to the defendant by the effect of and under its provisions. The vitality of the defendant as a corporation was established by the 18th Vict. ch. 33, alone, and the effect of that statute was to suspend the separate operation of the previous individual charters during the more general existence of the resulting company. It is moreover established law "that a subsequent Act of Parliament may control a prior statute" and that legal proposition is maintained and enforced in 3 Exchequer Rep., p. 320, The London and Brighton and South Eastern Railway Company *versus* Goodwin, in which the amalgamated company sued upon a bond conditional in favor of one of the companies forming the amalgamation, and executed upon that event, in which it was decided "that the last statute in point of time controls, in other words, that the new joint corporation is in the place of the several companies." This compound company, incorporated by the Act of 1854, 18th Vict. ch. 33, therefore, can be none other than the defendant, which alone can be The Grand Trunk Railway Company of Canada, and which alone, moreover, can by any possibility, hold possession of the railway lands for which the *indemnité* and *lods et ventes* are claimed in this suit. The defendant, consequently, can date its existence only from the 18th December, 1854, when that Act, the 18th Vict. ch. 33, became law.

Proceeding now to the special defence under the Seigniorial Tenure Act of 1854 it will be observed that its declared object and intention are the abolition of all feudal rights and duties in Lower Canada, and that it provides the means and appliances for effecting the purpose. It was eminently a relieving statute, and necessarily must receive, in conformity with law, as well as in the terms of its own 38th section, "the most liberal construction possible, with a view to ensure the accomplishment of the intention of the Legislature as hereby declared" "to abolish as soon as practicable, all feudal or Seigniorial rights, duties and dues, &c." By this Act, the abolition of the Seigniorial Tenure of itself abolished all claim for Seigniorial dues upon the transfer, sale or other alienation of the lands in question, unless for arrears arising from such alienations effected before that Act became law. Hence, under the general purview of the Act, the plaintiff could only lay claim to arrears due by the defendant. But the two Acts, the 18th Vict. ch. 33, and the Seigniorial Act 18th Vict. ch. 3, came into force on the same day, 18th December, 1854, and whatever

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acquisitions the defendant may have made after its existence, could by no possibility give rise to arrears accrued before the passing of those Acts, or could be brought within the 36th section of the Seigniorial Act, "*reserving to the Seigniors their rights to dues and duties accrued and due before that Act was passed.*" The Seigniorial Act would otherwise not be a relieving statute, and would, by implication, create prospective dues which its provisions literally and plainly abolished and intended to abolish.

With reference to the lands themselves, it cannot be denied, that, by our common Law, payment to the Seignior of his *indemnité* upon the original acquisition, relieved from all future feudal and Seigniorial dues, until the lands should again pass out of the hands of the party making the payment; till that event occurred they were, as Bacquet, p. 399 says, "autant que héritages amortis sont "faits allodiaux par ce moyen francs, libres, exempts de tout droit féodal, "seigneurial et casuel." Now these lands could not have passed to the Defendant until after the Seigniorial Act had come into force, 18th December, 1854, and until and up to that time they were *affranchies et exempts* from all Seigniorial dues, and especially from the *indemnité* and *lods et ventes* claimed by this suit from the defendant as their holder in mortmain, even, by way of argument, admitting their mortmain character.

But the Seigniorial Act, moreover, is declaratory in its enactments as well as relieving: the 33rd section covers all lands which had been commuted by the Seigniors, and declares them *to be*, and *to have been*, from the day of the date of the deed of commutation free from all Seigniorial rights, and holden *en franc aleu roturier*, manifestly in conformity with the common Law on the subject. In a similar spirit the 34th section declared and enacted that "All lands upon which mortmain dues (*droits d'indemnité*) have been paid to any Seignior, and which have not been sold or conceded since such payment to *parties holding otherwise than in mortmain*, are hereby declared *to be, and to have been from the day of the date of such payment, &c.*, released from all Seigniorial dues and duties, and held *en franc aleu roturier*, but subject to the payment of a *rente constituée* equal to the *cens et rentes* legally due thereon." The plaintiff's assumption of the mortmain character of the defendant in virtue of which alone he claims brings his pretension into conflict with this clause of the Act and destroys itself.

The retroactive character of these enactments of the Seigniorial Act is too evident to require remark, whilst the declaratory character of both, and especially of the latter, is equally manifest, settling the moot question of the non-liability to the *double indemnité* of lands held in mortmain, passing from one mortmainor to another, or so long as they continued under the original mortmainor's holding, and that, in effect, no actual alienation of the property in such a state of things was presumed or supposed in law to take place, in so far as the rights of the Seignior to *double indemnité* were involved.

The language of this enactment, the 34th section, is peculiarly precise and perspicuous, and, according to all well-established rules of legal interpretation, "must be taken in its ordinary and familiar signification and import, and, as to "the language employed, regard must be held to its general and popular use."

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Dwarris on Statutes, pp. 70, 2, 3, remarks that "When the Legislature has used "words of a plain and definite import, it would be very dangerous to put upon "them a construction which would amount to holding that the Legislature did "not mean what it expressed." The rights of the parties in this case do not rest upon the propriety, or otherwise, of this legislation or the feelings engendered one way or the other by it, whether it be odious or beneficial, is not the question, but what is the law, and yet it is possible that a narrow verbal criticism of some of those provisions might cast a temporary doubt upon their import, but that must vanish upon view of the intention of the Legislature, the liberal construction to be given to the Act, and the plain and perspicuous language of the enactments themselves and particularly of that of the 34th section.

The Seigniorial Act of 1854 became, by its amending Act, operative and effectual for the absolute and entire abolition of the tenure, dues and duties, on and from the 18th December, 1854, as well as for the enforcement of its declaratory law. This action is personal in its nature against the defendant, as the holder of the lands in mortmain, as having acquired them from the St. Lawrence and Atlantic Company, and which are not alleged by the plaintiff *to have been sold or conveyed to any parties holding otherwise than in mortmain* since the acquisition by the St. Lawrence and Atlantic Railway Company, many years since, and which could not have been acquired by the defendant previous to its creation as an incorporated Company, on the 18th December, 1854, at which time all Seigniorial dues were abolished. Assuming therefore, the payment of the *indemnité* originally upon the lands in question, before the 18th December, 1854, and not specially denied, and that these lands continued to retain their original mortmain character at that date, the Seigniorial Act expressly declares them *to be, and to have been free and released from all Seigniorial dues and duties from the day of such payment*, manifestly at a period before any possible acquisition by the defendant, and from that time held *en franc aleu roturier*, free of any feudal or seigniorial dues or duties whatsoever.

Finally, assuming the defendant to be a *main-morte*, and to have acquired the lands *à titre translatif de propriété* before the passing of the Seigniorial Act, the *double indemnité* could not be claimed as arrears accrued due under the 36th section of the statute, because, being the acquisition by one mortmainor from another, the 34th section would protect the transaction and prevent the accruing of dues to arise therefrom.

The mere question of the rightful retroactivity of Legislative Acts as applicable to the Seigniorial Acts in question, cannot be brought up for discussion in this cause. This Court cannot gainsay the power and right of the Legislature, in view of a great public good, to provide for the abolition of the Seigniorial Tenure, or, in its Supreme Legislative will, to declare what is or shall be the law in relation to assumed and contested points of that tenure law. Had the intention expressed or the language used by the Legislature been doubtful, the duty of this Court would have been to discover the one and to give effect to the other, under subjection to legal rules of interpretation; but in this matter the Court cannot interfere the language and intention are both explicit.

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Sedgwick, on Statutory and Constitution Law, p. 411, removes all difficulty on this point, and observes: "the rule is that an Act is to be construed as prospective in its operation in all cases susceptible of doubt, but this could "have no application to a case where the Legislature has directed, in language "too express and plain to be mistaken, that they designed to give the statute "a retroactive operation; in such case there is no room for interpretation."

From these considerations, the pretensions of the plaintiff are altogether unsupported by law, and must be rejected as well for the *indemnité* as for the *lods et ventes.*

But the defendant has objected especially as against the claim for *lods et ventes, the public utility of the defendant's undertaking.* As that particular point has been argued by both parties, it is fitting to observe upon it, but any lengthened discussion of the point might have been avoided, because it is admitted on both sides that the claim for *lods et ventes* cannot be made except upon a sale, *une vraie vendition* or its *acte equipollent.*

The law is explicit, "*que* lods et ventes sont dûs, non seulement à cause "de la vente des héritages, soit judiciaire, soit volontaire, mais encore pour "toutes les mutations équipollentes à vente, c'est-à-dire, pour tout acte qui "tranfère la pleine propriété d'un héritage moyennant un prix."—Anc. Denisart, vo. *Lods et Ventes.* The agreement through which the *lods et ventes* are claimed has been declared not to be a sale, or *acte équipollent à vente*, and, consequently, not productive of *lods et ventes.* This part of the claim might have rested here, but the defendant, as stated, has strongly urged this legal ground of public utility in discharge, and submitted a very long and influential list of authorities in support. It would be too tedious to refer to all, and one or two only will be selected for citation, inasmuch as all are concurrent, premising, however, that the character of public utility cast upon the undertaking is settled by the various statutes in relation to the establishment of the Main Trunk Line, and by the general opinion of French jurists who have treated of Railways. Bousquet observes "l'établissement d'un chemin "de fer constitue des travaux d'utilité publique pour lesquels la Compagnie "qui les entreprend est subrogée aux droits de l'État lui-même," so also another author, "Lorsque pour l'exécution de travaux publics, des concession-"naires sont autorisés à recourir à la voie de l'expropriation pour se procurer le "terrain nécessaire à leur exécution, ce n'est pas dans leur intérêt que l'expro-"priation est requise, c'est dans l'intérêt général, etc." This public utility being admitted, the authorities of the defendant sustain the pretension for the discharge from *lods et ventes.* Porquet de Livonnière gives as a reason: "par-"ceque l'intérêt particulier du seigneur doit céder à celui du public;" citing Mainard and Chopin in support, Bourjon, droit commun de la France, says: "la faveur d'une vente pour l'utilité publique l'affranchit du droit de *lods et* "*ventes.*" Hervé 3 vol. p. 23. Droits Seigneuriaux "vente pour cause d'utilité "publique, par exemple pour la confection d'un grand chemin, il n'y a pas de "lods et ventes: Une vente suppose un consentement de la part du vendeur, et "dans le cas d'utilité publique, le consentement du propriétaire est indifférent, "parceque c'est toujours malgré lui qu'il abandonne sa chose. Lorsqu'il y a

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" deux intérêts en concurrence, et qu'ils sont inconciliables, le plus petit doit " ceder au plus grand, par la seule raison que celui-ci est plus puissant. Dans " le cas d'utilité publique, c'est donc user de son droit que de disposer de la " chose d'un particulier, ce n'est pas traiter avec lui, ce n'est pas acheter de lui, " etc., l'indemnité qu'il reçoit ne lui est pas dûe comme prix d'une vente, ou " d'une convention volontaire et synallagmatique, puisque dans le cas d'un " pareil abandon il n'y a rien du fait du propriétaire, et qu'il n'y point de " véritable vente, le consentement du seigneur est inutile, la chose fut elle entre " ses mains, on ne disposerait également ; même entre ses mains, on ne lui doit " conséquemment, pas le profit du quint (lods et ventes) qui n'est autre chose " que le prix de son approbation, puisqu'on n'a pas besoin de son approbation." This reasoning is sustained by a multitude of authorities, among which will be found the case reported in 1 Lower Canada Reports, p. 91, Grant vs. The Principal Officers of H. M. Ordnance. This was a judgment by the Court of Appeals confirming that of the Superior Court of Montreal; it was broadly held by both that the seigniorial mutation fine is not due upon the sale of real estate for public uses. In the particular case there could be no doubt, because the land was acquired by the principal officers for purposes of public defence, but the chief justice, Sir James Stuart, did not confine the question within the narrow limits of the special case, but went upon the broad principle that acquisitions of land for public utility are freed from *lods et ventes.* After stating the acquisition as being evidently for purposes of public utility, the chief justice proceeds, " the only question for decision is whether *lods et ventes* are due on the acquisition of property for an object of public utility. A host of authors, amongst whom are Chopin, D'Argantré, Pothier, and others, maintain that there are not due ; a very few hold an opposite opinion. Indeed the origin of the right of *lods et ventes* rests upon the supposed consent given by the seignior to the mutation ; but his consent is not required for the acquisition of property necessary for an object of public utility, such as in this case, for instance. The right of public authority reaches to the origin of societies and preceded the feudal system." The plea of public utility sustaining public rights is maintained by the most eminent of the French jurists and legists, as well as by our provincial jurisprudence, in the concurrence of the judgments of the two Superior Courts of the province, and one of them the highest and in the last resort.

It is with regret that the grounds of the Judgment have been extended to this length, but the importance of the legal points discussed, the amount involved in the cause, with the very large additional litigation for other similar claims dependent upon the result of this suit, and the great and minute elaboration of the argument on both sides at the bar, appeared to require a close examination of every point submitted, as well as the citation of authorities in their own language and expression, in explanation of the conclusion arrived at by the majority of the Court which dismisses the plaintiff's action.

The Judgment is as follows:—

Judgment.—The Court, &c......Considering that the deed of agreement in the plaintiff's declaration mentioned is not in law a sale, or its equivalent act *acte equipollent à vent,* nor an *acte translatif de propriété* of the realty therein

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described, to the defendant; considering that the union of the St. Lawrence and Atlantic Railroad Company with the Grand Trunk Railway Company of Canada, and the other Railway Companies, all parties to the said deed of agreement, as in the said agreement and declaration stated, is not in law such mutation and alienation as rendered the defendants liable for the *indemnité* and *lods et ventes* demanded in this action by the plaintiff; considering that the defendant is not in law, or mortmain or *gens de main-morte*, subject to the payment of seigniorial *indemnité* for acquisitions by the defendant of real estate for the purposes of such defendant, and that the lands in the plaintiff's declaration alleged to be held by the defendant in mortmain were not by law so held in mortmain; considering that the defendant, even if such mortmainor, and if such acquirer of said realty and lands previous to the legal operation and effect of the Seigniorial Tenures Act, was, by the said last Act declared, to be relieved and freed from the payment of Seigniorial *indemnité* for such acquisitions made by the defendant, directly from another mortmainor, previous to the legal operation of the said Act, such acquisitions being held by the defendant at the time of the operation of the said Act; considering that the sums of money demanded by the plaintiff in this action are not in law for arrears of Seigniorial dues, accrued and due by the defendant to the plaintiff previous to the legal operation in that respect of the said Seigniorial Tenures Act; and further, considering that the Grand Trunk Railway, including therein the said realty and land, is by law a work of public utility, and that the acquisition of the said lands did not in law render the defendant liable for the payment of the *lods et ventes* demanded by the plaintiff in this action, doth maintain the peremptory exceptions of the defendant, and doth dismiss the plaintiff's action with costs. (The Hon. Mr. Justice Smith, dissenting.)

Cherrier, *Dorion* and *Dorion*, for plaintiff.
Barnard, Counsel.
Cartier and *Berthelot*, for defendant.
Loranger, *Q. C.*, Counsel.

MONTREAL, 29th FEBRUARY, 1860.

Coram SMITH J.

No. 2596.

Dickenson vs. *Bourque* and *Blanchard*, adjudicataire *mis en cause*.

Held.—That a Rule *nisi* for *folle enchere* must contain a description of the lands asked to be re-sold *à la folle enchere*.

In this case the adjudicataire having failed to pay the purchase money on motion of the plaintiff's attornies, a Rule was obtained for a *folle enchère nisi causâ*. The Rule referred to the lands as being described and specified in the sheriff's return and the *procès-verbal* of seizure thereto attached, by him made, to the writ of Execution issued in the cause, but did not contain a special description of the lands. The Court discharged the Rule, holding that the Rule should contain a description of the lands.

Rule discharged.

Torrance and Morrice, for plaintiff.
(A.M.)

MONTREAL, 31 DECEMBRE, 1859.

Coram BERTHELOT, J. A.

No. 1562.

Sternberg et al. vs. *Dresser, et Evans*, Tiers Saisi.

Jugé :—Que les gages ou salaires non encore dûs ou gagnés au jour de la signification de la saisie-arrêt ne sont pas saisissables.

Les demandeurs ayant contesté la déclaration faite sous serment par les tiers-saisi en cette cause sur le principe que le défendeur étant le commis du tiers-saisi ; ce dernier était tenu de déclarer combien il aurait à lui payer pour ses gages durant tout le temps de son engagement comme commis ; le tiers-saisi répondit en droit à cette contestation et entr'autres motifs donnés à l'appui de cette réponse en droit, le tiers-saisi alléguant les raisons suivantes : " That " the plaintiffs cannot and are not entitled by law to claim or attach any " salary or wages not actually due or owing by the said *tiers-saisi* to the de- " fendant at the time of the service of the said writ of *saisi-arrêt* or attachment " upon the said *tiers-saisi.*"

" That no salary or wages not actually due or owing at the time of the " service of the writ of attachment can by law be seized or attached in the " hands of the *tiers-saisi* as pretended by the plaintiffs."

Le tiers-saisi ayant aussi répondu spécialement à la contestation des demandeurs, et les demandeurs ayant répondu en droit à cette dernière réponse comme suit : " And the said Plaintiffs as to the pleading by the said *tiers-saisi* " secondly pleaded, saith : that the same is badly pleaded, and cannot be by " this Honorable Court received and maintained or allowed to avail to the " benefit of the said *tiers-saisi*, the same being hypothetical and combining in " one and the same pleading matters of law and facts and offering no certain " or distinct issue ;"—la cause fut inscrite sur le rôle de droit pour audition sur les deux réponses en droit.

Le tiers-saisi cita à l'appui de ses prétensions le précédent dans la cause de Malo v. Adhémar et la Banque du Peuple, T. S. ; 1 vol. L. C. Jurist, p. 270.

La Cour a maintenu la réponse en droit du tiers-saisi pour les raisons ci-dessus rapportées et a motivé son jugement comme suit :

La Cour après avoir entendu les demandeurs et le dit tiers-saisi tant sur la réponse en droit plaidé par le tiers-saisi à la contestation faite par les demandeurs de sa déclaration comme tiers-saisi, que sur la réponse en droit des demandeurs du second plaidoyer du tiers-saisi ; considérant que les gages ou salaires non encore dûs on gagnés au jour de la signification de la saisi-arrêt n'étant pas saisissables, et qu'elle ne pouvait avoir d'effet que quand à ce qui était alors dû ou acquis au défendeur a maintenu la réponse en droit du dit tiers-saisi et a renvoyé avec dépens la contestation faite par les demandeurs de la déclaration du tiers-saisi, et adjugeant sur la dite réponse en droit des demandeurs au second plaidoyer du tiers-saisi l'a renvoyée mais sans frais.

C. R. Bedwell, avocat des demandeurs.

J. Monk, avocat du tiers-saisi.

(P.R.L.)

MONTREAL, 30 MAI 1856.

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

No. 1729.

Martin vs. *Moreau.*

Jugé,—Que la requête civile doit être reçue à l'encontre d'un jugement final rendu par défaut et en dernier ressort.

Le 21 Mai 1856 le Défendeur présenta, a la Cour Supérieure siégeant à Montréal; une requête civile pour faire casser le jugement final rendu par cette Cour *exparte* et en dernier ressort le 13 Mai 1856, en vacance, par l'Honorable Juge Mondelet; condamnant l'impétrant en requête civile à payer au Demandeur £13 5 10 pour loyer d'une propriété et à abandonner et délaisser la dite propriété sous trois jours de la signification du jugement.

Cette requête civile alléguait:

Que le susdit jugement a été rendu ainsi par le dit Honorable Juge sans avoir aucune juridiction sur la présente cause.

Qu'il n'y a jamais eu en cette cause, aucun exploit introductif de la présente Instance, en conformité aux dispositions de la loi faite et pourvue en pareil cas.

Que l'Honorable Juge qui a rendu le dit Jugement était incompétent à ce faire *ratione materiæ*; en autant que le dit Augustin Moreau n'a jamais été assigné régulièrement ni légalement à comparaître en cette cause devant aucun Tribunal compétent, ainsi qu'il est contemplé par le Statut fait et pourvu en pareil cas.

Que le dit Augustin Moreau n'a jamais été assigné à comparaître devant cette Honorable Cour, mais seulement devant un ou plusieurs des Honorables Juges de cette Cour, lequel ou lesquels n'ont jamais eu aucune juridiction à cette fin depuis la passation du Statut Provincial 18 Victoria, Chapitre 108, ni depuis l'introduction de cette Instance.

Que le dit Augustin Moreau a été assigné à comparaître devant un prétendu Tribunal qui n'existe pas dans le Pays, et qu'aucune Cour de Justice légalement constituée n'a pris connaissance de la présente cause ou Instance; laquelle a été entendue et décidée en contravention aux lois du Pays.

Que la prétendue Instance n'était pas conforme aux dispositions de la loi faite et pourvue en pareil cas, et n'a pu donner aucune juridiction à l'Honorable Juge qui l'a entendue et décidée.

Que le dit Augustin Moreau n'a été poursuivi que pour la somme de treize livres, cinq chelins et dix deniers courant, pour balance de loyer dont la valeur annuelle est allégué n'être que de seize livres courant, et que conséquemment le susdit Jugement a été rendu en dernier ressort.

Que partant le dit Augustin Moreau qui est lézé à raison de tout ce que ci-dessus allégué; est bien fondé en sa présente Requête Civile, à l'effet de faire déclarer toute la procédure en cette cause nulle et de nul effet; comme ayant été introduite et suivie devant un Tribunal incompétent et qui n'avait aucune juridiction. (1.)

(1) Vide, Grant Appt and Brown Int. 6 Vol. L. C. Reports p. 187.

Martin vs. Moreau.

Le requérant prétendit lors de la présentation de sa requête; que dans l'espèce actuelle il y avait ouverture à la requête civile, que la requête civile existe en Canada et doit être accordée dans les cas prévus par l'ordonnance de 1667 telle que modifiée lors de son enrégistrement au conseil Supérieur de Quebec. Ord: 1667, titre 35. Déclaration du Roi, Mars 1685. Edits et ord: 1 vol: page 253. Ed: de 1854. Décln. du 22 Avril 1732. 1 vol, Ed: & ord: p, 533. En appel. Rottot Appt & Archambault Int: Jugement le 11 Mars 1852 à Montréal. (1.)

La requête civile fut reçue par la Cour, après audition des Parties et le jugement est comme suit:

"The Court having heard the said Augustin Moreau the petitioner and the Plaintiff by their counsel upon the petition, *Requête Civile* of the said petitioner, examined the proceedings and having deliberated, doth permit the petitioner to fyle the said petition, reserving to the Plaintiff all legal objections to the proceedings".

Lafrenaye & Papin, Avocats du Requérant.

R. & G. Laflamme, Avocats du Demandeur.

(P. R. L.)

MONTREAL, 30th NOVEMBER, 1859.

Coram MONK, Asst. J.

No. 114.

Ostell vs. O'Brien.

Held.—That a plea fyled after foreclosure and before any further proceeding had by plaintiff ought not to be rejected on motion of plaintiff founded on the mere foreclosure.

This was a motion to reject a plea fyled by the defendant, after he had been duly foreclosed, but before any further proceeding had been adopted by plaintiff, the foreclosure having been fyled at ten o'clock A.M., and the plea at half past ten.

PER CURIAM. It is quite impossible to suffer a party to be cut out of his right to plead by the mere fact of a foreclosure having been fyled a few minutes before the actual fyling of the plea, and without any further intervening action in the suit by the plaintiff. The plaintiff's motion is therefore rejected, but without costs. Motion rejected.

Fabre, Lesage et Jetté, for Plaintiff.

B. Devlin, for Defendant.

(S. B.)

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(1) Ce jugement est motivé comme suit:

La Cour après avoir entendu les parties par leurs Avocats, examiné la procédure en Cour Inférieure, les Griefs d'Appel et réponses à iceux, et sur le tout mûrement délibéré; considérant: que les voies de nullité invoquées par l'appelant en les supposant fondées en droit, donneraient lieu à un recours en Appel, et qu'il n'y a pas lieu à l'opposition *ni à la Requête Civile* dans l'espèce maintenant devant la Cour, et considérant le bien jugé de la sentence de la Cour Supérieure, en date du sept Septembre mil huit cent cinquante dont est Appel, confirme le dit jugement avec dépens.

MONTREAL, 30 SEPTEMBRE 1859.

Coram SMITH, J.

No. 2403.

Les Commissaires d'Ecoles pour la municipalité de la paroisse de St. Michel de Vaudreuil vs. Bastien.

Jugé :—1o. Que les commissaires d'écoles sont tenus de respecter les résolutions de leurs prédécesseurs en office ;

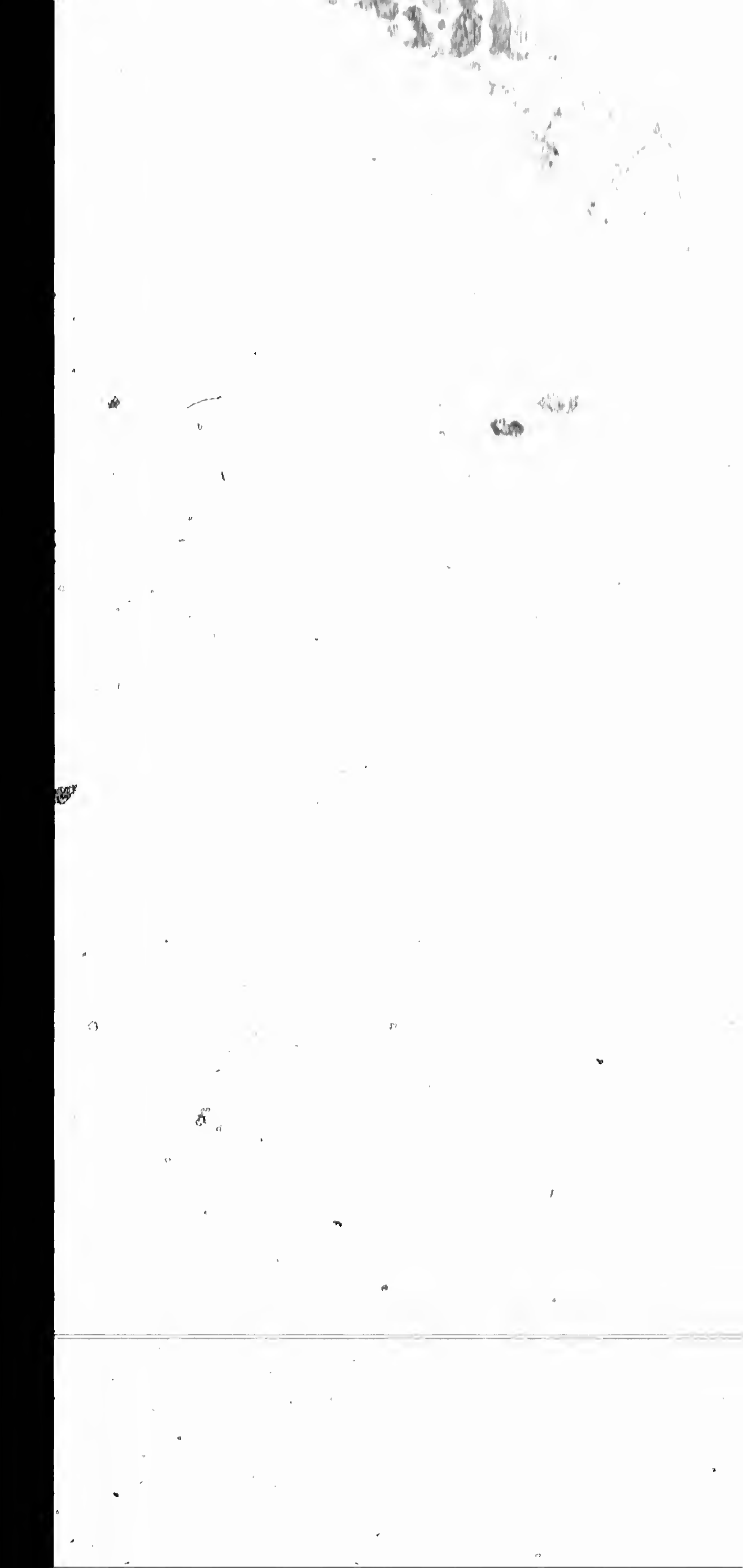
2o. Qu'une action en reddition de compte ne peut pas être portée sans aucun allégué de fraude ou erreur ; dans le cas où une décharge a été précédemment donnée.

3o. Que par la 12 Vic. ch. 50, sec. 12 le surintendant de l'instruction publique a le droit de régler les différends de cette nature et que son jugement a l'effet d'une sentence arbitrale.

Les Demandeurs poursuivirent le Défendeur qui avait été ci-devant leur secrétaire-trésorier ; par une demande en reddition de comptes pure et simple, sans alléguer que lors de la remise des livres par le Défendeur et du paiement qu'il avait fait à leurs prédécesseurs en office de la balance des deniers dont il était comptable lors de sa sortie de charge, le Défendeur les avait fraudés, ou que par erreur il s'était glissé des omissions dans sa reddition de compte à l'amiable faite entr'eux.

Le Défendeur plaida à cette demande par une exception en partie comme suit : "que, tel que dit dans l'action des Demandeurs, lui, le Défendeur, a remis, " entre les mains des Demandeurs, tous livres, papiers, comptes, reçus et docu- " ments qu'il avait eus, en sa possession, pendant la durée de sa charge, comme " Secrétaire-Trésorier des Commissaires d'école, pour la dite paroisse, et ce " sur la demande des Demandeurs, et ainsi lui, le Défendeur, se trouve sans " documents ou reçus, lesquels sont en la possession des Commissaires, et ont " été acceptés, par eux, sur reddition de comptes du Défendeur ; que par les " lois scholaires, le Défendeur, comme Secrétaire-Trésorier, était tenu de rendre, " publiquement, ses comptes aux contribuables de la dite municipalité, ce qu'il " a fait, chaque année, et qu'ensuite les commissaires d'école en charge, ont " reçu et accepté les dits comptes, comme corrects, justes et bien fondés, ce " qui résulte des documents ou rapports de délibérations de la dite corporation " scholaire, dont le Défendeur produit copies, comme ses exhibits, au soutien " des présentes, et que chaque fois et chaque année, les comptes du Défendeur " ont été régulièrement acceptés par les commissaires, et valablement rendus " par le Défendeur.

" Que tous les comptes étaient expliqués, lors de la reddition d'iceux, et que " les commissaires les acceptaient, de même que les autorités scholaires dans le " pays ; que les Demandeurs ne peuvent revenir contre l'acceptation des dits " comptes régulièrement faite, par la commission qui les recevait, et était alors " en charge, et que, si les Demandeurs, ou les commissaires, alors en charge, " ont accepté, comme ils l'ont fait, les dits comptes, et les ont ainsi reçus, et s'ils " ont reçu ou accepté, comme légales, des charges ou dépenses réellement " faites, mais non autorisées par les lois, ils doivent s'en attribuer la faute, et " non la faire retomber sur le Défendeur qui, lui, agissait sur leur ordre et auto- " risation, et n'a pas fait de frais, d'ouvrages ou des déboursés, ou n'a payé des



Les Commissaires d'Ecoles vs. Bastien.

" argents que sur l'ordre des commissaires alors en charge qui, ensuite, ont " accepté ses comptes, après que le Défendeur en eut donné connaissance aux " contribuables, en les lisant et les faisant connaître à la paroisse, conformément " à la loi.

" Que les commissaires, alors en charge, avait droit d'ordonner toutes les " dépenses que le Défendeur chargeait, et avaient le droit de les recevoir et " accepter comme valables et légales, et ordonner le paiement à même les fonds " scholaires, et le fait de l'acceptation des dits comptes, est une preuve valable " et suffisante de leur autorisation: Que les Demandeurs actuels ne peuvent " donc revenir sur les comptes que le Défendeur a rendus à d'autres commis- " saires qu'eux, et qui ont été approuvés par les premiers."

La preuve de ces faits ayant été administrée devant la Cour Supérieure, à Montréal, la cause fut entendue au mérite.

Smith, J.—This is an action brought by the School Commissioners of the parish of Vaudreuil against their ex-secretary-treasurer for moneys by him had and received for their own use. The accounts of the Defendant have already been approved and a discharge has been obtained by him from the former Commissioners.

The Plaintiffs form a corporation which by election has perpetual succession. The first point to be considered is, whether the Plaintiffs are bound by the acts of their predecessors? It cannot be doubted that they are and that if the discharge which has been given to the Defendant is good—it must be good against all.

The second point to be considered is, whether there are such circumstances in this case as would justify to reopen and set aside the account which has been rendered and accepted, but the Plaintiff's declaration do not state fraud or error. The Plaintiffs have sued the Defendant by a direct action for moneys had and received for their benefit. There is no allegation that the Defendant has moneys in violation of any clause of the Statute. There should be at all events, a precise allegation of his having received a particular amount not stated in the account rendered. It should have been a special action.

A third point to be considered is, whether by the 12 Vict. ch. 50, sec. 12; the Superintendent of Schools has a right to settle disputes on such matters, and whether his decision is not in the nature of a judgment or *sentence arbitrale*: —Now in the face of this Statute, can these suitors come before the Courts of Justice when another tribunal exists for the decisions of such difficulties, namely before the Superintendent of Schools, whose office is created by law? I am disposed to think that they cannot do so.

The action upon these grounds must be dismissed.

Cherrier, Dorion & Dorion, avocats des Demandeurs.

Ouimet, Morin & Marchand, avocats du Défendeur.

(P. R. L.)

Vide 1 vol. Jurist p. 189, the School Commissioners of Chambly v. Hickey.

MONTRÉAL 17 SEPTEMBRE, 1859.

Coram BADGLEY, J.

No. 376.

La Corporation du Comté de Chambly vs *Loupret.*

Jugé.—1o. Que le sécrétaire-trésorier d'une municipalité sur son refus de rendre compte; doit être condamné au paiement du montant établi par la preuve de la demanderesse avec intérêt à raison de 12 par cent et de plus contraint par corps.

2o. Que la règle pour obtenir une telle condamnation peut être signifiée au Greffe dans le cas où ce secrétaire-trésorier a quitté la Province. (1).

Dans cette cause, la demanderesse s'est pourvue en reddition de comptes contre le défendeur comme ayant été ci-devant son secrétaire-trésorier. Le défendeur ne contesta pas l'action, en sorte que la demanderesse ayant procédé *ex parte*, la seule question qui fut soulevée lors de l'audition au mérite par le défendeur fut de savoir : si en autant que le successeur du défendeur, n'avait pas été nommé par la même résolution qui le destituait nonobstant le 3e paragraphe de la 14e clause de l'acte des municipalités et des chemins du Bas Canada de 1855, 18 Vic. ch. 100 ; qui est comme suit : 3 "tout conseil aura le pouvoir de destituer tout officier nommé par lui ainsi que tout officier nommé par le gouverneur n'étant pas membre de tel conseil, pourvu que par la même résolution qui destitue tel officier, il nomme une autre personne à sa place et non autrement" lui le défendeur ne devait pas être considéré comme étant encore le sécrétaire-trésorier de la demanderesse. La cour par son jugement interlocutoire rendu le 31 mars 1859 (Berthelot, J.) condamna le défendeur à rendre le compte demandé, en observant que le défendeur n'avait et était sans aucun intérêt à invoquer les dispositions contenues dans le susdit statut.

Le 24 août 1859, la demanderesse fit signifier au greffe de la cour supérieure à Montréal, pour le défendeur qui avait quitté le pays après le prononcé du susdit jugement interlocutoire; une règle conçue en ces termes : "vû que le défendeur ne s'est pas conformé au jugement interlocutoire de cette cour du 31 jour du mois de mars dernier 1859, lui ordonnant sous un mois de la signification à lui faite du dit interlocutoire de rendre à la demanderesse un compte vrai, exact et sous serment avec pièces justificatives de la gestion et administration qu'il a eue des biens et deniers de la dite demanderesse depuis le 11 août 1855 au 5 février 1858 tant des argents qui lui ont été remis en mains par la demanderesse lors de son entrée en charge que des argents dûs avant son entrée en charge et qu'il a retirés depuis, ainsi que des argents qui sont devenus dûs subséquemment et par lui perçus et retirés pour la demanderesse, pendant qu'il a été son secrétaire-trésorier ; et vû que le défendeur n'a point depuis le délai expiré, rendu le dit compte et vû la signification à lui faite du dit interlocutoire par le ministère de Joseph Robert un des huissiers de cette cour, le 6e jour du mois d'avril dernier (1859) ainsi qu'il appert par le rapport du dit huissier à une copie du dit interlocutoire produit avec les présentes; la cour ordonne au dit défendeur de comparaître le 17e jour de septembre prochain au Palais de Justice en la cité de Montréal, à dix heures et demie du matin, cour tenante, pour là et alors donner ses raisons si aucune il a, pourquoi vû son défaut de rendre

(1). Sed Vide, 14 et 15 Vic. ch. 59 sec. 3—22 Vic. ch. 5 sec. 56.

Corporation de Chambly. vs. Loupret.

compte comme susdit, il ne serait pas condamné à payer à la demanderesse la somme de deux cent quarante six livres huit chelins et quatre deniers cours actuel de cette province, avec intérêt du 25 mai 1858, tel que reclamé par l'action de la demanderesse en cette cause avec dépens tant de la dite action que des présentes; et pourquoi il ne serait point contraint par corps au paiement de la dite créance. Et à défaut par le défendeur de comparaître au jour, heure et lieu susdits, il sera condamné à payer à la demanderesse la susdite somme avec intérêt et frais, et au paiement de la dite créance et contraint par corps ainsi que demandé dans la dite motion."

Cette règle fut déclarée absolue pour la somme de £96 8s. 3½d. montant établi en preuve par la demanderesse comme ayant été reçu par le défendeur durant sa gestion; avec intérêt au taux de 12 par cent avec dépens et la contrainte par corps fut accordée.

Leblanc et Cassidy, avocats de la demanderesse.

Lafrenaye et Papin, avocats du défendeur.

(P.R.L.)

MONTREAL, 30 DECEMBRE 1859.

Coram BADGLEY. J.

No. 316.

Lauzon vs. *Stuart.*

Jugé.—1er. Que les renvois dans une déposition, qui sont paraphés quoique non mentionnés dans le jurat de la déposition, n'annullent pas la déposition.

2o. Que l'omission dans la déposition que le témoin n'est pas parent ni allié de l'une ou de l'autre des parties au dégré prohibé, emporte la nullité de la déposition. (1).

Dans cette cause, le défendeur fit motion que certaines dépositions fussent mises de côté sur le principe énoncé en la motion comme suit: "Because the "said depositions contain erasures and marginal notes in material portions of the "said depositions which are not noted or certified in any manner in the *jurat* "to the said depositions respectively."

Cette motion ne fut pas accordée.

Le défendeur ayant fait une autre motion que les dépositions de deux témoins entendus de la part du demandeur, savoir: Joseph Proulx et Paul Lefebvre, fussent rejetées de la procédure pour les raisons contenues en la motion et qui sont comme suit: "Because the said witnesses appear by the depositions to be re- "lated to the Plaintiff and to one of the parties in this suit, and it is not shown "that they were not related within the prohibited degree, and are therefore in- "competent witnesses;" cette motion fut accordée.

PER CURIAM. Le défaut de mention des renvois ou apostilles, n'a pas l'effet d'annuller une déposition; pourvû que ces apostilles soient signées, au désir de l'article 18 de l'ordonnance de 1667, titre 22, des enquêtes. Mais l'omission de mentionner en quel dégré le témoin est parent est fatale, car l'article 20 prononce la nullité dans un cas semblable.

Les dépositions des témoins Proulx et Lefèbvre sont rejetées de la procédure.

Ricard, avocat du demandeur.

Carter, avocat du défendeur.

(P.R.L.)

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(1). Ord. 1667, titre 22, art. 14, 18 et 20.

MONTREAL 19th OCTOBER, 1859.

Coram MONK, J.,

No. 473.

Donald v. *Becket*

SECURITY FOR COSTS.

Held—That the interlocutory judgment of the Court granting the motion of the Defendant that a foreign Plaintiff shall give security for costs is only complied with by the Plaintiff offering as such security the persons of *two* sufficient sureties.

PER CURIAM. The Plaintiff being held to give security for costs, has offered by his motion to enter as such security, the person of one William Maxwell who would justify if required.

The Defendant has resisted the motion on the ground that the person of one surety is not a compliance with the law. My personal opinion is that the offer of the Plaintiff should be held sufficient, but the practice of this Court has been otherwise, and the Plaintiff will therefore take nothing by his motion.

Motion dismissed.

Torrance and Morris for Plaintiff.
C. R. Bedwell for Defendant.
(F. W. T.)

MONTREAL, 4TH MARCH, 1859.

ENQUETE SITTINGS.

Coram BADGLEY, J.,

No. 1398.

Coleman & al. vs. *Fairbairn.*

FAITS ET ARTICLES—ANSWERS vivâ voce.

Held,—That a party in the cause who has been ordered to answer interrogatories *sur faits et articles vivâ voce*, under 20 Vic. c. 44; s. 86, will not be allowed to read his answers from a paper previously prepared.

In this case, the Defendant appeared at the *enquête* sittings to make answer *vivâ voce* to interrogatories previously served upon him in the terms of 20 Vic. c. 44, s. 86, and in making answer, the Defendant attempted to make use of a paper on which he had previously written his answers.

Cross for Plaintiffs objected to the Defendant making use of the papers in giving answer *vivâ voce* to the interrogatories, and his objection was maintained and the Defendant ordered to make answer without reference to the paper.

Torrance & Morris, for Plaintiffs.
A. & W. Robertson, for Defendant.
(F. W. T.)

MONTREAL, 31st DECEMBER 1859.

Coram BERTHELOT, J

No. 16.

Farnan v. *Joyal.*

PEREMPTION.

Held 1st.—That notice of application for peremption once validly given to the plaintiff, the latter cannot prevent peremption from being granted by taking another proceeding in the cause.
2nd.—That the fact of the rule having been indorsed and intituled "*Louis*" *Joyal* in place of "*Lewis*" *Joyal* was not a misnomer fatal to the proceeding.

On the 20th December 1859, no proceedings having been had in the case during three years, the Defendant on the 20th served a rule nisi for peremption on this ground, returnable the 23rd December upon the Plaintiff's attorney; whereupon the latter on the 22nd inscribed the cause for final hearing on the merits on the 27th the *enquête* having been duly closed on both sides.

On the return day of the rule, *Torrance* for Defendant prayed that the rule might be declared absolute.

Nye for Plaintiff resisted the application; 1st. on the ground that the rule was intituled in a cause "*Louis Joyal*" and the cause before the court was one wherein "*Lewis Joyal,*" was Defendant; 2nd. on the ground that since the service of the rule for peremption, the Plaintiff had taken another step in the cause, namely, by inscribing the cause for hearing on the merits whereby this peremption was interrupted. He cited in support the case of *Beaudry* v. *Plinguet* 3 L. C. Jurist, p. 237, wherein Mr. Justice Mondelet ruled that peremption could be validly interrupted by a valid proceeding so long as judgment granting peremption had not been given.

Per Curiam. I hold that the word "Louis" in place of "Lewis" is no misnomer being "*idem sonans.*" I also hold notwithstanding the case of *Beaudry* vs. *Plinguet* with which I do not agree that by the service of the rule validly made or by notice of motion, the peremption is acquired.

Rule declared absolute.

T. Nye for Plaintiff.
Mack and Muir for Defendant.
F. W. Torrance, Counsel.
(F. W. T.)

MONTREAL, 29 FEVRIER 1860.

Coram MONK, J.

No. 2604.

Dupuy vs. *Surprenant & al.*

DROIT D'ACCROISSEMENT.—LEGS.

Jugé.—Que dans le legs d'une universalité de biens fait en faveur d'un mari et de sa femme "pour appartenir (les dits biens) à la communauté de biens qui règne entr'eux et être considérés comme conquets d'icelle," il y a lieu au droit d'accroissement en faveur du survivant des légataires, pour la part du prédécédé, si le prédécès a lieu du vivant du testateur.

Le Demandeur se présentait comme cessionnaire des droits héréditaires de cinq des frères et sœurs d'Eric Surprenant, l'un des Defendeurs et alléguait, dans sa déclaration :

Dupuy vs. Surprenant et al.

Que Charles Surprenant et Marguerite Bazinet, père et mère des cédants et du dit Défendeur Surprenant, avaient acquis un certain immeuble ; que par son testament en date du 4 mars 1843, le dit Charles Surprenant, après avoir fait certains legs particuliers, institua le dit Eric Surprenant et Marguerite Denaut, sa femme, ses légataires universels dans les termes suivants :

(Voir infra le jugement.)

Que la dite Marguerite Bazinet, par son testament, en date du même jour, a aussi institué le dit Eric Surprenant et Marguerite Denaut ses légataires universels, dans les termes suivants :

(Voir infra le jugement)

Que la dite Marguerite Denaut mourut le 23 août 1845 et qu'après son décès le dit Eric Surprenant fit faire inventaire de sa communauté avec elle lequel inventaire fut clos le 9 janvier 1846.

Que le dit Charles Surprenant mourut le 16 déc. 1846 et la dite Marguerite Bazinet le 13 déc. 1856 ; que partant la dite Marguerite Denaut a prédécédé les dits testateurs; que la communauté entre le dit Eric Surprenant et elle a aussi été dissoute avant le décès des testateurs et *que partant il y a eu caducité des legs faits à la dite Marguerite Denaut, et que par cette caducité la moitié des biens légués comme susdit est restée dans les successions des dits Charles Surprenant et Marguerite Bazinet ;* que le dit Eric Surprenant ayant été institué légataire universel et ayant recueilli ce legs, il ne doit rien appréhender dans la moitié des dites successions, qui doivent en conséquence être divisées entre les onze autres enfants des testateurs, parmi lesquels se trouvent les cinq cédants du demandeur ; que dans les dites successions, est demeuré l'immeuble en question ci-dessus, dont moitié a été léguée au dit Eric Surprenant et moitié à la dite Marguerite Denaut ; de sorte que les cédants du demandeur ont été saisis chacun d'un onzième dans la moitié du dit immeuble ;

Que par acte du 1er avril 1859, le dit Eric Surprenant a vendu la totalité du dit immeuble, à Olivier Perron, l'autre défendeur pour la somme de 9,000 livres ancien cours, à compte de laquelle il reçut alors 2472 livres, quant aux 6528 livres restant, le dit acquéreur promit les payer aux vendeurs ou représentants en six paiements annuels et consécutifs, dus et exigibles en Mars de chaque année, à commencer en Mars 1860 ; que le dit Olivier Perron prit possession immédiate et jouit encore du dit immeuble ;

Que le Demandeur comme propriétaire des cinq-onzièmes indivis, dans la moitié du dit immeuble aurait le droit de revendiquer du dit Olivier Perron ; mais qu'il se contente de réclamer cinq-onzièmes dans la moitié du prix de vente, sur les paiements à échoir en Mars 1860, 1861, 1862, 1863, 1864 et 1865, lesquels cinq-onzièmes forment la somme de £85 4s. 6d. que le Demandeur a droit de reclamer, comme étant substitué aux prétendus droits du dit Eric Surprenant ;

En conséquence le Demandeur concluait à ce qu'il fut déclaré subrogé au lieu et place du dit Eric Surprenant ; dans la balance due sur le dit prix de vente, jusqu'au montant de £85 4s. 6d. et à ce que défense fut faite au dit Olivier Perron de payer la dite somme à d'autres qu'au demandeur, à peine de payer deux fois.

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Le Défendeur, Eric Surprenant, plaida par une Défense en droit, qu'en supposant que le legs fait à la dite Marguerite Denaut fût devenu caduc, en conséquence de son décès avenu antérieurement à celui des testateurs, il n'en résultait aucun droit aux cédants du Demandeur, attendu que par la loi, les choses léguées à la dite Marguerite Denaut sont accrues au dit Eric Surprenant, co-légataire universel de la dite Marguerite Denaut, ce qui appert à la partie des dits testaments, citée dans la déclaration.

Loranger (T. J. J.) pour le Demandeur, prétendait lors de l'argument, que la disposition testamentaire, en faisant tomber le legs dans la communauté, avait fait une attribution de part à chacun des co-légataires et que cette attribution de part rendait l'accroissement impossible.

Doutre (J.) pour le Défendeur répondait que la clause qui fait tomber les biens dans la communauté, ne portait que sur l'exécution du legs et pour établir que le cas donnait lieu au droit d'accroissement, il citait les autorités suivantes.

Domat, T. 1. Liv. III, Tit. 1er, Sect. IX, Nos. I, V, XI, XIV, XV. Duplessis, T. 1. p. 379. Bourjon, T. 2, p. 340, VIII—p. 341 IX jusqu'à XII. Id. p. 342, XIV. Toullier T. 5. Nos, 505. 677. 679. 689. 691. Pothier T. 6. Don. Test. p. 409 et suiv. Règles 1. 5. 18. Merlin Rep. vo. accroissement 811. III, Duranton T. 9. Nos. 405. 497. 546. Ricard Don. Tit 1. 15. 39. No. 473. p. 541. Nos. 481. 487. Id. p. 544. Nos. 501. 503. 504. 507. Vazeille Successions T. 3. p. 167. No. 3. *in fine* No. 4. Proudhon Usufruit 1. 2. No. 630. 636.

Ci-suit le jugement.

"Considérant que par leurs testaments de dernières volontés feus Charles Surprenant et Marguerite Bazinet son épouse, en date du quatre mars mil huit cent quarante, ont nommé et institué leur fils Eric Surprenant, l'un des défendeurs dans la cause actuelle et Marguerite Denaut son épouse, leurs légataires universels, par les clauses suivantes, de leurs dits testaments de dernières volontés— (le dit legs couché dans les termes suivants, dans le testament du dit feu Charles Surprenant.)

"Donne et lègue le dit testateur à Eric Surprenant un autre de ses enfants issus de son dit mariage, et à Marguerite Denaut sa femme, pour appartenir à la communauté de biens, qui règne actuellement entre eux et être considéré comme conquêt d'icelle : tous et chacuns des autres biens, meubles et immeubles, propres acquets et conquets immeubles, qui se trouveront être et appartenir à lui dit Sr. testateur au jour de son décès, à quelque somme qu'ils puissent se monter, de quelque nature, qualité & dénomination qu'ils soient, en quelques lieux, pays ou coutumes qu'ils se trouvent dûs, sis ou situés, sans exception ni restriction d'aucun, les faisant et instituant ses seuls héritiers et légataires universels du résidu de tous ses susdits biens ; pour par eux leurs hoirs et ayant cause respectifs, jouir, faire et disposer de tout d'iceux en pleine propriété, au moyen des présentes, à n'en commencer la jouissance et possession qu'au décès arrivé de lui dit testateur, leur père et beau-père," et dans les termes suivants, dans le testament de la dite feue Marguerite Bazinet :—

"Quant au résidu de tous les autres biens meubles et immeubles propres, acquets et conquets immeubles qui se trouveront être et appartenir à elle dite testatrice au dit jour de son décès, à quelque somme qu'ils puissent se monter, de quelques natures, qualité et dénomination qu'ils soient, en quelques lieux, pays ou coutumes qu'ils se trouvent dus, sis et situés, sans exception ni restriction, elle dite testatrice donne et lègue ce même résidu à Eric Surprenant et à

Marguerite Denaut ses fils et brue avec elle demeurans, et qu'elle fait et institue ses seuls héritiers et légataires universels, du résidu de tous ses susdits biens; pour par eux leurs hoirs et ayant cause, en jouir, faire et disposer en tout et pleine propriété au moyen des présentes, pour aussi être les biens compris dans le présent legs universel, considérés comme conquêts de la communauté de biens qui règne actuellement entre eux dits légataires universels; à ne commencer la jouissance du résidu des susdits biens qu'au décès arrivé de la présente testatrice."

Vû que la terre désignée dans la déclaration en cette cause formait partie et était comprise dans le dit legs universel;

"Considérant que le décès de la dite Marguerite Denaut épouse du Défendeur Eric Surprenant, arrivé avant la mort des testateurs Charles Surprenant et Marguerite Bazinet n'a pas donné droit aux héritiers des dits Charles Surprenant et Marguerite Bazinet de participer ou de prendre part dans les biens légués par les dits testateurs en vertu de leurs testaments sus-mentionnés au temps du décès des dits testateurs.

"Considérant que par le défaut d'appréhender le dit legs par la dite Marguerite Denaut, les biens légués comme susdit, ne sont pas restés dans les successions des testateurs, mais que par tel défaut, le dit Eric Surprenant est devenu l'unique légataire universel des testateurs, et comme tel est devenu propriétaire exclusif de tous les biens meubles et immeubles délaissés par les dits Charles Surprenant et Marguerite Bazinet.

"Vû que le défendeur Eric Surprenant a valablement plaidé en droit et a établi les allégués essentiels de son exception péremptoire plaidée à cette action, maintient la dite défense en droit avec dépens ainsi que la dite exception et a débouté et déboute l'action du dit demandeur avec dépens."

Action déboutée.

Loranger & Frères, pour le Demandeur.
Doutre & Daoust, pour les Défendeurs.
(J. D.)

SUPERIOR COURT.

MONTREAL, 26th MARCH, 1860.

Coram MONK J.

No. 2591.

Cumming vs. *Dickey and the School Commissioners of Durham*, opposants, & *W. Winchester*.—Plaintiff, *par reprise d'instance*, contesting.

Held, that default to appear and answer to interrogations *sur faits et articles*, on the part of the plaintiff, will be taken off and the Rule and interrogatories set aside, where this Rule was issued during the pendency of a former Rule, in the same cause.

In this cause, the plaintiff *par reprise* contesting, submitted to the court a motion, which prayed, that the default to answer to the interrogatories, *sur faits et articles*, which was recorded against the late Sarah Cummings, on the 4th day of april 1853 be annulled and set aside, and the Rule itself declared to be null.

After alleging, that a Rule was previously issued and a consent fyled, that the answers to the interrogatories of the said Cumming, should be taken

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before a commissioner, and that the commissioner had returned, that she was through extreme age incompetent to answer, the motion asked, the setting aside of the default, for this, among other reasons, because the second Rule was irregularly issued, another rule having been previously issued on the 14th day of February 1853 in the cause.

The Court, without entering into the other ground urged with reference to the imbecility of the then Plaintiff and the suggestion made thereof in the cause granted the motion, on the ground of the irregularity of the issue of the second rule.

A. Morris, for Plaintiff.

A. & G. Robertson, for Defendant.

(A. M.)

MONTREAL, 29TH FEBRUARY, 1860.

Coram BADGLEY, J.,

No. 1327.

Isabel Macdougall vs. *Torrance.*

Held,—1st. That in an action against a carrier, a passenger's own oath, will be received, as to the contents of a trunk, which had been broken open.
2nd. That the captain of a ship, is liable for a *lady's* jewellery, stolen out of one of her trunks during the voyage.

In this case, the Plaintiff alleged that she was a passenger by the Ship "Harlequin," from Glasgow to Montreal, of which the Defendant was Captain. That she delivered to the mate, on board the said vessel, a trunk containing jewellery, of the value of £120 and informed him that it contained valuables. That the trunk was broken open, during the voyage and the jewellery abstracted. The Plaintiff proffered her own oath as to the value of the jewellery.

The Defendant pleaded want of notice of the contents of the trunk, and delivery to the Plaintiff, and denied the allegations of the Plaintiff, except that of her having been a passenger.

The delivery of the trunk, in good condition on board the vessel and the loss of the ornaments while on board was established by several witnesses and the Plaintiff's own oath was taken as to the contents and value of the articles. Her estimation of them was corroborated by that of two jewellers, who were aware of her possession of the family jewellery, and of its value. The case was submitted without argument, and judgment was rendered for the amount of the claim.

Torrance & Morris, for Plaintiff.

Rose & Ritchie, for Defendant.

(A. M.)

AUTHORITIES.

As to ornaments, *Angell* on *Carriers*, page 117, 118, 458, and as to the oath of the Plaintiff *Idem* 450, 452, 456, 457. *Danty* on *Preuve par Témoins*, page 115, sec. 29. The master continues liable under the Shipping Acts, 1854 and 1855:—Dowdeswell Shipping Acts, page 221; 510 Vide Shipping Act of 1854, s. 51. Though the owner seems to be absolved *Idem* p. 215, 500, Shipping Act of 1854 s. 503.

SED see also 9 L. C. Reports p. 169, case of Cadwalladder v. Grand Trunk Railroad Company as to *man's* jewellery, where a different rule is adopted.

IN APPEAL.

FROM THE SUPERIOR COURT, DISTRICT OF MONTREAL.

MONTREAL, 1st MARCH 1860.

Coram THE HON. SIR L. H. LA FONTAINE, Bart. CH. J.; AYLWIN, J., DUVAL, J., MONDELET, J.

GEDEON OUIMET & AL, (*Plaintiffs in the Court below.*)
Appellants.

AND

JEAN BTE. SENECAL & AL, (*Defendants in the Court below.*)
Respondents.

JUDICIAL SALE OF MOVEABLES—ACTION REVOCATOIRE.

Held,—That a direct action will lie to have a sale of moveables set aside for fraud; and this though a judicial sale has been resorted to.

THE Appellants in April, 1858, in the Superior Court, Montreal, sued the Respondents in an Action *revocatoire*, and by their conclusions prayed that a certain Cylinder Printing Press should be adjudged their property, and that a sale of it under execution, at suit of Bourguignon against Sénécal & Daniel, should be declared fraudulent, null and void, &c.

That Action was dismissed upon demurrer, but the Judgment dismissing it was reversed by sentence of this Court reported in 3 L. C. Jurist, p. 38. After that the parties went to enquête in the Court below.

The original Declaration of the Appellants, (as Plaintiffs in the Court below,) is in substance stated on p. 37–38, of 3 L. C. Jurist.

The defendants severed in pleading, and all of them urged the legality, and validity of the sale of the Printing Press, and of Senécal and Daniel's things on the 9th of March 1858. A great many witnesses were examined.

The Superior Court, on 30th September 1859, rendered the following Judgment:

"The Court having heard the parties by their Counsel, upon the merits of this cause, and upon the motion of the Plaintiffs of the twenty-first day of June last, that each and all of the Interrogatories *sur faits et articles* administered to J. Baptiste Sénécal, one of the Defendants, and to which he has refused to answer, be held and taken as confessed and answered in the affirmative, and upon the motion of the Plaintiffs of the twenty-first day of June last, that each and all of the Interrogatories *sur faits et articles* administered to Chrysologue Sénécal, one of the Defendants, and to which he has refused to answer, be held and taken as confessed and answered in the affirmative; and upon the motion of the Plaintiffs of the twenty-first day of June last, that each and every of the Interrogatories of the series *sur faits et articles* in this cause administered to Defendant François Daniel, to which said Daniel has refused to answer, be held and ordered to be held as confessed and answered in the affirmative, and that such parts of Interrogatories (of said series) as said Daniel has not answered to, or has answered evasively, be held and taken as confessed, and answered affirmati-

vely, and particularly, the thirty-first of said series, the forty-sixth, the forty-eighth, the sixty-fourth; and upon the motion of the Plaintiffs of the twenty-first day of June last, that each and all of the Interrogatories (*sur faits et articles*) administered to Isaac Bourguignon, one of the Defendants, and to which he has refused to answer, or has answered evasively, be held and taken as confessed and answered in the affirmative; and also upon the motion of the Plaintiff of the twenty-first day of June last, that each and all of the Interrogatories (*sur faits et articles*) administered to Charles Lapierre, one of the Defendants and to which he has refused to answer, or has answered evasively, be held and taken as confessed and answered in the affirmative, and particularly the two last; having examined the proceedings and proof of record, and having deliberated thereon—doth grant the said motions as against the said Chrysologue Senécal and François Daniel, and doth reject the other motions; and considering that the Plaintiffs have established by legal and sufficient evidence, that at the time of the taking in execution by the said Isaac Bourguignon, of the Printing Press referred to in the Plaintiffs' Declaration, and of the sale thereof by the said Bourguignon under and in virtue of the said execution, that they the said Plaintiffs were the legal owners and proprietors of the said Printing Press. And further considering that the said Defendants have proved by legal evidence on the issues by them severally raised by their pleadings in this cause, that the execution at the suit of the said Bourguignon against the goods and chattels of the said Senécal & Daniel was issued in due course of law, and was in all respects legal and regular in the forms prescribed by law in such matters; and further considering that the said Plaintiffs have failed to prove or establish by reason of anything alleged or proved in the said cause, that the said execution and sale had thereon, was in any way null and void and inoperative; and that by reason of the fact that the said Printing Press not being the property of the said Senécal and Daniel at the time of the said execution, and sold, altho seized and sold in the possession of the said Senécal & Daniel, as proprietors thereof, the said execution and sale so made *en justice* are not thereby null and void and inoperative, and cannot by law annul the said execution and sale, and thereby entitle the said Plaintiffs to the conclusions by them taken in their said Declaration.

"And further considering that the said Plaintiffs have failed to prove that the said Bourguignon, Lapierre and Jean Baptiste Senécal, in any way, were cognizant of the fact, that the said Senécal & Daniel at the time of the execution and sale of the said Printing Press were not the owners and proprietors of the said Printing Press, or that the Defendants, Senécal & Daniel, were in possession thereof by any other title than that of proprietors.

"And further considering that the said Plaintiffs have failed to prove by legal evidence that the Defendants, Bourguignon, Lapierre and Jean Baptiste Senécal, were in any way participant in any act of fraud or fraudulent concert to procure the issuing of the said execution or in any way fraudulently and collusively agreed to effect the said sale of the said Printing Press as belonging to the said Senécal & Daniel, with the knowledge that the said Printing Press

was, at the time, the property of the said Plaintiffs, or in any way to defraud the said Plaintiffs.

"And further considering that in all cases of *Ventes en Justice* (*Ventes forcées*) where the formalities of law have been complied with, no fraud on the part of the Defendants in the suit on which the execution has been issued, can affect or invalidate the rights of *bonâ fide* purchasers.

"And further considering that the said Plaintiffs have admitted by their Declaration that the said Bourguignon was in no way participant in any fraud as set forth by the said Plaintiffs, to obtain the conclusions of their said Action, and that the ordinary presumptions of law applicable to sales or alienations of a purely voluntary character do not apply to cases of *Ventes forcées* in the absence of some evidence of complicity or concert to defraud the rights of third persons (of the plaintiffs in the present instance); the Court doth dismiss the said Action as against the said Bourguignon, Lapierre and Jean Baptiste Senecal, with costs *distraits* to Messieurs Doutre and Daoust, Attorneys for the said Defendants, Bourguignon, Lapierre and Jean Baptiste Senécal.

"And the Court considering that the said Plaintiffs have established as against the said Senécal & Daniel, that at the time of the said sale the said Senécal & Daniel were the Lessees of the said Plaintiffs and of the said Printing Press, and that the said Plaintiffs are the proprietors thereof, the Court doth condemn the said Chrysologue Senécal and the said François Daniel jointly and severally to deliver up to the said Plaintiffs the said Printing Press within fifteen days after service of the present Judgment upon them, and in default of their so doing, the Court doth condemn the said Chrysologue Senécal and François Daniel jointly and severally to pay to the said Plaintiffs the sum of Five hundred pounds current money of the Province of Canada, with interest and costs of suit."

From which Judgment the Appellant appealed.

R. Mackay, for appellants, argued that Plaintiffs' allegations were sufficient and that this was established by the former judgment in appeal; that as to the *proofs* there never was a case better proved, nor one in which such a series of facts was proved, all of them indicative of contrivances and fraud. He referred to the authorities formerly cited by him, and to the following:

D'Aguesseau. Œuvr: Tom. 4. pp. 10. 11. 13; (a case of a *decret* set aside, for fraud.)

Johnson's Chanc: Rep; Vol. s. p. 255. Troup vs. Wood; (a case of a Sheriff's sale fraudulent declared null, and set aside.)

3 Campb: Rep; Keightley vs. Birch; (as to duty of Sheriffs and Bailiffs where there are not sufficient bidders, at a sale.) p. 521.

The case was argued in December, and on the first of March the Court of Appeals reversed the Judgment of the Superior Court.

MONDELET, J.—Les Appelants demandeurs en cour de première instance, avaient intenté une action contre cinq Défendeurs, savoir: Jean-Baptiste Senécal, sellier, et Chrysologue Senécal, et François Daniel, imprimeurs associés et faisant commerce à Montréal, sous le nom de Senécal et Daniel, et Isaac Bourguignon, imprimeur, et Charles Lapierre, huissier.

Ouimet et al., vs. Senécal et al.

Les Appelants demandeurs sont au nombre de cinq, savoir : Gédéon Ouimet, Ecr., avocat, David Shaw Ramsay, Ecr., Thomas K. Ramsay, Louis S. Morin, et Louis W. Marchand, Ecrs., avocats.

Le but de l'action était de faire mettre de côté, une vente judiciaire, que le dit Charles Lapierre, huissier, avait le 9 mars 1858, à l'heure de midi et demi, effectué sur un bref de saisie-exécution, émané de la cour de circuit de Montréal, et en vertu duquel il avait le 27 février 1858, saisi à la poursuite de Isaac Bourguignon, l'un des Défendeurs (intimés), dans la présente cause contre Chrysologue Senécal et François Daniel, deux des intimés, Défendeurs dans cette cause, comme ils le sont dans la présente, entre autre choses énumérées au procès verbal de saisie, une presse à cylindre de Hoe & Co., de New-York, et tous ses appareils, et ce dans la boutique et bureau des Défendeurs en la dite cause, dont le No. était 612.

Les Demandeurs appelants affirmaient dans leur déclaration, qu'ils étaient lors de la saisie et de la vente d'icelle, et lors de l'institution de leur action, propriétaires de la dite presse à cylindre, qui était en possession des dits Senécal et Daniel comme locataires d'icelle, des Demandeurs. La prétention des Demandeurs était que la saisie à *la vente* en question était nulle, étant faite, *super non domino*; en sus, frauduleuse, comme il appert par le procès-verbal même, et attendu que les Défendeurs en la dite cause et le dit Jean-Baptiste Senécal, avaient fait effectuer la dite vente, en secret, sans en avoir avisé les Demandeurs, bien qu'ils connussent les droits des dits Demandeurs. Ils allèguent la fraude, et en accusent tous les Défendeurs, à l'exception de Isaac Bourguignon.

Les Demandeurs énumérent plusieurs circonstances, telle que l'heure de midi et demi, l'absence des ouvriers attachés à l'imprimerie de "La Patrie," la hâte avec laquelle la vente fut faite, l'absence de l'exposition d'un pavillon et que le tout fut vendu pour le montant précis que réclamait Bourguignon, tandis que la valeur en était de plusieurs centaines de louis.

Les Demandeurs concluent à être déclarés propriétaires de la presse à cylindre, que la vente sus-mentionnée en soit déclarée nulle et mise de côté et que les Défendeurs soient condamnés à remettre aux Demandeurs la dite presse à cylindre, et à défaut de ce, payer £650, qu'ils allèguent en être la valeur. Enfin, les Demandeurs se réservent le droit de prendre de nouvelles conclusions.

Il ne s'agit plus maintenant que de l'appréciation de la preuve, car la Cour d'Appel ayant décidé, contrairement à l'opinion de la Cour Supérieure, qu'il y a en loi, une action pour faire mettre de côté, une vente de meubles, telle que celle dont il est question, faite en justice, il ne s'agit plus que de s'assurer si la preuve des Demandeurs est suffisante.

Il est à propos de remarquer de suite, que la Cour Supérieure (Smith, J.) tout en déclarant les Demandeurs propriétaires de la presse à cylindre, ne statue pas sur la question de la nullité de la vente d'icelle, et ne condamne que deux des Défendeurs, savoir : Chrysologue Senécal et François Daniel, et déboute l'action quant aux trois autres. Les trois Défendeurs absous, sont : Charles Lapierre, l'huissier exécutant, Isaac Bourguignon, le Demandeur, et Jean Baptiste Senécal, l'adjudicataire.

Il est inutile d'entrer dans tous les détails de cette cause, et se fatiguer à ré-

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capituler l'énorme masse de preuves inutiles, inadmissibles en loi, étrangères à la contestation et tout à fait injustifiables, que les parties se sont permis de produire et qu'on paraît, à ma grande surprise, avoir plus ou moins sanctionnées. Il est à regretter que de pareils procédés aient eu lieu, et il semble que ceux qui conduisent les procédures devraient énergiquement s'opposer à l'admission de preuves aussi palpablement inadmissibles. Quelques objections à la vérité, ont été faites, mais on eût dû dans tous les cas, faire reviser celles des décisions rendues ou réservées à l'enquête, qu'on regardait comme erronnées. Le système pernicieux de réserver, est en pleine opération dans cette cause: aussi avons nous un monceau de dépositions, qu'un juge pénétrant et exercé eut de suite énergiquement réduit à un très petit volume.

Il n'y a à juger que deux faits:

1 o. Les Demandeurs ont-il prouvé qu'ils étaient propriétaires de la presse à cylindre?

2 o. Ont-ils établi légalement que la vente dont ils se plaignent, a été faite par fraude, &c.?

1 o. J'ai mis trois jours à lire et examiner tout le dossier, et je ne trouve nulle part, la preuve légale de la propriété alléguée des Demandeurs. L'on a tenté par des dire et des oui dire, et des bruits, et de ce qu'on réputait, d'établir ce fait, mais l'on a failli, et l'on est à se demander, d'après les assertions de plusieurs des témoins mêmes des Demandeurs, si ces messieurs étaient propriétaires d'aucune chose, ou si les et tous les souscripteurs de "La Patrie" l'étaient, ou si aucun et combien d'entre les Demandeurs étaient propriétaires, ou si ces messieurs, ou quelques-uns, et combien et lesquels d'entre eux, étaient un comité de régie politique, ou enfin, et en deux mots quels ils étaient, et qu'est-ce qu'ils étaient. Les Demandeurs ne se sont pas même donné la peine d'alléguer comment ils sont propriétaires; en sorte que eussent-ils fait quelque espèce de preuve (ce qui n'est pas le cas) la cour ne pourrait les déclarer tels. Il est vrai que les Défendeurs auraient dû se plaindre de l'insuffisance manifeste des allégués de la déclaration, mais la faute des uns, à cet égard, ne remédie pas à celle des autres.

Il y a, a-t-on dit, chose jugée par le jugement de la cour de première instance, quant à la question de propriété de la presse à cylindre; non! y eut-il chose jugée, ça ne serait tout au plus qu'à l'égard des deux, qui ont été condamnés, et non pas quant aux trois, qui ont été absous, et qui ont nié les allégués des Demandeurs, qui auraient dû, comme ils y étaient tenus, les prouver.* Au reste, ce jugement n'a qu'une autorité momentanée, et qui en l'absence d'un appel interjeté, ne confère d'autre droit que celui de faire émaner l'exécution. L'autorité de la chose jugée est toute autre chose. Il faut que le jugment soit rendu par une cour en dernier ressort, ou que le terme de l'appel soit expiré, ou que l'appel ait été déclaré périmé.

Ord. 1667, tit. 27, art. 5. Jousse, t. 2, p. 87. 10 Toullier, No. 97, p. 150 et suiv.

* 10 Toullier, No. 195.

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Cela étant, l'action devait nécessairement être déboutée. J'ajoute qu'elle eut dû être déboutée quant à tous les Défendeurs.

Il est à peine nécessaire de remarquer que cette Cour ne doit aucunement s'occuper de savoir si les Défendeurs Senécal et Daniel étaient et sont propriétaires de la presse à cylindre. Il ne s'agit pas de cela du tout.

2o. Quant à la vente, les deux seules circonstances, qui, s'il y en avait d'autres sérieuses de prouvées, pourraient faire naître quelques soupçons, seraient l'heure à laquelle elle a eu lieu, et l'exiguité du prix. Or quant à l'heure, outre qu'il n'y a aucune loi qui exige qu'une vente par huissier, ait lieu à telle ou telle heure, nous avons le témoignage d'un certain nombre d'huissiers anciens, qui établit qu'il se fait de ces ventes à la même heure, et à d'autres heures.

Quant à l'exiguité du prix, le principe ne s'applique pas aux ventes forcées de meubles, attendu que cette exiguité de prix, ne peut *légalement* établir aucune présomption, vû qu'à ces ventes, il arrive le plus souvent que tout est sacrifié, n'a-t-on pas vu des biens de £100 vendus pour quelques piastres ?

Presumptio nascitur ex eo, quod plerumque fit. Ainsi, dans l'espèce, la présomption n'est pas en faveur des Demandeurs, mais elle est en faveur de la vente.

J'ajouterai que des faits et articles, on ne peut rien induire, car les refus de répondre à certaines interrogatoires, ne tirent point à conséquence, vû que ces interrogatoires sont posés de manière à ne rien établir, à moins qu'on ne réponde.

Il est assez étrange que les Demandeurs persistent à vouloir faire condamner Bourguignon, eux qui dans leur déclaration allèguent, qu'il n'a aucunement participé à la fraude dont ils se plaignent.

Le jugement quant aux deux condamnés, est sans fondement évidemment. Dans tous les cas, l'appel est mal fondé, et le jugement de la cour de première instance est bien rendu, quant aux trois Défendeurs Bourguignon, Lapierre et Jean-Baptiste Senécal.

Sir L. H. La Fontaine Bart ; Juge en Chef.

Il y avait cinq Défendeurs à cette action révocataire :

1o. J. Bte. Senécal, Sellier.

2o. Chrysologue Senécal et Frs. Daniel, Imprimeurs associés.

3o. Isaac Bourguignon, Imprimeur.

4o. Charles Lapierre, Huissier.

Il y a déjà eu appel, dans cette cause, d'un jugement qui avait maintenu une défense au fonds en droit. Ce jugement a été infirmé par cette Cour. Les parties ont été en conséquence obligées d'instruire leur cause ; ce qu'elles ont fait, en partie, au moyen d'une preuve testimoniale dont la moitié pouvait être retranchée comme étant tout-à-fait inutile, et l'autre moitié serait encore plus que suffisante pour permettre à aucun tribunal de juger en pleine connaissance des faits. Il est à espérer que l'exécution du nouveau règlement qui exige l'impression des témoignages dans les causes portées en appel, aura l'effet de faire disparaître cette prolixité dans les dépositions et toutes ces questions inutiles qui ne sont propres qu'à introduire la confusion là où la clarté seule devrait apparaître.

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Toute la contestation se réduit à deux questions principales : 1o. Les demandeurs ont-ils prouvé qu'ils étaient propriétaires de la chose qu'ils revendiquent ? 2o. S'ils l'ont prouvé ; ont-ils établi qu'il y ait eu fraude dans la vente dont il s'agit, et que les défendeurs en aient eu connaissance, ou y aient été plus ou moins participants ?

Sur le premier point, le jugement dont est appel a décidé dans l'affirmative, et il ne pouvait pas en être autrement. Trois des défendeurs n'avaient aucune prétention à la propriété de la presse à cylindre qui fait le sujet du procès ; Bourguignon, Lapierre, et Jean Bte Senécal. Le premier était le créancier saisissant, le deuxième était l'huissier saisissant, et le troisième a été l'adjudicataire à la vente. La question de propriété ne concernait donc que les Demandeurs et les deux autres Défendeurs, Chrysologue Senécal et François Daniel. Cette question, le juge de première instance l'a décidée en faveur des Demandeurs, et il a très bien décidé, en présence, non-seulement de l'ensemble de toute la preuve, mais encore de l'acte du 14 Sept. 1857, fait par Ramsay pour lui et ses co-propriétaires, par lequel acte les dits Chrysologue Senécal et Daniel prennent à loyer la dite presse à cylindre des "propriétaires de la Patrie qui sont," y est-il expressément déclaré, "également propriétaires de la grande presse à cylindre, qui se trouve actuellement et est en usage dans les ateliers typographiques de Senécal et Daniel." Ce sont à présent ces locataires qui, après avoir reconnu que les locateurs étaient propriétaires, reclament la propriété de la chose par eux prise à loyer ! C'est un nouveau mode d'acquérir la propriété qu'il faudra ajouter aux traités sur la matière.

Il y a plus ; le jugement condamne Chrysologue Senécal et François Daniel à remettre aux demandeurs la dite presse à cylindre, ou à leur payer la somme de £500 courant, et cela après avoir déclaré expressément que les demandeurs avaient prouvé qu'ils étaient propriétaires de cette presse, et que les deux derniers défendeurs, Senécal et Daniel, n'en étaient que les locataires. Et les deux condamnés n'ont pas appelé de ce jugement ! Ce jugement a donc la force de la chose jugée " *Il est considéré comme la vérité*, tant que cette présomption légale n'est pas détruite par les voies de droits. (*Bioche*, au mot "Jugement," no. 467.)

La *vérité* est donc que les demandeurs sont propriétaires de la presse à cylindre, et cette preuve est une preuve authentique, résultant d'un jugement que nous ne pouvons infirmer sous ce rapport. Cette preuve milite, non-seulement contre Senécal et Daniel, mais même, et encore avec bien plus de force, si c'est possible, contre les trois autres défendeurs qui n'ont eu et n'ont pu avoir aucun titre à la propriété de la presse, avant la vente dont il s'agit.

La deuxième question est celle de savoir s'il y a eu fraude, ou si J. Bte. Senécal peut être considéré comme un adjudicataire de bonne foi, quand même il y aurait eu fraude de la part des saisis.

J'admets que la vilité du prix, dans les ventes forcées d'effets mobiliers, n'est pas par elle-même un motif suffisant d'annuler la vente. Mais elle peut être un élément dans l'appréciation des faits ou des circonstances d'où l'on argue la fraude.

Quels sont les faits ? Les voici :

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Les demandeurs sont propriétaires d'une presse qui est constatée valoir plus de £500 courant. Cette presse est par eux louée à Senécal et Daniel qui s'en servent pour imprimer le journal "La Patrie," dont les demandeurs sont également propriétaires. Le Rédacteur et le teneur de livres du Journal sont employés par les demandeurs, et ont leur bureau dans la même maison où est la presse, et au même étage; la porte du bureau fait face à cette presse. Les demandeurs y vont très souvent. Aucun d'eux n'a connaissance de la saisie qui est dite avoir éte pratiquée le 27 de Février, non plus que de la vente qui a eu lieu le 9 mars. Les meubles de Senécal et Daniel avaient été vendus judiciairement à leurs domiciles. Ils étaient notoirement insolvables. Un de leurs apprentis, le défendeur Bourguignon obtient un jugement contre eux pour ses gages, et, le 27 Février, il les fait saisir et exécuter, dans leur imprimerie, pour la somme de £30 1 1 seulement. Et pour le paiement de cette modique somme, on permet à l'huissier, et celui-ci prend sur lui de saisir des presses et un matériel qui valent £1000 à £1200. Il y a une presse à cartes qui est constatée valoir £25 à £30, et deux presses à bras, valant, chacune £50 à £60. Ces trois presses appartiennent aux saisis, ainsi que le reste du matériel de l'imprimerie, moins la presse à cylindre qui est la propriété des demandeurs, et qui vaut plus de £500. S'il faut saisir et vendre cette presse à cylindre, ce sera sans doute le dernier meuble. Point du tout. Il est le troisième effet saisi et vendu ! et seulement pour la somme de £6 5s. ! A qui est-il adjugé ? à J. Bte. Senécal, frère et beau-frére des saisis ! Tout le reste des effets saisis est adjugé au même individu, et le tout ainsi vendu à ce fortuné sellier ne produit qu'une somme de £36 16s. de laquelle déduisant £5 16s. 4d. pour les frais de saisie et vente, il reste une balance de £30 19s. 8d., ce qui excède le montant à prélever, de 18s. 7d. courant. Voilà tout ce qui revient à ces deux infortunés saisis, d'effets qui valaient £1000 à £1200 au moins ! Cependant rien ne change de place tout reste au même endroit, comme si de rien n'avait été. Seulement, le lendemain de la vente, un frère de Chrysologue Senécal, et beau-frère de Daniel, Eusèbe Senécal, qui leur prête ou leur avait déjà prêté £150, entre en société avec eux. Et l'on continue pendant quelques jours d'imprimer "La Patrie" comme par le passé. Le propriétaire de la maison où est l'atelier, passe un Bail à J. Bte. Senécal, le sellier, et celui-ci fait à son tour un Bail à la nouvelle société, pour un prix convenu, mais le paiement est encore à venir.

Le jour de la saisie, tous les effets de l'atelier de Senécal et Daniel étaient déjà sous saisie à la poursuite d'un autre de leurs créanciers. Ils trouvent le moyen ce jour-là de le désintéresser pour le moment en lui donnant un fort à-compte, et ce créancier donne en conséquence ordre au Shérif d'arrêter sa saisie exécution. Mais ce créancier n'a pas, plus que les autres, connaissance de la saisie de Bourguignon.

Le matin de la vente, les saisis offrent à Bourguignon un à-compte de £15 qu'ils ont empruntés d'un autre beau-frère, le nommé Archambault; et Bourguignon refusant de les accepter, Chrysologue Senécal remet ces £15 dans son gousset, et se prépare à subir le grand sacrifice de son atelier, qui doit avoir lieu quelques minutes après. Que n'a-t-il alors donné ces £15 à l'huissier, et ne lui a-t-il fait vendre que le reste des effets saisis, qui lui appartenaient à

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lui et à Daniel. Mais la presse à cylindre, dans ce cas, n'aurait pas été vendue, et ce n'aurait pas été le résultat qu'on attendait de cette saisie secrète.

Qui a été établi gardien à la saisie? Eusèbe Senécal, frère et beau-frère des saisis, et leur associé dès le lendemain de la vente!

A quelle heure a été fixée *la vente?* On prétend qu'elle a été fixée à midi et demi, heure inusitée en pareil cas, de l'aveu de tous les huissiers entendus comme témoins, excepté un seul. Encore celui-ci ne se rappelle-t-il que d'une seule vente qu'il ait jamais fixée à une pareille heure. A midi et demi, tous les ouvriers de l'imprimerie et des imprimeries voisines étaient absents de leurs ateliers, étant alors allés prendre leur diner, ce qu'ils font de midi à une heure. Quand les ouvriers de Senécal et Daniel furent de retour de leur diner, la vente était terminée. J. Bte. Senécal, l'adjudicataire de tous les effets saisis et vendus, l'admet dans ses réponses aux Interrogatoires sur Faits et Articles. La vente était donc terminée à une heure.

Que l'on remarque que l'huissier Lapierre a avoué lui-même que c'était la première fois qu'il fixait une vente, à Montréal, à midi et demi. Son recors, Gilbert Tassé dit qu'ils [illegible]tendu environ un quart d'heure "pour voir si Chrysostôme Senécal [illegible]ait pas avec de l'argent pour régler l'affaire." La vente n'a donc commencé qu'à midi trois quarts; et comme, à une heure, elle était déjà terminée, cette vente n'a donc pas pris un quart d'heure. Et, durant ce court espace de temps, l'huissier a pu crier et adjuger des valeurs de plus de £1000! Sans même que la personne ou les personnes qui sont prouvées avoir été dans ce moment là dans le bureau de la rédaction, en aient eu connaissance! Mr. St. Amant, l'avocat de Bourguignon, et qui se trouvait à la vente, a cru même reconnaître, à la voix, Mr. Ramsay, comme étant l'une des personnes qui étaient dans ce bureau. "J'ai certainement, dit-il, entendu parler dans cet appartement là, en montant l'escalier, ainsi que lorsque j'ai été rendu sur la plate-forme entre les deux portes, c.-à-d. celle où se faisait la vente et celle du bureau de rédaction et d'affaires du Journal." St. Amant a donc eu raison de dire à Ricard, étudiant en droit, le même jour de la vente, que cette vente s'était faite "très promptement."

Nous avons la preuve que la vente a été faite en moins d'une quart d'heure. Voyons si elle pouvait être honnêtement et de bonne foi faite dans ce cour espace de temps. O'Neil, the bailiff says that he never fixed a sale between 12 and 1 in the city of Montreal, cannot recollect to have heard of such a thing. In St. Vincent street, there would be no audience. "Fairly or unfairly, if there was an audience, those things could not be sold in half an hour; they could not be entered and pointed out fairly to the audience in that time.... could not be honestly sold, as mentioned in detail in that Procès-verbal, in half an hour."

L'huissier Emilan McKay dit: "Je ne pourrais pas vendre et crier dans une demie-heure les effets énumérés dans le dit Procès-verbal."

McKay avait son bureau au-dessous de l'imprimerie de Senécal et Daniel, de même que M. Betournay, avocat, chez qui Ricard était étudiant en droit. Aucun d'eux n'a eu connaissance de la vente, et n'a vu de pavillon. "Lorsque je l'ai remarqué à M. St. Amand," dit McKay, "il n'a rien dit." Et Ricard ajoute

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qu'il n'a pas entendu monter ni descendre, et que M. St. Amant n'a rien dit du pavillon, au sujet de la remarque de M. Mackay."

Cette affaire du pavillon paraît être un peu mystérieuse. Il est assez difficile de se fixer sur ce fait. Les [illegible] l'on vu; selon les autres, il n'y en avait pas. Chrysologue Senécal lui-même a dit qu'il ignorait qu'un drapeau eût été exhibé. Si un drapeau a été réellement mis à la fenêtre, et à quelle heure, il faudrait s'en rapporter là dessus à celui qui l'aurait ainsi placé; c'est le recors de l'huissier, Gilbert Tassé, qui dit: "Quand Senécal est arrivé, et qu'il eût dit qu'il n'avait pas trouvé d'argent, je suis allé mettre le pavillon à la fenêtre du premier étage, au-dessus du rez de chaussée, à l'autre bout de l'enseigne de "La Patrie," c.-à-d. à midi trois quarts, ayant attendu un quart d'heure.

Ce pavillon a dû être enlevé immédiatement après la vente. Il n'y était donc plus à une heure. Quelle foi faut-il donc ajouter à ces deux scieurs de bois qui disent avoir été occupés ce jour-là à scier dans la rue St. Vincent, avoir vu le pavillon à 1¼ h. lorsqu'ils sont partis pour aller manger au marché Bonsecours, et l'ont vu à la même place à 1¾ h.?

Le pavillon est destiné à avertir le public ou les passants qu'une vente doit avoir lieu. Pour que cet avertissement soit loyalement donné de la part de l'huissier, et puisse atteindre son objet, il faudrait au moins que le pavillon fut exposé pendant un temps raisonnable avant la vente. Assurément l'huissier devait savoir qu'à une vente qui ne dure pas un quart d'heure, ce n'était pas remplir le but de l'avertissement, que de n'exposer le pavillon qu'au commencement de la vente. Il est à remarquer que le recors qui a exposé le pavillon est un témoin examiné de la part des défendeurs.

A part de Bourguignon, le saisissant, et de son avocat, il est prouvé qu'il n'y a eu à la vente que des Senécal, et des beau-frères des Senécal, Chrysologue, Eusèbe, Jean-Bte. et André Senécal, et Alex. Archambault, leur beau-frère, puis François Daniel, aussi leur beau-frère; puis, quatre imprimeurs seulement, les deux saisis, Eusèbe Senécal qui est entré en société avec eux le lendemain, et enfin Bourguignon qui paraît avoir formé vers ce temps là une société avec un autre imprimeur du nom de Cérat. Cependant Bourguignon n'a pas jugé à propos de parler de la saisie et de la vente, à son associé Cérat, qui, s'il l'eût su, n'aurait peut-être pas fait comme Bourguignon, refusé d'acheter pour quelques louis une presse qui en valait plus de cinq cents. "Je me suis abstenu de parler de la saisie que j'avais faite," dit Bourguignon, "excepté parmi ma famille et mes principaux amis." Cela fait tant de tort aux personnes qui ont le malheur d'être saisies! aussi pas un mot à son associé Cérat qui est imprimeur.

André Senécal, le frère, n'est arrivé qu'à la fin de la vente. Ce n'était pas la vue d'un drapeau qui l'y avait amené. Car il ne peut dire s'il en a vu un, ayant vu, seulement en entrant, quelque chose de rouge à la porte.

Archambault, le beau-frère, a été à la vente, mais la presse à cylindre était déjà vendue, lorsqu'il est entré. "Quelqu'un des Senécal m'a demandé à aller à la vente," dit Archambault.

Jean Bte. Senécal, l'adjudicataire, dit: "Je suis entré avant que la vente fut commencée, de sorte que je n'ai pu voir s'il y avait enseigne ou drapeau à la

porte ou ailleurs." Ce n'était donc pas le drapeau qui l'avait averti de la vente. Cependant il savait qu'elle devait avoir lieu, et l'heure précise à laquelle elle avait été fixée. Il en a donc reçu avis d'ailleurs. De qui, si ce n'est, comme Archambault, de ses fréres Senécal, ou beaux-frères. Il n'a pas payé à l'huissier les articles à mesure qu'ils lui étaient adjugés. Non, il a attendu que la vente fût terminée, et a tout payé, non à l'huissier, mais à M. St. Amant, l'avocat de Bourgnignon. C'était peut-être dans la vue que la vente se fit "très promptement," comme l'a dit St. Amant.

Venons maintenant à la déposition de M. Boudria, témoin des défendeurs. Il est "Professeur à l'Ecole Normale." Il était sur le point de prendre maison, et désirait acheter des meubles aux encans. Il va voir les affiches à la porte de l'Eglise. Celle qui annonçait la vente chez Senécal et Daniel attire son attention. La vente était fixée, dit-il, à 1 h. ou 2 h. "Je suis plutôt sous l'impression que c'était deux heures. Si l'heure avait été mentionnée comme fixée à midi et demi, j'aurais assisté à la vente, mais pour très peu de temps, environ un quart d'heure ou vingt minutes." Il lui fallait être à l'école normale à 1 heure.

Il est aussi prouvé que l'huissier Lapierre est dans l'habitude de sonner une cloche pour annoncer les ventes qu'il est chargé de faire. Il n'en a pas sonné dans cette occasion.

Un témoin ou deux *croient* avoir vu un M. Cadotte, sellier, à la vente. D'autres témoins disent qu'ils ne l'ont pas vu.

Plusieurs des défendeurs ont montré une insigne mauvaise foi en refusant péremptoirement de répondre à plusieurs des interrogatoires sur Faits et Articles. Aussi ces interrogatoires doivent-ils être tenus pour confessés et avérés, au moins ceux qui peuvent l'être; car il y en a quelques-uns qui, à raison de leur rédaction défectueuse, ne sauraient l'être.

Je dois dire que je vois dans cette saisie et cette vente, une affaire qui a été conduite secrètement autant que possible, une affaire conduite en famille, par collusion entre les membres de cette famille, caractérisée par la fraude la plus patente, fraude à laquelle ont participé toutes les personnes concernées, non seulement les deux défendeurs condamnés, mais encore les trois autres défendeurs absens, même Bourguignon, bien que par la déclaration des demandeurs, aucune telle participation ne lui soit imputée, qu'il en soit même disculpé. Enfin toute la transaction a été exactement décrite par Chrysologue Senécal lui-même dans une conversation qu'il a eue, après la vente, avec le témoin J. Bte. Deslauriers, étudiant en droit. "J'ai," dit ce témoin, "entendu dire par Chrysologue Senécal depuis la dite vente que lui Senécal et Daniel son associé avaient été plus fins que les demandeurs." C'est sans doute bien vrai, mais ce ne sont pas de ces finesses qui doivent recevoir la sanction d'une cour de justice.

The Judgment in appeal was recorded as follows:

"La Cour, &c. * * * *

1o. Considérant que les demandeurs ont établi que lors de la saisie et de la vente dont il s'agit en cette cause, ils étaient propriétaires et avaient la possession de la presse à cylindre qu'ils revendiquent.

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2o. Considérant que la saisie de la dite presse sur les défendeurs dans la cause dont il s'agit a eu lieu et a été pratiquée secrètement, de mauvaise foi, par collusion et fraude concertée entre tous les défendeurs, même Bourguignon, bien que la déclaration des demandeurs n'ait attribué à ce dernier aucune participation à la collusion et à la fraude, que néanmoins Bourguignon, nonobstant cette disculpation alléguée dans la déclaration des demandeurs, a été régulièrement mis en cause pour voir la dite saisie et la vente qui s'en est ensuivie déclarées nulles, que par conséquent il doit être, avec les autres défendeurs condamnés aux dépens de l'action, puisqu'il a jugé à propos, mais sans motif valable, de contester cette action.

3o. Considérant que non-seulement la saisie de la dite presse à cylindre, mais encore que la vente de cette presse ont eu lieu et ont été pratiquées secrètement, de mauvaise foi par collusion et par fraude concertée entre les saisis, l'huissier saisissant et John Baptiste Senécal (l'adjudicataire de la dite presse au prix de six louis cinq chelins, tandis qu'il est clairement prouvé que la dite presse valait plus de cinq cents louis) ; qu'à la vente et adjudication de la dite presse à cylindre, ces quatre individus ont agi secrètement, de mauvaise foi et se sont rendus coupables de la collusion et de la fraude, qui leur sont imputées, d'après la preuve faite dans la cause.

4o. Considérant qu'en pareil cas la saisie et la vente de la chose qui en a fait l'objet sont nulles et doivent être déclarées telles par le tribunal appelé à prononcer.

5o. Considérant que par le jugement de la Cour de première Instance il y a bien jugé en autant que les demandeurs, appellans, sont déclarés être propriétaires de la dite presse à cylindre et que les défendeurs Chrysologue Senécal et François Daniel sont condamnés à leur remettre la dite presse ou à leur payer la somme de cinq cents louis courants avec intérêts et dépens, mais qu'il y a mal jugé en autant que les demandeurs sont déboutés de leur action quant aux trois autres défendeurs et que de plus la dite saisie et la vente de la dite presse sont déclarées valables, maintient le dit jugement et la susdite condamnation qu'il porte contre les dits Chrysologue Senécal et François Daniel pour être la dite condamnation suivie et exécutée selon sa forme et teneur, et cette Cour faisant droit sur les autres conclusions des demandeurs, et procédant à rendre le jugement que la Cour Supérieure aurait dû rendre, annulle la saisie, vente et adjudication de la dite presse à cylindre, déclare les demandeurs propriétaires de la dite presse à l'encontre de tous les défendeurs, condamne le dit Jean Baptiste Senécal l'adjudicataire d'icelle à la rendre et restituer aux dits demandeurs sous quinze jours de la signification du présent jugement et à défaut de ce faire dans le dit délai la Cour le condamne conjointement et solidairement avec le dit Chrysologue Senécal et François Daniel à payer aux dits demandeurs la susdite somme de cinq cent livres cours actuel avec intérêt, et enfin la Cour condamne tous les défendeurs aux dépens tant en la dite Cour Supérieure qu'en cette Cour, etc.

(*L'Honorable M. le Juge C. Mondelet, dissentiente.*)

MacKay & Austin, for Appellants.

Doutre & Daoust, for Respondents.

(R. M. & F. W. T.)

MONTREAL, 10TH MARCH 1860.

Coram BADGLEY, J.

No. 5373.

Delisle vs. McGinnis.

Alexander M. Delisle vs. *John McGinnis.*

PRESCRIPTION OF HOUSE RENT. INTERRUPTION.

Held:—1. That the prescription of five years established by the 142nd article of the ordonnance of 1629 against arrears of house rent is in force in Lower Canada. *Semble.* That it is an absolute Bar to the action.

Held:—2. That Defendants having said within the five years immediately preceding the action, upon being asked for payment, *that he believed he had a larger account against Plaintiff,* was sufficient to interrupt prescription.

This was an action to recover a balance of house rent accrued more than five years previous to the institution of the action.

Defendant pleaded first the five years prescription under the 142nd article of the ordonnance of 1629 without tendering his oath; secondly, compensation; and thirdly, a *défense au fonds en fait.*

The Plaintiff answered to the first plea that Defendant could not by law claim such prescription and besides that the debt had never been paid and Defendant had within the five years immediately preceding the institution of the action on different occasions acknowledged his indebtedness to Plaintiff. To the second plea Plaintiff answered that with the exception of two items of the account which he denied, he had paid all the rest and produced his receipts.

Doherty for Defendant cited in support of his Plea of Prescription, *Laurent dit Lortie* vs. *Stevenson*, p. 190, *Scipiot* vs. *Gauvin*, p. 237, 1st vol. Révue de Législation and *Sinjohn* vs. *Ross* and *Christopherson*, Tiers-Saisi p. 509. Vol. 8. Lower Canada Law Reports. In the first case Wm. King McCord, J., held in the Commissioner's Court, that it applied and that it was an absolute Bar In the second case Judge Charles Mondelet in the same Court held that it was in force, but only as a presumption, not as an absolute bar. In the third case Judge Meredith held that the *ordonnance* was in force, and from his remarks it would seem that he concurred with McCord, J., that it was an absolute bar, although the Defendant having pleaded payment while invoking it and tendered his oath with his plea, the question was as the learned judge observed *coram non judice.*

PER CURIAM.—The plea of prescription must be maintained. It is now for the Plaintiff to prove the interruption if he can.

The Defendant in his answers to the Plaintiff's interrogatories then admitted that about six or eight months ago he was asked for payment of the amount claimed by T. S. Judah, Esq., acting as the attorney of the Plaintiff and that he, the Defendant, had replied as follows: "I have a larger account against Mr. Delisle."

Doherty for Defendant contended that this being a qualified statement and no acknowledgment of indebtedness was not sufficient to operate interruption.

PER CURIAM.—If the Court were to decide that these words were insufficient to work interruption, it would amount to this, that the Defendant at the time

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had a right to constitute himself *arbiter in rem suam*, by pretending that although he was the debtor of the Plaintiff for a certain amount, the Plaintiff was his debtor to a larger sum, which he could not do. It is to be observed that prescription is based upon the presumption of payment, but in this case the Defendant admits the Plaintiff's credit as against him and pretends that his obligation is extinguished by a compensation of another claim which he has yet to make good. The Court therefore considers the Plaintiff's case established. The Defendant having referred the decision of the two items of his account disputed to the Plaintiff's oath, and the Plaintiff being absent from the city, the Court appoints the first day of next term for the Plaintiff to make such oath. As to the rest of the Plaintiff's demand, upon verification of the receipts produced by him, his plea of payment will be sustained.

W. A. Bovey, for Plaintiff.

M. Doherty, for Defendant.

(W. A. D.)

CIRCUIT COURT.

MONTREAL, 17th FEBRUARY 1860.

Coram SMITH, J.,

No. 570.

Mayer et al., v. *Scott* and *Benning* et al., Garnishees.

SECURITY FOR COSTS.

Held—That a foreign Plaintiff will be held to give security for costs on the application of garnishee whose declaration is contested by Plaintiff.

PER CURIAM. The Plaintiffs, foreigners, have contested the declaration of the Garnishees who thereupon have asked for security for costs from Plaintiffs. The Garnishees are entitled to this and their motion to that effect is granted.

Motion granted.

M. Morison for Plaintiffs.

Laflamme Laflamme and *Daly* for Garnishees.

(F. W. T.)

COUR DE CIRCUIT.

MONTRÉAL, 17 MARS 1860.

Coram MONK, J. A.

No. 427

Thibaudeau vs. *Magnan*.

Jugé.—Qu'un mineur peut être poursuivi en son propre nom pour des objets de nécessité pour le paiement desquels il est responsable, et qu'il n'est pas nécessaire que l'action, dans ce cas, soit dirigée contre le tuteur du mineur.*

L'action du demandeur avait pour objet le recouvrement du prix de chaussures vendues au défendeur.

La preuve établissait clairement la vente, et que l'achat fait par le défendeur était proportionné à son état et à ses revenus.

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Le seul point sur lequel le défendeur appuyait sa défense était sa minorité, et que n'ayant pas encore atteint l'âge de vingt et un ans, il ne pouvait pas être assigné légalement à répondre en son propre nom à l'action du demandeur, mais que la demande de ce dernier aurait dû être dirigée contre le tuteur.

La cour, par son jugement, a reconnu la validité de la procédure du demandeur, en maintenant l'action de ce dernier.*

Denis pour le Demandeur.

Bondy et *Fauteux* pour le Défendeur.

(D.D.B.)

Une décision semblable a été rendue le même jour par le même tribunal, dans une cause No. 4345, Laurendeau v. Guérin.

Archambault et Bourgeau pour demandeur.

De Bleury, pour défendeur.

SUPERIOR COURT.

MONTREAL, 18TH MARCH, 1860.

Coram SMITH, J.

No. 2306.

Denis vs. *Crawford*.

Held,—That the 76th section of the Judicature Act of 1857 has virtually repealed the 24th Rule of Practice of the Superior Court, requiring the filing of exhibits, on which a declaration or other pleading is founded, at the time such declaration or other pleading is fyled.

This was a motion by the Defendant to reject from the Record certain exhibits on which the Plaintiff's declaration was founded and which were only fyled with the Plaintiff's statement or articulation of facts, instead of being fyled at the same time as the declaration, as required by the 24th rule of practice. The rule invoked by the Defendant enacts that such exhibits shall not be fyled "afterwards, unless by the special permission of the Court." Not being fyled within the prescribed period the Defendant fyled a written foreclosure against the fyling of such exhibits afterwards.

PER CURIAM.—I and my colleagues consider that the 76th section of the Judicature Act has virtually repealed the rule of practice relied on and that the only penalty for not fyling the exhibits at the time required by the rule is the payment of such costs as may thereby be occasioned to the opposite party. The motion is consequently rejected.

Motion rejected.

Ouimet & Morin, for Plaintiffs.

Bethune & Dunkin, for Defendants.

(S. B.)

* Sed *vide* contrà : Pigeau, tom 1 p. 83 : Décisions des tribunaux du B. C. tom 4, p. 224.

MONTREAL, 17TH SEPTEMBER, 1859.

Coram BADGLEY, J.

No. 2468.

Bonacina vs. *Bonacina*, and Divers Opposants.

Held.—That it is competent for an opposant, *before* fyling a contestation of the claim of another opposant, described as residing beyond the limits of the Province, to call upon such other opposant to put in security for costs.

This was a motion for security for costs, made by an opposant, who declared that he intended to contest the claim of another opposant described as resident beyond the limits of the Province, and whom he now called on to give such security.

On argument the motion was granted. Motion granted.

Dorion, Dorion & Sénécal, for opposant moving.

H. Taylor, for opposant resisting.

(S. B.)

MONTREAL, 21ST SEPTEMBER, 1859.

Coram BADGLEY, J.

Bonacina vs. *Bonacina*, and Divers Opposants.

No. 2468.

Held.—That it is not competent for an opposant, *after* fyling a contestation of the claim of another opposant, described as residing beyond the limits of the Province, to call upon such other opposant to put in security for costs.

This was a motion for security for costs, made by an opposant who contested the claim of another opposant described as residing beyond the limits of the Province, and calling on such other opposant to put in such security.

On argument the motion was rejected. Motion rejected.

Drummond & Dunlop, for opposant moving.

H. Taylor, for opposant resisting.

(S.B.)

MONTREAL, 30TH APRIL, 1860.

Coram BADGLEY, J.

Tate & al., vs. *McNeven*

No. 665.

PEREMPTION—INTERRUPTION.

Held.—That the death of a Plaintiff interrupts peremption.

Defendant obtained a rule for peremption, *nisi*, owing to no proceedings having been taken in the cause since May 1856.

The rule was obtained on the 17th and returned on the 23rd of April, 1860, upon which day there was fyled an *extrait mortuaire* shewing the death of Plaintiff, William Tate, in September, 1857. This was annexed to a paper by which *acte* was prayed of its production, and of the declaration by Plaintiff, George Tate, that his co plaintiff was dead; and that there was necessity for a *reprise d'instance*, as he had left minors and a widow.

R. Mackay argued that the death of William Tate in September, 1857, interrupted the *peremption*, and that the rule obtained by Defendant ought to be discharged in consequence. He cited 3 Carré, proc. civ., p. 402.

Bleakley, for Defendant *contra*.

On the 30th April, the Court (Mr. Justice Badgley) gave judgment ordering the rule to be discharged.

T. S. Judah, Attorney for Plaintiff.

R. Mackay, Counsel for Plaintiff.

Bleakley, for Defendant.

(R.M.)

IN APPEAL

FROM THE SUPERIOR COURT, DISTRICT OF MONTREAL.

MONTREAL, 5TH OCTOBER, 1857.

Coram AYLWIN, J., DUVAL, J., CARON, J., MEREDITH, J.

ANN SCOTT, *(Plaintiff in the Court below,)*

Appellant.

AND

MARIE M. M. PAQUET, AND OTHERS, *(Defendants in the Court below,)*

Respondents.

MARRIAGE IN EXTREMIS—FORMALITIES.

Held,—(Mr. Justice Aylwin, dissenting:)—1st. A person attacked with *delirium tremens* may have a lucid interval and may contract a valid marriage during such lucid interval.

2nd. It will not be reputed *in extremis* although death ensues within two days after its celebration, if the person was not at the time sensible that he was attacked with his last illness, and in imminent danger of dying.

3rd. The testimony of the attending Physician to the incapacity of the person corroborated by the consulting Physician called in the day after the marriage and the day preceding the decease, may be rebutted by the testimony of the Notary, the priest and a witness present at the celebration of the marriage and the execution of the marriage contract.

4th Where the status of the wife is recognised, collateral relations have not the *qualité* to dispute the marriage.

5th. Acknowledgment of the status of the children precludes an interested party from afterwards disputing the marriage.

6th. The status of a family being indivisible, it cannot be recognised by certain members, and disputed by other members of the same family.

7th. The ordinance of 1639, depriving of civil effects *marriages in extremis* should be strictly interpreted.

CARON, J. (Delivering the judgment of the court.)

This action was instituted by Ann Scott, one of the sisters, calling herself the heiress of the late William Henry Scott, her brother, against the said Marie M. M. Paquet and the other Respondents, his children, with the view of annulling the marriage, which the said William Henry Scott had contracted with the said Dame Paquet, and also for the purpose of annulling the contract of marriage, entered into between them, the same day, namely, the 16th December 1851, only two days before the death of Scott.

ALLEGATIONS OF THE DECLARATION.

The 18th December 1851, death of Scott intestate, leaving as his heirs the said Appellant, Ann Scott, and also Barbara and Jane Scott; those two last having renounced the succession of their brother, it went, in its entirety, to the Appellant. On the 15th December 1851, Scott was attacked by the illness of which he died, and from that moment, he continued in a constant state of *delirium*, until his death on the 18th.

On the 15th December, 1851, a marriage was secretly solemnized, by Mr. Ancey (Priest) with a contract of marriage, passed before Archambault, Notary. At the time of the marriage, Scott was in agony and incapable of knowing what he was doing.

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The prayer of the declaration was, that the marriage should be declared null, as to its civil effects, as also the Contract preceding it. This nullity it will be perceived rests upon three reasons :—

1° That the marriage was clandestine.

2° That it was solemnized *in extremis.*

3° That it was contracted when Scott was not *compos mentis.*

PLEAS.

I. The General Issue.

II. Several Exceptions, which may be summed up as follows:

1° That the Plaintiff, being only a relative of the deceased in the collateral line, was not entitled to demand the nullity of the marriage.

2° That, from the death of their father, the young Scotts had been in possession of their *status*, as his children, acknowledged, publicly and notoriously as his heirs and representatives, and that the Defendant, their mother, had been put into, and was in peaceable possession, ever since his death, of the property, which had been settled upon her by the marriage contract in question.

3° That the Appellant herself had acknowledged the young Scotts, the Respondents, as heirs of their father, by various deeds and documents of which several are given in the exceptions and also by means of an action brought against them on these very deeds.

4° That the other sisters of the Appellant should have been joined with her in the present action, which could not be legally brought by the Appellant alone.

5° That Scott and the said Marie M. M. Paquet lived together, for a long time, as husband and wife, with the intention, and under the promise of marrying each other, and that publicly and notoriously, and above all, to the knowledge of the said Appellant, who regarded the children, born of the said union, as her nephews and nieces, and treated them as such.

6° That, it was in order to put into execution these resolutions and promises, that on the 16th December 1851, the marriage in question was celebrated, with legal and sufficient formalities.

7° That the present action is vexatious and fraudulent, instituted through a conspiracy between the Misses Scott, in order to ruin the Defendant Paquet and her children.

THE ANSWERS AND REPLICATIONS ARE GENERAL.

The evidence consists in the testimony of a number of Witnesses, heard on both sides, and also in several writings and documents produced in the cause.

The depositions of the Witnesses of the Respondents are printed, in their entirety, in their factum as well as the deposition of Dr. Jamieson, who is the most important Witness of those examined on the part of the Appellant.

The *Défense au fonds en fait* made it incumbent on the Plaintiff to prove the essential allegations of her declaration, on which she specially based her action; namely, the *clandestinity* of the marriage; the incapacity of Scott to make a contract by reason of insanity; and the apprehension under which he had been of an approaching death.

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Without proving these facts, or at least one of them, the Plaintiff could not hope to succeed in her demand.

The Court below has based its Judgment solely upon this defect or want of proof. It has not thought proper to enter into a consideration of the Exceptions. It has decided that the Plaintiff had not proved her allegations, giving as reasons of its Judgment, that the Plaintiff had not established "that, at the "time of his marriage, Scott was in the *delirium*, the madness and mental "incapacity alleged in the action, nor that at the time of the said marriage, he "was under the impression that he was on the point of dying, at the last "extremity.

Such being the reasons of the Judgment appealed from, in order to see if it be correct, it is necessary first, to examine [illegible]ce in the cause, and then, if this proof leaves some doubt, it will be [illegible] direct our attention to the different questions of law raised by th[illegible]ptions.

The important fact, about which, accordin[illegible] proof, there exist difficulties in the cause, are the state of mind of Sco[illegible]t the time of the marriage, and the opinion that he himself entertained, at this time, as to the state of his health, and the probability of an approaching death.

On the part of the Respondents, it is contended that the evidence establishes that, at the time of the marriage, Scott had the full enjoyment of his intellectual faculties, and that he had no reason to think, and that those, who surrounded him, did not think any more than he did, that he must die of the sickness from which he was suffering; whilst on the part of the Appellant, it is contended that there is abundant proof, that Scott had then completely lost the use of his reason, and that it had not returned to him up to the moment of his death.

It was incumbent on the Appellant, who alleged these facts, to prove them; upon her was the *onus probandi*; if she has not made this proof, she ought to fail.

In referring to the evidence taken on one side, and the other, it i[illegible]ssible not to observe in it, great contradiction, difficult to account for, with [illegible]pect to the mental condition of Scott, during the three days which preceded his death, the 15th, 16th, and 17th December, 1851, (the 18th being the day of his death.)

The chief witness heard on the part of the Appellant, on this point, is Dr. Jamieson, who attended Scott in his last illness; if we believe him, during three days, till the instant of his death, Scott was continually in a complete and uninterrupted state of mental aberration and insanity, which made it impossible for him to know what he was doing, and to contract any engagement *avec connaissance de cause*, (knowing what he was about.)

He tells us that the sickness by which he was attacked, and of which he died, was the *delirium tremens*, and that this malady by its nature, does not leave the person suffering from it any lucid interval, during which, he can enjoy the use of his intellectual faculties, sufficiently to be capable of validly binding himself.

It was on the 15th December 1851, that he made his first visit to the patient; Scott was then in his own house; the Doctor found him with the features swollen, presenting symptoms of erysipelas, so marked that he declared that he was

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attacked by an erysipelatous inflammation. He concluded from the examination he made of the patient "that he was booked for *delirium tremens*." "He was in great mental perturbation."

Having left, after this first visit, the Doctor received from Scott himself a note, in which he demanded the pills that he had promised, which surprising him, he returned to see him. These two visits were in the afternoon. The second time he found him at his door, going out into the street; he describes his state and says: "That he had all the characteristic symptoms of *delirium tremens*, setting in with an unusual intensity."

The Doctor accompanied him to Madame Paquet's, where the Doctor remained only a short time. He returned there in the evening; he cannot say if he stayed there all night, but he is sure that he remained there the whole of the night of the 17th. He stayed with him the greatest part of the time, during the whole of his illness, leaving him little, day or night; the whole of the night of the 15th he was labouring under a state of mental hallucination. This mental state became worse during the night of the 16th, "and generally, there was "no marked improvement in his mental capacities, up to the time when he "awoke from his sleep, sometime before his decease, on the 18th:" "On the "evening preceding the arrival of Dr. Fisher, which I suppose to have been the "16th, the notary and the priest were present.

"On the afternoon of the following day, which I take to have been the 17th, "Doctor Fisher made his *first visit;* on the evening of the Wednesday, Mr. "Scott died. It was not until late on the night of the 17th, that the deceased "procured what may be said to have been his first sleep; he could not have had "any sound sleep before, as he was not under treatment of *delirium tremens*."

On the 17th, the Defendant Paquet, having been informed by the Doctor, that Scott was in danger: "she appeared surprised that the deceased was at all connected with danger." Doctor Fisher after having consulted with Doctor Jamieson; "called afterwards on the 18th." Dr. Jamieson represents that he was prevented by the Defendant from treating the sick man as he ought to have been; Doctor Dorion was called in and refused to interfere: "Mr. Scott "was dying or was dead when Dr. Fisher arrived (on the 18th.)

"The disease was not *necessarily fatal.* It was *quite possible death would not result.*" He adds; "on the second day of my attendance (the 16th, the "day of the marriage,) I attended during the greater part of the day, and left "to dine, at my boarding house at about *half-past one or two;* when I returned "it was towards *evening.* The candles were lighted. I had been absent two "or three hours more or less.

When he returned there were several persons in the bed room with Scott, the Doctor did not enter there, but he recognised the voice of Mr. Ancey the priest, Archambault, the notary, and Mr. Féré: "passing congratulations on what had taken place." After these had gone, he had caused a question to be put to Scott by Mme Paquet to which he answered properly. He adds; "I had not, at the time, the slightest knowledge of what had passed or what the business "of the priest and the notary was on the occasion of their visit; it is from the "effect of *delirium tremens* that Scott died."

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In cross-examination, he says, "From the beginning of his disease, *I expected* "*that he would recover from his disease.* On the first, second, and third day, I did not look upon the disease as a *decidedly mortal one.* I never conveyed "to Scott the idea that *he was* or might be *in danger.*"

This evidence is strong, and if the fate of the cause depended upon it, and if it were not contradicted, the nullity of the marriage would be apparent, on account of mental incapacity, but we will see that this proof is completely destroyed, both by the contradictions it contains, and by the other evidence in the cause.

Doctor Fisher, heard on the part of the Appellant, confirms the testimony of Dr. Jamieson in the following respects; He only visited Scott on the 17th, the evening before his death, and the morning after the marriage. He returned the 18th when Scott was dying or was already dead. (Between 4 and 5 on the 18th.) He said that Scott was attacked with *delirium tremens;* after consultation it was agreed that they would make him take "brandy punch." He went away under the impression that such would be the treatment. When he saw Scott, he considered him as incapable of speaking reasonably; he put him but few questions. His, was a very bad case of *delirium tremens.* He thinks that he died of this disease.

The only other witness, who confirms in any way the preceding ones, with regard to the mental state of Scott, at the time in question, is Johanna Kerbey, who was there in the service of Scott. She speaks of the 15th as the time when he left his house to go to Mme. Paquet's. He was then in *delirium:* neither this *witness* nor *Dr. Fisher* saw Scott on the 16th, day of the marriage, and consequently cannot say whether he was *compos mentis* that day or not. Kerbey only saw him on the 15th, the evening before the marriage. Dr. Fisher only saw him on the 17th, *late* in the *evening*, the day after the marriage. Neither the one nor the other knows how he was on the 16th in the evening, when the marriage took place.

On the part of the Plaintiff, on this point of the greatest importance, she had to sustain her pretention on the evidence of Dr. Jamieson; now, he himself admits that on the 16th, he left to get his dinner, between half-past one and two o'clock; that he only returned to the sick man after the candles had been lighted. Thus, whatever he may tell us, was the state of his patient when he left him, and when he saw him again in the evening; it is certain that he can say nothing positive as to his state during his absence.

Without entering into the details of the proof made on the part of the Defendants, Respondents, (which is printed at length in their factum), it suffices to state, that by Mr. Ancey, priest, vicar, at this period, of St. Eustache, it is proved, that on the 15th December, Scott sent for him, by his farmer, told him that he had a scene that day with his sister, that he wished to marry Mme. Paquet, and, for that purpose, he had sent for him; informed that a dispensation was necessary, the witness wrote at the request of Scott, a letter to the Bishop to obtain it. He then went away again, saying to let him know when the dispensation should have arrived. The dispensation came the following day; a message

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came from Mr. Scott to inform Mr. Ancey of it. He says: I found Mr. Scott much better than the evening before, calmer, and suffering less. It was about five o'clock in the evening, he was completely conscious.

He relates what took place before the marriage, the oath they made him take, and he relates what took place, several years before, between Scott and father Martin, when the same marriage was in question. (See the testimony on this point.) After the marriage, Scott expressed his satisfaction at what had been done, offered the witness the gold pen which had been used on the occasion; Scott himself gave the names and ages of his children; the ceremony lasted an hour and a half or two hours; neither the 15th nor the 16th was Scott in danger when the witness saw him; Archambault the notary, in place of a contract of marriage, suggested the making of a will, Scott refused saying that his will was made; that it was a marriage contract he wished to make. He himself dictated the principal clauses of it: above all, he insisted upon a clause of exclusion of community (as proved by the notary). Scott made him promise to return on the morrow; it was not understood that the marriage should be concealed; the witness spoke of it to all he met; on the 17th, he went to see Scott, according to promise, but he was not able to see him; he was dozing; the doctor had forbidden to allow him to be seen; on the 18th, the witness returned; Scott was dying. He was very much surprised at this change; on the witness being asked, to what cause he attributed this change, he answers; "I always "thought that the doctor had given him a dose of opium a little too strong; "and at the time, I expressed this opinion to several persons; when I married "him, I had not at all the thought that he *would die of this sickness*. I would "not have married him, if I had not been convinced that he was in the enjoy-"ment of all his intellectual faculties; I am assured of this, by the conversations "I had with him, *before* and *after* the *marriage*.

The very numerous, and very searching questions put to this witness in cross examination only afforded him the opportunity of explaining more fully, on what was founded the opinion he gave, and the reasons he had to think and to say :—

1° That at the time of the marriage, the 16th in the evening, Scott had the full and entire use of all his intellectual faculties; and 2° that at this time neither Scott himself nor Mr. Ancey nor the other individuals present, were under the impression that he must die of this malady, and that in fact, they had no reason to think so.

This evidence is, on all the important points, corroborated by that of the Notary Archambault, who prepared the contract, and was present at the celebration of the marriage, as well as by the testimony of Grégoire Féré, who was also present on these two occasions.

These two witnesses relate particular facts, circumstances in detail, clearly shewing that Scott was not only *compos mentis*, but that he was in the enjoyment of all his faculties. Both agree in saying, with Mr. Ancey, that Scott, the whole time that the execution of the contract, and the celebration of the marriage lasted, was seated on his bed, his legs hanging over; and that he dictated to the Notaries the principal clauses of the contract; that he insisted, above all, upon

the clause of exclusion of community; that he conversed composedly with them; that he himself wrote the names of his children as well as those of his mother; that he arose of himself to sign the contract and the marriage register, that he refused to sign on his bed, though the offer was made him, saying "*Badinez "vous? croyez-vous que je ne suis pas capable d'aller signer?*" (are you joking? do you think that I am not able to go and sign?)

After the marriage, Scott said that he was content; he was perfectly calm and said; "In case of accident, it would have pained me to leave my children "without being legally married."

There was no secret made of what was passing. All the people in the house knew it.

After the marriage, Scott was well enough; there was no indication whatever to induce one to suppose he was in danger.

By these same witnesses, and by the evidence of Father Martin, the important fact was established, that, since the year 1845, Scott had wished to celebrate his marriage with the Respondent; that to this end, he had caused Father Martin, who was then in the Parish, to be called, and every thing was ready for the celebration of the marriage, and that the affair fell through only, because Scott felt offended at the oath and promise, which they wished to exact from him, as to bringing up his children in the Catholic religion.

At that time, he repeated several times that the said Marie M. M. Paquet was his wife, that he recognised her as such, and that he would get himself married by a Protestant Minister. Scott often used to speak of his marriage, said that it was a matter that he neglected from day to day.

On the 16th December, in presence of M. Ancey, of the Notary Archambault, he declared that, if he was not married in 1845, by the ministry of Father Martin, it was that he had not understood the nature of the oath that he wished him to take with respect to his children. There were present at the marriage, on the 16th December, in the room, Scott and Mme. Paquet, M. Ancey, Archambault his clerk named Dagenais, Féré, and several other persons going and coming in different parts of the house; the son of Scott, and Guilbault, stepfather of the Respondent, were also present.

This very conclusive and very positive evidence, so well united and so consistent would well suffice, of itself, to destroy that of Dr. Jamieson, in case there were not proof in the cause of declarations and admissions, by the Doctor himself which shew that he had not always been, as to the mental state of Scott, during his illness, of the opinion which he has expressed in his deposition, as appears by the following extracts: 1° To Féré, who said to him, on the morning after the marriage, that he was surprised to hear that Scott was deranged, as he had found him so well, the Doctor replied: "In these maladies, there are always "moments, when a man may have a good judgment."

2° To the Notary Archambault, who was ill and under the care of the same Doctor, he said the very day when the contract and marriage took place, "that "he might go to Scott's, who was asking for him to make his marriage contract." He did not at all say that Scott was not in a state to make a con-

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tract; on the contrary, he urged him to go there, saying that there was no danger, in his going out, and at the same time speaking of Scott, he said to Archambault: "he is sick, but he is tolerably well." Archambault adds: "I said to the Doctor that Scott was asking for me to make his contract of marriage. "It was thereupon that the Doctor told him that he might go there." How can these facts be reconciled with what Doctor Jamieson tells us, in his deposition, that the day of the marriage, he knew nothing of what took place in his absence, that he did not know what the Priest and the Notary had come to do at Scott's.

3° "To Globenski, on the morning after the marriage, or the death (he is "not sure) the Doctor said that the day of his marriage, Scott was completely "conscious, and that he spoke like a man in possession of his senses; Globenski "adds; Dr. Jamieson told me that, in order to show me that Scott was quite conscious when he married."

4° Catharine Goguette, wife of Arpin proves that in July or August 1853, Doctor Jamieson replied in her presence to Mme. Paquet, (Respondent) "that "most certainly, M. Scott was conscious to the day of his death." The question that Mme. Scott had put him was in relation to her contract of marriage with Scott. In his answer, the Doctor made use of the word "marriage" with reference to the day of the marriage of Mr. Scott.

Nothing in the cause explains these palpable contradictions which were found in Dr. Jamieson's testimony, who as we have seen, is not only contradicted by the other witnesses, but contradicts himself several times, unless we suppose that the Dr. wished to clear himself from the reproach, which appears to have been cast upon him, that he had not been entirely stranger to the turn, altogether extraordinary and sudden, taken by a disease, which he himself, had not considered as dangerous and mortal.

Whatever may have been the mental state of Scott before and after marriage, during the day of the 16th December, it is impossible, with the proof, to come to another conclusion, if it be not, that this marriage at least took place in a long and peaceful lucid interval, during which he had the use of his mental faculties, and could contract "*avec connaissance de cause*," (knowing what he was about). The contract of marriage proved to have been dictated to the notary by Scott himself, is assuredly, not the production of a madman; on the contrary, its wise, prudent and reasonable provisions, prove his intelligence and lucidity of his mind at the time of its execution. The Doctor himself, always *admitted this fact*, except in the deposition he has given as witness; thus we must conclude that it has been wrongly contended, on the part of the Appellant, that at the time of his marriage Scott was not in a condition to contract.

From the same proof, we must also conclude that, at this time, Scott was not at all under the impression, that he must die of the disease from which he was suffering, that he had no reason whatever to think so, and that, in fact, no one thought so, not even Dr. Jamieson as he admits.

We might then leave the cause here, and say that the Plaintiff, having failed to make proof of the allegations of her demand, the judgment could not be

other, in the Inferior Court, than it has been, to dismiss the action, as has been done, and without going further, this Court might content itself with a simple confirmation of this judgment.

But considering the importance of the cause, it is well to express an opinion on the different questions of law which have been raised by means of the exceptions produced on the part of the Respondents.

These questions, to which it is proper to make allusion, are the following:

1° Is the marriage contracted *in extremis*, that is to say, little time before the decease of one of the parties, and when he is attacked with the disease of which he dies, null, *pleno jure*, by operation of law, or, in order to operate this nullity, must it be established that the party was then himself under the conviction that he was attacked with his last illness, and in imminent danger of dying.

2° Admitting that this nullity exists, are the collateral relatives admitted to oppose it to the children, born of a union notoriously and publicly acknowledged, which had preceded such a marriage.

3° If these collateral relatives have the right of invoking the nullity of such a marriage, can they do it after having recognised it themselves, directly or indirectly.

4° Is an isolated member of a family, interested in contesting the status of the children born of a marriage, contended to be illegal and null, admitted to adopt in a court of law, the proceedings required to this effect, alone, and in his personal name, without the concurrence and intervention of the other members of his family.

5° Was the ordinance of 1639, (which decreed the nullity of marriages contracted *in extremis*) in France, and should it be here, strictly and rigorously interpreted and restrained within narrow and confined limits?

The greater part of these questions are treated very much at length, in the *factum* of the Respondents, and the principles which should serve to guide them are supported by numerous authorities, which are cited there and which it would be useless to repeat here. It is, however, well to say something on each one of these propositions, and to refer to some authorities, which have not been cited by the parties; observing however, what is of the greatest importance, that all these questions ought to be examined and decided, not only according to the text of the French laws, which regulate for us these matters, but further in the spirit of legislation to which these laws owe their origin.

Another observation, which we must also make and keep in view, in the examination of all these questions, is the following; upon the validity or the nullity of the marriage disputed, depends the social condition and the fortune of the Respondent, and of her children brought into the cause with her; according to the law, which governs us, different in that respect from the English law, the subsequent marriage legally contracted, has a retroactive effect, that of legitimizing the children of the union which preceded it, and of placing the wife and the children born before on the same footing, in all respects as if a legal marriage had taken place at the time when this union began.

This consideration, which does not admit of doubt, easily explains the importance which the Respondents attach, and the immense interest which they have,

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in maintaining the validity of a marriage, which, otherwise would appear to be absolutely of no consequence, for having been celebrated, only two days before it was dissolved by the death of one of the parties. The matter is far otherwise when we notice that, if this marriage is valid, the mother in the eyes of the law is regarded the same as if she had always been a lawful wife ; the children will, in this case, have all the advantages and privileges arising from being legitimate, while, if this marriage is null, the mother and children lose forever the social *status* they have enjoyed ; both the one and the others are reputed illegitimate, with all the blights and the disadvantages which follow from this, and are deprived, the mother of the means of subsistence which have been left her by the man who had always declared and treated her as his lawful companion, and the children, of the considerable property of their father, who loved them, and cherished them as his children, regarding and treating them as such ; whose fortune, he thought, [illegible] assured, in causing the celebration of a marriage, which he reproached himself [illegible] deferred so long, and which he had decided upon for many years [illegible], an instant after it had been solemnised, according to the proof [illegible]."

Let us now proceed to the consideration of the questions stated above.

I. POINT.

As to the first question, we must hold that by the laws of France, applicable to the matter, in order to declare null a marriage contracted *in extremis*, the party contesting ought to establish, that when it was contracted, not only the deceased was attacked with the disease of which he died, but also and above all that he knew it, and thought so himself, and that he was convinced that he was then in imminent danger of a near dissolution. On this important point, and which is one of the *motifs* on which is based the judgment appealed from, no positive authority whatever has been cited ; it is then well to supply this deficiency in referring to those which follow, namely :

Cochin, I Vol ; p. 550.

"The Custom (la coutume) supposes a man, in such a state of depression, that "he regards death as ready to make its final assault, a man who yields to "the violence of his ill, who being unable longer to resist, abandons all, renounces all."

I Vol : p. 552.

All the authors agree that the disease must be in its last stage, in order to give the right to object to it. Although a person be not in a good condition, says Charondas, if at any rate, he is not so overcome with disease, that he cannot give attention to his affairs, he will be regarded as in health. *Arrêt* of 5th November, 1555.

"Dropsy is not a sufficiently strong [illegible] to cause the annulling o[illegible] "tion *inter vivos* according to Mtre J[illegible]rie Ricard, unless it was in [illegible] "stage, and inflicted upon the sick man the assaults of death."

P. 551.

Dumoulin was animated by the same spirit, when he said on the article 1[illegible]

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of the customs of Blois; *infirmitatem non nocere, nisi timeatur mors presens aut vicina*; it is therefore necessary that the sick man see, so to speak, that death is ready to give him the fatal blow.

Maitre, On the article 277:

"The diseases which are not mortal in themselves do not make the donations passed *inter vivos* to be regarded as *mortis causâ*."

Ricard, Donations, 1 Vol: p. 27 et 28.

We sufficiently understand that all kinds of diseases do not serve to make a donation declared null and made *mortis causâ*, when it is drawn as *inter vivos*; but solely those which are of a dangerous character, and which are commonly accompanied by the peril of an approaching death.

This results from these expressions of the custom.

"Donations made by persons, ill of diseases *from which a speedy death is* "*looked for*, by persons *in apparent danger of death*."

Pothier. Vol. 6. Donations *inter vivos*.

"It is necessary that at the time when the donation was made, the sickness "was then declared *mortal*."

"If the donation was made at the commencement of a disease, which seemed "little dangerous, although subsequently having got worse, it brought the donor "to the grave, a donation will not be regarded as made *mortis causâ*, seeing it "was made at a time when the donor did not think he was dying."

Applying to the facts proved in the cause, the principles established by these citations, we cannot help finding the *motif* of the judgment of the Court below correct, which goes on to say that Scott, when he contracted the marriage contested, not being under the impression of an imminent death, his subsequent decease which followed close upon the celebration of this marriage, cannot affect its validity.

II. POINT.

On the second question, "the right of collaterals to contest the validity of the "marriage." This right is strongly denied to the Appellant, who as sister of the deceased, is in the collateral line, and who, according to the Respondents, has very badly proved this quality of sister which she assumes. In fact it is abundantly proved that Scott lived for many years with the Respondent, that he treated her as his wife, and also treated the children, born of her, as his legitimate children. Several times there had been question about a marriage between them, and especially on the occasion which has been mentioned above, on which Father Martin was called to celebrate it. What was done on the 16th December 1851, was therefore only the putting into execution of an intention settled and formed long before, the accomplishment of a promise and of a contract made between the parties; and not only did Scott treat Dame Paquet as his wife, and the other Respondents as his legitimate children, and that notoriously and publicly, but also the one and the others were generally regarded and treated as such by all the world. To change such state of matters, to deprive a wife of her *status* and her position, as a lawful wife, and five children already of a cer-

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tain age, and some of whom have attained a suitable situation, the person who undertakes so grave and odious a task, must assuredly be well founded in his position, and above all, his right, his capacity, to raise the difficulty, must not in any respect be doubtful.

Now is it very certain that the collateral relative has the right to contest, against the wife whom, her, brother has recognized as his legitimate companion, and treated as such, and against the children who are born of the wife and of him, their state of legitimacy, which he had himself given them and which had been ratified by the public? It appears not only that this right of the collateral relative is doubtful, but also that it is, almost certain, that he does not possess it at all.

In support of this opinion, we may refer to the authorities cited in the factum of the Respondents, namely:—

Daguesseau—2nd Volume. Plaidoyer (Pleading) 12, page 288.

"You know, gentlemen, and we have learnt it by the jurisprudence of your "*Arrêts*, that the complaints of collaterals are regarded with little favour, "in the tribunal of justice.

"If it allows a father to avenge even after the death of his son, the injury "which the latter did him in marrying against his will, to extend his indigna- "tion and his anger, to the second generation, and to punish his son, in the per- "sons of his grand children, in refusing them not only the hope of his succession "but also the quality of legitimate children; it did not give the same power to "the collaterals, who did not allege in their favour, either the prejudice of nature, "or the authority of law, and whom a spirit of self interest alone, induces to "dishonour the memory of the father, and to distract the position of the child- "ren."

Page 291, "We could not give too much attention, to follow with exactitu- "de and even with scrupulosity, the rules which are prescribed to us, both by "the canons and by the ordinances; a Judge may tremble with reason, when he "considers that he is perhaps about either to break the ties which the very hand "of God has formed, or confirm the parties in a criminal engagement."

"But when death has broken this engagement, although we must still observe "the maxims of the Church and the State, we may less closely cleave to form- "alities, in order to declare in favour of possession, the surest and most inviola- "ble law, when the question regards the status of parties."

Daguesseau—2nd Volume. Plaidoyer (pleading) 57, pages 69, 70.

"We must regard and pay attention to the facts of each cause, to the great "consideration of the public interest, and not establish a general rule without "exception."

In the present case, the circumstances are the most favourable possible to the Respondents, who have been recognised by the two other sisters of the appellant and by the Appellant herself.

Daguesseau—5th Volume. 33me Plaidoyer (Pleading) page 150.

"For our part, before entering upon an examination of the different reasons

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"which we have just reminded you of, we will make two general observations.

"The first that the case of a marriage is not like that of a Will and some "other acts, with regard to which is cited the common law maxim; *quod ab* "*initio non valet, tractu temporis, convalescere non potest.*

"In the first place, an important distinction is made, which has been explain- "ed to you, of absolute nullities and of those which are only relative, and in- "troduced in favour of certain persons.

"When these persons by some personal indignity or incapacity, are no lon- "ger in a state to propose them, then it can be said that the marriage is as it "were made valid, not that it is without a defect, but by the defect of right in "the person who wishes to have it annulled:—*Non jure proprio, sed defectu juris alieni.*"

Page 151. "If the public advantage demands that we should rigorously "observe the essential formalities prescribed by the laws, the same advantage "does not allow us to expose the status of children, and the destiny of a family "to the caprices of an angry father or mother, (*much less a sister*) who would "sacrifice them rather to their passion than to justice.

P. 152. "A second general observation is, that there is a great difference "between examining a marriage which still exists, and a marriage which death "has severed.

"In the former case, too much care cannot be taken in the discussion of all "the nullities; it is difficult to halt at pleas, in bar (*fins de non-recevoir*), be- "cause there is yet time to repair the defects which are found there; judges "ought to tremble with the fear either of severing ties which the very hand of "God has formed, or of confirming an illegitimate tie which the Church con- "demns.

"But when death has anticipated their judgment, *and the only question is* "*concerning the status of the children*, pleas in bar (*fins de non-recevoir*), have "greater weight, and may be based upon circumstances sufficiently strong to have a decisive authority."

Possession. cohabitation, the approbation of the family, the silence of the mother, the good faith of the wife, *every thing is listened to in favour of the children*, when the marriage *of which they are born, has otherwise nothing odious in it.*

P. 153. "Where it is said, that the marriage in question, would have been "celebrated with all kinds of formalities, if the contracting parties had had their domicile at Paris."

In our case, the marriage of Mme. Scott would have been celebrated as far back as 1855, if there had not been the difficulty about the oath raised by Father Martin, a Jesuit.

This *arrêt* is very important inasmuch as the pleas raised by the defence had prevailed *even* against the [illegible]er. *Arrêt* 3rd. August, 1694.

Journal des Audiences. Vol. 4, Chapter 1st p. 409.

A collateral relative cannot appeal *comme d'abus*, as to the celebration of the marriage of a *sien parent* (*suus relative*) under pretext that there are nullities in the celebration.

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P. 410. "The advocate general Daguesseau, who made a very beautiful ad-"dress, having explained the facts and [illegible]ding with much clearness, nar-"rowed down the whole contestat[illegible] propositions mentioned above, "and said with regard to the [illegible] no difficulty that a collateral rela-"tive could not make an appeal *comme d'abus* as to the celebration of a marri-"age; that there was only the father and mother who were admissible to do it; "* * * * * * * * that it was a very sure maxim, founded upon the "judgments of the Courts; that if it were sometimes allowed to collaterals to "appeal *comme d'abus*, it was when their relative di[illegible] the family by an "unworthy alliance, which was not the present case."

The marriage was confirmed and declared valid, although it had begun *ab illicitis*, and notwithstanding the ordinances and the custom.

And it is added, that there was much the appearance, that what obliged the Appellant to contest the status of the children, was the desire that he had to avoid paying what he owed to the succession of Jean Bignon their father.

Repertoire, Guyot, Vol. XI. Verbo Mariage, page 368 and following to 373. There are reported there several notable *arrêts* which have rejected the demand of collaterals, even where there had not been any recognition of the children since the death of the father. In particular, in the case of the Chevalier de Flavigny married to his servant.

There was here disparity of condition, and a clandestine marriage; however the Comte de Flavigny brother of the deceased was refused in his demand to contest the marriage which he had never recognised, and although he offered to support the mother and the child, the Court granted civil effects to the marriage by *Arrêt* of date 22nd August 1758, page 371.

Page 372. There is reported an *Arrêt* of the 31st of December 1779, when it is said that the Advocate General Seguier, successfully applied this law of the Emperors Marcus and Lucius, which does so much honor to their reign, *Movemur et temporis diuturnitate et numero liberorum vestrorum.* The woman Bouchard, had a numerous family and she was besides worthy of the application of this law.

To all these citations, we must add one of great weight, and very positive on this subject; it is from Merlin:

Questions de droit, 10 Vol: Sect. 5, page 19, when he says: "Yes! certainly the Court of Appeals has wrongly decided (in entertaining the demands "of collateral relatives against a marriage which has peaceably subsisted till the "death of their relative). Yes! certainly the Court has wrongly decided, or at "any rate it has decided against the universal jurisprudence of the ancient tri-"bunals. We could cite more than 50 *Arrêts* which have declared collaterals "*purely and simply*, as not admissible to allege even reasons of absolute nullity against marriages."

Merlin only cites a single *Arrêt* rendered by the Parliament of Paris, the 31st December 1779 on the conclusions of the Advocate General Seguier.

According to what precedes we cannot doubt but that the Appellant was not qualified to contest the validity of the marriage and the legitimacy of the child-

ren of her brother, even in the case where the legality of the marriage and the legitimacy of the children had not been recognised by herself as the Respondents contend, which brings us to the third question.

III POINT.

The facts given in the factum of the Respondents, as establishing the acknowledgement by the Appellant of the marriage of her brother and the legitimacy of his children, appear established by the proof, and sufficient in law, to prevent her after such acknowlegements from contesting this marriage and this legitimacy, called in question in the present action. The time that the Appellant has allowed to pass before putting forth her claims, appears little fitted to shew, that she was herself strongly convinced of her right.

In point of fact, there has certainly been an acknowledgement on the part of the Appellant ; now in law this acknowledgement is fatal to her.

Guyot.—Repertoire, Vol. XI, Verbo Mariage, P. 363, § 4.

" With regard to collaterals, the law does not admit them, in the lifetime of " husband and wife, and if they recognize the marriage after the death of the " conjoints, they are not admitted to contest its civil effects, *even when the " reasons* D'ABUS *are absolute.*"

Vide,—Guyot already cited—from pages 368 et 373.

De Merle.—Of pleas in bar (*fins de non-recevoir*) page 304 :—

" With regard to even absolute nullities, such as those resulting from want " of celebration before the proper priest, there had been variations in the juris- " prudence, and even until the *arrêt* of the 9th April 1696, the maxim was " observed that the sole quality of collateral, rendered a person not admissible " in the appeal *comme d'abus*, unless the matter concerned a relative who dis- " honoured the family by an unworthy alliance.

" At this time, and above all after the Edict of the month of March 1697, it " became a constant rule that when there were absolute reasons, which made an " essential nullity in the celebration of marriages, the collaterals after the death of " father and mother, were entitled, not to come directly against these marriages, " for they were not listened to, but to attack them by appeal *comme d'abus*, and " incidentally by way of exception, to defend themselves against a demand by " the widow for *her dower*, or by children for a division of the succession fall- " ing to the family. But when collaterals or other relatives had *approved* or " formally *recognized* the marriage, after the death of husband or wife, that is " to say, when their rights had arisen and were rested, they were declared *not " admissible.* It may further be said with reference to civil marriages, which " involve even absolute nullities, that the new laws do not run counter to this " last state of the law."

In the present case, the Appellant only demanded the nullity of the marriage in 1854, three years after its celebration, and after having recognized it, as well as the children born of it, by the transfer which she made to her two sisters Barbara and Jane, who as well for the share of the Appellant as for their own brought an action, based upon this transfer in July 1853, against the minor

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children of their brother, giving them the quality of heirs and legal representatives of their father, the late William H. Scott, and demanding a condemnation against them, in these qualities.

Vide, Schedules No. 18 et 21.—folios, 18 et 23.

IV POINT.

The status of the parties having been recognized by certain members of the family, can it be contested by the others?

The sisters of the Appellant Barbara and Jane have recognized the qualities of the Respondents, as representing the succession of their brother, in suing them to declare executory against them, a judgment which they had against his succession.

Now, according to Mr. Cochin, cited by the Respondents, 4th Vol. p. 597, cause 110, the *status*, condition of the parties being indivisible, cannot be recognized by certain members of the family and contested by the others. The gist of his proposition being, that when the status of a child is assured with respect to one part of the family, the other relatives cannot attack it.

If such be the law, two sisters out of three, having recognized the *status* of the Respondents, the third, the Appellant, is excluded from the right of contesting it to them: otherwise, the two sisters who have recognized the legitimacy of the Respondents, not being able longer to contest it, and with respect to them, the Respondents requiring in all respects whatever, to be regarded forever as legitimate; if we admit that after this the Appellant could contest, with success, this same legitimacy, this anomaly would result from this fact, that as to one portion of the same family, the Respondents would be legitimate, while, for the other, they would pass for and be treated as illegitimate. This discordance is neither just nor tolerable, and could not be legal; better to adopt the maxim of "Cochin when the *status* of a child is assured, with respect to one portion of the "family, the other relatives cannot attack it.

Cochin, Vol. 4. Cause 110, p. 597.

"Would the minor be recognized as capable with respect to one portion of "his family, and incapable with respect to another portion. The status of men "is indivisible; what they are constantly with regard to some, they are the "same, with regard to the others, and principally in the bosom of one and the same "family, it is not possible to conceive that a child is at once capable and inca-"pable of all successions, according to the different members of the family who "present themselves."

V POINT.

It is useless to enter into any details on this 5th question, namely, to know, whether, the ordinance of 1639, on which is founded the nullity of marriages contracted *in extremis*, was in France, and ought here, to be rigorously restricted within its strictest terms, and ought to be interpreted favourably to the validity of such marriages.

It is sufficient to refer to the long list of authorities, which are found in support of this proposition in the factum of the Respondents: authorities which leave no doubt on the subject.

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Journal du Palais. Vol. 1. p. 716.

"We may add that the ordinance of 1639, is a penal and new law. As a "penal law, it does not admit of extension; as a new law, its terms are not "favorable against the disposition of the old law."

Cochin Vol. 4. p. 207 and following.

On the spirit of the Article 6 of the ordinance of 1639 concerning marriages *extremis.*

"The true, the only case to apply the ordinance is when a man marries at a "time, when he feels himself dying, when the violence of the disease, and the "impotency of remedies, makes him feel that life is ready to depart, when he "does not longer count on any aid; *at the extremity of life*, that is to say when "the stroke of death ready to fall upon them is expected at any moment, and "they only unite themselves to those they marry with the view of being im- "mediately and for ever separated from them," which is by no means the case here.

"Unforeseen death does not render the marriage subject to the article 6 of the ordinance of 1639. (It was not expected by Dr. Jamieson that Scott would die of the disease he was suffering from. He expected he would recover.)

Page 200.

"No one dare maintain that if the husband came to die shortly after the "marriage by an unforeseen death, this accident would change the right ac- "quired to the wife and to the children by a solemn marriage.

Page 209.

Arrêt of 29th, March, 1599, confirming the marriage of a man who died the very day on which he caused himself to be carried to the church in order to receive the nuptial benediction.

In our case, the sole reason why Scott did not go to the Church, was that being a protestant, he would not go there, and thence the necessity of the marriage at his domicile.

Page 592, & 593. On the spirit of the ordinance.

1°. "It must be agreed that it is an entirely new disposition, and which had "not its foundation in any previous ordinance.

2°. "It is a penal law the rigour of which is extreme, seeing that both the "guilty and all his posterity are involved in the same penalty.

3°. "It would appear that the legislator only had in view, these shameful "alliances which cover families with disgrace."

Journal des Audiences. Vol. 3. Lib. 3. ch. 16, page 472. Col. 1st.

"We understand by these words, extremity of life (*extrémité de la vie,*) the "time when a sick man does not see hope of returning health. His time is so "near death, that we may say in a manner that the sick man ceases to live."

"*Arrêt* of 18th May, 1685. Marriage of Sieur Talon de Rouval with his "servant—made *in extremis*, declared valid with civil effects and collateral rela "tives declared not receivable to contest it."

Bourjon. Vol. 1, Note on No. 60, P. 14.

"Nevertheless a marriage contracted *in extremis* by a person who being in

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"full health and before his malady, had done what was in his power to contract "it, but was prevented by oppositions or other difficulties, would not be in the "case of being deprived of civil effects, thus decided by *arrêt* of the Parliament of Normandy 29th July, 1719, reported in the 6th volume of the Journal des Audiences."

Pothier. Vol. 3, Contract of Marriage, No. 432.

"Although the marriage was *in extremis*, if the person being in full health "had done what in his power to contract it, and had been prevented by the "obstacle which had been interposed, and by oppositions which had been made "from which he could not sooner obtain relief, such a marriage should not be "deprived of civil effects; no blame can be imputed to this individual, it cannot "be said that he waited till he was *in extremis*, in order to contract his "marriage; it is therefore not the case provided by the law."

This was very wisely adjudged by an *arrêt* of the Parliament of Normandy of 29th July, 1719.

Journal des Audiences. Vol. 6. Ch. 58, P. 474.

Arrêt of the 29th July, 1719, cited above by Bourjon and Pothier, dismissing the demand of the mother; marriage of the Sieur de la Varenne with Catherine Habert.

P. 475. "Where it is reported that the marriage was celebrated on the 27th "July at two o'clock after midnight, when Sieur de la Varenne accompanied "by the brother Cosme, Capuchin, his physician, was carried in a chair, agonized, "and reduced to such an extremity, that they were obliged to carry him back "to his bed before the ceremony was entirely completed; and the day after, "the 28th, the Sieur de la Vereune died without having received extreme unction."

Merlin. Cour de Cassation, Repertoire. Verbo. Mariage Vol. 19. Sec. 9. Art. 3.

Arrêt granting civil effects to the marriage of the Sieur Thomasseau with Anne Duval.

"Considering that the penal disposition pronounced by these laws against "marriages *in extremis* can evidently only be applied to the case in which the "parties have voluntarily waited in order to contract a marriage till the end of "their lives, and when it is recognized that they had not previously had the "same intention; but that we cannot without wounding at the same time justice, public interest and the *uniform jurisprudence* of the tribunals, apply the "rigour of these laws to the case where the parties, constantly *animated* by a "desire to be united by the ties of marriage, have been prevented by a *vis major*, "or *what is the same thing*, by obstacles which it was *morally* impossible for "them to surmount, until a period very near to the end of their life."

"Considering that in the present case, the Plaintiff in appeal, articulated and "alleged that similar obstacles had existed, and had alone prevented Anne "Duval and the Sieur Thomasseau from marrying before the 19th of May "1790, the evening before the death of the latter, circumstances the proof of "which had rendered without application, the general disposition of the laws "cited above."

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"That thus, in rejecting this proof, and in nevertheless applying the deprivation of civil effects to the marriage in question, the judges whose *arrêt* is attacked have displaced and falsely applied the ordinance of 1639 and the edict of 1697."

For these reasons, the Court quashes and annuls the Judgment (*arrêt*) rendered by the Court of Appeals of Bordeaux, the 20th prairial, year 9.

Bardet—Vol. 2,	page 111.,	chap. 46.	*Arrêt* of	30 December, 1632.
do	do	page 167., chap. 28.	*Arrêt* of	12 May, 1633.
do	do	page 325., chap. 10.	*Arrêt* of	4 March, 1636.
do	do	page 544., chap. 33.	*Arrêt* of	9 August, 1639.

These last judgments (*arrêts*) prove the spirit of the jurisprudence in relation to marriages *in extremis*, before the ordinance of 1639: an exceptional and new law and contrary to the Common and Ecclesiastic Law.

To sum up, we will say in the first place, with the Inferior Court, that on the *défense au fonds en fait* (general issue) the action of the Appellant ought to be dismissed, inasmuch as she has not succeeded in establishing the essential facts which she alleged in her declaration, namely, that at the time of the marriage, Scott did not enjoy his intellectual faculties, or that he was under the impression that he must die shortly, of the malady of which he was attacked. And moreover, we may add that even, if on this point, there might exist some doubt, the Appellant could not even succeed in her demand, for several, if not, for all the reasons asserted by the Respondents, in their exceptions, and stated above.

We are therefore of opinion that the judgment appealed from is correct and ought to be confirmed.

The observations which precede, and which are to be found on the foregoing pages, are those which have been made by the undersigned judges, and by them adopted as reasons of their judgment, when it was rendered in this cause.

Duval, J., concurred.

Meredith, J., fully concur in the foregoing observations, in so far as they relate to the matters put in issue by the declaration of the Plaintiff in the Court below; and being of opinion with Mr. Justice Duval, and Mr. Justice Caron, and the Judges in the Court below, that the Plaintiff had wholly failed to establish her case, I deemed unnecessary to consider the matters alleged, by way of exception, in the pleading of the Defendants.

Aylwin, J. dissentiens.

In reviewing this case, although the *fins de non recevoir* pleaded by the Respondents would seem to present themselves first to be disposed of, yet as the consideration of them involves questions connected with the merits, I shall depart from the usual order, and postponing them, and even the issues raised on the Declaration and the perpetual exceptions, I shall attach myself, first, to what, in my view, is the chief point to be determined. In fact, did any marriage take place between the late William Henry Scott and the Respondent Marie M. Paquet, to create a legal *vinculum* between them? If, indeed, the parties had admitted expressly, such a marriage in fact, and sought only to have its nullity pronounced, or its validity declared, the enquiry would have been much limited;

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but the Respondents have set up by their exception, "que le dit feu W. H. "Scott a enfin le 16 Décembre, 1851, dans la paroisse de St. Eustache, con-"tracté un mariage légitimement et légalement en présence d'un prêtre "Catholique bien et dûment autorisé à faire la célébration de ce mariage."

The Appellant has denied this by her general answer to the exception. The issue is *ne unques accouple en loyal matrimonie*. In the trial of this issue, regard must be had to the nature and description of the proof required by the law of Lower Canada. The Ordinance of Louis the 13th à Paris en Janvier, 1629, article 41, is to the following effect:—"Nous défendons à tous Juges "même à ceux de Cour d'Eglise de recevoir à l'avenir aucune preuve par "témoins et autres que par escript en fait de marriage fors et réservé entre "personnes de village, basse et ville condition. A la charge néanmoins que la "preuve n'en puisse être admise que des plus proches parens de l'une et l'autre "des parties et au nombre de six pour le moins." Conférence de Guenois, livre 5, tit. 2, Des mariages, vol. 1, pp. 705—6.

"La déposition du curé, ni celle des parens et des témoins ni de la vérité du "mariage, n'a pas même été jugée suffisante par l'Ordonnance de 1667, titre "20, art. 7, 9, 10, puis qu'elle a défendu précisement de recevoir la preuve des "mariages autrement que par un acte *de célébration*, signé du Curé et des "témoins à l'instant du mariage et inséré dans les régistres de la paroisse où "il a été contracté." Danty—Preuve par témoin, p. 97.

"En un mot depuis le Concile de Trente et l'Ordonnance de Blois, (Henri 3, anno 1519, article 40), on ne reconnoist plus en France les mariages présumés "et ainsi la preuve par témoins n'en peut jamais être admise, parcequ'elle "serait inutile," loco citato.

In proof of the solemnisation or "*célébration*" relied upon by them, the Respondents have produced the following extrait du régistre des baptêmes, mariages et sépultures de la Paroisse de St. Eustache, District et Diocèse de Montréal, pour l'année 1851, and no other *preuve par écrit* or documentary evidence:

"Aujourd'hui, le seize de Décembre, mil huit cent cinquante et un, vû la "dispense de toute publication de mariage, ainsi que celle du temps prohibé "par l'église, accordée par Mgr. Ignace Bourget, Evêque de Montréal, comme il appert par sa lettre en date de ce jour, nous prêtre vicaire soussigné, autorisé "à cet effet, avons assisté comme témoin au consentement de mariage donné "et reçu par William Henry Scott, Ecuyer, marchand, domicilié en cette pa-"roisse, fils maj. du défunct William Scott et de défuncte Catherine Ferguson, "de Montréal, d'une part, et Dame Marie Marguerite Maurice Paquet, aussi "domiciliée en cette paroisse, fille majeure de Joseph Maurice Paquet, décédé, "et de Marie Marguerite Ignace Paquet, d'autre part, et ce en présence de MM. "Jean Baptiste Archambault, Ecuyer, Notaire Public, et Grégoire Féré, Ecuyer, "lesquels ainsi que les parties contractants ont signé avec nous, et ce après "avoir obtenu de la partie Protestante ce qui est exigé de la Cour de Rome en "pareille circonstance.

"Les dits époux reconnaissent par le présent acte, pour leurs enfants légitimes

"Henry William, âgé de vingt ans; Nicolas, âgé de dix-sept ans; Caroline, "âgée de quinze ans; James, âgé de quatorze ans; et François Henry, âgé de "douze ans, qui ont été baptisés à l'Eglise Catholique de St. Eustache, excepté "Nicolas dans celle de St. Rose."

(Signé,) MARIE MARGUERITE MAURICE PAQUET.
W. H. SCOTT,
GREGOIRE FÉRÉ.
J. B. ARCHAMBAULT.

F. ANCÉ, Prêtre Vicaire.

This certificate asserts a special power or authority to act, given not to the *Curé* or Rector, but his *Vicaire* or Curate. It is to be presumed that the thing done was according to the power given. Now what was done? Avons assisté *comme témoin au consentement du mariage donné et reçu, etc.; et ce après avoir obtenu de la partie Protestante ce qu'est exigé par la Cour de Rome en pareille circonstance.* F. Ancé, being the Curate of the Rector of St. Eustache, attends as a witness of the consent to marry, given and received. There were also present Jean Bte. Archambault and Grégoire Féré, two laymen. What is there to distinguish their presence or their testimony from that of Mr. Ancé? Nothing, except that they state no authority for their presence, whereas Mr. Ancé professes to require an authority to *assisté comme témoin*, and to act under it. Where is the law under which the testimony of Mr. Ancé is admissible in proof not of a marriage *célébré* or solemnized, but of *consentement de mariage donné et reçu?*

We have seen the prohibition of *la preuve par témoins*, of *célébration*, by the legislative power of the King of France, *même à ceux de Cour d'Eglise.* Let it now be ascertained whether a *consentement de mariage* may be thus evidenced.

"3. *Les promesses de mariage* par paroles de présent qui étaient autrefois "regardée comme un mariage commencé, comme il a déjà été observé ne sont "plus permises, et l'article 44 de l'Ordonnance de Blois, défend même aux "Notaires d'en recevoir les actes; ainsi la preuve en serait inutile." Danty, page 103.

"Les promesses de mariage se font *per verba de præsenti, aut per verba de* "*futuro*; que l'Ordonnance dit par paroles de présent, ou par paroles de futur. "Celles qui se font par paroles de futur ont accoutumé de se faire pardevant "les Notaires et Tabellions, s'il s'en passe contract, ou en présence de parens "ou amis. Celles qui se font par paroles de présent, se font ou doivent faire "en face de Saint Eglise ès mains du Prêtre ou de celui qui vacque au minis- "tère."

1 Guenois 706, note 13, sur l'article 44 de l'Ordonnance de Blois.

The certificate of Mr. Ancé does not state any consent *in facie ecclesiæ*, or any clerical act done by him. The Ordonnance de Louis 13 à St. Germain en Laye, le 26 Novembre, 1639, 1 Guenois, p. 707, article 1 prescribes "qu'à la "célébration du mariage assisteront quatre témoins digne de foi, outre le Curé, "qui recevra le consentement des parties, *et les conjoindra en mariage* suivant la "forme pratiquée en l'Eglise."

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With reference to the Curé, Danty says, page 102: "Il est donc constant "suivant l'opinion commune de l'Ecole, que le Curé n'est que le témoin néces-"saire du mariage, *Ut conventio partium habeatur pro legitimo contractu, et* "*sufficiente ad rationem sacramenti*; ainsi qu'en parle Cabassutius: *In Theoria* "*Jur. Canon*, l. 7, ch. 17, sur quoi Fra. Paolo en son histoire du Concile de "Trente, l. 8, a remarqué que le Concile de Trente en ordonnant la présence "du propre Curé, a changé un point déjà établi; Savoir, que tout mariage fait "en présence de trois témoins étoit bon et qu'au lieu de l'un des témoins il a "substitué le Curé."

The *Vicaire*, acting in the ordinary course for the *Curé*, is to be considered as the Curé. For what purpose? *pour recevoir le consentement et conjoindre en mariage.*

"Cette présence du Curé requise par nos lois pour la validité des mariages, "n'est pas une présence purement passive; c'est *un fait et un ministère du* "*Curé*, qui doit recevoir le consentement des parties, et leur donner la bénédic-"tion nuptiale."

Pothier du mariage, part 4, chap. 1, sec. 3, art. 1, § 5, No. 350.

The definition of marriage by Modestinus is *nuptiæ sunt "conjunctio" maris et feminæ, consortium omnis vitæ, divini et humani juris communicatio.* Dig. 23, 2, 1, de ritu nuptiarum.

"On peut définir le mariage (says Pothier), un contrat revêtu des formes "prescrites par les lois, par lequel un homme et une femme habiles à faire "ensemble ce contrat, s'engagent réciproquement l'un envers l'autre à demeurer "toute leur vie ensemble dans l'union qui doit être entre un époux et une "épouse."

"Il suit de cette définition, qu'un mariage où l'on n'aurait pas observé quel-"qu'une des formalités que les lois requièrent pour sa validité ou qui aurait été "conteacté entre des perrsonnes que les lois rendent inhabiles n'est pas un véri "table mariage."

Mariage, partie 1, chap. 1, No. 3.

It is evident from the form of the certificate, that the old pretensions of the Canonists and of the Schoolmen are now attempted to be revived in Lower Canada, contrary to law. The doctrine is again asserted "que les parties con-"tractantes sont elles mêmes les ministres du Sacrement, et qu'elles se l'admi-"nistrent l'une à l'autre par leur mutuel consentement; ils ajoutent qu'elle "n'est pas essentiellement nécessaire pour la validité du mariage, et que le Curé "n'est que le témoin nécessaire, sans la présence duquel le mariage est déclaré "nul, parcequ'il est réputé clandestin suivent le Concile de Trente, Session 24, "et l'art. 40, de l'Ordonnance de Blois, et cette opinion est reçue communé-"ment dans l'Ecole."

Danty, p. 101.

But the Priest must officiate as the officer of the law, and perform what the law requires. He must be active, not passive, or his presence is worthless. He must be present, 1o. pour recevoir le consentement; 2o. donner la bénédiction nuptiale. "Dans les rituels anciens il disait: *Ego tanquam Dei et Ecclesiæ* "*minister vos conjungo.*"

Mémoire à la fin du 57 Plaidoyer de D'Aguesseau, vol. 5, p. 166, note (a.)

"Parmi les nombreuses formules ecclésiastiques, (says Michelet, in his ori- "gines du Droit Français, page 33, 34), nous donnerons de préférence celles "qui appartiennent aux rituels de nos Eglises de France."

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"Rituel de Rouen. Nous avons fait les bans en cette Sainte Eglise, par trois "dimanches continues, entre tel N. d'une part, et tel N. d'autre part, et n'y "avons trouvé nul empêchement pourquoi le mariage ne doye bien et loyalle- "ment assembler; encore de rechief nous les faisons première fois, seconde fois, "tiers fois et quatré fois d'abondant. S'il y a aucun ou aucune qui y sache "empêchement par quoi le mariage ne se doye assembler, si le die. Car, qui "maintenant s'en taira et après en parlera, on le dénonchera excommunée. "(Personne n'empêchant, le prêtre dit à l'époux): N. veux-tu avoir N. à femme "et épouse, et la garder saine et enferme, et lui faire loyale partie de ton corps "et de tes biens; ne pour pire, ne pour meilleure tu ne la changeras tous le "temps de sa vie. Alors l'époux répond: Oui. Que lui baille-tu? Ma foy."

"Rituel d'Amiens: Le jour des noces, à la porte de l'Eglise, le prêtre dit: "Bonnes gens, nous sommes ici assemblés pour faire le mariage de N. et N. "dont avons fait les bans * * * Pourquoy s'il y a nul qui y sache aucun "empêchement * * * si le die présentement si haut, que on l'oye sur "peine d'excommuniment. Le prêtre demande: luy fut-elle oncques donnée. "R. Ouy, ou nenny. Donnez lui. Or le me rendez. Comme avez à nom? "N. Et vous, comment? N. Jean, voulez-vous cette femme, qui a nom Marie "pour nom de baptesme, à femme et à esponse? Sire, ouy. Marie, voulez-vous "cet homme, qui à nom N. par nom de baptesme, à mary et à épouse? Sire, "ouy. Jean, je vous donne Marie; Marie, je vous donne Jean.

"Dans le rituel de l'Eglise de Reims (1585) on lit: le Prêtre qui doit bénir "l'anneau, demande treize deniers qu'il reçoit du consentement mutuel des deux "époux; le fiancé prend ensuite l'anneau et trois deniers (les dix autres étant "réservés pour le prêtre); et par la main du prêtre il place cet anneau au qua- "trième doigt de la main de la fiancée, en disant après le prêtre: N. Je vous "épouse; sur le doigt du milieu et l'annulaire, auquel il passe l'anneau; et de "mon cœur je vous honore. Posant alors les trois deniers dans la main droite "ou dans la bourse de l'épousée, il ajoute: et de mes biens je vous doue."

M. l'Avocat Général de Lamoignon says, in the 1er Journal du Palais, p. 31, arrêt du 5 Février, 1675: "Quelques solemnités que la Concile de "Trente, ait établies pour la validité du mariage, on prétend qu'il ne demande "que la présence du propre curé; et l'on veut en induire que son *ministère* "*n'est pas nécessaire*, parceque lorsque le même Concile parle du Sacrement de "Confirmation, et de l'Ordre, il ne dit pas qu'il sera conféré, *presente Episcopo*; "mais que ce sera l'Evêque qu'en *sera le ministre*.

"Toutefois quelle apparence y a-t-il que cette présence du propre Curé, qui "est si *essentielle* à la validité du mariage, soit *une présence muette sans aucune* "*fonction ni ministère?* Ne peut-on pas soutenir que ce Concile a été d'un "autre sentiment puis que lorsqu'il prescrit la forme du mariage, il veut que le "Curé se serve de ces termes. "*Ego vos conjungo*," pour marquer que c'est lui

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" qui est le ministre de ce sacrement et qui l'applique aux parties, lorsqu'il voit
" qu'elles ont *toutes les dispositions nécessaires*, qui consistent *dans le consente-*
" *ment mutuel de l'un et de l'autre.*"

" Si nullum legitimum opponatur impedimentum, ad celebrationem matrimo-
" nii in facie Ecclesiæ procedatur. Ubi parochus *viro et muliere interrogatis* et
" eorum mutuo consensu intellecto, vel dicat, *Ego vos in matrimonium conjungo*,
" in nomine Patris, etc., vel *aliis utatur verbis juxta* receptum uniuscujusque.
" Provinciæ ritum. Posthæc præmissa monitione de indissolubili, matrimo-
" nii vinculo moneat primo sponsum est secum et intelligibiliter pronuntiet for-
" mam contractus matrimonia alis; sive verba distincte consensum matrimoni
" alem exprimentia, quibus pronuntiatis, eadem proponit sponae pronuntianda,
" ac dein [illegible], sic utrin que fide dicat Sacerdos.—Concil Trident, sess. 24, de
" reformat, cap. 1; et Ego tanquam Dei, minister, vos in matrimonium conjun-
" go, in nomine, etc. Van Espen, Juris. Eccles.: Pars. 2, cap. 6, No. 7; vol. 1,
" [illegible] Edit. Colon. Agrip., anno 1720."

" [illegible]et, dans son recueil d'arrêt, Lett. M. chap. 26, nous apprend, que
" [illegible] l'Ordonnance de Blois, on ne reçoit plus *d'autre preuve de mariage* que
" celle qui résulte de la bénédiction nuptiale; il rapporte un arrêt de l'année
" 1606, qui l'a ainsi jugé. *Novâ quadam jurisprudentiâ cap. veniens et cap. is*
" *qui fidem de sponsalibus apud Gregorium, non amplius observantur in hoc*
" *Regno, sed Regiâ constitutione Blesensi, art.* 40, *matrimonia ex carnali copulâ*
" *non præsumuntur, sed benedictione sacerdotali probantur et sic judicavit Sena-*
" *tus Paris.* Arrêts d'Augeard, vol 1, page 216. Arrêt du 12 Mars, 1693.
" Il subsiste *quoad fœdus et sacramentum* quoiqu'il ne produise pas d'effets
" civils."

" Ceux qui croient que le prêtre est le ministre du sacrement sont d'un senti-
" ment contraire; ils estiment que les mariages sans la bénédiction du prêtre
" *sont absolument nuls* et l'on verra ci-dessous *que les Parlemens suivent cette*
" *règle.* Cependant quant au for de la conscience, l'Eglise ne s'est pas encore
" expliquée sur la validité de ces mariages."

Durand de Maillanne, Dictionnaire Canon. Voce Clandestin, vol. 1, p. 523; edit. in quarto. Lyons, 1770.

" La présence du Curé, qui est requis par les Ordonnances et par le Concile
" de trente pour la validité des mariages n'est point une simple *présence corpo-*
" *relle*, qui pourrait être forcée et involontaire; mais elle doit être accompagnée
" de la part du Curé d'un *acquiescement et de l'approbation donné au nom de*
" *l'Eglise au consentement respectif des parties*, et de *la bénédiction nuptiale*,
" Arrêt de 1676. Les termes du Concile et de l'Ordonnance marquent une
" présence volontaire du Curé. En effet ces lois portent que le Curé *recevra* le
" consentement des parties et qu'il leur donnera la bénédiction nuptiale suivant
" l'usage de l'Eglise."

De Hericourt, Loix Eccles. chap. 5, art. 1, No. 27, p. 474 et notes.

Quoique le même chapitre premier du Concile de Trente requière la bénédiction du Curé avec les paroles qu'il rapporte, ou autres, suivant l'usage de chaque Province, il ne résulte point un empêchement diri-

mant de l'omission qui en serait faite; en effet, les Canonistes Romains dit Fagnan, ne croyent pas qu'il soit nécessaire que *le Curé parle* en mariant, parcequ'un temoin peut être temoin d'un fait, quoiqu'il garde le silence. 4. En France, *les Ordonnances et la jurisprudence des Arrêts ont adopté cet empêchement dirimant*, établi par le Concile de Trente, pour empêcher les mariages clandestins, et ont même été plus loin; en voici les dispositions. Article 40, Ordonnance de Blois. Lacombe: Jurisprudence Canonique. *Voce* empêchement article 1, No. 3 et 4, p. 280.

"Ce que nous avons dit, que le Prêtre qui célèbre le mariage, n'est pas un simple temoin, et qu'il y exerce un ministère, n'est pas contraire à ce qu' enseignent les Théologiens que les parties qui contractent mariage, sont elles mêmes les ministres du Sacrement de mariage. Il est vrai qu'ils en sont les ministres quant à ce qui est de sa substance et qu'elles se l'administrent réciproquement par leur consentement et la déclaration extérieur qu'elles se font de ce consentement; mais le Prêtre est, de son côté, le ministre des solemnités que l'Eglise et le Prince ont jugé à propos d'ajouter au mariage pour sa validité, et il est proposé par l'Eglise et par le Prince, pour exercer ce ministère.

Pothier du contrat de mariage partie 4, cap. 1, sect. 3, art. 1, par. 5, No. 353, vol. 3, p. 293, 1st edition 1781.

The Parish Registers of Lower Canada, both in the French times and since the Conquest, have been carefully kept, and furnish valuable materials for our past history. The forms generally used in the entry of marriages are "avec les cérémonies prescrites nous Prêtre, Curé (or Vicaire as the case may be) avons reçu leur mutuel consentement," or "ai reçu leur mutéel consentement de mariage et leur ai donné la bénédiction nuptiale, suivant la formule prescrite." In the present case, there is no acceptance by the Priest of the plighted faith of the parties. No conjunctio in matrimonium. No benediction nuptiale. No Priestly act whatever. No official act as a public functionary, preposé par le Prince. In the absence of all this, it is carefully recorded "ce après avoir obtenu de la partie Protestante ce qui est exigé par la Cour de Rome, en pareille circonstance." What this may be, is not stated; but most certainly, the certificate and entry are not improved by the addition. The French Kings kept a watchful eye over the encroachments of the Court of Rome upon their temporal authority: les libertés de l'Eglise Gallicane, were in full force, at the period of the Conquest of Canada, they are a portion of our Municipal Law in Lower Canada, secured to us by the Treaty of Peace, and the cession of the country to Great Britain as well as by the Quebec Act. The legislative power of the See of Rome, no more can be recognized now than it would have been in France prior to 1759, or it would be at this hour. Whatever then Mr Ancé may have obtained, it was not obtained in the discharge of his duty under the law of the land, and is therefore to be utterly disregarded, in pronouncing upon the validity of his certificate and entry. Mr. Ancé had also been examined on the part of the Respondents, as a witness in this cause, to prove the celebration of a marriage. His testimony was objected to, and the objection was reserved for the final hearing, or taken *de bene esse*. As the Judgment of

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the Court below proceeded upon the ground *actore non probante reus absolvitur*, no ruling was made upon the objection. It is manifest, however, that this evidence was received in gross violation of the Ordonnance de Moulins, and that it is inadmissible, being outre le contenu d'un ecrit, as well as forbidden by the Ordonnances already referred to. The evidence of this witness will require comment hereafter; but with reference to the celebration in fact of any marriage, it may be adverted to now as exhibiting the legal view entertained by the Priest on the subject of marriage. It appears that he undertook to administer an oath to Mr. Scott, "qui consistait dans l'engagement de laisser son epouse exercer librement sa religion et la promesse de laisser elever les enfans dans la Religion Catholique. The witness says that after this, "Je procédai à la célbration du mariage en présence de deux témoins, Monsieur J. Bte. Archambault, Notaire, &c. Monsieur Scott *declara alors qu'il prenait Dame Marie Marguerite Maurice Paquet, pour sa femme et legitime epouse, et cette dernier fit, aussi la même declaration en nommant Mr. Scott.* Dans la celebration d'un mariage entre Catholique et Protestant, *le Prêtre assiste comme temoin des declarations des parties qui declarent se prendre comme epoux et epouse.* Monsieur Scott, etait *assis sur son lit les jambes pendantes hors du lit conversant avec nous.*" The witness very gravely then says, "Je crois bien que la *ceremonie* a duré un heure ou deux. En y comprenant le tems qu'il a falloir pour redaction du contrat de mariage dont on l'a fait preceder et au quel j'ai signé comme temoin. In another part of his deposition, he says, "Je considerai que de proceder *à la celebration du mariage de Mr. Scott était un acle très important et très solemnel.* The words *ceremonie, celebration,* and *très solemnel,* are most singularly perverted when applied to the description of such a scene as that just depicted by the witness:—a sick man, with his legs dangling out of his bed, conversant avec nous; et declarant qu'il prenait Dame M. M. Paquet, pour sa femme et legitime epouse. Let us compare this *celebration* with the requirements of the declaration of King Louis XIII., à St. Germain en Laye, le 26 Novembre, 1639: "Comme les mariages sont le Seminaire des Etats, la source et l'origine de la société civile et le fondement des familles, qui composent les Republiques, qui servent de principe à former leurs polices, et dans les quelles la naturelle reverence des enfans envers leurs parens, est le lien de legitime obeissance des sujets enver leur Souverain; aussi les Roys nos predecesseurs, ont jugé digne de leur soin, de faire, des loix de leur ordre public, de leur decence exterieure, de leur honnesteté, et de leur dignité. A cet effet ils ont voulu que les mariages fussent *publiquement célebrés en face de l'Eglise avec toutes les justes solemnitéz et les ceremonies qui ont été prescrites comme essentielles* par les Saints Conciles, et par eux declarées, *etre non seulement de la necessité du precepte, mais encore de la necessité du sacrement.*"—Guenois I., p. 707.

I have come to the conclusion that neither the certificate and entry in the Parish Register, nor the evidence of Mr. Aucé, prove a marriage in fact between these parties. That there never has been a conjunctio in matrimonium by an authorized Minister, as required by law, and that no legal vinculum ever

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subsisted between them. On this ground alone, I would be prepared to reverse the Judgment of the Court below, over-ruling the Respondent's exception of a marriage duly celebrated, and to pronounce for the nullity as prayed for by the Appellant in her Declaration.

The question which I purpose to take up next, is that raised by the Declaration, that, on or about the 15th day of December, 1851, the deceased W. H. Scott "became delirious, and so continued up to the time of his decease; that he was quite incapable of entering into any contract, or granting any consent whatever," at the time of the supposed marriage between him and Dame Paquet. William H. Scott died on the 18th December, 1851, at the age of 52 years and 11 months, having been born on the 13th of January, 1799. He died after the voting for the return of a Member of Parliament for his County had ceased, and before the proclamation of the Member elected. He was the successful candidate, being re-elected. He was not a man of temperate habits, but, on the contrary, addicted to liquor. He kept a shop in the Village of St. Eustache, in a house in which he resided with one of his sisters. In another house in the same Village, but on the other side of the river, Marie Marguerite Maurice Paquet, one of the Respondents, resided, with her two youngest children, one of whom was idiotic and a cripple. An illegitimate connection had existed between her and Scott for many years, the fruit of which was the birth of five children, four boys and one girl. The eldest boy born in the month of May, 1831, baptized on the 25th September, 1831, as "Henri né il y a quatre mois en cette peroisse, de parens in connus," lived with his father as his clerk; the girl, Caroline by name, was taken from the mother, sent to the Appellant, her Aunt, residing in Montreal, as soon as she began to speak, and was educated by her, and resided with her until after the death of her father, she was married to Dr. Alfred Nelson, one of the Respondents. The deceased, her father, was called in the Aunt's family, her uncle William. The boys were brought up as Roman Catholics, and attended the Church services, sitting in the same pew with their mother. The daughter, it is to be necessarily inferred, though not directly proved, was educated as a Protestant in the faith of her father. William H. Scott was in the habit of from time to time of visiting the Respondent Paquet at her residence, and their connection was notorious and matter of scandal in the Parish. On the 15th December, 1851, Scott who had burned his face, as was supposed by comsng into contact with a heated stove, and who was under medical treatment, left his usual residence, in a state of great agitation, in spite of his sister's remonstrances. He was not shod as usual; his limbs bent under him, and he was supported until he reached the residence of the Respondent, Paquet. He had been drinking during the election, but for three days previously to his leaving his house, he had not drunk. On reaching the house of Paquet he lies down on a bed, and every description given of him by all the witnesses examined, connect him with this bed till his death. His family physician was Dr. Benjamin R[illegible]lly Jameson, who says, that in the afternoon of the 15th December, he was called to see him at the place where he kept his store; he was shewn to him by one of the Misses

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Scott, his sister. The late Mr. Scott was in a state of great mental perturbation. His face was considerably swollen and large vesication was seated on the frontal region; other small vesications and slight abrasures occupied portion of his face. His tongue was much furred. He was laboring under erysipalitous inflammation. Dr. Jamieson prescribed for him, and left instructions with Miss Scott to keep a very brisk action on his bowels, by means of the black draught, a medicine. Some short time after this visit, the Doctor received a note from Mr. Scott, himself, expressing surprise at not receiving pills he had promised to send over. The note must have been written under the *influence of great agitation or excitement*, as well from the character of the handwriting as from the nature of the request, the Doctor being convinced that he must have received the pills before that time. Dr. Jamieson then concluded as to the real nature of his disease in connection with the local affection of his face, that Scott was booked for *delirium tremens.* He hurried off immediately to see him, and met him on the threshold of his door going out into the street, asked him where he was going, but could get nothing in the shape of a distinct or connected narrative, he spoke incoherently, and peremptorily, refusing to yield to a suggestion to go back. The necessity of returning to the house in the state he then was, was urged upon him. *His thoughts were full of anxiety, distress and suspicion; he even seemed suspicious of the Doctor,* and indifferent to his offers of assistance to convey him where he was going, which the Doctor endeavoured to do seeing that he could not get him to turn back. Physical force was n[illegible]ted to, as in such cases it only makes the patient worse. The physic[illegible]ot consider him in a fit state to leave the house at that time, and w[illegible]edly rather that he had remained, because *a universal tremor occupied [illegible]ole muscular system, his movements were performed with anxiety, rapidity and imperfectly, in short, he manifested the whole train of symptoms characteristic of delirium tremens,* setting in with unusual intensity. Dr. Jamieson was perfectly satisfied that *he did not know what he was doing, he seemed to be impelled by an instinct of where he was going, the instinct that animates persons labouring under delirium tremens.* To use the words of Dr. Jamieson, as found in his deposition in the record: I do not say as a positive fact that I knew the secret workings of his mind, but I drew this conclusion from his refusal to listen to my representations as to the injury to which he was exposing himself, coupled with the manifestations of symptoms of delirium tremens. He stumbled a number of times, but by my assistance he was kept from falling entirely. He went to the house of the defendant Dame Marie Marguerite Maurice Paquet. I remained there a very short time. His appearance threw the inmates of the house into a state of alarm and surprise. The defendant in particular seemed to yield very largely to her feelings and seemed overwhelmed with painful emotions. I have no positive recollection of who were present at the time besides the defendant Miss Paquet. They immediately made preparation to make him comfortable; I left some instructions and took my leave with a view of devising a mode of treatment appropriated to the peculiar exigency of his case, because it was complicated

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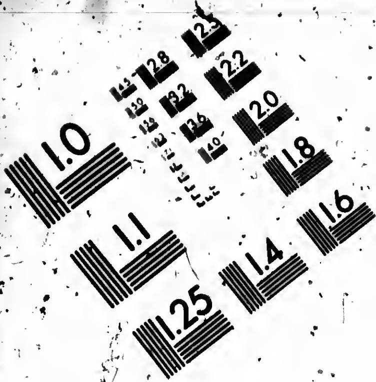
and required a combined or modified mode of treatment. I returned very shortly after, the same evening, and it strikes me I remained there the greater part of the night. I cannot say whether I remained the whole of that night. I know that I was there the whole of the night of the seventeenth. As far as my recollection serves me, I remained the greater part of the nights during all the time he was ill, to the best of my recollection I very [illegible] left him for any great length of time, either by day or night duri[illegible] the nature of the treatment I adopted, I did not expect [illegible] of his mental faculties until the arrival of the period ne[illegible] a course of medicines appropriate for delirium tremens. [illegible] to overcome by preliminary treatment, the inflammatory c[illegible] face, before employing hypnotics and stimulants, necessary to [illegible] delirium tremens; and that period may have been from twenty-four, forty-eight, or seventy-two hours, according to the circumstances. The more aggravated the complication of the disease, the more time it would be likely to take. During the whole of the night of the fifteenth, he was labouring under a state of mental hallucination. At one time he was defending his mother from imaginary imputation of slander, at another time devising means of escape from supposed premeditated attacks of imaginary enemies. He smoked occasionally. I endeavoured to engage his mind in conversation on the subject of the election which was then in progress. He would at times answer a question rationally, but without continuity, and would immediately wander off on the subject of his delirium. This is the character of delirium tremens; there is a gleam of intelligence in the midst of the wreck of the faculties of the mind, and I found it to be so in his case. There was a peculiar aggravation of the mental aberration of Mr. Scott on the night of the sixteenth; and generally there was no marked improvement in his mental capacities up to the time when he awoke from his sleep, some hours before his decease on the eighteenth. As far as my recollection serves me, three nights passed after he entered the defendant Miss Paquet's house, and before he died, and to the best of my recollection these were the nights of the fifteenth, sixteenth and the seventeenth; although I am not positive as to the days of the month, I am pretty certain as to the number of nights. I noted the number of nights from particular circumstances transpiring each day or night. On the evening preceding the arrival of Dr. Fisher, which I suppose to have been the sixteenth, the notary and priest were present. On the afternoon of the following day, which I take to have been the seventeenth, Dr. Fisher made his first visit. On the evening of the next day Mr. Scott died. It was not until late on the night of the seventeenth, that the deceased procured what may be said to have been his first sleep. Previous to this time he may have dozed for a short time, or have been made to remain in a state of quietude, but he could not have had any sound sleep, as he was not under treatment for delirium tremens, but for the alleviation of the inflammatory state of the face, that required a preliminary antiphlogistic treatment, and that of a modified kind. On the morning of the seventeenth, the defendant Miss Paquet enquired of me as to the state of



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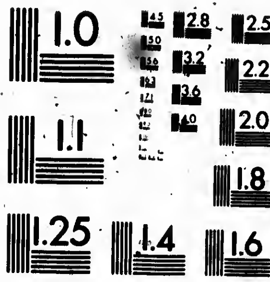
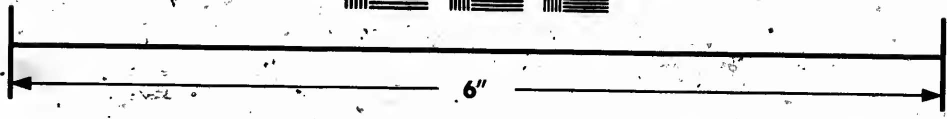
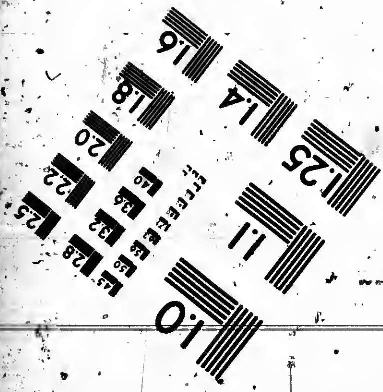
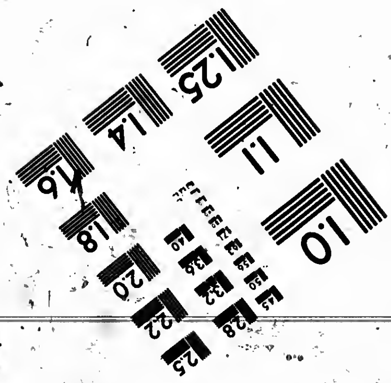

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the late Mr. Scott; I informed her that he was in a dangerous condition, and she appeared surprised that deceased was at all connected with danger, and it appears that she sent for Dr. Fisher without giving me any intimation of it. Dr. Fisher called with me in the afternoon of that day; we visited Mr. Scott together, and consulted as to the mode of treatment to be adopted. He afterwards called at Mr. Scott's house on the eighteenth, while I was in attendance; his second visit was made at my urgent suggestion, in consequence of my having anticipated a fatal termination of the case from the obstruction interposed by the defendant Paquet exercising the privilege and prerogative of a wife, and preventing me from employing the remedies which I considered necessary for such a case; this occurred on the eighteenth. After his sleep Mr. Scott got up appearing to be perfectly well, both bodily and mentally; he sat upon the edge of the bed and exclaimed while rubbing his eyes: Dr. what has brought you here, have I been sick? This was the period in my opinion, to have administered stimulants, to prolong the convalescence, and I had given him about an ounce and a half of brandy. Seeing that it had but a slight effect I endeavoured to repeat it, but was opposed by Miss Paquet. I then urged the necessity of her immediately calling in another medical man, to relieve me from the responsibility of the case, and Dr. Fisher was sent for. I then represented to her the danger of even waiting for the arrival of Dr. Fisher, and urged upon her to send for Dr. Dorion who was near at hand, stating at the time if Dr. Fisher was present, he would throw in brandy both by the mouth and by the rectum, as the patient was rapidly passing into the state of collapse. Dr. Dorion arrived; in the meantime Mr. Scott continued to sink rapidly. What we supposed to be effusion was going on in the brain. I gave Dr. Dorion a short exposition of my views relative to the disease and the treatment adopted, stating as my conviction at the same time, that the patient would succumb very rapidly, if stimulants were not largely and freely administered. Dr. Dorion shrugged his shoulders, went into the anti-room and smoked his pipe, telling me to do as I liked, that they had, (speaking of the defendants and her relatives,) a prejudice against brandy, and to administer something in place of it. I waited anxiously for the arrival of Dr. Fisher, as Dr. Dorion would not assume any share of responsibility in the treatment of the case. Mr. Scott was just dying or had just died when Dr. Fisher arrived; the roads being bad and he residing at a distance. My treatment had been interfered with very slightly on the sixteenth, but by persuasion of Dr. Fisher, I was allowed to go on, on the seventeenth; otherwise he would have been left in the undisturbed management of the case himself. At that time, he agreed with me as to the treatment. Although the disease from the first night, might have been considered one from which Mr. Scott might or might not have recovered, still it was of a highly dangerous character, but not necessarily fatal, being a disease from which it was quite possible death would not result. In fact I consider persons in that disease, aggravated as it was, their life hangs upon a thread, although from our mode of treatment, adopted since eighteen hundred and thirteen, we witness a great

many recoveries, and a nnmber of deaths, but a larger number of recoveries than deaths, although persons subject to it, if they recover once or twice are generally carried off in the end. I do not mean to state that Mr. Scott would certainly have recovered, even by the administration of the stimulants which I wished to give him, viz. the brandy, otherwise I would have poured it into him in spite of all opposition. During the time the delirium continued, from the commencement of the disease up to the time he awoke from his sleep, on the afternoon of the eighteenth, his actions and conduct were diametrically opposed to those of a person in the enjoyment of his sound senses. His imagination was morbidly excited. At one time he would crouch under the bed clothes to screen himself from imaginary enemies, and at another, he would put on his clothes to go out and address electors; on one occasion in particular, in spite of all our endeavours to the contrary, he dressed very late at night, muffled himself well up because such patients are very particular about the state of their feelings. Fearing that any degree of physical coercion would only exasperate him, I determined to leave him to his inclinations, as his project was neither dangerous to himself nor to others. He went to the church door in the village, and I went with him, his eldest son William accompanying us. When he reached there, he imagined that the conspirators were flying before him in all directions, pointing out to us the direction in which they were running; of course he merely pointed to where there was nothing at all. He changed his mind, became satisfied that the conspirators had dispersed and we got him back to the house. This must have been near midnight, perhaps past it; the villagers were all in bed. This occurred, as well as I can recollect, on the first or the second night of his illness. He continued during the whole of the time up to the period when he awoke from his sleep, to manifest a condition of mental aberration, and to commit extravagances such as I have mentioned, always excepting momentary intervals of apparent lucidity. This is the character of the disease; in the height of their delirium, patients will answer questions rationally and pertinently, and immediately after concentrating their thoughts upon the creations of their imagination. On the night of the sixteenth, after the notary and priest had gone out, he answered rationally a question put to him by me. The question was put through the defendant Miss Paquet, and I then entered the room myself; and he was sitting on the edge of the bed; when he commenced a disconnected and verbose statement of private affairs. I attempted to throw his thoughts into other channels, knowing that under circumstances, he would not have made such communications to me; observing through the course of his narrative: What could I do? I was in a scrape; and imagining his brother James in person before him although he was not there at all. He appeared to writhe most painfully under the imaginary reproaches of his brother James, saying, dear James, do not reproach me for I was in a scrape. The imaginary reproaches seemed to him exceedingly painful. By imperceptible degrees he continued to become more violent and intractable in his motions and language; a minute afterwards he fancied he saw a body of armed men trying to break the window. He rose up with a good deal of impetuosity and determi-

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nation to oppose their entry, but he soon yielded to a sense of fear, cowardice being a prominent feature of the disease, and suffered insupportable apprehensions of impending dangers; then followed upon this the steamboat conspiracy. He imagined himself a-board of a steamboat, that he was enveloped in a mist of fresh conspiracies. To see to what extent fear operated upon his mental faculties, I asked how much he would give to get clear of these conspirators; he stated that he would give a large sum of money, stating in what bank it was deposited and instructed his son William to touch said sum of money, and pay it the conspirators.

On the second day of my attendance on the late Mr. Scott, I attended during the greater part of the day, and left to dine at my boarding house about half-past one or two. When I returned it was towards evening; the days being short, the candles were lighted; I had been absent two or three hours more or less. On my return I found his private room viz. his bed room occupied by sundry persons. I refused to intrude into the room at that particular moment, that is, I declined to enter the room, from my own movement or sense of delicacy. Very few minutes afterwards, the parties made preparations to leave. I recognized the voice of Messire Ancé, the priest, of Mr. Archambault, the notary, and one Mr. Féré, passing congratulations on what had taken place. I anticipated that something important had been transacted, and put a question to Mr. Scott through the defendant Miss Paquet before I entered the room. The question that I put was to ask who was the physician that attended him, and he replied that it was Dr. Jameison; I heard the reply myself. This was the question that I have referred to as having been answered rationally and pertinently by Mr. Scott. I then entered the room immediately, with the view of ascertaining the precise state of his mind, and found him *in statu quo*, that is in the state I had left him or rather worse from the appearance of his tongue. There was a marked diminution in the inflammatory condition of the fa[illegible] a progress of development of that irritation of the brain peculiar to [illegible]*um tremens*. He was more violent and had less control of his mental faculties. It was at this time that he commenced the disjointed statement of his private affairs, and went on with the extravagances I have already mentioned as having taken place on the evening of the sixteenth. So far from my considering that he was at the time fit for the transaction of business, I would have deemed it unwise and culpable to have entrusted to his protection the safety of his own person for a single hour. I as a physician consider that he was at the time most decidedly unfit for the transaction of business. From my second visit, that is on the first evening of my attendance, the day I believe to have been the fifteenth up to the time he awoke from his sleep, on the day of his death, I consider him totally incapacitated from the state of his mind for the transaction of business. He was in a condition of absolute mental debility, peculiarly susceptible to the operation of any undue influence; this was tested by his willingness afterwards to sign large promissory notes, and give sums of money for the suppression of conspiracies, which he imagined to exist against him. His feelings, or fears and cowardice were much excited; he laboured under great appre-

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hensions of impending dangers, so much so, that I believe, to have been relieved from which, he would have readily parted with any amount of wealth, or consented to any proposition made to him not involving destruction or bodily affliction to his own person. I had not the slightest knowledge at the time of what had passed, or what the business of the priest and notary was on the occasion of their visit. I had no communication of it myself, and I believe the people there generally, except the immediate agents in the transaction, were in profound ignorance of it. When the party broke up and passed congratulations upon what had taken place, I had then suspicion or conjectured what had taken place. The following day a report spread around the village that he had been married the preceding day in the afternoon, which report confirmed my suspicions: there was one of the Misses Scott residing in the village at that time; I cannot distinguish them by name, but I believe it was Barbara. It was of the effects of delirium tremens that Mr. Scott died; I consider that the inflammation of the face was subdued.

Upon his cross-examination he says:—

When I spoke as I have spoken of the late Mr. Scott, as being in a condition, on the day of the sixteenth, to be easily influenced, it was not my intention to convey the idea that improper agencies had or had not been brought to bear upon the completion of the transaction that had taken place on the afternoon of the sixteenth, but from the way in which I saw attempts made to excite his hopes and fears on another subject, I have no reason to reject the supposition that he was unduly influenced; the probability is that he was. When I speak of attempts made to excite his hopes and fears on another subject (religion), I refer to a conversation that I heard between Messire Ancé and Dr. Dorion, on the day of the eighteenth, in the house where the deceased died, when I heard Messire Ancé mentioning that he had proclaimed to Mr. Scott the important proposition: "*hors de l'église point de salut;*" *that was his hour for salvation, and that few hours more might be too late.* Notwithstanding that, I have reason to believe that Mr. Scott died a Protestant, from the fact in particular that he was buried in the Protestant cemetery. Although I was in the village, I never heard at the time that Mr. Scott had consented to become a Roman Catholic. When I met the late Mr. Scott on the threshold of his house, I endeavoured as much as I could to induce him to return back to the house from whence he came, but I could not persuade him to do so, so much he appeared desirous of going somewhere. So soon as he turned the corner of the street leading to the house of the defendant, Miss Paquet, I saw that it was there he desired so much to go. When I spoke of lucid intervals in my examination in chief, I did not mean to speak of long intervals or that prolonged duration of lucidity that marks monomania; I alluded to those transitory gleams of intelligence that mark the progress of the disorder, of which he was taken ill decidedly on the fifteenth, and which continued increasing until he fell asleep on the night of the seventeenth. On the eighteenth, after a sound sleep, he had, I should say, two or three hours of a better condition of mind, during which time he had a correct knowledge of what was going on around him. He asked me what had brought me, or what I was there for; have I been sick? (not knowing what had occurred before

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apparently.) I told him that he had been slightly indisposed, but that he would soon be well. It was my sincere belief that he was convalescent then. From the beginning of the disease, I expected that he would recover from the disease; yet, at the same time, I intimated to Miss Paquet the certainty of its being connected with danger, if my prescription of the seventeenth took no effect. On the first, second and third day, I did not look upon the disease as a decidedly mortal one. I never conveyed to the late Mr. Scott any intelligence of the nature of his complaint, nor did I ever convey to him the idea that he was or might be in danger; that would have aggravated the disorder. During the disease of the late Mr. Scott, he had that knowledge of surrounding objects as is generally possessed by persons labouring under delirium tremens. On the evenings of the fifteenth and of the sixteenth he occasionally took his pipe; on the edge of the bed on the sixteenth, he seemed to enjoy his pipe tolerably well. On the sixteenth and seventeenth I remained the most part of the time near him, and now recall to my recollection that I passed also the night of the sixteenth with him. The symptoms of an increase of a disease were apparent on the sixteenth and seventeenth, from the state of his body, the muscular tremor pervading the whole of his body, the soft and comprehensible pulse, the moist and creamy tongue, and from the state of his mind, his apprehensions being more vivid, his movements being violent and unmanageable, and the fanciful illusions of his imagination more extravagant. I thought proper at once to treat immediately the local disease, the erysipelas, and to wait its subjugation before I commenced treating him for delirium tremens.

Question.—Is not the shortness of his lucid intervals on the sixteenth and the seventeenth day attributable in part to the treatment that you thought proper to follow in attempting to cure first the erysipelas, delaying the treatment of delirium tremens until the first object was obtained?

Answer.—By no means. I recognize the short lucid intervals as an effect of, and additional symptom of delirium tremens in its well developed character.

I do not believe that had I thought possible that delirium tremens could have been treated immediately, that his lucid intervals would have been of longer duration. The last symptoms of the disease of which Mr. Scott died were debility of the brain, occasioned by exhaustion of nervous powers. It is not of frequent occurrence that erysipelas is a frequent attendant of delirium tremens; in this particular instance, it was a perfectly local disease. In the particular instance of Mr. Scott, delirium tremens was in no way connected with monomania, although it may have consisted of a series of acts having analogy with monomania. The imagination of Mr. Scott was distorted on every subject, although he took particular care of his feelings, and would light and smoke his pipe. He was raving very much about the last election on the fifteenth and on the sixteenth also, when he wanted positively to go out to address the electors, but not afterwards about the election. I should believe that in a case of delirium tremens old affections and old impressions do not occupy the mind of the diseased, but only what has immediately surrounded him or occupied him, and I judge of this from what I have seen in my practice.

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Dr. Fisher, the other attending physician for the deceased, on his examination says:—

I remember in the month of December, eighteen hundred and fifty-one, as nearly as I can recollect on the sixteenth or seventeenth of December, eighteen hundred and fifty-one, I was called in to see the late William Scott, otherwise called William Henry Scott, of St. Eustache, Esquire, merchant, who was at the time ill of delirium tremens. I was called in consultation with Doctor Jamieson, who was then attending him. I understood I was called at the instance of the family, though I never enquired who sent for me—it was between four and five o'clock when I arrived—it was just getting dusk. I found him in bed, examined his pulse and considered him in a dangerous state; he was delirious, his face was swollen and he had a scar upon it. I proposed to give him medicine to induce sleep, laudanum with brandy—as we call it in our treatment, brandy punch. It seems that he had not previously slept, and this was given to calm his excitement and to induce sleep. The defendant, Miss Paquet, objected to his getting brandy at the time, but I overruled her objections on the ground that I considered it necessary, and left with the understanding that this treatment was to be followed, agreeing with Dr. Jamieson as regards the treatment. When I saw the late Mr. Scott he was in bed. I considered him incapable of talking rationally, and put but a few questions to him. He was not in my opinion in a fit state to transact any business, so much so that I consider if he had committed murder at the time, he would not have been responsible for it; his mind was in an unsound state when I saw him. The symptoms appeared to be those of a very bad case of delirium tremens. I considered his case a very bad case, that is to say a very dangerous case. I was guided to a certain extent in the treatment that I proposed by Dr. Jamieson's report of the length of time he had been ill, the treatment he had followed, and the fact of my having understood that he had not previously slept. It was in the house where the said Miss Paquet lives, and not in his own house that I found Mr. Scott; his eldest son (that is William) was there, Miss Paquet, was there, some servants, and there might have been others whom I do not remember, but I remember seeing the priest there. I was sent for again the next day, but when I arrived he was dead; after a patient wakes from sleep, it depends much upon the opinion of the attending physician as to the state of the patient in this disease, how long stimulants should be continued. I would not approve of stopping stimulants at once, had it been my case I would have continued it. I heard nothing about the marriage on the occasion of either of these visits, although I had occasion to speak to Miss Paquet, the priest and others present; none of Mr. Scott's sisters nor his brother were present on the occasion of my visits. I heard of the marriage afterwards, and I was at the time surprised that he should have got married in that state. I did not remark it to any one, but was struck with it myself. When I saw him he was not under the influence of fear. The character of the disease is the seeing of visions, being under the apprehension that people are coming to kill or rob him. I consider that the said late William Scott died of the disease of delirium tremens, under which he laboured when I saw him.

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On his cross-examination he says :—

I am not aware whether the late William Scott ever before had an attack of delirium tremens. I have known him perfectly well, even intimately, previous to his death for a number of years; he was a man of very quick temper, abrupt in his mode of speaking and peremptory generally in his language. I had two brothers in his shop at St. Eustache; both are now absent from the country. When I visited the late Mr. Scott, the day previous to his death, I advised that medicine be immediately given in order to produce rest. From the conversation that I had then with Dr. Jamieson, I learnt that he had not followed previously the mode of treatment that I then suggested and ordered. Dr. Jamieson told me that he had only given purgatives and local treatment for the subjugation of the inflammation of the face and of the eyes; these are the medicines that he told me he had given to suit the symptoms of the patient. When I saw the late Mr. Scott, I thought it was a very bad case, and doubted whether he would recover. From what Dr. Jamieson told me, I do not know whether it would have been necessary or proper to administer the treatment I suggested previously or at the beginning of the disease.

The medical evidence establishes beyond doubt that the disease of which W. H. Scott died was *delirium tremens*, yet the respondents by their exception have pleaded que le dit feu William Henry Scott était sain d'esprit et d'entendement lor du dit mariage, et du contrat de mariage qui l'a précédé, et *qu'il a continué de l'être depuis jusqu'a sa mort.*

The judgment of the Court below assigns as the reasons for the dismissal of the appellant's action, that "she has failed to establish by evidence the "material allegations of her declaration, and more especially that the late W. "H. Scott, therein mentioned, was, at the time of contracting marriage with "the defendant, M. M. M. Paquet, on the 16th day of December, 1851, as in "the said declaration alleged, delirious or otherwise of unsound mind and "understanding, or that the said marriage was so contracted by him in the "immediate prospect or at the period of death, *à l'extrémité de la vie.*" It is to be noticed, that no medical testimony whatever was adduced by the respondents to meet that of the two physicians who attended the deceased. The learned Judge, however, who delivered the judgment in the Court below, is reported to have said: "Dr. Jamieson states as a scientific fact, that the disease never leaves the patients until it leaves them finally, that is, there may be times at which it is more intense than at others, but the patient is never perfectly sane." If the case turned only on this evidence of the witness, *the Court would have no doubt*; but the defendant's evidence on the other side *is conclusive*, unless indeed we take the opinion of Dr. Jamieson that there can be no intervals of sanity. *We find the same opinion indeed in the book sent us by the plaintiff, but it is not supported by any authority.* It is the opinion of the Court *that there are cases, and this is one of them, when the person afflicted with the disease is at times in full possession of his faculties. The testimony of Messire Ancé on this point is conclusive.* The learned judge seems to have put the evidence of Dr. Fisher entirely to one side, notwithstanding the important statement of opinion, "I heard of the marriage afterwards, and *I was at the time surprised*

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that he should have got married in that state." The medical testimony appears to me to have been most improperly slighted by the Court below, when, being uncontradicted by professional witnesses on the other side, it was entitled to the greatest weight. The books cited on the behalf of the appellant fully support the doctrine stated by Dr. Jamieson, and I do not distinctly comprehend what other authority the Court below could have desired. The point was one of medical jurisprudence; if by authority the learned Judge meant the decision of a Court of Justice, that could only proceed upon the medical testimony of experts, upon the principle "*cuilibet in arte suâ credendum est.*" As to the medico-legal opinion of the Court below, I say it with respect (yet it seems to have been hazarded without anything to warrant it): it would appear to me that in enunciating the proposition, "that there are cases where the person afflicted with this disease is at times in full possession of his faculties," reference should have been made to these cases. No book is cited in support of this new opinion, and it seems strange to say that a man may be labouring under delirium, and yet at the same time be in full possession of his faculties. I cannot accept as a *canon* the opinion of the Court below upon this point, nor am I the more disposed to do so because it is so authoritatively laid down. Still less can I approve of the statement, that "*the testimony of Messire Ancé on this point is conclusive.*" It appears to me that, in comparison with the medical testimony, that of Mr. Ancé should weigh little in the balance. It is true that this witness lays claim to the possession of a little medical knowledge, but, if his opinion is to be taken, he concurs with the physicians in stating that the disease was *delirium tremens.* In answer to the question "Pouvez-vous dire oui ou non si c'était la maladie (*delirium tremens*) qu'il avait pendant quelques jours avant sa mort," he says, "si ce n'était pas elle, elle y était pour quelque chose selon mon opinion." He is asked: Pourquoi le pensez vous? His answer is, "c'était ce que les Docteurs pensaient, et le Dr. Jamieson était d'opinion que si on lui avait donné de la boisson, il aurait recouvré la santé." Trouvez-vous cette opinion raisonnable? Answer, "Selon mes petites connaissances, je le pensais dans le temps, tout à dépendu de la manière de le soigner, car je ne le croyais pas dans un état pour mourir." To the question "Avez-vous toujours été de l'opinion que le delirium tremens entrait pour quelque chose dans la maladie?" the answer is, "D'après ce qu'avaient manifesté les Docteurs j'eus cette opinion. J'ai connu l'opinion du Docteur seulement quelque temps avant sa mort." If the testimony of Mr. Ancé is to be opposed to that of the physicians, before treating it as conclusive, it is proper to enquire how they stand respectively as to the bias. On the one side there can be no leaning, nothing which it interests the witness to support. On the other, the proceeding of the witness is impeached, and he must seek to vindicate himself from the obloquy of witnessing and sanctioning by his presence fraud and surprise, practised upon a man in a weak state of mind and body both. Is the mere opinion then of Mr. Ancé, under these circumstances, to be considered conclusive, as it was by the Court below, and that of the physicians rejected? Certainly not, and in my opinion, upon this point, there is in the judgment complained of manifest error. If from opinion we go to the facts deposed to by this witness, there are

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some which were deserving of something more than passing notice. I am dissatisfied with the Judgment again, from the curt manner in which it disposes of the question of fact, without entering into a detailed statement of the evidence, in a case of great delicacy, which loudly called for it. I feel myself constrained to advert to some important statements made by this witness. And first, as to his primary interview with the deceased, he says, "En arrivant M. Scott, que je trouvai *sur son* lit *souffrant*, me dit, qu'il venait *d'avoir une scène chez lui avec sa sœur*, et m'ajouta, qu'il me faisait venir pour le marier avec la défenderesse, en la *désignant de la main* et l'appelant sa femme." On the cross examination he says, " Mr. Scott me dit qu'il me fesait appeler pour le marier avec la personne qu'il montrait de sa main et qui était M. M. M. Paquet, disant c'est ma femme, c'est ma femme, répétant l'expression deux ou trois fois, il me parut souffrant, et il me parut un peu exalté, en me parlant d'une scène qui avait eu lieu dans sa maison, ce n'était pas dans la maison où il était alors, mais dans la maison où était sa sœur."—" Je restai convaincu d'après ce qu'il me dit, qu'on lui avait fait quelque violence dans sa maison, où était alors sa sœur." The *scene*, was the effort made by his sister and Dr. Jamieson to induce him to remain at home and not to venture out, into the December air, in his state of health. It was a delusion on his part, as stated by Dr. Jamieson; he was excited, *un peu exalté*. Then comes the movement of the hand to indicate the person, instead of naming her, and the rapidity and imperfect enunciation of his wishes, the repetition of ma femme, ma femme, all symptoms of delirium tremens as stated by Dr. Jamieson. When the dispensation of marriage banns is mentioned " cela parut *contrarier* Monsieur Scott, qui désirait en finir, et il me demanda d'accomplir cet *acte* le plutôt possible." A sane man must have known that a marriage license of some kind was requisite, and the precipitation manifested is another indication of the state of the mind. Le lendemain le 17 (the day following the supposed marriage) the witness says, " je suis allé voir Mr. Scott, je ne pus lui parler, l'on me dit qu'il avait *besoin de repos*, qu'il *sommeillait et que d'après les intructions du médecin on ne devait pas le déranger.* Je causai quelques minutes avec Madame Scott, le 18 décembre, je suis allé le voir de mon propre mouvement, c'était vers 2 heures et demie ou 3 heures de l'après-midi. Je fus bien surpris de le trouver dans un état aussi alarmant quant à la maladie; son fils était sur le lit à côté de lui, pour l'aider à cracher, et tâcher de le soulever, M. Scott étant alors dans un état de coma." This corroborates the statement of Dr. Jamieson, instead of contradicting it. To come now to the precise time of signing the marriage contract, and the entry in the register, and to the attending circumstances. *It was for the respondents to have proved that there was then a lucid interval in the disease*, during which the deceased had a disposing mind. In cases of insanity, it is exceedingly difficult to discover with any approach to certainty an oasis in the desert of the thoughts. Minute and close observation by experienced persons might aid in the discovery. Let it now be asked, had Mr. Ancé the necessary requisites for the performance of an operation so delicate? I do not believe that he had. The work must be one of time; the subtlety of the disease baffles, for the most

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part, every attempt, to define the limit between disordered intellect, and the sane and disposing mind. What were the opportunities afforded to Mr. Anoé for the purpose of this investigation? He saw the deceased only twice in his life: about an hour the first time; as to the second "il pouvait être quatre heures et demi ou cinq heures lorsque je suis entré dans la maison, et pouvait être 6 heures ou 7 heures lorsque je repartis." This is very indefinite at the best, but let us enquire how the time was employed. Mr. Anoé is asked: Avez-vous eu une longue conversation avec M. Scott? Answer, Le temps fut employé à rédiger les actes, et à procéder à la cérémonie, *tout le temps fut employé à cela, M. Scott n'eut pas d'intervalle pour parler d'autre chose.* Il était assis sur son lit, les jambes pendantes au dehors de son lit. Quand je partis il était encore dans la même attitude, sans marquer aucune faiblesse. In the examination in chief the witness had said, conversant avec nous. Q.—Est-ce ce jour là que vous lui avez parlé de la religion catholique? R.—La veille et ce jour là, quand il fut question de la nature du serment exigé pour marier protestant et catholique? Q.—Quand est-ce qu'il vous a donné l'impression qu'il voudrait se faire catholique? R.—Les deux fois, mais surtout après la célébration du mariage, lorsque resté seul avec lui il m'invita à venir le voir et qu'on causerait ensemble. Q.—Combien de temps après cela avez-vous quitté la maison? R.—Cela termina ma conversation avec lui, lui promettant de revenir le voir le lendemain, *si mes occupations me le permettaient ou quelques jours après.* In the examination in chief he had said—" D'après ce qu'il m'avait dit l'impression en est restée qu'il voulait se faire catholique. Quand même il n'aurait pas été malade, je serais allé le voir le lendemain, parce que je devais y aller *non par suite de la maladie mais pour lui parler de religion.* On the cross-examination he says to the question.—Quand vous avez parlé à feu M. Scott au sujet de la religion, vous souvenez-vous d'aucune chose qui parût le frapper en particulier? et si aucune de vos remarques parut le frapper? R.—Rien en particulier. Q.—Avez-vous expliqué à M. Scott la signification de ce dictum de l'Eglise Catholique "*hors de l'Eglise point de salut.*" R.—Il ne fut nullement question de cela et la conversation n'alla pas jusque là. Q.—A-t-il paru avoir aucune inquiétude sur l'état de son âme, en considération de la vie qu'il avait menée? R.—Il ne me d[illegible] pas à comprendre que ce fut le cas. When asked "le contrat de mariage était-il réglé avant ou après votre arrivée? he says—Je signai au contrat comme témoin. Il ne s'est pas fait ni avant ni après, puisque j'ai signé, le clerc de M. Archambault l'a écrit en ma présence. Q.—Y eut-il en votre présence quelque discussion sur les conditions du contrat? R.—Ce fut M. Scott qui dicta les conditions du contrat selon ses volontés. Q.—Y avait-il quelqu'autre personne qui a pris part dans la dite discussion? R.—Je ne vis pas qu'il y eut discussion pour les conditions du contrat. M. Scott exprimait sa volonté et le clerc écrivait sous sa dictée. Je n'ai pas souvenance que personne ait suggéré des conditions à M. Scott, quand *il me parut agir selon la justice distributive.* In the examination in chief he had said "Je me rappelle que le *Notaire Archambault suggéra à Mr. Scott de faire un testament,* mais M. Scott insista pour que ce fût un contrat de mariage, mais je ne me rappelle pas qu'il ait donné des raisons pour en agir

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ainsi. Le 16 le jour du mariage, je l'ai trouvé beaucoup mieux qu'il n'était la veille. Je n'ai aucunement remarqué que M. Scott subissait aucunement ses obsessions de qui que ce soit dans cette occasion." If the testimony of the notary Archambault, a witness on the part of the respondents, be true, and there is no reason to disbelieve the important fact stated by him, which will now be adverted to, Messire Ancé's powers of observation are not great, or his recollection must be bad. The notary says in his deposition, "J'ai ouï dire après la mort de M. Scott, que l'on avait dit qu'il avait le *delirium tremens*, mais je ne l'ai pas pensé, parce que pendant les deux heures que je l'ai vu, je l'ai trouvé parfaitement bien, *si ce n'est pendant que j'étais là, sans me rappeler si c'était avant ou après la célébration du mariage, il faisait un grand vent qui sifflait dans le contrevent, et M. Scott prêta l'oreille et dit: les voilà.* Une personne, sans me rappeler qui, lui dit *écoutez* M. Scott, c'est le vent; en effet M. Scott prêta l'oreille et dit: en effet je suis convaincu que c'est le vent. Personne ne lui a demandé qui il pensait pouvoir venir. Il ne me paraissait pas agité, excepté quand il a dit les voilà. Je n'ai remarqué rien autre chose d'étrange dans sa conduite, pendant le temps que j'étais là. Je n'ai jamais vu M. Scott tomber en état d'excitation après avoir cessé entièrement de prendre des liqueurs fortes, seulement ce que j'ai observé, c'est qu'après avoir bu, il perdait la mémoire. A more conclusive proof than this of *delirium tremens* as described in the books and after them by Dr. Jamieson in his evidence, at the very time of the supposed marriage and supposed lucid interval, could not be desired. Again the fact sworn to by Mr. Ancé himself, "Je fus le dernier à partir, ayant resté après le départ du notaire et des témoins qui furent conduits en voiture, M. Scott me voyant partir seul, me dit *prenez garde à vous, que personne ne vous attaque en route, je lui répondis que je ne craignais pas, que j'étais habitué d'aller seul,*" is another proof of the feeling of apprehension, anxiety and fear characteristic of this description of insanity. It was only on the 18th, after a sound sleep, that the deceased, to use Dr. Jamieson's words, "had a correct knowledge of what was going on around him. He asked me what brought me, or what I was *there* for, have I been sick, not knowing what had occurred before apparently." With the proof of his ravings previously, from the moment of his departure from his own house to go to the residence of the respondent Paquet, I fully concur with Dr. Fisher when he says "he was not in my opinion in a fit state to transact any business, so much so that I consider if he had committed murder at the time, he would not have been responsible for it." The symptoms appeared to be those of a very bad case of delirium tremens. Witnesses have been examined by the respondents to prove contradictory statements of opinion made by Dr. Jamieson. This testimony I wholly reject. Before adducing it, it was incumbent on the respondents, in common justice, to have asked Dr. Jamieson if he had said what is imputed to him, and to have afforded him an opportunity of explanation. I say it was incumbent, because the rule of evidence, according to the English system, upon this point in my opinion is the only rule in Lower Canada. No authority from the French system can be had upon this matter. The *viva voce* public examination of witnesses, in open Court, and their cross-examination were unknown in our tri-

banals prior to the Conquest; they were introduced into the country, upon the change in the system of Judicature, which then occurred. The old Enquête was a secret and private examination of the witnesses, from which the parties and their counsel were carefully excluded, just as obtains in the Court of Admiralty, and the other Courts regulated by the Civil Law. But, even under the old system, to impeach the testimony of a witness or to contradict it, required specific *reproches*, which have not been made, and which have never, to my knowledge, been made in our Courts, the fact being that with open examination and cross-examination they are not required. But medical men, in answer to questions respecting the state of their patients, habitually resort to evasions, and their *bulletins*, intelligible among themselves, are more calculated to conceal than to declare the real facts of the case. If the deceased had been of sound mind at the time, of what the witnesses persist in calling the ceremony of marriage, it is singular that the physician in attendance upon the sick man, and who was his regular family physician, was not asked to witness it, or the marriage contract, although a stranger like Mr. Ancé was called upon, contrary to usage, to witness that contract. Notwithstanding the efforts made to discredit the evidence of Dr. Jamieson, I place perfect reliance upon it, and consider it highly creditable to his professional attainments. If reference now be had to the marriage contract, it will be found to exhibit internal proof of singularity, quite consistent with the condition of mind of the deceased. It contains a disposition of an unusual character, more testamentary than *contractual*, "le dit sieur futur époux, la met et subroge en tous ses droits, noms, raisons et actions, *toutes fois sur la perception de l'indemnité que pourra recevoir la dite Demoiselle, future épouse, le dit sieur futur époux intime à la dite Demoiselle, future épouse, qu'elle en fit le partage et s'en dessaisisse en pleine propriété aux Demoiselles Anne et Jane Scott, sœurs du dit sieur futur eta ussi Demoiselle Caroline Scott, fille du dit sieur futur époux, et ce pour chacune un tiers dans la dite indemnité.*" The bride was to receive this indemnity only to hand it over to three other parties. Again the covenant "quant à la généralité des autres biens meubles et immeubles que peut avoir et qu'aura le dit sieur futur époux à son décès, ils lui sortiront nature de *propre à lui, aux siens et à ceux de son estoc et ligne*" is strange when it is considered that his own son, William Scott, signs the contract, and his daughter is mentioned in the same instrument. What was meant then by *estoc et ligne* et aux *siens*? The singularity of Mr. Ancé being made to sign this contract has already been noticed, it only remains to advert to the circumstances that the notary Archambault, contrary to the provisions of the Statute of the 13 and 14 Victoria, cap. 39, sections 7 and 8, has not mentioned the number of the instrument, so as to shew that it was executed in a continued and unbroken series, and to enable reference being made to the index or *repertoire* of the instruments executed by him in his official capacity, and remaining of record with him as a public notary, and that the Christian name of Mr. Ancé is not given; evidently the document was drawn up in a hurry and in a very slovenly way.

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It has been argued on behalf of the respondents that this marriage so called was a reasonable act on the part of the deceased, was consistent with former acts

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of his, when perfectly sane and in health, and was only carrying out former promises often repeated. Evidence was adduced in support of the plea " que depuis un très grand nombre d'années le dit feu William Henry Scott, et la dite Dame Paquet *vivaient maritalement comme mari et femme sous la promesse* souvent alors donnée à cette dernière et souvent réitérée depuis par le dit feu W. H. Scott, qu'il épouserait légitimement la dite Mme Paquet. Que cette promesse et son intention de la mettre à exécution furent manifestées et annoncées par lui en différens temps devant ses parens et ses amis, et particulièrement devant et à la connaissance de la demanderesse en cette cause. Qu'il y a à peu près deux ans, le dit feu W. H. Scott désirant mettre à exécution la promesse qu'il avait souvent faite à la dite Dame, de l'épouser légitimement, du consentement de cette dernière fit demander un Prêtre de la Religion Catholique Romaine pour le marier légitimement avec la dite Dame Paquet, qu'à cette fin plusieurs amis du dit feu Scott se trouvaient assemblés dans la maison où vivait la dite Dame Paquet, avec leurs enfants, pour être témoins du dit mariage, que le dit feu Scott, et la dite Dame Paquet, s'y trouvaient en habit de fête prêts à contracter un mariage légitime devant *un Prêtre de la Religion Catholique Romaine, duement autorisé à cette fin*, lorsque ce dernier crut de son devoir d'insister auprès du dit feu W. H. Scott, qui était Protestant, à ce qu'il promit *sous serment*, de laisser élever ses enfants dans la religion Catholique, ce à quoi se refusa positivement le dit feu W. H. Scott, disant qu'il ne voulait pas faire tel serment, que ce n'était pas néanmoins par hostilité contre les Catholiques, puisque ses enfants avaient été élevés Catholiques, mais qu'étant Protestant il ne voulait pas faire telle promesse qui n'était pas d'ailleurs nécessaire suivant lui. Que le dit feu W. H. Scott répéta alors plusieurs fois devant le Prêtre Catholique alors présent, et ses amis alors présents, que la dite Dame Paquet était sa femme, et qu'il était son mari, manifestant toute sa volonté de la regarder et de la tenir pour sa femme et légitime épouse, la *traitant avec tous les égards dus à une épouse.*" Not to notice the proof by the respondents themselves, that the connection between these parties was a public scandal, and the respondent Paquet was notoriously a kept mistress or concubine, living not *maritalement*, but apart from Scott, her keeper, this plea in point of law is insufficient upon the very face of it. It has not been demurred to, it is true, but must be rejected, as the law has expressly prohibited all proof of it. The ordinance of the Kings of France, which I began by citing, and the authority of Danty, are positive upon the point. Under the old law of France, which we are bound to follow, it was the duty of the Judge *ex officio* to reject parol testimony, although not objected to by the parties, and to carry out the prohibition ordained by the Legislature. That portion of the plea also which mentions the oath as a condition must be rejected, as such an oath is manifestly unlawful upon the very face of it, and priests or ministers of religion have no authority in Lower Canada to administer oaths to laymen, yet as the proof adduced by the respondents on this head serves more fully to explain their legal pretensions as to the formation of the marriage tie between Protestant and Roman Catholic, I cannot suffer it to pass by unnoticed. It will be remembered that Mr. Scott died in December, 1851, and is supposed to have contracted matrimony two days before his death, the

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transaction which is relied upon in support of the respondent's claims dates so far back as to July, 1845, or upwards of six years before, the chief witness who speaks to it is le Révérend Père Félix Martin, Supérieur du Collége Ste. Marie, résidant à Montréal, he says: Dans le cours de juillet 1845, autant que je puis me rappeler, me trouvant à St. Eustache, le Curé de St. Eustache me dit que M. Scott voulait se marier avec la dite Dame Paquet, et que tout était préparé, et il me donna ses pouvoirs pour le marier me disant que M. Scott désirait que ce fut moi qui fit ce mariage. Une ou deux des personnes qui devait être témoins vinrent me trouver pour convenir de l'heure qui fut fixée vers neuf heures du soir. A cette heure ils vinrent me prendre, et nous nous rendîmes à la maison que l'on me dit être celle de la dite Dame Paquet. Je trouvai dans le salon trois ou quatre personnes venues comme témoins, me dit-on. Une petite table couverte d'un tapis avec deux chandeliers allumés étaient au fond du salon. Il y avait papier, plumes et encre, et je crois une Bible et pas autre chose. M. Féré, M. William Henry Scott et la dite Dame Paquet étaient en habits de visite, et plus proprement que de coutume. Les enfants étaient dans une chambre voisine, et se laissaient voir par la porte qu'ils entr'ouvraient. Je lui dis tout d'abord, qu'avant de procéder au mariage, il devait promettre sous serment d'élever ou faire élever ses enfants dans la religion Catholique, et cette proposition changea tout d'un coup la réception que m'avait faite M. Scott, et il protesta qu'il ne ferait jamais ce serment, mais qu'il était si peu opposé à ce que les enfants fussent élevés dans la religion Catholique, qu'ils l'étaient déjà. M. Scott s'exalta beaucoup, parla beaucoup et dit: "Au reste, je n'ai pas besoin de tout cela, tu es ma femme, je t'ai choisie pour ma femme," répétant l'expression plusieurs fois, et ce, en s'adressant à la dite Dame Paquet. Il lui demanda encore, veux-tu que je sois ton mari, ce qu'il répéta aussi. Dans le moment personne ne lui adressa la parole, et moi-même je ne lui dis rien, et il allait et venait dans la chambre comme un homme qui est blessé et aussi exalté, mais quand j'arrivai il n'était point exalté ou irrité. Madame Paquet était au fond de la salle debout pendant toute cette scène, et paraissait comme interdite et déconcertée, et quoique M. Scott ait été jusqu'à elle pour obtenir une réponse à ses questions, *je n'en ai pas entendu*. Ne pouvant pas procéder licitement au mariage sans que M. Scott vint à se rendre à l'exigence dont j'ai parlé, je me retirai, en m'excusant. Si ce n'avait été cette exigence là, M. Scott était décidé à se marier avec la dite Dame Paquet, et j'avais le droit, et j'aurais procédé au mariage si elle avait exprimé verbalement son consentement devant les témoins. J'avais vu plusieurs fois avant cette séance, la dite Dame Paquet, et elle m'avait manifesté sa volonté et son désir ardent de se marier avec M. Scott, et je ne puis attribuer son silence dans l'occasion présente qu'à sa timidité, car elle n'a pas parlé du tout. Cette timidité ne provenait à mes yeux, que de l'état d'exaltation avec lequel M. Scott lui parlait. Une ou deux heures après mon retour, un ou deux témoins vinrent me trouver, me disant que les parties étaient encore en présence, et me demandant s'il n'était pas possible de modifier quelque chose dans l'exigence sus mentionnée, et je répondis que ma ligne de conduite m'avait été tracée, et que ce changement ne dépendait pas de moi, et ils se retirèrent. Ces même personnes me répétèrent que M. Scott

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consentirait à tout, si on retirait cette condition. Je dis que si Madame Paquet avait donné son consentement, et que je l'eusse entendue le donner j'avais le droit de faire l'acte du mariage, et l'on aurait pu m'y forcer, avant même que M. Scott eut consenti à la condition demandée, et dans ce cas le mariage aurait été, et valide et licite. Lorsque M. Scott m'a refusé la promesse demandée, le mariage eût été valide mais non licite de ma part. On his cross-examination, when asked: Vous fallait-il une dispense pour marier M. Scott, lorsque vous lui avez rendu la seconde visite? The answer is: *Cette dispense était l'affaire du Curé et non la mienne, je n'ai pas vu de dispense,* après ma question par rapport au serment demandé "M. Scott paraissait exalté et très contrarié." He also says: Je n'ai vu M. Scott que deux fois. Ce n'est pas M. Scott lui-même qui est venu me demander la seconde fois, c'est par le Curé que j'ai su que M. Scott voulait que je le mariasse, mais *pour lui-même, il ne m'a jamais personnellement requis.* This transaction is also sworn to by Mr. Grégoire Féré, one of the respondents, witnesses who thus described it: Dans l'année 1845, dans le mois de juillet, je crois, à la suite d'une retraite ou de quelque autre cérémonie religieuse, M. Scott me fit demander de me rendre chez lui. J'y suis allé, j'ai vu là M. Scott, Madame Scott (la dite Dame Paquet), et quelques témoins qui s'étaient rendu là, je trouvai aussi des préparatifs qui indiquaient une cérémonie. En arrivant M. Scott, me dit, je suis pour me marier, et je veux vous avoir comme témoin en votre qualité d'un de mes meilleurs amis. Il y avait là une table couverte d'un tapis et des chandeliers d'argent. M. Scott me montra aussi une bouteille de champagne en disant, quand le mariage sera célébré, nous prendrons le champagne, pas avant. "Le Rév. Père Martin, Jésuite, qui devait faire le mariage ayant tardé un peu, quelqu'un alla le chercher. Le Père Martin est arrivé et s'est assis près de la table. M. Scott a pris la dite Dame Paquet par la main, et s'est approché du Père Martin. Le Père Martin lui dit alors qu'il y avait quelques obligations relativement à son mariage qu'il était de son devoir de lui communiquer. Là-dessus le Père Martin lui dit, qu'avant de procéder au mariage, il fallait qu'il s'obligeât par serment, à laisser élever ses enfants dans la religion Catholique. M. Scott qui comprenait qu'on voulait l'obliger à élever ses enfants catholiquement, se choqua et dit, j'ai toujours été assez libéral, et laissé faire mes enfants en matière de religion comme ils voulaient. Moi, dit-il, je suis né protestant, je ne veux pas qu'on m'oblige d'élever mes enfants dans une autre religion, et il ajouta qu'il ne voulait pas prêter un serment qui lui en faisait une obligation. Le Père Martin répondit qu'il ne pouvait pas procéder au mariage sans qu'il vint à prêter ce serment. Et en se levant M. Scott là-dessus dit: "Tout cela est matière de forme, et tenant par la main la dite Dame Paquet, il ajouta qu'elle était devant Dieu et devant les hommes sa légitime épouse, et qu'il la prenait pour telle. Le Père Martin entendant cela, a pris avec précipitation son chapeau et son papier et s'en est allé. Un des témoins est allé après lui, et il a persisté à s'en aller. Je suis resté avec quelques autres personnes chez M. Scott et nous avons bu le champagne. D'après tout ce que j'ai vu là et entendu, il est évident que dès ce temps là, M. Scott voulait bien sincèrement faire célébrer son mariage par le Père Martin, et si cette célébration n'a pas eu lieu, c'est dû uniquement à la promesse sous serment qu'on

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voulait exiger de lui comme je viens de dire. M. Scott me dit en particulier et personnellement, puisqu'il y a tant de difficultés, mon ami, dans votre religion, je me ferai marier par un ministre protestant.—Prochainement, j'irai à Montréal chercher mes dispenses chez M. Ross, pour me faire marier par un ministre protestant. Depuis ce qui s'était passé avec le Père Martin, M. Scott m'a parlé plusieurs fois de sa détermination de faire célébrer son mariage, et je comprenais que c'était par un ministre protestant. Le Père Martin était venu à St. Eustache soit à l'occasion d'une retraite ou à l'occasion d'une bénédiction de cloche.

The precipitate departure of the Père Martin, upon this occasion, is susceptible of explanation, although he was neither the *Curé* nor the *Vicaire* of the parish, and although he had no *dispenses* or authority from the Bishop, he was ready to be a witness, témoin au consentement de mariage, provided only that it were après avoir obtenu de la partie Protestante ce qui est exigé par la Cour de Rome en pareille circonstance. The distinctions made by the Père Martin, si Mme. Paquet avait *donné son consentement et que je l'eusse entendu le donner*, j'avais le droit de faire l'acte du mariage, et l'on aurait pu m'y forcer, *avant même que M. Scott eut consenti à la condition demandée, et dans ce cas le mariage aurait été, et valide, et licite*, lorsque M. Scott m'a refusé la promesse demandée, le mariage eut été valide mais non licite de ma part, are quite intelligible upon reference to the articles *Gomine* (mariage à la), and *Clandestin*, in the Dictionnaire de droit Canonique of Durand de Maillanne. The ultramontane doctrine so totally opposed to the libertés de l'Eglise Gallicane, and so contrary to the ordinances of the Kings of France, which are law in Lower Canada, affords the key to these subtle distinctions, and explains the pretensions of the respondents, loco. cit. verb. *Clandestin*, p. 522: "Ceux qui croient que le Curé n'est pas le ministre de ce sacrement, disent qu'il n'est pas nécessaire qu'il y consente; il suffit selon ces auteurs, *que le mariage soit contracté en sa présence, et qu'il sache ou connaisse l'intention des parties. En conséquence ces mêmes auteurs soutiennent que si deux personnes surprenaient un Curé, et contractaient mariage devant lui en présence de deux ou trois témoins*, leur mariage serait valide, parce qu'il aurait été contracté en présence du Curé, *modo Parochus fuerit adhibitus, Fagnan in quod nobis, de cland. despons.* Cette dernière condition n'est pas nécessaire suivant Corradus, de despons, lib. 7, cap. No. 36, Navarre, Sylvius et Barbosa, de offic. et potest. Paroch. cap. 21, No. 50, *Parochus* dit ce *valide assistit matrimonio, etiamsi ad alium finem vocatus, vel casu præsens; licet vi detentus*, dit toujours le même auteur, *dummodo tamen intelligat consensum contrahentium licet etiam renuens et dolose adductus, valide assistit; dummodo probe intelligat et audiat contrahentium verba, nisi claudens aures affactatus esset non intelligere, quamvis ipse nulla verba profera. Concludo igitur presentiam Parochi in matrimonis nessariam non tantum corpoream, sed etiam moralem requiri, cum intelligentia et advertia actus.* C'est la doctrine en général des ultramontains; elle est uniforme parmi eux à peu de chose près; quelques Docteurs français l'ont soutenue, et voici une consultation

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de Sorbonne, *donnée* à l'occasion d'un mariage à la Gomine, c'est-à-dire, fait en présence du Curé et malgré lui. Voyez *Gomine*—

"Le mariage dont il est parlé dans le mémoire ci-joint a été illicitement contracté, et ceux qui ont concouru à ce contrat comme l'ayant conseillé et y ayant assisté en qualité de témoins, sont très punissables ; il y a des diocèses où ils auraient encouru l'excommunication *ipso facto*, mais il est valide et indissoluble, selon le sentiment commun des théologiens qui se divisent sur la question ; si un tel mariage est sacrement, un grand nombre étant pour l'affirmative, parce que, selon eux, les contractants sont les ministres du sacrement, et les autres pour la négative, voulant que le Prêtre seul soit le ministre de ce sacrement ; mais les uns et les autres se réunissent, et disent d'une commune voix, qu'un tel mariage est un vrai contrat indissoluble de sa nature, parce que rien ne manque de ce qui est nécessaire et essentiel à un véritable contrat ; les contractants sont personnes légitimes et habiles à contracter ; ils ont donné leur consentement mutuel librement et sans être forcés ; la solennité requise par le Concile de Trente sous peine de nullité a été observée, le contrat s'est passé en présence de deux témoins, et d'un Prêtre commis par le propre Curé ; les uns et les autres ont su ce qui se passait en leur présence ; il n'y a rien contre la raison dans ce mariage par rapport à l'effet du contrat, mais seulement par rapport aux formalités prescrites et non observées, et seulement accidentelles ; ce qui fait que l'action est criminelle, telle que serait celle, d'une personne qui hors le cas de nécessité, baptiserait sans observer les cérémonies de l'église : mais on ne pourrait pas conclure de là, que le baptême et le mariage ne seraient pas valablement administré ; c'est pourquoi l'official ne doit pas prononcer dans cette cause que le mariage est nul, et qu'il est permis aux parties de contracter avec d'autres, si bon leur semble, mais seulement qu'elles se présenteront devant leur Curé, pour recevoir la bénédiction nuptiale, c'est ainsi que le Parlement de Paris a jugé en cas pareil. Délibéré en Sorbonne, le 3 janvier 1712, Habert, De Precelles

Ceux qui croient que le Prêtre est le ministre *du sacrement*, sont d'un sentiment contraire, ils estiment que les mariages sans la bénédiction du Prêtre sont absolument nuls, et l'on verra ci-dessous que les Parlements suivent cette règle. Cependant, quant au *for* de la conscience, l'Eglise ne s'est pas encore expliqué, sur la validité de ces mariages ; et dans les pays où l'on suit le Concile de Trente, ces mariages ne sont pas cassés quoique ceux qui les contractent y soient poursuivis comme infractaires de la Police Ecclésiastique ; on les oblige de se présenter de nouveau à leur Curé ou à l'Ordinaire, pour en recevoir la bénédiction nuptiale dans toutes les formes prescrites par le Rituel."

It is evident that since 1776, when the above was written, the Church of Rome has explained herself upon the validity of such marriages, but whatever may be that explanation, it is not Law here, and *this attempt to introduce it must be put down by our Courts*. The respondents have contended that the proceeding before Mr. Ancé was the complement of that before the Père Martin, and is proof that the deceased had a disposing mind and was sane on the 16th December, 1851, when the entry in the Register was made. Mr. Ancé states that he gave explanations to Mr. Scott about the oath required of him so

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as to remove the objections offered to the Père Martin. These explanations a to be found in his testimony. For my part I must say that I find neither distinction nor difference in them, and no proof of sanity in adopting them. The mother had not only herself freely followed her religious faith during twenty years, but had brought up her children freely in the same faith, except the daughter who was removed from her altogether and educated by her aunt, the appellant. The proceeding in 1845 savours much of drunken excitement, and is so to be explained, otherwise it is difficult to understand how a reasonable man could expect to be validly married without banns or license from any authority, civil or ecclesiastical, by a stranger to the parish. From the evidence of M. Féré, Scott had doubts of the fidelity of the respondent, and the testimony of Ellen Gamble confirms the existence of these doubts. If he had intended seriously to marry her, as he himself had said to Mr. Féré, all he had to do was to apply to Mr. Ross for a license from the Governor General holding the seal of the Prerogative Court of Canterbury, and to be married by his own Presbyterian minister. So far from doing this he continued to live in concubinage with the respondent, she residing in one house and he in the other, for more than six years after the transaction with the Père Martin. No doubt that if he had availed himself of the law of Lower Canada to legitimise his children *per subsequens matrimonium*, and abandoning his illicit and scandalous intercourse with the respondent, had made her his lawful wife, he would have done an act to be applauded. But whether from false shame, or from regard to his sisters who had kept his house for him and educated his daughter as an illegitimate child, true it is that he persisted in keeping these children and their mother in a state of humiliation and dependence. He might have relieved them from their condition at any time, but he would not do so during 20 years. Under the circumstances, then, can his proceeding before Mr. Ancé be received as affording proof of sanity, and of a disposing mind? I cannot believe that it does; on the contrary, I attribute it to the interested practices of those who surrounded him in his last moments when laboring under delirium, and when ready to sign orders to any amount to be relieved from the imaginary conspirators who possessed his disturbed brain. The learned Judge who delivered the judgment of the Court below omitted all notice of the allegation in the appellant's declaration that the "said pretended marriage was secret and clandestine," and very rapidly and summarily disposed of another allegation, viz., that this marriage was null, as taking place *in extremis* or à l'extrémité de la vie. In my view of the case, each of these points requires attentive consideration.

To begin with the allegation of *clandestinité*. At the 24th session of the Council of Trent, held on 11th November, 1563, it was ordained "*Qui aliter quam presente Parocho vel alio sacerdote de ipsius Parochi seu ordinarii licentiâ, et duobus vel tribus testibus matrimonium contrahere attentabunt eos S. Synodus ad sic contrahendum matrimonium omnino inhabiles reddit et hujusmodi contractus irritos et nullos esse decernit.* Upon this, Pothier, du contrat de mariage, part 4, chap. 1, sect. 3, art. 1, parag. 4, No. 348, says: "Observez que quoique la forme prescrite par le Concile pour les mariages, soit très sage et qu'elle ait été en conséquence adoptée et confirmée par les ordonnances de nos

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Rois, néanmoins le Concile excédait son pouvoir en déclarant nuls, où de sa seule autorité, les contrats de mariage où elle n'aurait pas été observée ; car les mariages, en tant que contrats, appartiennent comme tous les autres contrats à l'ordre politique, et ils sont par conséquent de la compétence de la puissance séculière et non de celle du Concile, à qui il n'appartenait pas de statuer sur leur validité.

Pothier, No. 349. Le Concile de Trente ne pût être reçu en France, malgré les efforts que firent la Cour de Rome et le Clergé pour l'y fair recevoir. Tous les catholiques reconnaissent, et ont dupuis toujours reconnu, que les décisions de ce Concile sur le dogme, sont la foi de l'Eglise ; *mais l'atteinte qu'il donne* dans ses décrets de *discipline au droit de la puissance séculière, et à nos maximes* sur un très grand nombre de points, fut *et sera toujours un obstacle insurmontable à sa réception dans ce Royaume.*

Le décret du Concile ne pouvant pas remédier aux abus des mariages clandestins en France, où ce Concile n'était pas reçu, et où ses décrets ne pouvaient par conséquent avoir aucune autorité, le Roi Henri III, jugea à propos *d'y remédier lui-même, ayant dans lui-même autant de pouvoir, pour cet effet, qu'en avait le Concile,* comme nous l'avons établi dans la première partie de ce traité. C'est ce qu'il fit par son Ordonnance, rendue aux Etats de Blois, article 49, où il est dit, " Avons ordonné que nos sujets ne pourront *valablement* contracter " mariage sans proclamations précédentes ; après lesquels bans, seront épousés " publiquement ; et pour témoigner de la forme, y assisteront quatre témoins " dignes de foi, dont sera fait régistre, etc." Et par l'article 44, il est défendu à tous Notaires, sous *peine de punition corporelle, de recevoir aucunes promesses de mariage par paroles de présent.*

Par l'édit de Henri IV, du mois de décembre 1606, le Roi veut que les causes concernant les mariages, appartiennent à la connaissance des Juges d'Eglise, à la charge qu'ils sont tenus de garder les ordonnances, même celles de Blois en l'article 40 ; et suivant icelles déclare les mariages qui *n'auront été faits et célébrés en l'Eglise, et avec la forme et solennité requise par le dit article, nuls et non valablement contractés, comme peine indicte par les Conciles.*

La déclaration du Roi Louis XIII, de 1639, article I, ordonne que l'article 40 de l'Ordonnance de Blois soit exactement gardé, et en l'interprétant, qu'à la célébration d'icelui assisteront quatre témoins *avec le curé, qui recevra le consentement des parties et les conjoindra en mariage suivant la forme* pratiquée en l'Eglise. Fait *défense à tous prêtres de célébrer aucun mariage qu'entre leurs paroissiens, sans la permission par écrit du curé ou de l'évêque.*

Il ne suffirait donc pas pour la validité du mariage, que les parties allassent *trouver à l'église leur curé, et qu'ils lui déclarassent qu'ils se prennent pour mari et femme : il faut que le curé célèbre le mariage.* C'est pourquoi, par arrêt de 1676, rapporté par d'Héricourt, part. 3, chap. 5, art 1, No. 27, un mariage dont les parties s'étaient fait, dans l'église, donner acte par un notaire, sur le refus fait par un curé de le célébrer, fut déclaré nul et en conséquence, par arrêt du 10 mai 1613, un enfant né de ce mariage fut déclaré bâtard.

For the validity of marriage, says Pothier, No. 354. Il faut non seulement qu'il ait été *célébré en face d'Eglise,* mais *encore que le prêtre qui l'a célébré, ait été compétent.*

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At No. 355, he says: le prêtre compétent pour la célébration des mariages, est le *curé des parties.*

At No. 361, la peine des parties qui ont fait célébrer leur mariage par un prêtre incompétent, est la nullité de leur mariage. Quoique le Concile de Trente, qui a prononcé cette peine, comme nous l'avons vu supra, No. 348, n'ait pas été reçu en France, nos Rois ont adopté et confirmé sa disposition à cet égard.

At No. 362 Pothier lays down: "Cette nullité des mariages célébrés par un prêtre incompétent, n'est pas de la classe de celles qu'on appelle relatives, qui n'ont lieu que lorsque la partie s'en plaint: *elle est de la classe de celles des nullités absolues, et elle ne peut se purger ni se couvrir que par une réhabilitation du mariage des parties, c'est-à-dire une nouvelle célébration faite par le curé ou avec sa permission, ou celle de l'Evêque. Il n'importe que les personnes qui se sont mariées hors de la présence et sans le consentement de leur propre curé, soient majeures ou mineures, enfans de famille, ou usantes de leur droit; nos lois ci-dessus rapportées, qui déclarent nuls ces mariages, n'ayant fait à cet égard aucune distinction.* On trouve néanmoins" adds Pothier, "dans les recueils d'arrêts quelques arrêts qui ont déclaré des parties non recevables dans l'appel comme d'abus par elle interjeté, de la célébration de leur mariage, sur le prétexte qu'il avait été célébré par un prêtre incompétent, hors de la présence et sans le consentement du curé, lorsque l'appel n'avait été interjeté qu'après un *long temps de co-habitation publique et sans que personne se fut jamais plaint de ce mariage.* La réponse est que ces arrêts *n'ont pas jugé qu'un mariage, qu'on supposerait célébré par un prêtre incompétent, puisse jamais être valable, et que ce vice puisse être purgé par quelque laps* de temps que ce fut, mais qu'ils ont seulement jugé qu'eu égard aux *circonstances de la cause, l'appelant était indigne d'être écouté, et reçu à entrer dans la discussion qu'il alléguait, et qu'on devait présumer que les choses s'étaient passées dans les règles, et que le prêtre qui avait célébré le mariage, avait eu la permission du curé.* Ce que nous disons est conforme à ce qui a été observé par M. d'Aguesseau dans un Mémoire qui se trouve dans le 5 vol. de ses Œuvres, après le 57e Plaidoyer.

To keep the clergy under proper control and compel obedience to the law, the French Kings "Outre les peines canoniques que les juges pourront prononcer (against priest performing unlawful marriages, in contravention to the Royal Ordinance) contre eux, les dits curés et autres prêtres, tant séculiers, que réguliers, qui auront des bénéfices, soient (*par nos juges*) *privés, pour la première fois de la jouissance de tous les revenus de leur Cure et Bénéfices pendant trois ans à la réserve de ce qui est absolument nécessaire pour leur subsistance, etc.* * * * *

Qu'en cas d'une seconde contravention, ils soient bannis pendant le temps de neuf ans des lieux que nos juges estimeront à propos.

Que les prêtres séculiers qui n'auront pas des bénéfices, soient condamnés *au bannissement pendant trois ans;* et en cas *de récidive, pendant neuf ans; et qu'à l'égard des prêtres réguliers, ils soient envoyés dans un couvent de leur ordre, que leur supérieur leur assignera hors des Provinces marquées par les*

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Arrêts de nos Cours, ou les sentences de nos Juges, pour y demeurer renfermés pendant le temps qui leur sera marqué par les dits Jugemens, sans y avoir aucune charge, ni fonction, ni voix active ni passive," Pothier, mariage, No. 364. The priest under the law of France in respect of marriage was also a civil functionary, and held as such to assist actively in carrying out the laws intended to restrain clandestine and irregularly contracted marriages.

In the Common Law Courts, *Nos Juges* were invested with the necessary authority to compel them to carry out the laws of the State. Acting upon the Ordinances, *Edits, Déclarations et Réglements,* of France in this behalf, we have a remarkable instance in this Colony under the French Government, again given to us by the Conseil Supérieur in the arrêts du 12 juin 1741, only 18 years before the conquest, being the arrêt *qui rend nuls les mariages des mineurs faits sans le consentement de leur parens et qui enjoint aux Curés d'observer les ordonnances Canoniques concernant la publication des bans.* Edits et Ordonnances, vol. 2, p. 204 et seq., 8vo, edition, 1855. The Conseil Supérieur among other things, by this arrêt, "enjoint au vicaire-général du diocèse de cette ville (Québec) et à tous autres vicaires-généraux, d'observer les Ordonnances et Constitutions Canoniques concernant la *publication et dispense des bans, laquelle dispense ne pourra être accordée* pour *marier des mineurs sans le consentement des pères et mères, tuteurs ou curateurs ou qu'il n'y ait un jugement rendu en connaissance de cause sur les oppositions au défaut de consentement des dits pères et mères, tuteurs ou curateurs."*

Enjoint pareillement à tous curés et prêtres *tant séculiers que réguliers, de marquer dans les actes de célébration de mariage, etc., d'y faire appeler et assister,* non *pas seulement deux témoins, mais quatre témoins suivant les Ordonnances, édits, déclarations et règlements.*

Ordonne qu'en *conformité des articles* 8 *et* 9 *de la déclaration du Roi, du* 9 *avril* 1736, *les actes de célébration de mariage seront inscrits sur les régistres de l'Eglise paroissiale du lieu où le mariage sera célébré, et en cas, que pour des causes justes et légitimes, il ait été permis de célébrer dans une autre Eglise ou chapelle, les régistres de la paroisse dans l'étendue de laquelle, la dite église ou chapelle seront situées, seront apportés lors de la célébration du mariage pour y être l'acte de la dite célébration inscrite.*

Fait défense d'écrire et signer en aucun cas les dits actes de célébration sur des feuilles volantes, à peines d'être procédé extraordinairement contre le curé et autres prêtres qui auraient fait les dits actes, lesquels seront condamnés en telle amende ou autre plus grande peine qu'il appartiendra, suivant l'exigence des cas.

It is thus seen that the highest law court in this colony carried out the laws of the Kingdom of France regulating marriage in their spirit, and conformably to what was practiced in the Mother Country at the time and afterwards as attested by Pothier.

To come now to the test of the certificate and entry of marriage by M. Aucé in the Parish Register, we must again refer to Danty preuve par témoin, p. 102: "L'acte de célébration n'est point aussi essentiellement nécessaire à la validité du mariage, il n'est que pour prouver que le mariage a été légitimement con-

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traité et sans cet acte le mariage est d'ordinaire déclaré nul et clandestin. Cela supposé, il faut examiner les cas dont Boiceau n'a point parlé, dans lesquels la preuve par témoin peut être reçue ou rejetée en ce qui regarde le mariage public et solennel. 1o. Il est certain *que la preuve par témoin doit être rejetée à* l'effet de prouver *qu'il y a eu des bans publics ou que les parties en ont obtenus dispense ou que l'ordinaire leur a permis de se marier devant un autre prêtre que devant le propre curé. Ces actes doivent être rédigés par écrit suivant l'Ordonnance, ils doivent être insérés dans les régistres et ainsi ils doivent être rapportés.*

The entry in the Register is *vu la dispense de toute publication de mariage, ainsi que celle du temps prohibé par l'Eglise, accordée par Monseigneur Ig. Bourget, Evêque de Montréal,* comme il appert par sa lettre en date de ce jour, nous prêtre *vicaire soussigné, autorisé à cet effet.*" The marriage then is not by the propre curé, but supposed to take place by special authority in writing from the Bishop of the Diocese to Mr. Ancé. Where is the writing? It is not produced, and its non production is not accounted for satisfactorily. Why was it not rapporté? Monseigneur Bourget has been examined as a witness, contrary to the prohibition of parol testimony contained in the Ordinances, but neither he nor Mr. Ancé, nor any other witness, professes to prove the contents or the form and tenor of this *dispense.* If, however, the evidence of Monseigneur is to be looked at, we find him deposing—"Par les réglemens canoniques, *les mariages entre Catholiques et Protestans sont défendus et les prêtres Catholiques n'y peuvent procéder que par une permission expresse du Pape donnée aux Evêques à cet effet.*" Admitting to the fullest extent the power of the See of Rome in all matters of faith and religious discipline, "de dogme," no court of justice can recognize the prohibition of marriage between Roman Catholics and Protestants, unless acquiesced in and sanctioned by the civil power, or power of the State. It is needless to say that in Canada no such sanction has been or could have been given. Where is the *permission expresse,* what are its terms and limits, when was it given, by the Papal authority or the Court of Rome? Of this there is no proof, yet the warrant of the Bishop for acting at all is the *permission expresse,* not produced, and that of Messire Ancé is the dispense and license not produced either. But the question here is, whether in this case, and under these circumstances, Mr. Ancé was the proper Curé of the Municipal law, regularly authorised to act as a civil functionary in carrying out the law of Lower Canada, that is the old law of France in relation to marriage? Between the réglement Canonique of the See of Rome and the common law there is no connection, there is direct repugnance, for the one prohibits what the other permits. The Ordinances require banns, or a dispense and a marriage in facie ecclesiæ, with the accustomed rites; in the absence of this, if there be a marriage, can it be otherwise than void for clandestinité? The priest who made the entry, and the Bishop under color of whose authority he professed to act, claim to proceed upon the Papal authority, not the Royal authority of the Kings of France, under the law of the land; their acts then must be illegal, and cannot be recognised as valid by the Law Courts here. To cite again from Danty, p. 119, additions sur le chapitre 5—"Boiceau dans ce cha-

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pitre fait trois espèces de mariage clandestin, of the two first no mention need be made here, but la troisième is, quand deux personnes majeures et usant de leurs droits *se sont promis mariage par paroles de présent, sans observer aucune des cérémonies de l'Eglise* et que ce mariage n'a point été rendu public ensuite par l'une des trois manières en laquelle il soutient qu'un mariage doit être réputé public savoir par promesse de mariage faites depuis par paroles de présent dans l'assemblée des parents *ou quand le mariage a été réitéré en face d'Eglise devant le propre Curé* ou qu'il y a eu co-habitation en qualité de mari et femme. The *dispense* not being produced or proved, the whole transaction then is to be viewed as if Mr. Ancé had received no authority at all from the Bishop, or at best, supposing that he had authority, it was insufficient, as far as the State and the public authority were concerned, and only of value in the Court of Rome. Mr. Ancé does not profess to have acted by the authority of the Curé, on the contrary he alleges another authority. If that authority then be insufficient or not proved, there is a want of the presence du propre Curé, which vitiates the whole proceedings and renders the marriage *clandestin and nul.* C'est une maxime certaine établie par les lois *de l'Eglise et de l'Etat que la présence du propre Curé* est essentielle pour la *validité du mariage.* Le Concile de Trente conforme en cela à nos Ordonances, en a fait un Décret formel, il a déclaré nuls les mariages célébrés devant tous autres Prêtres. Nullos ac irritatos hujus modi contractus esse decernit, pro ut presente decreto irritos facit et annulat. Les Ordonnances du Royaume et l'Edit de 1697 ont établi conformément aux Saints Canons, que *la présence du propre Curé* était une solemnité essentielle au sacrement de mariage. Cochin XI. Plaidoyer, vol. I, p. 147, in quarto. Again Mr. Scott lived, died and was buried as a Protestant, he had no *propre Curé* as contemplated by the law of France, and it does not suffice that the woman had her *propre Curé,* being a Roman Catholic. "Le Concile impose aux fidèles, lorsqu'ils veulent se marier, l'obligation *d'instruire de leur mariage l'Eglise particulière dont ils sont membres au moins en la personne du Curé* de cette Eglise, qui en est le chef et qui la représente; et c'est pour cet effet qu'il ordonne que leur mariage sera célébré par le Curé ou de son consentement.

Cette obligation est imposée à l'une et à l'autre des parties; l'une et l'autre des parties doit donc la remplir, pour qu'on puisse dire, que la forme prescrite par le Concile a été observée. C'est pourquoi, lorsque les parties sont de différentes Paroisses, quoique le mariage ait été célébré par le curé de l'une des parties, la forme prescrite par le Concile n'est pas remplie, si l'autre partie n'a pas fait concourir son Curé à son mariage, en lui fesant publier les bans. Ce mariage qui, quoique contracté par le Curé de l'une des parties, l'a été à l'insçu du Curé de l'autre partie, a donc *le premier caractère de clandestinité, qui consiste dans l'inobservation de la forme et solemnité prescrite pour la célébration des mariages.* On convient que lorsque l'une et l'autre partie ont satisfait à la formalité de faire intervenir à leur mariage le consentement de leur Curé, en le fesant célébrer par leur Curé commun, on passe par dessus l'inobservation de l'autre. On convient que lorsque l'une et l'autre partie ont satisfait à la formalité de faire intervenir à leur mariage le consentement de leur

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Curé, en le fesant célébrer par leur Curé commun, on passe par-dessus l'omission de la formalité de la publication de bans qui devait précéder, le mariage ayant été contracté entre majeurs, *et ayant été public* ; mais il a une grande différence entre cette formalité qui n'est qu'un préalable au mariage, et la forme à laquelle chacune des parties est assujettie de faire intervenir *le consentement de son Curé ou de l'Evêque, laquelle forme est une forme du mariage même, sans laquelle il ne peut être valable.* C'est pourquoi, lorsque les parties sont de différentes paroisses, le mariage, quoique célébré par le Curé de l'une des parties, est nul, *si le Curé de l'autre partie n'y a pas concouru, soit en publiant les bans, soit de quelqu'autre manière que ce soit, quand même les parties seraient majeures ; le Concile et les Ordonnances de nos Rois, qui ont adopté sa dispo-tion, n'ayant fait à cet égard aucune distinction entre les majeurs et les mineurs.*" Pothier, mariage, 4, chap. 1, sect. 3, art. 2, parag. 4, No. 366. Mémoire de M. d'Aguesseau, 5 tome de ses Œuvres. La clandestinité qui rend nul le mariage fait hors de la présence et sans le consentement du Curé des parties consiste en deux choses, 1o. dans le défaut d'une forme et solennité requise à peine de nullité ; 2o. dans le *préjudice que l'inobservation de cette forme pourrait souvent faire à des tiers, en leur dérobant la connaissance d'un mariage qu'ils peuvent avoir intérêt de savoir et d'empêcher.* Quoiqu'il ne soit pas au pouvoir des parens des majeurs de former un obstacle insurmontable au mariage qu'ils se proposent de faire, ils ont néanmoins un très grand intérêt d'en être avertis, parcequ'en étant instruits, ils peuvent souvent par le retard qu'ils apportent au mariage et par leurs remontrances faire ouvrir les yeux à la partie qui se proposait de faire un mariage peu convenable et la déterminer à ne le pas faire. La forme présentée par le Concile et par les Ordonnances de célébrer le mariage en la présence ou du consentement du Curé, laquelle est prescrite aux deux parties a un autre fondement principal, que nous avons rapporté ci-dessus. C'est pourquoi quand même l'intérêt qu'ont les familles d'être averties du mariage, ne se rencontrerait pas, l'inobservation de cette forme ne laisse pas de devoir faire déclarer nul un mariage auquel, quoiqu'il ait été célébré par le Curé de l'une des parties, le Curé de l'autre partie n'a pas concouru sans qu'on doive faire aucune distinction, entre le mariage des majeurs et celui des mineurs, le Concile et les Ordonnances de nos Rois qui ont prescrit cette forme n'ayant fait aucune distinction."

Of the publication of banns, it may be said, as of the entry in the parish register, "cet acte est un acte public. Le Curé ou le Prêtre qui tient sa place, fait en cela une fonction publique que nos lois lui attribuent ; et comme elle appartient à l'ordre civil, il en est comptable au juge séculier." Pothier, mariage, No. 376. "Entre autres formes (says Charondas le Caron, in his *Résolutions*, partie 3, tit. 10, p. 160, 161,) sont requises trois publications précédentes de bans qui se doivent faire en l'Eglise paroissiale par trois divers jours de fête et après eux *faut épouser publiquement en la présence de quatre personnes dignes de foi pour témoins* ce qui convient aussi cap. cumin tua de sponsal et matrim quod integrum extat in quarta collectione Decret alium ubi Innocentius Tertius scribens ad Bellova-censem Episcopum, *bannis* inquit ; ut tuis verbis, utamur, *in Ecclesia, secundum consuetudinem Gallicanæ Ecclesiæ*

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editio." Puisque par l'autorité des conciles, de l'ordonnance, et des anciens docteurs de l'Eglise Chrétienne on ne peut valablement et légitimement réputer mariage, la conjonction et co-habitation de l'homme et de la femme auparavant la *bénédition nuptiale faite solennellement en l'Eglise, c'est un abus d'appeler mariage consommé une clandestine et illicite conjonction.* Again at chap. 8, p. 181, Charondas says: entre les constitutions de Basilius Macedo, Empereur, il y a un article qui porte que *la bénédiction des noces se doit faire publiquement et non en cachette.* Aussi y en a des constitutions des Papes et entre autres C. cum societas 27, qui est de Léon trois, ubi scribitur, non dubium est illiam mulierem non pertinere ad matrimonium, cum qua docetur non fuisse nuptiale sacramentum. Le semblable se dit avoir été ordonné par les Capitulaires de Charlemagne et y a détermination expresse au Concile de Trente sessio. 24, cap. 1, de reformat. matrimo. et en l'ordonnance de Bloys. Et elle conjonction clandestine qui tient plutôt du concubinage que du mariage ne peut être autorisé par contrat de mariage encore qu'il y en ait des enfants. Nam instrumenta acta probationem matrimonii non sunt idonea nisi constat nuptias fuisse celebratas C. neque sine nuptiis Cod. de nuptiis. Tellement qu'outre la promesse et contrat de mariage, doivent être faits les bans publiquement en l'Eglise et en sont requis trois. Il suffira de réciter deux arrêts l'un du 26 juillet 1603, et l'autre du 8 janvier 1605, which he gives. D'Hericourt, lois Eccles. partie 2, chap. 5, art. 1er, page 58, says, "Le Concile Trente a exigé la *présence du propre Curé* des parties pour la validité du sacrement, et l'ordonnance de Blois a adopté la disposition. On ne doit pas douter que l'Eglise et l'Etat se réunissant, ne puissent *exiger sous peine de nullité,* de nouvelles formalités pour une action si solennelle."

We find in the 1er Journal du Palais, p. 585, arrêt du 16 juin 1674, these words—"Le Concile de Langres tenu en 1404, après avoir défendu sous des peines *rigoureuses les mariages clandestins, mit pour l'une des preuves de la clandesnité, le défaut de la bénédi tion, cum matrimonium fit per verba de presinti, non cum solemnetate debit a vel cum non dabatur honor vel benedicto in facie ecclesiæ.* Aux Conciles d'Angers tenus en 1274 et 1303, de Saumur en 1253, de Chartres et de Rouen en 1526, de Paris, 1557, et en plusieurs autres il est parlé de cette bénédiction en des termes *qui nous marquent sa nécessité.* Telle est encore la disposition *des Ordonnances de nos Rois et particulièrement de l'Ordonnance de* 1639 qui est l'ouvrage d'une jurisprudence consommée et dans laquelle défunt M. l'avocat-général Bignon, qui l'a redigée, [illegible] tout ce qui était dans les lois précédentes, et tout ce que sa sagesse [illegible] expérience lui a fait juger nécessaire pour le repos des familles, e[illegible] pureté de la discipline."

Durand de Maillane, Dictionnaire, Voce Clandestin, vol. 1, p. 500, says: "Rien n'est si sévèrement défendu que les mariages clandestins. Ceux qu'on "appelle à la Gomine, et dont nous avons parlé ne sont pas mieux traités dans le "Royaume. [illegible] jurisconsulte disait touchant ces mariages, qu'il ne faut pas "toujours [illegible] les actions humaines par le point de Théologie, il vaut mieux "dans ce[illegible] envisager cet intérêt public, dans lequel il est de la dernière "conséquence de conserver les formes et solennités ordinaires du sacrement, que

" de s'arrêter à des distinctions de l'Ecole, inventées pour mettre les consciences " à couvert et qui ne jettent qu'un très grande désordre dans les familles, et trou- " blent cette harmonie qui entretient les états dans leur lustre et dans leur splen- " deur. Il serait donc d'une dangereuse conséquence, d'admettre que la seule " présence du Curé est suffisante pour faire valider un mariage. Ce serait plu- " tôt une profanation publique, un mystère d'abomination, et faire d'une action " toute sainte, un scandale qui retournerait au mépris de la religion et de ses " ministres, et au bouleversement de toutes les sages précautions que le saint " Concile de Trente et les Ordonnances ont prises pour proscrire ces sortes de " désordres." The last authority which I shall cite, as to the clerical observances to be pursued by the Curé in the performance of the marriage ceremony, is the 89th of the Novellæ Constitutiones of the Emperor Leo. " Imperator, eidem Styliano. " Quemadmodum adoptionem promiscue habitam neglexit vetustas, quam tametsi " votis precibus sacrisque ceremoniis peragi lege permitteret, non tamen illam " se parvi pendere putabat ita et absolutam matrimonii constitutionem, dum id " citra jam receptam benedictionem iniri sineret, neglexisse videtur. Sed veter- " ibus alius voluntatis fortasse ratio inveniri possit: à nobis vero, cum divina " gratia ad honestius multo sanctiusque vitæ institutum jam res comparatæ sint " neutrum dictorum negligi convenit. Itaque quemadmodum, adhibitis sacris " deprecationibus adoptionem perfi cipræcipimus: sic sane etiam sacræ bene- " dictionis testimonio matrimonia confirmari jubemus. Adeo, ut, si, qui citra " hanc matrimonium ineant, id ne ab initio quidem ita dici, neque illos in vitæ " illa consuetudine matrimonii potiri velimus. Nihil enim inter cœlibatum " et matrimonium, quod reprehendi non debeat, medium invenias. Conjugalis " vitæ desiderio teneris? Conjugii leges serves necesse est. Displicent matri- " monii molestiæ? Cœlebs vivas, neque matrimonium adulteres, neque falso " cœlibatus nomine culpam prætexa." I have already said that Mr. Scott being a Protestant had no proper Curé at St. Eustache. With reference to the marriage of Protestants, the law of Lower Canada, as a British Colony, must be the law of England, as it stood prior to the passing of the Statute of the 26 George 2nd, cap. 33, intituled " An Act for the preventing of clandestine marriages," or the old Marriage Act of 1753. There can be no doubt now, that the intervention of a minister at the celebration of the marriage is essential to its validity, and was required by the law of England, as it stood before the passing of the Marriage Act. Ropers' Husband and Wife, by Jacobs, vol. 2, p. 445; Shelford on Marriage and Divorce, 37, 38, 54, 55; 1, Burge's Colonial Law, 156. Mr. Ance, if he ever acted as a minister at all, most certainly was not a minister of the Church of England and Ireland, or of the Church of Scotland, or such as are authorized to keep registers of marriages, and to perform marriages, under our local laws. Under the old law of France, as it stood in Canada at the time of the Conquest, no distinction was recognized in marriages between Protestants and Catholics. The practice pursued in this case, and the permission given by Monseigneur Bourget, and the regulations of the See of Rome, are wholly unsupported by law, and are not to be recognized in the Queen's Courts. If clergymen of the Church of Rome choose to perform the marriage ceremony between Catholics and Protestants, it must be done in the usual form prescribed

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by law in other cases. In his Memoire sur les mariages des Protestants, in 1785 Mr. Joly de Fleury says, page 162—Si celui qui reçoit le sacrement de mariage doit être en état de grâce, c'est une disposition intérieure qui dépend de sa bonne foi. Tant qu'il n'y a ni loi de l'Eglise ni loi de l'Etat qui établissent rien sur ce sujet les Evêques particuliers n'ont pas le pouvoir d'établir une nouvelle discipline, s'ils l'établissent par des Mandemens, il y aurait lieu à l'appel comme d'abus. Quand le Curé se croirait en droit d'examiner verbalement ceux qui se présenteraient, il ne peut jamais avoir le moindre prétexte d'exiger ni la communion ni un acte d'abjuration par écrit ou une profession de foi, ce qui est la même chose, qui ne peuvent servir qu'à faire faire des mariages par écrit et peut être des sacrilèges de mauvaise foi, et à entretenir les Assemblées par rapport aux autres. At page 150 Mr. Joly de Fleury says: " Les Evêques et les Curés peuvent donc administrer le mariage à celui qui ne croit pas que le mariage soit un Sacrement." The appel comme d'abus which brought ecclesiastical proceedings before the Common Law Courts under the old system may now be enforced by our Prerogative Writs of Prohibition, Mandamus, and Quo Warranto; a Certiorari would suffice to bring them up for review now before the competent tribunal, that is the Superior Court. The resort to Certiorari and Mandamus among us is of ordinary occurrence in Church matters, such as contestations respecting the building or repairs of Churches, the election of Church Wardens, &c.

From what precedes, I am of opinion that the plea of "clandestinité" is made out, apart from the peculiar circumstances attending the writing to the Bishop by Mr. Ancé; the haste and hurry of the proceeding; the mental and bodily condition of Scott; and the secrecy with which all was carried on, without the knowledge of the appellant and her sisters, and even of the attending family physician. 1st.—As no marriage took place in facie ecclesiæ. 2nd—As there was no active participation in it by the proper Curé. 3rd—As no dispensation has been produced or proved, and, therefore, none such is to be taken to have existed. 4th.—As no banns were published. 5th.—As no marriage rites whatever, and none of the ceremonies of the Church of Rome, or any other church, were performed. 6th.—As no license by the Roman Catholic Bishop can give validity to the marriage of a Protestant, unless it can be accompanied by all the forms and solemnities practised in the Church of Rome, and required by the Gallican Church and the Ordinances, Declarations, and Edicts of the Kings of France, in respect of marriage as a civil contract, as between Roman Catholic and Roman Catholic. 7th.—As no cohabitation followed the making of the entry in the Parish Register.

The next point to be noticed in this case is the allegation that the supposed marriage was made in extremis, and is therefore inoperative as to civil effects. This depends upon the declaration of 1639, which, as Pothier says, *Mariage* No. 429, " prive des effets civils une autre espèce de mariage. Elle porte, article 6: " Voulons que la même peine (de la privation des successions) ait lieu " contre les enfans qui sont nés de femmes que les pères ont entretenus, et qu'ils épousent lorsqu'ils sont à l'extrémité de la vie." He says, *quoique ce mariage ait été célébré à Eglise où cet homme s'est fait porter après la publication ou dispense de bans, qu'il soit en conséquence valablement contracté*, la loi ne veut pas qu'il ait les effets civils.

No. 430, he adds, il faut que ceux qui attaquent ces mariages prouvent deux choses ; 1o. le mauvais commerce qui a précédé le mariage ; 2o. que la personne était *in extremis* lorsque le mariage a été contracté.

Le mariage est sencé contracté in extremis, lorsque la personne était au lit, malade d'une maladie qui avait un *trait prochain à la mort quoiqu'elle ne soit morte que quelques mois après.* Un homme qui avait eu mauvais commerce avec une femme ayant été blessé d'un coup de pied, et l'ayant épousée six jours après dans un tems où la blessure paraissait si dangereuse, qu'il reçut l'extreme onction le jour de son mariage ; la Cour, par Arrêt du 28 février, 1667, jugea que ce mariage avait été contracté in extremis, *quoiqu'il eut survecu* cinquante quatre jours depuis, et réduisit à des alimens les enfants qu'il avait eus de cette femme. L'arrêt est rapporté au troisième tome du Journal des audiences. Il y a deux autres arrêts rapportés au même tome, l'un du 22 décembre, 1672 l'autre du 3 juillet, 1674, par lesquels des mariages furent réputés faits *in extremis*, quoique, dans l'espèce du premier, l'homme eut survécu 65 jours ; et dans l'espèce du second, 42 jours.

In the 1st Journal du Palais 326, arrêts du 8 Juillet et 5e Septembre, 1665, it is reported, " M. l'Avocat Général Talon dit, que selon toutes les apparences François Leriche était malade lorsqu'il contracta son mariage. Il répéta la circonstance de *la permission de se marier quâlibet horâ.* Il dit que, quoique régulièrement à considérer les termes du premier certificat du Curé qui avait été livré en bonne forme, on dût présumer *que ce mariage avait été célébré en face de l'Eglise*, néanmoins les circonstances du fait donnaient lieu de croire, *qu'il n'avait pu être célébré qu'en chambre.* Il passa plus avant, car il prétendit que quand même François Leriche n'aurait point été malade, son mariage n'aurait pas laissé de tomber sous la prohibition de la loi, et que l'Ordonnance de 1639 se devait entendre, non seulement des mariages contractés dans la maladie par les concubinaires avec leurs concubines mais encore des mariages par eux contractés avec les mêmes personnes sur le déclin de leur l'âge, et dans les dernières années de leur vie. Il ajouta que la dispence de publier les trois bans était abusive, et contraire à la même Ordonnance de 1839. *Sur quoi est arrivé arrêt conforme à ses conclusions, 22 décembre* 1871.

In the second Vol. of the Arrêts d'Augeard 935, we find an arrêt of the 16 Mars, 1786, in which it is said, of the party whose marriage was in question, " Il a eu à la vérité assez de force pour se transporter à la paroisse de Ste. Eustache et y célébrer son mariage, mais on remarque *une précipitation extrême dans la célébration* où l'on a réuni les fiançailles et le mariage, circonstances propres à faire présumer que le Sieur Arson qui pouvait tenter une fois se faire transporter dans l'Eglise paroissiale ne pouvait pas s'exposer à être transporté une seconde fois."

Merlin Répertoire Verbo Mariage, sect. 19, parag. 1, No. 3, page 47, vol. 8, in quarto. Le véritable, l'unique cas d'appliquer l'ordonnance, est lors qu'un homme se marie dans un tems où il se sent frappé de mort, ou la violence du mal et l'impuissance des remèdes, lui fait sentir que la vie est prête à lui échapper. All

the facts of this case, the precipitation with which the dispense was sent for, the avowed ground of illness upon which it was urged and given, the dispense as to the uncanonical time when the marriage was to take place, the sick room and bed, the absence of religious ceremonies, the want of notice to the sisters, the previous illness of Mr. Scott and its subsequent aggravation, the state of his mind, and his death so speedily following, of the same disease, delirium tremens, as that under which he was laboring when the licence was sent for,—these, when taken together, present the strongest case which can be conceived of a marriage in extremis, in violation of the declaration of 1639. I am decidedly of opinion that upon this point the judgment of the Court below is erroneous, both as to the fact and the application of the law, and that for this, if there were no other reasons, it ought to be reversed.

C'est donc une vérité confirmée par une jurisprudence certaine que l'on a toujours distingué les mariages faits en chambre par un moribond des mariages célébrés en face de l'Eglise même par les personnes infirmes mais qui ayant assez de force pour se faire conduire à l'Eglise ne peuvent être regardées comme à l'extrémité de leur vie, et si on accuse notre morale de relâchement nous avons un garant sûr, dans la jurisprudence qui l'a consacrée dans tous les tems, 4 Cochin, 210. Plaidoyer 95, in quarto.

Qu'un homme ait entretenu une femme et qu'il se détermine à l'épouser pour vivre publiquement avec elle, il n'y a rien en cela que la religion ni la loi puissent réprouver, au contraire l'un et l'autre le sollicitent pour ainsi dire à prendre ce parti.

Mais qu'un homme qui a vécu en mauvais commerce rougisse de prendre pour épouse celle qu'il a eu pour concubine, que par cette raison il refuse de l'épouser tant qu'il a espérance de vivre encore quelque tems et qu'il ne s'y détermine que quand il sent que sa honte va être ensevelie avec lui dans le tombeau alors la loi entre dans ses propres sentimens et refuse après sa mort des honneurs qu'il n'a jamais voulu accorder pendant sa vie.

Voir Cochin 108, in Quarto.

To come lastly to the consideration of the fins de non recevoir set up by the respondents. The Court below, by deciding upon the merits, has impliedly determined that they were insufficient to preclude the appellant from her remedy, and upon this point, and this alone, I agree with the judgment. Pothier, Marriage, No. 448, says: "Les parens de l'une ou de l'autre des parties qui ont contracté mariage, ne peuvent, àla vérité, tant que les deux parties vivent, attaquer la validité de leur mariage, n'ayant *alors aucun intérêt né* qui puisse les y rendre recevables, mais après la mort de l'une des parties, les parens, même collatéraux de cette partie, sont recevables à attaquer le mariage, incidemment à quelque contestation sur quelque intérêt temporel. Par exemple, les parens de la partie décédée peuvent revendiquer sa succession contre les enfans, en soutenant qu'ils ne sont pas habiles à succéder et en leur formant, pour cet effet, la contestation sur la validité du mariage dont ils sont nés." If the marriage had been impeached alone on the grounds of clandestinité, and as having been made in extremis, the fins de non recevoir would have had some countenance, but here it is alleged that there has been no marriage at all, no conjunctio in matrimonium

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and no consent to marry, from the mental incapacity of one of the parties, to make any contract at all. No authorities can be produced to show that under such circumstances the lawful heirs and next of kin are precluded from wresting possession of their inheritance from unauthorized hands. The proposition is unreasonable and unnatural upon its very front, when extended to a case like the present. It is again unreasonable, that the children who claim to be legitimate should place themselves in the position of being heirs presumptive to the appellant, who they would claim as their aunt and the sister of their father, without enabling her to contest this capacity on their part. It is said that there has been an acknowledgment of the marriage by the sisters of the appellant which binds her; this acknowledgment is made to result from the suit brought by them against the defendants en déclaration de jugement exécutoire. But it is to be noticed that before beginning the suit, to wit, on the 22nd June, 1853, by the act of renunciation to their brother's estate, before Gibb and his colleague, Notaries, Barbara Scott and Jane Scott declare, as a reason for renouncing, that they are "willing and desirous that their only surviving sister, Ann Scott, should have the full and entire benefit and advantage of the whole of the estate and succession of the said late William Scott, should she see fit to accept thereof," and that they adhere to and enforce all their rights and claims against their brother's estate under their father's will. The children who claim to be legitimate have only accepted the succession of the late William Henry Scott *sous bénéfice* d'inventaire, and their petition to obtain this benefice is only dated the 29th October, 1853; before that time they had not appréhendé la succession, or made acte d'héritiers—the whole matter was res integra. It is also objected to the appellant that she executed an assignment to her sisters before the same Notaries on the 28th June, 1853, of all her right, title, &c., as one of the legatees under the last will and testament of her deceased father, the late William Scott, in, to, or upon one undivided third part of that certain judgment, amounting in principal to the sum of £2910 15s. 2d., rendered in the Court of King's Bench on the 19th April, 1824, in favour of the said William Scott, the father, against William Scott, the younger, her brother. Now this assignment is made without guaranty, and subject to the condition: "It is expressly understood and agreed that nothing contained in the present *act* shall in any wise prejudice the right of the said Ann Scott to claim the estate and succession of her late brother, the late William Scott deceased, one of the defendants mentioned in the said judgment, nor in any wise affect her title as heir to the said estate and succession, should she see fit to assume the quality of heir to the said estate and succession, and to claim the same, nor shall any liability on her part as such heir be in any manner defeated, altered or impaired by the present transfer." The two sisters claimed to the judgment creditors of their deceased brother, they renounced his succession to enforce their claim, and they sought to enforce it by suing the appellant as the lawful heir and representative of her brother, and they also sued the children of that brother as heirs in possession, sous bénéfice d'inventaire. Under these circumstances there can be no estoppel of the appellant's right to question the validity of the marriage, and the authorities cited from Cochin and Le Merle are inapplicable. There is nothing approaching the

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case where les collatéraux ou autres parens avaient *approuvé et reconnu formellement le mariage.* Every act done by the appellant and her sisters being expressly declared to be for the purpose of enabling her to claim the estate and succession of her brother as his heiress-at-law.

In conclusion it is to be said, that the importance of this case, in a public point of view, as touching the form of marriage between Catholic and Protestant, as well as the doctrine of marriage and the marriage tie in Lower Canada, seems to require the more than usually extended observations, which I have thought it necessary to offer. Judgment affirmed.

Cross & Bancroft, for appellants.

Cartier & Berthelot, for respondents.

(A. C.)

FROM THE SUPERIOR COURT, DISTRICT OF MONTREAL.

MONTREAL, 1st DECEMBER, 1859.

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

No. 40.

THOMAS PALLISER,

(*Plaintiff in the Court below*)

APPELLANT;

AND

VENANT ROY DIT LAPENSÉE,

(*Defendant and Opposant in the Court below*,)

RESPONDENT.

HELD:—That where two executions issue, at the suit of different parties, against the same defendant, the Sheriff cannot unite both seizures in one *procès verbal*.

This was an appeal from a judgment of the Superior Court at Montreal, rendered on the 31st December, 1858, of which a report is given at page 119 of the 3rd volume of the Lower Canada Jurist, and note.

AYLWIN, J., *dissentiens:*—(After stating facts). In my opinion the record in this case is not in a state to admit of any judgment being rendered in it. At the time of the seizure the Sheriff was in possession of two writs,—here we have but one, and I think that the Court ought, under the circumstances, to send the case back, notwithstanding that the parties have not alleged a diminution of the record. However, as I am called upon to pronounce an opinion as to the validity of the judgment now appealed from, I would ask, where is the law that pronounces a nullity in a case like the present? At the argument, the counsel for the appellant relied on the 3rd article of the 33rd title of the Ordinance of 1667, but the authority cited is manifestly inapplicable, as it has reference solely to seizures of moveable property. In the earliest periods of our earliest history seizures by Sheriffs differed essentially from those made under the old law of France, and that difference has subsisted ever since. For example, the writ was a procedure totally unknown under the old law. Here we have an officer of justice who acts under order of the Court, whereas under the old law the party selected his own *huissier* without being armed with any writ whatever. Now, how has the Sheriff proceeded here? Why, in the way in which Sheriffs have invariably proceeded ever since that office has been known

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in this country. Besides *saisie sur saisie ne vaut*; why then should the sheriff seize twice? He has two writs, both ordering him to seize, and as they are conjointly delivered to him for that purpose, he makes one conjoint seizure under them. But, as I said before, where is the law of Lower Canada which requires a separate *procès verbal* of seizure on each writ? I know of none. The law of the land, moreover, requires that a *nullité* shall be pronounced by the Legislature and is never left to the decision of judges. To leave such power in judges would be in effect to give them power to legislate. In addition to the foregoing reasons I would merely add that the course pursued by the sheriff was one which entailed the least possible expense on the defendant and was therefore evidently in his interest.

LAFONTAINE, Chief Justice :—L'état du dossier fait apparaître les faits suivants :—

Deux jugements ont été obtenus, chacun, pour £125, contre le défendeur qui est maintenant opposant *afin d'annuler* dans deux causes distinctes, et non jointes à aucun étage des procédures, l'une à la poursuite de Janet Sanderson, et l'autre à la poursuite de Thomas Palliser. Ces deux jugements paraissent avoir été suivis de deux brefs d'exécution, qui ne sont pas au dossier, mais en vertu desquels (voir procès-verbal de saisie), il a été procédé à la saisie de l'immeuble dont il s'agit. Il n'y a qu'un seul procès-verbal de saisie, bien qu'en tête, il donne les titres des deux causes. Ce procès-verbal est daté du 15 janvier 1858. L'huissier saisissant commence par déclarer qu'il a procédé " en vertu de deux warrants " du shérif, " datés tous les deux du 5 janvier 1858, fondés aussi tous les deux sur deux brefs de saisie-exécution......datés tous les deux du 29e jour de mai 1857." Il n'a fait qu'un seul commandement de payer, lequel comprend le montant réuni des deux jugements, au lieu de faire au nom du demandeur, dans chaque cause, un commandement de lui payer seulement la somme précise qui lui était due. N'y ayant pas eu de vente en vertu de ces deux premiers brefs d'exécution, ils furent rapportés au tribunal de première instance. Plus tard, savoir le 20 février 1858, chacun des demandeurs fit émaner un *alias* bref d'exécution ordonnant au shérif de prélever, par la vente du fonds par lui déjà saisi, la somme due à chaque demandeur respectivement. Le shérif paraît avoir adopté les procédés préparatoires pour parvenir à cette vente. Mais deux oppositions *afin d'annuler*, faites au nom du défendeur, une dans chaque cause, sont logées au bureau du shérif, qui les produit devant la Cour Supérieure en ne les accompagnant que d'un seul et même rapport, en date du 9 juin 1858, fait sur une feuille détachée, non annexée aux brefs d'exécution, dans lequel rapport il allègue qu'en obéissance à ces brefs, il a fait les publications nécessaires pour la vente du fonds par lui déjà saisi, et mentionné dans la cédule A annexée aux deux brefs d'exécution. Cette cédule, après le titre des deux causes, consiste dans un extrait imprimé, coupé de la *Gazette Officielle*, et est sans date.

Les deux oppositions du défendeur concluent à la nullité de la saisie, parce qu'il n'y a pas eu deux actes séparés de saisie, et parce qu'au lieu d'un seul procès-verbal, il aurait dû y en avoir deux. Ces oppositions ont été contestées par

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les deux demandeurs, chacun séparément. Deux jugements sont intervenus le 31 décembre 1858, donnant au défendeur main-levée de la saisie.

Le défendeur se plaignait aussi dans ces oppositions de ce que la désignation de sa propriété n'était pas suffisante. Si un seul procès-verbal doit rendre la saisie valable, cette plainte du défendeur devient tout-à-fait futile en présence de sa signature à ce procès-verbal, sans aucune protestation de sa part: Pour justifier cette plainte, des témoins ont été examinés; s'ils l'ont été dans les deux causes, ce que j'ignore, nous n'avons leurs témoignages que dans une seule, et ce n'est pas celle qui est portée en appel. Nous avons seulement les témoignages pris dans la cause de Sanderson; nous ne pouvions donc en prendre connaissance, même s'il y avait lieu de s'occuper du dernier moyen d'opposition du défendeur.

La seule question est donc celle de savoir s'il devait y avoir deux saisies, deux procès-verbaux, et deux avertissements distincts dans la *Gazette Officielle*. A l'exception de ces trois actes de procédure et du rapport qu'en a fait le shérif, tous les autres ont été disjoints.

Le statut provincial de 1836, ch. 15, contient la disposition suivante: "Le procès-verbal de saisie sera annexé à chaque retour de saisie d'aucuns biens et effets, ou terres et immeubles, et renfermera un inventaire exact et détaillé des biens et effets, et une description légale des biens et immeubles qui auront été saisis." Et par la 18e section, lorsqu'il y a plusieurs demandeurs ou plusieurs défendeurs mentionnés dans un bref d'exécution, ou lorsque les parties sont en jugement en qualité de tuteurs, il est suffisant que l'avertissement du shérif mentionne le premier demandeur et le premier défendeur, déclarant en même temps qu'il y a d'autres demandeurs ou d'autres défendeurs, et que, dans l'autre cas, l'avertissement "déclare que tel tuteur est tuteur aux enfants mineurs de la personne décédée, sans spécifier au long les noms de tels enfants mineurs."

La première de ces dispositions, celle qui est relative au procès-verbal, doit s'entendre, évidemment, d'un procès-verbal comme étant exigé sur chaque saisie qui est pratiquée. Dans l'espèce il y avait deux titres exécutoires, distincts l'un de l'autre. Celui émané au nom de Palliser ne commandait pas et ne pouvait pas commander au shérif d'exécuter celui émané au nom de Sanderson et *vice versâ*. Le jugement dont il est fait mention au dos de l'un des brefs d'exécution, aux termes de la 30e section de l'ordonnance de 1785, n'est pas le jugement qui est mentionné au dos de l'autre. La saisie ne pouvait donc être faite sous la même autorité. Il devait donc y avoir deux saisies, et deux *retours* de saisie. Tout *retour* de saisie devant être accompagné, lorsqu'il est fait au tribunal, d'un procès-verbal de la saisie, il s'ensuit, que dans l'espèce, il aurait dû y avoir deux procès-verbaux de saisie, un pour chaque cause. Sans cela, la procédure dans l'une de ces deux causes qui sont disjointes, est incomplète. Au dossier de l'une d'elles, il n'y a pas de procès-verbal de saisie, il ne peut pas y en avoir. La suggestion qui a été faite que l'on peut regarder le procès-verbal comme étant commun aux deux causes, ne me paraît pas être une suggestion qui puisse être accueillie. D'abord elle n'aurait pas l'effet de compléter le dossier de l'une d'elles. Puis, supposons une opposition *à fin d'annuler* faite dans une seule cause, avec laquelle le shérif rapporte l'unique

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procès-verbal qui existe, puis cette opposition, après un premier jugement, portée en Cour d'Appel, il est facile de concevoir que le défendeur pourrait se pourvoir contre la saisie en autant qu'elle se rapporterait à l'autre cause, par une autre opposition à fin d'annuler, fondée sur le défaut ou l'absence du procès-verbal, et par là arrêter toute la procédure de cette cause jusqu'au retour du dossier de la cause en appel. Et même, après ce retour, le dossier de l'autre cause restera toujours incomplet, jusqu'à ce qu'on trouve le moyen de faire sortir le procès-verbal de saisie de l'un des dossiers pour le faire entrer régulièrement dans l'autre. L'une des parties sérait donc, sans qu'il y eut de sa faute, soumise à des délais indéfinis. Ainsi je suis porté à dire que, dans l'état de notre législation sur la matière, législation qu'il serait peut-être désirable de modifier, il aurait dû y avoir deux commandements de payer, deux saisies et deux procès-verbaux de saisie. Je regrette en quelque sorte d'avoir été obligé d'en venir à cette conclusion car la position du défendeur est loin d'être favorable, lui qui a signé le procès-verbal de saisie sans aucune protestation. Quant à l'avertissement qui doit être publié dans la *Gazette Officielle*, et qui, dans l'espèce, a été fait par un seul et même acte, il ne me semble pas entrainer les mêmes inconvénients que ceux que j'ai signalés plus haut. Rien n'empêche le shérif d'en produire au besoin des duplicata dans les deux causes, et par là de rendre complets les deux dossiers. Si le défendeur fait une opposition dans l'une des deux causes seulement, son autorité de procéder à la vente est bien suspendue, il est vrai, quant à cette cause; mais il me semble que, dans ce cas, son autorité relativement à l'autre cause n'en doit pas être affectée et reste entière.

L'absence de l'original du procès-verbal de saisie du dossier tel que présenté en Appel, ne saurait être, dans les circonstances une objection valable. Le défendeur en en produisant lui-même la copie duement certifiée qui lui a été signifiée, est venue au secours du demandeur.

Judgment confirmed.

M. Morison, for appellant.
Loranger et Frères, for respondent.
(S. B.)

COUR SUPERIEURE.

MONTREAL, 30 JUIN 1860.

Coram BERTHELOT, J.

No. 2248.

Whitney vs. *Dansereau.*

Jugé :—Que la contrainte par corps pour dommages et dépens qui pouvait être exercée en vertu de l'Art. 2, du Tit. 34 de l'Ord. de 1667, a été abolie par l'acte 12 Vict, c. 42.

Le demandeur ayant donné les quatre mois d'avis requis par l'Ord. de 1667, a fait motion que le défendeur fut contraint par corps au paiement d'un jugement qu'il a obtenu contre lui le 20 mai 1858, pour £378 10s. 6., dont £125 pour montant d'un billet et balance pour dommages résultant de l'in-exécution d'une vente de grains.

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Pour repousser cette motion le défendeur a soutenu :

1. Que cette cour ne pouvait ordonner la contrainte par corps, parce qu'elle n'avait pas été prononcée par le jugement final, quoique demandée par la déclation du demandeur.

Pigeau, Proc. Civile, T. 1 p. 404.
Dalloz, Rec. Alp. Vo. Contrainte par corps, No. 22, p. 747—p. 771 and 772.
Idem, Vo. compétence, p. 331.
Dalloz, Rec. Périodique, 1830—2—130.
Frescarode vs. Tasker.

2o. Que le jugement du demandeur n'ayant rapport qu'à des matières purement civiles, ne pouvait aux termes de l'Ord. 1667, donner lieu à la contrainte par corps.

Ord. 1667, Tit. 34, Art. 1.
Dalloz Rec. Alp. vo. contrainte par corps, sect. 1, p. 724—p. 731—733, sect. 2, p. 769.

3. Que l'Acte 12 Vict. ch. 42 avait aboli la contrainte par corps pour dettes, sauf dans quelques cas prévus dans la 15e clause et que la créance du demandeur n'était pas l'une de celles mentionnées dans cette clause.

4. Que dans tous les cas il était laissé à la discrétion de la cour d'accorder ou de refuser la contrainte par corps et que dans les circonstances sous lesquelles elle était demandée, la cour devait la refuser.

Serpillon, com. sur l'Art. 2 du Tit. 34 de l'Ord. 1667, p. 630.
Rodier, p. 676.
Ferrière, Dict. de Droit, vo. contrainte par corps.
Merlin, Question de Droit, vo. contrainte par corps §IV.

Le demandeur en réplique a prétendu que l'Acte 12 Vict. ch. 42 n'avait pas aboli la contrainte par corps dans les cas où elle pouvait être exercée en vertu de l'Ord. 1667, et qu'à tout évènement la créance du demandenr était l'une de celles exceptées par la clause 15e et qu'elle tombait dans la classe des dommages résultant de *torts personnèls* (personal wrongs.)

Berthelot, J.—Etant d'opinion que l'Acte 12 Vict. ch. 42 a aboli l'emprisonnement pour dettes dans tous les cas où il pouvait être ordonné en vertu de l'Ord. de 1667, sauf les quelques exceptions prévues dans la clause 15e il n'est pas nécessaire de décider toutes les questions soulevées par le défendeur. La prétention du demandeur que sa créance est comprise dans l'exception qui a rapport aux *personal wrongs* n'est pas fondée. Ces expressions *personal wrongs* ne signifient pas toute espèce de dommages, excepté ceux causés à la propriété foncière, ainsi que l'a prétendu le demandeur, elles ne se rapportent qu'aux injures faites à la personne, et ne s'appliquent pas à des dommages de la nature de ceux pour lesquels le demandeur a obtenu jugement. La motion du demandeur est en conséquence renvoyée avec dépens.

MM. Laflamme, Laflamme et Daly, pour le demandeur.
MM. Dorion, Dorion et Sénécal, pour le défendeur.

(V. P. W. D.)

EN APPEL.

DE LA COUR SUPÉRIEURE ; DISTRICT DE MONTRÉAL.

MONTREAL, 1ER MARS, 1860.

Coram SIR L. H. LA FONTAINE, Bart., Juge-en-Chef ; AYLWIN, J., DUVAL, J., MONDELET, J. A.

No. 2661.

SENECAL, (*Défendeur en Cour Inférieure,*)

Appelant.

ET

JARRET DIT BEAUREGARD, (*Demandeur en Cour Inférieure,*)

Intimé.

Jugé,—Que le curé a le droit de présider les assemblées de fabriques.

Par sa requête libellée, l'Intimé se plaignait de l'usurpation faite par l'Appelant de la charge de nouveau Marguillier au préjudice de l'Intimé qui avait été légalement élu Marguillier, sous la présidence du Marguillier en charge et comptable, le 27 Décembre 1857, à une grande majorité ; (l'Appelant usurpant cette charge sous le prétexte qu'il avait été élu tel Marguillier, le même jour, sous la présidence du Curé de la Paroisse.)

L'Intimé, par sa Requête, alléguait : qu'ayant été déclaré élu Marguillier par le Marguillier en charge il aurait été dûment installé en la manière ordinaire, sans opposition, dans le Banc d'Œuvre de l'Eglise de la Paroisse de Varennes, le dimanche, 1er Février, 1858.

Que le dimanche suivant, l'Appelant s'était illégalement emparé de la place de l'Intimé dans le Banc d'Œuvre, et l'aurait occupée durant le Service Divin du matin et aurait toujours continué à s'en emparer.

L'Intimé concluait par sa Requête à ce que son élection, comme nouveau Marguillier, fut déclarée valable, à l'expulsion de l'Appelant du Banc d'Œuvre et au paiement de la pénalité de £100 avec dépens.

Par sa réponse à cette Requête libellée, l'Appelant prétendait avoir été légalement élu nouveau Marguillier à l'assemblée tenue sous la présidence du Curé qui conformément à la loi et à l'usage immémorial et constamment suivi dans les Paroisses du Diocèse de Montréal et nommément dans celle de Ste. Anne de Varennes a le droit de présider telles assemblées.

L'Appelant alléguait en outre : que l'élection de l'Intimé étoit nulle et il concluait au renvoi de la Requête libellée. La contestation ayant été liée, les parties procédèrent à la preuve de leurs allégués respectifs.

Les deux élections eurent lieu le même jour dans la Sacristie, l'une sous la présidence du Marguillier en charge, et l'autre sous la présidence du Curé de la Paroisse et des procès-verbaux de ces deux élections furent produits.

La Cour Supérieure à Montréal, le 30 Octobre 1858, accorda à l'Intimé partie des conclusions de sa requête libellée en annulant l'élection de l'Appelant comme nouveau marguillier de l'Œuvre et Fabrique de la Paroisse de Ste. Anne de Varennes.

Senecal, vs. Beauregard.

Ce jugement est comme suit :

"La Cour, après avoir entendu les parties dans cette cause par leurs avocats "respectifs, examiné la procédure et les pièces de record, et sur le tout mûre- "ment délibéré, considérant qu'il appert par le témoignage que l'assemblée des "Marguilliers et notables, tenue le 27 de Décembre 1857, en la Paroisse Ste. "Anne de Varennes, dans le District de Montréal, à laquelle assemblée le dit "Michel Senécal, fils de Louis, allègue avoir été dûment élu Marguillier de la "dite Paroisse, n'a pas été présidée par le Marguillier en charge ou autre "Marguillier de l'œuvre et fabrique alors et là présent ; et vû que la dite assem- "blée a été présidée par Messire Joseph Désautels, Prêtre, Curé de la dite "Paroisse de Ste. Anne de Varennes, malgré l'objection duement faite à telle "présidence, l'élection du dit Michel Senécal, fils de Louis, comme Marguillier "de l'œuvre et fabrique de la dite Paroisse de Ste. Anne de Varennes, est "nulle.

"Et considérant qu'il n'y a aucune preuve légale de l'élection du dit Jarret "dit Beauregard, la Cour ordonne au dit Michel Senécal, fils de Louis, d'aban- "donner et laisser immédiatement la charge de Marguillier de l'œuvre et fa- "brique de la dite Paroisse de Ste. Anne de Varennes, et lui défend d'assumer "et remplir à l'avenir les fonctions de Marguillier de l'œuvre et fabrique de "Varennes. Et la Cour évince le dit Michel Senécal, fils de Louis, de la dite "charge de Marguillier, et le condamne à payer les frais de la présente pour- "suite au demandeur, distraits en faveur de MM. Lafrenaye et Papin, Avocats "du Demandeur."

Appel fut interjeté de ce jugement en vertu de la section 61 de l'Acte de Judicature de 1858, 22 Vict., ch. 5.

L'Appelant a exposé sa cause dans son factum comme suit :

L'Intimé, Demandeur en Cour Inférieure, prétendant avoir été dûment élu marguillier de l'Œuvre et Fabrique de la paroisse de Ste.-Anne de Varennes, et qu'au contraire l'Appelant, maintenant en possession de cette charge, n'avait pas été lui-même régulièrement élu, a, par sa requête libellée, demandé que l'élection de ce dernier fût déclarée illégale et nulle, et qu'en conséquence il lui fût ordonné d'abandonner cette charge, qu'il en fût exclu et lui fût défendu d'en exercer à l'avenir les fonctions, concluant en outre que lui, l'Intimé, fût déclaré avoir droit d'exercer la dite charge depuis le premier janvier mil huit cent cinquante-huit et en fût en conséquence mis en possession.

L'Intimé a fait valoir contre l'élection de l'Appelant les griefs suivants : que l'élection s'est faite dans une assemblée présidée par le curé de la paroisse, que la majorité, au lieu de se prononcer en faveur de l'Appelant, comme celui-ci le prétend, s'est prononcée en faveur de l'Intimé.

L'Appelant a répondu à la requête libellée, que dans une assemblée des marguilliers nouveaux et anciens et des paroissiens de la paroisse de Ste.-Anne de Varennes dûment convoquée pour l'élection d'un marguillier pour l'Œuvre et Fabrique de la dite paroisse, et présidée par le curé, comformément à la Loi et à l'usage immémorial et constamment suivi dans les paroisses du diocèse de Montréal et nommément dans celle de Varennes, il a légalement été élu par la grande majorité de l'assemblée, marguillier de l'Œuvre et Fabrique de la dite

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paroisse Ste.-Anne de Varennes, en remplacement d'Ambroise Savaria qui sortait de charge.

L'Intimé a produit une réplique générale. Des faits de la cause tels qu'ils ont été établis par l'Enquête, il résulte que l'Appelant a réellement eu la majorité des voix dans l'assemblée et que cette assemblée a été présidée par le curé conformément à l'usage du diocèse de Montréal et de la paroisse de Varennes en particulier, usage qui a été prouvé avoir existé de tout temps. Il est encore établi que le marguillier en charge a réclamé le droit de présider à l'encontre du curé qui a prétendu que c'était au contraire lui qui devait présider, d'accord en cela avec la majorité de l'assemblée.

Ainsi la seule question dans cette instance, était de savoir qui, du curé ou du marguillier en charge devait présider l'assemblée, quand tous deux en réclamaient le droit, et c'est aussi la seule que le Tribunal Inférieur ait décidée, ayant déclaré nulle l'élection de l'Appelant parce qu'elle avait eu lieu dans une assemblée présidée par le curé et non par le marguillier en charge.

La solution de la question jugée par le Tribunal Inférieur se trouve dans les propositions suivantes que l'Appelant se propose d'établir d'une manière aussi succinte que possible.

1o. Il n'y a aucune Loi générale, aucun Règlement particulier en vigueur dans le pays qui accorde au marguillier en charge le droit de présider les assemblées de marguilliers ou de paroisse.

2o. Dans l'absence de telle Loi ou de tel Règlement, l'usage constamment suivi dans les paroisses du diocèse doit servir de règle, et si le curé, en vertu de cet usage, est en possession de la présidence, comme il l'est dans la paroisse de Varennes, il doit y être maintenu.

Quant à la première de ces propositions, il est à remarquer que c'est à ceux qui prétendent que la présidence, dans les assemblées de marguilliers ou de paroissiens, appartient de droit au marguillier comptable, à citer les Lois ou les Règlements sur lesquels ils se fondent pour la lui décerner, quand l'usage la lui refuse. Pour se flatter de réussir ils doivent opposer à cet usage un titre formel fondé sur une Loi positive et qui aurait eu l'effet d'abolir cet usage devenu lui-même Loi. Aussi les partisans de la présidence du marguillier comptable ne trouvant aucun titre dans aucune Loi générale, croyent le découvrir dans divers Arrêts de Règlement du Parlement de Paris faits pour des paroisses de son ressort.

Il ne s'agit donc pour l'Appelant que d'examiner quelle est l'autorité de ces Arrêts de Règlement en Canada, et de s'assurer si on peut regarder leurs dispositions comme fesant partie de sa législation.

Il est évident que ces Arrêts de Règlement postérieurs à la création du Conseil Supérieur et qui n'y ont jamais été enregistrés n'ont, en Canada, aucune autorité comme dispositions législatives ou quasi législatives; expression dont on peut se servir en parlant de règlements qui n'émanent pas de l'autorité souveraine, mais seulement de celle des Parlements français.

Non seulement leur effet ne s'étendait pas au-delà du ressort du Parlement qui les avait rendus, mais même au-delà des limites des paroisses pour lesquelles ils avaient été spécialement rédigés.

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Si en France quelques auteurs ont cru pouvoir étendre ces dispositions à d'autres paroisses, et les proposer comme règles d'analogie où ces Règlements n'étaient pas en vigueur, ce n'était qu'autant que leurs dispositions n'étaient pas contraires aux usages de ces paroisses, car comme le remarque Durand de Maillane, Vo. Fabrique p. 3, en parlant du Règlement de St.-Jean-en-Grève " on ne peut s'en faire une règle littérale, à cause de la différence des lieux et des usages," l'auteur ajoutant que sur les matières de Fabrique, il n'y a aucune Loi générale.

C'est également avec cette restriction qu'il faut adopter ce que Dénizart Vo. Marguillier, No. 49, dit d'un autre Arrêt de Reglement, celui pour Montfermeil, qu'il devait servir de régle aux paroisses de campagne du ressort du Parlement de Paris. Rien ne prouve mieux que l'application de ces Règlements dans les paroisses pour lesquelles ils n'avaient pas été faits devait être modifiée par les circonstances et l'usage, que cette indication de deux Règlements différents comme devant servir tous deux de règle pour les paroisses qu n'en avaient pas.

Cet égard aux usages, du reste, ne peut surprendre quand on sait qu'en droit canonique, les usages d'une paroisse doivent faire Loi tant qu'ils n'ont pas été proscrits expressément par le législateur. Le Règlement pour Montfermeil, pas plus que celui de St.-Jean-en-Grève ne pouvait être invoqué dans les campagnes comme règle positive et obligatoire.

D'ailleurs la diversité des dispositions de ces Règlements, et souvent même leur opposition exclut toute idée qu'on ait pu les regarder même en France comme devant servir de règle générale et uniforme dans les paroisses dont ils n'étaient pas expressément destinés à régir les Fabriques. Beaucoup de paroisses avaient chacune leur règlement particulier. Dans la seule ville de Paris, il y avait trois différents Arrêts de Règlement pour les paroisses St.-Jean-en-Grève, Ste.-Marguerite et St.-Louis-en-l'Isle.

Cette diversité, au reste, fait voir que ces arrêts n'étaient qu'une compilation faite d'après des usages locaux antérieurement suivis. Ainsi l'Arrêt pour Montfermeil porte qu'il a été calculé sur les usages de la paroisse, et si on a cru pouvoir en invoquer les dispositions pour les campagnes, c'est que sans doute elles étaient plus conformes que d'autres aux usages de la campagne.

Dès lors il n'est pas surprenant de voir Monseigneur Affre dans son traité de l'Administration des Paroisses, Introduction page 13 et 14, après avoir remarqué que peu d'années avant la révolution les Parlements multipliaient les Arrêts de Règlement sur l'Administration des Fabriques dire " ces Arrêts accordés la plu- " part sur requête avaient consacré des usages locaux qui variaient à l'infini et " loin de servir de règle sûre, plusieurs pouvaient égarer ceux qui auraient " voulu en faire l'application à des paroisses régies par des usages contraires." Il ajoute " que les usages avaient tellement force de Loi à cette époque que " les juges s'y référaient souvent pour justifier leur décisions."

Il suffit de lire quelques-uns de ces Arrêts de Règlement pour se convaincre que plusieurs de leurs dispositions ne sont aucunement adaptées à l'état de nos Fabriques en Canada, et susceptibles de s'appliquer à leur régie.

Il en est même quelques-uns qui contiennent des dispositions qui seraient re-

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gardées en Canada comme étranges, telles que celles qui se trouvent dans ceux pour Montfermeil et Galines, et prescrivent aux marguilliers de remplir les fonctions de bedeau, dans l'absence de ces derniers, de présenter la chappe au célébrant, d'allumer les cierges, porter le feu pour les encensements, etc.

Quant à la présidence des assemblées de paroisses, ces Arrêts de Règlement ne sont non plus uniformes, car il en est comme celui de St.-Jean-en-Grève cité par Jousse en son Traité de l'Administration des Paroisses p. 343, qui la défèrent à des marguilliers d'honneur choisis dans certaines classes de la société et nommés premiers marguilliers sans y appeler les marguilliers comptables, les seuls que nos usages reconnaissent.

Au milieu des dispositions disparates que les Arrêts de Règlement offrent, ceux qui les invoquent devront nous expliquer, pourquoi ils adoptent plutôt telle de ces dispositions qui favorisent leurs prétentions que telle autre qui y répugne comme celle qui exige que les marguilliers élus sachent lire et écrire.

Ainsi sous quelque rapport qu'on les envisage, ces Arrêts ne peuvent l'emporter sur nos usages pas plus relativement à la présidence des assemblées qu'à tout autre objet du ressort des Fabriques.

Maintenant, si l'on écarte l'autorité des Arrêts de Règlement, on peut demander à l'Intimé sur quoi il pourra fonder sa prétention de faire présider les assemblées par le marguillier en charge à l'exclusion du curé, car c'est à celui qui réclame un privilége, une prérogative comme celle de la présidence, à prouver son titre du moment qu'il n'est pas admis.

On ne saurait prétendre que ce droit de présider est inhérent à la charge même de marguillier comptable, puisqu'en France, il était accordé à des marguilliers d'honneur, aux seigneurs et aux curés même.

Si les assemblées de marguilliers et de paroisses ne pouvaient être présidées que par le plus ancien marguillier de l'œuvre, celui qui est en exercice, ce Tribunal n'aurait pas confirmé la validité d'une assemblée, comme il l'a fait dans une cause où la Fabrique de Châteauguay était concernée. L'Appelant Reid prétendait que l'assemblée dans laquelle la poursuite avait été autorisée, n'avait pas été tenue suivant la Loi, c'est-à-dire convoquée et *présidée* par le marguillier en charge. La Cour d'Appel a jugé que l'assemblée avait été régulièrement tenue.—Vid. Décisions des Tribunaux Tom. 6, p. 290, Reid Appelant, et les curé et marguilliers de Châteauguay, Intimés.

L'induction que l'on doit tirer de cette décision, c'est que le droit de présider les assemblées n'est pas un attribut nécessaire et essentiel de la charge de marguillier comptable, et qu'il peut être exercé par d'autres, tel que le curé ; ce qui suffit pour établir que le marguillier en charge doit fonder son droit sur quelque autre titre que celui qui dérive de ses fonctions, un titre tel qu'une Loi ou l'usage qui en tient lieu peut seul donner.

Si l'Intimé ne peut se prévaloir d'aucune autorité semblable, l'Appelant peut invoquer, indépendamment de l'usage qui lui suffit, comme on le verra plus tard, des autorités, des Lois mêmes du pays qui supposent dans la personne du curé le droit qu'on prétend lui enlever, celui de présider.

Dans plusieurs des Ordonnances des Intendants du pays, qui avaient rapport à la convocation d'assemblées de paroissiens pour construction et réparation

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d'églises et de presbytères, c'est le curé qui est nommé le premier, qui convoque l'assemblée, qui en indique le jour, c'est lui qui en dresse l'acte, c'est lui enfin qui y joue le premier rôle et qui évidemment y préside. Est-il à présumer que si le curé n'avait pas été en possession du droit de présider les assemblées ordinaires de paroisses tenues pour des objets de Fabrique, on aurait songé à lui faire jouer ce rôle dans des assemblées dont le but était plus étranger à ses fonctions, celles de paroissiens convoquées pour la construction d'églises ou de presbytères? Dans aucune de ces Ordonnances, il n'est question du marguillier comptable comme devant les présider.

Comment imaginer que si on eut reconnu au marguillier le droit de présider en général les Assemblées de Fabrique et de Paroisse, on l'eût exclu de la présidence de celles dont on vient de parler? D'un autre côté, en France ces dernières étaient présidées par le maire qui y jouait le premier et l'unique rôle. En Canada le curé en a été président parce que déjà il présidait les assemblées ordinaires de paroisses; présidence qui a été depuis reconnue et confirmée par les Ordonnances et les Lois du pays qui, depuis la cession, ont pourvu aux moyens d'ériger les églises et les presbytères.—Vid. l'Ordonnance du Conseil Législatif 31me George III (1791) Chap. VI, Sect. IV. Vid. encore l'Ordonnance 2 Victoria (1839) Ch. XXIX, Sect. X.

Si, sous la domination française, les curés n'avaient pas présidé de semblables assemblées, et, qu'au contraire, elles l'eussent été par des marguilliers, et que l'on eût cru devoir changer cet ordre de choses, on trouverait quelque part l'explication de ce changement; il en serait resté quelque trace.

L'on peut dire sans craindre de se tromper que les Ordonnances et les Règlements émanés de l'autorité civile comme de l'autorité ecclésiastique, non seulement donnent au curé la première place, mais reconnaissent son droit de présider, car on n'y trouve aucune trace de cette distinction introduite par certains Arrêts de Règlement, entre la préséance et la présidence, distinction singulière et anomale par rapport au curé.

Mais quand le curé, pour se maintenir dans le droit de présider les assembléss de marguilliers et de paroissiens, n'aurait d'autre titre ou d'autre autorité que l'usage; cet usage, dans les principes du Droit Canonique qui règle les matières de Fabrique, suffit pour qu'on ne puisse l'en dépouiller. C'est ce qu'on va démontrer par la seconde proposition qui a pour objet de faire voir que dans l'absence d'une Loi ou d'un Règlement formel et obligatoire sur le droit de présider les assemblées de paroisses et de Fabriques l'usage doit en tenir lieu, et suffit pour le conférer et l'assurer au curé.

Cette proposition ne souffre pas plus de difficulté que la première. L'influence et l'autorité de l'usage sont encore moins susceptibles d'être contestés en Jurisprudence Canonique qu'en Jurisprudence Civile. On peut même ajouter que dans les matières de Fabrique, l'usage est la principale règle, l'unique même, pour résoudre et décider la plupart des questions qui s'y rattachent.

Cette autorité de l'usage en France, comme en Canada, s'explique par l'absence de toute Loi générale destinée à régler d'une manière uniforme l'administration des Fabriques, et à faire disparaitre des usages locaux, qui non seulement se sont perpétués, mais ont été même reconnus par l'autorité législative.

On se rappelle le passage de Monseigneur Affre cité plus haut sur la force de ces usages locaux, et qui peut également ici recevoir son application. Le même auteur ajoute, dans un autre endroit, en parlant d'objets de Fabrique, (p. 70 en note,) que "dans l'ancien droit, il n'y avait rien d'uniforme." Champeaux, dans son traité du Droit Civil et Ecclésiastique (Tome 1er, page 252,) au sujet de l'Arrêté du Parlement de Paris du 18 Avril 1562, des Lettres Patentes du 4 septembre 1619, et autres lois, qui avaient rapport à la régie des Fabriques dit : "La plupart de ces mesures ou n'étaient conçues qu'en termes vagues et "généraux, ou ne réglaient que quelques points particuliers ; en outre elles ne "recevaient pas leur exécution dans tout le royaume. Il en résulta l'intro- "duction *d'une foule d'usages différents* qui se convertirent en Règlements par- "ticuliers."

On conçoit qu'en Canada l'usage a dû avoir encore plus d'autorité, s'il est possible, qu'en France, par suite de l'impossibilité où l'on se trouvait souvent de faire l'application de la législation française à un état de société nouveau, et différant sous une foule de rapports de celui qu'on rencontre dans les vieux pays.

En Canada l'usage devait nécessairement créer, par rapport à une foule d'objets, un droit particulier que les tribunaux ont dû respecter comme ils l'ont fait.

On verra par les autorités cités par l'Appelant combien sont nombreux les objets de Fabrique qui n'étaient réglés que par l'usage, et leur variété n'est pas moins remarquable que l'autorité et l'influence que les Canonistes les plus célèbres se sont accordés à attribuer à la coutume.

Quant au pouvoir de l'usage en général, nous allons ajouter à l'opinion de Monseigneur Affre et de M. Champeaux, celle de deux Canonistes éminents. Suivant eux, la coutume fait règle par préférence à toute autre Loi. Le premier Vannespen, veut qu'on considère d'abord la coutume et possession non interrompues dont il ne veut pas qu'on s'écarte, et ce n'est que quand l'usage est incertain qu'il veut qu'on recourre aux synods et aux ordonnances des princes. (Vannespen, Ecclesiasticum universum, t. 1er, p. 37.)

Le second, Gibert, commentant Vannespen, dit qu'il faut examiner quel est l'usage, au défaut d'usage les lois des concilcs du pays et les ordonnances du prince. (Gibert, Corpus juris canonici, t. 2, p. 945.)

Non seulement ces auteurs mettent l'usage au-dessus des Arrêts, mais même au-dessus des lois de l'église et du prince, et, sous ce rapport, leur sentiment ne diffère pas de celui des jurisconsultes qui ont écrit sur le droit civil puisque ces derniers attribuent dans les mêmes conditions, assez d'empire à l'usage pour abolir la Loi et lui reconnaissent le pouvoir de se substituer souvent à ses dispositions les plus formelles.

Quant aux matières de Fabrique en particulier, les jurisconsultes qui sont cités journellement dans nos tribunaux tiennent le même langage que les canonistes. Guyot dit "qu'il faut toujours consulter l'usage." (Répertoire Vo. Marguillier, Tome XI, p. 328, col. 1ère.) Suivant Jousse, "le curé doit se conformer aux statuts du diocèse et à l'usage de la paroisse." (Gouvernement spirituel et temporel des paroisses, p. 6.)

Tel est la puissance de l'usage que ceux mêmes qui invoqueraient les Arrêts

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de Règlement contre les usages, seraient contraints d'invoquer l'usage contre les Arrêts sur une foule d'objets.

Ainsi, si l'on demandait à ceux qui en appellent aux Arrêts de Règlement pour Montfermeil et Gatines, pourquoi les Marguilliers, dans beaucoup d'autres paroisses ne font pas les fonctions de bedeaux en l'absence de ces derniers, pourquoi ils ne viennent pas présenter la chappe au célébrant, allumer les cierges, qu'au, raient-ils à répondre, si ce n'est que l'usage y est contraire? Aussi les auteurs qui prétendent étendre l'autorité des Arrêts de Règlement aux paroisses pour lesquelles ils n'ont pas été faits, sont forcés d'admettre que cela ne peut avoir lieu qu'en ayant égard à la différence des lieux et usages, comme on l'a remarqué plus haut.

Il serait fastidieux de faire ici l'énumération de tous les objets qui dans les matières de Fabrique, sont réglés par l'usage, quoique bien propre à faire ressortir cette vérité que, si l'usage n'est pas l'unique règle des Fabriques, elle est la plus générale et la plus respectée. Les citations de l'Appelant ne laisseront pas de doute à cet égard.

Quant aux questions de préséance et de présidence en particulier, elles sont également réglées par l'usage.

Denisart, en disant que les lois et les jurisconsultes ont établi que lorsqu'il s'agit de rang et de *préséance*, il faut suivre ce que l'usage et la loi municipale ont établi, entend appliquer cette maxime à la présidence même. C'est ce qui résulte évidemment des mots *présidence* et *préséance* placés à la tête de son article (Vo. préséance, t. 3, p. 746, No. 6.)

On lit dans le Répertoire de Guyot, à l'occasion de l'Arrêt d'Houplin, la question suivante posée par l'auteur de l'article. " Mais si dans l'espèce de " l'Arrêt d'Houplin, le curé avait été en possession de signer avant le seigneur, " aurait-il dû y être maintenu ? " Voici la réponse, elle est conforme à tout ce que l'on a dit de la force de l'usage: " Nous ne voyons rien qui puisse nous " empêcher d'adopter l'affirmative, la prescription sert de titre dans toutes les " matières où elle n'est rejetée ni par une loi expresse ni par les principes, etc." Répertoire de Jurisprudence, Vo. Fabrique, t. 7, p. 255, 256.] On ne saurait dire ici qu'il est contre les principes que le curé préside des assemblées de paroisse puisque la législature du Pays leur confère expressément ce droit relativement à celles de ces assemblées qui sont convoquées pour l'érection d'églises ou de presbytères.

Boyer après s'être prononcé en faveur de la présidence du Marguillier, ne le fait qu'avec la restriction que le curé ne soit pas en possession de présider. " Il " n'est pas contraire à l'ordre des choses," dit cet auteur, " qu'un curé préside " une assemblée de laiques, qu'il recueille les suffrages et qu'il dicte le délibéré ; " c'est l'usage d'une grande province [la Normandie], c'était l'usage primitif, et " lorsqu'il s'est conservé dans une paroisse, les Cours l'y maintiennent. Elles " considèrent que le curé, parcequ'il est honoré du sacerdoce, n'a pas perdu les " priviléges de citoyen, et que, d'ailleurs, il n'est pas étranger à son état de pré- " sider une assemblée occupée de l'administration des biens de l'église." [Boyer, Principes sur l'administration temporelle des Paroisses, t. 1er, sec. II, chap. 1 291].

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Le même auteur avait dit auparavant [page 285.] "Jusqu'à ce qu'il y ait "une Loi qui établisse l'uniformité sur les matières de présidence, les usages "locaux doivent être suivis avec une exactitude scrupuleuse."

Ces considérations, la Législature du Canada les a adoptées, elle les a sanctionnées de son autorité suprême, en maintenant expressément le curé président des assemblées de paroisses, ayant pour objet l'érection d'églises.

C'est la preuve la plus forte qu'on puisse apporter pour maintenir qu'en Canada l'usage, comme la prescription qui en résulte doivent avoir tout leur effet et que les principes de notre législation ne s'y opposent aucunement.

Si quelques auteurs comme Boyer lui-même, ont pu dire que de droit commun et généralement la présidence appartenait au marguillier, ils n'ont pu, en émettant cette opinion, avoir en vue que les Arrêts de Règlement ou les usages qui existaient là où ils écrivaient, puisque Boyer ajoute qu'il faut respecter l'usage contraire.

En Canada on peut dire que de droit commun, la présidence est dévolue aux curés, puisqu'elle est fondée sur un usage qui remonte à l'origine même de la colonie, qui s'est étendu à toutes les paroisses, qui a été aussi constant qu'uniforme et s'est perpétué jusqu'à nos jours.

Cet usage s'explique, en outre par l'état de société de la Nouvelle-France. Il existait dans les paroisses du diocèse de Québec quand ce diocèse comprenait tout le Bas-Canada ; depuis que le diocèse de Montréal en a été détaché, il s'est maintenu dans les paroisses de ce diocèse sans réclamation, à bien peu d'exception près ; enfin il a acquis une telle notoriété que personne ne peut l'ignorer. Quant à la paroisse de Varennes en particulier, il est prouvé que de tout temps le curé y a présidé les assemblées de Fabrique et de Paroisse sans que l'on ait tenté de faire voir que dans aucun temps le marguillier en charge ait exercé ce droit. Ce n'est qu'à une époque comparativement très récente que l'on a prétendu enlever aux curés cette prérogative. Cette question a, dit-on été jugée pour la paroisse des Trois-Rivières dans l'année 1831. Il est difficile sans connaître l'espèce dans laquelle cette décision a été donnée et les motifs de la Cour qui l'a prononcée de s'assurer si la question a été jugée *in terminis*. Dans ce district, la Cour Supérieure a décidé la question en faveur du marguillier en charge, dans deux causes, dans celle-ci, soumise de nouveau à ce tribunal, et dans une autre dont il n'y a eu aucun appel, c'est celle de Damour et autres contre Gingues, paroisse Ste. Philomène. [Vide le Lower Canada Jurist, Vol. 1er, p. 94.] Mais en consultant les autorités invoquées dans ces causes on verra que ceux des auteurs qui sont favorables au marguillier et donnent les motifs de leur opinion s'appuyent principalement sur les Arrêts de Règlement que l'on a démontré n'avoir aucune force en Canada.

Quant à l'assertion qui se trouve dans l'exposé des motifs du jugement dans l'une de ces causes que "le Régistre des délibérations courantes doit être remis au marguillier comptable en exercice," il est à propos de remarquer que dans nos usages, il n'existe pas de régistre des délibérations courantes, c'est-à-dire de régistre qui renferme seulement les délibérations qui ont rapport à la police intérieure de la paroisse, et dans lequel sont consignés les actes qui peuvent être d'un usage journalier pour le marguillier. (Jousse p. 178). C'est ce régistre

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des affaires courantes qui doit être remis au marguillier. Il n'existe dans nos Fabriques qu'un seul régistre des délibérations. C'est dans ce régistre qu'on inscrit les élections de marguilliers, les autorisations pour plaider, pour aliéner, enfin tous les actes qui intéressent la Fabrique sans distinction des affaires courantes ou de celles qui ne le sont pas. Le Régistre des délibérations désigné dans les Arrêts de Règlement sous le nom de registre courant, est un régistre tout-à-fait distinct de celui tenu dans nos Fabriques et que nous nommons simplement régistre des délibérations—lequel fait partie des archives de la Fabrique et y doit être conservé avec soin, (Vid. Jousse, p. 176) et aussi l'Article 38 du Règlement pour St.-Jean-en-Grève cité par Jousse, p. 357, et l'Article 37 du Règlement pour St.-Louis-en-l'Isle, idem, p. 387, on y trouve la distinction entre le régistre courant et le régistre des délibérations en général.

Lorsqu'il s'est agi de produire dans les Cours des extraits des délibérations du seul régistre tenu dans nos paroisses, n'ont-ils pas toujours été délivrés et expédiés par le curé, le seul dépositaire de ce régistre, le seul en possession d'en donner des extraits en qualité de président des assemblées de Fabriques ou de paroisses, qui y sont enregistrés? A-t-on jamais vu aucun de ces extraits délivré par le marguillier en charge? Nouvelle preuve de l'usage qui les a toujours exclus du droit de présider ces assemblées.

Maintenant il serait facile à l'Appelant de démontrer que cet usage est non seulement conforme à l'usage primitif de ce pays, mais encore à l'usage primitif en France, comme le remarque Boyer, qu'il était même une nécessité de l'état de société qui a régné dans la colonie, où les marguilliers surtout dans les campagnes, étaient choisis dans une classe privée du bienfait de l'éducation élémentaire et étaient par là même incapable de présider et de diriger des assemblées souvent nombreuses, dont les délibérations ont trait aux intérêts de toute une paroisse et peuvent embrasser une variété d'objets. Aussi l'on n'est pas surpris de voir nombre d'Arrêts de Règlement qui décernent la présidence aux marguilliers, exiger comme condition essentielle de leur admission à cette charge, l'obligation de savoir lire et écrire. Pour expliquer l'introduction d'un usage favorable au curé, il n'est pas besoin de remarquer que le Canada s'est trouvé pendant quelque temps sous la Juridiction du Parlement de Rouen, dans le ressort duquel les curés étaient en possession de présider. Quant à la juridiction de ce Parlement en Canada, (vid. Garneau, Histoire du Canada, Vol. 1er, p. 337, ch. 4, 1ère Edit.—Henrys Tome 1er, p. 257, Evêques in Partibus 86e Question.)

On pourrait aussi ajouter que cette présidence du curé est d'accord avec la nature de ces assemblées, qui, en Canada, ont été envisagées comme assemblées ecclésiastiques par l'Intendant Duchesneau, plus conforme à la nature des biens administrés puisqu'ils sont regardés comme biens ecclésiastiques, (Nouveau Denisart, Vo. Fabrique, Tome VIII, §1, p. 358, No. 3), dont les revenus sont sous le contrôle de l'évêque (Boyer, dans l'ouvrage déjà cité, Tome 2, p. 23, 24, 25), enfin plus conformes aux matières traitées dans ces assemblées, puisqu'elles ont souvent rapport au culte divin, aux dépenses duquel les Fabriques sont tenues de pourvoir. Ce sont autant d'objets sur lesquels il est très raisonnable que les ecclesiastiques aient plus d'autorité et d'influence que de simples sécu-

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liers. Toutes ces circonstances ne concourent-elles pas à prouver que ces assemblées doivent être présidées plutôt par des ecclésiastiques que par des laïques?

On pourrait enfin observer que l'usage qui consacre le droit du curé de présider n'offre pas la distinction introduite par les Arrêts de Règlement entre la préséance et la présidence, distinction qui tout en lui conservant la première place, lui fait jouer un rôle passif, un rôle secondaire qui ne saurait se concilier avec la dignité sacerdotale et le respect dont les Institutions Françaises avaient environné le clergé. (Edit de 1695 et les notes de Champeaux dans son Recueil du Droit Civil et Ecclésiastique, Tome 1er, pages 218-219). L'anomalie qu'on vient de signaler serait ici d'autant plus frappante que le curé par nos lois municipales doit présider ses paroissiens chaque fois qu'ils sont convoqués pour construction d'églises ou de presbytères.

Mais pourquoi s'arrêter à ces considérations, quand on peut en faire valoir à l'appui de la présidence du curé de plus décisives encore et qui se tirent de nos lois municipales et de nos usages. On peut les résumer dans ce peu de mots.

Pour exercer légalement un privilège, une prérogative quelconque, il faut un titre qui ait sa source soit dans une Loi positive, ou dans une possession et un usage constants.

Le marguillier ne peut en ce pays, se fonder sur aucune Loi, encore moins sur l'usage pour réclamer la présidence, le curé au contraire peut invoquer des Ordonnances et des Règlements émanés des autorités civiles et ecclésiastiques qui supposent et reconnaissent son droit de présider, et surtout il peut invoquer un usage aussi constant qu'uniforme et qui prévalait même en France sur le droit commun, comme le remarque Boyer, vol. 1er, p. 286. Aussi cet usage suffit-il pour qu'on ne puisse être admis à contester son droit.

L'Appelant peut donc nourrir l'espoir que le jugement dont il a interjeté appel sera infirmé, et qu'aux yeux de ce tribunal son élection, régulière sous tous les rapports, ne saurait être affectée parce que l'assemblée qui l'a élu, a été présidée par le curé de la paroisse comme toutes celles qui l'avaient précédée. Aussi, se flatte-il qu'il sera maintenu dans la charge qu'il tient de la confiance de ses co-paroissiens. Cette décision en confirmant l'état de chose actuel contribuera puissamment à faire régner l'ordre et l'harmonie dans les assemblées de Fabriques et de Paroisses. Du reste, ces corporations, pour être sous le contrôle salutaire du clergé, n'en ont pas été moins administrées en général, au coin d'une bonne économie et de la plus parfaite honnêteté. Telle est l'opinion de l'historien du Canada. (Garneau Histoire du Canada, Tome 1er, p. 358, 360, 1ère Edition).

Autorités invoqués par l'Appelant lors de la plaidoirie et qui ne sont pas citées dans son Factum.

Quant aux ordonnances des Intendants qui avaient rapport aux assemblées de paroisses pour construction et réparation d'Eglises et dont il est question dans le factum des appelants p. 4, vide Recueil des Edits et Ordonnances Edit. 8o.

Tome 2, p. 447, Ordonnance du 25 janvier 1716.

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Id. p. 572, Jugement du 26 mars 1745.
Id. p. 575, Jugement du 22 avril 1745.
Id. p. 588, Jugement du 24 juillet 1749.
Tome 3, p. 262, Jugement du 21 avril 1727.
Id. p. 329, Jugement du 14 septembre 1739.
Id. p. 335, Jugement du 18 janvier 1742.
Id. p. 372, Jugement du 23 octobre 1748.
Id. p. 373, 374, Jugement du 9 novembre 1748.

C'est le curé qui, d'après ces Ordonnances, est nommé le premier, convoque les assemblées, en fixe le jour, souvent en dresse l'acte et remplit en général les fonctions de président.

Nos lois municipales, en conférant la présidence de semblables assemblées au curé, n'ont fait que confirmer les anciens usages. Du reste, en France même, il arrivait souvent que les curés présidaient les assemblées de fabriques ou de paroisses.

Durand de Maillanne, Dictionnaire de Droit Canonique, vo. Droits Honorifiques, tome 2, p. 421, 422.

Arrêt du Parlement de Toulouse, du 14 juillet 1769. On y trouve la décision suivante: "auxquelles clôtures des comptes de Marguilliers et Administrateurs les Curés de Pailhés, Menay, Pujagon, et Madière, présideront chacun en droit soi conformément à l' article XVII de l'Edit de mil six cent quatre-vingt-quinze, etc.

Gibert, Institutions Ecclésiastiques, Edit. de 1760, 1 vol. 4o.

"Ils (les Curés) ont droit de présider à l'élection des Marguilliers."

De Combes, Recueil tiré des Procédures civiles de l'officialité de Paris, tome 2, chapitre 3, p. 346.

On y trouve la formule suivante de l'acte d'élection d'un Marguillier.

"L'an 1694, le dimanche, dernier jour de février, après la convocation au prône, issue de vêpres au son de la cloche en la manière accoutumée, moi, Germain des Mar, prêtre, curé de Mousigné et de la Frette, son annexe, me suis transporté dans le dit lieu de la Frette pour élire un Marguillier pour recevoir les deniers de la Fabrique du dit lieu, et faire la dépense, après la collection des voix a été nommé Pierre Frémont pour exercer et faire la dite charge par les habitants et les témoins qui ont signé les dits jour et an que dessus."

La formule d'acceptation avec l'assignation commence ainsi:

"Mtre Germain des Mar, prêtre et curé de la paroisse de Mousigné."

Ce qui indique évidemment que le Curé jouait le premier rôle et présidait à l'assemblée où était nommé le Marguillier.

Boyer, Principes sur l'administration temporelle des Paroisses, tome 1er, p. 287. L'auteur cite des arrêts, en faveur de la présidence du curé et nommément celui du 21 février 1784. Et en parlant de ce dernier arrêt, il ajoute: "Le parlement accordait la présidence à la *possession alléguée par le Curé*, et non au droit attaché à son caractère."

Ainsi, cet arrêt du Parlement de Paris confirme la prétention des Appelants, qu'ils fondent sur l'usage et la possession du Curé en Canada, de présider.

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L'arrêt de Règlement pour la paroisse de Courcité du 7 septembre 1758, (Code des Curés, t. III, p. 333), et celui pour la paroisse Guiry, du 27 août 1763, (id. 381) donnent la présidence au seigneur, au justicier de préférence au marguillier.

Il résulte des autorités ci-dessus ainsi que de celles citées dans le Factum des Appelants que le droit de présider les assemblées de Fabrique n'est pas nécessairement attaché à la qualité de Marguillier comptable, puisqu'en France elles étaient présidées tantôt par le Seigneur, tantôt par le Marguillier d'honneur et tantôt par le Curé même comme en Canada.

Autorité de l'usage relativement à une variété d'objets en matière de Fabriques.

Durand de Maillane, dictionnaire de droit Canonique, vo. Cloches, tome 1er p. 516, col. 1ère.—Cependant à l'égard de l'usage de la sonnerie et de son emploi, on doit suivre l'*usage* de chaque Eglise.

Rousseau de La Combe,—Jurisprudence Canonique, vo. Cloches, p. 145, col 1ère.—A Paris, le profit de la sonnerie appartient à l'Œuvre ou Fabrique, c'est le droit commun; cependant ailleurs il faut consulter l'usage. Ainsi l'usage l'emporte sur le droit commun.

Héricourt, Lois Ecclésiastiques de France, troisième partie, G. X. P. 136, ch. X. Des Droits Honorifiques. col. 2.—Il faut donc là-dessus, (les Droits Honorifiques) consulter l'usage.

Ancien Denisart, vo. Marguillier, tome 3, p. 242, No. 8.—Election d'un marchand comme marguillier, déclarée nulle, parce que l'usage étant de ne déférer cette qualité qu'aux personnes notables, on ne devait pas y nommer un marchand, quoique riche.....

Sallé. Code des Curés, tome 1er, p. 84. D'après les Ordonnances, Déclarations et Edits que l'auteur cite, les paroissiens en général sont chargés de l'obligation de loger le Curé. "Cependant, dans *l'usage*, ajoute l'auteur, on distingue les paroisses des villes, d'avec celles de la campagne. Dans les premières, ce sont les Fabriques qui sont tenues de fournir le logement du Curé quand elles ont des revenus suffisants."

De Combes. Recueil tiré des procédures civiles de l'officialité de Paris, tome 2, ch. 3, p. 404, cite un arrêt de Règlement qui ordonne que les assemblées pour les affaires de la Fabrique de la paroisse de Ste.-Croix, se feront en la *manière accoutumée.*

Code des Curés, tome 3, ch. IV, p. 243. Le Procureur-Général, à l'occasion de l'Arrêt de Règlement pour la Fabrique de Montfermeil du 25 mai 1745, dit "qu'il a cru seulement devoir y ajouter ce qui lui a paru spécialement nécessaire à la paroisse dont il s'agit relativement à des usages particuliers dont il a été instruit par des mémoires qui lui ont été remis." Voici donc des usages sanctionnés par un Arrêt de Règlement même.

L'Ordonnance de George III, ch. VI, 1791, relative à la construction et réparation des Eglises, se réfère à la loi et à la *coutume* antérieure à la conquête.—Sect. I. et Sect. III.

Lucet, Principes du Droit Canonique universel ou Manuel du Canoniste.

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Tit. 5, ch. I, p. 15 et 16.—"Leur élection (celles des Marguilliers) dépend de *la coutume* ou de la volonté des fondateurs. Mais l'usage presque général et un très grand nombre de Conciles veulent que le Curé intervienne toujours dans cette élection.

"Néanmoins, il est quelquefois exclu par une loi expresse de la fondation où par une *coutume ancienne et non interrompue*, et dans ce cas, le pasteur exclu doit représenter aux électeurs qu'ils ne peuvent choisir que ceux qu'ils jugeront, devant Dieu, les plus convenables pour administrer comme il faut, les biens de l'Eglise et des pauvres.

"Ils (les Marguilliers) prêtent ce serment, (celui dont l'auteur a parlé plus haut) tantôt entre les mains du Curé, tantôt entre celles du Magistrat ou d'un premier officier, suivant que l'ordonne la *coutume* de chaque paroisse.

L'auteur remarque en note, que d'après le droit Ecclésiastique de France, il ne paraît pas que les Curés soient exclus nulle part de l'élection des Marguilliers.

Guyot, Répertoire de Jurisprudence, vo. Marguillier, tome 12, p. 328, col. 1ère.—"Il faut toujours consulter l'usage."

On pourrait multiplier davantage les autorités sur ce point, mais celles-ci, ainsi que celles citées dans le Factum, suffisent pour prouver que l'usage dans les matières de Fabrique est la principale, sinon l'unique règle que les tribunaux doivent suivre. Les Parlements y avaient égard dans les Règlements qu'ils faisaient, et dans ce pays où les tribunaux n'ont pas le droit de faire des Règlements sur ces matières, il ne peuvent avoir d'autre règle que l'usage pour décider les questions qui y ont rapport.

Les Réglements émanés de l'autorité Ecclésiastique, comme ceux émanés de l'autorité Civile, en ce pays, reconnaissent le droit du Curé de présider les assemblées de Fabriques.

Les Statuts Synodaux du diocèse de Québec qui doivent servir de règle suivant Jousse lui-même, (p. 6,) sans dire formellement que c'est au Curé à présider, supposent par leurs différentes dispositions que c'est lui qui doit exercer ce droit, vide le Rituel du diocese de Québec, publié en 1703, à Paris, et les Statuts Synodaux, 9 novembre 1690, qu'il contient. Aucune dépense extraordinaire ne peut se faire sans le consentement du Curé, rien d'important ne se fait sans lui. Il signe tout; c'est à lui à faire élire les Marguilliers, conséquemment c'est à lui à convoquer l'assemblée où on les élit.

La formule même de compte que rend le Marguillier "compte que rend pardevant M. le Curé ou l'Archidiacre" qui, lui-même représente l'Evêque, ne peut laisser de doute qu'il ne doive présider l'assemblée où il reçoit les comptes.

Le Curé doit toujours aussi être présent à tout, présence qui est également obligatoire d'après le Règlement du Conseil Supérieur du 12 février 1675.—Recueil des Edits et Ordonnances, tome 2, p. 57, édition 8e.

Il est à remarquer que quand le Curé est nommé le premier, comme il l'est dans plusieurs des actes émanés de l'autorité Civile et Ecclésiastique en ce pays, il a par là même le droit de présider; car de droit commun, celui qui a la préséance, a également la présidence, à moins que par une disposition expresse et anomale comme celle de plusieurs des arrêts de Règlement, on ne divise les fonctions de la présidence entre le Curé et le Marguillier comptable.

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Quant au droit des Evêques de faire des ordonnances sur des objets de Fabrique, vide Champeau, Droit Ecclésiastique, tome 1er, p. 235 et 236, l'Edit de 1695, cité par l'auteur, art. 30 et les autres Ordonnances et Edits antérieurs, cités aussi par l'auteur.

Quant à la convocation des assemblées on ne peut rien induire du mode dont elle se fait, en faveur de la présidence du Marguillier. Ce mode variait suivant les Règlements, et dans leur absence était réglé par l'usage qui en cela, comme pour tout autre objet de Fabrique, servait de Règle.—Boyer, tome 1. tit. 2. sect. 2, p. 311.

L'auteur, même page *in fine*, ajoute qu'il paraît que le Curé pourrait avoir la prétention de convoquer, de son chef, dans les paroisses où il préside les assemblées en vertu d'un règlement, ou d'un *usage particulier*. Ainsi le Curé en Canada pourrait avoir cette prétention puisqu'il est en possession de présider. Du reste, c'est lui qui convoque l'assemblée au prône, le rôle du Marguillier se borne à demander cette convocation.

D'ailleurs, le droit de convoquer n'est pas tellement lié à celui de présider qu'il n'en puisse être séparé, puisque Boyer, ibid., p. 312, en note, remarque qu'en Normandie, les Curés président les assemblées quand il n'y a pas de Marguillier d'honneur, où, cependant, c'est le second Marguillier en charge qui convoque, ce qui, néanmoins, ne lui donne pas le droit de présider.

De ce que les Fabriques sont des corps laïcs, on ne peut en conclure, que leurs assemblées ne peuvent être présidées par des ecclésiastiques.

En France, combien d'assemblées laïques comme les assemblées de charités, celles concernant les hôpitaux et autres, étaient présidées par des ecclésiastiques —Jousse, p. 471, Règlement du 4 novembre 1763, pour St.-Barthélemy, article. 6. Durand de Maillane, vo. Hôpital, tome 2, p. 194. Déclaration du 11 décembre 1698, article X.

Aussi, Boyer, tome 2er, p. 191, dit-il expressément, qu'il n'est pas contre l'ordre des choses qu'un Curé préside une assemblée de laïcs.

En ce pays, cette présidence ne saurait être contre l'ordre, puisque la loi confère expressément au Curé la présidence des assemblées de paroisses convoquées pour construction ou réparations d'Eglises. Il serait donc absurde de prétendre qu'il est contre les principes de notre législation qu'un ecclésiastique préside une assemblée laïque.

L'Intimé a prétendu que le Curé n'étant que le premier Fabricien ne pouvait être le premier Marguillier.

En supposant la chose vraie, il ne s'en suivrait pas que le Curé ne pourrait pas présider. Mais le Parlement de Paris reconnaissait au contraire le Curé comme le premier Marguillier, puisque par son Arrêt du 29 mai 1727, il a jugé qu'en sa qualité de *premier Marguillier*, le Curé ne pouvait reprendre un procès, s'il était désavoué par tous les Marguilliers et les habitants.—Jousse, p. 174.

L'Intimé a encore invoqué l'Arrêt rendu pour la paroisse St.-Jacques de la Boucherie, le 23 juillet 1707, (Code des Curés, tome 4, p. 258) cet Arrêt ne peut être cité comme favorable à ses prétentions. Le curé n'était pas en possession de présider, c'était au contraire le premier Marguillier qui était en pos

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session de proposer, de recuillir les voix, enfin, de présider. Aussi, le Curé, en faveur de qui l'Arret a été rendu n'avait-il pas réclamé ce droit.

Que le Marguiller ait été maintenu dans sa possession, que l'usage de la paroisse ait été respecté, rien de plus juste, puisqu'il en faut toujours revenir à l'usage sur le droit de présider, et d'autant plus à celui suivi en Canada, que suivant Boyer, il est conforme à l'usage primitif et que quand il s'est conservé dans une paroisse, les tribunaux le respectent.

CITATIONS DE L'INTIMÉ.

Que les arrêts de Règlement rendus en France concernant les fabriques, depuis l'établissement du Conseil Supérieur de Québec; étaient conformes à *l'ancien droit*, et nommément, celui rendu pour la paroisse de St. Jean-en-Grève.

L'abbé Affre, p. 445, Note 1, éd. de 1835.

De Champeaux, 1 vol. p. 251.

Les deux arrêts exceptionnels cités par l'appelant pour démontrer que ces arrêts ne reposent pas sur le *droit commun;* mais sur les usages locaux, sont l'arrêt du Parlement de Rouen et celui du Parlement de Toulouse.

Or, (quant au premier) en Normandie plusieurs causes particulières existaient qui faisaient exception au droit commun de la France, de même que sa coutume excluant la communauté de biens y faisait exception. Voir ces motifs dans le 1er Vol. de Maréchal, Ed. de 1762, pp. 272, 273.

Mais, encore faut-il observer qu'en Normandie il y avait des assemblées du *Bureau ordinaire* dans les *campagnes*, ce qui n'avait lieu dans les autres Provinces, que pour les *villes*.

Nouv. Den. vo. Fabriques des paroisses § IV. no. 4, p. 363. Merlin vo. Assemblée, § IV, p. 109.

Encore, dans ces assemblées du *bureau ordinaire*, en Normandie, le curé ne présidait pas de droit, mais seulement en l'absence du marguillier d'honneur,

Nouv. Den.—loco citato.

Quand aux *assemblées générales*, en Normandie, comme dans toutes les autres Provinces de la France, le curé n'en était pas le président.

Nouveau Den. loco citato.

Quant au second arrêt cité comme exception au droit commun; celui du Parlement de Toulouse, cité par Durand de Maillane, vo. droits honorifiques, il suffit de remarquer qu'en Provence, il n'existait pas alors de Fabriques régulièrement organisées et distinctes des communautés d'habitants. 1 Vol. De Champeaux, p. 251, à la noté.

Dans cet arrêt du Parlement de Toulouse, le Seigneur est déclaré être le Président des Assemblées qui servoient tant aux Fabriques qu'aux Communautés en Provence. Durand de Maillane, vo. droits honorifiques.

Quant à la présidence des curés, *en droit soi*, mentionnée en cet arrêt, ce n'est que pour la reddition des comptes des marguilliers, et cette présidence est basée sur l'article 17 de l'Edit de 1695 qui ne donne pas cette présidence; mais seulement le droit de *revoir* et *d'examiner* les comptes des Fabriques ainsi que le remarque l'auteur de l'ancien Denisart, vo. Fabriques no. 23 p. 389.

Evidemment il y a erreur dans cet arrêt, et l'abbé de Boyer le reconnait. De Boyer, 1 vol. p. 285.

A part de ces deux arrêts *exceptionnels* et dont l'un est entaché d'erreur, et dont l'autre ne donne la présidence au curé qu'en l'absence du marguillier d'honneur, tous les autres arrêts constatent le droit commun de la France.

Celui du 23 Juillet 1707 pour la paroisse de St. Jacques de la Boucherie avait été rendu par l'ordonnance de l'archevêque de Paris en date du 1er Novembre 1698, en sorte que les autorités Ecclésiastiques ont elles-mêmes concouru à la formation de ce droit commun.

Jousse, Gouv. des paroisses, page 179, § XII, no. 3.

Mémoires du Clergé, 3 tome, p. 1156, et p. 1225. Ed. de 1716.

En France, la présidence n'était pas même reconnue par les lois pour les Hôpitaux et Maladreries.

L'abbé Fleury, Inst. au droit Eccl. 1 vol. p. 506.

Jousse, sur l'Edit de 1695, p. 427, art. 11 de la Décln. de Ls. 14, du 12 Déc. 1698.

Les Fabriques sont des corps laics, et des gens de main-morte.

Jousse, p. 5 et 6.

Durand de Maillane, tome 3, vo. Fabrique, p. 346.

Anc. Den. vo. Fabriques, p. 329.

Les biens des Fabriques sont des biens ecclésiastiques, quant à *leur destination* mais seulement dans ce sens, qu'ils *participent aux privilèges dont jouissent les biens du clergé;* c'est-à-dire qu'ils sont exempts des droits d'aides, de taxes, de cotisations etc., Anc. Den. vo. Fabriques, No. 10, 11, etc. Mais leur administration est *temporelle;* et tout ce qui dépend de cette administration est porté devant le Juge Royal.

Jousse sur l'Edit de 1695, art. 17, pp. 107, 109.

Le curé n'est que le premier fabricien et n'est donc pas le premier des marguilliers.

Les Marguilliers étant au-dessus des fabriciens qui ont le droit de les élire et formant le corps exécutif des fabriciens, il est tout naturel de dire que le premier des fabriciens ne saurait être leur président.

Jousse, p. 287, no. 10.

Les registres sont autant sous la garde des Marguilliers que du Curé.

Jousse p. 175, 176.

L'extrait des registres donné par le premier Marguillier serait aussi authentique que celui que le curé donnerait.

L'abbé De Boyer, 1 Vol. p. 282, 326, 327 et 333.

L'abbé Affre, p. 77, Ed. de 1835.

En France, les procès-verbaux des délibérations, étaient redigés tantôt par un secrétaire, tantôt par un notaire.

1 Vol. l'abbé De Boyer, pp. 282, 327, 331, 333, 335, 337.

2 Code des Curés, p. 324, arrêt du 11 avril 1690, p. 326, le notaire au Chatelet Carnet préposé, &c., &c.

Rep. de Guyot vo. Marguillier, note 1, p. 327, formule &c.

Le droit de convoquer réside dans la personne du premier Marguillier. En Canada comme en France.

Senecal, vs. Beauregard.

Jousse, p. 121.

1 Vol. Boyer, p. 312-315.

Or le droit de convoquer comporte le droit de présider.

1 Vol. Boyer, p. 312.

Wilcox on Corporations, No. 69 p. 45.

Ceci résulte de ce que le Marguillier sortant est obligé de se faire remplacer.

Rép. de Guyot vo. Marguillier, p. 329, 1ère col. 6 al.

L'abbé Affre, p. 16, Ed. 1845.

L'abbé Boyer, p. 5 et 6, et le Marguillier sortant a le droit de proposer son successeur.

L'abbé Affre, loco. citato.

Mais si l'élection était faite sans opposition, elle serait bonne.

1 Vol. De Boyer, p. 318 et il cite Henrys.

L'usage n'était pas toujours suivi en France.

1 Vol. l'abbé Fleury, p. 47.

Papon, liv. 3, p. 227.

Nouv. Den. vo. Fabriques des paroisses, p. 364, No. 5.

Il faut que cet usage soit fondé sur les *jugements*.

L'abbé Fleury, 1 Vol. 47.

Or des jugements ont été rendus en Canada; dans tous les anciens districts accordant la présidence au premier Marguillier; à Montréal:

Lefebvre vs. Thibert—Damour vs. Gingues—Brodeur vs. Sénécal.

La possession était aussi mise de côté.

Anc. Den. vo. Fabrique, No. 19, 2e col. 1er al.

En Canada, l'usage n'a point prévalu quand il s'est agi d'appeler les notables aux assemblées.

Mandamus quant à la paroisse de St. Hyacinthe et autres paroisses.

Sir Louis H. Lafontaine, Bart., J. C.;—L'Intimé était le Demandeur en cour de première instance. Prétendant avoir été légalement élu marguillier de l'œuvre et fabrique de la paroisse de Varennes, et qu'au contraire l'Appelant, qui était en possession de cette charge, n'avait pas été lui-même régulièrement élu, il présenta une requête à l'effet de faire déclarer nulle l'élection de ce dernier, puis de faire déclarer que lui l'Intimé avait le droit d'exercer la charge de marguillier depuis le 1er janvier 1858.

Le Curé de Varennes convoqua l'assemblée des paroissiens, en la manière ordinaire. Au jour fixé, deux personnes reclamèrent le droit de présider, le Curé et le marguillier en charge. Dans le fait, il n'y eut qu'une assemblée. Le Curé déclara l'Appelant duement élu, et le marguillier en charge qui croyait avoir le droit de présider, en fit autant de son côté, et déclara l'Intimé duement élu. Le Curé rédigea acte de son élection, et le marguillier en charge fit rédiger acte de la sienne par un notaire.

La seule question de droit soumise à notre décision est celle de savoir qui, du Curé ou du marguillier, a le droit de présider en pareil cas. Le Demandeur a, dans sa requête, non seulement prétendu s'appuyer sur une loi quelconque, qui pouvait se trouver écrite quelque part, étendant son empire sur tout le Bas-Ca-

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nada, et donnant expressément la présidence aux marguilliers à l'exclusion des curés, mais il a encore invoqué l'usage *immémorial* suivi en Canada. Il a très bien fait, car l'usage qui fait loi très souvent, surtout en ce qui concerne les fabriques et les matières ecclésiastiques, était sa seule ancre de salut, s'il ne réussissait pas à mettre le doigt sur cette prétendue loi écrite, mentionnée d'une manière un peu vague dans sa requête. De loi écrite, expresse, à l'aide de laquelle l'Intimé voudrait soutenir sa prétention, il n'y en a pas. Quelques lois écrites que nous possédons en Canada, et qui, par analogie, peuvent avoir trait à la question, ont été, il est vrai, promulguées par notre législature. Mais ces lois, loin de venir au secours de l'Intimé, militent en faveur de son adversaire, c'est-à-dire, que ces lois reconnaissent le droit des curés de présider. Je les citerai bientôt.

L'Intimé s'est reposé sur quelques arrêts de réglement intervenus pour quelques paroisses en France. Ces arrêts sont presque tous, sinon même tous, postérieurs à l'établissement du conseil souverain de Québec, et n'y ont pas été enrégistrés. Du reste, comment pouvait-on raisonnablement ordonner qu'ils y fûssent enrégistrés ? Ces arrêts ne portaient pas de réglements qui fûssent susceptibles d'une application générale en France. Ils se bornaient à reconnaître l'existence de certains usages locaux, et à sanctionner ces usages comme devant avoir force de loi dans les circonscriptions territoriales où ils existaient déjà. Mais ces usages n'étaient pas les mêmes partout. Ils différaient dans chaque paroisse pour ainsi dire. Pour cette raison là-même, les arrêts qui, dans l'occasion, proclamaient leur existence, devaient nécessairement décréter, et décrétaient en effet, des réglements qui différaient les uns des autres, chacun de ces réglements ne pouvant être, par conséquent, mis pleinement en vigueur que dans la paroisse ou la localité pour laquelle il était fait. Lequel de ces arrêts de réglement, particuliers à certaines paroisses en France, devrons-nous adopter, pour venir au secours de l'Intimé ? Si nous adoptons l'un, nous devons nécessairement rejeter l'autre. D'un autre côté, si l'on nous propose d'adopter le dernier, l'on doit nécessairement s'attendre au rejet du premier. Nous sommes donc dans l'impossibilité de faire un choix ; et si nous sommes dans cette impossibilité, c'est parce que les arrêts qu'on présente à notre adoption, (en nous disant, prenez, en voici un, en voici un autre, ils sont différents, il est vrai, mais prenez toujours,) n'établissent pas une règle qui soit, ou puisse être susceptible d'une application génerale, universelle. Mais, il y a plus, c'est que l'Intimé, en nous proposant d'adopter, soit l'un, soit l'autre de ces réglements, ne nous propose pas de l'adopter en entier. Il veut que l'on n'adopte que la partie qui ne repugne pas au sentiment qu'il a de sa dignité, bien ou mal entendue. Il ne veut pas entendre parler de la partie de l'un de ces réglements, qui, si elle était adoptée en Canada, l'asservirait, dans l'occasion, à remplir le rôle de simple bedeau.

Les raisons que je viens de donner m'empêchent de reconnaître que les arrêts particuliers à quelques paroisses en France, que l'Intimé nous a cités, puissent avoir force de loi en Canada.

L'Intimé n'a donc pas réussi à établir l'existence d'une loi écrite, positive, qui vienne appuyer sa prétention. Il lui reste néanmoins le second moyen

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énoncé dans sa requête, celui fondé sur l'usage. L'usage est un fait qu'i faut constater d'une manière ou d'une autre, avant que l'on puisse reconnaître qu'il a, ou qu'il aura force de loi. Sur ce point, le savant avocat de l'Intimé, qui a très habilement soutenu la cause de son client, est trop candide pour ne pas admettre qu'il a complètement failli à prouver que l'usage fût en sa faveur. Non seulement au dire des témoins de l'Appelant, mais encore au dire des témoins de l'Intimé, l'usage constant, invariable, a été et est que, dans la paroisse de Varennes, ainsi que dans presque toutes, (sinon même toutes,) les autres paroisses du pays, les assemblées tenues aux fins de nommer ou élire les marguilliers, ont été et sont encore présidées par les curés. Ainsi la preuve de l'usage en cette matière, est acquise, non à l'Intimé, mais bien à son adversaire; et elle est acquise à celui-ci de la manière la plus ample et la plus claire qu'il soit possible de concevoir. Il est pleinement démontré que, dans la paroisse de Varennes, l'occasion dont il s'agit, a été la première où l'on ait tenté de mettre en question le droit du curé de présider. Le curé de Varennes était donc dans la possession de ce droit depuis l'établissement de cette paroisse.

J'ai dit plus haut que nous avions des lois écrites qui, par analogie, venaient au secours de l'Appelant. Ces lois n'ont fait que consacrer une régle constamment mise en pratique dans ce pays sous la domination française, et reconnue par divers jugements des tribunaux existant à cette époque. Je n'en citerai que quelques uns; mais comme, par leurs dates, ils se rapprochent du temps de changement de domination, et qu'en outre, ils sont presque tous uniformes, ils serviront mieux à rendre raison des deux lois portées sur la matière depuis ce changement de domination. Il y a le jugement de l'Intendant Hocquart du 5 juillet 1732; "l'acte d'assemblée des habitants" des habitants de St. François de Sales en l'Ile Jésus, "fait en présence du Sieur Jean Lyon de St. Ferréol, supérieur des Missions de Québec, &c."

Jugement de l'intendant Bigot, du 23 octobre 1748 :—"Nous, ayant égard à la dite requête, ordonnons que par le dit Sieur curé, il sera incessamment convoqué une assemblée des habitants de la dite paroisse, &c., de laquelle assemblée il sera dressé acte par le dit Sieur curé."

Jugement du même intendant constatant qu'un état de répartition était signé par le curé comme étant celui qui avait présidé à sa confection. Jugement du même intendant, du 14 janvier 1749, constatant un fait semblable; autre jugement du même intendant, du 10 juin 1749.

Tous ces jugements, et plusieurs autres que l'on pourrait citer, lesquels ne concernent il est vrai que les constructions ou réparations d'églises et de presbytères, établissent au-delà de tout doute, que les assemblées requises à cet effet étaient tenues, presque toutes, en la présence du curé, ou d'un autre ecclésiastique délégué exprès, et que le curé, ou cet ecclésiastique, y jouaient le principal rôle, c'est-à-dire qu'ils présidaient, et rédigeaient l'acte constatant le résultat des délibérations. Nous n'y voyons jamais les marguilliers remplir ce rôle principal; nous ne les voyons pas même, dans aucune occasion, appelés le moins du monde à le faire.

Tel était l'état de choses existant, lorsqu'est arrivé le changement de domina-

tion, état de choses qui a du se continuer jusqu'à la promulgation de l'ordonnance du Conseil Législatif, de 1791, chap. 6, concernant la construction ou la réparation des églises, &c., dans laquelle ordonnance, il est dit expressément que les assemblées convoquées pour ces objets seront présidées par les curés, disposition qui est reproduite dans l'ordonnance du Conseil Spécial de 1839, ch. 29, sur le même sujet.

L'introduction en Canada du principe sur lequel se repose l'Appelant, n'a rien qui doive surprendre. L'usage avait établi en Normandie la présidence du curé. Les premiers habitants du Canada étaient pour la plupart originaires de cette province. En outre, nous avons été pendant quelques temps, régulièrement ou irrégulièrement, sous la juridiction du parlement de Rouen, et de plus, sous la juridiction de l'Archevêque de Rouen. Le journal manuscript des R. R. P. P. Jésuites dont l'original est à Québec, nous apprend que, "le 15 août 1653, fut annoncé le Jubilé, sous l'autorité de Monseigneur l'Archevêque de Rouen, qui en avait ici envoyé le mandement de le publier. Son mandement doit être conservé dans les archives comme *pièce authentique de la continuation de possession* que le susdit seigneur Archevêque a déjà prise par quelques autres actes du gouvernement spirituel de ce pays. Cette publication toutefois du Jubilé sous son nom et autorité, est, ajoute le même journal, le premier acte qui ait paru notoirement dans le pays, qui est d'autant plus authentique qu'il s'est fait en la présence du gouverneur, etc., etc."

Tout cela peut rendre compte de l'introduction, dès le commencement de la colonie, de l'usage de la présidence du curé. Du reste, cette présidence n'a rien qui soit contraire à l'exercice des droits des fabriciens. Le curé est peut-être la seule personne qui, par sa position, présente le caractère d'un officier impartial, qui ne doit point prendre part aux luttes, ni pour l'un ni pour l'autre des partis. Il est en quelque sorte (pour emprunter le langage de nos institutions modernes), un officier rapporteur en titre, agissant *ex officio*, comme le font, dans d'autres occasions, certains autres officiers publics.

Je dois m'abstenir d'en dire davantage sur la question de droit, car je ne pourrais le faire sans m'approprier la plus grande partie de l'habile factum du savant conseil de l'Appelant, dont j'approuve presque tous les raisonnements. Je les approuve d'autant plus que je vois avec plaisir qu'il a puisé tous les principes qu'il a énoncés et soutenus, exclusivement dans l'ancien droit ecclésiastique de la France, qui est celui du Bas-Canada, et par conséquent celui d'après lequel nous avons fait serment de juger.

L'importance qui se rattache à cette cause m'engage à exprimer la satisfaction que j'éprouve en voyant que le jugement qui va être prononcé, sera rendu à l'unanimité. J'espère qu'il aura l'effet de mettre fin à la funeste division qui, depuis quelque temps, paraît avoir fait des habitants de la paroisse de Varennes, deux camps ennemis, et de ramener la paix dans une paroisse naguères si unie et si paisible. D'un autre côté, si le droit n'est pas, dans cette circonstance, en faveur de ceux qui ont contesté la *présidence* du curé, et voulu par là opérer un changement dans ce qui s'était pratiqué jusqu'ici sans que les paroissiens en eûssent souffert, il ne faut pas, non plus, faire tomber sur eux un blâme trop sévère. L'exemple de changements, dont la tendance est d'établir dans le

diocèse de Montréal des usages différents de ceux qui existent dans les autres diocèses du Bas-Canada, leur a été donné de plus haut. Les opposants de Varennes ont malheureusement cherché à imiter cet exemple.

Jugement infirmé.

Cherrier, Dorion et Dorion, avocats de l'Appelant.
Lafrenaye et Papin, avocats de l'Intimé.
[P.R.L.]

SUPERIOR COURT.

MONTREAL, 30TH NOVEMBER, 1859.

Coram SMITH, J.

No. 2335.

Fawcett et al. vs. *Thompson* et al.

Held:—1st. Where A. B. & Co. agreed to tan a quantity of hides the property of C. D. & Co., and to deliver the leather when tanned to the latter who were to have the exclusive right of sale thereof, on the understanding that the former were to be entitled to a certain share of the profits arising from the sale of the leather by the latter, and instead of so delivering the leather when tanned to C. D. & Co. one of the members of the firm of A. B. & Co., without the knowledge even of his partner, conveyed the leather into a foreign state and sold the same for his own benefit, assuming at the same time a fictitious name, that such an act was not a *vol* as understood by the law of Lower Canada.

2. That apart from any question of *vol*, A. B. & Co. had no right to revendicate such leather in the hands of a third party who had purchased the same for a valuable consideration, unless the latter acted in manifest bad faith.

3. That proof to the effect, that the leather coming as it did from a foreign market ought to have borne the stamps and marks of weight and inspection and to have been rolled, and instead thereof bore no such stamps and marks and was in the main unrolled, and that the price paid was low, at a time when leather was particularly scarce, is not evidence of bad faith on the part of the purchaser, sufficient to justify the revendication of the property by the party claiming it.

This was an action *en revendication* to recover 3657 sides of hemlock sole leather which the Plaintiffs who were carrying on business in New York State alledged was their property and had been stolen, taken and carried away into Canada and there came into the unlawful possession of the Defendants who were leather dealers at Montreal.

The Defendants, denying the truth of the allegations of the Plaintiffs' declaration, pleaded, in effect, that they had purchased the leather, together with a much larger quantity, from divers persons in possession thereof and acting as proprietors and owners and entitled to sell the same at Montreal aforesaid, and who, according to the usual custom of trade had imported the same into this Province. That the said Defendants purchased and paid for the said leather in the usual course of business in good faith and without knowledge of any right, claim or pretension of the Plaintiffs in respect thereof. That the Plaintiffs, by permitting the leather to be imported into this Province by parties having the same in their possession were debarred from any recourse against the Defendants as *bonâ fide* purchasers thereof for good and valuable considerations in the usual course of business, and that the Plaintiffs recourse was only against the party or parties so entrusted with the leather.

The Plaintiffs, denying the truth of the Defendants' plea, replied specially as follows:—"That it is not true that the said Defendants were *bonâ fide* purchasers of the leather referred to in the pleadings in this cause, in the usual

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course of business; that on the contrary the said Defendants, who are large dealers in leather, well knew, at the time they pretend to have purchased the same, that the said leather came from the United States of America, and that all leather so coming from said United States, in a legitimate manner, is put up in Rolls, and bears the stamp of the tanner who tanned it and likewise certain marks indicating the weight thereof, and the stamp of the Inspector who inspected it, indicating its weight and quality; that the said Defendants moreover well knew at the time of their said pretended purchase, that leather was unusually scarce and of very ready sale in the state of New York, whence the said leather was brought, at the time they so pretend to have purchased it; that notwithstanding the premises aforesaid the said leather was offered to the said Defendants, in a loose and and unrolled state and without any Tanner's or Inspector's stamp thereon or any mark whatever indicating its weight or quality, and at a price about or below what they the said Defendants well knew at the time it could be sold for in the said State of New York from whence it was so brought and this notwithstanding the costs of transportation thereof from the said State, which they well knew to be very heavy, and the Provincial Custom's Duty thereon of fifteen per cent."

BETHUNE, for Plaintiffs, contended that the evidence of record clearly established, that the hides from which the leather was manufactured were the property of the Plaintiffs and were by them delivered to a firm of W. H. and F. Stevens to be tanned, on the understanding that the latter were to deliver the leather when tanned to the Plaintiffs who were to have the sole and exclusive right of sale thereof, the tanners being entitled to a certain share in the profits to arise from the sales. That after the hides were tanned they left the tannery *en route* apparently to the Plaintiffs, but on the way the junior member of the same firm whose name was Fletcher Stevens caused the leather to be diverted from its proper course and taken into Canada, where, under the assumed name of F. Stafford and with the assistance of one —— Stanton—whom he had hired to accompany him on the journey and who went under the assumed name of L. L. Stratton, he sold the leather to the Defendants, and converted the proceeds to his own benefit, Walter H. Stevens, the senior member of the said firm being in total ignorance of any such diversion of the leather from its intended destination. Under such circumstances it was manifest that the Plaintiffs could revendicate the leather in the hands of the Defendants, notwithstanding that the Defendants might have bought the same for a fair consideration and in good faith. The principle of law governing the present case was "*nemo plus juris in alium transferre potest quam ipse habet.*" Then as to the question of *vol* as understood by our law he referred to DOMAT—*Supplément au droit public*—Lib. 3, tit. 8, sec. 1, p. 157.—GUYOT, *Repertoire, verbo* VOL p. 644, *première partie.*—And as to the general right to revendicate property as in the present case he referred to POTHIER—*Traité des Cheptels*, No. 50.—GRAND COUT. vol. 2, p. 1324.—No. 14.—DOMAT, *loco citato*, s. 10, p. 158.—*Ar. de* LAMOIGNON, vol. 1, p. 132, 133, Nos. 96 & 93.—*Kent's Commentaires*, 2 vol., p. 323 and *seq.* to 325.—GUYOT, *Rep. verbo* VOL, 3rd part, 1st sect. p. 664, 665.—BELL'S COM. 1 vol. p. 281 and note 7.—STORY on sales, §188, 190, 191, 194, 199, 201.—LONG on sales, RAND'S Ed. p. 167, commencing "in short,

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the general rule of the English law, &c." and p. 173, commencing "there are many exceptions to the general rule respecting sales in market overt, &c."—DALLOZ, *Rec. Per.* 1849—Part. 1, p. 145.

Then as to the alleged valuable consideration paid by the defendants and their good faith. He contended that it was in evidence, that at the time the leather was purchased by the defendants leather was very scarce in Montreal, and that not only was the price per pound paid for it low, but it appeared by the receipts produced by the Defendants themselves that a discount of $861.63 had been allowed on the purchase of a portion of it. It was, moreover, in evidence, that the quantity was most unusual, as coming from New York to this Market, that it was the only instance where strangers had been known to bring in leather from the States to Canada for sale; that, moreover, all leather coming from the States to this market bears the stamps and marks of the weight and inspection, and is invariably put up in rolls, whereas the leather in question bore no evidence whatever of inspection nor marks nor stamps of any kind indicating its weight or quality, and was, moreover, in the main loose and unrolled. It was manifest, therefore, to say the least of it, that the defendants had failed to exercise that sound discretion which the very suspicious circumstances attendant on their purchase plainly called for, particularly in the face of the well-known rule—*caveat emptor*.

ROBERTSON, for Defendants, contended,—

That from the terms of the agreement produced by Plaintiffs, it appeared that one of the parties who sold the leather to the Defendants was a partner with Plaintiffs, and that in such case, even if the sale was made in fraud of the copartners, the loss must fall on the partnership. So, if several joint owners let one have possession of goods, and he disposes of them improperly, the loss falls on the joint owners.

That the sole ground of action, namely, that the leather was *stolen* from the Plaintiffs, before it came into defendants possession, is not proved.

That the distinction between *vol* and fraud, or *escroquerie*, was in favor of Defendants, who could retain the goods even if obtained and sold unjustly and fraudulently, or in breach of trust, the Defendants the vendees being ignorant of the fraud.

That by the evidence of record, it was proved that the Defendants had paid the full market value of the leather in good faith, and therefore the loss must fall on Plaintiffs on the principle that if one of two innocent parties must suffer, &c.

That, moreover, although it was proved that the leather was sold to Defendants, yet that the leather seized was not identified.

And cited following authorities—13 Toullier p. 111, No 118. 10 & 11, Vic. ch. 10, s. 1.—34 Eng. L. & E. Rep., p. 60[illegible].—6 Metcalfe's Rep., p 74.—Parson's Mer. Law, p. 56 & 180.—Carr. and Mars. Rep., p. 63.—1 Metcalfe's Rep., p. 362.—4 Duranton, p. 374, 375, 376, 377.—15 Mees. and W., p. 216.—12 Dalloz, *Verb. Vente & Echange*, 860, 862 and note.—1 Rondot, p. 423.—Code Civil An. p. 953.*

* The accuracy of the above citations is not vouched for, as they are taken from memoranda made at the argument; the counsel for Defendants not having been able to furnish the Reporter with an exact memorandum.

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PER CURIAM.—This was an action of *revendication* to recover a quantity of leather from a firm doing business in this city, of which leather plaintiff asserted that he was the owner, and further that it had been stolen from him, and had since come into the possession of the defendants. Defendants replied that plaintiffs were not the owners of the leather; that they purchased it in good faith from the proprietor; that they had given an adequate price, and had bought without any suspicious circumstances. Further, they said that even if plaintiffs were the owners, yet having allowed the property to go into the possession of others, who had brought it to Canada as the apparent proprietors, the said plaintiffs could have no recourse against the defendants, who had bought it. The plaintiffs, by their replication, answered that the circumstances of the sale were such as to excite suspicion of fraud, that the leather was not in the condition in which leather was usually brought from the U. States for sale; and that there were circumstances to show that the sellers were not in good faith, as, for instance, that the purchase was for a very low price. The evidence for the plaintiffs had been procured by a *commission rogatoire*, and it seemed that Fawcett & Co, of New York, being large dealers in leather, had entered into a contract with Stephens & Co., by which the former were to furnish hides to be tanned by the latter. The leather thus made was to be re-delivered to Fawcett & Co., at a certain place in New York, to be sold by them. After certain deductions and percentages, the profit and loss were to be in common, and Fawcett & Co. were, in addition, to receive a percentage to guarantee all sales made on credit. This was how Stephens, who sold to the defendants, became possessed of the leather, and under the terms of that contract Fawcett & Co. claimed to be the proprietors of it. His honor was against them on this ground, and considered that the contract disclosed a co-partnership. It was sufficient proof of this that the profit and loss was to be divided. It was, moreover, shown by the agreement that Fawcett & Co. were to guarantee the sales—for why guarantee the sale of what was absolute property? It had been objected that the agreement that the leather should be sent to New York, necessarily controlled the right of property; and that was true as between Fawcett and Stephens; but it could not be true as to third parties, to whom these partners would appear in the light of all other partners. To make such a pretension available, it must be shown that the defendants were aware that Stephens was fraudulently converting the property of the co-partnership to his own use. This brought him to another part of the case,—the want of evidence that the plaintiffs had ever been in possession of the leather, after it had ceased to be in the condition of raw material; and this would be necessary in order to sustain the action, unless there were also proof of bad faith. No doubt, according to the evidence, there had been an enormous fraud practised on the plaintiffs, by Stephens getting possession of some 20,000 hides, converting them into leather, and instead of delivering the leather at New York, bringing it into Canada to sell it. It was proved that Stephens had changed his name, and that after passing the leather for a certain distance in the direction of New York, in order to deceive all parties, he had altered its route, and brought it to Montreal. He had committed a great fraud; but he was the apparent owner, and was in possession in

right of co-partnership. As to the particular circumstances on which plaintiffs rested to make out fraud, the first was that the leather was not stamped, as was common with leather coming from the United States. But though leather was usually stamped after it reached the large cities, there was no evidence that this was usually done in the provinces where it was made, or that it would be done in the ordinary course, in the case of leather manufactured in the interior and sent over the Ogdensburgh Railroad to Montreal. Another point was that the leather was not rolled. A part was rolled; and as to the rest, there was evidence that the circumstance was not of a kind to excite suspicion. As to the price there was conflicting evidence; but considering the quantity, amounting in value to $10,000, he was of opinion that the price paid was not such as to carry a necessary inference of fraud. Another point insisted on by the plaintiff was, that Stephens was in possession by theft; but there could be no such theft by co-partners of goods belonging to the co-partnership, as could give rise to a revendication.

The following was the *considerant* of the Judgment:—"The court * * * considering that the said plaintiffs have failed to establish the material allegations of their said action, and particularly that the said plaintiffs were at the time stated in the said declaration, the absolute owners and proprietors of the leather, seized in this cause, or that they, the said plaintiffs, ever were in possession, as proprietors, of the said leather so seized; and further, considering that the said defendants have established that they purchased the said leather from persons in possession thereof as the apparent owners and proprietors thereof, and without any knowledge of any fact which could have excited the suspicion of the said defendants, that the said parties so in possession were not, in fact, the owners thereof, the Court doth dismiss the said action with costs."

Action dismissed.

Bethune & Dunkin, for Plaintiffs.
A. & W. Robertson, for Defendants.
(S. B.)

MONTREAL, 30TH APRIL, 1860.

Coram BADGLEY, J.

No. 2380.

Joseph vs. *Morrow, et al.*

eld:—That a witness cannot be examined a second time by the party producing him in the same case unless allowed by the Court on special application.

In this case a witness who had been examined some months before by the Defendants, was again before closing their *Enquête* brought up by them to give further evidence. The identity of the witness being established by his examination on *voir dire*, the Plaintiff objected to his giving further evidence.

MONK, J., presiding at *Enquête*, maintained the objection holding the exami-

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nation *de novo* of a witness to be inadmissible unless authorized by the Court upon special application made to that effect.

Motion having been made to revise the ruling at *Enquête*.

BADGLEY, J., after stating the circumstances, remarked that such right could only be obtained on a special application to the Court, stating the particular grounds why such a privilege should be granted.

Motion rejected and the ruling at *Enquête* sustained.

Cross & Bancroft, for Plaintiff.

Ricard, for Defendants.

Counsel cited the case of St. Denis vs. Grenier, 2 vol. Jurist, p. 93. Phillips on evidence 3d Am. Ed. vol. 2, p. 409, also cases of Giles vs. Powell, 2 Car. and Paine 259. Brown vs. Giles, same 1 vol. p. 118.

(H. B.)

COUR DE CIRCUIT.

MONTREAL, 18 JUIN, 1860.

Coram MONK, J.

No. 866.

Senécal vs. *Chenevert*.

La déclaration des noms de tous les membres d'une société commerciale, requise par l'acte 12 Vict., ch. 45, doit elle être faite partout ou la société fait quelqu'acte de commerce ou suffit-il de la faire au Greffe de la Cour Supérieure et au Bureau d'Enregistrement du lieu où la société a son comptoir et où est le siège de ses affaires?

Jugé que la déclaration au lieu où la société a son comptoir suffit.

Le Défendeur, domicilié à Trois-Rivières, était poursuivi comme actionnaire de la "Compagnie de Navigation des Trois-Rivières," pour le montant de la penalité imposée par l'Acte 12 Vict., ch. 45, contre ceux, qui fesant partie d'une société commerciale, négligent de faire, dans les soixante jours, la déclaration du nom de leurs associés, tel que requis par cet acte. Le Demandeur alléguait que cette compagnie avait fait des affaires à Montréal, et que le Défendeur était passible de l'amende de £50 pour n'avoir pas produit sa déclaration au Greffe de la Cour Supérieure et au Bureau d'Enregistrement à Montréal.

Le Défendeur a décliné la jurisdiction de la Cour, se fondant sur ce que la Compagnie de Navigation des Trois Rivières n'ayant pas fait d'affaires à Montréal, il n'était tenu de produire la déclaration exigée par le Statut qu'à Trois Rivières qui était le siége de ses affaires, que la cause de l'action n'ayant pas originée à Montréal, il n'avait pu être traduit hors la jurisdiction de son domicile.

A l'enquête il fut prouvé que la "Compagnie de Navigation des Trois Rivières" avait établi une ligne de communication entre les Trois Rivières et Montréal, que son bureau devait être à Trois Rivières, qu'elle y avait ses agents et que les assemblées de la Compagnie s'y étaient tenues, qu'elle avait fait naviguer un bateau à vapeur qui avait transporté des voyageurs et des marchandises de Montréal à Trois Rivières.

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Le Défendeur prétendait que l'acte qui exige la publication du nom des membres de toute société commerciale avait été passé d'après une loi qui existe maintenant en France et qui n'était elle-même, que la reproduction modifiée des articles de l'ordonnance de 1673, sur le même sujet, tombés en desuétude longtemps avant le code; que le but de cette publication était de faire connaître les noms de tous les associés à ceux qui pouvaient avoir des transactions avec la Société et que pour remplir ce but, cette publication n'était nécessaire que là où la société avait un bureau, une maison ou un établissement, c'est-à-dire à l'endroit où elle pouvait être régulièrement assignée et non pas partout où elle pouvait faire quelqu'acte isolé de commerce. Que la loi française n'exigeait rien autre chose et que nonobstant quelque légère différence dans les termes, elle devait servir à l'interprétation de notre statut, l'objet des deux lois étant le même. (1)

Le demandeur prétendait au contraire, qu'il suffisait que la Société eût fait quelques actes de commerce, même un seul, à Montréal, pour soumettre le Défendeur à la pénalité imposée par le statut.

Le Juge Monk. Pour interpréter correctement le statut, il faut rechercher le but que la Législature avait en vue en le passant, ce but était évidémment de faire connaître à ceux qui pourraient transiger avec une société le nom de ses membres. C'est surtout là ou l'assignation peut être donnée dans les cas de poursuites que cette connaissance est nécessaire et c'est aussi au domicile social que la publication doit être faite. Il serait déraisonable d'exiger l'accomplissement de la formalité de la publication à tous les ports qu'un vaisseau appartenant à une Société peut fréquenter, et le statut en exigeont la publication partout ou la Société fait des affaires, a seulement voulu dire ce que la loi française explique en d'autres termes, lorsqu'elle dit "partout ou la Société a une maison ou un établissement de commerce." Le Défendeur réside à Montréal et si le Demandeur a droit de recouvrer la pénalité qu'il reclame, ce ne peut être que parceque le Défendeur n'aurait pas produit de déclaration à Trois Rivières même, et ce n'est que là que l'action pourrait être portée.

L'exception déclinatoire est maintenue et l'action déboutée.

Lafrenoye et Papin, pour le Demandeur.
Ed. Carter, Conseil.
Dorion, Dorion et Senécal, pour le Défendeur.
Bethune et Dunkin, Conseils.

(V. P. W. D.)

(1) Massé, Droit Commercial, t. 3, p. 45, No. 55. & No. 57, p. 49.
De Langle, Société Com., t, 2, p. 15, No. 729 et suiv.
Goujet et Merger, Vo. Société. Nos. 163, 166, 273.

MONTREAL, 5TH DECEMBER, 1859.

Coram SIR L. H. LA FONTAINE, Bart, Ch. J., AYLWIN, J., DUVAL, J., MONDELET (C.) A. J., MONK, J. *adhoc.*

No. 3.

THE BANK OF BRITISH NORTH AMERICA,

Plaintiff in the Court below.

Appellant.

AND

ANGÉLIQUE CUVILLIER, et al.

Defendants in the Court below.

Respondents.

Held,—1. A deed of warranty will not cover a class of debts not contemplated by the parties at the time it was executed, though the terms of the Deed be so general as to purport to extend to all debts whatever.

2. If the recital in a deed of warranty indicate the purpose for which the deed is executed, its effect will be restricted to that purpose, though the dispositive portion of the deed be couched in general terms.

3. A deed of warranty stating that M. C. proposes to carry on business in Montreal and elsewhere; and that to enable him to do so, and to meet the engagements of a firm in liquidation of which he has been a partner, he would require Bank accommodation; and that the sureties were willing to become his security with a view of making the Bank perfectly secure with respect to any debts then due, or which might thereafter become due by him; and then containing an agreement by the sureties to become liable for all the present and future liabilities of the said M. C. whether as maker, drawer, endorser or acceptor of negotiable paper, or otherwise howsoever; will not make the sureties liable for debts contracted by the said M. C. by endorsing, or procuring the discount of negotiable paper in his own name for the benefit of a firm of which he became a member subsequent to the execution of the deed of warranty, although such paper had been discounted at his request, and placed to his individual credit in the Bank.

4. A defendant may be a witness for his co-defendants, if he be not interested, or if his interest be removed by a discharge.

This was an appeal from the Judgment of the Superior Court, Montreal, rendered on the 30th April, 1858, of which a report is to be found in the 2d L. C. Jurist, p. 154, and *seq.*

Bethune for appellant, (after stating pleadings and facts)

The counsel for the Respondents contended in the court below that "as between the creditor and the surety, the contract is *strictissimi juris*, and is in all cases to be interpreted strictly against the Creditor; and in support of his proposition, cited "Burge on suretyship, P. 46 and Seq., and authorities there cited, both from the civil and common law."

It is submitted on behalf of the Appellant, that Burge not only did not lay down the rule invoked but on the contrary, by a chain of reason and authority (commencing at P. 40, and terminating at P. 46) states the true doctrine as recognised in England to be as follows :—

(P. 46) "It may then be considered that the contract of guarantee or surety will be subject, as every other contract, to the rule that where there is ambiguity or obscurity which the other parts of the instrument do not explain, it is to be constructed *potius contra proferentem*, that is, against the party giving the contract."

And at P. 42, 43., with reference to the party *proferentem verba*, Burge says;—"It must be recollected however that under the civil law the person *proferens verba* was the party to whom the stipulation was made the "Stipulator." The words of the stipulation were necessarily those of the person to whom the promise was made; the person promising only assented to the question proposed by the person stipulating.

The principle on which the rule of the English law is founded, is precisely that on which these texts of the civil law proceed; the words employed in the law of England are those of the party promising, in the civil law, they were the words of the party to whom the promise was made.' A late eminent Judge has expressed it with his accustomed perspicuity. "The words employed in the guarantee are the words of the Defendant (the surety) and there is no reason for putting on a guarantee a construction different from that which the Court puts on any other instrument. With regard to other instruments, the rule is, that if the party executing them leaves anything ambiguous in his expression, such ambiguity must be taken most strongly against himself."

This explanation of Burge with regard to the position of the promissor under the Civil Law rule, is supported by Voet. Lib. 45, Tit. 1, No. 23.

And the doctrine enunciated by Burge as obtaining in England, is supported by Fell in his work on guarantees, P. 129, and by the following cases:—

Mason vs. Pritchard, 12 East, P. 227. Hargreave vs. Smee, 6 Bingham, P. 245. Davey et al. vs. Phelps, 2 Manning & Granger, P. 301. Mayer vs. Isaac 6 Meeson & Welsby, P. 606. Broom vs. Batchelor, 1 Hurleston & Norman, P. 255.

2. The Respondents contended, that any change in the position or status of the debtor relieved the surety, and relied on the authorities cited in the Court below, as reported at P. 157 of the 2nd vol. of the L. C. Jurist.

By reference to these authorities it will be found that neither in Addison nor in the several cases referred to, is any such broad doctrine laid down, and that all the cases (except Anderson vs. Thornton) have reference to time or period of duration of bond, and not to mere change of position or status. The first of these cases, Simpson vs. Cook may at first sight appear to sanction the doctrine to a certain extent, but on a close examination of the report, it will be seen that the real question in that case was whether or not the bond was to exist after the partnership for which was it given was dissolved by the death of one of the partners. And the case of Anderson vs. Thornton, 3. Q. B. P. 276, so far from supporting the proposition distinctly maintains the opposite doctrine.

The appellant would also refer to the cases of Barclay vs. Lucas, 1 Term R. P. 291 note (*a*) and Metcalf et al. vs. Bruin 12 East P. 399, as ruling in a sense contrary to that contended for by the Respondents.

3. The Respondents argued that the recital in a bond will control the condition of it, and the Honorable Judge who rendered the judgment in the court below emphatically stated that "the only proper mode of settling the question is to take the recital as indicating the intention of all parties and controlling the body of the deed within the limits of those intentions."

The authorities relied upon in support of this proposition are to be found in

the L. C. Jurist *loco citato*. Now one of these authorities is Addison on Contracts, but instead of laying down the rule as above stated, he says, "the condition of the obligation may be restrained by the recital and the recitals by the condition," and the cases cited are merely to the same effect.

With reference to Addison, it is to be observed, that in his Edition of 1847 he lays down the rule in the absolute form insisted on by the Respondents in these words.—"The condition of the obligation is always restrained by the recitals." and cites a case in support, that of Sansom vs. Bell, 2 Campbell, P. 39. Unfortunately for his citation the case was one where the condition was made to control the recital. Seeing this, no doubt, he altered the expressions in his subsequent Editions, as shown above, and dropped the citation of Sansom & Bell.

In addition to the case of Sansom & Bell, the Appellant would refer to the case of Saunders et al. vs. Taylor, 9 Barnewall & Cresswell, P. 35, as maintaining the doctrine in England that the condition will sometimes control the recital.

On the part of the Appellant there is no pretension or desire to evade the rule of the civil law,—"*natura fidejussionis sit strictissimi juris et non durat, vel extenditur, de re ad rem, de persona ad personam, de tempore ad tempus;*" the nature of the liability, the person dealt with, and the duration of the undertaking being in every instance, in the present case, strictly in terms of the Bond. The pretention on the part of the Respondents, as at page 158 of the vol. of the Jurist already quoted, that the Appellant advanced the moneys in question in reality to A. Cuvillier & Co., and that Maurice Cuvillier merely put his name on the paper as security for A. Cuvillier & Co., is best answered by the fact, that in the case of the Castle drafts, which covers more than the half of the Appellant's demand, A. Cuvillier & Co. never were in any way liable either as promissors or endorsers, so that Maurice cannot be said to be surety in a case where there is no principal debtor other than himself, and in the other cases, where A. Cuvillier & Co. were liable, Maurice, as a member of the firm, was liable without requiring in addition to sign his individual name: he could not therefore be said to be surety in respect of a debt, for the payment of which he was liable as a principal. And it is moreover abundantly proved that the Bank at all times refused to deal with A. Cuvillier & Co. limiting their operations on every occasion to dealings with Maurice Cuvillier alone.

Having thus shown that the law of creditor and surety as understood in England, and which has been so much relied upon by the counsel for the Respondents, in no way affects the interests of the Appellant in the present case, the Appellant would now refer the Court to the following authorities, as showing what may more properly be termed the law really applicable to the case now before the Court.

1. "Le cautionnement est un contrat par lequel quelqu'un s'oblige, pour un débiteur envers le créancier, à lui payer en tout ou en partie ce que ce débiteur lui doit en accédant à son obligation.

Le contrat qui intervient entre la caution et le créancier envers qui elle s'oblige, n'est pas de la classe des contrats bien faisants ; car le créancier ne reçoit par ce contrat rien audelà de ce qui lui est dû : il ne se procure qu'une sûreté pour ce qui lui est du, sans laquelle il n'aurait pas contracté avec le débiteur

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principal, ou ne lui aurait pas accordé le terme qu'il lui accorde: mais le cautionnement renferme un bienfait à l'égard du débiteur pour qui la caution s'oblige." Pothier, Obligations, No. 365.

2. "Pour juger de l'étendue de l'obligation de la caution il faut bien faire attention aux termes du cautionnement.

Lorsque la caution a exprimé pour quelle somme, pour quelle cause elle se ren doit caution, son obligation ne s'étend qu'à la somme ou à la cause qu'elle a exprimée.

Au contraire, lorsque les termes du cautionnement sont généraux et indéfinis le fidéjusseur est censé s'être obligé à toutes les obligations du principal débiteur résultantes du contrat auquel il a accédé; il est censé l'avoir cautionné *in omnem causam*." Pothier, Obligations, No. 404.

Denisart in his new collection, *verbo* caution P. 322, Nos. 10 and 11, in effect holds the same language as Pothier.

3. Ponsot in his treatise on *cautionnement*, No.27, says:—" Celui qui répond de la solvabilité d'autrui, ne le fait que parce qu'il y est porté, soit par une bienveillance toute spéciale pour le débiteur cautionné, soit parce qu'il connaît ses ressources industrielles ou financières qu'il croit pouvoir compter sur sa fidélité à tenir les engagements qu'il a pris. Toutes ces considérations sont evidemment personnelles." And Troplong in his treatise on the same subject, No. 150 says —" en effet, le cautionnement est déterminé par l'affection qu'on porte à une personne, par la confiance qu'on a en elle, par le désir de lui rendre service, de favoriser son établissement, &c., &c. On cautionne tel débiteur à cause des garanties morales et pecuniaires qu'il présente."

Is not this just the kind of *cautionnement* given here? The mother and sisters of Mr. Maurice Cuvillier, partly from affection and partly from confidence in the high business talent and unswerving integrity of this near relative (of the measure of whose capacity and morality they must be presumed to be the very best judges) come forward and ask the Bank to "*favoriser son établissement*" by making him pecuniary advances, and that without limit as to time or amount; thus proclaiming in the strongest possible manner their entire faith in the character and capacity of the party in question. Is it to be said then, that because this gentleman may have abused the confidence thus placed in him, and under cover of it obtained advances for purposes foreign to those which they may originally have contemplated, that the Bank is to be the sufferer? Assuredly not, must be the response of every honest mind.

But it might be said, can sureties be thus bound *in eternum?* Certainly, if they choose thus to obligate themselves. Pothier, *loco citato*, evidently thinks so, and Denisart in his new collection, *verbo* caution, P. 323 No. 12, puts the very case of an *engagement perpétuel*, and in doing so, points out the mode in which alone the surety can put an end to his obligation. He says:—" Il est certain que celui qui cautionne un débiteur, n'a pas communément l'intention que son engagement soit perpétuel; aussi les auteurs sont ils d'avis qu'après un certain tems plus ou moins long, et dont la fixation doit dépendre de la prudence des juges la caution peut assinger le débiteur principal pour le faire condamner à lui rapporter décharge de son cautionnement, &c."

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Lastly, as to the admissibility of Maurice Cuvillier as a witness.

The pretension of the Respondents is, that having confessed judgment in the cause, and being released from costs by his co-defendants, he has ceased to have any pecuniary interest in the event of the suit, for although not released by his co-defendants from liability to indemnify them, such liability is balanced by his liability to the Bank; inasmuch as he cannot be called upon to pay more than once. In other words, that the interest in either case is equal.

It is submitted by the Appellant, that not only is it not proved that the interests are equal, but on the contrary, the legal presumption is and must be that, inasmuch as these co-defendants carefully abstained from discharging him from liability over to them, they must hold some counter security which they are afraid of releasing by so doing. The *onus* of establishing such equality of interest is on the Respondents, and as they have failed to establish it, even by presumption, the Court must of necessity reject the evidence.

But whether Maurice Cuvillier's ev[illegible] rejected or not from the record, is a matter of indifference in the de[illegible] of this case.

Abbott, for Respondents, reiter[illegible] ment which he offered to the Court below as reported at page [illegible] of the 2nd vol. of the L. C. Jurist, and relied on the authorities n[illegible] that report, and was followed by *Loranger*, Q. C., and by *Stuart*, in rep[illegible]

AYLWIN, *J. dissentiens.*

The Bank was the party Plaintiff before the Court below. The defendants were Maurice Cuvillier described as "late of the city of Montreal, in the District of Montreal merchant at present residing at Belleville, in that "part of the province of Canada heretofore constituting the Province of "Upper Canada, Dame Marie Claire Perrault, of the said city of Montreal, widow of the late Honorable Austin Cuvillier, in his lifetime of the said "City, Merchant, Angelique Cuvillier, of the said city of Montreal, wife of "Alexander M. Delisle of the said City, Esquire, and the said Alexander M. "Delisle as the husband of the said Angelique Cuvillier, Mary Anne Cuvillier of "the city of Quebec in the district of Quebec, wife of George Burns Symes, of the "said city of Quebec, Esquire, *non commune en biens* with [illegible] and the said "George Burns Symes, as the husband of the said Mary A[illegible] Cuvillier, and "Luce Cuvillier, of the said City of Montreal Spinster of the full age of majority, *fille majeure et usante de ses droits.*"

On the 30th April, 1858, Maurice Cuvillier having given a *Cognovit actionem*, or confession of judgment, it was entered up and recorded against him, in the Superior Court at Montreal, but the action was dismissed, in so far as respects Angelique Cuvillier, Mary Anne Cuvillier, and Luce Cuvillier, three of the Defendants, who are now Respondents before the Court. Dame Marie Claire Perrault died during the pendency of the suit, and proceedings were discontinued *quoad* her.

The present Appeal is brought by the Bank from the judgment of dismissal.

The liability of the Respondents for which the Bank contends rests upon an instrument executed at Montreal, on the 26th July, 1849, before T. Doucet and

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his colleague, Public Notaries, *inter partes* to wit, the said Maurice Cuvillier, of the first part, the said late Dame Marie Claire Perrault, Angelique Cuvillier, wife of Alexander M. Delisle, Mary Anne Cuvillier, wife of George Burns Symes, and the said Luce Cuvillier of the second part, the Bank of Montreal of the third part, and the said Bank of British North America now Appellant of the fourth part.

Upon the true construction of this instrument the present appeal must depend. The parties to it begin by declaring "that the said late Austin Cuvillier, (the "Honorable Austin Cuvillier,) his son Austin Cuvillier of the City of Montreal, "now absent in England, and the said Maurice Cuvillier carried on trade and "commerce, at this City, upon an extensive scale, under the firm of 'Cuvillier "and Sons' until the eleventh day of the present month of July when the said "firm was dissolved by the death of the said late Austin Cuvillier."

"That the said Maurice Cuvillier hath, *since the death of the said late Austin Cuvillier, carried on and proposes to carry on trade and commerce in this City and elsewhere.*

"That to *enable him to do so, and to meet the engagements of the said late "firm of Cuvillier and sons, he will require discounts and pecuniary assistance "to a considerablle extent* from the said parties of the third and fourth parts respectively, and that with a view of making the said parties of the third and fourth "parts *perfectly secure,* with respect to any *debts which now or hereafter may be "due to them* respectively by the said Maurice Cuvillier, and with respect to the "*present and future responsibilities of the said Maurice Cuvillier to the said "parties of the third and fourth parts respectively, the said parties of the second "part are willing to become security to and in favor of the said parties of the "third and fourth parts.*"

After this recital the instrument proceeds as follows: "Now therefore. the "said parties hereto of the second part do hereby make *themselves jointly and "severally liable to and in favor of the said parties hereto* of the third and fourth "parts respectively, they thereof accepting, *for all debts heretofore contracted "or that may hereafter be contracted to and in favour* of the parties of the third "and fourth parts respectively, *by the said Maurice Cuvillier and* GENERALLY "*for* ALL *the present and* FUTURE LIABILITIES *of the said Maurice Cuvillier, "towards the parties of the third and fourth parts respectively, whether as maker "or drawer, endorser or acceptor of negociable paper or otherwise, and whether re-"sulting from discounts, pecuniary advances* OR ANY OTHER CAUSE WHATEVER, the "said parties hereto of the second part, hereby jointly and severally promising "and obliging themselves to meet and pay the said present and FUTURE DEBTS "and liabilities of the said Maurice Cuvillier, as if THEY WERE JOINTLY AND "SEVERALLY THE PRINCIPAL DEBTORS THEREOF, and expressly renouncing the "*benefit of the exceptions of division and discussion and* ALL OTHER SUCH EX-"CEPTIONS *with respect to the said debts and* LIABILITIES *and the* OBLIGATIONS "*so hereby contracted by them.*"

The Bank, in its Declaration, has counted against the Defendants, upon eight pieces of negotiable paper, namely:

1st.—16th October, 1854, a Bill of Exchange for £625 Currency, drawn at

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New York, by Charles H. Castlo on Maurice Cuvillier, at Montreal, to order, at ten days sight, accepted on the 18th October and duly protested for non-payment, at the instance of the Bank as holder, on the 31st October, 1854.

2nd.—19th October, 1854, a Bill of Exchange for two thousand five hundred dollars equivalent to £625 Currency, drawn at New York, by Charles H. Castlo on Maurice Cuvillier, at Montreal, to order, at ten days sight, accepted on the 23rd October, and duly protested for non-payment, at the instance of the Bank as holder, on the 4th November, 1854.

3rd.—21st October, 1854, a Bill of Exchange for £625 Currency, drawn at New York, by Charles H. Castle on Maurice Cuvillier, at Montreal, to order, at ten days sight, accepted the 24th October, 1854, and duly protested for non-payment, at the instance of the Bank as holder, on the 6th November, 1854.

4th.—24th October, 1854, a Bill of Exchange for £750 Currency, drawn at New York, by Charles H. Castle on Maurice Cuvillier, at Montreal, to order, at ten days sight, accepted on the 26th October, 1854, and duly protested for non-payment at the instance of the Bank as holder, on the 8th November, 1854.

5th.—23rd October, 1854, a Bill of Exchange or draft for £400 Currency, drawn at Montreal, by the firm of A. Cuvillier & Company, then composed of Austin Cuvillier, the said Maurice Cuvillier and Edward Chaplin, on Messrs. Henry Bull & Company, Belleville, Upper Canada, payable to the order of Maurice Cuvillier, at ten days sight, discounted by the Bank on the 23rd October aforesaid "*at the special instance and request of the said Maurice Cuvillier and paid to him*, protested for non-acceptance on the 3rd November, 1854, and for non-payment on the 10th November, at the instance of the Bank as holder, with due notice given to Maurice Cuvillier as endorsor.

6th.—23rd October, 1854, a draft for £200 Currency, drawn at Montreal, by the said firm of A. Cuvillier & Company on the said firm of Henry Bull & Company, at Belleville, in Upper Canada, payable to the order of Maurice Cuvillier at twenty days sight, discounted by the Bank on the said 23rd October, at the like special instance and request, and paid to the said Maurice Cuvillier, protested for non-acceptance on the 3rd November, and for non-payment on the 25th November, 1854, at the instance of the Bank as holder, with due notice given to Maurice Cuvillier as endorser.

7th.—23rd October, 1854, a draft for £450 Currency, drawn at Montreal, by the said firm of A. Cuvillier & Company on the said firm of Henry Bull & Company, at Belleville aforesaid, payable to the order of Maurice Cuvillier at thirty days sight, discounted by the Bank, at the instance and request of, and paid to Maurice Cuvillier as aforesaid, protested for non-acceptance on the 5th November 1854, and for non-payment on the 6th December following, at the instance of the Bank as holder, with due notice given to Maurice Cuvillier as endorser.

8th.—3rd September, 1854, a Promissory Note made by Jerôme Grenier, for £176 14s 6d. Currency, payable at four months, to Messrs. A. Cuvillier & Co., or order, at the Bank of Montreal, by them endorsed, to the said Maurice Cuvillier, and by him to the Bank, protested for non-payment on the 11th January, 1855, with due notice given to Maurice Cuvillier as endorser.

For their defence to the action, the Defendants, Dame Marie Claire Perrault,

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the widow of the late Honorable Austin Cuvillier, Mary Anne Cuvillier and Luce Cuvillier pleaded by *Exception peremptoire.*

1o" *Que le dit acte de garantie ou de cautionnement du 26 Juillet,* 1849, *devant* " *le dit Mtre. Doucet et son confrère Notaires, est frappé de nullité absolue et* " *ne les lie aucunement aux termes d'icelui comme cautions solidaires du Dé-* " *fendeur Maurice Cuvillier pour le paiement des prétendues sommes reclamées* " *par la Demanderesse* (the Bank) *en sa déclaration.*"

2o. " Que si les Défendeurs sont devenus, par le dit acte de cautionnement " du 26 Juillet, 1849, cautions solidaires du Defendeur Maurice Cuvillier envers " la Demanderesse (the Bank) ce ne pourrait *être tout au plus* que pour le paie- " ment des créances qu'aurait ou pourrait avoir la demanderesse contre le Déf- " endeur Maurice Cuvillier, soit comme tireur, endosseur ou accepteur sur traites, " lettres de change, billets négociables, soit comme *autrement débiteur*, et les- " quels créances *en autant que le dit Maurice Cuvillier en serait* " *devenu debiteur aux divers titres*, ci-dessus, auraient pour source, " cause, valeur, considérations ou objet, SOIT LA LIQUIDATION OU LE REGLEMENT " des DETTES et AFFAIRES DE LA CIDEVANT SOCIETE COMMERCIALE DE CUVILLIER " & SONS, COMPOSEE DU DIT FEU L'HONORABLE AUSTIN CUVILLIER, et DES DITS " AUSTIN CUVILLIER, JUNIOR, et MAURICE CUVILLIER, soit le COMMERCE INDI- " VIDUEL du dit Maurice Cuvillier, c'est-à-dire TOUT COMMERCE QUE LE DIT " MAURICE CUVILLIER FERAIT POUR SON SEUL COMPTE et PROFIT INDIVIDUEL."

" Que par le dit acte de cautionnement les dits Defendeurs ne sont point " devenus cautions solidaires, pour le paiement de créances fondées sur traites, " lettres de change, billets signés, endossés ou acceptés par le dit Maurice Cuvil- " lier ou sur autres titres et qui auraient pour source, cause, valeur, " considérations ou objet, *le commerce du dit Maurice Cuvillier fait* " *en société avec d'autres*, ni pour le paiement de créances fondées sur " traites, lettres de change, billets signés, endossés ou acceptés *hors de son com-* " *merce individuel, n'ayant pas pour cause ou objet un commerce individuel de* " *sa part, et n'étant à son égard individuel que des obligations ou dettes* D'UN " CARACTÉRE CIVIL, NON D'UN CARACTERE COMMERCIAL."

" Que le dit Maurice Cuvillier, à la connaissance du public en Canada et aill- " eurs et *de la Demanderesse en particulier, a immédiatement ou presqu'immé-* " *diatement* après la date du dit acte du 26 Juillet, 1849, cessé de faire commerce " pour son compte et profit individuel soit à Montréal, soit ailleurs, que même " depuis le printems, 1851, jusque vers le 1er Mai, 1852, le dit Maurice Cuvillier " à la connaissance du public à Montréal et ailleurs, et à la *connaissance par-* " *ticulière* de la Demanderesse, a commercé en société au dit lieu de Montréal " *avec Austin Cuvillier, junior*, SON FRÉRE, sous la raison sociale de 'A. Cuvillier " & Co.', qu'ensuite depuis le commencement de Mai, 1852, jusqu'à aujourd'hui, " le dit Maurice Cuvillier, à la connaissance du public à Montréal et ailleurs et " *de la Demanderesse en particulier*, a commercé en société et commerce en- " core en société au dit lieu de Montréal avec le dit Austin Cuvillier, junior, son " frére, et Edward Chaplin, sous la raison sociale de 'A. Cuvillier & Co.', qu' " enfin depuis le dit acte du 26 Juillet, 1849, le dit Maurice Cuvillier *n' a fait* " *aucun commerce particulier pour son compte et profit individuel en la Cité* " *de Montréal ou ailleurs.*

"Que les dites traites ou lettres de change mentionnées en la Déclaration, tirées "par le dit Charles H. Castle, à New York sur le dit Maurice Cuvillier, et par "ce dernier acceptées, n'ont été ainsi tirées sur le dit Maurice Cuvillier, et par "lui acceptées à la connaissance particulière de la Demanderesse, ou des per-"sonnes gérant ou administrant ses affaires, que pour le *compte, profit, l'intérêt* "*et les affaires de la dite société commerciale du dit Maurice Cuvillier avec son* "*dit frère* Austin Cuvillier, junior, et le dit Edward Chaplin."

"Que le dit Maurice Cuvillier en ayant ainsi permis au dit Castle de tirer sur "lui et en ayant accepté icelles dites traites et lettres de change en dernier lieu "mentionnées, N'A ETE QU'UN PRETENOM POUR ET AU LIEU DE SA DITE SOCIETE "COMMERCIAL AVEC SON DIT FRERE ET LE DIT EDWARD CHAPLIN."

"Que les dites traites ou lettres de change, ainsi tirées par le dit Castle et "escomptées à New York par la branche ou l' agence de la Demanderesse avant "acceptation d'icelles par le dit Maurice Cuvillier, ont ainsi été tirées et escomp-"tées sur une lettre de crédit ou reconnaissance par écrit consentie et signée "par le dit Maurice Cuvillier à la Demanderesse à Montréal par laquelle un "crédit à un montant très considérable avait été ouvert en faveur du dit Castle "et par laquelle le dit Maurice Cuvillier s'engageait d'honorer et accepter les "traites ou lettres de change que tirerait le dit Castle sur le dit Maurice Cuvil-"lier, et que la dite branche ou agence de la Demanderesse escompterait à New "York. Qu'en ayant ainsi signé, consenti et délivré la dite lettre de crédit ou "reconnaissance par écrit à la Demanderesse au dit lieu de Montréal le dit Maurice "Cuvillier (et ce à la connaissance de la Demanderesse) *n'a agi que pour le* "*compte et profit de sa dite société* avec son dit frère *et le dit Edward Chaplin*, "ET N'A ETE QU'UN PRETE NOM POUR ICELLE SOCIETE."

"Que les dites lettres de change ou traites mentionnées en cette cause tirées "par le dit Castle et escomptées à New York par la dite branche ou l'agence "de la Demanderesse, les montants réalisés par leur escompte ont fait *comme* "*autres transactions de ce genre l'objet de comptes en débit et crédit entre le dit* "*Castle et la dite société du dit Maurice Cuvillier avec son dit frère et le dit* "*Edward Chaplin et non entre le dit Castle et le dit Maurice Cuvillier,* "*attendu que les dites traites ou lettre de change.* NE CONCERNAIENT LE DIT "MAURICE CUVILLIER QUE NOMINALEMENT, mais concernaient en réalité la dite "société avec son dit frère et le dit Chaplin, *dans les livres de laquelle société* "*figurent toutes transactions de ce genre,* ET CE A LA CONNAISSANCE DE LA DE-"MANDERESSE OU DES PERSONNES GERANT SES AFFAIRES."

"Qu'ainsi les dites traites, &c., tirées par le dit Castle ayant été tirées sur le dit "Maurice Cuvillier et acceptées par ce dernier et l'escompte ou le produit d'icelle "n'ayant été applique que pour le compte, le profit, l'intérêt et les affaires de la "dite société du dit Maurice Cuvillier avec son frère et NON POUR LA LIQUIDATION ET "LE REGLEMENT DES AFFAIRES DE LA DITE CI-DEVANT SOCIETE DE CUVILLIER "AND SONS, DANS LAQUELLE ETAIT ASSOCIE LE DIT FEU HONORABLE AUSTIN CUV-"ILLIER, NON PLUS QUE POUR LE COMMERCE INDIVIDUEL OU A L'OCCASION D' "AUCUN COMMERCE INDIVIDUEL DU DIT MAURICE CUVILLIER, les dits Défend-"eurs ne sont point devenus et ne se trouvent point en vertu du dit acte de Cautionnement du 26 Juillet, 1849, cautions solidaires du Défendeur Maurice

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" Cuvillier envers la Demanderesse à raison de l'acceptation par le dit Maurice " Cuvillier d'icelles dites traites tirées par le dit Castle et partant ne sont point " tenus envers la Demanderesse au paiement d'icelles dites dernières traites ou " lettres de change."

" Qu'en *supposant* que la Demanderesse ou les personnes gérant et admi- " nistrant ses affaires n'eussent pas connu que le dit Maurice Cuvillier en consentant " à la Demanderesse la dite lettre de crédit en faveur du dit Castle et en per- " mettant à ce dernier de tirer sur lui et en acceptant les dites lettres de change " ou traites mentionnées en cette cause tirées sur lui par le dit Castle, *n'était* " *que le prête-nom* de sa dite société commerciale avec son dit frère et le dit " Edward Chaplin, et *n'agissait que pour le compte, le profit, et l'intérêt d'icelle* " *dernière société*, les dits Défendeurs ne seraient même pas dans ce cas, en vertu " du dit acte du 26 Juillet, 1849, tenus et obligés comme cautions solidaires du " Défendeur Maurice Cuvillier en faveur de la Demanderesse à raison et par " suite de l'acceptation par le dit Maurice Cuvillier des dites traites ou lettres de " change tirées par le dit Castle en autant que la valeur, cause ou considération " d'icelles dites traites ou lettres de change non plus que la cause ou la con- " sidération de l'acceptation d'icelle par le dit Maurice Cuvillier *ne concernaient* " *ni la liquidation ni le règlement des affaires de la dite ci-devant société de* " '*Cuvillier & Sons,' ni aucun commerce individuel du dit Maurice Cuvillier*, " et attendu que l'acceptation d'icelles traites ou lettres de change par le dit Mau- " rice Cuvillier ne CONSTITUERAIT A SON EGARD QUE DES CREANCES D'UN CARAC- " TERE PUREMENT CIVIL ET NON COMMERCIAL ET NON LIE AVEC LE REGLEMENT " ET LA LIQUIDATION DES DITES AFFAIRES DE LA DITE CI-DEVANT SOCIETE DE " CUVILLIER & SONS."

" Qu'ils ne sont nullement tenus et obligés comme cautions solidaires du Dé- " fendeur Maurice Cuvillier, au paiement des dites traites ou lettres de change " mentionnées en cette cause tirées par le dit A. Cuvillier & Co. sur Henry " Bull & Co. payables à l'ordre du dit Maurice Cuvillier et endossées par ce der- " nier, ni au paiement du billet du dit Jérôme Grenier en faveur de A. Cuvillier " & Co., endossé par ces derniers et ensuite endossé par le dit Maurice Cuvillier, " attendu *que la valeur, cause ou considération des dites traites et du dit billet* " *qui viennent d'être mentionnés en dernier lieu non* plus que la valeur, cause " ou considération du *dit endossement par le dit Maurice Cuvillier sur icelles* " *dernières traites sur icelui dernier billet ne concernaient* ni la liquidation *et le* " *règlement des dites affaires de la dite ci-devant société de Cuvillier & Sons* " *ni aucun commerce individuel du dit Maurice Cuvillier, mais concernaient les* " *affaires de la dite société de A. Cuvillier & Co.*, et *ce à la connaissance de la* " *Demanderesse.*

" Que d'ailleurs en supposant qu'elles n'eussent pas concerné icelle dernière " société, l'endossement par le dit Maurice Cuvillier sur icelles dernières traites " et sur icelui billet constituerait *à l'égard du dit Maurice Cuvillier une obli-* " *gation nullement liée à aucun commerce individuel du dit Maurice Cuvil-* " *lier, ni au règlement des affaires de la dite ci-devant société de Cuvillier* " *& Sons et partant ne tombant pas sous l'effet du dit acte de cautionnement* " *du dit* 26 *Juillet*, 1849.

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"Que les produits ou montants réalisés par les escomptes des dites traites ou "lettres de change et billet mentionnés en cette cause n'ont été ni pour le "règlement et la liquidation des affaires de la dite ci-devant société de Cuvil- "lier & Sons, ni pour l'égard d'aucun commerce individuel du dit Maurice Cu- "villier, mais qu'ils l'ont été pour *le compte, le profit et l'intérêt de la dite société* "*A. Cuvillier & Co., dans les livres de laquelle ils figurent et que tout ce* "*que dessus a eu lieu à la connaissance pleine et entière de la dite Demanderesse,* "*ou des personnes gérant ses affaires.*"

"Qu'attendu ce que dessus les dits Défendeurs ne sont nullement tenues et "obligés au paiement d'aucune des dites sommes reclamées par la Demanderesse, "icelles dites sommes ou prétendues créances ne tombent point sous l'effet du "cautionnement que comporte le dit acte du 26 Juillet, 1849."

Issue having been joined and evidence adduced by the parties, the judgment now under review was pronounced on the 30th of April, 1858.

Maurice Cuvillier, though one of the Defendants, was examined as a witness on behalf of his Co-defendants although his testimony was objected to by the Bank, a motion was made to overrule this testimony, and to strike it from the fyles, and the judgment begins by disposing of this motion which is rejected.

The *Considerants* as given in the Court below are "that the said Plaintiff "hath failed to establish the material allegations of the declaration, and par- "ticularly that the said Defendants Angelique Cuvillier, Mary Anne Cuvillier, "and the said Luce Cuvillier, are liable in manner and form as complained of; "then, "that it is fully established in evidence by the said Defendants, that "the bills or drafts and promissory note sued on in this Cause, were not given by "the said Maurice Cuvillier to the said Plaintiff in this cause, in the prosecution "of any business carried on by the said Maurice Cuvillier either *in winding up* "*the business of the late firm of Cuvillier & Sons or in carrying on any business* "*of trade and commerce in his own name,* further that the said Defendants have "fully established by legal and sufficient evidence that the drafts or bills of ex- "change firstly, secondly, thirdly and fourthly sued on, &c., were accepted by the "said Maurice Cuvillier, *and were discounted by the said Plaintiff for the benefit* "*of the firm of A. Cuvillier & Co.,* of which firm the said Maurice Cuvillier "was a member, *and this to the knowledge of the said Plaintiff;*" then "that the "said Defendants are not liable to the said Plaintiff, as the surety of the said "Maurice Cuvillier, as the said drafts or bills of exchange *were not discounted* "*by the said Plaintiff for the said Maurice Cuvillier, in the prosecution of any* "*separate trade or commerce either in his own name or in winding up the affairs* "*of the late firm of Cuvillier & Sons.*"

Next, "that the several drafts or bills of exchange drawn by the said firm of "A. Cuvillier & Co. on the firm of Henry Bull & Co. of Belleville, in favor of "the said Maurice Cuvillier, and discounted by the said Plaintiff, were in point "of fact *discounted for the benefit of the said firm of A. Cuvillier & Co.* as the "said Maurice Cuvillier *the payee and endorser of the said bills,* was at the time "of the drawing and endorsing of the said bills, *a member of the said firm of A.* "*Cuvillier & Co. and of Henry Bull & Co., of Belleville, to the knowledge of* "*the said Plaintiff;*" further, "that the said promissory note made and signed

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"by the said [illegible] Grenier in favor of the firm of A. Cuvillier & Co., and "endorsed by the said Maurice Cuvillier, *was also discounted for the benefit of "the said firm of A. Cuvillier & Co., of which firm the said Maurice Cuvillier "was at the same time a member, and this to the knowledge of the said Plaintiff,*" "further" that the said last mentioned bills of exchange and promissory notes were "not *discounted for the said Maurice Cuvillier, in carrying on any separate trade "or business or in the winding up of the affairs of the late firm of Cuvillier & "Sons,* and by reason thereof no action at law hath accrued to the said plaintiff "to compel the payment thereof from the said Defendants as the sureties of the said "Maurice Cuvillier, under and by virtue of the Deed or Bond of suretyship, set out "in the Declaration of the said Plaintiff," whereupon "the Court doth maintain "the exception of the said Angelique Cuvillier, Mary Anne Cuvillier and the "said Luce Cuvillier Defendants, as pleaded by them to the action of the said "Plaintiff, and doth as regards the said Angelique Cuvillier, Mary Anne Cuvillier "and the said Luce Cuvillier, dismiss the action with costs."

The judgment then [illegible] condemn Maurice Cuvillier upon his Confession, to pay to the Plaintiff [illegible] 12s. Currency, with interest and costs of suit, as prayed for.

In examining this judgment, the first point which presents itself is, the admission of Maurice Cuvillier as a witness for the Defendants, he being Co-defendant, and no judgment having been entered up as against him at the time of his examination. In support of this ruling the case of Worrall vs. Jones, 7 Bingham 395, and Pipe vs. Steel, 2 Queen's Bench Reports 734, were cited by the Respondents, but in these cases the witness had suffered a judgment by default, and the testimony was tendered by the Plaintiff and not as in this case by Co-defendants. The general rule which excludes the evidence of a party to the record, is the rule to be followed in this case 1 Greenleaf on Evidence §329, 330 It seems to be admitted that the judgment is in this respect faulty, but it is said that the complexion of the case is not changed by the rejection of the evidence of Maurice Cuvillier.

Before proceeding further, it is to be noticed that the Defendants have not alleged in their exception, that the business of the firm of Cuvillier & Sons was ever wound up, or that the liability of the Defendants under the Deed, was ever discharged or that it never attached at all. Now in express terms, the Defendants became liable "for all debts heretofore contracted," and generally for all the *present* and future *liabilities* of the said Maurice Cuvillier.

The liability of the Defendants was undertaken for "*that the said Maurice "Cuvillier hath, since the death of the said late Austin Cuvillier, carried on* "and proposes to carry on trade and commerce in this City and elsewhere." "Their object was "to enable him to do so, *and to meet the engagements of the "said late firm of Cuvillier & Sons,*" for which purpose "*he will require [illegible] "and pecuniary assistance to a considerable extent from the said [illegible] of "the third and fourth parts respectively.*" In what relation [illegible] parties, Defendants, stand towards each other? The firm of Cuvillier & Sons com-posed of the late Honorable Austin Cuvillier, and his sons [illegible] Cuvillier, the younger, and Maurice Cuvillier, had been dissolved on [illegible] July,

1840, by the death of the father. On the 26th of the same month of July, the deed in question is signed in the absence of Austin Cuvillier, the younger, in England, by Dame Marie Claire Perrault, the widow of the deceased, presumptively *commune en biens* with her husband, and her three daughters, his natural heirs. The Defendants had an interest in the liquidation of the affairs of the firm Cuvillier & Sons manifestly, and Austin Cuvillier, the younger, who was examined, as a witness for the Defendants, swears that "after the death of the "Honorable Austin Cuvillier, in the year 1849, *Maurice Cuvillier was appointed "by the family Cuvillier to wind up his affairs*, at the same time with his own "business."

Maurice Cuvillier, as the Defendants witness, says, "I am positive that I "commenced winding up the estate previous to the execution of the deed filed "in this cause by the Plaintiffs as their Exhibit number 2, (the deed of the 6th "July, 1849). I ceased to wind up the said estate at the time mentioned (about "November, 1852,) in consequence of its settlement being completed *by the "purchase by my brother Austin and myself from the other heirs of my late "father* of *all that remained due to it*." I think it right at the outset to notice the marked distinction between the position of the Defendants, and that of ordinary sureties under the usual *cautionnement*, although subsequently, it will have to be discussed more at length. Maurice Cuvillier was their attorney or *mandataire*, and in undertaking for him, they undertook for themselves in the management of the common business of all, and their joint interest.

"The account with Mr. Maurice Cuvillier was opened (at the Bank of British "North America) in July, 1849, and *continued up to the time of the failure of* "Maurice Cuvillier." Evidence of David Davidson, the Cashier, a witness for "the Defendants (Page 35 of the printed Record, line 16).

The case with reference to the four bills of exchange, drawn by Castle and discounted at New York, stands upon a different footing, from the drafts drawn by A. Cuvillier & Co. and the promissory note of Jerôme Grenier. The bill transaction is distinguishable from the others, in this important respect, that neither the name of A. Cuvillier & Co. nor Bull & Co. appears upon the face of the paper, the acceptance being that of Maurice Cuvillier alone.

Upon the theory of the defence, it was for the Defendants to shew that this transaction did not come within the guarantee or *cautionnement* and to connect it with business foreign to the purposes of the deed, in order to exclude the liability set up against them by the Bank. Let it now be enquired, has this been done? The three letters or requisitions dated the 9th, 10th and 21st of October, 8541, explain the origin of the four bills drawn from New York, sued upon by the Bank, and now in question. It is to be noticed that the originals are printed forms such as are in common use at the Banks with blanks which are filled up in writing, and that the concluding portion of the printed form "this guarantee and obligation is intended to remain in force, &c.," is inapplicable to the position of Maurice Cuvillier when signing them. The applicant "is Maurice Cuvillier and his request to the Bank is "to order a credit to be "lodged with the Manager of your Branch at New York in favor of C. H. Castle, "Esquire, same place, for the sum of 5000 dollars or £1250" (3000 dollars or

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"£750, and 5000 dollars or £1250 respectively) which is followed by, "and "I hereby engage to honor his draft on me for this amount to be drawn before "the 20th instant (the 28th instant and the 31st instant respectively,) at ten "days sight." Pursuant to these requisitions a credit is opened to Castle at New "York, by the Bank, and the four bills drawn by Castle, on Maurice Cuvillier, "are received in consequence. The deed of the 20th July, 1849, states "that "the said Maurice Cuvillier hath since the death of the said late Austin Cuvillier "carried on and proposes to carry on trade and commerce in this city and *else-"where.*"

Mr. Davidson, the cashier of the Bank, when examined by the Defendants as "their own witness, is asked, "Were you not informed by Maurice Cuvillier "for what purpose the credits on New York and specially the proceeds of the "drafts forming Plaintiff's Exhibits numbers 1, 2, 3, and 4 were to be "used, and if so state what that purpose was?" His answer is "Mr. Maurice "Cuvillier applied for these credits *in favour of his agent in New York*, as "stated to me in connection with business, *which he managed for Bull and "Company*, of Belleville. The drafts sued upon, formed part of *a long series of "similar transactions* of which the foregoing was the only explanation. 'I re-"member to have received.'" The same witness says, "the account with Mr. "Maurice Cuvillier, was opened in July, 1849, and continued up to the time of "the failure of Maurice Cuvillier." The Bank positively declined to have any "transactions with A. Cuvillier and Company. "I am certain that I informed "him (Maurice Cuvillier) that in all the transactions with the Bank, the Bank "depended upon the said warranty," the deed of the 20th July, 1849. "The *paper "now sued upon would never have been discounted except in reliance upon that "security.*" "I recollect distinctly that I told Mr. Austin Cuvillier on more than "one occasion, that the Bank *would not transact any business with his firm.*"

In looking at these four bills in a commercial point of view, their value depended upon the ostensible parties to them, and in the whole process of their issue and negotiation, the party mainly interested and liable, is the individual Maurice Cuvillier the acceptor, upon the face of them. The Defendants have sought to shew that the appearance of the bills was fictitious, that Maurice Cuvillier was merely a *prête-nom*, and that the party really interested, was the firm of A. Cuvillier & Co. From this plea of the Defendants it is to be inferred, that the resort to a feigned party, must exempt them from liability. But admitting it to be the fact, that Maurice Cuvillier purposely omitted the name of A. Cuvillier and Co. in order to procure a discount or pecuniary advance which would have been refused by the Bank, if the transaction had appeared in its true light, is the Bank to be made the victim of the deception? The Bank trusted Maurice Cuvillier upon the faith of the Defendants' deed, and his representation whether true or false bound them equally. The misappropriation of the credit, cannot prejudice the Bank. It is to be ascertained however, how far the Defendants are justified in asserting that the funds obtained by Maurice Cuvillier were resorted to for the payment of liabilities by A. Cuvillier & Co. Three witnesses depose to this. Austin Cuvillier says, "the drafts 1, 2, 3 and 4 were dis-"counted at Plaintiff's Bank agency in New York, and the proceeds were ap-"

"plied to meet engagements of our firm there." Benjamin S. Curry says, "" the proceeds of the drafts went to the credit of A. Cuvillier & Co. in C. H. "Castle's account current with them, and were drawn against purchases of "groceries for them in New York. The said drafts were charged in A. Cuvillier "& Co.'s books to C. H. Castle."

Edward Chaplin says, "I declare that those drafts were made, accepted "and discounted for the purposes of being used in A. Cuvillier & Co.'s business, "and were *in part* placed to their credit in C. H. Castle's account with them. "This account is produced as Defendants' Exhibit number one, and is in accord- "ance with A. Cuvillier & Co.'s books where they stand charged to said Castle. "I observe by this account that the *remaining portion of the proceeds of the* "*said drafts* was credited by Castle to H. Bull & Co."

The books of A. Cuvillier & Company have not been produced, nor have any extracts from them been shewn or proven to contain true entries. Parol testimony cannot supply the want of them. Again Defendants' Exhibit number one is not proved. It purports to be an account current between A. Cuvillier & Co. and C. H. Castle, with interest to 1st November, 1854. The debit side contains charges from the 1st—4th November, 1854, to the 30th.—2nd January, 1855, and the credit side two charges of $6000 each purporting to be drafts on H. B. & Co. one at three months, and the other due 12th—15th March. *It is not balanced, nor dated, nor signed.* There is nothing to shew that it was ever rendered by Castle or any other authorized by him, and no attempt whatever has been made to prove any of the items, or to shew whence it proceeded. This paper does not bind Castle in any manner but as between the Plaintiff and the Defendants, its contents require to be proved, and it is a mere piece of waste paper upon this record.

Both Austin Cuvillier and Curry are in error when they speak of the application of the proceeds obtained from the Bank at New York. That application did not lie within their knowledge, and they did not speak from surmise. Curry undertakes to say that the drafts "were drawn against purchases of groceries for them (A. Cuvillier & Co.) in New York." The informal paper called account current, if worth anything, shews by the first five items on the debit side amounting in the aggregate to 15079 dollars out of a total of 16793 dollars added up on that side, that instead of groceries, the drafts are made to meet a balance of account, and four acceptances of other drafts. Austin Cuvillier says, "the proceeds were applied to meet engagements of our firm there," as has been remarked by Chaplin, this supposed account current of Castle contains two items of 1,000 dollars, each credited to B. & Co. that is probably Bull & Co. a firm in which A. Cuvillier & Co. had no interest, although Maurice Cuvillier individually had an interest. It is to be noticed also that the credit side of this paper distinguished the drafts on M. C., presumably Maurice Cuvillier, from one under date of the 25th October, 1854. "A. C. & Co. acceptance of my draft due to day 1500 dollars." The two items of the 21st and 24th October, 1854 "less credited B. & Co. 1000 dollars" imply necessarily another account current with B. & Co., but this is neither proved or even alluded to. It was for the Defendants to have examined Castle, for he or his clerks would alone prove the

purpose and object for which the credit at New York was procured and in what manner the funds raised from that source were applied or disposed of. The Defendants themselves have put their own construction upon the words "less credited B. & Co.," for Ch[illegible] says "I observe by this account that the *remaining port*[illegible] *of the said drafts was credited by "Castle to H. Bull &* [illegible]

The Court below then was in error, in assigning as a ground for dismissing the claim of the Bank upon the four bills of Exchange in question, that they "were accepted by the said Maurice Cuvillier, and were discounted by the said "Plaintiff for the benefit of the firm of A. Cuvillier & Co. of which firm the said Maurice Cuvillier was a member, and [illegible] *knowledge of the said Plaintiff.* The credit was in the name of Castle, who was free to use it for any purpose he thought fit, either in connection with Maurice Cuvillier's individual business, or that of A. Cuvillier & Co., or Bull & Co. or in any other way. It was impossible for the Bank to foresee what Castle would do with their funds, over which they lost all control, the moment they came into his possession.

The Bank could have no knowledge that these discounts were for the benefit of the firm of A. Cuvillier & Co. The Defendants have not pleaded that Castle too was a *prête nom*, and no correspondence between him and A. Cuvillier & Co. on the subject of these credits is produced. If even the individual account of Maurice Cuvillier with the firm of Austin Cuvillier & Co. had been produced, the items would require to be proved to make them evidence against the Bank. The statement of the Defendants' witnesses that the entries in the books of Austin Cuvillier & Co. corresponded with those in the account kept by Maurice Cuvillier at the Bank, is worth nothing, it is no evidence, without the production of the books and account, neither of which are before the Court. But even beyond this, this portion of the testimony is disproved by the Defendants themselves, the Bank account with Maurice Cuvillier must have stated the amount of the credits in full, plus the Bank charge for discount. The books of A. Cuvillier & Co. if even they corresponded with the paper called account current, would take no notice of the two thousand dollars credited to Bull & Co.

The purpose for which the deed was signed by the Defendants, was to obtain a credit with the Bank in favor of Maurice Cuvillier, to enable him to wind up the estate of Cuvillier & Sons, and to engage in business, on his account, *at Montreal and elsewhere.*

An account was in consequence opened by the Bank with him, and in his own individual name. The firm of A. Cuvillier & Co. had an existence before this apart from Cuvillier & Sons, no connection with Cuvillier & Co. on the part of Maurice Cuvillier is pretended to have existed prior to 1851, when Chaplin says "Maurice Cuvillier took an interest in the business *in the nature of a partner having a share* (what share?) *in the profits and partaking of the liabilities*". The declaration of partnership required by the Provincial Statute of the 12 Victoria chapter 45 is made by Austin Cuvillier, Maurice Cuvillier and Edward Chaplin at the office of the Prothonotary on the 21st July, 1852. (Schedule No. 40).

This declaration is of course proof against the partners, yet though not proof

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as to third parties, taking for granted, the date of 1851 or that of May or June, 1852; there was an interval between such date and the 26th July, 1849, when the Defendants signed the deed upon which the Bank has brought its suit. During these two years or three years as the case may be, the account between Maurice Cuvillier and the Bank, according to the pretentions of the Defendants themselves, must have been confined to his own business apart and distinct from that of A. Cuvillier & Co. If the evidence of Maurice Cuvillier is to be received he continued to wind up the Estate of Cuvillier & Sons till November, 1851, when he and his brother Austin purchased the interest of his sisters the Defendants in their father's estate. Although he asserts "I have done *no regular business on my own account individually* since my father's death," it follows from what has been said, that the Defendants were liable to the Bank, under the deed, upon their own theory, for all discounts and advances made to him during this interval of time. The account of Maurice Cuvillier with the Bank was never altered; Austin Cuvillier & Co. after the accession of Maurice to the firm, opened no new account with the Appellants. The Bank would have no transactions with A. Cuvillier & Co., who kept their account with the Montreal Bank and the City Bank. No notice was given to the Bank of the sale by the Defendants to their two brothers as stated by Maurice, whether such sale took place or not, (for of that there is not due proof) but the mere assertion of Maurice Cuvillier only. The terms of this sale are not stated, but it is in evidence by the Defendants' own witness Benjamin S. Curry (page 40 of printed record) that at the very time of his examination "*I am now employed by Mr. A. M. Delisle (one of the Defendants) to balance the Books at Belleville of the late firm of Cuvillier & Sons.*" This was as late as the 1st. April 1857. It is quite intelligible now, why the Defendants have not pleaded that the estate of Cuvillier & Sons have been wound up and liquidated, and why their exception makes no mention of any connection between Maurice Cuvillier and Bull & Company.

The Defendants object to the connection with Cuvillier & Co. as relieving them from liability under the bond, but are silent as to Bull & Co. Now Mr. Davidson, when examined by the defendants, says, "I understood *that Bull & Co. were largely indebted to the firm of Cuvillier & Sons and that Mr. Maurice "Cuvillier was endeavouring to recover that debt, and that his transactions with "Bull & Co. had reference to that object.*" Down to the 1st April, 1857, long after the transactions now in question, and even after the bringing of this suit, the books of Cuvillier & Sons were not balanced and that estate continued unliquidated. The paper styled account current makes a distinction in the same transaction originating with Manrice Cuvillier between the respective interests of the two firms of Cuvillier & Co. and Bull & Co. in the same round sum of money. But by what *ear*-mark could the Bank discern that the credit in the name of Castle, was to be apportioned at all, and what proportion was to be allotted to each of the two firms, or any of them?

The defendants have sought to establish a negative, that Maurice Cuvillier carried on no business for himself individually. Their witnesses express opinions more or less strongly upon this point. But, on the part of the Bank, every

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credit which they gave to Maurice Cuvillier in their account with him was an individual transaction with him, forming part of a series commencing from the date of the deed, and continuing unbroken and unaltered till the close of their transactions. He bought bills of Exchange, in his own name, payable to his own order, he accepted bills drawn on himself individually, he endorsed negotiable securities in his own name, not a farthing was drawn in his account with the Bank, but upon his own cheque, he dealt individually with Bull & Co. in one shape or other, he opens credits on New York in his own name, but all liability for this is relieved by the word *prête nom* and the mere vague opinion of witnesses, without means of ascertaining the fact. On this point, it is only necessary to ask to whom was the credit given by the Bank? The only answer must be, that it was to Maurice Cuvillier, in reliance upon the security afforded by the deed of the 20th July, 1849. With reference to the four bills of Exchange, the name of A. Cuvillier & Co. does not appear at all, it was not upon their credit then, that the Bank took them. As to the other four pieces of negotiable paper, although bearing upon them the name of A. Cuvillier & Co. they are only discounted for Maurice Cuvillier upon his individual credit and signature. Why should the Bank require this signature, if the personal liability of Maurice Cuvillier was alone looked to apart from the deed. As a partner, his liability was as perfect and as great under the signature of A. Cuvillier & Co. as with the addition of his own name. Why was this addition required by the Bank? Only to bind the Defendants, in the terms of the deed "*generally* "*for all the present and future liabilities of the said Maurice Cuvillier towards* "the parties of the third and fourth parts respectively, whether as *maker or* "*drawer, endorser or acceptor of negotiable paper or otherwise*, and whether "resulting from *discounts, pecuniary advances or any other cause whatever.*" The Bank all along relied upon the security afforded by the deed, without which credit would have been refused to Maurice Cuvillier as it was to A. Cuvillier & Co. The officers of the Bank had an eye specially to this deed, and even took advice, as to the extent of its operation. Although the Defendants have attempted to show that credit was given irrespective of it, even supposing the evidence of Mr. Austin Cuvillier to avail against the terms of that deed, I can attach no weight to it, after the contradiction given to that evidence by Messrs. Davidson and Paton. It may have been flattering to the vanity of Mr. Austin Cuvillier to believe that the Bank required no security from the deed. But it is not to be supposed that gentlemen intrusted with the affairs of the Bank, and knowing their responsibility, would feel themselves at liberty, to treat as waste paper, a document of the stringent character of that in question, and so formal in its import. Upon the most careful consideration of the evidence I arrive at the conclusion that the four bills of Exchange declared upon, are altogether unconnected with A. Cuvillier & Co. in their concoction, that they are to be viewed as representing advances made to Maurice Cuvillier, individually, that they were taken by the Bank upon the faith of the Defendants' guarantee contained in the deed and upon the reliance that Maurice Cuvillier would apply the proceeds pursuant to the trust reposed in him, that if any part of these proceeds was applied to the purposes of the firm of A. Cuvillier & Co. it was un-

distinguished from the rest by the Bank, and by all the world, except those behind the scenes, that Hull & Co. actually obtained a part of the funds raised, which may or may not have profited the estate of Cuvillier & Sons, as the case may be; and that for aught that appears to the contrary, Maurice Cuvillier individually may have profited by this transaction as well as C. H. Castle, whose participation in it is wholly unexplained, and who alone could throw light upon it, as a witness if examined by the Defendants.

I am of opinion that the Defendants have wholly failed to prove their exception with regard to this portion of the demand of the Bank, and that the statement contained in the judgment of the Court below, that the four bills in question were "accepted by the said Maurice Cuvillier, and were *discounted by the said Plaintiff* for the benefit of the firm of A. Cuvillier & Co. and this *to the knowledge of the said Plaintiff*," is not sustained by the evidence of record, but is directly contradicted by it.

To proceed now to the consideration of the three drafts, drawn by A. Cuvillier & Co. on Henry Bull and Company at Belleville which were discounted by the Bank upon the individual endorsement of Maurice Cuvillier in his own name.

It is to be observed, that the judgment of the Court below upon this head of the demand of the Bank, asserts that these drafts "were in point of fact discounted for the benefit of the said firm of A. Cuvillier & Co. as the said Maurice "Cuvillier the payee and endorser of the said bills was, at the time of the draw-"ing and endorsing the said bills a member of the said firms of A. Cuvillier & "Co. and of Henry Bull & Co. of Belleville, and *this to the knowledge of the "said Plaintiff*." The exception of the Defendants does not set up, any partnership with Bull & Co. on the part of Maurice Cuvillier, and does not seek to impugn this transaction, upon the ground of such partnership, as in the case of Cuvillier & Co. The evidence as to the connection of Maurice Cuvillier with Bull & Co. is very loose and unsatisfactory, and hardly would warrant the statement, that a co-partnership was proved,

But, however, this may be, there is nothing to shew that Maurice Cuvillier, being connected with both firms, obtained a discount from the Bank, for the benefit of one of them rather than the other. Nothing to shew the state of accounts between the two firms, or to exclude a personal and individual interest on the part of Maurice Cuvillier, in getting this paper discounted. A connection between Cuvillier & Sons, and Bull & Co. is proved, of the precise nature of the connection there is no proof, nor on the part of the Bank was this necessary. If Bull & Co. were indebted to the estate of Cuvillier & Sons, or if there were accounts between them, (as beyond doubt there were), the Bank in discounting paper upon which the name of Bull & Co. appeared after Maurice Cuvillier's endorsement was affixed, had every reason to suppose the transaction real and not fictitious. In discounting this paper, the Bank credited neither Cuvillier & Co. nor Bull & Co. but the proceeds were put to the credit of Maurice Cuvillier, with whom alone there stood any account open in their books. Against the credit upon this discount, Maurice Cuvillier might cheque for himself, and on his own private account, or upon any account whatever. There is nothing to warrant the conclusion stated in the judgment, that in point of fact,

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the drafts were discounted for the benefit of the said firm of A. Cuvillier & Co. However Maurice Cuvillier may have used the proceeds, the Bank could only have made the discount for its own particular customer Maurice Cuvillier, and not for the two firms who were not customers and had no account there.

As has been already said, the Defendants have not set up, either that their liability under the deed never attached at all, or that it came to an end at any particular time, or was not a continuing guarantee or that it had been defeated. If the Defendants had pleaded that Maurice Cuvillier by becoming a partner in the firm of A. Cuvillier & Co. on a particular day, had put an end to the guarantee, or that the affairs of A. Cuvillier & Sons had been entirely liquidated and wound up on a given day, and that therefore the guarantee had determined, the defence would have been intelligible, and would have furnished an answer to the demend of the Bank. But the attempt to distinguish the transactions of Maurice Cuvillier, into those lying within, and those "*hors de son commerce* "*individuel*" n'ayant pas pour cause ou objet un *commerce individuel de sa* "*part, et n'etant à son egard individuel que des obligations ou dettes d'un carac-* "*tere civil, non d'un caractere commercial*," seems, in my apprehension very wire drawn and thin spun. It seems singular to compel a Bank to draw the line of distinction between "*dettes d'un caractere civil*," and "*dettes d'un carac- tere commercial.*" If distinction there be, why did not the Defendants, who as heirs of the late Austin Cuvillier, and sisters of Maurice Cuvillier, could best discern it, point out this distinction, and notify the Bank, that an association between Maurice Cuvillier and his brother Austin Cuvillier the younger, drew a line of demarcation, as to future transactions? The theory set up by the Defendants is, that Maurice Cuvillier never had any "*commerce individuel*" at all or any "*dettes d'un caractere commercial.*" Then, why was any account commenced at all with the Bank in the name of Maurice Cuvillier? It is not denied that the liquidation of the estate of Cuvillier & Sons was in the hands of Maurice Cuvillier, acting on behalf of the family Cuvillier.

In the interval between the date of the deed and the connection with Cuvillier & Co., mercantile paper of every kind must have passed between Maurice Cuvillier and the Bank, in which the firm of Cuvillier & Sons, in liquidation had an interest. Is it to be argued that the Bank was to look at each individual piece of paper, and trace its pedigree up to Cuvillier & Sons before dealing with it? Such a pretension would be preposterous, and it can only excite a smile to notice such a statement as that of the witness Curry, that of the checks deposited, by Maurice Cuvillier, in the Plaintiff's Bank the "greater portion had pre- "viously been received by A. Cuvillier & Co. in the ordinary course of their "business, that is to say, the name of the firm was mentioned in the greater "portion of these checks as the payees of them." As, if in taking a cheque to bearer over the bank counter, anything else was looked at than the name of the drawer and the amount, and that there were funds to meet it. The Defendants have attempted to prove a negative, that notwithstanding the terms of the deed Maurice Cuvillier, never engaged in business on his own account either in Montreal or elsewhere. The cross examination of the witnesses, shews their inability to do more, than to express mere surmise, or opinion upon this point

Every endorsement by Maurice Cuvillier of negotiable paper discounted at the Bank, was in Law a new drawing and an individual transaction of a commercial nature between him and the Bank, in the terms of the deed binding upon the Defendants. The credit having been once opened to Maurice Cuvillier pursuant to the deed, it was for the Defendants to close that account and their liability, at the same time by proper countermand and due notice. Admitting Maurice Cuvillier to have been a partner both of Cuvillier & Co. and of Bull & Co., there was nothing to prevent him from negotiating their paper for his own account, and of disposing of it, upon his own individual endorsement. It was that individual endorsement which was guaranteed by the deed. If it were improperly given, and loss is to occur, it should properly fall upon the Defendants by whose act the credit was procured, and not upon the Bank,—upon the co-heirs of Maurice Cuvillier joint and several obligors with him under the bond rather than strangers. These observations apply to the promissory note of Grenier, the last head of the demand of the Bank, as to the Bills and drafts. By the endorsement of A. Cuvillier & Co. it became the property ostensibly of Maurice Cuvillier between whom and the Bank its discount became a new and individual transaction, irrespectively either of Grenier the maker or Cuvillier & Co. the payees and endorsers. Why should the Bank have questioned the title of Maurice Cuvillier to this note, or have refused to discount it at his request, and to place the amount to his individual credit, in the account standing open in his name, and undisturbed from the time of the signing of the Deed? That title could no more be questioned, than the title of Maurice Cuvillier, to the bill of Exchange, sold to him by the Bank and made payable to himself or order, for a thousand pounds sterling, which was purchased by him, out of discounts upon the paper of A. Cuvillier & Co. Maurice Cuvillier might endorse this bill to A. Cuvillier & Co. on their account, or to any one else, as they might endorse Grenier's note, to him, to be discounted on his private account and in his individual name. The judgment of the Court below states that the Bank has not made out its case and that the Defendants have proved their exception. I am of opinion on the contrary that the Bank made out a primâ facie case against the Defendants, which entitled it to judgment, and that the exception ought to have been overruled and dismissed, for want of proof, if for no other reason, as to legal sufficiency.

The point, however, which has been chiefly debated between the parties, turns upon the construction of the deed. The Defendants have viewed that instrument, as an ordinary suretyship or *cautionnement*, they have contended "natura fidejussionis est strictissimi juris et non durat vel extenditur, de re ad rem, de personâ ad personam, de tempore ad tempus." The Court below has adopted this view, and even the bank has consented, to treat the contract as one simply of suretyship. I have never been able to see it in this light. The personal interest in the business of the Estate of Cuvillier and Sons, on the part of the Defendants, is manifest. That Estate was wound up and managed by Maurice Cuvillier acting for his mother, his sisters, the Defendants, and himself, and his brother Austin Cuvillier, the younger.

The business of the Estate was evidently a very large one, not confined to

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Montreal alone but extending to Belleville in Upper Canada. It has come out in evidence, by the very witnesses of the Defendants, that at a given time, they sold or transferred their interest in their father's Estate to their brothers Maurice Cuvillier and Austin Cuvillier the younger. The price, or the conditions of this transaction are not stated, but it may reasonably be supposed, that a large sum of money was involved in it. In the absence of a direct interest in the estate it would be difficult to understand, how a widow and her three daughters would undertake a joint and several liability with Maurice Cuvillier, such as that shewn by the deed, which contains no limit either as to time or amount. But when the true position of the Defendants towards their father's Estate, and relatively to their brothers, is properly considered, it becomes plain that their interests were all bound up together. It was with a view to that interest and for their own profit and advantage, that they made "themselves jointly and severally "liable to and in favor of the said parties hereto of the third and fourth parts "respectively, they thereof accepting, for ALL DEBTS *heretofore contracted, or "that may hereafter be contracted, to and in favor of the parties of the third and "fourth parts respectively by the said Maurice Cuvillier*, and GENERALLY for "ALL the present and FUTURE LIABILITIES of the said Maurice Cuvillier, whether "as maker or drawer, ENDORSER OR ACCEPTOR of NEGOTIABLE PAPER OR OTHER-"WISE, and whether resulting from DISCOUNTS, pecuniary advances OR ANY "OTHER CAUSE WHATEVER, hereby JOINTLY and SEVERALLY promising and "obliging themselves, to MEET AND PAY, the said present and FUTURE DEBTS AND "LIABILITIES of the said Maurice Cuvillier, as if THEY WERE JOINTLY AND "SEVERALLY THE PRINCIPAL DEBTORS THEREOF."

Is the construction of this obligation to be restrained and limited, by the rules applicable to the ordinary every day *cautionnement?* I cannot bring myself to believe this. The relation between the parties is that of *principal and agent*, not that of *principal and surety;* and in this case the agent was not the ordinary *procurator*, but the *procurator universorum bonorum*, and *procurator in rem suam*, at the same time.

But, assuming hypothetically, that the contract under consideration is to be viewed as a *cautionnement*, the terms of it are so extensive, so general, or rather universal and comprehensive, that it is plainly an exception to the usual and ordinary *cautionnement* or suretyship. "Lorsque les termes du cautionnement sont "généraux et indéfinis, le fidejusseur est censé s'être obligé *à toutes les obliga-"tions* du principal débiteur, resultans du contrat auquel il a accedé, il est "censé *l'avoir cautionné in omnem causam*, Pothier Obligations No. 404."

"Si les lettres de crédit ne sont point restreintes à une somme déterminée, "elles donnent une action au banquier pour *toutes celles que le mandant lui "aura adressés* c'est le cas d'appliquer la loi *si ita* 55 Digestor, de fidejussoribus "suivant laquelle, *si verba sunt ad infinitatem* toleratur infinitas. Digest 46. 1. "45, si ita stipulatus. Denizart, verbis, Lettres de credit." This law 55 is from Paulus lib. 2, quæstionum, and as follows. "Si ita stipulatus a Seio fuero, "QUANTAM PECUNIAM *Titio* QUANDOQUE CREDIDERO, dare spondes? et fidejus-"sores accepero, DEINDE *Titio* SAEPIUS CREDIDERO: nempe seio in OMNES SUMMAS "obligatus est et per hoc FIDEJUSSORES QUOQUE."

The glossa f. upon this law is *verba* EXTENSIVA et INFINITA, infinitatem inducunt : atque ita INFINITAS TOLERATUR. Digestorum seu Pandectarum Juris Civilis, tomus tertius, page, 1110. Lugduni Sumptibus Pillehotte 1618. "The "general rule is fidejussores non obligari ad id quod mora debitoris ad principalem obligationem accedere potest. But if the surety had bound himself *in* "*omnem causam* he is liable for whatever interest becomes payable by reason of "the debtor's delay. He will be liable to the full extent which the *terms of the* "*obligation or the nature of the act for which he has obliged himself will war-* "*rant.* Thus if *the terms are general and indefinite*, he is bound *for all* the "*obligations* of the principal debtor *necessarily incident to* or resulting from *the* "*contract or act for which he has become surety.* In this case he is said to be a "*surety in omnem causam.*" Burge, Suretyship 53. 4. "Quicunque actionis aut "negotii, alicujus nomine, intercedit, *in omnem causam intercedere intelligitur,* "NISI TAXATIONEM CERTAM, fidejussioni apposuerit." Herring. fidejuss. cap. 24, No 132, 3, 4.

"Autant l'article 2015 ordonne de ne pas de passer les limits du cautionne-"ment quand *ces limites sont définies, autant il lui donne de latitude, quand il* "*a été contracté indéfiniment.* Un *cautionnement indefini*, lorsqu'il a été con-"tracté IN UNIVERSAM CAUSAM pour me servir des expressions de Paul (l. 56 "de) edilitio edicto. Il dit IN OMNEM CAUSAM dans la loi 55 Dig. de Fidejus-"soribus. Et il a ce caractère *lorsque rien dans le contrat ne le restreint d'une* "*manière expresse ou tacite.* En pareil cas *le créancier est censé avoir stipulé* "*qu'il sera pleinement indemnisé par le fidejusseur.* INDEMNEM ME PRŒSTABIS." Troplong du cautionnement No. 157.

Connexorum et *dependentium* idem est judicium, "Il est evident que le fidejus-"seur d'une obligation s'oblige non seulement à la chose, à laquelle le débiteur "principal s'est expressement et directement engagé mais encore à toutes les "causes non exprimées qui peuvent provenir de la nature du contrat." Simplex fidejussor alicujus contractus (dit Casaregis) non solum obligatur ad id ad quod "principalis debitor expresse aut directe tenetur, sed obligatur etiam pro "*omnibus illis casibus et causis non expressis, quœ possunt provenire ex naturâ* "*ipsius contractûs.*" Discursus 62, No. 40, Vol. 1 p. 225. Venetiis, 1740 ex typographiâ Balleonianâ. Troplong, ut supra No. 158.

Casaregis cites first among his authorities the Law Latinus 56 Dig. Edilitio Edicto and adds what Troplong has omitted "nec non tenetur *pro omnibus* "aliis accessoriis, CONNEXIS, et *dependentibus* ab eodem contractu. Et in *ter-* "*minis magis dubitabilibus*, quod scilicet fidejussor obligatur in casu etiam "resolutionis contractus *ob culpam* unius ex contrahentibus." Nos. 41, 42, 43, of the same Discursus 62, and he adds No. 44 "Et ita semper judicatum fuit "Genuœ per nostra tribunalia ob prœdictas rationes *contra fidejussorem favore* "*Cambistœ.*"

"Fidejussor, (says Pothier ad Pandect, lib 46, tit. 1 sect. 4 No. 34) *facil* "*entelligitur* se *obligasse* EODEM MODO quo se obligavit reus principalis. Qui "GENERALITER fidejubet pro eo qui ex aliquo contractu obligatus est, intelligi-"tur fidejubere in OMNEM OBLIGATIONEM quœ ex illo contractu descendit." No. 35.

"Toutes choses égales de part et d'autre, la clause douteuse doit s'interpréter

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"contre celui qui par la nature du contrat était maitre d'endicter les conditions "*fût-ce même le débiteur*, lorsque s'étant engagé SANS RESTRICTION IL VEUT "ENSUITE EN SUPPOSER, parcequ'il était maitre de ne pas s'obliger sans prendre "ses précautions. 1 Pardessus Droit Commercial, partie 2, tit. 1, cap. 2, sect "3, No. 191, p. 328."

"On doit tenir d'abord comme maxime invariable qu'il n'est permis d'inter, "prêter que ce qui en a besoin, Pardessus ut supra, p. 325."

"Le caution qui n'a pas limité son engagement à une somme déterminée doit "acquitter en entier ce qui sera dû à l'échéance ou à l'évènement, tant en prin- "cipal qu'accessoires et dommages intérêts. Suivant *la nature de l'obligation* "*cautionnée* ou la POSITION RESPECTIVE DES PARTIES, c'est à déterminer l'*étendu* "*de cautionnement.* Pardessus Droit Commercial part. 3, tit. 7, chap. 2, No. "586, Vol. 2, p. 436." Troplong Cautionnement No. 160 lays down. "Elles "(les lois Romaines) prévoient le cas où un contrat est résolu par la faute du "contractant qui a été cautionné et ellès *étendent* à la caution toutes les consé- "quences de cet évènement. 161, Nous les voyons même déclarer la caution "responsable des *agissemens* qui se *rattachent par voie de conséquence et de* "*connexité à une convention légalement dissoute.* 162 C'est sur l'autorité de "ces lois que Casaregis d'accord du reste avec le Guidon de la Mer et Emeri- "gon décide que lorsqu'un emprunteur à la grosse, (lequel ne doit rendre la "somme prêtée qu'en cas d'heureux retour) *pratique un sinistre frauduleux, son* "*fidejusseur est tenu de la restitution de cette somme aux prêteurs, attendu* "*qu'il est tenu de la faute et du dol de celui qu'il a cautionné.*"

At No. 146, of the same treatise, Troplong says, "nous répétons donc que "LES CIRCONSTANCES ONT ICI UNE INFLUENCE SOUVERAINE. Les examples ne "doivent être pris QU'AVEC PRECAUTION, et il est dangereux de conclure d'un "cas à l'autre, sans avoir égard A LA QUALITÉ DES PERSONNES, AUX RAPPORTS "RESPECTIFT, AU STYLE DU COMMERCE, aux habitudes des places, etc. Sans "doute le cautionnement ne se présume pas, *il ne faut pas être facile à l'admettre* "mais il ne faut non plus EXIGER LA PRONONCIATION DES MOTS SACRAMENTELS "ET REFUSER DE LE VOIR DANS LES CLAUSES OU L'USAGE ET LA BONNE FOI "L'APERCOIVENT HABITUELLEMENT."

At No. 147, the same great lawyer says, "Quoique le cautionnement ne se "présume pas CEPENDANT LA LOI L'ADMET DE PLEIN DROIT DANS CERTAINS CIR- "CONSTANCES." I cannot hope to find stronger "*circonstances*," in any case, to hold the Defendants liable for the intromissions of Maurice Cuvillier, in the business of the family or for contracts entered into, upon the credit of his name individually, AS STIPULATED FOR BY THE DEFENDANTS IN REM UNIVERSAM, with this Bank. The pretensions of the Defendants seem to me, against good faith,—and in judging of this cause, I repose the fullest and most entire confidence, in the evidence given by Mr. David Davidson, on the part of the Bank. His relations with the Bank had ceased at the time of his examination as a witness, and if any loss is to follow to that institution, by his conduct in this matter, I see no reason to charge him with it. In my opinion, the Bank, were entitled to rely upon the deed, and my belief is that they did, and that they never trusted Cuvillier & Co. with whom they would not even deal, or Bell &

Co. of whom they had not satisfactory knowledge, but that they advanced their money upon the credit due to the estate and succession of the Honorable Austin Cuvillier, as pledged by the deed upon the name "*Maurice Cuvillier*," individually and alone, not to be doubted or mistrusted, but to be viewed in the self same light, as the name of Cuvillier & Sons in the handwriting of the late Honorable Austin Cuvillier himself. *Hæreditas personam defuncti sustinet.* Why did the Defendants intervene in the deed, unless as the personal representatives of the deceased, and why did they undertake a joint and several obligation, *solidaire*, unless to add to the individual obligation of each of them as heir *pro parte virili* and to become answerable *in omnem causam* for their coheir Maurice Cuvillier, whom they trusted, in universam causam, to whom they gave a letter of credit, without limit, or restriction whatever, as to time, CAUSE or amount. The caution used by the Bank in refusing to deal with Cuvillier & Co., was expressly declared to Maurice Cuvillier the agent of the Defendants and to Austin Cuvillier their brother. Was this made known by Maurice to the Defendants by their procurator *in omnem causam?* If so they are expressly bound. If not, they are answerable for the suppression of the fact. They must suffer for the fraudulent concealment by their agent Maurice Cuvillier of a matter which it so much imported them to know. But, notwithstanding the doubts of the Bank as to Cuvillier & Co., the Defendants seem to have had none themselves; *they sold their interest to Austin Cuvillier as well as to Maurice;* they trusted Austin Cuvillier the younger themselves, when the Bank would not trust him. With what face can the Defendants object to transactions connected with Cuvillier & Co., or Bull & Co., when they themselves deal with Austin Cuvillier, their own co-heir, and sell out to him and when Mr. A. M. Delisle sends up to Belleville, on the behalf of the family Cuvillier, a person to balance the books of Bull & Co., even after the bringing of this suit? Bull & Co. were "connected" with the Estate of Cuvillier & Sons, by the showing of the Defendants themselves; why then, have they not proved, that in the Bill transaction at New York, with Castle, the doings of Maurice Cuvillier were *civil* and *non commercial?* Not but that if they had given such proof I would discharge them from liability under the deed, for the misappropriation of the funds, if such there were, given to Maurice Cuvillier upon the faith of this instrument, in no way exempts the Defendants from the liabilities of their own trusted agent, who got the money, to use or to abuse it, only because the Defendants had stipulated that the Bank should be "*indemnis.*"

I have said that in my view of this case, it is not one of principal and surety, but of principal and agent. As I regard it, it falls within the observation of Troplong, du mandat No. 53 "Dans certain cas le mandat peut n'être pas "étranger *aux affaires du mandataire lui-même.* Mais ce n'est qu'autant que "*son intérêt se trouve mêlé à celui d'une autre personne que le mandat* regarde "plus particulièrement. *Quia scilicet,* dit Cujas, et MEO NEGOTIO TUUM ALI"QUANTUM ADMIXTUM FUERIT. Ainsi le mandat, peut concerner simultanément "le mandant et le mandataire comme par exemple quand Pierre demande à "François de prêter à Jacques, une somme d'argent que ce dernier doit em"ployer AU PROFIT DU PREMIER. *Ce mandat intervient* [illegible] PRINCI-

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"PAL DU MANDANT de Pierre, mais il n'est pas étranger non plus à l'intérêt DU "MANDATAIRE QUI PRETE SON ARGENT ET EN RETIRE DES PROFITS."

I regard this case as one of "*Commission*," and I apply to it, what is said by Troplong, in his Traité du mandat 605, 606 and page 295 *interprétation de procuration*. Procuration *générale cum liberâ*, page 268.

I view it as a Commission facultative, in the words of Delamare and Le Poitevin, vol. 2, No. 204. "Le choix DES MOYENS D'EXÉCUTION OU DE QUELQUES-"UNS DE CES MOYENS EST ABANDONNÉ AU LIBRE ARBITRE DE CELUI QUI L'EXÉ-"CUTE aucun mode ne LUI EST EXPRESSÉMENT IMPOSÉ, IPSE SIBI EST LEX. Par "conséquent, QUELQUE SOIT CELUI QU'IL SE TRACE A LUI-MEME, ON NE SAURAIT "DIRE QU'IL EXCEDE LE MANDAT." De là cette maxime de Casaregis "In mandato collato AD LIBERUM ARBITRIUM MANDATARII, NUNQUAM INTRAT QUŒSTO EXCESSUS MANDATI." I see in this case, a mandate by the Defendants, *ad liberum arbitrium*, of Maurice Cuvillier, as to which, in its exercise, the Defendants have no right to complain against the Bank, who gave a credit and trust, as they were told to do, *in omnem causam*. Excess of authority under the circumstances is not to be thought of, nor can the distinction between *des obligations d'un caractère civil* and those D'UN CARACTERE COMMERCIAL, be recognised for a moment. It is a distinction without a difference; Troplong in the traité du mandat says No. 285, page 295. "Dans le commerce, on peut même "concevoir plus de latitude dans l'interprétation de la procuration, les circon-"stances en décident. Par exemple, je vous charge de faire le commerce pour "moi et à ma place dans la ville de Nancy, et il est reconnu que pour faire "marcher ce commerce, vous êtes dans la nécessité de souscrire des billets à "ordre, ou d'emprunter, dans la mesure où j'aurais dû le faire moi-même si "j'avais été présent. Nul doute que vous n'ayez agi dans les termes de votre "mandat général. C'est la doctrine de Deluca, Hinc non improbabiliter de "jure dicendum videbatur, subdicto mandato, seu INSTITOTARIA GENERALI "istam quoque facultatem contineri, quoniam procuratore, constituto ad aliquid "agendum, *demandata* censentur OMNIA EA QUŒ PRO EO NEGOTIO EXPLENDO "NECESSARIA SUNT; illa prœsertim quœ de communi usu fieri solent *et quœ "veri similiter, idem principalis, pro eodem negotio explendo faceret*. De "cambiis discurs. 13 No. 6 à 7. Ces dernières paroles sont dignes de re-"marques."

Now what is the contract which the Defendants by their theory seek to repudiate? A transaction with their own brother, Austin Cuvillier the younger, their co-heir, whom they trusted themselves so far as to sell to him and Maurice Cuvillier their interest in the father's estate, and another with Bull & Co., a business connection of their father, whose Books, at Belleville, were long after this, balanced by a person expressly employed for the purpose by Mr. A. M. Delisle, acting for the Defendants. What more natural then, than dealing with such parties? At No. 274, Troplong again says: "Le sens de l'article 1987 "est que la procuration est générale alors même qu'elle renferme le manda-"taire dans une certaine fonction pourvu que dans cette fonction elle lui laisse "*le pouvoir de faire toutes les affaires prévues ou imprévues qui s'y rattachent "successivement*. Ainsi *faites le commerce à ma place dans la ville de Smyrne*,

"voilà une procuration générale, bien que le mandant n'autorise le mandataire "que pour le commerce et nullement pour ses autres affaires étrangères au "commerce. Mais comme dans le commerce que le mandant veut faire à "Smyrne, il communique au mandataire le pouvoir d'agir de la manière la "plus entendue la plus libre, relativement à toutes les affaires quelconques "que le commerce nécessite, ce mandataire a un mandat général." Deluca De Cambiis discurs. 13 No. 6 uses the phrase "institor generalis" and I know of none which more definitely and appropriately characterizes the relation between the Defendants and Maurice Cuvillier, under this deed. To cite again from Troplong, mandat No. 602. "Quoique nous ayons dit tout à l'heure que "le mandant n'est tenu envers les tiers qu'autant que le mandataire a agi con-"formément à ses pouvoirs, il faut cependant tempérer cette règle par une ex-"ception et cette exception a lieu quand L'ABUT DU MANDAT loin de ressortir "de la procuration est au contraire, couvert par la procuration même dont la "production a induit les tiers en erreur. Je m'explique. Je donne procuration "à Pierre d'emprunter 300 francs, Pierre fait à Primus cet emprunt. Mais au "lieu de s'arrêter là, il se sert du mandat pour contracter en mon nom un "deuxième, un troisième emprunt de Secundus et de Tertius. Bien que Pierre "ait fait de ma procuration un usage excessif, bien que les deux derniers em-"prunts soient contraires à mes instructions et par conséquent illégitimes, je "n'en suis pas moins obligé personnellement envers Secundus et Tertius, s'ils "ont été de bonne foi. Pierre avait un pouvoir apparent les tiers ont eu juste "sujet d'y croire. Il n'y aurait aucune sûreté à traiter avec un absent, si on "les rendait responsables d'un abus caché."

605, "Et la raison est ici d'accord avec le crédit privé, qui milite pour les "tiers. C'est en effet la faute du mandant de n'avoir pas précisé la personne "auprès de laquelle il voulait que l'emprunt fut fait. Ou bien, si à cet égard "il n'est pas reprochable, c'est sa faute d'avoir laissé la procuration aux mains "de son mandataire après que le mandat était accompli par le premier em-"prunt. Ou bien enfin si sous ce second rapport, il a de bonnes excuses, il est "dans tous les cas *responsable d'avoir mal placé sa confiance*, c'est lui *qui doit* "*en souffrir et non pas les* TIERS QU'IL A MIS EN RAPPORT AVEC CE MANDATAIRE "INFIDEL. Publicæ repugnant acquitati dit excellemment Ansaldus. Discur-"sus 30, No. 4, Civili que commercio quod quis sincerâ fide contrahens, cum "aliquo præmanibus habente publicum instrumentum mandati debeat sub istâ "bonâ fide decipi.

606. "Ces exemples ne sont pas les seuls. La procuration peut avoir été "révoquée, le mandataire *a forfait à ses devoirs en continuant une gestion qui* "*lui* est interdite. *Mais quand cette révocation est ignorée des tiers, de quel* "*droit le mandant la leur opposerait-il? Pourrait-il* leur faire un reproche "d'avoir eu confiance dans cette procuration, dont son mandataire était por-"teur? Pourquoi ne l'a-t-il pas retirée des mains de ce dernier? Pourquoi "lui a-t-il laissé ce titre de nature à attirer la confiance des tiers, quels moyens "les tiers auraient-ils donc de se prémunir contre ces abus impénétrables à "leur recherche, où serait la sûreté dans les affaires?

"Si dominus sciverit procuratorem suum fines mandati excedere, et non con-

"tradixerit, assentire *videtur.*" Straccha, mandati 18. If it be true that no business was done by Maurice Cuvillier on individual account, before he entered into the firm of A. Cuvillier & Co., why did not the Defendants countermand the credit opened for him at the Bank under their Deed. No public notice seems to have been given of his having formed this connection, the entry made in the office of the Prothonotary, gives no notice to the world, it is lodged in silence, and remains in the pigeon holes of the officer, until searched for. The Bank account continued in Maurice Cuvillier's name, after the formation of this connection just as it stood before.

"The Scottish Banks (says Burge, page 60) have been accustomed to open with their customers a peculiar sort of cash account or bank credit, which has produced great benefit to all branches of trade and manufactures. A cash credit of this description is an undertaking on the part of a Bank to advance to an individual, or to a partnership such sums of money as may be from time to time required not exceeding on the whole a certain definite amount to be repaid, and a continual circulation kept up by the replacing in the bank of small profits and sums as they come in." The present transaction is of that class, only unlimited as to amount or to time.

Burge again p. 65, says "In Scotland, where there is a change on the part of the creditor, where a cash credit bond is granted to a banking house, the partners of which happen to be materially altered, during the currency of the credit, do the cautioners Mr. Bell asks continue to be responsible notwithstanding change and without any notice or any renewal of their engagement? He answers it would be a great hardship, even on the customers, if on every change all the bonds of credit of a banking house were to be renewed, but there does not seem in Law to be any necessity for this, and generally there is a stipulation against it in the bond, 1 Bell Commentaries on the Law of Scotland 371.

"A guarantee of furnishings to be made to a Company will not authorize "furnishing after a radical change in partnership, though if such furnishings "are made *bonâ fide and in ignorance of any change the guarantee will be "effectual.*" Bell, ut supra. "*Innovationes ac mutationes vel nova pacta "facta a mercatoribus contra formam* LITERATUM OBLATORIARUM et non DE-"DUCTA AD NOTICIAM CORRESPONSALIUM NON INFRINGUNT PRIMÆVAM OBLIGA-"TIONEM IN DICTIS LITERIS CONTRACTAM." Casaregis Discursus 34, No. 26, vol. 1, p. 121. Potissime attenta importantia istarum literarum quæ OBLATORIÆ nuncupantur, quæ ve adeo religiosè custodiuntur et custodiri debent inter mercatores, ut eæ semper fixæ et inviolabiliter servandæ sunt, DONEC PER ACTUM RETRO SIMILEM ET INNOVATIVUM NOTIFICETUR CONTRARIUM CORRESPONSALIBUS. Ita ut non solum quæcumque immutationes non substantiales sed NEC ETIAM PACTA ESSENTIALIA ET DESTRUCTIVA, NON DEDUCTA TAMEN AD NOTITIAM CORRESPONSALIUM MINIME ATTENDANTUR IN FRACTIONEM OBLIGALIONIS CONTENTÆ EISDEM LITERIS OBLIGATORIIS. *Set* bene per pensis per Rota decisionem 151, coram Reverendissimo Domino meo Decano. Casaregis Discursus 35, No. 26, page 125, vol. 1. In the same Discursus, Casaregis marks the distinction as to liability between the case of "præpositionem et institoriam

"particularem et institoriam generalem. Mandatum seu præpositio ad nego-"tiandum totaliter expirat post mortem præponentis *ob mutationem status ob-"tingentem in præposito seu institio* SECUS SI PRÆPOSITIO SEU MANDATUM IN "LITERIS OBLATORIIS ESSET A PRÆ[illegible]NTE UNIVERSALITER DATUM." The credit given by the Defendants to Maurice Cuvillier their *institor* was unlimited and universal. It was to his individual name alone that the Bank had to look, his name when put by him on negociable paper was the name of the Defendants themselves. Institoria actio semper præsupponit, institorem, institorio sive præponentis nomine contraxisse. Müllers' Promptuarium, sub voce Institor, vol. 3, p. 641, No. 5.

Knowledge is not brought home to the Bank as contended for by the Respondents and asserted in the Judgment of the Court below. Of the good faith of the Bank I have no doubt whatever.

In conclusion I am therefore of opinion to reverse the Judgment of that Court and to enter up judgment against the Respondents jointly and severally *solidairement* with Maurice Cuvillier.

MONDELET (C.) J. :—The present appeal is from a Judgment of the Superior Court, at Montreal, of the 30th April, 1858. The action was instituted in March 1855, by the Appellant, against the Respondents who are alleged to be jointly and severally bound towards Appellant, amongst other liabilities, to the payment of the sum of £4107 12s. Currency with interest, &c.

The Appellant's claim is made to rest on a Notarial Deed of the 26th July 1849, between Appellant and Respondents, as herein afterwards stated.

The cause or motive of the Deed is apparent from the following :

"Which said parties declared to us the said Notaries, that the said late Austin Cuvillier, of the City of Montreal, Merchant, now absent in England, and the said Maurice Cuvillier, carried on trade and commerce at this City, upon an extensive scale, under the firm of Cuvillier & Sons, until the 11th day of the present month of July, when the said firm was dissolved by the death of the said late Austin Cuvillier ; that the said Maurice Cuvillier hath, since the death of the said late Austin Cuvillier, carried on, and proposes to carry on, trade and commerce in this City and elsewhere ; that to enable him to do so, and to meet the engagements of the said late firm of Cuvillier & Sons, he will require discounts and pecuniary assistance to a considerable extent, from the said parties of the third and fourth parts respectively, and that with a view of making the said parties of the third and fourth parts perfectly secure with respect to any debts which now or hereafter, may be due to them respectively by the said Maurice Cuvillier, and with respect to the present and future liabilities of the said Maurice Cuvillier to the said parties of the third and fourth parts respectively, the said parties of the second part are willing to become security to and in favor of the said parties of the third and fourth parts respectively as hereinbefore set forth :—

"Now therefore, the said parties hereto of the second part do hereby make themselves jointly and severally liable to and in favor of the said parties hereto of the third and fourth parts respectively, they therefore accepting, for all debts heretofore contracted, or that may hereafter be [illegible] to and in favor of

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the said parties of the third and fourth parts respectively, by the said Maurice Cuvillier, and generally for all the present and future liabilities of the said Maurice Cuvillier towards the parties of the third and fourth parts respectively, whether as maker or drawer, endorser or acceptor, of negotiable paper, or otherwise, and whether resulting from discounts, pecuniary advances, or any other cause whatever, the said parties hereto of the second part, hereby jointly and severally promising and obliging themselves to meet and pay the said present and future debts and liabilities of the said Maurice Cuvillier, as if they were jointly and severally the principal debtors thereof, and especially renouncing the benefit of the exception of division and discussion, and all other such exceptions, with respect to the said debts and liabilities and the obligations so hereby contracted by them. For thus &c.

Done, &c."

The parties to the Deed are:

Of the First Part,—MAURICE CUVILLIER.
" Secd. Part,—THE LATE MRS. CUVILLIER and the Respondents.
" Thd. Part,—THE BANK OF MONTREAL.
" Frth. Part.—THE APPELLANTS.

Maurice Cuvillier appeared in the cause, with the other Defendants, but made no defence; and in September, 1857, while the Respondent's *Enquête* was proceeding, he confessed Judgment.

There were [illegible] fyled by the other Defendants.

By the first, they pretended that the Deed was an absolute nullity, and that the action should be dismissed.

By they second, they contended that if bound at all by the Deed, they were, at any rate, only bound in respect of transactions, either having reference to the liquidation and settlement of the affairs of the late firm of Cuvillier & Sons, consisting of the late Hon. Austin Cuvillier, and Austin Cuvillier, Jr., and Maurice Cuvillier, or wherein Maurice Cuvillier had acted on his own account and for his own profit solely; and were not bound in respect of any transactions having reference to any trade carried on by Maurice Cuvillier in partnership with others; that soon after the date of the Deed, Maurice Cuvillier, to the knowledge of the public, and of the appellant in particular, ceased to trade on his own account; that from the spring of 1851 to about May 1852, he to the like knowledge, traded at Montreal in partnership with Austin Cuvillier, Jr., his brother, under the firm of A. Cuvillier & Co.; that from the beginning of May 1853, till then, he (to the like knowledge) traded at Montreal, with the same Austin Cuvillier and one Edward Chaplin, under the same firm; that since the date of the Deed, he (to the like knowledge), had not traded at all at Montreal on his own account and for his own profit solely, or otherwise than in co-partnership with his brother and Chaplin; that to the Appellant's knowledge the four Castle Bills of Exchange, had no reference to the liquidation of the old firm of Cuvillier & Sons, or to any trade of Maurice Cuvillier's own, but were

drawn and accepted for account of A. Cuvillier & Co., and were discounted by the Appellant in New York, in pursuance of a letter of credit signed by Maurice Cuvillier in favor of Castle, he Maurice Cuvillier being throughout, a mere *prête-nom* for A. Cuvillier & Co., and the whole transaction being really theirs; that (to the like knowledge) the other three Bills of Exchange and the Promissory Note sued upon, were altogether, the affair of A. Cuvillier & Co.; and they, the Defendants pleading, were therefore liable upon none of them.

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The third Plea was one of simple denegatio[illegible]

Issue was joined generally.

Madame Cuvillier's decease was shortly afte[illegible]; and the Appellant thereupon, desisted from the suit, against [illegible]

The Appellant's case at *Enquête*, rested upon [illegible] of the 26th July, 1849, and upon proof and admissions, in usua[illegible] the negotiable paper sued upon, &c.

The Evidence of the Respondents is voluminous.

Among the witnesses produced by Respondents is Maurice Cuvillier. A motion was made and renewed by Appellant, for the rejection of Maurice Cuvillier's deposition, on the score of interest. This evidence at *Enquête*, was allowed to be taken *de bene esse*, and was not rejected on the merits, but allowed, the motion to reject it being itself rejected by the final Judgment.

The final Judgment dismisses the Action, upon the principle that the Drafts or Bills of Exchange, sued upon, were discounted by appellant for the benefit of the firm of A. Cuvillier & Co., of which firm the said Maurice Cuvillier was a Member, and this to the knowledge of Plaintiff (Appellant) and not discounted for Maurice Cuvillier, in the prosecution of any separate trade or commerce.

I entertain no doubt as to the Interpretation to be given to the Deed. It is, in my opinion, a plain question about which a great deal of idle argumentation has been indulged in.

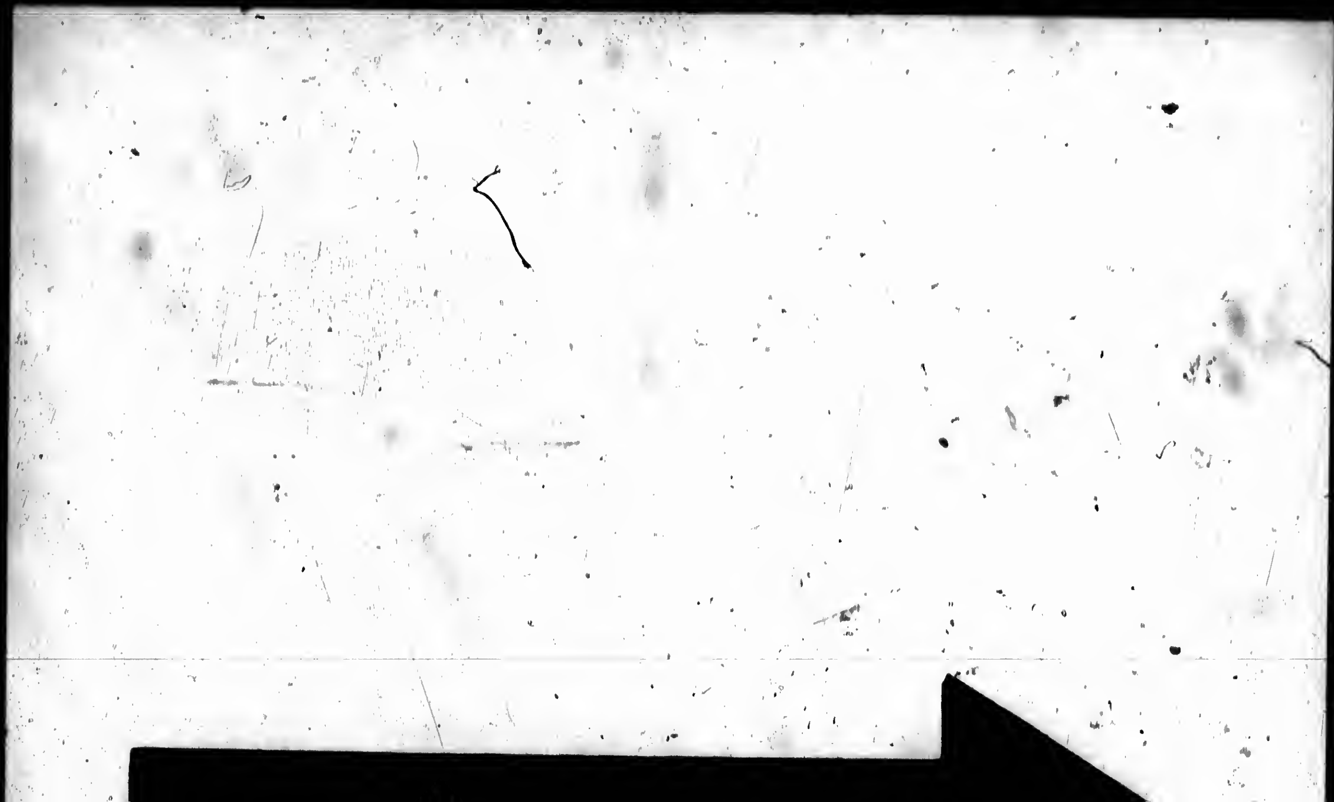
The Deed is simply two-fold, in its motive, viz:

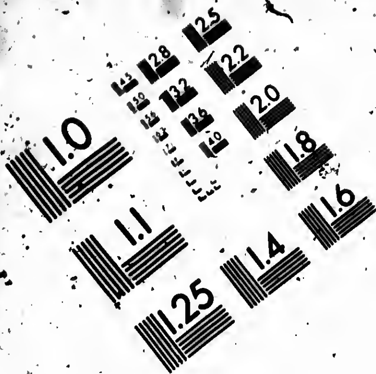
1o. To enable Maurice Cuvillier to liquidate the liabilities of the old firm of A. Cuvillier & Sons.

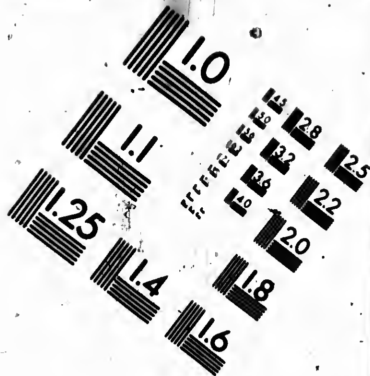
2o. To enable him (Maurice Cuvillier) to carry on trade and commerce in Montreal and elsewhere.

Now, unless the Bank of British North America has established, that the discounts obtained by Maurice Cuvillier, were for *himself*, or for the liquidation of the liabilities of the firm of the late A. Cuvillier & Sons, the sureties cannot be held bound and responsible. There is no evidence of that. On the contrary, several merchants have proved that it was well known in the commercial circle, that Maurice Cuvillier was a member in the new firm of A. Cuvillier & Co. Why then did the Bank discount notes to Maurice Cuvillier?

Is it because he signed his name? But Mr. Davidson must have known what every one knows, that as a member of the co-partnership of the firm of A. Cuvillier & Co. Maurice Cuvillier was bound by that signature. Why get his name? The natural inference is, that, knowing well the sureties were not bound by the Deed of warranty, for such discounts, he tried and expected to bring them under the operation of the Deed, by means of the *individual* signa-







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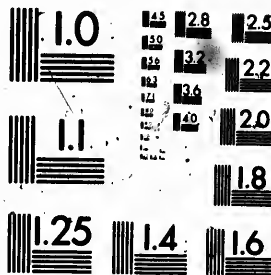

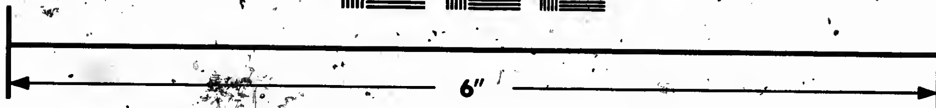

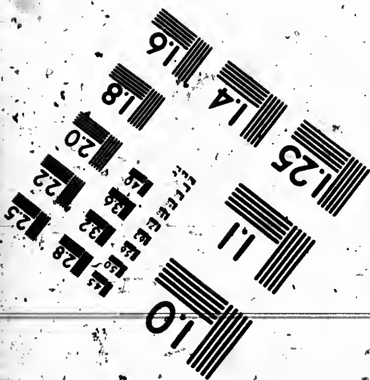
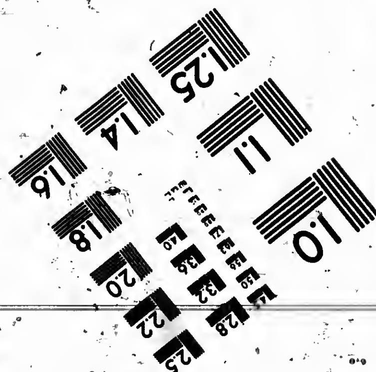

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ture of Maurice Cuvillier, which he probably imagined he could twist into an act of individual trade and commerce. In that attempt, Mr. Davidson, has overshot his mark.

I am clearly of opinion that the whole case reduces itself to a nutshell, and that the Appellant has taken a position, which cannot, for a moment, be sustained.

In my view of the case, it becomes useless to discuss the question of the admissibility of Maurice Cuvillier as a witness, he being a party to the record.

I am, upon the whole, of opinion, that the Court should confirm the Judgment of the Superior Court.

Duval, J.—This action was instituted for the recovery of a sum of £4107 12s. cy., with interest, alleged to be due by the Defendants to the Bank in virtue of an *acte de cautionnement* (suretyship) executed before Doucet and his colleague, at Montreal, on the 26th of July, 1849. (This Deed is printed in the Transcript, p. 15.)

In this Deed it is stated that the late Austin Cuvillier and his two sons, Maurice and Austin, carried on trade and commerce, at the City of Montreal, on an extensive scale, under the firm of Cuvillier & Sons, until the 11th of July 1849, when the partnership was dissolved by the death of the father, the late Austin Cuvillier. That Maurice Cuvillier proposed to carry on trade and commerce in the City of Montreal and elsewhere. That to do so, and to meet the engagements of the late firm of Cuvillier & Sons, he would require discounts and pecuniary assistance to a considerable extent from the two Banks parties to the said Deed, and to secure to the latter the payment of such monies they might advance to Maurice Cuvillier, the Defendants agreed to make themselves jointly and severally liable for all debts heretofore contracted, or that might be subsequently contracted in favor of the said Banks by the said Maurice Cuvillier, and generally for all the present and future liabilities of the said Maurice Cuvillier towards the said Banks, whether as maker, drawer, indorser or acceptor of negotiable paper or otherwise. (See the whole clause printed in p. 16 of the Transcript.)

The whole question turns on the interpretation to be put on this clause.

Is the undertaking of the Defendants a general, unlimited guarantee *in omnem causam*, as the Bank contends? or is it a special limited guarantee *"for the causes and purposes plainly set forth in the Deed, and well understood by all the contracting parties?"*

I am of opinion it is the latter; that is, a special limited guarantee. The parties have put their own interpretation on the Deed.

They declare that Maurice Cuvillier will require pecuniary aid and assistance to meet the engagements of the late firm of Cuvillier & Sons, and to carry on his own business, and to secure the payment of any moneys advanced for *these two* specific purposes, the Defendants hold themselves responsible. It would be a perversion of all language to declare this a guarantee in *omnem causam*. The Defendants have guarded against such an interpretation in the most positive and precise language.

Pothier, in his Traité des Obligations, No. 404, says:—"Lorsque la caution

"a exprimé pour quelle somme, ou pour *quelle cause* elle se rendait caution, "son obligation ne s'étend qu'à la somme ou à la *cause* qu'elle a exprimée." Toullier, vol. 6, p. 328, says:—"Quelques généraux que soient les termes "dans lesquels une convention est conçue, elle ne comprend que les choses sur "lesquelles les parties se sont proposé de contracter." In support of this opinion, dictated by plain common sense, Toullier refers to Pothier and Domat.

These rules have met with the approbation of the most distinguished writers on our own law, and will be found not inconsistent with the rules which guide the Courts in England. (See Addison on Contracts, p. 856, last edit.) Pothier, the same treatise on Obligations, No. 91, lays down the rule: "On doit "rechercher qu'elle a été la commune intention des parties contractantes, plus "que le sens grammatical des termes." In No. 96 he says: "Une clause doit "s'interpréter par les autres contenues dans le même acte, soit qu'elles pré-"cèdent ou qu'elles suivent." (See further No. 98 and 99.) These rules are in strict accordance with those laid down for the interpretation of Contracts, not questioned at this day; they will be found confirmed by the following writers:—Troplong, du Cautionnement, No. 150, says: "Le cautionnement ne "s'étend pas d'une personne à une autre. Quand je cautionne une société de "commerce, je ne suis pas censé cautionner la Société nouvelle qui lui succède "et prend la suite des affaires." 4 *Pardessus*, "Droit commercial," No. 975.

The present is a much stronger case against the Appellants, as will be shewn by the facts hereinafter mentioned.

But it has been argued that the liability incurred is for all debts. I answer such is not the case. The preamble of a Deed forms a part of the contract, in so far as it makes known the object the contracting parties had in view, and explains their intention.

Toullier, 6th vol. page 354 says: "Le préambule des actes sert également à "en interpréter les clauses et à découvrir l'intention commune des parties?"

The Deed above referred to establishes that the monies were to be advanced by the Bank *for two purposes*."

1st. To enable Maurice Cuvillier to meet the engagements of the late firm of Cuvillier & Sons.

2nd. To enable Maurice Cuvillier to carry on trade and commerce.

By the evidence adduced in this cause, it is clearly proved that the monies advanced by the Bank were so advanced for neither of these *two* purposes.

It is proved that Maurice Cuvillier did not carry on trade and commerce as contemplated by the deed. He had no counting house, no office, no place of business of his own. Not one Montreal merchant could be found who would say he knew Maurice Cuvillier carried on trade; on the contrary, it is fully established that he had no private funds, and that he was employed as principal manager of all the financial business of the firm of A. Cuvillier & Co., attending daily on their premises and at their office from morning until evening.

The evidence of Mr. Davidson, the Manager of the Bank, shows he knew well the monies were not advanced for the purposes mentioned in the Deed. The fact of his *inducing* Maurice Cuvillier to *endorse* the notes and bills of other

firms then dealing with the Bank, very clearly indicates that he intended to include these debts in the guarantee, not as the debts of Maurice Cuvillier, the maker or drawer, but as those of Maurice Cuvillier, the *Indorser*, that is, the person whom he himself had induced to guarantee the payment of debts contracted by others, else why resort to the clumsy expedient of making one partner endorse, in his own name, the notes or bills of the co-partnership? To this question Mr. Davidson has given his own answer, by saying, he knew the guarantee did not extend to the debts contracted by these firms.

Further, why was the account of the Firm of A. Cuvillier & Co. kept open in the books of this bank in the name of Maurice Cuvillier? The firm of A. Cuvillier & Co., had got a great deal of accommodation from the bank,—it deposited its moneys there—all was done in the name of Maurice Cuvillier. It would certainly require an unusual degree of boyish credulity to believe that this was not the result of cool calculation.

All knowledge of these proceedings was studiously kept from the Defendants. Had they been made aware of them, would they not instantly have made known their determination of resisting the payment of such demands; saying truly that they agreed to assist their brother, if he continued his trade, but that they never agreed to become answerable for the commercial speculations of men unknown to them.

Had Maurice Cuvillier carried on business in his own name, the Defendants might have protected themselves by inspecting his books at regular intervals, and stopping the business as soon as they found out that the losses by far exceeded the profits.

If the Defendants should be condemned to pay this claim as the sureties of Maurice Cuvillier, *Indorser*, not maker or drawer of the Notes and Bills, would not the creditors of the *joint* estate of A. Cuvillier & Co. claim in preference to the Defendants? Can this be said to be justice to the latter, and that they assumed such a risk?

In weighing these facts we must not forget that all took place under the immediate control of the Manager, not always in accordance with the wishes of the parties—a gentleman represented by the evidence as one possessed of great information and experience in commercial matters.

The Defendants, therefore, justly say to the Bank: You knew Maurice Cuvillier did not carry on trade and commerce; your own evidence establishes this important fact. You knew Maurice Cuvillier asked from you no advances of money to meet the engagements of the late firm of Cuvillier & Sons. You knew the monies advanced by you, were so advanced, not to Maurice Cuvillier, but to the firm of A. Cuvillier & Co. of Montreal, and to that of Bull & Co. of Belleville. Was not Mr. Davidson, the Manager of your Bank, right when he said the letter of credit was worth nothing *quoad* these advances? I am of opinion he was.

Here it may be proper to notice a statement made, that the Defendants did not, in reality, become answerable for debts contracted in which they had no interest; that the children are the heirs of their late father, and the widow, *commune en biens* with him, at the time of his decease. In answer to this, it

will suffice to say, they are not sued as such. We cannot travel out of the record. If we could, we must all say, that *such is not the fact.* The children are not the heirs; the wife is not *commune en biens.*

I will close these remarks by referring to the objections made to the admissibility of Maurice Cuvillier, a co-defendant, as a witness.

This being a case of a commercial nature, we are bound by the rules of Evidence laid down by the laws of England.

On such a question, the Judges in England will not require information from the Judges in Canada. I shall, therefore, be brief, referring without commentary, to the following authorities:—Worral v. Jones, 7 Bing., 398; 3d. Starkie on Evid., 1063. Any further reference to cases to be found in Phillips, Buller's n.p., and other works, is not deemed necessary.

Although entertaining no doubt on this question, I deem it proper to add that the evidence, without referring to the deposition of Maurice Cuvillier, is, in my opinion, conclusive in favor of the Respondents.

I add a note of English authorities, which will be found to coincide with the views of the French Jurists:—

Collyer on Partnership, § 624: A guaranty given to the *whole* firm, shall not, *primâ facie,* enure to the benefit of the *remaining* partners.

Also, § 625, 628. The reasoning in these and following paragraphs is very applicable to the present case.

Gow on Partnership, pp. 135, and following.

1 vol. of Bell's Com. on the Laws of Scotland, p. 374 (II), and following.

LaFontaine, Ch. J:—L'opinion déjà exprimée par deux des Honorables Juges, qui forment la majorité de cette cour, me laisse bien peu à dire.

L'acte de garantie ou de cautionnement dont il s'agit, n'a été consenti que pour deux fins particulières, expressément énoncées dans l'acte, savoir; Pour aider Maurice Cuviller: 1o. A satisfaire aux engagements de la ci-devant société "Cuvillier & Sons;" 2o. A faire commerce en son nom seul; et non pour aucune autre fin, encore bien moins, pour le commerce que Maurice Cuvillier prendrait sur lui de faire en société avec d'autres individus.

Il n'y a aucune preuve, de la part de la Banque, appelante, que les avances qu'elle a faites, et dont elle poursuit le recouvrement, aient été par elle faites à Maurice Cuvillier, seul, et surtout qu'elles lui aient été faites exclusivement pour l'une ou l'autre des deux fins énoncées dans le cautionnement. Il lui était impossible de faire une pareille preuve, car elle savait fort bien que ces avances avaient eu lieu pour un tout autre objet, pour le profit et l'intérêt de la nouvelle société "A. Cuvillier & Cie.," dont Maurice Cuvillier était membre à la connaissance de la Banque elle-même.

M. Davidson est le principal témoin de la Banque.

Il a été dit qu'il est doué d'une intelligence peu commune. Il est facile de s'en convaincre à la lecture de ses réponses, mais il n'y a pas d'intelligence qui pouvait y tenir. Après s'être efforcé longtemps à répondre de manière à ne pas admettre qu'il connut l'existence de la nouvelle société, il finit enfin par reconnaître qu'en effet cette nouvelle société existait, qu'il en avait connaissance,

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et que Maurice Cuvillier ne faisait pas un commerce séparé seul en son nom. Il ne devait pas tant hésiter à faire cette admission, puisque le fait que Maurice Cuvillier était en société avec d'autres individus est établi par trois lettres du mois d'octobre 1854 produites de la part de la Banque elle-même, (voir cédules Nos. 42, 43 et 44 du Record, pages 37 et 38.) Et cette société est constatée par écrit être celle de A. Cuvillier & Co. par lettre datée de Liverpool 5 Juin 1853, adressée par Holderness & Chilton, à la Banque elle-même, à Montréal, (cédule 45 du Record page 38.) Et c'est l'une des lettres, sur lesquelles la Banque faisait des avances à A. Cuvillier & Cie., tout en prenant en même temps, et de plus, la signature individuelle de Maurice Cuvillier. Comment la Banque peut-elle prétendre aujourd'hui que ses avances n'étaient pas faites à la société ?

La question de l'effet du cautionnement est une question qui doit être décidée par le droit Français exclusivement.

L'acte, qui contient ce cautionnement, doit être interprété favorablement à ceux qui l'ont donné, mais rigoureusement contre ceux au profit desquels il a été donné. Jamais les cautions n'ont eu l'intention de s'obliger pour des avances faites à la nouvelle société " A. Cuvillier & Co., " la Banque le savait ou devait le savoir. Cependant toutes ses avances, dont elle poursuit le récouvrement ont été faites à cette nouvelle société, et exclusivement pour l'intérêt de cette société. La Banque espérait sans doute en tirer de plus grands profits. Elle doit aujourd'hui en subir les conséquences.

Judgment of S. C. confirmed.

Bethune & Dunkin, for Appellant.
Henry Stuart, Counsel.
Cartier & Berthelot, for Respondents.
T. J. J. Loranger, Q. C., and
J. J. C. Abbott, Counsel.
[S. B.]

IN APPEAL.

MONTREAL, MARCH 2ND, 1860.

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

Our Sovereign Lady the Queen vs. *Joseph Palliser.*

REGISTRY ORDINANCE—INDICTMENT.

Held,—That the punishment prescribed by Ord. 4 Vic. c. 30, s. 1, is cumulative and that sentence of imprisonment and fine is to be awarded upon the conviction had against the Defendant in manner and form as enacted by the ordinance.

Joseph Palliser was found guilty on the following indictment:

Province of Canada, Lower Canada. } IN THE COURT OF QUEEN'S BENCH (CROWN SIDE) MARCH TERM, 1859.

District of Montreal, To wit. } THE JURORS for OUR LADY THE QUEEN, upon their oath, present that, in and by a certain *Acte* or DEED duly made and passed by and before Maitre Archambault and his Colleague Maitre

Longtin, public notaries, on the nineteenth day of February, in the Year of Our Lord, one thousand eight hundred and fifty-nine, at the parish of St. Louis de Gonzague, in the District of Beauharnois, in that part of the Province of Canada which formerly constituted the Province of Lower Canada, Joseph Palliser, then of the parish of Saint Malachie d'Ormstown, in the said District of Beauharnois, blacksmith, acknowledged to owe to William Cross, then of the last mentioned parish, merchant, present, and accepting, and a party to the said *Acte* or DEED, the sum of Forty-six pounds and two pence current money of this Province, upon a settlement of all accounts between them up to the said day and year; which said sum of money the said Joseph Palliser, in and by *Acte* or Deed, bound himself to pay to the said William Cross or to his order, within one year from the date of the said *Acte* or Deed, with interest, at the rate of six per cent, on the said sum of money, to be computed from the said date. And the Jurors aforesaid, upon their oath aforesaid, do further present that the said Joseph Palliser, did, in and by the said *Acte* or Deed, as security for the payment of the said sum of money, specially hypothecate to and in favour of the said William Cross, his heirs and assigns, a certain piece of real property described in the said *Acte* or Deed, as follows, that is to say, "an emplacement "seated and situated in the village of Durham, of the said parish of Saint Mal- "achie d'Ormstown, known and designated as being lot number three of the "Episcopal Church's property, containing sixty-five feet in width by ninety-five "in length, the whole more or less, bounded in front by the Queen's highway, "in the rear by the remainder of the said Church's property, on the north east "side by the lot number two, and on the south west side by the lot number "four, with a blacksmith's shop thereon erected, its circumstances and appurte- "nances," which said deed of obligation and hypothec have never been registered. And the Jurors aforesaid, upon their oath aforesaid, do further present, that by a certain other *Acte* or Deed duly made and passed by or before Maitre Beaudry and his Colleague Maitre Le Brun, public notaries, on the fourth day of March in the same year of Our Lord one thousand eight hundred and fifty-nine, at the parish of Saint Martine, in the said district of Beauharnois, the said Joseph Palliser, late of the parish of Saint Malachie d'Ormstown, in the said district of Beauharnois, blacksmith, well knowing the existence of the said unregistered prior hypothec of and upon the said piece of real property, and that the said hypothec was so unregistered as aforesaid, did fraudulently and unlawfully, and with intent to defraud the said William Cross, sell the same piece of real property to James Cairns, then of the last-mentioned parish, in the said district of Beauharnois, Yeoman, present and accepting, and a party to the said last-mentioned *Acte* or Deed; he, the said Joseph Palliser, in and by the said last-mentioned *Acte* or Deed, fraudulently and unlawfully, with intent to defraud the said William Cross, declaring that the said piece of real property was then free and clear of every burthen and incumbrance and mortgage whatever, except a certain annual perpetual and irredeemable ground rent (*rente foncière*) therein specified as payable to the Lord Bishop of Montreal; which said sale the said James Cairns afterwards, to wit, on the last-mentioned day and year, caused to be registered in and at the Registry Office of, for, and in, the county of Chateauguay

The Queen, vs. Joseph Palliser.

in the said district of Beauharnois, wherein the said real property was at the said dates and is situate; against the form of the statute in such case made and provided, and against the peace of our said lady the Queen, her Crown and dignity.

(Signed,) C. E. SCHILLER, *Deputy Clerk of the Crown.*

GEO. ET. CARTIER, *Attorney General*
By S. C. MONK, Q. C.

Mr. Justice Aylwin presiding at the trial, did not pass judgment; but under 20 Vic. cap. 44, sec 22, reserved the following case for the consideration of the Court of Queen's Bench, on the appeal side thereof.

Joseph Palliser, was tried before me sitting on the crown side of the Court of Queen's Bench on the twenty-fourth day of September last at Montreal, and found guilty upon an indictment for misdemeanour, in selling to one James Cairns certain real property hypothecated in favour of one William Cross under a Notarial Deed not enregistered, with intent to defraud the said William Cross. The prosecution rests upon the first section of the Registry Ordinance 4th Victoria, cap. 30th, by which it is enacted that each and every person who, knowing the existence of any such unregistered prior sale, grant, mortgage, hypothec, privilege, or incumbrance, of or upon any lands, tenements or hereditaments, or of any part or parcel thereof, shall be guilty of a misdemeanour, and being thereof duly convicted shall be liable to such imprisonment not exceeding twelve calendar months, and also to such fine and penalty not exceeding five hundred pounds current money of this province as the Court before whom the conviction shall take place shall think it right to inflict. As doubts exist in my mind whether the punishment be cumulative, and if so, whether it was competent to the Special Council to create a new offence, and to annex to it the punishment in question, consistently with the proviso contained in the 3rd Section of the Imperial Statute of the 1st & 2nd Victoria, cap. 9, constituting that legislative body, I have deemed it right to reserve these questions for the consideration of the Court of Queen's Bench on the appeal side thereof, and to postpone judgment until such questions shall have been considered and decided by the said Court; I have taken bail from the defendant to appear at the term in appeal, which will commence on the first of December next, and I respectfully desire the opinion of the Court in the premises pursuant to the Statute of the 20th Victoria, chapter 44, section 22.

(Signed,) T. C. AYLWIN, J.

Montreal 19th October, 1859.

The judgment in appeal was recorded as follows:

"After hearing counsel, as well on behalf of the defendant, Joseph Palliser, as for the Crown, and due deliberation had on the case transmitted to this Court from the Court of Queen's Bench, on the Crown side at Montreal, it is considered and adjudged by the Court, now here, pursuant to the Statute in that behalf, that the punishment prescribed by the first section of the ordinance of the Governor and Special Council for the affairs of Lower Canada, of the fourth year of Her Majesty's reign, chapter 30, intituled: "An Ordinance to prescribe and

regulate the registering of titles to lands, tenements and hereditaments, real or immoveable estates, and of charges and incumbrances on the same, and for the alteration and improvement of the law in certain particulars in relation to the alienation and hypothecation of real estates and the rights and interests acquired therein" is cumulative, and that sentence of imprisonment and fine is to be awarded upon the conviction made and had in this behalf against the said defendant, in manner and form as enacted by the said Ordinance, unless otherwise there be good cause for arresting judgment (*Dissentiente* the Honourable Mr. Charles Mondelet, Assistant Judge.)"

Johnson, Q. C., pro Regina.

E. Carter, for Defendant.

(F. W. T.)

IN APPEAL.

FROM THE SUPERIOR COURT, DISTRICT OF MONTREAL.

MONTREAL, 31st May, 1860.

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

No. 86.

WILLIAM BROOKS, (*Defendant in the Court below.*)
Appellant

AND

NATHANIEL S. WHITNEY, (*Plaintiff in the Court below.*)
Respondent.

Held:—1st. That notice to the Defendant Appellant, of an application for a Rule for *contrainte par corps*, against the Appellant Defendant in the Court below as voluntary guardian is not required by the Rules of Practice.

2nd. That a variance between the final Judgment on the Rule and the terms of the Rule is not a ground for setting aside the said Judgment.

3rd. That a Defendant, who becomes a voluntary guardian of effects seized under a writ of execution liable to *contrainte par corps*.

This was an appeal from a judgment rendered in the Superior Court upon a Rule *nisi causa*. The Plaintiff obtained a judgment against the Defendant for $602, with interest and costs. The Sheriff seized certain property, under a writ of execution, of which the Defendant became voluntary guardian. The Sheriff returned that the Defendant refused to deliver him up the goods and that thereby he was unable to proceed to their sale. The Superior Court granted the Plaintiff a Rule *nisi causa* , ordering, "that the Defendant be declared to have been in contempt of Court and liable to be *contraint par corps* and ordering him to be committed to the common jail of the District of St. Francis until he shall have produced the said effects so seized as aforesaid, that the same may be sold in due course of law or until he shall have produced the full value thereof with all damages and costs occasioned by the default of the said William Brooks in the premises or until he shall have paid to the Plaintiff the amount of the debt, interest and costs in the cause and the subsequent costs occurred therein."

William Brooks vs. ath. Whitney.

The Appellant appeared on the Return of the Rule and fyled an answer in writing objecting that the Rule was irregularly issued, as he had received no notice of it, and that he could not be legally appointed guardian.

The Court dismissed the answer, and ordered the value of the goods to be established, *avant faire droit.* The parties went to evidence as to value, which was admitted by the defendant, to be $800.

The parties were afterwards heard, and the Court on the 30th June 1859 gave judgment making the Rule absolute in the following terms:—"La Cour après " avoir entendu le Demandeur et le Défendeur *mis en cause* par leurs Avocats " sur le mérite de la règle émanée de cette Cour le vingt-six Mars mil huit cent " cinquante-neuf, examiné la procédure, preuve produite, vu le jugement interlo- " cutoire rendu en cette cause, le 30 jour d'Avril 1859, lequel ordonnait avant " faire droit sur la dite Règle, qu'il serait procédé à la diligence du Défendeur " mis en cause sous huit jours à compter de la signification à lui faite du dit " jugement du 30 Avril 1859, et à défaut par lui de ce faire, à la diligence du " Demandeur en la manière ordinaire, à établir la valeur des biens-meubles, " effets et animaux, saisis par le dit Défendeur et non représentés ainsi qu'il " appert au Rapport du Shérif au dos du writ d'exécution émané en cette cause " en date du dix-huit Janvier mil huit cent cinquante-neuf, et détaillé comme " suit au procès-verbal de saisie annexé au dit writ, savoir: *Six Single Sleighs,* " *One Double Sleigh, One Logan Stud Horse, One Gray Mare, Two Bay* " *Horses, Two Bay Colts,* et vu l'admission donnée par le dit William Brooks " *mis en cause* que la valeur des dits biens-meubles, effets et animaux, savoir: " Six Single Sleighs, One Double Sleigh, One Logan Stud Horse, One Gray " Mare, Two Bay Horses, Two Bay Colts, sont de la valeur de huit cent piastres " courant, et avoir délibéré; déclare absolue la dite Règle du 26 Mars 1859, " et ordonne qu'un bref de contrainte par corps émané en cette cause pour " arrêter la personne du dit William Brooks, le Défendeur gardien nommé des " effets saisis en cette cause et l'incarcérer dans la prison commune du District " de St. Francis et l'y détenir jusqu'à ce qu'il ait payé la dette, intérêt, frais et " les frais subséquents en cette cause en vertu du jugement rendu en cette cause " le 30e jour de Décembre 1858, c'est à savoir: la somme de six cent soixante " et deux piastres cours actuel de dette, avec intérêt sur icelle à compter du " premier jour de Juillet mil huit cent cinquante-huit, jusqu'au paiement, qua- " rante-et-une piastres et trente-cinq cents frais taxés sur le dit jugement, et " dont distraction a été accordée à Messieurs Torrance et Morris de la cité de " Montréal, les avocats et procureurs du dit Demandeur, trois piastres et trente- " trois cents, frais accrus sur le bref de *fieri facias de bonis* émané en cette cause, " six piastres et quinze cents, frais du Shérif sur le dit bref de *fieri facias de* " *bonis,* et enfin les dépens de la dite Règle pour contrainte par corps aux quels " dépens, la Cour condamne le dit Défendeur mis en cause et taxés par ce " Jugement à deux louis onze chelins et six deniers dit cours."

The Defendant appealed from this Judgment, alleging, that the condemnation pronounced by the Judgment had a narrower scope than that sought by the Respondent. That the Rule ordered imprisonment until the Appellant *should have produced the effects seized or their value or until he should have paid the debt*

Brooks vs. Whitney.

interest and costs, while the final Judgement, condemned the Appellant *to be imprisoned until he should have paid the debt, interest, costs and subsequent costs Sheriff's fees and costs of the rule*, thereby depriving the Appellant of the benefit of the alternative, granted by the Rule. The Appellant further contended that the condemnation in the Judgment was *ultra petita* and deprived him of the option granted in his favour and asked the Judgment to be set aside for this reason, and also, because the Rule was issued in the first instance without notice to the Appellant and because the appointment of the saisi, as guardian, was illegal, and did not constitute him the *depositaire judiciare* of the effects seized, and therefore he was not liable to *contrainte par corps.*

The Respondent maintained that as voluntary guardian, the Defendant was in contempt of Court, in refusing to produce the goods and that the Court being the sole judge of contempts against itself, had perfect right in its discretion, after cause shown on the Rule, by its final Judgment, to restrain the alternative asked for by the Rule, and to condemn as in this case it had done the Defendant to imprisonment, until he should have paid the debt, interest and costs.

After counsel heard and deliberation, the appeal was dismissed and the Judgment of the Court below confirmed.

Abbott and Dorman, for Appellant.

Torrance and Morris, for Respondent.

(A. M.)

SUPERIOR COURT.

MONTREAL, 29TH FEBRURRY, 1860.

Coram SMITH, J.

No. 128.

Rolland v. *Bristow.*

CITY COUNCILLOR—MONTREAL—DISQUALIFICATIONS.

Held.—Under 12 Vict., cap. 128, s.s. 8 & 41, 1o. That a party elected to be councillor in the corporation of the City of Montreal, not being possessed to his own use and benefit of real and personal estate within the City of Montreal after payment of his just debts, of the value of £500 cy., is not qualified to be so elected.

2o. That a party elected to be such a councillor, and becoming [illegible] during his occupancy of said office, is by such insolvency disqualified to hold such office.

The petitioner in this matter by his petition or *requête libellée*, set out his qualification as a voter of the St. Lawrence ward in Montreal, and that by the statute 14 & 15 Vict., cap. 128, ss. 8 & 41, it is enacted that no one shall be elected a councillor of the City, unless a resident householder within it for a year before his election, and unless he has real and personal property within the city, after payment of his debts, of the value of £500 currency; that he should continue to have such pecuniary qualification during his term of office, and should continue to be a resident householder, and that he should become disqualified if he became insolvent or bankrupt.

That Defendant was, on the 28 July 1850, elected councillor for the City of Montreal for a term of three years; that he was not at the time of his election or afterwards qualified, not having been a resident householder in Montreal for a year before the election, nor possessed of the property qualification; that since

Rolland, vs. Bristow.

his election he had become insolvent and ceased to hold his office; that he illegally assumed to exercise the office of councillor and the court was authorized to issue a writ requiring him to answer the petition and to shew cause by what authority he assumed to exercise the office.

With the petition was fyled a copy of a judgment of the Circuit Court, rendered 13 September, 1859, against the Defendant for £11 7s. 2d., together with copies of writ of execution in the same case with a return by bailiff of *nulla bona* against the Defendant, the report purporting also to be signed by him, also affidavits by petitioner and another setting out their belief that Defendant had not the necessary property qualification, had become insolvent, was not at the time of the making of the affidavit a householder, but was living in a boarding-house.

The Defendant pleaded an *exception à la forme*, which was dismissed. Afterwards Defendant pleaded to the merits alledging his qualification, that he was not insolvent and denying the allegations of the petition. The case being inscribed for evidence and hearing, the petitioner examined the City clerk and another witness who produced the voters, and assessment lists of the City of Montreal, extracts from which were fyled, showing that petitioner's name was on these lists as proprietor of houses in Bleury street; that Defendant's name occurred in the list of 1859 as a tenant and not as proprietor of real estate, that in the voter's list for 1860 Defendant's name did not appear either as tenant or proprietor.

Smith J., in giving judgment, held that the proof was sufficient to sustain the pretensions of the petitioner, in the absence of any proof on the part of the Defendant, who was bound to show that he had the right to exercise the office he assumed to hold, the proceeding being in the nature of a *quo warranto*. The judgment was recorded in the following terms.

"Considering that the said Petitioner and informant hath fully established by legal evidence the material allegations of the said *requête libellée*, and namely that at the time of the election of the said William Bristow to be a councillor for the St. Lawrence Ward for the City of Montreal, to wit, at the election held in the city for the election of a councillor for the said St. Lawrence Ward on the twenty-eighth day of February last past, to wit, February 1859, the said Informant as Petitioner was a duly qualified elector and voter qualified to vote at the election of a councillor for the said St. Lawrence Ward in the City of Montreal, and that he, the said William Bristow, was not duly qualified to be elected as such councillor, the said William Bristow not being possessed to his own use and benefit of real and personal estate within the City of Montreal, after payment or deduction of his just debts of the value of five hundred pounds currency, and that he hath continued to be so disqualified down to the filing of the information or *requête libellée* of the said Informant or Petitioner, and that thereby by reason thereof, the said William Bristow was unqualified by law to be elected as such councillor.

And further considering that it hath beeen established by legal evidence by the said Informant or Petitioner, that since the said election and during the occupancy of said office of councillor by the said William Bristow, the said

William Bristow hath become insolvent, and hath thereby become disqualified by law to hold the said office, and by reason thereof hath ceased to hold the said office of councillor as aforesaid, the Court doth maintain the said Petition, Information, or *requête libellée*, and doth declare the said election of the said William Bristow to be and to have been illegal, null and void, and doth further declare that by reason of the subsequent insolvency of the said William Bristow, the said William Bristow, hath by law ceased to hold the said office of councillor as aforesaid, and by reason thereof, doth declare the occupation of the said office as councillor as aforesaid, for the St. Lawrence Ward to be an intrusion into and a usurpation of the said office, and the Court doth accordingly oust the said William Bristow from his said office of councillor for the St. Lawrence Ward in the City of Montreal, and doth exclude the said William Bristow from the exercise of the functions of the said office as aforesaid.

And the Court doth condemn the said William Bristow to pay the costs of the said information or *requête libellée*."

H. Stuart for Petitioner.

Devlin for Defendant.

[H. B.]

COURT OF QUEEN'S BENCH.

IN APPEAL.

FROM THE SUPERIOR COURT, DISTRICT OF MONTREAL.

MONTREAL, 9TH MARCH, 1860.

Coram Sir L. H. LAFONTAINE, Bart., C. J., AYLWIN, J., DUVAL, J., (C.) MONDELET, A. J.

WILLIAM BRISTOW, (*Defendant in the Court below,*) Appellant.

AND

GABRIEL ROLLAND, (*Petitioner in the Court below,*) Respondent.

CITY COUNCILLOR—MONTREAL—DISQUALIFICATIONS.

Held, that an appeal does not lie to the Court of Queen's Bench from a judgment of the Superior Court exercising the jurisdiction conferred upon the latter by 12 Vict., chap. 41.

The Judgment of the Superior Court is reported at p. 281 of 4 Lower Canada Jurist. The Defendant immediately sued out a Writ of Appeal from the Court of Queen's Bench, returnable the 15th March 1860.

The petitioner by his counsel, *H. Stuart*, Esquire, on the 8th March 1860, moved the Court of Queen's Bench which was then sitting, to quash the Writ of Appeal, and dismiss the Appeal, on the ground that the Judgment of the Superior Court was final, and that the law did not give an Appeal in this matter.

B. Devlin, Esquire, contra.

PER CURIAM: "La Cour • • • * • • • • Attendu que par la loi il n'y a pas d'appel du Jugement rendu par la Cour Supérieure, le vingt-neuf

Rolland vs. Bristow

Février mil huit cent soixante, la Cour casse, annulle et met au néant le dit appel interjeté, accorde la motion du dit intimé avec dépens contre l'Appelant et ordonne la remise du dossier, etc., etc.

Appeal dismissed.

B. Devlin, for Appelant,
H. Stuart, for Respondent.
(F. W. T.)

IN APPEAL

FROM THE SUPERIOR COURT, DISTRICT OF BEAUHARNOIS.

MONTREAL, 3RD SEPTEMBER, 1860.

Coram Sir L. H. LAFONTAINE, Bart. C. J., AYLWIN, J., DUVAL, J., (C.) MONDELET, J., BADGLEY, J.

CHARLES ARCHAMBAULT, (*Defendant in the Court below.*)

Appellant.

AND

LOUIS ARCHAMBAULT, (*Plaintiff in the Court below,*)

Respondent.

ARTICULATION OF FACTS—DEFAULT.

Held, that a plaintiff having made default to answer a statement (*articulation*) of facts fyled by a defendant in support of a plea of compensation, such statement shall be taken as admitted by such plaintiff under 20 Vict., cap. 44, sec. 74.

The Plaintiffs' action was for the recovery of a sum of £201 1s. 11d. cy.

The Defendant met the action by a peremptory exception of compensation and by a *défense au fonds en fait.*

After issue joined, the Defendant produced and fyled within the prescribed delays, an articulation of facts in conformity with the allegations of the peremptory exception.

The Plaintiff omitted on his part to answer this articulation of facts, and also omitted to fyle an articulation himself. He subsequently made a motion that the default might be taken off and that he might be permitted to fyle his answer to said articulation and also to fyle his own articulation. This motion by an interlocutory judgment of the Court rendered the 16th February 1859, was rejected.

A final judgment was rendered by Mr. Justice Guy on the 28th October, 1859.

The following "*considérant*" of this judgment is the only one necessary to give:

"Considérant encore que le Défendeur n'a pas justifié son exception de compensation quant à la somme de trente-sept livres quinze chelins et dix deniers dit cours, et que nonobstant l'articulation de faits soumise par le Défendeur et à laquelle le demandeur n'a pas répondu, les créances opposées ainsi en compensation par le Défendeur n'étant pas claires et liquides, ne peuvent en

droit être admises comme une extinction de la dette du Demandeur qui est une dette claire et liquide, etc., etc. * * * * condamne le Défendeur de payer au Demandeur, etc., etc."

The Defendant appealed from this Judgment.

The Judgment in Appeal was recorded in the following words:

Aylwin, J., and Duval, J., *dissentientibus.*

"La Cour, *

1. Considérant qu'en Cour de première instance, le Défendeur a opposé à l'action du Demandeur une exception de compensation et paiement.

2. Considérant que les faits qui servent de base à cette exception, sont reproduits dans l'articulation de faits du Défendeur; que le Demandeur n'a pas répondu à cette articulation de faits, et n'en a lui-même reproduit aucun; que même sa motion pour être admis à le faire a été rejetée par la Cour de première instance; qu'ainsi, aux termes du Statut de 1857, chap. 45, sect. 74, les énoncés dans l'articulation du Défendeur doivent être considérés comme admis par le Demandeur; que, tel étant le cas, la demande doit être regardée comme éteinte depuis longtemps, et le Demandeur aurait dû en être débouté; que par conséquent, il y a eu mal jugé par le jugement dont est appel.

Infirme le susdit jugement, savoir le jugement rendu, le 28 Octobre 1859, par la Cour Supérieure siégeant dans le district de Beauharnois, avec dépens contre l'intimé sur le présent appel; et cette Cour, procédant à rendre le jugement que la dite Cour Supérieure aurait du rendre, déboute l'intimé de sa dite action, avec dépens; et ordonne que le dossier soit remis à la dite Cour Supérieure siégeant comme susdit."

Judgment reversed.

M. Branchaud, for Appellant.

P. Denis, for Respondent.

(F. W. T.)

SUPERIOR COURT.

MONTREAL, 26TH FEBRUARY, 1859.

Coram BADGLEY, J.

No. 1696.

Ramsay vs. *Hitchins* and *Ramsay* opposant, and divers opposants.

Held,—That an opposition ***à fin de conserver*** **will not be received after the delay has expired although before the homologation of the report of distribution so far as to disturb the rights of parties already collocated where the omission to fyle it in time is not attributable to the negligence o oversight of the attorney, but such opposition will be received so far as to give the new opposant the moneys not distributed.**

In this case the Sheriff had levied of the land of the Defendant £206 15s. 8d and making his return accordingly, the Plaintiff put in an opposition for the amount of the judgment.

Another party opposant put in his chirographary claim of £32 11s. 11d. for goods sold and delivered.

Ramsay, vs. Hutchins.

A report was prepared and the money proposed to be distributed according to these claims and there remained a sum of £32 16s. 11d. to be returned to tne Defendant.

This report was affixed and posted up agreeably to the rules of practice of the Court on the 27th December, 1858.

On the first day of the next term, the Plaintiff made a motion supported by affidavits to be permitted to fyle another opposition for the *bailleur de fonds* claim of £322 10s. 0d. cy.; that the report of distribution already prepared be set aside, and a new report ordered to be prepared according to the oppositions then fyled including the new opposition.

Torrance, for Plaintiff and Opposant Ramsay, cited the case of *Woodman* vs. *Letourneau* and *Letourneau*, Opposant, 3 L. C. Jurist, p. 27, in support of motion.

PER CURIAM.—The facts in this case shew negligence in the Plaintiff in not placing in the hands of his attorney the papers necessary to prepare the opposition now sought to be fyled, but none on the part of his attorney. I will not therefore admit the opposition so far as to disturb the right of parties already collocated, but the report shall be reformed so far as to give the Plaintiff the sum of £32 16s. 11d. cy., not distributed.

Motion granted in part.

Torrance and Morris, for Plaintiff and Opposant.

R. Macdonnell, for Opposants, *Gault* & al.

(F. W. T.)

MONTREAL, 23RD JUNE, 1860.

Coram BERTHELOT, A. J.

Nos. 2435 and 2591.

Clapin vs. *Nagle and Clapin and Nagle and others, Opposants.*

OPPOSITION—CONTESTATION AFTER DELAY.

Held that a party opposant will be allowed to contest a report of collocation and distribution after the delays have expired upon cause shewn by affidavit that the party is interested and that the party collocated to his prejudice appears on examination of his opposition not to be entitled the amount of his collocation.

The Sheriff of the District of St. Hyacinthe returned that he had levied of the lands of the defendant, a sum of £470 13s. 11d. cy. The plaintiff and one John McGinnis were opposants for certain sums and were both collocated rateably for a certain sum which was divided between them by a report of collocation and distribution fyled on 12th May, 1860.

The time for contesting the report had elapsed when Louis Antoine Dessaulles, as in the rights of the plaintiffs gave notice on the 25th May aforesaid to the Attorney of the Opposants McGinnis that he would move the Court on the 18th June then next to be allowed to fyle a contestation of the report as

Clapin, vs. Nagle

regards the collocation in favour of McGinnis, founded upon the affidavit of Dessaulles in the following words:

"That he is in the rights of Clapin the Plaintiff and Opposant in this cause. That he is also an Opposant; that Deponent only on the 23rd of this month, examined the report of distribution in this cause prepared and found that opposant McGinnis had been collocated to the prejudice of Clapin and Deponent.

That Deponent did not give the matter attention sooner being under the impression and belief that H. W. Austin advocate of Montreal had undertaken to watch said report for him and to contest said McGinnis' opposition should he be collocated.

That Deponent's absence from Montreal on public business he being a member of the Legislative Council prevented him giving the matter his personal attention until the delay fixed by the Rules of Practice of this Court had expired; that Deponent believes the opposition of said McGinnis to be unfounded.

That should the said report of collocation in this cause stand in its present form deponent will suffer great loss and damage."

The motion was made and the affidavit and contestation fyled at the same time, and the parties heard.

Per Curiam: Having looked at the affidavit and also at the opposition of McGinnis, I allow the Plaintiff to fyle his contestation, on payment of 11s. 8d. of costs.

Motion granted.

Mackay and Austin, for Plaintiffs.
M. Doherty, for McGinnis.
(F. W. T.)

Vide contrary decision, *Forsyth* vs. *Morin* and divers Opposants; 2 L. C. Jurist, 59.

MONTREAL, 31st MARCH 1860.

Coram Smith, J.

No. 189.

Torrance vs. *Philbin*.

Held:—1st. That payment on account of a Promissory note within five years, interrupts the Statutory prescription, notwithstanding no action brought within that period.

2nd. That where there was a book account and also a Promissory note, and accounts stated had been rendered including both and charging interest, the Court will not strike off the interest where the Defendant had not pleaded an imputation of his payments as against the note.

In this cause, the Plaintiff claimed of the defendant, $\$206\frac{17}{100}$ as the balance of a Promissory note made in 1852. The declaration also contained the common counts, for goods sold and delivered. The defendant pleaded the Statutory prescription of five years to the action in so far as founded on the promissory note, and that of six years, to the account for goods sold and delivered and also the general issue. The Plaintiff replied, that though no action had been brought within 5 or 6 years respectively, yet the prescription had been interrupted by payments on account.

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Such payments were proved by testimony and admitted, on answer to interrogatories *sur faits et articles* by the Defendant. The Defendant however claimed to impute his payments as against the note, so as to extinguish the interest running upon that security.

At the argument, the counsel for the Defendant, abandoned the pleas of prescription, admitting the interruption.

With regard to the imputation it was held by the Court, that imputation not having been pleaded by the Defendant, that question did not arise and the Court would not interfere, the only evidence in the Record being the accounts fyled by the Plaintiff by which the balance was shown and which had been proved to have been rendered to the Defendant. Judgment accordingly was given for the full amount claimed.

A. Morris, for Plaintiff.

Mackay and Austin, for Defendant.

(A. M.)

MONTREAL, 31ST MAY, 1860.

Coram SMITH, J.

No. 2380.

Joseph vs. *Morrow* et al.

Held:—That when there is a sale by sample, and the goods do not agree with it, the vendor must make known the defect within reasonable delay: he could not claim to rescind the sale and return the goods after a delay of six months.

In this case the Plaintiff brought his action for the amount of a Note for $300 being one of three notes given for a purchase of Brandy and Port Wine. The Defendants for their Plea or Exception alleged among other things, that the sale of the Brandy was by sample, with which on examination, it was found not to agree; that the Notes in question had been given before the Brandy was examined, and that the defect was not discovered until afterwards, when they gave Plaintiff notice that the note could not be paid, and that they were willing to return the Brandy.

Evidence was adduced at great length by the Defendants to establish that the Brandy did not correspond with the sample, but it is not necessary to refer to this branch of the case inasmuch as the Judgment turned upon the want of diligence shewn by the Defendants, in allowing some six months to elapse before making known their pretension.

It appeared by the evidence of Woods, Plaintiff's clerk and others, that in March 1858 Woods met the Defendants together, in the street, and told them that Plaintiff had some Brandy which he could sell at a low price; that at their request he afterwards took a sample of the Brandy to them, and that on calling upon them some days after, he concluded a sale of Twelve Hogsheads at five shillings per gallon, at an unusual credit of six, twelve, and eighteen months. Seven of the Hogsheads were delivered immediately, the others remained in Plaintiff's stores at the request of the Defendants. A few days

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after the delivery of the Seven Hogsheads, Woods called and got the notes. The Brandy was then lying in a yard occupied by the Defendants and others in common.

The Brandy after lying in the yard for some days, was put in the cellar of Defendants, when several casks were opened, and samples of some of them were shewn to Morrow, one of the Defendants, by his clerk Balfour. No complaint was made except that two or three months after the sale Morrow mentioned to Woods that the Brandy was muddy. Some time afterwards Morrow proposed to Woods to keep the five Hogsheads, which had not been delivered, and to cancel one of the notes; it was not until the first note came due after the lapse of six months that any complaint was made that the Brandy was not according to sample, and this ground was not taken, nor any disposition shown to cancel the sale, until the Plaintiff had refused to take payment of one half the amount of the first note, and to renew for the rest of it, when the Defendants claimed to cancel the claim on the ground that the Brandy was not according to sample, and notified the Plaintiff that they were ready to return it.

On the statement of these facts by the Plaintiff's counsel, the Court declined to hear the other points raised in the case, and after an examination of the Record and evidence dismissed the Defendant's exception and gave judgment for the Plaintiff, maintaining his action for the sum demanded. After briefly explaining the case,

Smith, J.—The only point in the case is whether the Defendants could keep the Brandy six months, and this although by the evidence of their clerk it had been examined a short time after its receipt, and then when the note which was given for it became due complain that it was not according to sample—this could not be done.

The Defendants should have tendered back the Brandy immediately so as to give Plaintiff an opportunity to verify the alleged variance. The case of *Stuart* vs. *Demontigny* cited by Defendant's counsel only confirms this view. The Plaintiff must have judgment.

Cross and Bancroft, for Plaintiff.

Ricard, for Defendants.

(H. B.)

The following are the authorities of the Counsel for the Plaintiff, on the point on which the decision turned.

Chitty on Contracts, p. 462, 7th Am. Ed.
Bell, Law of Scotland, 1 Vol. p. 439.
Story, Sales, pp. 426. 427.
Parsons, Contracts, p. 475.
Pardessus, No. 582, 2 Vol. pp. 34-37.
Devilleneuve et Massè, Dic. du Con. Com.: *vente* 215, 221, 222.
Pothier, No. 229.

MONTREAL, 31st DECEMBER, 1859.

Coram MONK, J.

No. 808.

Le Séminaire de Québec vs. *Labelle et Labelle*, Plaintiff en garantie, vs. *Tassé*, Defendant en garantie.

Held,—That a deed of sale merely annullable, *atteint d'une nullité relative*, produces lods et ventes.

MONK, J.—The declaration sets out: that by deed of sale dated 23rd May 1852, one Tassé acquired from Simon Durand and wife a lot of land situated in the seigniory of Ile Jesus belonging to the Plaintiffs, for the sum of 1500 livres ancient currency, upon which it is alleged there accrued £52 1s. 8d. of *lods et ventes* in favour of Plaintiffs. This property belonged to Durand's wife, who was then a minor, but a party to the deed; Durand bound himself to cause the deed to be ratified by his wife, when she should attain the age of majority. That on the 1st October 1856, there were due on this land £3 0s. 6d. arrears of *cens et rentes*. That the Defendant is *detenteur actuel* of the above lot of land having acquired the same from Tassé. That in addition to the above lot of land the Defendant is possessor of another farm described in the Declaration on which there had accrued on the 1st October 1856, £5 9s. 1d. for arrears of *cens et rentes*. That the Defendant is liable hypothecarily for these several sums making together the sum of £60 11s. 3d. and the conclusions taken against him are in conformity to this pretention.

On the 14th August 1858, Labelle took out an action *en garantie* against François Zéphirin Tassé, the same mentioned in the principal action as Labelle's vendor. In this action it is alleged that Tassé by deed dated 13th February 1857, transferred to him with guarantee, the two lots of land mentioned in Plaintiff's declaration in the principal action and that there Tassé specially undertook to pay all arrears of seigniorial dues; and in consequence of the hypothecary action of the Seminary of Quebec, Labelle calls upon Tassé to become his *garant* and to take up his fait et cause; this Tassé does, and on the 27th January 1859, filed an exception to the hypothecary action against Labelle in which he sets forth the following facts.

That the deed of sale of the 23rd May, 1852, (23rd March in the Exception) from Durand and wife to him and on which *lods et ventes* are claimed is and was null and produced no *lods et ventes*. That the lot of land mentioned in said deed, was a *propre* of Marguerite Tassé, wife of Simon Durand.

That when the pretended sale of the 23rd May 1852, was made, Madame Durand was a minor, that this sale accompanied by her husband's promise to cause it to be ratified when his wife reached the age of majority, could have no legal effect until the ratification—this ratification never took place, for Marguerite Tassé, Madame Durand died on the 12th January 1853, still a minor. That by the decease of Marguerite Tassé *en minorité* the deed became absolutely null.

That half of the lot of land mentioned, in the deed of the 23rd May 1852 from Simon Durand and wife to Tassé, became the property of the said Tassé as heir to his deceased sister Marguerite Tassé and the other half to his brother Hé-

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bert Gilbert Tassé in the same quality of heir to his sister. That by deed dated 25th May 1853, Tassé the present Defendant *en garantie* sold to Simon Durand all his immoveables, undivided rights and share as heir of the *propres* to his deceased sister, Durand's wife—among which was the farm in question—half of which belonged to Tassé as above mentioned. That on the same day 25th May 1853, Simon Durand resold to Tassé the present Defendant *en garantie* all his rights and property in the immoveables *propres* left by his wife Tassé's sister, among which was the farm in question.

That by another acte dated 4th June 1853, Tassé the Defendant *en garantie* acquired from his brother Hébert Gilbert Tassé the other undivided half of the land in question.

That it was in virtue of the two actes just mentioned, Tassé became possessor of the farm in question and not by the deed of the 23rd May 1852, from Simon Durand and his wife, a minor—who died without ratifying the first deed as above stated.

That therefore the main action against Labelle is unfounded and he concludes for the dismissal of the action alleging that he offered the *cens et rentes* claimed before the institution of the first action, that is: in the month of March 1856 and tenders them again by his plea and by deposit.

To this the Plaintiffs answer, that the acte of 23rd May (March again) had full legal effect and transferred the property to Tassé. That immediately after Tassé went into possession of the farm—paid the price and possessed it up to the date when he sold it to Labelle. That the defect in the deed of the 23rd May 1852, was only a relative *nullity*—a *nullité* which has not been declared such by any competent tribunal and which in any case cannot be urged by the Defendant *en garantie*, Tassé; by a second answer the same reasons are urged, adding however, that Tassé was never molested in his possession and ownership of the land in question, but on the contrary was maintained in his position of proprietor by his sister's heirs. That the deed of sale of the 23rd May 1852, was ratified in so far as was necessary by the subsequent acts above referred to.

Upon the issue thus raised, the parties proceeded to proof. The Plaintiffs have admitted, 1st, that the lot of land firstly described in their declaration was a *propre de succession* of Marguerite Tassé wife of Simon Durand and acquired by inheritance from her father and mother.

2nd. That the lots of land mentioned in the several deeds of the 25rd May 1853 and the 4th June 1853 form the lot of land last above mentioned and on which lods et ventes are claimed.

3rd. That Tassé, the Defendant *en garantie*, and his brother Hébert Gilbert Tassé were heirs at law of their deceased sister Marguerite Tassé. It is also proved that Madame Durand died a minor.

Three witnesses were examined by the Plaintiffs in the principal action. These witnesses proved Tassé's possession after the deed of the 23rd May 1852. Something is said about possession previous to that date, but there is nothing appearing from that evidence nor *aliunde* in what capacity. We have the fact that he possessed it afterwards up to the period of his sale to Labelle in 1857, and as the proof is presented, the Court is justified in assuming that this possession

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was in virtue of the deed of sale from Simon Durand and his wife of the 23rd May 1852.

Reverting now to the documentary evidence produced, consisting of the deed of sale from Durand and his wife to Tassé dated 23rd May 1852; the cession of successive rights by Tassé to Durand dated 25th May 1853, the resale from Durand to Tassé of the same date and the sale of successive rights by Gilbert Tassé to his brother the Defendant *en garantie* dated 4th June 1853, it becomes necessary to determine;

1st. Whether the deed of sale from Durand and his wife to Tassé dated 23rd May 1852 is a nullity, and if so, whether it is an absolute or a relative nullity If an absolute nullity, the case is at once disposed of, if only relative we must enquire.

2nd. Whether it has been ratified or not, and if not, whether such ratification be necessary to enable Plaintiffs to recover the *lods et ventes* mentioned in their declaration.

Upon the first, I am clearly of opinion that this is not the case contemplated by the 226th article of the custom. The wife although a minor consented and the property in the deed itself was declared to be her property and a *propre de succession*. This therefore is the sale by a minor *mineure émancipée*, the husband being agent to the deed for the purpose of authorising his wife and to stipulate a *garantie* that she would ratify the sale when she reached the age of majority. The *nullité* then is *relative*, not *absolute*. *Les mineurs sont restitués pour cause de lésion seulement*, is a maxim of the law so well established as to admit of little or no controversy. I speak of acts to which minors have been a party consenting as in the present instance. The next point to be determined is whether this deed has or has not been annulled? In answer to this question we have only to enquire how such a deed *atteint d'une nullité relative* would be set aside. And it is plain that it must be done either by a Court of competent jurisdiction or by a deed of resiliation or retrocession, the operation must be conventional or judicial, I know of no other way. In this case there has been no judgment annulling the deed and there has been no resiliation, no retrocession, unless the sale by Zéphirin Tassé to Durand dated 25th May 1853 and the sale from Gilbert Tassé of the 4th June 1853 can be regarded as such which plainly they cannot. It is true the two Tassés are heirs at law of their sister, this does not alter the case. If this sale amount to any thing in the present instance, they must be viewed as an informal mode of ratifying their sister's deed and this is so far true that the deed which revocable by Gilbert Tassé *pour cause de lésion*, is now irrevocable and was made so by the acts referred to. And thus the whole defence, as I view the case falls to the ground. Whether there be ratification or not, so long as the deed exists, if my view of it be correct, it not only exists, but cannot now be annulled by Madame Durand's heirs, the two Tassé's; it is a good deed bearing *lods et ventes*. The authorities showing that a deed of sale *annullable et atteint d'une nullité relative*, produces *lods et ventes* until annulled are numerous; this is not the case of a condition upon which the validity of the sale depends; the legality of the sale in this instance did not depend upon the ratification; it is valid without liable to be set aside for

lesion only. Judgment must therefore go for the Plaintiffs for *lods et ventés* upon lot No. 1, and a ventilation is ordered to determine the respective value of the two lots sold by the deed of the 23 May 1852 in order to settle the amount of *lods et ventes* for which the Defendant must be held *hypothecarily* liable.

Chaurette, et al vs. Loranger.

Cherrier, Dorion & Dorion, for Plaintiff.
Lafrenaye & Papin, for Defendant.
Cartier & Pominville, for Defendant en garantie.
(P. R. L.)

MONTREAL, 31st DECEMBER, 1859.

Coram MONK, J.

No. 1814.

CHAURETTE, *vs.* RAPIN, ET AL., AND RAPIN, ET AL., (*Plaintiffs en garantie.*)

AND

LORANGER, (*Defendant en garantie.*)

Held, that the securities on an appeal are not bound for the condemnation money, when the Appellant files a declaration to the effect that the Judgment appealed from, can be executed; although the appeal bond has been given in the usual way.

MONK, J.—Action on Security Bond in appeal. In a cause of Chaurette *vs.* Cousineau, judgment was rendered in the Superior Court, at Montreal, on the 23rd September 1856, condemning the Defendant Cousineau to pay £117 3s. 4d.

On the 22nd October 1856 nearly a month after this Judgment, the Defendant Cousineau by his Attornies filed a declaration at the Prothonotary's office consenting that execution should issue in due course, notwithstanding the appeal he was about to take from the Judgment rendered against him. Upon this, it would appear, execution issued. At least the fiat is produced dated 3 days after the production and fyling of this declaration and the fact is admitted by the Plaintiff in his answer to the Defendant.

On the 25th February 1857, a writ of appeal was taken out and on the 5th March 1857, security in appeal was entered by Cousineau, Rapin and Garrick; the present Defendants became bound as such security not only for the costs in appeal, but also for the condemnation money, costs and damages. In fact the Bond is in usual form.

The Appeal was prosecuted and on the 4th December 1857, the Judgment of the Court below was confirmed in appeal.

The present action is brought upon the Bond for the condemnation money and the costs of both Courts.

The Defendants plead, that the Bond of the 5th March 1857 was consented in error.

That the Respondents exacted security for costs in appeal only, seeing that a consent was filed by the Defendants to the execution of the Judgment, notwithstanding the appeal, and that execution had issued in consequence.

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Plaintiff answers that the consent was not a valid consent and that although he did take out execution, the consent such as it was, was revoked by the Defendant Cousineau filing an opposition to the execution of the writ of execution based upon the ground that he had appealed from the Judgment. Of this opposition the Court has no proof; no copy of it is filed, nor is there evidence of it *aliunde*.

Having consented to the execution of the Judgment in the Court below, Cousineau was bound to find security for costs in appeal and for these costs only. The law required so much of him and no more, this was the utmost extent of his obligation. His securities have gone further than he was bound to go in the special circumstances of this case. They have become bound for debt, interest and the costs of both Courts. There is no proof whatever to show that the securities were aware that a consent had been given and that execution had gone out. In the absence of such proof, we must presume ignorance of this important fact on the part of the securities and if ignorance, the law justifies the Court in assuming that there was error. The knowledge of that fact was of the highest importance to the securities and their ignorance of it involves a very serious error of fact. The law as to what extent of error will involve the nullity of an obligation may be thus stated. "Pourqu'une erreur entraine la nullité d'une convention, il faut qu'il soit moralement certain que si la vérité avait été connue, la partie qui réclame contre l'obligation ne se serait point engagée."

In this instance, it is not going too far to say that we have this moral certainty. The Court is therefore of opinion that error is a good defence. Besides, we may invoke another principle here equally urgent and decisive of this case. The obligation of the principal here was to find security for costs in appeal. The Judgment for the debt and the costs of the Court below was being enforced by execution at the time security was given. To become security for a Judgment debt or for any liquidation by execution is certainly unusual, and the law wisely provides that such a preposterous anomaly should be avoided by declaring that security for costs in appeal is all that can be required or exacted in such a case. This was the full extent of Cousineau's obligation and it was his obligation to pay the costs of appeal to which the security was to apply and which it was intended they should guarantee.

It is a well known maxim of the law, "*qu'il est de la nature du cautionnement de n'avoir plus d'étendue que l'obligation pour laquelle il est donné ; de sorte qu'on ne peut pas plus exiger de la caution que du débiteur principal,*" upon the whole case and applying these principles to the facts proved, the Court is of opinion that Judgment should go against the securities for the costs of appeal only.

The Judgment of the Court is *motivé* as follows.

"La cour après avoir entendu les parties par leurs Avocats sur le mérite tant de la demande principale que de la demande en garantie, examiné la procédure, pièces produites et avoir sur le tout délibéré, considérant que l'acte de cautionnement, en date du 5 Mars 1857, produit en cette cause, fut consenti par erreur de la part des Défendeurs quant à toute somme excédant le montant des frais

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encourus en appel, c'est-à-dire, trente livres courant, tel qu'établi par la preuve produite ; considérant qu'au lieu de donner caution pour le montant de la condamnation, frais et dommages, tel que porté dans le dit acte de cautionnement, les dits Défendeurs entendaient et devaient donner cautionnement pour les frais d'appel, maintient l'exception produite par les Défendeurs dans la cause principale.

Et faisant droit sur la demande principale condamne les Défendeurs conjointement et solidairement à payer à la Demanderesse la somme de £30 0s. 0d., cours actuel de la province du Canada, montant des frais sur l'appel interjetté par le nommé Louis Cousineau, du jugement rendu par cette Cour le 23 Septembre 1856, dans une cause No. 1154, dans laquelle la Demanderesse actuelle était Demanderesse et le dit Louis Cousineau était Défendeur, lequel dit jugement, du 23 Septembre 1856, a été confirmé par la Cour du Banc de la Reine, jugeant en appel le 4e jour de Décembre 1857, laquelle dite somme de £30 0s. 0d. dit cours, la Demanderesse a droit de recouvrer des Défendeurs, et ce, par et en vertu de l'acte de cautionnement du 5 Mars 1857, filé en cette cause avec intérêt à compter du 23 Novembre 1858, jour de l'assignation en cette cause jusqu'au parfait paiement, et aux dépens, comme dans une action de la dernière classe de la Cour Supérieure, distraits en faveur de M. L. Bélanger, avocat de la Demanderesse.

Et la Cour adjugeant sur la demande en garantie, condamne le Défendeur en garantie à garantir et indemniser les dits Demandeurs en garantie de la présente condamnation prononcée contre eux en faveur de la dite Marguerite Chaurette à raison du susdit cautionnement, le tout avec dépens de la dite action en garantie jusqu'à l'enfilure du plaidoyer du Défendeur en garantie, distraits en faveur de MM. Doutre et Daoust, avocats des dits Demandeurs en garantie, et condamne les Demandeurs en garantie à payer au Défendeur en garantie les frais de la contestation faite par les Demandeurs en garantie du dit plaidoyer du Défendeur en garantie.

L. Bélanger, avocat de la Demanderesse.

Doutre, Daoust et Doutre, avocats des Défendeurs.

J. M. Loranger, avocat du Défendeur en garantie.

(P. R. L.)

MONTREAL, 30th APRIL, 1860.

Coram SMITH, J.

No. 1259.

Lane et al, vs. *Ross et al.* and *Ross et al.* Opposants.

Held.—That a *commission Rogatoire* asked for on the day the case was fixed for evidence and final hearing, without affidavit of any kind could not be granted.

In this case judgment having been obtained by default under the provisions of the Statute 22 Vict., c. 5, sec. 11, an opposition was fyled by the Defendants under the same Statute. The case having been fixed for evidence and hearing at the same time, the Opposants made a motion, of which they had

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given notice two days before, for a Commission Rogatoire to examine witnesses in Australia. No mention was made of any facts to be proved, nor were the names of any witnesses given, nor was any affidavit produced in support of the motion. The Court dismissed the motion and allowed the case to proceed, remarking that a motion of this sort could not be granted as a matter of course That as with a jury trial it would never do to grant a motion of this sort at the time of the trial, and thus render it possible to put off an important case without good reason. That the unreasonable time at which the application was made, when the case was fixed for evidence and hearing, and the absence of any affidavit to shew the necessity of or importance of such a commission, rendered it impossible to allow the motion.

Browne for Opposants said that he could produce an affidavit, and asked that the case should be continued till the following day, to enable him to do so which the Court refused; the following day was the last day of the May Term, when no cases were heard, and the case was then inscribed for the second time; under the circumstances the delay could not be granted.

Cross & Bancroft, for Plaintiff.

Browne, for Opposants.

(H. B.)

See the ruling of Day, J., in a different case, Willis vs. Pierce, 2. Jurist 77.

MONTREAL, 28TH OCTOBER 1858.

Coram C. MONDELET, J.

No. 712.

Booth, vs. *The Montreal and Bytown Railway Company.*

VACATION—PRELIMINARY PLEAS.

Held, that there is not, during vacation, obligation to fyle preliminary pleas within the four days next after the return of the Writ, as ordered by the 16 Vic. ch. 194.

The original Writ of Summons in this case issued on the 9th of July 1858. It was returned 2nd August 1858.

The Defendant appeared, under reserve, and on 1st September following fyled an Exception à la forme, with the usual deposit. The principal ground of Exception was an informality (alleged) in the service of process. (3 L. C. J. p. 196.)

Early in September term the Plaintiff moved to reject said Preliminary P[lea] for various reasons, among them the following:

"Because no such Exception *à la forme* could be received or fyled, legally, in this cause but within the four days next, after the second of August last, day of the return of the original Writ of Summons in this cause, but said Exception of Defendants was fyled only on the first of September, to wit, long after said four days had expired."

The parties were heard in September Term when *R. Mackay*, for Plaintiff, argued that the law was imperatory requiring such Preliminary Pleas to be fyled within four days even in vacation. This law was the 16 Vic. ch. 194,

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§21.—This is the last law. It is not changed by the 22 Vic. ch. 5, §59, which extends the tenth section of the 16 Vic. ch. 194 but does not touch or repeal, in any way, the later section, the twenty first. He urged that this 21 section was to govern this case, and that, according to it, the Preliminary Plea of Defendants was fyled too late.

E. Carter, for Defendants, relied upon the last part of Sec. 59 of the 22 Vic. ch. 5, which he held to operate repeal of the 16 Vic. ch. 194, §21 as far as concerned this case.

Per Curiam.—The motion is rejected, with Costs.

Mackay and Austin, for Plaintiff.

E. Carter, for Defendant.

(R. M.)

MONTREAL, 30th JUNE, 1860.

Coram Monk, J.

No. 1475.

Barbeau vs. *Grant.*

Held.—1stly. That the prescription established by the article 127th of the *Coutume de Paris*, does not apply to seamen's wages.

2ndly. That the plea of prescription under that article is insufficient, if it does not contain an affirmation of payment.

The Plaintiff brought his action after the expiration of the year, for the recovery of wages due to him as master of a steamer plying between Montreal and Laprairie. The Defendant met this action by a plea of prescription of one year, under the 127th article of the *Coutume de Paris;* but this plea contained no averment of payment or tender of oath of payment, invoking the prescription as an absolute bar to the action.

The Plaintiff demurred to this plea, alleging, 1stly. That the article of the *Coutume de Paris*, did not apply to wages claimed by mariners and seamen 2ndly. That the prescription under that article was not an absolute bar, but merely a presumption of payment, which should be followed by an affirmation of payment and the tender of the oath of the Defendant; 3rdly. That the prescription of one year against seamen's wages was introduced into France, not by the article above cited of the *Coutume*, but by the *Ordonnance de la Marine* of 1681, which is not in force in this country; 4thly. That in Lower Canada, the only prescription which could be invoked against such demands is the prescription of six years, established by the 10th and 11th Vict., c. 11.

The cause was heard upon the demurrer before his Honour Mr. Justice Monk and was decided in favour of the Plaintiff.

Per Curiam. The Article of the Custom of Paris invoked by this plea, does not apply to the case of wages claimed by mariners and seamen, as persons of that class cannot be included under the denomination of *mercenaires*, used by the article. Even if it did apply, the plea of prescription is insufficient and bad, not being accompanied by an affirmation of payment. The prescription under that law is not an absolute bar to the action, but merely a simple pre-

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sumption of payment; and further the practice in the *Chatelet de Paris* was to refer in such a case to the oath of the Defendant. The plea of prescription is dismissed with costs and the demurrer maintained.

Demurrer maintained.

Edward Carter for Plaintiff.

Mackay & Austin for Defendant.

(E. C.)

N. B.—Authorities cited by the Plaintiff.

ON THE FIRST PROPOSITION: Guyot on Prescription, vol. 47, p. 10.

ON THE SECOND PROPOSITION: 2. Bourjon on the Art. 127th of the *Coutume de Paris*, p. 579; Auzanet on the art. 126 and 127 of the *Coutume*, p. 112, see note; *arrêt* of the 16th January, 1622, cited by Auzanet, p. 112; *arrêt* of the 12th July, 1672, reported in the *Journal du Palais*, vol. 1st., p. 259; Valin Nouveau Commentaire sur l'ordonnance de la Marine, p. 212; Ordonnance de la Marine, tit. 12, art. 2; Hogan et al, vs. Scott et al, 1 Jurist, p. 83; Babin vs. Caron, 2 Revue de Leg., p. 166; Scott vs. Stuart, 1 Lower Canada Rep., p. 167.

ON THE THIRD PROPOSITION: Valin, sur l'ordonnance de la Marine, new ed., p. 200.

ON THE FOURTH PROPOSITION: Strother vs. Torrance, 2 Jur. 163.

Authorities cited by the Defendant.

ON THE SECOND PROPOSITION: Ferrière, Grand Coutumier sur les art. 126 and 127 de la Coutume; Bourjon sur les art, 126 and 127 de la Coutume.

MONTREAL, 24TH NOVEMBER, 1855.

Coram DRISCOLL, A. J., PELLETIER, A. J.,

No. 72.

Whitney vs. *Brewster*.

Held that a Curator to the Estate of an absentee who contests and defends, is *personally* liable for the Costs of the Plaintiff's action.

In this cause, the Plaintiff, a creditor, by his suit, called upon the Defendant in his capacity of Curator to the Estate of W. W. Janes an absentee, to render to him as a creditor of the Estate, an account of his gestion, and concluded for costs against the defendant personally, if he contested.

The Defendant having contested, by the Judgment of the Court, was condemned to render an account, and also personally to pay the costs of the action.

Morris & Lambe, for Plaintiff.

Rose & Monk, for Defendant.

(A. M.)

MONTREAL, 20TH JUNE, 1860.

Coram BERTHELOT, A. J.

No. 1905.

Molson et al. vs. *Reuter et al.*

FORECLOSURE—PLEADINGS.

Held,—That the pleas fyled by a defendant half an hour after foreclosure from pleading entered by the prothonotary, will not be rejected on motion to that effect made by the plaintiff, though the latter support his motion by an affidavit that the defendant has no defence to his action, and that the pleas are sham pleas, and though the defendant do not resist the motion by counter affidavit to the effect that his pleas are *bonâ fide* fyled.

Motion dismissed.

E. Carter, for Plaintiffs.

John Monk, for Defendants.

(F. W. T.)

MONTREAL, 31ST DECEMBER, 1859.

Coram BERTHELOT, A. J.

No. 888.

Constable, et al. vs. *Gilbert et al & Simpson et al.* T. S.

Held,—That a Defendant has no interest in contesting the Declaration of a *Tiers Saisi*, on the ground that the goods of such *Tiers Saisi* are under seizure for the amount admitted by him in his declaration to be due to the Defendant, and that such a contestation will be dismissed on demurrer fyled by the *Tiers Saisi* himself.

This was a hearing on law, on the issue raised by the demurrer, fyled by George N. Albright one of the *Tiers Saisis*, to the contestation fyled by Defendant Charles S. Burroughs to the declaration of said George N. Albright as such *Tiers Saisis*. Albright by his declaration admitted he owed Burroughs a certain amount for which the latter had recovered a judgment against him. Burroughs contested this declaration, on the ground that before and at the time the attachment was served, Albright's goods were actually under seizure under an execution issued on said judgment. The *Tiers Saisi* demurred to the contestation on the ground that the Defendant had no interest in raising such a contestation, and that the same was wholly unfounded in law.

The Court maintained the demurrer, and dismissed the contestation, and assigned the following *motif*:—" Considerant que le dit defendeur est sans interêt à soulever la dite contestation et qu'elle est d'ailleur malfondée en droit, a debouté la dite contestation avec dépens."

Demurrer maintained and contestation of T. S. dismissed.

Cross & Bancroft, for Defendant Burroughs.

Abbott & Dorman, for Albright T. S.

(S. B.)

Mann, et al. vs. Lambe.

MONTREAL, 19TH SEPTEMBER, 1860.

Coram BERTHELOT, J.

No. 2116.

Mann, et al. v. *Lambe.*

FOREIGN PLAINTIFF—SECURITY FOR COSTS.

Held,—That a foreign plaintiff will be permitted to give security for costs by deposit of a sum of money.

The Plaintiffs who were resident in England impleaded the defendant in this Court.

The Defendant in due course moved the Court that the Plaintiffs should give security for costs, and that all proceedings should be stayed until such security was given.

Thereupon the Plaintiffs moved the Court, that in lieu of giving security, they should be allowed to deposit with the Prothonotary such sum of money as the Court might see fit to fix.

The motion of the Plaintiffs was granted, and a deposit of £50 currency ordered in lieu of such security.

Motion granted.

E. Barnard, for Plaintiffs.

Torrance & Morris, for defendant.

F. W. T.)

MONTREAL, 29TH SEPTEMBER, 1860.

Coram BADGLEY, J.

No. 728.

Boucher v. *Lemoine* et al.

ISSUE OF WRIT—INSTITUTION OF ACTION.

Held,—That the tender of principal and interest after issue of writ of summons though before service of writ is bad unaccompanied by the costs of an action before return.

The Defendants were served with the writ and declaration demanding a sum of money in this cause, according to the return of the Bailiff, on the 24th November, 1859, between the hour of four and six in the afternoon.

Two of the Defendants pleaded a tender of principal and interest but without costs made by another, the principal Defendants about half-past four the same day to the Plaintiff.

BADGLEY, J.—Held that the writ and declaration having already been prepared and issued the tender of the principal and interest without costs was insufficient.

Léon Doutre, for Plaintiff.

H. Stuart, for Defendants.

(F. W. T.)

SUPERIOR COURT.

MONTREAL, 30th JUNE, 1860.

Coram BERTHELOT, J.

No. 2261.

Ash et al., vs. Willett & Seymour et al., Opposants.

SALE OF MOVEABLES—INVALID—FAUTE DE DEPLACEMENT.

Held.—That to entitle opposants, who claimed as proprietors by purchase, to withdraw machinery from sale and execution, the same having been seized as belonging to the defendants, an actual *deplacement* and delivery must be proved, which not having been done, their pretensions could not be upheld.

The Plaintiffs in this cause had previously obtained a judgment against one Samuel T. Willett of Chambly, cloth manufacturer, defendant in an hypothecary action, whereby two certain lots or pieces of land, and premises and water power described in said judgment were declared to be liable and hypothecated for the payment of the sum of £1250 with interest thereon being the balance remaining due under and in virtue of the concession and sale of the said lots of land, and the defendant was adjudged and condemned as *detenteur* of the said lots and water power to pay the same, unless he should *delaisser* the lots within 15 days after service of the judgment upon him.

Not having done so, execution was, in due course of law, issued, and the two lots of land, premises and water power, and also a two story masonry store thereon erected, together with all the machinery, therein contained as it then stood, known as the Chambly Woollen Factory, was taken in execution. The defendant had previously signed a return of *nulla bona*.

The opposants by their opposition claimed that the said machinery should not be sold, but that by the judgment to be rendered in the cause, the opposants should be declared proprietors of the same and *main levée* thereof granted to them as such.

In support of this claim they alleged that a lease was made to them of the lots of land and building, passed before Papineau, N. P., on the 16th day of May, 1855, at Montreal, by the defendant and one George Rice Willett, then the proprietors, and that on the same day, by a notarial *acte*, the machinery seized, was sold to them, and of which they received possession.

The plaintiffs contested the opposition denying its allegations, and represented that they possessed a hypotheque on the said lots of land and that it covered and included the said machinery which they declared was not moveable but was attached to the realty *unis à l'immeuble* and formed part thereof according to the custom of the province.

They also represented that the sale of the machinery set up by the opposants was collusive, and null; that, moreover, on the very same day the pretended deed of sale was executed, the same machinery was hypothecated by the said defendants and said Willett to the opposants by a notarial *acte* of same date, of which a copy was produced, and which deed was afterwards registered on the 2nd day of July, A. D., 1855, whereby, by accepting thereof and re-

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gistering said deed, the opposants admitted the said machinery to be and treated it as immoveable property.

The plaintiffs also fyled a *defense en fait* to the opposition.

The parties proceeded to evidence on the contestation.

The opposants adduced testimony with the view to establish that the machinery was moveable, and that delivery thereof had been made to a clerk on their behalf who received the key of the premises and retained it during a part of one day.

The plaintiffs established their title, which, in so far as founded on the authentic documents filed, was admitted.

The plaintiffs proved that the premises, including the machinery, had always continued in the open possession of the defendant Willett and his brother George Rice Willett, from the year 1848 up to the year 1856, and thence hitherto in that of the defendant, and that, as well after the pretended sale as before it; that the business was carried on in the premises as before by the Willetts and by the defendant; that the premises were assessed in their and his name, and that at the time of the seizure the defendant was, according to public report, the proprietor and possessor of the factory, machinery and premises. It was established also that the opposants had never paid rent under the pretended lease.

After hearing, the judgment of the Court was rendered in the following terms:—

La Cour après avoir entendu les dits Dame Philo Letitia Ash et autres contestants et les opposants Melancton Hiram Seymour et autres sur le merite de la contestation par les dits Philo Letitia Ash et autres de l'opposition des dits opposants Melancton Hiram Seymour et autres examiné la procédure pièces produites et le témoignage et avoir sur le tout délibéré, considérant que les opposants n'ont pas prouvé suffisamment les alléguées de leur opposition, et de plus qu'il n'est prouvé qu'il y ait eu aucun déplacement réel et suffisant des meubles et choses mobilières par eux reclamés en leur opposition et qu'ils en aient eu aucunement la tradition pour leur en faire acquérir la possession et la propriété d'une manière suffisant et légale a debouté et deboute la dite opposition avec dépens distraits à Messieurs Torrance et Morris Avocats des dit Dame Philo Letitia Ash et autres contestants.

Torrance & Morris for Plaintiffs & Contestants.

Abbott & Dorman for Opposants.

(A. M.)

MONTREAL, 31st DECEMBER, 1859.

Coram MONK, A. J.

No. 1914.

Morson vs. *David*.

HELD—That a Notarial Obligation for a loan executed during the period that the 16th Vic., ch. 80 was in force, is subject to reduction in capital and interest, as regards any excess over and above the amount actually loaned.

This was an action to recover the sum of £1000 amount in capital of a No-

tarial Obligation executed by the defendant in favour of the plaintiff on the 28th of July, 1854, and interest thereon since the first of February 1859.

The defendant pleaded as follows:—"The said defendant for plea to the declaration and action of the said plaintiff saith that the allegation contained in the said declaration and in the obligation in the said declaration in part recited, to the effect, that the said defendant was and is indebted to the said plaintiff in the sum of £1000 currency for a like sum advanced and loaned by the plaintiff to the defendant, was, and is, erroneous and untrue, inasmuch as he the said defendant never did receive from the said plaintiff either before, at the time of, or since the execution of the said obligation, by way of such loan, any greater or larger amount than £910 currency. That the said obligation was so passed for the larger amount of £1000 currency to cover an usurious *bonus* or sum of £90 currency which the said plaintiff insisted that the said defendant should pay him over and above 6 per cent interest per annum on the said loan, as stipulated in the said deed.

That by reason of the premises and by law the said obligation was and is void in so far as the said amount of £90 currency and the interest thereon at 6 per cent per annum since the first day of August, 1854, are concerned; that the said plaintiff illegally exacted payment from the said defendant of the said interest last mentioned up to the first day of February last, namely of the sum of £24 6s currency, and that consequently the only amount for which the said defendant is legally liable to plaintiff is £885 14s. and interest thereon since the first day of February last, for which and for costs of suit the said defendant herewith tenders a confession of judgment.

Wherefore the said defendant prays *acte* of his confession aforesaid, and that the said declaration and action for any excess over and above the said amount of eight hundred and eighty-five pounds fourteen shillings currency and interest thereon since the first day of February last until actual payment and costs of suit be hence dismissed and that should plaintiff not accept the said confession that he be condemned to pay the costs of contestation.

Issue was joined generally and the facts pleaded were proved by the answers of the plaintiff to interrogatories *sur faits et articles.*

The following was the judgment of the Court,

"The Court * * considering that the said defendant hath established the matters and things contained in his plea or answer to the action and *demande* of the said plaintiff, it is adjudged that the plaintiff do recover from the said defendant the sum of eight hundred and eighty-five pounds fourteen shillings current money of the Province of Canada, as the sole amount due and owing by the said defendant upon the sum of one thousand pounds said currency, amount of the obligation made and consented by the said defendant to and in favor of the said plaintiff on the twenty-eighth day of July 1854 before Maître J. A. Labadie and his colleague Public Notaries, with interest upon the said sum of eight hundred and eighty-five pounds fourteen shillings from the first day of February 1859 until actual payment and costs of suit up to the production and fyling of the defendant's plea and tender and offer of confession of judgment of which costs *distraction* is granted to Messrs. Dorion, Dorion & Senecal the Attornies of the

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said plaintiff, and the Court doth dismiss the action and *demande* of the said plaintiff as to any other or greater amount and doth condemn the plaintiff to pay the costs of contestation."

Judgment according to Defendant's plea.

Dorion, Dorion & Sénécal for Plaintiff.

Bethune & Dunkin for Defendant.

(s. n.)

MONTREAL, 31st MAY, 1854.

Coram SMITH, J., MONDELET, (C.) J.

No. 2199.

Cumming vs. *Taylor.*

ACCOUNT—DEBATS DE COMPTE.

Held,—That in an action to account where the defendant pleaded that he had previously accounted, and fyled with his pleas copies of his accounts alleged to have been previously rendered, and the issues were so joined the plaintiff cannot fyle *débats de compte* until the said issues shall have been previously decided, and that the *débats de compte* fyled by the plaintiff, may be rejected by motion on the part of the defendant to that effect.

The action of the plaintiff was to obtain from the defendant an account of his gestion of the plaintiff's affairs, and investment of certain monies of the plaintiff by the defendant, as his agent and attorney, to wit, from the 17th January, 1845, to the 1st July, 1850.

The defendant pleaded to the action three pleas.

The first plea alleged in substance that the defendant from January, 1845, to the 1st July, 1850, did act as the friend and gratuitous agent of the plaintiff, and sold for the plaintiff bills of exchange on the Hudson's Bay Company, and made investments for and paid over interest on the same to the plaintiff, and in each and every year during said period, from 1845 to the 29th May, 1850, the defendant did exhibit and deliver to the plaintiff a statement and stated account in writing of the moneys aforesaid, and did fully account for the moneys so received by him as aforesaid, to wit; on the 28th day of January, 1846; on the 10th June, 1846; on the 2nd July, 1847; on the 30th May, 1848; and 29th May, 1850; that each and every of the said statements and stated accounts show and exhibit the real and exact balance, and were severally and respectively correct, just, and true; and the plaintiff admitted and approved thereof; all which the defendant was ready to verify, prove, and maintain, and the defendant averred that from the 29th May, 1850, when the said stated account was so furnished and delivered to the plaintiff as aforesaid, up to the 1st July, 1850, no transactions of any kind took place between the plaintiff and the defendant, &c., &c. Wherefore, &c.

And the defendant for further plea to the action and declaration of the plaintiff, did allege and say, that from the year 1845, to the 1st July, 1850, the defendant did at the special instance and request of the plaintiff, act as the friend and gratuitous agent of the plaintiff, and did during that period at the request of the plaintiff act as the friend and gratuitous agent of the plaintiff, and did during that period at the request of the plaintiff, put out and place at interest

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divers sums of money, for and on account of and to the use of the plaintiff, and did receive and take documents and vouchers for such monies on behalf of the plaintiff, and with his knowledge, consent, acquiescence, and approbation, and did from time to time well and truly and faithfully account to and with the plaintiff for all such moneys to his entire satisfaction, and did exhibit and deliver to him at divers times statements and stated accounts thereof.

That theretofore, to wit, on the 29th May, 1850, the defendant at the special request of the plaintiff, did deliver to the plaintiff a full and particular account stated in writing, embracing the whole period during which the defendant had so acted as the friend and gratuitous agent of the plaintiff.

That the said last mentioned account was true and just, and as such acquiesced in and approved of by the plaintiff.

That in and by the said last mentioned account a balance stood in favour of the defendant of the sum of £202 cy., which the plaintiff admitted and promised to pay when thereunto requested, all which the defendant was ready to verify.

And the defendant avers that from the said 29th May, 1850, when the said stated account was so furnished and delivered to the plaintiff, up to the 1st July, 1850, no transactions of any kind took place between the plaintiff and defendant, and no moneys or securities of any kind whatever were during the last mentioned period delivered to or received by the defendant, from or on behalf of the plaintiff. Wherefore &c.

The third plea was the general issue.

With his pleas the defendant fyled certain accounts, which purported to be copies of the accounts alleged by the defendant to have been rendered to the plaintiff.

The plaintiff answered these pleas generally.

After issue joined the plaintiff inscribed the cause for *enquête*, and on the 1st May, 1854, fyled certain *débats de compte* to the copies of accounts fyled by the defendant. The plaintiff then demanded answers from the defendant to his *débats de compte*.

The defendant then moved the court on the 17th May, 1854, that the *debats de compte* of the plaintiff might be rejected from the record for the following reasons:—

Firstly: because the accounts mentioned in the said *débats de compte* were not liable to be debated, inasmuch as they are and profess to be, only copies of accounts previously rendered by the defendant to the plaintiff.

Secondly: because the issues raised by the pleadings were confined to the question, whether or no an account had been rendered by the defendant to the plaintiff of the sums of money mentioned in the plaintiff's declaration previous to the institution of the action, and the accounts debated were only copies of the accounts which the defendant alleges he had so rendered, and are only fyled as exhibits to facilitate the proof that their originals were so rendered.

Thirdly: because the said plaintiff is not entitled by law to contest the said accounts, and because the said *débats de compte* are illegally and irregularly fyled.

Cummings, vs. Taylor.

The defendant at the time of presenting this motion asking for delay to answer the *débats de compte* until the motion was adjudged upon.

Per Curiam.—"The court having heard the parties by their counsel upon the motion of the defendant, that the paper writing fyled in this cause by the plaintiff, and styled *débats de compte*, be rejected from the record, having examined the proceedings and deliberated, considering that by the issues joined in this cause as set up by the exceptions of the defendant, no *débats de compte* can be now had until the said several issues shall have been previously decided, the court doth grant the motion of the said defendant the fyling of the said *débats de compte* being premature, and in consequence doth reject the said paper writing, styled *débats de compte* produced and fyled in this cause by the plaintiff, with costs."

Motion granted.

Rose & Monk for plaintiff.
Badgley & Abbott for defendant.
(F. W. T.)

MONTREAL, 31st OCTOBER, 1856.

Coram Smith, J., Mondelet, J., Chabot, J.

The same parties.

Held.—That where an agent has rendered accounts of his gestion and administration to his principal, and that such accounts have been duly received by the principal without any objection being made thereto, an action *en reddition de compte* will not lie.

The pleadings in this cause are stated above at pp. 304, 305 and 306.

After hearing on the merits the action was dismissed.

Smith, J.—The plaintiff alleged that the defendant as agent of plaintiff, had received large sums of money and should have invested the same and be held to account; the defendant pleaded that he had rendered accounts, that he did invest the monies, and that in 1850 he finally rendered an account showing a balance of £200 in his favour, and to which the plaintiff did not object. The only evidence was the admission by defendant in his plea and the acknowledgment by plaintiff on *faits* and *articles* that the accounts were regularly rendered, but that he did not receive them as final. The court held that this action could not go beyond the conclusions of an action *en reddition de compte* and that although defendant might have rendered himself liable to plaintiff in certain cases, and might still have monies in his hands, yet an account having been found to have been rendered, the action must be dismissed.

The judgment was recorded as follows:

"The Court having heard the parties by their Counsel upon the merits of this cause, having examined the proceedings, proof of record, and having deliberated, considering that the said plaintiff hath failed to establish the material allegations in his said action, and further considering that the said defendant hath rendered long before the institution of the present action, from time to time, accounts of the gestion and administration by the said defendant of the monies confided to him the said defendant by the said plaintiff, and that the

said accounts so rendered by the said defendant were duly received by the said plaintiff, without any objection whatever being made thereto, and were taken and received by him as an account of gestion and administration of the said defendant, of the sums of money placed by the said plaintiff in the hands of the said defendant, and considering that by reason of such accounting, no action can lie against the said defendant *en reddition de compte*, as now demanded in and by the said action, doth dismiss the said action with costs, reserving to the said plaintiff all other his recourse, if any he have, against the said defendant, touching or concerning such gestion and administration aforesaid."

Action dismissed.

Rose & Ritchie for Plaintiff.
Badgley & Abbott for Defendant.
(F. W. T.)

MONTREAL, 30TH AVRIL, 1860.

Coram BERTHELOT, J.

No. 847.

Senécal, vs. *Mill et al., et Taylor et al., Int.*

Jugé,—1o. Que le vendeur, sans jour ni terme, non payé, peut revendiquer sa marchandise entre les mains d'un tiers acquéreur.

2o. Que c'est au tiers acquéreur à prouver que la vente a été faite à terme, et qu'à défaut de cette preuve on doit présumer que la vente a été faite au comptant.

3o. Que le fait que le grain revendiqué a été mêlé avec d'autre grain de même espèce, n'est pas un obstacle à la revendication.

Dans le mois de Juillet 1859, le Demandeur vendit à Joseph Dansereau, l'un des défendeurs, 1401 minots d'avoine qu'il avait dans un hangard à Verchères. Dansereau assisté du commis des Intervenants, reçut l'avoine et la fit transporter immédiatement à bord d'une barge appartenant aux Intervenants et conduite par Mills l'autre défendeur. L'avoine fut mêlée avec d'autre qui avait été prise ailleurs.

Après la livraison, le Demandeur ne pouvant être payé, fit saisir-revendiquer la quantité d'avoine qu'il avait vendue à Dansereau, en vertu de l'article 176 de la Coutume de Paris.

Dansereau fit défaut.

Mills contesta l'action disant qu'il n'était que l'agent et l'employé des Intervenants; que l'avoine en question avait été mise à bord de son bateau par ces derniers; qu'il l'avait mêlée avec d'autre grain de même nature; qu'elle ne pouvait plus être identifiée et que la saisie Revendication ne pouvait être dirigée contre lui.

Même contestation de la part des Intervenants qui prétendirent de plus être propriétaires de cette avoine, l'ayant achetée avec d'autres quantités, de Dansereau et lui en avoir payé le prix dès avant la livraison, et que le Demandeur ayant laissé passer sa marchandise entre les mains d'un tiers acquéreur de bonne foi, à sa connaissance, avait perdu son privilège.

Whitney, vs. Burke.

Le Demandeur ayant lié contestation avec le défendeur Mills et les Intervenants et les faits ayant été prouvés à l'enquête, la cause fut inscrite au mérite.

Dorion, W. pour le Demandeur émit comme propositions légales: 1o. Que l'on devait présumer la vente faite sans jour ni terme lorsqu'il n'y avait pas de preuve du contraire. (1) 2o. Que sous l'opération de l'article 176 de la coutume de Paris, la revendication pouvait être faite même entre les mains de tiers acquéreurs de bonne foi; que le vendeur non payé peut suivre sa chose en quelques mains qu'elle se trouve, parcequ'il n'en a jamais perdu la propriété. (2) 3o. Que le mélange du grain avec d'autre grain de même espèce et nature ne pouvait faire perdre au vendeur son droit de revendication; qu'il suffisait d'identifier l'avoine qu'il revendiquait, comme quantité et non grain par grain. (3)

Robertson, A. pour le défendeur Mills et les Intervenants, combattit les propositions qui précèdent et s'appuya particulièrement sur le défaut de preuve du Demandeur, et sur ce que la saisie Revendication ayant été faite lorsque l'avoine était en la possession des Intervenants, ces derniers devaient en être présumés propriétaires.

Jugement maintenant la saisie revendication, et déboutant l'Intervention.

Dorion, Dorion et Senécal, pour le Demandeur.

W. W. Robertson, pour le Défendeur Mills.

A. Robertson, pour les Intervenants.

(V. P. W. D.)

MONTREAL, 28th JUNE, 1854.

Coram SMITH, J., MONDELET, J.

No. 2286.

Whitney v. Burke.

HELD.—That in a declaration on a promissory note the words "for value received," need not be expressed but that the fact of the giving of such value is a matter for proof.

An action was instituted in this cause to recover the amount of a promissory note for the sum of £154 17s. The declaration alleged the making of the note, and its delivery for value received to the Plaintiff, but did not allege that the note itself was made for value received. The defendant demurred to the declaration on the grounds that it did not allege that the note was made "for value received," that it appeared from the declaration that the note was made without value and that it was a *nudum pactum.*

At the argument, Lambe for Plaintiff, contended that the words "for value received," needed not to be expressed or alleged, but that the fact whether value was so received or not was a matter for proof. He quoted Smith on contracts §.100 Chitty on bills p. 691, 61. Byles p. 100 and page 306 note.

After hearing the demurrer was dismissed.

Montizambert & Morris for Plaintiff.

T. Nye for Defendant.

(A.M.)

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(1) Pothier, Vente, No. 324.

(2) Ferrière, G. C., Tome 2, p. 1319 et 1320, No. 1 et suiv., p. 1323 et 1324, No. 13. Bourjon, tome 1, p. 145, tome 2, p. 695, sec. IV, No. 21.

(3) Pardessus, tome 4, p. 507 et 543.

MONTREAL, 30TH APRIL, 1860.

Coram BADGLEY, J.

No. 1459.

Wheeler et al. vs. *Burkitt* et al.

Held,—That where a female defendant is described in the writ of Summons as duly separated as to property from her husband, and said defendant pleads to the action among other things that she was not separated from her husband as to property, such allegation will not be struck out on the motion of the plaintiff on the ground that such allegation is matter of an exception à *la forme*.

This was an action brought to recover the sum of $1390 7/100 alleged to be due by the female Defendant to the female Plaintiff; the female defendant being described in the Plaintiff's declaration *as duly separated as to property from her husband George F. Reiniger.*

To this action the female Defendant among other things pleaded that "*she was not separated as to property from her husband.*"

After the fyling of the Defendant's pleas, but before issue was joined, the Plaintiff moved that so much of her pleas as denied the separation of property should be rejected therefrom, inasmuch as that allegation brought in question the description of the parties, and should have been the subject matter of an *exception à la forme.*

This motion was rejected; the Court considering that the separation was an allegation of fact, which the Plaintiff would have been bound to prove under the general issue; and that assuming the allegation to be true, it could not have been met by an *exception à la forme.*

T. S. Judah, for Plaintiff. Motion rejected.

John Monk, for Defendants.

(J. M.)

MONTREAL, 29TH SEPTEMBER, 1860.

Coram MONK, J.

THE SAME CAUSE.

HELD,—That where a plaintiff alleges that a female defendant is separated from her husband as to property, he is bound to prove it either by an ante nuptial contract or judicial sentence.

The pleadings in this cause appear above. Issue having been joined, and the cause having been duly inscribed for the adduction of evidence and final hearing on the merits, the Plaintiff produced two notarial deeds executed by the female defendant, in which she acknowledged that she was duly separated as to property from her husband, and also her answers to interrogatories *sur faits et articles* wherein she admitted that she had signed the deeds in question at the request of her husband.

T. S. Judah, for Plaintiff thereupon contended that the separation had been duly established.

Monk for defendant argued that there could be but one of two modes by which a *separation de biens* could be proved; viz. an *ante nuptial contract* or a judicial sentence. The allegations in the deeds could not make evidence in favor of the Defendant, and should not consequently operate against her.

The court took the same view as the Defendant's Counsel, and dismissed the action.

The judgment was recorded in the following terms:

"The Court considering that it is not proved that the defendant Sarah Ann Burkitt was at the time of the institution of this action or at any previous time

Paquet, vs. Miclette.

thereto separated as to property from the said George Frederick Reiniger, her husband, doth dismiss this action with costs."

T. S. Judah, for Plaintiff. Action dismissed.

John Monk, for Defendant.

(J. M.)

MONTREAL, 29 SEPTEMBRE, 1860.

Coram BADGLEY, J.

No. 1035.

Paquet et *uxor* vs. *Miclette.*

FRANC ET QUITTE.

Jugé,—Que celui qui vend avec la *clause de franc et quitte*, obtiendra jugement, avec dépens, contre l'acheteur qui aura plaidé et prouvé l'existence d'une hypothèque, pourvu qu'en déduisant du prix de vente le paiement réclamé par l'action, il reste une somme suffisante, entre les mains de l'acheteur, pour le garantir.

Action *ex vendito*, pour la somme de cent quinze livres, cours actuel, avec intérêt, étant un terme échu du prix de vente stipulé en l'*acte* de vente du vingt-trois juillet mil huit cent cinquante-huit : outre les garanties ordinaires, cet *acte* portait la clause de *franc et quitte* ; l'acheteur avait payé une somme de deux cent cinquante livres, pour le premier terme, échu le premier novembre, mil huit cent cinquante-huit.

Le Défendeur contesta l'action par une *exemption péremptoire*, et allégua que, par *acte* du vingt février, mil huit cent cinquante-cinq, Sophie Gadbois avait vendu l'immeuble en question aux Demandeurs, et avait encore, sur cet immeuble, une hypothèque de *bailleur de fonds*, dûment enregistrée, pour une balance de trois cent soixante et deux livres, cinq deniers et demi, avec intérêt ; que le Défendeur était menacé d'éviction ; que la clause de *franc et quitte* stipulée en sa faveur était illusoire, et ne lui offrait aucune garantie ; que partant il était recevable à demander que l'*acte* de vente du vingt-trois juillet, mil huit cent cinquante-huit, fût rescindé et annulé, que la somme de deux cent cinquante livres, par lui payée aux Demandeurs, lui fut restituée par ces derniers, et que l'action des Demandeurs fut déboutée avec dépens ; et subsidiairement à ce que, par le jugement à intervenir, il ne fût tenu payer la somme réclamée par les Demandeurs qu'en par ces derniers fournissant bon et valable cautionnement qu'il ne serait point troublé au regard de la dite hypothèque de *bailleur de fonds* avec dépens de la contestation contre les Demandeurs.

Les Demandeurs, dans une *Réponse*, opposèrent à ces moyens une quittance par Sophie Gadbois du quinze mars, mil huit cent cinquante-huit, réduisant son hypothèque de *bailleur de fonds* à la somme de quatrevingt trois livres, six chelins et huit deniers, avec intérêt ; mais ils n'avaient fait enrégistrer cette quittance qu'après la production du plaidoyer du Défendeur.

Les Demandeurs, à l'audition de la cause, prétendirent que le Défendeur n'était pas fondé en droit à demander la rescision de l'*acte* de vente, en conséquence de la violation de la clause de *franc et quitte* ; que d'ailleurs, comme, après avoir payé le montant de l'action, il lui resterait encore en mains une somme plus que suffisante, pour le garantir contre la réclamation de Sophie Gadbois, il n'avait pas d'intérêt à plaider comme il l'avait fait, et que jugement devait être prononcé contre lui.

Le Défendeur, à l'appui de ses conclusions, tendant à la rescision de l'*acte* de vente, cita :—

Rép. de Guyot, Vo. *Franc et quitte.*
Nouv. Dénisart, " "
Rép. de Merlin, " "

où il est établi que, dans l'espèce, l'acheteur est recevable à demander l'annullation de la vente.

Lorsque le vendeur a stipulé la clause de *franc et quitte*, sachant qu'il existait des hypothèques sur l'immeuble, il est constitué en mauvaise foi, et est censé avoir agi frauduleusement, quelque soit le montant de l'hypothèque, en sorte qu'il n'est pas recevable a poursuivre, devant le Tribunal, l'exécution des clauses de l'*acte* de vente, tant qu'il n'a pas fait disparaître la cause du trouble, et son action doit être renvoyée provisoirement: que s'il obtient jugement, il doit toujours être condamné aux dépens, comme peine de son dol et de sa mauvaise foi.

Le Défendeur n'était pas tenu en loi d'attendre l'échéance du dernier terme de paiement, pour plaider le trouble résultant de la dite hypothèque, et dès que ses vendeurs lui intentaient une action il pouvait y opposer leur mauvaise foi.

Il maintint enfin que comme la quittance produite, avec les *réponses* des Demandeurs, n'avait été enregistrée qu'après la production de son plaidoyer, et comme par conséquent il en ignorait alors l'existence, il devait à tout événement obtenir les frais de sa contestation. Jugement :—

" The Court having heard the parties by their counsel upon the merits of " this cause, examined the proceedings and evidence of record, and having " deliberated thereon, &c.; And considering that the Defendant cannot be sub- " jected to any present trouble by reason of the said existing mortgage in the " pleadings mentioned, inasmuch as he will retain in his hands, not including " the sum demanded in this cause, a portion of his purchase money exceeding " the sum of £83 6s. 8d., remaining charged on the said land, as mentioned " in the pleadings in this cause &c., doth condemn the Defendant to pay to the " Plaintiff, the sum of &c., and costs of suit."

Jugement pour le Demandeur.

Jodoin et Falkner, pour les Demandeurs.
Roy et Bruneau, pour le Défendeur.
(R. R.)

MONTREAL, 30TH APRIL, 1860.

Coram MONK, J.

No. 1392.

Sims et al. vs. *Evans* et divers opposants.

Held,—That dower stipulated in a marriage contract to be "such as is established by the laws of Lower Canada" is legal and customary dower and not *douaire préfix*.

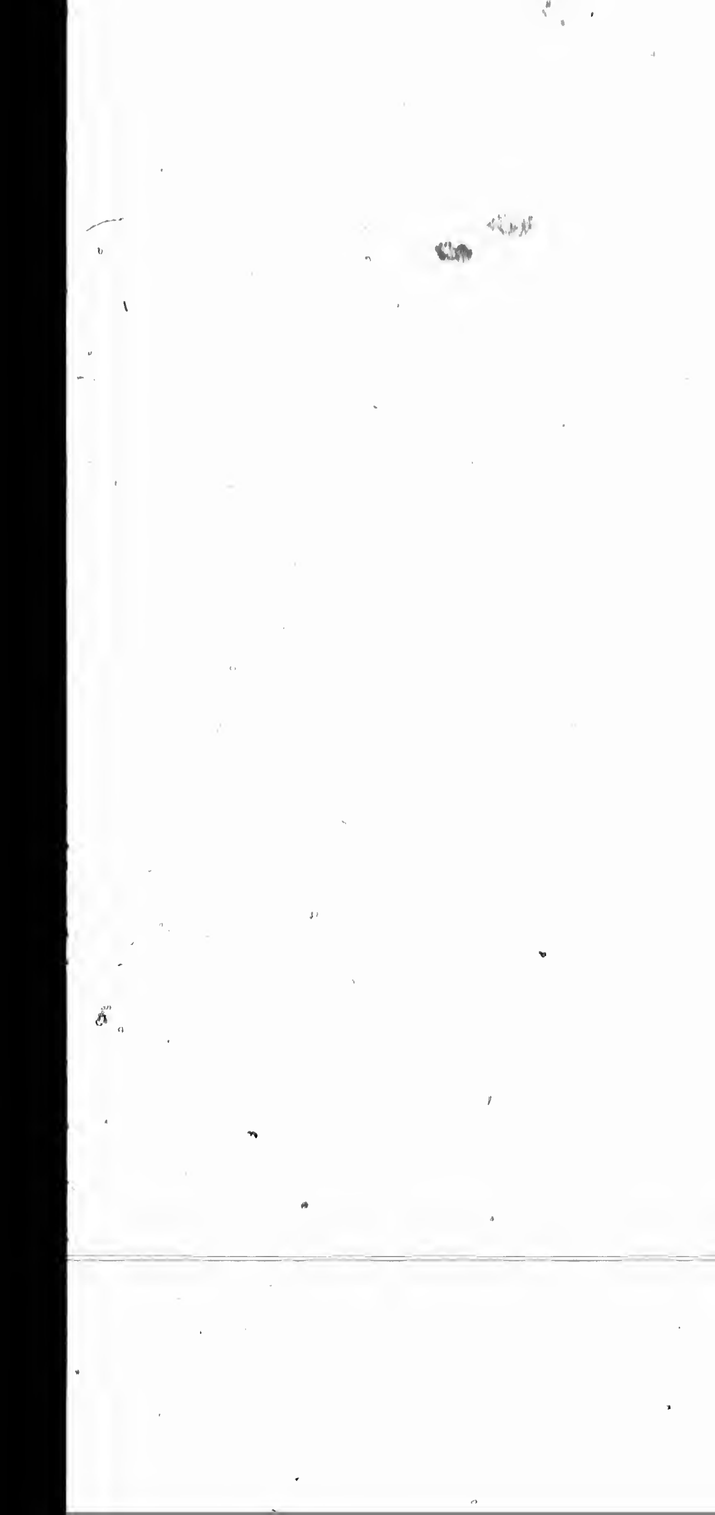
That registration of such mariage contract is not necessary to preserve the hypothecary rights of the widow and children upon real estate subject to such dower.

Quære. Is registration of "hypothecary rights," not evidenced by some written document, possible under the provisions of the registry ordinance?

The Sheriff returned the Writ of Fieri Facias de terris issued in this cause with the proceeds of the sale of the real estate of the Defendant.

The Opposant, Dame Selina Wood, widow of the Defendant, acting as well personally as in her capacity of tutrix to a minor child, issue of her marriage with the Defendant, by her opposition *à fin de conserver*, claimed one-fourth of the amount of the moneys returned.

The opposition contains the following allegations: That a contract of marriage



Stilts et al vs. Evans et al.

was passed between her and the Defendant her husband, on the 17th February 1844, at Montreal, by which exclusion of community is stipulated and it is declared "that the dower to which the said Selina Wood should be entitled "should be such as is established by the laws of Lower Canada" but that she should only be entitled to it in case there should be issue of the marriage, out of which case she renounced to all dower: marriage of the parties, 19th February 1844: birth of the minor child who still survives; that the land seized was owned and possessed by the Defendant prior to the said marriage and thereafter to the time of his death: death of the Defendant 1st February 1857; appointment of the widow as tutrix to the minor; renunciation by her on behalf of the minor; that the dower *douaire coutumier* to which the opposant, Mrs. Evans, is entitled in respect of land seized is the usufruct of one-fourth thereof (the marriage being a third marriage and the children of the first marriage not being entitled to dower) and the *douaire coutumier* of the minor child is the said one fourth part *en propriété* and that the said opposant has a right to be collocated for one-fourth of the proceeds of the sale of the land subject to dower.

The Opposant Berthelet, based his opposition upon a notarial obligation made by the Defendant in his favor, 24th March 1846, registered 27th of the same month, hypothecating the land in question.

By the report of distribution, the Opposant, Berthelet, was collocated to the exclusion of the opposant Mrs. Evans. The latter contested Berthelet's collocation, alleging that she ought to have been collocated in preference to him for her dower. That by virtue of her marriage with the Defendant and by law the land and premises seized and sold became and were legally liable to dower, *douaire coutumier*, in favor of the said opposant and of her minor child. That the said dower was the legal and customary dower and is created by law as a right of property and not by the contract of marriage and was not a claim liable to registration.

The Opposant Berthelet, answered this contestation, setting forth the following legal pretensions: 1st. That the dower claimed by Mrs. Evans is not the legal and customary dower but is the dower stipulated in her favor by her contract of marriage. 2. No designation in the marriage contract of real property and consequently no right of hypothec acquired upon the property seized and that the same was not affected by said dower. 3. That Mrs. Evans cannot contest the report of distribution her marriage contract never having been registered and the *titre de créance* of the Opposant Berthelet having been duly registered. 4. That the marriage contract is null as regards him for want of registration.

The fact that the contract of marriage never was registered being admitted, it will be seen that the issue between the parties was simply an issue of law.

Ritchie, for the Opposant Mrs. Evans. The legal points in this case may be stated under two questions. 1. Is the dower claimable by Mrs. Evans the *douaire légal et coutumier* created by law or is it *douaire préfix* in virtue of her marriage contract? 2. If the dower be the *douaire légal et coutumier*, was any registration required to preserve the rights of Mrs. Evans and of her minor child? The first question is important, for if answered in the negative, there is

an end to the claim of Mrs. Evans. It will be observed that by the contract of marriage there is no exclusion of dower and no renunciation thereto, except in the case of there being no issue of the marriage. Renunciation of dower must be express. "La renonciation tacite n'est jamais présumée en cette matière." (Guyot's Rep. Vo. *Douaire*, p. 284 and 285. Pothier, *Douaire*, p. 2.) Where the contract of marriage is silent as to dower, it still exists, and that even where a large donation is made, in the marriage contract, by the husband to the wife and which might be presumed to be intended to take the place of dower. (Guyot Vo. *Douaire*, p. 283.) Upon referring, however, to the definitions given by the various legal writers to *douaire préfix*, it will appear that the dower in question is undoubtedly *douaire coutumier* notwithstanding it is referred to in the contract of marriage. "Douaire préfix est celui que les parties *substituent* par leur contrat de mariage au douaire coutumier." (Merlin's Rep. Vo. *Douaire*.) "Le douaire est appelé *préfix*, lorsqu'il est constitué par le contrat de mariage *différemment du coutumier*." (Renusson, *Douaire*, p. 38.) "Le douaire préfix ou conventionnel *vient de l'accord et convention des contractans* dans leur contract de mariage, *et qui est réglé autrement que le douaire ne l'est par la coutume*." (Ferrière sur Paris, Tit. XII., Art. 247, No. 7, p. 659, Grande Coutume. Pigeau, Proc. Civ. p. 258 and 259.) In the present case the parties established no dower but merely stipulated that the dower should be the legal and customary dower such as is established by law. While the dower thus referred to does not conform to the definitions given of *douaire préfix* it is easy to establish, by authority, that it is really *douaire coutumier*. Ferrière in his commentaries upon the *Coutume de Paris* (Art. 247, p. 671, No. 1, Grand Cout.) says that there is no *necessity* for a stipulation in the contract of marriage that the wife shall have *douaire coutumier*: a clear intimation that if it be so expressed, the dower is not *préfix* but remains *coutumier*. "Ce droit (le douaire) est acquis, *nonobstant le défaut de mention d'icelui par le contrat de mariage*, c'est-à-dire indépendamment de toute convention, pourvu qu'il n'y en ait pas de contraire: le douaire étant un droit légal." (Bourjon, Tit. XII, cap. 2, sec. 2.) Pigeau, (Vol. 2, p. 258) defines the *douaire coutumier* to be that which the law gives when there is no contract "*ou lorsque dans le* "*cas ou il y en a un, il* ne contient pas de fixation de douaire."

"Le douaire coutumier est un droit purement légal *qui prend sa source* dans la loi. Nouv. Denisart Vo. Douaire § III, p. 183. "*Quand le douaire* "*stipulé par contrat de mariage est conforme au douaire coutumier*, IL EST "COUTUMIER et *non préfix* puisque sans la convention il serait dû à la femme. "Cette stipulation n'est pourtant pas inutile, vu que l'hypothèque du douaire "sans convention et en vertu seulement de la disposition de la coutume n'est "que du jour de la célébration du mariage et l'hypothèque du douaire stipulé "est du jour du contrat." Ferrière, Grand Cout. Art. 247, No. 7, p. 659; See also Lemaître, Cout. de Paris, p. 278, bottom of page and p. 296 top of page. See also 5 Merlin's Rep. Vo. Gains Nuptiaux §VII reporting a case where *douaire coutumier* was stipulated in a *contrat de mariage*.

The question whether *douaire coutumier* created since the 31st December 1841 is subject to registration is not distinctly raised in the present contestation,

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but it may be incidentally referred to. The 1st section of the Registry Ordinance (4 Vic., cap. 30) provides that certain Deeds, &c., passed, &c., since 31st December may be registered, "and that every such deed, &c., *privileged and* "*hypothecary right and claim and incumbrance* shall be inoperative, &c., "against any subsequent purchaser, grantee, mortgage, hypothecary creditor, "&c., *unless such memorial thereof as by this ordinance is prescribed* shall have "been registered, &c." Now, the right to *douaire coutumier* is not such a privileged and hypothecary right claim or incumbrance. It is created solely by the law, in which it has its source and is independent of any convention of parties. The registry ordinance did not contemplate the registration of a right to customary dower. The right to *douaire coutumier* is not a *simple créance* which confers upon the wife and children a mere *hypothèque* upon property of the husband, but it is a *droit foncier* and forms an essential part of the *propriété* of the *fonds*. The wife becomes by the force of the law from the date of the marriage *propriétaire partielle* of the property affected by dower, and at the death of her husband she becomes seized *de plein droit* of her share in the property liable to dower. Particular attention is directed to the argument of M Merlin (5 Repertoire Vo. *Gains Nuptiaux*, §7) and to the arrêt of the Cour de Cassation adopting his views. The case there reported is almost exactly parallel to the present contestation and the principles so ably elucidated by M. Merlin are applicable in every respect to the questions which present themselves in this case. See also Merlin's Rep. Vo. *Douaire* §VIII.

The *contestante* might, if need be, go further and maintain that even if *douaire coutumier* be held to be an "hypothecary right," and that its registration is contemplated by the Registry Ordinance, the law in this respect must be held to be inoperative and no such right can be lost or prejudiced by want of registration, for the reason that the law prescribes no mode of registering such rights. To establish this proposition it is only necessary to look closely at the 1st, 10th, and 11th sections of the ordinance which are the only sections referring to the registration of such claims created since the 31st December 1841. The first section provides that every hypothecary right of which such a memorial as *is prescribed* by the ordinance shall not have been registered previous to registration by a subsequent hypothecary creditor shall be inoperative as regards such creditor. The tenth section points out how various memorials are to be made and what particulars they are to contain. Among these are memorials of "hypothecary rights and claims," which are required to express amongst other things the names of the *creditors* and *debtors*, the *amount of the debt*, a description of the lands, &c., the nature and date of the written security or document conferring or affording evidence of such hypothec. Nothing is said respecting a memorial of a claim for customary dower and it is evident that the 10th section cannot refer to a claim in respect of which there are properly speaking neither debtors nor creditors, no debt, and which is not conferred by any written document. This will appear still more clearly by referring to the terms of the 11th section. Memorials of hypothecary rights are here certainly spoken of, but when we see that it is declared that such right *shall be produced* to the registrar and *that upon it he shall write a certificate of the registration*

of the memorial, we must either come to the conclusion that the maxim "*lex neminem cogit ad impossibilia*," must be applied and the provisions of the ordinance, in so far as the registration of rights existing by mere operation of law is concerned, held to be inoperative or that only such rights as are conferred by some "*document*" are intended to be comprehended in the first section as may perhaps be inferred from the 11th section.

Belle pour l'Opposant Berthelet. 1o. Mme. Wood, ès qualité, réclamait un *douaire coutumier* en vertu de *son contrat de mariage* qui n'avait pas été enrégistré. Si le douaire en question ne devait son existence qu'à la loi, sans aucune stipulation, il est clair que l'enrégistrement de ce *douaire coutumier* ne pouvait se faire; mais ce douaire devant son existence à la stipulation contenue dans le contrat de mariage ne pouvait avoir de force et d'effet que par l'enrégistrement, et se trouvait nul à l'égard de tout possesseur d'hypothèque enrégistrée. En effet, l'Ordonnance 4 Vict. chap. 30, sec. 1, mentionne comme devant être enrégistrés, "tous droits et réclamations privilégiées et hypothécaires, et charges, "quelle que soit leur origine, et qu'ils *soient produits par la simple opération de* "*la loi* ou autrement, qui seront consentis, faits, acquis, ou obtenus,........ "à raison ou au moyen desquels des terres, tènements ou héritages, propriétés "réelles ou immobilières dans cette Province seront ou pourront *être aliénées*, "transportées, léguées, hypothéquées, obligées, &c., d'aucune façon ou ma-"nière." Or, en supposant que le *douaire coutumier* reclamé par Mme. Wood, en vertu de son contrat de mariage, fût un *douaire coutumier* ordinaire qui n'avait pas besoin de stipulation pour exister, ce douaire néanmoins, par cela même qu'il était accordé par un contrat de mariage, devait être enrégistré. S'il n'y avait eu aucune stipulation, cette dame pouvait se défendre en disant, *ad impossibile nemo tenetur*. Mais, ici, l'enrégistrement étant possible, la section de l'ordonnance précitée était applicable.

2o. Madame Wood réclamant un douaire en vertu de son contrat de mariage, ce contrat était son titre réel, le seul qu'elle pouvait invoquer. Or ce titre, étant sujet aux dispositions précitées de l'ordonnance, devait contenir une description de toutes les propriétés sur lesquelles le douaire devait se prendre. L'ordonnance, mettant de côté toutes affectations générales de propriétés immobilières, excepté dans certains cas prévus, il fallait une description correcte et spéciale chaque fois que la règle générale était applicable comme dans le cas actuel. Les créanciers ont non-seulement, d'après l'ordonnance, le droit de savoir que les biens de leurs débiteurs sont aliénés ou hypothéqués, mais ils ont encore le droit de savoir quels biens leurs débiteurs ont aliéné ou hypothêqué, quelle partie de leurs biens ils ont ainsi aliéné et quel est le montant des hypothêques qu'ils ont consenties.

The judgment was recorded as follows:

"The Court, &c., considering that the dower mentioned in the contract of marriage between the said opposant, Selina Wood, and her late husband, William Evans, dated the 17th February, 1844, was and is the legal and customary dower known as such to the laws of that part of this Province heretofore known as the Province of Lower Canada, and as such customary and legal dower not requiring enregistration for any purpose of law;—and seeing that the said Selina Wood, as

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well in her own name as in her capacity of tutrix to Fredrick William Evans, minor, issue of her marriage with the said late William Evans is by law entitled to be collocated for the said dower before and in preference to the said opposants Berthelet and Elliott;—doth order that the said order or draft of distribution be revised and reformed, and the said opposant, Selina Wood, in her said name and capacity collocated before and in preference to the said opposants, Olivier Berthelet and Andrew Elliott, for the sum of £230 3s. 1d., being the one fourth part of the amount levied of the land belonging to the said late William Evans sold in this cause, less the amount allowed to the *adjudicataire* for deficiency in the said land and as the amount of the said customary dower claimable thereon as stipulated in favour of the said opposant, Selina Wood, and her minor child, by the said contract of marriage hereinbefore mentioned, with costs."

Contestation maintained.

Ross & Ritchie, for opposant Wood.
Belle, for opposant Berthelet.
(T. W. R.)
(J. A. A. D.)

MONTREAL, 23 DECEMBRE, 1858.

Coram C. MONDELET, J.

No. 847.

EX-PARTE SUR APPLICATION DE

ROBERT ET AL.,

Pour Writ de Certiorari.

ET

VIGER ET AL.,

Commissaires pour l'érection civile des paroisses, etc.

ET

JOSEPH ALLARD ET AL.,

Syndics.

Jugé : 1o. Que tels commissaires n'avaient aucun droit sous l'opération de l'Ordonnance Provinciale, 2 Vict. chap. 29, et des lois qui l'ont précédée et suivie ; de déléguer à l'un d'eux, leur pouvoir à l'effet de procéder à l'enquête qui a eu lieu dans l'espèce actuelle ;
2o. Que cette délégation est un excès de juridiction ;
3o. Que tous les procédés qui ont eu lieu en conséquence de cette délégation peuvent être mis de côté au moyen du Writ de Certiorari.

L'affidavit produit en cette cause de la part des Requérants pour obtenir un Writ de Certiorari à l'effet de faire annuller tous les procédés des commissaires pour l'érection civile des paroisses, etc., expose complètement toutes les phases de la procédure qui avait été faite par les commissaires. Cet affidavit est comme suit :

Louis Boudrias, cultivateur, de la paroisse de St. Michel de Lachine, dans le district de Montréal, après serment duement prêté sur les Saints Evangiles, dépose et dit :

Qu'après les procédés ecclésiastiques voulus en pareil cas, sur requête de certains habitants, cultivateurs de la paroisse de St. Michel de Lachine susdite, de-

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mandant à Sa Grandeur l'Evêque Catholique de Montréal son décrêt pour la construction d'une Eglise, sacristie, presbytère et cimetière dans la dite paroisse, et après l'émanation du décrêt canonique de Sa Grandeur le dit Evêque, certains individus se disant propriétaires intéressés dans la construction d'une Eglise, sacristie, presbytère et cimetière, dans la dite paroisse, auraient le dixième jour d'août, mil huit cent cinquante-quatre, présenté une requête aux commissaires nommés, en vertu des diverses ordonnances concernant l'érection civile des paroisses, pour le diocèse Catholique Romain de Montréal, demandant l'autorisation de procéder à l'élection de syndics pour surveiller la construction d'une Eglise, sacristie, presbytère et cimetière dans la dite paroisse—les signataires se disant former la majorité des habitants Français-Canadiens, de la dite paroisse.

Que la dite requête comportait cent trente-huit signatures ou noms d'individus que la dite requête alléguait être requérants habitants francs-tenanciers catholiques de la dite paroisse.

Que sur telle requête il émana une ordonnance, le quatorze septembre mil huit cent cinquante-quatre, de Jacques Viger, écuyer, Joseph U. Beaudry, Théod Doucet, Alfred Pinsonneault et Joseph Belle, commissaires nommés pour le diocèse Catholique Romain de Montréal autorisant l'élection de syndics pour surveiller la construction de la dite Eglise, sacristie, presbytère et cimetière en exécution du dit décrêt.

Que sur un certificat de Messire A. Duranseau, certifiant qu'une assemblée pour l'élection des syndics avait été duement faite et convoquée, Joseph Allard, Louis Barré, Jean-Baptiste Quesnel, André Legault, Nicolas Martin, François Paré, présentèrent une requête le trois octobre, mil huit cent cinquante-quatre, aux dits commissaires pour confirmation de leur prétendue élection faite (suivant les alléguées de leur dite requête,) le vingt-quatre septembre mil huit cent cinquante-quatre, à laquelle assemblée ils alléguaient avoir été élus avec un nommé Henri Pigeon.

Que le neuf octobre, mil huit cent cinquante-quatre, sur la dite requête en dernier lieu mentionnée, émana une ordonnance des dits commissaires donnant avis aux intéressés que le dit acte d'élection ainsi que la dite requête des dits syndics serait prise en considération par les dits commissaires le vingtième jour du même mois d'octobre, à onze heures du matin, en l'étude de E. Guy, alors leur secrétaire à Montréal, auxquels jour et heure tous opposants, si aucun il y avait, seraient entendus.

Que le dit jour, vingt octobre mil huit cent cinquante-quatre, par R. et G. Laflamme, écuyers, avocats, comparurent devant les dits commissaires, un certain nombre d'individus dont les noms sont donnés, tous propriétaires francs-tenanciers catholiques de et dans la paroisse de St. Michel de Lachine, dans le district de Montréal, et déclarèrent s'opposer à l'homologation du dit acte d'élection et lesquels produisirent, le six novembre de la dite année, des moyens d'opposition par lesquels ils alléguaient entre autres moyens :

1° Que la requête du dix août mil huit cent cinquante-quatre, faite aux dits commissaires pour l'élection des dits syndics contenait des noms supposés.

2° Que l'élection des syndics était nulle.

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3° Que lors de l'election des dits syndics, la majorité des habitants catholiques francs-tenanciers propriétaires protestèrent contre telle élection, déclarant là et alors qu'ils refusaient de procéder à telle élection et demandant que leurs protestations fussent consignées au procès-verbal de telle élection; que leur demande fut refusée et que le président refusa de mettre aux voix une demande ou proposition comportant telle déclaration.

4° Que quelques-uns des assistants firent choix des nommé Joseph Allard, Louis Barré, Jean-Baptiste Quesnel, André Legault, Nicolas Martin, François Paré, et Henri Pigeon.

Que cette élection prétendue était nulle, pour entre autres raisons, les suivantes:

1° Parceque la construction d'une nouvelle Eglise, sacristie, presbytère et cimetière dans la dite paroisse était inutile et ruineuse pour les contribuables.

2° Parceque telle demande n'avait pas été régulièrement et légalement faite aux autorités ecclésiastiques ou civiles.

3° Parceque telle demande n'avaient pas été faite par la majorité des habitants francs-tenanciers intéressés.

4° Parceque le site de l'Eglise ayant déjà été fixé, on ne pouvait le déplacer sans nécessité évidente et absolue ce qui n'était pas allégué.

5° Parceque plusieurs des noms contenus dans les deux requêtes savoir: celle présentée à l'Evêque pour obtenir son décret canonique et celle présentée aux dits commissaires n'avaient jamais été donnés, que parmi les francs-tenanciers propriétaires dont les noms se trouvaient apposés aux dites requêtes, plusieurs, et nommément les opposants, n'auraient jamais autorisé l'apposition de leurs noms, que les noms de plusieurs autres se trouvaient là par erreur sans consentement ou surpris par de faux prétextes.

6° Parceque plusieurs des requérants étaient protestants, non propriétaires, mineurs, ou absents, savoir : non propriétaires francs-tenanciers résidants (A.B. etc).

7° Parceque les suivants n'avaient jamais apposé ou autorisé l'apposition de leurs noms sur la dite requête : (C. D., etc.).

8° Parceque ceux des requérans qui avaient véritablement droit de demander qui avaient demandé la construction ne composaient qu'une faible minorité.

Les opposants ci-dessus nommés invoquaient en outre à l'encontre de l'acte prétendu d'élection de syndics plusieurs moyens de nullité alléguant :

1° Que tous les procédés de la dite assemblée ont été irréguliers et illégaux.

2° Que la dite élection ne s'est pas faite à la pluralité des voix de francs-tenanciers propriétaires de la dite paroisse présents.

3° Parceque les votes de plusieurs individus non propriétaires et non francs-tenanciers y ont été pris et que la dite élection a été faite à l'aide de telles voix.

4° Parceque le secrétaire de la dite assemblée a refusé de consigner au procès-verbal de la dite assemblée les protestations et requisitions des propriétaires francs-tenanciers intéressés dans la dite élection.

5° Parceque le président et le secrétaire de la dite assemblée ont refusé et n'ont pas mis aux voix, la proposition régulièrement faite de plusieurs des intéressés à la dite élection.

Que sur l'opposition ainsi faite et produite les requérants ou ceux d'entre eux,

pour lesquels Jules R. Berthelot, écuier, avocat, avait droit et autorisation de comparaitre, produisirent le vingt-huit novembre mil huit cent cinquante-quatre une réponse à la dite opposition, alléguant à l'encontre de l'opposition les moyens suivants sur lesquels les dits requérants se fondaient pour demander le renvoi de la dite opposition, savoir :

1° Parcequ'il n'y avait rien dans la procédure qui fit voir que les personnes qui y sont mentionnées comme opposants, le fussent réellement.

2° Que ceux d'entre les opposants qui étaient francs-tenanciers ne formaient qu'une faible minorité des habitants de Lachine.

3° Que plusieurs de ceux dont les noms sont mentionnés comme opposants ne sont ni francs-tenanciers ni propriétaires, que les nommés (suivent les noms) étaient non propriétaires.

4o. Que les nommés (suivent les noms) qui ont signé comme requérants ne pouvaient pas être Opposants.

5o. Parceque les personnes ci-dessus nommées n'ont autorisé personne à comparaître pour eux et que leurs noms doivent être retranchés.

6o. Qu'un certain nombre d'Opposants au nombre de vingt huit mentionnés dans la dite réponse devaient être retranchés parcequ'ils avaient pris part à l'élection des Syndics. La dite réponse était en outre suivie d'une défense en fait générale.

Que le vingt janvier mil huit cent cinquante cinq, Rodolphe Laflamme Ecr., avocat, produisit devant Etienne Guy, Ecuyer, alors secrétaire des commissaires à son bureau, en la cité de Montréal, un acte de désaveu en bonne et due forme de la part de———, par lequel acte de désaveu produit en vertu d'une procuration spéciale donnée à cette effet par les dits désavouants à leur dit Procureur le dit R. Laflamme, agissant comme tel procureur aurait déclaré que les dits constituants désavouaient le dit Mtre. Jules R. Berthelot, Ecuyer, avocat et procureur, de la cité de Montréal, dans le District de Montréal, pour avoir le vingt Octobre alors dernier, savoir : Octobre mil huit cent cinquante quatre, produit devant les dits commissaires une comparution pour et au nom des dits constituants aux fins de les représenter comme leur procureur et avocat, pour demander la confirmation de l'élection des Syndics nommés pour établir la cotisation légale, pour la construction d'une église, déclarant en outre le dit procureur en vertu de la dite procuration que les constituants n'avaient jamais donné leur consentement à l'apposition de leurs noms sur telle requête demandant l'autorisation des dits commissaires de nommer des Syndics pour établir la cotisation légale pour les dites bâtisses, et qu'ils n'ont jamais demandé la confirmation de l'élection des Syndics.

Que le dit acte de désaveu fut régulièrement produit avec une requête en désaveu fondée sur tel acte régulièrement signifié au dit Jules R. Berthelot en même temps qu'une copie du dit acte de désaveu.

Qu'aucun procédé ne fut adopté par les Requérants ou le dit Jules R. Berthelot, sur le dit désaveu qu'aucune réponse ou contestation d'icelui ne fut produit par les dits Requérants.

Que le trente novembre, mil huit cent cinquante quatre, les dits commissaires savoir : Jacques Viger, Ecuyer, Joseph Roy, Ecuyer, alors commissaires et main-

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tenant décédés, et le dit Joseph Ubalde Beaudry, déléguèrent le dernier un d'entre eux pour procéder à la preuve des allégués faits par les Requérants et Opposants sur la Requê tetendant à faire nommer des Syndics pour surveiller la construction de la dite Eglise.

Et par une autre ordonnance en date du vingt neuf novembre, mil huit cent cinquante cinq, les dits commissaires, savoir: Joseph Roy, Ecuier, Joseph U. Beaudry, Alfred Pinsonnault et Joseph Belle, en leur dite qualité déléguèrent et autorisèrent le dit Joseph U. Beaudry, un des dits commissaires, à se rendre en la dite paroisse de St. Michel de Lachine, pour procéder à terminer l'Enquête commencée par lui en cette cause, déclarant par la dite Ordonnance que vû le rapport fait par le dit Joseph U. Beaudry sur la première Ordonnance et vû que la preuve n'avait pas été terminée ou complétée, il fut ordonné du consentement des parties, que le dit Joseph U. Beaudry fut délégué et autorisé à se rendre à la dite paroisse de Lachine, le quinzième jour de décembre alors prochain, aux fins de procéder à terminer l'enquête par lui commencée.

Que subséquemment les dits commissaires, savoir les dits Jacques Viger, Joseph Belle et Théod Doucet, Ecuyers, ont, le vingt et un février mil huit cent cinquante sept, en leur dite qualité, émané une ordonnance autorisant le dit Joseph U. Beaudry, de procéder à terminer et compléter la preuve des allégués respectifs faits par les parties en cette cause, soit à Montréal, soit à Lachine et dans ce dernier cas, que le dit Joseph U. Beaudry fut tenu de donner avis aux intéressés du jour et de l'heure où il procéderait.

Qu'en vertu de telle Ordonnance, le dit Joseph U. Beaudry donna par un avis sous sa signature requérant, par le dit avis, un certain nombre d'individus qu'il désigna nommément; de comparaître jeudi, le vingt sept août, au bureau de Joseph Dubreuil, en la paroisse de St. Michel de Lachine, pour donner leurs raisons pourquoi leurs noms ne seraient pas rayés du nombre des Requérants en autant qu'ils n'étaient pas Catholiques. 2o. D'autres individus qu'il désigna par leurs noms pour venir nier ou admettre leur signature. 3o. Requérant par le dit avis un certain nombre d'individus de venir justifier leur qualité de propriétaires notifiant en même tems par le dit avis les intéressés qu'il recevrait également telle preuve qui serait offerte quant aux paroissiens qui n'avaient signé ni la Requête ni l'Opposition, le dit Joseph Ubalde Beaudry, restreignant par tel avis la preuve à faire, contrairement à l'Ordonnance et indiquant et suggérant, de sa propre autorité, quelle preuve les parties avaient à faire et tendant par ses procédés à faire lui même l'instruction de la preuve qu'il appartenait seulement aux parties intéressés de faire, et ce contrairement et en dehors de l'ordonnance et en violation de la loi qui ne lui déléguait aucune telle autorité.

Que sur l'exécution de tel avis le dit Joseph U. Beaudry en sa dite qualité de délégué refusa aux parties de procéder à la preuve en dehors des limites qu'il avait assignées par le dit avis contrairement à la loi et à l'ordonnance qui le déléguait.

Que le dit Joseph Ubalde Beaudry a, le vingt quatre septembre dernier, filé entre les mains du secrétaire des dits commissaires un rapport de ses procédés sur les dites Ordonnances le déléguant comme susdit.

Qu'aucun jour ne fut fixé pour clore ou faire l'enquête des parties après les pro-

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cédés faits par le dit Joseph Ubalde Beaudry au dit lieu de Lachine le vingt sept août dernier comme ci-haut mentionné. En dehors de l'enquête faite pardevant le dit délégué il n'y eut aucune enquête, aucune preuve reçue ou produite devant les dits commissaires et les dits Opposants savoir, les Requérants pour writ de certiorari, ne furent en aucun tems interpellés de produire leur preuve devant les dits commissaires et ne furent jamais notifiés d'aucun ajournement pour telle preuve ou aucune clôture ou forclusion faute de produire telle preuve devant les dits commissaires ne fut prononcée.

Qu'en outre le dit Joseph U. Beaudry en sa dite qualité de délégué a refusé d'entendre aucune preuve offerte par les dits Opposants tendant à établir que certaines signatures apposées à la requête demandant l'autorisation de procéder à l'élection des syndics, n'avaient jamais été données par les individus dont elles comportaient être les signatures à moins que ces individus ne fussent parties opposantes ne fut prononcée.

Que le dit délégué a en outre rejeté le désaveu pour dix des désavouants sans preuve faite relativement au dit désaveu, et a en outre retranché comme ne pouvant être opposants quatorze individus qui avaient signé, et a en outre retranché dix individus sur les opposants comme n'ayant pas qualité quoique leurs qualités ne fussent pas niées ou mises en question par les Requérants, sur le fondement qu'ils n'étaient pas résidents, et par tels procédés diminuant le nombre des opposants et des intéressés dans la construction de la dite Eglise, et le dit délégué admettant comme propriétaires sur contestation faite de leurs qualités des individus qui déclaraient n'avoir pour titres à la propriété qu'une promesse verbale lors de leurs signatures apposées à la Requête.

Qu'après la production du rapport du dit Joseph U. Beaudry devant les dits commissaires, il n'y eut aucune demande, avis ou interpellation faites aux parties de procéder à leur preuve; aucune demande ou déclaration de foreclusion, et le déposant est informé que les procureurs ou avocats ne reçurent aucun avis légal qui soit parvenu à leur connaissance d'aucun procédé ultérieur.

Que nonobstant, le quatorze Octobre dernier les dits commissaires, savoir: Jacques Viger, écr., Joseph Ubalde Beaudry, écr., et Théod. Doucet, écr. procédèrent à rendre jugement sur la dite requête, l'opposition et le désaveu ci-haut mentionnés sur déclaration faite par T. T. Durand, écr., secrétaire, qu'il avait laissé avis aux procureurs et avocats des parties, que les commissaires prendraient en considération les dites requêtes, oppositions et désaveu, et là et alors les dits commissaires, hors la présence des dits opposants ou de leurs procureurs, prononcèrent leur jugement par lequel ils déclarent que le désaveu ci-dessus mentionné n'est valable qu'à l'égard de Benjamin Carignan, Marie Angélique Monnette, Dosithé Legault dit Deslauriers, et Timoléon Poirier, rejettant le dit désaveu quant aux autres parties y dénommées et déclarant que la requête aux commissaires pour l'élection des syndics porte les noms des requérants formant la majorité des habitants franc-tenanciers de la dite Paroisse de St. Michel de Lachine et y domiciliés, seuls intéressés dont la majorité soit requise suivant la loi et adjugeant sur la requête présentée par la majorité des dits syndics demandant la confirmation de leur élection et la permission de faire la répartition des sommes requises pour les constructions susdites, considé-

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rant que le désaveu ne pourrait en rien affecter la dite requête et considérant que les moyens invoqués par les Opposants ne pourraient faire rejeter la demande des dits syndics, les dits commissaires sans égard à la dite opposition ont confirmé et homologué le susdit acte d'élection accordant les conclusions de leur requête et les autorisant à cotiser les propriétaires de terres et autres immeubles situés dans la dite paroisse de Lachine et à prélever le montant de la somme pour laquelle chaque individu serait cotisé et colloqué pour sa part contributive tant pour effectuer la construction des dits travaux que pour subvenir aux frais nécessaires qu'occasionnera la dite cotisation.

Que les dits commissaires en rendant le dit jugement ont excédé leur juridiction, et les dits opposants, requérants, writ de certiorari sont lésés par tel jugement.

Qu'en exécution du dit jugement les dits syndics ont procédé à la confection d'un acte de cotisatisation et ont, le trente-un mars mil huit cent cinquante huit, demandé aux dits commissaires l'homologation du dit acte.

Que le dit jour trente-un du mais mil huit cent cinquante-huit, les dits requérants ont produit une opposition à la dite homologation alléguant la nullité et l'irrégularité des procédés adoptés par les dits commissaires, et la nullité et l'irrégularité de l'ordonnance par eux rendue le quatorze octobre mil huit cent cinquante-sept.

Que nonobstant tel opposition Jacques Viger, écr., Joseph Ubalde Beaudry, écr., et Théod Doucet, écr., tous commissaires siégeant, rendaient leur jugement ou ordonnance rejetant la dite opposition, et approuvant et homologuant le dit acte de cotisation pour être suivi et executé suivant sa forme et teneur, et ordonnant que les ouvrages nécessaires pour la construction des dits édifices soient donnés au rabais, et que la cotisation portée sera exigible des contribuables en douze paiements trimestriels et égaux dont le premier deviendra dû et payable le premier jour d'août prochain et ensuite successivement tous les trois mois jusqu'au paiement final. Que les dits jugements, ainsi que celui du quatorze octobre dernier, sont nuls, illégaux, et doivent être considérés tels et déclarés nuls et non avenus par cette cour ainsi que tous et chacun des procédés, ordres et ordonnances faits, donnés et rendus par les commissaires avant le dit jugement, ainsi que le dit déposant en est informé par son aviseur légal, et ce pour entr'autres raisons les suivantes :

1°. Parceque les dits requérants n'ont en aucune manière établi qu'ils avaient, et n'avaient pas la majorité des habitants franc-tenanciers, propriétaires catholiques de la paroisse de St. Michel de Lachine, ainsi que l'exige la loi pour demander l'autorisation de procéder à l'élection de syndics et par suite les dits commissaires n'avaient aucune jurisdiction, autorité ou pouvoir d'émaner l'ordonnance du quatorze septembre mil huit cent cinquante-quatre.

2°. Parce qu'aucun procès-verbal en bonne forme suivant la loi de l'assemblée pour l'élection des syndics n'a été fait et produit devant les dits commissaires, constatant telle élection à la majorité des voix.

3°. Parce que les dits commissaires ne pouvaient par leur dit jugement en aucune manière statuer sur le désaveu fait et produit dans la dite cause, attendu qu'aucune contestation ne fut jamais liée sur tel désaveu, aucune enquête

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faite, aucun avis donné aux désavouants ou à leurs procureurs pour procéder ou pour leur enjoindre de procéder ou pour leur intimer que les dits commissaires entendaient ou voulaient statuer sur leur prétention, et qu'ils ont été condamnés et leurs prétentions déterminées par le dit jugement du quatorze octobre dernier sans aucune demande à cet effet formulée par aucune des parties intéressées.

4o. Parceque toute la procédure faite, instruite et ordonnée par les dits commissaires antérieurs, et pour arriver au dit jugement sur le mérite de l'opposition est nulle, contraire à la loi et ne peut servir de base au prétendu jugement rendu par les dits commissaires.

5. Parceque les dits commissaires n'avaient par la loi aucune autorité, pouvoir ou Juridiction de déleguer aucun d'entre eux pour entendre la preuve et que par suite les deux ordonnances par eux rendues pour faire la preuve sur les contestations de l'opposition et de la requête, savoir, l'ordonnance du trente novembre, mil huit cent cinquante quatre déléguant et nommant le dit Joseph Ubalde Beaudry, pour procéder à la preuve des allégués faits tant par les requérants que par les opposants et l'ordonnance du vingt neuf novembre mil huit cent cinquante cinq, pour le même objet, sont nulles, non avenues et ne peuvent servir pour justifier le jugement rendu par les dits commissaires.

5o. Parcequ'en supposant même que la prétendue preuve reçue par le dit Joseph Ubalde Beaudry Ecuyer, en sa dite qualité de délégué fut légalement prise, cette preuve était illégale et le dit commissaire délégué a outrepassé ses pouvoirs, violé la loi et les dits commissaires en sanctionnant et ratifiant ses procédés, par le jugement du quatorze octobre dernier, ont violé la loi outrepassé leurs pouvoirs et excédé la juridiction.

7o. Parceque le dit commissaire délégué a fait, ordonné, et reçu une preuve outre et en dehors de la contestation soulevée entre les parties intéressées, a refusé d'accepter comme propriétaires et a rejetté du nombre de propriétaires francs-tenanciers intéressés, un grand nombre des opposants dont la qualité de propriétaires et intéressés n'étaient pas mise en question par les requérants; le dit commissaire délegué ayant retranché de la liste des opposants tous ceux des propriétaires qui ne résidaient pas dans la dite paroisse, sans que tel retranchement fut demandé par aucune des parties et sans que leur qualité de propriétaire fut niée ou aucunement contestée et les dits commissaires en sanctionnant et ratifiant tel acte, ont excédé leur juridiction.

8o. Parceque l'ordonnance des dits commissaires en date du vingt un février mil huit cent cinquante sept, en supposant qu'elle fut dans les attributions des dits commissaires, n'a jamais eu son effet, les dits opposants n'ayant jamais été appelés et n'ayant jamais eu, aux termes de la dite ordonnance, l'occasion de faire ou compléter l'enquête: le dit Joseph Ubalde Beaudry ayant, par son dit avis, restreint l'effet de la dite ordonnance l'ayant modifié, de son autorité privée en sa qualité de délégué et ayant refusé l'admission d'aucune preuve en dehors de celle par lui indiquée et requise par son dit avis.

9o. Parcequ'aucune preuve ou enquête légale n'a été faite devant les dits commissaires pour établir les faits niés par la dite opposition, lesquels devaient être établis avant que les dits commissaires pussent procéder à rendre jugement et

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sans la preuve desquels ils n'avaient aucune juridiction pour prononcer tel jugement.

10o. Parcequ'aucun jour ne fut fixé par les dits commissaires, pour clore ou faire l'enquête des parties devant eux.

11o. Parceque après les procédés faits par le dit Joseph U. Beaudry, en sa prétendue qualité de délégué, le vingt sept août dernier, il n'y eut aucune enquête des opposants, savoir les requérants, *writ de certiorari* ne furent en aucun temps interpellés de produire leur preuve, ou de la terminer et ne furent jamais notifiés d'aucun ajournement pour telle preuve ou d'aucune demande de clôture ou de forclusion, faute de produire telle preuve devant les commissaires.

12. Parceque le dit délégué, Joseph Ubalde Beaudry, Ecuyer, a refusé d'entendre aucune preuve tendant à établir, que certaines signatures apposées à la requête demandant l'autorisation de procéder à l'élection des Syndics n'avaient jamais été données par les individus dont elles comportaient être les signatures, à moins que ces individus ne fussent parties opposantes; et a en outre retranché du nombre des opposants, quatorze individus qui avaient signé la requête, et en outre retranché dix individus comme n'ayant pas les qualités, quoique leurs qualités ne fussent pas niées, ou mises en question et que les dits commissaires, en sanctionnant tels procédés, ont excédé leur juridiction.

13o. Parceque le dit Joseph Ubalde Beaudry, en sa dite qualité de délégué, n'a jamais exécuté la dite ordonnance des dits commissaires du vingt et un février, mil huit cent cinquante sept, mais l'a au contraire restreinte et modifiée; a dirigé et fait, sans la demande des parties, la preuve de faits qui étaient dans le domaine exclusif des parties intéressées et que les dits commissaires en adoptant et sanctionnant tels procédés, ont excédé leurs pouvoirs.

Et le dit déposant est informé par son Aviseur légal que les faits ci-dessus mentionnés sont vrais et que les dits commissaires ont excédé leur juridiction en rendant tel jugement.

R. Laflamme, pour les requérants, s'appuyant sur les raisons alléguées, dans l'affidavit soutint, que la délégation de J. U. Beaudry était nulle. Les commissaires pour exercer l'autorité, juridiction et tous les pouvoirs qui leur sont donnés par l'ordonnance provinciale, 2e Vict. chap. 29 doivent être au moins trois d'entre eux. Ils n'ont droit de déléguer l'un d'eux que dans un cas seulement, celui prescrit par la 7e section de la dite ordonnance, lorsqu'il s'agit de fixer les limites, bornes et démarcations pour l'érection d'une paroisse et qu'il devient nécessaire de faire une descente sur les lieux. Les commissaires ont excédé leur juridiction en rendant les deux ordonnances déléguant leur pouvoir à l'un d'eux pour recevoir l'enquête et tous les procédés qui s'en sont suivis sont nuls.

2° Les commissaires ne pouvaient adopter le rapport de leur prétendu délégué, sans violer les dispositions du Statut qui créait leur juridiction. L'ordonnance par lequel ils déléguèrent M. Beaudry ne conférait tout au plus à ce dernier que le pouvoir de faire l'enquête généralement. En assumant comme il le fit par les procédés, le controle et la direction de la preuve, il excédait ses pouvoirs, il restreignait illégalement les parties dans l'exercice de leurs moyens de défense et c'était un excès de juridiction qui infectait de nullité tous les procédés des commissaires auxquels cette enquête servait de base et leur enlevait

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toute juridiction pour imposer sur les contribuables une cotisation aussi onéreuse que celle demandée. De plus la clause 16 du statut 2 Vict. chap. 29 donnait les qualifications requises des parties ; et il ne pouvait pas être au pouvoir d'un commissaire d'établir d'autres disqualifications que celles établies par le statut. Tous les propriétaires catholiques résidents ou non résidents sont également assujétis au paiement de la cotisation, tous sont intéressés dans la construction de cette église, par conséquence ils avaient droit de se porter opposants, ce qui résultait des dispositions mêmes du statut. Le commissaire délégué retranche tous les non résidents sur le principe qu'ils sont non résidents. En défalquant tous ces propriétaires non résidents le délégué place la majorité chez les requérants. Les commissaires sanctionnent ce procédé. Il y a là excès de juridiction manifeste qui doit entrainer la nullité du jugement final.

Pominville, pour les syndics. L'ordonnance 2 Vict. ch. 29, donne aux commissaires entière juridiction, pouvoir et autorité d'entendre, juger et déterminer sans les astreindre à aucune forme particulière de procéder. L'élection des syndics a été faite conformément aux sections 9 et 10 et suivant l'ordonnance des commissaires. Par la section 7 les commissaires peuvent déléguer l'un d'eux, lorsqu'ils le jugent à propos, pour éviter le déplacement et le voyage d'un trop grand nombre d'intéressés. La procédure pour instruire la cause a été faite du consentement des parties. Les deux ordonnances, celle du 30 novembre 1854, et celle du 29 novembre 1854, déléguant J. U. Beaudry pour recevoir la preuve, ont été rendues par les commissaires à la demande des requérants eux-mêmes. Le commissaire délégué n'a pas outrepassé les pouvoirs à lui donnés par les ordonnances des commissaires. Il n'a fait qu'user de la latitude et des pouvoirs d'un juge enquêteur ceux, de régler ce qui est pertinent à la cause. Avec son rapport il a transmis aux commissaires tous les témoignages qu'il a plu aux parties intéressées de produire. L'enquête a eu lieu tant sur la requête, l'opposition que sur le désaveu. Ce rapport ne fait que constater le dire des témoins et les faits apparents même par le dossier. La 16e Vict. ch. 125, sec. 6, reconnait à chaque commissaire le droit d'assermenter les témoins. Les commissaires n'ont pas homologué le rapport de J. U. Beaudry, ils ne l'ont considéré que comme partie de la preuve et ont rendu leur jugement sur tous les témoignages produits. Les requérants n'ont fait aucune objection à cette enquête, ils ont produit des témoins et ne se sont pas plaint devant les commissaires des procédés de J. U. Beaudry. Ils ne peuvent attaquer ce procédé qu'ils ont eux-mêmes demandé et qui a été fait avec leur consentement.

La Cour par son jugement annulle tous les procédés adoptés depuis le 30 novembre 1844, en motivant son jugement comme suit :

"La Cour après avoir entendu les dits syndics et les dits requérants en cette cause sur le mérite du Writ de Certiorari et autres sujets à contestation en cette cause, examiné la procédure et avoir sur le tout délibéré. Considérant que les commissaires pour l'érection civile des paroisses et autres objets, sous l'opération de l'Ordonnance Provinciale 2 Vict. chap. 29 et des lois qui l'ont précédée et suivie, n'avaient aucun droit de déléguer, comme ils l'ont fait à Joseph Ubalde Beaudry, écuyer, l'un d'eux, leurs pouvoirs à l'effet de procéder à l'enquête qui a eu lieu.

Considérant qu'en ce faisant les dits commissaires ont excédé leur juridiction, ont fait un acte absolument nul, que le consentement des parties ne pouvait et n'a pu valider et dont l'effet est que leur ordonnance du 30 novembre 1854 aussi bien que tous les procédés qui l'ont suivie et le jugement du 14 octobre 1857, et aussi le jugement du 31 mars 1858, sont nuls et doivent être cassés, annullés et mis au néant, ayant été rendus sans preuve. Casse, annulle et met au néant tous les procédés des dits commissaires depuis et compris leur dite ordonnance du 30 novembre 1854, et tous les jugements, ordres et ordonnances qui l'ont suivie, avec dépens contre les dits syndics.

Et ordonne que le dossier soit remis aux dits commissaires pour par eux être procédé suivant qu'il appartiendra."

Laflamme, Laflamme et Barnard, avocats des requérants.

Cartier et Pominville, avocats des syndics.

(P. R. L.)

(F. P. P.)

IN THE CIRCUIT COURT.

MONTREAL, 15TH OCTOBER, 1860.

Coram BADGLEY, J.

No. 12.

THE TRUSTEES OF THE MONTREAL TURNPIKE ROADS, (*Defendants in the Court below.*) Appellants.

AND

ALDIS BERNARD, (*Complainant in the Court below.*) Respondent.

Held,—1st. That no Municipality of "La Côte des Neiges" exists.

2nd. That the Municipal Act of 1860 (23 Vict., ch. 61) does not apply to any Road or Roads under the control of the Trustees of the Montreal Turnpike Roads, but that such Roads are exempt from the operation of said act.

3rd. That an appeal lies from a judgment of the Inspector of Police at Montreal to the Circuit Court in the case submitted.

4th. That all illegal judgments will be reversed with costs by the Circuit Court.

The facts of the case are shewn by the following extracts from the Petition in Appeal alleging, &c., &c.

That by a writ of Summons issued by C. J. Coursol, Esq., Inspector and Superintendent of Police, on the 15th August, 1860, the Appellants were commanded to be and appear on the 18th August, before such Justices of the Peace as should be present to answer the Summons and Complaint, and to be dealt with according to Law.

That the complaint against Appellants was that they did on the 28th July, 1860, cause an obstruction and nuisance in a Public Road situated in the Parish of Montreal, in the Municipality of "La Côte des Neiges" by erecting a small house and a fence or gate at the entrance of the way where it joins the Turnpike Road, obstructing and impeding the passage and particularly the Respondent from passing while obliged day by day to go to Montreal, and that thereby they had incurred a penalty of not more than $10 nor less than $2. That said nuisance or obstruction continued during three days in the Public Road, and

an additional penalty was thereby incurred for each such day of not more than two nor less than one dollar, and the Respondent prayed that Appellants should for said offence be dealt with according to law.

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That Appellants appeared before the said Justice as commanded, by the ministry of John Monk, Esq., Advocate, and that Joseph Papin, Esq., appeared for the Respondent.

And the Appellants then and there excepted to the said complaint, as follows:—

1st. Because there exists no Municipality of "La Côte des Neiges."

2nd. That the 23rd Vict. ch. 61. L.C., Municipal Act, act under which the complaint was preferred, did not apply to Roads under the control of the Appellants.

3rd. That the Respondent was not competent to prefer the charge.

That the sitting magistrate reserved these points until proof and hearing on the merits.

That Appellants then pleaded "not Guilty" to the Complaint.

That after examination of witnesses of whom Respondent was one and *délibéré*, the said Charles J. Conrsol on the 11th September, 1860, did by judgment rendered, convict the Appellants to pay $2 for the obstruction caused by them, and an additional fine of $1 for one day during which it remained, and to pay 4\frac{40}{100}$ for costs, and said sums if not paid within eight days should be levied, &c., &c.

That Appellants have given the required security and due notice to all the parties concerned, and as aggrieved by said Judgment and Conviction submit the following reasons for a Reversal:—

1st. Because no Municipality of La Côte des Neiges exists by Law.

2nd. Because the statute of 1860 in question does not apply to Roads under the control of Appellants.

3rd. Because the judgment and conviction complained of was rendered contrary to law and evidence.

4th, Because it was proved that Appellants were "not guilty."

5th. Because the complaint, charge and proceedings were irregular, informal illegal, bad and improperly brought.

Wherefore Appellants prayed for a Revision and Reversal of said judgment or conviction and that the same should be set aside and quashed with costs against Respondent.

John Monk for Appellants submitted the following points:

That Act of 1860, Lower Canada Municipal Act, 23 Vic. ch. 61, does not apply to Roads under control of your Petitioners, (page 197).

That Turnpike Roads have been constructed by the Province, under acts of Legislature, and cannot be dealt with by any Municipal act.

That the Road Inspector was the proper person to prefer complaints. Sect. 49, Page 256.

That proper formalities required to remove any obstruction had not been complied with. Page (282) 281, *et seq.*

That the pretended obstruction or toll bar and gate was erected on the Turn-

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pike Road, and not on or nearer one foot from Sisson's lane, a lane out of jurisdiction of Appellants, and in assuming the reverse, the Magistrate had erred.

That there existed no Municipalities other than County Municipalities, and the Municipality of the Parish of Montreal was by statute substituted for the then existing County Municipality.

Statutes 1846, page 1041, of 1847, p. 1272 and of 1855, p. 387. 9. Vict. c. 78. 10 and 11 Vict. ch. 7 and 18th Vict. c. 100.

That by Turnpike acts, the Trustees could erect Gates, Bars, Houses, &c , &c., on any part of the Roads under their control, and prevent passage till toll should be paid, and could commute passage money, should they deem fit. It was the intention of the Legislature that toll should be paid by persons passing on these Roads, and toll to be collected on entrance.

Under plea of "not guilty" it was a good defence to prove that the Respondents were excusable and justificable in doing act complained of; Archbold's Criminal Pleading, p. 89. Paley on Convictions, p. 33.

As Respondent refused to pay toll, the Appellants as a Public Body could not act otherwise than they did, and their acts were done under an asserted authority and in pursuance of a good and sufficient title.

Jos. Papin, Esq., for Respondent cited in argument; 1st clause, sect. 24, par. 7 of act 1860; 3 Vict. ch. 31, sect. 13, and other authorities.

Badgley, J.—In rendering judgment, detailed the facts of the case and observed; "the magistrate who has fyled his notes of evidence and copies of papers before this Court manifestly was led into error. The proof establishes that the Gate or Toll *Bar* complained of as an obstruction by Respondent was erected on the Turnpike Road, and not on Sisson's Lane. This the Trustees had a perfect right to do, under the acts governing them as a Public Body. The act of 1860, p. 23 Vict. ch. 61, does not apply to Roads under the control of the Turnpike Trustees; they are governed by their acts of Incorporation only The conviction must be quashed with costs against Respondent.

John Monk for Appellants.

Joseph Papin, for Respondent.

(J. M.)

MONTREAL, 13TH & 14TH NOVEMBER, 1860.

Before Mr. Justice Badgley and a special Jury.

AND 27th NOVEMBER, 1860.

Coram MONK, A. J., in Banco.

No. 269.

***Higginson* vs. *Lyman* et al.**

1. A promise signed by one partner in the name of his firm, but without authority from his partners, undertaking to receive a stranger into that firm, is not binding upon the members of it; and *semble*, even silence or inaction on the part of the other members of the firm, would not be an implied sanction of such promise, although such sanction might be inferred from circumstances.
2. An agreement to take a person into partnership after the lapse of a specified time, "upon terms that shall be mutually satisfactory," but specifying no conditions as to duration, shares, and the like, is not such an agreement as will afford any basis for the assessment of damages, in the event of a breach of it.
3. A motion to set aside a verdict and dismiss the action, or to grant a new trial, is regular, and in accordance with the practice of the Court.
4. The Superior Court has the power of appreciating for itself the evidence adduced before the Jury and if the verdict be not sustained by the evidence, will set it aside upon a motion to that effect and render such judgment as shall be justified by the record.

Semble, that immoral conduct, by keeping a mistress, or frequenting brothels, is a sufficient justification for a refusal to fulfil an agreement to receive the person guilty of it as a partner.

Semble, also that one partner being a [illegible]ant in the cause, examined under the recent statute in that behalf, may be a good wit[illegible] co-partners, any objection going only to his credibility.

This was an action of da[illegible] brought for the breach of an alleged agreement by Lymans, Savage & Co., to receive the Plaintiff as a partner in their firm.

The paper relied on was written and signed by Mr. B. Lyman, the senior partner, and was in the following terms:—

MONTREAL, 4th April, 1857.

Thomas Higginson, Esq.:

DEAR SIR,—Touching the conversation the writer had with you, the present is to say that we will allow you £200, say two hundred pounds per annum, and also five per cent on the profits of the business carried on here for the next two years, after which time we will admit you as a partner on terms that will be mutually satisfactory. This letter to be strictly private and confidential.

Yours very truly,

LYMANS, SAVAGE & CO.

At the expiration of the period referred to in this letter, the Plaintiff, having a short time previous received a letter from Mr. B. Lyman informing him that he could not recommend his reception into the firm, made a formal request to the Defendants to receive him as a partner, which they refused to do. He then instituted his action claiming $25000, damages, for loss of profits and advantages, and of the position which being a member of the firm would have given him. The Defendants denied that the letter in question constituted or evidenced any contract with them: alleging that it only expressed Mr. B. Lyman's individual intention, which they did not share, and of which they were ignorant, and that in any case, the Plaintiff had been guilty of the immoral and irregular conduct specified in their plea, upon which they relied as a justification for refusing to admit him, even had they ever agreed to do so, which they denied.

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Issue having been joined upon this plea generally, the questions for the jury were finally settled by the Court of Appeal as follows :—

1. Did the Defendants, as a commercial firm, contract with the Plaintiff to admit him as a partner, in manner and form, as set forth in the declaration?

2. Have the Defendants refused to admit the Plaintiff as such partner?

3. Did the Plaintiff between the 4th day of April, 1857, and the 4th day of April, 1859, co-habit openly with a woman of profligate character, and did he maintain her in a state of prostitution?

4. Was the Plaintiff bound to remain in charge upon the premises during the night time?

5. Did the Plaintiff, during the said period of time, absent himself from the Defendants' store at night, in order to pass his time at brothels?

6. Did he introduce women of bad fame into the said store within the said period?

7. What is the Plaintiff's general character, and is he a person of irregular morals and discreditable conversation and repute?

8. Did the Plaintiff suffer any damage by reason of not being admitted into the said firm as a partner? If so, at what sum do you assess the damage?

Evidence having been adduced on both sides upon the several points submitted, but none of any fact in support of the alleged agreement, or tending to shew any knowledge of it, or acquiescence in it by any of the partners in the firm except Mr. B. Lyman: His Honour Mr. Justice Badgley charged the jury as follows :—

THE JUDGE'S CHARGE.

The Hon. Mr. Justice BADGLEY said :—

The magnitude of the amount demanded, and the importance of the legal points involved, compel me to extend my observations somewhat more than I had originally intended in charging the Jury in this case. The action seeks the recovery by the Plaintiff of £6,500 for damages, said to be suffered by him by reason of the Defendants' refusal to admit him into their Co-partnership firm of Lymans, Clare & Co., as dealers in drugs, &c., at Montreal and elsewhere in Canada. The declaration sets out that by a paper writing, dated the 4th April, 1857, written on behalf of the Defendants, by Benj. Lyman, one of the Defendants, and senior partner of the firm, and signed with the co-partnership name, the Defendants agreed to his admission as a partner in their co-partnership, which should be permanent and continuous, alleges the Plaintiff's refusal of advantageous offers in consequence, states his good business capacity, their refusal to admit him although often requested, and his privation of profits and advantages from so large and profitable a business, becoming more extended from the 4th April, 1859, estimates the value of his share at £6,500, and concludes that by means of their refusal to admit him into their co-partnership, he has been deprived of profits and advantages from the co-partnership business to the amount of £6,500, which he claims with interest and costs of suit.

The action is therefore based upon this alleged contract made by one partner

as an absolutely binding agreement upon his co-partners, for the admission of the Plaintiff into their co-partnership.

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The issues raised by the Defendants' pleas, are:—

1st. Their denegation of such an agreement.

2nd. Their exemption from such agreement of their partner, being without their consent or participation; and

3rd. Hypothetically their relief from such agreement if it existed, by reason of the Plaintiff's misconduct.

The written evidence adduced by the Plaintiff, consists 1st, of the agreement or paper writing referred to in the declaration; and 2nd, of two setts of correspondence, the first between the Plaintiff and Benjamin Lyman, and the second between Plaintiff and the firm of Lymans, Savage & Co. The first commences with a letter from B. Lyman to the Plaintiff, written at Toronto, on the 1st April, 1859, in which the writer suggests to the Plaintiff that he might get the Medical Hall, as Beers was dead, and that from circumstances that had come to his (B. L's) knowledge, he will be unable to recommend to his partners the Plaintiff's admission into their firm as a partner. On the 2nd April, 1859, the Plaintiff acknowledges the receipt of that letter, denies his interference with the contract by any act of his, and asks for an explicit relation to himself, in a private note, of the nature and cause of the charge. His letter of the 16th April, calls B. L's attention to his letter of 2nd April, to which the latter replies on the same day, declaring his own willingness to admit the Plaintiff into the firm, upon terms which could be agreed upon between them, and as the other partners should consent to, but for the facts which had come to the knowledge of the writer. The correspondence with the firm then opens, with the Plaintiff's letter to them of their last date, 16th April, covering copies of the agreement and of the correspondence above, states his unconsciousness of the action by him to break or forfeit that agreement, and requests that it may be carried out by the other partners and by B. L. himself; on the 28th and 30th he draws their attention to his note of the 16th instant, and by the latter claims their favorable notice of the agreement, under which he is intitled to ¼ part of the business, as there will now be four partners, and thinks his name should appear at all events as partner, &c., and demands to act as such partner. The reply of the firm, dated 2nd May, denies his assumption of being their partner, declares it unfounded within his own knowledge, ignores the existence of such partnership between them and him, qualifies him as their clerk, and finally asserts the existence of insuperable objections against any proposition for his admission into their firm as a partner. On the 3rd May, 1859, this portion of the correspondence closes by Plaintiff's letter, acknowledging the answer of the firm, and intimating his intention to seek a reparation of the injury done to him. The action followed almost immediately, the declaration being dated the 7th May, 1859.

No reference will at present be made to the other written evidence produced nor to the receipts for the monies paid as they do not specially apply to the contract.

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The testimony consists of the evidence of Benjamin Lyman and of a few other persons. That of Benjamin Lyman is taken under the authority of a recent statute 23 V. Chap. 97 sec. 49, which enables a party in a cause to be brought up and examined and cross-examined as a witness. Benjamin Lyman explains the origin of agreement, which he says was written at Plaintiff's request, and represented his Benjamin Lyman's own feelings towards the Plaintiff, but not those of the firm who might not agree to it; told Plaintiff he had not their sanction for it, to which Plaintiff replied if they did not it would go for nothing; says that the conditions of the two years service at £200 per annum and the 5 per cent on the profits *here*, were subsequently carried out—that he had suspicions of Plaintiff's morality in the summer of 1857, proves the correspondence produced, states the gross business of the firm at £75,000 per annum, denies all knowledge of a letter from Plaintiff of 5th April, 1857, accepting his proposal of agreement asserts that the £1000 was offered by the Plaintiff as a loan on call at interests of 8 per cent and was only called by a lawyer's letter after the rupture with the Plaintiff, he did not tell his partners of the agreement until after his letter of the 1st April, 1859. The 5 per cent was not entered in the books of the firm until this year, and was unknown to his Co-partners until the Plaintiff's demand to them to take him into partnership. £300 was received by Plaintiff in full for that claim and was charged to Benjamin Lyman's private account, as having been proposed by him without their consent. Heard of a co-partnership spoken of between Plaintiff and late Wm. Lyman, Plaintiff said Wm. Lyman could not succeed, never heard that Plaintiff could have had the Medical Hall. Plaintiff's salary at £200 per annum was credited to the Plaintiff, and at his departure his account was made up by the Book-Keeper, who had been directed by witness about time of his Benjamin Lyman's departure for England, to credit the Plaintiff with the £200 per annum. Did not notify the Plaintiff in 1857 of his conduct, or previous to 1859, never tendered the £1000 or the 5 per cent. for which separate actions were brought. The latter was paid in 1860. That account of profits could not be made up before. Admits the good business capacity of Plaintiff.

Mr. Workman testifies to having seen the letter of the 4th of April, 1857, about that date received it from Plaintiff and kept it in his possession for a year, states that Plaintiff had prospects of business connection with the late Wm. Lyman, by whom he was requested to speak to the Plaintiff about a connection —a connection was also proposed or spoken of with Mr. Carter, but advised Plaintiff to continue with his house and to get any offer of partnership in writing, mentions that a part of the £1000 paid over to Lymans, Savage & Co., £700 was held by the late firm of witness, only paid 6 per cent on the £700 being partly the Plaintiff's and partly his father's money.

Mr. Carter testifies to his willingness to have received Plaintiff into the share of Medical Hall business. Defendants business largest of the kind in the province, the good will a year's profits, not profits of a fair business, that is wholesale and retail, was Executor of late Wm. Lyman's estate to which Defendants had to pay £18 to £20,000.

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Mr. Sinclair was aware of offers made to Plaintiff from Defendant and others, and advised him to accept the former, did not see the letter of proposal.

Mr. Spence, saw the Defendants' letter and Plaintiff's reply in a copy shortly after his receipt of the original document signed Lymans, Savage & Co.; on a Sunday in Defendants' store, shortly after seeing Defendants' letter, Plaintiff said "there is my answer to their letter lying on the desk," did not read it, read a copy, draft of reply shewn to him by Plaintiff, none of Defendants present at the time, nor any one in defendants' employ, Plaintiff had key of the premises, and apparently in charge of them.

Mr. Lamplough estimates the good will of Defendants' business at from £8,000 to £10,000. With this evidence such as it is the Plaintiff closed his case. The evidence advanced by the Defendants refers mainly to the Defendants' conduct in connection with a woman named Martha Scott, his nightly and untimely absence from the defendants' premises of which he had charge, and in which he had an apartment provided for him to sleep at night—his visits to houses of ill-fame and his connection with the woman above named. It is unnecessary at this time to detail this testimony with more particularity; it will be fresh in your recollection, and you will be able to supply omissions; it may be observed, however, that it is of a positive and direct character, that, O'Leary's testimony stating Savage's application to him on the 28th May, 1857, with reference to plaintiff's conduct is confirmatory of the testimony of Benjamin Lyman as to suspicions of the firm against the plaintiff in the summer of that year and whilst in their employ. As to the evidence of Mr. Clare, the material parts shew that plaintiff never spoke to him of his partnership with the firm—that the letter of the 5th April, 1859 was not seen by him, that the £1000 was a loan on call at 8 per cent, offered by the plaintiff himself, and that plaintiff had a sleeping apartment in the premises, without charge, and had charge of the premises that the two Messrs. Lymans had each a key and the plaintiff the third one, that plaintiff had ready access to the books, made no complaint in regard to his account until about the time of his departure on the 4th May, 1859—states the annual profits from 1855 to 1859 both inclusive to average about £4,000 or £5,000 per annum—subject to bad debts. Large increase of business since 1859—states plaintiff's absence on the business of the firm for 2 months in 1855 and two days in 1856. Cannot swear if his sleeping apartment was occupied by any one else during plaintiff's absence—would have seen the letter spoken off by Spence if it had been lying on the desk. The $1200 paid to plaintiff for the 5 per cent claim was charged to B. L. on account of refusal of other partners to allow it, &c. The balance of 1858 was made up to 1st January in May or June of that year—that of 1859 is not yet made up.

The evidence of the defendants' was closed and the plaintiff adduced evidence in rebuttal of the defendants' evidence. B. L. was again brought forward to establish the plaintiff's intimacy with his family. Darling proves the plaintiff lodging several times at the Ottawa Hotel in latter part of 1858-59. Lee and Renaghan as to character of Turnout, a witness of the defendants. Thomas Higginson the plaintiff's father was intimate and friendly with defendants. Never was told by them of his son's conduct until after the rupture—often

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visited by plaintiff at the Ottawa Hotel, when witness and wife came to town, and that they visited his son at his room at the store but not late at night. Other evidence was offered but not being in rebuttal was rejected. With this evidence for the defence which has been gone over cursorily including that of Mr. B. L. of which evidence the plaintiff avails himself under the statute, it will be for the jury to render their verdict upon the suggestions submitted for their consideration. It is proper to observe that the statute has introduced nothing new in the matter of the examination of a party except the mode of it—under the former law the party was examined upon interrogatories, now by the statute he is examined and cross-examined as a witness, but as to himself the result is the same by both laws, he cannot turn his evidence to his own advantage. It is proper to premise *in limine* before stating to you the law of the case, that both judge and jury have particular duties to perform in such cases as this. Their respective provinces are sufficiently distinct to enable both to keep apart from each in their respective functions. In a general way it is the duty of the judge to point out to the jury any rule of law which either renders evidence necessary or gives peculiar weight to one species of evidence or defines the manner in which a certain fact must be proved. He should also distinctly explain to the jury, what principles of law are applicable to the point in issue, and in order to enable him to do so correctly he must distinguish questions of law from questions of fact. In matters of contracts, the construction rests with the Court alone. On the other hand it is the duty of the jury to take the construction from the Court either absolutely or conditionally according as the words of the contract and the surrounding circumstances require or not to be ascertained as facts by the jury. In matters of law also it is scarcely necessary to observe that juries must take the law from the judge and from their own opinions; unless this were so there would be no certainty in the law, for a misconstruction by the Court is the proper subject for redress by a high tribunal, such as a Court of Error or Appeal but a misconstruction by a jury cannot be set right at all effectually. Bearing these observations in mind, it is my duty to state to you the law in connection with the issues and evidence of record. It will be in your recollection that there were three issues noticed to you upon the pleadings filed in this cause. 1st. The absoluteness of imperfection of the agreement relied upon by the plaintiff. 2nd. The legal power of one partner of a firm to introduce a person as a partner into the firm without the sanction of his co-partners, and 3rdly the dissolution of an existing co-partnership or of a contract for the formation of one by the misconduct of an actual partner or of the intended partner; this last issue is hypothetical. As subsidiary to these it may be necessary to advert to the legal means required for establishing the damages demanded and sought to be recovered.

As before observed the Plaintiff relies upon an absolute agreement, between himself and the Defendants as co-partners under the firm of Lymans, Savage & Co., which is in the following terms and must be taken in its own words as they are on the fact of this instrument itself, and not as it appears in the Plaintiff's declaration. (The agreement is read.) It may be at once observed that no legal evidence has been adduced by the Plaintiff of his acceptance of this

agreement. The copy of a letter dated the 5th April, 1857, seen by Mr. Spence as he says shortly after the Plaintiff's receipt of the alleged agreement and the Plaintiff's pointing to a letter lying on the office desk and saying "there is my answer" are not in themselves proof of the existence of the original letter under that date. No such letter is known to Mr. B. Lyman, or to the witness Clare, who would have seen it had it been on the office desk as stated. The Plaintiff ever mentioned either the agreement or his acceptance of it to his fellow clerk, Clare, and has not in any way adverted to it as part of his case, it is not referred to in his declaration, no copy of that letter of acceptance was transmitted by him to the firm under cover of his letter of the 16th of April, 1859, nor is it mentioned in any part of his correspondence with the firm, or made known to them until after his proceeding at law against them. The copy offered in evidence by Plaintiff is not proof; it is only secondary evidence which cannot be admitted without first showing the previous existence of the original, and its non-production after notice. The discrepancy in Mr. Spence's testimony as to the Sunday on which he says he saw this copy is not important except as to the exact date of the letter of acceptance. It might have been the second Sunday or some time after, but not the first Sunday. The agreement was written on Saturday the 4th of April, it was written in the afternoon, and the Plaintiff consulted several of his friends: the answer would scarcely be the 5th of April. The Plaintiff's counsel have presented this agreement to the Court and Jury as a proposal of agreement if so it only becomes binding and absolute upon its proved acceptance which has not been shown; if it was such a proposal it was competent for the proposer to retract and withdraw it until after its acceptance—until that event it was imperfect as an agreement. It is a clear principle of law that the parties to a mutual contract of bargain must mutually consent, and that consent must be made known in some way or manner recognized by the law. The terms of the agreement show its imperfectness as a co-partnership contract, the principal elements of such a contract are wanting, the terms, conditions and duration of the co-partnetship, the shares of the partners respectively their advances or otherwise to the business, the partnership name, and all this moreover with the statement written in the agreement itself, that the Plaintiff's admission was on terms to be agreed upon. The Plaintiff's counsel has also qualified it as an offer for entertaining a proposal of co-partnership, but so again it is not a contract, and manifestly it is not a contract absolute in itself and in its own terms. Upon this first issue therefore it is my duty to tell you that the paper wanting produced in support of the Plaintiff's action is not in the face of the agreement binding in law upon the firm of Lymans, Savage & Co., or upon the Defendants.

We have now reached the second issue which embraces a very interesting point of co-partnership law, which the jury will receive from the Court, inasmuch as but little matter of fact that is uncontradicted, is connected with it, and is, that the proposal was written by B. Lyman, the senior partner of the firm, and that it was signed with the co-partnership name. This issue involves the entire question of the nature and establishment of partnerships, the powers of individual partners, particularly to introduce third persons into their subsist-

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ing co-partnerships, and to use the co-partnership name. The law which is clear and explicit upon all these points will be found in standard authorities which will be given in their own language as more explicit and plain than my own. It must be premised that a general concurrence of opinion exists among law writers upon the subject, in England, and Scotland, France, the United States and this province. The contract of partnership is defined by Story on Co-partnership—Sect. 2—to be "a voluntary contract between two or more competent persons to place their money, effects, labour and skill or some or all of them in lawful commerce or business with the understanding that there shall be a communion of profits thereof between them."—Pothier Contrat de Société, Nos. 5, 11, 12—"C'est un Contrat, &c.,—it is a contract formed by the consent alone of the parties:—it is essential to the contract that the partnership be established for the common interest of the parties, each hoping to have a share or part in proportion to what he shall have brought into it."—Delangle Tr. de la So. No. &c., "La Societe nait de la volonté des parties, &c." Similar authorities will be found in Domat Bk. 1 No. 801—Code Civ. art. 1842, Collyer on Partnership, part 182.

The contract of partnership being therefore especially and altogether dependent for its existence upon the consent of each of the parties, is eminently exclusive in its nature and character; hence it is an established principle of law (Story No. 5) "that as it can only commence by the voluntary consent of the parties, so when it is once formed no third person can be afterwards introduced into the firm as a partner, without the concurrence of all the parties who compose the original firm. It is not sufficient to constitute the new relation that one or more of the firm, shall have assented to this introduction, for the dissent of a single partner will exclude him, since it would in effect amount to a right of one or more of the partners to change the nature, the terms and obligations of the original contract, and to take away the *delectus personæ* which is essential to the constitution of a co-partnership." So also Collyer No. 8—"And first, the contract must be voluntary, therefore no stranger can be introduced into a firm as a partner without the concurrence of the whole firm; this *delectus personæ* is so essentially necessary to the construction of a partnership that even the executors and representatives of a deceased partner themselves do not as such succeed to the state and condition of partners"—a special contract to the effect is required. So also is the law of Scotland—Bell's Comment:—Pothier No. 91, says:—"Chacun des Associes, &c., each of the co-partners having the right to dispose of the partnership effects only for his own share therein, he may in consequence, without the consent of his co-partners, unite to himself a third person in his own share of the partnership, but without their consent, he cannot, unite him with the co-partnership. Wherefore, if I think proper to unite a third person to myself, he will be my partner in my share of the partnership which was established between us, but having no right to bring him into our partnership without your consent, except for my own part, he will not be your partner, because the rule of Law *socii mei socius meus socius non est*. In No. 95, Pothier goes on to say that "even if the partner had the sole and entire management of the business, he cannot of himself make a third per-

son a partner of the firm, as to give to his partners a partner whom they have not chosen, exceeds the bounds of the simple administration of co-partnership property." Delangle, No. 194, says:—"In civil and commercial partnerships, in which the choice of persons is one of the principal elements of their constitution, no partner can, without a stipulation to that effect or without the consent of his co-partners, substitute his assignee in his place. The consent is determined by, and rests upon the social position—the morality, solvency, and intelligence of the parties. No contractor, partner, can of his own will modify the conditions under the faith of which the partnership was formed." Troplong, Tr. de Soc., No. 755, observes:—"A partner in a civil or commercial partnership may give himself a partner in his own partnership share. This sub-partner is not a member of the first partnership; his admission into the partner's share forms a particular and distinct co-partnership, independent of the original one," and 4 Pardessus, 973, says:—"It is the essential part of a partnership for the partners to choose each other. None can force his co-partner to receive in his place any person to whom he may have assigned the whole or part of his rights in the co-partnership, nor even if he were sole manager of the business can he admit a new partner without the consent of the old one; that admission, whenever it may occur, must, in principle, be the result of a unanimous consent and will. The majority cannot govern the minority in this, although he or they who compose the latter, should state no reason or ground for refusing—and the opposition against such refusal could not support a contestation in law, upon which a judgment could be rendered to compel the acceptance of the new partner." So also Duvergier, No. 373, who, after going over the same ground, thus concludes:—"Personal confidence is the root of the contract, and the friend of my partner may not possess my confidence"

The decisions of the U. S. Courts uphold this same doctrine:—"A person who shares the profits of a member of a firm, may be a partner with that member, and yet not a member of the whole partnership."—14 Robinson Lou. R. p. 368-9, 7 Pick 235, 1 Hill Rep.:—"One of several partners cannot receive another person into a firm without the consent of his co-partners;" and in 14 Johns 322, the judge calls it a "very dangerous principle to admit into the doctrine of partnership."

It must too be admitted by both judge and jury as well settled to require any comment, that in principle and in law when a partnership is once formed, no third person can be afterwards admitted or introduced into the firm as a partner without the concurrence of all the partners who compose the original firm.

But it may be said that the partnership signature to the proposal made to the plaintiff binds the firm. The authorities already cited are too precise and perspicuous to be set aside by any implication to be derived from the use of the co-partnership signature by any of the parties. It is true that the individual partners are the mandataires of their firm and of each other, and that equal authority is given by the law to each to act for all; but that administrative power is limited within the co-partnership's transactions for which the partnership itself was formed and constituted. Pothier at No. 66 says: "this power consists in making all necessary agreements for the partnership selling the

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goods, receiving the monies from sales, &c. 2. Troplong says every civil and commercial co-partnership, has a precise and settled object, which the manager is bound to carry out in virtue of the duties of his functions." No. 712:— "Each partner has the right of managing the partnership affairs—he is presumed to have received from the co-partnership a mandate to manage and administer under the control of his co-partners for the advantage of the undertaking. This tacit mandate, a consequence of the confidence between them, comprehends the powers contained in a general procuration to purchase, sell, pay, receive, &c., the co-partnership effects;" and at No. 908 an express power to the partners in such commercial partnerships is more easily presumed the interests of commerce have so established it. The partners are presumed, by the mere fact of their association together, to be mandatories for each other, to have given to each other the power of binding themselves and them jointly *solidairement* and indefinitely for all the legitimate objects of the co-partnership; and within the sphere of that administration, each partner has an implicit mandate from his co-partners to treat with third persons." So also Duvergier 385 and Delangle No. 126-128—this last author restrains the power to the "*appréciation des actes et des faits relatifs à l'exploitation des affaires sociales.*

The English authorities are equally plain and positive on this point. Story No. 94 observes—"In virtue of this community of rights and interests in the partnership funds, stock and effects, such partner possesses full power and authority to sell pledge or otherwise dispose of the entirety of any particular goods or other personal effects belonging to the partnership, within the scope of his partnership, he is properly deemed to do such acts as their agent, and as the accredited representation of the firm." Collyer No. 384:—"One partner has an implied authority to bind the firm by contracts relating to the partnership: he may draw, endorse, &c., and do any other acts and enter into any contracts in reference to the business of the firm which are incident or appropriate to such business according to the ordinary course or usage thereof." See also Gow on Part. p. 32.

Now this power is essential to the well conducting of commercial transactions and is necessarily implied in the very existence of partnerships; that implication however carries with it its own limitation and restriction, and comprises its application to the business of the firm, the actual concerns of the partnership for which it was established and formed; under no circumstances can this power be extended or presumed to extend to the formation of new partnerships or the admssion of strangers into old ones, these are not the objects nor the business of the subsisting co-partners. Where could this abusive power be stopped if it were once allowed to operate. If one stranger could be introduced twenty might by the same rule and the shares and capitals of the original partners would be materially changed from those contemplated by the original contract; in fact their capitals, original or acquired might be divested by the participation of strangers without capital or capacity. There is but one mode of maintaining an introduced partner of this kind as a member of a firm and that is the aquiescence of the other partners, if that be expressed his adoption is perfect, but it may also be implied from the acts of the partners themselves as if the other

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partners choose to adopt his acts as a partner, if they choose to adopt managements made by him as their partner *ex gra.* by joining in an action for a demand subsequently contracted they may do so, and the action will be maintained and it becomes the action of the firm—1 Hill, Rep. But knowledge is not enough acquiescence in the acts of the person so intended to be admitted as a partner must be clearly and positively brought home to all the other partners in order to bind them.

The introduction of a third person into a firm is a contract with each of the partners to which each must consent individually, and it may be said that there are as many contracts as there are partners. Nor will the approbation of the managing partner alone suffice, nor is the mere knowledge by the other partners of the act of their partner sufficient. Knowledge is not aquiescence nor can any legal inference in support of their partners act [illegible] or allowed from their knowledge or their silence upon the subject du[illegible]rval until the time of when the contract might be expected to ta[illegible]s and words may be sufficient to constitute a co-partnership cont[illegible]y are those of all the partners and shew an acceptance by the partn[illegible]refore, to bind them. Evidence of this acceptance is required. 6 Madd.; 5 Jac. 284. If the contract attempted to be enforced against a firm, in its inception secured their sanction and countenance, the joint obligation attaching upon them to perform it is plain and manifest as a general principle. Each member is necessarily presumed to participate in the expected or resulting benefits of such a contract, and to countervail that advantage, the joint duty obliging them to fulfil it, is imposed: such an engagement by the firm in no respect differs from that of a single member the only difference is in the number of the parties, the consequence and responsibilities which ensue upon a breach of it are precisely the same—but where the inception of the contract was unknown to the other partners who rejected it upon the arrival of the period when it was to take effect, and no evidence of their acceptance was given by act or word, and no acquiescence shewn, their responsibilities are their own, and whether the other partners be many or few, they are in no way compelled to fulfil what they have not sanctioned. It h[illegible] argued that the payment of the 5 per cent on the profits here allowed to th[illegible]tiff during the two years mentioned in the proposal of agreement, is a sanction of it by the other partners. The circumstances attending the inception of that matter are within your recollection; the charge was unknown to the other partners until after the rupture—it was never entered in the partnership books until after the event. Mr. Clare, the book-keeper, was not aware of it, until on being required to make out the Plaintiff's account after the rupture, the latter for the first time, objected, because the 5 per cent had not been credited to him he never previously had objected to the entries in the books to his credit, although he had free access to them. Moreover, so far from acquiescing in this charge, the other partners immediately compelled B. L., the proposing partner, to charge himself with the sum received by the plaintiff in discharge of that claim, because he had proposed it without their sanction, and further, it was not paid until 1860. The payment of the 5 per cent is no proof of the sanction of the defendants and does not bind them or him. Upon this issue how stands

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the case—the paper writing produced by the plaintiff shows it to be the act of the writer B. L., alone, who, on plaintiff's application, proposes to him a continuance of his service with the firm for two years at an increased rate of wages instead of £150, £200 per annum with 5 per cent on the profits *here*, that is in Montreal, aftea that time the writer proposes to plaintiff his admission into the firm, upon terms to be agreed upon and to be mutually satisfactory. This was to take place after the two years: this proposal had never been communicated to the other partners, Mr. H. Lyman or Mr. Savage, either by B. L., or what is more strange, by the plaintiff himself, until his demand of admission into the firm, although B. L. informed him he had not his partners' sanction for making the proposal. Until that time there is no approach to evidence even to their knowledge of this proposal, much less of their acceptance of the agreement or the acquiescence in it by either of them by word or act—the plaintiff is not only silent upon this important subject with the partners, but he is equally so with Mr. Clare—there is no proof of his having done, or been concerned in any partnership act which the co-partners had adopted, or of his having been considered by them in any other quality than their clerk and manager as before the rupture. The law refuses to compel non-consenting partners to submit to proposals of this character, whilst it denies to the partnership signature subscribed by one partner for objects beyond the scope of the partnership business, and mandate any effect whatever—no general procuration, however large, can validate it. Take away from this case the assumed power of one partner to bind his co-partners in this matter, and remove any legal responsibility which could be supposed to have arisen from the use of the partnership name to the abuse of the partnership mandate, and it will be manifest that you cannot fail to perceive by a recurrence to the plaintiff's testimony in support of his case in chief, that there is no case for you, this issue is clearly against the plaintiff. To mantain it in his favour would be against law, as it would be against principle, it would give rise to contentions subversive of a co-partnership system altogether—it is my duty to state this to you who are commercial men, engaged in commercial pursuits and possibly some of you connected with partnerships for your consideration. The law has settled the point as I have endeavoured to explain it to you and it ignores all acts such as this of individual partners upon the responsibility of co-partners, either as to all or any of them; hence it necessarily follows that if the agreement were perfect which it is not, no responsibility in the plaintiff's favour is cast upon the firm of Lymans, Savage & Co. or upon the defendants as partners of that firm by the act of B. Lyman.

Upon these two main issues, the plaintiff must rest upon his own strength for success; as regards the plaintiff there is nothing to support the case either in evidence or in law. I had hoped to have discharged you yesterday at the close of the plaintiff's evidence; had the defendants then moved for a nonsuit, I should not have hesitated to grant the application but although the legal aspect of the case since then is quite unchanged, subsequent proceedings have been adopted which now compel me to submit to you, the third or hypothetical issue together with the law affecting it. It is not my purpose at present to detail the evidence adduced on this part of the case, it must be still in your recollection,

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and I shall therefore confine myself to remark that it appears to sustain the complaints made by the Defendants; this, however, is for your consideration the sum of that testimony is as follows: that the Plaintiff has kept Martha Scott for several years past, and during the time of his service with the Defendants, and especially during the two years mentioned in the proposal; that she has had two children during his connection with her, and that a third is coming. That this woman and her sister lived with their mother until the last four years, that the latter keeps a bawdy house, that living next door to their mother's house they go backwards and forwards to her frequently; that the Plaintiff has frequented the mother's house, and also that of one Emilie Duval, where he appears to have been connected some time since with the girl McGuire; that he has frequently left his employers' premises intrusted to his charge and spent his nights in these places, with other facts and circumstances that I need not repeat. These are facts sworn to and proved before you, and moreover about in so many words admitted and commended by the Plaintiff's Counsel. If you can bring your minds to consider them as things of no importance, as mere venial errors, conduct not disreputable in itself, which should not debar a person from entering into partnership with respectable firms or with any of yourselves, should you be placed in such circumstances, or with any other respectable persons, you will declare it by your verdict; on this point you are the judges of the fact, and the decision rests with you. You must bring the matter home to yourselves, in what way such conduct should be considered by you. I have only now to state to you the law upon the subject of a partner's misconduct, and its result. Admitting, for argument sake, that a partnership did actually exist, with a partner guilty of misconduct, his co-partners, with all their business responsibilities upon them, must have some means of escaping from his connection, and here the law comes to their assistance against the party himself, who might attempt to enforce the continuance of the co-partnership, or the binding nature of an executory contract. The dissolusion of the contract of partnership it is admitted by the law of England for a variety of considerations. Where the period of the partnership is unlimited, it is a partnership at will, and in such case it is competent for any partner at any time to withdraw from it and dissolve the partnership. Hence, Story, No. 271, says, "a partnership at will, may be dissolved not only by a positive or express renunciation thereof by one partner, but also by implication from his acts and conduct, whether by acts or in writing." So also Collyer, No. 105. So Bell's Comment, B. 7, ch. 2, p. 631-2. The French law has similar principles and doctrine, Pothier, 65. De Langle, No. 662, says: "la loi, &c." The law allows every partner to free himself from the servitude of an unlimited partnership, and it is enough for him to manifest his inclination, at once to dissolve all the links that connect him with the partnership, provided that he does not take advantage of the occasion to enrich himself by the detriment of his co-partners or to cause them damage. Section 2, Troplong, No. 911. The same freedom, however, is not assured for limited partnership: In those cases ground must be shewn for making the demand, such, according to English law, is bankruptcy, insanity, or other real or just ground for giving the required redress by a Court of Equity. This juris-

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diction is of a most extensive and beneficial character, and may declare partnerships void *ab initio* or decree their dissolution from the date of the decree. In this category of grounds for dissolution are the misconduct, fraud or violation of duty of a partner, but every trivial departure from duty or violation of the articles of partnership, or every trifling fault or misconduct, will not set these courts in operation, such as mere defects of temper, casual disputes, difference of opinion and other minor grievances, which may be somewhat inconvenient and annoying, but do not essentially obstruct or destroy the ordinary rights, interest or operations of partnership. Story, No. 287.—"On the other hand, if a case of gross misconduct, abuse of authority, gross want of good faith or diligence, such as is and must be productive of serious injury to the success and prosperity of the business of the partnership, Courts of Equity will interfere. Habitual intoxication, gross extravagance or negligence would lead to a like result. But a strong and clear case must be made out of positive or meditated abuse. There must be an unequivocal demonstration by overt acts or gross departures from duty, that the danger is imminent or the injury accomplished. For minor misconduct or grievances, if redress be required, the Courts will go no further than to act upon the guilty or faulty party by way of injunction." Gow, p. 227—Collyer, p. 227,—"Though the Court stand neuter with respect to occasional breaches of agreement between partners which are not so grievous as to make it impossible for the partnership to continue, yet when they find that the acts complained of are of a character that relief cannot be given except by a dissolution, the Court will so decree, though it is not especially asked." You will observe that these remarks apply to actual partnerships where the existing contract is dissolved, and it does appear reasonable that it should be so whenever the objects of the partnership are no longer attainable, or the partner's misconduct so seriously mischievous that it ought not to be tolerated. Now if this be judicial action upon a perfect and subsisting contract, how much more should it apply to intended and imperfect contracts, and thereby prevent parties coming together as partners only to be separated." The French law offers similar principles, Delangle, No. 673,—"Mais la Société, &c., but the partnership, like all other conventions, may cease before its term, if the state of things become such, that the object originally contemplated by the partners can not be attained as if the conduct of one of the partners casts discredit upon the partnership *si ita injuriosus aut damnosus socius sit ut non expediat eum pati*, also Pothier 152, 2 Troplong 983, who says "judges should notice the changes which destroy that harmony which is necessary for the prosperity of the partnership, they must consider the personal habits, the disposition, the character whose influence of no consideration in other contracts, is so great in this marriage or union of civil and commercial interests. Union gives them strength, but discord ruins the best formed ennterprizes; discord among co-partners is then a serious cause for the dissolution of their partnership; the same result follows from every thing that shake the confidence placed in the personal qualities of a partner charged and intrusted with a part of the partnership's action. The mutual confidence of partners among themselves respectively is the true link of the contract of co-part-

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nership. That the partner who shall have become a gambler, a dissipated, *prodigue* spendthrift, and he whose ill conduct unknown at the time of the contract but since then revealed, would occasion serious apprehensions as to his administration of the co-partnership. "So also Duvergier, p. 393, 575,—"La confiance, &c., personal confidence is the basis of the contracts of partnership. If the conduct of a partner be such that this confidence can no longer subsist in the minds of his co-partners, *ex gra.* if he commit repeated faults a dissolution of partnership may be demanded against him. He promised to be careful and honest, he fails in his engagements, his partners are discharged from him. It is not from their intercourse with each other alone that the morality of partners is to be appreciated, acts and matters foreign to the co-partnership business which might take from one of them, the consideration which he enjoyed at the formation of the partnership, will justify a demand for its dissolution. Who would condemn honourable and reputable men to the penalty of a perpetual contrast with a man stigmatized by judicial condemnations or by public opinion. The gravity of the facts, the nature and frequency of the intercourse required by the special character of the contract of partnership should be weighed by the judges, and if they consider that the partnership bond has become insuppoatable from the faults of one of the partners who formed it, they will order it to be dissolved." It would be poor sophistry to deny the applicability of these authorities to the case in hand simply because they refer in terms to existing partnerships; they apply as well to contracts of co-partnership about to be entered into, and justify the defendants if justification were needed, that the plaintiff's conduct before his entry into the co-partnership would be a fair sample of what it would be after. But we are left in no doubt upon the effect of the law, inasmuch as the Court of Appeals has itself settled the special questions suggested for your answers and has given to them a legal significance and purport that cannot be contradicted or diminished. You have the case before you in the fact of an old and long established firm having had a young man in their service for a considerable period of time. Upon his natural application to the senior partner, who appears to have entertained a strong personal regard for him, to know what he proposed to do for him, the partner stated to him his own views and feelings towards him and which, at the request of the applicant, he put into writing and as it happened signed the writing with the partnership signature, but intimating at the same time that he had not the sanction of his co-partners; the Plaintiff's other emyloyers,—which the applicant was to obtain. The writing secured an increase of salary from £150 to £200 per annum and 5 per cent on the profits of the business at Montreal, and proposed his admission into the firm after two years upon terms to be settled. No knowledge by Mr. H. Lyman and Savage of this proposal until the rupture had occurred, or acquiescence in it by them either by word or act at any time is in evidence; the law invalidetes this unauthorised proposal of one partner and nullifies the partnership signature subscribed by him, thereby relieving them and the firm from any liability or responsibility towards the Plaintiff for the nonfulfilment of the agreement by reason whereof he claims damages for loss of profits and advantages from the business of the firm. But what profits? Of those of a partnership at will which has

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not existed at all and which if it had existed any partner might dissolve at his pleasure, or refuse to carry it into effect if only intended to be established, or those of a limited partnership brought to dissolution by the misconduct of any of the co-partners. In this case there is no partnership at all, no privity of contract between the Plaintiff and the Defendants. He was no partner in their firm, had no control or right in its management, nor under any responsibility for its engagements or losses; in fact there is neither a contract nor agreement between them nor foundation for a claim to damages against them and therefore if profits be the measure of damages, no profits in the business of the firm for his participation or distribution. The Plaintiff's case is one of not unfrequent occurrence at law, that of a person contracting with one without authority he must himself bear the result. Under this view of the case there can be no assessment of damages against the Defendants.

Before I close this case, it is proper to refer to one or two circumstances that have been mentioned in the course of the trial: but you must bear in mind that in coming to a decision upon the points to be submitted to you that the reckless assertion of counsel, their suppositions or beliefs are not to be taken as proofs, and though they may move feelings, the rights of parties are to be decided upon the evidence adduced before you. The counsel in stating his case represented the paper writing first as a proposal for agreement, you must be reminded that if it was so, by his own showing it is not an absolute contract in itself, and secondly he represented it as only entertaining a proposal for an agreement,—in this case the law requires it to be accepted; in the former case, it is no contract and cannot support damages, in the latter the acceptance being not proved cannot support the action. It has been asserted that there has been error in the ruling rejecting the testimony of Duval, there is none in fact, but if there were it is not matter for the Jury to pass upon, the testimony rejected was not testimony in rebuttal of the defendants' evidence. The evidence of Turnout, a witness for defendant, has also been questioned, and an attempt has been made to discredit his testimony. Lee and Renahan have been brought up for the purpose. The latter says nothing at all, and the former, Lee, speaks as to Turnout's driving a prostitute in his cab and getting a small bottle of essence for her at a druggist's. If that were an impropriety in a cabman, it is not an indication of his being generally unworthy of belief—impropriety of conduct such as his, if it even be improper, is no indication of perjury—it might as well be said that impurity of conduct would be perjury. Formerly two witnesses were necessary in perjury, because there would be no more than one oath against another in a matter of perjury, but though that strictness has long been relaxed, the evidence must more than counterbalance the oath of the witness, therefore an opposing witness will not avail against a fact sworn to unless corroborated by other independent circumstances. Now Lee has not opposed any fact sworn to by Turnout, but draws his conclusions from the bottle of essence. Turnout's evidence has been supported by others and has been well nigh admitted by the defendants' Counsel. It has also been asserted that the woman with whom the plaintiff had connection was not impure. She lives in a house having brothels on each side; she was backwards and forwards to the house of her mother who

kept a brothel, and had lived with her mother four years before when her mother was in the same line of business. The old proverb applies to, her—"we are known by our acquaintance." Her character is for your consideration, not mine. But to prevent any misconception on these points, and to bring to your mind the testimony attempted to be discredited, the evidence for the defence, as well as that in rebuttal will be read to you (here that evidence was read). As before stated the appreciation of this testimony is for you, not for me. It is for you to answer the suggestions that are submitted for your verdict as you may see fit. I have only to add, that in law no contract with defendants in the plaintiff's favour has been proved in any manner against them.

The jury found unqualifiedly in favour of the Plaintiff upon all the questions submitted to them; except the 3rd, which they answered as follows:

"According to the evidence, the Plaintiff visited one Martha Scott, a woman "of doubtful character, but there is no proof of his having cohabited with her "or maintained her in a state of prostitution," and they assessed the damages at $6500.

On the 20th November, 1860, *Abbott* for Defendants, followed by *Bethune*, moved that the verdict of the jury be disregarded and set aside, and that the Plaintiff's action be dismissed with costs; or in the event of the Plaintiff's not being entitled to the dismissal of the action, that a new trial be granted.

The points relied on were that there was no evidence of any contract with the firm of Lymans, Savage & Co.: that the paper put in evidence, had never been accepted, but that if accepted, it could afford no basis for any assessment of damages, not containing any terms, and contemplating a subsequent negotiation to settle the terms. It was also urged that the Court had the power of receiving an application of the kind in question, that jurisdiction flowing naturally from the Act 14 and 15 Vict., cap. 89, and having been assumed by both the Superior Court and the Court of Queen's Bench, ever since the passing of that Act.

Johnson, Q. C. and *Cross*, for Plaintiff, took issue with the Counsel for the Defendants upon every one of the points urged, and contended that though the paper of itself did not constitute an agreement unless its execution were sanctioned by the other partners, yet such sanction was to be implied from the circumstances of the case: that the law furnished the rule as to shares in and duration of a partnership, when the parties had omitted to regulate them, and that the jury might with propriety include prospective damages, the value of the good-will of the business and the like, in their estimate. They further urged that the Court had no right to assume the power of dismissing the action contrary to the verdict of the jury.

Upon this point the Defendants' counsel cited the following cases, which they contended afforded instances of the exercise of this power by the Superior Court at Montreal and Quebec, and by the Court of Queen's Bench, on various grounds: sometimes upon the verdict; sometimes partly upon the verdict and partly upon the evidence; sometimes upon the law alone; sometimes upon an appreciation of the evidence alone, viz.:

Casey vs. Goldsmid, 2 L. C. Rep., 200.

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Ferguson vs. Gilmour, 5 L. C. Rep., 150.
David vs. Thomas, 1 Jurist 69.
Gilmour vs. Ferguson, 1 Jurist, [illegible].
Gibb vs. Tilstone, 10 L. C. Rep. [illegible].
Grant vs. The Ætna Insurance Comp., Sup. Court, Montreal.

And as showing the interpretation given to the statute by the Court of Appeals the cases of

Shaw vs. Meikleham, 3rd Jurist 5.
Beaudry vs. Papin, 1st Jurist 115.

The parties were heard at great length upon all the points, and on the 27th November, [illegible], rendering judgment upon the motion said

This case is before the Court on two motions by the Defendants—one to set aside the verdict of the jury and to dismiss the action, and the other for a new trial. These motions are [illegible] and presented in an alternative form—that is, the defendants move to set aside the verdict and to dismiss the action, and in the event of the Court [illegible] to grant that motion, they move that a new trial of the issue be granted.

This mode of offering two or more motions in an alternative form, seems to have been sanctioned by this Court and also by the Court of Appeals. Being sanctioned by precedent, the Court holds that the proceeding adopted by the defendants is regular. Ten reasons are assigned in support of these motions, and in the view of the law and the practice of our Courts taken by the defendants, these reasons are applicable to both. Before examining the validity of these reasons, it may not be amiss to state briefly the grounds upon which motions for new trial, in arrest of judgment and for judgment *non obstante veredicto* are based, and the reasons in law and in fact, usually urged in support of such motions respectively, and, in doing so, I shall speak more particularly of the law as it stood previous to the introduction of our Statute 14 and 15 Vic, cap. 89. The ground of a motion for new trial may be any irregularity in the proceedings connected with the trial, or any matter extrinsic to the record, shewing that the trial may have been in due form, yet that it has not done justice between the parties. For instance, where it appears by the judge's notes of testimony that the jury have brought in a verdict without or contrary to evidence—that illegal evidence has been adduced, or that legal evidence has been overruled and refused; that exorbitant damages have been given, or that the Judge himself has misdirected the Jury, so that they found an unjustifiable verdict. For these and similar reasons, it is competent to the unsuccessful party to move that the verdict which has been given, be set aside and a new trial had.

Arrests of judgment arise from intrinsic causes appearing on the face of the record—as if in an action for slanderous words, the defendant denies the [illegible] and issue is joined thereon, if a verdict [illegible] found for the Plaintiff that the [illegible] were actually spoken, the fact is established; yet the Defendant may move in arrest of judgment, that the words are not in their nature actionable, and if the Court be of that opinion, judgment is arrested and reversed for the Plaintiff

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and it is an invariable rule that whatever is alleged in arrest of judgment must be such matter as upon demurrer would have overturned the action. But the rule will not hold *e converso* that everything that may be alleged as cause of demurrer will be good in arrest of judgment; for merely *formal* objections which might have been sufficient ground of demurrer will be cured or aided by verdict; by it the facts are ascertained which before from the inaccuracy of the pleadings might be dubious.

The motion for judgment *non obstante veredicto* is also made by reason of some intrinsic objection apparent on the face of record but differs in this particular from the motion in arrest of judgment that it is made on the part of the Plaintiff and not usually on the part of the Defendant. It is accordingly grounded, when made by the plaintiff, on an objection to the pleading of the latter. Thus when the plea confesses and attempts to avoid the declaration by some matter, which amounts to no sufficient avoidance of it, in point of law, and the plaintiff, instead of demurring, has taken issue upon the truth of the plea in fact, and that a verdict has been found for the defendant, yet the plaintiff may move that, without regard to the verdict, the judgment be given in his favor, notwithstanding the verdict—for the plea having confessed it by an allegation which, though true in fact, is bad in law, it appears upon the whole, that the plaintiff is entitled to maintain his action and have judgment. Formerly an impression prevailed that this motion could be made only on behalf of the plaintiff—but a contrary opinion seems to prevail now in England and instances of motions of this description have been made on behalf of the defendant. It is certain that since the introduction of the 14 and 15 Vic. cap. 89 the courts of Lower Canada, both those of original and appellate jurisdiction, have entertained and adjudicated upon such motions, made on the part of defendant. The cases are numerous and it is quite unnecessary to cite them here.

The Court has deemed it right to advert to these elementary principles, laid down in all English text books of authority, in order to show that there has been in some respects, a deviation in our Courts from the strict practice in England and the United States in regard to motions for judgment *non obstante veredicto.* This no doubt has resulted from the recent modification of our jury system. General verdicts were abolished by the Act of our Legislature 14 and 15 Vic. cap. 89, and special verdicts or findings are substituted in their stead. The 5th section of that Act also confers on the Superior Court the power to set aside on motion verdicts and grant new trials—to arrest judgment and to set aside verdicts with the view no doubt of entering judgment notwithstanding or contrary to the verdict; and it appears to me that the decisions, as well of this Court, as of the Court of Appeals, recognize a power, in the tribunal of original jurisdiction, to set aside verdicts of juries, upon mixed questions of law and fact, and upon questions of law alone and of fact alone.

I think the decisions go this length. The cases are numerous but familiar to the Bar and need not be cited. Upon a careful review of these cases I am therefore clearly of opinion that under our system of jury trials the motion for judgment *non obstante veredicto*, for the reason that no evidence or no sufficient evidence has been adduced, in support of the verdict, is a proceeding sanctioned

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by the practice of our Courts. If there can be an objection to the technical term *non obstante veredicto*, we may call it simply a motion to *set aside* the verdict and to enter judgment for plaintiff, or for the defendant, as the case may be, notwithstanding the finding of special facts by the jury—in other words notwithstanding the verdict. Holding then that these motions are regular, in the particulars above adverted to, it now becomes my duty to enquire whether either of them should be granted in this case, and if either, which of them?

Taking up first the question of evidence, we have to weigh the value of that evidence if it appear that any has been adduced in support of the Plaintiff's pretensions as he has presented them in the present action. The plaintiff claims £6500 damages resulting from the breach of an alleged contract entered into by defendants, as a commercial firm, to take him into partnership. He avers that he sustained that amount of damage from having been "deprived of profits and advantages, and of position resulting from a partnership in the best and most extensive establishment of the kind in Canada." By their plea, the Defendants deny the existence of any such contract, and that even if any such contract had been entered into by them (which they expressly deny) they set forth what they consider sufficient reasons to show that plaintiff had forfeited all right to the fulfilment on their part of the pretended contract. Issue being joined, the first question submitted by the Court to the Jury was in these words, and it is obvious that, upon their answer to this, the Plaintiff's case mainly depended:—"Did the defendants, as a commercial firm, contract with the Plaintiff to admit him as a partner in manner and form alleged in the declaration?"

To this question the Jury answered unanimously in the affirmative, and it is their finding and the evidence in support of it I have now to consider. The Defendants contend that this part of the verdict is wholly unsustained by evidence; that, in point of fact, it is contrary to the testimony adduced in the cause.

The first reason in support of their motion is "that no evidence was adduced at the said trial to prove that the Defendants, as a commercial firm, did contract with the Plaintiff to admit him as a partner in manner and form as alleged in Plaintiff's declaration." And their sixth reason—

"That the said findings and each and every of them were contrary to law and to the evidence of records." The paper writing referred to in the Plaintiff's declaration as embodying the contract, was written by Benjamin Lyman, senior partner in the firm of Lymans, Savage & Co., the Defendants, and in the form of a letter from him to Mr. Higginson, the Plaintiff. The terms and purport of that letter are as follow:

"MONTREAL, 4th April, 1857.

"*Thomas S. Higginson, Esq.:*—

"DEAR SIR,—Touching the conversation the writer had with you, the present is to say that we will allow you £200, say two hundred pounds per annum, and also five per cent. on the profits of the business carried on here for the next

two years, after which time we will admit you a partner on terms that will be mutually satisfactory.

"This letter to be strictly private and confidential.

"Yours very truly,

"LYMANS, SAVAGE & Co."

This is the written contract upon which the Plaintiff relies, and I proceed now to enquire into the evidence relating to it. The testimony of Benjamin Lyman in relation to this paper, is as follow:—

"On the 4th April, 1857, I was senior partner of the firm of Lymans, Savage & Co. On that day I addressed a letter to Plaintiff on my own responsibility, and at the time told Plaintiff so; on that occasion I wrote the name of the firm, I told Plaintiff I only expressed my own feelings, and which might not be agreed to by the firm. He replied, he thought they would. Plaintiff had asked me what I intended to do for him, and I told him I had always intended that he should take Mr. Savage's place. Plaintiff asked me to give him in writing what I intended, and I gave him, in writing, the letter of the 4th April. This was written at the very time of his conversation with me. After the letter was written Plaintiff remained in the employ of the firm for two years."

In cross-examination he says:—

"The letter of the 4th April, 1857, was written in Plaintiff's room, in the store when I was taking my luncheon. I told him I had not the sanction of my partners, and he said if they did not consent it would go for nothing. Plaintiff said he thought I could induce my partners to come into the arrangement. I had not the sanction of my partners. The first time I told my partners that I had written such a letter was after I wrote the letter of the 1st April, 1859."

As a matter of fact resulting from this evidence which is precise and direct, and is uncontradicted by any other testimony of record, but, on the contrary, is corroborated by the very terms of the letter and other circumstances, it is manifest and so manifest as to leave no doubt whatever, in any reasonable mind, that this letter was written without the knowledge sanction or authority of the other co-partners, Henry Lyman and Alfred Savage. This fact being thus legally and conclusively established, the rule of law applicable is plain. The two other partners were not bound by this letter, unless they became so by subsequent ratification, this is beyond controversy, and therefore requires no comment or citation of authority. A few legal maxims dispose of this part of the case. It is admitted that each partner is the general agent of the firm, for all purposes connected with the partnership. He may therefore dispose of the whole, or any part of the personal property belonging thereto in like manner as if he were sole owner. So all transactions by a partner, as agent of the firm, will bind the firm. The contract of co-partnership is consequently one of the most important known to the law. Hence it is that the express and unequivocal consent of all the other partners is required in the admission of new members. As between the partners therefore it cannot be created by mere operation of law, but depends solely upon the fact of agreement. No third person can be introduced by one or more partners, into a firm, but with the consent expressed, or intelli-

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gibly implied from acts, unequivocal in their nature, of all the other parties. This is the law, and bearing this principle in mind, we have to enquire, whether evidence has been placed of record proving [illegible]quent ratification, of this act of Benjamin Lyman, by the other [illegible] If such ratification be proved, the verdict of the Jury so [illegible]owever, there be no evidence whatever, or evidence to the contrary, the verdict in this particular finding, is bad. Before proceeding further, however, in this enquiry, it is right, that the Court should examine the evidence in regard to another important point in this case; and that is whether it be proved, by any kind of evidence whatever, that this offer of partnership was ever accepted by Mr. Higgin[illegible]y to make that acceptance known to the firm, or in any way to bind him or the firm? It will be recollected that the letter written by B. Lyman bore date the 4th April, 1857,—and it is pretended that the Plaintiff answered it by a letter dated the following day, that is the 5th April, 1857—this may or may not be true—the Court is not called upon to discuss moral probabilities, or to appreciate the value of conflicting presumptions, which escape the ingenuity of legal argument but as a matter of fact there is no proof whatever adduced to prove that this letter of the 5th April, 1857 was ever written, was ever sent to, or received by the firm of Lymans, Savage & Co. or even Benjamin Lyman himself. A young gentleman by the name of Spence was examined by the Plaintiff to prove that such a letter of acceptance was written, and his own words will demonstrate the value of his evidence in this particular. "Knew Plaintiff in 1857—Knew of his receiving a letter from Defendants. Plaintiff brought the letter to witness, who saw a draft of the reply in 1857, shortly after he first saw the said letter from Lymans, Savage & Co. Witness saw Plaintiff in the store on Sunday, and Plaintiff said 'there is my answer to their letter lying on the desk.' This was shortly after my seeing the letter to him from Lymans, Savage & Co.

Cross-examined:—"Plaintiff shewed witness the draft of his reply shortly after his receiving the original letter. Cannot say how long after. The letter I speak of as having been pointed out to me by Plaintiff was pointed out on Sunday. None of the firm were present, nor any in the employ of Lymans, Savage & Co. Plaintiff had the key of the premises and was apparently in charge of them on that day. Witness did not read the letter lying on the desk, but has read the copy shewn to him by Plaintiff. It was pointed out by Plaintiff as being the letter. To the best of his knowledge it was the Sunday after the 5th April, 1857, that witness saw the letter lying on the desk that Plaintiff pointed out to him."

Mr. Spence says he never read the original but has read the copy shewn to him by Plaintiff. Both parties seem to unite in speaking highly of the character and credibility of this witness; and, therefore, giving the fullest weight to his testimony, I am bound to say that there is no positive or legal evidence whatever of the existence of this letter of acceptance. The most that can be said is, that there exists a presumption that such a letter was written as Mr Spence's evidence seems to imply. But this presumption is refuted by the testimony of Mr. Clare, book-keeper of the firm, and of Benjamin Lyman. Mr. Clare says:—"As book-keeper witness had access to all books and letters to or

from and of the firm. Was constantly in the office. Witness never heard of the letter of date the 5th April, 1857. Never saw it. Only heard of it a few days since. Had such a letter been left lying on the office desk, witness would certainly have seen it. He thinks he would have seen it, if left lying as Mr. Spence says. It is his business to put away papers. As they accumulate they are filed away."

Mr. Benjamin Lyman says:—

"I did not receive any letter from Plaintiff of date the 5th April, 1857. I did not see such a letter lying on the office desk. The firm did not, to my knowledge, receive such a letter. I never read such a letter or saw it, nor heard of it till a day or two ago, when my lawyers shewed me a copy of it."

The letter here referred to, and of which an alleged copy is produced, is in these words:—

"MONTREAL, 5th April, 1857.

"*Messrs. Lymans, Savage & Co., Montreal*:—

"DEAR SIRS,—In reply to yours of the 4th inst., the present is to say that I accept your offer of two hundred pounds per annum, and five per cent. on the profits of your business for two years from this date, after which time you are to admit me a partner, upon terms mutually satisfactory.

"Yours truly,

"T. S. HIGGINSON.

"P. S.—My name of course to appear in the firm."

Had proof been offered that this letter had been written on the day it bears date, or about that time, and that the firm had then received it, such a formal acceptance, it must be conceded, would have had a very serious significance in the present case, but as a matter of fact the Court does not find in the evidence adduced any proof that such a letter was ever written at the time it purports to bear date or at any time during the two years, or that it was sent to, or received by the firm of Lymans, Savage & Co., or Benjamin Lyman, and we look in vain for any other testimony to shew that the Plaintiff formally or expressly accepted the proposed offer of Benjamin Lyman to become a partner in the firm, before the expiration of the two years. It is quite true that he remained in the Defendants' employ—received the £200 per annum and 5 per cent. upon the profits. It results clearly from these facts that so far he did accept the offer, and it may be urged, with some appearance of truth, that the acceptance and compliance with part, was, or was equivalent in fact to, an acceptance of the whole. The jury, no doubt, thought so, and that so far as it was a contract, it was completed and rendered binding upon both parties, and the Court is of opinion that in so far as the acts of Higginson tend to prove an acceptance of the whole contract by him, the proof of these acts was evidence to go to the Jury and that it was their duty to appreciate that testimony. It would be going too far, therefore, to say that there is no proof of the acceptance by Mr. Higginson of Benjamin Lyman's offer of co-partnership. Assuming however, that there was the tacit acceptance contended for, it could only be such in regard to Benjamin Lyman unless it be proved that the other partners were aware of the letter of the

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4th of April, 1857, written by their partner Benjamin Lyman and of the offer of 5 per cent on profits and of the prospective partnership therein contained. It was urged in argument by Higginson's counsel, that we must infer or presume the other partners' knowledge of the offer of partnership and of the 5 per cent. profits from the fact that the Plaintiff's salary was raised to £200 per annum after the 4th April, 1857, and that he remained in their employ during two years. Now the Court is of opinion that even in the absence of all evidence to the contrary, we could presume no such thing. No legal presumption or inference of fact could arise here and for this simple reason :—The engagement of Mr. Higginson, by the senior partner, for two years at £200 per annum bound the firm—their acquiescence was not necessary—they, as a firm, were bound in law to fulfil that engagement. If this part of the contract required their ratification, and they had ratified it by paying him £200 a year, a presumption might arise that they had ratified the entire engagement. There is an obvious distinction here, and one we must not lose sight of. The Court must, as a matter of law, regard this engagement to pay 5 per cent. on the profits and the offer of a partnership separately from the hiring of the Plaintiff for two years at £200 per annum, and suppose, as we must in examining the force of presumptions, and the applicability of evidence, that Mr. Benjamin Lyman had offered, without the sanction of the firm, 5 per cent. on profits and a partnership alone, would complete silence and inaction upon that engagement, raise a presumption in law or in fact that the other partners had ratified the engagement? Assuredly not. And the Court is of opinion that this is undoubted law, even if they were aware of such an agreement having been entered into by their partner. Silence and inaction during the period to the time when the contract was to take effect is not, in a case like the present, a ratification of the contract; and no presumption of acquiescence is legally deducible from such silence and inaction, even if they were aware of the existence of such an engagement. But let us enquire a little further into this matter and examine the evidence touching their knowledge or ignorance of Benjamin Lyman's letter of the 4th April, 1857. And first as to the 5 per cent., respecting which a good deal has been said. This credit of 5 per cent. to Plaintiff was never entered in the books. Mr. Clare the book-keeper says he became aware of it only in May, 1859. The charge was made in the books of the firm in 1860 and was then charged to Benjamin Lyman because the other members of the firm objected to it. Benjamin Lyman says: "The first entry made in the books of the firm with reference to the 5 per cent. was made in 1860. His partners knew nothing of it till about the time that Plaintiff demanded to be admitted into partnership and was refused. The firm was sued afterwards for the 5 per cent. After suit I and Mr. Clare made up the amount to the best of our ability, and we decided that if the amount was not accepted, the Plaintiff might go on with his suit. The amount $1,200 was accepted by the Plaintiff and was charged to me individually on the ground that I had promised it to Plaintiff without my partners' consent, and that they were not responsible."

It will be remarked that the payment of 5 per cent. was made by Benjamin Lyman himself on the 18th May, 1860, after the action was brought, and appea-

red then for the first time in the Defendants' books and to the debit of Mr. B. Lyman. That his partners were ignorant of his engagement to pay the 5 per cent. till then, and they then disavowed his act. This testimony corroborated as it is by Clare and by all the circumstances relative to this charge of 5 per cent. as proved, is, in the opinion of the Court, conclusive: unless indeed we discard the whole statement as a tissue of falsehoods from beginning to end, which nothing in the character of the witness, or on the record will justify.

Then as to the partnership. Mr. Clare never heard of it. Mr. Higginson never spoke to him of it and B. Lyman swears that his partners knew nothing of the letter of the 4th April, 1859, and when he made demand of a partnership he is met by a peremptory refusal on the part of the firm, and yet in the face of all this the Jury found they had ratified the engagement entered into by B. Lyman. The Court has no hesitation in saying that such a finding is not only without evidence, but contrary to evidence. That the verdict in this particular is bad and that all the findings must be set aside. I have felt it my duty to dwell at length upon this part of the case, because the Jury who rendered this verdict was composed of men of high character and great intelligence, and in deciding, as I feel bound to decide that their finding is contrary to evidence, it is proper that the parties immediately interested in this cause should be made fully aware of the grounds upon which this Judgment of reversal rests.

The Court is confirmed in the view here taken, inasmuch as it is sanctioned by the charge of the honorable and learned Judge who tried this cause, and I entirely concur in the opinion he expressed in his charge to the Jury that had a non-suit been asked for by the Defendants he would have granted such an application.

The first finding of the Jury being thus disposed of, it is obvious that the remaining seven findings share the same fate—they can offer no obstacle to the setting aside of the verdict *in toto*, but it is proper that the Court should offer some observations respecting the last finding of the jury assessing the damages, and in doing so, it is necessary to advert, not only to the evidence, but also to the allegations of the Plaintiff's declaration. The contract is thus set out:

"And whereas heretofore, to wit, on or about the 4th day of April, 1857, at the said city of Montreal, by a certain writing, *sous seing privé*, written on behalf of the said Defendants, by said Benjamin Lyman, the senior partner of the firm of the said firm of Lymans, Savage & Co., the Defendants undertook and declared that they would allow the Plaintiff £200 per annum, and also five per cent on the profits of the business carried on there, to wit, in the said city of Montreal for the next two years, to wit, after the date of the said writing, after which time, to wit, after the expiry of the said two years, which two years expired on the fourth of April last past, to wit, 1859, they agreed to admit the Plaintiff as a partner into the said business of the Defendants, which writing is herewith produced to form part of these present." There is a strange allegation following, that the connection was intended to be permanent and continuous.

Apart from this avowment of perpetuity in the co-partnership we have not a word about the terms and conditions of the proposed association—and on

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looking at the paper writing of which *profert* is here made—we find that not only were no terms whatever agreed upon or mentioned, but that they were to be subsequently determined upon to the mutual satisfaction of both parties. The allegations of the declaration leave us completely in the dark upon this essential point, and the letter but increases the obscurity, except in this that it demonstrates that the terms of the connection were to be the subject of future negociation—and that as a matter of fact the conditions were expressly left unsettled—they were reserved by the very terms of the letter for future adjustment, and were to be arranged so as to be mutually satisfactory. Now what is the present action brought for? For the recovery of damages resulting from the breach of this alleged contract. And what are the damages claimed? For loss of prospective profits only.

In order that there may be no misapprehension upon this important point, I will quote the very words of the declaration:—

"And the Plaintiff avers that by the said refusal of the Defendants to admit his as such partner he had been deprived of profits and advantages and of position resulting from being thereby established in the best and most extensive establishment of the kind in Canada, and has suffered injury and damage in all to the amount of £6,500 currency and upwards."

It is quite true, that in a previous part of his declaration he says "that relying on this agreement he refused other advantageous offers"—but he does not assign these refusals as causes of damage, nor does he claim indemnity for such lost opportunities of improving his fortunes, but exclusively and expressly for loss of future, prospective profits in the firm of Lymans, Savage & Co., and for this alone.

Now let us enquire into the nature of these damages and consider the possibility of adjusting them under these allegations.

It is perhaps unnecessary to say that in a case like the present, there can be neither nominal nor vindictive damages. The loss must be determined by the plain process of figures, and the damages fixed with something approaching to arithmetical accuracy—they may amount to more or less, according to the judgment of the jury, but there must be a basis upon which the award is to rest, and a calculation susceptible of some kind of analysis. Now, neither under the allegations of the Plaintiff's declaration, nor upon the evidence adduced had the Jury any such basis, nor had they any means of making such a calculation of the damages claimed. It is not alleged nor is it proved (in fact it could not be proved) whether it was money or labour and skill, the Plaintiff was to contribute. No amount is mentioned or proved—nor any mention of skill and labour as his contribution. It is not alleged nor it is proved what share of profits he lost. Now holding as we must, with this declaration before us, that loss of profits alone are claimed—how did or how could the Jury award £1250? To what share of the profits was this sum equivalent? With this statement of his case and this proof in support of it, how could the Jury find that he lost £1250 when he omits to tell them the proportion of the profits he was to receive? In this particular, both the allegations of the declaration and the evidence are

fatally defective. Whether the loss of profits be accrued or prospective the same insuperable difficulty presents itself. The action is so brought and the evidence is of such a character, that no legal, no intelligible adjudication of damages could, or in the opinion of this Court, can ever take place in this cause. In a case not only analogous but similar to this Chief Justice Abbott, afterwards Lord Tenterden, gave his opinion in the following terms:—"He was of opinion that the action was not maintaible in the absence of evidence to show the terms upon which the parties were to become partners, and said that he had never heard any instance in which such an action had been supported without proof of the terms." This was the case of Figes vs. Cutler, and has not, as I am aware, been overruled. The case in 9. Bingham, cited by the Plaintiff's Counsel, is entirely different from the present.

This, as it appears to me, is not only sound law, but from pure necessity and the plainest dictates of common sense is entirely conclusive. For all these reasons combined and in view both of the pleadings and the evidence adduced the Court is of opinion that the motion to set aside the findings of the Jury and to dismiss the action must be granted, and the action is dismissed accordingly with costs.

It only remains for me to express my obligations to the Counsel who argued this case both on behalf of the Plaintiff and the defendants, for the learning and remarkable ability with which they urged their respective pretensions, from which I have received much assistance in my deliberations.

The judgment as motivé was as follows:

"The Court having heard the parties by their counsel upon the Defendant's motion of the 20th inst.:—That the verdict and finding of the Jury in this cause, rendered and made on the 14th day of November inst., at the trial of the issues in this cause, be set aside and be disregarded, and thereupon, notwithstanding the said verdict and findings, that the declaration and action of the Plaintiff be hence dismissed with costs; having examined the proceedings, evidence and record in the said cause, the verdict and findings of the Jury, and upon the whole deliberated; considering that it appears both by the parole testimony adduced by the Plaintiff at the trial, and also by the paper writing by him produced, as his exhibit No. 1, purporting to be a letter written and signed by the firm—Lymans, Savage & Co., the Defendants, but proved to have been written and signed without their authority or knowledge, and addressed to the Plaintiff, that no legal or binding contract was thereby entered into between the Plaintiff and Defendants as a commercial firm or otherwise; considering that there is no evidence whatever of any contract between the Plaintiff and the Defendants to admit the Plaintiff into partnership in the manner and form alleged and set forth in the Plaintiff's declaration; considering that the Plaintiff's action is brought to recover of, and from the said Defendants, damages resulting from the breach of the alleged contract or offer to admit the Plaintiff into partnership, stated to have been entered into between the Plaintiff and B. Lyman acting therein for the Defendants, and also one of the Defendants in this cause, by letter dated [illegible] April, 1857, and seeing that the damages thus alleged and

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claimed by the Plaintiff's action, and by him declared to have resulted from the loss of future profits in the firm of Lymans, Savage & Co., and exclusively for damages so resulting to the Plaintiff; considering that it doth not appear by the allegations of the Plaintiff's declaration, nor by the evidence adduced, what were or were not, to be the terms and conditions of the proposed co-partnership, alleged to have been agreed upon between the Plaintiff and the Defendants; considering that it doth not appear by the allegations of the Plaintiff's declaration, nor by the evidence adduced, what sum or amount the Plaintiff was to bring into the capital, stocks, or co-partnership of the Defendants, Lymans, Savage & Co., or what he was to contribute thereto as a partner; considering further, that it does not appear by the allegations of the Plaintiff's declaration, nor by the evidence adduced, what was to be the Plaintiff's share or proportion of, and in the future profits of, the said firm and co-partnership of Lymans, Savage & Co., considering that without the allegation and proof of what the Plaintiff's share and proportion in such profits were to be, no action such as the present could or can be maintained in law; nor could any legal verdict be rendered therein, awarding damages, such as are claimed in this cause, to the Plaintiff; seeing, therefore, that the 1st and the 8th findings are, and each of them is, contrary to law and to the evidence adduced in this cause, and considering that the 2nd, 3rd, 4th, 5th, 6th and 7th findings of the said verdict are entirely void, null inoperative and of no effect in law, and must be overruled, set aside and rejected, doth grant the said motion of the said Defendants, and in consequence the said verdict and findings are, and each of them is, hereby set aside, and the Plaintiff's action is hence dismissed with costs—*distrait* in favour of Messrs. Abbott and Dorman, Attorneys for the said Defendants."

Cross and Bancroft for Plaintiff.
F. G. Johnson, Q. C., Counsel.
Abbott and Dorman for Defendants.
Bethune, Counsel.
(J. J. C. A.)

MONTREAL, 15 MAI, 1860.

Coram MONK, J.

No. 1765.

Bleau vs *Béliveau.*

Jugé,—1o. Que l'hôtellier ou le maître de pension ne peut retenir en gage les effets de son pensionnaire pour la pension de ce dernier, lorsque ce pensionnaire est au mois ou à la semaine.
2o. Que la loi n'accorde ce privilége qu'au maître d'hôtel sur les malles et effets d'un pélerin, ou d'un voyageur ou d'un passant.

L'action du Demandeur était une saisie-revendication ayant pour objet de revendiquer une valise contenant diverses hardes de corps, la propriété du Demandeur laquelle le Défendeur gardait en sa possession contre le gré et la volonté du Demandeur.

Le Défendeur plaida qu'il gardait en sa possession les susdits effets à titre de gage, que le Demandeur avait occupé une chambre dans son hôtel et qu'il lui devait un certain montant pour frais d'hôtelage et qu'en se refusant sous les cir-

constances, de laisser le dit Demandeur enlever ses susdits effets, il n'avait fait qu'user du privilége que lui accorde la loi en pareil cas, et que de plus il aurait lui-même saisi les susdits effets pour ses susdits frais d'hôtelage.

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Le Demandeur répondit à cette défense que la loi n'accordait pas de tel privilége au Défendeur, attendu qu'il était un pensionnaire permanent chez le Défendeur et qu'il ne pouvait pas être rangé dans la catégorie des "pèlerins et voyageurs."

La preuve établissait que le Demandeur pensionnait au mois chez le Défendeur.

Le Défendeur invoquait au soutien des prétentions par lui émises dans sa défense, l'article 175 de la Coutume de Paris qui a trait au privilége des hôtelleries.

La Cour par son jugement a déclaré que l'article de la Coutume de Paris cité par le Défendeur au soutien de ses prétentions, ne pouvait dans ce cas recevoir son application, vu que ce n'était pas le cas d'un pèlerin, voyageur ou passant contemplé par cet article de la Coutume, mais bien celui d'un pensionnaire au mois ou à la semaine pour lequel la loi n'accorde pas de privilége à l'hôtellier ou au maître de pension.

A. St. Amand, pour le Demandeur.

L. Bétournay, pour le Défendeur.

(C. A.)

MONTREAL, 30TH APRIL, 1860.

Coram BADGLEY, J.

No. 1839.

Macfarlane vs. *Béliveau.*

HELD:—1st. That in an action commenced by *Capias ad Respondendum* and wherein judgment has been rendered declaring such *Capias* good and valid, a *Capias ad satisfaciendum* will issue, on proof by Plaintiff petitioning that the Defendant *under bail* has not according to the 12 Vict., ch 42, fyled in the Prothonotary's office a statement under oath of all his credits, property and effects, and such Defendant will be imprisoned for a space of time at the discretion of the Court not exceeding one year.

2nd. That Defendant need not have notice of such Petition.

Action by saisie-arrêt avant jugement and Capias ad Respondendum by Plaintiff against Defendant under the 22 Vict., ch. 5, sec. 48, writs issued the 20th November, 1858.

Defendant arrested and gives bail 25th November, 1858, to Sheriff of the District of Arthabaska.

Special bail put in the 21st December, 1858.

Judgment in favor of Plaintiff, the 30th June, 1859, declaring saisie-arrêt and Capias good and valid, &c., &c.

On the 26th April, 1860, the Plaintiff petitioned the Court, shewing:—

The issuing of Capias and arrest of Defendant.

The furnishing of special bail.

The rendering of final judgment in the cause.

"That the Defendant has neglected and omitted to fyle within the delays prescribed by law in such case in the office of the Prothonotary of this Court, a statement under oath, indicating the moveables and immoveables that he possess, and the place where the same are situated, in order that the Plaintiff may proceed to attach the same by execution and also indicating the names and

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residences of his debtors and the amount of the indebtedness of each, and also a declaration that he the Defendant is ready to abandon and give up to his creditors the effects and property in such statement set forth.

And whereas by such refusal and omission and that the judgment in this cause exceeds the sum of £20 currency, the Petitioner preys—

That a writ of *Capias ad satisfaciendum* do issue against the body of Defendant and that he be arrested and imprisoned in the common jail of this district for a space or term of one year or such other time as this Honorable Court may order.

With this petition were fyled copies of final judgment, Bail, Bond, and Certificate of Prothonotary that no statement had been fyled in the Prothonotary's office, according to the 12 Vict., ch. 42.

On the 30th April the Court renders the following judgment:—

"The Court having heard the Plaintiff and Petitioner upon his petition that, &c., &c., considering that the Defendant hath not fyled the statement under oath, required under the provisions of the 12 Vict., ch. 42, doth therefore order the Defendant to be imprisoned in the common gaol of the District of Montreal for the period of one year."

R. & G. Laflamme, for Plaintiff and Petitioner.

Cartier & Pominville, for Defendant.

Similar judgments were rendered the same day in the following cases.

No. 910. *Fenwick* vs. *Maine*.

No. 1995. *Gilmour* vs. *Hart*.

No. 571. *Hudon et al.*, vs. *Gervais*.

(J.A.P. JR.)

MONTREAL, 24 SEPTEMBRE, 1859.

Coram BERTHELOT, J.

No. 612.

La Compagnie du Prêt et d'Emprunt du Haut-Canada, vs. *Vadeboncœur et ux.*, et *Vadeboncœur et al.*, Opposants.

Jugé,—Que la vente d'un immeuble substitué ne peut pas être opposée tant que la substitution n'est pas ouverte.

Par leur Opposition afin d'annuller, les Opposants Louis Vadeboncœur, en sa qualité de curateur légalement élu en justice à Louis Joseph Napoléon, autrement connu sous le nom de Louis Napoléon Chef dit Vadeboncœur, son fils mineur, légalement émancipé, commerçant, de la cité de Montréal, pour l'assister aux causes, et le dit Louis Napoléon Chef dit Vadeboncœur, mineur émancipé suivant la loi et faisant commerce, en la dite cité où il est résidant et domicilié, alléguaient :

Que par acte reçu en la dite cité, devant maître Labadie et son confrère, Notaires publics, le quatorze Mai, mil huit cent quarante, François Chef dit Vadeboncœur, bourgeois, de la dite cité, fit son testament solennel et ordonnance de dernières volontés, par lequel il légua et donna à Louis Chef dit Vadeboncœur, son fils né de son légitime mariage avec Monique Brosseau, la jouissance de tous les biens immeubles qu'il délaisserait à son décès, mais cette

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jouissance des dits biens ne devait commencer au profit du dit légataire qu'après l'extinction de l'usufruit des mêmes biens dans la personne de la dite Dame Monique Brosseau à qui il légua telle jouissance par sondit testament ; et quant à la propriété des dits biens, il la légua et donna aux enfants nés et à naître de son légitime mariage, c'est-à-dire du légitime mariage de son dit fils Louis Chef dit Vadeboncœur, lesquels enfants, ne devant commencer leur jouissance qu'après le décès de leur père.

Que le dit testateur est décédé, au dit lieu de Montréal, le ou vers le dix avril, mil huit cent quarante-trois, sans avoir changé ses dites dispositions testamentaires et aussitôt son décès, sa dite épouse a eu saisine de ses biens immeubles.

Que les biens immeubles, ainsi délaissés par le dit testateur, et par lui légués ainsi que ci-haut rapporté, sont les mêmes biens immeubles que ceux saisis en cette cause sur les Défendeurs.

Que le susdit testament a été publié et lu, suivant la loi et dans la manière et les délais prescrits par la loi, dans le dit district, le deux Octobre, mil huit cent quarante-trois.

Que la dite Dame Monique Brosseau est décédée, dans le dit district, et qu'aussitôt son décès, le dit Louis Chef dit Vadeboncœur, le susdit légataire, qui est le même que le Défendeur en cette cause, a eu saisine légale des dits biens immeubles et les possède encore.

Que le dit Louis Vadeboncœur, le Défendeur, a épousé Dame Sophie Guilbault, dans le dit district, suivant la loi, le ou vers le vingt-sept avril, mil huit cent quarante et un et que de ce mariage il est né un enfant mâle, le ou vers le huit septembre 1842, lequel a été baptisé sous le nom de Louis Joseph Napoléon, lequel est vivant.

Que par ses susdites dispositions testamentaires, le dit testateur a créé une substitution relativement à ses dits biens immeubles, laquelle n'est pas encore ouverte, et qui ne devra avoir son effet qu'au décès du dit Louis Chef dit Vadeboncœur, le Défendeur.

Que le vingt-trois Mars dernier, le dit Louis Napoléon Chef dit Vadeboncœur a été émancipé suivant la loi, dans le dit district, et que le dit Louis Chef dit Vadeboncœur, son père, a été là et alors élu son curateur aux causes, laquelle charge il aurait accepté.

Que les biens immeubles, saisis en cette cause sur les Défendeurs et décrits au procès-verbal de saisie ; sont des biens immeubles laissés par le dit Testateur [illegible] son décès et sont compris dans la susdite substitution et que le dit Louis Napoléon Chef dit Vadeboncœur est celui qui aux termes du susdit testament est propriétaire de tels biens et doit être appelé à les recueillir après le décès de [illegible] père, et que la saisie faite de tels immeubles sur les Défendeurs est illégale et doit être mise au néant.

La Demanderesse répondit en droit à cette Opposition comme suit :—

Que la dite Opposition, en autant qu'elle invoque la prétendue substitution contenue dans le Testament de feu François Chef dit Vadeboncœur, est mal fondée et ne peut être maintenue, pour les raisons suivantes :—

1o. Parceque les dits Défendeurs et Opposans n'avaient [illegible]

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la dite Opposition, de demander que la saisie faite en cette cause fut déclarée nulle, ni de s'opposer à la vente des immeubles saisis.

2o. Parceque la dite saisie a été faite sur les dits Défendeurs et Opposans qui étaient et sont encore en possession des immeubles saisis *animo domini*, et qu'en conséquence la dite saisie a été bien faite et que les dits Défendeurs et Opposans n'ont aucun droit de s'en plaindre et sont mal fondés à en demander la nullité.

3. Parcequ'en, supposant, (ce qui est nié), que les dits immeubles fussent grevés de substitution en faveur des enfans des dits Défendeurs et Opposans cela ne donnerait aucun droit ni intérêt aux dits Défendeurs et Opposans de faire la dite Opposition.

4o. Parceque dans la même supposition, les dits Défendeurs et Opposans n'auraient aucune autorité pour faire la dite opposition ni pour agir au nom et dans les intérêts des appelés à la dite prétendue substitution.

5o. Parceque la dite prétendue substitution n'est pas ouverte, et que par conséquent la vente des immeubles saisis ne pourrait affecter en aucune manière les droits ni les intérêts de ceux en faveur de qui ils seraient substitués, et qu'en conséquence, il n'y aurait aucune occasion, prétexte ni droit de faire une opposition pour conserver ces prétendus droits et intérêts.

6o. Parceque le dit Testament de feu François Chef dit Vadeboncœur, en date du quatorze Mai, mil huit cent quarante six, sur lequel est fondé la dite opposition ne créa aucune substitution en faveur des enfans des dits Défendeurs et Opposans, ni de qui que ce soit.

7o. Parceque dans et par le dit Testament le dit feu François Chef dit Vadeboncœur légua la jouissance de ses biens à Dame Monique Brosseau, son épouse, et après la mort de cette dernière à son fils Louis Vadeboncœur, un des Défendeurs et Opposans, et après la mort de ce dernier à son épouse, si toute fois il se mariait et décédait avant son épouse, pour après le décès de cette dernière les dits biens appartenir aux enfans du dit Louis Vadeboncœur.

Que si ces dispositions peuvent être considérées comme contenant une substitution, telle substitution ne peut s'étendre au-delà de deux degrés outre le premier donataire ou légataire, par conséquent ne pourrait s'étendre aux enfans du dit Louis Vadeboncœur, attendu que la dite Monique Brosseau a recueilli et possédé les dits biens après la mort du dit feu François Chef dit Vadeboncœur; qu'après la mort de la dite Monique Brosseau, le dit Louis Vadeboncœur a recueilli les dits biens et les possède encore, et que le dit Louis Vadeboncœur étant marié, s'il meurt avant son épouse, cette dernière devra à son tour recueillir les dits biens et en prendre possession.

Que vu ce que dessus, les dits Défendeurs et Opposans sont mal fondés à s'opposer à la vente des dits biens saisis à raison de la dite prétendue substitution.

Les parties ayant été entendues en droit, le jugement de la Cour renvoyant l'opposition est motivé en ces termes.

La Cour après avoir entendu la Demanderesse et les Opposans, Louis Vadeboncœur ès qualité et consors, par leurs Avocats, sur la contestation et réponse en droit de la Demanderesse à l'encontre de l'opposition des dits Opposans; examiné la dite opposition et la dite contestation et réponse en droit, et en avoir

délibéré, considérant que la substitution que les Opposans allèguent avoir été créée, par le Testament de François Chef dit Vadeboncœur, n'est pas encore ouverte aux termes mêmes, de leur opposition, et que le dit Testament a été bien et duement publié; Considérant de plus que les Opposants ne font aucunement voir par les allégués de leur opposition que les droits qu'ils représentent puissent être purgés ou perdus par la vente des immeubles, qu'ils reconnaissent avoir été saisis sur les Défendeurs en cette cause, qui en avaient la saisine lég[illegible]; maintient la dite contestation, et déboute la dite opposition avec dépens.

Vide, Rép. de Guyot, vo. substitution, p. 536.

Augeard, arrêt du 23 Mai, 1692.

Leblanc & Cassidy, Avocats des Opposants.

J. Papin, Avocat de la Demanderesse.

(P. R. L.)

NOTE.—Une semblable opposition, de la part du tuteur à la substitution, fut renvoyée pour les mêmes motifs.

QUEEN'S BENCH, 1860.

QUEBEC, 19TH JUNE, 1860.

Coram SIR L. H. LAFONTAINE, Bart., C. J., AYLWIN, J., DUVAL, J., MONDELET, (C.), A. J., & BADGLEY, J., *ad hoc.*

No. 35.

TILSTONE & AL., (*Defendants in Court below,*)

APPELLANTS.

AND

GIBB & AL., (*Plaintiffs in Court below,*)

RESPONDENTS.

Held,—That on an Appeal from the Judgment of the Superior Court rejecting the Defendants' motion for a new trial and entering up Judgment for Plaintiffs on the verdict of a Jury, the Court will set aside the verdict and dismiss the Plaintiffs' action, *non obstante veredicto,* where they consider, that according to law and the evidence adduced at the trial, the verdict ought to have been for the Defendants.

This was an Appeal from a Judgment rendered by the Superior Court at Quebec on the 1st of June 1859, rejecting the Defendants' motion for a new trial and entering up judgment on the verdict of the jury, condemning the Defendants to pay the Plaintiffs the sum of $5329.72, and interest and costs.

The question at issue in the Court below was, whether or not the promissory note on which the plaintiffs' action was founded was paid, and the question of fact submitted to the Jury was:—

"Did the Defendants William Henry Tilstone and Charles Harry Elridge "Tilstone before the institution of the present action at Quebec, pay and satisfy "to the said Plaintiffs the amount demanded in the present action, or any, and "if any, what part thereof?"

Tilstone et al., vs. Gibb et al.

And the Jury returned the following verdict:—"The Defendants William Henry Tilstone and Charles Harry Eldridge Tilstone, before the institution of the present action, at Quebec, did not pay and satisfy to the plaintiffs the amount demanded by the present action, or any part thereof, and so say nine of the said jurors."

The following was the judgment rendered by the Court below on the Defendants' motions for a New Trial:—

"La Cour ayant entendu, les parties par leurs avocats respectifs sur la règle "obtenue le quatrième jour d'avril dernier, par les défendeurs William Henry "Tilstone et Charles Harry Elridge Tilstone tendant à faire mettre de côté le "verdict du Jury rendu en cette cause le vingt-six mars dernier, et à faire "ordonner un nouveau procès pour les raisons y mentionnées, ayant examiné la procédure, les pièces et preuves au dossier, considérant que les raisons "alleguées par les dits défendeurs en leur dite règle ne sont fondées ni en loi ni "en fait; considérant que les jurés ont par leur dit verdict rapporté et prononcé "sur la question de fait à eux soumise par la Cour, renvoie la dite règle avec "dépens contre les dits Défendeurs en faveur des dits reprenants l'instance.

"La Cour ayant entendu les parties par leurs avocats respectifs sur la règle "obtenue le quatrième jour d'avril dernier, par le défendeur, Havilland Lemesurier Routh, tendant à faire mettre de côté le verdict du jury rendu en cette "cause le vingt-six mars dernier, et à faire ordonner un nouveau procès pour les "raisons y mentionnées, ayant examiné la procédure, les pièces et preuves au "dossier, considérant que les raisons allégnées par le dit défendeur en sa dite "règle ne sont fondées ni en loi ni en fait, considérant que les jurés ont par leur "dit verdict rapporté et prononcé sur la question de fait à eux soumise par la "Cour, renvoie la dite règle avec dépens contre le dit défendeur en faveur des "dits reprenants l'instance."

And on motion of the plaintiffs to that end judgment was entered up on the verdict, condemning the defendants as before stated.

The following was the Judgment rendered by the Court of Appeals;—Mr. Justice Duval dissenting:—

"La Cour, considérant que les deux billets mentionnés dans cette instance comme ayant été consentis par William Henry et Charles Harry Eldridge Tilstone, sous les nom et raison de W. H. Tilstone & Son, le premier en date, celui qui devenait dû le quinze Juin mil huit cent cinquante-huit, et qui fait l'objet de la présente action, est celui sur lequel les premiers paiements faits par les dits deux débiteurs, doivent être imputés, comme ils l'ont été en effet par les reçus qui constatent ces paiements; d'abord, parceque le dit billet était le premier qui devenait dû; ensuite, parceque le paiement en était garanti par un endosseur, et, enfin, parceque dans les circonstances, les débiteurs étaient bien fondés à faire, en payant, l'imputation qu'ils ont faits.

Considérant, en outre, que dans l'espèce, la dite imputation, portée aux susdits reçus, qui sont signés par le commis des Demandeurs, lie ces derniers, et est, du reste, l'imputation que la loi faisait elle-même en pareil cas.

Considérant, par conséquent, que le susdit premier billet, échu le 15 juin mil

huit cent cinquante huit, est payé, et que, par conséquent, dans le jugement dont est appel, il y a mal jugé, infirme le susdit jugement, savoir, le jugement rendu le premier juin mil huit cent cinquante-neuf, par la Cour Supérieure siégeant à Québec, et ce, avec dépens contre les Intimés, sur le présent appel; et cette Cour, procédant à rendre le jugement que la dite cour supérieure aurait dû rendre, déboute les dits Intimés de leur action avec dépens."

Adams vs. The School Commissioners.

Judgment of Court below reversed and verdict of Jury set aside.

Holt & Irvine, for Appellants.

Bethune & Dunkin, Counsel.

F. C. Vannovous, for Respondents.

O'Kill Stuart, Counsel.

(S.N.)

IN APPEAL.

FROM THE SUPERIOR COURT, DISTRICT OF ST. FRANCIS.

MONTREAL, 1ST DECEMBER, 1860.

Coram Sir L. H. LA FONTAINE, Bart., C. J. AYLWIN, J. DUVAL, J. MEREDITH, J. MONDELET, (C.) A. J.

No. 1865.

ADAMS, (*Plaintiff in the Court below*,)

APPELLANT.

AND

THE SCHOOL COMMISSIONERS FOR THE MUNICIPALITY OF BARNSTON,

(*Defendants in the Court below*,)

RESPONDENTS.

POWERS OF SCHOOL COMMISSIONERS—EXPENDITURE FOR SCHOOL HOUSES:

HELD,—1st. That the liability of a Municipal Corporation is measured by its powers; and consequently,

2nd. That School Commissioners are not liable for the balance of an obligation, given for the erection of a Model School House, being in excess of the amount authorized by law to be so expended.

The action of the Appellant, Plaintiff in the Court below, was brought in the Superior Court, at Sherbrooke, to recover from the Respondents the sum of £62 15s., with interest, from the 5th July, 1855, alleged to be due, in virtue of an obligation in writing, executed on that day in favor of the Appellant and one Humphrey, his partner in business, by the then School Commissioners of the Municipality of Barnston. The obligation purports to be "for the balance due the said Adams & Humphrey for the building of the Model School House at Barnston Corner, to wit: in the said township of Barnston, under contract of the said parties," and is payable in three months after date; and for securing the payment, the Commissioners hypothecated certain property described in the obligation, being, in fact, the Model School House itself, and the land upon which it is erected. The Appellant further alleged that on the 23rd April, 1857, Humphrey assigned to him his interest in the above mentioned mortgage and obligation. He further claimed a sum of $1[illegible] alleged to have

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been paid by him for insurance of the School House for the benefit of the Commissioners.

To this action the Respondents pleaded, first, a *défense au fonds en fait*; secondly, a perpetual exception by which they alleged in substance, that previous to the execution of the obligation declared upon, the then School Commissioners for the said Municipality, had levied by School rate or assessment, upon the Township of Barnston, the sum of £150 currency, for the erection of the said Model School House, and had also received from the Common School Fund, a like sum of £150, for the same purpose, amounting together to £300, which had been laid out in the erection of the School House, and had, in fact, been paid to the said Adams & Humphrey, for building it; that the School Commissioners were, by law, precluded from levying or expending any further sum for that purpose, and that the obligation entered into by them for the payment of the further sum of £62 15s. was therefore null and inoperative to bind the Defendants.

Admissions of the facts were given on both sides, and the Court below, considering that the obligation declared on "was for the payment of a Model School House, and was in excess of £150, for which sum only the Municipality could legally be assessed and compelled to pay, and the said obligation was and is inoperative to bind the Defendants," dismissed the action except as to the insurance money paid by Plaintiff.

From this judgment the Plaintiff appealed.

The legal pretensions of Appellant will appear from the following extracts from his factum:—

The principle recognized in the judgment is, that the obligations of Municipal Corporations, under contracts in matters under their control, are measured by their powers. This is a bold proposition, and if it is good law, no party can with safety make a contract with a Municipal Corporation, without possessing not merely a full knowledge of its powers upon all specific subjects, but an entire knowledge of all the proceedings of such Corporations having any reference to such subjects. A teacher could not enforce his contract for wages, nor a man who contracted to furnish wood for any school, unless special power is contained in the law for levying for such purpose, and then only to the amount specified in the law. To deal with Corporations, under such circumstances, becomes a very hazardous affair. Every man who contracts with a Municipal Corporation to construct a road or bridge, must determine what are the specific powers of such Corporation respecting such road. There is an obvious distinction to be borne in mind between *enforcing* a contract, and providing means to discharge it. The judgment in this cause, seems to confound these two things. The contractor, of course, takes his risk of the solvency of a Corporation, as he does of an individual, when he covenants with it, but it is too much to impose upon him the necessity of determining their legal rights and powers. School Commissioners may have, and do have, other funds and property than those raised for the support of schools. Under 37th section of 9th Vic., c. 27, 15 per cent in addition to the sum raised to be equal to the grant allowed from Government, was permitted to be raised; under 10 Vic., c. 14, section 1, the

Adams, vs. The School Commissioners.

sum to be raised was allowed to be double the amount of the government grant, and for contingent debts a sum could be levied equal to thirty per cent of the whole assessment in any school municipality. Here was ample scope for them to acquire general funds. School Commissioners frequently receive special grants from Government, for a specific purpose, beyond the ordinary grant, to which they are entitled for such object by law. The powers conferred on School Commissioners by law are full, and the ordinary powers [illegible] Muni-cipal Corporations, 9 Vic., c. 27, sec. 28 "may sue and [illegible] rally have the same powers which any other body poli[illegible] ought to have, with regard to the purposes for which it is in[illegible] restriction as to holding property, is that in cities they can [illegible] above the annual value of £500, and the parishes and town[illegible]. Their right to hold, and the presumption of their holding, as w[illegible] as *real* property is recognized by the 24th section of same act. The [illegible] acts go further, they even contemplate the existence in certain cases of just debts, which the commissioners have no means to pay. The following is the 10th section of 19 Vic. c. 14: "It shall be lawful for the superintendent of schools to cause special assessments to be levied in any school municipality, for the payment of lawful debts, *admitted by such municipality*, or adjudged by a Court of Justice, to be due by such municipality, and which debts such municipality could not otherwise pay." Even if the respondents had no means of raising the money to pay appellant's debt, in any other way, here is a mode provided; but the *means* of payment, is not the question to be decided in this cause. The question is, is there a just debt? If so, let there be judgment. How can the Superintendent act upon the above cited section, where the debt "has been adjudged by a court of justice to be due by such municipality," if the courts as the dictum of this judgment declares, cannot adjudge such a debt due? * * If the question were presented under the prerogative writs act, when the Government interposed to restrain the Commissioners from making an assessment not warranted by their Charter, it would be a legitimate subject of consideration *as against the Corporation*, but when a party has contracted with them, in good faith, and they have received his property and are using it for the benefit of the municipality, to allow them to take advantage of their own wrong to defraud an innocent party, appears inconsistent with the spirit of all law, as applicable to corporations or individuals.

Appellant maintains that when the School Commissioners contract upon subjects plainly within their jurisdiction, as between them and the party with whom they contract, the precise limit of their powers cannot be brought in question. That question can only arise, when as a Corporation, they are assailed by the proper remedy for exercising franchises not conferred on them by law. On no other principle would there be safety in treating with corporations of this nature. They would become entirely impracticable. If corporations could repudiate all contracts when by error or design they exceeded their powers, there would be no need of special remedies as applicable to them, to divest them of corporate rights, or restrict them within the limits of their charters, for the whole responsibility would be cast upon parties dealing with them, and there

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Adams, vs. The School Commissioners.

would be no occasion for special remedies, because the exact limit of their powers would be ascertained in the decision of every case of debt or contract between them and parties dealing with them.

The Respondents, who, it will be remarked, are not the same Commissioners who made the obligation, contended that the obligation sued upon was not given for a legal debt inasmuch as it was for a sum laid out in the erection of a Model School House, in excess of the amount allowed by law to be so expended.

By the 9th Vic. c. 27 § XXI., it is enacted "that it shall be the duty of the "School Commissioners in each Municipality * * * * Thirdly, to do "whatever it may be expedient to do with regard to building, repairing, keep-"ing in order, or renewing all School Houses, lands, fences, and moveable pro-"perty, which shall be held by them, or to hire temporarily, or accept the gra-"tuitons use of Houses and other buildings, for the purpose of keeping Schools "therein, *Provided that no rate shall be levied for the building of a Superior "or Model School, to exceed the sum of one hundred and fifty pounds*, nor for "a Common School to exceed the sum of seventy-five pounds." Section XXIV provides "That no such Corporation" (viz: the School Commissioners for any "Municipality,) "shall alienate any portion of the property held by it without "the express authority of the Superintendent of Schools."

The School Commissioners, having expended the sum allowed them from the Common School Fund, and the £150, levied by assessment upon the Municipality, and which was the only sum which the Municipality could be legally called upon to pay for the erection of a Model School, manifestly exceeded their powers, in entering into the agreement with Adams & Humphrey for the payment of the further sum of £62 15s., and the Municipality cannot be bound by a contract, entered into by them in defiance of the express provision of the law. They would otherwise be enabled indirectly, to bind the Municipality for the payment of a sum which they could not levy upon it by direct assessment, and the object of the law, viz: the restraining of extravagance in the erection of School Houses, would be defeated. The question whether the Commissioners have or have not funds arising from other sources than direct taxation, can have no legal bearing upon this case. The liability of the Corporation must be tested by its power to contract, and not by its ability to pay. Should the contrary principle be established, there would be nothing to prevent School Commissioners from expending £3,000 instead of £300, in the erection of a single School House and making the Municipality liable in the end for the amount. Besides in this case the Model School House in question, is itself hypothecated by the obligations sued on for the payment of the sum claimed, and upon a judgment in favour of the Plaintiff, might be sold under execution to the manifest prejudice of the interests of education.

Judgment confirmed.

Sanborn & Brooks, for Appellant.
Ritchie & Borlase, for Respondents.
(T. W. R.)

EN APPEL

DE LA COUR SUPÉRIEURE, DISTRICT DE MONTRÉAL.

MONTRÉAL, 3e SEPTEMBRE 1860.

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

No. 1.

NIANENTSIASA (*Demandeur en Cour inférieure,*) APPELANT.

AKWIRENTE, ET AL (*Défendeurs en Cour inférieure.*) INTIMÉS.

DOMMAGES PAR ASSEMBLÉE TUMULTUEUSE.—RIOT.

JUGÉ,—Que la présence des défendeurs, au sein d'une assemblée tumultueuse, résultat d'un complot; les rend responsables des dommages causés par cette assemblée, lors même qu'ils n'auraient pas activement participé, dans les voies de fait.

L'appelant alléguait dans sa déclaration :

"Que le ou vers le premier de février mil-huit-cent-cinquante-six, et longtemps avant, le Demandeur était propriétaire et en possession d'une maison et dépendances dans la Seigneurie des Sauvages du Sault St. Louis, ainsi que d'effets mobiliers placés dans la dite maison et dépendances, lesquelles il occupait avec sa femme et ses enfants.

"Que le ou vers le dit jour, premièr de février mil-huit-cent-cinquante-six, les dits Défendeurs (les intimés) conspirant ensemble dans le but de ruiner le Demandeur (l'Appelant) et sa famille, et ce avec d'autres individus inconnus au Demandeur (l'Appelant) auraient illégalement et malicieusement chassé de la dite maison le Demandeur et sa famille et mis sur le carreau, brisé et détruit ou enlevé les effets mobiliers du Demandeur (l'Appelant) et auraient livré ce dernier et sa famille, sans abri, aux intempéries de la saison la plus rigoureuse de l'année; et qu'après avoir ainsi chassé le Demandeur (l'Appelant) et sa famille, les dits Défendeurs (les Intimés) auraient là et alors renversé, demoli et detruit la maison du Demandeur (l'Appelant) en causant par telles voies de-fait au dit Demandeur (l'Appelant) des dommages considerables.

"Que par la misère et les souffrances physiques et morales causées au Demandeur (l'Appelant) et à sa famille ainsi que par les pertes ci-dessus, le Demandeur (l'Appelant) avait éprouvé et souffert des dommages d'au moins cent livres courant."

Les défendeurs (intimés) plaidaient qu'ils n'avaient causé aucuns dommages au demandeur; que si ce dernior en avait souffert aucuns, ils n'avaient été occasionés par aucune conspiration, concert ou connivence des défendeurs.

Le 28 Octobre 1858, l'action était déboutée, sur le motif que le demandeur n'avait pas prouvé les allégués essentiels de sa déclaration.

MONDELET, J., *dissentiens.* L'acte de ceux qui ont pris part à cette démolition est des plus repréhensibles et il conviendrait de bien punir ceux qui en ont été coupables. Mais, ici, il n'y a aucune preuve quelconque, par deux témoins au moins, que les défendeurs ont pris part à cette demolition. Il est au contraire établi, que les défendeurs étaient à une certaine distance. Plusieurs des témoins

des défendeurs jurent positivement que ces derniers n'ont aucunement pris part à cet acte de démolition. Quoique les défendeurs aient été vus avec la foule, ou à peu de distance, cela ne prouve pas qu'ils aient pris part avec les autres, dont, assez singulièrement, pas un seul n'a été identifié. Et les témoins eux-mêmes étaient là, s'en suit-il qu'ils ont démoli ou pris part à la démolition de la maison du demandeur. Dans le cas même où, dans leur intérieur, ils auraient approuvé cet acte outrageant, ou que par leur présence ils auraient donné à penser qu'ils ne le désapprouvaient pas, va-t-on les condamner pour cela ? Ils n'étaient pas obligés d'arrêter les perturbateurs; ils n'eussent pu le faire d'ailleurs, la foule était composée d'une centaine de personnes.

Il faut bien se garder, dans des occasions comme celle-ci, dans le désir louable de punir les actes répréhensibles, comme l'est celui dont se plaint le demandeur, de rendre solidaires de ces outrages, des gens qu'on n'a aucunement prouvé y avoir pris part, autant rendre responsables et passibles de dommages tous ceux ou celles qui étaient dans le voisinage de la maison du parlement en 1849 et qui, ou riaient, ou ne disaient rien, ou ne s'opposaient pas à cet acte de vandalisme.

Je pense que la Cour de première instance a bien jugé, parcequ'il n'y a pas de preuve contre les défendeurs. Le jugement devrait-être confirmé.

Bruneau, J. Le demandeur soutient qu'il a établi les faits suivants :

1er. Qu'il était propriétaire et en possession de l'immeuble, dépendances et autres biens décrits en sa déclaration ;

2e. Que ces biens ont été détruits ou enlevés et qu'il a souffert des dommages ;

3e. Que les défendeurs ont pris part à la démolition de ses biens ; que c'est de leur assentiment et par leur participation qu'il a souffert ces dommages ;

4e. Qu'il y a eu entente et conspiration entre les dits défendeurs pour détruire la propriété du demandeur.

Les intimés prétendent au contraire que l'appelant a complètement [illegible] tous les rapports et que la preuve faite par les intimés est des plus fortes et qu'il est établi par icelle, qu'ils se sont trouvés là par hasard, n'ayant fait que passer par les lieux, qu'ils étaient à distance de la maison du demandeur et de la foule, n'ayant aucunement participé dans l'outrage. La majorité de la Cour pense différemment et est d'opinion que le demandeur a prouvé les principaux allégués de sa déclaration et qu'en conséquence la Cour de première instance a mal jugé en déclarant le contraire et en renvoyant l'action du demandeur et que ce dernier en conséquence a droit de recouvrer des dommages contre les défendeurs.

J'ai cru nécessaire de faire précéder l'examen de cette partie des témoignages qui inculpe les défendeurs, de quelques remarques préliminaires sur la nature de cette action, la loi qui lui sert de base et la preuve qu'elle exige.

L'esprit de la législation moderne, chez tous les peuples civilisés jouissant de constitution analogue à la nôtre, reconnait et établit de la manière la plus formelle, la justice du principe de rendre responsables des délits de la nature de celui dont il s'agit, commis dans son sein, tous les membres de la société, pour l'acte de quelques uns d'entr'eux, acte auquel non seulement ils n'ont pas participé,

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mais qui leur était entièrement inconnu, qu'ils eussent empêché même, si commis en leur présence, en décrétant que toutes villes ou villages incorporés seront tenus d'indemniser tous ceux dont la propriété aurait été détruite dans une émeute, par des attroupements tumultueux, les autorisant d'avance de cotiser à cet effet toutes les propriétés, et donnant une action directe contre les corporations pour le dommage souffert, à défaut de leur part d'indemniser la partie qui aura ainsi souffert. Le code civil, en traitant des délits, n'a fait que consacrer les principes reçus dans l'ancien droit français sur cette matière, et les engagements ou obligations que la loi fait naître à l'occasion des délits ou des *quasi délits*, sont compris dans les articles 1382 et 1383. Le premier porte : tout fait quelconque de l'homme qui cause à autrui du dommage, oblige celui par la faute duquel il est arrivé à le réparer. Toullier commentant cet article, l'explique comme suit : " cet article, dit-il, comprend généralement tous les faits quel- " conques qui causent immédiatement et par eux-mêmes et le mot *fait* est pris ici " dans le sens le plus étendu et comprend non seulement toutes les actions et omis- " sions nuisibles à autrui, mais encore les réticences"; " enfin", ajoute-t-il, " la dispo- " sition de notre article comprend, dans le mot *fait*, la faute que commet celui qui, " pouvant empêcher une action nuisible, ne l'a pas empêchée. Il est censé " l'avoir faite lui-même. C'est en effet une sorte de complicité que de ne pas " empêcher une action nuisible, quand on a le pouvoir; on doit donc en " répondre civilement." Toullier, Tome 10 Nos. 116, 117.

C'est un principe reçu chez toutes les nations civilisées. Le code Prussien porte : "celui qui souffre sérieusement, ce qu'il pouvait ou devait empêcher, " en répond comme s'il l'avait ordonné." Code Prussien, Partie 1ere, Titre 6 No. 59.

Les actes nuisibles à autrui sont divisées en deux classes : 1°. Attentat, à la personne ou aux droits personnels d'autrui. 2° Attentat à sa propriété ou à ses droits réels.

La première comprend toutes les atteintes, à la sûreté, à la liberté, à la réputation ou à l'honneur des personnes, ou à l'exercice de leurs droits personnels. La seconde comprend tous les attentats contre la propriété ou le bien d'autrui lorsqu'on le dévaste ou détériore, lorsqu'on le prive de sa jouissance ou de sa possession, lorsqu'on attente à ses droits réels, ou lorsqu'on l'empêche d'en acquérir ; or tous ces attentats, tant à la *personne* qu'à la *propriété*, sont également tous défendus et reprimés par des peines et des amendes, ou la réparation du dommage qu'ils ont causé. Toullier, Tome 10, No. 121.

En voilà suffisamment, je pense, pour établir le droit d'action du demandeur contre les défendeurs, et la preuve va le constater dans l'instant.

Les faits de la destruction de la propriété du demandeur, par un rassemblement tumultueux d'hommes, est prouvé à satiété par tous les témoins, tant ceux de la défense que ceux de la demande.

Les défendeurs ont-ils pris part à cet attentat directement ou indirectement, sont-ils coupables par action ou omission, ou autrement ? La lecture des parties saillantes des témoignages, constate la vérité. Ou je me fais illusion ou il existe dans le témoignage une preuve évidente non que les défendeurs se sont trouvés là par accident, qu'ils n'ont fait que passer par les lieux et qu'ils continuèrent de

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de suite leur route vers le village, mais au contraire qu'ils faisaient partie de cette foule d'émeutiers qui ont commis l'attentat et qu'ils y ont co-opéré, sinon d'une manière aussi active que plusieurs d'entr'eux, au moins en encourageant par leur présence l'acte de vandalisme, commis sous leur yeux.

La conspiration nous ne la trouvons pas en effet dans les procédés d'une assemblée régulièrement organisée, nous ne voyons pas d'élection de président, de secrétaire, nous ne voyons point de résolutions régulièrement faites et secondées, d'aller en masse détruire la propriété du demandeur et de quelques autres qui se trouvaient dans le même cas; non, mais nous trouvons un complot formé dès le matin dans le village, pour détruire les maisons des personnes en question; nous voyons la population mâle presque toute entière du village du Sault St. Louis se diriger par intervalle sur un seul point, la demeure du demandeur, dans le bois, à trois milles du village et vers midi tout le monde était rendu sur les lieux, et attendait là jusqu'à la fin de la journée, et ce n'est que sur les cinq heures du soir, lorsqu'il est presque impossible de reconnaître les personnes, que l'œuvre de destruction commence; pas moins de cinquante personnes entrent dans la maison, une maison de vingt pieds quarrés, en jettent les meubles dehors, et les brisent; en chassent le demandeur et sa famille et finissent par démolir la maison complètement. Et l'on veut exiger que le demandeur, dans des circonstances semblables, puisse nommer celui d'entre ces assaillants, qui a brisé tel ou tel meuble, qui a défait telle ou telle partie de sa maison! c'est exiger une preuve impossible, la loi n'exige pas telle chose et ne peut l'exiger, sans permettre l'impunité. Il suffit dans des cas semblables de faire la preuve que le demandeur a faite pour qu'il ait droit d'exiger d'une cour de justice, la punition de ceux qui directement ou indirectement ont contribué à l'attentat commis; et suivant la majorité de la Cour les défendeurs sont du nombre; nous trouvons établi que, sans avoir travaillé activement, ils étaient là, sinon comme une espèce de corps de réserve, pour soutenir les assaillants en cas de résistance, à tout évènement, pour les encourager par leur présence dans la voie de fait prouvée par tous les témoins.

Il est heureux que le demandeur ait pu, dans des circonstances aussi difficiles, faire une preuve aussi forte; ayant été obligé de recourir au témoignage, je ne dirai point, de témoins hostiles, mais de complices, pour établir la cause; je dis heureusement, car, si dans le cas actuel, les défendeurs eussent pu échapper à la vengeance de la loi, les conséquences les plus désastreuses pour l'avenir en résulteraient pour cette localité. L'enfant de la nature n'est que trop porté à se faire justice à soi-même, qu'il apprenne de suite que personne n'a et ne doit avoir ce droit. La hache et le couteau, au lieu d'être pour lui, comme maintenant, des instruments utiles et inoffensifs reprendraient comme autrefois leur rôle d'instruments de destruction et de mort, dont on ferait usage dans les troubles pour assouvir la haine et la vengeance. Qu'il sache plutôt que la porte des tribunaux est toujours ouverte pour rendre justice à tout le monde, à lui, comme aux autres et que si la loi se trouvait insuffisante pour le protéger contre les griefs dont il pourrait avoir à se plaindre, en s'adressant au gouvernement et à la législature, il rencontrerait la protection dont il peut avoir besoin.

Galherty, vs. Torrance.

Ci-suit le jugement :

La Cour,—Considérant qu'en déclarant, par son jugement du 28 Octobre 1858, que le demandeur n'avait pas établi les allégués essentiels de son action, la Cour de première instance n'a point fait une appréciation exacte de la preuve, ses allégués étant suffisamment établis pour donner gain de cause au demandeur ;—Infirme le susdit jugement, et condamne les défendeurs, conjointement et solidairement, à payer au dit demandeur la somme de £30, avec intérêt de ce jour et les dépens. Aylwin et Mondelet, Juges, *dissentientibus.*

Doutre et Daoust, pour l'appelant.

Ed. Carter, pour les intimés.

(J. D.)

SUPERIOR COURT.

MONTREAL, 30th NOVEMBER, 1860.

Coram Badgley, J.

No. 2268.

Gaherty vs. *Torrance et al.*, et *E. Contra.*

Held,—1st That in case of damage to cargo the carrier is bound to prove that the cause of the damage was within the exceptions of the bill of lading;

2nd. That salt ought not to be carried on deck between Quebec and Montreal, unless the bill of lading expressly permitted carriage in that mode.

This was an action whereby the Plaintiff claimed of the Defendants £87 17s. 1d. cy. for freight of 4,000 bags of salt carried by the schooner New Liverpool from Quebec to Montreal. The declaration alleged the shipping of the salt, and further that at the time of the making of the agreement to carry it, it was further agreed with one McDougall, agent of the Defendants, that part of it should be carried on deck, as was the custom; that during the voyage the vessel and cargo suffered damage from the perils of the navigation against which the master entered his protest; that he delivered the salt to the Plaintiffs' but that 300 bags were damaged by the accidents of navigation from liability for which damage he was specially exempted under the contract.

The Defendants met the action by pleas and an incidental demande, alleging that the Plaintiff did not safely and securely carry the salt in terms of the bill of lading.(which was in the usual terms). That he only delivered 3717 bags, while 283 bags of the value of £70 13s. were lost and 617 were so much damaged by water, that the Defendants were obliged to sell the same at a loss of £109 5s. 0d. cy.

They further alleged that the loss was owing to the negligence, want of care and misconduct of the Plaintiff and his servants, and that he had violated his duty by carrying a part of the salt on deck. The freight due was therefore asked to be compensated against the loss by the pleas; and by the incidental demande, the balance of loss was claimed to be paid to the Defendants.

The Plaintiff produced the captain of the schooner who testified that the loss was owing to bad weather which caused the vessel to leak so much that

Gaherty, vs. Torrance.

there were 3 feet of water in the hold; that the damage arose from stress of weather and was confined to the lower tiers of salt in the hold. McDougall proved that there was nothing said about carrying on deck, and that if salt was carried on deck it should have been stated in the Bill of Lading.

The Defendants established by testimony, the condition of the salt, the non-delivery of the 283 bags and the sale at a reduced rate and the loss sustained by the Defendants. They also proved that carriage on deck was more dangerous than in the hold, that the vessel did not appear to have leaked and that the salt was carelessly delivered. It also appeared from the Captain's protest that the damage was occasioned by waves washing over the vessel.

Morris for Defendants, argued:—

1°. That Parol Evidence to explain the Bill of Lading as a contract was inadmissible, Flanders 454.

2°. That the Bill of Lading imported that the goods were to be carried under deck, and that salt ought be so carried, Abbott 426, Valin Comm. ord. mar. 260, 621, Flanders 209, 210.

3°. That the *onus probandi* was upon the carrier to shew that the damage was occasioned by causes covered by the exceptions in the Bill of Lading, which in this case had not been done, Flanders 262, 291.

4°. That a custom must be generally known and precise and definite, in order to be applied to the contract and define the rights of parties, Flanders, page 207-8.

Dunlop for Plaintiff contended, that he had proved the custom to carry on deck between Quebec and Montreal, and that the damage had been caused by stress of weather, for which the carrier was not liable.

After hearing, judgment was rendered in favor of the Defendants for the amount of the loss they had sustained after deduction of the freight.

Drummond & Dunlop, for Plaintiff.

Torrance & Morris, for Defendants and Incidental Plaintiffs.

(A. M.)

LIST

OF JUDGMENTS RENDERED IN THE COURT OF APPEALS FROM 12TH DECEMBER 1859, TO 17TH DECEMBER 1860, INCLUSIVELY.

DECEMBER TERM 1859, QUEBEC.

No.	APPELLANT.	RESPONDENT.	DATE.	JUDGES.	JUDGMENT
56.	Chabot	Guay	December 12,	Chief Justice, Aylwin, Duval, Meredith, Mondelet (C.)	Confirmed.
51.	Provancher	La Haye	"	" " " " "	"
52.	Marchildon	Fabrique Batiscan	"	" " " " "	"
26.	Bell	Ross	"	" " " " "	"
24.	Kilborn	Boswell	" 13,	" " " " Mondelet (C), *diss.*	Reversed.
20.	Coxworthy	Giles	"	" " " " "	Confirmed.
48.	Quebec Bank	Gibb	"	" Aylwin, Duval, Mondelet, Chabot (absent)	"
57.	Cary	Johnston	"	" Aylwin, Duval, Mondelet,	"
17.	Normand	Crevier	" 17,	" Aylwin, Duval, Meredith, A. Stuart *ad hoc.*	Reversed.
31.	Grand Trunk	Dallaire	"	" Aylwin, Duval, Meredith, Mondelet (C)	Confirmed.
35.	Dallaire	Grand Trunk	"	" " " " "	" but modified.
78.	McCaffrey	Dorval	"	Duval, Meredith, Mondelet, (Chief Justice and Aylwin diss.	Confirmed.
55.	Levallée	Trigge	"	Chief Justice, Aylwin, Duval, Meredith,	Reversed.
47.	Buteau	Fortier	"	" " " " Mondelet (C) dissent'g.	"
* 18.	Supple	Kennedy	"	" Duval, Meredith, (Aylwin, Mondelet (C) diss.	Confirmed.
37.	Lemieux	Grand Trunk	"	Duval, Meredith, Mondelet (C), (Chief Justice, Aylwin, diss.	"
40.	Boswell	Denis	"	Chief Justice, Duval, Meredith, Mondelet (C), (Aylwin, diss.	"
38.	Withall	Michon	"	" Aylwin, Duval, Mondelet (C), (Meredith, diss.	Reversed.
46.	Laterrière	Verret	"	" " " Meredith, Mondelet,	"
83.	Paton	Ardouin	"	" " " Mondelet, (Meredith diss.	"
73.	Regina	St. Louis	"	" " " "	Conviction set aside.

MARCH TERM 1860, MONTREAL.

No.	APPELLANT.	RESPONDENT.	DATE.	JUDGES.	JUDGMENT
53.	DeBellefeuille	Gaüthier	March 1,	Chief Justice, Aylwin, Duval, Mondelet (C)	Confirmed.
71.	Beaubien	Corporation du Village du Coteau St. Louis	"	" " " "	"
64.	Dawson	Belle	"	" " " "	"
48.	Ouimet et al	Senecal et al.	"	" " " Mondelet (C), diss.	Reversed.
91.	Milne	Bell	"	" " " "	Confirmed.
60.	Pepin	Dupuis	"	" " " "	
39.	Senecal	Jarret Beauregard	"	" " " "	Reversed.
61.	Sauvé	Jourdain	" 2,	Aylwin Duval, Mondelet, Chief Justice diss.	"
	Queen	Palliser	"	Chief Justice, Aylwin, Duval, (Mondelet (C) diss.	Conviction maintained.
95.	Osgood	Cullen	" 3,	" " " "	Appeal dismissed
	Regina	Barry	" 8,	" " " "	Conviction maintained.

QUEBEC 1860.

No.	APPELLANT.	RESPONDENT.	DATE.	JUDGES.	JUDGMENT.
9	Têtu	Boudreau	March 12	Aylwin, Mondelet (C), A. Stuart, *ad hoc*, (Chief Jus. Duval dis.	Reversed.
44	Ross	McGreevy	" 13	Chief Justice, Aylwin, Duval, Mondelet (C)	"
69	McGreevy	Poetter	"	" " " " diss	Confirmed.
74	Lavoie	Gagnon	"	" Duval, Mondelet (C), (Aylwin, diss	"
75	Boivin	Gagnon	"	" " " Aylwin, diss	"
66	Lenfesty	Metivier	"	" Aylwin, Duval, (Mondelet (C), diss	Reversed.
53	Vezina	Roy	" 15	" " " "	"
62	Destroismaisons	Blais	"	" " " "	Confirmed.
41	Bell	Pentland	"	" " " "	Reversed.
61	Haslett	Pentland	"	" " " "	"
48	Dean	Hall	"	" " " "	Confirmed.

JUNE TERM 1860, MONTREAL.

No.	APPELLANT.	RESPONDENT.	DATE.	JUDGES.	JUDGMENT.
37	Perrault	Flamme	May 31	Chief Justice, Aylwin, Duval, Mondelet (C), Monk	Confirmed.
25	Do.	do.	"	" Aylwin, Duval, Mondelet (C), Monk,	"
78	Greenshields	Plamondon	"	" " " " Aylwin, dissenting,	Reversed.
58	Desjardin	Banque du Peuple	"	" Mondelet (C), Badgley, (*Aylwin, Duval*) dissen'g.	"
84	Maloney	Quinn	"	" Aylwin, Duval, Badgley,	Confirmed.
69	Gould	Sweet	"	" Aylwin, Duval, Mondelet (C)	"
34	Elliot	Howard	"	" " " "	Reformed.
86	Brooks	Whitney	"	" " " (Mondelet diss	Confirmed.
29	Cantin	Coquerelle	"	" Duval, Mondelet (C), (Aylwin, dissenting,	"
36	Ouimet	Gagnon	"	" Aylwin, Duval, (Mondelet (C), diss	"
31	Doutre	Ellice	"	" Aylwin, Duval, (Mondelet (C), Badgley dis.	"
93	Grand Trunk	Huston	"	" " " " " "	"
33	Do.	Mountain	"	" " " " " "	"
79	Grenier	Monarch Insurance Co.	"	" " " "	"
9	Bank of Montreal	Simpson	"	" Duval, Mondelet (C), Badgley, (Aylwin, dis	"
49	Miclette	Poulin	"	" Aylwin, Duval, Mondelet (C),	Reversed.
72	Wardle	Moir	June 4	" Aylwin, Mondelet (C), (Duval, dis.	Confirmed.
46	Rowell	Newton	"	" Duval, Mondelet (C), (Aylwin, dis	"
56	Beauchamp	Lefebvre	"	" Aylwin, Duval, Mondelet (C), Berthelot	Reversed.
45	Harbour Commis.	Grange	"	" Aylwin, Mondelet (C), Duval diss	"
43	Do. do.	Huston	"	" " " " "	"
	Howard	Elliott	"	"	
48	Boucher	Lemoine	" 8	" Aylwin, Duval, Mondelet (C)	Appeal dismissed.
				" " "	Reversed.
55	Carden	Finlay	" 9	" Duval, Badgley, Monk, (Aylwin, dis	"

No.	APPELANT.	RESPONDENT.	DATE.	JUDGES.	JUDGMENT.
92	Moss	Douglas	June 9	Chief Justice, Aylwin, Duval, Badgley, (Mondelet (C), dissenting as to costs.	Reversed without costs.
26	Blanckensee	Sharpley	"	Aylwin, Duval, Bruneau, (Chief Justice Mondelet (C), dis.	Confirmed.
32	Macpherson	Montreal Assur. Co.	"	Chief Justice, Aylwin, Duval, Mondelet (C),	Appeal dismissed.

No.	APPELANT.	RESPONDENT.	DATE.	JUDGES.	JUDGMENT.
48.—	Boucher	Lemoine	“ 8,	“ “ “ “	Appeal dismissed.
55.—	Carden	Finlay	“ 9,	“ Duval, Badgley, Monk, (Aylwin, dis	“

No.	APPELANT.	RESPONDENT.	DATE.	JUDGES.	JUDGMENT.
92.—	Moss	Douglas	June 9,	Chief Justice, Aylwin, Duval, Badgley, (Mondelet (C), dissenting as to costs	Reversed without costs.
26.—	Blanckensee	Sharpley	“	Aylwin, Duval, Bruneau, (Chief Justice Mondelet (C), dis	Confirmed.
32.—	Macpherson	Montreal Assur. Co.	“	Chief Justice, Aylwin, Duval, Mondelet (C),	Appeal dismissed.
	JUNE TERM 860, QUEBEC.				
27.—	Jackson	Fahey	June 12,	Chief Justice, Aylwin, Duval, Mondelet (C), Power	Confirmed.
79.—	Gugy	Nadeau	“	“ “ “ (Mondelet dis	“
30.—	Davidson	Quebec Bank	“	“ “ “ “ Badgley,	“
88.—	Bourassa	Bedard	“ 19,	“ “ “ “	Reversed.
67.—	Anderson	L'Assurance	“	“ Mondelet (C), Power, (Duval *in toto*, Badgley *en partie*, dissenting	“
58.—	Kerr	Gugy	“	“ Aylwin, Duval, Badgley, Power,	“
70.—	Fraser	Buteau	“	“ “ “ Mondelet (C), Badgley,	“
37.—	Goudreau	Théberge	“	“ “ “ “ “	Confirmed.
43.—	Stuart	Sleeth	“	“ Duval, Mondelet (C), (Aylwin, Badgley, dis	“
35.—	Tilstone	Gibb	“	“ Aylwin, Duval, Mondelet (C), Badgley,	Reversed.
15.—	Campbell	St. Louis	“	“ “ “ “ “	Confirmed.
72.—	Atkins	Quebec Build'g Society	“ 20,	Aylwin, Mondelet (C), Badgley, (Chief Justice, Duval, dis	Reversed.
23.—	Montizambert	Talbot	“	“ “ “ “ “ “	“
32.—	Gibb	Beacon Ass. Co.	“	Chief Justice, Mondelet (C), Badgley, (Aylwin, Duval, “	“
59.—	Miller	Smith	“	“ Aylwin, Duval, Mondelet (C), Badgley,	“
65.—	Grainger	Parke	“	“ “ “ “ “	“
64.—	Bank U. C.	Bradshaw	“	“ “ “ “ “	“
39.—	Lenoblet	Maheux	“	“ “ “ “	
76.—	Beresford	Shauley	“	“ Duval, Mondelet (C), Badgley, (Aylwin, dis	“
60.—	Culliton	Laperriére	“	Aylwin, Mondelet (C), Badgley, (Chief Justice, Duval, dis	“
50.—	Doyle	McLean	“	Chief Justice, Aylwin, Duval, Badgley, (Mondelet (C), dis	Confirmed.
	SEPTEMBER TERM 1860, MONTREAL.				
73.—	Brown	Valois	September 1,	ChiefJustice, Aylwin, Duval, Mondelet (C), Bruneau	Confirmed.
64.—	Lanthier	Daoust	“	“ “ “ “ dis	“
71.—	Hagan	Wright	“	“ “ “ “	“
53.—	Hynes	McFarlane	“	“ “ Mondelet, (Duval dis	Reversed.
65.—	Archambault	Archambault	“ 3,	Chief Justice, Mondelet, Badgley, (Aylwin, Duval, dis.	Reversed.
41.—	Fournier	Russell	“	“ Aylwin, Duval, Mondelet (C), Bruneau	“
51.—	Nianentsiasa	Akwirente	“	“ Duval, Bruneau, (Aylwin, Mondelet (C), dis	“
4.—	Marchand	Lamirande	“	“ Aylwin, Duval, Mondelet (C)	Confirmed.
91.—	Comp. d'Assur.	McGillivray	“	“ “ “ “	Reversed.
77.—	Watson	Mayor	“	“ “ “ “	“
	Lady the Queen	Martin	“	“ “ “ (Mondelet diss	Conviction approved.
85.—	Rochon	Duchesne	“	“ “ “ “	Appel débouté.

No. APPELLANT.	RESPONDENT.	DATE.	JUDGES.	JUDGMENT.
75.—Thouin	Leblanc	September 7,	Chief Justice Aylwin, Duval, (Badgley diss.	Reversed.
54.—Brodeur et al.	Senecal	"	" " " Mondelet (C)	Reversed.
3.—Lyman et al	Higginson	"	" " " "	"
46.—Clements	Beauchemin	"	" " " "	Confirmed.
30.—Bouchard	Desjardins	" 8,	" " " " Bruneau	"
90.—Edmonstone	Davidson	"	" " " " "	Reversed.

SEPTEMBER TERM, QUEBEC 1860.

No. APPELLANT.	RESPONDENT.	DATE.	JUDGES.	JUDGMENT.
91.—Lemelin	Larue	September 20,	Chief Justice, Aylwin, Duval, Mondelet (C), Badgley	Confirmed.
O.S.L. the Queen	Creamer	"	" " " Meredith, Mondelet (C)	Conviction approved.
10.—Savoie et ux	Lamontagne	"	" " " Mondelet (C), Badgley	Confirmed.
84.—Patton	Giles	"	" Duval, Mondelet (C), (Aylwin, Badgley, dis.	"
71.—Beaubien	Dorion	"	Aylwin, Duval, Mondelet (C), (Chief Justice, Badgley, dis.	"
52.—O.S.L, the Queen	Baird & W. Hossack repren. l'instance	" 21,	Mondelet (C), Bruneau, Berthelot, Monk, Taschereau	"

DECEMBER TERM 1860, MONTREAL.

No. APPELLANT.	RESPONDENT.	DATE.	JUDGES.	JUDGMENT.
60.—Jarry	Cie. Depot & Pret. H.C.	December 1,	Chief Justice, Aylwin, Duval, Meredith, Mondelet (C),	Confirmed.
4.—Moncion	Cousineau	"	" " " " "	"
93.—Footner	Joseph	"	" " " " Bruneau,	Reversed.
11.—Chamberlain	Ball	"	" " " " Mondelet (C),	"
49.—Adams	School Commissioners.	"	" " " " "	Confirmed.
1.—Lacombe	Fletcher	"	" " " Mondelet (C), Bruneau,	"
57.—Hagan	Cullen	" 7,	" " " Meredith, Mondelet (C),	"
59.—Bouchard	Desjardins	"	" " " Mondelet (C), Bruneau,	Reversed.
20.—Ravary	Grand Trunk	"	" " Bruneau, (Duval, Badgley, dis.	"
47.—Perrin	Cuthbert	"	Duval, Mondelet (C), Bruneau, (Chief Justice, Aylwin dis.	Confirmed in part.
66.—Leclaire	McFarlane	"	Chief Justice Aylwin, Mondelet (C), (Duval, Meredith dis.	Reversed.
55.—Steele	Gilman	"	" " Meredith, Mondelet (C), (Duval, dis.	"

QUEBEC 1860.

No. APPELLANT.	RESPONDENT.	DATE.	JUDGES.	JUDGMENT.
29.—Ross	Scott	December 12,		Reversed.
5.—Noad	Lampson	" 17,	Chief Justice Duval, Meredith, Mondelet (C), (Aylwin dis.	Modified and confirmed.
99.—Bank U. C.	Harrison	"	" " " " " "	Confirmed.
34.—Grand Trunk	Hall	"	" Aylwin, Badgley, (Duval, Mondelet, (C), dis.	Reformé.
17.—Lavoie	Cartier	"	" Aylwin, Duval, Meredith, Mondelet (C)	Confirmed.
96.—Dickey	Terriault	"	Duval, Meredith, Mondelet (C), (Aylwin, dis.	Reversed.
97.—Dickey	Terriault	"	Aylwin, Duval, Meredith, Mondelet (C),	Confirmed.
19.—Brown	Wallace	"	" " Mondelet (C), (Chief Justice, Meredith dis.	Reversed.
23.—Grand Trunk	Corpor. of Point Levis	"	Chief Justice Aylwin, Duval, Meredith, Mondelet (C),	"
90.—Lapointe	Archevêché Quebec	"	" Duval, Mondelet (C), (Aylwin, Badgley, dis.	Confirmed.

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OF THE

LOWER CANADA JURIST.

COMPILED BY
STRACHAN BETHUNE, *Advocate.*

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" :—*Vide* MUNICIPALITY.

ARBITRATION :—Award of, must be signified, *à peine de nullité*. (Blanchet & *ux.*, vs. Charron, Q. B.)........ 8

ARTICULATION OF FACTS :—A failure to answer the same within the time specified by the 74th Section of the 20th Vic. ch. 45, entails an admission of the facts therein set forth. (Archambault, applt. & Archambault, respdt. Q. B.)........ 284

ATTACHMENT :—Affidavit for, before judgment, concluding with the averment, that without the benefit of the writ the plaintiff will lose his debt *or* sustain damage, is not bad for uncertainty, and, although such affidavit contains special reasons in conformity to the 48th Section of the 22 Vic. ch. 5, insufficient in themselves to sustain the attachment, the affidavit will be sufficient, if it contains the general averments sanctioned by the 10th Section of the 25th Geo. 3—ch. 2. (Milne vs. Ross & al. S. C.)........ 3

" :—*Vide* WAGES.

ATTORNEY in a case is *dominus litis* and cannot be interfered with or controlled by any understanding or arrangement entered into with his own client by the opposite party or his attorney, without his sanction. (O'Connell vs. The Corporation of Montreal, S. C.)........ 56

AVEU JUDICIAIRE :—An authentic copy of a party's answers on *Faits et Articles* in one suit and fyled as evidence in another suit will be deemed sufficient evidence of the facts admitted by such answers. (Clairmont & vir vs. Dickson, C. C.)........ 6

[Confirmed in appeal,—December 1859.]

BILL OF LADING :—*Vide* CARRIER.

CAPIAS AD RESPONDENDUM :—Fraudulent preferences to creditors by a defendant, after his insolvency, do not amount to "secretion," and therefore form no ground for a *capias*; but, the defendant's intention to go to Boston, and the fraudulent preferences shown to other creditors, and his treatment of plaintiff's agent when he called upon him to make an assignment, by telling him not to bother him, are circumstances sufficiently strong to show that his intention was to defraud plaintiff. (Tremain vs. Sansum, S. C.)........ 48

" AD SATISFACIENDUM will issue, on Plaintiff's Petition (without notice), where the defendant, under bail on a *capias ad respondendum* issued under the 12th Vic. ch. 42, has failed to fyle in the Prothonotary's office

the statement under oath referred to in the Statute. (Macfarlane vs. Béliveau, S. C.).. 357

CARRIER is not relieved from liability arising from negligence, when the Bill of lading contains the clause "not liable for leakage, breakage and rust." (Harris & al. vs. Edmonstone & al., C. C.)........................ 40

" :—In an action against, the plaintiff's own oath will be received as to the contents of trunk which had been broken open, and the value of such contents although consisting of jewelry will be recovered, where the party claiming was a *lady*. (MacDougall vs. Torrance, S. C.)...... 132

" is bound to prove that the cause of the damage was within the exceptions contained in the bill of lading; and salt carried on deck of a schooner running between Quebec and Montreal, is so carried entirely at the risk of the carrier, unless the bill of lading expressly permit it to be so carried. (Gaherty vs. Torrance & al. & E. contra, S. C.)........ 143

CERTIORARI :—*Vide* CHURCHES.

CITY COUNCILLOR :—*Vide* MONTREAL.

CHURCHES :—Commissioners for erection of, have no right to delegate to one of their number power to proceed to take an *enquête*, in case in question; and such delegation is an excess of jurisdiction, and the proceedings had thereunder are consequently liable to be set aside under a writ of *certiorari*. (Exparte Robert & al. and Viger & al., S. C.).... 316

COMMISSION ROGATOIRE, asked for on the day the case [illegible]ed for evidence and final hearing, without affidavit of any kind, will not be granted. (Lane & al. vs. Ross & al. and Ross & al. Oppts., S. C.)........................ 295

CONTRAINTE PAR CORPS :—*Vide* SECRETARY TREASURER.

" " " cannot be exercised to enforce payment of a note and damages resulting from the non-execution of a sale of grain. (Whitney vs. Dansereau, S. C.).. 211

" :—A defendant who becomes a voluntary guardian, under a writ of execution, is liable to *contrainte par corps*, and the Rule therefore need not be preceded by a Notice to such defendant of the intended application for the Rule; and a variance between the Rule and the Judgment thereon is not a ground for setting aside such judgment. (Brooks, Applt., and Whitney, Respdt., Q. B.)............................ 279

COSTS :—*Vide* CURATOR.

CURATOR to the estate of an absentee who contests and defends is *personally* liable for the costs of the Plaintiff's action. (Whitney vs. Brewster, S. C.) 298

CURÉ :—*Vide* FABRIQUES.

DAMAGES, resulting from a riot, may be claimed from a party proved to have been amongst the body of rioters, although not taking an active part in their proceedings. (Nianentsiasa, Applt., and Ackwirente et al., Respdts., Q. B.).. 367

DEBATS DE COMPTE :—*Vide* ACCOUNT.

DEPLACEMENT :—*Vide* MOVEABLES.

DEPOSITION :—*Vide* EVIDENCE.

DIME is payable at Easter of each year and *pro rata* amongst the *curés* who may happen to serve a parish during the same year, and the ecclesiastical year in regard thereto runs from St. Michel of one year to St. Michel of another year. (Filiatrault *vs*. Archambault, S. C.).............. 10

DOWER :—When stipulated in a marriage contract to be "such as is established by the laws of Lower Canada," is legal and customary dower and not *douaire prefix*, and the registration of such marriage contract is not necessary to preserve the hypothecary rights of the widow and children upon real estate subject to such dower. (Sims & al. vs. Evans, and divers Oppts., S. C.)................................ 311

EJECTMENT :—Where the term of lease is less than a year and the rent payable for that term does not exceed £50, the Circuit Court has jurisdiction, notwithstanding the 5th Section of the 18 Vic. ch. 108, and notwithstanding that the annual value or rent of the property leased would exceed £50, if the term extended to a period of one year. (Clairmont and *vir* vs. Dickson, C. C.).. 4

[Confirmed in Appeal, December 1859.]

" :—A tenant may be ejected for non-payment of one quarter's rent, and in the bringing of the action it is not necessary specially to invoke the Statute. (Browne vs. Janes, S. C.).. 35

EVIDENCE :—*Vide* AVEU JUDICIAIRE.

" , as to a contract executed in a foreign country, will be regulated by the law of that country. (Wilson vs. Perry & Perry, T. S., S. C.,)...... 17

" :—A cousin germain may be examined to prove *actes d'héritiers*, on the ground that he is a *témoin nécessaire*. (Fillion & al. vs. Binette, S. C.).. 36

" :—*Vide* INSCRIPTION EN FAUX.

" :—Marginal notes in a deposition which are initialed but not noted in the jurat are not null, but a deposition which omits to state that the witness is not related, allied or of kin to any of the parties in the cause or to state the degree of his relationship is a nullity. (Lauzon vs. Stuart, S. C.).. 126

" :—*Vide* CARRIER.

" :—A person attacked with *delirium tremens* may have a lucid interval and may contract a valid marriage during such lucid interval. (Scott, Applt., and Paquet & al., Respdts., Q. B.).. 149

" :—The testimony of the attending Physician touching the incapacity of a person, attacked as above, to contract marriage, corroborated by the consulting Physician called in the day after the marriage and the day preceding the decease of such person, may be rebutted by the testimony of the Notary, the priest and a witness present at the celebration of the marriage and the execution of the marriage contract. (Do.).. 149

" :—A defendant may be witness for his co-defendants, if he be not interested, or if his interest be removed by a discharge. (The Bank of British North America, Applt., and Cuvillier & al., Respdts., Q. B.) 241

" :—Where a plaintiff alleges that a female Defendant is separated from her husband as to property he is bound to prove it, either by an ante nuptial contract or judicial sentence. Wheeler & al. vs. Burkitt & al. S. C.).. 309

" :—*Vide* PARTNERSHIP.

" :—(*Semble*) One partner being a defendant in a cause, examined as a witness under the Judicature amendment Act of 1860, may be a good witness for his co-partners, any objection going only to his credibility. (Higginson vs. Lyman, S. C.).. 329

" :—(*Semble*) Immoral conduct, by keeping a mistress, or frequenting brothels, is a sufficient justification for a refusal to fulfil an agreement to receive the person guilty of it as a partner. (Do.).. 329

" :—*Vide* DAMAGES.

EXCEPTION *à la forme* may be fyled on the first September, in an action returned on the 2nd August; the four day rule being held suspended during the vacation between 9th July and 1st September. (Booth vs. The Montreal & Bytown Railway Co., S. C.).. 296

:—*Vide* MARRIED WOMAN.

Exhibits need not necessarily be [illegible]h the declaration or other pleading, since the passing of the Judicature Act of 1857; the 76th section whereof has virtually repealed the [illegible]th Rule of Practice. (Denis vs. Crawford, S. C.).. 147

Experts cannot prevent the opening and publication of their report, until their fees and expenses are raised. (Duchesnay vs. Giard, S. C.)........ 9

Execution—Where two executions issue, at the suit of different parties, against the same defendant, the sheriff cannot unite them in one *procès-verbal*. (Palliser, Applt., and Venant Roy dit Lapensée, Repdt., Q. B.)...... 208

" :—*Vide* Substitution.

Fabriques :—At meetings of, *curé* has the right to preside. (Sénécal, Applt., and Jarret dit Beauregard, Respdt., Q. B.).............................. 213

Faits et Articles :—A party interrogated *vivâ voce*, under 20 Vic. ch. 44, s. 86, will not be allowed to read his answers from a paper previously prepared. (Coleman & al. vs. Fairbairn, S. C.).............................. 127

" :—The default to appear will be taken off and the Rule and Interrogatories set aside, when such Rule was issued during the pendency of a former Rule in the same cause. (Cumming vs Dickey and the School Commissioners of Durham, Oppts., and Winchester, Plff, *par reprise* contesting, S. C.).. 131

Folle enchere :—Rule for, must contain description of the lands sought to be re-sold. (Dickenson vs. Bourque and Blanchard, *adjudicataire*, S. C.).. 119

Foreclosure :—*Vide* Plea.

Franc et quitte—Party selling subject to clause of, will obtain judgment with costs against purchaser who pleads and proves existence of a *hypothèque*, when after deduction of the price there would remain a balance sufficient to cover the *hypothèque*. (Paquet & *ux.* vs. Miclette, S. C.).. 310

Grand Trunk Railway Company :—The acquisition of the St. Lawrence and Atlantic Railroad did not give rise either to *Lods et ventes* or *Indemnité*, (Kierzkowski vs. The Grand Trunk Railway Company of Canada, S. C.).. 86

Guardian :—*Vide* Contrainte par Corps.

Hotel Keeper, or boarding house keeper, has no privilege on the effects of a boarder by the month or week, and the privilege accorded by the 175th Article of the Custom of Paris is restricted to the case of a mere passing traveller. (Bleau vs. Béliveau, S. C.).......................... 356

Indemnite :—*Vide* Grand Trunk Railway Co.

Inscription de faux :—In case of, with regard to a *testament solennel*, the witnesses to the will may be examined as witnesses, but their isolated evidence unsupported by other proof or presumption, is not sufficient to maintain such inscription. (Lavaliée et al. vs. Demontigny, S. C.)...... 47

Insurance :—On a demand for indemnity, under a Marine Policy, it is necessary to prove that the damage claimed was caused by some peril insured against, and the mere fact that the goods insured were damaged to a trifling extent by salt water, does not constitute such proof. (The Sun Mutual Insurance Co., vs. Masson et al. and E. Contra, S. C.)...... 23

" :—A Survey of goods alleged to be damaged, made without notice to the underwriter, followed by a sale at nine of the clock, in the morning of the second day after the Survey, at which sale the claimant bought in the goods, is irregular, and such proceedings afford no criterion of the extent of damage the goods have sustained. (Do. Do.) 23

" :—The Insurance by a Mortgagee creditor of the house or building subject to his Mortgage is not an insurance of the building *per se*, but

only of the creditor's security for the payment of his debt, and to support an action on the Policy there must be a loss existing at the time of action brought, and if before action brought, the premises be rebuilt, whereby the creditor's security is restored, he cannot recover as for a loss. (Mathewson vs. The Western Assurance Co., S. C.) 57

INTEREST :—Where there has been a book account and also a Promissory note, and accounts stated have been rendered, including both and charging interest, the Court will not strike off the interest where the defendant has not pleaded an imputation of his payments as against the note. (Torrance vs. Philbin, S. C.) 287

" :—A notarial obligation for a loan executed during the period that the 16th Vic. ch. 80 was in force is subject to reduction in Capital and Interest, as regards any excess over and above the amount actually loaned. (Morson vs. David, S. C.) 302

JUDGMENT, *non obstante veredicto*, will be rendered by the Superior Court dismissing the Plaintiff's action on motion to that end, where the Court is of opinion that according to law and the evidence adduced at the trial the verdict of the Jury ought to have been in favor of the defendants. (Higginson vs. Lyman et al., S. C.) 329

" :—On an appeal from the Judgment of the S. C., rejecting the defendant's motion for a new trial, and entering up judgment for plaintiffs on the verdict of a Jury, the Court will set aside the verdict and dismiss the plaintiff's action, *non obstante veredicto*, where they consider, that according to law and the Evidence adduced at the trial, the verdict ought to have been for the defendants. (Tilstone & al., Applts., and Gibb & al., Respdts., Q. B.) 361

JURISDICTION :—*Vide* EJECTMENT.

" :—In a hypothecary action, the Circuit within which the *détenteur* holds possession, not the Circuit where the original contract stipulating the *hypothèque* is made, is the place where the cause of action is held to have arisen. (Morkill, Appellant, and Cavanagh, Respondent S. C.) 7

LEGACY :—In case of a legacy of the universality of the testator's property to a husband and his wife "to belong (the said property) to the community of property existing between them, and to be considered a *conquêt* of such community," there will be *accroissement* in favor of the legatees, for the part of the predeceased who dies during the life time of the testator. (Dupuy vs. Surprenant et al., S. C.) 128

LÉSION :—*Vide* MINOR.

LESSOR and LESSEE :—*Vide* EJECTMENT.

" " " :—*Vide* APPEAL.

LEX LOCI CONTRACTUS :—*Vide* EVIDENCE.

LIEN, for advances is good as against the owner of goods, under 10 and 11 Vic. ch. 10, § 4, when made for the pledgor's own private purposes, or to carry out a contract between pledgor and pledgee, although the pledgee knows of the ownership not being in the pledgee, so long as the pledgee has not notice from the owner that the pledgor had no authority to pledge. (Clark vs. Lomer and Clark et al., Plaintiffs, *par reprise d'Instance*, S. C.) 30

" :—Knowledge that the pledgee was not the owner does not make him *malâ fide* as regards the owner, in case like the above. (Do.) 30

" :—Is not extinguished by the pledgee transferring to a third party for value negotiable paper, which he had taken for the advances, if the notes came back again into the pledgee's hands, in consequence of not being paid at maturity. (Do.) 30

Lods et Ventes :—*Vide* Grand Trunk Railway Co.

" :—Are due on a deed of sale merely annullable, *atteint d'une nullité relative.* (Seminary of Quebec, vs. Labelle and Labelle, Plaintiffs *en garantie* vs. Tassé, Defendant *en garantie*, S. C.)........................ 290

Marriage will not be reputed *in extremis*, in the case of a party attacked with *delirium tremens*, although death ensue within two days after celebration of the marriage, if the person was not at the time sensible that he was attacked with his last illness and in imminent danger of dying. (Scott, Appellant, and Paquet et al., Respondents, Q. B.)........... 149

" :—When the status of the wife is recognised, collateral relations have not the *qualité* to dispute the marriage, and the acknowledgment of the status of the children precludes an interested party from afterwards disputing the marriage. (Do.).................................. 149

" :—The Status of a family being indivisible it cannot be recognised by certain members and disputed by other members of the same family. (Do.).. 149

" :—The ordinance of 1639, depriving of civil effects marriages *in extremis* should be strictly interpreted. (Do.).............................. 149

Married woman, *séparée de biens*, sued in an action on two notarial obligations in which she acknowledges herself personally indebted to the plaintiff, can plead and prove by verbal testimony, that the statement of personal indebtedness contained in the obligations is false, and that on the contrary it was the husband who was really indebted and that she was merely his security, on the ground that such contracts are in fraud of the law of the land. (Mercille, Appellant, and Fournier et ux., Respondents, Q. B.).. 51

" :—The authorisation of a, in an *acte* to which the husband is a party, stated in terms to have been given, is sufficient, although by the language of the *acte* the husband is not strictly made the party speaking. (Metrissé et al., Appellants, and Brault, Respondent, Q. B.)......... 60

" :—Where she is described in a writ of summons as duly separated as to property from her husband, and she pleads, amongst other things, that she was not so separated, such allegation will not be struck out on motion, on the ground that it is properly matter of exception *à la forme*. (Wheeler et al., vs. Burkitt et al., S. C.)................... 309

Minor emancipated can validly alienate moveables, and a *hypothèque* which guarantees the payment of a *douaire préfix* is a moveable right which a female minor, emancipated, by marriage, can alienate with the authority of her husband. (Metrissé et al., Appellants, and Brault, Respondent, Q. B.)... 60

" cannot be relieved from the consequences of an *acte* by a mere allegation of *lésion*, but must prove the fact. (Do.).......................... 60

" may be sued for the recovery of articles of necessity. (Thibeaudeau vs. Magnan, C. C.)... 146

Misdemeanor :—The punishment prescribed by the Ord. 4 Vic. ch. 30, § 1, is cumulative, and sentence of imprisonment and fine is to be awarded upon the conviction had against the defendant in manner and form as enacted by the ordinance. (Regina vs. Palliser, Q. B.)............... 276

Mitoyen wall :—The neighbour who makes use of the increased height thereof made by his co-neighbour is held to pay him the half of the cost and value of such increased height. (Tavernier vs. Lamontagne, S. C.) 81

Montreal :—A party elected under 12 Vic. ch. 123, § 8 and 41, to be councillor in the Corporation of, not being possessed to his own use and benefit of real and personal estate within the City of Montreal, after

payment of his just debts, of the value of £500 cy., is not qualified to be so elected, and a party elected to be such councillor and becoming insolvent during his occupancy of said office, is by such insolvency disqualified to hold such office. (Rolland vs. Bristow, S. C.)....... 281
" :—*Vide* TURNPIKE TRUSTEES.
MONTREAL AND CHAMPLAIN R. R. CO. :—The Secretary and Accountant have no power to accept drafts on behalf of the Company, and consequently the moneys covered by such drafts may be legally attached by process of *saisie arrêt*, notwithstanding such acceptance by such unauthorized officers. (Ryan et al., Appellants, and The Montreal and Champlain R. R. Co., Respondents, Q. B.)...................................... 38
MOVEABLES :—In case of sale of, *déplacement* is necessary to constitute delivery sufficient to convey title. (Ash et al., vs. Willett and Seymour et al., opposants, S. C.)... 301
MUNICIPAL CORPORATION :—The liability of, will be measured by its powers. (Adams, appellant, and the School Commissioners for the Municipality of Barnston, respondents, Q. B.).............................. 363
MUNICIPALITY :—An Appeal lies from a judgment of the Inspector of Police at Montreal, under the Municipal Act of 1860, (23d Vic., ch. 61,) to the Circuit Court, and such judgment, if erroneous, will be reversed with costs. (The Trustees of the Montreal Turnpike Roads, appellants, and Bernard, respondent, C. C.)................................ 326
OBLIGATION :—*Vide* INTEREST.
OPPOSITION *afin d'annuller* :—*Vide* MOVEABLES.
OPPOSITION *afin de conserver* will not be received after the delay has expired, although before the homologation of the report of distribution, so far as to disturb the rights of parties already collocated, where the omission to fyle it in time is not attributable to the negligence or oversight of the attorney, but such opposition will be received so far as to give the new opposant the moneys not distributed. (Ramsay vs. Hitchins, and Ramsay, opposant, and divers opposants, S. C.)...... 285
" :—*Vide* REPORT OF COLLOCATION.
OPPOSITION *afin de distraire* may be fyled to a *venditioni exponas de bonis*. (Delisle vs. Couvrette and Clément dit Larivière, opposant, C. C.)......... 84
PARTNERSHIP :—One partner cannot sue another partner, after dissolution of the firm, for monies unaccounted for or misappropriated, otherwise than by action to render account. (Thurber vs. Pilon, S. C.)........... 37
:—The registration of, required by the 12 Vic., ch. 45, is sufficiently made at the place where the seat of the business is established, and need not be made at every place where the partnership may happen to transact business. (Sénécal vs. Chenevert, C. C.)............. 239
" :—A promise signed by one partner in the name of his firm, but without authority of his partners, undertaking to receive a stranger into that firm, is not binding upon the members of it; and (*semble*) even silence or inaction on the part of the other members of the firm, would not be an implied sanction of such promise, although such sanction might be inferred from circumstances. (Higginson vs. Lyman et al., S. C.) 329
" :—An agreement to take a person into partnership after the lapse of a specified time, "upon terms that shall be mutually satisfactory," but specifying no conditions as to duration, shares, and the like, is not such an agreement as will afford any basis for the assessment of damages in the event of a breach of it. (Do.).................... 329
PAYMENT :—Imputation of, *Vide* INTEREST.

Péremption d'Instance cannot be interrupted by a party taking a proceeding in the cause, after notice of motion for *péremption* has been served, and an endorsement of a party's name as "Louis" instead of "Lewis," is not a misnomer which can affect the application. (Farnan vs. Joyal, S. C.) 128

" :—Is interrupted by the death of the plaintiff. (Tate et al., vs. McNeven, S. C.) 148

Plea :—Fyled after foreclosure, and before any further proceeding had by plaintiff ought not to be rejected on motion of plaintiff founded on the mere foreclosure. (Ostell vs. O'Brien, S. C.) 122

" :—Fyled half an hour after foreclosure will not be rejected though the plaintiff make affidavit that the defendant has no real defence to the action, and though the defendant do not make a counter affidavit, to the effect that the plea is a *bonâ fide* one. (Molson et al., vs. Reuter et al., S. C.) 299

Prescription :—Of five years against arrears of rent, will be held interrupted by defendant saying within the five years immediately preceding the action, that he believed he had a larger account against plaintiff. (Delisle vs. McGinnis, C. C.) 145

" :—Of five years against a promissory note, will be held interrupted by a payment on account, although no action be brought within the fatal period. (Torrance vs. Philbin, S. C.) 287

" :—Seamen's wages cannot be prescribed under the 127th article of the Custom of Paris, and a plea of prescription under that article is insufficient, if it does not contain an affirmation of payment. (Barbeau vs. Grant, S. C.) 297

Privilege :—*Vide* Hotel Keeper.

Promissory Note :—*Vide* Prescription.

" :—In action on, the words "for value received" need not be expressed, the fact of the giving of such value being a matter of proof. (Whitney vs. Burke, S. C.) 308

Registration :—*Vide* Partnership.

" :—*Vide* Dower.

Rent :—*Vide* Adjudicataire.

" :—*Vide* Saisie gagerie.

" :—*Vide* Ejectment.

" :—Prescription.

Report of Collocation may be contested after the delays have expired, upon cause shown by affidavit that the party contesting is interested, and that the party collocated to his prejudice appears on examination of his opposition, not to be entitled to the amount of his collocation. (Clapin vs. Nagle, and Clapin, and Nagle, and others, opposants, S. C.) 286

Requête Civile can only be received in respect of a judgment rendered *en dernier ressort*, and from which there is no appeal. (Valin vs. the Corporation of Terrebonne, S. C.) 14

" ought to be received against a final judgment rendered by default, and *en dernier ressort*. (Martin vs. Moreau, S. C.) 121

Riot :—*Vide* Damages.

Saisie Arret :—*Vide* Attachment.

" Gagerie *par droit de suite*, may be exercised as well for the rent due as for that to accrue, and the want of designation in the writ of the place where the goods have been removed to, cannot be taken advantage of, at the hearing on the merits. (Rodier vs. Joly, S. C.) 15

SAISIE REVENDICATION :—*Vide* LIEN.

" " will issue to attach a vessel, on affidavit by the lessor thereof, to the effect that the lessee of the vessel, destined to run between Montreal and U. C., has incurred liabilities on the vessel at a U. S. port, that he has become insolvent, *en déconfiture*, and that should he run the boat to U. C. she would in due course call at such port in the U. S., and be in all probability seized there for the payment of such liabilities. (Routh et al., vs. Macpherson. S. C.)...................... 45

" " :—Where A. B. & Co., agreed to tan a quantity of hides, the property of C. D. & Co., and to deliver the leather when tanned to the latter, who were to have the exclusive right of sale thereof, on the understanding that the former were to be entitled to a certain share of the profits arising from the sale of the leather by the latter, and instead of so delivering the leather when tanned to C. D. & Co., one of the members of the firm of A. B. & Co., without the knowledge even of his partner, conveyed the leather into a foreign state, and sold the same for his own benefit, assuming at the same time a fictitious name; such an act is not a *vol.* as understood by the law of Lower Canada, nor does it give a right to C. D. & Co., to revendicate such leather in the hands of a third party who has purchased the same for a valuable consideration, unless the latter acted in manifest bad faith; and proof to the effect that the leather coming as it did from a foreign market ought to have borne the stamps and marks of weight and inspection, and to have been rolled, and instead thereof, bore no such stamps and marks, and was in the main unrolled, and that the price paid was low, at a time when leather was particularly scarce, is not evidence of bad faith on the part of the purchaser, sufficient to justify the revendication of the property by the party claiming it. (Fawcett et al., vs. Thompson et al., S. C.).......... 234

" " :—The vendor, without day or term, can revendicate the goods sold by him, even in the hands of a third party, purchaser, and, in such case it will be for such third party to prove that the sale was made on credit (*à terme*); and in default of such proof, the sale will be presumed to have been made for cash; and where the goods consist of grain, the fact of the grain being mixed with other grain of the same kind, is no bar to the revendication. (Senécal vs. Mills et al., and Taylor et al., Int. party, S. C.).............................. 307

SALARY :—*Vide* WAGES.

SALE :—Where a sale is made by sample and the goods do not agree with it, the vendor must make known the defect within a reasonable delay; and the vendor cannot claim to rescind such sale and return the goods after a delay of six months. (Joseph vs. Morrow et al., S. C.)...... 288

" :—*Vide* MOVEABLES.

" :—*Vide* SAISIE REVENDICATION.

" :—*Vide* FRANC ET QUITTE.

SAMPLE :—*Vide* SALE.

SCHOOL COMMISSIONERS are bound to respect the resolutions of their predecessors in office, and when such predecessors have received the account of the Secretary-Treasurer and discharged him, it is not competent to the new Commissioners to sue such Secretary-Treasurer to render account; and moreover, the Superintendent of Education, has, by the 12 Vic., ch. 50, s. 12, the right to regulate all differences of the kind, and his decision in that behalf, produces all the effect of a *sentence*

arbitrale. (The School Commissioners for the Municipality of the Parish of St. Michel de Vaudreuil vs. Bastien, S. C.)............ 123

SCHOOL COMMISSIONERS are not liable for the balance of an obligation, given for the erection of a Model School House, being in excess of the amount authorised by law to be so expended. (Adams, Applt., and The School Commissioners for the Municipality of Barnston, Respdts., Q. B.),... 363

SECRETARY-TREASURER :—*Vide* SCHOOL COMMISSIONERS.

" :—Of a municipality, ought, on his refusal to render an account, to be condemned to the payment of the amount established by the plaintiff's proof, with interest at 12 per cent., and to *contrainte par corps*, and the rule to obtain such condemnation ought to be signified at the Prothonotary's office, in case the Secretary-Treasurer has left the Province. (The Corporation of the County of Chambly vs. Loupret, S. C.)............ 125

SECURITY FOR COSTS :—On application therefor, plaintiff can be compelled to furnish *two* sureties. (Donald vs. Becket, S. C.)............ 127

" :—May be exacted by a garnishee from the party (foreigner) contesting his declaration. (Mayer et al., vs. Scott and Benning et al., Garnishees, C. C.)............ 146

" :—May be exacted by an opposant, *before* but not *after* fyling a contestation of the claim of another opposant, described as residing beyond the limits of the Province. (Bonacina vs. Bonacina, and divers opposants, S. C.)............ 148

" :—*Vide* APPEAL.

" :—May be given, by depositing a sum of money with the Prothonotary; the amount thereof to be determined by the Judges. (Mann et al., vs. Lambe, S. C.)............ 300

SHERIFF'S SALE :—*Vide* ADJUDICATAIRE.

SUBSTITUTION :—The sale by execution of real estate burdened with a substitution cannot be opposed, so long as the substitution is not open. (The Trust and Loan Co. of U. C. vs. Vadeboncœur et al., and Vadeboncœur et al., opposants, S. C.)............ 358

SUCCESSION :—The heirs *en ligne directe* are liable to an action on the part of a creditor of the estate, although they may have never meddled with the succession, unless they renounce, and if the renunciation be made after action brought, they must pay costs to the date of the fyling thereof, and such renunciation may be fyled at any time before final hearing. (The Montreal City and District Building Society vs. Kerfut et al., S. C.)............ 54

TIERS-SAISI :—Declaration of, cannot be contested by a defendant on the ground that the goods of such *tiers-saisi* are under seizure for the amount admitted by him in his declaration to be due to the Defendant, the defendant having no interest in raising such a contestation; and such a contestation will be dismissed on demurrer fyled by the *tiers-saisi* himself. (Constable et al. vs. Gilbert et al., and Simpson et al, T. S., S. C.),............ 299

TURNPIKE TRUSTEES, Montreal, cannot be sued, under the Municipal Act of 1860 (23 Vic., ch. 61) for an alleged obstruction on one of the roads under their control. (The Montreal Turnpike Roads, Applts., and Bernard, Respdt. S. C.),............ 326

USURY :—*Vide* INTEREST.

VENDITIONI EXPONAS :—*Vide* OPPOSITION *à fin de distraire*.

VERDICT :—A motion to set aside a verdict of a special jury and dismiss the Plaintiffs' action, or to grant a new trial, is regular, and in accordance with the practice of the Court. (Higginson vs. Lyman et al., S. C.), 320

VERDICT:—*Vide* JUDGMENT *non obstante veredicto.*

VESSEL :—*Vide* SAISIE REVENDICATION.

VOL :—*Vide* SAISIE REVENDICATION.

WAGES or salary not yet due or gained only on the day of service of attachment are not seizable. (Sternberg et al., vs. Dresser and Evans, T. S. S. C.), ... 120

" :—*Vide* PRESCRIPTION.

WARRANTY :—A deed of, will not cover a class of debts not contemplated by the parties at the time it was executed, though the terms of the deed be so general as to purport to extend to all debts whatever. (The Bank of British North America, Applt., and Cuvillier et al., Respdts., Q. B.),.. 241

" :—If the recital in a deed of, indicate the purpose for which the deed is executed, its effect will be restricted to that purpose, though the dispositive portion of the deed be couched in general terms. (Do.),.... 241

" :—A deed of, stating that M. C. proposes to carry on business in Montreal and elsewhere, and that to enable him to do so, and to meet the engagements of a firm in liquidation of which he has been a partner, he would require bank accommodation; and that the sureties were willing to become his security with a view of making the bank perfectly secure with respect to any debts then due, or which might thereafter become due by him: and then containing an agreement by the sureties to become liable for all the present and future liabilities of the said M. C., whether as maker, drawer, endorser or acceptor of negotiable paper, or otherwise howsoever: will not make the sureties liable for debts contracted by the said M. C., by endorsing, or procuring the discount of negotiable paper in his own name for the benefit of a firm of which he became a member subsequent to the execution of the deed of warranty, although such paper had been discounted at his request, and placed to his individual credit in the Bank. (Do.),. 241

WILL :—*Vide* INSCRIPTION EN FAUX.

WITNESS :—*Vide* EVIDENCE.

" :—Cannot be examined a second time by the party producing him in the same case, unless allowed by the Court on special application. (Joseph vs. Morrow et al., S. C.), ... 238

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