The Legal News.

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NEGLIGENCE.

A curious point arose in a case (*Brown* v. *Pennsylvania Railroad Co.*), decided May 6, by the Common Pleas, in Pennsylvania. A foot was found at a public railway crossing, in a hole at the side of the track, between one of the rails and the planking of the carriage way used for the passage of vehicles. The foot was that of a girl of 14 who, a short time previously, had been sent by her mother on an errand which obliged her to cross the track. There was no direct evidence to show how the accident happened. The girl was seen by one witness, standing between the rails, in a stooping position, as if doing something with her shoe or foot, and a moment or two afterward she was struck by the engine, and her body torn to pieces. How the foot got into the hole did not appear; and the question was whether the mere fact of the foot being found in that position was evidence enough to go to the jury as to whether the accident was occasioned by the Company's negligence. The judge at the trial thought the evidence insufficient, and the plaintiff was nonsuited; but on a rule to take off the non-suit, this decision was reversed. The Court observed: "The law presumes that every one injured, through the love of life, and the instinct of preservation, did all they could to prevent an accident, and it would therefore appear to follow that if any theory can be assigned save concurrent negligence, for the cause of the accident, the question as to the negligence of the defendant must be left to the jury." Reference was made to the case of *Lehigh Valley R.R.* v. *Hull* (61 Penn. St. 361), in which it was held that if a man be found dead at a railroad crossing, having been killed by a train, the question whether he was lawfully on the railroad, and whether his own negligence contributed to his death, must be submitted to the jury.

A SKETCH OF THE CRIMINAL LAW.

Sir James Fitzjames Stephen, author of the "Digest of the Criminal Law of England," in an article in the *Nineteenth Century* under the above caption, gives a summary view of the English criminal law. This sketch may well serve as a complement to the late Chief Justice Sewell's paper on the sources of our civil law, which we lately reproduced. It may be observed that this article in the *Nineteenth Century* is stated by Mr. Justice Stephen to be an abridgment of a History of the Criminal Law on which he has been engaged for many years, and which, it is probable, will shortly appear. The article is as follows:—

The Criminal Law may be considered under two great heads, Procedure and the Definitions of Offences. In a systematic exposition of the law such as a penal code, the part which defines crimes and provides for their punishment naturally precedes the part which relates to procedure, inasmuch as the only purpose for which the latter exists is to give effect to the former; but in a historical account of the growth of a body of law as yet uncodified, an account of the law of procedure naturally precedes an account of the laws of crimes and punishments, because the institutions by which the law is administered have been as a matter of fact, and in the earlier stages of legal history must be in most cases, the organs by which the law itself is gradually produced. Courts of justice are established for the punishment of thieves and murderers long before any approach has been made to a careful definition of the words "theft" and "murder," and indeed long before the need of such a definition is felt. For these reasons I begin this sketch of the criminal law by giving some account of the English courts of criminal jurisdiction. I then pass to the procedure observed in them, and thence to the definitions of crimes with which they have to deal.

The ordinary criminal courts in England are:—

(I.) The Queen's Bench Division of the High Court of Justice.
(II.) The Assize Courts.
(III.) The Central Criminal Court.
(IV.) The Courts of Quarter Sessions.

Each of these Courts has its own history. The administration of justice in England came, by steps which I need not try to trace, to be regarded as one of the great prerogatives of the King—perhaps as his greatest and most characteristic prerogative; and one of the most striking

effects of the Norman Conquest was the degree to which it strengthened this prerogative and centralized the administration of justice. The prerogative was exercised in very early times through the Curia Regis, from which in course of time were derived the King's Courts of Justice, the two Houses of Parliament, the Privy Council, and the different offices of State. The head officer of the Curia Regis was called the "Capitalis Justiciarius Angliæ," and his office was of such dignity that in the King's absence on the Continent he acted as Viceroy. The Court also contained, amongst other officers, an indefinite number of *justitiarii*, who performed judicial and administrative duties when and where they were directed to do so by special writs or commissions. The steps by which Parliament on the one hand, and the Privy Council and other executive officers on the other, came to be separated from the King's Court and to have an independent existence, need not here be noticed. The courts of justice were derived from it as follows. The life of the kings of England in early times can be described only as an incessant journey. King John, for instance (of whose movements an ephemeris founded upon official documents still in existence has been published), seems for years never to have lived for a week at a time at any one place. The King's officers, and amongst others his judges, travelled with him, and the unfortunate suitors had to follow as best they could. Evidence still exists of the intolerable hardships which this state of things produced. One of the articles of Magna Charta was intended to remedy them. It runs, "Communia placita non sequantur curiam nostram, sed teneantur aliquo loco certo." This was the origin of the great civil court, the Court of Common Pleas, which from that time forward was separated from the Curia Regis and was held as a separate fixed court of justice *certo loco*, namely, in Westminster Hall. The Court of Exchequer, which was originally a court of revenue business only, also became stationary about the same time—probably indeed it was always held at the place where the treasure was kept; but the legal business of the King's Court, not done in either of these courts, still continued for a time to follow the person of the King. By degrees, however, the old King's Court changed into the Court of King's Bench, which in its origin was the supreme criminal court of the realm, and had also jurisdiction over many matters connected with the royal prerogative, which in our days would not be regarded as forming part of the criminal law. As time went on it acquired or usurped civil as well as criminal jurisdiction, but from the very earliest times down to the year 1875 its position as the great criminal court of the realm remained unaltered. In that year all the superior courts of law were fused into the High Court of Justice, which may thus be said to be a return, after an interval of about six centuries, to the Curia Regis.

Though it is the supreme criminal court of the realm, the High Court of Justice rarely tries criminal cases in the Queen's Bench Division. It does so only when the matter to be decided seems likely to raise questions which possess some special interest, legal, political, or personal. Little indeed is to be gained by such a trial, as such cases would otherwise be tried before the same judges and in precisely the same way in other courts. There are, however, some incidents peculiar to a trial before the Queen's Bench Division, one of which is that, if the charge is one of misdemeanor, an application for a new trial on the part of the defendant will be entertained. There is no court of appeal properly so called in criminal cases in this country; but informalities in the procedure may give occasion to a writ of error which may be taken up to the House of Lords, and questions of law arising on any trial may be brought before the Court for Crown Cases Reserved.

The great bulk of the more important criminal business of the country is done before the assize courts, the technical description of which is Courts of Commissioners of Oyer and Terminer and General Gaol Delivery, or the Central Criminal Court. The assize courts are of the highest antiquity. As I have already said, the Curia Regis contained an unascertained number of justitiarii who used to be sent as Commissioners to different parts of the country to perform judicial and other duties as occasion required. They were called from this circumstance "justices in eyre" (*in itinere*), and, according to the terms of their commission, they tried either particular cases or all civil or all criminal cases (both or either) in a given area. In many instances, and for a considerable length of time, they investigated and superintended the whole internal administration of the

country, and more particularly everything which affected either proximately or remotely any one of the infinitely varied rights of the King, especially those which affected his revenue.

By degrees, however, these fiscal and miscellaneous duties came to be performed by other means, and the duties of the justices of assize were confined to the local administration of civil and criminal justice. For this purpose the whole of England was in the time of Henry the Second, twelfth century, divided into six circuits, which have existed with singularly little variation down to our own time. The Central Criminal Court which sits every month for London and the neighbourhood, was established in the year 1834. Before that time, for many centuries, the lord mayor and aldermen and the recorder of the city of London had by charter the right of being upon all commissions of oyer and terminer and gaol delivery for the city of London and the county of Middlesex. Criminal cases of minor importance are tried by the courts of quarter sessions, held four times a year (whence their name) by the justices of the peace of every county, and of such of the larger towns corporate as have, by their charters, courts of quarter sessions. These courts were first established in the fourteenth century in the reign of Edward the Third. For some centuries they could and did try all offences except high treason; and down to the end of the sixteenth century, if not down to the civil wars in the middle of the seventeenth century, they used continually to pass sentence of death. In a single year in the reign of Queen Elizabeth no less than thirty-nine persons were hanged under the sentences of the Devonshire court of quarter sessions. After this, their powers were by degrees diminished in practice though not in theory, and throughout the eighteenth and during the early part of the nineteenth centuries (when nearly all crimes were nominally capital) the courts of quarter sessions were practically restricted to the trial of cases of trifling importance. When capital punishments were abolished in nearly every case except high treason and murder, the jurisdiction of these courts was considerably extended, and they can now try all offences, except those for which the criminal can on a first conviction be sentenced to death or penal servitude for life, and some other specific offences, (such, for instance, as libels) in which legal or constitutional questions of importance are likely to be involved.

The Justices of the Peace for the county are the judges of these courts, the chairman being only *primus inter pares*, and having no special authority. Two justices at least must be present to make a court. In boroughs, the recorder who is appointed by the Crown is the judge. He is paid a salary by the corporation out of the property or rates of the town.

These are the ordinary English criminal courts. Besides them, there are others which are called into activity only on rare occasions. The House of Lords is a Court of criminal jurisdiction, to which the House of Commons is the grand jury. The House of Commons can impeach any peer of any crime whatever, and it can accuse any commoner of any misdemeanor before the House of Lords. Impeachments are now extremely rare. Two instances only have occurred within the last century; namely, the impeachment in 1785 of Warren Hastings, and the impeachment in 1806 of Lord Melville. The control exercised by Parliament over public servants of all ranks is now so complete and efficient, that it would be difficult for any one to commit the sort of crimes for which people were formerly impeached. The proceeding at best is a very clumsy one. The impeachment of Warren Hastings lasted for more than seven years, though the number of days during which the Court sat was not so great as the number of days in which the Court of Queen's Bench sat in the trial of the impostor Orton for perjury in 1873-4.

The House of Lords has also a personal jurisdiction in all cases of treason and felony over peers of the realm. If a peer is accused of committing felony, the procedure against him up to the time when the indictment is found is the same as in the case of any other subject. When he is indicted, the indictment is sent, if Parliament is sitting, before the House of Lords; if Parliament is not sitting, before a Court composed of a certain number of peers, presided over by the Lord High Steward, who is appointed for the purpose, whence the Court is called the Court of the Lord High Steward.

These Courts are rather antiquarian curiosities than anything else. Since the accession of George the Third in 1760, there have been only

three trials before the House of Lords sitting in this capacity; namely, the trial of Lord Byron (the poet's grand-uncle) in 1765, for killing Mr. Chaworth in a irregular duel; the trial of the Duchess of Kingston for bigamy in 1776; and the trial of Lord Cardigan in 1841 for wounding Mr. Tuckett in a duel.

These are all the Courts ordinary and extraordinary which at present exercise criminal jurisdiction of any importance in England, but great historical and legal interest attaches to the criminal jurisdiction of the Privy Council. The criminal Law of England in early times was vague and meagre, and the system by which it is administered (trial by jury) was open to every sort of corrupt influence. Indeed, the local power of the aristocracy during the fourteenth and fifteenth centuries was so great that trial by jury was in many cases a farce. There are many curious proofs of this in the Parliament rolls and elsewhere. Under these circumstances the Lord Chancellor exercised in civil cases, powers which Lord Bacon compared to the powers of the prætors and censors in ancient Rome. The intervention of the Lord Chancellor in civil cases was accepted by the public, struck deep roots in English law, and introduced by degrees the system of jurisprudence which we call "equity," and which has done much to correct the faults and fill up the deficiencies of the common law. The Privy Council (sitting under the title of the Court of Star Chamber) tried to do the same with regard to the criminal law, and I have little doubt that if it had exercised its powers discreetly and fairly, it would have succeeded in doing so. It rendered, in fact, considerable services by punishing persons whose local influence enabled them to intimidate juries and to set the ordinary courts at defiance, and by punishing a variety of offences which for different reasons were not regarded as crimes by the common law. Perjury by a witness, for instance, was not a criminal offence till it was treated as such by the Star Chamber.

Whatever may have been its merits, however, there can be no doubt that under James the First and Charles the First the Court of Star Chamber became oppressive in the highest degree, attempting by cruel and arbitrary punishments to put down the expression of all opinions unwelcome to the then Government. This brought about its abolition, which was effected by one of the first acts of the Long Parliament in the year 1640. After the restoration the Court of King's Bench took upon itself some of the functions of the Star Chamber, and in particular recognised and acted upon most of the additions which it had tacitly made to the original criminal law.

A remnant of the criminal jurisdiction of the Privy Council survived the destruction of the Court of Star Chamber, and still exists. In all cases arising in India or the colonies, an appeal lies from all Courts of Justice, civil or criminal, to the Queen, and such appeals are heard by the Judicial Committee of the Privy Council. Such appeals are hardly ever permitted in criminal cases; but sometimes a legal question of peculiar difficulty and novelty may arise which it is desirable to decide upon the highest authority, and in such cases the Judicial Committee of the Privy Council is the body before which it is heard. The committee is not, strictly speaking, a Court. It is a body of advisers by whose opinion Her Majesty is guided in the orders which she gives.

[To be continued.]

NOTES OF CASES.

COURT OF REVIEW.

MONTREAL, June 30, 1882.

TORRANCE, RAINVILLE, MATHIEU, JJ.

[From S. C., Montreal.

BRAIS v. CORPORATION OF LONGUEUIL.

Damages for criminal prosecution—Probable cause.

The inscription was from a judgment rendered by the Superior Court, Montreal, Mackay J., November 26, 1881.

The plaintiff complained of the defendants, that they had illegally arrested him and caused his detention while they had a warrant prepared against him, and then compelled him to give security to appear on a subsequent day. It appeared in evidence that on the 15th January, 1881, the plaintiff removed a barrier which had been placed by the corporation on a piece of land donated to the city, called the Quinn Avenue. There was a constable present to prevent people passing through, and he arrested

plaintiff and conducted him to the police office, where a warrant was prepared, and he was bound over to appear at a future day. The proceedings then begun by the city were afterwards quashed Plaintiff averred that he had a perfect right to remove the barrier and pass on to land which he had leased from the Quinn family. He alleged a previous verbal lease, and a written lease signed the afternoon of the arrest.

The defendants answered the present action by alleging that persons had been in the habit of evading the payment of tolls by making use of by-roads, and the Council, under C. M. 749, had closed them by resolution duly passed previously, in consequence of which the barrier in question had been raised to prevent access to the Quinn Avenue, which was their property. Counsel for the corporation further cited the road ordinance 4 Vic., c. 16, sec. 25, which creates a penalty to prevent persons once on a public road turning off in order to evade payment of a toll. The charter of the corporation 44-45 Vic., cap. 75, sec. 214, A.D. 1881, allowed the arrest on view by a constable of any person violating a law or city by-law. The court below dismissed the action on the ground that plaintiff had not proved want of probable cause for the arrest and prosecution.

TORRANCE, J. It appears to me that the defendant only obtained the lease from the heirs Quinn, in order to give a color of right to his removal of the barrier. He also removed the barrier in order to evade the prohibition of the Council, which desired that all should pay the tolls when they used the public roads. I say nothing as to the right of the corporation to put up the barrier, but I do not see that the plaintiff has proved a claim for damages, or want of probable cause for the prosecution. Malice is not alleged at all.

RAINVILLE, J., remarked that if the case had come before him in the Court below, he would have dismissed the action without costs, because criminal proceedings had been adopted by the defendants to test a question of civil right. There was no necessity for arresting the plaintiff; the question of right should have been determined by a civil suit. His Honor, however, would not dissent on a question of costs.

Judgment confirmed.

Prefontaine & Co. for plaintiff.

Lacoste & Co. for defendant.

SUPERIOR COURT.

MONTREAL, June 30, 1882.

Before JOHNSON, J.

GROTHE v. SAUNDERS.

Probable cause for criminal prosecution.

The plaintiff executed a mortgage in favor of defendant, and on the faith of the representation that only one other mortgage existed on the property, the defendant made advances. The representation was untrue, the property being at the time mortgaged to its full value. The defendant then caused the plaintiff to be prosecuted criminally. A bill was found, but the plaintiff was acquitted by the petit jury. Held, that the defendant acted with probable cause.

PER CURIAM. This is an action for damages arising from an alleged malicious prosecution. The issue is really a very narrow one, though the evidence is voluminous and the argument was long. A great deal of the testimony was given quite beside the question, but the points which are the gist of the case are unaffected by most of the evidence. To maintain his case the plaintiff must of course show malice, and want of probable cause. The *onus* is removed from him in point of procedure by the defendant's plea, which says there was probable cause. It is not enough to show that the accusation was unfounded. So much has been said on this subject in former cases that it would be a waste of time to reiterate the well known rules. I will merely say that it would be absurd and intolerable to hold that those who honestly or even vindictively use the processes of the criminal law are to suffer loss and annoyance merely because it should turn out on full investigation that the charge is unfounded, unless the proof show a want of probable cause.

The charge was for obtaining property under false pretences. The evidence is that the plaintiff executed a deed in favor of the defendant, in which he pretended that the property thereby mortgaged was only mortgaged in favor of the Trust and Loan Company, and then gave the defendant a mortgage to the extent of $1,600 to cover as well what he already owed, as future advances which were subsequently made on the faith of that representation. Other mortgages, however, absorbed the entire value of the property, and the defendant lost his goods. The bill was found and the trial came on, and a petit jury acquitted the prisoner (the present plaintiff). Now the question is whether the defen-

dant in bringing that charge, as he did, acted with malice and without reasonable cause. It is not whether he so acted upon grounds which ultimately turned out to be insufficient to convict; not whether there was certainly and conclusively cause for bringing it; not even whether he was incensed and overanxious to get a conviction. All that would tend, no doubt, to show malice; but malice, as everybody knows, will not sustain the action, unless there is also a want of probable cause. Therefore, the question is whether the grounds were reasonable and probable upon which he proceeded. It certainly would not be the first case that has been brought on good, or even on conclusive grounds, and where the accused has been freed by a jury in a criminal court. But had he fair and reasonable grounds for proceeding? He produces the deed which speaks for itself. It says there is one mortgage only. Then the notary says the same thing. It was urged for the plaintiff that he only understood French; but the notary says he read the deed in French to him. More than this, his attention was very particularly called to the fact, and must have been so, for the deed as first expressed said that the money was due to the Trust and Loan Company under "a mortgage;" but was altered before signing it to "mortgages to the T. & L. Co."—the sum being still the same. It was also urged on the plaintiff's side that the other mortgage to the Metropolitan Society had been mentioned in a conversation before the passing of the deed to defendant. J. Beauchamp and young Grothé are brought up to prove this, and they both say that the other mortgages were mentioned. As to young Grothé, Mr. Brunet and Mr. Lyman both say that they would not believe him on oath. Lyman says the same thing as to Beauchamp. Brunet was brought up again, and Lyman was cross-examined with some effect to show that they judged harshly; but after all, without the evidence of Mr. Brunet or of Mr. Lyman, it would still be a question of the weight of evidence, and I should not hesitate to take the deed itself, and the notary's evidence and the very nature of the transaction itself, in preference to the son, and the intimate friend of the plaintiff; for it would be absurd to believe that Saunders would have advanced his goods on this security if he had known it to be worthless.

Judging this case as a jury would be bound to judge it, taking the evidence for themselves, and the law from the Court, I feel satisfied that there is not only no want of probable cause shown, but the defendant, on the contrary, had very reasonable grounds to go upon in prosecuting this plaintiff as he did. As to malice, if there is no want of probable cause, malice is immaterial; but one way or the other, the only suggestion on the subject of malice was the fact that the bill had been laid before the Grand Jury without previous examination before a Magistrate. It is a practice which I do not approve of, unless there is necessity for it; but the law has provided for that, and vested the Crown counsel with the discretion of permitting it, as was done here; and the plaintiff gives the best reason for it, for he says the defendant had already addressed himself to a Magistrate who would not act.

I will cite only two authorities on the general principles of this sort of action. In *Williams* v. *Taylor*, 6 Bingh. 186, Ch. J. Tindal said :—"The facts ought to be such as to satisfy any reasonable mind that the accuser had no ground for the proceeding but his desire to injure the accused."

Hilliard on Torts, p. 428 : "Where the plaintiff has been acquitted on the charge brought against him, the acquittal does not raise a presumption of want of probable cause."

These principles—those of the English law—have always in my time, been applied to these actions. Necessarily so, I consider, as I said in *Chartrand* v. *Pudney* in Review, two years ago this very day.* It is very true that our civil rights are to be governed by the laws of France as they existed at the time of the cession—with such modifications by local or imperial power as have been subsequently made. One of those modifications was the introduction of the whole body of the English criminal law. That measure, generally regarded as a great public benefit by the whole people without distinction of origin, as I have always believed, would become a great danger and mischief, if those who exercise their rights under it were not protected by the same rules as those which would govern their exercise in England. Our own law says nothing on the subject; but in the analogous case of false arrest under civil process our law has made provision by art. 796

* 3 Legal News, p. 237.

of the C. of P., which says that even in that case the right of action must be shown "by establishing by proof against the creditor, the want of probable cause."

On the whole case I am of opinion that the defendant acted very carelessly—perhaps very confidingly—in believing the plaintiff without exacting a registrar's certificate. But this would not impair his criminal recourse. On the contrary, though it may be said with truth that he was incautious, and though in many cases under civil law his want of caution might be fatal to his recourse, that is not so in criminal law which is mainly directed to the protection of those who too easily confide, and get too readily taken in. I see, too, that when he had once begun proceedings the defendant went too far in his efforts to get the plaintiff punished, but all that will not give the plaintiff a right of action. Action dismissed, with costs.

Trudel & Co. for the plaintiff.
Ritchie & Ritchie for the defendant.

SUPERIOR COURT.

MONTREAL, June 30, 1882.

Before JOHNSON, J.

McCALL v. BONACINA, PLFF. collocated, & LA SOCIÉTÉ DE CONSTRUCTION JACQUES CARTIER, contesting.

Order of hypothecs—C.C. 2048.

PER CURIAM. In this case there are two contestations. The plaintiff's collocation being contested by the building society, and the society's collocation being contested by plaintiff.

We will take first the contestation raised by the building society to the plaintiff's collocation, being number eleven of the report, though the argument in the one really applies to both. The Registrar's certificate discloses: 1st. An obligation of the 4th February, 1871, by Bonacina to Gustave Drolet for $800 and interest, registered the same day. The registration was renewed 9th December, 1871. By an *acte* of transfer of the 11th December, 1871, registered the 13th of the same month, this obligation, then reduced to $400, was transferred to Lucien Huot; and on the 11th February, 1876, Huot transferred this balance of $400 to the building society (contestant), they afterwards assigning it to the plaintiff by deed of the 7th July, 1876. 2nd. An obligation by Bonacina to Huot for $600, which Huot assigned on 11th February, 1876, to the building society, they transferring the same to the plaintiff on the 7th July, 1876. 3. Obligation by Bonacina to the Building Society for $5,185.12, in which Huot, who was creditor of the two first obligations, intervened and gave priority to the Society. 4. Obligation by Bonacina to Lucien Huot for $500, by the latter transferred on the 11th February, 1876, to the Building Society, who on the 7th July, 1876, transferred to plaintiff. 5. The transfer by Huot to the Building Society, first, of the balance of $400 (first obligation); secondly, of $600 (under the second obligation), and, thirdly, $500, (under the obligation fourthly above mentioned by Bonacina to Huot), in all $1,500. 6. Transfer 7th July, 1876, by the Building Society to plaintiff of Bonacina's debt of the $400, and $600 due by Bonacina, and of the $500 transferred to the society by Huot. Bonacina intervened in this transfer, and became debtor of the plaintiff for another sum of $1,500 with interest at 8 per cent., and for security Bonacina hypothecated lot No. 942. The certificate further mentions two obligations of Bonacina in favor of the Building Society for $4,040.

It results from these entries that the Building Society here contesting was, on the 7th of July, 1876, creditor as the transferee or *cessionnaire* of Huot for—

1. The balance of the first obligation	$400
2. The amount of the second obligation	600
3. The amount of the third obligation	500
Total amount of obligations transferred by Huot to the Society	$1,500

Besides this the Building Society was direct creditor on its own account of the defendant Bonacina by his obligation in the Society's favor which in order of hypothec preceded the third mortgage to Huot (that of $500), and again of two other obligations forming together $4,040, but they go for nothing in the present case. It further results from these entries in the certificate of the Registrar that the two first obligations from Bonacina to Huot were subjected by the latter to a preference or priority of hypothec in favor of the Building Society, as a further security for Huot's own obligation to the Society for $5,185.12, registered 4th June, 1873. That by transfer of 11th February, 1876, Huot transferred to the Society the three

obligations of which he was creditor, *i.e* :—1st, Obligation, under which there was a balance due of $400 ; the second, for a sum of $600, and the third obligation (for $500), of which the registration is posterior to that of the Society's hypothec, $500; total $1,500. Thus by this transfer the Society became proprietor of two obligations (the first and second) on which it had priority of hypothec. Thus, also, by the transfer from the Society to the plaintiff, which is also a new mortgage from the defendant (7th July, 1876), the Society assigned to the plaintiff the $1,500 which Bonacina owed them, under the transfer from Huot, *i.e.*, the two first obligations registered before the Society's was, but on which the Society had been granted by Huot, before he transferred, a priority of hypothec for $1,000 ; and the third obligation from Huot to the Society, which was posterior ($500), making $1,500.

There was no mention in this deed of transfer of priority of hypothec, nor of the obligation of the defendant for $5,185, which took rank before the $500 one. There is not, I say, in the deed one word on the subject. By this same deed of the 7th July, 1876, the defendant Bonacina, who owed already the $1,500 that had just been transferred, obliges himself to pay the plaintiff another $1,500, and hypothecates the same lot, No. 942, already hypothecated for all the three sums above mentioned. The Society, a principal party to this deed, makes no reservation either of its right of priority nor yet of its hypothec for $5,185 which came before that for $500, by previous registration.

Now as to the contestation raised by the Society, it is evidently without foundation as against the plaintiff's collocation for $1,000. It is made up of the two sums of $400 and $600. The first of these sums was the balance under the obligation of defer dant to Gustave Drolet of the 4th February, 1871. The second was the defendant's obligation to Huot of the 11th of November, 1872, and both duly transferred to plaintiff, and registered anterior to Huot's grant of priority to the Society. The Prothonotary has disregarded the clause of priority given by Huot to the Society over these two anterior mortgages which he transferred to them. This is what they complain of in their contestation of item 11 in favor of plaintiff. But the Prothonotary was right, because the Society, having subsequently acquired from Huot on the 11th February, 1876, the two obligations on which it had already obtained a right of priority, the qualities of privileged and hypothecary creditor, and of transferee of the mortgages subject to priority became united in the Society. There was *confusion;* and the priority was extinguished, because there was no further reason for it. There was also a further reason, even if the priority had not been extinct by confusion, and that reason was that the Society in transferring these obligations ought to have reserved the benefit of their priority in their transfer to the plaintiff, of the 7th July, 1876. Instead of declaring that the two obligations transferred to plaintiff were subject to their right of priority, they keep perfectly silent on the subject, and must either have felt that their priority was extinguished by the confusion, or have meant to deceive,—for after all if their priority exists, the plaintiff has been completely duped. But it is said the plaintiff's agent (Mr. Hutchinson) could have seen at the Registry Office that this priority existed. Yes, he could, and he could also have thought it was extinct by confusion, or that the Society did not insist on it since it made no reservation of it. Again, not only did they not reserve any right of priority, but they may have intended that the property which was mortgaged to them should be pledged to the plaintiff, for the transfer of 7th July, 1876, is more than a transfer ; it is a new mortgage of the same property effected in the presence of the Society's Secretary. According to Art. 2048 C.C., "The creditor, who expressly or tacitly consents to the hypothecation in favor of another of the immoveable hypothecated to himself is deemed to have ceded to the latter his preference." Now that is exactly what happened here. Therefore the collocation of plaintiff by item 11 for the two sums of $400 and $600 is right, and the society's contestation of it is dismissed.

Now, as regards the plaintiff's contestation of No. 13, by which the society's collocation for the sum of $1,667.12, on account of $5,185.12, amount of defendant's obligation of the 4th June, 1873, is contested. This was an intermediate obligation never transferred at all by the Society to the plaintiff, and registered before the third obligation of Bonacina to Huot ($500) transferred to plaintiff ; the Prothonotary was right again, probably, as a matter of practice, under Art. 727 C. P., in collocating the parties according to their apparent rights ; but this does not prevent the plaintiff from asking for the application of the law under Art. 2048, and saying, as I think she has a right to say, that this society, in dealing with her, led her to believe they had no priority. Therefore I maintain the plaintiff's contestation of that item, and order a new report of distribution in that respect, in conformity with the law by which the society renounced their priority, with costs in both contestations against the loser.

Trenholme & Taylor for plaintiff.

Geoffrion & Co. for Building Society.