The Legal News.

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A NAIVE EXPEDIENT.

One of the most curious suggestions made for the relief of the New York Court of Appeals emanates from a Mr. Gebhard, and appears in a communication to the *Albany Law Journal*. It is — Codification! — "A hastily prepared Code," says Mr. Gebhard, "would at least let us know what the law is; "when we know what it is, we have removed "the necessity of asking the Court to tell us, "and to that extent lessened the burdens of "the judges." It is refreshing to meet with such childlike faith. In this part of Canada we have been enjoying the advantages of a Code for seventeen years—not "a hastily prepared Code," but one compiled with great deliberation by jurists of eminent standing and long experience; but we do not think the necessity has been removed of asking the Court to tell us what the law is, nor have the burdens of our Court of Appeal been sensibly affected by its existence. In fact, we cannot imagine anything that would be more fruitful in litigation than "a hastily prepared Code." If Mr. Gebhard's suggestion were acted upon, we fancy some of his clients would soon be inclined to spell in a different way the epithet by which we have described his scheme.

THAT STRANGE PORTRAIT.

The *American Law Review* candidly discloses the sources of its information respecting Canadian affairs. It was gathered "from "the stories told by Canadian *émigrés*, of "whom there are a good number in this "country, and whose ranks are receiving "daily accessions. These *émigrés* are among "our very best citizens." Our contemporary goes on to state that one of them, who migrated to St. Louis seven years ago, has prospered so mightily that "he is now "achieving distinction as a legal author." Another, from Nova Scotia, has been for many years a prominent figure in public affairs, and has been "a Senator of the United States!" He might possibly, adds the *Law Review*, have become a Justice of the Peace in Nova Scotia!

These are more startling sources of information than we imagined. Twenty, or ten, or even seven years ago, may be considered ancient history as to many branches of Canadian affairs. The stories of the *émigrés* are as accurate as the old maps of the British Provinces which are in vogue in some New England schools. And because Canadians have prospered abroad is it to be inferred that they would not have succeeded at home? How will this logic work? Our cities are full of American *émigrés* from Vermont, from New Hampshire, Massachusetts and other States. Many of them have prospered and grown rich. Some of them are counted among "our best citizens." As well might we contend that Mr. Blank, from Massachusetts, instead of becoming a millionaire in Canada, would never have risen above the proprietorship of a peanut stand in Boston.

Our neighbours are great enough now to be able to dispense with unjust depreciation of Canada, for the purpose of exalting themselves. We are sensible that there is vast room for improvement among us in very many particulars. Our spirit is daily vexed by the presence of abuses which few have the courage to assail. But apparently, even in the eyes of the *Review*, society in the United States is far from immaculate; for, on another page, referring to the pardon of Mason, our contemporary candidly admits that "in "Canada, society is better governed than in "the United States."

LEGAL AUTHORSHIP.

After all, the lot of the Canadian gentleman in St. Louis, who is "achieving distinction as a legal author," does not seem to be one of unadulterated bliss, for in another article the *Law Review* laments over the small rewards of legal authorship. "There is no money, as a general rule," says our contemporary, "in writing original articles for legal peri- "odicals"; and he adds: "It is believed that "the *American Law Review*, under its former

"management, had a rule of paying two "dollars per page for any articles which it "would accept and publish. We think we "are violating no confidence when we say "that every cent which its publishers paid "for articles was money lost." This is sad, but not surprising. Long judgments are generally useless as well as tedious, and long articles, unless by writers of world-wide reputation, are still less worthy of study. They cannot be cited as authority, and usually they have nothing but their own dulness to sustain them.

EARLY REPORTS.

Mr. Periard, law publisher, has in press a second edition of the volume of reports issued in Montreal thirty years ago by Mr. Justice Ramsay and the late Hon. L. S. Morin. These reports, which were the prelude to the establishment of the *Lower Canada Jurist*, have always been scarce, and for many years it has been very difficult to obtain a copy. The new edition has been revised by the learned judge, and will doubtless be appreciated by the profession.

HODGE v. *THE QUEEN.*

The following peculiar reference to this case was inserted in the speech of the Lieutenant-Governor of Ontario, at the opening of the Legislature: —"You will be pleased to know that by a recent decision of the Judicial Committee of Her Majesty's Privy Council, the right of Provincial Legislatures to regulate the traffic in intoxicating drinks is placed beyond controversy. The judgments in this case and the Insurance case, and the decision that lands escheating to the Crown for want of heirs are the property of the province, taken in connection with the observations made by the learned judges in disposing of these cases, have had a reassuring effect on the public mind, by showing that the federal principle embodied in the British North America Act, and the autonomy it was intended to secure for the individual provinces, are likely to be safe in the hands of the court of final resort in constitutional questions." The Judicial Committee will, no doubt, be duly grateful for the compliment.

NOTES OF CASES.

PRIVY COUNCIL.

LONDON, Nov. 24, 1883.

Before LORD WATSON, SIR BARNES PEACOCK, SIR ROBERT P. COLLIER, SIR RICHARD COUCH and SIR ARTHUR HOBHOUSE.

FRECHETTE, Appellant, and LA COMPAGNIE MANUFACTURIERE DE ST. HYACINTHE, Respondent.

Servitude—Water-course.

Where a person complains that the flow of water in a stream passing through his land has been obstructed by the act of the owner of the lower land, and the issue is raised that the plaintiff by his own works has altered the natural course of the stream, it is for him to prove, in order to make out a case entitling him to relief, that the servitude, as it existed previous to the changes made by himself, i.e. the natural or the established flow, has been interfered with by the lower proprietor.

The appeal was from a judgment of the Queen's Bench, Montreal. See 5 Legal News, p. 187.

PER CURIAM. The parties to this suit are owners of contiguous lands on the left bank of the River Yamaska; the plaintiffs, who are the respondents, being the owners of the upper lands, and the defendants, one of whom is the appellant, of the lower. The complaint is that the defendants have lately erected a barrier which prevents the water flowing in due course from off the land of the plaintiffs.

To understand the position of affairs it is convenient to refer to a plan put in by the defendants. Prior to the year 1878 matters stood as follows:—The whole river was traversed by a dyke marked A, which conducted the water to a mill (No. 4) belonging to the plaintiffs. After working that mill the water escaped into the natural channel of the river, and was not diverted again by the plaintiffs until nearly 100 yards below mill No. 4, where it reached the head of another dyke (Dyke No. 1), which was built near and nearly parallel to the left bank, and which caught a portion of the stream and carried it to another mill (Mill No. 1) belonging to the plaintiffs. The rest of the stream was caught by a dyke

(Dyke No. 3), the head of which was in mid-channel opposite Mill No. 4, and which conducted the water to the defendants' Mill No. 3. The water escaping through the tail race of Mill No. 1 also descended to Mill No. 3, but how it was used there, if used at all, does not clearly appear. Early in the year 1878 the plaintiffs carried Dyke No. 1 up the river to a point above the head of Dyke No. 3, and there connected it with a reef of shingle which extends to the right bank of the river. By this work the whole stream has been intercepted below Mill No. 4 and conducted to Mill No. 1, except when there is water enough to overflow the reef of shingle, and except so much as may leak through the dyke or through the reef. The defendant says that water has thus been taken away from the water-course formed by Dyke No. 3; and in the month of June, 1878, for the purpose as he alleges of recouping himself, he erected a barrier so as to prevent the escape of water from the tail race of Mill No. 1, and to form a head of water for a new mill which he built just below No. 3. The plaintiffs have also built a new mill (Mill No. 2) just below No. 1, and have excavated the bed of the river to receive their new wheels.

There has been considerable controversy whether the defendants' operations have impeded the working of Mill No. 1 or only that of Mill No. 2, but, in their Lordship's opinion, the controversy is not now material. The important fact is that the defendants' barrier has been found to bay back the water to a maximum depth of 22 inches at point A, which is the dividing line of the two properties. And the important question is, whether the plaintiffs are entitled to have the barriers so lowered that the water shall not be bayed back to any extent at all at Point A.

By the Civil Code of Quebec all rights to flowing water are classed under the head of servitudes; and by sect. 500 real servitudes are divided into three classes, according as they arise from the natural position of the property, from the law, or from the act of man. Servitudes arising from the law have nothing to do with the present question.

Sect. 501, which deals with servitudes of the first class, is as follows:—"Lands on a "lower level are subject towards those on a "higher level to receive such waters as flow "from the latter naturally and without the "agency of man. The proprietor of the lower "land cannot raise any dam to prevent this "flow. The proprietor of the higher land can "do nothing to aggravate the servitude of the "lower land."

Sect. 503 applies specially to rivers. It says, "He whose land borders on a running stream "may make use of it as it passes for the "utility of his land, but in such manner as "not to prevent the exercise of the same right "by those to whom it belongs, saving the pro-"visions contained in Cap. 51 of the Consoli-"dated Statutes for Lower Canada, or other "special enactments." "The same right" their Lordships take to mean the right to make use of the running stream as it passes the bordering land.

Unless then the provisions of the Code are limited by some special enactment, the plaintiffs have a right to say that the flow of water from their land shall not be impeded, so far as it is a natural flow, and independent of the agency of man. In this case the natural flow of the river has been altered by the agency of man for a long time, but an artificial flow may acquire as ample a right to protection as a natural flow.

The 3rd cap. of the 4th title of the Code treats of servitudes established by the act of man. Sect. 545 recognizes the right of every proprietor to subject his property to such servitudes as he may think proper consistently with public order. Sects. 549 and 550 are as follows:—

"No servitude can be established without a title; possession even immemorial is insufficient for that purpose."

"The want of a title creating the servitude can only be supplied by an act of recognition proceeding from the proprietor of the land subject thereto."

"Title," which answers to "titre," means a written or express grant.

Now as regards the flow of water which existed prior to 1878, and which it may be convenient to call the established flow, it is not now disputed but that the plaintiffs became and were, just before the execution of their new works, rightfully possessed (whether by title or by some act of recognition does not clearly appear), of what, according to the

Code, is a servitude over the defendants' property. Their Lordships consider that the plaintiffs then had, at least as between them and the defendants, the same right to protection for the established flow as if it were the natural flow. The defendants might not raise any dam to obstruct the established flow.

The appellants' counsel contended strongly at the bar that the working of the plaintiffs' mill has not been impeded or only impeded to a slight extent, and that the defendants have been materially injured by the abstraction of water. But their Lordships did not think it necessary to hear the respondent's counsel on those points. For the right to resist interference with a natural flow of water, or a flow legally established, is independent of the actual user of the water. Neither would the plaintiffs' right to have the established flow protected be barred by the mere fact that the defendants may have been injured by deprivation of water owing to the extension of Dyke No. 1. That might give the defendants a right to sue for damages, or to remove the dyke; but it does not follow that they can interfere with the established flow from the plaintiffs' land.

The appellant's counsel also insisted strongly that the action is wrong in form, but their Lordships see no reason to differ from the two Quebec Courts on this point.

The question whether Chapter 51 of the Consolidated Statutes does not confine the plaintiffs to a single remedy, viz., that of pecuniary damages, is a more substantial one. There is certainly great difficulty in so construing the Code and the statute as to produce a clear and harmonious result for the whole. There is nothing on the face of the statute itself to limit the generality of the powers it appears to confer on riparian owners. It was stated at the bar that there had been a course of decision in Canada which had the effect of placing a limit on the general terms of the statute. But the only case cited, that which is stated in the respondent's factum filed 11th May, 1881, appears only to refer to the mode of ascertaining damages. And the Judges in the Lower Courts do not refer to any course of decision, while they entertain a great diversity of view as to the limits within which the statute is to be construed. The Superior Court appears to think that the statute is no answer to actions founded on common right and on actual injury. Mr. Justice Ramsay, while impugning both the motives and the capacity of its framers, thinks it means nothing more than that if and when damages are sued for they shall be ascertained by referees. The rest of the Court in one passage express an opinion that the statute was not intended to operate against those who had turned running waters to use, and in another, that it was intended to operate only against landowners and not against millowners. It is difficult to find the foundation for any of these limitations. At the same time, their Lordships find it difficult to suppose that by the saving of the statute contained in Sect. 503, the Code intended to give no remedy whatever beyond pecuniary compensation for any violation of its rules. The question was very ably argued at the bar, but in the result their Lordships do not find it necessary to pronounce any opinion on it.

The substantial difficulty in the way of the plaintiffs is this: that they are seeking to establish a new and different servitude by the act of man without either grant or recognition; that they have not alleged or proved what was the precise servitude which existed prior to 1878; and that the decree which they have obtained proceeds on the assumption that the existing state of things is the natural state, or at least that there is identity between the state of things before and after the plaintiffs' operations of 1878. This is the difficulty to which the attention of their counsel was specially called, and to see how it stands it is necessary to examine the proceedings with some particularity.

In the declaration filed by the plaintiffs, they set forth their documents of title, and allege that they have had for upwards of 62 years the rights, privileges and water powers *actually used by them.* They pray for a declaration of those rights, for a declaration that the defendants have illegally disturbed the enjoyment of them, and for demolition of the defendants' barrier. It is clear then that, so far, the plaintiffs make no distinction between the existing flow of water and the established flow.

The defendants on their part rely on the alterations of 1878. They say in substance that the mischief is caused by the plaintiffs' own works executed below Mill No. 1 in the preceding spring and summer; that the extension of Dyke No. 1 has caught all the water and carried it down to Mill No. 1; that by collecting so large a quantity of water into the narrow space on the left bank, the plaintiffs have themselves to blame if at that point the water is more abundant than they like; and that they have no grant (*titre*) giving them a right so to use the river.

In replying to these defences the plaintiffs do not fall back on their right to the natural or the established flow of the water. As regards their works below Mill No. 1, they say that the defendants' allegations are false in fact. And as to all their recent operations, they say that their only object has been to preserve the water and conduct it from one of their mills to another, *as they have always done.*

At the wish of both parties experts were appointed by the Court to report upon instructions given to them by the Court. They were to state,—

1. The conditions of the localities and of the erections described in the writings of the parties, both before and after the said erections.
2. The works of the defendants.
3. The nature of those works, and whether they are calculated to injure the working of the water power used by the plaintiffs before they were completed.
4. What should be done so that each party may use the water without injury to the other.
5. What amount of damages, if any, should be paid by the defendants to the plaintiffs.

These instructions are not pointed to the effect of the plaintiffs' operations, but rather indicate that the only question is whether the flow existing at the time of the defendant's operations has been impeded.

In answer to the first and second questions the experts show the construction of the old and new mills to the effect hereinbefore stated, but they say nothing about the extension of Dyke No. 1, nor do they show what was the former flow of the water, or the bed of the river, or in any other respect what was the state of the localities prior to the execution of the recent works of the plaintiffs. In answer to the third question they find that the defendants' new barrier bays back the water to the depth of about two feet at the boundary line, Point A. In answer to the fourth question they find the defendants ought to lower their barrier 22 inches, so as not to bay back the water at all over Point A. And they award $100 for damage.

The parties then went into evidence, and the cause came on for hearing before Mr. Justice Sicotte, Judge of the Superior Court. That learned Judge gave the plaintiffs a decree in precise accordance with the opinion of the experts. The decree is founded on recitals showing that the plaintiffs have been in possession of a real right for a year and a day, using the upper waters and letting them escape over the land of the defendants. Then it states that the barrier raised by the defendants has obstructed the waters in *their natural course such as it was formerly.*

It is clear then that the Superior Court paid no attention to the alteration effected by the plaintiffs' works in 1878. The recital of possession for a year and a day is true of the prior state of things, but is not true of the existing state of things. Nor is the present course of the water its natural course, nor such as it was formerly.

On appeal to the Queen's Bench, there was a difference of opinion among the Judges. Mr. Justice Ramsay states very clearly the point of the defence which is now under discussion. He says, "The defendants answer "that they have not stopped the natural "flow of the water, but that the plaintiff "has, by increasing his own works above, "directed the waters of the river out of their "natural course, and so created an artificial "accumulation of water which can only "escape through the tail race." He thinks this would be a good defence if it were not for the acquiescence or recognition of the defendants. But there is no evidence of such acquiescence in the plaintiffs' works of 1878. The evidence referred to by Mr. Justice Ramsay consists of two acts. First, the

construction by the defendants of Dyke No. 3, which was long prior to the extension of Dyke No. 1. Secondly, the construction of the works now complained of. But in the first place, though it is true that by their new works the defendants sought to take advantage of the new flow of water, they did so because their former flow was partially cut off. And in the second place an act can hardly be treated as acquiescence in favour of a person who has ever since been contending against it, and striving to destroy it. It is at the utmost acquiescence on condition of enjoying the thing acquiesced in, and if that condition is taken away, so is the acquiescence.

Having thus disposed of the defence founded on the extension of Dyke No. 1, Mr. Justice Ramsay addresses himself to the question of damage. He thinks that there is no sufficient evidence of damage, and would either dismiss the action or remit it for further report by experts.

The opinion of the rest of the Court was delivered by Mr. Justice Tessier. That learned Judge states the defendants' plea that the plaintiffs themselves have caused the mischief complained of, but he thinks it completely answered by the report of the experts in answer to the 3rd question. Now that question and answer relate only to the existing flow of water, and have absolutely no bearing on the prior question whether the plaintiffs are entitled to have that flow protected. Mr. Justice Tessier then quotes Art. 501 of the Code, and says that the Company have not added anything to the volume of the water by the hand of man, because they have not introduced any foreign water into the Yamaska. On these grounds the Court decides for the plaintiffs, and dismisses the appeal.

It is true, indeed, that the plaintiffs have not increased the whole volume of the Yamaska, but they may have accumulated the waters of that river into a small space, and so have increased their depth at the point where they complain of it, and have augmented the servitude they desire to enforce. This is the very thing which the Court of Queen's Bench appear to think would be material if only it had been done by introducing fresh water into the Yamaska, instead of being done by a readjustment of the waters of the Yamaska itself. That it must have been done to some extent seems evident from the plan, and the respondents' counsel so admitted. It results also from the evidence given by Bertrand and by Delisle, showing how the water which used to flow to the right of Dyke No. 1 now flows to the left. The plaintiffs have left the point untouched by evidence. Whether the difference is much or little has not been ascertained. By Sect. 501 of the Code, the proprietor of the higher land can do nothing to aggravate the servitude of the lower land. The plaintiffs have certainly accumulated the volume of the water, and have probably increased its depth in the narrow channel up to the dividing line. To that extent they are aggravating the servitude of the lower land, and to that extent at least they have no right to demand, as they do demand, a free course for the water sent down by them. That the matter is left in this uncertainty is the fault of the plaintiffs who are bound to allege and prove a case entitling them to relief. They come into Court insisting on their right to keep unobstructed the flow of water which they say has existed as it now is for more than 60 years. The issue is distinctly raised that the existing flow is not the ancient one; but they continue to insist that it is, and refuse to shape their case so as to try the question whether or no they are really entitled to some relief on the ground that the established flow had been interfered with, and to get that amount of relief. It is unsatisfactory to dispose of a case on such grounds, but their Lordships cannot see by what right the defendants are to be compelled to keep their dam so low that the whole volume of water, as accumulated and increased by the plaintiffs, shall run away unobstructed.

It is not easy to find decisions precisely applicable to such peculiar circumstances; but their Lordships have not been referred to and are not aware of any case in which the plaintiff has obtained relief in respect of any servitude except that to which he has clearly alleged and proved his right.

In *Saunders* v. *Newman*, 1 B. & A. 258, the plaintiff had acquired a prescriptive right to

an artificial flow of water. All he had done within recent times was to alter the construction of the wheel turned by the water. It was held that the defendant, a lower proprietor, had no right to obstruct the ancient flow; but it seems clear from the observations of the Judges that the decision would have been otherwise if the plaintiff's operations had substantially altered the flow of the water. Abbott, J., says, "When a mill has "been erected upon a stream for a long period "of time, it gives to the owner a right that "the water shall continue to flow to and "from the mill in the manner in which it "has been accustomed to flow during all that "time. The owner is not bound to use the "water in the same precise manner, or to "apply it to the same mill. If he was, that "would stop all improvements in machinery. "If indeed the alterations made from time "to time prejudice the right of the lower "mill, the case would be different; but here "the alteration is by no means injurious, "for the old wheel drew more water than "the new one."

Tapling v. *Jones*, 11 H. L., 290, was cited as an authority for the plaintiffs; but so far as it bears upon the point under discussion it favours the argument for the defendants. For the plaintiff in *Tapling* v. *Jones* succeeded in getting protection for nothing but his ancient light; those very rays of light to which he had acquired an indefeasible right. Lord Westbury says:—"In the present case "an ancient window in the plaintiff's house "has been preserved, and remained unaltered during all the alterations of the holding. ". . . . . The appellants' wall, so far as "it obstructed the access of light to the "respondent's ancient unaltered window, "was an illegal obstruction." And Lord Chelmsford, in answering the argument that the alteration of windows had changed the character of the right so as to destroy it, says, "But it is not easy to comprehend how this "effect can be produced by acts wholly "unconnected with an ancient window "which the owner has carefully retained in "its original state."

It may be inferred from these judgments that, if the plaintiff in *Tapling* v. *Jones* had so mixed up his old lights with his new ones that they could not be distinguished, he would have failed. It is true that in that case the protection given to the ancient light carried with it incidentally protection to the new lights. But the only reason why it did so was that the new lights could not be obstructed without obstruction to the ancient light. New lights are no encroachment, nor did the plaintiff's decree aggravate the defendant's servitude, for he was only prevented from building so as to obstruct the ancient lights. In the case of an augmented flow of water the servitude of the lower proprietor is aggravated.

The result is that the plaintiffs have insisted on an enjoyment to which they have shown no legal title, and have not proved or even alleged any case for relief in respect of that enjoyment to which they may have had a title. Their lordships have anxiously considered whether it is possible usefully to remit the case to be tried on the true issues. They are, however, convinced that an attempt to do so will not save time or money, and that the litigation must follow the strict course. They will humbly advise Her Majesty to reverse the decrees below and to dismiss the action with costs. The costs of this appeal will follow the result.

Judgment reversed.

Henry Matthews, Q.C., and *Macleod Fullerton*, counsel for the Appellant.

Bompas, Q.C., and *Kenelm E. Digby*, counsel for the Respondents.

COUR SUPÉRIEURE.

MONTRÉAL, 29 Décembre 1883.

Coram PAPINEAU, J.

LEWIS et al. v. PRIMEAU et al.

Preuve testimoniale contre un acte authentique —Inscription en faux.

JUGÉ:—*Que la Cour ne peut permettre à une partie à un acte authentique, de prouver par témoins la fausseté de la date de l'acte sans avoir recours à l'inscription en faux, que dans un seul cas, savoir, lorsqu'il s'agit d'un rapport d'huissier.*

L'action des demandeurs est basée sur un certain nombre de billets promissoires dont l'un est daté du 17 octobre 1882. Les défen-

deurs opposèrent à cette action un acte authentique de composition et décharge, daté à Québec, le 31 octobre 1882. Les demandeurs répondirent spécialement que cet acte n'avait pas été signé à la date qu'il porte, mais le 16 octobre 1882; puis, ils présentèrent à la Cour Supérieure une requête demandant à s'inscrire en faux contre le dit acte, pour prouver qu'il avait réellement été signé à cette dernière date. Sur cette requête, les défendeurs déclarèrent que l'acte en question avait été signé à diverses dates, par différents créanciers, à Montréal et à Québec, avec l'entente qu'il ne serait complété et n'aurait d'effet que lorsque tous les créanciers auraient signé, ce qui a eu lieu à Québec, à la date que porte l'acte; que, dans tous les cas, il a été signé par les demandeurs après le 17 octobre 1882, et qu'à cette fin les défendeurs entendent s'en prévaloir.

Les demandeurs, laissant alors de côté leur inscription en faux, firent une motion demandant à la Cour qu'il leur fût permis de prouver, par témoins, dans la cause principale, que le dit acte avait été signé à une autre date que celle qu'il porte, sur le principe que les défendeurs avaient admis, dans leur déclaration sur l'inscription en faux, que l'acte portait une date fausse quant aux demandeurs, ce qui avait détruit l'authenticité de l'acte.

Les défendeurs résistèrent, alléguant que les demandeurs n'avaient aucun intérêt, puisque la déclaration maintenait que l'acte avait été signé postérieurement au billet; que d'ailleurs les aveux des défendeurs, quelque puisse être leur portée, ne pouvaient servir que sur l'inscription en faux, et que rien ne justifiait la demande des demandeurs.

Le jugement est comme suit:—

"La Cour, après avoir entendu les parties, par leurs avocats respectifs, sur la motion produite le 3 décembre courant par les demandeurs, pour qu'il leur soit permis de prouver par témoin et sans recours à l'inscription de faux la date à laquelle une des parties à un acte notarié a signé cet acte devant le notaire, l'acte ayant été signé à Montréal et à Québec à des jours différents, et comportant avoir été signé en un seul jour; avoir examiné la procédure et délibéré;

"Considérant que le seul cas où, d'après le code de procédure, la Cour puisse permettre de procéder à prouver la fausseté d'un acte authentique est celui où il s'agit d'un rapport d'huissier, et que le cas présent est différent;

"Renvoie la dite motion sans frais."

Abbott, Tait & Abbotts, pour les demandeurs.

Barnard, Beauchamp & Barnard, pour les défendeurs.

(J. J. B.)

SUPERIOR COURT.

MONTREAL, January 16, 1884.

Before MATHIEU, J.

THE BOLT & IRON CO. OF TORONTO v. GOUGEON.

Mandate—Authority of agent.

A deed of composition signed by a mandatary without any authority to accept a composition, is not binding on his principal.

In this case the plaintiff claimed from the defendant the sum of $166.24 for goods and merchandise sold and delivered to the defendant. To this the defendant pleaded that on the 27th of March last he only owed the plaintiff the sum of $135.55, and that at that time the defendant's creditors, among whom was the plaintiff, agreed to take sixty cents on the dollar for any amount due to it by the defendant, payable by promissory notes, endorsed by Leon Gougeon at four, eight, and twelve months from the 2nd April last, without interest; that he offered the notes, which the defendant refused to accept, and he deposited with his plea $27.11, the amount of one of the notes matured and offered the other two notes, with a right to increase it in the event of the plaintiff proving that a larger sum was due, which the defendant did not admit.

PER CURIAM. It appears that the deed of composition was signed on behalf of the plaintiff by C. E. Torrance, who himself states that he was not authorised to sign it, as does also the manager of the Company. Torrance was the broker or agent of the Company to sell their goods in Montreal. He took orders which were forwarded to Toronto, and the goods were sent thence to the purchasers. The statement of Torrance, that the manager of the Company had approved of his signing the deed of composition, cannot be admitted in evidence, inasmuch as this ratification cannot be the object of verbal evidence, and is, moreover, contradicted by the manager of the Company. Now it is not proved that Torrance had authority to represent the plaintiff in agreeing to the deed of composition, and it is the duty of anyone who contracts with a *mandataire* to satisfy himself of the sufficiency of his powers and to prove it. The plaintiff cannot therefore be held bound to submit to the said deed of composition, to which it was not a party; but it can only claim from the defendant the sum of $135.53, as it is proved that the defendant did not receive the shipment of 14th March, 1883, for which sum with interest from the 19th of June last, judgment will go.

Macmaster, Hutchinson & Weir for plaintiff.

Augé & Lafortune for defendant.