The Legal News.

Vol. XI. APRIL 28, 1888. No. 17.

The case of *Bunch* v. *Great Western Railway Co.* (9 Leg. News, 136, 275, 283; 17 Q. B. Div. 215;) has been carried to the House of Lords, and there the judgment of the Court of Appeal has been affirmed, Lord Bramwell dissenting. The facts were that a woman arrived at a station on the Great Western Railway forty minutes before the time at which the train by which she intended to travel was to start. The train was not at that time drawn up in the station. She had with her a bag and two other articles of luggage, which were delivered to a porter to take into the station. She saw the other two articles labelled, and told the porter that she wished to have the bag in the carriage with her, and asked if it would be safe if left with him. He replied that it would be. There were notices in the station that porters had orders not to take charge of luggage, and that the company would not be liable for luggage taken into the carriages. The bag was lost through the negligence of the porter. The case was tried in the Marylebone County Court, where judgment was given in favor of the plaintiffs for £18. On appeal to the Divisional Court, Justices Day and Smith differed, the former being of opinion that the company were not responsible, while Mr. Justice Smith considered that there was evidence to support the finding of the County Court judge that the porter was holding the bag on behalf of the company. Smith, J., as junior judge, withdrew his judgment, and judgment was entered for the company, with leave to the plaintiffs to appeal. The Court of Appeal reversed the judgment of the Divisional Court, Lopes, L.J., dissenting, and restored the judgment of the County Court judge. This decision has now been affirmed by the House of Lords, Lord Bramwell dissenting.

It is very much to be regretted if the magnificent site of the Montreal Court House has to be abandoned in favour of one much less desirable. The present building is no doubt inadequate and defective, but we are not inclined to believe that architectural skill is so limited that it is impossible to improve the accommodation, and overcome most of the defects complained of. Considerable alterations and repairs have been in progress for more than a year past. Two elevators are now being put in. To what end are these costly improvements being made if the building is to be abandoned?

Comment is now being made upon the fact that Chief Justice Waite died poor, and that his family are not adequately provided for. The rewards of the bench are so insignificant that it could not well be otherwise. The Chief Justice of the United States Supreme Court receives about the same salary that is paid to some of the subordinate officers of the Bank of Montreal in this city. Notwithstanding popular impressions as to the largeness of lawyers' fees, the same may be said of the incomes of eminent and hardworking members of the bar. Within a few years we have lost an unusual number of our prominent men. We may instance Andrew Robertson, Edward Carter, Devlin, Doutre, Kerr, Leblanc, and Judges Day, Ramsay, Torrance, and Mackay. All these, and others whose names will occur to our readers, died comparatively poor after many years of exhausting labour.

The late Minister of the Interior, the Hon Thomas White, whose death has been so universally and sincerely mourned, is one of the few public men in Canada who have attained great distinction without being members of the bar. The legal profession, however, may claim him in a measure, as he followed a course of legal study in Ontario, but was diverted from his intention of entering upon practice by his first and stronger love for the press. There can be no doubt that he would have achieved distinction at the bar, but the loss to the legal profession has been amply compensated by the gain to the press and to the public life of Canada. In reference to journalism more particularly, it is difficult to overestimate the personal influence which Mr. White exerted during a period extending over thirty years. The example of his honourable independence, cheerful and untiring industry,

and generous sympathy with every worthy cause, effected a great change for the better, and was a discouragement to mere bohemianism which sometimes threatens to encroach upon the legitimate walks of the profession.

The bill introduced by the Minister of Justice respecting the application to Canada of the criminal law of England, provides that the criminal law of England as it stood on the 1st of July, 1867, in so far as the same may be applicable to Canada, but subject to and as modified by—(*a.*) Any Act of the Parliament of the United Kingdom having the force of law in Canada or any Province thereof; (*b.*) Any Act of the Legislature of any Province now forming part of Canada passed prior to the date at which such Province so became a part of Canada and still having the force of law; and (*c.*) Any Act of the Parliament of Canada,—shall be the portion of the criminal law of England in force in Canada.

SUPREME COURT OF CANADA.

OTTAWA, April, 1888.

Present: Sir W. J. RITCHIE, C.J., and FOURNIER, HENRY, TASCHEREAU & GWYNNE, JJ.

GLENGARRY CONTROVERTED ELECTION CASE.

Election Petition—Ruling by judge at trial—Appealable—Dominion Controverted Elections Act (R. S. C. ch. 9, secs. 32, 33 & 50)—Construction of — Time — Extension of—Jurisdiction.

HELD:—1. That the decision of a judge at the trial of an election petition, overruling an objection taken by respondent as to the jurisdiction of the judge to go on with the trial on the ground that more than six months had elapsed since the date of the presentation of the petition, is appealable to the Supreme Court of Canada under sec. 50 (C.) ch. 9, R. S. C. (Gwynne, J., dissenting).

2. In computing the time within which the trial of an election petition shall be commenced, the time of a session of Parliament shall not be excluded unless the Court or Judge has ordered that the respondent's presence at the trial is necessary. (Gwynne, J., dissenting.

3. The time within which the trial of an election petition must be commenced cannot be enlarged beyond the six months from the presentation of the petition, unless an order has been obtained on application made within said six months.

An order granted on an application made after the expiration of the said six months is an invalid order, and can give no jurisdiction to try the merits of the petition which is then out of Court. (Ritchie, C.J., and Gwynne, J., dissenting.)

Appeal allowed with costs.

Blake, Q.C., and *Cassels, Q.C.*, for appellant.
Macmaster, Q.C., for respondent.

SUPERIOR COURT.

MONTREAL, April 21, 1888.

Before MATHIEU, J.

POUDRETTE v. ONTARIO & QUEBEC RAILWAY COMPANY.

Injunction—Railway actually constructed.

This case arose out of the Ontario & Quebec construction in St. Clet. The plaintiff took a writ of injunction to restrain the company from building across his mill dam in such a way as to injure his water privileges, as by a deed previously passed to the company, one of the considerations of the sale was that in building their line the railway company would not interfere with the water power used by plaintiff to drive his mills.

In asking for an injunction, the plaintiff alleged that the company had built an embankment across the pond, and had caused him a damage for which they were responsible.

The injunction was granted, but the writ was not served, and negotiations were started to arbitrate any damage caused to Poudrette, and Mr. Laurent was named as the company's arbitrator. After some nine months, during which time the railway works were completed, it was found impossible to decide upon a third arbitrator, and the proceedings being broken off, the plaintiff served the injunction which had been granted nearly a year before.

In answer to this writ the company pleaded that the injunction was not tenable, as the

railway works were completed before its service; that the plaintiff had waived his right to an injunction by allowing the matter to go to arbitration; and that on the merits no damage had been sustained, and the mill privileges and water power in no way disturbed or lessened by the railway works.

Judgment was rendered by Mathieu, J., dismissing plaintiff's petition for a permanent injunction on the grounds:—

1st. Because the works were completed before the writ was served, and as the writ called for the discontinuance of the works it could not be granted.

2nd. Because plaintiff had waived his right to his recourse by injunction, because he had allowed his claim to be referred to arbitration.

The dismissal of the plaintiff's proceedings carried costs against him.

(R. T. H.)

*COURT OF QUEEN'S BENCH—MONTREAL.**

Exemptions from seizure—Damages awarded for libel and slander not exempt from seizure—Compensation.

HELD:—Affirming the decision of Torrance, J., M. L. R., 2 S. C. 410, that the amount of a judgment obtained as damages for libel is not exempt from seizure by garnishment.

Quære, as to the right to oppose other claims in compensation of the damages a party has been condemned to pay for a *délit* or *quasi délit*, or to seize in his own hands the sums so awarded to his debtor.—*Archambault & Lalonde*, Dorion, C.J., Tessier, Cross, Baby, JJ., Sept. 17, 1887.

Sheriff's sale—Vacated at suit of purchaser—C. C. P. 714—Property charged with dower claim.

HELD:—That a purchaser of real estate at a sheriff's sale is not bound to take a deed of the property, but may have the sale vacated, if it appear that the immovable is charged with a claim for dower which is not extinguished by sheriff's sale; and this is so, even where the purchaser has knowledge, before the sale, of the existence of the hypothec.—*Blondin & Lizotte*, Dorion, C.J., Tessier, Cross, Baby, JJ., Feb. 22, 1887.

City of Montreal—41 Vic. (Q.) ch. 6, s. 26—Municipal taxes—Local assessment for local purposes—Educational Institution—Exemption.

HELD:—(Reversing the judgment of the Superior Court, M. L. R., 2 S. C. 265), that the assessment imposed on the proprietors benefited, for the cost of a work of a local character and for the benefit of properties in a particular section of the City of Montreal, is not a municipal tax within the meaning of 41 Vict. (Q.) ch. 6, s. 26, but is of the nature of a local assessment for local purposes, and as such does not come under the exemption from municipal taxes accorded to educational institutions by the statute cited.—*La cité de Montréal et les Ecclésiastiques du Séminaire de St. Sulpice de Montréal*, Tessier, Cross, Baby, Church, Doherty, JJ. (Baby, J., diss.), Jan. 27, 1888.

Exemptions from taxation, M.C. 712, 978a—Taxes imposed by municipal by-laws for payment of interest and creation of sinking fund for redemption of municipal debentures.

HELD:—That taxes imposed by municipal by-laws for the payment of the interest and creation of a sinking fund for the redemption of municipal debentures constitute a hypothec upon all the real property of the municipality taxable at the date of the passing of such by-laws, and the hypothec continues to affect the property even when it passes into the hands of a purchaser in whose possession it would have been exempt from taxation had he owned it at the date of the passing of the by-laws.—*La Communauté des Sœurs des S. N. de Jesus et Marie*, Dorion, Ch. J., Tessier, Cross, Church, JJ., Nov. 22, 1887.

*SUPERIOR COURT—MONTREAL.**

Montreal, City of—Municipal election—46 Vict. (Q.) ch. 78, s. 27—Date of election—Extraordinary vacancy.

Held, That the date of a municipal election within the meaning of 46 Vict. (Q.) ch.

* To appear in Montreal Law Reports, 3 Q.B.

* To appear in Montreal Law Reports, 3 S.C.

78, s. 27, is not the day of polling, but the day on which the City Council declares the person to be elected; and the same rule applies where an election is held to supply an extraordinary vacancy which occurs during the year.—*Donnelly* v. *Kennedy*, Tait, J., June 28, 1887.

Sale of immovable free and clear for cash—Hypothecs existing on property—Purchaser not bound to execute deed unless property is clear—Evidence.

Held, 1. (Following *Burroughs & Wells*, M.L. R., 3 Q.B. 492)—That where real estate is sold free and clear of incumbrances, the purchaser to pay the price in cash to the vendor, and it appears that the property is charged with hypothecs, the purchaser is not bound to execute a deed until the vendor has caused the hypothecs to be discharged.

2. It is not necessary that the acceptance by the vendor of an offer to purchase an immovable be expressed in writing. Acceptance may be shown by acts of the vendor, or his agent, such as preparations to vacate the property, interviews between the parties, etc.

3. Evidence of payment of a hypothecary claim registered against an immovable, must be made by the production of a duly registered discharge.—*Greene* v. *Mappin*, Tait, J., May 31, 1887.

Sale—Error as to accessory of thing sold——Refusal of party complaining to cancel contract—Damages.

The plaintiff purchased from defendant at public auction two lots of land on Bishop street, and signed a memorandum of sale in which reference was made to the official plan, on which the street was marked as being 51 feet wide. On the surveyor's plan prepared for the sale, the street was also traced as 51 feet, but by error, this part of the street was represented on the lithographed copies as of uniform width with the upper part of the street, which was 60 feet feet wide. In the advertisements, and in the auctioneer's announcement, the street was also described as 60 feet wide. The vendors offered to cancel the sale if the purchaser had been led into error by the lithographed copies, but the plaintiff chose to adhere to the bargain.

Held, In an action of damages by the purchaser, that the plaintiff having received the full number of square feet bargained for, having refused to relinquish the bargain, which was a profitable one for him, having signed the memorandum of sale in which reference was made to the homologated plan showing a street 51 feet wide, and, moreover no specific damage being proved, his action of damages could not be maintained.—*Inglis* v. *Phillips et vir*, Davidson, J., Nov. 5., 1887.

Mutual Insurance Company—Note signed by President in settlement of valid claim against Company.

The by-laws of a mutual insurance company gave the president the management of its concerns and funds, with power to act in his own discretion and judgment in the absence of specific directions from the directors; and it was also his duty to sign all notes authorized by the board or by virtue of the by-laws. The president was both president and treasurer, and was also acting as secretary.

Held:—That the plaintiff, who was the transferee for value, given before maturity, of a note signed in behalf of the company, by the president, as president and treasurer, and given to the payee in settlement of a valid claim against the company, was entitled to recover the amount of said note from the company.—*Jones* v. *E. T. Mutual Fire Ins. Co.* in Review, Taschereau, Mathieu, Davidson, JJ., Nov. 5, 1887.

RECENT UNITED STATES DECISIONS.

Nuisance—Public Picnics and Dances.

Public picnics and public dances are not, in their nature, nuisances; and a village ordinance, in so far as it seeks to declare them to be nuisances, regardless of their character, is void. They are not in the list of common-law nuisances enumerated in the text-books. See 4 Bl. Com. (Sharswood's ed.) 166 *et seq.* 1 Hawk. P. C. (Curwen's ed.) 694; Wood Nuis., p. 35, § 23 *et seq.* Now is there anything necessarily harmful in the nature of either,

more than in that of any other public amusement? When conducted with proper decorum and circumspection, and remote from public thoroughfares, it is impossible to conceive how any public injury or annoyance can result. That the manner of conducting them may be productive of annoyance and injury to the public, is not to be questioned; but since the nuisance must consist in this, and not in the picnic or dance, of itself alone, the ordinance should be directed only to it. While the right of the people to be free from disturbance and reasonable apprehension of danger to person and property is to be respected and jealously guarded, the equal rights of all to assemble together for health, recreation or amusement, in the open air, is no less to be respected and jealously guarded. That a privilege may be abused is no reason it shall be denied.—*Village of Des Plaines* v. *Porter*, Sup. Ct. Ill., Jan. 19, 1888.

Restraint of Trade.

The defendant, upon selling out his business and stock in trade, agreed with the plaintiffs, upon sufficient consideration, not to engage in the same business at the same place again, either directly or indirectly, for five years, and stipulated large damages in case of a breach of the contract. *Held*, that such a contract is not to be extended, by construction, beyond the fair and natural import of the language used, and in this instance did not extend to isolated acts or occasional services in good faith rendered for the accommodation of another dealer by defendant, nor to employment in some subordinate capacity not affecting the management of the business or influencing custom, but did prohibit him from engaging in business with another, or in his name or for him, in any such capacity (whether foreman, salesman or manager) as would result in the mischief which it was the plain purpose of this agreement to prevent. The Court said: "The words 'directly or indirectly' emphasize the agreement, and permit no evasion of its purpose and object. To engage his services to or in assisting a rival dealer in the same business, to solicit and make sales and to influence buyers in that market, including his old customers, would we think be fairly within the terms of the contract. But it refers to engaging in business; it does not extend merely to isolated acts which might tend to interfere with the plaintiff's business, or to occasional services voluntarily rendered for the convenience or accommodation of another in good faith. Nor do we think it would include subordinate employment, not affecting the management or control of the business, or directly influencing custom. In *Whitney* v. *Slayton*, 40 Me. 224, a covenant not to engage in the business of iron-casting within certain limits was held broken by the obligor's becoming a stockholder in a corporation carrying on that business, or being employed by such corporation in conducting it. In *Finger* v. *Hahn*, 42 N. J. Eq. 607, the defendant sold out his butcher business, and agreed 'not to carry on the business on his own account, or to operate any butcher business.' The evidence showed that he was operating a department of the butcher business in a grocery store kept by another, and for the latter, and that he did the buying and selling, as well as cut the meats, and the contract was held broken. In *Newling* v. *Dobell*, 19 L. T. (N. S.) 408, where the defendant, in selling out, agreed not to carry on or be concerned in or interested in the business of a tailor, held that the contract was broken by working as a journeyman for another. The covenant clearly embraced the exercise of his trade or skill for an employer as well as for himself. So in *Hill* v. *Hill*, 55 L. T. (N. S.) 769, the covenant was 'not to engage in, or be in any way concerned or interested in the same business, and the defendant was not permitted to engage as employee on a salary.' In *Vincent* v. *King*, 13 How. Pr. 235, the seller covenanted 'not to exercise, carry on, or in any way pursue his trade in the village;' and in *Ewing* v. *Johnson*, 34 id. 202, the seller covenanted 'not to in any manner interfere with the prosecution of the business of the purchaser.' So in *Boutelle* v. *Smith*, 116 Mass. 113, the covenant was 'not to directly or indirectly engage in any business, or to do any act that shall interfere with the business purchased.' But it seems that the use of the words 'be concerned in,' or 'interested in,' 'do any act,' etc., in addition to the terms 'carry on' or 'engage in,' showed that the parties

intended to extend the contract further than the latter terms alone would do. The cases of *Grimm* v. *Warner*, 45 Iowa, 106; *Allen* v *Taylor*, 39 L. J. Ch. 627; and *Clark* v. *Watkins* 9 Jur. (N.S.) 142—cited by respondents—substantially support his contention, and hold that a contract 'not to engage in or carry on' the same business does not include employment in the same business for another unless the contract expressly so stipulates. But the Court must consider the nature of the business which the party abandons, and agrees not to undertake, 'directly or indirectly,' and the natural and reasonable effect of the said employment upon it in determining whether the contract has been violated directly or indirectly, for if there has been an indirect violation or fraudulent evasion of it, resulting in damage, it could hardly be material that he was receiving wages instead of profits." *Nelson* v. *Johnson*, Supreme Court, Minnesota March 5, 1888.

COUR D'APPEL DE PARIS.

18 janvier 1888.

Présidence de M. PRADINES.

DEBRAY v. CHRISTY.

Servitude—Passage—Commencement de preuve par écrit—Présomption.

La preuve de l'existence d'une servitude discontinue, spécialement d'une servitude de passage, peut résulter de présomptions graves, précises et concordantes, appuyées d'un commencement de preuve par écrit.

Et ce commencement de preuve par écrit peut même résider dans les énonciations d'un acte, auquel le propriétaire du fonds dominant ou ses auteurs n'ont point été parties.

LA COUR,

Considérant que les premiers juges ont à tort refusé de trouver dans les pièces et documents de la cause le titre d'une servitude de passage existant sur le fonds des intimés au profit du fonds des appelants dans les termes où ces derniers la réclamaient;

Considérant, à cet égard, que les appelants trouvent un premier élément de droit dans l'acte notarié du 16 décembre 1809, lequel contient textuellement "qu'il existe sur le fonds vendu aux intimés deux chemins ou sentiers conduisant, l'un, aux moulins des sieurs Philippeaux, l'autre, au moulin des Prés";

Considérant, il est vrai, que les appelants n'ont pas été parties à cet acte, mais qu'ils peuvent invoquer, au moins, ces énonciations comme un commencement de preuve par écrit de la servitude dont leurs adversaires leur contestent aujourd'hui l'existence;

Considérant que ce commencement de preuve est susceptible d'être complété par les présomptions graves, précises et concordantes qui abondent dans la cause;

Considérant que les appelants sont tout d'abord fondés à invoquer le plan dressé en vertu de l'expertise ordonnée par jugement du Tribunal de la Seine du 16 mars 1824, déposé au greffe le 29 mai 1824, la dite expertise homologuée par jugement du 5 juin suivant; que c'est sur cette expertise, et en s'y référant expressément qu'a été rendu le jugement du Tribunal de la Seine du 28 août 1824, qui a adjugé l'immeuble, aujourd'hui propriété des appelants, à Edme-Auguste Debray, leur auteur; qu'il est à remarquer que, sur le plan joint à cette expertise, le chemin litigieux est visiblement amorcé au regard de la propriété des intimés; et qu'au jugement d'adjudication précité a comparu Nicolas-Charles Debray, auteur des intimés, pour déclarer command au profit d'Edme-Auguste Debray, l'auteur des appelants;

Considérant, d'ailleurs, que ce même chemin se retrouve sur le cadastre de 1812 et sur d'anciens plans;

Considérant, au surplus, qu'à ces titres et documents, les appelants ajoutent la production d'un certain nombre de pièces établissant que, depuis plus de quarante ans, ce chemin est connu dans le pays sous le nom de "Chemin des Deux-Frères," dénomination qui prouve bien qu'entre les deux frères devenus voisins, le libre et public usage de cette voie avait toujours été reconnu par l'un à l'autre pour le service de sa propriété;

Considérant que c'est ainsi que les appelants ont versé au débat: 1o. Une pièce émanant de la garde nationale de Montmartre, en novembre 1846, et portant qu'à cette date, Edme-Auguste, auteur des appelants, habitait le chemin des Deux-Frères; 2o. L'acte

de décès d'Edme-Auguste, portant qu'il est décédé à cette adresse le 26 juin 1853; 3o. Une affiche dressée en vue de la vente de ses biens, portant que son fils, qui la poursuivait, était aussi, lui, domicilié à cette adresse;

Considérant que ces présomptions, résultant des actes, sont encore confirmées par l'état des lieux, par la présence, dans la remise des appelants, d'une charrette de meunier qui n'a pu y accéder que par le passage revendiqué; enfin par la disposition des constructions des intimés, toutes élevées en bordure du chemin litigieux; lequel aboutit du reste à la porte en planches dont les appelants ont encore la clef;

Considérant que l'ensemble de ces présomptions complétant la reconnaissance de l'obligation consignée dans l'acte de 1809, par les intimés, constitue, au profit des appelants, un titre formel dans les termes de l'art. 691 C. civ;

Par ces motifs,

Infirme le jugement dont est appel, et faisant ce que les premiers juges auraient dû faire;

Décharge les appelants des dispositions et condamnations contre eux prononcées;

Et, sans qu'il y ait lieu de procéder à l'expertise demandée, dit que les appelants font la preuve que le fonds des intimés est grevé au profit du leur d'une servitude de passage qui est fondée en titre;

Fait, en conséquence, défense aux intimés de faire aucune entreprise ou aucun ouvrage qui pourrait gêner l'exercice de la dite servitude.

NOTE.—I.—Sur le premier point: Jurisprudence constante, conf. V. Cass. 8 novembre 1886 (Gaz. Pal. 86.2.780) et la note.

II.—Sur le deuxième point: V. conf. Cass. 20 octobre 1885 (Gaz. Pal. 85.2.571) et la note.

COUR D'APPEL DE NANCY.

12 décembre 1887.

GENAY v. MAILLARD.

Compensation—Créance eventuelle, incertaine et indéterminée—Art. 1291, C. Civ.

Une créance éventuelle qui n'est ni certaine quant à son principe, ni déterminée quant à son chiffre, ne peut être opposée en compensation à une autre créance liquide et exigible.

Spécialement le propriétaire d'une maison, débiteur de son architecte, ne peut opposer en compensation à une créance liquide et exigible de ce dernier, celle qui pourrait résulter à son profit d'une action en responsabilité qu'il lui a intentée à raison de malfaçons.

Le tribunal de Nancy avait rendu, le 5 avril 1886, le jugement suivant:

"Attendu qu'il est constant en fait que Maillard est débiteur de Genay d'une somme de 1,700 fr. pour honoraires sur travaux que le défendeur a fait exécuter dans sa propriété sise avenue de Boufflers;

"Attendu qu'indépendamment de ces travaux, Genay a encore été chargé comme architecte, depuis moins de dix ans, de diriger la construction d'une maison du défendeur, rue Lepois, et qu'il a reçu pour ses honoraires, une remise de 5 p. c. sur le prix de cette construction;

"Attendu que, selon Maillard, la grille et le portail en fer qui ont été établis devant cette maison sont, par suite de malfaçons ou vices de construction, dans un tel état de délabrement que leur réfection est devenue nécessaire et qu'elle entraînera des dépenses considérables;

"Attendu que Maillard a introduit devant le tribunal de commerce de Nancy, contre la société des ateliers de Neuilly, qui a fourni et posé cette grille et ce portail, une demande en responsabilité; mais qu'il soutient en outre que cette responsabilité incombe à Genay, chargé comme architecte de la surveillance et de la direction des travaux et qu'en conséquence il a conclu, par voie de demande reconventionnelle, à faire déclarer Genay responsable de ces malfaçons et avaries et à le faire condamner à des dommages-intérêts à déterminer au moyen d'une expertise;

"Attendu qu'aux termes de l'art. 1291 C. civ., la compensation légale n'a lieu qu'entre deux dettes également liquides et exigibles et que cette disposition de la loi ne peut recevoir d'application dans la cause;

"Attendu néanmoins que si la créance de Maillard n'est ni liquide, ni exigible, et si même elle n'a qu'un caractère purement éventuel; si, d'autre part, son existence certaine et sa quotité ne pourront être déterminées qu'après une mesure préalable d'instruction, il n'en est pas moins certain qu'en pareille situation il appartient aux magistrats de concilier les deux intérêts contraires qui se trouvent en présence, celui du demandeur principal dont la créance est certaine et liquide, et celui du défendeur dont la demande reconventionnelle nécessite une instruction et des retards (Demolombe, t. 28, No. 689; Larombière, art. 1293, Nos. 20, 21—Cass. 4 août 1851);

"Attendu qu'en tenant compte des faits de la cause et notamment de cette circonstance que la solvabilité de Maillard est incontestable et que la créance de Genay est devenue, depuis la demande, productive d'intérêts, il y a lieu de reconnaître que la solution la plus équitable et à la fois la plus avantageuse pour les deux parties, consiste à joindre les deux demandes et à surseoir à leur décision jusqu'au jugement de l'instance pendante devant le tribunal de commerce entre

Maillard et la société de Neuilly, ce jugement et la procédure à laquelle il aura donné lieu, devant nécessairement fournir au tribunal de sérieux et utiles éléments de décision quant à la demande reconventionnelle;

"Par ces motifs,

"Donne acte à Maillard de ce qu'il n'a jamais entendu méconnaître la créance de 1,700 fr. formant l'objet de la demande de Genay;

"Ce fait, et réservant aux parties, en ce qui concerne la demande reconventionnelle, tous leurs droits, moyens et actions, dit qu'il sera sursis à statuer sur les demandes respectives de Genay et de Maillard jusqu'après le jugement de la demande formée par Maillard devant le Tribunal de commerce contre la société des ateliers de Neuilly;

"Réserve enfin les dépens de l'instance."

Sur appel de Genay, la Cour a rendu l'arrêt suivant:

La Cour,

Attendu qu'il n'a jamais été contesté par Maillard que Genay est son créancier d'une somme de 1,700 fr. pour ses honoraires d'architecte, à raison de travaux exécutés, sous sa direction, dans une propriété que l'intimé possède, avenue des Boufflers, à Nancy;

Attendu que, vainement, Maillard cherche à se soustraire au paiement de sa dette, en opposant à Genay, à titre de compensation, une prétendue créance qu'il aurait contre lui, à raison de sa responsabilité dans les malfaçons et avaries constatées dans la pose de la grille de sa maison de la rue Lepois et qui font l'objet d'une instance pendante entre lui et la société des Ateliers de Neuilly;

"Attendu, en effet, que cette créance éventuelle qui n'est ni certaine, quant à son principe, ni déterminée, quant à son chiffre, ne peut, aux termes de l'art. 1291 C. civ., être opposée en compensation à Genay, dont la créance est, dès à présent, liquide et exigible; que c'est donc à tort que le tribunal, au lieu de prononcer une condamnation immédiate, a cru devoir surseoir jusqu'à ce qu'il ait été statué sur l'instance engagée devant le tribunal de commerce entre Maillard et la société des Ateliers de Neuilly;

"Attendu, d'ailleurs, qu'il est, dès aujourd'hui, démontré à la Cour que Genay n'a encouru aucune responsabilité dans l'établissement et la pose de la grille de la rue Lepois;

"Attendu, en effet, qu'il ressort des documents de la cause et des conventions verbales intervenues entre Maillard et André, que la grille devait être posée sous la direction et la surveillance du sieur Lauer, architecte, représentant, à Nancy, de la société des Ateliers de Neuilly; que ce dernier, en effet, s'est acquitté seul de cette mission et en dehors de l'intervention de Genay, qui n'a pas même été consulté; qu'il y a donc lieu de faire droit à l'appel de celui-ci et de réformer le jugement du 5 avril 1886:

Par ces motifs:

Infirme, etc....

Note.—V. conf. Cass. 15 juillet 1885 (Gaz. Pal. 85.2. 289) et la note; Douai 20 mai 1887 (Gaz. Pal. 87.1.833).

INSOLVENT NOTICES, ETC.

Quebec Official Gazette, April 21.

Judicial Abandonments.

Irénée Choquette, sadler, St. Hyacinthe, April 18.

Samuel Laurin, trader, Montreal, April 6.

Curators appointed.

Re Ephrem Cloutier, tanner.—D. Arcand, Quebec, curator, April 14.

Re J. O. Delisle.—C. Desmarteau, Montreal, curator, April 11.

Re N. A. Guilbault, district of Joliette.—C. Desmarteau, Montreal, curator, April 17.

Re Samuel Laurin.—C. Desmarteau, Montreal, curator, April 17.

Re Théodore Pouliot, currier.—N. Fortier, Quebec, curator, April 16.

Dividends.

Re Joseph Bérard.—First and final dividend, payable May 8, C. Desmarteau, Montreal, curator.

Re N. Friedman, Lachine.—Dividend, D. Seath and G. Daveluy, Montreal, joint curator.

Re Onésime Boulianne.—First dividend, payable at office of McCall, Shehyn & Co., Quebec, May 4, 1888.

Re George Walker.—First and final dividend, payable May 1, J. G. Ross, Montreal, curator.

Separation from bed and board.

Engénie de Combe Porcheron vs. Edmond François Bourdon, furrier, Montreal, April 12.

Quebec Official Gazette, April 28.

Judicial Abandonments.

Narcisse Turgeon, tanner, Lévis, April 19.

Curators appointed.

Re Wm. O'Leary, trader, Montreal.—S. J. Carter, Montreal, curator, April 18.

Re Joseph T. Fortin, trader, Murray Bay.—H. A. Bedard, Quebec, curator, April 24.

Re Simon Méthot, trader, Grande Rivière.—H. A. Bedard, Quebec, curator, April 17.

Re T. Michaud & Co.—D. Arcand, Quebec, curator, April 19.

Re Montreal Bottle and Glass Co.—P. S. Ross, Montreal, liquidator under Joint Stock Companies Insolvent Act of 1882. Claims to be filed on or before June 1.

Dividends.

Re Beuthner Brothers.—First and final dividend, payable May 16, A. F. Riddell, Montreal, curator.

Re R. M. Levine, Fox River.—First and final dividend, payable May 12, F. Veit, Gaspé Basin, curator.

Re Arthur Roy, trader, St. Cyrille.—First and final dividend, payable April 12, H. A. Bedard, Quebec, curator.

Separation as to Property.

Calixte Morin vs. Maxime Paul Hus, farmer, parish of St. David, April 21.