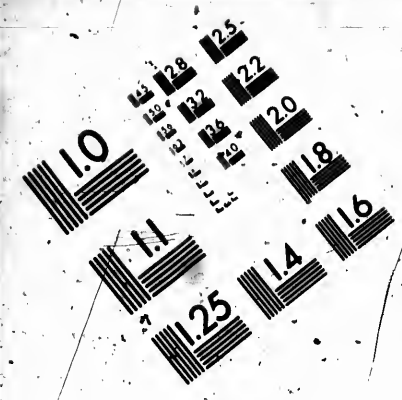

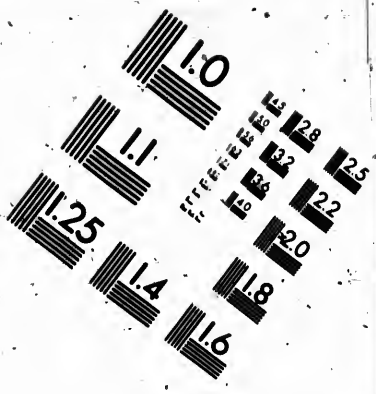

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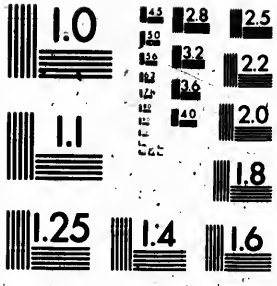

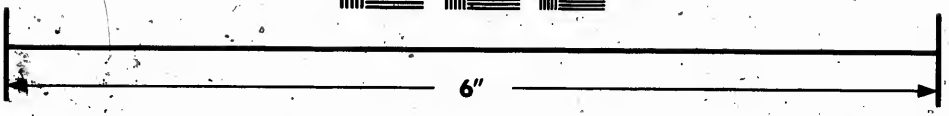

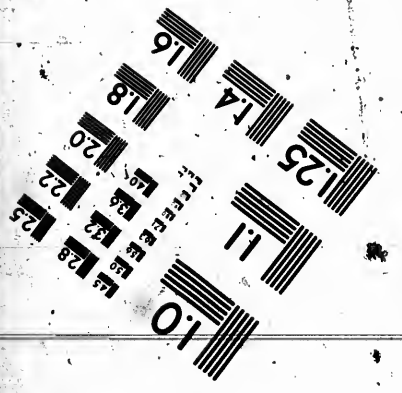

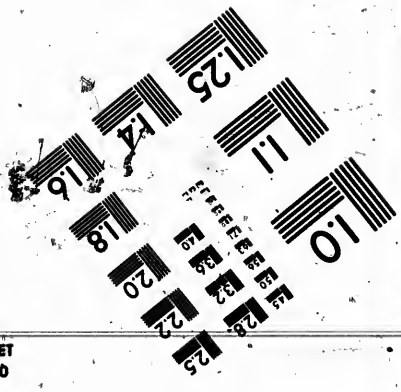

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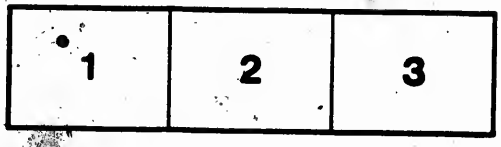

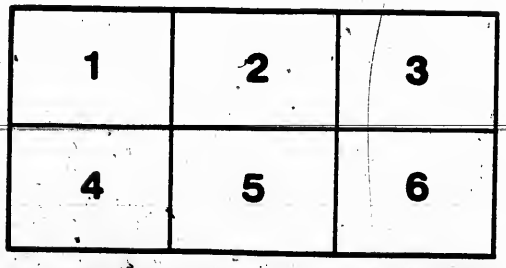

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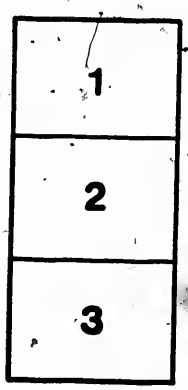

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THE

LOWER CANADA

Jurist.

COLLECTION DE DECISIONS

DU

BAS-CANADA.

VOL. III.

Editorial Committee.
S. BETHUNE; P. B. LAFRENAYE; F. W. TORRANCE.

Managing Editor.
F. W. TORRANCE

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BY S. BETHUNE

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PREFACE TO THE THIRD VOLUME.

THE EDITORS in concluding the Third Volume of the LOWER CANADA JURIST, would again express their obligations to the Judges for their courteous aid in the preparation and revision of the Reports; and to their professional brethren for many cases supplied and much assistance given.

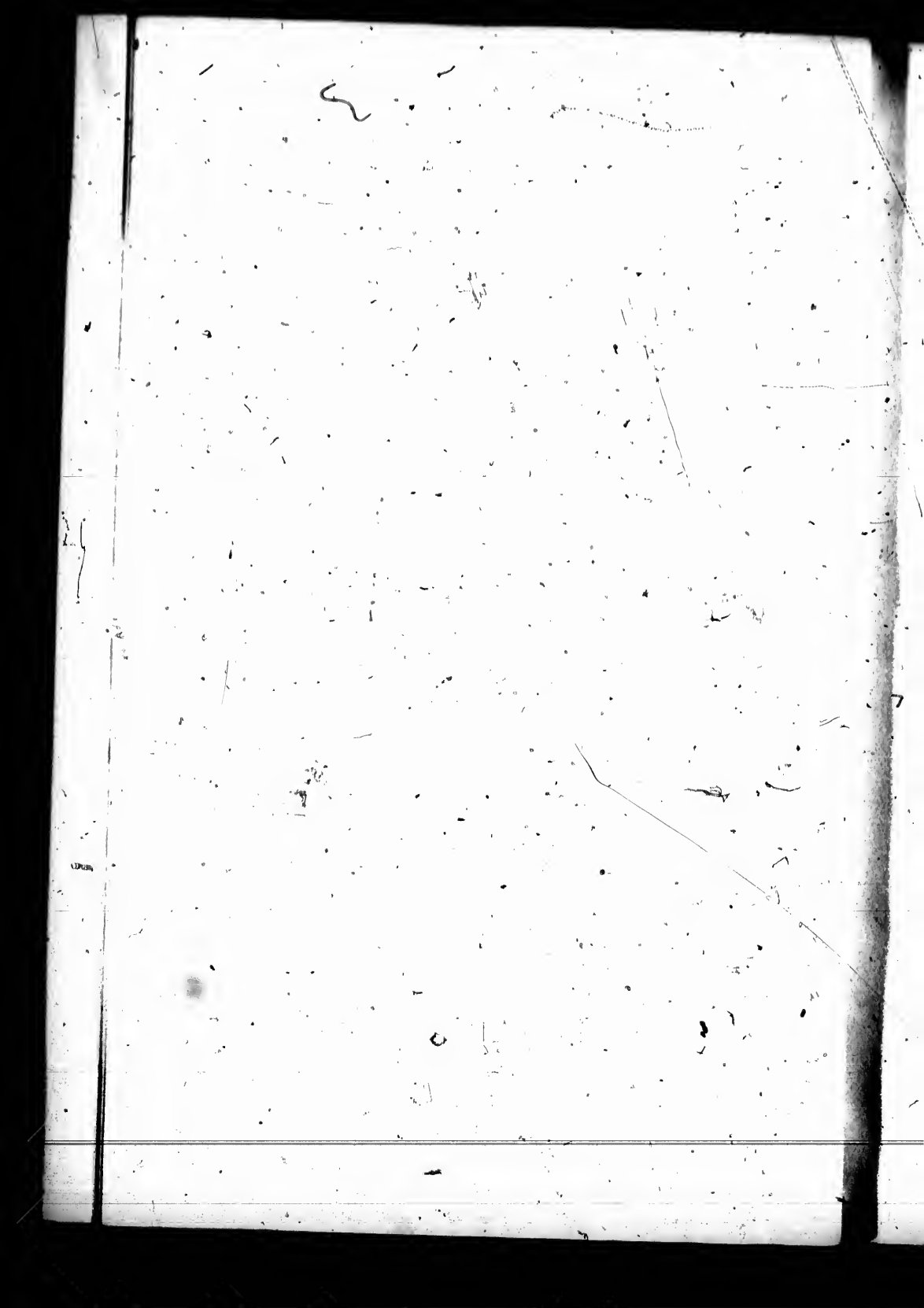
The motives which induced the publication of the LOWER CANADA JURIST are to be found recorded in the Preface to the First Volume. It is much to be regretted that the Government should have allowed the continuance to the present time of a system of reporting the decisions of the Courts, alike vexatious to the Bench, the Bar, and the Reporters themselves.

If the amendments long since suggested were only made and faithfully adhered to, the publication of the LOWER CANADA JURIST would no longer be necessary side by side with the Government reports, and the Bar would no longer be taxed, as they have been for the last three years, for a double series of judicial decisions.

As in former years, each case reported has the initials of the contributor.

The number of cases reported in this Volume is 144.

The MANAGING EDITOR would here express his sense of the assistance he has had from his law pupil, MR. REGINALD J. PLIMSOLL in the revision of the reports and the correction of the proof sheets.



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In the Circuit Court,

FOR THE DISTRICT OF MONTREAL.

MONTREAL, 14TH DECEMBER, 1858.

Coram SMITH, J.

No. 4629.

Girouard v. *Beaudry.*

ELECTION AGENT—PAYMENT OF SERVICES.

Held:—That an election agent has no action against his principal to recover a sum of money as the value of his services, as such agent, without a special undertaking by the principal to pay.

This was an action by a law student for £5, value of his services as legal representative of Defendant during the candidature of the latter for election as member for this city in the Legislative Assembly in the month of September last.

In support of his action Plaintiff produced an authorization written and signed by Defendant, in which he styled the Plaintiff as his friend Mr. Désiré Y. C. Girouard. Plaintiff proved the value of his services, and his attendance at the poll; also that Mr. Ramsay, advocate of this city, who was one of the Committee of Mr. Beaudry, and acting as his agent in the engagement of representatives, had promised that he should be paid for his services; and that though Defendant styled him "his friend," he was not acquainted with Plaintiff. Plaintiff contended, also, that it was the usage in all such cases to pay the representative without any especial agreement.

On the part of the defence it was urged that it was necessary to prove a special understanding between the Defendant and Plaintiff that the latter was to be paid, and the amount to be paid. That, moreover, it was evident, by the terms of the letter, that the term *mon ami*, my friend, indicated that Plaintiff's services were to be gratuitous.

SMITH, J.—This action must be dismissed. A mandate is always supposed to be gratuitous, unless a special agreement to pay is proved between the parties. In this case it is not proved that Mr. Ramsay was the authorised agent of Defendant for that purpose. As to the pretension of Plaintiff that it is only necessary to prove a *quantum meruit*, this pretension is unfounded. As in the case of a lawyer suing on a *quantum meruit*, so in this case no action can lie, because there is no tariff by which the Court can regulate the claim. Some of the witnesses might be of one opinion, and some of another, as to the value of the services, and it would be impossible to arrive at any certainty.

Action dismissed with costs.

Bovey, for Plaintiff.

C. A. Leblanc, for Defendant.

(V. A. B.)

IN APPEAL.

FROM THE DISTRICT OF ST. FRANCIS.

MONTREAL, 3RD SEPTEMBER, 1858.

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

No. 58.

CHALMERS,

(*Plaintiffs in Court below.*)

APPELLANT.

AND

THE MUTUAL FIRE INSURANCE COMPANY OF STANSTEAD AND SHERBROOKE COUNTIES.

(*Defendants in Court below,*)

RESPONDENTS.

Held 1st. That the 23rd Section of the Act 4, William 4, Ch. 33, respecting double Insurances on *houses or buildings*, does not apply to insurances on *goods*.

2nd, That an endorsement on a Policy issued under the provisions of said Act, consenting to the removal of the goods insured, from the building described in the Policy to another building, and signed by the Secretary alone is binding on the Company.

This was an Appeal from a judgment rendered by the Superior Court, at Sherbrooke, on the 27th day of March last, dismissing the Appellant's action.

The Judgment was rendered by Mr. JUSTICE SHORT, in the following words: —"The Court considering, among other things, that at the time the goods insured by the Defendants in this cause, for the loss of which the Plaintiff claims to be indemnified by said Defendants, were destroyed, the said goods were also insured by the Ætna Insurance Company, such last mentioned insurance having been effected by the Plaintiff without the consent in writing of said Defendants as by law required, and without their knowledge, as is proved, by the evidence adduced in this cause by the said Defendants, and that by reason of such double insurance, the policy granted by the said Defendants to the said Plaintiff, on which his action in this behalf is founded, became null and void, doth maintain the exceptions of the said Defendants lastly pleaded in this cause, doth declare the said policy so granted by the said Defendants to the said Plaintiff, null and void, and doth dismiss the action of said Plaintiff in this behalf with costs."

The action in the Court below was to recover the sum of £375, amount of a policy of Insurance on goods, granted by the Respondents in favor of the Appellant, and dated March 24th, 1854. The fire by which the goods were consumed occurred on the 27th of August, 1855.

The Respondents fyled several pleas, but the points chiefly raised by them, and those on which the case mainly turned, were: 1st. That the goods had been removed after the execution of the policy from the building therein described, to the building in which they were burned, without the consent of the Respondents,—2nd. That while the policy was in force the Appellant effected another Insurance for £800 with the Ætna Insurance Company, without the knowledge or consent of the Respondents.

As respects the first point, an endorsement had been made on the policy as follows: "The goods insured within have been removed to a new building

"about twenty rods South of the block of cottages on the Depot ground at Rich-
"mond Station, where they are to continue insured the same as before removal.'

(Signed,) HOLLIS SMITH,
Secretary.

Sherbrooke, July 21st, 1855.

This endorsement the Respondents contended should by law have been signed also by the President of the Company, and that not being so signed the policy was voided. The second point turned on the interpretation to be put on the 23rd Section of the Act 4, William 4th, Ch. 33, which is in the following words:—"That if any insurance on any *house* or *building* shall be made with the "Company, and with any other Insurance Company, or office, or person at the "same time, the policy issued by the Company shall be void, unless such double "Insurance shall have been agreed to by the Directors, and their consent to the "same signified by an endorsement on the policy, signed by the President and "Secretary." The Respondents contending that the expressions used necessarily involved goods insured in buildings, and the Appellant on the other hand contending that by the common law of the land, an insurer has a right to insure in as many offices as he likes, without giving any notification whatever to the Insurance Company, with which he originally insures, and that the terms of the Statute must be strictly interpreted and applied only to the cases clearly coming within the precise meaning of the Act.

The Judgment of the Court below was reversed. The following is the judgment of the Court of Appeals:—"The Court considering that the dry goods, crockery, hardware and groceries, the property of the above named John Chalmers, the Appellant in this cause, contained in a store at Richmond, in the Township of Shipton, and mentioned in the Indenture or Policy of Insurance in this cause fyled, were on the 27th day of August, 1855, at Richmond aforesaid, while the said Indenture or Policy of Insurance was in full force and effect, destroyed by fire, without the fault or neglect of the said Appellant: Considering that the said Appellant hath well and truly performed and fulfilled all the covenants and stipulations to be by him performed and fulfilled, in virtue of the said Indenture or Policy of Insurance, and that the said Appellant had a right subsequently to the making and signing of the said Indenture or Policy of Insurance, to have the said goods, crockery, hardware and groceries, insured by the Ætna Insurance Company, without obtaining the consent of the Respondents, and was not bound to give the Respondents notice of such subsequent Insurance: Considering further, that the indorsement on the said Indenture or Policy of Insurance allowing the Appellant to remove the said dry goods, crockery, hardware and groceries to "a new building about twenty rods south "of the block of cottages on the Depot ground at Richmond Station," was made by competent authority and is binding on the said Respondents; and considering that the Respondents have failed to adduce sufficient legal evidence of the material allegations contained in the plea of peremptory exception in this cause fyled, and that by reason of such failure, and of the evidence adduced by the Appellant, the said Appellant had a right to demand from the said Respondents payment of the sum of £375, the Appellant having established by evidence

Chalmers vs. Insurance Company.

that the value of the goods so destroyed by fire exceeded the amount stipulated in his favor as well by the Policy of Insurance, signed by the Respondents as by the Policy, signed by the Ætna Insurance Company; and that in consequence in the judgment pronounced by the Court below, on the 27th day of March, 1858, dismissing the action of the said Appellant with costs, there is error:—It is considered and adjudged by the Court here, that the said judgment of the Court below be, and the same is hereby reversed, annulled and made void; and the Court here, proceeding to render the judgment which the Court below ought to have rendered, doth condemn the said Respondents to pay and satisfy to the said Appellant the said sum of £375 currency, for the causes in the said Appellant's declaration mentioned, with interest thereon from this day, and costs incurred by the said Appellant as well in the Court below as in this Court here in this behalf. The Honorable Mr. Justice Aylwin dissenting."

The Judgment of the Court was delivered by DUVAL, J., who cited the following authorities:—

Dunlop's Paley on Agency, p. 161, s. 2. 1 Bell's Com. p. 607 (1) and 478. Pothier Mandat No. 29, also p. 888, observation générale. Ellis on Insurance p. 229, No. v and No. vii.

AYLWIN, J., *dissentiens*,—

The Statute, under which this Insurance Company has its being, has provided, "that if any Insurance on any *house* or *building* shall be made with the Company, and with any other Insurance Company, or office, or person at the same "time, the policy issued by the Company shall be void, unless such double Insurance shall have been agreed to by the directors, and their consent to the "same signified by an endorsement on the policy, signed by the President and "Secretary.". This enactment is a condition implied in every risk taken by the Company and forms part of the contract with the assured. Supposing this condition to have been expressed in so many words, on the back of the policy, would it not be very like a quibble to argue, that because, in terms "house or building" was only mentioned, that the contents of a house or building did not fall within these words. The risk as to Insurance on goods and chattels, is much greater than on "house or building," the number, quantity and value, being so variable and uncertain, and so difficult to be ascertained, of which this very case presents a forcible example. Is it consistent with reason then, that the Insurance on a chattel interest should be exempt from the obligations of an Insurance, on a house or building? The term "house or building" is a larger expression, comprehending within it the goods and chattels contained in it, and is not in my opinion exclusive of them. The rule *qui dicit de uno, negat de altero*, does not apply here, but the other and more certain rule *ubi eadem est ratio, ibi est idem jus*, is to receive its due application. The Legislature by the Act of the 19 Victoria, ch. 58, has placed this construction upon "house or building," as a generic term, comprehending different species, and not as distinct species, by declaring "that the provisions and sentiments contained in the 23d Section of the above cited Act, (the Section above cited) shall be held to *include* and *have* reference to *all property* as well personal as real." This Legislative construc-

tion was proper, as the first Act undertook to make terms and conditions for the contracting parties, contrary to the usual course of Legislation, it was right, to leave to implication as little as possible. I view the last act as only declaring what the common law would have ruled without it. In the construction of Statutes, we find instances in Dwarris and Mailher de Chassat, of the application of the rule which in my opinion ought to decide this case, of bringing within a genus, cases of species not expressly enumerated. I have viewed this case as one of the construction of a contract, my opinion is the same if it be viewed in the light of a construction of a Statute. I am, therefore, of opinion to affirm the Judgment of the Court below.

Judgment of Court below reversed.

Thomas W. Ritchie, for Appellant.
Sanborn & Brooks, for Respondents.
(S. B.)

IN APPEAL FROM THE DISTRICT OF MONTREAL.

MONTREAL, 1st DECEMBER, 1858.

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

No. 6.

SHAW, ET AL.,
(Defendants in the Court below),
Appellants.

AND

MEIKLEHAM,
(Plaintiff in the Court below),
Respondent.

Held,—That a verdict of a Jury cannot be set aside in appeal, when no motion has been made in the Court below either for a new trial, in arrest of judgment, or for judgment *non obstante veredicto*.

This was an Appeal instituted *de plano* from a judgment rendered by the Superior Court at Montreal, on the 23rd day of November 1857, condemning the Appellants to pay to the Respondent the sum of £474 6s. cy., as found by the verdict of a special jury before whom the case was tried, there being no motion of any kind to set aside such verdict.

LA FONTAINE, J. C.,—Ce procès a été instruit devant un corps de jurés dont le verdict a été favorable au demandeur; et celui-ci a ensuite obtenu un jugement homologatif du verdict et condamnant en conséquence les défendeurs à lui payer la somme de £474 6s. 0d. cy.

En cour de première instance, les défendeurs n'ont point fait motion "pour suspendre le jugement," (in arrest of judgment), ni "pour demander un nouveau procès, ou pour mettre de côté le verdict." (Statut de 1851, ch. 89, sect. 4, ¶ 1.) Cependant ils ont interjeté appel du jugement qui les condamne à payer. Cet appel peut-il être admis? S'il est admissible, nous sommes appelés ou à confirmer la condamnation, ou à rendre tel autre jugement que la cour de première instance aurait du rendre. La question est donc de savoir si, dans les circonstances, en supposant même le verdict attaquable, la première cour aurait

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pu rendre un autre jugement que celui qu'elle a ainsi rendu. En d'autres mots, les défendeurs ne faisant aucune des motions autorisées par le statut, pour se plaindre du verdict, la cour pouvait-elle d'elle-même réfuser d'accorder à l'autre partie sa motion demandant jugement sur le verdict. Si elle ne le pouvait pas, elle n'avait pas à rendre d'autre jugement que celui qu'elle a rendu, et par conséquent les défendeurs ne sont pas fondés dans leur appel.

Le procès par jury en matière civile était inconnu à notre ancien droit. Nos lois statutaires l'ont emprunté au droit anglais. L'ordonnance de 1785 avait fait quelques règlements touchant les listes et les qualifications des jurés. Bien qu'elle ait gardé le silence sur le mode de se plaindre de leurs verdicts, les tribunaux, à l'instar de ce qui se pratiquait en Angleterre, ont cru néanmoins devoir donner aux parties le pouvoir par motion en arrêt de jugement, ou pour demander un nouveau procès, ou pour faire mettre de côté le verdict. Si, comme règle générale, l'on ne doit pas admettre que le seul fait d'emprunter à un code étranger une disposition législative, entraîne nécessairement l'adoption du système de procédure de ce même code, il n'en est pas moins vrai qu'il peut s'introduire des exceptions à cette règle, sanctionnées par une longue jurisprudence, surtout lorsque cette sanction a eu pour elle l'appui de quelques dispositions statutaires, introductives de cette procédure étrangère applicable à d'autres parties du procès par jury. C'est ainsi que dans sa 18e section, l'ordonnance de 1785 portait que les jurés seraient choisis des listes faites par le Shérif, " de la même manière et sous les mêmes règles que les jurés spéciaux sont choisis dans les cours de justice en Angleterre; " c'est encore ainsi que la 20e section de la même ordonnance disait " que toutes récusations et exceptions contre les listes, ou contre quelque juré particulier qui y sera mentionné, seront faites et jugées, cour tenante, conformément aux lois d'Angleterre."

Enfin, ce que la jurisprudence des tribunaux canadiens avait introduit comme se rattachant nécessairement au système du procès par jurés, a reçu la sanction de la Législature par notre statut de 1851, chap. 89, sect. 4, qui, après avoir dit qu'un tel procès pourrait avoir lieu dans les séances hebdomadaires de la cour supérieure, ajoute: " pourvû qu'aucune motion pour suspendre le jugement, ou pour demander un nouveau procès, ou pour mettre de côté un verdict, ne sera entendue ou déterminée par moins de trois juges."

Après avoir parcouru presque tous nos livres anglais sur la matière, je n'ai pu découvrir aucun cas où les tribunaux aient de leur propre mouvement anéanti un verdict de jury, lorsque la demande n'en avait pas été faite par l'une des parties. Il me semble bien établi que l'initiative des parties était nécessaire pour attaquer le verdict, dans la jurisprudence anglaise existant lors de l'introduction du procès par jurés en Canada, initiative qui a continué d'être exigé jusqu'à ce jour. Anciennement, le mode de se pourvoir contre un verdict était par la voie d'un *writ of attaint*. A ce mode a été substitué le recours par *motion*, comme étant plus expéditif et moins dispendieux. Le *writ of attaint* était poursuivi par la partie elle-même, lorsqu'elle croyait avoir à se plaindre du verdict. Ce *writ*, tombé en désuétude depuis bien longtemps, a été formellement abrogé par le statut impérial, 6e Geo. 4, chap. 50, sect. 60, qui porte " that it shall not be lawful for the king, or any one on his behalf, or for any

party or parties in any case whatsoever, to commence or prosecute any writ of attaint against any jury or jurors for the verdict by them given, or against the party or parties who shall have judgment upon such verdict; &c., &c." L'initiative appartenait donc à la partie, et non aux juges. Pourquoi ceux-ci seraient-ils intervenus, si la partie qui avait succombé ne se plaignait pas? Depuis que le mode de se pourvoir contre un verdict a été changé, l'on voit, dans tous les livres anglais, que c'est sur *motion*, *pétition* ou *application* de la partie; ces trois mots se retrouvent partout. Il faut que cette demande soit formulée dans un délai de quatre jours; ou si, dans des circonstances particulières, l'on permet quelque fois à la partie de la présenter après ce délai, faut-il toujours que ce soit avant le jugement homologatif du verdict. Le même règlement existe ici. L'article 76 et l'article 77 des règles de pratique de la cour supérieure fixent les délais dans lesquels doivent être faites les motions pour *nouveau procès*, ou *en arrêt de jugement*, tandis que le 75e ne permet de demander jugement sur le verdict qu'après l'expiration de ce délai.

Pour justifier davantage mon assertion que ce n'est que sur motion de la partie que les juges en Angleterre peuvent intervenir, je citerai une disposition législative: c'est celle que l'on trouve dans la 2e section du Statut Imperial, 5e Geo. 4, chap. 106. Dans une action soumise à un jury aux cours appelées "Courts of Great Sessions" dans le pays de Galles, il est permis à la partie mécontente du verdict, de s'adresser *par motion* à aucune des cours du banc de la Reine, des plaidoyers communs ou de l'Echiquier siégeant *in Banco*, "for a rule to show cause why a new trial of such action should not be granted, or nonsuit set aside and a new trial granted, or a verdict entered, for the Plaintiff or defendant, or a nonsuit entered, as the case may be, *in the same manner as hath been usually heretofore done in actions depending in the said courts, and tried at* nisi prius *before any Judge of Assize*, by virtue of any record issuing out of the said courts; and that thereupon it shall and may be lawful for the said courts to grant such rule, and proceed to hear and determine the merits of the same, *in such manner and form as hath been heretofore done in actions depending in the said last mentioned courts, and tried as aforesaid &c.*"

Je pourrais encore, sur le même sujet, en appeler à quelques dispositions de l'Acte Impérial de 1854, chap. 125, appelé "Common law procedure act," lequel établit des cours d'appel pour les fins de cette loi. (Sect. 36). "In every rule Nisi for a new trial or to enter a verdict or nonsuit, the grounds upon which such rule shall have been granted shall be shortly stated therein," (Sect. 33) "In all cases of rules to enter a verdict or nonsuit upon a point reserved at the trial, if the rule to show cause be refused or granted and then discharged or made absolute, the party decided against may appeal (Sect. 34). "In all cases of motions for a new trial upon the ground that the judge has not ruled according to law, if the rule to show cause be refused, or if granted be then discharged or made absolute, the party decided against may appeal, provided any one of the Judges dissent from the rule being refused, &c., &c." (Sect. 35). "The court of appeal shall give such judgment as ought to have been given in the court below, &c." (Sect. 41).

Toute cette législation est une reconnaissance de la nécessité qu'il y avait

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auparavant de se pourvoir par motion contre le verdict pour se soustraire à la condamnation qui autrement eût été inévitable. L'on peut encore invoquer sur ce point la 26e section du statut Impérial, 4e et 5e Guil. 4, ch. 62, concernant le comté Palatin de Lancaster.

La motion doit être faite dans les délais fixés, du moins avant jugement sur le verdict. "It is too late (Harrison's digest by Fisher, p. 2359) for a defendant to move for a new trial after judgment for the Plaintiff non obstante verdicto. Pierce *vs.* Reid, 6 M. and G. 1; 6 Scott, N. R. 1010."

Notre statut de 1851 reconnait à la partie mécontente, trois voies d'attaquer le verdict par trois motions distinctes. Ces motions doivent être faites à la cour dans laquelle le verdict a été rendu, et non à cette cour. Il est libre à la partie de faire ces motions ou de ne les pas faire. Si elle ne veut pas exercer ce droit, elle doit être censée y renoncer, et par conséquent acquiescer au verdict, du moins tacitement; et lorsque le jugement qui la condamne en homologuant le verdict, n'excède pas ce verdict, qu'au contraire il y est en tout conforme, la partie ainsi condamnée est sans grief devant cette cour. Elle ne peut pas nous dire, en supposant même que le verdict eût pu être attaqué, que la cour de première instance lui a refusé ce qu'elle avoit droit d'obtenir, puisqu'elle même s'est abstenue de le lui demander. Or la demande qu'elle pouvait lui faire était, ou une demande en arrêt de jugement, ou d'un nouveau procès, ou de mettre de côté le verdict. Aucune de ces demandes n'ayant été faite à la cour de première instance, on ne peut pas dire que cette cour eût du rendre un autre jugement que celui dont est appel. Elle n'a donc pas mal jugé.

Il me semble résulter de la jurisprudence anglaise que le défaut de motion pour attaquer le verdict dans le délai fixé, équivaut à un acquiescement à ce verdict. Sur ce point, il me semble qu'il n'y aurait pas de doute dans les principes de notre droit français. "Le silence de la partie emporte acquiescement aux actes de procédure et aux jugements, lorsqu'elle laisse écouler les délais accordés pour les attaquer." Bioche, au mot "acquiescement", No. 48.

De la part du demandeur, il y a eu acquiescement exprès au verdict par sa motion pour jugement; de la part des défendeurs, acquiescement tacite, en s'abstenant de formuler, en cour de première instance, aucune motion contre le verdict, et en renonçant par là à obtenir un *nouveau procès*, (a new trial), nouveau procès qui fait évidemment l'objet de leur appel. Des trois motions qu'ils avaient la faculté de faire, ils auraient pu choisir pour la première celle *en arrêt de jugement*. Ils auraient pu succomber sur cette motion, alors c'eût été de leur part, même dans le droit anglais, un acquiescement au verdict; car c'est une règle générale de ce droit "that after an unsuccessful motion in arrest of judgment, a party is not at liberty to move for a new trial, even within the first four days of term; for by moving to arrest the judgment, he affirms the verdict. *Philpot* vs. *Page*, 6 D. et R. 281; 4 B. et C. 110. (Harrison's Digest, p. 3965; Archbold's common law practice, 1853, p. 169). S'il devait y avoir acquiescement dans ce cas de la part des défendeurs, à plus forte raison devait-il y avoir acquiescement de leur part, lorsqu'ils ne présentaient aucune des motions que la loi leur permettait de faire. Un défendeur peut avoir de bonnes raisons pour ne pas objecter à l'homologation d'un verdict rendu contre lui.

Il est vrai que, dans le cas actuel, le verdict est pour le montant de la demande ; mais, dans un autre cas, le verdict pourrait être pour une somme moindre que celle demandée, et être néanmoins encore attaquable au point d'assurer le succès d'une motion pour un nouveau procès. Le défendeur, quoique mécontent du verdict, peut néanmoins trouver qu'il est de son intérêt de ne pas l'attaquer, et il s'abstient de faire la demande d'un nouveau procès. Soutiendra-t-on qu'en pareil cas, le juge appelé, sur la demande de l'autre partie, à homologuer le verdict, devra s'abstenir néanmoins de le faire, s'il est d'avis que le verdict est justement attaquable, et qu'un nouveau procès aurait été par lui accordé, s'il lui avait été demandé ? Le juge arrêterait donc de son propre mouvement l'effet d'un verdict, nonobstant l'acquiescement des parties, exprès de la part de l'une qui demande jugement, et tacite de la part de l'autre qui, pour des raisons dont elle doit être seul le juge, s'abstient de recourrir aux voies que la loi lui donne d'attaquer le verdict !

Les appelants ont été bien en peine de nous dire quel jugement, en supposant qu'il pût leur être favorable, ils s'attendaient à obtenir sur le présent appel. "Vous pourrez," nous ont-ils suggéré, "infirmer purement et simplement le jugement homologatif du verdict ; vous pourrez peut-être aller plus loin, et accorder un *nouveau procès*;" c'est-à-dire que nous pourrions prendre sur nous de leur accorder, ce que le tribunal de première instance n'a pas pu leur accorder, pour la raison toute simple que la chose ne lui avait pas été demandée. Ce qu'il n'était pas au pouvoir de ce premier tribunal d'ordonner dans l'état de la cause, il n'est pas en notre pouvoir de l'ordonner. D'un autre côté, en infirmant purement et simplement le jugement dont est appel, nous serions censés déclarer que ce n'était pas là le jugement que la cour supérieure aurait dû rendre. Et cependant c'était le seul jugement qu'elle pût rendre dans l'état de la cause, tel qu'elle lui a été présentée ! Mais l'on nous dit ; si vous infirmez purement et simplement, la partie contre laquelle le verdict a été rendu, demandera un *nouveau procès* (a new trial,) ou bien, ce *nouveau procès* sera demandé par son adversaire, c'est-à-dire la partie en faveur de laquelle le verdict aura été ainsi rendu. Il faut reconnaître que ce serait faire là aux parties, une position qui n'a été demandée ni sollicitée par l'une ou par l'autre, en cour de première instance. Quelle raison y aurait-il donc pour ce tribunal, d'intervenir, en pareil cas, pour faire aux parties une telle position contre leur gré ? Je n'en vois aucune, bien certainement. Il me semble qu'accéder à une telle proposition, ce serait méconnaître les limites de notre juridiction, qui ne nous permet pas de voir, dans une procédure en appel, d'autres griefs que ceux dont la partie appelante a pu être victime en cour de première instance. Dans ce système, qui demande, en appel, que le jugement homologatif du verdict soit infirmé purement et simplement, bien qu'aucune motion n'ait été faite pour l'attaquer, quelle position fait-on aux parties, surtout à celle en faveur de laquelle le jugement sur verdict a été ainsi rendu ! La motion qui a donné lieu au jugement, constate, de la part de l'intimé, son acquiescement formel au verdict, puisqu'il a lui-même demandé le jugement ! Si ce jugement est infirmé, le fait de sa motion demandant ce jugement, n'est-il pas néanmoins toujours là pour attester son acquiescement ? Pourra-t-il, en présence de cet acquiescement,

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demander que le verdict soit mis à néant ? Son adversaire, qui trouvera qu'il est de son intérêt de ne pas demander un *nouveau procès*, quoique mécontent du verdict, s'abstenant lui-même de faire cette demande, ne pourra-t-il pas lui opposer cet acquiescement, puisque cet acquiescement une fois donné doit lui profiter comme tout autre acquiescement de la part d'un adversaire ?

Sur la question de l'inadmissibilité de l'appel dans un cas comme celui-ci, les autorités suivantes sont décisives. On les trouve dans les rapports des causes devant le *Conseil Privé*, par *Moore*, sur des appels des colonies.

Vol. 3, p. p. 87 et suiv : *Ramdass*, appelant, contre Madowdass et autres intimés, sur un appel de *Bombay*, 7 fév. 1840. "Such appeal does not, however, extend to the finding of a jury upon issues directed from the equity side of the court ; no motion for a new trial having been made, nor exceptions taken to the master's report founded upon the verdicts in such issues." Mr. Baron Parke dit : "In the present case, the appellant meaning to object to the finding of the court on the facts, should have applied to the equity side for a new trial, as a verdict against evidence ; and having brought all the evidence before the court, the refusal of a new trial and consequent adoption of the finding, as one of the grounds for a decree, would then have been the subject of appeal ; and the propriety of the decision on the facts would be considered and decided in a court of appeal....

"As there has been no application for a new trial in this case, the facts proved on the issues, and the propriety of the finding upon it, cannot now be brought under our review....

Ib ; p. p. 150 et suiv. : *in Re* John Muir, de l'Isle de Tobago ; 5 déc. 1839 : Sur action du pétitionnaire pour assaut et faux emprisonnement, il avait obtenu contre les défendeurs un verdict pour £115 de dommages. Les défendeurs avaient fait motion *to set aside the verdict*, mais la cour étant partagée d'opinion, il n'y eut pas de jugement sur la motion. Plus tard le pétitionnaire fit motion pour jugement, "when the court, being divided in opinion, the following minute was entered : "The court divided, so that there was no order made." No motion was made by the defendants in arrest of judgment."

A la suite de quelques autres incidents, le demandeur présenta sa pétition à Sa Majesté en Conseil, priant qu'il fût ordonné "that judgment might forthwith be entered and entered upon the said verdict, and execution issued thereon."

"Mr. [illegible]" "Upon the facts of the case, there is no doubt the judges have done wrong. The petitioner brought an action of assault in the court of Common Pleas below, and recovered large damages £115 ; the defendant applied for a new trial. It appears to be the practice of the court of Common Pleas, in *Tobago*, that (instead of moving a side-bar rule for judgment, as here,) it is a motion in open court, by the party applying to the court ; but one would suppose that such a motion would be granted as of course, unless there was a motion in arrest of judgment, and we have no difficulty in saying the judges ought to have granted that motion. *They had no right to consider the propriety of the verdict.* After verdict, the motion to enter up judgment is a motion of course, and that motion ought to have been granted unless there was some reason for it."

Comme il n'y avait pas de *précédent* à l'appui de la pétition, ses conclusions ne furent pas accordées. "All we can do", ajouta le Baron Parke, "is to recommend the petitioner again to apply to the judges of the Common Pleas, and to intimate to them that it is the opinion of their Lordships sitting here, as Her Majesty's Judicial Committee of Privy Council, that, *there being no motion in arrest of judgment*, it is the bounden duty of the court to give judgment for the Plaintiff."

Ib. Vol. 6, p. p. 419 et suiv: *Tronson*, appelant, contre *Dent* et autres, dans un appel d'un jugement de la Cour Suprême de *Hong Kong* sur le verdict d'un jury, juin 1853; "*Held*, that as the english practice prevailed at *Hong Kong*, the allowance of such appeal was irregular, being in effect, an appeal against the verdict of a jury, and that the proper course would have been to have moved the court below for a new trial, and to have appealed against the judgment refusing such motion."

Sir John Patteson, en prononçant le jugement, dit, entre autres choses: p. 442; "what is it that is appealed against? It is the judgment of the court. Now, the judgment of the court is manifestly a right judgment, so long as the verdict remains. If the verdict stands, no other judgment can be given, and, therefore, the judgment which is given by the judge appears to be the only act of the court, and it is only against an act of the court that an appeal lies. There is no other act of the court, the verdict is not the act of the court; the verdict is the act of the jury, and I do not find any where in the ordinances (1) that any thing is said about an appeal against the verdict of the jury. If that intervening step had taken place which I before alluded to, namely, that a motion had been made for setting aside the verdict and granting a new trial, then the refusal to do so on the part of the court, would have been an act of the court, and there would have been an appeal against that act; but I cannot see any where upon the face of these proceedings, or on the facts which are brought before us, how there is any appeal against any act of the court, otherwise than against a judgment of the court; then, if that be so, what is this appeal? Why, it is nothing more nor less than an application for a new trial; not an appeal against an act of the court, but an application to have the verdict of the jury set aside, and a new trial granted..... p. 446, "we think, therefore, that we cannot encourage such a proceeding, and that it would be very desirable to have it fully understood that no such application can be made by way of appeal to Her Majesty in Council, to set aside a verdict, and to have a new trial, unless there has been a previous application made to the court in which the trial took place, to have the verdict set aside and a new trial granted, on whatever grounds that motion might proceed."

Je trouve dans les "Condensed Reports of Louisiana vol. 1, p. 302," un cas analogue à celui-ci. Le système de procès par jury a été introduit dans la Louisiane. Là, comme ici, une cause peut s'instruire devant le juge avec l'assistance ou sans l'assistance d'un jury; et il y a appel. Dans la cause de Morgan et Bell, en 1817, un verdict avait été rendu en faveur du demandeur. Le défendeur in-

(1) Ordinances constituting the Supreme Court at *Hong Kong*.

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terjeta appel. Il n'avait pas fait de motion pour *nouveau procès*. Sur l'appel il invoqua quatre moyens, dont le second était "that the Plaintiff's counsel handed to the Jury a formula, by which the verdict was rendered; they filling up blanks left for the sums." Ce moyen fut déclaré inadmissible en appel. Le juge Martin dit à cette occasion, "we think that any misconduct of the counsel or of the jury, especially of the kind complained of, ought to be taken advantage of by a motion for a new trial."

Les appelants ont invoqué la cause de l'*Assurance* et *McGillivray*, dont le jugement en première instance a été confirmé par cette cour le 7 juillet 1857. Ils ont tort de prétendre que cette cause forme un précédent en leur faveur. La majorité de cette cour étant d'avis de confirmer le jugement sur le mérite même de la contestation, il était pour ainsi dire indifférent que les juges assignassent tous les autres motifs qu'il pouvait y avoir d'arriver à la même conclusion, et que pouvait présenter l'état de la procédure. Mais il n'en est pas ainsi dans la présente cause. Les juges de cette Cour sont d'opinion que le verdict du jury aurait dû être en faveur des appelants, et que, s'ils eûssent fait en cour de première instance une motion pour faire rejeter le verdict et obtenir un nouveau procès, cette motion aurait dû leur être accordée. N'ayant pas fait une telle motion, ils doivent en subir les conséquences. Nous n'avons pas d'alternative; il nous faut nécessairement confirmer le jugement.

The judgment of the Superior Court was accordingly confirmed, AYLWIN, J., dissenting.

Judgment of the Court below confirmed.

Rose & Monk, for Appellants.

Cross & Bancroft, for Respondent.

(S. B.)

COUR SUPERIEURE, 1857.

MONTREAL, 20 MARS 1857.

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

No. 253.

Robert et al., vs. *Dorion et al*,

SAISINE HEREDITAIRE.—DELIVRANCE DE LEGS.

Jugé,—Que l'effet d'un legs universel est tel qu'aucune demande en délivrance de legs n'est nécessaire.*

Jacques Dorion, en son vivant marchand, domicilié à St-Eustache, y est décédé le ou vers le 20 Janvier 1822, laissant deux enfans issus de son mariage avec Geneviève Decousse, savoir: Etienne et Marie-Hélène Dorion.

Dans le terme de la ci-devant Cour du Banc du Roi, tenue en Avril 1822, Etienne et Marie-Hélène Dorion ont porté une action en pétition d'hérédité contre Charles Dorion, leur oncle, et contre Horatio Gates et Nathaniel Jones, alléguant qu'ils étaient tous trois en possession des biens composant la succession de leur père.

Charles Dorion a opposé à cette action que Jacques Dorion lui avait légué tous ses biens par un testament olographe en date du 9 Mars 1821.

* Voir une décision contraire dans la cause de Holland v. Thibaudeau, No. 668, à Sherbrooke 27 Janvier, 1854, par les juges Day, Short, et Caron—Décisions du Bas Canada, Tom. 4. 121.

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Les deux autres Défendeurs, Gates et Jones, ont allégué que Jacques Dorion, par son testament olographe du 9 Mars 1821, le même que celui invoqué par Charles Dorion, lui avait légué tous ses biens et les avaient nommés ses exécuteurs testamentaires.

Les Demandeurs ont produit des réponses générales et fait entendre quelques témoins pour prouver que les Défendeurs étaient en possession des biens de la succession.

Le 10 Juin 1823, la Cour du Banc du Roi, par un jugement préliminaire, a ordonné aux Defendeurs Gates et Jones de rendre compte de ce qu'ils avaient en leur possession appartenant à la succession de Jacques Dorion.

Le 7 Octobre 1823, Gates et Jones ont rendu un compte, dans lequel ils ont porté la recette à £8,357 15s 10d, la dépense à £210 14s 8d, et la reprise à £7,851 12s 6d, laissant une balance de £295 8s 8d qu'ils devaient à la succession, cette somme provenant de la vente des meubles et effets mobiliers du dit Jacques Dorion.

Lors de l'audition sur le mérite de la cause, les Appelants ont prétendu 1o. Que le testament produit par les Défendeurs, n'était pas prouvé; 2o. Qu'en supposant qu'il le fut, il était inintelligible et qu'il devait être considéré comme non avenu; 3o. Que le Défendeur, Charles Dorion, n'ayant jamais obtenu délivrance du legs qu'il invoquait, il était, à tout événement, tenu de rendre aux Demandeurs, héritiers du Testateur, les biens de la succession avec tous les fruits et revenus qu'il en avait perçus, sauf à lui ensuite à demander la délivrance de son legs; 4o. Que ce legs, dans tous les cas, ne pouvait s'étendre qu'à l'usufruit des sommes d'argent trouvées en la possession du Testateur lors de son décès et à l'usufruit de ses immeubles et non à ses meubles et à ses dettes actives qui constituaient la plus grande partie des biens de sa succession. (On trouvera à la page 21 une copie exacte du testament produit par les défendeurs, Appendice A.)

Nonobstant les objections soulevées, par les Appelants, la Cour du Banc du Roi, par son Jugement du 20 Avril 1824, a adjugé que le dit Charles Dorion avait en vertu de ce testament droit de retenir, et de posséder (*to retain hold and possess*) sous les restrictions y contenues, les immeubles du dit Jacques Dorion qui avait aussi disposé de l'intérêt de son argent en faveur du dit Charles Dorion et de ses enfans; mais que dans ce legs d'argent devait être compris non seulement l'argent trouvé en la possession du Testateur lors de son décès, mais encore toutes les sommes de deniers énumérées dans le jugement qui avaient été placées à intérêt, et dont il devait jouir sa vie durant et quant à tous les autres meubles, dettes et effets qui appartenaient au Testateur ou qui lui étaient dûs lors de son décès et dont le dit Charles Dorion n'avait pas disposé par son testament, il a été adjugé qu'ils appartenaient de droit aux Demandeurs, Etienne Dorion et Marie-Hélène Dorion, et la Cour ordonna aux Défendeurs de les leur rendre ainsi que tous les documents, papiers, écrits et pièces justificatives ayant rapport à ces meubles, dettes et effets qu'ils avaient en leur possession, et adjugeant sur le compte rendu par les Défendeurs Gates et Jones, elle ordonna que la balance de £295 8s 8d qu'ils avaient entre leurs mains, en leur qualité d'exécuteurs testamentaires, serait payée aux Demandeurs

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après déduction, néanmoins, des frais qu'ils avaient encourus dans cette cause, et enfin il fut adjugé que chaque partie paierait ses frais. (Voir la page 22 pour ce jugement, Appendice B.)

Les Demandeurs s'étant pourvus contre cette décision qu'ils ne trouvaient pas assez favorable, la Cour d'Appel, par son Jugement du 19 Janvier 1828, l'a reformé en adjugeant que par son testament, Jacques Dorion n'avait légué à son frère Charles Dorion et à ses enfants conjointement avec lui, que l'*usufruit* de ses immeubles et l'intérêt des sommes qui lui étaient dues par obligations la vie durant du dit Charles Dorion et de ses enfants mâles et la vie durant de ses filles ou jusqu'à ce qu'elles fussent mariées; que les Demandeurs étaient propriétaires de la succession du dit Jacques Dorion sous la réserve de l'usufruit et l'intérêt sus-mentionnés, en faveur du dit Charles Dorion et de ses enfants mâles et femelles conjointement durant la vie du dit Charles Dorion et la vie de ses enfans mâles et celle de ses filles ou jusqu'à ce que ces dernières fussent pourvues par mariage; que ce Jugement tiendrait lieu de délivrance de legs, et le dit Charles Dorion et ses enfants jouiraient des dits biens aux termes du testament à compter de la date du dit jugement; que les Demandeurs avaient été comme héritiers du dit Jacques Dorion, saisis des biens de la dite succession jusqu'à l'époque de cette délivrance de legs, et qu'ils avaient droit aux fruits et revenus des dits biens depuis le décès du Testateur; que le Défendeur, Charles Dorion, rendrait compte sous trois mois, de tous les immeubles qui appartenaient au dit Jacques Dorion lors de son décès, et dont il avait eu la jouissance et possession ainsi que de tous les fruits et revenus qui en étaient provenus; et de plus que le dit Charles Dorion et les dits Horatio Gates et Nathaniel Jones rendraient, dans le même délai de trois mois, un compte de tous les biens meubles, droits, dettes, argents, livres de comptes, titres, et papiers qu'ils avaient en leur possession, appartenant à la dite succession; et finalement il fut adjugé que le jugement de la Cour du Banc du Roi, en autant qu'il pouvait différer de ce jugement, était infirmé avec dépens tant ceux de la Cour Inférieure que ceux encourus sur l'Appel. (Voir ce jugement à la page 23.)

A son tour, le Défendeur, Charles Dorion, appela de ce jugement, et le 15 Décembre 1830, Sa Majesté Guillaume IV, de l'avis de son Conseil Privé, infirma le jugement du 20 Avril 1824, rendu par la ci-devant Cour du Banc du Roi et celui du 19 Janvier 1828, rendu par la Cour d'Appel, et ordonna que la procédure fut remise à la Cour du Banc du Roi; et il fut déclaré par ce décret ou jugement que les enfants de Charles Dorion, n'étant pas parties dans la cause, l'interprétation à donner au testament de Jacques Dorion, ne pouvait être prise en considération devant Sa Majesté, vû que l'intérêt de ses enfants dépendait en grande partie de cette interprétation. Ce jugement se trouve dans l'appendice D., page 25.

La procédure fut, en conséquence de ce jugement, remise à la ci-devant Cour du Banc du Roi, et les Demandeurs adoptèrent les procédés nécessaires pour mettre en cause les enfants du dit Charles Dorion en formant contre eux une demande en déclaration de jugement commun. Pendant ces procédés, Etienne Dorion, l'un des Demandeurs, est décédé, et ses héritiers et représentants ont repris l'instance. Les trois Défendeurs sont également décédés et leurs repré-

sentants ont été assignés à reprendre l'instance et ont été condamnés à le faire par divers jugements.

Ces incidents ont longtemps retardé tant la demande en déclaration de jugement commun que la demande principale.

Enfin toutes les difficultés résultant du décès ou du changement d'état des parties ayant été surmontées, la cause a été plaidée devant la Cour Supérieure à Montréal, qui a rendu, le 20 Mars 1857, le jugement suivant:

SMITH, J.—This is a case which has been for a long time in litigation, for it stands now in the same position as it did in the year 1822, with the exception only of *reprises d'instances* which have taken place since that time. The action was brought by Etienne, Marie and Hélène Dorion, as Heirs-at-law of Jacques Dorion, in his lifetime a merchant of St. Eustache, against Charles Dorion, Nathaniel Jones and Horatio Gates, the declaration alleging that the Defendants had taken possession of the estate of the deceased Jacques Dorion, who died in 1821, without any legal authority for so doing. Jones and Gates set up, in defense to the action, an olograph will of the deceased, bequeathing his estate to his brother Charles and his children, and appointing them the executors. Charles Dorion also sets up the will, and pleads a bequest to himself and his children of the whole estate. The plaintiffs answer generally that it is not true. The case was submitted for Judgment in 1822, and the Judgment which the Court at Montreal then rendered was in 1824 reversed by the Court of Appeals at Quebec. It then went to the Privy Council, and there both the former judgments were reversed and the case sent back in order that the children of Charles Dorion might be called in, as being interested in the estate, and that the Judgment to be rendered should be common to them. This has been accordingly done. The Plaintiffs contend that as heirs-at-law they are seized of the estate and they demand an account. The Defendants on their side say that they are the universal legatees, and are legally in possession and that no account is due. It is a question of title. At the argument it was contended that the will was bad, as being unintelligible, but this pretention was abandoned. Secondly, it was contended that the legacy was of the usufruct only and not *en propriété*. The Defendants answer that it was a universal legacy, and that it made no difference, so far as this action was concerned, whether it was the usufruct only or *en propriété*. On examination of the will, we find that it embraces the entire succession except the *meubles et effets*. The Testator bequeaths the *jouissance de ses fonds et les revenus de tous ses argents* to Charles Dorion and to his children bearing the name of Dorion. Was this a universal legacy? I think it was. It was contended by the Plaintiffs that the estate could not pass without *délivrance de legs*. I think, however, the question is one merely of title. The Defendants are in possession. Have they a good title in law to the property? Does the will give them one? This is the question raised by the pleadings. The act of 1801 gives a testator the absolute disposal of his property.

In my opinion, therefore, a will under this act is a good title. The old rule was *le mort saisit le vif*. Under this maxim it is said that the heir takes the estate although he must give it up immediately afterwards to the legatee. Now

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there seems to me to be a manifest absurdity and contradiction in saying in this case, that the testator under the act of 1801 gives his estate to one person and that the law gives it to another. The two propositions, it seems to me, are incompatible. Charles Dorion was in possession and the heirs-at-law sued him. Now admitting the old law to be fully in force, yet if a legatee be in possession it is not necessary for him to demand *délivrance*. The authors who hold a contrary opinion are few, and are overborne by those on the other side. This is the case here. The legatee is in possession. In the *Pays de droit écrit* where the *institution d'héritier* prevailed, the *delivrance* was considered a useless formality, This appears from numberless decisions. The reason of the old rule which existed in the *pays coutumier* was, that the testator could not dispose of all his property. The estate belonged to the heir, and the legacies were considered merely as charges upon it. But here the act of 1801 gives the testator the same power of disposal as existed in the *Pays de droit écrit*. On the principle, therefore, that *cessante ratione, cessat ipsa lex*, a demand of *délivrance* should no longer be considered necessary for a universal legacy. Upon these grounds I think that the present legatees were not bound to demand *délivrance*, they having entered into possession without it. As to whether it was a *legs d'usufruit*, it is not necessary to determine that question now; it is sufficient to decide that the Defendants are now entitled to possession, but the question may be raised hereafter.

By the Judgment of the Court of Appeals, the Defendants were declared bound to account for the rents, issues and profits, including money, up to the date of the Judgment, which was to stand to them for a *délivrance*. But the executors were seized with the personal estate, and could make *délivrance de legs* of personal property. I am aware there is some conflict of authority on this point; but this is the better opinion, of course, they do it at their own risk, and if they pay money which is not legally due, they must bear the loss. I think, therefore, the Judgment is wrong in this respect. The executors rendered an account with their plea, shewing a balance of £298, and the Court, at Montreal gave Judgment for £298, each party paying his own costs.

Mondelet, J., said that the question was whether *délivrance de legs* under the law as we have it in this country was necessary. He thought the Judgments at Montreal and Quebec were both wrong. The act of 1801 placed us in the same position as in the *Pays de droit écrit*. This *délivrance* was not necessary. It was easy to see why the law customary in France made it necessary to demand *délivrance* from the heir. But here when a testator disinherits his heir, and and makes another person his heir, it was absurd for the latter to be obliged to go and ask for the estate from the former, when he at the same time declares that it does not belong to him. In this way the Judgment at Quebec, while correcting an error in the Judgment at Montreal, committed another itself.

Badgley, J. An uniformity of judicial opinion appears to prevail upon the validity of the will in question in this cause; both the Provincial Courts that originally adjudicated upon the contestation as well as the Committee of the Privy Council in England have concurred upon this point. Assuming, then, the validity of the will, it sets out a bequest made by the testator to his brother Charles

Dorion and to his children of the name of Dorion, and so long as they shall bear that name, of the *usufruit* use and enjoyment *de tous les fonds et les revenus de tous ses argents.* Charles Dorion having died *pendente lite*, his children have been made parties in the cause in conformity with the suggestion to that effect contained in the judgment of the Privy Council, which suspended further proceedings for that purpose, *inasmuch as the children's interest materially depended upon the construction of the will.* Whatever doubt might be supposed to have existed in the mind of the judges of that court upon the important question of the construction of the will, a doubt strongly implied not only from their suggestion as above, but also from their reversal of the judgments of both the Provincial Courts Original and Appellate, the argument at the Bar before us, has rested chiefly if not altogether upon the application of the legal maxim *le mort saisit le vif* and the necessity for the merely technical formality of the *délivrance de legs* to the legatees in this case by the Plaintiffs, the heirs of the testator. Considering the case upon the restricted ground submitted by the litigating parties themselves, and being unwilling to discuss any other ground not submitted, I have reached the same conclusion at which my colleagues have arrived upon the judgment to be rendered, but not quite by the same course that they have taken. In the systems of jurisprudence in force in France at the time when our municipal law reached this Province, a representative to the estate was fully secured in customary France, from which our law proceeded, by reserving out of every estate a portion or quote part called the *légitime* for the heir, which the law jealously guarded from the testator's disposition of his estate, whilst in the *pays de droit écrit*, although the capacity was conceded, to the testator to dispose unrestrainedly of the entire *patrimoine*, the law was absolute in requiring the nomination of an heir *institution d'héritier* in the will itself, however small the portion bequeathed to him. By these means the vacancy of the estate under both systems was avoided, and hence the rule *le mort saisit le vif* as well as the legal formality of the *délivrance* was recognized as law and applicable in both. The reasons why the Customary Jurisprudence necessitated the *délivrance* by the heir, are thus expressed by Prudhon, Tr. de l'Usufruit 1 vol. p. 481.

" L'empereur Justinien avait défini le legs, *donatio quœdum a defuncto relicta* " *et ab heredi prestanda.* De ces dernières expressions on a tiré cette consé- " quence qu'il n'appartenait point au légataire de se mettre lui-même en posses- " sion de la chose léguée : et dès lors il a été reçu comme une règle constante " en jurisprudence que tout légataire autre que le légataire universel doit obte- " nir des mains de l'héritier la délivrance de son legs comme si l'acte de libéra- " lité était essentiellement subordonné à cette condition : en sorte que toute " entrée en jouissance de la part du légataire qui n'aurait agi que de sa propre " autorité ne peut être considéré que comme une voie de fait incapable de " servir de fondement à une possession légitime, et contre laquelle l'héritier est " fondé à s'élever et à agir pour obtenir lui-même sa réintégrande et la restitu- " tion de toutes choses dans leur état primitif, sauf au légataire à mieux agir " ensuite, par une demande régulière en délivrance. La nécessité de procéder " ainsi est fondée sur ce que l'héritier peut avoir des exceptions à faire valoir

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" contre la validité du legs, qu'il peut être en droit d'en retenir une partie pour " l'acquit de sa reserve légale etc., etc., et sur ce que dans tous les cas, il serait " contraire au bon ordre que le légataire fut admis à se rendre justice à lui-" même. Et-comme le testateur ne peut déroger à la loi qui donne la saisine " à l'héritier où placer son légataire au-dessus de cette règle d'ordre public, " qui veut que personne ne puisse se rendre justice à soi-même, de là les au-" teurs concluent qu'il ne lui serait pas permis de le dispenser de l'obligation de " demander la délivrance de son legs."

Grenier, Tr. des Donations, 1 vol. p. 699, states the law of the *Pays de droit écrit*, " L'institution d'héritier que le testament devait nécessairement contenir, " portait sur tout le patrimoine du défunt : aussi on appliquait dans ces pays " à l'héritier testamentaire comme aux héritiers du sang la règle, *le mort saisit* " *le vif*." He explains that the nominated heir, however small his portion under the will, became *saisi* of the whole estate, not as a *saisine de propriété* but *de possession*, and thence, " on devait s'adresser à lui pour obtenir le délais-" sement de la légitime par les héritiers du sang et l'exécution des legs." The Statutory legislation introduced into the Province by the 14 Geo. 3 c. 83, and the 41 Geo. 3 c. 4 has changed the previously existing law in both respects materially from what it was either in the *pays coutumier* or in the *pays de droit écrit*, and has substituted as it were a new testamentary code. These statutes were eminently enabling and extending statutes, the former enlarging the power and capacity of devisors whilst the latter enlarged those of devisées and legatées. The effect of this legislation was to enable the testator to pass away his entire estate from his heir, thereby abolishing the customary *légitime* altogether, and leaving the institution of the testamentary heir where it was previously, no part of our municipal law. The limitations and restrictions of the old law ceased to be operative before the beneficial influence and extension of the statutory enactments, and their establishment necessarily involved the practical abolition of the legal formalities connected with the old law, and which consequently disappeared with the foundation on which they rested. The maxim *le mort saisit le vif* and the formality of *délivrance de legs* are no longer applicable as before the Statutes, the former because *le titre de légataire est dans la volonté du testateur*, and thus the legatee takes directly from the testator, supplanting the *héritier* in the *saisine*, and also the latter because the capacity to dispose vested in the devisor overpasses the heir altogether in favour of strangers and annuls the reserved *légitime*. The disposition by last will has therefore become nearly as effective for the transmission of bequests as the power to sell for purchasers under *actes entre vifs*, in neither needing the assistance of the heir, and hence the jurisprudence of the Courts has declared the formal *délivrance* unnecessary. But independently of the foregoing, by the jurisprudence of both customary and written France, the universal legatee was recognized as heir and thereby freed from the legal formality of the required *délivrance de legs*. The definition of the universal legatee *en usufruit* is thus given by Prudhon. " L'usufruitier universel est celui à qui le testateur a légué la jouissance de tous ses biens : il est à titre universel seulement lorsque le testateur ne lui a légué que la jouissance d'une quote part de ses biens en général, ou celle de ses immeubles ou de son mobilier

ou celle d'une quote part de ses immeubles, ou de son mobilier généralement pris." Now the bequest in this case is the *usufruit de tous les fonds et le revenu de tous ses argents* terms comprehensive in themselves and characteristic of the *legs universel* not of the legs a *titre universel*. The law upon this matter is thus expressed by Grenier, p. 700, who says, where *une quotité des biens du testateur* is not *reserved* by the law for any existing heir, "le légataire universel est saisi de plein droit par la mort du testateur sans être tenu de demander la délivrance. Il a paru inutile dans ce cas d'astreindre le légataire universel à la demande en délivrance de legs. Ce légataire est saisi de la succession par la loi, il est mis à la place des héritiers du sang, à l'instar de l'héritier testamentaire en pays de droit écrit." Again the Usufructuary Legatees are in actual possession, which the Plaintiff's action admits by demanding the demission of that possession. For what purpose, to restore it back by a *délivrance de legs* in due form? *Sed*, even Henrys, Gui Pape, Papon and Ricard, the strong advocates in favour of the formality observe, "que l'héritier ne serait pas fondé à demander contre le "légataire le désistement de l'objet sauf à lui a faire ensuite la délivrance." Hence Grenier remarks, "si l'héritier n'est pas recevable à demander le désiste- "ment, il est inutile que le légataire lui demande la délivrance," and Pothier, Don. Test. ch. 5, sect. 2, and Repertoire de Jurisprudence Vo. Légataire §5, No. 7, both concur, "il suffit au légataire de retenir la chose, car ce serait un "circuit inutile qu'il l'a rendit à l'héritier pour la lui demander de suite." The Plaintiff's claim for the *fruits et revenus* of the estate has no foundation against these usufructuary legatees, whose possession is for themselves and not for the heirs the Plaintiffs. Even upon the ground of the bequest being a *legs particulier*, the action in that respect could not be maintained in the face of the law and authorities above mentioned and of the legatees' possession as above stated: I have carefully confined my remarks to the points dwelt upon in argument, and have not felt myself justified in looking beyond them; for these reasons I concur in the judgment rendered, restricting the Plaintiff's claim to £298, the balance shown in the account of the Executors of the will as being for matters not included in the usufructuary bequest to the legatees.

Le jugement est motivé comme suit:

"The Court having heard the parties in this cause, Plaintiffs *par Reprise* "*d'Instance*, and Defendants *par Reprise d'Instance*, by their respective counsel "upon the merits of this cause, with the exception of Walter Waller and "Dame Eulalie Dorion, his wife, two of the Defendants *par Reprise d'Instance*, "who are in default to appear, and with the exception of Dame Elizabeth "Malcolm, tutrix to her junior child, Severein Dorion, and one of the Defendants "*par Reprise d'Instance*, she being in default to appear by an Attorney in this "cause, examined the proceedings and evidence adduced, and particularly the "last will and testament of the said late Jacques Dorion, and having delibe- "rated, considering that the said Defendants *par Reprise d'Instance*, to wit the "said Jean-Baptiste Théophile Dorion, Charles Dorion, Firmin Dorion, George "William Gernon, and Marie-Eugenie Dorion, his wife, Eustache Dorion, "Horatio Gates Jones, Francis G. Johnson, Emilan McKay, Walter Waller and "Eulalie Dorion, his wife, Dame Elizabeth Malcolm and Charles Zéphirin "Dorion, have established the material allegations set forth and contained in

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" the exception peremptoire pleaded in this cause by the said Charles Dorion, " Horatio Gates and Nathaniel Jones, the three original Defendants in this " cause, and now represented by the said before-named Defendants *par Reprise* " *d'Instance* in their said names and capacities, to the action and *demande* of " the said Plaintiffs *par Reprise d'Instance*, as representing the said original " Plaintiffs Etienne Dorion and Marie-Hélène Dorion, and particularly that " the said Jacques Dorion in and by his last will and Testament olographe " made and executed on the ninth day of March, one thousand eight hundred " and twenty-one, did bequeath to the said Charles Dorion and his children, " his real and personal estate as set forth in the said last will and Testament " under the limitations therein contained, and that said bequest by law imparted " a *legs universél* to and in favor of the said Charles Dorion and his said " children; and further considering that by law the effect of the said bequest, " (*legs universel*) under the provisions of the said last will and Testament, was " to vest in the said Charles Dorion and his children, by law, the estate so " bequeathed to them, by the said testator, so as to render any *demande en* " *délivrance de legs* by the said Charles Dorion and his said children altogether " unnecessary; and further considering that at the time of the institution of " the present Action against the said Charles Dorion, and the other Defendants, " the said Charles Dorion was in possession of the real and personal estate so " bequeated to him by the said Jacques Dorion, by virtue and under the autho- " rity of the said last will and Testament, and that such possession was legal " and valid to all intents and purposes, and that by reason thereof, and by law " no action accrued to and in favor of the said Plaintiffs to have and maintain " the conclusions by them taken in and by their said declaration against the " said Charles Dorion and the other above-named Defendant *par Reprise* " *d'Instance* respecting him, the said Charles Dorion; the Court doth maintain " the said exception so by them the said Defendants *par Reprise d'Instance* " representing the said Charles Dorion, one of the said original Defendants, " pleaded in and by the said peremptory exception, and doth dismiss this " Action as respects the said Defendants *par Reprise d'Instance* respecting the " said lates Charles Dorion, one of the principal Defendants; and further con- " sidering that the said Defendants *par Reprise d'Instance* representing the " original Defendants Horatio Gates and Nathaniel Jones, impleaded as De- " fendants in the present Action, in their capacity of Executors of the last " will and Testament of the said late Jacques Dorion have rendered to the said " Plaintiffs *par Reprise d'Instance* a just and faithful account as they were bound " to do by law of their gestion and administration of the said estate of the said " late Jacques Dorion in their said quality of Executors of that portion of the " said estate and succession of the said late Jacques Dorion, not comprehended " and included in the universal bequest by the said testator to the said Charles " Dorion and his children; and considering that by the said account so ren- " dered, the said Defendants *par Reprise d'Instance* representing the said Horatio " Gates and Nathaniel Jones, it appears that there is due and owing from the " said estate and succession of the said late Jacques Dorion by them as execu- " tors thereof as a balance of *reliquat de compte* the sum of two hundred and

" ninety-five pounds eight shillings and eight pence, current money of this Pro- Robert vs.
" vince of Canada, to the Plaintiffs *par Reprise d'Instance* as the heirs-at-law Dorion.
" of the said late Jacques Dorion : It is therefore adjudged that the said Defend-
" ants *par Reprise d'Instance*, representing the original defendants, Horatio
" Gates and Nathaniel Jones, to wit, Horatio Gates Jones, Francis G. Johnson,
" in his said capacity, and Emilan McKay, in his said capacity, be and they
" are hereby condemned to pay and satisfy to the said Plaintiffs *par Reprise*
" *d'Instance*, the said sum of two hundred and ninety-five pounds, eight shillings
" and eight pence said current money, balance or *reliquat de compte* remaining
" in the hands of the said Executors, with interest thereon from this day, and
" the Court doth condemn each party Plaintiffs and Defendants to pay their
" own costs.

" His Honor, Mr. Justice Mondelet, concurs in the conclusion of the Judgment,
" dissenting, however on that part of the Judgment which qualifies as a *legs*
" *universel*, a bequest, which, in the opinion of Judge Mondelet is a *legs parti-*
" *culier*, but adds that in neither case is there necessity for a *délivrance de legs*."

Cherrier, Dorion et Dorion, pour les demandeurs.

Leblanc et Cassidy, pour les defendeurs.

(F. W. T.)

APPENDICE A.

COPIE DU DOCUMENT PRODUIT PAR LES DÉFENDEURS COMME ÉTANT LE TESTAMENT DE JACQUES DORION.

Jacques Dorion de la paroise Seute utache, lequelle, e Donne e leque à son frère Challe Dorion. Comme le Del Jacques Dorion de la religion Catolique e romenne com sin De core e Desprei prevenant la mor com netan poin Inmortelle Je recomande a Dieu qui me fase misericor, sirei corde qui me padonne me peche Com je pretan avoir un place au roiome De sei amei auran Des Bon recoive mon name ge Don a Challe Dorion la goiyan de tous les fon que ge posede ausei Bien com lin terre de toutes les argants aveque les yanfan qui la desa darnier fame, que toutes les yanfan quiora aveque elle auseito que mon frère cera mor, ei reteiron tout les profei intere e'aquira toute qu'a seuse qui porteron le no De Dorion ausito que sa feigue cero marciaié sa cera feinei le garson De sa fame reteiron tout le reveneu gatan pour le repo de mon name que auquin Deme fon nesoique vandeu ausei que l'argants queiargant que l'argants restera ou aie toute le reveneu eiron toujoure Depere anfei, ausei ala charge Depégué a ma seur Marie Dorion tous les yane quince Louis Deu cour actuelle qui pera toute ma dete auquin tor que ge poure ovoir fette le tout apre ma mor qui goiron gatan pour me feuneraque avoir le pleu Bo sarvice qui ne soique poin veu etre antere Dan le mi lei auei Deu Semiquire que toute le mon aeique Des siarge povre com reiche ge veuavoir quatre les plus proche, me frère ou paran qui sois que a Beiaie au noir a me Depan aveque des Bans Deiliaire, quatre autre De me pleu pre De me yamei, quatre Bandelleiaire blanche gatan etre expose dans mon sarquere tre goure aveque me pleu Boza Bei Dans la pleu Beile deme chambre toute seuce qui vouDron me voir me voigue, sei toute foi mon core ven a peué trope De l'an Bome aveque un Belle peise De Dra noir—pour la mettre tout an noir, ca cera pour leglise apre gatan De pleu avoir la Pleu Belle tomBe qui vien Dangleterre an marBre, aveo quatre Belle pome rantoure aveque DeBare de fere Ge pretan etre antere a la reiveir Deuchene, Sei ge vene a moureire Dan queique androi Dema porte Dan sette paroisei ecepete que sa pacere cinquante livre, De pleu gatan queles Domesteique toute parson

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anployée pour moi soisgue mi an noir ame dépan sei on veu me randre le Darnel sarveise, genome pour ecequiteur monsieur Horatio Gates e cuisie e monsieur Gopse son neveu.

Je le fe Dellon volon selo mon Bon pleaseire, tou me yatenscion, toute autre aque gore fette game qui nan soigne parlé.

Fette a la reveir Deuchene Senteutache Dellonfoi le nenf marsse 1821.

Signé.

JACQUES DORION.

APPENDICE B.

DISTRICT OF MONTREAL.

IN THE COURT OF KING'S BENCH.

No. 253.

TUESDAY THE 20TH APRIL, 1824.

Etienne Dorion & al., vs. Charles Dorion & al.

Present: The Hon. Mr. Justice REID, the Hon. Mr. Justice FOUCHER, the Hon. Mr. Justice PYKE.

The Court having heard the parties by their Counsel, examined the proceedings and evidence adduced and particularly the last will and testament of the said late Jacques Dorion, bearing date the ninth of March, one thousand eight hundred and twenty-one, and the inventory of the estate, property and effects left by the said Jacques Dorion at the time of his decease, it is considered, that by virtue of the said last will and testament, the said Defendant Charles Dorion, is entitled to retain, hold and possess, under the limitations contained in the said last will and testament, all the real estate which belonged to the said late Jacques Dorion at the time of his decease, and that in regard of the said real estate, no action hath accrued to the said Plaintiffs, nor is any account due to them touching the same. And in regard of the moveable property and effects of the said late Jacques Dorion, it appears that in the said last will and testament, he, the said late Jacques Dorion, the testator, hath disposed only of his *money* by giving and bequeathing the interest thereof to the said Charles Dorion and to the children of his marriage, with his last wife; but that by the expression contained in the said last will and testament, it would appear to be the intention of the said testator, to comprehend in this legacy, not only the money in his own possession at the time of his decease, but also the monies which he has, in his lifetime, placed out and secured at interest; and therefore that under this legacy the said Charles Dorion is entitled to claim, have and receive the interest accrued and become due, and hereafter to accrue and become due—during his lifetime, on the following sums of money, so placed out and secured upon interest by the said testator, and in regard of which said sums of money therefore, no action hath accrued, nor is any account due to the said Plaintiffs—that is to say:

On the sum of twenty-five pounds, due by William Thompson, by obligation passed at Montreal, before Lukin and his colleague, notaries, bearing date the fifteenth day of May, one thousand eight hundred and twenty-one.

On the sum of one hundred and sixty-six pounds, thirteen shillings and four pence, being the balance of the price of a lot of land sold by the testator to David Thompson, Esquire, by deed passed before Seguin and his colleague, notaries at Terrebonne, and bearing date the twenty-sixth day of September, one thousand eight hundred and twelve.

On the sum of eighty pounds, nineteen shillings and two pence, due by Pierre Poirier, by obligation passed before J. Désautels, and his colleague, notaries, bearing date the eighth day of July, one thousand eight hundred and seventeen.

On the sum of two hundred and thirty pounds, due by Nicolas Eustache Lambert Dumont, Esquire, by obligation passed before M. Thibault and his colleague, notaries, and bearing date the sixth day of August, one thousand eight hundred and nineteen.

On the sum of fifteen pounds twelve shillings and sixpence, due by Jean-Baptiste Labrèche, by obligation passed before F. H. Seguin and his colleague, notaries, the seventeenth day of March, one thousand eight hundred and ten.

On the sum of four hundred and ninety-seven pounds, fourteen shillings and one penny, due by Louis Bardet dit Lapierre, by deed passed before J. M. Cadieux and his colleague, notaries, at Montreal, bearing date the thirtieth day of October, one thousand eight hundred and sixteen.

On the sum of twenty-one pounds, five shillings, due by Louis Chaurette, by obligation bearing date the twenty-fourth day of April, one thousand eight hundred and twenty, and passed before J. Désautels, and his colleague, notaries, at Montreal.

On the sum of four thousand four hundred pounds due by Horatio Gates and Nephew, by obligation passed before J. Désautels and his colleague, notaries, at Montreal, and bearing date the eighth day of July, one thousand eight hundred and seventeen.

On the sum of one thousand four hundred pounds due by Horatio Gates, Esquire, by obligation passed before H. Griffin, and his colleague, notaries, at Montreal, and bearing date the twenty-fourth day of December, one thousand eight hundred and seventeen.

And as to all the other moveable property, debts and effects, which belonged or were due and owing to the said testator at the time of his decease, and of which no disposition appears to have been made by the said last will and testament, it is adjudged that the same is and are the property and do of right belong to the said Plaintiffs—and it is thereupon ordered, that the said Defendants and each and every of them do deliver up to the said Plaintiffs, all and every the documents, papers and vouchers in the possession of the said Defendants or of any or either of them touching or regarding all or any of the said moveable property, debts and effects, hereby adjudged to the said Plaintiffs—and having seen and examined the account bearing date the sixth day of October, one thousand eight hundred and twenty-three, and filed in this Court on the seventh day of the same month, made and rendered by the said Horatio Gates and Nathaniel Jones, the executors of the said last will and testament, of the moveable property, monies, goods, chattels and effects of the said late Jacques Dorion, which have come to their hands and possession since and during their administration under the said last will and testament, to which account no objections have been made or taken by any of the parties—it is thereupon adjudged, that the sum of two hundred and ninety-five pounds, eight shillings and eight pence, being the balance remaining in the hands of the said executor, be by them paid over to the said Plaintiffs, first deducting therefrom what shall be reasonably taxed and allowed to the said executors for their costs and expenses in and about the present action—and it is finally adjudged that each party do pay their own costs.

APPENDICE C.

PROVINCE OF LOWER CANADA } COURT OF APPEALS.

The 19th of January 1828.

ETIENNE DORION & AL., APPELLANTS,

vs.

CHARLES DORION & AL., RESPONDENTS.

The Court having heard the parties by their Counsel, examined their proceedings and maturely deliberated upon the whole, is of opinion that, the said Jacques Dorion, deceased, by his last will and testament, bearing date the ninth day of March, one thousand eight hundred and twenty-one, did devise and bequeath to his brother, Charles Dorion, and to the children of the said Charles Dorion by his last wife, jointly with the said Charles Dorion, the usufruct of all the real and immoveable estate, which was the

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property of him, the said Jacques Dorion, on the day of his decease, with the interest to accrue upon the several securities by mortgage for the payment of money of which he, the said Jacques Dorion, died possessed, to have and to hold the usufruct of the said real and immoveable estate and the interest to accrue upon the said securities by mortgage, for the payment of money unto the said Charles Dorion, and to his said children male and female jointly, during the life of the said Charles Dorion, the lives of his said children being males and the lives of his said children being females, or until the day of the marriage of the said children being females respectively, as may first happen, and that no other right title or benefit of any description whatsoever hath been, by the said last will and testament of the said Jacques Dorion devised, or bequeathed to the said Charles Dorion or to the said children of the said Charles Dorion, male or female, or to any or either of them. It is therefore considered and adjudged that Etienne Dorion and Marie Hélène Dorion, the Plaintiffs in this cause, are and they are hereby declared to be the true and lawful heirs of the said Jacques Dorion, deceased, and as such the true and lawful proprietors of the succession of the said Jacques Dorion, deceased, and of all the estates, rights, debts, monies and effects moveable and immoveable, real and personal, which compose the said succession, and that thereof and of every part thereof the said Etienne Dorion and Marie Hélène Dorion, since the decease of the said Jacques Dorion, have been and now by the law are seized and thereunto are entitled *à titre de propriété*, subject to the usufruct and to the payment of the interest devised and bequeathed, as aforesaid, in the manner hereinafter adjudged and declared: —And it is further considered and adjudged that the said last will and testament of the said Jacques Dorion, deceased, bearing date the ninth day of March one thousand eight hundred and twenty-one is, and it is hereby declared to be a lawful and efficient will, and that under and by virtue thereof the said Charles Dorion and his said children male and female are jointly entitled to the *usufruit* of all the real and immoveable estate which was the property of him, the said Jacques Dorion, on the day of his decease, and to the interest to accrue upon the several securities by mortgage for the payment of money of which he, the said Jacques Dorion, died possessed, from and after *délivrance de legs*, in each case respectively; and inasmuch as it appears from the proceedings in this cause that no *délivrance de legs* whatever hath, by the said Charles Dorion and his said children, been demanded or obtained of or from the Plaintiffs in this cause or either of them; but that the Defense of the said Defendant Charles Dorion, in this cause, is a claim of title on behalf of himself and of his said children to the usufruct and interest aforesaid under and by virtue of the said last will and testament of the said Jacques Dorion, deceased. It is further considered and adjudged that this present judgment do and shall stand as a judgment *en délivrance de legs*, and that under and by virtue thereof, the said Charles Dorion and his said children, from and after this day and during the life of the said Charles Dorion, the lives of his said children being males and the lives of his said children being females or until the day of the marriage of the said children, being males as may first happen, shall be entitled to possess, have and hold *en usufruit* all the real and immoveable estate which was the property of him, the said Jacques Dorion, on the day of his decease, and to receive the rents, issues and profits thereof, which from and after this day shall accrue thereon, and the interest which from and after this day shall in like manner accrue upon the several securities by mortgage for the payment of money of which the said Jacques Dorion died possessed; and inasmuch as the Plaintiffs in the cause have been by Law seized of the estate and succession of the said Jacques Dorion from the day of his decease until *délivrance de legs*, was by this judgment so as aforesaid made and awarded, and in contemplation of law, were, therefore, possessors thereof *de bonne foi*; It is further considered and adjudged that the said Etienne Dorion and Marie Hélène Dorion, are, and they are hereby declared to be entitled to all the rents, issues and profits, which have accrued upon all, and any and every part of the real and immoveable estate which was the property

of him, the said Jacques Dorion, on the day of his decease, from the day of the decease of the said Jacques Dorion until this day and to all the interest which in like manner hath accrued and become due upon the several securities by mortgage for the payment of money of which the said Jacques Dorion died possessed, from the day of the decease of the said Jacques Dorion until this day. And by reason of the premises, It is further considered and adjudged that the said Charles Dorion, in the space of three calendar months next after signification of this judgment, do render to the said Etienne Dorion and Marie Hélène Dorion, a just and true account, in due form of law, of all and every the estates, real and immoveable, which were the property of the said Jacques Dorion, on the day of his decease, and since his decease have been in the actual possession of the said Charles Dorion and of the rents, issues and profits of such estates and of each and every of them, from the day of the decease of the said Charles Dorion until this day:—that the said Charles Dorion, Horatio Gates and Nathaniel Jones and each of them in like manner in the space of three months next after signification of this Judgment do render to the said Etienne Dorion and Marie Hélène Dorion a just and true account in due form of law of all and every the estate moveable, rights, debts, monies, securities for money books of account, titles, deeds, papers, and other effects moveable of every description of which the said Jacques Dorion died possessed, and which since the decease of the said Jacques Dorion, have come to the hands, possession or power of the said Charles Dorion, Horatio Gates and Nathaniel Jones or of either of them respectively, and more particularly do render a just and true account, in due form of law, of all the interest which hath accrued and become due upon the several securities by mortgage for the payment of money of which the said Jacques Dorion died possessed from the day of the decease of the said Jacques Dorion until this day, and which since the decease of the said Jacques Dorion has come to the hands, possession or power of the said Charles Dorion, Horatio Gates and Nathaniel Jones, or of either of them respectively: and lastly it is considered and adjudged that the judgment of the Court below of the twentieth day of April one thousand eight hundred and twenty-four, in so far as the same doth in any respect militate against this judgment or against any matter or thing therein contained, be and the same is hereby set aside and reversed with costs to the Appellants, as well in this Court as in the Court below, and that the record in this cause be remitted to the Court below for such further proceedings in the premises as to law and justice appertain. *Distraction de frais* awarded to the Attorney-General on his motion as the Attorney of the said Appellants.

APPENDICE D.

AT THE COURT OF ST. JAMES.

The 15th December 1830.

PRESENT:

The King's Most Excellent Majesty in Council.

Whereas, there was this day read at the Board a Report from the Right Honorable the Lords of the Committee of Council for hearing Appeals from the Plantations, &c., dated 14th December instant, in the words following, viz:—

His late Majesty having been pleased by his order in Council of the 15th of January, 1829, to refer unto the Committee the humble Petition and Appeal of Charles Dorion against Etienne Dorion and Marie Hélène Dorion, setting forth that &c.....

.....

The Lords of the Committee in obedience to the said order of reference this day took the said Petition and Appeal into consideration, and having heard Counsel on both sides thereupon, Their Lordships do agree humbly to report as their opinion to your Majesty

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that the Judgment of the Court of King's Bench at Montreal of the 20th April 1824, and also the Judgment of the Court of Appeals of the Province of Lower Canada of the 19th of January 1828, should be reversed and that the case should be remitted to the said Court of King's Bench with a Declaration that the children of the Appellant Charles Dorion not being parties in the suit, the consideration of the construction of the will of the testator Jacques Dorion cannot be proceeded in before Your Majesty in Council inasmuch as the interest of the children of the said Charles Dorion materially depends upon that construction.

His Majesty having taken the said Report into consideration was pleased by and with the advice of His Privy Council to approve thereof and to order as it is hereby ordered, that the judgment of the Court of King's Bench, at Montreal, of the 20th of April 1824, and also the judgment of the Court of Appeals of the Province of Lower Canada, of the nineteenth of January 1828, be and the same are hereby reversed, and that the case be and the same is hereby remitted to the said Court of King's Bench; and it is hereby declared that the children of the Appellant Charles Dorion, not being parties in the suit, the consideration of the construction of the will of the testator Jacques Dorion, cannot be proceeded in before his Majesty in Council inasmuch as the interest of the children of the said Charles Dorion materially depends upon that construction. Whereof, the Governor, Lieutenant Governor or Commander-in-Chief of the Province of Lower Canada for the time being and all other persons whom it may concern are to take notice and govern themselves accordingly.

This is to certify that the foregoing is a true copy of his Majesty's order in Council on the Appeal of Charles Dorion against Etienne Dorion, and another, from a Judgment of the Court of Appeals for the Province of Lower Canada of the 19th of January, 1828.

(Signed),

THOMAS DEVEY, (L. S.)

COUNCIL OFFICE,
WHITEHALL, 7th April, 1835.

MONTREAL, 29 MAI, 1858.

Coram SMITH, J.

No. 2559.

Monty v. *Ruiter.*

Jugé, Que le writ étant le commencement de l'action, la Cour a juridiction du jour de son émanation, quoique signifié à une personne qui a cessé d'être justiciable de cette Cour depuis son émanation, par l'érection d'un nouveau District.

Le writ d'assignation qui avaient été émané en cette cause le 25 Fevrier 1858, avait été signifié le 6 Mars 1858 au domicile du Defendeur dans le Township de Dunham, dans le nouveau District de Bedford, par un huissier de la Paroisse de Ste. Marie de Monnoir, ci-devant enclavée dans le District de Montreal et maintenant dans le District d'Iberville.

Le Defendeur produisit une exception déclinatoire par laquelle il prétendait que la Cour n'avait aucune juridiction ni sur la matière en litige ni sur le Défendeur qui ne lui était pas justiciable. L'Acte de Judicature de 1857 est devenu en force le 6 Mars 1858 en sorte que le District de Bedford a dès lors été érigé pour les fins civiles par l'opération de cette loi.

SMITH, J.—By the 146th section of the 20th Vic. ch. 44, it is stated that "no "alterations in the limits of any District or Circuit, &c. shall affect any suit or "proceeding pending when such alteration shall take place," &c. &c. Was this suit pending from the day on which the writ issued in this cause? From

the language of the 12th Vic. chap. 38, sec. 19, the issuing of the writ must be taken as the commencement of the action, so that in this instance the writ having been issued before the proclamation for the new districts, this suit fell within the provisions of the 146th section of the Judicature Act of 1857, wherein it is stated that certain actions shall not be affected by the alterations of the new Districts. The writ had therefore the power to summon the Defendant, but the bailiff had no right to serve the writ. In this view of the case, the Defendant should have met the action by an *exception à la forme*.

Monty vs. Rutter.

Exception déclinatoire dismissed.

Laflamme, Laflamme & Barnard, for Plaintiff.

Doherty, for Defendant.

(P. R. L.)

MONTREAL, 25 SEPTEMBRE 1858.

Coram BADGLEY, J.

No. 1321.

Woodman vs. *Létourneau*, and *Ed. Létourneau*, Opposant.

Jugé,—que sur permission de la Cour et en connaissance de cause, une Opposition afin de conserver peut-être produite en aucun temps avant l'homologation du rapport de collocation, en par l'Opposant payant tels frais qui peuvent être encourrus sur la réformation de ce rapport et de plus 20s. de dépens.

Le rapport de collocation et de distribution des deniers rapportés en cette cause et provenant de la vente des biens immeubles du défendeur ayant été produit et affiché le 13 septembre 1858; Edouard Létourneau fit motion pour permission de produire son opposition afin de conserver. Cette motion était appuyée d'affidavits de la part de l'Opposant et de son procureur et fut opposée par le Demandeur.

PER CURIAM.—L'opposition est reçue à la condition que l'Opposant paiera les frais à être encourrus sur la réformation du rapport de collocation et de plus 20s.

Lanctot, pour le Demandeur.

Cherrier, Dorion & Dorion, pour l'Opposant.

Vide même décision, par le juge C. Mondelet, en la cause, No. 2570, *Hubert* vs. *Lemieux*, et divers Opposants, et *Rapin*, Opposant, permettant à ce dernier de produire son Opposition afin de conserver en par lui procédant *à ses propres dépens*; le 28 Octobre 1858.

(P. R. L.)

MONTREAL, 31ST OCTOBER, 1857.

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

No. 339.

Desbarats v. *Murray*.

COMMERCIAL MATTERS.

Held, That in an action by parties not traders, the evidence of the Plaintiff's nephew is inadmissible to prove the sale and delivery of firewood.

This was an action brought among other things for the recovery of the price of a quantity of fire-wood and hay alleged to have been sold by the Plaintiff to

Desbarats vs. Murray.

the Defendant, neither party being a trader. At the enquête, a witness of the name of Sheppard, a nephew of the Plaintiff, was brought up for examination, with a view to prove the sale and delivery of the fire-wood and hay. The witness was objected to, as being within the degree of relationship prohibited by law, and therefore incompetent. The presiding Judge ordered the evidence to be taken *de bene esse*, as the witness resided out of the District, and the objection was afterwards adjudicated upon by the Court as above constituted; and by an interlocutory judgment rendered on the 31st October 1857, the witness was declared incompetent and his deposition rejected from the record.

DAY, J.—A motion has been made in this case to try an objection made at the enquête to the competency of the nephew of the Plaintiff brought forward to prove the sale of wood and hay left in the premises of the Plaintiff at the time they were leased by him to the Defendant. It was objected at the argument that this was not a commercial matter, and that, as it was not a sale in the way of trade, it was not a commercial sale. This has been the uniform view taken by our Courts heretofore in similar cases, for example, the selling of hay by a *habitant* from his farm is not considered as a commercial fact, and may be considered at the settled jurisprudence of our Courts. The learned judge thought that another conclusion might be arrived at. The evidence of the witness must be rejected.

MONDELET, J. thought that the jurisprudence was right.

SMITH, J. did not dissent, as this had become a settled jurisprudence, but could not see the distinction. The passing of a moveable from hand to hand by sale was in his view an act of commerce. The question ought not to be what the capacity of the parties was, *e. g.*, were they traders, but what was the transaction. If the jurisprudence had not been settled, he would have been disposed to give a different judgment.

Motion granted.

T. S Judah, for Plaintiff.
Cross & Bancroft, for Defendant.
(H. B.)

EN APPEL

DU DISTRICT DES TROIS-RIVIERES.

QUEBEC, 13 DECEMBRE 1858.

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

McCARTHY ET AL,

Défendeurs en cour de première instance.

Appelants.

ET

HART,

Demandeur en cour de première instance.

Intimé.

SUBSTITUTION—RELIGION JUDAIQUE.

Jugé :—Qu'en vertu des clauses d'un testament portant substitution et qui sont en substance comme suit : pour par un tel en jouir en usufruit, sa vie durant seulement, la propriété sera et appartiendra à l'enfant mâle aîné issu en légitime mariage de B. H., et au cas que B. H. décéderait sans enfant mâle né ou à naître en légitime mariage, le testateur veut et ordonne que la propriété soit transmise à l'enfant mâle né en légitime mariage de B. H., etc., etc., il suffit que celui des enfants de B. H., qui doit recueillir soit un enfant mâle vivant à son décès, et que c'est alors que la substitution doit s'ouvrir au profit de cet enfant ; que cet enfant ait eu un frère aîné pré-décédé ou n'en ait pas eu.

SIR L. H. LAFONTAINE, Baronnet, Juge en Chef :

On lit dans le testament de feu Aaron Hart, fait dans la ville des Trois-Rivières où le testateur avait son domicile, la clause suivante : 7o. " Donne et " légue le dit sieur testateur à Benjamin Hart, son troisième fils, un hangard à " deux étages etc., etc., pour par le dit légataire en jouir sa vie durante seule- " ment, la propriété étant réservée à son enfant mâle aîné issu en légitime " mariage, et au cas de non-enfant, la dite propriété *substituée* tel que mentionné " aux legs du troisième et quatrième articles du présent testament."

Ces deux articles 3 et 4 doivent donc servir à expliquer le 7e dont il s'agit. Par le 3e, il légue à Moses Hart, son fils aîné, tous ses droits dans les fiefs Ste. Marguerite et Dusablé, " pour par le dit Moses Hart en jouir en usufruit sa vie durante seulement, la propriété desquels fiefs et droits y annexés sera et appartiendra à l'enfant mâle aîné issu en légitime mariage du dit Moses Hart, et au cas que le dit sieur Moses Hart décéderait sans enfant mâle né ou à naître en légitime mariage, le dit testateur veut et ordonne que la propriété des dits fiefs et de tous les droits y afférants, soient transmis à l'enfant mâle né en légitime mariage du sieur Ezekiel Hart, et au cas de mort de ce dernier sans enfant mâle né ou à naître de son dit mariage, la propriété des dits fiefs ainsi que des droits appartenants, passera entre les mains de l'enfant mâle né en légitime mariage du sieur Benjamin Hart, etc., etc." (3e fils du testateur.) Puis, après une semblable disposition quant à l'enfant mâle d'Alexander Hart (4e fils du testateur,) il est dit : " En cas de mort de ce dernier sans enfant mâle né ou à naître de son dit mariage, la propriété des dits fiefs et de tous les droits y annexés *sera enfin substituée* à la fille aînée la plus âgée issue du mariage des

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dits sieurs Moses, Ezekiel, Benjamin et Alexander Hart, auxquels les dits biens demeureront *substitués* l'un à l'autre dans les dits cas, avec cette défense par le dit testateur qu'il, dit sieur Moses Hart, usufruitier des susdits fiefs et de tous les droits y annexés, ne pourra en aucune manière, vendre, engager et aliéner et hypothéquer les dits fiefs, la propriété étant réservée comme dit est."

Le 4e article du testament contient un legs *semblable* du fief Bécancour qui est donné en premier lieu au second fils, Ezekiel Hart, puis successivement aux autres fils du testateur, aux mêmes termes et conditions que dans le troisième article.

Il est évident que les troisième et quatrième articles portent substitution, d'abord en faveur d'un enfant mâle, puis, à défaut d'un tel enfant, en faveur de "la fille aînée la plus âgée du mariage des sieurs Moses, Ezekiel, Benjamin et Alexander Hart," les quatre fils du testateur ; il est encore bien évident que le testateur a voulu que la substitution ne profitât à cette fille que dans le cas où il n'y aurait pas, à la mort du grevé, d'enfant mâle d'aucun de ses fils. Prenons le 3e article, aux termes duquel les fiefs Ste. Marguerite et Dusablé doivent appartenir d'abord à "l'enfant mâle aîné issu en légitime mariage du dit Moses Hart, et, au cas que le dit Moses Hart décéderait sans enfant mâle né ou à naître en légitime mariage," alors à "l'enfant mâle né en légitime mariage du dit Ezekiel Hart, etc., etc." Il me semble clair que celui des enfants de Moses Hart qui doit recueillir, doit être un enfant mâle vivant à son décès, car c'est alors que la substitution doit s'ouvrir au profit de cet enfant, que cet enfant ait eu un frère aîné pré-décédé, ou n'en ait pas eu. Il suffira donc à cet enfant, pour recueillir, qu'il se trouve être l'aîné des enfants mâles du dit Moses Hart, vivants à son décès, ou bien le seul enfant mâle vivant alors. Le système contraire est insoutenable ; il conduirait même à des conséquences absurdes, comme on peut s'en convaincre par l'hypothèse suivante. Supposons que Moses Hart ait eu deux enfants mâles en légitime mariage, et que l'aîné soit mort avant lui. Dans le système des Appelants, le second de ces deux enfants, survivant à son père, ne pourra pas recueillir, parce qu'il aura eu un frère aîné. Cependant celui-ci n'aura lui-même rien recueilli, parce qu'il sera mort avant son père. Qui recueillera donc en pareil cas ? ce sera ou un enfant mâle, ou une fille, ou d'Ezekiel, ou de Benjamin, ou d'Alexander Hart, peut-être même une fille de Moses Hart le grevé, et cependant celui-ci aura laissé un enfant mâle ! Nous voilà donc, dans ce système, en pleine contradiction avec les termes du testament et en pleine opposition à l'intention du testateur. Que l'on remarque encore que la condition est : Si le dit Moses Hart, décède "sans enfant mâle né ou à naître." S'il laisse un enfant mâle, même à naître, la condition est donc remplie, et cet enfant est donc appelé, et le seul appelé, bien qu'il ait pu avoir un frère aîné, mais qui serait prédécédé.

Il faut donc appliquer le même raisonnement au legs particulier dont il s'agit dans cette cause, et qui forme le 7e article du testament. Ce legs porte substitution au profit de celui des enfants mâles de Benjamin Hart, qui, au décès du père, se trouvera être le plus âgé, encore qu'il ne soit pas le premier né. L'Intimé est dans ce cas ; il avait un frère aîné, il est vrai, Aaron Philip Hart, mais ce frère aîné est mort longtemps avant son père.

Le testateur, après avoir fait un grand nombre de legs particuliers, avait nommé ses quatre fils ses légataires universels, et choisi pour exécuteurs testamentaires ses deux fils Moses et Ezekiel, et le sieur Robert Lester, qui comprirent si bien que le testament portait substitution, qu'ils le firent publier en justice deux mois après la mort de son auteur.

Le dernier moyen invoqué en appel, et qu'il me reste à noter, est qu'il n'y a pas de preuve suffisante du mariage de Benjamin Hart et de la naissance de ses deux fils. A mes yeux, cette preuve est complète. Le testateur, ses fils et leurs familles appartenaient tous à la religion judaïque. Ce n'est qu'en 1829 qu'un acte de la législature du Bas-Canada (9e Geo. 4, ch. 75) a permis aux Juifs d'avoir des régistres authentiques pour constater leur état civil : " tout ministre de la religion judaïque," porte la 7e section,.... " tiendra un régistre en duplicata de tous actes de mariage et de toutes naissances et sépultures." Puis il est déclaré que toutes les dispositions de notre statut de la 35e Geo. 3, ch. 4, concernant les régistres de l'état civil, s'appliqueront aux régistres tenus sous l'autorité de ce nouvel acte. (Sect. 7 et 8.) Or l'acte de la 35e Geo. 3, porte (Sect. 13) " que dans tous les cas où les régistres d'aucune paroisse, église protestante ou congrégation, ne pourraient se trouver, ou qu'il n'en aurait pas été tenu, rien dans cet acte ne sera censé s'étendre à empêcher de faire la preuve des baptêmes, mariages et sépultures, tant par témoins que par papiers ou régistres de famille, ou par autres moyens accordés par la loi, réservant aux parties adverses le droit de détruire ou réfuter telle évidence." Les Juifs, sujets britanniques, doivent avoir tout le bénéfice de cette loi, d'autant plus que l'acte déclaratoire de la 1ère Guil. 4, ch. 57, reconnait qu'ils " ont droit, et seront censés, considérés et regardés comme ayant droit à tous les droits et priviléges des autres sujets de Sa Majesté, ses héritiers et successeurs, à toutes intentions, interprétations et fins quelconques etc." Il est prouvé dans la cause qu'il n'y avait pas aux Trois-Rivières de régistres de l'état civil des personnes professant le judaisme ; l'Appelante Mary McCarthy en a elle-même donné une admission formelle dans la cause. De-là la nécessité dans laquelle s'est trouvé Benjamin Hart d'aller à New-York faire constater devant un ministre de sa congrégation religieuse la naissance de ses enfants. Il y en a un certificat dans la cause donné même sous serment, le 31 mars 1857, par le Rév. M. Lyons se disant " the minister of the congregation Shearéth Israel in the city of New York," et avoir en cette qualité la garde des régistres de naissances, mariages et sépultures, appartenant à cette congrégation. Ce certificat contient un extrait de ces régistres, lequel constate le mariage du dit Benjamin Hart, à New-York, avec dame Judy Harriet Hart, la déclaration que de ce mariage étaient nés, aux Trois-Rivières, deux fils, savoir Aaron Philip le 29 juin 1811, et l'Intimé le 8 avril 1813. L'Appelante a prétendu que ce certificat n'était pas conforme à ce qu'exige notre statut de 1853, ch. 198. Il me semble au contraire qu'il en remplit toutes les conditions, et par conséquent il doit faire preuve de son contenu *prima facie*. C'était à l'Appelante à en nier formellement la vérité par écrit, au désir de la 7e section, ce qu'elle n'a pas fait. Mais en supposant que ce certificat serait défectueux, la preuve des faits dont il s'agit n'en serait pas moins suffisamment établie par d'autres parties du dossier.

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A l'acte de vente du 7 sept. 1832, que le dit Benjamin Hart a fait du terrain en question à son frère Moses Hart, est intervenu le dit Aaron Philip Hart. Il est vrai qu'il n'y est pas dit qu'il est le fils de Benjamin. Mais il y intervient pour garantir la vente avec son père. Quel motif aurait donc eu l'acheteur, son oncle, de le faire ainsi intervenir, s'il n'avait pas été son neveu, alors le fils aîné du vendeur? Moses Hart devait connaître les enfants de son frère, et en faisant ainsi intervenir Aaron Philip Hart à l'acte de vente, il le reconnaissait par cela même pour être alors le fils aîné de son frère, et habile à recueillir l'héritage substitué, s'il venait à survivre à son père. C'est encore pour se prémunir contre l'événement, par le prédécès du dit Aaron Philip, de l'ouverture de la substitution au profit d'un autre enfant mâle du dit Benjamin Hart, que l'acheteur Moses a stipulé qu'il ne paierait le prix de vente que quand le vendeur serait prêt à l'employer à l'acquisition d'un autre terrain avec le titre de bailleur de fonds à son profit. Il y a là, de la part de Moses Hart, une reconnaissance du mariage de son frère Benjamin et de la naissance de son fils Aaron Philip, et une telle reconnaissance fait preuve contre les défendeurs, représentants du dit Moses Hart, et ce d'autant plus que l'Appelante elle-même invoque le susdit acte de vente, par son exception péremptoire. Il y a plus, c'est que ce mariage et cette naissance sont admis par la dite Mary McCarthy dans la seconde partie de son exception. Voici comme elle s'y exprime: "la dite Mary McCarthy en ses dites qualités, dit de plus, que Aaron Philip Hart, écuier, avocat, de la cité de Montréal, était et est l'enfant mâle aîné issu du légitime mariage de Benjamin Hart avec Harriet Judith Hart, ces deux derniers nommés en la déclaration du dit demandeur."

M. Dumoulin, notaire, dit dans son témoignage: "Je sais que Benjamin Hart, après son mariage à New-York avec Harriet Judith Hart, est venu demeurer aux Trois-Rivières et a eu plusieurs enfants dont Aaron Philip était l'aîné et Arthur Wellington (l'Intimé) était le cadet. Toute la famille de Benjamin Hart était juive."

Il y a preuve authentique que le dit Aaron Philip Hart est décédé avant son père, étant mort en 1848, et son père seulement en 1852.

L'on trouve dans la cause deux *affidavits* fait par Caroline et Adolphus M. Hart, enfants d'Ezekiel, à l'effet que Aaron Philip Hart était décédé avant son père, et que l'Intimé était, à la mort de celui-ci, le plus âgé de ses fils; qu'il était d'usage pour leur père et pour le dit Benjamin Hart de conduire leurs enfants des Trois-Rivières à la ville de New-York peu de temps après leur naissance afin de faire inscrire leurs noms sur le régistre de la congrégation judaique dans cette ville. Il est vrai que ces deux personnes sont les cousins germains de l'Intimé, mais les défendeurs n'ont pas fait rejeter du record ces deux affidavits. Du reste, la preuve de l'Intimé est suffisante sans ces affidavits. Trois des Défendeurs ont même admis par écrit (pièce 54 du dossier) que l'Intimé était en effet le fils aîné du dit Benjamin Hart.

Sur le tout, je trouve les faits de la cause suffisamment établis, et je suis d'opinion que le jugement dont est appel devrait être confirmé.

A. Stuart, pour l'Appelant.

Barnard, pour l'Intimé.

(P. B. L. et F. W. T.)

EN APPEL DU DISTRICT DE QUEBEC.

QUEBEC, 13 SEPTEMBRE 1858.

Coram Sir L. H. LAFONTAINE, BART, J. en C., AYLWIN, J. DUVAL, J., CARON, J.

JAMES DOUGLAS, *Appelant,*

ET

HENRY DINNING, *Intimé.*

RATIFICATION DE TITRE—ACTION EN GARANTIE.

Jugé :—Que l'impétrant qui est troublé par une opposition à sa demande en ratification de titre est bien fondé à diriger une action en garantie contre son vendeur, et que cette action en garantie a toujours été accueillie et maintenue.

Sir L. H. LAFONTAINE, Bart., J. C.

Le 22 oct. 1855, vente par l'Appelant à l'Intimé d'une terre située à Beauport, pour le prix de £3500 ; et le 13 février 1856, vente d'une partie de la même terre par l'Intimé au nommé John Henderson Galbraith pour le prix de £2900, avec stipulation expresse de garantie de " toutes dettes, hypothèques et empêchements généralement quelconques," puis avec la stipulation suivante :

" And with a view of discharging and clearing the said property from all secret charges and incumbrances, it is hereby specially agreed by and between the said parties that the said John Henderson Galbraith shall immediately sue for a ratification of his present deed of purchase from the Superior Court of Lower Canada, sitting at Quebec, and follow up the same with due diligence, and if any opposition should be made against the said ratification by or through the vendor or his *auteurs*, he the said vendor shall be bound to cause the same to be removed at his own costs and diligence with all proper despatch, and that until such judgment of ratification shall have been rendered, the said purchaser shall not be bound to pay any part of the price of the present sale."

Le 1er sept. 1856, Galbraith demanda des lettres de ratification. A cette demande deux oppositions furent présentées, l'une de la part de James Jeffery, pour la somme de £3600, montant d'un cautionnement judiciaire donné, le 7 janvier 1854, par l'Appelant conjointement avec le nommé Breakey, et l'autre de la part de G. B. Hall et son épouse ; et l'Appelant dit que le 3 du même mois, il demanda la permission de produire lui-même une opposition afin de conserver, mais sans reclamer d'hypothèque, ni de privilége de bailleur de fonds vû qu'il se présentait après le délai expiré, laquelle permission lui fut accordée

L'Intimé est ensuite intervenu dans la cause, comme garant formel de Galbraith, aux fins de contester les dites oppositions, et aussi pour poursuivre l'Appelant et le mettre en cause comme garant formel. Puis il intenta une action en garantie contre ce dernier, en lui dénonçant les oppositions des dits Jeffery et Hall.

L'Appelant n'a pas contesté l'action, de manière qu'elle a été instruite et jugée *ex parte*. Ce jugement qui est en date du 8 mars 1858, condamne l'Appelant à garantir et indemniser etc., etc.

De ce jugement il a interjetté appel, prétendant qu'en pareil cas, c'est-à-dire

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en demande de lettres de ratification, il n'y a pas lieu à l'action en garantie. On a été même jusqu'à dire de la part de l'Appelant que l'ordonnance d'enregistrement avait eu l'effet d'abroger notre statut relatif aux lettres de ratification. Cette proposition tout-à-fait nouvelle pour moi, et faite, je crois, pour la première fois, est tout-à-fait insoutenable, et ne peut en aucune manière souffrir la discussion; loin d'être censé avoir été abrogé par l'ordonnance, le statut a toujours continué d'être mis en vigueur, et il est de plus reconnu l'être par le statut de 1851, ch. 60, s. 2.

On a aussi dit qu'à Québec, sous l'empire de la loi des lettres de ratification, on n'avait accordé l'action en garantie à l'acheteur que dans le cas où il y avait eu stipulation expresse qu'il demanderait ces lettres. Et bien, le requérant Galbraith se trouve dans ce cas vis-à-vis de son vendeur Dinning, comme on peut voir par la clause de son acte d'acquisition, ci-haut rapportée au long. Et assurément si l'action en garantie compétait à Galbraith contre Dinning, la même action devait par contrecoup compéter à Dinning contre son propre vendeur, l'Appelant.

Je ne sais ce qui a pu être décidé à Québec; mais je sais qu'à Montréal, l'on n'a jamais fait de difficulté, sur procédure pour lettres de ratification, d'accorder l'action en garantie. Dès l'année 1831, c'est-à-dire peu de temps après la promulgation du statut des lettres de ratification, j'ai moi-même intenté une action en garantie de la part de l'impétrant qui était troublé par une opposition à sa demande. L'action fut maintenue, et le vendeur condamné à garantir l'acquéreur par jugement du 19 oct. 1831. (*Ex parte* Dieudonné Perrin, requérant, Pepin opposant; Perrin, demandeur en garantie, contre Simon Hogue, défendeur en garantie.) Et, depuis ce temps là, l'action en garantie sur opposition à des lettres de ratification, a toujours été accueillie et maintenue.

L'on sait que les lettres de ratification ont pris la place de la formalité du *décrêt volontaire*, dans le but de mettre un acquéreur en état de faire purger les hypothèques d'une manière moins couteuse, et en même temps plus expéditive. C'est une formalité substituée à une autre. Pothier, dans son introduction au titre 21 de la coutume d'Orléans, p. 26, No 170, dit: "Les oppositions afin de conserver, qu'on forme au décrêt volontaire, doivent pareillement (c'est-à-dire comme les oppositions afin de distraire et afin de charge) être dénoncées au vendeur qui en doit défendre l'acquéreur etc." Nous lisons dans le Rép. de Guyot, au mot "hypothèque," p. 673, ed. de 1784: "L'opposition au sceau (des lettres de ratification) a l'effet de la demande en déclaration d'hypothèque ou de l'action d'interruption."

Grenier, dans son commentaire sur l'Edit de 1771, ed. de 1787, p. 14, remarque: "le vendeur n'avait pas le temps de prendre des arrangements avec les créanciers opposants; il était exposé à essuyer des frais ruineux de procédure ou de consignation: pour éviter cet inconvénient, il a été rendu une déclaration le 5 sept. 1783, enrégistrée au parlement le 9 janvier 1784, qui porte, art. 2, que l'acquéreur ne pourra former aucune demande contre son vendeur, soit afin de main-levée des oppositions, soit afin d'être libéré du prix de son contrat, qu'après quarante jours de délai, à compter du jour du sceau des lettres de ratification." Cette déclaration est donnée en entier par Grenier à la fin de

son commentaire p. 515. On ne doutait donc pas que sous l'empire de l'Edit de 1771, l'acquéreur pût, en cas d'oppositions, se pourvoir contre son vendeur et l'appeler en cause pour faire lever ces oppositions, ou en défendre le garanti. Grenier ajonte que le vendeur ne pouvait se mettre à l'abri de ce recours de la part de l'acquéreur, que par une stipulation expresse : " On peut", dit-il p. 28, stipuler par exemple, " que l'acquéreur prenant des lettres ne pourra forcer le vendeur à faire cesser les oppositions, pour quelques causes qu'elles soient faites ; qu'il sera tenu de souffrir les droits des acquéreurs antérieurs, de payer les créanciers de rentes perpétuelles ou viagères, pour n'être lui-même que créancier, comme eux, de ces rentes, et sans pouvoir en retenir les capitaux sur le prix de son acquisition ; qu'il sera en un mot forcé de payer, nonobstant toutes oppositions et sauf ses oppositions et ses droits, en cas de ventes postérieures."

Notre statut de 1829, a emprunté la plupart de ses dispositions à l'Edit de 1771. Il n'a rien changé des relations qui existent entre l'acheteur et le vendeur, sur la garantie. Il laisse subsister le recours du premier tel qu'il eût pu l'exercer en France sous l'Edit de 1771. Puisque là, l'acquéreur eût eu le droit, en cas d'oppositions à ses lettres de ratification, d'appeler son vendeur en cause, il s'ensuit qu'ici l'Intimé était bien fondé à se pourvoir contre l'Appelant, et que celui-ci est non-recevable à attaquer le jugement qui le condamne.

Jugement confirmé.

Bossé, pour l'Appelant.
A. Stuart, conseil.
Holt et Irvine, pour l'Intimé.
(P. R. L. et F. W. T.)

IN APPEAL

FROM THE DISTRICT OF MONTREAL.

MONTREAL, 1st SEPTEMBER, 1858.

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

GEDEON OUIMET, ET AL., (*plaintiffs in the Court below.*)

APPELLANTS.

AND

J. B. SENECAL, ET AL., (*Defendants in the Court below.*)

RESPONDENTS.

JUDICIAL SALE—FRAUD.

Held,—A direct action will lie to have a sale of moveables set aside for fraud; and this, though a judicial sale has been resorted to.

The appellants in April, 1858, instituted an action revocatory in the Superior Court at Montreal, against the firm of Sénécal & Daniel, printers, J. B. Sénécal, a saddler, Charles Lapierre, bailiff, and Isaac Bourguignon, a printer. They alleged that Bourguignon had obtained a judgment in the Circuit Court against Sénécal and Daniel, and in February, 1858 issued execution against their goods and chattels. The total of Plaintiff's debt, interest and cost was £30 1s. 1d. That Charles Lapierre was the bailiff charged with the execution, and that he seized all the types, machines, and stock that were found in the printing esta-

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blishment of Sénécal & Daniel, and among other things, a cylinder press, worth upwards of £600, and leased by appellants to Sénécal & Daniel. The Declaration alleged contrivances of the Bailiff, and Sénécal & Daniel, and J. B. Sénécal, and such fraudulent preparations before hand that appellants were kept in ignorance and J. B. Sénécal bought all sold, and nothing less than all that had been seized, for a few shillings only, beyond the £30 1s. 1d., amount of the execution; the goods sold being worth upwards of £1000, and comprehending the cylinder press property of the appellants, and which (it was alleged,) he, J. B. Sénécal knew to belong to appellants. In respect of this press, the appellants alleged the sale to be null, as having been made without the observance of the formalities of law, and as being *super non domino*, and fraudulently contrived and consummated to defraud them. Bourguignon was expressly excepted from charge of fraud, but the appellant thought fit to join him in the action, particularly as they alleged that the formalities required by law had not been observed. The declaration concluded that the cylinder press should be adjudged the property of plaintiffs, and that the seizure and sale of it should be annulled, "with costs against any of the defendants contesting this action," and that the said press should be ordered to be given up to plaintiff, and that in default of defendant or any of them whom it may concern to give it up, they or he, in default, should be condemned to pay plaintiff £650, instead of said press, being the value thereof; the plaintiff reserving, etc., etc., etc.

The defendant fyled several appearances and demurrers, and several pleas, and upon their demurrers (all very nearly alike) the Superior Court (Mr. Justice Smith) dismissed appellant's action on 29th May, 1858. The chief reasons of demurrer were the following:

1o. Il n'existe pas de demande en nullité de décret en matière mobilière.

2o. La nullité d'une vente judiciaire d'objets mobiliers ne peut être poursuivie par une action du genre de celle-ci.

3o. Les demandeurs alléguant que la vente de la presse en question était nulle et de nul effet, leur action ne pouvait avoir aucun objet légal, et ils n'avaient aucun intérêt à la porter sous cette forme.

4o. Si la vente de cette presse était d'une nullité absolue, ainsi que le prétendaient les Demandeurs, elle n'avait pu avoir l'effet de les dépouiller de leur titre de propriété et cette action ne pouvait compéter en leurs personnes.

In addition to the above reasons, the demurrer of Isaac Bourguignon, contained the following:

5o. La seule base plausible de cette action serait l'allégué de fraude, et la déclaration ne portant aucune accusation de fraude, contre le présent défendeur, l'action devait à tout évènement être déboutée quant à lui.

In appeal *Joseph Doutre* for the Respondents argued:

1o. Qu'il n'y a pas d'action possessoire en fait de meubles; non plus que de demande en nullité de décret.

Bioche.—Dict. de procédure, vol. 1er., *vo.* Action possessoire Nos. 65 et 99 page 187.

Pothier, vol. 4, Possession, No. 93, p. 553.

Belime.—Droit de Possession, No. 272, p. 305, No. 273, p. 306, No. 274.

Idem,—Pages 312 et 313 sur la morale et l'équité invoquées par les Appelants.

2o. Que les faits allégués en la déclaration ne pouvait donner lieu à une autre action qu'à la revendication.

Pothier, vol. 4, Propriété No. 298, p. 455.

3o. Que la revendication d'un meuble doit être accompagnée d'entiercement.

Poncet.—Traité des Actions, ps. 45–46, 80–81–82.

Boncenne.—Procédure Civile, vol. 1, p. 62.

Pothier, vol. 4, Propriété, No. 300, p. 456, Nos. 302, 309, 318, 328, 354, 362–4.

R. MacKay for the Appellants argued that it was most correct to institute a direct action to have the fraud declared and the consequent nullity and to have the sale set aside which had a form of legal sale; that saisie revendication would have been improper against Jean B. Sénécal and would not have obtained justice against the Bailliff nor yet against Bourguignon and it was not Plaintiff's remedy against Sénécal and Daniel *their lessees.*

The Appellants argued that their action was *sui generis* not *complainte* nor *action possessoire* but one of the *Actions Pauliennes* of the Digest (Tom. 2, Bonjean pp. 163–164; Chardon tom. 2, p. 360) and they cited the following other authorities in favour of direct action as brought. Erskine's Prine. of Law of Scotland, p. 466.—Louisiana Rep. vol. 14, p. 191 and Condensed Rep. vol. 3, p. 577.—L. C. Rep. vol. 6, p. 489.

Against course by *saisie revendication* against Sénécal the purchaser, Merlin Rep. §1 No. 5,—and as against the lessees (Sénécal & Daniel) tom. 2 Bourjon p. 566:

Lafontaine, C. J., rendering Judgment said:

Les Demandeurs ont été déboutés de leur action sur une *défense au fonds en droit.*

Cette action était dirigée contre:

1o. Jean Baptiste Sénécal, sellier;

2o. Chrysologue Sénécal et François Daniel, imprimeurs associés;

3o. Isaac Bourguignon, imprimeur;

4o. Charles Lapierre, huissier.

Ci-suit un précis des allégués de la déclaration des Demandeurs:

1o. En vertu d'un Bref d'exécution émané de la Cour de Circuit, à la requête du dit Isaac Bourguignon contre les deux associés Sénécal et Daniel, le dit huissier Lapierre procéda, le 27 Février dernier, à 4 heures de l'après-midi, à la "boutique et bureau d'affaires" des dits associés, à saisir et prendre en exécution, comme appartenant à ces derniers, divers meubles, entre autres "une Presse à cylindre de Hoe & Co., de New-York, et tous ses appareils;"

2o. Le 9 Mars suivant, à midi et demi, le dit huissier procéda à la vente des effets ainsi saisis, et vendit le tout au dit J.-Bte. Senécal;

3o. La dite presse et ses appareils sont encore dans l'endroit où ils ont été ainsi saisis et vendus, et le dit J. B. Senécal prétend en être maintenant le propriétaire en vertu de cette prétendue vente;

4o. La dite presse et ses appareils étaient, avant et à la date des dites saisie

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et vente, la propriété des Demandeurs et l'est encore; les dits associés Senécal et Daniel n'en avaient la possession que comme locataires, les ayant pris à loyer des Demandeurs;

5o. La dite vente ainsi faite le 9 Mars, est nulle, étant faite *super non domino*, et étant, de plus, frauduleuse, ainsi qu'il appert par la simple inspection du procès-verbal de l'huissier, et encore parce que le dit J.-Bte. Senécal a fait faire la dite vente en secret, et sans en rien communiquer aux Demandeurs, bien qu'il connût tous leurs droits susdits.

6o. La dite vente a été faite contrairement à la loi, et sans avoir observé les formalités, et sans que les Demandeurs aient eu aucune connaissance qu'elle allait avoir lieu, ce qui a été cause qu'il n'y a pas eu réellement de compétition à cette vente; tout avait été arrangé d'avance par fraude par les Défendeurs et l'huissier (à l'exception du dit Bourguignon); le dit J. B. Senécal avait acheté le tout pour presque la somme exacte due au saisissant, avec intérêt, frais et frais subséquents; tandis que les dits effets vendus, s'il y avait eu compétition libre et ouverte, l'eussent été pour £1000, et au-delà, et les quatre premiers items l'eussent été pour £750, la dite presse à cylindre, seule, valant £650; la dite vente a, de plus, été faite à une heure inaccoutumée, savoir, à midi et demi, et lorsque les ouvriers de Senécal et Daniel étaient absents à leur dîner, lesquels ouvriers ou quelques-uns d'eux auraient pu enchérir, ou auraient pu en avertir les Demandeurs; la dite vente a été faite d'une manière précipitée par l'huissier qui prêtait son aide aux dits associés Senécal et Daniel, de telle sorte que la vente a été finie dans une demie-heure, et avant que les ouvriers fussent de retour de leur dîner; aucun pavillon ne fut exposé à la porte de la maison; le dit J. Bte. Senécal, l'acheteur, est le frère du dit Chrysologue Senécal, et savait que les Demandeurs étaient alors les créanciers, comme en effet ils l'étaient, des dits associés Senécal et Daniel, à un fort montant, savoir, £500, et savait aussi que la dite presse à cylindre appartenait aux Demandeurs, et que les dits Senécal et Daniel n'en étaient que les locataires; et cependant il ne donna aucun avertissement aux Demandeurs; et depuis la vente, il a loué tout ce qu'il a ainsi acheté, aux dits Senécal et Daniel, à vil prix, et il est de plus sous l'obligation de leur en faire cession à demande, sur le remboursement de son prix d'achat. Enfin, il y a eu fraude et collusion entre les Défendeurs (à l'exception du dit Bourguignon), et c'est en conséquence de cette fraude et de cette collusion que les dites saisie et vente ont eu lieu, de manière que c'est sans droit et sans titre que le dit J. B. Senécal prétend maintenant être le propriétaire de la dite presse.

7o. Les Demandeurs concluent à être déclarés propriétaires de la dite presse, à la nullité de sa saisie, vente et adjudication, etc., etc.

Les Défendeurs ont plaidé séparément, à l'exception des associés Senécal et Daniel qui se sont joints dans leur défense. Chaque plaidoyer contient une défense en droit et une défense en fait. Il ne s'agit, pour le moment, que des défenses en droit. Il suffit de relater les raisons données à l'appui de celle du dit J. B. Senécal; les voici:

"1o.—Parceque les dits demandeurs n'allèguent pas sous quelles conditions ils se réputent propriétaires de la Presse à Cylindre avec les appareils en ques-

tion, si c'est comme associés, comme propriétaires indivis ou autrement, et ne font voir aucun rapport légal entre eux pour se porter comme tels propriétaires, et porter la présente action."

"2o.—Parcequ'il n'existe pas, sous notre droit, de telle action qu'une demande en nullité de décret en matière mobilière."

"3o.—Parceque la nullité d'une vente forcée d'objets mobiliers ne peut être l'objet d'une action directe, comme la présente."

"4o.—Parceque les dits Demandeurs alléguant eux mêmes en leur dite Déclaration que la vente mentionnée comme ayant eu lieu le neuf Mars dernier, de la dite "Presse à Cylindre de Hoe & Co., de New-York, et tous ses appareils," est nulle et de nul effet, la présente action ne peut avoir aucun objet légal, et les dits Demandeurs n'avaient et n'ont aucun intérêt à la porter sous la forme actuelle."

"5o.—Parceque la nullité absolue de la dite vente alléguée par les dits Demandeurs n'ayant pu avoir l'effet légal de les déposséder de leur titre de propriété, la présente action ne pouvait compéter en leurs personnes."

"6o.—Parceque les dits Demandeurs n'alléguant pas une fraude concertée entre les dits Défendeurs, les dits Demandeurs ne pouvaient légalement porter leur action contre différentes personnes, contre lesquelles ils n'allèguent aucun lien commun d'action."

Le jugement n'est pas motivé; le Juge s'est contenté de dire: "Maintient les dites défenses en droit plaidées par les dits Défendeurs respectivement, en conséquence déboute l'action des Demandeurs, avec dépens distraits en faveur de Messieurs Doutre et Daoust, avocats des dits Défendeurs."

Il me semble que le jugement est erroné; les défenses en droit n'auraient pas dû être maintenues, ni l'action déboutée *in limine*. Les allégués de la déclaration sont suffisants pour justifier l'action et les conclusions, s'ils sont établis en fait. Une vente faite en apparence sous forme de justice, mais réellement faite par fraude et collusion, comme les Demandeurs prétendent que celle-ci l'a été, n'est pas plus exempte d'être attaquée par un tiers, victime de cette fraude et de cette collusion, que tout autre vente frauduleuse. Il ne doit pas être permis de dépouiller ainsi un tiers de sa propriété. Celui-ci doit avoir un moyen de se faire rendre justice. "Ce n'est pas seulement par des actes," dit *Chardon*, no. 62, "c'est aussi dans des instances et par des jugements concertées, que par fois la fraude parvient à se préparer les moyens de nuire à des tiers; quelle que soit la surveillance du ministère public et des Juges, trop souvent ce scandale se renouvelle dans les tribunaux." (1) Ces actes judiciaires ainsi entachés de fraude, peuvent, dans certains cas, être attaqués par la tierce opposition. Dans d'autres, on peut employer la voie directe pour exercer cette action.

Capmas, "de la révocation des Actes", p. 100 no. 66; "Il n'est donc pas douteux que l'action paulienne s'applique, chez nous, même aux jugements qui dépouilleraient le débiteur, et qu'il aurait laissé rendre contre lui, en colludant avec ses adversaires." p. 104, no, 73.

(1) Merlin, aux mots "Opposition (Tierce)" §. 2.

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"L'action paulienne peut être intentée contre tous ceux qui ont traiteo avec le debiteur de mauvaise foi, qui ont coopero avec lui, d'une maniere quelconque, à l'acte argué de fraude, ou seulement qui ont profité de cet acte, qui y ont trouvé l'occasion d'un gain injuste." L'action paulienne étant donnée contre un jugement argué de fraude, il y a la même raison de la donner contre une vente par exécution, mise à effet par fraude et par collusion, de manière à dépouiller injustement un tiers de sa propriété.

The Judgment in Appeal was recorded as follows:

"La Cour, &c. 1o. Considérant que les allégués de la déclaration des Demandeurs sont suffisants en loi pour justifier leur action et leur en faire adjuger les conclusions s'ils sont établis en fait, que par conséquent toutes les défenses au fonds en droit plaidées respectivement par les Défendeurs sont mal fondées, et que partant dans le jugement dont est appel qui maintient les dites défenses au fonds en droit et déboute les Demandeurs de leur action, il y a mal jugé; Infirme le susdit jugement, savoir le jugement rendu le vingt-neuvième jour de mai dernier, par la Cour Supérieure siégeant à Montréal, avec dépens contre les Intimés sur le présent appel; et cette Cour procédant à rendre le jugement que la dite Cour Supérieure aurait dû rendre, rejette toutes les dites défenses au fonds en droit, avec dépens, et ordonne que le dossier soit remis à la dite Cour Supérieure siégeant à Montréal."

Judgment reversed.

Mackay & Austin, for Appellants.
Doutre & Daoust, for Respondents.
(R. M., J. D. & F. W. T.)

COUR SUPERIEURE.

MONTREAL, 4 MAI 1852.

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

No. 923.

Exparte *George Hart.*

Req. Sentence de Ratification de titre et *Divers Opposants.*

Jugé:—Que l'acquéreur n'est point tenu de déposer l'intérêt du prix de son acquisition pour obtenir une sentence ou jugement de ratification et la purge des hypothèques affectant sa propriété.

Le requérant George Hart, dont la requête fut produite le 1er octobre 1849 ayant acquis le 4 août 1847, la propriété dont il demandait ratification de titre pour la somme de £100 payable avec intérêt; fit motion le 21 octobre 1851 pour qu'il lui fût donné acte du dépot qu'il faisait alors de la somme de £100 avec intérêt. Cette motion dont avis fut donnée à tous les Opposants, est comme suit: "Motion on behalf of the said Applicant for act of the deposit herewith made by the said George Hart in Court of the sum of £100 Currency, being the amount set forth as the purchase money of the land set forth and described in the deed fyled in this cause, with interest." Nonobstant cette motion, George Hart ne déposa que la somme de £100 sans intérêt.

Le 12 avril 1852, Françoia Perrin un des opposants fit motion, "qu'attendu "que le dit requérant en cette cause n'a réellement déposé en cette cause que "la somme de cent louis courant, montant de son prix d'acquisition en principal

" sans déposer l'intérêt sur icelle somme depuis le jour de son acquisition à " venir au jour de son dépôt en cette cause, savoir depuis le 4 août 1847 au 21 " octobre dernier suivant le certificat ci-annexé, lequel intérêt se monte à la " somme de £25 5s. 8d., quoique par la loi il était tenu de ce faire et que par " sa motion faite en cette cause le vingt-et-un octobre dernier il a demandé acte " du dépôt de la dite somme de £100 courant avec intérêt, comme s'il eut " déposé l'intérêt sur son dit prix d'acquisition tandis que le dit Requérant n'a " déposé que la somme de £100 courant, et partant n'a pas déposé tout son " dit prix d'acquisition; le dit prétendu dépot fait en cette cause le vingt-et-un " octobre 1851 soit déclaré irrégulier, nul et de nul effet et comme non-avenu " le tout avec dépens." Après audition; cette motion fut renvoyée sur le principe qu'un acquéreur n'est pas obligé par le statut provincial 9 Geo., 4 ch. 20 de déposer l'intérêt de son prix d'acquisition.

Le jugement est motivé comme suit:

" The Court having heard the Opposant François Perrin and the Petitioner " George Hart, by their Counsel, upon the motion of the said François Perrin " of the 12th April last, that the deposit of £100 currency, made by the said " Geo. Hart, as price of the land, be declared irregular, inasmuch as the inter- " est stipulated by the deed and to be paid, is not also deposited, examined the " proceedings and having deliberated, *considering that the Interest on the said* " *sum of* £100 *is no part of the price of the said land*, doth dismiss the said " motion with costs."

A. et G. Robertson pour Geo. Hart.

P. R. Lafrenaye, pour François Perrin.

Vide 5 L. C. Rep., p. 390, *Ruston* vs. *Blanchard*.

P. R. L.

MONTREAL, 24 OCTOBRE 1858.

EN VACANCE.

Coram C. MONDELET. J.,

No. 554.

Macdonell, et al., *vs. Collins.*

LOCATAIRE—EXPULSION.

Jugé,—qu'un locataire qui ne doit qu'un seul terme de loyer peût être expulsé en vertu de la 18 Vic. ch. 106 sec. 2 par. 4.

Le Défendeur ayant été poursuivi en vertu de l'acte des locateurs et locataires pour quitter les lieux loués sur l'allégué qu'il était dû aux Demandeurs £52 10s. montant du quartier de loyer échû le 1er août 1857 en vertu d'un bail notarié reçu devant Mtre. Isaacson le 17 Janvier 1857 et n'ayant pas contesté, la cause fut inscrite au mérite *ex parte.*

La seule question qui fut soumise à la considération de la cour était de savoir: si un locataire pouvait être expulsé faute de paiement du loyer pour moins de trois termes.

Le jugement fut rendu en faveur des Demandeurs, mais il n'est point motivé.

A. & G. Robertson, pour les Demandeurs.

Lafrenaye & Papin, pour le Défendeur.

(P. R. L.)

MONTREAL, 29 MAI 1858.

Coram C. MONDELET, J.,

No. 18.

Lacroix vs. *Prieur.*

MAISON—ACHETEUR—LOCATAIRE.

Jugé:—1o. Que l'acquéreur d'une maison vendue par décrêt a un droit d'action contre l'occupant pour loyer par suite de son occupation de cette maison lors et depuis le décret;—

2o. Que l'occupant qui a enlevé les meubles garnissant la maison pour les transporter ailleurs et qui a dégarni les lieux, doit être condamné au paiement du loyer de l'année entière.

Dans cette cause le Demandeur a poursuivi le Défendeur, le 2 septembre 1857, pour la somme de £32 9s. 6d., savoir: £30 pour le loyer de l'année devant expirer le 1er Mai 1858, et £2 9s. 6d., pour les cotisations imposées sur cette propriété par la corporation de Montréal pour l'année alors courante.

Le Demandeur alléguait: que le Défendeur a occupé depuis le 1er Mai dernier, au douze du même mois à titre de locataire et avec la permission de dame Amélia Hopper, veuve Stevens, de cette cité, une maison en briques à deux étages; a raison de £36 par année de loyer payable chaque mois, et les cotisations.

Que la valeur annuelle de la dite maison et dépendances, [illegible]upées par le Défendeur était et est encore d'au moins la dite somme de [illegible] courant par année, et les cotisations imposés sur icelles par la corporation de Montréal, pour l'année courante, lesquelles cotisations se montent à £2 9s. 6d., courant.

Que le dit jour douze Mai dernier le Demandeur a acquis la dite maison du Shérif du district de Montréal à une vente qu'en a faite ce dernier en vertu d'un bref de *Venditioni exponas* émané de cette cour contre la dite Dame Amélia Hopper, à la poursuite de "The Trust and Loan Company of Upper Canada." Que le demandeur est en conséquence de la dite acquisition subrogé en tous les droits de propriété de la dite dame Stevens sur la dite maison, et les loyers d'icelle à compter du dit jour 12 Mai dernier.

Que le défendeur a continué d'occuper la dite maison avec la permission du demandeur et n'a payé aucune partie du loyer d'icelle au demandeur, et que le ou vers le 27 août dernier, et depuis, le dit défendeur a enlevé tous les meubles et effets qui servaient à garnir la dite maison pour sureté du loyer d'icelle, et les a transportés dans une autre maison.

Que la dite maison sus désignée en premier lieu est maintenant complétement dégarnie et abandonnée par le défendeur qui refuse de la garnir et meubler conformément à la loi ou de payer au demandeur le loyer d'icelle maison que par la loi et les conventions entre lui et la dite dame Stevens, le dit défendeur est tenu de payer au Demandeur à compter du douze Mai dernier jusqu'au 1er Mai prochain.

Le Demandeur concluait à l'émanation d'un writ de Saisie Gagerie par droit de suite et au paiement de la susdite somme de £32 9s. 6d.

Le Défendeur a plaidé à cette action une exception et une défense au fonds en fait. Son exception est en substance comme suit: Que le 5 Mai 1857, la dite dame Hopper déclara au défendeur qu'elle allait mettre fin à la saisie de la

dite maison en payant le montant de la créance pour laquelle la saisie arrêt avait été faite ou que du moins elle trouverait moyen de faire acheter cette maison pour elle par l'entremise de quelqu'ami, et là et alors, le dit jour 5 Mai 1857, la dite dame Hopper loua au défendeur acceptant, la maison en question pour l'espace de temps qui devait s'écouler de ce jour là au jour de la vente de telle maison sur le pied de £3 par mois sans autre charge et il fut là et alors convenu entre la dite Dame Hopper et le défendeur, que si elle (la dite dame Hopper) devenait acquéreure de telle maison au décrêt, qu'alors et dans tel cas le défendeur pourrait continuer à l'occuper à raison de £3 par mois, mais que si elle ne devenait point acquéreure que lui (défendeur) aurait à faire ses conditions avec l'acquéreur, et il fut convenu que si la dite dame Hopper devenait acquéreure à décret elle n'aurait au reste droit à £3 par mois qu'en construisant en arrière de la maison une cuisine pour l'usage du Défendeur, et que sans celà le Défendeur pourrait quitter les lieux.

Que le Défendeur a pris possession de la maison en question le 5 Mai 1857 et l'a occupée jusqu'au 12 du même mois époque à laquelle le Demandeur en est devenu propriétaire.

Qu'aussitot après que le Demandeur fut ainsi devenu propriétaire, le Défendeur s'est adressé à lui pour obtenir un bail des lieux, mais que le Demandeur a refusé en disant qu'il pensait ne point rester propriétaire.

Que le Défendeur a occupé la dite maison jusque vers le 27 août 1857 et qu'en les quittant, savoir: le ou vers le 30 août 1857 et avant l'institution de la présente action, il a offert au demandeur, en espèces légales et à deniers découverts, en la cité de Montréal, en présence de témoins une somme de onze livres courant pour trois mois et vingt jours de jouissance et occupation de la dite maison, savoir: pour jouissance depuis le 12 Mai 1857 inclusivement au 1er Septembre de la même année, mais que le Demandeur à refusé d'accepter tels offres en disant qu'il avait droit à une année de loyer.

Que la valeur de la jouissance et occupation de la dite maison n'a été aux dites époques tout au plus que de £3 (1) par mois et que même cette somme était trop élevée, vû que cette maison était pour ainsi dire inhabitable à raison de sa mauvaise construction et de la quantité d'eau qui s'accumulait constamment dans sa cave.

Que le Défendeur n'a point loué la dite maison pour une année ni de la dite Amélia Hopper ni d'aucun autre.

Que de l'exposé ci-haut il résulte en loi que lui (défendeur) ne peut être sujet au paiement d'une année de loyer de la dite maison, mais que le seul montant qu'il soit obligé de payer est celui dè la jouissance et occupation de la dite maison pendant l'époque susdite.

En conséquence le Défendeur conclut à ce que ses offres soient déclarées bonnes et valables pour le montant desquelles il était prêt à confesser jugement en faveur du Demandeur, mais avec dépens contre ce dernier et au cas de refus au renvoi de l'action.

Le Défendeur ayant donné des admissions quant au titre d'acquisition du Demandeur et quant au fait que lui le Défendeur avait quitté la maison le 27

(1) Sic.

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août 1857, le Demandeur examina comme témoin dame Amelia Hopper qui prouva que le Défendeur avait occupé la maison depuis le 1er Mai 1857, qu'il l'avait dégarnie vers la fin d'août 1857 et que la valeur de son occupation par année était de £36.

Sa déposition fut admise par le Défendeur comme valant celle de deux témoins.

Le Demandeur ayant admis que le Défendeur lui avait fait les offres en question le 30 août 1857, ce dernier examina deux témoins qui prouvèrent que l'occupation de la maison pouvait valoir annuellement £27.

La cour par son jugement a maintenu le droit d'action du Demandeur et lui a donné jugement pour le montant entier du loyer pour l'année expirant le 1er Mai 1858. Son action avait été émanée le 2 Septembre 1857.

Le jugement est motivé comme suit: "considérant que le Demandeur a fait preuve des allégués essentiels de sa déclaration, et nommément que le Défendeur a occupé, suivant et comme il l'allègue, l'héritage décrit en sa déclaration, considérant de plus que le Demandeur est en droit de réclamer du Défendeur *le loyer du dit héritage pour l'année entière*, attendu que le Défendeur a dégarni les lieux, et à transporté les meubles et effets mobiliers qui garnissaient la maison par lui occupée et décrite en la déclaration du Demandeur en une autre maison laquelle est aussi décrite en la déclaration du Demandeur, condamne le Défendeur à payer au Demandeur la somme de £30 du cours actuel pour le loyer de l'année expirée le 1er Mai 1858, avec intérêt sur la dite somme à compter du 3 septembre 1857, jusqu'à l'actuel paiement et aux dépens.

Cherrier, Dorion & Dorion, pour le Demandeur.

Leblanc & Cassidy, pour le Défendeur.

(P. R. L.)

COUR DE CIRCUIT.

MONTRÉAL, 10 NOVEMBRE 1858.

Coram C. Mondelet, J.

No. 2883.

Deslongchamps, père, et al., vs. *Payette dit St. Amour.*

OCCUPATION SANS BAIL—DURÉE.

Jugé.—Qu'en conformité aux dispositions de la 16me. Clause de l'acte des Locateurs et Locataires de 1855, 18 Victoria, ch. 105, une personne qui a occupé sans bail une maison ou partie de maison depuis le 1er Mai est tenue au paiement du loyer annuel jusqu'au 1er de Mai de l'année suivante.

La présente action était portée pour £9. 0. 0. "balance restant due pour "l'usage des prémisses abandonnées sans raison ni permission." Le Demandeur alléguait:

"Que le Défendeur du consentement et avec la permission des Demandeurs "a occupé à compter du 1er Mai 1858 à venir au dernier juillet 1858 à raison "d'une livre par mois un haut de maison, etc., et qu'il l'a laissé quoiqu'il dût "l'occuper jusqu'au mois de Mai 1859, etc., etc., sans raison ni permission."

"Que la valeur du loyer pour l'usage et l'occupation, etc., est de £12 par "an." Les Demandeurs alléguaient qu'ils avaient reçu £3. 0. 0. à compte, savoir, pour les mois de mai, juin et juillet.

Cette demande était accompagnée d'une saisie-gagerie qui eut lieu par droit de suite.

Le Défendeur plaida une défense au fonds en droit et une dénégation générale. Les parties furent entendues tant sur la défense en droit qu'au mérite le même jour. Cette défense en droit contenait les propositions suivantes pour repousser l'action des Demandeurs :

Deslongchamps vs. Payette

1o. Parce que les Demandeurs n'allèguent point qu'ils étaient ou soit les propriétaires, ou principaux locataires du haut de maison en question.

2o. Parce que les dits Demandeurs n'allèguent point soit un bail verbal ou autre, soit une promesse ou engagement du Défendeur d'occuper le dit haut de maison, pendant un temps quelconque, et les conditions.

3o. Parce que les dits Demandeurs alléguant eux mêmes que le dit Défendeur leur a payé le montant du loyer qu'il devait donner pour l'occupation qu'il a eu du dit haut de maison, ce dernier ne devait rien aux dits Demandeurs, et c'est à tort, illégalement et sans droit que les dits Demandeurs ont fait émaner la saisie-gagerie et l'action qu'ils ont émanées et instituées.

A l'enquête, les Demandeurs ont prouvé l'usage et l'occupation des prémisses, la valeur annuelle de cette occupation et l'abandon qu'en fit le Défendeur le dernier jour de juillet dernier.

La Cour s'appuyant sur la 16me. Clause du Statut Provincial 18 Vict., ch. 108 rendit jugement pour 6 jours de loyer, savoir, pour le loyer depuis le dernier jour de juillet jusqu'au 6 août; jour de l'émanation du writ de saisie-gagerie, et la saisie-gagerie fut déclarée bonne et valable avec dépens.

Archambault & Dukamel, pour les Demandeurs.

De Bleury, pour le Défendeur.

(P. B. L.)

MONTREAL, 7 DECEMBRE 1858.

EN VACANCE.

Coram BADOLEY, J.

No. 978.

Healy vs. Labelle.

LOYERS—EXPULSIONS.

Jugé.—Qu'un locataire ne peut pas être expulsé en vertu de la 18 Vic. ch. 108 sec. 2 par. 4 sur le principe qu'il ne paie pas son loyer conformément aux conditions du bail.

Le Défendeur; à la demande en expulsion dirigée contre lui en cette cause sur le principe qu'il devait à la Demanderesse la somme de £15. 8s. 4d. courant, étant la balance de son loyer échu depuis le 1er Mai 1858 au 1er août 1858, à raison de £4 3s. 4d. par mois en vertu d'un bail notarié; opposa une exception dont les termes sont comme suit: "And the said Defendant for exception saith, that the action of the plaintiff as instituted cannot be maintained and that the said Defendant cannot be compelled to answer because he, the said Defendant says, that the action and demand of the said plaintiff is in fact a demand or action to recover the rent by her alleged to be due by the said Defendant, and is not as is required by law, a demand or action for the rescision of the lease, or the recovery of the possession of the said leased premises, in any of the cases provided for by law, as in a demand for rent joined to either of the aforesaid remedies; and that the said demand and action as brought is *primarily* for

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the recovery of rent, which said action and demand cannot by law, be brought or entertained."

La Demanderesse ayant répondu en droit à cette exception; après audition la cour renvoya la réponse en droit de la Demanderesse sur le principe que les allégués de sa déclaration n'étaient pas suffisants pour lui donner le droit d'expulser son locataire, mais elle lui permit d'amender sa déclaration en y ajoutant comme cause de la rescision du bail; que le Défendeur ne garnissait pas les lieux loués suffisamment pour en assurer le loyer.

Cet amendement ayant été fait le 15 Novembre 1858, le Défendeur plaida encore la même exception qui fut renvoyée sur une autre réponse en droit de la Demanderesse. Le jugement qui renvoie cette exception est comme suit:

"The court considering that the Plaintiff's amended declaration discloses on "its face a sufficient ground for proceeding in ejectment against the Defendant "doth dismiss the Defendant's Exception fyled in this cause with costs."

Doherty, pour la Demanderesse.

DeBleury & Bourgeau, pour le Défendeur.

(P. R. L.)

COUR SUPERIEURE.

MONTREAL 28 NOVEMBRE 1857.

Coram SMITH, J.

No. 462.

Beaudry vs. *Papin, and Papin*, opposant.

PROCÈS PAR JURÉS—FRAIS.

Jugé,—1o. que les frais encourrus sur le verdict d'un Jury qui a été mis de côté, ne sont pas à la charge de la partie qui a obtenu ce verdict en sa faveur.

2o. Que dans un tel cas, la partie contre laquelle le verdict a été rendu, est généralement condamné aux frais du premier procès.

Le 29 juillet 1857 un bref de saisie-exécution fut émané de la Cour Supérieure siégeant à Montréal contre les biens-meubles du Défendeur pour £99 1s. 2d. que les avocats du Demandeur reclamaient par distraction de frais en vertu d'un jugement rendu par la Cour du Banc de la Reine le 12 Mars 1857 renversant le jugement de la Cour Supérieure, mettant de côté le verdict du jury, ordonnant un nouveau procès, condamnant le Défendeur aux frais de l'appel et ordonnant de plus qu'il paierait les frais en Cour Supérieure, sans mentionner quels frais.

L'action du Demandeur était pour dommages personnels et le jury rendit un verdict contre lui.

Le Demandeur ayant fait motion pour obtenir un nouveau procès, prétendant que le verdict était contraire à la preuve, la Cour Supérieure rejeta sa motion et conformément au verdict débouta le Demandeur de son action. En appel ce jugement fut cassé.*

Cette motion pour un nouveau procès ne réclame aucun dépens.

La principale question était une question d'interprétation du jugement de la Cour du Banc de la Reine quant aux *frais en Cour Supérieure* que le Défendeur avait été condamné à payer.

* Vide 1 L. C. Jurist p. 114.

Le 28 juillet 1857, le Défendeur fit offres par acte notarié de la somme de £51 8s. 10d. montant des frais de l'appel et de plus 13s. 8d. étant les frais sur la motion.

Ces offres furent refusées et le Demandeur ayant fait taxer ses frais, fit émaner une saisie exécution.

Le Défendeur forma une opposition afin d'annuller et déposa le montant de ses offres.

Cette opposition ayant été contestée, après audition, elle fut maintenue, ces offres furent déclarées suffisantes et la saisie fut déclarée nulle.

SMITH, J.—The question raised by the opposition fyled in this cause rests on the interpretation to be given to that part of the Judgment rendered in this cause in appeal, concerning costs:—

A tender of £52 2s. 6d. has been made by the opposant being the amount of the costs in appeal and costs of motion.

This tender accompanies the opposition.

In looking at the Judgment of the Court of Appeals there is to be found no distraction to cover the costs below.

Then as to the true meaning of the words contained in the Judgment rendered in appeal it is necessary to enquire.

That Judgment is rendered in appeal concerning two Judgments rendered in the Court below.

Now what are the costs stated in the Judgment rendered in appeal as to costs. Upon what principle would the Court above intend to give costs anterior to the new trial? Upon the motion for a new trial that Court could only give such costs as the Court below would have given anterior to the period mentioned in Appeal.

Supposing that a new trial had been ordered by the Superior Court reversing the verdict of the Jury, what would have been the costs then?

Upon the law of new trials, scarcely a case is to be found where upon a mere error of the Jury, the costs of the first trial are to be borne by the successful party.

In no part of the world where trials by Jury are understood, have the costs of the first trial be thrown upon the successful party.

In England in such a case as this one, the Plaintiff would have paid the costs upon the granting of a new trial.

Several cases in England and the United States reported in the Books, show that where this is error as mentioned in the *considerants* of the Judgment rendered in appeal; wherein it is stated that the Jury has not properly weighed the evidence, the Plaintiff pays the costs.

I would not have granted a new trial without the Plaintiff paying the costs.

I may mention here that the original motion did not ask for costs at all. The tender is declared good and valid, and the opposition is therefore maintained with costs.

Le jugement est motivé comme suit:

"The Court having heard the plaintiffs, "par distraction de frais", and the opposant by their counsel upon the merits of the contestation by the plaintiffs

Beaudry vs. Papin.

"par distraction de frais" of the opposition of the opposant; having examined the proceedings and proof of record, and having deliberated thereon; considering that the said opposant in this cause hath fully established the material allegations of his said opposition, and that the said plaintiffs "par distraction" had no right to take, in execution, the goods and chattels of the said opposant for any larger or greater sum than the costs awarded in and by the Judgment rendered in the Court of Queen's Bench, Appeal side, and considering that by the said Judgment the costs awarded to the said plaintiffs "par distraction" were such costs only as were incurred subsequently to the motion for a new trial, which said motion had been refused by the Court below;

And considering that the said Judgment in Appeal reverses, the said Judgment in the Court below without any mention whatever of costs as regards the said motion, and considering that the proceedings in the Court below are only by the said Judgment reversed from the time of the rendering of the Judgment by the Court below on the said motion for a new trial; and further considering that by the said motion in the Court below no costs whatever are asked or demanded by the said Plaintiffs in the Court below; the Court doth reject the contestation of the said Plaintiffs "par distraction" and doth declare the offer made by the said opposant before the issuing of the said writ of execution *de bonis*, and subsequently reiterated in and by the said opposition to be good and valid; and doth maintain the said opposition and doth condemn the said Plaintiffs, "par distraction" to pay the costs of the said opposition."

Ouimet, Morin & Marchand, for Plaintiff.

LaFrenaye, for Defendant, and Oppt.

(P. R. L.)

MONTREAL, 30 AVRIL 1858.

Coram SMITH, J.

No. 1986.

Bourassa v. *Bédard.*

TESTAMENT—NOTAIRE—ECRITURE.

Jugé.—1o. Que le notaire qui reçoit un testament solennel n'est point tenu en Canada de *faire mention* qu'il a écrit le testament.

2o. Que l'on peut aliéner par testament nonobstant la défense d'aliéner de son vivant.

Le Demandeur poursuivait la Demanderesse en reddition de compte et partage des biens de la communauté qui avait existée entr'elle et feu François Bourassa fils dont le seul et unique héritier était le Demandeur son père.

La Défenderesse contesta cette action par une exception peremptoire au moyen de laquelle elle alléguait le testament solennel de feu son mari, reçu le 19 janvier 1856 par devant Mtre. Beauvais, notaire public, et deux témoins, et par lequel testament il l'avait instituée sa légataire universelle et l'avait nommée son exécutrice testamentaire. Elle alléguait que comme ayant été commune en biens avec son époux décédé et en sa qualité d'exécutrice testamentaire, elle s'est trouvée saisie du jour de son décès de tous ses biens meubles et immeubles.

Le Demandeur répondit spécialement que ce testament était nul, vû qu'il

n'y appert pas qu'il ait été écrit par le notaire ou par son clerc en sa présence et sous sa dictée et qu'en loi l'absence de cette déclaration le rendait nul.

Par sa réponse spéciale le Demandeur alléguait de plus, que quand bien même que ce testament serait déclaré valable, cependant il ne pourrait valoir au profit de la Défenderesse, quant à ce qui concerne l'immeuble décrit en la Déclaration, vû que par la Donation que le Demandeur avait fait de cet immeuble le 22 Octobre 1827, au mari de la Défenderesse, il était expressément convenu que cet immeuble ne pourrait en aucune façon être aliéné par le Donataire ou engagé pendant la vie du Demandeur et de son épouse, et que conséquemment feu François Bourassa fils n'avait pu transmettre cet immeuble à la Défenderesse par son testament.

La Défenderesse cita les autorités suivantes :—

Sur la proposition que le notaire n'est point tenu de faire *mention* qu'il a écrit le testament, (il suffit qu'il l'ait écrit).

POTHIER,—Cout : d'Orléans, Tit. XVI, No. 14, *in fine.*

FERRIERE,—4 Grand Com. tit. 14, art. 289, Glose 5, no. 6, p. 106. Ibidem, obser. de M. le Camus sur l'art. 289, no. 1, p. 131. L'ord. de 1735 qui avait abrogé plusieurs formalités requises par les Coutumes pour la validité des testaments, n'exigeait point cette mention.

POTHIER,—Don. Test. ch. 2, art. 3, par. 1.

Ce n'est que depuis la promulgation du Code Napoléon que cette mention est exigée ;—l'art. 972 l'exige à peine de nullité.

Sur la proposition que l'on peut aliéner par testament nonobstant défense d'aliéner de son vivant.

2 Vol. Furgole, p. 52, no. 72, des testiments, ch. 7, sec. 1.

La Cour après audition a débouté le Demandeur de son action.

Le jugement est motivé comme suit :

"The Court considering that the said Plaintiff hath failed to establish by legal and sufficient evidence the material allegations in his said declaration as set forth by him in his said action, and further considering that the said defendant hath fully established the allegations set forth in her said peremptory exception, namely, that by the last will and testament of François Bourassa duly made and executed before Beauvais notary public and two witnesses, she the said defendant was named and appointed the universal legatee of the said François Bourassa, as set forth in the said plea, and as such, entitled to have and possess the real and personal estate of the said François Bourassa under the provisions of the said will as the only true and lawful proprietor thereof, and further considering that the said Defendant cannot by reason of any matter or thing set forth and contained in the special answers of the said Plaintiff to the plea of the said Defendant, be debarred or prevented from having and maintaining the conclusions by her taken in her said plea, the Court doth maintain the said plea and doth dismiss the said action with costs."

Leblanc & Cassidy, pour le Demandeur.
Lafrenaye & Papin, pour la Défenderesse.

Action déboutée.

(P. R. L.

MONTREAL, 29 MAI, 1858.

Coram C. MONDELET, J.,

No. 330.

Bouthillier, vs. Turcot.

PENALITE—CLAUSE COMMINATOIRE.

Jugé:—1o. Que la pénalité portée dans un compromis n'est que comminatoire en loi.

2o. Que la partie en faveur de laquelle la sentence arbitrale a été rendue est tenu de prouver les dommages lui résultant de l'inexécution du compromis et de la sentence arbitrale.

Le Demandeur réclamait du Défendeur la somme de £200 montant de la pénalité portée dans un compromis intervenu entre eux sous seing privé par suite de l'inexécution de la sentence arbitrale qui avait été rendue par les arbitres choisis par eux. Le compromis et la sentence arbitrale ordonnaient la nomination d'un procureur pour liquider et régler définitivement les affaires de la société qui avait existé entre les parties. Par la sentence arbitrale il était enjoint aux parties de nommer le sieur Laforce leur procureur ou un autre à son refus.

Pour mettre cette clause de la Sentence Arbitrale à effet, les parties avaient reconnu par divers protêts et notifications, la nécessité de signer mutuellement une procuration en faveur du Sieur Laforce l'autorisant de régler avec les débiteurs de leur ci-devant société et pour fixer avec lui le quantum de sa commission sur la perception des deniers. Néanmoins le Défendeur refusa plus tard d'accomplir cette procuration en sorte qu'aucun procureur n'étant nommé par procuration spéciale, le Demandeur intenta son action pour le recouvrement de la pénalité alléguant le refus du Défendeur de se conformer à la sentence arbitrale.

Le Défendeur, par ses défenses prétendait que c'était le Demandeur qui mettait obstacle à l'accomplissement de la sentence arbitrale et qui se refusait à consentir cette procuration. Les parties ayant procédé à la preuve de leurs alléguées respectifs, la cause fut inscrite au mérite et la Cour renvoya l'action pour plusieurs motifs qui sont consignés dans le jugement, mais entr'autres sur le principe que la pénalité réclamée n'est que comminatoire.

Le jugement est motivé comme suit:

La Cour après avoir entendu les parties par leurs avocats sur le mérite de cette cause et sur la motion du Défendeur de 18 Mai courant que la déposition de François Xavier Laforce prise le 6 Avril dernier en cette cause soit rejetée de la procédure pour les raisons mentionnées en l'objection faite lors de l'examen du témoin, et qui a été réservée; avoir examiné la procédure, pièces produites et le témoignage et avoir sur le tout délibéré, rejette la dite motion et considérant que le Demandeur n'a pas fait preuve des allégués essentiels de sa déclaration et nommément que le Défendeur s'est refusé d'exécuter la sentence arbitrale dont il est question en cette cause, en mettant obstacle en refusant de donner les pouvoirs nécessaires au nommé Laforce suivant qu'il est allégué en la dite déclaration; Considérant qu'il n'est aucunement établi que tels pouvoirs fussent nécessaires pour autoriser le dit Laforce d'agir dans le sens et en exécution du compromis fait entre les parties en cette cause, et par conséquent que le

Défendeur est en défaut à cet égard ; considérant de plus que la pénalité de £200 pour le recouvrement de laquelle la présente action est intentée n'est en loi que comminatoire et que le Demandeur n'ayant fait preuve d'aucun dommage résultant de l'inexécution prétendue du dit compromis et de la sentence arbitrale à laquelle il a donné lieu ; la présente action ne peut être maintenue, déboute la dite action avec dépens.

Bouthillier vs. Turcot.

Lafrenaye & Papin, avocats du Demandeur.

Cherrier, Dorion & Dorion, avocats du Défendeur.

(P. B. L.)

MONTREAL, 29 MAI 1858.

Coram DAY, J.

No. 1705.

Faribault, vs. St. Louis, et al., *et la Compagnie du Richelieu*,

Demanderesse par reprise d'instance.

INCORPORATION—REPRISE.

Jugé.—Qu'une association qui, durant le procès a été incorporée par acte provincial, est bien fondé à reprendre l'instance comme corps incorporé.

Dans cette cause une compagnie non incorporée composée de plusieurs actionnaires et possédant des bateaux à vapeur avait actionné les Défendeurs pour la somme de £48 6s. 6d.

Depuis l'institution de l'action, cette compagnie étant devenue incorporée par l'acte 20 Vic. ch. 170, elle présenta une requête pour reprendre l'instance sous le nom de son incorporation.

A cette requête, les Défendeurs plaidèrent une défense au fonds en droit et une défense au fonds en fait.

La défense en droit, ayant été renvoyée, les parties procédèrent à la preuve.

Il fut établi en preuve que la Compagnie du Richelieu avait continué depuis son incorporation toutes les transactions et les affaires de la cidevant compagnie non-incorporée.

DAY, J. This is an application by the Richelieu Company to take up the *instance* as Plaintiffs in this cause.

The original Plaintiffs forming a Joint Stock Company have since the commencement of this suit, been incorporated by Act of Parliament and they now pray that the new Company should be allowed to take the place of the Plaintiffs.

The Defendants have objected, but it is a right which clearly belongs to the Petitioners.

By their Act of Incorporation it is declared that all the property, rights and actions belonging to the said Joint Stock Company shall be transferred to the Richelieu Company and that all debts and obligations should be acquitted and performed by the said corporation.

The Petition is therefore granted.

Lafrenaye & Papin, for Plaintiffs.

Cartier & Berthelot, for Defendant.

(P. B. L.)

MONTREAL, 30 JUIN 1858.

Coram SMITH, J.

No. 1842.

Trudeau et al. vs. Ménard.

Jugé.—1o. Que deux créanciers peuvent poursuivre ensemble pour le recouvrement de leur créance. (1)
2o. Qu'un contrat d'une nature exécutoire (a contract of an executory nature) ne peut pas être prouvé par témoins même sous l'empire de la jurisprudence française sans un commencement de preuve par écrit.

Cette action était intentée par deux commerçants non-associés pour l'inexécution d'une convention verbale intervenue le 1er Juin 1854 entre eux d'une part, et le Défendeur et un nommé Pierre Dugrenier d'autre part, et par laquelle convention ces derniers se seraient engagés et obligés conjointement et solidairement de faire et fournir aux Demandeurs dans le cours de l'hiver suivant, la quantité de deux cents cordes de bois de corde d'épinette à raison de 5s. 10d. par corde que les Demandeurs devaient leur payer, le dit bois livrable sur la ligne du chemin de fer du Grand Tronc au neuvième rang de la paroisse St. Simon (actuellement St. Liboire.)

Par acte reçu à St. Pie devant Mtre. Bachand et son confrère Notaires, le 9 Mai 1855, le Défendeur reconnut avoir reçu en diverses fois avant cette époque des demandeurs, diverses sommes de deniers au montant de trente-sept livres, dix chelins sur et à compte de ce contrat de bois consenti par le dit Défendeur et le dit Pierre Dugrenier, envers les dits Demandeurs, et attendu que les dits Ménard et Dugrenier n'avaient pas rempli leur contrat mais qu'ils devaient par après le remplir, suivant et conformément aux conventions intervenues entr'eux.

Le Défendeur et le dit Pierre Dugrenier ayant négligé d'accomplir les engagements qu'ils avaient ainsi contractés avec les Demandeurs, ceux-ci dans le cours du mois de décembre 1856 auraient consenti par convention verbale d'accorder au Défendeur le cours de l'hiver 1856-57 pour faire fournir et livrer aux demandeurs la dite quantité de deux cents cordes de bois qu'il promit fournir *en bois franc* à l'exception de dix cordes qui devaient être de bois d'épinette.

Le dit Défendeur ayant encore négligé de fournir et livrer aux demandeurs qui l'en avoient souvent requis; la dite quantité de bois, et ayant totalement failli à ses obligations résultant des dites conventions sus-mentionnées, les Demandeurs réclamaient £50 de dommages en sus des avances par eux faites. Les Demandeurs réclamaient en tout la somme de £87 10s., savoir: £50 de dommages et celle de £37 10s., par eux avancée au Défendeur.

Le Défendeur plaida par exception qu'il avait exécuté cette convention et de plus une défense au fonds en fait. Les Demandeurs ayant prouvé leurs allégués et admis par leurs réponses avoir reçu trente neuf cordes dont vingt cordes et un quart à 2s. 6d., la corde, la cause fut inscrite pour audition au mérite en Mai 1858. Le 27 Mai 1858 son honneur le juge Mondelet ordonna une nouvelle audition sur la question de savoir: si les Demandeurs avaient le droit de se joindre pour porter une seule action.

La cause ayant été inscrite de nouveau pour audition au mérite en Juin 1858 le jugement fut rendu en faveur des Demandeurs que pour £36 4s., y compris

(1) Vide also L.C.R., 8th vol. p. 191 Stevenson et al., vs. Bisset.

£10 de dommages, vû que la preuve faite par les Demandeurs par témoins ne pouvoit pas être reçue sans un commencement de preuve par écrit, avec intérêt sur la somme avancée, du jour de sa réception par le Défendeur et les dépens. Trudeau vs. Ménard.

Cherrier, Dorion & Dorion, pour les Demandeurs.

Sicotte & Chagnon, pour le Défendeur.

(P. R. L.)

MONTREAL, 17 MAI 1858.

Coram DAY, J.

No. 1833.

Taylor, vs. Sénécal, et al.,

WRIT—DECLARATION.

Jugé,—Qu'il est nécessaire qu'un writ d'assignation accompagne la déclaration, nonobstant la comparution du Défendeur par procureur.

Cette action était portée pour le recouvrement d'un billet promissoire signé par les Défendeurs comme associés, qu'ils contestèrent par une exception de compensation.

La cause, ayant été inscrite au mérite, la Cour était sur le point de rendre jugement en faveur du Demandeur, lorsqu'elle s'aperçut qu'il n'y avait aucun bref de sommation.

PER CURIAM—Le Défendeur peut bien comparaître par son avocat sans avoir été assigné. Il n'est pas nécessaire que le Writ lui soit signifié pour autoriser son procureur à comparaître devant la Cour lorsqu'il ne désire pas se prévaloir de ce défaut.—Mais il faut absolument qu'un Writ soit émané de la Cour, pour lui donner jurisdiction.

Dans l'espèce, le Writ d'assignation n'étant pas produit, la cause est renvoyée du délibéré.

A. & G. Robertson, pour le Demandeur.

Archambault & Duhamel, pour les Défendeurs.

(P. R. L.).

MONTREAL, 30TH DECEMBER, 1858.

Coram BADGLEY, J.

No. 2614.

Walker v. *Burroughs and Burroughs Opposant.*

OPPOSITION—AFFIDAVIT—DATE.

Held,—That opposition *à fin d'annuller* dated after the making of the affidavit appended thereto must be set aside.

On the 26th Nov., 1858, Opposant fyled an opposition *à fin d'annuller* to an *alias* writ of execution against his lands. The affidavit followed the opposition and was written upon the same page. The affidavit was made at St. Andrews on the 24th November, while the opposition bore date at Montreal the 26th of said month, apparently two days after the making of the affidavit.

Plaintiff moved to set aside the opposition, on the ground that the affidavit did not apply to the opposition.

At the argument, the counsel for the opposant contended that the discrepancy

Walker v. Burroughs.

in the date of the opposition was not fatal, that it was evidently an error, that in fact the date of the opposition was without the affidavit only authenticated by the fyling of the opposition, and that so far as concerned its merits, the date was immaterial. In support of this view of the immateriality of the date, Counsel cited the case in the Superior Court, No. 1707, Wilson v. Pariseau, and Dalpé dit Pariseau opposant, in which there had been a similar motion made to set aside the opposition on the ground of the insufficiency of the affidavit. In the latter case the opposition was dated 7th September, 1857, the affidavit the 28th of same month, while the writ of execution was issued and the seizure made on the 16th of same month; the opposition being in fact dated nine days before the issuing of the writ of execution. The Court composed of Justices Smith, Mondelet and Badgley, by judgment 18th November of same year dismissed the motion. Another motion was made in the same case to set aside an opposition fyled by Dame Simard, which was also rejected 20th December, 1856, by Justices Day, Smith, and Mondelet. In the latter case the opposition was dated the day before the affidavit was made.

BADGLEY, J. dismissed the opposition, holding the irregularity in the date to be fatal, and that the cases sent up were inapplicable.

Abbott & Baker, for Plaintiff.
Cross & Bancroft, for Opposant.
(H. B.)

Opposition dismissed.

MONTREAL, 30TH MAY, 1857.

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

No. 726.

Gauthier v. *Boudreau et al.*

TUTOR TO A SUBSTITUTION.

Held:—That an action does not lie in favour of a Tutor, elected *en justice* to a substitution under a will, to have the enjoyment of the usufructuary declared forfeited, *en d'échéance d' usufruit.*

The declaration of the plaintiff set up the will of one Joseph Simard, whereby the usufruit of certain immoveable property was given to the defendants, as more fully declared in the declaration, that after the expiration of the usufruit, the property was to go to the children of defendants; that the defendants entering into the enjoyment of the property under the will, did not use it *en bon pere de famille*, but wasted it, whereby their rights as usufructuaries were forfeited; that the plaintiff, on the 6th January, 1855, was elected Tutor to the substitution created and established by the said will, conformably to law and had accepted said charge.

The plaintiff concluded among other things, that the defendants be declared to have forfeited their rights of usufructuaries, and that they be deprived of such rights, that the plaintiff *ès qualité* be in consequence declared incommutable proprietor of the said property without being subject to said usufruit; and that the plaintiff *ès qualité* be put into exclusive possession of said property, offering to pay the usufructuaries an annual sum in lieu of such usufruct.

Two of the defendants, Victor Boudreau and his wife by a first plea alleged *inter alia* that no substitution was created by the will of Simard, and that the

plaintiff had been wrongfully appointed Tutor to the pretended substitution, and that the *acte de tutelle* was null. By a second plea these defendants denied the allegations of plaintiff's declaration. Gauthier v. Boudreau et al.

The other defendants Desjardins and wife met the action by a *defense en fait.*

After evidence taken in the cause, it was heard on the merits, and judgment rendered by the Court.

DAY, J.—This was an action instituted by the tutor to a substitution against the *grevé* seeking the forfeiture of his right of enjoyment on the ground that he was committing waste and depredation. The court was stopped from entering into the merits of this case by the question whether the Plaintiff had any right in the quality assumed to institute such an action. The Court had no hesitation in saying he had not. The tutor to a substitution had merely to look to the taking of the inventory of the property *substitué* and the investment of the monies, but he had no right as a proprietor, and could not consequently call upon the Court to place the property in his hands. If any one has a right of action it is the *appelé.* The Court however declined to offer any opinion as to whether the *appelé* could succeed in an action in the present instance. Action dismissed without costs, the defendants having based their defence on wrong grounds.

The Judgment was recorded in the following words:—

„The Court having heard the parties by their Counsel upon the merits of this cause, examined the Proceedings and Evidence for Record, and having deliberated thereon, considering that the Plaintiff in his said quality of Tutor to the Substitution in his Declaration in this cause fyled, alleged, hath not by Law any right of action against the defendants for the causes, matters, and things in the said Declaration set forth,—doth dismiss the action of the Plaintiff without Costs. Action dismissed.

Leblanc & Cassidy, for Plaintiffs.

T. J. J. Loranger, for Boudreau *et uxor.*

Pominville, for Desjardins *et uxor.*

N.B.—In this instance there was no *appelé* born at the time of the institution of the action.

(F. W. T.)

CIRCUIT COURT.

MONTREAL, 17TH FEBRUARY, 1859.

Coram SMITH, J.

No. 53.

Morrin vs. Legault dit Deslauriers.

BILLET PROMISSOIRE EN BREVET.—ENDORSEMENT.

Held,—That a *billet promissoire en brevet* made before notaries, payable to a party or his order, is negotiable by endorsement in the ordinary way.

This suit was brought upon a *billet promissoire en brevet*, executed in notarial form before two notaries, without signature or mark, the defendant being unable to write, by which the defendant acknowledged himself indebted to one Kimpton in the sum of £15 18s., which he promised to pay said Kimpton or his order, for value received, in one year from date. The payee, by a transfer *sous seing privé* written upon the note, made it over to the plaintiff, who sued as holder.

The defendant pleaded that an instrument of such a kind was not a nego-

Morrin v. Legault dit Desnotarial to be valid.
lauriers.

tiable note, that the transfer was insufficient, and that it should have been

SMITH J.—The paper in question has all the requisites of a negotiable promissory note. It promises to pay, for value received, a certain sum of money to a party named, or his order, at a certain time. The assignment is complete, being equivalent to an endorsation.

Judgment for Plaintiff.

Snowdon & Gairdner for Plaintiff.
Leblanc & Cassidy for Defendant.
(W. F. G.)

COUR DU BANC DE LA REINE.

EN APPEL.

DU DISTRICT DE MONTREAL.

MONTREAL, 5 OCTOBRE 1857.

Coram Sir L. H. LAFONTAINE, Bart., J. en Chef, AYLWIN, J., DUVAL, J., CARON, J.

JEAN BRUNEAU,

(*Demandeur en Cour Inférieure,*)

Appelant.

ET

JOSEPH NAPOLEON CHARLEBOIS,

(*Tiers-saisi en Cour Inférieure,*)

Intimé.

TIERS-SAISI—DECLARATION—CONTESTATION—DELAI.

Jugé: Que par la règle de pratique, Numéro 98, on ne peut pas produire une contestation de la déclaration d'un tiers-saisi après le délai de huit jours.

Le 28 juin 1856 la Cour Supérieure de Montréal a rendu un jugement qui a rejeté les moyens de contestation opposés par l'Appelant à la Déclaration de l'Intimé, entre les mains duquel avait été pratiquée une saisie-arrêt. L'Intimé Charlebois, fit sa Déclaration affirmant ne rien devoir. Plus de huit jours s'écoulèrent sans contestation et ce ne fut qu'après l'expiration de ce délai, que l'Appelant, Demandeur en produisit une; sur motion de l'Intimé Charlebois, cette contestation fut rejetée comme ayant été produite trop tard.

La déclaration du Tiers-Saisi fut faite le 5 mai 1856, par laquelle il déclare n'avoir rien en sa possession appartenant à la Défenderesse et ne lui devoir aucune somme.

La contestation fut produite le 17 juin 1856.

Par une règle de pratique promulguée par la Cour Supérieure, il est déclaré:

That any party intending to contest the declaration of a Tiers-Saisi shall file his contestation within eight days from the making of the declaration of the Tiers-Saisi, if the attachment be an attachment after judgment; and if the attachment be an attachment before judgment then within eight days from the rendering of the judgment in the original cause.

Voir P. 29, règles de pratique, No. 98.

La Saisie-Arrêt était une Saisie-Arrêt après jugement, conséquemment aux termes de la règle de pratique ci-haut, la contestation produite après le délai de huit jours, était irrégulièrement produite.

Une motion fut faite de la part du Tiers-Saisi le 25 juin 1856, demandant le rejet de la contestation en s'appuyant sur cette règle de pratique.

Le 28 juin 1856 intervint le jugement dont est appel accordant la demande du Tiers-Saisi et rejetant la contestation.

Il y a dans la contestation de la déclaration du Tiers-Saisi une allégation dans les termes suivants:

Que les faits ci-dessus ne sont parvenus à la connaissance du Demandeur qu'aujourd'hui. Et vû la fraude du dit Tiers-Saisi il est recevable à produire la présente contestation.

L'Appelant dans son factum prétendait que la contestation qu'il avait produite sous ces circonstances et qui était basée entièrement sur les faits de fraude commis par le Tiers-Saisi, équivalant à une soustraction et recel des effets et valeurs de la débitrice de l'Appelant concertés entre elle et le Tiers-Saisi, le rendait recevable à venir critiquer la déclaration faussement donnée par le Tiers-Saisi, après le délai de huit jours assignés par les règles de pratique.

Il n'existe aucune loi que limite le tems dans lequel la déclaration d'un Tiers-Saisi faussement et frauduleusement donnée pourra être contestée. Dans l'absence d'aucune loi assignant tel délai, il n'est pas dans les attributions des tribunaux de pouvoir restreindre l'exercice d'un droit aussi important en assignant un délai fatal hors duquel il pourrait être exercé. Des règles de pratique ne peuvent jamais avoir un effet aussi étendu, qui est uniquement réservé au pouvoir législatif et si la lettre comporte tel sens, l'interprétation doit la limiter et même l'effacer.

Dans le cas même où la Cour croirait devoir assigner un pareil délai pour les contestations ordinaires, le Demandeur devrait au moins être mis en demeure de déclarer s'il conteste ou non, avant que le Tiers-Saisi puisse être reçu à opposer ou invoquer le délai prescrit comme objection à la production de telle contestation.

L'Intimé dans son factum énonçait ainsi ses prétentions:

Une règle de pratique faite par la Cour Supérieure, (la 98ème règle), fixe à huit jours le délai dans lequel cette contestation doit être produite. A ce jugement rendu en conformité de la règle, on objecta que cette règle est sans vigueur en autant qu'elle a été faite en contravention aux dispositions du droit commun, qui laisse libre pendant trente ans la contestation de la Déclaration d'un tiers-saisi. Quelques praticiens en effet émettent cette doctrine que le tiers-saisi est exposé pendant trente ans à voir contester sa Déclaration; que la saisie-arrêt est une instance dont les effets ne se périment que par la prescription trentenaire. D'autres ne fixent aucun délai particulier, assimilant la saisie-arrêt aux actions ordinaires qui se périment par trois ans. Quant à la première opinion elle ne saurait être soutenue.

Pourquoi la saisie-arrêt qui est pratiquée entre les mains d'un tiers étranger au créancier et au débiteur, qui n'est qu'un témoin que l'on assigne pour déclarer ce qu'il doit, serait-elle une action privilégiée échappant aux délais ordinaires de la péremption? Quoique plus plausible, la seconde est encore sans fondement. Le droit commun n'a aucune disposition sur les délais de la péremption d'instance. Le délai de trois ans s'est introduit par l'usage, et la pratique suivie par les Cours françaises. L'on a suivi cet usage ici, mais qui pourrait empêcher nos Cours de fixer un autre délai à l'expiration duquel, l'instance serait périmée

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en ce sens, que l'inaction de la partie pendant un délai quelconque, ferait rayer sa demande des régistres de la cour et en donnerait congé à la partie adverse, sauf à la renouveler. Une règle semblable a existé, en vertu de laquelle une cause qui avait été laissée sans procédés pendant trois termes, était mise hors de cour. C'est aux Cours à régler leur propre discipline, quand une loi particulière ne paralyse point leur jurisdiction; et en matière de saisie-arrêt, il n'existe aucune loi semblable. Le Demandeur avait huit jours pour contester la déclaration du tiers-saisi. C'est un privilége dont il n'a point profité, et il doit s'imputer à lui seul les conséquences de son inaction. Mais il objecte à cette observation que sa contestation contenait un reproche de fraude et collusion entre l'Intimé Charlebois et Dame Cléophée Ranger. La distinction entre ces cas et les cas ordinaires est sans différence. Le Demandeur devait pratiquer une saisie-arrêt nouvelle, s'il avait depuis l'expiration des délais appris des faits qu'il ignorait jusque-là. Quant au tiers-saisi la règle lui donne le privilége d'être libéré dans les huit jours, si l'on ne conteste sa déclaration, et il en a profité.

SIR LOUIS H. LAFONTAINE, Bart., Juge en Chef, *dissentiens :*

Sur jugement obtenu contre la Défenderesse, marchande publique, le 27 février 1856, dans la Cour Supérieure, à Montréal, l'Appelant a fait émaner un bref de saisie-arrêt entre les mains de plusieurs personnes du nombre desquels est l'Intimé, fils de la Défenderesse. Celui-ci a fait sa *déclaration* le 5 Mai 1856, qui était le jour fixé par l'assignation. Il a affirmé ne rien devoir à la Défenderesse et n'avoir aucun effet à elle appartenant.

Le 17 juin suivant, l'Appelant, contestant la déclaration du tiers-saisi, produit des moyens de contestation, lesquels moyens, datés du 6, étaient accompagnés d'un avis de même date, signé des procureurs de l'Appelant, à l'effet qui suit :

" Au dit Louis Napoléon Charlebois, le tiers-saisi : Prenez avis de la contes-" tation ci-dessus, et que vous êtes tenu et requis d'y fournir plaidoyers ou " réponse dans les huit jours à compter de la signification des présentes." Le tout a été signifié au tiers-saisi personnellement le 12 Juin 1856.

Le 19 du même mois, le tiers-saisi a comparu par ses procureurs qui, le 25, ont fait en son nom une motion à l'effet de faire rejeter les moyens de contestation, " comme ayant été irrégulièrement produits et longtems après le déla, " des huit jours, et attendu qu'aucune règle n'a été émanée en cette cause " ordonnant au tiers-saisi de répondre aux dits moyens de contestation," et à l'effet de faire en même temps déclarer l'Appelant " déchu du droit de con-" tester la déclaration du tiers-saisi, ne l'ayant pas fait dans les délais voulus."

Le 28 Juin (1), est intervenu le jugement dont est appel, par lequel la motion du tiers-saisi est *accordée*, et les moyens de contestation en conséquence rejetés avec dépens. Si, de fait, ce jugement n'a eu pour motif que l'un des moyens articulés dans la motion, il nous le laisse ignorer, car il n'est point *motivé*. A en juger par les *Factums* des deux parties, le jugement n'aurait eu, en effet, qu'un seul motif, celui de la non production, dans la huitaine, de la contestation de la déclaration du tiers-saisi. D'un autre côté, en *accordant* purement et simplement *la motion* du tiers-saisi, ce jugement n'est-il pas censé déclarer : 1o.

(1) Présents : MM. les Juges Day, Smith et C. Mondelet.

que le délai des huit jours est un délai fatal; 2o. que le Demandeur est déchu de son droit de contester la déclaration du tiers-saisi, à défaut de l'avoir fait dans cette huitaine; 3o. qu'il fallait pour présenter cette contestation, obtenir au préalable une *règle*, c'est-à-dire la *permission* du tribunal saisi de l'instance?

La 90e. des *Règles de pratique* de la Cour Supérieure est en ces termes. "Any party intending to contest the declaration of a *Tiers-Saisi* shall file his "contestation *within eight days* from the *making* of the declaration of the *Tiers-Saisi*, if the attachment be an attachment after judgment; and if the attachment be an attachment *before* judgment, then *within eight days* from the rendering of the judgment in the original cause."

Un jugement prononcé dans le même tribunal, par une majorité des juges assistants, (le 27 Octobre 1855, *Dubé* contre *Dubé*, et *Jourdonnais* Tiers-Saisi), a été invoqué de la part de l'Appelant, comme ayant décidé, ou que la règle de pratique était sans force, ou que le délai des 8 jours n'était pas un délai fatal. Dans cette cause, *Jourdonnais* avait fait sa déclaration le 8 Mars 1855, jour du rapport du bref de saisie-arrêt émané sur jugement. Il avait affirmé ne rien devoir au Défendeur. Le Demandeur avait obtenu la permission de contester, mais c'était plusieurs mois après l'expiration des huit jours, puisque ce n'est que le 24 Septembre 1855, qu'il fit motion "que, si le "Défendeur et le tiers-saisi Jourdonnais ne répondaient pas, sous 8 jours, à la "contestation de la déclaration du dit tiers-saisi, *à leur être signifiée avec la pré* "*sente règle*, il fut permis au Demandeur de procéder *ex parte* à moins que *cause* "*au contraire ne fût montrée* le 17 Octobre suivant." Ce jour-là, la contestation et la *Règle nisi*, avec rapport de leur signification, sont produites; et, le 22, on fait de la part de Jourdonnais une motion à l'effet de faire rejeter les moyens de contestation, "attendu qu'ils ont été irrégulièrement produits, et notamment "qu'ils n'ont été produits que longtemps après que le dit Jourdonnais eût fait "sa déclaration comme tiers-saisi, et longtems après le délai de 8 jours accordé "pour pouvoir produire semblable contestation." Cette motion qui, il est à remarquer, avait été faite par les mêmes avocats qui représentent aujourd'hui l'Intimé, et qui était combattue par les mêmes avocats qui représentent l'Appelant, fut rejetée par le jugement précité du 27 Octobre 1855. (1)

Ainsi, sur le même point, celui du délai de huitaine, nous avons deux décisions opposées l'une à l'autre. En France, dans l'ancien droit, le créancier qui voulait arrêter entre les mains des tiers les sommes dûes à son débiteur, procédait par voie de simple *opposition*, ou de *saisie-arrêt* proprement dite. Dans le fait, ces deux procédures étaient presqu'en tout semblables. Elles ne différaient pour ainsi dire que de nom; c'est ce que nous apprend Pigeau, t. 1, p. 12[illegible] par la première, [illegible] forme *opposition*" [illegible] les mains d'un tiers qui est en possession du mobilier du débiteur), "à la remise de ce mobilier, pour empêcher le débiteur d'en disposer; ou bien on le *saisit par arrêt* entre les mains de "ce tiers, ce qui est la même chose que l'opposition, et n'en diffère que par la "dénomination."

(1) Présents: MM. les Juges-assistants Monk, Pelletier et Berthelot, (M. Monk ne concourant point.)

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Aujourd'hui, sous le nouveau code de procédure français qui a entouré la saisie-arrêt de formalités beaucoup plus précises et mieux définies que celles qui étaient autrefois [illegible], on ne fait aucune distinction entre la *saisie-arrêt* et l'*opposition* ; ce sont, en pareil cas, des actes [illegible] qui sont reconnus ne signifier que la même chose, comme on peut le voir par la rubrique même du titre 7e de ce code : "des saisies-arrêts ou oppositions."

Dans l'ancien système [illegible] saisie-arrêt se faisait de deux manières, "avec dénonciation et assignation au saisi pour la voir déclarer "valable, et ordonner la délivrance des deniers au saisissant ; ou sans dénonciation ni assignation." (Pigeau, t. 1, p. 652). Cette dernière manière de procéder était propre à créer des embarras au débiteur ; aussi n'est-elle pas approuvée de tous auteurs. Cependant il reconnait "qu'il y fait très commun de voir des saisies-arrêts en cette forme, surtout "à Paris."

Ces deux manières de procéder avaient donné lieu à deux péremptions bien différentes quant à leur durée, (même auteur, p. 653) : "Un acte de notoriété du Chatelet, du 29 juillet 1707, atteste qu'un exploit de saisie-arrêt, *qui ne porte point assignation*, ne peut périr que par *le laps de* 30 *ans*, mais qu'il périt par *celui de* 3 *ans* lorsqu'*il contient assignation*, parce qu'il introduit alors une instance, et que toute demande non suivie d'un jugement demeure éteinte au bout de ce temps."

Il cite l'art. 91 de l'ord. de 1629, et Argou, t. 2, p. 290 ; aussi l'art. 21 du titre 19 de l'ord. de 1667, à la disposition duquel il emprunte cet argument "Le tiers-saisi", dit-il, "est un véritable *séquestre* de la somme arrêtée ; or cet "article porte que ceux qui auront fait établir un séquestre, seront obligés de "faire vuider leurs différends et les oppositions dans trois ans, à compter du "jour de l'établissement du séquestre ; autrement les séquestres demeureront "déchargés de plein droit, sans qu'il soit besoin d'obtenir autre décharge."

Nous avons encore à l'appui de ce qui précède, l'attestation de M. Chauveau sur Carré, 3e Ed. t. 4, p. 589 à la *note*. "Dans la plupart des ressorts, et "notamment dans celui de Paris, la saisie-arrêt ou opposition n'étoit point mise "au nombre des actes que l'ordonnance frappait de péremption. Son effet "durait 30 ans, et, en conséquence, il a été décidé, par arrêt de la Cour de Cas- "sation du 14 août 1820 (S. t. 21, 1ère part. p. 33) que la publication du Code "de procédure n'a rien changé à l'effet d'une opposition formée antérieurement, "parce qu'autrement on lui donnerait un effet rétroactif."

L'auteur, évidemment, fait allusion au cas où il n'y avait eu ni dénonciation ni assignation. Quoiqu'il en soit, il est bien constaté que la péremption qui pouvait atteindre une saisie-arrêt, ne pouvait pas être moindre que de trois ans. Le saisissant avait donc, pour le moins, ce délai de trois ans durant lequel il pouvait contester. En effet je ne vois pas qu'aucun délai fatal, plus court que celui qui devait produire la péremption, ait jamais été prescrit ou appliqué en pareil cas. Il en est encore de même en France sous le nouveau code, nonobstant toutes les dispositions qu'il renferme sur la saisie-arrêt. Il n'établit aucun délai pour contester la déclaration du tiers-saisi. "Il suit de là," dit Roger, no. 596, "que celui dont la déclaration n'a pas été contestée, dans le principe, n'est pas [illegible] à prétendre, dans le cas où il serait recherché plus

" tard, que tout est terminé à son égard." Bioche, Dict. de proc., Vo. " saisie-arrêt," No. 201 : " la déclaration du tiers-saisi peut être attaquée, tant que l'on " n'a pas renoncé à se prévaloir des irrégularités ou des inexactitudes qu'elle " contient ; la loi n'a pas déterminé le délai. *Metz*, 21 juin 1822." On demandera peut-être : mais que fera le tiers-saisi avant que la péremption soit acquise ? Pour ce qui se pratiquait sous l'ancien droit, Pigeau, p. 657-58, nous donne la réponse à cette question : " Si on ne conteste pas," dit-il, " la vérité de son " affirmation, il doit, sans autre procédure, attendre le jugement qui sera rendu " entre les saisissants et le saisi " ; et, quant au nouveau droit, la réponse se trouve dans l'article 576 du code de procédure, lequel s'exprime ainsi : " Si la " déclaration n'est pas contestée, il ne sera fait aucune autre procédure, ni de " la part du tiers-saisi, ni contre lui." Voici ce que nous lisons sur cet article du Code, dans Chauveau sur Carré déjà cité, Quest. 1973, ter : " Existe-t-il un " délai pour attaquer la déclaration, en sorte qu'après ce délai, le tiers-saisi soit " à l'abri de toute réclamation ?" L'on répond : " Ce serait mal interpréter " l'article 576, que de supposer qu'il interdit toute recherche contre la déclara- " tion du saisi, si elle n'a pas lieu à l'instant même, ou dans un temps voisin. " Cet article signifie qu'on ne peut faire contre le tiers-saisi d'autre procédure que " celle qui serait nécessitée par les réclamations à élever contre sa déclaration. " Mais aussi cette dernière est permise à toutes les époques, tant qu'on n'a pas " renoncé à se prévaloir des irrégularités ou des inexactitudes que la déclaration " pourrait contenir."

Dans ce pays, la saisie-arrêt après jugement, doit toujours se faire avec assignation au saisi comme au tiers-saisi. Il n'en peut être autrement depuis la promulgation de quelques statuts provinciaux qui touchent à cette matière, et dont le premier remonte à l'année 1834. Ce qui pouvait et peut encore se faire en France, au moyen de plusieurs actes de procédure, se fait ici par un seul et même acte, qui contient l'exploit de saisie, la dénonciation de cette saisie au débiteur du saisissant, accompagné d'une demande en validité de la saisie, et l'assignation en déclaration affirmative, à donner au tiers-saisi.

Toutes ces formalités qui peuvent être successives en France, ont lieu ici pour ainsi dire simultanément ; tiers-saisi et débiteur sont assignés, par le même exploit, à comparaître au même jour, le premier pour faire sa déclaration, et le second pour voir déclarer la saisie-arrêt bonne et valable. Il y a donc, par cet exploit, appelé bref ou *writ* de saisie-arrêt, *assignation*, et, par conséquent, *introduction d'instance*. Cette instance, comme toute autre instance, doit être sujette à la péremption, mais cette péremption, comme je l'ai déjà fait voir, ne saurait être moindre que de trois ans. Tant que cette prescription n'est pas acquise, ou qu'un jugement n'a pas mis fin à l'instance en déboutant le saisissant de son action en saisie-arrêt, celui-ci peut donc être reçu à exercer le droit de contester la déclaration du tiers-saisi. C'est un droit que la loi lui a donné, et qui, par conséquent, ne peut lui être ôté que par un décret du législateur, et non par une simple règle de pratique faite par les juges de la Cour Supérieure ; les règles de pratique que cette Cour a l'autorité de faire, ne pouvant être que des règles de simple procédure, " nécessaires," ainsi que s'exprime l'acte de judicature de 1849, chap. 38, sect. 100, " pour régler la manière de conduire les causes,

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" matières et affaires devant la dite Cour, ou les juges d'icelle, ou aucun d'eux " et tous les ordres et procédures y relatifs," mais non pour créer des prescriptions absolues tendant à faire déchoir une personne de ses droits après un délai de 8 jours, lorsque la loi n'a assujetti cette partie qu'à une prescription de beaucoup plus longue. La règle de pratique en question, étant, à mon avis, selon les termes de la section précitée de l'acte de judicature, " contraire à la loi en " vigueur dans le Bas-Canada," je dois, suivant le dispositif de la même section, la regarder comme étant " nulle et de nul effet."

Quelques uns de nos statuts provinciaux viennent encore appuyer cette conclusion. Aux termes de celui de 1834, chap. 4, sect. 3, lorsqu'un tiers-saisi résidait dans un autre district que celui dans lequel le bref de saisie-arrêt était émané, le tiers-saisi devait être assigné à comparaître au greffe de la Cour de son district pour y faire sa déclaration, laquelle déclaration était transmise aux juges de la Cour d'où l'exploit était émané. Il pouvait s'écouler plus de huit jours avant que cette transmission eut lieu. Cependant le délai fatal, prescrit par la règle de pratique, courant du jour même que la déclaration est faite, le saisissant aurait donc été exposé à voir la prescription acquise à son préjudice, sans qu'il eût été en son pouvoir de contester, peut-être même avant d'avoir pu connaître quelle déclaration avait été faite par le tiers-saisi! En effet, si la règle de pratique qui a été promulguée lorsque ce statut était encore en pleine vigueur, a force de loi, la prescription qu'elle établit au profit du tiers-saisi étant absolue, celui-ci doit en avoir tout l'avantage, quelque soit le préjudice que le saisissant puisse en éprouver. Le statut de 1853, chap. 194, (Sect. 17 et 18) a modifié, il est vrai, celui de 1834, en ce qui regarde l'assignation à donner au tiers-saisi domicilié dans un autre district, ce tiers-saisi devant être à l'avenir appelé à comparaître au lieu d'où le bref de saisie-arrêt est émané, mais il lui laisse encore la faculté de comparaître, " le jour ou avant le jour du rapport de " la saisie-arrêt," s'il le juge à propos, au bureau du protonotaire de la Cour de son district, et d'y faire sa déclaration; et il est du devoir de ce protonotaire de transmettre cette déclaration à celui de l'autre Cour.

La deuxième question est celle de savoir si, pour contester la déclaration d'un tiers-saisi, il faut, au préalable, obtenir la permission du tribunal. Je crois que cette formalité est exigée, bien qu'on puisse douter de son utilité. Avant 1834, lorsque le saisissant voulait contester la déclaration d'un tiers-saisi, il était d'usage de présenter à la Cour une motion ou requête demandant acte de la déclaration que faisait le saisissant qu'il entendait contester, et concluant à ce qu'il fût ordonné au tiers-saisi de comparaître à un jour certain pour répondre à la contestation dont les moyens lui étaient signifiés avec copie de l'ordre de la Cour. Cette manière de procéder est reconnue et confirmée par le statut de 1834, sect. 4, bien que la disposition à laquelle je fais allusion, semble au premier abord n'avoir en vue que le cas particulier de la contestation de la déclaration d'un tiers-saisi domicilié dans un district autre que celui d'où la saisie-arrêt est émanée. Il y est dit: " Pourvu toujours que si tel demandeur entend " contester la déclaration du tiers-saisi, il puisse demander à la Cour *dans la-* " *quelle* telle poursuite a été intentée, *la permission* de le faire, et qu'il puisse, " en obtenant telle permission, filer sa contestation de telle déclaration; et la

" dite Cour alors transmettra telle contestation, avec une vraie copie du juge-
" ment en faveur du demandeur, du writ de saisie, et de telles autres procédu-
" res, dans la poursuite, que la Cour pourra croire nécessaires, ou que l'une ou
" l'autre partie pourra demander, à la Cour dans laquelle le tiers-saisi a fait sa
" déclaration ; et la dite Cour pourra procéder à tous égards relativement à telle
" contestation, de la même manière que si telle poursuite eût été originaire-
" ment devant la dite Cour." Il est vrai que ce cas ne peut plus se présenter depuis le statut de 1853, chap. 104, ce statut (sect. 17) exigeant que la contestation de la déclaration du tiers-saisi résidant dans un autre district que celui d'où l'exploit de saisie arrêt est émané, soit présentée, instruite et décidée dans ce dernier district, mais la disposition précitée du statut de 1834 n'en est pas moins importante, si l'on réfléchit que son objet, en rendant nécessaire la *permission* de la Cour, dans le cas particulier auquel elle a trait, *n'était pas d'établir une formalité nouvelle, seulement applicable à ce cas*, mais bien de déclarer *à laquelle* des deux Cours, dans ce cas particulier, la permission de contester devait être demandée. C'était admettre la pré-existence de cette formalité dans la procédure à suivre dans une instance de cette nature, et c'était en même tems la confirmer. Or cette formalité, il est évident, est méconnue par la 98e règle de pratique de la Cour Supérieure. Cette règle procède sur le principe qu'il n'y a pas de permission à obtenir du tribunal. En effet il peut se faire que la déclaration d'un tiers-saisi soit faite ou le dernier jour d'un terme de la Cour, ou même dans la vacance (statut de 1853, chap. 104, sect. 19,) et que, dans ce cas, le délai de huitaine s'écoule, sans que le saisissant puisse avoir l'occasion de présenter sa demande. [illegible]le de pratique pourrait donc devenir un déni de justice, si la formalité dont [illegible]git dût co-exister avec elle.

Dans le système qui admettrait la validité de la règle de pratique, il faudrait nécessairement reconnaître que, par cette règle, le saisissant qui veut contes[illegible] est de fait, quoiqu'erronément, placé dans une position analogue à celle d[illegible] demandeur qui a à répondre à une exception, ou d'une partie qui est appelée [illegible] défendre. Dans ce cas il faudrait un acte de forclusion pour faire déchoir le saisissant de son droit de contester.

Enfin il me semble que, pour les raisons que je viens d'exposer, la contestation dans laquelle s'est engagé l'Appelant, devait être rejetée, faute d'obtention préalable de la permission de la Cour [illegible] l'instance, sauf à lui à renouveler cette contestation, après avoir obtenu [illegible] permission ; car il n'est pas encore déchu de son droit. Cependant si le jugement dont est appel était confirmé tel qu'il est, sans modification, il me semble que la motion du tiers-saisi qui concluait entre autres choses, à la déchéance du droit de contester sa déclaration, ayant *été accordée* purement et simplement, cette déchéance est prononcée par le jugement de la Cour de première instance, et se trouverait maintenue par l'arrêt de ce tribunal, qui confirmerait ainsi ce jugement. Je ne peux donc pas concourir dans un tel arrêt.

DUVAL, J.—If the Chief Justice's opinion were to be sustained, it would set aside three fourths of the rules of practice, as well those published in 1828, by the late Court of King's Bench as those lately published by the Superior Court, and yet such has not been the sweeping condemnation of those rules by any

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Court. I refer to the case of *Carey* v. *Dorion* in which under a rule of practice requiring interrogatories *sur faits et articles* to be answered before the closing of the *enquête*, there was a decision by the Court of King's Bench at Quebec, the Chief Justice Sewell presiding, against the party omitting to answer in time, and this decision was maintained in Appeal by Chief Justice Reid. In the present case, the Plaintiff ought to have asked the permission of the Court to contest, founded on the facts he has stated to the Court, and he is still in time to get the permission.

AYLWIN, J., Concurred in the judgment of the majority of the Court, but stated that he did not express any opinion on the legality of the rule of practice.

Jugement confirmé.

Laflamme, Laflamme & Barnard, pour l'Appelant.
Loranger, Pominville & Loranger, pour l'Intimé.
(P. B. L. & F. W. T.)

COURT OF QUEEN'S BENCH.

MONTREAL, 28TH JANUARY, 1848.

Coram ROLLAND, C. J., DAY, J., SMITH, J.

No. 1305.

Rogers, et al. v. *Rogers.*

MARRIAGE IN ENGLAND—NO COMMUNITY.

HELD:—That there is no community of property, according to the custom of Paris, between parties married in England, their then domicile, without any antenuptial contract, who have afterwards changed their domicile and settled and died in Lower Canada.

The declaration of the Plaintiff alleged that, on the [illegible]th day of November, 1804, Richard Rogers and Thomasine Pearce were married in the parish of Stoke Damerel, County of Devon, both parties being then domiciled in England, that about twenty-eight years before the institution of this action, they emigrated to Lower Canada, and settled in the City of Montreal where they died, Rogers the 7th June, 1843, and Pearce the 23rd July, 1846; that inasmuch as there was no contract of marriage executed, and as according to the laws and customs of England at the time when the marriage existed, no community of property existed between husband and wife, the removal of their domicile from England to Lower Canada, where the *communauté* exists could not have the effect of establishing such community; that on the 28th November, 1818, Roger acquired from Gervais and wife, a certain immoveable &c, of which immoveable property he remained sole proprietor till his death, and which he left in his succession together with moveables and effects to the value of £250, and £100 in the Savings Bank; that on the 1st October, 1831, Rogers made his last will and testament before Labadie, N. P., by which he bequeathed to Thomasine Pearce all his property belonging to him, *en propre*, by reason of the community of property which he alleged to exist between him and Thomasine Pearce, on condition: 1stly. That if he left children, Pearce should only have the usufruct, but should be dispensed from making any inventory, and 2ndly. That on the extinction of the community by her death or any other cause the property should pass to the

lawful surviving issue of the testator; that the defendant was disinherited by the will, and the said Pearce appointed Executrix; that by virtue of such appointment she took possession of all the property of her husband, that on the 10th September, 1845, Pearce died, leaving, by will, all her property to the defendant *en usufruit*, and in full ownership to Emelia and Isabella Rogers, children of Richard Rogers, her son, and should both die childless and before 21, then it was to revert to Richard; she bequeathed to Emelia all her deposits in the Savings Bank, deducting £50 for funeral and testamentary expenses, naming John and Robert as executors; that at his death Rogers left four children who were all surviving at the death of Pearce, and consequently the legacy to her was one simply of usufruct; that the Defendant being disinherited by his father, all the property of the succession belonged to the Plaintiffs; that the £100 15s. deposited in the Savings Bank by the elder Rogers, in his lifetime, belonged to his succession, and were not affected by the testament of his wife, that all the father's effects remained in the mother's possession till her death, and thereafter in the Defendant's, concluding that the Plaintiffs be declared sole proprietors of the property in question, and that the Defendant be condemned to give it up.

The Defendant fyled an *exception péremptoire* admitting the main facts upon which the action was based, but alleging that by operation of law community existed between the parties immediately upon their domiciliation in Lower Canada, and that this community existed till the dissolution of the marriage by their decease, alleging the *legs d'usufruit*, by the mother to the Defendant, and that in consequence he has a right to the usufruct of her half of the property, and concluded for the dismissal of the Plaintiff's action.

The Plaintiff's answer was general, and after issue joined admissions were given, whereby the issue was restricted to the question as to whether, after the transfer of domicile to Lower Canada, there was a community of property between the deceased Richard Rogers and Thomasine Pearce.

After an elaborate argument at the hearing on the merits, the Court pronounced the following judgment:—

"The Court having heard the parties by their Counsel, having examined the proceedings, evidence of record, and seen the admissions given by the parties respectively and deliberated thereon; considering that there never was or could be a community of property between the father and mother of the parties in this cause, they having married in England, the place of their domicile, and no contract of marriage having been previously entered into, and that the transferring of their domicile to Lower Canada, where they died, could not have the effect of establishing such a community of property between them contrary to their presumed intentions at the time of their marriage, that the plea of the Defendant in bar of the Plaintiff's action is therefore unfounded in law, and it is therefore considered, and adjudged that the said Plaintiffs, in their said capacities of Universal Legatees of the said late Richard Rogers, their father, are the sole, true and legal proprietors of equal portions in all the property left by the said Richard Rogers at his death, and among others of the said immoveable in the declaration in this cause mentioned, and described as follows, to wit:

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" Un emplacement situé au faubourg St. Laurent susdit de la contenance de " quarante pieds de front sur quatre vingt pieds de profondeur, prenant pardevant " à la rue St. Jacques, par derriere a Joseph Papineau, Ecuier, tenant d'un côté " au nord-est au dit M. Papineau et de l'autre côté à St. Joseph Leduc," and also of the moveable property mentioned in the said declaration as amounting in value to the sum of Two hundred and fifty pounds, current money of this province, and also in the sum of one hundred pounds, fifteen shillings and eight pence, said currency, deposited by the said late Richard Rogers in a bank in this city of Montreal, known as the "Montreal Provident and Savings Bank," as also in the interest accrued upon the said sum of one hundred pounds, fifteen shillings and eight pence from the twenty third day of July, one thousand, eight hundred and forty-six, date of the death of the late Thomasine Pearce, the widow of the late Richard Rogers, and mother of the said plaintiffs and defendant, and the Court doth condemn the said defendant to restore to the said plaintiffs without delay, the possession and enjoyment of the said immoveable hereinbefore mentioned and described, as also the rents and profits thereof, *fruits et revenus* since the death of the said Thomasine Pearce, to wit, since the twenty-third day of July, one thousand, eight hundred and forty-six, the said rents and profits to be valued by *experts*, named by the parties in this cause, before a judge of this Court in vacation. And it is further ordered, that the said defendant do, within one month from the signification of the present judgment, make and render to the said plaintiffs, a true and just account under oath, according to law, of the moveable property and succession of the said late Richard Rogers, and also of the said sum of one hundred pounds, fifteen shilling and eight pence, so deposited in the said "Montreal Provident and Saving's Bank," together with the interest accrued thereon since the said twenty-third day of July, one thousand, eight hundred and forty-six, date of the death of the said Thomasine Pearce. The Court reserving to make and render hereafter such further order and judgment in the premises as to law and justice may appertain, after the said defendant shall have made and rendered the said account or shall be in default so to do. Defendant condemned in costs.

Judgment for plaintiffs.

Lafontaine & Berthelot, for plaintiffs.
Johnson & Burroughs, for defendant.
(F. W. T.)

There is a meagre report of this very important decision in the *Revue de Legislation*, vol. 3 p. 255, without mention of the judges composing the Court who rendered judgment.

MONTREAL, 28TH SEPTEMBER, 1858.

Coram SMITH, J.

No. 880.

Somers vs. Athenæum Insurance Society.

Held,—1. That an action on a policy of insurance against fire, for the value of a house attached on both sides to other buildings, and inhabited for a portion of the time during which the policy was running by four tenants, is maintainable, though the house is described in the policy as detached from other buildings and inhabited by two tenants; provided it be proved that the error in the description of the house was made by the agent of the insurers, and that the increased number of tenants were not in the house either at the time of the effecting of the policy, or at that of the fire.

2. The true description of the premises need not be alleged in the declaration, nor the error alluded to.

3. An answer to a plea by defendant alleging the misdescription may be made, admitting the misdescription but charging the error upon the plaintiff's agent, and it is no departure.

4. The parol testimony of the agent is sufficient to support the allegations of the answer, and sustain the action.

5. And it makes no difference that the policy was for a year before the fire in plaintiff's possession unobjected to, with a printed notice upon it to examine it and see if it was correct.

6. Or that the diagram to which reference was made, both in the interim receipt and in the policy, corresponded with the description in the policy.

This was an action upon a policy of insurance issued on the 7th Nov., 1855, covering for one year from that date, premises described in the policy as follows:

"On the building of a one-and-a-half story house, built of and covered with "wood, situate on the north side of Cadieux Street, in the St. Jean Baptiste "Village, Montreal, *detached from other buildings, owned by assured, and occu-* "*pied by Mr. Godfrey and one tenant as dwellings; as per plan and applica-* "*tion No. 6308, fyled in this office.*"

On the back of the policy a notice to the insured was printed requiring him to examine the policy and see that it was correct.

The plan referred to was annexed to a proposition signed "Thos. Somers, per J. B. Homier"; and the description in the plan and proposition corresponded with that in the policy, except that in the proposition the answer to a question as to the number of tenants had been originally written "two," but a pen had been drawn through it, and no other word substituted. The interim receipt, dated 7th Nov., 1855, was also fyled by the plaintiff, and it also referred to the plan and proposition. A memorandum book was produced at *enquete* by Homier, who at the time of the insurance was the defendant's clerk, in which an entry in the form of a notice had been made on the 7th November, 1856, informing the defendants that a house had been erected on one side of the risk; and this notice was signed "Thos. Somers, per J. B. H."

At the date of this entry the policy was renewed, and a few days afterwards the building was destroyed by fire.

The DECLARATION set up the policy, and followed the description contained in it, except that the part herein printed in italics was omitted, and these words substituted for it: "Which house contains 80 feet in front by 24 feet in depth, and comprised four distinct tenements."

The PLEA alleged that under the conditions of the policy every person desirous of effecting insurance must describe the construction of the buildings, where

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they are situate, and in, whose occupation; that every insurance attended with peculiar circumstances of risk, arising from the situation of the object with regard to adjoining risks or construction of premises, must be specially mentioned in the order for the policy, so that the risk may be fairly understood; and that if such matter of description be not so expressed, and the said conditions carried out and fulfilled; or if any misrepresentation be given, so that the insurance be effected for a lower premium than ought to be paid; or if building or goods be described in the policy otherwise than they really are,—the insured shall not be entitled to any benefit under the policy.

That in no one of these respects had the conditions of the policy been fulfilled. That the house, instead of being detached from, was attached to, other buildings; that instead of two tenants there had been four; that the property insured was in these respects described in the policy otherwise than it really was; that there had been a false and fraudulent misdescription of the premises on the part of plaintiff; and that he had, in consequence, obtained the insurance of his property at a lower rate of premium than should have been paid, and that he was consequently entitled to no benefit under the policy.

The plaintiff, by a SPECIAL ANSWER, asserted that when the insurance was effected the house was attached by the roof to the house of one Pelletier; that Whyddon, defendants' agent, visited it before he took the risk and gave instructions for making the plan referred to; that if the description in the policy was wrong it was the fault of defendants, by whom both the application and the policy were prepared. That when the policy was renewed, plaintiff was asked if any change had taken place in the premises, and replied that it was still connected with Pelletier's house, and that another had been built on the other side; and that he then offered to pay any extra premium that might be required, and that he was told he would be notified if the payment of any extra premium was necessary.

The defendant replied by a general answer in law and in fact.

The evidence as to the points in issue consisted chiefly in the parol testimony of Joseph Whyddon, formerly agent at Montreal for the defendants, and of J. B. Homier, formerly employed in their office as a clerk, whose depositions, by their purport, in effect sustain the assertions of the plaintiff in his special answer, viz., that the plan was made by Homier, under the instructions of Whyddon, who had previously visited the premises; that the application was filled up and signed by Homier, under Whyddon's instructions, without any authority and without having received any instructions from the plaintiff; that the policy was filled up from the plan and proposition; that the premium charged was the correct rate for an attached building, though it is stated that a higher rate would have been charged had it been known that there were four tenants; and finally, that the conversation on the 7th November, 1856, took place as stated in the special answer.

All of the evidence tending to impeach or vary the policy, the plan or the proposition, was objected to by the defendants' Counsel, and the objections reserved.

There appeared to be no dispute as to the facts that at the time the insurance was effected, Pelletier's house was attached to the plaintiff's by the roof, with a

passage below; that the fire originated in Pelletier's house, and communicated with the plaintiff's by this roof; and that for a time pending the policy the premises had been occupied by four tenants, though such was not the case at the time of the fire, and was not proved to have been the case at the date of the policy.

The case was first argued before DAY, J., who afterwards expressed a desire that the case should be re-argued as to the sufficiency of the mode of bringing the action, and the regularity of the pleadings, remarking that he thought that the matters alleged by the plaintiff in his answer should have formed part of the substantive allegations of the declaration, intimating that he inclined to the pretensions of the defendants upon this point, though to those of the plaintiff, upon the others which arose in the case. The case was, therefore, inscribed for re-argument; and, coming before his Honor Judge Smith, was re-argued, generally.

Cassidy, for plaintiff, stated the pleadings and evidence; and urged, that the erroneous description having been the act of the defendants, by their own agent, could not afford them any ground for defeating the plaintiff's action.

Abbott, for defendants, submitted in effect the following propositions and authorities:—

First. The special answer constitutes a departure from the declaration; and the evidence does not support the action as it is set up in the declaration. This is fatal.

Stephen on Pleading, 412 to 417. 2 Saunders. (Williams), 84 A., Note 1. 20. Johnson, 160. Gould on Pleading, 457, 458.

Second. The description in the policy is a warranty, and every warranty must be literally fulfilled, or the policy is void.

1 Phillips on Ins., 416, 760; p. 421, sec. 762; p. 458, sec. 866; p. 469, sec. 869; p. 470, sec. 871. 1 Arnould, p. 491, sec. 184. 7 Hill, 188. 13 Wendell, 92; 16 Wendell, 481. 6 Cowen, 673. 7 Wendell, 270.

And this warranty is *promissory* as well as affirmative.

Grun, 470. 1 Arnould, 581. 2 Duer, p. 657. Ib., Note 6, p. 749.

Third. This representation or misdescription, whether arising from fraud or negligence, avoids the policy.

1 Arnould, 488, sec. 191.

Here there are two breaches of warranty: the house is attached instead of detached; and had four tenants instead two. One house was attached at the time of the execution of the policy; another was afterwards built, of which a written notice was given in conformity with the conditions of the policy; but the omission of the first was a manifest misdescription, and a fatal breach of warranty. It cannot be got over by the incidental mention of it to an under clerk in a conversation of plaintiff with him—even if that clerk's evidence were to be believed, and if parol evidence to change the contract were admissable.

Fourth. The application, with plan annexed, must be taken to have been signed by Homier for plaintiff, with his authority; for the interim receipt and the policy refer specially to them, and he himself produces and relies upon both these documents. The notice also, which he must assume, and does assume, is signed in the same way. And he cannot plead ignorance of the error, for he

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had been a year in possession of the policy before the fire occurred, and there is a special notice on the back to him to verify its correctness.

Fifth. The conditions of a policy are *de droit etroit.*

Grun, 20. 1 Phillips, p. 468, sec. 866.

Sixth. The first and second conditions of the policy have been infringed; for the description of the construction of the buildings, where they are situate, and in whose occupation, is erroneous in material points. No special mention of the adjoining construction is made either in the order or application, in the plan, or in the policy; and the building is described in the policy otherwise than it really is; and, in these respects, there is a complete and fatal breach of the conditions of the policy.

Seventh. The plaintiff cannot offer parol evidence directly to contradict the policy in respect of the description of the subject assured, and by that means escape the consequences of the misdescription; and of the breaches of warranty and of the conditions of the policy.

2 Phillips on Ev., Ed. (1849) pp. 356, 357 and 358, 9 and 10 cases cited. 2 Saunders, Pleading and Ev., pt. 1, p. 497. 1 Duer, 176, sec. 27. Weston vs. Ernes 1 Taunton, 116 and 117.

Neither in Chancery nor at Common Law will parol evidence be received tending to prove an agreement different from the one made by the same parties under seal.

Dwight vs. Pomroy, 17 Mass, 303.

Assuming that a mistake in drawing articles might be proved by parol, yet in an action of covenant or written articles the plaintiff cannot prove by parol evidence an agreement different from the one on which he has declared.

Barndoller vs. Tate, Serg. and Rawle, 160.

In Henkle vs. Royal Ins. Co., 1 Vesey, 318, which was a bill in Chancery to correct a mistake in a policy; the deposition of the Agent, being the principal evidence, was not considered "proper proof." Where a mistake was alleged to have been made in a settlement, the Court would not allow it to be corrected on the evidence of the Attorney who drew it, because there was nothing in the handwriting of the parties to shew that a mistake had been committed.

Hardwood vs. Wallis, cited 2 Vesey, 195.

Hence the Court would not receive mere parol evidence alone.

1 Dickinson, 295. Shergold vs. Broome, 13 Vesey, 373, 376.

Except only in cases where fraud is alleged.

2 Saunders, pt. 1, Loc. cit. 2 Phillips on Ev., 357.

He accordingly moved to reject such portions of the testimony of Whyddon and Homier as tended to vary the contract contained in the policy.

Cassidy, in reply, argued that there had been no departure in pleading; there being nothing in the special answer which contradicted the declaration, or varied the ground of action. The plea accused the plaintiff of fraudulent misdescription, and the answer negatived the fraud and charged the defendants themselves with being the authors of the error. It was very plain that such had been the case, for Whyddon's and Homier's depositions conclusively proved it. To try to escape paying the loss in the face of their evidence was dishonest, and little better than an attempt at the robbery of the plaintiff, which the Court could

not sustain. He contended that it was competent for the plaintiff to prove the nature and cause of the error by parol evidence, as no other evidence of such error could be expected to be in existence; and no better testimony could be obtained than that of the Agent and clerk of the defendants, who, themselves, committed it.

SMITH, J.—(After stating the facts.) I am of opinion that the plaintiff should recover. The facts, as proved by Whyddon and Homier, the one the Agent and the other the clerk of the defendants at the times of the execution and renewal of the policy, clearly shew that the error in the description arose entirely from the act of the Company themselves, through their agent. They prove there was no misrepresentation or concealment whatever on the part of Somers, for he had nothing to do with the description of the premises, which was wholly made out in the office of the defendants under the directions of Whyddon. The diagram also was made by Homier, and both the description in the policy and the diagram were different from the description which the plaintiff himself had given.

The defendants had contended also that there was a breach of warranty. This question I do not consider as having been raised by the pleadings, and as to the alleged breach of the conditions of the policy, that only affected the policy so far as such breach of the condition was material. The several points in which there was misdescription on the face of the policy were not material, inasmuch as Whyddon proved that the premium charged, was the premium proper for the insurance of an attached house, and not of one detached from other buildings. And there is no evidence that, either at the time of the insurance or of the fire, the four tenants were in the premises.

As to the question raised as to the admissibility of parol evidence to shew that there had been a mistake, I think such evidence admissible, and that the time during which the plaintiff held the policy and the notice to him to verify its contents, do not affect the position of the parties. Whatever may be the tenor of the written documents, no better evidence of the cause and nature of the errors contained in them can be found than the testimony of the persons under whose instrumentality they were drawn and executed, and the evidence must be admitted.

The pretensions of the defendants that there has been a departure in the pleadings, is also, I think, incapable of being sustained. The plaintiff declares upon a policy. The defendant says there is misdescription, and claims a forfeiture of the policy. The plaintiff replies, if there is misdescription it is the defendant's own fault. This is not a departure. It is merely a joinder of issue upon the plea. It is analogous to the case of an action on a promissory note where prescription is pleaded, and the reply is that there has been a subsequent promise. The action must be maintained.

His Honor cited—2 Saunders 806, Gould 458, 1 Arnould 51, Hammond 82, Ellis 91.

Judgment for Plaintiff.

Leblanc & Cassidy, for Plaintiff.
Abbott & Baker, for Defendants.
(L. J. C. A.)

MONTREAL, 30TH DECEMBER, 1858.

Coram BADGLEY, J.

No. 536.

McDonell vs. *Grenier alias Grinier, and the said Grenier* Opposant.

OPPOSITION—MOTION.

Held,—That an opposition *à fin d'annuller* containing frivolous or insufficient grounds will be rejected on motion.

BADGLEY, J.—This is an opposition *à fin d'annuller* made by the defendant to a writ of *Venditioni Exponas* alleging as grounds, firstly; that there was already a previous seizure of the goods, and that *saisie sur saisie ne vaut*; secondly, that the amount claimed by the writ was more than what was due; thirdly, general grounds of irregularity. The plaintiff has moved to reject the opposition. 1o. Because there was no order of a judge for the opposition which was made to a writ of *Venditioni Exponas*. 2o. Because the opposition did not state how much was due by the defendant while objecting to the amount demanded. 3o. Because the opposition did not state the cause in which the prior seizure was made. The sole question with me is whether this opposition can be rejected on motion in place of a demurrer, and I think it can.

Motion granted.

Ouimet, Morin & Marchand for Plaintiff.
Bondy & Fauteux for Defendants.

(F. W. T.)

MONTREAL, 29TH NOVEMBER, 1858.

Coram SMITH, J.

No. 817.

Dooley, Petitioner, vs. *Wardley, et. al.*

PETITION EN DESTITUTION DE TUTELLE.

Held,—That a person not of kin or a relative to the minor has a right to present a petition *en destitution de tutelle*, when the minor has no kin or relative within Canada.

The petitioner was a tutor, *ad hoc*, who alleged by his petition that the minor had no relatives in Canada.

The defendants contesting the petition, fyled among other pleas a *defense en droit* or demurrer, whereby they alleged that the petition could not be maintained, because the petitioner had failed to allege that he is a relative or of kin to the minor in the petition mentioned, or that he has any quality, by reason whereof and by law he is entitled, to fyle the said petition for setting aside and annulling the appointment of the said Wardley as tutor to the said minor.

Bedwell for defendants, contended that the statute 41 Geo. 3, cap. 7, s. 18, giving the relatives and kin a right to present the petition *en destitution de tutelle*, must be construed strictly as the privilege of the next of kin, and not ex-

tended beyond the particular case mentioned in the statute; and that other persons had the common law remedy by an ordinary action. He cited 41 Geo. 3, c. 7 s. 18 and ex parte O'Meara, 1 L. C. Jurist, 195.

Cassidy contra.

The demurrer was dismissed on the ground that the allegation that the minor had no relatives within Canada, took the petition out of the ordinary rule limiting the petition to relatives and next of kin.

Demurrer dismissed.

D. Browne, for petitioner.
Cassidy, counsel.
C. R. Bedwell, for defendants.
(F. W. T.)

MONTREAL, 30TH DECEMBER, 1858.

Coram BADGLEY, J.

No. 2326.

Esty et ux vs. *Judd et vir* and *Judd et vir, Opposants.*

OPPOSITION TO *Vend. Exp.*—CREDITS NOT GIVEN.

Held,—1o. That a Defendant is entitled to file an opposition to a *venditioni exponas*, if credit be not given on the face of the writ for payments previously made on account of the judgment.
2o. That an opposition to a *venditioni exponas* will be maintained where land *en rôture* has been advertised to be sold in another parish than where it is situated.

In this case, the Plaintiffs, after obtaining judgment against Dame Content Judd, one of the Defendants, for a sum of £52 12s. 7d., with interest and costs, took out a writ of *fieri facias* against goods and lands, under which a considerable sum was levied from the sale of the goods and chattels, and by the judgment of distribution afterwards rendered, the Plaintiffs and their attorneys were collocated altogether for £75 6s. 11d. on account of debt, interest, and costs. Two lots of land were seized under the same writ, but were prevented from being sold by an opposition *a fin de charge*, which was subsequently dismissed. A *venditioni exponas* was then issued for the sale of these lots, and it was to this writ that the present opposition *a fin d'annuller* was fyled by the Defendants. Three grounds were alleged by the opposants, viz.: 1. That the moveable property of the said Dame C. Judd had not been fully discussed, a part of what was seized remaining unsold in consequence of an opposition *a fin de distraire* fyled by one Dr. Dorion, which was still pending and undetermined; 2, that the lots were situated in different parishes, and were, notwithstanding, advertised by the Sheriff to be sold in the same parish; 3, that previously to the issuing of the *venditioni exponas*, the Plaintiffs and their attorneys had received considerable sums on account of the judgment, viz., the amount already mentioned as awarded to them by the judgment of distribution, for which credit had not been given, nor any deduction made in the writ. The opposition concluded with a prayer that the *venditioni exponas* should be set aside as illegally issued, or that, if the Court should order the sale of the lots in question, or of one of them, such sale should be ordered to be made only for the balance which should be found to be due by the said Dame C. Judd. The 2nd ground,

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as affecting one lot only, was admitted by the Plaintiffs in their contestation. As to the other two grounds, it was contended that they were not sufficient to entitle the Defendants to fyle an opposition to a *venditioni exponas*; that moreover the facts relied upon existed and were within the Defendants' knowledge at least two or three months before the day appointed for the sale of the lots under the *fieri facias*, and that it was therefore incumbent upon them to have fyled their opposition then; and that as to the 1st ground in particular, it was the duty of the Defendants, if they chose, and not of the Plaintiffs, to have contested the opposition of Dr. Dorion. A demurrer and special answer were fyled to this contestation, but no judgment was rendered on the law issue, the parties being ordered to go to proof *avant faire droit*.

At the hearing on the merits, *Lunn*, for the Opposants, said he relied chiefly on the 3rd *moyen*, the 2nd being admitted as affecting one lot, and cited the case of *Fournier* and *Russel*, decided in appeal, (L. C. Jurist, vol. 1 p. 118) in which a similar ground was set up, and was maintained by the Court of Queen's Bench. He contended that the cases were exactly analogous; that, although it was true the judgment of distribution, under which the plaintiffs had received payment of a portion of their debt, was pronounced a considerable time before the day appointed for the sale under the *fi. fa.*, yet, that the latter writ was rightly issued for the whole amount, and that consequently the defendants were not entitled, or, at all events, it was not necessary for them, to fyle their opposition to it; if they chose to trust to the Plaintiffs not to allow their property to be sold for more than was actually due, surely this could not be made the foundation for a charge of negligence against them. They were alarmed, however, when they saw the *venditioni exponas* issued for the whole amount of the judgment in debt, interest and costs, without any notice being taken of previous payments.

Badgley, J.—After stating the facts, referred to the case of *Fournier* and *Russel*, and said he must follow the rule laid down by the Court of Queen's Bench. He would accordingly give judgment, maintaining the opposition with costs, and ordering all proceedings under the *venditioni exponas* to be stayed until the balance due by the defendant should be ascertained.

The judgment was drawn up in the following terms:—"The Court, &c., "considering that at the issue of the writ of *venditioni exponas de terris* in this "cause issued, there had been levied of the goods and chattels of the defendant, "Dame Content Judd, in virtue of the writ of execution issued by the plaintiff "against the said goods and chattels, lands and tenements, divers sums of money, "which have not been credited to her on the face of the said writ of *venditioni* "*exponas*, issued against said lands and tenements, and considering that the "advertisement of sale of the lot of land secondly mentioned in the Sheriff's "advertisement of the sale of the said lands and tenements is irregular, inasmuch "as the sale of the said lot of land was so advertised to be sold (*sic*) at the "church door of the Parish of St. Martin, instead of that of the Parish of St. "Rose, the parish of the locality of the said lot, doth maintain the opposant's "opposition to the extent aforesaid, to wit, doth discharge the said writ of *ven-* "*ditioni exponas quant à présent* of (*sic*) the said lot of land secondly described

" and doth order that all proceedings under the said writ of *venditioni exponas* " in this cause issued, be suspended until such time as the Plaintiff shall have " fyled, with the said writ of *venditioni exponas*, or any other such writ here- " after to be issued for proceeding to the sale of the said lands and tenements, " a statement showing the exact balance to be levied under the said writ; the " whole with costs, &c."

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Opposition maintained.

Belanger, for plaintiff.
Hemming & Lunn, for opposant.
(A. H. L.)

MONTREAL, 31ST DECEMBER, 1858.

Coram SMITH, J.

No. 74.

Desjardins vs. *Banque du Peuple.*

ADJUDICATAIRE—DEFICIENCY IN LAND—RECOURSE.

Held,—That an action brought by an *adjudicataire* of real property against a party as Plaintiff, *poursuivant le décrêt*, to recover the value of a deficiency in the extent of land sold, cannot be brought *de plano*, until such deficiency shall have been established in an action to reform the Sheriff's title granted to the *adjudicataire*, and correct the description of the quantity of land, to which action the *poursuivant* and the *saisi* must be parties.

2. That until such deficiency be so ascertained, the title granted by the Sheriff operates as a bar to any action merely personal against the Plaintiff, *poursuivant le décrêt*, as having received the proceeds of the sale, and is conclusive evidence of the quantity of land sold, and conveyed, as between the Plaintiff and Defendant, until it be legally set aside or reformed.

The Plaintiff was purchaser, at Sheriff's sale, of a certain property seized and sold under a writ of *venditioni exponas*, in a case of La Banque du Peuple *vs.* Donegani, and brought the present action to recover the value of an alleged deficiency in its quantity. The declaration set up at length the Sheriff's deed, of date the 8th November, 1854, by which it was declared that the property in question, therein described as " Une terre en fief relevant à foi et hommage " située à l'extrémité ouest de l'Isle Perrot sur le côté opposé à Vaudreuil con- " tenant quatre cents arpents, c'est-a-dire, tout ce qui peut se trouver dans les " limites suivantes, à partir de la ligne Jean Moreau au sud-ouest, suivant le " bras de la rivière séparant la dite isle Perrot de l'isle de Montréal et s'éten- " dant vers le nord-est au terrain des représentans Janisse, de là allant dans une " direction sud-est, le long de la ligne des dits représentans Janisse, jusqu'à l'in- " tersection de la dite ligne avec celle de Joseph Lalonde, avec une maison, " hangard et autres bâtisses dessus construites," had been in due course offered for sale by the Sheriff at public auction, and had been adjudged and sold to the now Plaintiff as the best and highest bidder, at the price of eleven hundred pounds.

The declaration then alleged that in consideration of the said purchase money, paid in the manner acknowledged in the Sheriff's Deed, the Sheriff thereby declared to have " cedé, donné, vendu et transporté au dit François " Xavier Desjardins la dite terre et dépendances ainsi que mentionnée au com- " mencement du dit acte de vente, sise et située comme susdit, et contenant les " dits quatre cents arpens en superficie et aussi tous et chacun les droits, titre,

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" interêt et propriété, prétention et réclamation quelconques qu'il pouvait avoir " comme shérif en vertu du dit writ d'exécution et de Vend. Exp. dans et sur " icelle et chaque partie et portion d'icelle pour avoir et tenir la dite terre, etc.

" Que la dite somme de £1100, étant le prix de son acquisition comme susdit, " fut plus tard, savoir le 21 novembre 1853, rapportée par le dit shérif dans la " dite cause No. 60, où la Banque du Peuple était Demanderesse et John Done- " gani Défendeur, ainsi que de plus fortes sommes provenant toutes de la vente " des immeubles saisis et vendus en vertu des dits brefs d'exécution et de Ven- " ditioni Exponas, dans la dite No. 60 et plus tard, savoir le 26 juin 1854, " fut payée par le dit shérif, en vertu d'un jugement de cette Cour rendu dans " la dite cause le 17 fevrier 1854, à la dite Banque du Peuple en satisfaction de " la créance pour laquelle la dite Banque du Peuple avait poursuivi le dit John " Donegani. . . .

" Que la dite terre et dépendances qui lui avait été ainsi vendue comme con- " tenant quatre cents arpens en superficie, ne contenait réellement et ne contient " encore actuellement que cent quatre-vingt huit arpens en superficie; que " c'est par erreur et en conséquence et par suite de son ignorance que la dite " terre ne contenait que 188 arpens en superficie, que le Demandeur a consenti " de payer et a payé réellement au dit shérif la dite somme de £1100; que la " dite terre ne contenant que 188 arpens ne valait pas la somme de £1100, mais " tout au plus, ce que le Demandeur n'entend pas admettre, une somme ayant les " même rapport a £1100 que 188 à 400.

" Que conséquemment le dit Demandeur en payant pour la dite terre £1100 " a fait une perte de £583, la Banque du Peuple ayant profité au même montant

" Que le Demandeur, vu le dit defaut de contenance, a droit de demander la " réduction de son dit prix d'acquisition, lequel devra être fixé à cinq cent " treize livres, et en autant que la dite Banque du Peuple a fait un profit injuste " et illégal, en recevant la différence entre la dite somme de £517 du cours " actuel et £1100 du même cours, le Demandeur a droit de répéter la dite diffé- " rence, se montant à la somme de £583 du cours actuel avec intérêt du 8 no- " vembre 1853 de la dite Banque du Peuple, savoir de la Défenderesse;"

Concluding thus:

" Pourquoi le Demandeur se réservant le droit de demander la nullité du " décret si le cas y échet, conclut à ce que la Défenderesse soit condamnée à lui " payer la dite somme de £583 du cours actuel avec intérêt sur icelle depuis le " dit jour 8 novembre 1853 et dépens."

The Defendant met the action,

1st. By a demurrer, resting on the several grounds that the Defendant was not liable to indemnify the Plaintiff for any such loss, for the mere reason that the property was sold at the Defendant's instance, and that the Defendant received the price; that no fraud was alleged, which might have rendered the defendant responsible; that it did not appear by the declaration that the Defendant had profited by the sale otherwise than as creditor of the said Donegani; that the declaration shewed Donegani to have been the party who was benefitted by the proceeds of the sale, inasmuch as they went to his creditors in his discharge and that the action should have been directed against him; lastly, that by the

terms of the deed, as cited in the declaration, the Plaintiff had purchased the land *comme corps*, and as comprised within given limits.

2nd. By a peremptory exception to the effect that the description of the property was got by the Sheriff from Donegani and others, without reference to the Defendant; that the land had been sold not by measure, but as a *corps certain*, having defined limits; that the Plaintiff had visited the property and knew its contents; that the property having belonged to Donegani, and been sold on his account by the Sheriff, it was necessary to make him, Donegani, a party to any suit for diminution of price, as being the party directly interested in the sale; that the proceeds of the sale had been reduced by a certain amount for costs, before being paid to the Defendants; also that the Plaintiff, if he had ever had a good ground of action against the Defendant, had lost it by his neglect to notify the Defendant within a reasonable time after his taking possession of the land, of the deficiency; in consequence of which neglect the Defendant had parted with a large amount of stock, held in the bank by Donegani, now insolvent, and was without any means of meeting the Plaintiff's claim.

3rd. By a second peremptory exception, alleging that the Plaintiff had received already from the Grand Trunk Railway Company, for right of way and materials taken from the land for the construction of the railway, the sum of £900, and had moreover derived large profits from fire-wood sold from the land and from a ferry pertaining to the same; that, therefore, the Plaintiff's only action could be to resiliate the deed of sale, on his offering to render account of all he had received from the land.

4th. By a third peremptory exception setting out that, supposing the Plaintiff to have a legal claim upon Defendant for some portion of the price, such claim could be for no greater proportion of the price than that which the value of the part of the land of which he had been deprived, bore to that of the part of which he was in possession, without regard to superficies, since the part which he had received was of much greater value by reason of the buildings upon it, and the ferry, than an equal extent of superficies without those advantages.

5th. By a general denial.

The Plaintiff replied specially to the *first* exception, that he was unaware of the deficiency until shortly before the institution of his action; and to the *third* exception, that the value of the buildings and ferry was trifling, and of no account in comparison with that of the land sold. To the *second* exception an answer in law was pleaded, averring the Plaintiff's right in law to pursue the Defendant (as having brought to sale the property in question) for compensation; and alleging that the Plaintiff had his choice, either of an action *en resiliation ou nullité de décret*, or of the action which he now brought, without his being obliged in any way to account for the profits or to offer to abandon the land.

Issue having been joined, the case was heard on the demurrer and the answer in law, and the following judgment was rendered by C. Mondelet, J., on the 30th April, 1858:

"La Cour etc., considérant que la défense en droit plaidée par la Défendeur est mal fondée en autant qu'il est allégué par le Demandeur en sa décla-

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" ration que l'immeuble dont il y a question a été vendu par le shérif au " Demandeur par le contenu, et non comme corps certain, suivant ce que pré- " tend la Défenderesse, et que la Défenderesse, ayant reçu bien au-delà de ce " que le Demandeur aurait été en loi obligé de payer sur la dite vente, et " qu'ainsi d'après les allégués de la déclaration du Demandeur, la Défenderesse " a profité aux depens du Demandeur et est tenu de le rembourser jusqu'à la " concurrence de ce ; considérant que le Demandeur par les allégues de sa " déclaration est en droit, s'il en fait la preuve, de répéter de la défenderesse " telles sommes d'argent qu'il établira avoir été reçues par elle la Demanderesse et " dont elle aurait profité aux dépens et au préjudice du Demandeur, déboute " avec dépens la défense en droit.

" Et faisant droit sur la réponse en droit aux exceptions peremptoires " plaidées en premier (seconde ?) lieu par la Défenderesse, considérant " qu'il est allégué dans les dites exceptions péremptoires, que l'heritage " dont il est question en cette cause, n'a pas été vendu à la mesure mais " comme corps certain, ayant des limites bien définies ; et attendu qu'à raison " de cet allégué la Cour ne peut prononcer aucun jugement sur le mérite des " pretentions respectives des parties, avant qu'il y ait eu preuve a cet égard, " ordonne, avant faire droit, que les parties fassent, suivant la loi, preuve de " leurs allégués à cet égard, dépens réservés."

The parties then went to evidence, and an *expertise* was ordered and made for the purpose of ascertaining the precise contents of the lot. The report of the *expert* declared the superficial extent to be 170 arpents 67 perches.

The case was then heard on the merits.

Smith, J.—This action is brought to recover from the Defendant the value of deficiency, in quantity, of certain land sold to Plaintiff at Sheriff's sale, in the case of La Banque du Peuple *vs.* Donegani. It is directed against the present Defendant, upon the ground that, as Plaintiff in the former case, it received the money paid by the Plaintiff for the quantity of land ostensibly conveyed to him by the Sheriff's deed, but which, in fact, was greatly overstated in the deed. The Defendant first fyled a *defense en droit* to the action, but it was dismissed. The Defendant also pleaded several grounds of defence, as that the land was sold as a *fief*, entire and with given boundaries, *par corps* and not by quantity ; also, that its value depended in a great measure on certain contingencies, as ferries, &c., and not alone on its superficial extent; further, that the Plaintiff failed to notify the Defendant, within a reasonable time, of the alleged deficiency, and that the Bank consequently allowed certain securities it held for Donegani's debt to go out of its hands. I will not, however, dwell on these points, since the judgment rests upon another ground.

It is maintained that a Plaintiff *poursuivant le decrêt* is the *garant* of the *adjudicataire*, and there is no doubt that he may be so, under certain circumstances. When the loss sought to be recovered is attributable to him, the law of France would make him the *garant*. And the authorities go to shew that an *adjudicataire* may come against the person last collocated for monies by the judgment of distribution, whether *poursuivant* or not, to be refund in case of deficiency in the immoveable sold, the presumption being that such person has received

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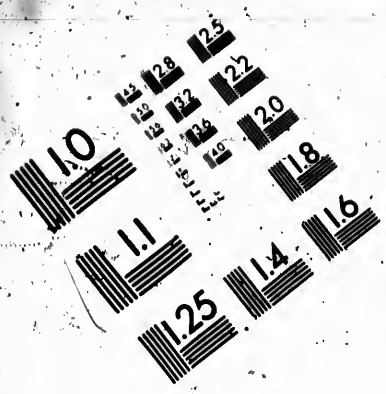
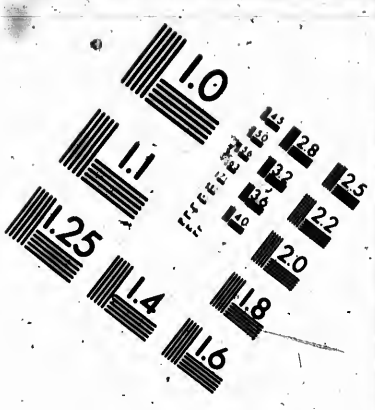
the amount, and benefitted by the loss of the *adjudicataire*. But in this case the land passed by the Sheriff's deed, and there is a deficiency in the quantity conveyed by the Sheriff. The Plaintiff brings a personal action to refund, against the Bank, without in any way attempting to reform or correct his own title received from the Sheriff. Does such an action lie as now brought? I think not. It appears to me that this is not the action given by French law. It is true that the [illegible] laws of France, with regard to seizures differ considerably from those [illegible] have no *commissaires aux saisies réelles* and [illegible] statutory provisions on the point of the transfer of [illegible] to the [illegible] is quite clear that the Sheriff is bound [illegible] to give [illegible] title which represents that given by the *commissaire*. The [illegible] vendor; the sale is compulsory, through the agency of the Sheri[illegible] the property into his hands and sells it for the benefit of the *saisi* or [illegible] creditor, but the Sheriff is merely the agent of the *saisi*, and gives a title in the latter's behalf, though in his own name. His title is that which the *saisi* could have given, and which the law forces him to give through the Sheriff. When so given, the title is authentic, and must be taken to be so, and binding between the parties to it, as if a voluntary conveyance had been made by the Defendant. How then can an action be brought, *de plano*, on an alleged deficiency, against a recipient of the money, when the very title which the Plaintiff has taken from the Sheriff is not in any way impugned or sought to be corrected or reformed? In so far as the Plaintiff is concerned, as *adjudicataire*, it is conclusive against him until the error, if any exist, is rectified. And as a preliminary step to such rectification, all the parties interested must be before the Court, the Defendant as having been represented by the Sheriff, the former Plaintiff as *poursuivant le décrêt*, and the Plaintiff as the *adjudicataire*,—and the Court would then be in a position to decide. It is the *nullité de décrêt* which gives rise to the action for indemnification, and the plaintiff should have begun by his petition *en nullité ou rectification de décrêt*. The *décrêt* and the title of the *adjudicataire* would be then set right, and the deficiency of the land ascertained between all the parties interested in the settlement; and, the deficiency *thus* ascertained, the *adjudicataire* would have his recourse against the party or parties who may have received the monies. This is the course drawn from the authorities. (See Hericourt p. 302; Rep. de Jurisp. vo. "*adjudication*" p. 165 2 Bourjon, Criées, art. 131 p. 731; Nouv. Denisart p. 37 No. 7.)

The judgment of the Court was recorded as follows:—

"The Court having heard the parties, &c., considering that the said Plaintiff "hath failed to establish that by law any such, action as that which is now "brought by the said Plaintiff to recover from the Defendant the value of the "deficiency of the quantity of land claimed by the present action, exists in law; "and further, considering that such deficiency of land, the value of which is now "sought to be recovered in and by the present action, can only be legally settled "by action to reform or correct the description of the quantity of land stated, in "the title of the said land, to have been conveyed by the Sheriff of this district "to the said Plaintiff, under the adjudication made by the said Sheriff, by authority "of law; and further, considering that, for the purposes of conveying the title





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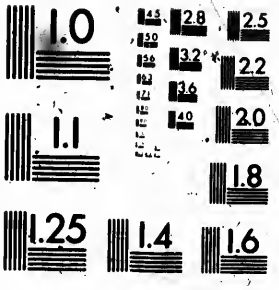

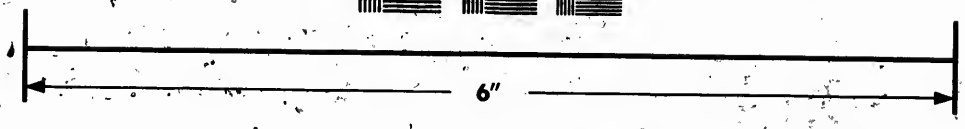

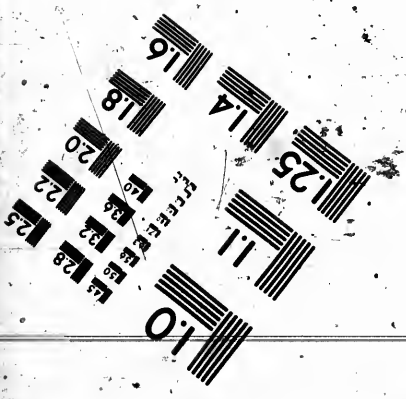

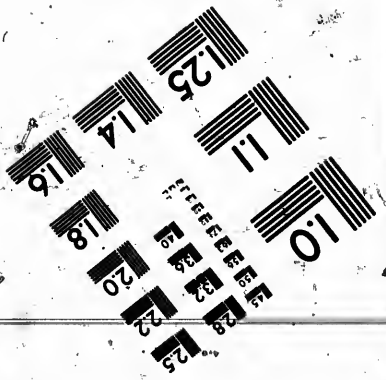

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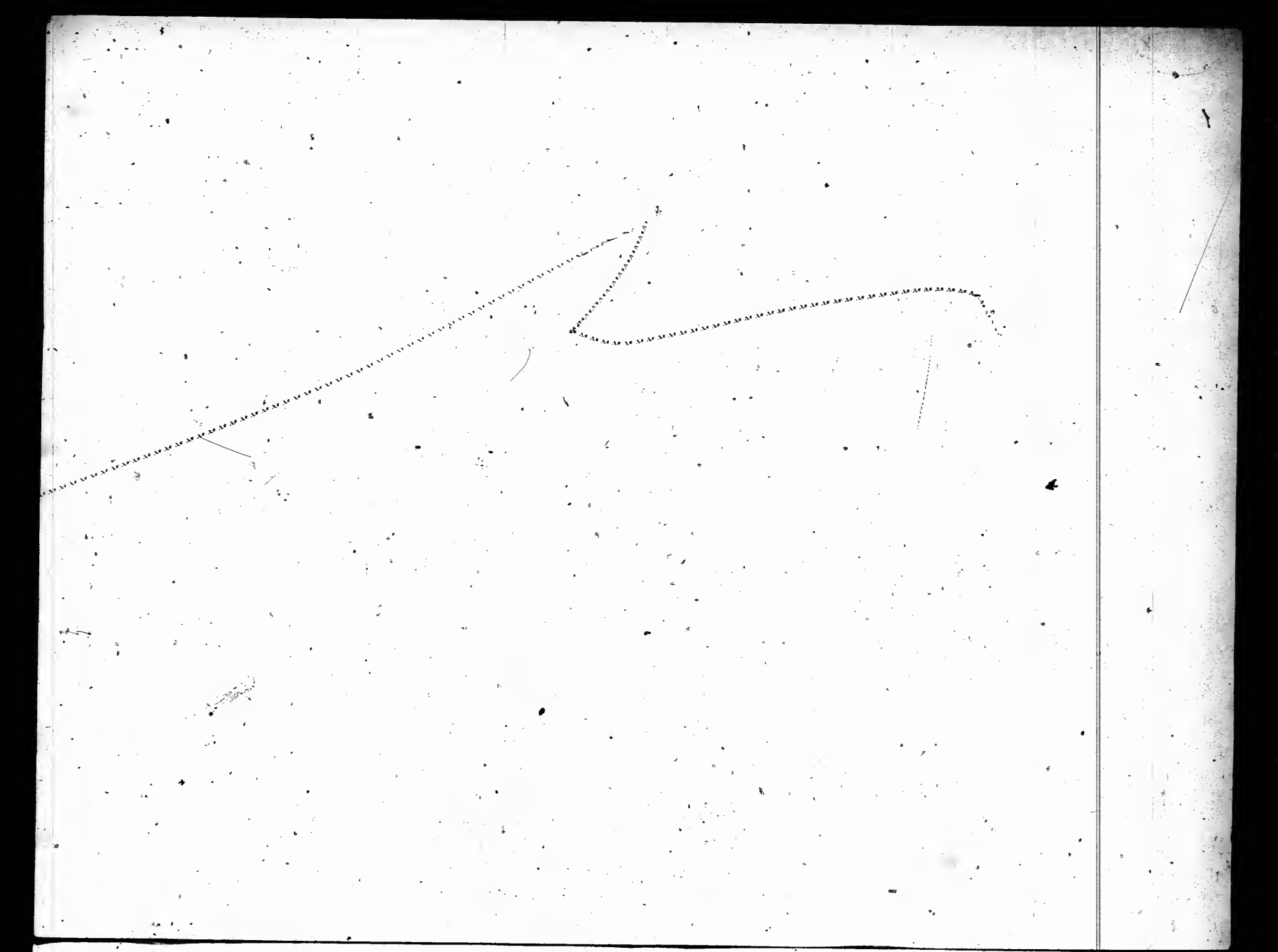

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"to the land so sold and adjudicated, the said Sheriff is by law the representative of the party, Defendant, on whom the said adjudication was made, and "that such deficiency, if any exists in the land so conveyed, can only be ascertained in an action in which the said *saisi* is a party, as being in law considered "the vendor, acting by the said Sheriff as aforesaid, together with the *poursuivant le decrêt* and the *adjudicataire*, who alone in such case, as parties to the "adjudication, are *légitimes contradicteurs* in such contestation;

"And further, considering that until such deficiency shall have been so established, the title granted by the said Sheriff operates as a bar to any action "merely personal against the said Plaintiff as having received the proceeds of the "said sale and adjudication of the said land, and, being in full force and effect, "is conclusive evidence in law between the said Plaintiff and the said Defendant "of the truth of its contents until it shall have been legally set aside or reformed, "the Court doth dismiss the action of the said Plaintiff with costs."

Action dismissed.

Laflamme, Laflamme & Barnard, for Plaintiff.
Cherrier, Dorion & Dorion, for Defendant.

(W. F. G.)

MONTREAL, 23D DECEMBER, 1858.

Coram C. MONDELET, J.

No. 2468.

Bonacina vs. Bonacina and Gundlack, Tutor, Opposant.

WILL—CONSTRUCTION.

Held,—That a will declaring that a farm of the testator should be held by the male heirs of the testator's family in the manner thereinafter limited, and then giving one-half to William and his lawful male heir after him, and one-half to Duncan and his lawful male heir after him; and, in the event of William or Duncan dying without lawful heir or issue, giving the share of him so dying to the survivor; and, if both should die without lawful issue, giving the farm to Sophia Mackintosh, and unto her eldest son on taking the name of Mackintosh; and, to prevent all misconstruction, declaring that the eldest son of William and the oldest son of Duncan and no other could inherit the farm, does not mean a bequest of the farm to the eldest son of Sophia Mackintosh,—William dying without issue, and Duncan dying leaving no son and only a daughter,—so long as Duncan has a daughter.

This case came before the Court on an opposition *a fin de distraire*, made by the opposant, John George Gundlack, in his quality of tutor to William Gundlack Mackintosh, a minor, claiming as the property of the opposant, in his capacity of tutor, certain immoveable property seized under a judgment against the defendant, as the property of the defendant.

The OPPOSITION set forth the will of the late William Mackintosh, of date the 6th September, 1841; whereby it was alleged, among other things, his farm at Lachine should be held and enjoyed by the male heirs of his (the testator's) family in the manner thereinafter limited; that is to say, he gave and bequeathed unto his son William Mackintosh, and unto his lawful male heir after him, forever, so far as the law of the Province would permit, one-half of the said property; and next he gave and bequeathed unto his second son, Duncan Mackintosh, and his lawful male heir, forever, the other half or part of the said property;

and that the said last will did furthermore establish and set forth, that, in the event of both the said William Mackintosh and Duncan Mackintosh dying without lawful issue, then and in that case he bequeathed the whole of the Lachine property, rest, residue, and remainder of his estate, unto Sophia Mackintosh, and unto her eldest son on taking the name of Mackintosh; and the said testator, in order to prevent all misconception, as he therein alleged, that the eldest son of the said Duncan Mackintosh, and the eldest son of the said William Mackintosh, and no other; *meaning thereby, and no other issue of them, the said Duncan Mackintosh and William Mackintosh, should inherit the said property at Lachine.*

That the said William Mackintosh, the son, departed this life on or about the 23rd February, 1842, childless and intestate, and that his half of the said Lachine property thereupon became the property of and vested in the said Duncan Mackintosh, his brother, subject to the clauses and conditions set forth in the said last will.

That afterwards, to wit, on or about the 28th June, 1854, the said Sophia Mackintosh also departed this life, leaving the said William Gundlack Mackintosh, her eldest son, and heir under and in virtue of the said last will.

That afterwards, to wit, on or about the 28th May, 1856, the said Duncan Mackintosh, mentioned in the said last will, also departed this life without leaving a son or any male issue of him, the said Duncan Mackintosh, to inherit the Lachine property; and the said minor child, William Gundlack, became and was, and is the only lawful male heir as well of the said late William Mackintosh as of the said late Duncan Mackintosh; and the said Lachine property, as such, became vested in him.

That in the terms of the said last will of the said late William Mackintosh, and by law, the whole of the said Lachine property became the property of and vested in the said minor, William Gundlack, as well in virtue of his being the only lawful male heir of the said late William Mackintosh and of the said Duncan, but also as the eldest son of the said late Sophia Mackintosh, referred to and mentioned in said last will, by her marriage with the opposant.

That the real estate seized in said cause, and advertised to be sold as belonging to the defendant, is part and portion of the real estate mentioned and described in the said last will, and is the sole property of the opposant in his said capacity, and is not the property of the defendant.

The plaintiff contested this opposition, and by A FIRST PEREMPTORY EXCEPTION, alleged in terms of the will the bequest of the Lachine property to William and Duncan Mackintosh; that after several other special legacies the said William Mackintosh, the testator, declared that as to all the rest, residue, and remainder of the estate, whatever and wherever, and of what nature, kind or quality soever the same might be and not therein before given and disposed of, he did thereby give and bequeath the same to the said William and Duncan Mackintosh, to be equally divided between them; and in case any or either of them should die without lawful heir or issue, then he gave the share of the one so dying to the survivor; and if both happened to die without lawful issue, he then gave and bequeathed the whole of the Lachine property, rest, residue and remainder of his estate unto Sophia Mackintosh, and unto her eldest son on

Bonacina vs. Bonacina.

taking the name of Mackintosh; and, to prevent all misconstruction, that his intention was that the eldest son of the said William Mackintosh, and the eldest son of the said Duncan Mackintosh, and no other, could inherit the said property at Lachine; that the latter clause was put in the said will by the said William Mackintosh to explain that in the bequest he had made to William Mackintosh and his lawful *male heir* after him, of one-half of the Lachine property, and to Duncan Mackintosh and his lawful male heir, the other half of the said property, he only meant by the words *lawful male heir*, the eldest of the male children of each of the said William and Duncan Mackintosh, to the exclusion of all their other male children.

That the testator, William Mackintosh, died about the 18th February, 1842.

That the legatée, William Mackintosh, died without issue on or about the 23d February, 1842, and his share in the said property seized in this cause thereby reverted to the said Duncan Mackintosh, his brother, as it is admitted by the said opposition.

That the said Duncan Mackintosh, married the said Dame Agnes Bonacina, from which marriage, was begotten Marie Mathilde, *alias* Mathilda Mackintosh.

That the property seized in this cause is the Lachine property, mentioned in the said will, which according to the terms thereof, could only revert to Sophia Mackintosh and unto her eldest son, in case both the said William and Duncan Mackintosh should both die without lawful issue.

Then followed the ordinary conclusion.

By a SECOND PEREMPTORY EXCEPTION, the plaintiff said that the will invoked had never been registered in the registry office for the county wherein the land seized was situated, nor had the will been published and registered in the registers of the late Court of Queen's Bench or of the Superior Court at Montreal, nor in any other court where it ought to have been publicly read and published and enregistered to preserve the substitution created by the said will in favour of the said Sophia Mackintosh and her eldest son, and that it the said Sophia Mackintosh and her eldest son, could have claimed any right on the property seized in this cause under and in virtue of the substitution created by the said will, they cannot, from the want of such reading publication and enregistration of the said will, invoke such right as against the plaintiff, who is a *bona fide* creditor of the said late Duncan Mackintosh and of his said estate.

The issues were completed by general answers and replications.

PER CURIAM. Under the construction of the different clauses of the will, as the court interprets them, the tutor in his capacity has no interest in making his present claim. The property in question went to the child of the deceased Duncan Mackintosh.

The judgment was recorded in the following terms:

"The Court, considering that the opposant not only is unfounded in law in his pretensions in favour of his pupil, but shews and establishes himself as well by his own allegations as by the will of the late William Mackintosh of the 8th September, 1841, partly in the opposition of the said Gundlack, recited that none or no other, but the eldest male heir of either William or Duncan Mackintosh, sons of the said testator could inherit his property at Lachine, and that

the daughter of the said testator, Sophia Mackintosh herself, or her eldest lawfully begotten son could not inherit such property, unless the said William and Duncan Mackintosh died without lawful issue, and whereas the said Duncan Mackintosh has left a daughter lawfully issued of his marriage with defendant, who is still living, and therefore the property seized in said cause, is in said defendant as well in her own name as having been *commune en biens* with her said husband, as in her quality of tutrix to Mathilde her daughter, issue of her marriage with the said Duncan Mackintosh, and not in the said William Gundlack, for whom and in whose behalf the opposant, his tutor, has fyled the opposition in this cause, dismisses the said opposition with costs." Bonacina vs. Bonacina.

W. E. Holmes, for Opposant.

Cherrier, Dorion & Dorion for Plaintiff. Opposition dismissed.

(F. W. T.)

As the above decision turns entirely upon the construction to be put upon certain clauses of a very obscurely worded will, we give them *verbatim* below :—

"It being my will and intention that the Property belonging to me at Lachine, in the District of Montreal and Province of Canada, containing about two hundred and forty arpents in superficies, and all, and singular, the appurtenances thereunto belonging, shall be held and enjoyed by the male heirs of my family, in manner and way hereinafter described and limited, that is to say, I give and bequeath unto my son William Mackintosh, and unto his lawful male heir after him forever, or so far as the law of the Province permits, one half of the said Property, containing about three arpents in breath, by about forty arpents in depth, bounded in front by the River Saint Lawrence, and in rear by the land of one Leduc, on the east side by the property of the late John Grant and Vennant Roy Lapausé, and on the west side by the other part or half of the said property, and to mark the line of separation stones, and set in the ground at intervals for the purpose, and that the road leading from the front to the rear of the property be common, and serve for both parts. And next, I give and bequeath unto my second son, Duncan Mackintosh, and unto his lawful heir forever, the other half or part of the said property, containing about three arpents in breadth, and about forty arpents in depth, bounded in front by the River Saint Lawrence, and in rear by the land of one Leduc, on the west side by the estate of the late John Grant, and on the east side by the other half or part of the said property, and, to mark the line of separation stones, and set in the ground at intervals as already described.

* * * * * * * * * * * * * * * * * * * *

* * * I give and bequeath unto Miss Jane Mackintosh, Church street, Inverness, out of the above monies, the sum of Fifty pounds sterling, annually during her natural life, which my executors will regularly transmit to her, and the rest, residue and remainder, whatever it be, and the funds or securities to be paid and transferred to the said William and Duncan Mackintosh respectively, when, and as they shall severally and respectively attain their several and respective ages of twenty-one years, and that the interest accruing and therefrom, in the meantime, shall be applied towards their education and maintenance respectively, until they shall severally and respectively attain their said ages aforesaid, and that they may get as good an education as the means I leave them will allow, and in case any or either of them shall die without lawful heir or issue, then I give the share of him, so dying, to the survivor, and if both happen to die without lawful issue, I then give and bequeath the whole of the Lachine property, rest and residue and remainder of my estate unto Sophia Mackintosh, and unto her eldest son on taking the name of Mackintosh, and to prevent all misconstruction, the eldest son of the said William Mackintosh, and the eldest son of the said Duncan Mackintosh and no other can inherit the said property at Lachine."

MONTREAL, 31st DECEMBER, 1858.

Coram SMITH, J.

No. 772.

Lynch vs. *McLennan et al., and Bank of Upper Canada*, Garnishee.

CASHIER GARNISHEE—NOT BANK—DRAFT ON BANK, NOT MONEY IN HANDS OF BANK.

Held,—1st. That the Cashier or other Officer of a Bank receiving money, as the Attorney of another party, acts individually, and does not constitute the Bank such Attorney.
2nd. That a draft upon a Bank, payable on presentation, the Bank being merely the instrument of conveying the sum, is not money in the hands of the Bank, belonging to payee and liable to attachment on his account.

The Plaintiff placed a *saisie-arrêt*, after judgment, in the hands of the Bank of Upper Canada to attach monies coming to the Defendants, representatives of late firm of Wilson, Jack and Hughes. The Manager, in Montreal, of the Bank, appeared and made his declaration to the effect that at the time of the service of the writ and since, the Bank held no funds belonging or due to Defendants. This declaration the Plaintiff contested, alleging for reasons that, on or about the 21st November, 1856, there was due to the Defendants by the Government of the Province, the sum of £579 14s. 2d. cy., for work performed by the previously existing firm of Wilson, Jack and Hughes, upon the Beauharnois Canal; that this amount was at about the said date, paid by the Government to Thomas G. Ridout, Esq., Cashier of the Bank of Upper Canada, at Toronto, in his capacity of attorney of the said firm, and was deposited by him in the Bank of Upper Canada, in his said qualities of Cashier of the Bank and attorney of the firm; that long before such deposit the firm had been notoriously dissolved by the death of Wilson, one of its members, and its dissolution was at the time of the making of the deposit a public and well known fact, of which the Bank was in law bound to be aware; that if the Bank had allowed the said sum to go out of its hands it could only have done so by connivance with parties interested in defrauding the creditors of the Defendants and the Plaintiff in particular, and was accountable for the amount.

The Bank, *Tiers-saisie*, answered that neither at the time of the service of the writ nor afterwards had it held any monies belonging, or due to Defendants; that the sum mentioned in the Plaintiff's contestation, never came into the possession or power of the Bank, and never was deposited there to the credit of the Defendants, and that no sum whatever the property of Defendants had since the service of the writ been paid out of the Bank; and formally denied the imputation of connivance and fraud.

Issue having been joined, evidence was taken by a *commission rogatoire* to Toronto, where the Deputy Receiver General, and one of the Bank clerks were examined, and by the examination of Mr. Taylor, Manager of the agency in Montreal. The evidence disclosed that a warrant for £579 14s. 2d., issued from the Receiver General's office, on the 21st Nov., 1856, in favor of Wilson, Jack & Hughes, and was paid to Mr. T. G. Ridout, the Cashier of the Bank at Toronto, who gave his receipt therefor as attorney of said firm. A draft for the sum upon the Montreal agency was then enclosed by mail in a letter

addressed "Messrs. Wilson, Jack & Hughes, Beauharnois, care Bank of Upper Canada, Montreal." Hughes, one of the firm, called at the Bank, endorsed the draft in the name of the firm and was paid the amount. This took place some six months before the service of the writ.

Smith, J.—A *saisie-arrêt* had been placed in the hands of the Bank of U. C. in Montreal, to attach monies due to a late firm of Wilson, Hughes & Jack, and Mr. Taylor, Manager of the agency, made his declaration that the Bank held no such funds, which declaration the Plaintiff contested. It appeared that Wilson, Hughes & Jack had some claims against the Government, which were paid by the Receiver General to Mr. Thomas G. Ridout, of Toronto, Cashier of the Bank of Upper Canada, on their account, and Mr. Ridout remitted the amount by a draft upon the agency in Montreal. One of the firm called, endorsed the draft and drew the money. An attachment was put into the Bank. The Manager declared there were no funds. The Plaintiff contested, alleging that the Bank had improperly paid out the money, since it was notorious that the firm of Wilson, Hughes & Jack was dissolved by the death of Wilson, one of the partners (of whose estate the Defendant, McLennan, in this case was Curator,) and that the Bank allowed the money to go out of their hands by connivance with the members of the firm. The point on which the case turned was, whether Mr. Ridout, the cashier of the Bank in receiving the money on behalf of Wilson, Hughes & Jack, constituted the Bank their attorney or only himself individually became so. It were very questionable whether a Bank could in any circumstances become the attorney of a party; as a corporation its powers were allotted to it, and these did not include the representing and acting for individuals. Then Mr. Ridout's acts as Cashier, affected the Bank only when they were within the scope of his office, and related to matters which were in the regular course of the business of a Bank. His receipt as Cashier for money deposited, was binding on the Bank, but his receipt even with the word Cashier, for money received by him as attorney for another was an individual receipt, and the designation "Cashier" could only be regarded as descriptive. (His Honor here referred to Angell & Ames on Corporations, nos. 296 & 300.) Being therefore the Agent of the firm in question, and having no notice of dissolution, Mr. Ridout in the execution of his mandate transmitted the amount to the parties who were to receive it, making the agency in Montreal merely the instrument of conveying it. The Bank here could legally and justly affirm that it had held no funds belonging to Wilson, Hughes & Jack or any of them.

The Judgment of the Court was recorded as follows:—

"The Court having heard the Plaintiff and the *Tiers Saisie* by their counsel "upon the merits of the contestation by the Plaintiff, of the declaration made "and fyled in this cause by the *Tiers-Saisie*, and upon the motion of the "Plaintiff of the 24th December instant, to maintain the objections by him, "made to the questions put in cross-question by the *Tiers-Saisie* to the witness "E. T Taylor, examined the proceedings and evidence of record and having "deliberated thereon, considering that the said Plaintiff hath failed to prove "the allegations of his said contestation of the declaration of the *Tiers-Saisie* "in this cause, namely, that at any time before the service of the writ of

Lynch vs. McLennan.

"*saisie-arret* in this cause, there was deposited in the office of the Bank of "Upper Canada to the credit of the said Defendants, or of the said firm of "Wilson, Jack & Hughes, the said sum of £579 14s. 2d. currency, or any "other sum of money whatever; and further, considering that it hath been "fully established by the said Plaintiff in his said contestation, that the said "money was paid over to Thomas G. Ridout, Esquire, in his capacity of attor-"ney of the said firm of Wilson, Jack & Hughes, and by him transmitted by "draft through the Bank of Upper Canada at Toronto, to the branch Bank at "the City of Montreal, made in favor of the said firm of Wilson, Jack & "Hughes and by the said Bank at Montreal, paid in due course of business long "before the issuing of the writ of *saisie-arret* in this cause; and further, con-"sidering that it is not established by evidence that such payment of money "was made in any way in fraud of the said Plaintiff nor of any other interest-"ed in the said money, and that such payment was made in good faith, the "Court doth dismiss the said contestation with costs."

Contestation dismissed.

Doutre & Daoust for Plaintiff.
Rose & Monk for Tiers-Saisie.
(W. F. G.)

CIRCUIT COURT.

MONTREAL, 12 MARCH, 1855.

Coram BRUNEAU, J.

No. 222.

Robson vs. *Hooker et al.*

HELD,—That the owner of a trunk, which has been lost by the negligence of a common carrier, may in a suit against the carrier prove by his own oath *ex necessitate rei* the contents and value of the articles therein contained.

The plaintiff brought his action to recover the sum of £15 15s. the value of a trunk, entrusted to the defendants at Montreal, by the plaintiff, for conveyance to Hamilton, but which was never delivered by them to the plaintiff. The declaration in the action, which was then an appealable one, set up the delivery to and the subsequent loss of the trunk by the defendants, and after specifying the contents of the trunk, and the value of the articles therein contained, made tender of the plaintiff's oath in proof thereof.

The defendants by their pleas admitted the receipt of the trunk by them, and the agreement to carry the trunk from Montreal to Hamilton, but alleged, that they had in fact carried the trunk to Hamilton and there delivered it to one Brown, a wharfinger in Hamilton, whereof the plaintiff had notice.

Proof being gone into, and the receipt of the trunk by the defendants satisfactorily shewn, but no delivery proved either to the plaintiff or to any one on his behalf, though a trunk entered on the manifest of the steamer as marked "Jas. Robson," (the plaintiff's name being John,) was proved to have been delivered to the wharfinger, and the judge having admitted the plaintiff to prove the contents of the trunk and the value thereof, by his own oath, after hearing on the merits, judgment for the amount claimed was given in favor of the plaintiff.

Judgment for plaintiff.

Morris & Lambe, for plaintiff.
Rose & Monk, for defendants.
(A.M.)

MONTREAL, 18TH NOVEMBER, 1857.

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

No. 1675.

Neveu, père, *et ux.* vs. *DeBleury*.

EVIDENCE—RECEIPT SIGNED WITH CROSS BEFORE WITNESSES.

Held,—1st. That the payment of money in a non-commercial case, may be proved by witnesses who witnessed a receipt signed, by the party receiving the money, with a cross in their presence. 2nd. That in the examination of such witness it is irregular to begin by asking whether the amount had not been paid.

The action sought, among other things, the recovery of a sum of £28 12s. 6d. cy., alleged by the plaintiffs to have been paid by them to the now defendant, Sabrevois DeBleury, as Attorney for Raphael Brunet, *tutor*, and alleged not to have been paid over by the now defendant to Brunet.

The defendant met the action among other pleas by a plea of payment of the sum of £28 12s. 6d. cy., mentioned above to Brunet.

After issue joined, on the pleadings, the defendant attempted to prove at *enquête*, by the attesting witnesses to a receipt signed by Brunet with his mark, (the receipt being fyled by the defendant as his exhibit), that the defendant had actually paid the said Brunet the sum of £28 12s. 6d.

The witness, Thomas S. Judah, being put the following question: "Examine "defendant's exhibit number one, and say whether the money mentioned therein "was in your presence paid to Raphael Brunet, mentioned therein; whether "this receipt was read to him, and whether the said Raphael Brunet made his "mark in your presence, and that of the other witnesses subscribed thereto,"—the plaintiffs objected to the question on the ground that it was illegal and inadmissible in tending to prove, by testimonial proof, the payment of a sum over 100 livres, which was illegal; that it tended to prove by a witness the extinction of a judgment; that the payment referred to in the question could only be established by a written proof, inasmuch as the question was irregular, illegal, and in violation of the laws of the country.

The question was reserved by the presiding Judge at *enquete*, Mr. Justice Mondelet, to whom it was submitted; and the plaintiffs afterwards moved the Court to have the question rejected.

Per Curiam.—The Court are unanimously of opinion that the facts under consideration may be legally proved by the testimony of witnesses under our law. This would appear to be sanctioned by the Legislature, on reference to the old promissory note Act, 34 George III., cap. 2, which in the sixth section recognized crosses as valid in the case of promissory notes; and it was therefore reasonable to say, that, in the case of a receipt, a cross might be proved. But the question in the present instance must be rejected, inasmuch as it commenced by asking the witness if the money had not been paid.

Motion granted.

Loranger & Pominville, for plaintiffs.
H. Stuart, for defendant.

(P. W. T.)

MONTREAL, 27TH SEPTEMBER, 1858.

Coram C. MONDELET, J.

The same cause.

RECEIPT SIGNED BY MARK—EVIDENCE.

Held that the payment of a sum of money may be proved by the attesting witness to a receipt signed with a mark made by the party receiving the money.

The facts of this case appear on page 87.

The deposition of the witness Thomas S. Judah was subsequently taken in the following way;

Question.—Veuillez regarder l'exhibit du défendeur, numéro un, et dites si la signature au bas d'icelui, "T. S. Judah," est ou n'est pas votre signature.

Réponse.—C'est la signature du témoin; elle y est apposée comme témoin; la signature "F. T. Judah," apposée au bas du dit exhibit comme témoin est la vraie signature de Frédérick T. Judah alors l'étudiant du témoin, et maintenant résidant à Toronto.

Question.—Le nommé Raphael Brunet, mentionné au dit exhibit, apposa-t-il alors en votre présence sa marque d'une croix au bas du dit exhibit.

Réponse.—Au meilleur de la connaissance du témoin et croyance, il a fait sa marque d'une croix en sa présence.

Question.—Vous rappellez-vous que c'est dans votre propre étude que le témoin Isidore Bousquet avec le dit Raphael Brunet, se rendirent le premier pour payer l'argent mentionné au reçu et l'autre pour recevoir l'argent.

Réponse.—Il lui est impossible de s'en rappeler. Tout ce qu'il sait, c'est que le dit Raphael Brunet a fait sa marque d'une croix comme mentionné ci-haut, et le témoin est bien certain qu'il n'aurait pas signé son nom comme témoin si le dit Raphael Brunet n'eût pas fait au préalable sa marque d'une croix.

Transquestionné.

Ne connaissait pas Raphael Brunet avant, et ne l'a pas connu depuis. Ce qu'il sait c'est qu'un individu qui a dit se nommer Raphael Brunet a fait sa marque d'une croix en sa présence.

No other witness was examined by the defendant, but the plaintiffs gave a written consent that the above deposition should stand as well for that of Frederick T. Judah, and specially as two.

After a hearing on the merits, the Court gave Judgment in favour of the defendant.

The judgment was recorded in the following terms;—

La Cour, *

Considérant que le défendeur est bien fondé dans sa prétention de payement au nommé Raphael Brunet, dont il est question en la déclaration des demandeurs, de la somme de vingt huit livres douze chelins et six deniers, cours actuel reclamée par la présente action, lequel payement le défendeur a bien et légalement prouvé par le reçu sous croix en présence des témoins, du cinq août mil huit cent quarante cinq étant l'exhibit numéro un du dit défendeur en cette cause le dit reçu dument, légalement et suffisamment prouvé, considérant qu'il résulte de ce qui précède que les demandeurs n'ont aucun droit d'action contre le dé-

fendeur pour le recouvrement de la dite somme de vingt huit livres douze chelins et six deniers dit cours, non plus que pour celle de trente livres seize chelins dit cours par eux réclamée maintient les exceptions péremptoires du défendeur quant à ce et déboute l'action des demandeurs avec dépens.

Neveu vs. DeBleury

Loranger and Pominville, for Plaintiffs. Action dismissed.
H. Stuart, for Defendant.
(P. W. T.)

The receipt produced by Mr. DeBleury was in the following terms :—

" L'an mil huit cent quarante cinq, le cinq d'août après midi, est comparu devant les témoins soussignés Raphael Brunet tuteur ad-hoc à Joseph Neveu enfant mineur, et le demandeur ès-qualité dans une certaine cause No. 868, contre Joseph Neveu, père et uxor lequel a reconnu et confessé avoir reçu en bonne monnaie ayant cours de l'hon. Chs. C. Sabrevois de Bleury son avocat dans la dite cause, la somme de six cent quatre vingt sept livres ancien cours, égale à vingt huit livres 12s. 6d. cours actuel, montant du jugement du trente et un mai dernier rendu en la dite cause, et qu'il, le dit Sieur de Bleury a perçu des mains de L. Drummond écr., avocat du dit Joseph Neveu père et femme ; de laquelle somme le dit Raphael Brunet ès-qualité de Tuteur ad hoc au dit enfant mineur en donne quittance au dit Sieur de Bleury. Ainsi fait les jour et an susdits à Montréal. Et le dit Raphael Brunet a déclaré ne savoir écrire de ce requis et a fait sa marque d'une croix en présence de nous."

THOMAS S. JUDAH.
F. T. JUDAH,
H. ISIDORE BOUSQUET. } *Témoins.*

RAPHAEL ma × BRUNET.
marque.

MONTREAL, 30TH APRIL, 1858.

Coram SMITH, J.

No. 2218.

Whitney, vs. *Clarke*.

CLERK—INCOMPETENT TO CONTRADICT HIS OWN RECEIPT.

Held, that a clerk is incompetent to prove that a receipt given by him for his employer to a customer for a sum of money was given by error, and that he did not actually receive the money acknowledged by the receipt.

This action was instituted for the recovery of the sum of £50 Currency with interest thereon, from the 10th day of November 1856, and costs of suit. This sum the Plaintiff claimed, as being the balance remaining due on a Promissory Note, for £162 17s. 1d. Currency, made by the Defendant to the order of the Plaintiff at Montreal, on the 7th May of 1856.

The Defendant appeared, and by his first plea alleged, that he had before the institution of the action, paid the Plaintiff the sum of £167 17s. 1d. Currency, as the " amount of the promissory Note, and in excess thereof, in full satisfaction " and discharge thereof."

By his second Plea, the Defendant pleaded two payments to the Plaintiff, viz. at Montreal on the third day of September 1856, of the sum of £55 Currency to be applied in payment of the said Note, and of the other sum of £112 17s. 1d. Currency on the 17th of November 1856, at Montreal to be applied in payment and discharge of the said note, and that the Plaintiff then accepted the said sum of £112 17s. 1d. in full satisfaction and discharge of the Promissory Note.

Whitney vs. Clarke.

The Plaintiff in his answers to the pleas of the Defendant denied his pretensions and alleged that the Defendant had in fact only paid on account of the said Note, the sum of £112 17s. 1d. Currency, namely, to the Plaintiff in person £55, on the third of September 1856, for which he granted the receipt produced and marked as Defendant's exhibit number one,) and afterwards the other sum of £57 17s 1d. Currency on the 17th day of November 1856, paid by the Defendant to Plaintiff's clerk and book-keeper, L. A. Dufresne.

The Plaintiff alleged that at the time of this last payment the Defendant fraudulently induced Dufresne to give him a receipt for £112 17s. 1d. including therein the said first payment of £55, and the said last payment of £57 17s. 1d. on the pretence that he had never received a receipt for the first payment.

And that in fact the said receipt was obtained by fraud, and granted by the Plaintiff's clerk in error and by mistake, and should only have been a receipt for the sum then actually paid, to wit; £57 17s. 1d. Currency.

The whole matter at issue, turned upon the validity of the last receipt which was produced by the Defendant.

The receipts were in the following terms, viz.,

First:—

"Received Montreal, 3rd Sept. 1856, from William Clark, fifty-five pounds Currency, on account note."

"N. S. WHITNEY."

£55 Currency.

And second:—

"Received from Mr. W. C. Clark the sum of one hundred and twelve pounds 17s. 1d. Currency, being on account of Note due 10th instant, Montreal 17th November 1856."

"N. S. WHITNEY,"

"Per L. A. DUFRESNE."

£112 17s. 1d.

At Enquête, the Plaintiff proved by Luc. A. Dufresne, one of his Clerks and book-keeper, that he Dufresne had signed the receipt, Defendant's exhibit No. 2, on the day it bore date. That on the morning of that day the Defendant paid him on account of the said note £57 17s. 1d. for which he gave a receipt. That in the afternoon of the same day, the defendant returned and asked the witness, as he had made a previous payment on account, for which he represented that he had got no receipt, to give him a full receipt for the said payment of £57 17s. 1d. and the former one of £55, and that witness did so on defendant's returning the receipt given in the morning, which was destroyed.

The evidence of this witness was objected to, on the ground of interest, but the objection was over-ruled by the presiding judge Mr. Justice Smith.

The plaintiff also produced an extract from his books, shewing according to these, that he had received but two payments of £55 and £57 17s. 1d., and he proved the correctness of the extract by another of his clerks, Edmond Gravelle. The books shewed a balance of £50 as due by the defendant. The signature to the first receipt was proved by this witness, to be in the handwriting of the plaintiff himself, and of the second in that of the said L. A. Dufresne. The defendant admitted to Gravelle "that he kept no cash book," and

when spoken to, as to the debt in question said "he had it in his mind that he had paid it long ago," but was "not positive."

Torrance for the Plaintiff at the hearing, argued that he was entitled to judgment in his favour, for the following reasons:—

1st. That the testimony of Luc. A. Dufresne could not be rejected and was legal and admissible.

2nd. That, if the evidence of Dufresne was to be discredited, it could only be on the adduction of testimony, showing that he was unworthy of credit. This had not been done by the defendant, and his testimony therefore remained entirely unimpeached and reliable.

3rd. That the second receipt was clearly proved to have been given in error and by mistake.

4th. That there were moreover the strongest presumptions that the note was not paid in full, shewn by the facts of the case.

Some of these might be mentioned.

1o. If the pretensions of the defendant were true, he had paid more than the amount due. The note was for £162 17s. 1d. The first receipt and the second erroneous one would together, make up £167 17s. 1d.

2o. The second receipt itself, declared the payment to be "on account" merely, of the note.

3o. Besides all this, the note which was pretended to have been discharged on the day the second receipt was granted, was not then given up to the defendant, but was retained in the possession of the plaintiff and a receipt on account given.

H. Stuart for the defendant contended that the evidence on behalf of the plaintiff was insufficient.

The plaintiff relied upon the invalidity of the second receipt, asserting that the same was given by error, and that a lesser sum was actually received by him than the amount mentioned therein; and in support of his pretension, produced two witnesses, Clerks in his employ:—L. A. Dufresne, the Clerk who signed the receipt objected to, and E. Gravelle.

L. A. Dufresne examined on the *Voir dire*, says:—

"Is a clerk and book-keeper in the employ of the Plaintiff, and has been so "for upwards of two years. The signature L. A. Dufresne for the Plaintiff, "attached to receipt Exhibit No. 2, is his signature."

Defendant's Exhibit No. 2, was signed by the witness on the day it bears date purporting to be a receipt for £112 17s. 1d. Witness did not in fact receive this amount on that day. The amount actually received, was £57 17s. 1d., for which he gave a receipt in the morning for that amount. The receipt Defendant's Exhibit No. 2, was given subsequently on the same day. The Defendant came in the morning, and paid to witness the sum of £57 17s. 1d., on account of his Note, Plaintiff's Exhibit No. 1, leaving a net balance of £50 due on the said note, the Defendant saying, that if he had money, he would pay the balance in the afternoon, when he said he would call. In the afternoon he came back, said that he had no more money to give witness, having paid it over to other hands; but, he asked witness if he would be good enough as he had made a

Whitney vs. Clarke.

previous payment of £55, on account of said note, and very likely, he thought, he had no receipt of such previous payment, and therefore, for witness to give him a full receipt for the two payments of £55 and £57 17s. 1d. Witness accordingly did so. Defendant returning the receipt given in the morning. The witness had not at that time ever seen Defendant's Exhibit No. 1. The two receipts would be an over payment of the note. When monies are received on account it sometimes happens, that receipts are not given, the customers knowing the clerks.

It was in the morning that the Defendant obtained the first receipt for £57 17s. 1d. There was no other person concerned in this transaction but myself. He told me he had more money with him at the time, but required it for the purpose of payments on purchases elsewhere. He returned in the afternoon and obtained the receipt Exhibit No. 2. Witness destroying the receipt given in the morning.

E. Gravelle was also examined:—

"Is a clerk in the employ of Plaintiff, and has been so for several years. Having examined Exhibit No. 1, swears that it is the Plaintiff's Signature thereto attached, and that it has reference to the note declared upon in the declaration. Having examined Exhibit No. 2, declares the Signature to be L. A. Dufresne's on behalf of the Plaintiff, a Book-keeper then, and still in employ of Plaintiff. He was authorized to sign receipts on behalf of Plaintiff. This also refers to the note declared upon in Plaintiff's declaration. Witness proves authenticity of Exhibits Nos. 3 & 4. Letter authorized by Plaintiff. All the above Exhibits being filed by Defendant."

Cross-Examination and Re-Examination unimportant beyond the fact of establishing, "That in course of Plaintiff's business, when a customer makes a payment on account, he does not always get a receipt. Sometimes the monies are received by letter through the Post. They sometimes get receipts subsequently. This often happens. The Plaintiff does not always acknowledge the receipt of Money Letters from his customers when transmitted by Post. Plaintiff receives a great many money letters through this channel, and frequently omits acknowledging the receipt of them. In dull seasons the most part of the letters are answered, and in busy seasons not so many."

The Defendant had a running account with the Plaintiff apart from this note, before the maturity thereof.

These two witnesses were produced by the Plaintiff, and it is upon such testimony that the Plaintiff asked this Court to set aside a written document. The only one of these two cognisant of the transaction was the Clerk signing the receipt, and his parole evidence, without any corroboration, was to set aside his writing. The Defendant trusted that the evidence would be found insufficient by this Court;

1st.—Because the Clerk attempting to set aside a receipt by his oath, is, if under the circumstances not absolutely incompetent, a suspicious witness, not entitled to credit by law.

2nd.—That the interests of society require that a receipt should be considered sufficient unless set aside by undoubted and overwhelming evidence, in the absence of which the presumption of Law is complete in its favor.

SMITH, J.—I have come to the conclusion that the plaintiff had failed to establish the matters set out in his special answer, though I have had such difficulty in coming to a conclusion that I would gladly see the case go to the appeal Court. As a general rule a receipt is not conclusive. Here I do not consider the evidence of Luc. A. Dufresne to be admissible for the plaintiff.

He is swearing to his own discharge.

The judgment was recorded in the following terms:

"The Court having heard the parties by their counsel upon the merits of this cause, examined the proceedings and evidence of record, and having deliberated thereon, considering that the said plaintiff hath failed to establish by legal and sufficient evidence the material allegations of his declaration, and further considering that the said defendant hath fully proved the material allegations of his said exception fyled, namely, that before the institution of the present action he had fully paid the amount of the Promissory Note, on which the said action is brought. And further considering that the said defendant cannot be barred from having and maintaining the conclusions taken in the said exception by reason of any thing alleged and set forth in the special answer contained. And adjudging on the motion made by the said defendant, that the evidence of Luc. A. Dufresne, a witness produced by the said plaintiff, for the purpose of supporting the allegations of the said special answer, the Court doth maintain the said motion, and doth adjudge the said evidence of the said witness, Luc. A. Dufresne, to be illegal and inadmissible, and doth reject the same: And the Court doth maintain the exception of the said defendant, and doth dismiss the said action with costs, distraits to Mr. Henry Stuart, the attorney for the defendant."

Torrance and Morris, for Plaintiff. Action dismissed.
H. Stuart, for Defendant.
(F. W. T.)

AUTHORITIES CITED BY PLAINTIFF.—1o. Receipt in general only *primâ facie* evidence of payment. Phillips, Ev. 8th London Edn. 1, 388. Roscoe Ev. p. 47, London 8th Edn. 1851. Taylor 3*rd*. Edn. London; pp. 607, 706 and 919, §671, §786, §1037.

Reports: Graves v. Key, 3 B & Ad. 318. Lampon, v. Corke, 5 B & Ald. 606, 611. Farrar, v. Hutchison, 9 Ad. & El. 643.

2o. Error or fraud may be proved by party erring or misled, and by clerk *ex necessitate rei*. Phillips, 1. 139 — 141, 8th Edn. London, or 1, 145, 6, Amer. Edn. 3rd Edn. 1849. Starkie, 1, 132, 133, and notes. 3rd Edw. London. Greenleaf, Ev. 1, §411, p. 513, §416, p. 517.

Reports: Edmonds v. Lowe, 8 B. & C. 407. 8 Hunter v. Leashley, 10 B. & C. 864.

MONTREAL, 18TH SEPTEMBER, 1858.

Coram BADGLEY, J.

No. 28.

Molson vs. *Burroughs; and Bank of Montreal*, tiers saisie.

SAISIE ARRET AFTER JUDGMENT—EXCEPTION À LA FORME.

Held,—That irregularities and informalities in a *saisie arrêt* after judgment cannot be attacked by an *exception à la forme*, and that such an exception will be rejected on motion.

This was a motion to reject an exception *à la forme* fyled to a writ of *saisie arrêt* after judgment, on the ground that the writ is in the nature of an execution, and cannot be attacked by exception, but only by opposition.

Molson vs. Burroughs.

Hemming, for defendant, argued that though in one sense a *saisie arrêt* after judgment might be considered as an execution, inasmuch as it was a proceeding in execution of a judgment, yet that it did not at all follow that it was identical with a *saisie execution*, or that it should be governed by the same rules of procedure. That in the same sense an action instituted for the purpose of declaring a judgment executory might be considered as an execution, but no one could doubt its being also an action. That the primary object sought by the party issuing a *saisie-arrêt* was to obtain a *transport forcée* of the debt owing by the *tiers-saisi* to the *saisi*, and the defendant was summoned by the writ "to appear to hear the attachment declared good and valid, and further to answer as the said writ requires," as an intervening party, for the purpose of seeing that such *transport* was effected in due course of law. That it had been held in the Court of Appeals, in the case of Macfarlane & Whiteford, that a *saisie arrêt* was an "acte d'assignation par lequel le *saisissant* formule une de-"mande contre les personnes ainsi citées"; or, in other words, that the proceeding was in fact an action. That the defendant or *saisi* had the right to intervene, at every step of the proceedings, in order to see that the same were regular and conformable to law; and this not only as to matters between himself and the *saisissant*, but also as between the *saisissant* and the *tiers-saisi*. That it was manifestly impossible for the defendant to exercise these rights if he were restricted to an opposition *à fin d'annuller*, the only pleading that a defendant is allowed to oppose to a *saisie execution*. Moreover, what object could there be in forcing a party, who was already before the Court, to take upon himself the character of opposant. If we looked at the theory of all oppositions, we should find that they were a means provided by law, whereby a party who was not before the Court could, under certain circumstances, bring himself before the Court and state how he was aggrieved. But no single instance can be found in the books, of a party, who finds himself already before the Court in any other character being obliged to take upon himself the character of opposant. Then, again, what rules are to govern as to the delays when such opposition should be fyled. In the case of a *saisie-execution*, an opposition *à fin d'annuller* must be fyled previous to the sale and return; but, in the case of a *saisie-arrêt*, that would be impossible; for it is not until the day after the return-day, when the *tiers-saisis* have declared, that the defendant can be sure that there is any seizure at all. Or the very defect that the defendant may wish remedied, as in the present case, might be that there was no legal return at all. Or contestations might arise between the *saisissant* and the *tiers-saisi* after the return, in which the *saisi* had an interest to contest; and if it be contended that it might be fyled any time before the sale, this also would be impossible, as there was no means provided whereby the defendant should be notified of the sale of the goods seized on the *tiers-saisi* after judgment obtained against him; and moreover, in the great majority of cases, there is no sale at all. Under these circumstances, it was manifest that the defendant must be allowed to plead, as in an ordinary action. That even though it should be held that an opposition was the only way of contesting a *saisie-arrêt*, still, inasmuch as the *moyens* set forth in the exception were exactly the same as might be set up by an opposition *à fin d'annuller*, the Court would not, therefore, reject the pleading for a mere

misnomer; for the Court had allowed two pleas, in two cases decided last September term, to stand, although they characterized them as monstrous misnomers, merely on the ground that they were, in substance, good answers. Supposing, however, that these reasons should be held insufficient, the plaintiffs have not adopted the proper course in endeavouring to have the *exception à la forme* rejected on motion: they should have demurred to the same, for the fact of such a lengthened argument being necessary, would tend to prove that it was really a question of law, and not of mere practice. That in order that a pleading might be rejected on motion, it was necessary that there should be such an irregularity in the fyling of the same as should be patent on the face of it, and such as the Court would be bound to notice; but, in the case of Dechantal vs. Dechantal, there would be found an identically similar proceeding as the present, in which the Court formally adjudged on the *exception à la forme* therein fyled on its merits, which it would not have done had the fyling of the same been such a patent irregularity as contended by the plaintiffs.

PER CURIAM.—This is the case of a *saisie-arrêt* after judgment, which the defendant meets by an *exception à la forme*, averring that the writ of *saisie-arrêt* was not returned into Court until the day following the return day. The case is before the Court on the plaintiff's motion to reject the exception. The question is, whether the *saisie-arrêt* after judgment can be attacked by an *exception à la forme* of this nature, as if it were a new action. By the law and practice of our Court, the *saisie-arrêt* after judgment is regarded as an execution; but the defendant has no valid interest in raising such an objection after the return of the writ into Court, and after the declaration of the garnishee has been made and fyled of record. Moreover, I have consulted my brother Judges, and they all concur with me as to the practice of the Court being as I have stated. The exception must be dismissed.

Motion granted, and Exception dismissed.

Baker, for plaintiff.

Dorman, Counsel.

Hemming & Lunn, for defendant.

Authorities cited by plaintiff. Saisie-arrêt is in the nature of an execution:—Roger, saisie-arrêt; 6 Lower Canada Reports, p. 148; Mettayer et al. vs. McGarvey and Mettayer et al., T. S. As to mode of opposing sa. ar.: 1 Pigeau, p. 658 and 29, p. 621; vide also 2 L. C. Jurist, 60.

Authorities cited by Defendant:—Macfarlan vs. Whiteford, 1 Jurist, pp. 49 and seq.; Roger, *saisie arrêt*, pp. 216 and 322; Carré & Chauveau, Proc. Civile, vol. 4, p. 575; Pigeau, Procédure Civile, vol. 1, p. 658; and cases Stuart vs. DeMontigny, and Hunter vs. Dorwin.

(S. B., F. W. T., & E. J. H.)

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* REPORTER'S NOTE.—*Sed vide contra.*—The case of Pinsonneault vs. Mailloux and L'Heureux, T. S., (No. 334, S. C.)—This was a *sai. ar.* after judgment, to which the defendant pleaded that the T. S. was not the *véritable débiteur*. At the argument, it was contended by plaintiff's Counsel that the defendant could have no interest in pleading such a point, inasmuch as he could have no possible interest in preventing the T. S. from paying his debt, and thus relieving him from liability to the plaintiffs; and, moreover, that the proceeding by *sai. ar.* after judgment was in the nature of an execution, and could not strictly be pleaded to. The Court, composed of Justices DAY, SMITH and MONDELET, rendered the following judgment on the 31st day of March, 1856:—"The Court * * * considering that the attachment, *saisie arrêt*, * * * is irregular and insufficient, * * and that the exception of him, the defendant, in that behalf, is well founded in law, maintaining the said exception,—doth set aside, and declare null and void, the said attachment, with costs to the said defendant." (S. B.)

MONTREAL, 28TH SEPTEMBER, 1858.

Coram SMITH, J.

No. 514.

Campbell et al. vs. Jones et al., and Jones et al., defendants par reprise d'instance.

CARRIER SHIPPER—GOODS IN TRANSITU.

Held,—That a common carrier who delivers goods to the consignee, after being notified by the shipper of the goods whilst *in transitu* not to deliver them, is liable to the shipper for the value thereof.

This was an action to recover the sum of £355 2s. 7d. cy., being the value of three cases of goods shipped by the plaintiffs at Montreal, on board the defendants' vessel, and which, by the bill of lading, the defendants undertook to deliver at Toronto to one Samuel Casper.

The Declaration alleged, that while the vessel was *en route* the plaintiffs notified the defendants not to deliver the goods to the consignee, inasmuch as he had stopped payment; but that, notwithstanding such notice, the goods were delivered by the defendants to Casper at Toronto, and were in consequence wholly lost to the plaintiffs.

The defendants pleaded that no sufficient notice had been given to them; that the goods had been landed, according to custom, at a public wharf at Toronto; that the plaintiffs had a branch establishment at Toronto, and could have and ought to have looked after the goods when so landed; that, moreover, they had taken and still held Casper's note for the sale to him of the goods in question, and had repeatedly dealt with him since their delivery in endeavouring to obtain security, and otherwise, in all respects as if he were the true owner of the goods.

The following was the judgment of the Court:—

"Considering that the said plaintiffs have fully established the material allegations of their said declaration, and that the goods, the value of which are now sought to be recovered from the said defendants, were shipped on board the "Ranger," belonging to the said defendants, and were delivered by the said defendants to the said Samuel Casper after the defendants had been duly notified to stop the said goods *in transitu*, and not to deliver the said goods; and that, by reason thereof, the said defendants are liable in law to account for the value thereof as set forth in the bill of particulars, being the price for which said goods were sold by the said plaintiffs to the said Samuel Casper.

"And further, considering that the said defendants have failed altogether to prove the allegations in their said pleas set forth,—doth condemn the said defendants, Henry Jones, William John McDonell, and the said Dame Susan Isabella Jones, in her said capacities, jointly and severally, to pay to the plaintiffs the sum of £355 2s. 7d., current money of the Province of Canada, with interest thereon from the 11th day of September, 1854, date of service of process in this cause until actual payment and costs of suit."

Judgment for plaintiffs.

A. & W. Robertson, for plaintiffs.

Rose & Monk, for defendants.

(S. B.)

MONTREAL, 28TH OCTOBER, 1858.

Coram MONDELET, (C.), J.

No. 28.

Molson vs. Burroughs and The Bank of Montreal, T. S.

Held,—That a *saisie-arrêt* after judgment cannot be rejected or dismissed, on motion, for alleged irregularities connected with its return into Court.

MONDELET, (C.), J.—This is a motion to quash a writ of attachment after judgment, on the ground that it was returned too late, namely, on the day after the day on which it was returnable. Now, if this proceeding, by way of attachment, be an action, the point attempted to be raised cannot be tried by motion; and, if it be an execution, it must be tried by opposition. So that, under any circumstances, the motion must be rejected.

Motion rejected.

Joel C. Baker, for plaintiff.

Hemming & Lunn, for defendant.

(S. B.)

MONTREAL, 28TH OCTOBER, 1858.

Coram MONDELET, (C.) J.

No. 363.

Leverson et al., vs. *Cunningham and Boston, Sheriff*, MIS EN CAUSE.

Held,—In the case of a Rule for *contrainte* against the Sheriff as *gardien*, allowing no alternative but payment of Plaintiff's debt, where, in consequence of the Sheriff having pleaded that the value of the effects was only of a certain amount, the Court of Appeals has ordered that proof be made of such value, and that the Rule be made absolute with power to the Sheriff to liberate himself from the *contrainte* on payment of such value; that notwithstanding such judgment of the Court of Appeals, and the proof made thereunder, the Rule will be dismissed, on the ground that it does not itself give the alternative of paying the value of the effects seized.

This was a final hearing on the rule for *contrainte par corps*, respecting which reports are to be found at pages 3 and 86 of the 1st volume, and at page 297 of the 2nd volume of the Jurist, after proof had been made of the value of the effects seized, as ordered by the judgment of the Court of Appeals, contained in the last report referred to.

At the argument, it was contended, on the part of the Sheriff, that the rule should be declared absolute, leaving to the Sheriff, in the terms of the judgment of the Court of Appeals, the right to liberate himself on payment of the value of the effects, which, it was further contended, was clearly proved not to exceed £50 currency. And it was argued, on the part of the plaintiffs, that the proof as to the value was wholly insufficient, and that the rule should simply be declared absolute.

MONDELET (C.) J.—(After stating facts). There can be no doubt that I must obey the order of the Court of Appeals in this case, although my opinion may be different. That Court has prescribed what the judgment of this Court shall be; but I shall give judgment on my own responsibility. The Court of Appeals ordered an *avant faire droit*, ordering the Sheriff to make proof, although there was nothing about value in the rule. I am, of course, bound to carry out this order; but the question arises, how am I to apply this proof in giving judgment on the rule as drawn? If the judgment of the Court of Appeals goes too far,

Leverson vs. Cunningham.

I am not pliant enough to obey it. The Court of Appeals cannot dictate to this Court what judgment it shall render. I know of no Court having such power, unless it be in Turkey, where "might is right." When this Court was called, finally, to adjudicate upon the evidence, it had to ascertain whether the evidence adduced could be applied to the *libellé, plaint, demande*, or rule, or whatever proceeding they might have before them, whatever might be its name or character. Upon investigation, the Court here found the evidence altogether inapplicable to the *demande libellé*, or rule in this cause issued. The answer of the Sheriff the Court could not, of course, look at, or, at least, judicially take notice of it; it was no part of the *libellé* of the plaintiffs. As well might the Court take upon itself to adjudicate in favor of a plaintiff upon allegations which were not to be found in his declaration, or upon allegations in a special answer omitted in the declaration. Such a doctrine, elementary, and universally known as well as generally admitted by men conversant with their profession, ought not to be overlooked by this Court, and it was not overlooked. This Court was fully satisfied, that, were it to apply the evidence, such as it was, to this rule, and adjudicate in favor of the plaintiff, and grant him, not what he had alleged and prayed for, but what he had neither alleged nor prayed for, the judgment would be a nullity. It would be open to the *Requête Civile*, under the operation of the 34th Article of the 35th Title of the Ordinance of 1667. In vain would it be urged upon this Court that all proceedings were *de bonne foi*. If that was to be the rule, or rather if there was to be no rule whatever, then all the science of the *procedure*, and Pigeau and others, might be cast aside, and the will of judges, instead of well understood rules, be law. Of course, with such a doctrine, there would be an end to all security, and the Judges might, with impunity, disregard the fundamental golden rule of the Roman Law:—*Sententia debet esse libello conformis et potestas judicis ultra id quod in judicium deductum est nequaquam potest excedere.* This Court could not and would not disregard that maxim, and much less the Ordinance of 1667; both of which, in as far as the present case was concerned, were justice and common sense. The rule must, therefore, be dismissed with costs.

Rule dismissed.

T. K. Ramsay, for plaintiffs.
Bethune & Dunkin, for the Sheriff.
(S. B.)

MONTREAL, 28TH FEBRUARY, 1859.

Coram SMITH, J.

No. 399.

Morgan vs. Forsyth et al.

LIABILITY OF REGISTERED OWNERS OF VESSELS FOR SUPPLIES.

Held,—That the party having open possession and control of a vessel, and using it for his own benefit and drawing the profits, is liable and not the registered owner for supplies furnished to it.

This action was brought against the defendants as registered owners of the steamer "Aylmer," for the sum of £54 14s. 9d., the price of a quantity of firewood furnished to the steamer during the navigation season of 1856. The defendants pleaded that during the whole of that period the "Aylmer" was in the

possession and under the control and management of one Humphrey, as the lessee thereof, and as running and trading with the steamer for his own use and benefit to the plaintiff's knowledge; and that the wood was furnished to the steamer on account and upon the credit of Humphrey, whose note the plaintiff took in settlement. To this plea the plaintiff answered specially, that the wood was supplied at the request of the master of the steamer, and without any knowledge of Humphrey or of his credit, and that only after delivery of the whole, and on demanding payment from the master, the plaintiff was informed that Humphrey was the owner and would pay; that in consequence of this information and the representations of Humphrey that he was the actual owner, the plaintiff accepted his note, which was protested at maturity, that only then the plaintiff became aware that at the time of the sale and delivery of the wood, the defendants and not Humphrey were the owners, and that he had since learned that at the time Humphrey was insolvent; further, that immediately on learning that the defendants were the owners, he had applied to them for payment, and had since done nothing to destroy or forfeit his claim upon them.

SMITH, J.—The general principle is that registry is decisive evidence of title in a vessel, so that if a first purchaser neglects to register, and a second does register, the latter is preferred and is the legal owner. In fact no effectual transfer of title can take place without registry, and the defendants at the time in question, were, no doubt, the real owners, being registered as such. But the point on which the case turns is, to whom was credit given? and this is a matter of evidence. The testimony of Humphrey shews that he bought the vessel in May, 1856, (though without a Bill of Sale) and that not being able to pay the price, it was sold subsequently, with his consent, to other parties; but that before the second sale, and while the steamer was being run by him for his own profit and wholly under his management and control, the wood was furnished. The crew and officers were Humphrey's, and the master, who contracted for the wood and received it, was appointed and paid by Humphrey, and was throughout his agent. The authorities clearly indicate that the registry of title, though creating a *primâ facie* liability on the part of the registered owner, is not conclusive. "To say," observes Lord Ellenborough, in an analogous case having reference to a chartered ship, "that the registered owner, who divests himself by the charter "party of all control and possession of the vessel, for the time being, in favor of "another who has all the use and benefit of it, is still liable for stores furnished "to the vessel, by order of the captain, during the time, would be pushing the "effect of the Register Acts much too far." And again, "the question," (of liability for stores furnished a vessel) "is a pure question of contract and credit, "which, like all other questions of goods sold or work done, must be decided "by a jury upon consideration of all the circumstances." * There was a sale to Humphrey, verbally, by which the defendants divested themselves of all control and possession of the vessel in his favor, and he, thenceforward, and during the time in question had the use and benefit of it, and is responsible for the stores supplied to it and ordered and received by his agent the master.

* Addison on contracts, American Edition, pp. 626 and 629.

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The judgment was recorded as follows:—

"The Court, &c., &c., considering that the plaintiff hath failed to prove the "allegations of his said declaration, and that the said defendants ever contracted "with the said plaintiff, or in any way became liable in law to pay to the said "plaintiff for the price and value of the wood sought to be recovered in this "action, the Court doth dismiss this action with costs."

Action dismissed.

Popham, for plaintiff.

Abbott & Baker, for defendants.

(W. F. G.)

MONTREAL, 26TH FEBRUARY, 1859.

Coram SMITH, J.

No. 406.

Grenier et vir, vs. The Monarch Fire and Life Assurance Company.

POLICY OF INSURANCE—FORFEITURE.

Held,—1st. That under a clause in a policy of insurance, that if there appear fraud in the claim made to a loss, or false swearing or affirmation in support thereof, the claimant shall forfeit all benefit under such policy, the Court will reject the claim of the policy-holder, if the Company establish that the claim is unjust and fraudulent, and far in excess of the actual loss to the knowledge of the policy-holder.

2nd. That general evidence may outweigh the positive testimony of witnesses, where the evidence of these witnesses is not consistent, and where the presumptions are adduced against its truth.

This was an action brought by the plaintiffs to recover the sum of £585 4s. 11d., alleged to be due under a policy of insurance made in favor of one of them, Marie Sophronie Grenier, trading as a *marchande publique* at St. Hyacinthe. The Declaration sets up the policy of Insurance: that a fire occurred on her premises on the 7th May, 1855, by which her stock-in-trade to the value of £485 4s. 11d., and her household furniture to the value of £100, were destroyed by fire.

The defendants pleaded, in effect—First, That the loss suffered by the plaintiff was inconsiderable, and would have been less and probably nothing but for her own negligence; that there was an express condition in the policy, endorsed thereon and forming part thereof, to the effect and in the words following:—"All persons insured by this Company sustaining any loss or damage by fire, "are forthwith to give notice to the Company at their office in Adelaide Place, "London, or its Agent, as soon as possible after (within fourteen days at furthest), "are to deliver in as particular an account of their loss or damage as the nature "of the case will admit of, and make proof of the same by their affidavit or "affirmation, and produce such other evidence as the Directors of the Company "may reasonably require. In this account the property and articles must be "specified in detail, with the quantities, qualities, and prices; no profit or "advantage is to be included in such claim. And until such affidavit or affir-"mation, account and evidence, are produced, the amount of such loss, or any "part thereof, shall not be payable or recoverable; and if there appear fraud "in the claim made to such loss, or false swearing or affirmation in support "thereof, the claimant shall forfeit all benefit under such policy." That by the

particular statement produced by defendants as their exhibit No. 1, she represented her loss to be £485 4s. 11d., which statement she had sworn to and delivered to the defendants; that there was in this statement fraud and false swearing, within the true intent and meaning of the said express condition in the said policy; that plaintiff must have known, and did know at the time, that this was so, and that her claim was wilfully exaggerated with a view to defraud the defendants; and that she had, therefore, forfeited all benefit under said policy, and was not entitled to recover anything. The second plea, was a *défense au fonds en fait.*

The case went to evidence, and was dismissed.

SMITH, J., in giving judgment, said in effect:—This is an action on a policy of insurance, under which the plaintiff, Madame Archambault, was insured from May, 1854, to May, 1855, for the sum of £600, of which £500 was on goods and stock-in-trade in her shop and premises at St. Hyacinthe, and £100 was on furniture. A fire occurred in her premises before the expiry of the policy, and she handed in to the Company, defendants, a statement on oath, in which she says that goods to the value of some £500 were absolutely destroyed. The defendants pleaded that the plaintiff, Madame Archambault, never had or held a stock of such value; that she had suffered no loss; and that the claim was fraudulent and worthless. The questions involved in this case are entirely of evidence. Has the plaintiff complied with the terms and conditions of her policy? and is her claim a fraudulent one?

With the exception of three witnesses, who are Archambault plaintiff's son, her daughter, and a law student by name of L'Amoureux, all the evidence adduced is of a general character. The defendants adduced evidence to show that there was not on plaintiff's premises at the time of the fire the amount of goods the value of which was claimed by her; in fact, that it was impossible she could have had the stock she had sworn to. That the fire took place between ten and eleven o'clock in the evening, and was put out by a few buckets of water in a few minutes. That it was confined to a corner of the shop, and that it was highly improbable that such a loss as is claimed could have occurred there. Neighbours were examined who spoke to these facts. The city assessors were also examined, who had shortly before valued the stock for the purposes of assessment at £25. Then there was evidence collateral to this: parties were examined who had been in the habit of dealing at the shop, and had gone there shortly before the fire in search of goods of the description of those in the list sworn to, but had been told that plaintiff had none on hand at the time. Merchants of great standing in Montreal were examined as to the quality and quantity of goods of particular descriptions likely to be found in a shop like plaintiff's, in a country town, who declared that the quantity of some of the choicer goods was greatly in excess of what was likely to be found in such a shop. Mr. Thomas, of the firm of Bruyere Thomas & Co., one of these merchants, had said that plaintiff must have had, according to her list, a larger stock of an article called "silk plush" than his house would import in one year; that no one in the country purchased that article except for an order, and then only a yard or a yard and a half at a time.

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This, then, is the character of the general evidence adduced. We now come to the particular and positive evidence of Archambault, and the other of plaintiff's witnesses.

Archambault and L'Amoureux swear positively to the making of the inventory by them some days before the fire. The former says that the draft of the inventory which he produces, written in pencil, was made some days before the fire, and was in his pocket accidentally after all the goods, books, and invoices had been destroyed by the fire. Their evidence is corroborated by that of Miss Archambault, and it is hard that credence should not be given to it; but it must be weighed with the other evidence, and, if against all probability, is it to stand? Let us look a little more closely into the evidence of these witnesses. No invoices of any purchases are produced, nor is there evidence of the destruction of any invoices; but, if destroyed, they certainly might have been replaced. Nothing of the kind was done—no single invoice is produced, and not a book. Archambault swears that he took down the goods in the inventory at the prices at which they were bought in Montreal; but he forgot this when he swore that he himself had brought back from a visit to the United States £200 worth of valuable silks. Is it likely that he could not find the persons in Montreal from whom the goods were bought, if bought there? Nichols, a trader in Montreal, is the only one examined who had sold to plaintiff; and he says that the goods he sold were not like those in the statement sworn to, but were, on the contrary, like the goods which are in the list of those which were saved at the time of the fire. Miss Archambault swears that she bought £60 worth of goods at a particular place in Montreal; but she gives no details, and produces no account. The plaintiff's stock was, at the time of the fire, assessed on a value of £25. This she endeavours to explain by evidence that carpenters were at work when the assessors came to assess, and that the goods had in consequence been removed up stairs; but this is contradicted by the evidence of the assessors themselves. In relation to Archambault's story that he had brought a large amount of valuable goods from the States, there is the evidence of parties to show that when he came back he was as poor as when he left; that he was very vain, and would have been likely to have made a display of his goods if he had brought them back with him. The evidence might be dwelt upon at greater length, but enough has been said to shew that the claim is a fabricated one, that there has been a breach of the conditions of the policy; and the action must be dismissed.

The judgment is as follows:—"Considering that the said plaintiffs have failed to prove the allegations of their said declaration, and that she, the said Dame Marie Sophronie Grenier, suffered the loss for the recovery of which the present action is brought; and further, considering that the said defendants have fully established that the claim of the said plaintiffs, set up in and by virtue of the policy of insurance declared on in the said declaration, is unjust and fraudulent, and is far in excess of the actual loss by the said Dame Marie S. Grenier, incurred by the destruction of the property insured under said policy; and further considering that the said claim was so made with a full knowledge of the said plaintiff, Dame Marie S. Grenier that the said claim was unjust and fraudulent, and that it was made for the purpose of defrauding the said Company, the

defendants, and is therefore in violation of the conditions of the said policy, and that thereby the said Dame Marie S. Grenier hath forfeited all claim whatever under the said policy to recover for any loss actually suffered by her, the said plaintiff,—the Court doth dismiss the said action with costs."

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Action dismissed.

R. & G. Laflamme, for plaintiffs.
Cross & Bancroft, for defendants.
(H. B.)

MONTREAL, 30TH APRIL, 1859.

Coram BADGLEY, J.

No. 101.

Fowler vs. *Stirling, et al.*

BILL OF LADING—CONSIGNOR, WHEN NOT LIABLE FOR FREIGHT.

Held.—That a Bill of Lading, as between the parties thereto, may be explained by parol testimony. That the vendor of Merchandise, who is named the Consignor in the Bill of Lading, is nevertheless, not liable for the freight of said merchandise which he had delivered to vendee's Agent *before* shipment, according to contract and to the knowledge of the ships agent. A Bill of Lading may be transferred by mere delivery without indorsement.

Action in the form of a *quantum meruit* for payment of freight. The Defendants pleaded, that the iron, for the payment of the freight of which the Plaintiff sought to recover from them by his action, was, previous to its shipment sold by them to W. Darling of Montreal, that they agreed with Darling to deliver him the iron in Glasgow, and by Darling's orders, they accordingly delivered it to his Agent, T. C. Orr, a shipping Agent of that city, and also agent of the Plaintiff's vessel, and by whose orders it was shipped on board of that vessel. That Darling had agreed with Orr for the shipment of his iron, that the Bill of Lading stated a specific agreement, and that the freight was recoverable only from the party with whom that agreement had been made.

Cross, for Plaintiff:—In this case the ship claims her freight from the consignors as the original contractors. The shipment was made by them under a Bill of Lading wherein they are named the consignors, and Mr. Moikleham of Montreal, consignee, to whom it appears the iron was charged as Vendee in Invoices emanating from the defendants. The only qucation is one purely of evidence, and that is whether the defendants are consignors, and as such, original contractors.

The Bill of Lading appears to have been made out by Mr. Maxwell, the general manager and agent for the defendant's business, he also made out the accounts, charging the goods to Moikleham. They were put on board the vessel by the defendants, under the Bill of Lading so made out, the defendant's privity as consignors is therefore clearly enough established, and as such, their liability in law is beyond doubt. It does appear that in February previous one Mr. Darling employed Orr, a general shipping agent, to engage freight for him for this iron, which it appeared Darling had ordered from the defendant's manufactory for March delivery at Glasgow, that Orr, acting on this engagement, had secured freight by the "Diana," a vessel to sail in March, placing at the time in the defendant's hands the written order of Darling's agent for the

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delivery of the iron, but that it had not been shipped in pursuance of this order, nor by Orr's agency, that the fact of Orr being Ships Broker for the California at the time the iron was shipped in May under the Bill of Lading in question, had no effect upon the contract nor the liability of the defendants, as Orr had not acted as Darling's agent nor made the shipment either in his own or Darling's name, and the defendant's had by their own act elected to be themselves the consignors. So far as Orr was agent, for the ship he could only bind it within the scope of his employment, and by acting in the capacity of ship's agent: now the contract and the facts shewed that the shipment was made by and in the name of the defendants as consignors, and there could be no presumed intention to make, through Orr's instrumentality, a different contract, and for other parties. As to Orr's supposed agency for Darling unless he acted in that name and capacity, he could neither bind the ship to Darling nor Darling to the ship; both he and his clerks swear positively that as regards the shipment they did not act for Darling, a fact that could not be doubted, seeing that the defendant's own act precluded the possibility of such being the case. They also prove the agency for Darling to have been of a special character and terminated long previously, but whether Orr was agent for Darling or not, if even the agency which terminated in March had subsisted in May, he could only give Darling the benefit of the contract and involve him in the responsibily of it, by acting in his name, which he did not do; the defendants had all the benefit of the contract as they thereby reserved to themselves the entire control over the goods, the defendants are the only parties privy to the contract, Darling is not. The ship cannot be compelled to look beyond the immediate parties to the contract, nor can these parties be absolved under pretence that others are interested. The defendants are consignors, and as such liable. The consignors are besides as regards the ship the actual proprietors, and the only proprietors they can recognize of the goods, being vendors without delivery, and retaining the powers of proprietors. As to the words in the Bill of Lading "Freight for "the said goods to be paid by the consignee as per agreement at the rate of —— "primage and average accustomed." These are to be construed as part of the context, and if ambiguous, in a sense adverse to the pretensions of the persons who wrote them, they could however, only imply that a rate of freight had been previously named, which the writer of the document could not for the moment specify, this could not control nor change the nature of the agreement, nor is any separate specific agreement proved with regard to rate, it should therefore be the prevailing rate at the time.

Popham, for Defendants.—In the first place the form of the action is bad. The Bill of Lading upon which it is based, is not filled up in the ordinary form, but says, "freight to be paid" &c., &c., "*as per agreement.*" Now a *quantum meruit* cannot lie upon a specific contract. 1 Saunders Pl. & Ed. 82.

The defendants cannot be held for the freight, because they made no contract direct or implied. It is proved that the iron was delivered to Darling according to his directions to them. Orr, to whom Darling desired to be delivered, received the iron from them as Darling's agent, and therefore, they were *not* the shippers of the iron, and consequently not liable for

the freight. A Bill of Lading, as between the parties therein mentioned, may be explained by parol testimony. 7 Taunton, *Wilson* vs. *Hart*, 304.

It was therefore competent for the defendants to show, and they have shown, that although mentioned as the consignors of the iron in the Bill of Lading, they were, in reality not so, but simply the vendors of iron delivered before shipment to the vendee, Darling, who had made an agreement with the ship's agent for the carriage of the iron, and who received it at Glasgow on behalf of Darling, and who caused it to be placed on board the Plaintiff's vessel. The vessel also acquiesced in the contract between Orr & Darling by signing the Bill of Lading, wherein it was stipulated that the freight was to be paid "*as per agreement.*" If the agreement which the defendants have proved to have been made between Orr and Darling, was not the one here alluded to, it was incumbent on the Plaintiff to have shown which he has not done, what was the nature of his agreement, and between whom it was made before he could recover upon that document. It is not proved that the defendants agreed to deliver the iron in Glasgow, in March, and had they done so, the vendee waived this obligation by his acceptance of the *delivery in* April.

The iron was legally delivered to the vendee in Glasgow before the shipment and the validity of *this delivery could* not be effected by the mention of Meikleham's name as the consignee, as he has been proved to have been merely the vendor's agent, and he delivered the Bill of Lading to Darling before the ship's arrival at this Port, [illegible] that he suffered no inconvenience thereby. The delivery of the Bill of Lading to Darling, *without* indorsement, was a sufficient transfer. Story on contracts, No. 810; 6 Espinasse, Dobbin v. Thornton, 16; Long, on sales p.p. 175, 302.

Badgley, J.—In 1853, "Darling & Co." received from the defendants a quantity of iron goods as ordered, and by letter of 3rd October of that year remitted to the latter a bill for £500 0s. 0d. on account requesting to be informed of the usual difference of rate made by the defendants in the execution of orders for different descriptions of their wares. By a letter in November following, a remittance was advised of the balance £107 0s. 2d. and added "you may book for me 80 tons bars for shipment in March, the specifications "will follow in a week or two. P.S.—I have given Mr. Meikleham the Bill of "Lading and the duplicate of this order." This Meikleham was the defendants' general agent at Montreal for the transaction of their business and for procuring orders in their line of trade. By letter of 25th November following, the defendants through their managing clerk, Maxwell, replied to the letter of October, acknowledging the receipt of the bill, and observed "we have advised "Mr. Meikleham that we have entered your order for 80 tons of bars at £10 "per ton usual terms," which they particularize as a time credit at the selling rate or the payment of cash with a discount. Subsequently, however, Darling & Co., having been informed that their specifications could not be furnished, made out "corrected specifications" of iron which were delivered to Meikleham, dated 19th January, 1854, for execution by the defendants, and at the same time, by their letter to John Darling, at Edinburgh, the brother and agent of the writer, directed the latter to obtain freight for the ordered iron from Thomas C.

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Orr, a shipping agent at Glasgow, and which after several communications between these two by letter and telegram was secured at fifty shillings per ton. By a letter of 1st March, signed *John Darling, for W. D.*, and sent to Meikleham at the works near Glasgow, the defendants through him were directed to have delivery made to Orr for shipment, and, by another letter, of the same date, from John Darling to Orr himself, after reference to the communications between them respecting the iron and the freight, the former adds, "Please, at earliest "convenience send me the name of the vessel, the consignee is Mr. William "Darling." John Darling further mentions to Orr, his orders to the defendants for the delivery of the iron to him, Orr, for shipment. Subsequently the defendants are informed by Orr of this intimation by Orr's clerk, and when the goods were ready for shipment, they were marked W. D., and the defendants received Orr's directions respecting their delivery on board which appears to have been attended to. *It was at first supposed by John Darling that the goods would be ready for shipment in March*, but the late period at which the corrected specifications reached the manufacturers, the defendants, prevented their being shipped by the "Diana," a vessel on the berth for Montreal and under Orr's agency. In May following when the goods were ready, Orr directed their shipment on board of two vessels also in his agency, the larger portion by the "California," and the balance by the "Mary." The orders of John Darling were for the delivery of the goods to Orr for shipment, and Orr, finding they could not go by the "Diana," directed the defendants by Maxwell, their managing clerk, with whom Orr and his clerks had intercourse respecting the goods, to send to the Broomielaw, for shipment by the "California" and "Mary;" no change in the transactions between Darling and the defendants had taken place and the order for the goods remained uncancelled. Maxwell establishes the fact of the goods having been sent to and shipped upon those vessels by the directions of Orr, who at the precise time of the shipments was absent from Glasgow, but his shipping transactions were attended to by his shipping clerks. The invoice was made out in Meikleham's name and the Bills of Lading were filled up in the usual manner by Maxwell, showing that the goods were shippep by the defendants to Meikleham with the stipulation—"the freight for the said goods to be paid by the consignee as per agreement." The invoice and shipper's copy of the Bill of Lading were transmitted to Meikleham at Montreal by whom they were received some time previous to the arrival of the "California" which first reached her port and at once delivered over by Meikleham to Mr Darling the real consignee, who afterwards passed the entries for the goods in his own name with the usual oath of property to the invoice and paid the duty. With the invoice and Bill of Lading in hand he claimed and obtained delivery of the goods as his own property from the ship, neither the ship master, nor the ship consignee making objection to the delivery to him, as the consignee of the goods.

It is for the freight by the "California" that this action has been instituted and this same freight has already given occasion to two courses of litigation.

The first originated in a demand by the defendants against Mr. Darling to pay the price of iron which he resisted upon the ground of short delivery of

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the iron ordered; but was unsuccessful, the judgment against him being founded upon the fact that he had assumed to ask as the owner of the iron and received delivery of it from the ship's side and had made no complaint until long after the vessel's departure from this port. The judgement of the Superior Court was affirmed in appeal upon similar grounds and the amount was paid to the defendants through the sheriff. The freight, however, remaining unpaid, the shipmaster, the Plaintiff in this cause sued Meikleham as the consignee under the Bill of Lading and failed upon the ground of the perfected delivery of the iron to and acceptance by Mr. Darling, and that under the circumstances of the case, no liability attached to Meikleham. The judgment of the Superior Court in this case was also affirmed in appeal and from English decisions. All the cases are collected, commented and compared in recent editions of Abbott on Shipping from the Leading case in 1790, Pearson and others vs. Wilkes down to Domett against Beckford, 5 B. and Adol. 521, by Lord Denman, which has not been disturbed, and the rulings invariably went upon the simple ground "that the clause in the Bill of Lading being introduced merely for the benefit of the master and ship owner did not make it compulsory on the latter to withhold the delivery of the goods until payment of freight by the consignee, and consequently that *the* owner of the goods was not discharged from his liability by the neglect of the ship owner to obtain payment from the consignee." "The law will imply from the fact that the goods were laden on a ship to be conveyed from ——— to ——— a contract by *the owner of the goods* to pay for the carriage. J. Parke Domett vs. Beckford.—This general principle is, however, governed by an exception which is thus stated in the above references and expressed by Flanders, 540. "But it is declared if the goods *are not owned* by the consignor and are not shipped on his account and for his benefit, in that case the carrier is not entitled to call on him." Having met with no success in that proceeding the plaintiff now turns upon the defendants as the shippers of the goods and sues them for the freight as consignors under the Bill of Lading. The principles of law applicable to the ordinary cases of the liability of consignors for freight are clearly stated by Flanders in his work on shipping, No. 539. "But whilst the liability of the consignee is admitted where he receives goods under a Bill of Lading such as described, it does not follow that the consignor is exempt. There is no shifting of liability. The contract of the consignor and consignee is not considered to be inconsistent with each other, each is an original contract upon a sufficient consideration, 5, B. and ad. 521. 2 Gale and Dav. 244 and 17 Johns, 264." In commercial transactions nothing is more common than that there should be several persons, all of whom are liable for the same thing; and in this country (the U. S.) the cases all proceed upon the principle that the clause in the Bill of Lading "the consignee paying the freight," is introduced for the benefit of the carrier not of the consignor." This principle as applied in the United States, it is needless to observe is adopted from English decisions and jurisprudence.

It is fully recognized in the authorities cited upon the general principle above mentioned, but is also established in 3 Kent Com. 221-222 M. & M. 157, 17 Johns 234, Abbott on shipping 511, with Sergeant Shee's note

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at same page, and may therefore be considered indisputable. The question that remains, does this doctrine cover this case, must be answered from the facts in evidence. It is proved that W. Darling of Montreal had previous dealings with the defendants of a similar kind with his last order, that upon his inquiry he was informed by them of their terms for credit or cash, that he sent his order to them and directed his agent in Edinburgh to procure freight from Orr, a ship agent at Glasgow, specially selected by himself that the agent did engage and agree with Orr for the freight at a named price, did order the defendants through Meikleham to deliver the goods to Orr, and transmitted to the latter a delivery order for the purpose, together with an intimation of the order sent to defendants to deliver to Orr. That Orr personally and by his shipping clerks directed the goods to be sent from the defendants' premises to the Broomielaw for shipment on board of the "California", that the goods were so sent and shipped, that no specific agreement was ever made or entered into between the defendants, the shippers and ship master, that the Bill of Lading was made out by Maxwell and contained the clause as to the consignee *paying freight* "*as per agreement*," which could only refer to the agreement for freight between J. Darling and Orr, that the invoice and Bill of Lading were transmitted by Defendants to Meikleham, their agent in Montreal, who at once delivered them over to W. Darling, by whom the necessary entries were made as of his own goods and paid duties on them, and to whom delivery was made by the plaintiff at the ship's side, without objection or refusal by the plaintiff, or any objection thereto by the ship's consignee, and finally that W. Darling's order was thus executed by the defendants and shipped and delivered to him in due course at Glasgow, leaving it entirely in his own option to adopt the credit or cash condition of its liquidation. From this state of facts, it is manifest that the goods were W. Darling's from the time they were sent for shipment, that they were shipped for his benefit and advantage, and that the defendants were not the owners of them. "Where goods are sent from a vendor to a vendee, the delivery of them to the carrier usually vests the property in the vendee, and he is the person to sue the carrier for the loss of them; 8 T. R. 330, 3 Bos. & Pul. 585, 2 Camp. 36. In fact and in law the defendants ceased to be owners of the iron when it reached the ship's side, where it was both actually and constructively delivered to Orr, in the double capacity of ship's agent and agent for the purchaser W. Darling in Montreal. No liability can therefore attach to the defendants from any actual or presumed ownership of the goods being in them. But it may be said this evidence cannot override the written contract, the Bill of Lading produced, in which the defendants style themselves shippers and *ergo* consignors. But a Bill of Lading is merely the shipmaster's formal acknowledgement of his having received certain goods on board for certain parties, his obligation to deliver them in like good condition and the stipulation of a rate of freight payable by the consignee, &c. &c. The Bill of Lading is, however, not conclusive. See Bates vs. Todd, 1 Moo. & Rob 106. Tindal (Ch. J.) said "that as between the original parties, the Bill of Lading was merely a receipt, liable to be opened by the evidence of the real facts", &c. And this point is sustained by corroborative authorities.

The evidence of record shews that the goods shipped were the property of Darling, not of the defendants at the time of shipment and that Orr, the ships agent, who directed their shipment and had made the agreement for freight with W. Darling's agent knew this well, moreover, the declaration is only in assumpsit, alleges no ownership of the goods as in defendants, nor any particular facts against them to subject them to liability. Under these circumstances their liability does not appear to be established and the Plaintiff's action cannot be maintained.

Action dismissed.

Cross & Bancroft, for Plaintiff.

J. Popham, for Defendants.

(A. C. & J P.)

MONTREAL, 28TH FEBRUARY, 1859.

Coram BADGLEY, J.

No. 2178.

McNamee vs. Himes.

FALSE IMPRISONMENT.—NOTICE OF ACTION.

Held,—1. That a party, *bona fide*, and reasonably believing himself to be authorized by a Statute, though he be not, is entitled to a month's notice of action under 4 and 5 Vic., c. 25, and 14 and 15 Vic., c. 54.

2. That the plea of want of notice in such a case is, in fact, a general issue, and cannot be touched by a demurrer.

This was an action of damages for false imprisonment.

The defendant, by his first plea, alleged that for the causes of action set forth in the plaintiff's declaration, the plaintiff was bound to give the defendant notice in writing of the action, and of the cause thereof, one calendar month at least before the institution of the suit; and of the said plea the defendant put himself upon the country.

The plaintiff demurred to the first plea, because there is no law nor statute in this Province requiring the notice of action referred to in said plea in cases of the nature of this cause; and because the issue tendered by such plea, being one of law, the defendant's conclusions for a trial by Jury cannot be granted on such law issue.

Counsel being heard on this law-issue, the Court rendered judgment.

BADGLEY, J.—This action is in damages for false imprisonmen. The defendant has pleaded the facts which gave occasion to the arrest, and by which he proposes to establish that he was acting under the statute for such cases provided. He also pleads the want of a month's notice of action, which should have been given in conformity with the statute. The plaintiff has demurred to this last plea, and the demurrer must be dismissed. It must be observed that the Provincial Larceny Act, 4 and 5 Vic., cap. 25, has been copied almost in every particular of language and provision from the British Statute, 7 and 8 Geo. IV., c. 29, for the same object. By both Acts the owner of stolen property may apprehend the thief, even without a warrant; and by both the protection of the statute is given to every person acting *bona fide* under its provisions, by

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affording him a month's notice of action, with the plea of general issue and special matter in evidence. The British and Provincial Statutes being similar in the particular provisions involved in this case, the jurisprudence of the English Courts will obviously guide our decisions in this Province in cases under similar circumstances. In this case the point turns upon the *bona fide* belief of the defendant that he was acting under the statute. The Act was not made for those who act in conformity with its requirements, but for the protection of those who might act against it, but yet under the belief that they acted under its provisions. Lord Tenterden observed in Beechey vs. Sidis: "If he acted "lawfully he would not require any notice whatever. The intention of the "section of the Act was to protect persons acting illegally, but in supposed "pursuance of the statute, and with a *bona fide* intention of discharging their "duty under the Act of Parliament." "It has uniformly been held, that where a party, *bona fide*, believes or supposes he is acting in pursuance of an Act of Parliament, he is within the protection of such a clause"; 9 Barn. and Cr. 808, 809; so also the Court of Exchequer, in Hughes vs. Buckland, 15 M. and W., 354 and 5. In this case, Parke (B.) says "the Act is general in its terms, and gives jurisdiction to all persons for all acts done in pursuance of it. These words do not mean acts done in *strict* pursuance of that Act; because, in such a case, a party would be acting legally, and therefore would not require protection. The words, therefore, must be qualified by the decisions; and then the meaning will be, that a party, to be entitled to protection, must *bona fide* and reasonably believe himself to be authorized by the Act. From the foregoing, it will also be seen that the Act must be taken to be general in its terms, and not to be confined to Peace Officers, &c., but to extend to all persons believing that they act under it. The notice of action may always be demanded when the party prosecuted had reasonable ground for supposing the thing done by him was done in execution of or under the authority of the statute." Cooke vs. Leonard, 6 Barn. & Cr., 355; Cann vs. Clapperton, 10 Ad. and El. 582.

The plea of notice is, in fact, a general issue, and cannot be touched by a demurrer. The point involved is a matter for the Jury, not for the Court.

Demurrer dismissed.

M. Doherty, for plaintiff.
W. A. Bovey, Attorney for defendant.
Edward Carter, Counsel.

(P. W. T. & W. A. B.)

Authorities cited by defendant's Counsel:—

Imperial Act, 7 and 8 Geo. IV., cap. 29, sections 63, 75, (Collyer's Crim. Stat.)
Provincial Act, 4 and 5 Vic., c. 25, sections 55 and 67; and 14 and 15 Vic., c. 54.
Beechey vs. Sidis, 9 Barn. and Cress., 806.
Reed vs. Cowmeadow, 6 Adolphus and Ellis, 661, &c.
Hughes vs. Buckland, 15 Meeson and Welsby, 344.
Jones vs. Gooday, 9 ditto, 735.

MONTREAL, 28TH FEBRUARY, 1859.

Coram BADGLEY, J.

No. 849.

Mitchell, Petitioner, *and Brown* ET AL., Defendants.

MOTHER GUILTY OF MISCONDUCT,—INCAPACITATED AS TUTRIX.

Held,—That a *tutelle* will not be set aside, on the petition of the mother of minors, upon the ground that the tutor appointed is not a relation, if it appear that the mother, from her habits and character, is totally unfit to be appointed tutrix herself, and that there is no objection to the fitness of the tutor appointed, and that there has been no irregularity in the proceedings for his appointment and that there are no other relatives of the minors within the jurisdiction of the Court except the mother.

In this case Maria Mitchel, widow of the late Thomas C. Speirs, presented a petition, setting forth, that her late husband died at Montreal about the 1st of March 1858, leaving five minor children, all females, issue of her marriage with him, the eldest aged thirteen years, and the youngest thirteen months. That, on the 24th of March last, John O. Brown, a stranger to the children, and in the absence of the Petitioner, and without her knowledge and consent, and without any right to do so, presented a petition for the appointment of a tutor and subtutor to the said minors, and caused to be assembled the requisite number of friends, in default of relatives of the said minors, to give their advice upon his petition, and without her knowledge and consent caused himself to be appointed tutor, and George Nunn sub-tutor to the said minors. That the *assemblée* was composed of entire strangers to the children and their mother. That the tutor had removed the children from her custody, so that she was deprived of their keeping and comfort. That by law she was entitled to the custody of her children in preference to all other persons, and concluded that the appointment of tutor and sub-tutor be set aside and annulled, and that the Court would order that a new appointment be made in the usual manner.

The petitioner filed a copy of the *Acte de Tutelle* sought to be set aside.

To this petition the defendant pleaded a special answer, setting forth, that long before and at the time of her husband's death, the petitioner was and had ever since continued to be a person of intemperate, dissolute and disorderly habits and character, totally unfit to have the care and custody of the said children; that she was a notorious drunkard, and had been frequently, both before and since the death of her husband, taken into the custody of the Police of the City, for drunkenness and disorderly conduct in the streets, and was utterly incapable of maintaining the said children, and bringing them up in a proper manner. That, in fact, long before her husband died, as well as afterwards, she neglected to take any care or charge of the children, but left them in a helpless and utterly destitute condition, so that they were supported by the charity of the Defendants and other persons interested in their welfare.

That the appointment of tutor was made in conformity with the advice of a competent number of friends of the minors, with the full knowledge of the petitioner, and after the observance of all the formalities required by law. That Mr. Brown was, in every respect, a fit and proper person, *idoine capable et suffisant*, to be a tutor of the said minors, and was appointed, because of the drunk-

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en habits and disorderly conduct of the mother, and her consequent total unfitness to have the care and guardianship of the children, and that it was essential to their moral and physical welfare, that some other guardian than the mother should be appointed, and because there were no other relatives within the jurisdiction of the Court.

The defendants also denied all the allegations of petitioner, not specially admitted by the plea, and prayed the dismissal of the petition.

The petitioner by her replication to this plea, denied that her habits and character were such as the defendants alleged, and said that sometime previous to the death of her husband, she received from him a blow upon the head, which so disabled her, that she was obliged to go into the hospital; and that it was only while suffering from the effects of the blow, that her children were, if ever neglected by her; and that, if she were ever guilty of the bad conduct referred to in defendant's plea, it was while suffering from the effects of said blow and the cruel treatment of her husband, but that she was before and has been since, a person of proper conduct, and as such entitled to the direction of her children.

An *enquête* was ordered upon these issues, and several witnesses were examined, and the cause inscribed and heard on the merits.

BADGLEY, J.—This Tutelle sought to be set aside was given under the following circumstances.

The petitioner was married as by certificate of Rev. Mr. Wilkes to her husband Thomas C. Speirs in 1845, to whom she bore five female children, who, at the date of her petition, were of tender years, as by Baptismal Certificates of Rev. W. Bond, the eldest being about 13 years and the youngest 13 months. The parents for late years previous to the husband's death had led a miserable life, he was a man of violent temper, and had become almost blind and incapable of procuring support for his family, whilst she, the petitioner, had become a reckless drunkard, finding means to continue her intemperance, but none for her family, constant broils ensued between them, aggravated, doubtless, by the destitution of the family, his inability to procure food and raiment for them, and her utter abandonment to intemperance, until finally in his rage he struck her so violently, that the stupidity of drunkeness under which she labored at the time, was converted into insensibility, and it is supposed fearing that he had actually killed her outright he committed suicide upon himself by cutting his own throat; kind neighbours, and among the number, Mr. Brown, the Respondent, who had previously charitably assisted the unfortunate family, interested themselves for them all at this juncture; they procured admission for the insensible petitioner into the Montreal General Hospital, and gave food and clothing to the children and provided for their care and protection. This occurred on the 28th of February last, and in the ensuing 1st of March, the deceased husband was buried after a Coroner's Inquest had been duly had. In the state of destitution into which the children were thrown with no relative but their mother, and no friend but those who had extended kindness and charity to their parents and themselves, it was considered proper to place the almost orphans *en Tutelle* for the care and supervision of their persons. The mother was discharged as convalescent from the hospital on the 22nd day of March last, having recovered

from the effects of the violence committed upon her, and from an incipient attack of delirium tremens produced by intemperance, and on the day of her discharge was notified of the intention to appoint a Tutor to her children, the notice intimating time and place for the appointment. She did not appear at the *assemblée* which took place on the 24th of March last, and Mr. Brown was duly appointed Tutor, and from which office her petition prays that he may be removed, and another *assemblée* had for another appointment upon the following grounds; because he was so appointed without her knowledge or consent; because he took her children from her care and custody, and removed them to parts unknown; because she has been deprived of the comfort and keeping of her children, and is by law entitled to their care and custody in preference to all other persons.

The Respondent has put in issue her personal unfitness to have the care and charge of the children by reason of her intemperance and dissolute habits past and present, and this issue she has accepted by her replication, alleging her good conduct previous as well as subsequent to the *tutelle*. It must be observed *in limine* that the children had no relatives but their mother, and no friends but those who protected them after their father's death, and further, that no imputation morally or personally has been cast upon the Tutor, the objection as to him resting upon the fact merely of his being a stranger. Hence it must follow that if her personal and natural right, as a mother, her maternal fitness, is not established, there can be no reason for setting aside this appointment for the purpose of making another, of another stranger. Now as to the main point, the mother's fitness, the testimony is conclusive, that she had been sottishly intemperate for a long time before the unfortunate occurrence detailed above, and that the ill habits previously acquired stuck by her even after her discharge from the hospital. Her intemperance since that time is also established, and has shewn her to have been the inmate of the police station house. Unlike anger, intemperance is proved to be no short madness and such habits and misconduct, independent of the established facts of her inability to support herself, her precarious employment for her own subsistence by occasional labour, and without a home for herself, render manifest her unfitness to have the charge or care of these young female children. The law has wisely left a discretion in the Judge in this respect, and assumes to itself the protection and supervision over children against the notorious ill conduct and dissoluteness of parents wherever the law is called upon to act. It is at all times difficult to deny a parent's claim to the care of her children, but that claim must rest upon moral and personal fitness of character and not upon profligate qualities which must lead the children to vice and immorality. The case cited on the part of the petitioner has no application to this matter: there a jew grand-father was appointed tutor provisionally to his grandchildren issue of his Christian daughter-in-law during her minority, *attendu la minorité de la mère;* upon attaining her legal majority she claimed and obtained the *Tutelle* of the persons of her children. There was no question in that case of personal unfitness, and cases are not wanting which have decided against the parent by reason of *une inconduite notoire*, see Dalloz, tutelle, p. 726, &c., and a number of authorities. In this case the

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petitioner's misconduct renders her (the mother) personally unfit, and the petition being unsupported by proof in the other particulars must be dismissed with costs. It is only necessary to add in conclusion that all proper access to the mother upon proper occasions should be allowed.

The judgment is; "The Court, &c., considering that the established misconduct of the petitioner, *inconduite notoire*, for a long time previous as well as subsequent to the appointment of the Respondent to the tutelle sought to be set aside in this case to the minor children, issue of her marriage with the late Thomas Speirs deceased, renders her altogether unfit to receive and take such *Tutelle*, and considering that the said Tutor is not charged with any moral or personal unfitness or incapacity, nor is any such proved against him, in or by reason of the discharge of the duty of his office, and considering that the said children have no relations whatever to whom the said Tutorship could properly be given, and finally that the allegations in the said petition contained have not been proved, doth dismiss the said petition with costs."

Petition dismissed.

Marcus Doherty for Petitioner.
Samuel W. Dorman for Defendants.
(F. W. T. & S. W. D.)

MONTREAL, 31 OCTOBRE 1857.

Coram SMITH, J., C. MONDELET, J., BADOLEY, J.

ET

MONTREAL, 28 NOVEMBRE 1857.

Coram C. MONDELET, J.

No. 772.

Lynch vs. *McLennan* et al.; *La Banque du Haut-Canada*, Tiers saisie.

CONTESTATION APRÈS L'EXPIRATION DU DÉLAI.

Jugé, Que pour être admis à contester la déclaration d'un tiers-saisi après l'expiration du délai fixé par la règle de pratique, il faut montrer cause suffisante pourquoi la contestation n'a pas eu lieu dans le délai.

La déclaration de la Banque du Haut-Canada tiers-saisie avait été faite le 31 juillet 1857.

Le 17 octobre 1857, le Demandeur demanda par requête qu'il fût admis à contester la déclaration de la tiers-saisie nonobstant l'expiration du délai fixé par la règle de pratique appuyant sa demande d'un affidavit dans lequel le dit Demandeur alléguait qu'il n'avait pu recueillir les informations nécessaires pour contester que difficilement et depuis l'expiration des délais; savoir—tout récemment, et qu'il était exposé à souffrir des dommages s'il n'était pas admis à contester.

La cour trouva ces motifs insuffisants et renvoya la requête par jugement du 31 octobre 1857.

Le 17 novembre 1857, le Demandeur renouvela sa requête qu'il appuya d'un nouvel affidavit, dans lequel il alléguait que jusqu'au 29 septembre précédent (1857) il n'avait pu obtenir les informations nécessaires pour entreprendre une

contestation dispendieuse; qu'il lui avait fallu communiquer avec les officiers du gouvernement à Toronto, et que ce n'est qu'après avoir reçu du receveur-général, une lettre datée du 25 septembre 1857, qu'il avait pu entreprendre cette contestation; que d'après cette lettre, la tiers-saisie devait avoir en mains, appartenant aux Défendeurs, une somme de £570 14s. 2d. et que si le Demandeur n'était pas relevé du défaut de n'avoir pas contesté dans les délais il était exposé à perdre sa créance. Lynch vs. McLennan.

La cour trouva ces raisons suffisantes et admit le Demandeur à contester, par jugement du 28 novembre 1857.

Requête accordée.

Doutre et Daoust, pour Demandeur.
Rose et Monk, pour Tiers saisie.

(J. D.)

MONTREAL, 28TH OCTOBER, 1858.

Coram BADGLEY, J.

No. 2309.

Lambert vs. Bertrand.

Held, in an action *en bornage*, where the plaintiff's title showed a deficiency in superficies and the defendant's title showed a uniform width throughout the whole depth of his property, and where line fences and ditches were proved to have existed, to a certain extent, between the two properties,—that the division line should be run in the direction of the said fences and ditches, but so as in any case to give the defendant his full breadth and depth, according to his title.

This was an action *en bornage*. In the plaintiff's title-deed his land was described as containing two arpents in front by thirty arpents in depth, less a supposed superficial deficiency of 2¾ arpents. The defendant's deed, on the other hand, claimed a uniform width of two arpents throughout the whole depth of 30 arpents.

Evidence having been adduced, and the parties heard, the Court rendered the following judgment:—"Considering that the property of the plaintiff, as appears by the deed of sale to him made thereof, and which deed is by him fyled of record, was deficient in breadth on the line of the depth thereof, and such deficiency has been established to have existed during the possession thereof by his *auteurs*, and that the property of the defendant has always been of the full extent of two arpents in front by thirty arpents in depth; and considering that the division line between the said two properties has been partially established and acted upon by the parties or the *auteurs* of the said parties before the institution of this action, and that there did exist, by line fences and ditches along the said line, running backwards from the front to the depth of about ten arpents;—doth order, *avant faire droit*, that by a sworn land surveyor, to be named by the parties within eight days, at the office of the Prothonotary of this Court, and, in default thereof, to be named *ex officio* by this Court or by one of the Judges of this Court in vacation, a line of division be drawn between the said respective properties of the parties, plaintiff and defendant, and boundaries be fixed, determined and established at the place where the property of the plaintiff touches and joins the land of the defendant, according

Lambert vs. Bertrand.

to the titles of the said parties; but so that in the extension of the said division line from front to rear the same shall, as far as may be, run in the direction of the said fences and ditches, and so as in any case to give the defendant his full breadth and depth aforesaid according to his titles, the parties present or after having been duly notified: of which operation the said surveyor is hereby ordered to make a report to this Court with all due diligence, together with a figurative plan (descriptive) of the premises. Costs reserved."

Survey ordered.

Sicotte & Chagnon, for plaintiff.
Cherrier Dorion & Dorion, for defendant.
(S. B.)

MONTREAL, 28TH OCTOBER, 1858.

Coram C. MONDELET, J.

No. 2297.

Palsgrave vs. *Sénécal et al.*, and *Prieur*, GARDIEN, Petitioner.

Held,—That the *gardien* of moveable property cannot, during the pendency of the seizure, compel the surrender to him of such moveable property by the defendant, in the absence of positive proof that the defendant is deteriorating it by improper use.

This was a petition by a *gardien* under a *saisie mobilière* for an order on the defendants to surrender the possession of the property seized, on the ground that the defendants were making use of the same against the will of the *gardien*, and that the effect of their so doing was to expose the property to deterioration and damage.

The application was resisted on the ground, that if the *gardien* wished for possession of the property, he should have taken it into his own possession at the time of the *saisie*; and that, as he had not done so, but had left the property in the hands of the defendants, he could not now complain, unless he proved that the defendants were making an improper use of it. The property here seized was a printing press; and the defendants had done nothing more than use it in a legitimate way, namely, by printing with it.

The following was the judgment of the Court:—

"Considérant que le gardien en cette cause, F. X. Prieur est mal fondé en sa requête, attendu qu'il n'avait aucun droit de s'emparer de la presse d'imprimerie dont il est question, dans le but de l'enlever, de sa propre autorité, comme il l'établit lui-même, par les affidavits de sa dite requête, et qu'il n'est pas en droit de se plaindre du refus des défendeurs de laisser le dit gardien enlever la dite presse.

"Considérant que le dit Prieur n'a aucunement établi ni prouvé que la dite presse d'imprimerie se détériore par l'usage qu'en font les Défendeurs, ou se détériorera en telle sorte qu'il y ait juste cause d'ordonner que déplacement en ait lieu, et que les Défendeurs cessent d'en avoir la possession, suivant la loi. Renvoie la dite requête avec dépens."

Petition rejected.*

F. P. Pominville, for petitioner.
R. Mackay, Counsel.
Doutre, Daoust & Doutre, for defendants.
(S. B.)

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* Authorities cited by petitioner's Counsel:—Jousse, Ord. of 1667, Art. 15, tit. 19. Pothier, Proc. Civ., Ch. 2, Art. 5, sec. iii., 4 Carré, Q 2055.

MONTREAL, 21ST DECEMBER, 1858.

Coram BADGLEY, J.

No. 363.

Lefebvre vs. Vallée.

Held,—That special bail may be put in, even after judgment, and after the bail to the Sheriff have been sued, and this on petition of the bail themselves.

PER CURIAM.—This is a petition to put in special bail, under the following circumstances. The defendant was arrested under a *capias ad respondendum*, and gave bail to the Sheriff. On the return day the Defendant appeared and made a motion to quash, which resulted in nothing. The plaintiff then took judgment in ordinary course. About two years afterwards the plaintiff sued the bondsmen who now fyle a petition in the original action, praying to be permitted to put in special bail, stating that they were ignorant of the law. This reason is certainly weak, but the application can do no harm to the plaintiff, and I shall therefore grant it, giving fifteen days to put in the necessary bonds.

Leblanc & Cassidy, for plaintiff. Application granted.
Cherrier, Dorion & Dorion, for petitioners.
(S. B.)

MONTREAL, 30TH DECEMBER, 1858.

Coram BADGLEY, J.

No. 2396.

The Attorney General, pro Regina, informant, vs. *Beaulieu.*

Held,—In case where a party accused of subornation of perjury has been arraigned and pleaded not guilty, and no day certain has been fixed for his trial, and no forfeiture of his bail has been declared, that the mere failure of the party to answer when called in the term subsequent to that in which he was arraigned cannot operate as a forfeiture of such bail.

PER CURIAM:—This is an action on a Bail Bond. It would appear that one Alexander Louis Pappen had been arrested for subornation of perjury, and that the defendant and one Croteau had given bail for his appearance. Pappen was subsequently arraigned and pleaded not guilty, but no day was fixed for his trial. In the following term he was called but failed to appear, and now the Crown sues the bail as for a forfeiture. This is plainly irregular, and as none of the formalities for the escheatment of the recognizance on which the information was based were observed, the information must be dismissed.***

Lewis T. Drummond, Attorney General *Pro Regina*.
Edward Carter, for Defendant.
(S. B.)

*** A similar judgment was rendered in the case, 2397 vs. Croteau.

MONTREAL, 30TH DECEMBER, 1858.

Coram BADGLEY, J.

No. 477.

Campbell et al. vs. Beattie.

Held, in the case of a *rebellion de justice*, that no mitigating circumstances can prevent the issuing of a *contrainte par corps*.

Per Curiam.—This is a rule for a *contrainte par corps* against the defendant for *rebellion de justice*. It would appear that the bailiff charged with the writ of execution went to the defendant's house to effect the seizure, but the defendant being at the moment upstairs, the bailiff waited below and entered into conversation with the clerk, in the course of which he expressed himself freely respecting the conduct of the defendant, and particularly referred to a judgment which had been put in execution the day before, as a sham. The defendant soon came down, and more conversation followed, irritating in its nature. The bailiff handed him the warrant, and while he was looking over it went behind the counter to make the seizure. The defendant thereupon took him by the collar, the clerk opened the door, and the bailiff was put out. The *recors*, finding themselves of no further use, followed. Within half an hour, however, the defendant, convinced that he had acted unwarrantably, proceeded to the office of the plaintiff's lawyer and said that he felt he had done wrong, that he had been provoked to it, but that they might now go and make the seizure and he would not offer any opposition. He went also to the Sheriff's office and spoke to the same effect. Up to this time no return had been made. The only question is, does the case come under the ordinance? There can be no doubt that it does; and, although there are many mitigating circumstances connected with the affair, the defendant had no right to take the law into his own hands. It was held by the Court of Appeals, in the case of Mercure and Laframboise (p. 168, 5 vol. L.-C. Reports), where the defendant's conduct was merely negative—he looking out of an upper window and refusing to open the door when the bailiff rang the bell—that the *contrainte* must go. I cannot, therefore, refuse the writ in a case like the present, where the bailiff has been violently ejected.

Rule absolute.

A. & W. Robertson, for plaintiffs.
George Macrae, for defendant.
(S. B.)

MONTREAL, 30TH DECEMBER, 1858.

Coram BADGLEY, J.

No. 362.

McBean, vs. *DeBartzch & DeBartzch* et al, *mis en cause & Drummond* Opposant.

Held,—That an execution, issued on a judgment against several defendants jointly, directed against one of them for the whole debt is illegal and will be set aside on opposition, without even a tender of the amount really payable by such defendant.

This was an opposition *à fin d'annuler* fyled by one of the *mis en cause*, on the ground that the judgment was against the *mis en cause* jointly and not

severally, and that the writ of execution was directed for the whole debt against the opposant alone.

McJetan vs. DeBartsch.

The Plaintiff contested on the ground that the debt was an hypothecary one, in respect of certain property held by the *mis en cause* as proprietors, and was therefore due by them solidarily, and that the opposant was moreover bound to tender with his opposition the proportion of the debt which he, at all events, admitted he owned.

Per Curiam :—I am with the opposant. This seizure is plainly irregular and I must therefore set it aside.

Opposition maintained.

H. Taylor, for Plaintiff.
C. J. Dunlop, for Opposant.
(S. B.)

MONTREAL, 31st DECEMBER, 1858.

Coram SMITH, J.

No. 2524.

Pepin vs. *Christin* dit *St. Amour*.

Held,—That one Co-Partner cannot, after the dissolution of the firm, sue another Co-partner to render an account without himself offering and tendering an account.

Per Curiam :—This is an *actio pro socio*. A variety of pleas have been fyled which it is unnecessary to notice here as there is a point of law involved in the case which is fatal to the plaintiff's action. The Plaintiff is equally *comptable* with the Defendant, and until he offer and tender an account himself he can have no action against his Co-partner to compel him to render an account. There being no offer or tender of such account by the Plaintiff, the action must necessarily be dismissed with costs.

Action dismissed.

Louis Bélanger, for Plaintiff.
Leblanc & Cassidy, for Defendant.
(S. B.)

MONTREAL, 31st DECEMBER, 1858.

Coram SMITH, J.

No. 6.

Sanderson vs. *Roy* dit *Lapensée & Roy* dit *Lapensée*, Opposant.

Held,—That where two executions issue, at the suit of different parties, against the same Defendant, the sheriff cannot unite both seizures in one *procès verbal*.

Per Curiam :—This is an opposition *à fin d'annuler* fyled by the Defendant, assigning several grounds, but the only point which has attracted the attention of the Court is that the sheriff has made out but one *procès verbal de saisie* under the two executions, namely the one in this case, and the other in No. 8, Palliser vs. Roy dit Lapensée. Now, altho' I think the law allows the sheriff to act upon the two executions together, yet, inasmuch as they are separate and independant

Sanderson vs. Lapensée.

seizures, there must be a *procès verbal* for each, so as to conform to the requirements of the ordinance of 1667. I must, therefore maintain the opposition.***

Opposition maintained.

Morison, for Plaintiff.

Loranger & Loranger, for Defendant & Opposant.

(S. B.)

MONTREAL, 31 MARS 1859.

Coram SMITH, J.

No. 702.

Lynch vs. *Leduc et Mathieu*, Opposant.

ENREGISTREMENT—BAILLEUR DE FONDS.

Jugé, qu'un Bailleur de fonds, qui n'a pas enregistré dans les délais fixés par la 16me. Vict., Chap. 206, est primé par l'acquéreur subséquent qui n'a pas assumé la dette due au Bailleur de fonds et qui a enregistré avant le Bailleur de fonds primitif.

Le demandeur ayant fait vendre sur un jugement hypothécaire une terre possédée par le Défendeur, et l'argent étant rapporté devant la cour, deux oppositions afin de conserver furent produites l'une par Antoine Mathieu, l'autre par le Demandeur.

Antoine Mathieu fondait son opposition sur un acte d'échange passé le 3 février 1851, avec F. Secours dit Maska, qui avait reçu en échange la terre vendue en cette cause, et s'était chargé de payer à Mathieu une soulte qui n'avait pas encore été payée, lors du décret, et que l'opposition reclamait avec privilége de Bailleur de fonds. L'enregistrement de cet acte n'avait été effectué que le 4 avril 1855.

Le Demandeur Lynch fondait son opposition sur une obligation à lui consentie avec hypothèque sur la terre vendue en cette cause le 22 mai 1855, par Pierre Bélard dit Latour alors propriétaire de la dite terre. L'enregistrement de cet acte avait été effectué le 25 mai 1855, *postérieurement à l'enregistrement de Mathieu.*

Le rapport de collocation ayant colloqué Mathieu de préférence à Lynch, ce dernier contesta le rapport sur les motifs suivants.

Le 9 décembre 1852, François Secours, qui avait reçu en échange de Mathieu la terre décrétée, échangea la même terre avec Antoine Bonhomme, sans aucune soulte et l'acte fut enregistré le 6 avril 1853, *avant* l'enregistrement de l'échange entre Mathieu et Secours.

Le 25 avril 1853, Antoine Bonhomme échangea la même terre avec Pierre Latour, le débiteur de Lynch, sans soulte, et l'acte fut enregistré le 27 octobre 1854, encore *avant* l'enregistrement de l'échange entre Mathieu et Secours.

Lynch prétendait donc que Mathieu n'ayant pas enregistré son titre dans le délai fixé par la 16me. Vict., Chap. 206, Sect. 6; c'est-à-dire dans les 6 mois du 14 juin 1853, date de la sanction du statut suscité, Pierre Bélard dit Latour avait acquis la pleine et entière libération de l'hypothèque de Mathieu, lorsqu'il

*** A similar judgment was rendered in the cause No. 8, *Palliser* vs. *Roy* dit *Lapensée.*

consentit l'obligation sur laquelle était fondée l'opposition de Lynch, et que ce dernier ayant le droit de se prévaloir de tous les moyens de droit dont pourrait se servir son débiteur pour repousser une demande en déclaration d'hypothèque de la part de Mathieu, il aurait dû être colloqué de préférence au dit Mathieu.

La cour adoptant ces motifs a maintenu la contestation de Lynch et a ordonné la réformation du rapport de distribution avec dépens.

Lynch vs. Leduc.

Doutre, Daoust et Doutre, pour Lynch.
Leblanc et Cassidy, pour Mathieu.

Contestation maintenue.

(D.)

CIRCUIT COURT.

MONTREAL, 17TH FEBRUARY, 1859.

Coram SMITH J.

No. 696.

Benjamin & al. vs. *Clarke & vir.*

MARITAL AUTHORIZATION.

Held,—That an action to recover the price of goods sold and delivered to a married woman, separated as to property from her husband, will not be maintained without proof that the husband expressly authorized the purchase by his wife.

The declaration of the plaintiffs alleged the marriage of the defendant, Clarke, to her husband the other defendant, and that by marriage contract previously entered into, it was agreed between the defendants that each of them should separately enjoy, manage and administer his and her property, and be liable and responsible separately each for his and her debts,—the said husband for that purpose fully authorizing his said wife; that the defendant, Clarke, subsequently was indebted to the plaintiff in the sum of £35 9s. 8d. for goods sold, and delivered by them to her, which sum she had promised to pay.

The defendant's (Clarke's) first plea was to the effect, that the goods had been sold to her husband and not to herself; and that by her marriage contract it was agreed that he should bear all household expenses, of which the amount sought to be recovered formed a portion.

The general issue followed.

Per Curiam.—This is the case of the purchase of goods in a shop by a wife separated as to property, without the express authorization of her husband. The action cannot be maintained according to the well-known principle of our law, that a married woman cannot bind herself without the express authorization of her husband. This principle was affirmed by the Court of Appeals in July, 1846, in the case of De Rouville and al., appellants, and the Commercial Bank, Midland District, respondents—1 Revue de Legislation, 406 and seq.; but, as the defendant has not by her plea specially raised this objection, the action is dismissed without costs.

B. Devlin, for plaintiffs.
Monk & Macrae, for defendants.

Action dismissed.

(F. W. T.)

MONTREAL, 1ST MARCH, 1859.

Coram SMITH, J.

No. 1651.

Bell v. Rigney et. al., and Milne, Opposant.

JUDICIAL SALE—POSSESSION—PROPRIETORSHIP.

Held,—1st. That where goods are bought at a judicial sale no delivery is necessary to pass the property.

2nd. That *tacite reconduction* in relation to moveables only arises when the lessor is a dealer and makes a business of letting moveables.

3rd. That parties remaining in possession after expiry of lease, will be deemed to hold them as owners

In this case an *alias* writ of execution issued against the goods and chattels of the defendants, under which a seizure was made. The opposant by an opposition *à fin de distraire* claimed a portion of the goods seized, as having acquired them under a former writ of execution against the defendants, alleging that at the time he acquired them, the 1st of April, 1854, he made a lease of them to the defendant, who remained in possession for two years, the term of the lease, and afterwards to the time of seizure, in virtue of the same which was continued by *tacite reconduction*. The opposition being contested was dismissed.

SMITH, J.—The opposant purchased the goods he claims at a judicial sale, the law presumes delivery and no *déplacement* of the goods was necessary. At the time of sale the opposant leased the goods to the defendant for the term of two years, which term was up in April, 1854, but he claims that the lease was continued by *tacite reconduction*. The only question then here is, can the lease be extended to an indefinite period so as to defeat the presumption of law arising from the defendant's possession that he is proprietor.

There is no doubt that *tacite reconduction* exists in favor of landlord in reference to leases of real property, but it is only extended to moveables in one case, that is where the party is in the habit of letting moveables. We find this doctrine in various authors. *Pothier* gives some examples, *Louage*, Nos. 370–371. citing the case of the *Tapissier*, who lets for the purpose of furnishing an apartment, 4 *Duvergier*, No. 234 and seq. In the present case, the opposant not being in the habit of letting, there can have been no *tacite reconduction*. The lease then expired in 1856, and as defendant remained in possession, and as nothing to the contrary is shewn by the opposant, the goods must be held to be the defendant. *Possession vaut titre.* The opposition is dismissed.

McKay & Austin, for opposant.

A. & W. Robertson, for plaintiff contesting.

(H. B.)

MONTREAL, 31ST MARCH, 1859.

Coram SMITH, J.

No. 2301.

Pearce vs. *The Mayor, Aldermen and Citizens of the City of Montreal.*

NO LIEN ON PIANO FOR RENT OF CONCERT ROOM.

Held,—That the lessor of a concert room had no lien on a piano temporarily placed there for an evening concert, for the rent of the room as against the proprietor of the piano, who is not the lessee of the room.

The declaration of the Plaintiff alleged that the Plaintiff was proprietor of a grand piano of the value of £160, which he had temporarily deposited in the City Concert Hall; that since said deposit, the defendants against the will of the Plaintiff withheld the same from the Plaintiff to his damage of £50 cy. The conclusion of the declaration was in revendication, and that the defendants further should pay the Plaintiff's damages £50.

The plea firstly pleaded by the defendants alleged that they had leased the room mentioned in plaintiff's declaration, in November last for one evening for a sum of £10, to one Charles Elliott who had placed the piano there, that they knew nothing of the Plaintiff in the matter, and that the defendants had a lien and privilege upon the piano for said rent, before the Plaintiff could remove it.

The Defendant's second plea was a *défense au fonds en fait.*

The parties joined issue on these pleas, and went to evidence, and were heard on the merits this term.

PER CURIAM.—The Plaintiff has established his right of property. The Defendants have pleaded a lien or *droit de retention*, alleging that they have the privilege of landlords. I am against this pretension and give judgment in favour of the Plaintiff.

The judgment was recorded as follows:

"The Court, &c. &c. . . . . Considering that the said plaintiff hath established the material allegation of his said action, and that he is the proprietor of the piano seized in this cause. And further considering that the said defendants have failed to maintain and establish in law, any right of privilege over the said piano as set forth, by the exception in this cause filed, or any right of lien over the said piano for the payment of the sum due and owing by the said Elliott mentioned in the said plea. And considering further that the said plaintiff, by reason of the illegal detention of the piano, after due notification to deliver up the same to the said plaintiff hath suffered damage to the amount of £7 10s. 0d. current money of the Province of Canada. The Court doth overrule the said exception with costs, and doth condemn the said defendants within 15 days after service of this judgment, to restore and deliver up the said piano to the said plaintiff, and in default of so doing within the said 15 days, to pay as and for his damages in this respect the sum of £150 current money aforesaid, and the further sum of £7 10s. 0d. current money, as and for his damages by reason of the said illegal detention, and costs of suit. *Distraits* to Mr. W. E. Holmes the Attorney for the said Plaintiff.*

W. E. Holmes, for Plaintiff.
J. Papin, for Defendants.

Judgment for Plaintiff.

(F. W. T.)

* *Vide* case of *Nordheimer*, et al., vs. *Hogan*, et al. 2 L. C. Jurist 281; and *Brown* v. *Hogan* et al., S. C., Montreal; No. 2655; A.D., 1854. Law Reporter, p. 83, 4.

MONTREAL, 28 FEVRIER, 1859.

Coram SMITH, J.

No. 2482.

Boudreau et al. vs. *Damour*

COMPOSITION OU ATERMOIEMENT.

Jugé, Qu'un acte de *composition* ou atermoiement n'est pas résolu, faute de paiement, dans les délais stipulés, si le créancier a consenti à altérer l'acte de composition, sans l'assentiment du débiteur qui a composé.

L'action des Demandeurs avait pour objet le recouvrement de différents billets dont les sommes réunies formaient celle de £182.

Par différentes exceptions, le Défendeur plaida novation, délégation et extinction des titres de créance énumérés dans la déclaration, ces diverses exceptions reposant sur l'exposé de faits qui suit: par acte du 6 août 1856, le Défendeur avait transporté avec garantie de fournir et faire valoir aux Demandeurs et à F. X. Brazeau;—savoir aux dits Demandeurs la somme de £170 5s. 4d., et à F. X. Brazeau celle de £168 6s. 9d. formant ensemble celle de £338 12s. 1d., due et payable au dit cédant (le Défendeur) avec plus fortes sommes, par différentes personnes nommées dans l'acte.

Ce transport était ainsi fait, pour par le dit cédant demeurer quitte envers les dits cessionnaires de pareille somme de £338 12s. 1d. qu'il leur devait avec plus forte somme, par billets et par compte courant avec cette condition que les dits cessionnaires seraient tenus, ainsi qu'ils s'y obligeaient expressément, dans le cas seulement et non autrement, où les sommes transportées leur seraient régulièrement payées à leur échéance respective, de donner une quittance générale et finale au dit cédant du montant en entier de leurs créances respectives; mais que dans le cas contraire où les dites sommes ne leur étaient pas régulièrement payées aux termes et de la manière mentionnés au dit acte, les dits cessionnaires auraient alors le droit d'exiger le montant en entier de leurs créances respectives, avec intérêt; cette clause étant de rigueur et non comminatoire, l'une sans laquelle le dit acte n'eut point été consenti. Toutes les créances énumérées dans la déclaration des Demandeurs étaient antérieures à ce transport. Le Défendeur prétendait que ce transport avait éteint toutes les créances des Demandeurs et que nonobstant la rigueur des termes de l'acte pour rendre le défaut de paiement, dans les délais spécifiés, fatal au Défendeur, ce dernier ayant perdu tout contrôle sur les débiteurs délégués, il ne pouvait être soumis légalement qu'à l'obligation de fournir et faire valoir. Le Défendeur alléguait qu'il n'avait jamais été notifié du défaut de paiement de la part d'aucun des débiteurs délégués et que ces débiteurs eux-mêmes n'avaient jamais été mis en demeure de payer.

Par une exception de paiement le Défendeur alléguait que les Demandeurs avaient reçus des débiteurs délégués au-delà de la somme transportée, savoir celle de £199 8s. 10½d.

Par une dernière exception le Défendeur alléguait que les Demandeurs avaient fait leur personnelle affaire des créances à eux cédées, et avaient donné délai à l'un des débiteurs délégués pour le dernier paiement (£25) qui leur était dû sur le transport et que par le fait du délai donné au dit débiteur, les

Demandeurs avait perdu le droit de rentrer en possession des titres de créances existant lors du transport.

Les Demandeurs répondirent à ces exceptions qu'ils avaient en effet reçu des débiteurs les sommes mentionnées en l'exception de paiement mais qu'ayant partagé ce qu'ils avaient perçu avec leur co-cessionnaire Brazeau, ils n'avaient pas été payés de leur proportion ; que la décharge du Défendeur était sujette à la condition du paiement régulier des créances déléguées et que l'une de ces créances, n'ayant pas été payée dans le délai spécifié au transport, les Demandeurs n'étaient pas tenus à libérer le Défendeur et que la stipulation de le libérer était devenue sans effet et d'aucune valeur. Les Demandeurs niaient avoir fait leur affaire personnelle des créances cédées et avoir donné délai aux débiteurs délégués.

La preuve du Défendeur établit que les Demandeurs ont reçu la somme de £199 8s. 10½d. et celle des Demandeurs établit également qu'ils ont partagé avec leur co-cessionnaire Brazeau.

Un dernier paiement de £25 n'avait pas été payé au délai stipulé par l'un des débiteurs délégués. Le Défendeur prouva par écrit que ce même débiteur avait eu délai de Brazeau pour un paiement antérieur au dernier, et il prouva par un témoin que ce même débiteur avait eu délai de la part des Demandeurs pour le dernier paiement de £25 et qu'il (le débiteur délégué) avait offert la somme aux Demandeurs avant l'expiration du délai qu'il avait obtenu d'eux.

La preuve faite par ce témoin est contredite par un témoin des Demandeurs, et il y avait lieu à peser la valeur de cette preuve.

Dorion, pour les Demandeurs, prétendit à l'argument, que le défaut de paiement dans les délais spécifiés était fatal à la libération promise et rendait l'acte nul, nonobstant la modification introduite dans cet acte de composition par le transport ; que l'engagement personnel du Défendeur, de voir au paiement régulier des créances déléguées maintenait dans toute sa force, le principe sur lequel reposent les actes de composition et dans toute la rigueur de l'usage et de la loi qui rendent l'acte nul, faute de paiement au terme convenu ; que le délai donné par Brazeau ne pouvait être opposé aux Demandeurs, dont les droits étaient distincts de ceux de leur co-cessionnaire ; que la preuve du délai prétendu donné par les Demandeurs était détruite par une preuve contraire et que de plus la preuve testimoniale ne pouvait être admise pour prouver ce délai, vu que c'était prouver par témoin outre et à l'encontre d'une preuve authentique, savoir, le transport notarié qui stipulait les délais dans lesquels les débiteurs délégués devait payer.

Doutre, pour le Défendeur, répondit que les parties à un acte, malgré leurs stipulations respectives, devaient être ramenées, lorsqu'elles se présentaient devant les tribunaux dans les limites et sous l'empire des règles particulières à l'espèce de contrat qui domine dans l'acte ; que de même qu'une vente, appelée donation, doit rester soumise aux lois de la vente, de même un engagement personnel et principal, rendu possible comme accessoire seulement, par l'acte qui l'établit, doit rentrer sous l'empire des conséquences de l'obligation accessoire ; que la clause de fournir et faire valoir, simple obligation accessoire et conditionnelle, se trouvant en conflit avec l'engagement personnel contenu dans la stipulation de nullité de l'acte, faute de paiement par les débiteurs délégués, il fallait décider

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laquelle de ces deux obligations primait l'autre; que le Défendeur, s'étant dessaisi de ses titres de créances contre ses débiteurs délégués, n'avait pas même le droit ni le pouvoir de s'informer s'ils avaient payé avant l'expiration des termes de paiement; que la stipulation de nullité de l'acte, faute de paiement régulier, était impossible d'exécution, comme obligation principale, et qu'il n'était soumis qu'à l'obligation accessoire de fournir et faire valoir; que les créances déléguées n'ayant pas été partagées entre les Demandeurs et leur co-cessionnaire Brazeau de manière à lier aucun des débiteurs à l'un des créanciers délégués plutôt qu'à l'autre, le délai donné par Brazeau pouvait être valablement opposé aux Demandeurs; que d'ailleurs le Défendeur avait prouvé que les Demandeurs eux-mêmes avaient donné délai à l'un des débiteurs et qu'ils ne pouvaient imputer qu'à eux-mêmes le défaut de paiement au terme spécifié; que la preuve testimoniale de ce délai avait été valablement admise, vu qu'elle avait eu lieu en matière commerciale et qu'elle était faite non pas à l'encontre d'un acte authentique et civil, mais qu'elle établissait le mode d'extinction qui anéantissait les causes d'action mentionnées dans la déclaration, savoir; billets et comptes de commerce.

Le jugement affirme les principes émis dans la dernière exception, comme on peut le voir par ceux des considérants du jugement qui suivent, savoir:

"Considering that the said Defendant hath established by sufficient evidence the allegations set forth in his exception to this action fourthly pleaded, &c. &c., And further considering, that in becoming thus proprietors of the said debts so assigned over, the said Plaintiffs and the said Brazeau were bound in law, by force of the reciprocal delegation assumed, by the said Plaintiffs and the said Brazeau to do no act which could have the effect of altering and changing the legal obligations assumed by them at the time the said transfer was so made, or which could have the effect of diminishing or of defeating the right which the said Defendant had to claim the final discharge stipulated to be given, by the said Plaintiffs and the said Brazeau to the said Defendant, under the express stipulations of the said acte de transport. And further considering that by law and by the legal effect of the said transport, the said Plaintiffs and the said Brazeau were garants of each other's acts in enforcing payment of the debts jointly assigned over to them; And further considering that it is established by evidence that the said Brazeau did give and grant delay of payment to one of the debtors whose debt was assigned over as stated in the said acte of transfer, by reason of which, and by law the condition stipulated in the said acte of transfer became of no effect in law to bar or destroy the right of the said Defendant to plead the discharge of all the pre-existing liabilities of the said Defendant towards the said Plaintiffs; and further considering that the sum of money now sought to be recovered in and by the present action has thereby become discharged and extinguished, in virtue of the said acte of transfer, the Court maintains the said exception, pleaded by the said Defendant and doth dismiss the action of the said Plaintiffs with costs."

Action déboutée.

Cherrier, Dorion and Dorion, for plaintiffs.
Doutre, Dacust and Doutre, for defendant.
(J. D.)

COURT OF SESSION, OUTER-HOUSE, EDINBURGH, 23RD FEBRUARY, 1859.

Coram LORD ARDMILLAN.

Ferguson vs. *Pow and others.*

DOMICILE—SCOTLAND OR JAMAICA.

Held,—In the case of a Scotchman who originally had his domicile in Scotland, but abandoned that domicile and established a new domicile in Jamaica, and finally gave up and left his Jamaica domicile with the intention of returning to Scotland, but died before his return, that his domicile at the time of his death was Scotland.*

This is an action brought for the purpose of having the question determined, whether the succession to the personal estate of a Scotchman, who died in America, *en route* from Jamaica to Scotland, falls to be regulated by the law of Jamaica or the law of Scotland.

Mr. Robert Ferguson was born in Leith in or about the year 1800. His father, Thomas Ferguson, now deceased, was a native of Peeblesshire, but resided in Leith at the date of his son's birth, and for some time thereafter, and afterwards settled in the town of Peebles. Mr. Robert Ferguson resided continuously in Leith from his birth until 1826, when he commenced business there on his own account, which he carried on till some time in the year 1836, when, in consequence of bad health, he left Leith. He resided with his father in Peebles a part of that year, and a part of the year 1837; and after about a year's residence with his father he went to Manchester and took employment there. After a year's residence in Manchester, his health still continuing bad (and after paying a visit to his friends at Peebles), he left this country in 1839 and went to Jamaica, where he continued to reside till about the year 1854. On or shortly after his arrival in the colony he got into business, and kept a shop or store at Wigton, Mayhill, near Kingston, until the time of his leaving Jamaica. He held no heritable property there. Some years before leaving Jamaica he married a Scotch lady, who had previously resided at Leith, and with whom, when in Leith, he had formed an acquaintance. At the date of the marriage she was resident in Jamaica. He was successful in his business in the colony, and realised considerable means. In the month of August, 1854, he left Jamaica, intending to return to Scotland, accompanied by his wife. With this view he had previously retired from business, and sold off and realised all his household furniture, stock, and other personal property in Jamaica. He had lived continuously and uninterruptedly in Jamaica during the period betwixt 1839 and 1854; but he left the colony in the latter year without any intention of returning, and after having wound up his affairs there. On leaving the colony, he first went to New York, and after remaining there for a few months he went on a tour through Canada, and thereafter, having gone to Detroit, Michigan, in the United States, in the month of September, 1855, he died

* As a similar question might readily present itself here, in the case of a Scotchman establishing a domicile in Canada, and then abandoning it in order to return to his native country, we make no apology for publishing the above very interesting decision of a Scotch Court.—EDITOR'S NOTE.

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there on the 12th of that month, after six days' illness. He was survived by his wife, but he left no child; and his personal property, therefore, fell to be divided between his widow and his next of kin. At his death he left personal property amounting to £6935 11s. 9d., and in addition he possessed heritable property in Scotland.

In the action it was maintained, on the one hand, that the succession to the personal property fell to be regulated by the law of Jamaica, and therefore that the next of kin by the mother were entitled to succeed as well as the next of kin by the father, as also that such of the next of kin by the father as were heirs in heritage were entitled to succeed without collating the heritage; while, on the other hand, it was maintained that the succession fell to be regulated by the law of Scotland, and therefore that the next of kin by the mother were excluded, and that heirs in heritage must collate if they sought to participate in the personal property. Lord Ardmillan (Ordinary), after a lengthened debate, took the case to avizandum. He has now pronounced the following interlocutor and note:—

Edinburgh, 23*d February*, 1859.—The Lord Ordinary having heard counsel for the parties, and made avizandum, and considered the closed record and whole process: Finds that at the date of the death of the deceased Mr. Ferguson, his domicile was in Scotland: Finds that the succession to his personal estate must be regulated by the law of Scotland; repels the condescendence and claim for James Ritchie; and sustains the claims of John and Andrew Pow, and of Joan Ritchie, Jane or Jean Ritchie or Traquair, William Ritchie, Thomas Ritchie, Adam Campbell, and Thomas Pow, as the next of kin according to the law of Scotland, each to an equal share to the fund *in medio*, but subject in the case of the claimants, John and Andrew Pow, to the condition that they shall collate their shares of the heritage of the deceased; ranks and prefers the said claimants, and decerns in the preference and against the holder of the fund *in medio* accordingly: Finds, in the circumstances of this case, all the parties entitled to their expenses out of the fund *in medio*; allows accounts thereof to be lodged, and remits the same to the auditor to tax and report.

(Signed) James Craufurd.

Note.—The facts of this case appear in the minute for the parties, and the correspondence in process.

Scotland was the original domicile of Mr. Ferguson. It was the country of his father, his birth, and education; of his first engagement in business, and his residence for the first thirty-six years of his life, and it was quitted for Jamaica in 1839, partly with a view of getting a situation or embarking in business, and partly, and it rather appears chiefly, on account of the state of his health, and in the hope of regaining health by change of air and residence in a milder climate. This is a domicile of the most clear and decided character, such as would easily revert, and of which, when taken in connection with the home attachments, never lost, and the wish and hope of return, never relinquished, the resumption may be naturally and easily inferred.

Had Mr. Ferguson died in March, 1854, while residing and carrying on business in Jamaica, where he had lived, and toiled, and prospered for nearly fifteen years, the Lord Ordinary is of opinion that his domicile would have then been in Jamaica, though even on this point the fact that he left Scotland not as a youth to push his fortune, but in mature age, and chiefly on account of his health, and that he frequently and strongly expressed his intention of returning to his native country, and had even fixed the time for doing so, distinguishes the case from any of those in the books, and creates some degree of difficulty. But he did not die while resident in Jamaica.

It is proved, and indeed not disputed, that Mr. Ferguson did in August, 1854, finally and completely quit Jamaica, severing all ties which united him to that country, realising his estate, transferring the seat of his fortunes, embarking with his wife, without intention of returning to Jamaica, and finally abandoning his West Indian domicile. He died in America in September, 1855.

It has been argued that this complete abandonment of the West Indian domicile would of itself, and without any intention of returning to Scotland, be sufficient to revive or restore the Scottish domicile, but the Lord Ordinary is not disposed to give effect to that argument. He thinks that if Mr. Ferguson had left Jamaica with the intention of settling in America or elsewhere than in Scotland, but had died before reaching America or the other place of settlement, his original Scottish domicile could not be held as revived, *ipso facto*, by the mere act of quitting Jamaica. To hold the Scottish domicile as revived under such circumstances would be to exclude both the elements of fact and intention, and to sustain a domicile which the deceased had acquired or recovered neither *facto* nor *animo*. But in this case the deliberate and settled intention on the part of Mr. Ferguson of returning permanently to Scotland is as well established as his intention permanently to quit Jamaica. Both are beyond all doubt. It was for the purpose of returning to his native country and to reside there that he quitted Jamaica; and this it is, this clear and decided purpose, coupled with the fact of abandonment, which is the peculiar feature of the case.

It appears to have been held, by some at least of the authorities in the Roman law, that a person *in transitu* from one domicile to another is *sine domicilio* (Dig. Lib. 30, Tit. 1, L. 27, § 2). But there is no authority in our law for the proposition that a person can be *sine domicilio*, and it has not been pleaded that Mr. Ferguson had no domicile. Then it is not contended, and could not with any hope of success be maintained, that Mr. Ferguson died domiciled in America. That is a view of the case which no one attempts to support. The alternative and the only alternative put by either party is between the Jamaica domicile and the Scottish domicile. The point of time is the date of Mr. Ferguson's death in September, 1855. At that time the Jamaica domicile had been completely and finally abandoned by Mr. Ferguson, with the intention of returning to Scotland, and without any intention of again returning to Jamaica. This abandonment had been effected both *facto et animo*, and was quite complete and conclusive; and although the route was circuitous, the deceased was at the date of his death *en route* for Scotland, with intention of permanently remaining there, in his domicile of origin, in the country of his family, his birth, his education, and his industrial occupation till the age of thirty-six.

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The recovery of a domicile of origin under such circumstances is more favourably regarded than the acquisition of a new domicile; and the case of a person abandoning his acquired domicile and dying *in itinere* on his way home to his original domicile is a different case from that of a person dying *in itinere* on the way to a foreign country with a view to the acquisition of a new domicile. The original domicile especially, when retained till mature years, and when the hope of returning has been cherished during the whole period of absence, is more easily reverted to than a new domicile can be acquired.

The Lord Ordinary thinks that the distinction between these two cases must be carefully kept in view. He is not of opinion that a person dying *en route* for a new domicile, not his domicile of origin, can be held as acquiring the domicile to which he is journeying, and thus as domiciled in a country which he has never reached. But on considering the authorities, and having regard to the actual circumstances of this case, he is of opinion that Mr. Ferguson must be viewed as having abandoned his acquired domicile in Jamaica and recovered his original domicile in Scotland.

The point is one of such delicacy and difficulty that it cannot be otherwise than with diffidence that the Lord Ordinary expresses this opinion; but he has adopted it after careful review of the institutional authorities, and of the decisions, both English and Scottish; and while there are difficulties attending any solution of the question, he thinks that the preponderance of authority and of legal principle is in accordance with the conclusion to which he has come.

The authorities in favour of the proposition that the domicile of origin is more easily recovered than a new domicile can be acquired (Story, sec. 47, par. 17; 1 Burge, p. 34. The Harmony, 2 Rob. Admir. Rep., 322, per Lord Stowell. Munro *v.* Munro, House of Lords, 10th August, 1840, per Lord Cottenham. The Lord Advocate *v.* Lamont, 20th May, 1857. 19 Dun, 770, per Lord President). Then there are some authorities which touch more closely the present question.

In the case of Colville against Lander, 15th January, 1800 (*in voce* succession, App. 1), the question as to the domicile of a Scotchman dying on his way home from St. Vincent's *via* America and Canada were raised under circumstances not very different from the present, and the decision was in favour of the Scottish domicile. Mr. Burge quotes this decision as an authority for the proposition, that a person quitting an acquired domicile, and dying *in transitu* for the original domicile, must be held as having recovered that original domicile (1 Burge, p. 35). Story states the same proposition in the clearest terms:—"If," says he, "a man has acquired a new domicile different from that of his birth, and he removes from it with an intention to resume his native domicile, the latter is acquired even while he is on his way *in itinere*, for it reverts upon the moment the other is given up" (Story, 47). And again in another passage he says (Story, 48):—"A national character acquired in a foreign country by residence changes when the party has left the country *animo non revertendi*; and if he dies *in itinere* to his native country, with that intent his native domicile revives." Mr. Burge (v. 1, p. 34) expresses himself to the same effect; so does Phillimore in his work on Domicile (pp. 22, 23), and in a sepa-

rate passage on the same subject (p. 104) he repeats the doctrine, and refers to the authority of Lord Stowell; and in the opinion of Sir John Leach, in Munro *v.* Douglas (5 Mad., page 379), and that of Lord Chancellor Cottenham, in Munro *v.* Munro (1 Rob., House of Lords Cases, 606), may be found in substance an adoption of the same rule. It is not necessary to carry the dictum of Sir John Leach, which is not very precisely expressed so far as to hold that a party may have acquired a new domicile of choice if he dies *in itinere* toward that new domicile. It does not appear to the Lord Ordinary that the learned Judge intended so to express himself, and the decision in the cause which he was then considering did not require the statement, and would scarcely have been consistent with the expression of any such view. But the rule that a person finally quitting an acquired domicile and dying *in itinere* to his original domicile has thus recovered his original domicile is stated by Sir John Leach, and is quite consistent with the judgment in Munro *v.* Douglas, and in Munro *v.* Munro, and is supported by the high authority of Mr. Story and Mr. Burge, and the case of Colville. The recent cases of Cockrell *v.* Cockrell, 14th July, 1856, (*Law Journal*, N.S., vol. 25, ch., p. 730.) The Attorney-General *v.* Fitzgerald, 23d July 1756 (same vol., p. 743), and Lyall *v.* Paton, 1st August 1856 (same vol. p. 746), all decided by Vice-Chancellor Kindersley, are—as judgments, and looking to the terms of the decisions pronounced—not at all opposed to the rule now adverted to. The point is not decided, and did not require to be decided, in any of these cases. Some of the observations of the learned Vice-Chancellor do at first sight seem in opposition to those of Sir John Leach; but the explanation appears to be that the opinion of Sir John Leach was supposed by Sir Vice Chancellor Kindersley to go farther than it really did. When Sir John Leach's opinion is considered as applicable to the case of a person returning from a foreign country to the domicile of origin, and dying *in itinere* to that original domicile, there is nothing in it opposed to any of the authorities mentioned by Vice-Chancellor Kindersley, or even opposed to his own decisions in these cases of Cockrell, Fitzgerald, and Lyall in 1856.

No Scottish authority has been adduced to support the Jamaica domicile in the present case, and no English authority directly in point has been quoted, while the maxims of some of the learned civilians, the institutional authorities of Story and Burge, and Phillimore, the remark of Lord Stowell in the case of the Harmony, and the observation of Sir John Leach in Munro *v.* Douglas, support the Scottish domicile.

Accordingly, the Lord Ordinary is, on the whole matter, of opinion that at the date of Mr. Ferguson's death his domicile of origin in Scotland had been recovered.

Counsel for claimants founding on the law of Jamaica—Mr. A. S. Cook and Mr. Hill. Agents—Messrs. W. & J. Cook, W.S.

Counsel for claimants founding on the law of Scotland—the Solicitor-General and Mr. A. B. Stand. Agent—Mr. William Duncan, S.S.C.

MONTREAL, 7TH MARCH, 1859.

Coram C. MONDELET, J.

[ENQUÊTE SITTINGS.]

No. 751.

Scott et al. vs. *Scott et al.*

ENQUETES—APPEAL FROM INTERLOCUTOR.

Held,—That proceedings at *Enquêtes* in a cause, will be suspended to enable a party appealing from an interlocutory judgment, to apply to the Court of Appeals for the allowance of an appeal of which he has given notice to the other side.

Application was made in this cause on behalf of the defendant for an adjournment of the *Enquetes* under the following circumstances. During the previous term of court, a law hearing had taken place on a *défense en droit* to the plaintiff's declaration and answers in law to two of the defendant's pleas. A judgment had been rendered dismissing the *défense en droit* and ordering *preuve avant faire droit* on the answers in Law. The plaintiff inscribed the cause on the *Rôle des Enquêtes*, and on the same day the defendants gave notice of an application to the Queen's Bench for the allowance of an appeal from the interlocutory judgment so rendered on the law hearing. On the 1st of March no Court of Queen's Bench was held, in consequence of a division of opinion of the udges, as to whether there was a quorum of competent judges of that court; jthe defendants lodged their motion with the clerk of the court as directed in such cases by the Judicature Act of 1857, and now produced a certificate of the clerk of the Court to that effect, certifying also, that proceedings could not be had thereon in consequence of the decision of the judges that no court could be held.

The defendants now urged in support of their application for a postponement that having a right of appeal they had done all the diligence in their power to avail themselves of that right, that it was not the intention of the law that they should be deprived of their remedy, nor that they should incur any forfeiture of right, resulting from a cause over which they had or could have no control That the Judicature Act of 1857, by allowing applications to be lodged with the clerk on the failure of a competent court, had intended to afford the parties the benefit of their diligence, and that it would be a hard case, if from the fault of the executive in delaying the nomination of a sufficient number of judges of the higher court, the defendants should be deprived of their rights.

On the part of the plaintiffs two points were submitted: 1st. That the judgment was not one susceptible of being appealed from; 2nd. That nothing short of a rule of the Queen's Bench granted, ordering the plaintiffs to show cause why an appeal should not be allowed, could have the effect of suspending proceedings.

As to the first point it had been determined in the case of *Gugy* vs. *Sutherland*, that there was no appeal from an interlocutory judgment dismissing a *défense en droit* to a declaration; because it was susceptible of remedy by the final judgment, which was the case in point, as the remainder of the judgment decided nothing against the defendants, it did not dismiss any of the pleas, on

the contrary it allowed them to remain until the final judgment, when the question still remained open as to their validity.

On the second point the terms of the 24th section of the Ordinance, 25 Geo. 3 Cap. 2, clearly meant that proceedings should not be suspended in any case, when an appeal was sought, until the higher court interposed its authority by granting the rule, the terms of the law were plain, and the law had not been altered, that the Judge here was seized of the cause, and proceeding with it was a duty that could only be interrupted by the active interposition of the authority of the higher court, and it was incumbent on the party making the application, as well to shew the law authorizing the judge to grant it, as that it was a proper case for the exercise of such authority, that so far from admitting as a sufficient reason that the executive had neglected their duty, by not providing for the competency of the Queen's Bench, the judge by considering it would accommodate himself to the convenience of that authority of which he was supposed and recognised to be independant. That giving the judgment the defendant asked for would be equivalent to making a law where one did not exist, for the justification of the executive, and would adopt their blameable acts as a *motive* for the judgment, acts for which the plaintiffs could be in no degree responsible, besides as the judgment was in their favour they were for the present presumed to be right, a presumption which could not be for the time invoked in favour of the defendants, and assisting them to a supposed remedy under the circumstances would be conniving at the frustration of proceedings.

MONDELET, J.—As to the first point, it is not for me to decide whether the cause be appealable or not, that is a question for the determination of the Queen's Bench, I can have nothing to do with it.

As to the second there are two questions, the first is as to the intention of the law. The second involves what is most vital to the rules by which society is governed by our system, viz., the independence of the Bench, in the uninterrupted exercise of its functions.

The law gives me no authority to postpone a cause under like circumstances, I cannot exercise that authority by the law because it has not so declared, but although it does not grant the power, it is not prohibitory. As to the other question, when the executive violates the law in place of providing for its administration, as they are bound to do, for I do not hesitate to say that for years the executive have culpably violated the law, by not providing for the efficiency of the courts, and when parties go on with their cases, and do all in their power do all they are bound to do, are they to suffer from this cause, God defend us from such a conclusion. If I can aid them without violating the law, I am disposed to do so, but, must not save for excellent reasons, I cannot suspend the proceedings, but can exercise a discretion, and will therefore order an adjournment of the *Enquête* until the fourth *Enquête* day in June, by which time an opportunity will be afforded for the defendants to make their application in case the term of that Court be held on the first of June, the day fixed by Law.

Application granted.

Cross & Bancroft, for Plaintiffs.

Cartier & Berthelot, for Defendants.

(A. O.)

MONTREAL, 20TH MARCH, 1859.

Coram SMITH, J.

The same cause.

ENQUETES—JUDGE IN BANCO SUPERIOR.

Held,—1o. That a Judge sitting *in banco* may revise and reverse the ruling of another Judge of the Court sitting at *Enquête*.

2o. That the ruling of a Judge at *Enquêtes* is wrong which suspends proceedings at *Enquêtes* to enable a party, appealing from an interlocutory judgment, to apply to the Court of appeals for the allowance of an appeal of which he has given notice to the other side.

The same arguments were renewed on a motion by the Plaintiffs for a revision of Judge MONDELET's ruling at *Enquête*, it being further urged by the Plaintiffs, that Judge MONDELET had adopted, as a justification for his judgment, the very reasons he denounced in pronouncing it, there being no other grounds for giving it, and those being wholly untenable in law; also, that the pretended exercise of a discretion was a frustration of the Plaintiffs' legal remedy, and an arbitrary exercise of authority which the Judge had no warrant or permission for in law.

SMITH, J.—The only law which applies to the case, is the ordinance of 1785; that gives an appeal from an interlocutory judgment, but the appeal must be allowed; there must be something done by the higher Court to interrupt the proceedings here; without that, the Judge has no authority. The law says, that an appeal may be had "from any interlocutory sentence or judgment in "certain cases, provided always that such appeal shall not be granted and "allowed except upon motion made in the Court of Appeal for that purpose, and a "rule served upon the other party, or his Attorney, to shew cause, &c." The rule so served shall have the effect to stay execution in such interlocutory judgment till the determination of the motion in appeal. This is imperative and binding on the Judge here. There is nothing shewn by which the Defendants will lose any right, and it is not to be presumed. A Defendant may do many things to interrupt and delay a Plaintiff's proceedings, and it may be his interest to do so, if he is likely to lose his case, but the Judges cannot imagine rights for him which the law has not given. It was the intention of the Legislature to take away or deny any such right or appeal until the order of the higher Court was granted. The only ground for operating a suspension of proceedings by the ordinance, is the granting of the rule or order of the Court to shew cause. It is argued that the notice, under the circumstances, is equivalent to it; but the notice is the mere private act of the party, and an appeal may never be granted on it. The object of the provision in the ordinance was to prevent delays and chicane of parties requiring suspension of proceedings, under pretence of mere notices of appeal. It is asked to suspend the proceedings on the ground of a simple application to have been made to the higher Court, and its failure for want of a Court. The Judges can take no cognizance of such reasons, nor can they know anything of the causes which delay the efficiency of the higher tri' unal; they have nothing to do with these, nor are they responsi-

ble for them; they must allow the responsibility to rest where the law has placed it. The motion is granted. Scott vs. Scott.

Cross and *Bancroft*, for Plaintiffs. Motion granted.

Cartier and *Berthelot*, for Defendants.

(A. C.)

MONTREAL, 30 DECEMBRE 1858.

Coram BADGLEY, J.

No. 1857.

Donally vs. *Nagle et McDonald*, Opposant.

Jugé, que le gardien d'effets saisis n'a aucun intérêt et est non-recevable à opposer la vente de ces mêmes effets saisis subséquemment par un autre créancier durant la contestation soulevée sur la première saisie.

Les effets mobiliers du Défendeur avaient été saisis dans une cause portant No. 1998 à la Cour Supérieure, à Montréal, à la poursuite de John McGinnis, Demandeur en garantie en la dite dernière cause, et l'Opposant avait été nommé gardien.

La vente sur cette saisie fut suspendue par une opposition afin d'annuller.

Durant la contestation de cette opposition, le Demandeur fit saisir les mêmes effets et un autre gardien fut appointé à cette seconde saisie le 10 juillet 1858. Le 21 juillet 1858, le gardien McDonald produisit une opposition afin d'annuller à l'encontre de cette seconde saisie dans laquelle il relatait les faits ci-dessus, en alléguant que par la loi il était tenu à la représentation de ces effets même par corps et par laquelle il concluait à la nullité de la seconde saisie et de plus à ce qu'il fut ordonné que vû la dénonciation par lui faite de sa qualité de gardien, les procédés en la cause actuelle fussent suspendues jusqu'à jugement sur l'opposition en la cause portant No. 1998 dans laquelle il avait été constitué gardien, ou au moins jusqu'à due notification de la saisie en cette cause au premier saisissant McGinnis, jusqu'à ce que lui l'opposant put être déchargé valablement de la garde des effets saisis, et jusqu'à ce que des procédés ultérieurs fussent ordonnés par la cour, le tout avec dépens.

Cette opposition fut contestée par le Demandeur au moyen d'une défense en droit sur le principe, que le fait d'une saisie antérieure dans laquelle l'Opposant avait été nommé gardien des mêmes effets, n'avait conféré aucun droit à l'Opposant pour l'autoriser à retenir possession de ces effets et à en empêcher la vente et qu'il n'avait aucun intérêt.

Après audition sur la défense au fonds en droit, la cour a renvoyé cette opposition. Le jugement est comme suit:

La cour après avoir entendu le Demandeur et l'Opposant par leurs avocats sur la réponse en droit du Demandeur à l'opposition afin d'annuller produite en cette cause par le dit Opposant, avoir examiné la dite opposition et les plaidoyers en cette cause et avoir délibéré, maintient la dite réponse en droit endossée contestation; filée par le Demandeur à la dite opposition *afin d'annuller* avec dépens.

Leblanc et Cassidy, Avocats du Demandeur.

Sicotte et Chagnon, Avocats de l'Opposant.

(P. R. L.)

MONTREAL, 31 DECEMBRE 1858.

Coram SMITH, J.

No. 2196.

Frothingham v. *Gilbert.*

Jugé, que l'amendment de la déclaration pour en faire concorder les allégués avec la preuve est toujours permis en vertu de la 12 Vic. chap. 39, sec. 86, les frais étant à la discrétion de la Cour.

La déclaration en cette cause alléguait l'existence d'un bail notarié en date du 23 Février, 1856, tandis que ce bail avait été passé le 22 Février, 1856. Le Défendeur avait plaidé une exception de compensation et une défense au fonds en fait. Lors de l'audition au mérite, le Demandeur fit motion pour amender sa Déclaration dans les termes suivants: Motion on behalf of Plaintiffs, that they be permitted to amend their declaration in this cause by substituting therein for the words "third" wherever it occurs in the said declaration, the word "second;" the whole upon the payment of such costs as this Court will order; Cette motion fut accordée sans frais par la Cour dans son jugement final qui est comme suit: The Court having heard the parties by their Counsel upon the merits of this cause, and also upon the motion of the Plantiffs, to be permitted to amend their declaration in this cause by substituting therein for the words "third" wherever it occurs in the said declaration the word "second;" having examined the proceedings, evidence of record and deliberated, considering that the said Plaintiffs have established by evidence the material allegations of their said declaration, and that the said Defendant hath failed to prove the allegations of his said exception, doth dismiss the said exception with costs, and adjudging on the motion of the said Plaintiffs to amend their declaration doth grant the said motion, and doth condemn the said Defendant to pay to the said Plaintiffs, &c., &c.

Abbott & Baker, pour le Demandeur.

Rose & Monk, pour le Défendeur.

(P. R. L.)

MONTREAL, 28 FEVRIER 1859.

Coram BADGLEY, J.

No. 1711.

Lacroix vs. *Perrault de Linière.*

Jugé, qu'un directeur d'une compagnie est tenu de répondre aux interrogatoires sur faits et articles qui lui sont proposés concernant les différentes transactions faites par le bureau de direction.

Le Demandeur qui est actionnaire et un des directeurs de la compagnie du chemin de fer de Montréal et Bytown, comme créancier de cette compagnie poursuivit le Demandeur pour le montant de ses actions dans cette compagnie. Par ses défenses, le défendeur allégue que le Demandeur est non-recevable en sa demande, vû ses qualités d'actionnaire et de directeur et nommément en ce que certaines transactions du bureau de direction ont eu l'effet de ruiner le crédit de la compagnie et de la faire tomber en déconfiture. Le Demandeur ayant été interrogé sur faits et articles touchant ses transactions qui eurent lieu durant sa charge de directeur répondit qu'il n'en connaissait rien.

Lacroix vs. Perrault.

Le Défendeur fit motion le 23 février 1859, à ce que le Demandeur soit tenu et enjoint de répondre distinctement et catégoriquement aux quatrième, huitième, onzième, treizième et quatorzième interrogatoires sur faits et articles à lui soumis par le dit Défendeur et auxquels il n'a point répondu ainsi qu'il était tenu de le faire, et en autant que le dit Demandeur comme étant un des directeurs de la compagnie du chemin de fer de Montréal et Bytown, est tenu de connaître les faits dont il est question dans les susdits interrogatoires ; le tout avec dépens ; et à défaut par le dit Demandeur de répondre aux susdits interrogatoires dans le délai qui sera fixé par cette honorable cour ; à ce qu'iceux interrogatoires soient tenus pour confessés et avérés.

Après audition, cette motion fut accordée et il fut enjoint au Demandeur de répondre de nouveau à ces interrogatoires.

Le jugement est comme suit :

La cour après avoir entendu les parties par leurs avocats sur la motion du Défendeur du 23 février courant, examiné la procédure et avoir délibéré, accorde la dite motion et en conséquence ordonne au Demandeur de comparaître devant cette cour le premier jour d'enquête, en mars prochain, pour là et alors répondre *de novo* et catégoriquement, aux quatrième, huitième, onzième, treizième et quatorzième interrogatoires sur faits et articles à lui soumis par le dit Défendeur.

Cherrier, Cassidy et Dorion, pour le Demandeur.

Lafrenaye et Papin, pour le Défendeur.

(P. R. L.)

MONTREAL, 26 FEVRIER 1859.

Coram BADGLEY, J.

No. 100

Sarault vs. *Ellice.*

Jugé, que l'exception de paiement et la défense au fonds en fait peuvent être valablement opposées à une demande et ne sont pas incompatibles ni contradictoires.

Le Défendeur ayant invoqué par sa première exception la prescription trentenaire ; plaida en second lieu une exception de paiement, tout en niant les allégués de la déclaration du Demandeur et en dernier lieu, il plaida une défense au fonds en fait.

Le Demandeur fit motion le 25 février 1859, à ce que le Défendeur fut tenu de faire option entre ses défenses affirmatives et sa défense au fonds en fait et qu'à défaut de ce faire, il demanda le rejet des trois défenses.

La cour après audition a rejeté cette motion avec dépens et le jugement est motivé comme suit : " Considering that by law and the existing jurisprudence of Lower Canada the affirmative plea of payment and the plea of general issue may be pleaded together in the same action, and that the said Defendant is not in law held to make his option of one of the said pleas and to abandon the other of them, &c., &c.

Motion renvoyée.

Fleming, pour le Demandeur.

Rose et Monk, pour le Défendeur.

(P. R. L.)

MONTREAL, 28 FEVRIER 1859.

Coram BADGLEY, J.

No. 1528.

La compagnie du prêt et d'emprunt du Haut-Canada vs. *Doyle et Stanley*, Opposant.

Jugé, qu'une opposition qui, par un amendement subséquent des procédés qu'elle attaque n'a plus aucune raison d'être, doit être renvoyée sur une motion, mais sans frais.

L'Opposant en cette cause sur qui une règle pour folle enchère avait été obtenue le 24 décembre 1858, fit une opposition afin d'annuller le writ de *venditioni exponas de terris* sur ce que la règle pour la folle enchère avait été accordée contre le nommé George E. Stanley, tandis que son véritable nom et celui sous lequel il avait acquis la propriété saisie en cette cause, est George J. Stanley.

La Demanderesse fit motion après le rapport de cette opposition par le shérif, à ce que ce dernier eut à amender son rapport en constatant que la propriété avait été réellement adjugée à George J. Stanley. Cette motion ayant été accordée après audition et le rapport du shérif ayant été amendée en conséquence le 23 février 1859; la Demanderesse fit alors motion comme suit:

Qu'en autant qu'il appert par les procédés en cette cause et l'amendement fait par le shérif au rapport ou retour par lui produit en premier lieu, que le dit rapport est maintenant correct et en accord avec les allégués de l'opposition produite par l'Opposant, et que par conséquent la dite opposition n'a plus aucune base; la dite opposition soit rejetée avec dépens.

Que de plus en autant qu'il appert également par les procédés en cette cause que le dit Opposant George Joseph Stanley, gentilhomme, de la cité de Montréal s'est rendu adjudicataire le 22 novembre dernier, d'un immeuble vendu par le shérif sur le Défendeur et décrit dans la cédule annexée au rapport du dit shérif et que le dit George Joseph Stanley a depuis négligé de payer le prix de la dite adjudication; savoir; la somme de quinze cent cinquante livres cours d'Halifax;

La cour ordonne que le dit immeuble soit vendu de nouveau à la folle enchère aux risques et frais du dit Opposant George Joseph Stanley à moins que cause ne soit montrée au contraire devant cette cour samedi le 26ème jour de février courant, à dix heures et demie du matin, cour tenante le tout avec dépens.

Après audition des parties intéressées, la cour accorda la motion et renvoya l'opposition, mais sans frais.

Jos. Papin, pour la Demanderesse.

Bovey, pour l'Opposant.

(P. R. L.)

COUR DE CIRCUIT.

SOREL, 7 FEVRIER 1859.

Coram BRUNEAU, J.

No. 113.

Mogé vs. *Dupré*.

Jugé, que l'hypothèque générale existante sous l'ancien régime hypothécaire en Bas-Canada et acquise avant la mise en force de la 4 Vict., Chap. 30, et enregistrée avant aucune inscription prise par le tiers-détenteur; est valable.

Le Demandeur par sa déclaration alléguait : que par acte de vente reçu le 26 février 1834, Mtre. Lenoblet et son confrère notaires, le Demandeur et son épouse ont vendu à François Harpin cultivateur de St. Ours, un lot de terre situé dans le village de St. Ours et y décrit au long moyennant 30 fr. ancien cours de rente annuelle la vie durant du Demandeur et de son épouse. vs. Lapré.

Que cet acte fut enregistré le 29 novembre 1851.

Que le 29 septembre 1857, trois années de cette rente sont devenues échues, et vû le décès de l'épouse du Demandeur, la moitié de ces arrérages s'élevait à £1 17s. 6d. Que le Défendeur est propriétaire et détenteur d'un lopin de terre hypothéqué au paiement de cette rente, en autant que le dit François Harpin est devenu propriétaire et en possession de ce lopin de terre peu de temps après la passation du dit acte de vente qui a eu l'effet de frapper d'une hypothèque générale le dit immeuble ainsi acquis par le dit François Harpin postérieurement à la passation du dit acte de vente qui a été dûment enregistré comme susdit pour conserver la dite hypothèque générale sur le dit lopin de terre dont le dit Défendeur est maintenant détenteur et en possession comme propriétaire.

Le Défendeur plaida ; que l'immeuble dont il était en possession n'était pas grevé de l'hypothèque mentionnée en la déclaration du Demandeur, qu'il possédait cet immeuble par bons titres enregistrés antérieurement à l'acte de vente fait par le Demandeur à François Harpin. Le Défendeur produisit un acte d'échange entre Hypolite Mogé et François Harpin en date du 13 avril 1847, non enregistré et une donation de cet immeuble, ainsi acquis par François Harpin en vertu de cet acte d'échange en faveur du Défendeur reçu le 19 septembre 1854 et enregistré le 20 septembre 1854.

Par sa réponse spéciale le Demandeur alléguait : que par les titres invoqués par le Défendeur, ce dernier fait voir qu'il a eu connaissance de l'existence de la créance reclamée, en autant que par l'acte d'échange du 13 avril 1847, François Harpin l'auteur du Défendeur s'est obligé au paiement de cette créance et dans l'acte de donation du 19 septembre 1854, le Défendeur a reconnu avoir reçu copie de cet acte d'échange.

Lafrenaye, pour le Demandeur prétendit que l'hypothèque générale constituée sous l'ancien régime hypothécaire existant en Bas-Canada avant la promulgation des lois d'enregistrement, existe encore dans certains cas ; comme dans l'espèce actuelle ; que les lois d'enregistrement n'ont pas aboli l'ancienne hypothèque générale lorsqu'elle existait comme droit acquis avant la passation de la 4 Vict., Chap. 30 ; et il cita des précédents de la Cour Supérieure à Montréal.

Viger vs. Mack et la Banque du Peuple.

No. 295 : Lord Bishop of Montreal vs. Brewster and C. Brewster, Oppt. en 1856.

Le jugement rendu par la cour a accordé les conclusions de la déclaration du Demandeur sur le principe que l'hypothèque générale du Demandeur était un droit acquis que la loi ne lui avait pas enlevé.

Lafrenaye et Bruneau, pour le Demandeur.

Marchessault, pour le Défendeur.

(P. B. L.)

MONTREAL, 13TH JUNE, 1857.

Coram C. MONDELET J.

No. 982.

Close vs. *Close*.

LESSORS AND LESSEES' ACT—JURISDICTION.

Held,—That a declinatory exception is good in law to an action of damages for non-delivery of premises leased, brought into Court under the provisions of the Statute 18 Vic., cap. 108, commonly called the Lessors and Lessees' Act.

The declaration of the plaintiff claimed £500 from the defendant, being damages for breach of a contract in not giving him possession of certain premises in the terms of a written lease.

The prayer of the declaration was, that the defendant should answer the demand in pursuance of the Statute commonly known as the Lessor and Lessee Act.

The defendant met the action by an exception declining the jurisdiction of the Court under the Statute in question, 18 Vic., cap. 108, for the matters set forth in the declaration of the plaintiff, as being simply an action of damages.

The plaintiff demurred to the exception for several reasons, the main one being that the matters alleged in the declaration arising out of the relation of landlord and tenant, and of the breach of a contract of lease, are under the terms of the Statute, within the summary jurisdiction of the Justices of the Superior Court.

The parties were then heard upon the demurrer, and the same was dismissed with costs.

Demurrer dismissed.

E. Carter, for plaintiff.

Devlin & Fleming, for defendant.

(F. W. T.)

MONTREAL, 31ST MARCH, 1859.

Coram SMITH[redacted]

The same cause.

LESSORS AND LESSEES' ACT—JURISDICTION.

Held,—That the Superior Court has no summary jurisdiction under 18 Vic., cap. 108, in an action of damages for breach of contract of lease, in not delivering possession of the leased premises to the lessee.

This cause was finally heard on the merits of the *exception déclinatoire* in the March term, 1859.

Per Curiam.—The Court has no jurisdiction to try the present cause under the Lessor and Lessee Act, and maintains the exception.

Action dismissed.

E. Carter, for plaintiff.

Devlin & Fleming, for defendant.

(F. W. T.)

MONTREAL, 30TH MARCH, 1859.

Coram SMITH, J.

No. 1166.

Joseph v. *Castonguay et al.*

Held,—That *accroissement* takes place in the donation of a usufruct even by *acte entre vifs*, if such deed, by its disposition and by its clear expression, create a substitution reciproque; that the substitution created by a donation and by a will are regulated by the same rules of law.

This was an action *en partage* brought by the representatives of the heirs of one Jean Baptiste Castonguay.

On the 15th day of May, 1827, the late Dame Marie Josephte St. Germain Gauthier, widow of one Jean Baptiste Castonguay (father of the one before mentioned), "desirant se demettre en son vivant" in favor of her daughter Julie Castonguay, of a certain house and premises, by deed of donation, "entre vifs et irrevocable," gave to the said Julie Castonguay the "jouissance et usufruit sa vie durante d'un emplacement en cette ville, rue Capitale," &c.

The deed then went on to say that the "dite donatrice désirant conserver aux enfans à naître en légitime mariage à la dite donataire seulement, la propriété pleine et entière de l'emplacement si-dessus designé, sans l'étendre à un degré plus éloigné, veut et entend que la dite emplacement et maison ci-dessus données en jouissance à la dite dame donataire, *demeure substitués comme elle les substitue* aux dits enfans à naître en légitime mariage de la dite dame donataire seulement auxquels elle donne la propriété des dits biens ce qui à été accepté pour eux par le dit Sr. Luc Dufresne, leur père, et la dite dame donataire, leur mère," &c.

Further on, the said deed stipulates, that, "au cas de mort de la dite dame donataire, sans enfans la jouissance et usufruit des dits emplacements et maison mentionnés en ces présentes seront reversibles et appartiendront à ses frères et sœurs survivants leur vie durante, et si alors tous les frères et sœurs de la dite dame donataire étaient décedés, la propriété du dit emplacement et maison appartiendra à leurs enfans nés et à naître en légitime mariage pour être ensuite partagé entr'eux par souche, que les enfans à naître de la dite dame donataire à elle *substitués*," &c.

Julie Castonguay died without issue, but leaving two brothers and one sister (Jean Baptiste Castonguay, first above named, François Xavier Castonguay, and Mme. Leclère, the two last named being the Defendants in this case) surviving, and who all had possession and enjoyment of the said house and premises together.

On the 21st January, 1849, Jean Baptiste the younger died, leaving six children, in whose rights the said Plaintiff [redacted].

The Defendants having let the house in question to a new tenant, and from him collected the rent, and the Plaintiff, being thus excluded from his share thereof, brought his action *en partage* and for his share of the profits.

Ramsay, for Plaintiff, having stated the facts of the case, said: The principal question arises on the interpretation of the deed of the 15th May, 1827. That

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this deed was so badly drawn that it was impossible to apply to the technical expressions there used their strict and legal signification, as there was no possible interpretation of the deed throughout by which the use of the words "*usufruit*" and "*substitution*" could be reconciled. It was therefore necessary to seek from the general terms of the deed the intention of the donor, and, on the part of the Plaintiff he contended: 1st. That though the word "*usufruit*" was used in the clause of donation, it was quite evident that it was really the full property that was given, *grevé*, in favor of certain other parties, for the deed expressly states that the donor divested herself of the property. In favor of whom, then? Not of the children, for they did not exist, and "*le néant ne peut avoir aucune propriété.*" (Vide Pothier Des Successions, c. 11, sec. 2, art. 1er, p. 7,—4to.,) Besides, by the terms of the deed, the children to be born are *substituted* to their mother. It cannot be pretended that they were substituted for the usufruct, for, independently of the rule of law just cited, such a clause is unnecessary. The usufruct of itself would follow the property on the death of the usufructuary. This interpretation equally applies to the disposition of the deed in case Julie Castonguay should die without issue. The brothers and sisters surviving should each take their share *grevés* in favor of their children who were substituted to them. Or if it be maintained that the deed of donation contained two conditions (a proposition which its terms do not altogether discourage),—first, the death of Julie Castonguay without issue but leaving brothers and sisters,—second, her death leaving no brothers and sisters but only nephews and nieces, the former of which really happened, then it is unnecessary to embarrass the argument with the consideration of what the donor meant through the confused use of the words "*usufruit*" and "*substitution*," because Jean Baptiste Castonguay the younger was the son of the donor, and one of her heirs, and also the heir of his sister Julie, and took, if not under the deed, at least by the common law, and the union of the usufruct conveyed to him by the deed of donation, at least under this reading of the deed, to the property to which he succeeded, destroyed the former by confusion, and he transmitted his third to his children, *auteurs* of the Plaintiff. (Vide Repertoire, Vo. Usufruit, sect. V., § 6, p. 407; An. Denisart, Vo. Usufruit, No. 35; Lacombe, Vo. Usufruit, No. 23.

2nd. If the word *usufruit* were to prevail, and the use of the words *substitués* and *substitutions* were to be explained away, it would avail the Defendants nothing unless they could show that the *droit d'accroissement*, operating in donations of usufructs by will but not in bequests of property, did not affect such a deed as this. It is a deed of donation *entre vifs et irrevocable*, and is so called by the parties to it, and not a will. The distinction too made between usufructs and property as regards *accroissement* is a pure subtlety, and ought to be restrained and not be applied to a new class of deeds. (Vide Ferrière, Dict. de Pratique, Vo. Accroissement; An. Denisart, Vo. Accroissement, No. 18; N. Denisart, Vo. Accroissement, § VI., 2.; Ricard, t. 1, p. 540; Tr. des Don. Entre Vifs,; also Toullier, 3, No. 448, and 5, No. 699.

Dorion, A. A., for Defendants, said the deed of donation established a usufruct, first in favor of Julie Castonguay, and, in case of her death without issue,

in favor of her brothers and sisters surviving her, *leur vie durant;* that the shares in such usufruct of the brothers and sisters dying first accrued *par droit d'accroissement* to the survivors, who had the right to enjoy the usufruct of the whole property until the death of the one dying last. (Vide Pothier, Tr. des Don., Sect. CVI. § III.; Rep. Vo. Accroissement, p. 113, col. 1; Nouv. Den. Vo. Accroissement, § V.; Ricard, Tr. des Don., t. 1, p. 548.

Under the terms of the donation, no partage of the property could take place until all the brothers and sisters were dead.

The Plaintiff demanded a partage, as representing the heirs of J. Bte. Castonguay the younger, while the children of J. Bte. Castonguay, whose rights he had acquired, had all renounced to the estate of their father.

Ramsay, in reply, said, that even if it were proved that Plaintiff's *auteurs* had renounced, their renunciation still came too late, as they had previously taken possession of the property, and were in possession of it when Plaintiff purchased, and that this was an *acte d'heritier* which invalidated any subsequent renunciation. Vide Pothier, Tr. des Substitutions, sect. 6, art. 2, § 1, p. 559, —4to. Besides that, as far as regards three of Plaintiff's *auteurs*, there was no proof of the authorisation of the agent who pretended to renounce for them.*

SMITH, J.—This is an action brought by the Plaintiff as the representative of the children of Jean Baptiste Castonguay, to recover a share in certain real estate in the city of Montreal, as proprietors and for a partage thereof, and for a share of profits and rents, &c. The title of the Plaintiff rests on a sale to him by the children of Jean Baptiste Castonguay, as the heirs of the said Jean Baptiste Castonguay and as claiming title, under a certain deed of donation, executed by Mme. St. Germain, on the 15th day of May, one thousand eight hundred and twenty-seven, by which deed the children of Jean Baptiste Castonguay pretend that they are entitled to take the property on the ground that the substitution created by the donation in favor of Jean Baptiste Castonguay, his brothers and sisters, is of the property itself and is that of *grevés* under the donation. This right of property was transmitted to the children (the *auteurs* of the Plaintiff), as the heirs at law of Jean Baptiste Castonguay.

The Defendants contest this action on the ground, 1st, that no right of property whatever passed under the donation to Jean Baptiste Castonguay at all; that the right of Jean Baptiste Castonguay was the right of a mere usufructuary, and that, as the *usufruit* was given to Jean Baptiste Castonguay and his brothers and sisters surviving Julie Castonguay, the share of Jean Baptiste Castonguay in the *usufruit* accrued, *jure accrescendi*, to his brothers and sisters, and that the right of *usufruit* was still existing at the time of the institution of the present action, and that the children of Jean Baptiste Castonguay not being called under the donation to take the property (except in the case of Jean Baptiste Castonguay and the brothers and sisters of Julie, the original usufructuary, dying without children, which is not the present case), are not otherwise called by the donation to take the property at all.

* It might be a question how far even a valid renunciation would avail parties in the position of the Defendants.—REPORTER.

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The second exception sets up the same ground of defence, with the addition that even if the children had any right of property, until the extinction of the *usufruit* to Jean Baptiste Castonguay and his brothers and sisters no right could vest within, and that the present action, even if founded in law, is premature.

The third ground is, that as the children of Jean Baptiste Castonguay had renounced the succession of their father, what right even they might have had under the donation was lost by the renunciation, and that consequently the title of Plaintiff in that respect is bad.

The title of the Plaintiff therefore rests on the donation of the 15th of May, 1827, executed by Madame St. Germain. The Plaintiff asserts that the donation to Julie Castonguay, the reversion of which, under the terms of the donation, is given to Jean Baptiste Castonguay, is something more than a mere *usufruit*. That she is *grevée de substitution* in favor of her children, should she have any, and that, although it is qualified as a *usufruit*, it is in point of law a donation of the property itself, and that her brothers and sisters, taking the property after her decease without children, are themselves *grevés* in favor of their own children, and that the substitution being created by a donation and not by a will, and it having had its effect by the donees having possessed the property, and that a division was made among the donees of their respective shares, the share of each donee, on his decease, vested in his children, and consequently the title was complete.

It was also asserted, that even supposing the donation to Julie with reversion to her brothers and sisters, was that of a mere *usufruit*, yet as the *usufruit* had vested under the donation in Jean Baptiste Castonguay and others, that it became a separate right in each, and on the death of Jean Baptiste Castonguay his share of the *usufruit* became reunited to the property and vested in his children as his heirs; and in support and corroboration of this view the Plaintiff contended that from the terms of the donation itself, it was the clear intention of the donor to grant the property itself to her children, burthened with a substitution in favor of the grand-children; for if the donation involved simply a *droit d'usufruit* to Julie and her brother and sisters after her, the donation is defective in this, that the property after the decease of the brother and sisters is given to no one, and that it cannot be supposed that it was the intention of the donor to give a mere right of usufruit without at the same time bestowing the property on some one, and that from this alone the intention of the donor is manifested so as to show that it was the property itself and not the mere enjoyment of it which was contemplated by the donor in making the deed.

The first point to be determined in the settlement of this question, is to discover what the real intention of the donor was in making the donation in question, and what was in reality bestowed on the donees by the deed. On reference to the donation it will be found that the intention was to create a mere usufructuary right in favor of Julie Castonguay. The words used by the donor appear to me to leave no doubt on this point. The donor expressly declares that she desires to give the enjoyment only to Julie during her life time, for the *usufruit* is detached and separated from the property, and the *usufruit* alone

is given to Julie, and the property in the same donation is given in express terms to her children, should she have any.

The *usufruit* is accepted by Julie herself, and the donation of the property which was to take effect simultaneously with the donation of the *usufruit*, is given to the children born, or to be born, and accepted for them by Julie and her husband.

Throughout the whole donation the right of Julie is described as being a mere *usufruit*, and it is this mere right of *usufruit* which is given to the brothers and sisters of Julie. It is the reversion of this right alone which is given to the brothers and sisters. Now if the language of the donor is to mean anything, it says the enjoyment is given to Julie and the property is given to another. The property could not vest in two separate individuals at one and the same time.

In vesting the property in the children, Julie was necessarily excluded from it, and it cannot be supposed that in giving the property to the children it was the intention of the donor to use terms in giving the *usufruit* to Julie which would have changed the character of the donation, and which would have had the effect, in the very face of the clear and manifest intention of the donor, of vesting the property in Julie.

The word "*usufruit*" is sometimes intended to mean the property itself, where, from the terms of the whole act, this intention is apparent; but here the reverse is the case. The *usufruit* is first separated from the right of property, and at the very time the *usufruit* is given the right of property is given also. Now it cannot be presumed that this is an ordinary case of substitution in favor of the children of Julie to take after her death, for it is a direct donation of the property to the children of Julie, the *usufruit* having been first separated and detached from it and a substitution of the right of *usufruit* alone created in favor of the brothers and sisters of Julie in the event of her dying without children.

There are other clauses in the deed which show that the intention of the donor was to grant only a life interest, for Julie is charged with the keeping of the property in repair and certain other charges which clearly show to me that it was the intention of the donor to restrict the right of Julie to that of a mere usufructuary and no more. This, then, being the right of Julie, the reversion of the right is given, after her death without children, to her brothers and sisters. It is clear to me that the right of Jean Baptiste Castonguay, as one of her brothers, can be no more than what was given to Julie under the terms of the donation; it could be no more, for it is the mere reversion of this right of Julie which is given to them. It was the *usufruit* which had been detached and separated from the property, which property, by the terms of the donation, vested in the children of Julie if she had any, and this right could not be changed by the mere fact of Julie dying without any issue, and even supposing that the gift of the property to the children of Julie to be born afterwards might be liable to doubt, there being no children alive to take the property at the time it was given, it could never have the effect in law of converting a mere usufructuary right into a right of property, contrary to the clear and express terms of the donation.

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The *usufruit* was to go in one line, namely, the children of the donee, and the property in another line, namely, the grand children, and the donation in favor of both took effect at one and the same moment. And supposing that the children, as the heirs at law of the donor, might eventually take the property at the termination of the *usufruit* so far as the terms of the donation are concerned, they could not take the property as the heirs at law of their father, Jean Baptiste Castonguay, as he could not transmit to them any right of property whatsoever.

The children of Jean Baptiste Castonguay are only called by the donation to take the property in one case, viz., in case of the brothers and sisters of Julie dying before her, and she (Julie) dying without children. But as this case did not happen, the children of Jean Baptiste Castonguay could only claim property under the donation on the principle that their father, Jean Baptiste Castonguay, was himself proprietor, and it is on this principle that this action is directed against the brothers and sisters of Jean Baptiste Castonguay, as if they were all proprietors *par indivis*.

Now I think it is shown that he was not proprietor at all, but a mere usufructuary, and as such he could transmit in his succession no right of property whatever.

The next point urged by the Plaintiff is, that as the *usufruit* was created by a donation and not by a will, that after it had once vested in the usufructuaries that it became a separate right, and as no express mention was made in the donation to take the property so soon as the enjoyment of the share of Jean Baptiste Castonguay so separated from the others by separate enjoyment had lapsed, the share of Jean Baptiste Castonguay again became reunited to the property and became vested in his heirs, and that the other joint usufructuaries could not claim this *usufruit* of the share of Jean Baptiste Castonguay *par droit d'accroissement*. This pretension rests on the presumption that Jean Baptiste Castonguay was in reality *grevé de substitution*, and not a mere usufructuary. That in this respect a donation is different from a last will, and that in donations the *droit d'accroissement* does not attach as it does when the right is given by will, and that even if no such distinction existed, the right of Jean Baptiste Castonguay having once vested in him, and he having enjoyed his right by a distribution with the other usufructuaries of the rents, issues, and profits of the immoveable estate that the separation and division so made operated as a bar to any *droit d'accroissement*, which, in the absence of any such separation and division, might have otherwise attached. On this point, I am against the Plaintiff. It is true that in respect to the pretension as respects the *droit d'accroissement* it does not usually exist in donations, as between the donor and the immediate donees, but when a substitution of the *usufruit* is created by the donation, and to take effect after the decease of the original donee, then it seems to me that there is no distinction made in the law between substitutions created by donation and those created by last will (see citations from Ricard and others), and that when even from the terms of the substitution a contrary intention is not plainly manifested therein, the law presumes that a *substitution reciproque* is created and that there must be a termination to the *usu-*

fruit, before it again becomes united to the right of property from which it had been originally separated and detached. Now by the terms of this donation it appears to me that there is created a *substitution reciproque* in favor of the brothers and sisters of Julie, by which the survivor of them was to take and enjoy until the final termination of the substitution. The thing (that is, the *usufruit*) is given to the brothers and sisters conjointly; they are *conjoints* in the substitution of the enjoyment of this property, and also given to them *leur vie durante*, and as no one is called by the express terms of the donation to take the property in the event of the brothers and sisters succeeding to the *usufruit*, it (the property) can only be taken after the extinction of the *usufruit*. The mere fact that the brothers and sisters having enjoyed together the *usufruit* and that they divided the rents, issues and profits among them, is not such a separate enjoyment as would create separate and independent rights in the usufructuaries, so as to [illegible] the heir at law to the property each part of the *usufruit* as it fell in [illegible] *usufruit* as a whole passed under the donation to Jean Baptiste Castonguay and the others, and it must terminate as a whole, *juré non decrescendi*, before the property can be again united to the property from which it had been originally separated. So long therefore as there are usufructuaries to enjoy, no property can vest in the heirs who may be entitled to claim after the termination of the *usufruit*.

Assuming, therefore, that the right of Jean Baptiste Castonguay under the donation was a mere *usufruit*, a life interest, and a reversion of the right given to Julie; secondly, that he (Jean Baptiste Castonguay) could transmit in his succession no right of property whatever to his children; thirdly, that the children are not specially called by the donation to take the property, except in one case, already explained, which did not happen; fourthly, that as no one is specially called to take the property after the *usufruit* passed to Jean Baptiste Castonguay and the others; fifthly, that the heirs cannot claim any right in the property until after the final extinction of the *usufruit*, I am of opinion that the children of Jean Baptiste Castonguay had no right of property under the donation which they could legally convey to the present Plaintiff, and that the action must be dismissed, with costs.

On action *en garantie* the Plaintiff has judgment against Defendant *en garantie* to indemnify him against present judgment with costs.

Action dismissed.

T. K. Ramsay, for Plaintiff.

Cherrier, Dorion & Dorion, for Defendants.

(T. K. R.)

IN APPEAL,

FROM THE SUPERIOR COURT, DISTRICT OF MONTREAL.

MONTREAL, 5TH MARCH, 1859.

Coram SIR L. H. LAFONTAINE, BART., C. J., AYLWIN, J., DUVAL, J., MONDELET, (C.,) J.

No. 3.

ARTHUR C. WEBSTER,
(Plaintiff in the Court below,)
Appellant;

AND

THE GRAND TRUNK RAILWAY COMPANY OF CANADA,
(Defendant in the Court below,)
Respondent.

Held,—1. That it is competent for a shareholder, who has transferred his shares as collateral security, to bring an action of damages against the Company for refusing to register such transfer during a period of several months, and thereby causing him great pecuniary loss, although such transfer be prepared in the form of the Company's charter.

2. That, moreover, the allegations that the transferees had offered to surrender such transfer to the Company, and had demanded that the Company should transfer the shares on their books, were sufficient to meet the requirements of the Company's charter.

This was an appeal from the judgment of the Superior Court, at Montreal, rendered on the 28th of June, 1858, and reported at page 291 and seq. of the 2nd Volume of the Jurist.

The judgment of the Superior Court was reversed, and the judgment of the Court of Appeals was in the following words:—"The Court, ... considering that the depreciation in the value of the capital stock of the Appellant, alleged in his declaration, is therein stated to have been occasioned by the unlawful refusal of the party Respondent to permit and allow the Appellant to dispose of and transfer the same; considering that the Appellant has alleged injury sustained by himself, by an act of the Respondent, for which he has personally a right to demand damages from the party Respondent; considering that the Respondent should properly have availed himself of a defence to the merits, and that the *défense au fonds en droit* by him pleaded, is insufficient and unfounded in law, and that, therefore, in the judgment of the Court below, by which the said *défense au fonds en droit* has been maintained and the Appellant's action has been dismissed, there is error;—it is considered and adjudged by the Court here, that the said judgment, that is to say, the judgment rendered by the Superior Court at Montreal, on the twenty-eighth day of June last, be and the same is hereby reversed; and proceeding to render the judgment which the Court below ought to have rendered, it is further considered and adjudged, that the said *défense au fonds en droit* be and the same hereby is overruled; that the parties do proceed to the adduction of evidence upon the issue of fact between them, and that the said Respondent do pay to the Appellant the costs by him incurred in this behalf, as well in the Court below as in the Court here, and that the record be remitted." (The Hon. Mr. Justice Mondelet *dissentiente.*)

MONDELET (C.), J., in dissenting from the judgment, remarked that in the first place the action should have been brought against the Directors and not against the Company, the act complained of as not having been performed being one which the Directors and not the Company were bound under the Act of Parliament to perform; but the most potent reason which influenced him was that no such action as the one brought could lie. This action is brought for infringing a statute compelling the registration of transfers of stock. The transfer here was an absolute one. It is alleged that Webster had certain private understandings with Lemesurier, Routh & Co. and the Savings Bank, of which the Company knew nothing. The argument was that the transfer was not absolute, inasmuch as it was not carried out by the Company. The answer, however, is this,—the Grand Trunk have nothing to do with that. The *cessionnaires*, or, rather, the absolute proprietors, might have sued the Company or compelled them by *mandamus* to register the transfer, but there can be no action on the part of Webster against the Company. The *défense en droit* is fyled on the very ground that there is no action at all in Webster, and I am decidedly of that opinion. In England they have the general demurrer which answers to our *défense en droit*, and the special demurrer which answers to our exception *à la forme*. As regards the former, the only difference between the English pleading and ours is, that we are required to give special reasons, which is an improvement on the English system. There was an ordinance of France which compelled Courts of Justice to decide *in limine*. Why have an *enquête* when from the very allegations of the Plaintiff it appears he has no action? I make these observations because I do not see why an *avant faire droit* should have been ordered as was suggested. Moreover, by the statute a duplicate transfer must be delivered, not to make a transfer, but to make an entry thereof merely in the Company's books. Now, how can an action like this, which is to compel the making of a transfer and not the mere entry thereof, be brought? The statute in a case like this must be strictly interpreted. Damages are claimed in a matter wherein the Company is not placed *en demeure*. On the whole, I consider the judgment of the Court below was good. Webster did not call on the Company to do anything. At all events he has not the present action.

DUVAL, J.—At the time of the argument the case seemed so plain, that I only consented to take the case on *delibéré* out of deference to the learned Judge who rendered the judgment in the Court below. The *motifs* of the judgment themselves show that the Court was led into error as to the fact. It has been argued on the part of the Company that the damages, if any, were sustained by the assignees and not by the Plaintiff, inasmuch as the fall in the value of the stock took place after the assignment. Now, this is the error of fact that has been made. On referring to what has been termed an assignment, it will be found that Lemesurier, Routh & Co. are to account to the Plaintiff for the monies they received, and, retaining the amount due to themselves, pay over the balance to the Plaintiff. How then can it be said that the Plaintiff is without interest? The amount to be retained by Lemesurier, Routh & Co. is certain—it is the debt due to them by the Plaintiff. The fall in the value of the stock necessarily diminishes the balance which is to be paid over to the Plaintiff, and cannot

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affect Lemesurier Routh & Co., who will claim from the Plaintiff what they cannot get from the Company. The declaration alleges this damage to be so much per cent; but the Company expect to get rid of this demand on a general demurrer, that is, admitting the fact alleged to be true, they say the Plaintiff has no action.

As to the alleged want of privity of contract, it is too plain to call for any remark. The Plaintiff is a stockholder, and to him the Company is responsible.

AYLWIN, J.—The Appellant being possessed of 268 shares, of £25, stg., each, in the Grand Trunk Railway, on the 1st October, 1853, and being indebted to the firm of Lemesurier, Routh & Co., in the sum of £1403 15s. 7d., currency transferred to them 58 of these shares as collateral security for the payment of the debt, and in order that the said firm might realise the amount of it, an assignment was executed, *in due form of law*, as the declaration alleges, in their favor, the whole on the understanding that the surplus of the proceeds, after deduction of the Appellant's debt, should be paid to him by the firm. The declaration states that Lemesurier, Routh & Co. thereupon *duly demanded* of the Company to transfer the said 58 shares to them, and then and there also presented to the Company the said transfer, and offered to surrender the same on the due enregistration of the same on the books of the Company; but that the Company wholly neglected and refused so to do, whereupon on the 24th December, 1853, several similar verbal applications in the mean time having been fruitlessly made to the Company by the firm in question to the same effect, an application was made in notarial form by Mtre. Gibb and his colleague, notaries, reiterating the former demands. It is then alleged that the Company persisting in the former refusals, the said firm *duly protested* for *all costs, losses, damages, injuries*, and *hurts* suffered and sustained, or which thereafter might be sustained in consequence of the premises, as the whole will more fully appear by reference to an authentic copy of such demand and protest, *herewith produced* and fyled, and to which the Appellant in the declaration *particularly referred, as forming part of* those presents.

A similar transfer upon the like conditions is also alleged as having been made by the Appellant to the Savings bank of 210 other shares of the same railroad stock, and the demand and refusal to register are again stated in the declaration in substance as above mentioned.

The declaration then proceeds to set out "that in so refusing to transfer the said several shares on the books of the said Company as aforesaid, the said Company assigned no legal or sufficient ground for withholding such transfer and moreover had not any legal or sufficient ground or justification for so acting, but on the contrary were bound and liable forthwith on the demands so made as aforesaid, to transfer the said several shares on the Books of the said Company, to the parties so demanding the same. That at the said several periods when the said demands were so made as aforesaid on the said Company Defendant, to transfer the said several shares of stock on the Books of the said Company, the said 268 shares were worth, in the Montreal Market, and were readily saleable therein at 18 per cent. discount, and that had the said Company Defendant transferred the said shares on the said Books of the said Company

Defendant, as they were bound to have done, the said Lemesurier, Routh & Co., and the said Bank who held the same as aforesaid in the interest of the said Plaintiff could have and would have sold and disposed of the same for an amount not less than £5494 Sterling, or £6684 7s. 4d. Currency. That notwithstanding all the foregoing premises the said Company Defendant still continued illegally to refuse to transfer on the Books of the said Company, the aforesaid 268 shares of the said Stock, or any part thereof, until the 4th day of April, 1854, when the said Company transferred on their said Books the aforesaid 58 shares in favor of the said Lemesurier, Routh & Co., and until the 13th day of May, 1854, when the said Company transferred the said 210 shares in favor of the said City and District Savings Bank of Montreal. That in the interim between the time when the said transfer on the Company's said Books was so originally demanded as aforesaid and the respective dates last mentioned when the said transfer was so actually effected, the Capital Stock of the said Company Defendant became and was so greatly depreciated in value, that the only amount which the said Lemesurier, Routh & Co., and the said Bank were enabled to obtain and realise for the said 268 shares of Stock, which they caused to be sold with all reasonable and prudent despatch after the said transfers were so respectively made, on the Books of the said Company as aforesaid, was £4353 4s. 2d. Cy., instead of £6684 7s. 4d. Cy., which they could easily have obtained and realised therefor, had they been allowed to have their said transfers recorded on the Company's said Books at the period when the demands to that effect were first made as aforesaid; thereby causing a manifest loss to the said Plaintiff of at least £2331 3s. 2d. Cy., independently of loss of interest and costs of protest and other damages incidentally suffered by him the said Plaintiff, by reason of the said illegal and unjustifiable acts of the said Company Defendant, which said loss of interest, costs of protest and other incidental damages aforesaid, the said Plaintiff estimates at £668 16s. 10d. Cy. That by reason of the said several premises and by law the said Plaintiff hath a right to recover from the said Company Defendant, the said two amounts last mentioned, which form united £3000 currency."

Webster et al. and Grand Trunk R. W. Co.

The Respondent, party Defendant in the Court below, pleaded a *défense en droit*, equivalent to an English demurrer, and assigned seven reasons in support thereof, which reduce themselves in substance to two, and the Court below has sustained the plea and dismissed the Appellant's action.

That Court has ruled that it was not competent to the Appellant to bring this action in his own name, and that having parted with his stock, the only action that could be brought was one by the assignees—that there could be no qualified transfer as to the Company, and that as regarded third parties the transfer must be absolute. Our well known rule of law is *l'interêt fait la mesure des actions*; another rule well known is *toutes les actions sont de bonne foi*. It was quite competent to the Appellant to make as many separate assignments as he held shares. This was not the case of a partial transfer to several assignees, one debt for a gross sum, which would subject the debtor to parcel out his payments in proportions dictated by the will of the creditor instead of enjoying the privilege of liberating himself by one single payment of the whole debt.

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The loss sustained by the Appellant by the alleged improper refusal of the Respondent to recognize the transfer, as alleged in the declaration, was personal to himself, and he never made any assignment of his claim for damages or divested himself of it. Neither of the assignees could sustain an action to recover those damages, as they formed no part of the subject matter assigned. On the 4th April, 1854, and the 13th May, 1854, when the Company transferred the shares to the assignees, they had no direct action or claim against the Company to recover damages for the previous refusal to recognize the transaction. So far from appearing to claim damages the assignees accepted the transfer on the books at the last hour when the Company agreed to it. The party really injured by the depreciation of his stock and the fall in its value between the date of the assignments and the transfers, is the Appellant and no one else, and he alone can maintain an action in damages. Although the demand and protest were made not in the name of the Appellant, but of the assignees, that is perfectly indifferent: such demand and protest enured to his benefit. In any case instead of demurrer, the Company, if it had such a defence, should have urged it by peremptory exception.

The second ground upon which the Court below proceeded, was, that it did not appear by the declaration that the Company were called upon to do an act which they were in law bound to do. That the general Railway Act 14 and 15 Victoria, cap 51, sect. 17, prescribed a particular method for effecting transfers of stock, and the declaration did not show the required formalities to have been pursued. That the wording of the statute should have been followed *rigoureusement à la lettre*, and that the declaration did not allege strict compliance with the form prescribed by the statute.

As to the form of action, the words of the Judicature Act, 12 Victoria, cap. 38, sec. 87, which are the law prescribed to all our Courts in Lower Canada, are express: "No form of action or of words is or shall be necessary in any declaration, &c.; but the parties may and shall respectively state bonâ fide and to the best of their belief in plain and concise language, to the interpretation of which the rules of construction applicable to such language in the ordinary transactions of life do and shall apply, so that no allegation or statement may or shall be held to be insufficiently made if it would be ordinarily understood to have the meaning intended by the party using it. The form of transfer in the railway act must be pursued; but in declaring in a Court of Law in a case like the present, no precise form is required. The 46th section of the Judicature Act again enacts that to all allegations of fact in any pleading the ordinary rules of legal construction shall apply so that it shall be sufficient to support any pleading that the facts alleged in it agree sufficiently with those proved to maintain the conclusions of such pleading, or some of them, and that the Court shall be of opinion that the opposite party could not have been misled by such pleading as to the real nature and effect of the facts intended to be therein alleged and to be proved under such pleading, and the Court may, in its discretion, *at any time before judgment*, and on such conditions as it shall deem just, allow any pleading to be amended, so as to agree with the facts proved, if the Court shall be of opinion that the ends of justice will be promoted by allowing such amendment."

In this case could the Company be misled by this declaration as to the forms of transfer of its own stock, when it is alleged that after this refusal they recognized the transfers in question and entered them on their books?

I have often had to regret that formal objections are too much encouraged in our Courts, contrary to both the letter and the spirit of our own law. With reference to demurrer in particular, it is purely English, and in direct opposition to the practice of the French and Continental Courts. Under the law of Scotland, it is well observed in an able article to be found in the 17th volume of the London Law Journal, p. 235: "The reason of the important difference between Jury Trial as customary in England, and as introduced into Scotland (the issue in the former evolving itself out of the pleadings, and being directed in the latter by the Judges in concurrence with the suitors), is obvious enough. The Scottish mode of pleading by condescendences and answers is loose and argumentative, and not subject to the discipline of demurrers."

If the *articulation de faits* of our own law, which is tantamount to the condescendence, were more favored, amendments facilitated at small expense, and the costs of unnecessary *enquêtes* made to fall on the party occasioning them the demurrer would soon decline, if not altogether cease.

The resort to this mode of defence has, on several previous occasions, been productive of great loss to Defendants availing themselves of it by the reversal in this Court, of judgments which they had obtained in the other Courts. This case must have the same fate. The judgment of the Court below will be reversed, with costs, and the demurrer overruled.

Judgment of Court below reversed.

Bethune & Dunkin, for Appellant.

Cartier & Berthelot, for Respondent.

Andrew Robertson, Counsel.

(S. B.)

Note.—De droit un cédant est bien recevable, à faire poursuite d'action par lui cédée et le défendeur ne peut l'en faire débouter pour raison de la dite cession d'autant que les *actions directes demeurant toujours en la personne du cédant* en leur efficace, hors quand le cessionaire a fait signifier au défendeur sa cession. Imbert. Practique Civile, livre 3, chap. 10, p. 635, édition 1612, X.

Coutume de Paris, art. 108, faut signifier le transport à la partie et en bailler copie auparavant que d'exécuter. Le cessionnaire a que *l'action utile, les directes demeurent toujours en la personne du cédant*, comme dit nostre texte. Le cessionnaire est seulement comme *Procureur* ayant droit du cédant, l. 1 et 2, cod. de obligat. et act. l. 6, 7, 8, de hæred. vel act. vend., l. 21. D. eod. titul. l. 3. C. de novat. Et autres textes rapportés en la conf. des Coustumes, partie 2, tit. 5.

Note X by Guenois, to the above passage of Imbert.

MONTREAL, 20TH FEBRUARY, 1860.

Coram BADGLEY, J.

No. 1712.

The Trust and Loan Company of Upper Canada vs. *Mackay et Ux.*

SERVICE OF WRIT ON WIFE.

Held, 1mo. That the temporary absence of a wife *séparée de biens* does not render illegal the service of a writ of summons on her at the domicile of her husband.

2do. That the service must be made by delivering the writ to the Defendant or at her domicile to some person for her and the return must state to whom speaking in terms of the ordinance of 1849. Tit. 2. Art. 8.

BADGLEY, J.—The point raised by the exception "à la forme" is the insufficiency of the service upon Mrs. Mackay "séparée de biens" from her husband. The service of the copies of the writ and declaration was duly made upon the husband, who at the time informed the officer of the absence of Mrs. Mackay from town. The bailiff did not then serve a similar copy intended for her. The next day, however, another bailiff was sent with it to her residence, but the husband answered the door upon the occasion, and, seeing the officer, immediately closed the door, without giving him time to state his errand, the copy intended for her was thereupon left upon the floor of the open porch outside of the house, and the bailiff returned his service upon her as follows:

"I the undersigned Robert McCormick, &c., do hereby certify and return "under my oath of office to this Honorable Court, that on the eleventh day of "November in the year of our Lord one thousand eight hundred and fifty eight, "between the hours of twelve and one of the clock in the afternoon, I did "summon Dame Mackay, one of the within named Defendants, to be and "appear on the day and at the place within mentioned, to answer as the "within original writ of summons demands and requires by speaking to and "leaving a true certified copy thereof together with a copy of the annexed "declaration, thereunto annexed with a grown person of her family at her "domicile, &c."

The exception meets the return and rests upon two grounds: 1st. Her absence at the time of the alleged service, and 2nd, the absolute want of service upon her. The Defendant has foreclosed the Plaintiffs from pleading and from evidence, and has been allowed to proceed exparte; at the close of the *enquête* the Plaintiff inscribed the case for hearing under the 33rd rule of practice, without answer to the exception. The evidence establishes the merely temporary absence of Mrs. Mackay from her residence, whilst it proves the validity of the return. The serving bailiff's testimony is: "The house [illegible] I went to "make the service is in on Sherbrooke street. It has a p[illegible] front of it "into which I entered. Mr. Mackay, came to the d[illegible] soon as he saw "me, he shut the do[illegible] without waiting for the end of [illegible]. I told him "through the door [illegible] would leave the process for [illegible]kay on the floor "of the porch which I did. That is [illegible] that passed. [illegible] say to a cer-"tainty whether Mr. Mackay heard what I said through [illegible]

The practice rule which authorised the Plaintiff's inscription without answer, also expressly ruled *that every Plaintiff for the purpose of such hearing shall be held to confess the allegations contained in such exceptions.* The Defendant's evidence disproves the bailiff's return, the allegations of the exception deny its truth, and the Plaintiff's acquiescence with the pleading and evidence, and his enforced confession under the rule of the allegations contained of the denial, sustain the exception "*à la forme*" and in effect dismiss the action. It is proper, however, to add a few words upon the two grounds taken by the Defendant in so far as they are governed by law. The first, the absence of the wife, is untenable upon every principle, she is only *séparée de biens* and her absence was merely temporary, her husband's domicile was hers, as long as she was only *séparée quant aux biens*; this point is settled in 1 Bourjon, p. 107–8. "La dépendance de la femme est toujours la même si la puissance du mari sur "les biens est affaiblie; ainsi dans ce cas, la femme n'a d'autre domicile que "celui de son mari, cette séparation ne lui est accordée que pour la conserva- "tion de son bien tant pour elle que pour son mari lui-même, et sans donner "atteinte à la juste et inévitable dépendance de la femme, mais autrement si "elle est séparée de corps et d'habitation, alors le domicile de son mari "cesse d'être le sien." See 2, Biret des nullités p. 25. The Plaintiff did not except to the proceeding adopted by the Defendant, upon the ground of an *inscription en faux*, being the proper course, and which appears in any case to be inapplicable to our Bailiff's returns, under our system of jurisprudence and present practice, generally adopted in this district for several years past as most convenient and practical as well as legal, whatever may have been the practice in Old France, where oral testimony was not favoured, where *Huissiers* and *Sergens* were appointed by Letters patent and whose offices were "charges venales," and where a different course of practice and judicial proceeding prevailed. It would be singularly ridiculous to require the *inscription en faux* against all Bailiff's returns at this time, including Bailiffs of Commissioners, Circuit and Superior Courts, in no way assimilated with the Huissiers of Old France, and not only in matters of writs, but of motions, notices, bills of costs, &c., &c., why should any distinction be made between these, yet they all are services and returns.

The second point falls within the requirements of the Ord. of 1667, t. 2, art. 3, which requires that "tous exploits d'ajournement seront faits à personne ou domicile et sera fait mention des personnes auxquelles ils auront été laissés à peine de nullité." The object of this law was to intimate to the party sued the nature of the proceeding adopted against him, hence not only must a *remise* be made *à personne ou domicile*, but the return must also declare the person *parlant à qui*, to whom the *remise* was made. Without these requirements a mere verbal service must have sufficed, and courts of justice might innocently commit great injustice, 1 Carré and Chauveau p. 401 observes, "il nous paraît "que d'après l'esprit de la loi ce n'est pas dans un avertissement orale que consiste la signification de l'exploit, la remise de la copie est une partie essentielle "afin que, demeurant entre les mains de l'assigné, elle puisse former son titre et "lui servir à proposer les nullités dont ce titre pourrait être vicié; or la remise

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" de la copie étant indispensable la mention de cette remise l'est aussi: car " l'exploit doit former la preuve de l'accomplissement de toutes les formalités," Cour de Cas., 3 Novembre 1818. The old French law under the ordinance of 1667 and the modern law of France under the *Code de Procédure*, are entirely similar in this matter with similar nullities sanctioning similar practice and decisions, all sustaining the principle that the *exploit* should reach the knowledge of the *partie assignée*. " Il faut que l'assignation parvienne nécessaire- " ment à celui qu'elle concerne, il faut de plus que le juge puisse être morale- " ment assuré qu'il en a eu connaissance; de là, la nécessité imposée à l'huissier " de remettre à personne ou domicile, 7, Prost. de Royer, p. 571." .

The same author at a previous page 741, observes: " Les motifs de cette juris- " prudence sont évidens, ou exige qu'il soit fait mention de la personne à qui " l'exploit à été laissé afin que si la partie assignée ne se présente pas, le juge " avant que d'octroyer défaut puisse s'assurer par la preuve même qui en est " consignée dans l'acte que l'assignation a été remise à cette partie soit à per- " sonne ou à domicile de manière qu'elle ait pu en avoir connaissance." The party by these legal precautions is protected against surprise. But it has been objected that the Defendant's appearance in the cause covers the nullity, and that all the advantage contemplated by the law in her favor, must be considered as having been secured to her from the mere fact of her *comparution*. This was the jurisprudence anterior to the Ord. of 1667 and the opinions of Hubert Mazuer and Fontanon were sustained by a general practice. They say " l'effet de " l'ajournement, est la comparution de la partie ajournée; que l'ajournement " nul par quelque défectuosité si la partie est comparue en vertu d'icelui et est " parvenu à l'effet et cause finale qui lui est propre, conséquemment la nullité est " couverte et l'acte valable *non ratione citationis sed ratione presentiæ*." But the authors object to this jurisprudence that nullities can only be proposed after appearance in the cause, that in this there is nothing contrary to the natural order of legal ideas, that it is in conformity with the jurisprudence as well of the Ordinance as of the Code de Procedure, and that otherwise expensive and tedious litigation would follow and that Defendants would lay by until after judgment rendered, when the whole of the proceedings might be set aside with heavy expenses and great delay, hence therefore both in justice and in law, " on rai- " sonne avec moins de rigidité et l'on admet le Défendeur à venir de prime " abord dire, l'assignation est nulle, etc., ce système est moins positif que celui " des tems qui précédèrent l'ordonnance. Toutefois il est conçu d'une manière " plus humaine et plus secourable, etc.," removing difficulties and preventing expenses, and at the same time keeping within the conclusion of the ordinance that all such defective assignations were nullities, " parce que les règles prescrites pour " lui en assurer la remise n'ont pas été strictement observées," 2 Carré and Chau- veau, p. 215, and seq, who cite Boncenne, Boitard and 1 Pigeau, p. 493, see also 1 Carré and Chauveau p. 456, Quest 374. A proper service is essential in all cases; in this case, it has not been made upon Mrs. Mackay, the law is precise as regards the *femme separée de biens*. A service must be made upon her, that upon her husband is legally ineffective to bind her, 4 Bioche, Dict. de Proced. Vo.; Femme Mariée p. 291. L'Assignation à deux époux séparés de biens.

doit à peine de nullité leur être donnée par copies séparées, alors même que la signification en est faite au domicile par eux élu chez un mandataire commun." Al o, 1 Carré & Chauveau, p. 398, (348 bis) "puisque la copie est destinée à avertir les parties &c., there must be as many copies, *à peine de nullité*, as parties, this is the general principle, and in the particular case of the *femme séparée;* the authors at p.p. 399, 400, declare in reply to the question of the sufficiency of conjoint service upon husband and wife, by one copy, that by "*une jurisprudence unanime*, viz., in case of the *époux* being *communs en biens* and the action having reference to *biens de la communauté*, they are held in law to be *une seule et même personne*, and the service by one copy is valid: but, "ou les époux sont séparés de biens et il s'agit dans la contestation soit de biens qui leur appartiennent par indivis, soit de biens particuliers à la femme en sorte que le mari ne figure que pour l'autorisation, dans ce cas leurs intérêts sont distincts: les copies doivent être separées." Prost de Royer, p. 518 vo., Assignation, to the same effect; other authorities may be added, but these suffice, Pigeau's citation does not apply to this case. The bailiff's return is a falsehood and a nullity, and the exception "*à la forme*" must be maintained, which dismisses the action with costs.

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Action dismissed.

Henry Judah, for Plaintiffs.
Henry W. Austin, for Defendants.
(P. W. T.)

MONTREAL, 31ST MARCH, 1859.

Coram SMITH, J.

No. 1671.

Anderson & al, vs. *The Mayor Aldermen and Citizens of the City of Montreal.*

Held.—That an undertaking to "open, level, form and make" certain streets and squares in the City of Montreal, necessarily involved the making of side walks, but not the making of fences along the line of such streets and around such squares and the repairing of the road-way.

This was an action instituted by the Plaintiffs to determine the validity of a certain claim advanced by them against the Defendants for certain works performed by the former, under a deed of cession to the latter of certain property in the City of Montreal; the Plaintiffs having consented to advance and expend the outlay or money necessary for the "opening, levelling, forming and making" of certain streets and squares, which it was agreed should be made through the property ceded.

The Defendants contested three items of the claim, namely a charge of £183 0s. 8d. cy. for fencing the property ceded, £570 7s. cy. for plank side walks to the streets, [illegible] laid out, and £85 cy. for various repairs to the road-way of these streets, on the ground that none of such items came under the denomination of or was in any way legally involved in the "opening, levelling, forming and making" the streets and squares in question.

The City Surveyor in office at the time the works were executed attested that they were all done under his superintendence and supervision, and that in

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his opinion they all fell under the class of work specified. And his opinion in that respect, except as regards the fences, was corroborated by the evidence of two competent [illegible] who were examined as witnesses by the Plaintiffs.

The following [illegible] judgment of the Court: Considering that the said Plaintiffs [illegible] by legal and sufficient evidence, that by Deed of agreement made and executed at Montreal before Maître Rose and his Colleague, Public Notaries, and bearing date at Montreal the thirtieth day of November, one thousand eight hundred and forty two, by and between the representatives of the late Thomas Phillips and the said Defendants, it was agreed, that the said estate Phillips should [illegible] gratuitously to the said Defendants the necessary amount of land for the continuation through the property of the estate of the said Phillips of Dorchester and St. Catherine streets; and also for the opening of a certain other street intended to be run through the said property of the said estate Phillips as pointed out in the said agreement, and also for the opening and making of certain squares in the line of the said new street, and that it was further agreed by and between the said parties, that the said estate Phillips should advance the money necessary for the opening, levelling, forming and making the said continuations of the aforesaid streets, as well as the new streets and squares intended by the said agreement to be afterwards opened, on the condition referred to in the said deed of agreement; and it was further agreed that the money before that time from the first day of May for the purposes set forth in the said deed, and to be thereafter for the said purposes expended by the said estate Phillips should be refunded out of the assessments to be levied and collected on properties situated or to be thereafter situated on the said streets, and that the said assessments should be specially and exclusively applied to the payment of the sum already expended and to be thereafter expended for the purposes contemplated by the said agreement, namely, in the opening, levelling, forming and making the said streets and squares until final payment and satisfaction thereof; and considering that the said Plaintiffs have established by legal evidence the said agreement and the several stipulations above detailed, and that they have expended under the provisions of the said agreement the sum of two thousand five hundred and twenty-four pounds, nine shillings and eleven pence, with interest on the sum of two thousand three hundred and [illegible] pounds, seven shillings and five pence from the first day of November one thousand eight hundred and forty-four; and further considering that the said Defendants have by their exception to this action fyled, admitted that the said sum so expended is correctly [illegible] under the provisions of the said agreement to the extent of one thousand five hundred and seventy-seven pounds eleven shillings and five pence only, [illegible] have pleaded by the said exception that they are not liable to refund to the said Plaintiffs any further or greater sum, than the said sum of one thousand five hundred and seventy-seven pounds, eleven shillings and five pence under the covenants and agreements set forth by the said Plaintiffs in their said action; and that the items charged firstly, for fencing the said streets, and secondly, for making the wooden side walks, and thirdly, for the repairs of the said streets after they had been made, are not chargeable to them, the said Defendants, under the stipulations of the said

agreement; and further considering that the said Defendants have established that under the provisions of the said agreement, they cannot be held liable to pay and refund to the said Plaintiffs the amounts expended by the said Plaintiffs for the fencing of the said ground so given by the said Plaintiffs under the *don gratuit* contained in the said agreement, and for the repairing of the streets after the said streets were made, and completed as agreed upon—the said two items of charge not falling within the provisions and stipulations of the said agreement; and further considering that in the absence of any provision in the said agreement for the fencing of the streets, the said parties to the said agreement are liable in law to all the obligations subsisting between immediate and adjacent proprietors, and thereby liable to erect the fences between their said several properties by common contribution; and further considering that by the provisions of the said agreement respecting the opening, levelling, forming and making the said streets, the said Defendants are bound and liable in law, for the outlay incurred in the making of the side walks as a necessary part and portion of the said streets, according to the true intent and meaning of the said agreement; and further considering that the said side walks were so made under the superintendance of the city surveyor for the time being under the provisions of the said agreement, and that the expenditure in that respect was approved of by the said Defendants; and further considering that in respect of the other charges, for fencing and repairing the roads or streets, the said City Surveyor had no authority in law to bind the said Defendants, the said expenses not being justified, under the terms of the said agreement; and further considering that the said Defendants have fyled with their said exceptions, a statement of the assessment received by them amounting to the sum of £552 5 0 current money of this Province, which statement is admitted by the said Plaintiffs to be just and correct, and that by the terms of the said agreement the sums expended and stipulated to be repaid from the time that such streets were finished and accepted; it is considered and adjudged****.

Judgment for Plaintiffs.

Bethune & Dunkin, for Plaintiffs.
Joseph Papin, for Defendants.
(S. B.)

MONTREAL, 30TH DECEMBER, 1858; AND 26TH FEBRUARY, 1859.

Coram BADGLEY, J.

No. 1044.

Chapman vs. *Clarke*, cur., *and The Unity Life Insurance Association*, *T. S.*

Held, 1. Service upon a foreign Insurance Company, at an agency or office within the jurisdiction of the Court, is a valid service upon such Company.

2. Such Company may be condemned upon such service to pay the amount of a policy, though such policy may have been effected at another agency beyond the jurisdiction of the Court.

3. The judgment *validant* a *saisie arrêt*,—and ordering the T. S. to pay the Plaintiff, when served upon the T. S., operates as a *transport forcé*, and vests the debt due by the T. S. in the Plaintiff, to the exclusion of the creditors of the Defendant, even although he be insolvent.

This case was submitted for judgment on the declaration of the Tiers Saisie,

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under the following circumstances, detailed in the declaration made by Mr. Reynolds their agent at Montreal.

That one Sutton, deceased, to whose estate the Defendant was curator, effected an Insurance upon his life in Chatham, U. C., at an agency of the Company there; that the requisite preliminary proofs had been furnished to the agency there, and had been transmitted to England where the *chef lieu* of the Company was; that the agency in Montreal was the chief agency for Canada, but that the amount of the policy was not payable there; that the *Tiers Saisis* doubted whether there was any service binding upon them, by the mere service of the writ of attachment at their agency in Montreal, or that there could be any judgment ordering them to pay the amount of the policy in Montreal.

Cross for the Tiers Saisis, argued that the doubt suggested by the declaration of Mr. Reynolds was well founded. That under the circumstances there was no valid service upon the Company, and that there being no contract to pay Sutton in Montreal, there could be no judgment compelling the Company to do so.

Abbott, for the Plaintiff, cited 22 Vict., chap. 6, § 3, to shew that the service at any agency of the Company, brought it validly before the Court and within its jurisdiction; and argued that it could be compelled to pay here, under the circumstances detailed in the declaration.

BADGLEY, J., (30th Dec., 1859) rendered judgment, declaring the service sufficient and the attachment good and valid, and ordering the *Tiers Saisis* to pay the Plaintiff the amount of his debt.

A copy of this judgment was afterwards served on the Tiers Saisi, but before the usual fifteen days expired, one Cubitt, a creditor of Sutton, gave notice to the Plaintiff and *Tiers Saisis* of an application for the allowance of an intervention, alleging the insolvency of Sutton's estate, and concluding that the monies in the hands of the Tiers Saisis should be paid into Court to be distributed amongst the creditors *au marc le livre*. The petition was presented in vacation for allowance to a Judge in Chambers, who ordered it to be heard in term. Between this order and the subsequent argument, the Plaintiff issued execution against the Tiers Saisis, who thereupon paid the debt and costs to the Sheriff; and the amount was handed to the Plaintiff.

On the 17th of February, the question of the allowance of the intervention coming up for argument;

Bethune, for Cubitt, urged that the estate of Sutton being insolvent, its assets became the property of its creditors, and should be divided equally among them. That to give effect to the judgment in favor of the Plaintiff would be contrary not only to the general spirit of the French law as enunciated in the *Coutume de Paris*, but also to the opinions of the text writers and to adjudged cases. Grand cout., vol. 2, p. 1377 no. 4. 1 Pigeau, 664. 2 Henrys, p. 313. Ancien Den. vo., Saisi-Arrêt, p. 420, nos. 32 and 33.

Abbott, for Plaintiff, argued that the judgment *validant* the saisie-arrêt operated as a *transport forcé*, and conveyed the debt absolutely to the Plaintiff. This is the opinion best supported by authority, and appears finally to have prevailed in France. There was a conflict upon the point under the old system, which partially extended to the new, but the weight of authority is now decidedly in its favor;

(J. J. C. A.)

not in consequence of any enactment or provision contained in the code, but as the result of principles drawn from the nature of the proceeding. 2 Berriat St. Prix, (citing two old arrets), p. 523. note 3. 6 Bioche 58, 59. 4 Carré and Chauveau p. 639. Q. 1971 et seq; and 1983.

Roger, pp. 370 et seq: is against it, but he stands alone, and the principle has been sanctioned and adopted as the jurisprudence here; which, if there be any doubt, should settle the question.

Masson vs. Choall and the Merchants Ins. Company, T. S., and Brion oppt., 6 L. C. Rep p. 169.

But the Plaintiff having been actually paid, all question must cease, as all writers agree that there can be no repetition.

Roger, 382, § 646.

The notice of the application to be allowed to intervene made no difference.

12 Vict. cap. 38 § 92.

16 Vict. cap. 194 § 2.

But intervention is not the proper course. The intervening party should have taken his recourse by opposition *afin de conserver*, for there can be no intervention except during the pendency of a cause.

3 Carré et Chauveau 196, 214, Q. 1270.

The cause is now finished and the present proceeding is in the nature of an execution.

Mettayer vs. McGarvey, and Mettayer 6, L. C. Rep 148. Roger, p. 2, no. 2.

Bethune in reply, urged that the ancient jurisprudence which governed us, adopted universally the principle of the right of the creditors of an insolvent to share his estate amongst them, and that the judgment sought by the Plaintiff would strike at the root of that principle. That the authorities cited on behalf of the Plaintiff were from the modern law, and that they were based upon the fact that in all the cases they referred to, the judgment *validant* the *saisie arrêt* had acquired the force of *chose jugée*, which was not the case here; the delay for appeal not having expired.

That as to the payment made subsequently to notice of intervention, it could have no effect, the Plaintiff having proceeded, and the *Tiers Saisis* paid, at their own risk. The statutes cited evidently applied only to interventions before judgment, which were frequently fyled for mere purposes of delay. The statutes were passed to remedy an abuse in that respect, and could not be held to apply to interventions of this description.

That the mode adopted of claiming a share of the monies seized by an intervention was correct, and was the precise mode mentioned in the authorities already cited.

Badnley, J., (26th February, 1859) rendered judgment for the Plaintiff, and against the allowance of the intervention, chiefly on the ground that the point had been formally decided in that sense in Masson vs. Choall. 6 L. C., Rep. p. 169.

Abbott & Baker, for Plaintiffs.

Cross & Bancroft, for T. S.

Bethune & Dunkin, for Intg. party.

(J. J. C. A.)

MONTREAL, 31st DECEMBER, 1858.

Coram SMITH, J.

No. 200.

Thomas et al., Assignees, vs. *The Times and Beacon Fire Assurance Co.*

Held,—That the condition of a policy imposing the penalty of a forfeiture of all remedy upon it, in the event of any fraudulent overcharge, is not comminatory, but will be carried out, if such overcharge be proved.

The Plaintiffs in this case, as representing one Dorval, claimed over £600 as a loss by fire to goods in a shop tenanted by Dorval.

The Defendants pleaded, 1, That no statement of loss had been furnished them; and 2, That the whole of the damage caused to Dorval by the fire in question consisted in injury to certain goods, and did not exceed £32 10s., and that there was a fraudulent overcharge made in his claim, which, under the conditions of his policy, deprived him of all remedy upon it.

Dorval had furnished the Defendants with a statement which consisted merely in an extract from his books showing his stock in trade in May 1857, his purchases up to February 1858 (the date of the fire), and, deducting from those sums the amount of his sales, less his profit, and the amount remaining after the fire; showing a balance which was entitled, "Balance which A. D. is entitled to claim from the Insurance Co."; without asserting, either directly or indirectly, that the goods represented by the so-called balance had been either destroyed or injured by the fire in question, and giving no detail of any goods whatever.

It was proved that no goods were destroyed by the fire in question; that the fire had only extended over the edges of two rows of shelves, representing only a small fraction of one side of the shop, the goods on which shelves had all been inventoried and valued by persons employed by the Defendants for the purpose; that the damage to these goods was chiefly caused by water, and amounted to only about £32; that all the other goods in the shop were undisturbed on their shelves and uninjured; and it further appeared, that, assuming that the goods claimed for as destroyed, had been on those shelves (as none others were touched or approached by the fire), there must have been considerably more goods of all descriptions on those shelves, than in all the rest of the store put together, *exclusive* of the damaged goods taken off them, which it was proved were sufficient to fill them.

Belanger, for Plaintiffs urged that their case was made out in evidence; that it was impossible to show exactly what goods they had before the fire, and unreasonable of the defendants to demand it of them. That their books proved the extent of their loss, and that such a mode of proof had been recognized as sufficient in the case of *Morison et al.* vs. several Insurance Companies.

Abbott for Defendants insisted that the statement furnished to the Company was not a statement of loss by fire, but only a pretended balance of goods on hand at one time, over those in the possession of the claimant at another. If there had been an extensive conflagration, causing an absolute destruction of

goods and rendering a statement in detail impossible, proof from regularly kept books would be allowed its weight; but in this case, where the fire had been put out by a platter-full of water, there was no reason for refusing a statement. There was therefore no preliminary proof. (Hammond, p. 111.) But apart from that, there was here a gross and obviously fraudulent overcharge, which, under one of the conditions of the policy, caused its forfeiture. The evidence as to the amount of the overcharge was conclusive; and nothing showed it more glaringly than the absurd result derived from the so-called statement itself, by comparing its enunciation of the amount of loss with the amount of goods remaining in the shop; and placing those amounts in juxta-position with the superficial contents of the scorched shelving, as compared with that which was untouched. This enormous discrepancy must be explained by the Plaintiffs. It is sufficient for us to show that it exists, to cast the burden of explaining it upon the Plaintiffs, and if they fail to do so their action must be dismissed. 1 Annual Louis. Rep. p. 216; 1 Hennen's Digest, p. 750; Ellis on Ins., p. 53 Am. ed. p. 15 of English; Regnier vs. La. Ins. Co., 12 Louisiana Rep. 336; Marchesseau v. Merchants' Ins. Co., 1 Rob. 438; Wightman v. Western Ins Co., 8 Rob. 442; Hammond on Ins., p. 15.

SMITH, J., adopted the view of the Defendants on both points, and dismissed the Plaintiff's action.

Belanger, for Plaintiffs.

Abbott & Baker, for Defendants.

(J. J. C. A.)

MONTREAL, 31ST MARCH 1858.

Coram BADGLEY, J.

Macfarlane vs. *Delisle and Mackenzie & al.* Garnishees.

Held,—1. That the limitation in a deed of assignment requiring a creditor who receives his proportion of the estate of an insolvent trader, to give a discharge in full, is inoperative as respects creditors not parties.

2. That where an assignee of an insolvent trader holds moneys in his hands belonging to the trader's estate, the Court will order the assignee to pay them over to an attaching creditor not a party to the deed.

3. That where the declaration of a garnishee does not fully disclose the facts of the case, garnishee must pay the costs of the contestation.

The Plaintiff took out an attachment *Saisie arrêt* after judgment in the hands of the garnishees, who severally declared that at the time of the attachment, they had nothing in their hands belonging to the Defendant, and their declarations were contested by the Plaintiff.

The Defendant being insolvent, had made an assignment to McKenzie and Whiteford two of the garnishees of all his estate, for the benefit of those of his creditors who should become party to the deed of assignment, and give a discharge in full. On receiving the goods and assets of the estate, the assignees, the day that the deed of assignment was executed made a sale of the whole to the other garnishee Lovell, for the sum of £2203 16s. 10d. currency, being a sum which it was presumed would enable the assignees to pay ten shillings in the pound on the whole of the Defendant's apparent indebtedness. The sum of

Macfarlane vs. Delisle.

£2263 16s. 10d. was divided among the creditors who were parties to the deed of assignment, a sum of £105 5s. 4d. being reserved for the Plaintiff who was not a party to the deed as his share should he become a party afterwards. The payments were all made by notes of Lovell, and a note for the sum of £105 5s 4d remained in the hands, or within the control of the garnishees McKenzie and Whiteford at the time of the making of their declarations. The note was in fact produced and fyled in court by Whiteford with his answers to Plaintiff's contestation, he then alleging that it was all that remained in his hands as assignee, and that he then produced it in case the Court saw fit to dispose of it. The other matters which came up in the contestation are sufficiently referred to in the remarks of the learned judge who gave judgment.

BADGLEY, J.—In this case the Defendant a man by the name of Delisle, became involved in his circumstances, and insolvent. He called his creditors together and asked delay, off ring twenty shillings in the pound in quarterly payments, or to allow his creditors to take stock to the full amount of their debts at their option. Some creditors took the amount due them in goods from his stock, and some gave the delay. The Plaintiff would do neither. Delisle found that he could not go on after making payment to the extent of five shillings in the pound, and made an assignment of all his effects and assets by deed to McKenzie and Whit ford, two of the garnishees, making them trustees. The Plaintiff did not think proper to become a party, but nearly all the creditors did. Schedules were annexed to the deed showing the stock in detail, as well as the debts due and the cash on hand at the time of the assignment, amounting together to some £4800. It would appear that Lovell, the other garnishee, in contemplation of this assignment had made an offer to the creditors, to take the stock at a valuation, and to pay to each creditor an amount proportionate to the amount of his claim. There was a condition in the deed that no creditor was to receive his proportion unless he gave an absolute discharge. Lovell took all the stock at ten shillings in the pound, realizing to the creditors ten shillings in the pound and probably a little more. The Plaintiff did not feel himself bound to accede to the conditions of the deed, nor would he unless he were put upon the footing of those who had previously received five shillings in the pound. This would appear from the evidence. The assignees very properly said that they were only Trustees for the benefit of all the creditors, and refused to give the Plaintiff any more than his share of the proceeds of the estate as it came into their hands as assignees. This not being satisfactory to the Plaintiff, he took out an attachment after judgment, in the hands of McKenzie, Whiteford and Lovell, the garnishees, upon a judgment, he had previously obtained against the Defendant. The garnishees came up and severally declared that they had nothing in their hands of the Defendant, and their declarations were contested, the Plaintiff among other things alleging fraud on their part. The garnishees claimed the right to answer separately, and held that there should have been three separate contestations, but this point was overruled in appeal, the Appellate Court holding that fraud if proved would make the garnishees liable *in solido*. But no fraud has been proved. It is shown on the contrary that the best that could be done for the estate in the

interest of the creditors generally was done, and that Lovell, one of the garnishees lost some £700 or £800 by his part in the matter. So far, therefore as Lovell is concerned the contestation is dismissed but without costs. As to the other garnishees McKenzie and Whiteford, it is shewn that they had a sum kept back for the Plaintiff for his proportion, ten shillings in the pound on his claim, this sum they will now by the judgment of this Court be justified in paying over to the Plaintiff and they are now ordered to do so, and as it was not distinctly stated in their declarations, that this sum was held back for the Plaintiff, they must pay the costs of the contestations. Judgment ordering the garnishees to account and pay over to the Plaintiff the rateable proportion of the Defendant's estate, and in default thereof, condemning them within 15 days of the service of a copy of the judgment to pay the amount of Plaintiff's debt with interest and costs. The Court also awarding costs of the contestations against the garnishees McKenzie and Whiteford jointly and severally.

Cross & Bancroft, for Plaintiff, contesting.

A. & W. Robertson, for garnishees.

(H. B.)

TERREBONNE, 13TH FEBRUARY, 1859.

Coram BADGLEY, J.

Prevost vs. *DeLesderniers*, and *Frothingham*, Opposant, contesting collocation of *Prevost*.

Held.—The contestation of a judgment of distribution will be permitted at any time before its homologation on cause being shewn and on payment of costs.

In this case the Plaintiff was collocated in a *projet* of a judgment of distribution, to the exclusion of the Opposants. The period allowed for contesting it had passed and a rule obtained for its homologation. The Opposants moved to be permitted to fyle a contestation of Plaintiff's collocation, on the ground of an accidental delay in the transmission of their proposed contestation, which had made it too late.

Abbott, for Opposants, cited *Woodman* vs. *Letourneau and Letourneau*, 3 L. C. Jurist, p. 27, and *Hubert* vs. *Lemieux* and *Rapin*, Montreal, 28th Oct., 1858, in both of which an opposition was allowed to be fyled after preparation of the judgment of distribution.

Prevost objected that the case shewn was insufficient, and urged the great inconvenience and delay which would result if the contestation were now allowed.

BADGLEY, J., allowed the fyling of the contestation on payment of costs by the Attorney. The object to be attained in all such cases was justice for all parties, and a claimant demanding what he conceived himself to be entitled to, had a right to be heard, notwithstanding any inadvertence of his Attorney. In such cases the Court would inflict costs on the Attorney, but could not overbalance substantial claims on the one hand, by any mere inconvenience on the other.

Motion granted.

Abbott & Baker, for Opposant.

Prevost, for Plaintiff.

(J. J. C. A.)

MONTREAL, JUNE 30, 1856.

Coram DAY, J., SMITH, J., MONDELET, (C) J.

No. 1050.

Moss vs. *Carmichael*, and *The Railroad Car Company*, Opposants.

Held.—That a corporator may be a witness for the corporation, if it appears that he has no interest in the result of the suit.

The Opposants claimed by an opposition *à fin de distraire* certain lumber, seized as being in the possession of the Defendants.

Childs was called as a witness on behalf of the corporation. He admitted on the *voir dire* that he held stock in the company, but stated that the company was insolvent—that his stock was all paid up; and that under no circumstances could the company pay its creditors in full; therefore, as his liability was limited, that it was of no pecuniary importance to him whether the Opposants succeeded in their opposition or not.

Day, for Plaintiff, objected that the witness was incompetent as being to some extent a party to the suit and as being interested in the result; and moved to reject his testimony, an objection having been previously taken to it at Enquête and reserved by the presiding judge.

Abbott, for Opposants, urged that the only ground upon which he could be excluded was that he was interested. As a corporator he was not necessarily incompetent for the corporation. Greenleaf, § 332; Angell & Ames on Corp., § 660.) The cases show that corporators are generally incompetent for the corporation, but only because they are generally interested. But they are competent witnesses if they have no personal or private interest in the property holden by the corporation. (1 Greenleaf, § 333; 1 Phillips, pp. 46–48; 4 Phillips, 55–58; Angell & Ames on Corp., § 652.

DAY, J.—The only test of the competency of the witness is his interest in the event of the suit. In this case the witness can be called upon for no contribution, even for costs, in case of the failure of the Opposants. He can reap no benefit from their success, for it is proved that under no circumstances can they ever make any return to their stockholders. He has therefore no such interest in the proceeding before the Court as disqualifies him from being a witness for the Opposants. The motion to reject his testimony must therefore be dismissed.

Motion dismissed.

J. J. Day, for Plaintiff.
Abbott & Baker, for Opposants.

(J. J. C. A.)

MONTREAL, 23RD DECEMBER, 1858.

Coram MONDELET, (C.), J.

No. 766.

Gordon vs. *Henry*.

Held.—That it is not competent for the vendor of goods, bargained and sold for cash and not delivered in consequence of the non-payment of the purchase money, to sue for the price.

This was an action to recover £12 4s. 8d. cy., balance of an account for freight, and £37 2s. 6d. cy. as the price at which certain goods had been bargained and sold by Plaintiff to Defendant for cash, and which were not delivered in consequence of the failure of the Defendant to pay the price, the Plaintiff declaring his willingness still to deliver on payment of such price. Gordon vs. Hosie.

The Defendant specially denied having purchased the goods, and pleaded several special circumstances in avoidance of the action, which it is unnecessary here to detail, as no proof whatever was offered in support thereof.

PER CURIAM.—There can be no doubt that the Plaintiff here has proved a bargain and sale, and an offer to deliver as set up in his declaration; but the question is, can he sue for the price without making actual delivery of the goods? To solve this question, I must first determine who is the owner of the goods. Now, according to our system the title is still in the vendor, for want of delivery, and that being the case it is quite clear that he cannot sue for the purchase money, inasmuch as the price can only be sued for when the sale has been perfected, and the sale is not perfected without actual delivery. There being no question raised with regard to the amount claimed for freight, judgment will go for that amount, but that part of Plaintiff's demand, which asks for the price of the sale of the goods must be dismissed.

Judgment accordingly.

Bethune & Dunkin, for Plaintiff.
Abbott & Baker, for Defendant.

(S. B.)

NOTE.—At the argument the following authorities were cited by the Plaintiff's Counsel.—Pothier, vente nos. 278, 279, 307 and 308.—Troplong, vente nos. 591, 592, 593 and 594.—Story on sales §443c.—Parsons on contracts, 2 vol. 18 p. 483 and seq.

CIRCUIT COURT.

MONTREAL, 15TH APRIL, 1858.

Coram BADGLEY, J.

No. 455.

Corse v. *Taylor*, and *Taylor*, Opposant.

Held,—That where Plaintiffs declare that they do not contest an opposition *à fin de distraire*, *main-levée* of the seizure will be granted without costs against the Plaintiffs, but with costs against the Defendant.

In this case a writ of execution issued under which, according to the *procès verbal* of seizure, sundry goods and effects of the Defendant, John Taylor, were taken in execution. An opposition *à fin de distraire* was put in by one William Taylor alleging that at the time of the seizure they were in his (the Opposant's) possession as proprietor, and that they were seized on premises occupied by him under deed of lease, copy of which he produced.

On behalf of the Opposant, motion was made that the Plaintiffs be called to declare whether they contested the Opposition, and in default of their contesting the same that *main levée* of the seizure should be granted to him with costs.

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The Plaintiffs, by their attorneys, declared that they did not contest, and the Opposant asked for *main levée* of the seizure with costs against the Plaintiffs' contending that he was entitled to such costs on the allegations of his opposition, which was not contested.

The Court on the 15th of April gave judgment upon the motion, maintaining the opposition, granting *main levée* to opposant of the seizure, but did not give costs against the Plaintiff, but against the Defendant.

Doherty, for Opposant.

Cross & Bancroft, for Plaintiff.

(H. B.)

COUR SUPERIEURE.

MONTREAL, 28 FEVRIER 1859.

Coram-BADGLEY, J.

No. 1037.

Moreau et vir. vs. *Léonard.*

Jugé:—Que la signification et le rapport des interrogatoires, sur faits et articles, peuvent avoir lieu avant l'inscription de la cause sur le rôle des enquêtes.

La contestation en cette cause avait été liée sur l'inscription de faux le 1er juillet 1858.

Le 12 janvier 1859, le Défendeur sur l'inscription de faux donna avis aux procureurs des Demandeurs sur l'inscription de faux qu'il avait inscrit cette cause sur le rôle des enquêtes pour la preuve le 26 janvier 1859.

Le 27 décembre 1858, les Demandeurs sur l'inscription de faux firent émaner une règle pour interroger le Défendeur en faux sur faits et articles le 25 janvier 1859, cour tenante et *viva voce*.

Le dit jour 25 janvier 1859, le Défendeur fit défaut, mais ayant ensuite comparu dans une des divisions de la Cour Supérieure, refusa de répondre aux interrogatoires pour diverses raisons, et entr'autres parceque la cause n'étant inscrite sur le rôle des enquêtes que pour le lendemain, il lui était difficile de savoir dans quelle division de la cour il devait se présenter et que ce n'était que par accident qu'il s'était trouvé dans la division où il avait été appelé.

Son honneur M. le juge Mondelet, président de la première Division de la Cour des Enquêtes, ayant renvoyé la discussion de cet incident à l'audience; les parties furent entendues *in banco* le 17 février 1859, et la cour par son jugement ordonna au Défendeur en faux de répondre aux interrogatoires.

Ouimet, Morin et Marchand, avocats des Demandeurs en faux.

La Frenaye et Papin, avocats du Défendeur en faux.

(P. B. L.)

MONTREAL, 13TH NOVEMBER, 1858.

Coram BADGLEY, J., and a Special Jury.

No. 1994.

Wood et al. v. *Shaw.*

Held,—1. A promissory note payable to the order of an Insurance Company, and given in payment of a premium of insurance, is negotiable.

2. A memorandum at the foot of the note indicating its consideration, does not limit its negotiability.

3. The indorsement of such a note by the Secretary of the Company, in that capacity, was sufficient to pass the title to the note to the Plaintiffs; an implied authority in him to do so, having been shown by proof of the ordinary course of business of the Company; that the Directors had effected the arrangement with the Plaintiffs of which the transfer of the note formed part; and that the Company had received the consideration of such transfer.

4. A holder of negotiable paper as collateral security, before it became due, is not affected by any equities between the original parties.

5. An exchange of negotiable paper is sufficient to constitute each party to such exchange, a holder for value of the paper he receives.

This case was submitted to a special Jury, the Hon. Mr. Justice BADGLEY presiding. His charge fully exhibits the facts, and the questions of law raised by them, and was as follows:—

GENTLEMEN OF THE JURY,—This action is instituted by the indorsees and holders of defendant's three promissory notes, payable to the order of the Atlas Mutual Insurance Company of New York; and is met in pleading by a variety of objections, alleging want of consideration for the notes by the Company, its want of legal capacity at the inception of the contracts for which the notes were given, its fraudulent character in formation and existence, its insolvency at date of the contracts, its fraudulent representations which led the Defendant to contract with it, and the fraudulent and unauthorized transfer of the notes to Plaintiffs without consideration, the whole with the Plaintiffs' knowledge and with their participation in the alleged frauds. The Defendant also alleges that the notes were given for premiums of insurance on certain of his named vessels, and sets off the premium paid by him for re-insurance of three vessels, and the amount of indemnity insured against the loss of the City of Montreal, one of them. The issue has been narrowed to two questions, upon which you will declare your verdict. Are the Plaintiffs *bona fide* holders of the notes for a good consideration? and second, as a consequence of your affirmative finding on the first, What is the amount of the Defendant's indebtedness?

The main and chief issue is involved in the first point, which in itself is a mixed question of law and fact. As the testimony must be fresh in your recollection, it will be alluded to in its prominent parts only, and as illustrating the principles of law connected with the issue. You have in the testimony the fact that the Atlas Company was incorporated in 1842, but remained unorganized until 1852, when it went into operation, having perfected the requirements of the State law incorporating it. That the law did not require a monied or cash capital to be paid up, but *bona fide* subscriptions for insurance to the amount of 500,000 dollars; which were effected, and in consequence 300,000 dollars of premium notes were received by the Company. These premium notes given by the stock subscribers were in advance for insurances to be effected, and formed

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the capital of the Company, and at the same time the subscribers' security for and to each other in the Mutual Company. Being so established, it commenced operations in 1852, and continued them uninterruptedly until March 1856, when it was suspended by the effect of an injunction. In the interval a very extensive business had been carried on. Policies had been issued covering risks to the large extent of 8 or 9 millions of dollars, and losses had been liquidated and paid to the extent of two millions of dollars. It is for the Jury to determine whether in this statement of the Company's establishment and affairs, the fraudulent and "bogus" character imputed to it by the Defendant is correctly applicable to it. The testimony also showed that the Defendant effected insurance with this Company through their agent in this city on his three vessels,—the City of Montreal, City of Manchester, and the Pride of Canada,—by valued policies for the period of one year, and the several premiums were respectively settled by the Defendant's promissory notes, payable to the order of the Company at a year from date, each note having a memorandum at the foot of each of the name of the particular vessel insured, for premium of which the note was given. The notes now sued upon are proved to have been for the premiums of insurance upon the Pride of Canada and City of Montreal, the policies for which expired on the 20th and 24th of March respectively. The memorandum has been particularly noticed in the defence as in itself tending to limit negotiability of the notes, and requires a passing remark. The mere mention of the particular subject insured as a memorandum on the note, you need scarcely be informed, can only be for identification and assistance in the keeping of the account and the settlement of the loss of the particular subject should it occur, and cannot in law serve to limit the negotiation of the note, in fact it forms no part of the notes, and it would seem that it could have no other effect than to facilitate the adjustment of each particular loss, and that is altogether unconnected with the question of the negotiability or non-negotiability of the notes themselves. It is likewise stated in the evidence that the Company having occasion to raise funds for the purposes and exigencies of its business, made arrangements with the Plaintiffs, through its Finance Committee, to raise 30,000 dollars for four months upon the Plaintiffs' notes, and for which the latter were to be secured by a transfer as collateral security of Company's effects and assets consisting of notes for premiums held by the Company, and which were transferred to the Plaintiffs to the amount of about 33,000 or 34,000 dollars, the excess being intended to secure the Plaintiffs for their advance. This excess has not been objected to; but among those notes so transferred were the three notes in suit in this cause, with others of a like description to complete the security. The evidence states that the Plaintiffs' notes were discounted in due course by the Company, who received the proceeds and applied them to their own purposes, and that this mode of raising the required amount was adopted on account of the facility afforded by the known good standing and established credit of the Plaintiffs, who were engaged in an extensive grocery business in New York, rather than in discounting those effects, which being made by strangers, such as Defendant, and in favor of insurance companies, which were then generally in bad odor, would not be so

easily available as the paper of the Plaintiffs. The transaction in itself exhibits nothing in conflict with law. It will be for you to determine from the facts proved whether fraud exists or not in the transaction itself.

It is proper here to revert to the point established by the law, that the subscribers' premium notes given in advance for insurance to be effected, were the security of those subscribers. They were so; but even these were made transferable by the Company by the same law, and by its provision in that respect full validity and effect were given to their transfers; but the law had no reference to notes given for premiums on policies issued in the ordinary course of the Company's business transactions as general insurers, because in fact these latter were the representatives of what are usually cash transactions. Now from what fund, it may be asked, was the Company expected to meet its engagements and pay losses? Were the cash representatives to accumulate untouched at the banker's, and the subscribers be called upon to pay per centages upon their premium notes, instead of using the cash and raising money upon the available paper in hand. Such a course does not seem reasonable, and hence the legislative provision authorizing the transfer of these subscription premium notes, has furnished the Plaintiffs with a strong argument for the necessary application of the ordinary notes in hand to meet the business requirements of the Company, as all similar notes and securities of a like negotiable character received by commercial institutions in the way of their business, are in like manner usually applied and used. The notes in suit, on their face are payable to the order of the Company, and become negotiable from that fact, differing in that respect from notes not payable to order, which, although assignable, are not so assignable as negotiable paper. The very purpose and object of the negotiability of such paper are contained in the promise or direction on its face to pay to order, which immediately renders it assignable to all the world by indorsement. The Defendant has given to his notes to order a general currency by indorsement, and the law will not permit him to restrict or limit his liability. The transaction, then, such as proved, was carried into effect on the 4th September 1855. Now it is proper that you should satisfy your own minds of the position of the Company at the date of the notes in the spring of 1855, and at the date of the transaction in question. It is in evidence that the Company had suffered losses in 1854 and 1855; that, in common with the other insurance offices in New York, the pressure had reached the Atlas also, but that it continued its business without interruption and was undoubtedly solvent; that in November 1855 the Company being desirous of increasing their subscribed stock or subscription notes, were induced to cause their affairs to be examined into by a Committee, whose scrutiny resulted in a reported surplus of 127,000 dollars; that to remove all possible apprehensions, this report was submitted subsequently to a second committee, who struck off any possible doubtful amounts, and reported a surplus of 80,000 dollars; that thereupon confidence was such, that new subscriptions to the amount of 300,000 dollars were taken up, some of the directors paying in additional notes to the amount of 6,250 dollars each; that the [illegible] themselves paid in 2,750 dollars in addition to their previous investments; that every loss was promptly met

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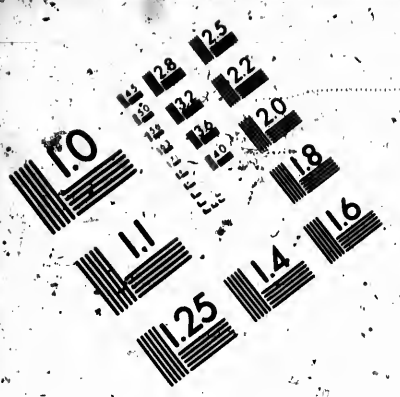
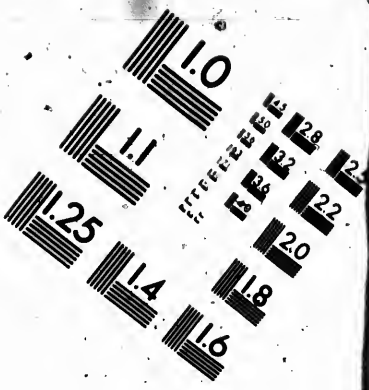
and liquidated up to January 1856; that the Company continued business until March 1856, when it was suspended by the Injunct[illegible]. These facts stated by Tracy, the Secretary of the Company, a witness before you, have been corroborated by evidence of Mr. Hart, the Company's agent in Montreal from 1854 until the suspension in 1856. He says that the Company's transactions even in this city were exceedingly extensive, and that all losses had been fully liquidated up to January 1856. As matter of fact, it is for you to collect from the evidence the position of the Company at the time referred to, and especially in the early part of September, when the transfer of the notes was made. As to the law of the matter, no legal presumption of fraud can be gathered from them against the Company. Your appreciation of the evidence will enable you to characterize the transaction between the Plaintiffs and the Company, and will also enable you to determine whether it was a fair business transaction, and whether the Plaintiffs took the notes *bona fide* and for a good consideration. It is for you to pass upon the transaction referred to. But it is strongly urged that the notes were not in fact legally transferred to the Plaintiffs,—that their transfer by Tracy's indorsement was unauthorized, and passed no right to the Plaintiffs against the Defendant, the maker. Bearing in mind their negotiability, their having been assets and property of the Company, and their delivery to the Plaintiffs in fulfilment of the arrangement between them and the Finance Committee by which the Company raised 30,000 dollars upon the Plaintiffs' acceptances, the notes in hand shew that they were indorsed [illegible]racy the Secretary, and he has told you that he did so by the direc[illegible] President, in fulfilment of a previous arrangement made by the Fin[illegible]mittee and with the knowledge of the Directors and trustees of the Co[illegible]; that he had frequently made such endorsements under their sanction, and that they adopted his acts, which had never been sanctioned by them, and that moreover the funds received in consequence of the completion of the transaction had been received by the Company with the knowledge of the Directors. It would seem that if the acts of the Secretary were unauthorized, it was for the Company or its receiver to complain, and not the Defendant; but it is proved that neither ever objected to the indorsement. In all the ordinary business transactions of individuals, they are necessarily their own principals, and, upon any dispute arising, a direct application made to them as principals settles the difficulty; but with corporations, their very nature and establishment require their affairs to be entrusted to and managed by agents under various denominations, whether by special or by implied authority, because, as is well known, the presence of a large stock proprietary to carry on their ordinary transactions from day to day is an utter impossibility. The Atlas Company had a Finance Committee for such operations; they had also Directors, whilst the President and Vice-President, with the Secretary, acting under their direction and authority, were the executive and ministerial officers to carry on its general operations and business. The general principle of law regarding agents, is, that whatever a man, acting for himself, may do by himself, he may do by his agent; and that every disqualification for contracting by the Agent on his own account will not disqualify him from contracting as the

Agent of another, an agent being considered as a mere instrument. The law, moreover, requires no particular form or mode of appointment to enable an agent to draw, accept, or endorse bills or notes so as to charge his principal. He may be specially appointed for the purpose, or may derive his power from some general or implied authority: and it is recognized law that the subsequent recognition of an agent's act [illegible] authority, provided the agent, when he acted, assumed [illegible] In this case the Secretary was duly appointed such by written [illegible] Board, as produced by him, had no special authority to ind[illegible] frequently indorsed such paper, and indorsed these notes [illegible] tion of the President in fulfilment of the arrangement made by [illegible] Committee, and with the knowledge of the Directors who notified [illegible] his acts and indorsements by raising and appropriating the funds from the Plaintiffs' notes received by the Company in exchange for the Company's assets endorsed by the Secretary. Viewing this as an implied authority, the law declares that "an authority is often implied from circumstances, as if the agent has formerly been in the habit of drawing, accepting, or indorsing for his principal, and his principal has recognized his acts." "It may be admitted," says Chief Justice Tindal, "that an authority to draw does not import in itself an authority to indorse Bills, but still the evidence of such authority to draw is not to be withheld from the Jury when they are to determine, on the whole of the evidence, whether an authority to indorse existed or not." Prescott v. Flinn, 9 Bing. 19; 2 Moo. & R. 22 S. C. And therefore from the fact that the confidential clerk had been accustomed to draw checks for them, that in one instance they had authorised him to indorse, and in two other instances had received money obtained by his endorsing their name, a jury was held warranted in inferring that the clerk had a general authority to indorse." Now this is the law as regards individuals, but it is said not to reach to corporations. Whatever may have been held in former times in England with respect to these bodies, it is the recognized law of this Province and of the United States respecting them, as shewn in Angell & Ames on Corporations, that commercial corporations are considered as, and classed with, natural persons in their ordinary transactions; and the old rule of English law which held that a corporation could only contract by writing under their common seal, maintained by force of particular circumstances in England, has yielded and is now universally repudiated, and it is now settled even there, as will be found in the case of East London Water Works v. Bayley, in 4 Bing. 283, that among its powers is that of issuing bills or notes enjoyed by a corporation incorporated for the purposes of trade, the very object of whose institution requires that they should exercise this incidental power. See also Broughton v. Manchester Water Works Company, 3 B. & A. 1. From the abrogation of the old rule it follows that the publicly recognized officers of the institution must, from the nature of things, be entrusted with the ordinary transactions, and hence the office of cashier of a bank enables that officer to carry on their operations without the concurrence of the directors. The very nature of the business requires that it should be so. The implied authority from the acquiescence and ratification of the officer's acts is





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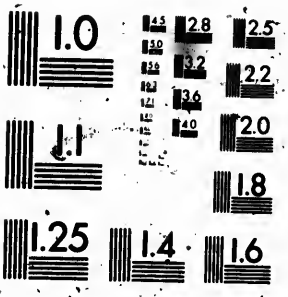

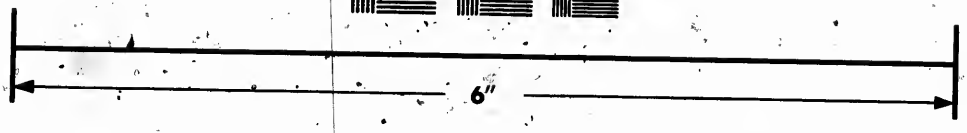

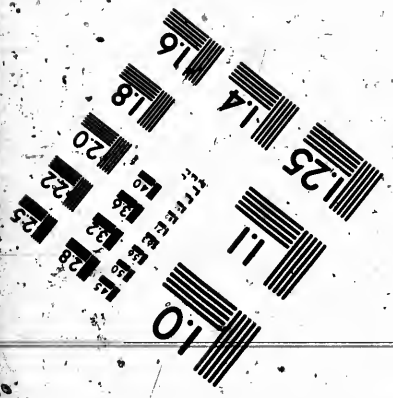

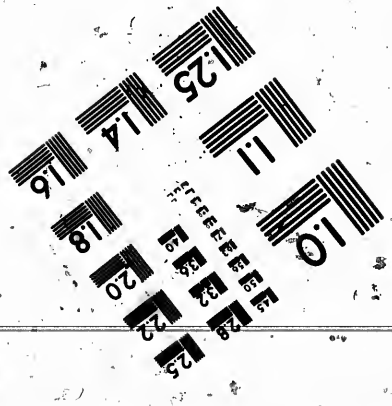

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equally powerful. If the act, the endorsement, were within the power of the Corporation, the law makes it fall within the law of ratification and confirmation universally applied to the conduct of those in the relation of principal and agent. This principle applies equally to corporations and to natural persons. As already observed, the latter are their own principals; but for artificial bodies, such as corporations, they can only act by and through their officers, who, in one sense, are their agents, in another the corporations themselves. As to persons and things outside of the organization of a corporation, to all the world besides its own members, the acts of its officers are its own acts. If the dealing be within the powers of the corporation, mere silence and acquiescence will be sufficient in many cases; and when the corporation receives the proceeds of a transaction done in their agent's name and by his assumed authority, there exists the highest possible evidence of its approval. 1 Smith's Appeal Cases, N. Y. P.; Byles on Bills, pp. 23, 24. The law therefore does not interfere to set aside such acts of agents, but, on the contrary, lends the sanction of its power to give effect to them by the ratification and confirmation of the implied authority.

There only remains to observe upon the claims of set-off made by the Defendant; first, for re-insurance effected upon his vessels, and, second, for the indemnity from the loss of the City of Montreal. The policies for the City of Manchester and the Pride of Canada ran out in due course, and the notes given for their premiums were earned. From the evidence it will be seen that the re-insurance could have covered a very few days only of any of the Atlas policies issued to the Defendant,—in fact, only 17 or 18 days for the City of Manchester and the Pride of Canada, and about 35 days for the City of Montreal. There would appear to be no doubt of the loss of this ship, which sailed from Liverpool on the 3d of April 1856, and a part of her was picked up near Newfoundland before the 20th of the same month. She never reached her port of destination, and the amount insured upon her was 6,000 dollars. The Defendant claims to reckon the loss from day of sailing, according to the law laid down in the French *Ordonnance de Commerce*, which cannot be true as fact in all cases; but the English and the American decisions concur in saying that there is no fixed rule as to the time after which a missing ship should be reported to be lost. It is in all cases a question of presumption for the Jury to be governed by the circumstance of each particular case. The authorities are Kester v. Jones, Ky. & M. 333; Cohen v. Hinckley, 2 Comp. 51, and others. It will be for the Jury in this case to satisfy themselves, from the evidence adduced, if they should deem it necessary to allow the claim for set-off. But upon this point it must be remarked that the notes sued upon were for the earned premiums on the Pride of Canada and the City of Manchester, not for that of the lost ship; that they are in themselves substantially distinct contracts. It is also in evidence that the re-insurance indemnity on the lost ship was actually paid to the Defendant after the loss had occurred, and previous to this action; the promissory notes matured before the policies expired. [Being in error as to this fact, I corrected it to the Jury, stating that the notes ran out with the policies bearing the same date.] The notes sued on in this case, however, ma-

tured before the policy for the insurance of the City of Montreal had run out. The loss would of course be a debt by the insurer to the insured; but the authorities maintain a material distinction in effect between an indorsement before and after a bill or note becomes payable, namely, that an indorsement before the note becomes due passes to the indorsee a perfect title to sue upon the bill or note, wholly free from any claim the acceptor or maker have upon the indorser; and that even if it becomes paid before it becomes due, and it is then endorsed over *bona fide* for value to another person, the indorsee may sue the acceptor upon it. 3 Camp. 124. If it be indorsed after due, the indorsee takes it, subject to all the objections and equities to which it was liable in the hands of the person from whom he received it; and whatever would be a good defence to an action on it by the indorser, will be a good defence in an action by the indorsee. Where fraud or illegality is established, there is such a presumption of law, that there was no consideration, that the Plaintiff is bound to rebut it, because in such cases the law supposes that the original party, not being himself willing to sue upon the instrument, has handed it over to another to sue upon it for his benefit. This presumption so raised by the law, must, as observed, be rebutted by the holder showing affirmatively that he gave value You will determine by the evidence adduced if the Plaintiffs have done so.

The whole case, facts, and law are with you for your consideration, and it will be for you to give your verdict upon the two questions submitted, which will be handed to you in writing for your consideration.

The JURY found in accordance with the pretensions of the Plaintiffs upon both the questions submitted to them; and the Plaintiffs having moved for judgment upon the verdict in the February Term following, the Defendant moved for a new trial before the same judge.

Monk, Q. C., for Defendant, urged that the charge was erroneous in holding that the notes in question were negotiable.

Abbott, for Plaintiff, supported the charge of the Judge in that respect.

And on last day of term His Honor declared, that, having given the case his best consideration, he was unable to conclude that he had in any respect erred in his directions to the jury, and that the motion must be dismissed.

Judgment for Plaintiffs.

Abbott & Baker, for Plaintiffs.

Rose & Monk, for Defendant.

(J. J. C. A.)

The following authorities were cited for the Plaintiffs.

As to the negotiability of the notes: Revised Statutes of New York, p. 593; 1 Comstock, 371; 4 Comstock, 51; Byles, 49; 4 Bingham, 283; 1 Smith's Rep. 47; 1 Smith's Leading Cases, 448.

As to authority of Secretary of Corporation to endorse: Dunlop's Paley, 155, 6, note 1; Story on Agency, § 50, 52, 53.

As to implied ratification by accepting the benefit derived from the transaction and otherwise: Angell & Ames, 267, 8, 9; Curtis v. Leavitt, 1 Smith's Rep. 47, 137; Emmett v. Read, 4 Selden, 312; Howland v. Myer, 3 Comstock, 290.

The Defendant's counsel cited the following to show that in the absence of precise evidence as to when a vessel was lost, the day she was last heard of is taken as the date of loss: 2 Arnould on Insurance, 796; Pothier, Assurance, No. 122.

EN APPEL.

De la Cour Supericure, District de Montreal.

MONTREAL, 3 MAI, 1859.

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

No. 63.

Pinsonnault, (*Demandeur en première instance.*)
Appelant.

ET

Dubé, (*Défendeur en première instance.*)
Intimé.

Jugé,—Que la promesse de vente (qui vaut vente) quoique verbale est obligatoire. (1).

Lafontaine, Juge en Chef: Le Demandeur allègue dans sa déclaration que le ou vers le 1er Mai 1855, il avait loué au Défendeur les terrains dont il s'agit, et cela par *convention verbale*, pour une année, à compter du dit jour 1er Mai 1855, à raison de £20 de loyer; qu'il avait été de plus convenu entre le Défendeur et lui, qu'à l'expiration de la dite année, il vendrait au Défendeur, et ce dernier achèterait les susdits terrains, pour le prix de $1000 dont $500 seraient payables comptant, et $500 un an après; que le Défendeur était, le ou vers le 1er Mai 1855, entré en possession des dits immeubles en vertu du dit bail et promesse de vente verbale; que le Défendeur n'ayant pas, à l'expiration de l'année du dit Bail, savoir le 1er Mai 1856, ni depuis, re[illegible] les conditions de la dite promesse de vente, et payé au dit demandeur la somme de $500, le dit bail aurait été continué par tacite reconduction pour une autre année expirée le 1er Mai 1857.

Puis, le Demandeur concluait à ce que le Défendeur fût assigné à comparaître pour voir dire et déclarer qu'il était déchu du droit d'acheter en vertu de la dite promesse de vente, et que le dit Défendeur fût condamné à rendre, remettre et abandonner au dit Demandeur sous quinze jours du jugement à intervenir, la jouissance et possession des lieux, avec en outre les fruits et revenus depuis son injuste détention, le tout avec dépens.

Par une première exception péremptoire, le Défendeur répondait que, dans le cours du mois d'Avril 1855, il avait acheté de l'appelant, par convention verbale, les terrains en question, et que l'appelant s'était obligé de lui en passer titre valable aussitôt qu'il en serait requis; que cette vente avait été faite pour le prix de $1000, dont $500 devaient être payées dans le cours de l'année 1855, et le reste en quatre ans par paiements annuels de $125, le premier desquels devait s'opérer en Mars 1857; puis, qu'en vertu de cette convention verbale, le dit Demandeur avait livré le dit emplacement, maison et bâtiments au dit Défendeur qui en avait pris possession en qualité de propriétaire, l'avait toujours occupé et l'occupait encore sous la foi que le Demandeur lui donnerait un

(1) Vide, 3 Vol. Revue de Législation et de Jurisprudence, page 261, Gaulin & Pichette.

titre aussitôt qu'il en serait requis; "et qu'en prenant possession le Défendeur avait payé comptant au Demandeur la somme de £50." Le Défendeur alléguait encore qu'au moyen de paiements subséquents, il avait bien et duement acquitté la moitié du prix de vente; et le 31 Mars 1857, il lui a fait faire, par notaires, une sommation de lui passer titre le lendemain, et de venir ce jour-là chez le notaire pour y recevoir en même temps le paiement échéant dans le dit mois de Mars.

Quant aux paiements actuellement prouvés avoir été faits par le Défendeur, la preuve ne les a constatés que jusqu'à concurrence de la somme de $375, se composant de $200, payées en Avril 1855, avant la prise de possession du Défendeur, de $75 payées en Novembre de la même année, et de $100 payées en Avril 1856. Ceci est admis par le Demandeur dans ses réponses sur faits et articles.

C'est le premier Mai 1855 que le Défendeur a pris possession. Le Demandeur le dit lui-même dans sa déclaration. Mais il ajoute que c'est "en vertu du dit bail et promesse de vente verbale." C'est invoquer deux titres qui se combattent mutuellement. Si c'est en vertu d'une promesse de vente que le Défendeur possède, alors il possède *animo domini* pour lui-même, et non pour le Demandeur. Celui-ci le déclare formellement dans un des premiers chefs de sa déclaration, lorsqu'après avoir invoqué son propre titre d'acquisition du 2 Mai 1854, il dit que ce titre a été "suivi de son exécution légale, qu'il a été duement mis en possession, et qu'il a été ainsi en possession *jusqu'au 1er Mai* 1855." Il ne l'a donc pas été depuis; et s'il a alors cessé d'avoir cette possession, c'est qu'elle a passé en d'autres mains, celles du Défendeur, non à titre de locataire, car, dans ce cas, le Défendeur n'eût eu que l'occupation, et la possession proprement dite eût continué d'être en la personne du Demandeur. Ainsi l'appelant a invoqué, pour rendre compte de la possession du Défendeur à partir du 1er Mai 1855, deux titres qui se contredisent.

Que s'est-il réellement passé entre les parties? Le Demandeur a allégué l'existence d'une promesse de vente, mais il déclare dans son factum qu'il n'en a pas fait la preuve. Il a aussi allégué un bail verbal qu'il n'a pas prouvé d'avantage. De son côté, le Défendeur dit qu'il y a eu réellement vente. De ce que le Demandeur n'a pas fait de preuve de sa promesse de vente, il ne s'en suit pas que son assertion, dans sa déclaration, de l'existence de cette promesse, ne doive pas profiter au Défendeur, et lui venir en aide pour établir les énoncés de son exception, relatifs au fait d'une vente. Que l'on remarque que la promesse de vente que le Demandeur a invoquée, n'est pas cette sorte de promesse de vente, qui est unilatérale, la seule, comme le fait observer *Troplong* (1), dont se soit occupé *Pothier* dans le chapitre intitulé *des promesses de vendre*, mais bien cette autre sorte de promesse qui est synallagmatique, par laquelle l'une des parties s'oblige à vendre et l'autre à acheter moyennant un prix convenu, de telle sorte qu'il ne reste plus qu'à passer acte de la vente ainsi préparée. (*Troplong*, no 114). En effet le Demandeur allégue, dans sa déclaration, qu'il fut convenu que lui vendrait au Défendeur, et que celui-ci achèterait de lui les terrains en question. Il est vrai qu'il ajoute que la vente devait avoir lieu à l'expiration d'une année.

(1) De la vente, no. 115.

Plasonneault vs. Dubé.

Mais est-ce bien le cas ? N'y a-t-il pas eu au contraire vente parfaite et consommée du jour qu'il a eu livré la possession au Défendeur ? C'est dans les énoncés de la déclaration et dans les réponses du Demandeur sur faits et articles, qu'il faut chercher la preuve de ce qui s'est réellement passé entre les parties. Dans sa déclaration, le Demandeur reconnait qu'il y a eu convention de vendre et d'acheter, que c'est après cela que le Défendeur a pris possession ; que le prix de la vente avait été fixé à $1000, ce dont convient le Défendeur. En répondant " oui " au second interrogatoire sur faits et articles, le Demandeur a admis, dans les termes de cet interrogatoire, que " durant le mois d'Avril 1855, ou vers le premier de Mai de la dite année, il était entré en marché avec le dit Défendeur de lui vendre " les terrains en question, " et s'était rendu à cet effet à St. Jean avec le Défendeur chez Henry Tugault, écuier, avocat, dans le but de le consulter sur la manière de passer le contrat de la dite vente." Il est vrai qu'en répondant au 3e interrogatoire, il ajoute : " La raison pour laquelle je suis allé avec le Défendeur chez M. Tugault, était pour savoir si le contrat, au cas que la dite vente aurait lieu, pourrait être fait au nom de l'épouse du Défendeur, car ce dernier voulait que le contrat fût passé au nom de son épouse, et non au sien : Monsieur Tugault a répondu que cela ne pouvait pas se faire."

C'est avant de prendre possession, que le Défendeur paie au Demandeur $200. Ce dernier l'admet dans sa réponse au 11e interrogatoire : " Vers la fin du mois d'Avril 1855," dit-il, " le Défendeur m'a payé une somme de $200 comme garantie du loyer ; car sur cette somme je devais me payer de mon loyer, pour le temps que le Défendeur occuperait la dite maison et terrain, et le surplus ou la balance, je devais la remettre au Défendeur, lorsqu'il quitterait la dite maison et le dit terrain." Il est assez curieux de voir un locataire payer d'avance tout son loyer, mais il est encore plus curieux de voir ce locataire qui n'aurait tout au plus à payer qu'un loyer de £20 pour une année, mettre d'avance entre les mains du locateur, une somme de £50 pour *garantie* de ce même loyer ! Et comme si cette *garantie* ne pouvait pas satisfaire le locateur, on le voit encore recevoir, dans le cours de la même année, une autre somme de £43 15s ! Et le Demandeur a la bonhomie, pour ne pas faire usage d'une autre expression de nous dire que " cette somme ne reste pas entre ses mains comme payée en déduction des dites mille piastres, prix de vente des dits terrain et maison " !

En répondant " oui " au 8e interrogatoire, il a admis, dans les termes de cet interrogatoire, que " c'était après avoir été avec le Défendeur chez le dit Henri Tugault, qu'il avait ainsi mis le Défendeur en possession " ; ce qui a eu lieu le 1er Mai 1855, temps auquel lui le Demandeur admet, dans sa déclaration, avoir cessé d'avoir la possession.

La promesse dont il s'agit a donc été suivie de tradition et de possession. Il y a eu consentement réciproque des deux parties sur la chose et sur le prix, prix dont une partie a été reçue par le Demandeur avant qu'il eût livré la chose, et une autre partie dans le cours de l'année qui a suivi cette livraison. En ce cas, il y a lieu à l'application de la vieille maxime, *La promesse de vente vaut vente*, maxime qui prévalait dans l'ancienne jurisprudence française, et qui a été érigée en texte de loi par l'article 1589 du Code Napoléon, lequel porte : " la promesse de vente vaut vente lorsqu'il y a consentement réciproque des deux par-

ties sur la chose et sur le prix." Le titre sur lequel repose la possession du Défendeur, est cette vente, et elle seule. Il possède donc *animo domini*. Il ne peut donc être censé tenir ou occuper à titre de locataire, dans le sens de la 16e section du statut de 1855, chap. 108, dont il n'y a pas, par conséquent, lieu de lui faire l'application.

Enfin, d'après les faits tels qu'ils sont établis dans la cause, je n'hésite pas à dire que, sous le système seigneurial récemment aboli, la transaction dont il s'agit aurait donné ouverture au profit de lods et ventes.

Je suis donc d'opinion que le jugement de la cour de première instance, doit être confirmé.

Le jugement de la Cour en Appel est motivé comme suit :

La Cour après avoir entendu les parties par leurs avocats sur le mérite de cet appel, examiné le dossier de la procédure en Cour de première instance, les griefs d'appel et les réponses à iceux, et sur le tout mûrement délibéré :—

Considérant qu'il résulte de la déclaration du Demandeur et de ses réponses aux interrogatoires sur faits et articles que le Défendeur a acquis le terrain en question en vertu d'une promesse de vente suivie de possession, et que c'est en vertu de cette promesse de vente, et non en vertu d'un bail à loyer, qu'il a cette possession ; que le Demandeur n'a établi aucune cause de déchéance des droits acquis au Défendeur en vertu de la dite promesse de vente ; que, par conséquent, dans le jugement qui déboute le Demandeur de son action avec dépens, il y a bien jugé, confirme le susdit jugement avec dépens sur le présent appel.

Cartier, Berthelot & Pominville, avocats de l'Appelant.

Cherrier, Dorion & Dorion, avocats de l'Intimé.

(P. B. L.)

COUR SUPERIEURE.

MONTREAL, 28 MAI 1859.

Coram C. MONDELET, J.

No. 157.

Ouimet & al vs. *Senécal & al.*

Jugé,—Qu'une partie au dossier ne peut être témoin, quoique non intéressée.

Il s'agissait de deux motions, faites, l'une par Isaac Bourguignon, l'autre par Charles Lapierre, deux des Défendeurs, ayant chacune pour objet de faire reviser et renverser une décision rendue, par le Juge présidant à l'enquête, le 7 Mai 1859, qui avait déclaré incompétent, comme témoin, Chrysologue Senécal, un autre des Défendeurs, produit comme témoin par ses deux co-défendeurs sus-nommés.

Doutre, pour les moteurs, dit que cette action avait pour objet de faire annuler une vente judiciaire de meubles ; qu'elle était dirigée contre cinq personnes, dont deux avaient plaidé conjointement et les trois autres séparément ; que le seul lien commun entre les défendeurs, d'après la déclaration, était l'allégué que tous, à l'exception d'Isaac Bourguignon, s'étaient concertés pour effectuer une vente simulée et frauduleuse d'un article mobilier appartenant aux Demandeurs ; que les conclusions de la déclaration ne demandaient aucune condam-

Ouimet vs. Senécal.

nation solidaire; que les Défendeurs avaient maintenu cette séparation entre eux, en plaidant séparément à l'action; qu'il y avait par conséquent autant d'instances que de contestations séparées; qu'en supposant que toutes les défenses fussent, en définitive, trouvées mal fondées, chacun des Défendeurs n'aurait à répondre que pour lui-même des faits allégués dans la déclaration.

Dans le cours de leur enquête, les Demandeurs ont produit, comme témoins, un frère et des parents, au degré prohibé, de trois des Défendeurs, et lorsqu'objection fut faite à leur examen, par les Défendeurs, sur ce motif, son Honneur M. le Juge Badgley les déclara compétents, pour déposer dans les contestations liées entre les Demandeurs et ceux des Défendeurs, avec lesquels ces témoins n'étaient pas parents, savoir les Défendeurs Bourguignon et Lapierre.

Ces deux derniers avaient réclamé l'application de ce qu'ils considéraient être le même principe, et avaient produit comme témoin, Chrysologue Senécal, l'un des Défendeurs,—lequel avait déclaré n'avoir aucun intérêt dans la contestation liée entre les Demandeurs et les dits Bourguignon et Lapierre.

Son Honneur, le Juge Mondelet, ayant déclaré ce témoin incompétent l'objet de ces deux motions était de faire reviser cette décision, et par une anomalie de notre loi de judicature, c'est au même juge que l'on est forcé de demander l'infirmation de sa propre décision. Les moteurs demandent au juge mieux informé de corriger ce qu'a fait le même juge moins informé.

Le principe que personne ne peut être témoin dans sa propre cause, n'est aucunement contesté. Le témoin produit n'est pas partie dans l'instance mue entre les Demandeurs et ceux qui le produisent. S'il était intéressé, il en serait autrement, et lors même qu'il ne serait pas partie au dossier, l'intérêt l'exclurait. S'il existe d'ailleurs aucun doute, sur le fait de l'intérêt, il paraît être bien réglé, en France, que le témoin doit être entendu, sous réserve, et que c'est au juge du fond, à déterminer sur sa compétence. Le principe général est que tout témoin est idoine et compétent, jusqu'à ce que l'on justifie d'un motif d'exclusion. On ne trouve nulle part le principe d'exclusion résultant du simple fait que le témoin est partie au dossier,—ce qui est bien différent du principe qui exclut une partie, comme témoin, dans sa propre cause.

Dalloz, Dict. Gén. Vo. témoin, nos. 9, 55, 62, 73.
—Do do do Additions Vo. témoin, nos. 58, 72, 82.
—Code de Procédure, art. 284.
—Greenleaf on evidence, t. 1, nos. 360, 389, 390.
—Taylor on evidence, t. 2, nos. 1217 et 1218.

La question a été formellement décidée par un juge de cette cour, dans un cas moins favorable que le présent. Ce fut le 2 Octobre 1856, dans la cause no. 576 Garth vs. Woodbury et al. L'un des Défendeurs, contre lesquels on avait pris des conclusions solidaires, fut admis à déposer, dans l'intérêt de son co-défendeur.

Austin, pour les Demandeurs, soumit la question, en s'appuyant sur les motifs qui avaient guidé l'Hon. Juge, lors de sa décision, à l'enquête.

PER CURIAM.—Il y a 5 Défendeurs, Chrysologue Senécal et F. Daniel ont plaidé conjointement. Jean-Bte. Senécal, Chs. Lapierre et Isaac Bourguignon ont plaidé séparément. Par la déclaration des Demandeurs, il appert que les

Demandeurs exonèrent de toute fraude Isaac Bourguignon. L'action a pour objet de faire mettre de côté la vente par justice, faite d'une presse d'imprimerie, à cylindre, pour cause de fraude. Ouimet vs. Senécal.

Chrysologue Senécal est produit par Isaac Bourguignon et Charles Lapierre. Interrogé sur le *voir-dire*, il déclare qu'il est intéressé quant à lui-même, mais qu'il n'a aucun intérêt dans la contestation élevée entre les Demandeurs et les autres Défendeurs. Il est à remarquer que les Défendeurs ne sont pas poursuivis conjointement et solidairement.

L'on s'est appuyé sur ce que toute personne est témoin idoine, à moins que la loi n'ait déclaré l'incompétence. L'on a dit de plus que la maxime incontestable, que nul ne peut être témoin en sa propre cause, n'est pas applicable à la question actuelle, attendu que Chrysologue Senécal n'est pas proposé comme témoin dans sa propre cause, mais bien uniquement sur la contestation entre les Demandeurs et les deux Défendeurs Isaac Bourguignon et Charles Lapierre. On s'est fortement appuyé sur l'injustice qui résulterait du refus d'admettre ce témoignage, puisqu'il ne tiendrait à un Demandeur, que de mettre en cause, sans raison valable, ceux dont il serait de son intérêt d'écarter le témoignage.

Quant aux autorités tirées de Greenleaf et Taylor, il est évident qu'elles ne peuvent guère recevoir d'application, dans notre système. En Angleterre et aux Etats-Unis, devant un jury, il peut être praticable, de même qu'au criminel, d'obtenir, de suite, la décharge d'une partie, et de la proposer et de l'entendre comme témoin ; d'ailleurs dans ces pays, surtout depuis plusieurs années, l'on s'est considérablement relâché de la rigueur que l'on mettait jadis, à exclure certains témoins. En Canada, l'on n'en est pas encore rendu là ; et comme la cause dont il s'agit ici, n'en est point une commerciale, il importe que les cours de justice aient la main ferme à faire respecter des principes dont la sagesse est consacrée par l'expérience des siècles, et qui semblent ne devoir être méconnus, qu'autant que l'on aurait la certitude que les hommes sont aujourd'hui plus honnêtes, plus véridiques et plus respectueux envers la sainteté du serment, qu'ils ne l'étaient lorsque le génie, l'expérience et la sagesse de ceux qui ont présidé à la promulgation des lois qui nous régissent, ont prudemment élevé une barrière qu'on voudrait renverser.

Quant aux autorités tirées du Droit français que l'on a citées, elles vont à établir des principes en fait d'intérêt, qui ne sont pas en question, car il semble d'après le simple aperçu des faits dans l'espèce actuelle, que la partie proposée n'a pas, dans la contestation sur laquelle il est question de la faire entendre, cet intérêt qui disqualifie. Ainsi à ce point de vue de la question, il ne paraîtrait pas que le témoin, si c'était un témoin, et non une des parties dans la cause, fût incompétent.

Dans la cause de la Banque de l'Amérique du Nord vs. Cuvillier et al, l'on avait fait confesser jugement à la partie (Maurice Cuvillier) que l'on avait proposé et fait entendre comme témoin. Cela ne veut pas dire que l'on a eu raison d'en agir ainsi. C'est une explication et voilà tout.

Dans la cause de Garth vs. Woodbury et al, il paraît que l'une des parties a été examinée comme témoin. Il n'est pas ici question de critiquer cette décision. Le savant juge qui a admis ce témoignage, a exercé son jugement comme il a cru devoir le faire.

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Il y a encore une autre cause, c'est celle de Dorion vs. Workman et al : mais elle est toute différente. Le 22 juillet 1848, Collins, une des parties, fut mis hors de cause et le 22 Janvier 1849, il fut déclaré témoin compétent, n'étant pas intéressé. Ainsi il ne pouvait pas être rejeté, comme partie à la cause, il ne l'était plus.

Enfin dans la cause actuelle, il paraît aussi que le frère de Chrysologue et Jean-Bte. Senécal, (savoir Eusèbe Senécal) ayant été produit comme témoin, par les Demandeurs, sur les contestations des Défendeurs non parents avec le témoin, objection fut faite par les Défendeurs, sur motif de parenté, et le témoin fut déclaré compétent par Son Honneur le Juge Badgley. Cette décision va à établir, dans l'espèce, la compétence du témoin quant à la chose dont il était question et qu'il pouvait être témoin dans la contestation des défendeurs non parents ; mais elle n'affecte pas la seule question dont il s'agit ici, c'est-à-dire si la partie peut être transformée en témoin.

Ainsi donc, en présence des arguments, des autorités et des principes invoqués, apparaît la maxime, que la partie ne peut être témoin dans sa cause. En vain se rejete-t-on sur ce que c'est une contestation séparée ; toujours faut-il en revenir à se demander si ce témoin est partie au record.

Au reste, il vaut mieux se ranger du côté de l'inadmissibilité, c'est dans les principes,—et laisser à la Cour d'Appel, à rectifier cette décision, si elle est erronée. La décision du juge à l'enquête, rejetant le témoin comme partie, doit donc être maintenue et les motions rejetées avec dépens.

Motions rejetées.

MacKay & Austin, pour Demandeurs.
Doutre & Daoust, pour Défendeurs.

(J. D.)

MONTREAL, 3 JUIN 1859.

Coram BADGLEY, J.

No. 157.

LA MÊME CAUSE.

Jugé,—Qu'une partie au dossier, mais non intéressée, peut être témoin. (1).

Les Défendeurs J.-Bte. Senécal, C. Senécal, F. Daniel, et Chs. Lapierre ayant produit comme témoin, leur co-Défendeur Isaac Bourguignon, objection fut faite à son audition ; mais l'objection a été rejetée sur le motif qu'il n'était pas intéressé dans la contestation issue entre ceux qui le produisaient comme témoin et les Demandeurs.

Objection rejetée.

(J. D.)

N. B.—The decision of Mr. Justice Badgley is in a contrary sense to that of Mr. Justice Mondelet, at p. 179.

MONTREAL, 30 JUIN 1859.

Coram BADGLEY, J.

No. 226.

Rochon & ux. vs. *Duchene & ux.*

Jugé,—Qu'une donation onéreuse dont les charges excèdent la valeur des biens donnés n'est pas nulle faute d'insinuation.

La demanderesse comme héritière et légataire universelle de Joseph Dumoulin son père, et comme cessionnaire de ses deux sœurs, reclamait par action pétitoire un immeuble qui avait appartenu au dit Joseph Dumoulin.

La défenderesse a opposé à cette action.

1o. Que par son testament Joseph Dumoulin n'avait légué à la demanderesse et à ses deux sœurs que ses biens meubles et non ses immeubles; que comme légataire elle n'avait aucun droit aux immeubles du testateur et qu'elle ne pouvait reclamer l'immeuble en question à titre d'héritière de son père, vu qu'elle avait ainsi que ses sœurs accepté le legs qu'il leur avait fait par son testament, et " que nul ne peut être héritier et légataire d'un défunt en même temps." (1)

2o. Que Joseph Dumoulin et Céleste Quevillon avaient donné cet immeuble, conquet de leur communauté, à Vincent Dumoulin leur fils, par acte du 8 juillet 1850, moyennant certaines charges estimées à 2000 livres; que le même jour et à raison de cette donation le donataire Vincent Dumoulin s'était obligé de payer 2500 livres à l'acquit des donateurs, et qu'il leur avait transporté une somme de 5200 livres qui lui étaient dû par Joseph Dumoulin son frère.

Que ces obligations quoique stipulées dans des actes différents de celui qui contenait la donation en étaient néanmoins le prix et la cause et que ces charges excédaient la valeur de l'immeuble donné, en sorte que la donation du 8 juillet était une donation onéreuse valable sans insinuation. (2)

3o. Que l'immeuble donné était un conquêt de la communauté des donateurs chacun d'eux était considéré en avoir donné la moitié; (3) que l'acte du 8 juillet 1850, avait été enrégistré du vivant de Céleste Quevillon, ce qui valait insinuation pour sa part de l'immeuble donné, (4) que cet immeuble était entré dans la communauté de biens qui avait éxisté entre elle et Vincent Dumoulin le donataire, et que par la dissolution de la communauté la part du dit Vincent Dumoulin était échue à l'enfant issu de leur mariage, en sorte qu'elle ne possédait que la moitié de l'immeuble, dont un quart provenait de Joseph Dumoulin et l'autre de Céleste Quevillon; qu'à tout événement la demanderesse ne pouvait obtenir qu'un quart de l'immeuble, c'est à dire, la moitié de ce qui avait été donné par Joseph Dumoulin.

M. le juge BADGLEY: Joseph Dumoulin n'a légué à la demanderesse et à ses deux sœurs que ses biens meubles, mais dans ce pays un testateur peut disposer

(1) Coutume de Paris, Art. 300 Guyot, Rép. voir héritier pp. 489-490-491. LeBrun des Successions, t. 2 p. 151, No. 5.

(2) Pothier des substitutions t. 6, p. 471. Guyot Rép. voir Donation p. 194 2 col. Ricard des Donations t. 1 pp, 254 et 255, Nos. 1097 et 1101. Bourjon t. 2, p. 126, tit. 4 ch. 5 s. 1. Nos. 3 et 4. p. 134, s. 10. No. 50. Ancien Denisart, voir insinuation.

(3) Pothier, Communauté, Nos. 487, 644, 645, 648, et 649.

(4) 15 Vict., chap. 93, sec. 4.

Rochon vs. Duchesne.

par testament de tous ses biens et quelqu'ait été en France l'incompatibilité des qualités de légataire et d'héritier, il semble qu'ici, la même personne pourrait être en même temps légataire des meubles et héritier des immeubles dont le testateur n'aurait pas disposé. Il n'est cependant pas nécessaire de décider cette question dans cette cause actuelle. L'immeuble donné valait environ 7000 livres lors de la donation, et les charges mentionnées dans l'acte de donation ajoutées à la somme de 5200 livres transportée le même jour par Vincent Dumoulin à son père et à celle de 2500 qu'il s'était obligé de payer pour lui aux héritiers Senécal, excédaient la valeur de l'immeuble donné. Il est vrai que les ordonnances de 1539 et de 1731 soumettent toutes les donations, même les donations onéreuses à la formalité de l'insinuation, mais par la jurisprudence ces dernières en ont toujours été dispensées. Les auteurs expliquent que l'insinuation des donations onéreuses n'est requise, que lorsque les charges ne sont pas appréciables en argent.

L'action des demandeurs doit être renvoyée sans qu'il soit nécessaire d'examiner les autres questions soulevées par les défendeurs.

Action déboutée.

R. & G. Laflamme pour demandeurs.

Cherrier, Dorion & Dorion pour défendeurs.

(V. P. W. D.)

MONTREAL 30 JUIN 1859.

Coram BERTHELOT, J.

No. 1728.

Grégoire vs. *Laferrière.*

Jugé,—Que la 7e clause de l'acte 12 Vict., chap. 206, ne s'applique qu'aux rentes viagères stipulées dans des actes de donation entre vifs, et non à celles créées par testament; et que ces dernières n'emportent pas d'hypothèques à l'encontre des tiers acquéreurs de bonne foi, si l'immeuble n'est pas désigné et spécialement affecté par le testament, pour une somme d'argent déterminée conformément à la clause 28 de l'ord. 4 Vict., ch. 30.

Le 1er décembre 1842, Catherine Cazabon dit Didier veuve Grégoire, fait un testament et légue à Joachim Grégoire et Joseph Simon Grégoire ses deux fils, deux terres y désignées situées à St. Cuthbert, à la charge de loger, nourrir et entretenir la demanderesse d'une manière convenable. Ce testament a été enrégistré le 21 juillet 1847. Les légataires refusent de lui fournir son logement, nourriture et entretien; de là action hypothécaire pour £100 contre le défendeur, tiers détenteur de l'une des terres léguées par Mme. Didier.

Le défendeur répond que le 31 janvier 1849, il a acquis par échange l'immeuble pour lequel il est poursuivi. Que son acte d'échange a été enregistré le 5 février suivant.

Que la demanderesse n'a aucune hypothèque sur sa terre pour l'accomplissement des charges et obligations imposées par Mme. Grégoire à ses légataires, parce que son testament ne contient aucune affectation spéciale de la terre en question en faveur de la demanderesse, et qu'aucune valeur en argent n'a été assignée à ces charges, de manière à affecter cette terre en la possession d'un tiers acquéreur subséquent de bonne foi.

Que d'ailleurs la demanderesse avait été partie à une quittance dans laquelle elle avait reconnu avoir reçu de Grégoire Grégoire son frère, 134 livres 7 deniers, qu'il était tenu de lui payer en vertu du testament de sa mère et qu'elle avait alors déchargé la terre du défendeur de toutes hypothèques qu'elle pouvait avoir en vertu de ce testament.

Société de Construction Canadienne vs. Lamontagne.

M. *Cassidy* pour la demanderesse a prétendu, à l'audition de la cause, 1o. Que la décharge invoquée par le défendeur ne s'appliquait qu'à la somme qu'elle avait reçue et pour laquelle elle avait donné quittance et non aux obligations de la loger, nourrir et entretenir auxquelles ses frères étaient tenus envers elle par le testament de leur mère. 2o. Qu'elle avait une hypothèque sur la terre du défendeur pour l'accomplissement de ces obligations, parce que la clause 7 de la 16e Vict. ch. 206, était une clause déclaratoire de la 4e Vict. ch. 30, et devait s'appliquer à toutes les rentes viagères indistinctement par quelqu'acte qu'elles fussent créées et qu'elle avait un effet rétroactif.

M. *W. Dorion* pour le défendeur a soutenu 1o. que la demanderesse avait par la quittance qu'elle avait donnée à son frère déchargé la terre du défendeur de toutes les hypothèques qu'elle pouvait avoir sur cette terre. 2o. Que la clause 7 de l'acte 16 Vict. ch. 206, avait il est vrai un effet rétroactif, mais que cette clause ne mentionnait que les rentes viagères créées par des actes de donations entrevifs et qu'elle ne pouvait être étendue aux charges imposées par un testament ou autre acte. Que pour conférer une hypothèque en faveur de la demanderesse, la testatrice aurait dû affecter spécialement la terre du défendeur à l'accomplissement de ces charges et leur fixer une valeur en argent ainsi que cela est requis par la 28e clause de l'acte 4 Vict. ch. 30.

M. le juge Berthelot était d'opinion que la demanderesse n'avait déchargé la terre du défendeur que de l'hypothèque qu'elle avait pour la somme reçue; mais que la clause 7e de l'acte 16 Vict., ch. 206, devait être restreinte et limitée à ses propres expressions, et que cette clause ne parlant que des donations entre vifs, ne pouvait être étendue de manière à s'appliquer aux obligations imposées par le testament de madame Grégoire en faveur de la demanderesse, et que celle-ci n'avait pas d'hypothèque sur la terre du défendeur.

Action déboutée.

Leblanc & Cassidy pour la demanderesse.
Cherrier, Dorion & Dorion pour le défendeur.
(V. P. W. D.)

MONTREAL, 3 MAI 1859.

EN CHAMBRE.

Coram Smith, J.

No. 169.

La Société de Construction Canadienne de Montréal vs. *Lamontagne.*

Jugé.—Que main levée d'une saisie-revendication, peut être accordée par un juge en chambre, sur le rapport du shérif fait avant le jour fixé par le bref, et sur les affidavits produits par les parties.

Dans cette cause un writ de saisie-revendication avait été émané pour saisir revendiquer entre les mains du Défendeur certains objets appartenant à la De-

Masson vs. Desmarteau.

manderesse; et les effets saisis par l'huissier avaient été placés en la possession d'un gardien. L'action était rapportable le 30 Avril 1859. Le Shérif fit le rapport de ses procédés le 23 Avril 1859. La Demanderesse présenta une requête à M. le Juge Smith en chambre pour obtenir possession des effets saisis revendiqués en donnant le cautionnement voulu en pareil cas. La difficulté soulevée par l'honorable Juge fut de savoir, s'il avait jurisdiction en chambre et durant le terme, pour pouvoir adjuger sur le mérite d'une telle application. Lafrenaye, pour la Demanderesse prétendit, que tous les incidents et les référés de cette nature qui requièrent célérité devaient être décidés sommairement sur le droit le plus apparent de l'une des parties, 1 Pigeau, proc. civile pages 108 et 109; actes de notoriété, page 522, Edit de Janvier 1685; et qu'une jurisprudence constante avait sanctionné ce mode d'application; no. 1685 l'honorable J. R. Rolland vs. Bockus, Montréal, le 8 Avril 1846, action rapportable le 18 Mai 1846. no. 1929, the North American Colonial Association of Ireland vs. Crosby, Montréal, le 29 Août 1849, action rapportable le 1r Octobre 1849; no. 2016 Crosby vs. Ross, Montréal le 5 Août 1849, requête d'un tiers, savoir: "The North American Colonial Association of Ireland," accordée et celle du Défendeur rejetée; *coram* Smith, J., action rapportable le 1er Octobre 1849. no. 328 Hudon vs. Chadwick en 1858.

En conséquence des citations ci-dessus, la requête de la Demanderesse fut accordée; main-levée de la saisie-revendication lui fut donnée et elle fut mise en possession des effets saisis après avoir donné le cautionnement ordinaire.

P. R. Lafrenaye, avocat de la Demanderesse.

Doutre, Daoust et Doutre, avocats du Défendeur.

(P. R. L.)

MONTREAL, 30 AVRIL 1859.

Coram BADGLEY, J.

No. 861.

Masson et al. vs. *Desmarteau et al.*

LETTRE DE GARANTIE.

Jugé,—Que le cautionnement, résultant d'une lettre de garantie, pour un montant limité, et pour un temps à être déterminé par sa révocation ultérieure, n'est pas éteint par le paiement d'un montant équivalent au montant cautionné; et effectué par le débiteur sans imputation, lorsque la caution est solidaire.

Les demandeurs en cette cause poursuivent les défendeurs pour £100, étant le montant d'une lettre de crédit souscrite par les défendeurs en faveur de Louis Plamondon et qui est comme suit:

Montreal, 25 September 1855.

Messrs. Masson, Bruyère, Thomas, & Co.

Gentlemen,

Please advance, sell and deliver to Mr. Louis Plamondon of this City, from time to time as he may require them, goods to what amount you please, and on such terms as may be agreed upon. And we hereby bind ourselves jointly and

severally with him to the amount of one hundred pounds, cy., and to pay the same on his neglecting to do so. This letter to remain in force until countermanded by us. Masson v. Desmarteau.

Your obedient servants,

(Signed,) DESMARTEAU, PLAMONDON & MOUSSEAU.

£100 0 0.

Les demandeurs alléguaient en leur déclaration, que par cette lettre de crédit ou de garantie ainsi faite et signée et adressée par les dits défendeurs aux dits demandeurs ils sont devenus obligés et tenus envers eux, au paiement jusqu'à concurrence de £100 cours actuel, pour toutes marchandises et effets, vendus et livrés sur et en vertu de la dite lettre de crédit et de garantie au dit Louis Plamondon et ce jusqu'à révocation d'icelle.

Que depuis le dit jour, 25 septembre 1855 au 9 juin 1857, ils ont vendu et livré sur et en vertu de la dite lettre de crédit, au dit Louis Plamondon, à sa demande et réquisition et pour son profit et avantage, divers effets, marchandises et articles de commerce pour et au montant de £413 2s. 0d. cours actuel, sur lesquels dits effets le dit Louis Plamondon en a remis aux dits demandeurs pour un montant de £28 11s. 6d. même cours, laissant dû sur les dits effets un montant de £384 11s. 2d. cours actuel, suivant le compte produit au soutien des présentes et auquel les demandeurs réfèrent; que le dit Louis Plamondon a souvent reconnu devoir aux dits demandeurs, et que les dits défendeurs ont souvent reconnu aussi que le dit Louis Plamondon devait la dite somme aux dits demandeurs.

Que pour assurer aux dits demandeurs le paiement de la dite somme de £384 11s. 2d. cours actuel, le dit Louis Plamondon a, à différents temps consenti et signé en faveur des dits demandeurs les divers billets promissoires mentionnés en la déclaration.

A cette demande les défendeurs plaidèrent une exception péremptoire en substance comme suit:

Que les dits défendeurs ont, le 17 juin 1857, notifié les dits demandeurs qu'ils cesseraient depuis et après ce jour-là d'être responsables envers eux pour Louis Plamondon y dénommé, et ce aux termes de la lettre de garantie récitée en la déclaration produite en cette cause par les demandeurs et ont alors révoqué la dite lettre.

Que les dits demandeurs ont accepté le susdit avis des défendeurs le 17 juin 1857, et ont néanmoins continué à avancer des marchandises au dit Louis Plamondon à leurs risques et périls après le dit jour, 17 juin 1857.

Que le dit Louis Plamondon dénommé en la déclaration produite en cette cause par les dits demandeurs, a payé à ces derniers diverses sommes de deniers depuis le 17 juin 1857, jour de la révocation de la dite lettre de garantie, se montant à une somme excédant £100, savoir £159 5s.

Que partant la dite somme ainsi payée par le dit Louis Plamondon aux dits demandeurs doit de plein droit être imputée sur le montant garanti par la dite lettre de crédit, comme étant la dette que le dit Louis Plamondon avait le plus d'intérêt à acquitter.

Masson vs. Desmarteau.

Que le paiement de la dite somme de £159 5s. ainsi payée par le dit Louis Plamondon aux demandeurs depuis le 17 juin 1857, a eu l'effet de libérer les défendeurs de leur cautionnement envers les dits demandeurs.

A cette défense les demandeurs ont répondu spécialement comme suit:

Que les sommes réclamées par eux, par la présente action, étaient toutes dues par le dit Louis Plamondon dès avant le 17 juin 1857, jour de la signification de la révocation de la lettre de crédit sur laquelle cette action est fondée, et qu'ils ne poursuivent pas pour le prix de marchandises vendues et livrées au dit Louis Plamondon depuis la révocation de la lettre de crédit. Que bien que le dit Louis Plamondon ait payé £159 5s. depuis la révocation de la dite lettre de crédit, les dits défendeurs sont néanmoins tenus aux termes et dans le sens de la dite lettre de crédit au paiement du montant d'icelle en faveur des dits demandeurs, qui sont créanciers du dit Louis Plamondon, d'une somme beaucoup plus considérable pour marchandises vendues et livrées avant la révocation de la dite lettre de crédit, les dits défendeurs étant conjointement et solidairement obligés avec le dit débiteur jusqu'à concurrence de £100.

Que les dits défendeurs n'ont pas le droit de demander que la dite somme de £159 5s. payée par le dit Louis Plamondon soit imputée à éteindre et payer le montant de la dite lettre de crédit.

La contestation ainsi liée, les parties donnèrent des admissions des faits et furent entendues au mérite.

Pominville pour les demandeurs prétendit que par la lettre de garantie, les défendeurs s'étaient obligés solidairement avec le débiteur et que conséquemment ils demeuraient toujours responsables des diverses sommes dues par le débiteur et il cita: 2 Pardessus p. 436, chap. 2, No. 586. 2 vol. Droit Commercial, par Gouget et Mercier vo. Caution p. 77.

Lafrenaye pour les défendeurs prétendit que cette lettre de crédit avait été donnée en conformité aux dispositions du statut de 1847, 10 & 11 Vic., cap. 11, sec. 7. Que le paiement de £159 5s. fait par le débiteur Plamondon depuis la révocation de la lettre de crédit sans aucune imputation avait eu l'effet d'anéantir le cautionnement des défendeurs. Pothier; obligations No. 567 coroll. 5.

Le jugement condamne les défendeurs au paiement de la somme demandée, mais il n'est pas motivé.

Cartier, Berthelot & Pominville avocats des demandeurs.

Lafrenaye & Papin avocats des défendeurs.

(P. R. L.)

MONTREAL, 28 NOVEMBRE 1857.

Coram MONDELET, J.

No. 1479.

Les Commissaires d'écoles pour la municipalité de la paroisse de St. Pierre de Sorel.

vs.

Les Commissaires d'écoles pour la municipalité de la ville ou Bourg de William Henry.

Jugé,—Que la signification du writ d'assignation faite au domicile d'un secrétaire trésorier de commissaires d'écoles est nulle.

Les défendeurs produisirent en cette cause une exception à la forme de l'assignation qui leur avait été faite en cette cause. Cette exception est comme suit: Les défendeurs pour exception péremptoire à la forme à cette action disent, que l'exploit d'assignation est nul, qu'il doit être déclaré tel par cette cour, et qu'eux les dits défendeurs ne peuvent être tenus d'y répondre pour les raisons suivantes:

Parce que les dits défendeurs n'ont reçu aucune assignation en cette cause, et qu'aucune copie du dit exploit d'assignation n'a été laissée à leur bureau d'affaires en la ville ou bourg de Sorel.

Parce que l'assignation a été faite à John George Crébassa à son domicile dans la ville ou bourg de Sorel ainsi que mentionné au rapport de l'huissier écrit au dos de l'exploit d'assignation et non pas au bureau d'affaires des dits défendeurs où elle aurait du être faite. Parce que l'assignation n'a pas été faite conformément à la loi.

A la dite exception les dits demandeurs répondirent comme suit:

Que tous les allégués contenus en la dite exception à la forme sont faux et mal fondés, que l'assignation en cette cause a été faite sur John George Crébassa, secrétaire-trésorier des dits défendeurs à son domicile et personnellement, ce qui est une assignation suffisante aux yeux de la loi, et que d'ailleurs les dits défendeurs n'avaient aucun bureau ou place d'affaires, si ce n'est au domicile du dit John George Crébassa à William Henry.

La preuve a constaté que le bureau des défendeurs n'était pas tenu au domicile de M. Crébassa.

Le jugement de la cour est motivé comme suit:

La Cour après avoir entendu les parties par leurs avocats sur l'exception à la forme des défendeurs "The School Commissioners for the municipality of the Town or Bourg of William Henry," à cette action, avoir examiné la procédure et preuve et avoir sur le tout délibéré, considérant que les défendeurs en cette cause les dits commissaires d'écoles pour la municipalité de la ville ou bourg de William Henry n'ont pas été légalement assignés, la signification du bref de sommation faite à domicile à John George Crébassa étant sans valeur en loi, laquelle signification aurait du être faite au bureau ou lieu d'affaires des dits défendeurs comme susdit; maintient la dite exception à la forme et déclare

School Commissioners, Sorel, vs. School Commrs. Wm. Henry.

l'assignation susdite nulle et de nul effet, et renvoie les dits défendeurs absous de la demande des demandeurs, avec dépens.

Cherrier, Dorion & Dorion avocats des demandeurs.

Cartier, Berthelot & Pominville avocats des défendeurs.

(P. R. L.)

Editor's note. Sed ; Vide. La Corporation du Comté de Terrebonne appelante et Valin intimé, décidé en appel en Juin 1859.

MONTREAL, 28 FEVRIER 1859.

Coram BADGLEY, J.

No. 986.

Martineau vs. *Karrigan.*

Jugé,—Qu'il n'est pas nécessaire de faire une élection de domicile dans une inscription en faux.

La déclaration du demandeur allègue :

Qu'en 1854 un nommé Blake fit son testament léguant la terre présentement en litige à B. qui la vendit au demandeur après le décès de Blake, qui mourut dans la même année et sans avoir rien changé à son testament.

A la mort de Blake, le défendeur était en possession comme locataire de la dite terre et ne voulut pas s'en désaisir, de là, la présente action. L'action fut rapportée le 23 novembre 1857. Le 26 novembre 1857, le défendeur produisit une exception dilatoire, portant qu'en juillet 1857 il a acheté de Michael Blake frère du testateur, qui se prétend seul héritier du dit James Blake, la susdite terre et en conséquence demanda délai pour appeler le dit M. Blake comme son garant formel. Michael Blake n'a pas comparu. Le 20 mars 1858, le défendeur fit motion pour s'inscrire en faux contre le testament du dit James Blake, et la copie d'icelui filée comme exhibit du demandeur, la minute ayant été apportée au greffe et les moyens de faux produits ; le 19 février 1859 le demandeur principal, maintenant défendeur en faux ; fit motion pour faire rejeter les dits moyens comme étant non-pertinens et inadmissibles. Cette motion contenait huit moyens différents : 1o. Les dites inscriptions et moyens ne sont pas appuyés sur une autorisation spéciale, celle produite avec l'inscription étant de Martin Karrigan seulement, ce qui n'est pas la même personne que le défendeur (1). 2o. L'inscription elle-même est faite au nom de Martin Karrigan tandis que l'action principale porte Martin Karrigan *alias* Karrigan, fils. 3o. Il n'y a aucune élection de domicile (2). 4o. Les dits moyens sont trop vagues et trop simplement négatifs (3). 5o. Les dits moyens attaquent non-seulement la fausseté de l'acte mais encore sa validité. 6o. Les moyens attaquent l'acte non-seulement de fausseté mais de falsification et il n'y a aucune raison pour en soutenir la falsification. 7o. L'acte argué de faux a été admis et reconnu pour vrai par le défendeur. 8o. L'acte argué de faux est vrai et sincère et la dite inscription n'est faite que pour obtenir du délai (4). La motion concluait à ce que le dit demandeur en faux fut déchu de son droit d'inscription de faux et que la dite inscription fut déclarée irrégulière, nulle et non avenue, et les dits moyens impertinens et inadmissibles et qu'il fut passé outre à l'instruction de l'action principale.

Martineau vs. Kerrigan.

Le demandeur en faux répondit à cette motion par une autre, demandant que ses moyens de faux fussent déclarés pertinens et admissibles et que le défendeur en faux fut tenu d'y répondre dans tel délai qu'il plairait à la cour d'accorder. Cette dernière motion fut accordée et la première rejetée, le jugement sur cette dernière ne se motivant que sur une raison d'insuffisance sans autre détail, voici le jugement de la cour.

Considering the motion fyled in this cause by the plaintiff, defendant en faux and the reasons therein set forth insufficient for the rejection of the inscription en faux of the defendant plaintiff en faux fyled in this cause; doth reject the said motion with costs, and adjudging upon the motion fyled by the defendant plaintiff en faux, doth maintain the same, and doth declare the moyens de faux by him fyled relevant and admissible, and doth order the plaintiff, defendant en faux, to fyle his plea thereto within eight days after the making of the procès-verbal descriptive of the exhibit fyled and argué de faux in this cause.

Le. Ricard avocat du demandeur.

McKay & Austin avocats du défendeur.

(P. R. L.)

Le défendeur en faux cita :

(1) Pigeau t, I, p. 409.
Pothier t. X, No. 769.
Code de procédure art. 218.
Carré et Chauveau t. 2, p. 398.
Denisart t. 8 p. 486.

qui tous ainsi que les autres qui ont traité sur le faux, veulent une autorisation spéciale du demandeur en faux pour s'inscrire en faux.

(2) Pothier t. X, No. 769.
Pigeau t. I, p. 418 à la note.
Carré et Chauveau t. 2, pp. 415 et 416.

(3) Pigeau t. I, p. 423.
Nouveau Denisart t. 8, p. 479.

(4) Carré et Chauveau t. 2, p. 400.

COUR DE CIRCUIT.

MONTREAL, 17 DECEMBRE 1858.

Coram SMITH, J.

No. 632.

Leblanc vs. *Rousselle.*

LETTRE DE GARANTIE.

Jugé :—Que les paiements faits sans imputation par le débiteur, ont eu l'effet d'anéantir le cautionnement donné en sa faveur en vertu d'une lettre de garantie (1) pour un montant limité.

Le demandeur en cette cause réclamait de la défenderesse en qualité de légataire universelle en usufruit, de feu son défunt mari, Marc Antoine Primeau, la somme de £50 en vertu des allégués de sa déclaration en substance comme suit :

Que le premier août 1857, en la dite paroisse de Ste. Martine, district de

(1) 10 & 11 Vict., cap. 11, sec. 7.

Leblanc vs. Rousselle.

Beauharnois, Théophile Dumouchel, ci-devant marchand de la dite paroisse de Ste. Martine et actuellement commis de la dite cité de Montréal, fit et consentit son billet promissoire en faveur du demandeur, par lequel billet, à trois mois de sa date, le dit Théophile Dumouchel là et alors marchand, promit payer pour valeur reçue au dit demandeur ou à son ordre au bureau de la banque du peuple à Montréal, savoir; au bureau de la banque du peuple, faisant affaires en la cité de Montréal, dit district de Montréal, la somme de £50 et lequel billet le dit Théophile Dumouchel signa là et alors comme suit: "Théophile Dumouchel," et là et alors le remit au dit demandeur qui en est demeuré depuis porteur et créancier de bonne foi.

Que le montant du dit billet est maintenant dû et échu depuis longtemps savoir, depuis le 4 octobre 1857 et que lors de son échéance et souvent depuis, le dit billet a été présenté au bureau de la dite banque du peuple pour en obtenir le paiement qui en a toujours été refusé faute de fonds destinés à en effectuer le paiement.

Que le dit Théophile Dumouchel est en faillite et en déconfiture et est incapable de rencontrer ses engagements et est notoirement insolvable, et ce au vu et su de la dite défenderesse.

Que le 26 mai 1856 le dit feu Marc Antoine Primeau là et alors vivant fit et consentit un écrit sous seing privé portant date à Ste. Martine susdit le 26 mai 1856, par lequel écrit adressé au dit demandeur; le dit feu Marc Antoine Primeau déclara "qu'il se rendait caution pour le dit Théophile Dumouchel jusqu'au "montant de £50 de marchandises si toutefois le dit demandeur voulait bien "accepter le dit Marc Antoine Primeau et ce suivant les termes de paiement que "le dit demandeur établirait avec le dit Philippe Dumouchel;" et tel qu'il appert au dit écrit produit et qui est comme suit: "G. Leblanc, écr., Ste. Martine, 26 mai 1856. Monsieur, le porteur, M. T. Dumouchel désirant ouvrir un magasin dans mon village à Ste. Martine, je vous informe que je me rends caution pour lui jusqu'au montant de £50, cinquante livres cours actuel, de marchandises, si toutefois vous voulez bien m'accepter, et ce suivant les termes de paiement que vous établirez avec lui. Ce faisant, vous obligerez votre très humble serviteur. M. A. Primeau."

Qu'en conséquence du dit écrit, et en considération de la solvabilité bien connue du dit feu Marc Antoine Primeau et de sa recommendation contenue au dit écrit, le dit demandeur fit des avances de marchandises au dit Théophile Dumouchel suivant les termes de paiement établis entre eux et par lesquels il ut bien entendu et stipulé entre ce dernier et le dit demandeur que le cautionnement ainsi offert par le dit Marc Antoine Primeau jusqu'à concurrence de cinquante livres courant resterait et serait toujours valide pour les derniers £50 que le dit Théophile Dumouchel pourrait devoir au dit demandeur et que ce dernier aurait toujours recours contre la dite caution pour le susdit montant de £50 tant que le dit Dumouchel lui serait redevable d'au-moins £50.

Que le dit billet fut donné pour des marchandises ainsi vendues et livrées par le demandeur au dit Dumouchel.

Que la dite défenderesse sachant bien qu'elle est caution et redevable jusqu'à concurrence de £50 envers le dit demandeur pour le dit Théophile Dumouchel

a retiré de ce dernier avant sa faillite et sur la masse de ses biens qui devait être distribuée entre tous ses créanciers, des sommes d'argent et des valeurs considérables pour se garantir et s'indemniser du susdit cautionnement.

Que le dit demandeur est créancier du dit Théophile Dumouchel pour un montant excédant la dite somme de £50.

Que le dit Marc Antoine Primeau en soumettant son dit cautionnement aux termes des paiements qui seraient établis entre le dit demandeur et le dit Théophile Dumouchel savait bien que le dit demandeur retiendrait le bénéfice de tel cautionnement sur les deniers dont le dit Théophile Dumouchel lui serait redevable en définitive jusqu'à concurrence de £50, et que de fait les termes de paiements établis le furent ainsi.

Les défenses de la défenderesse sont en substance comme suit :

Que le demandeur n'a jamais fait connaître au dit feu Primeau, s'il acceptait ou non cette offre ainsi faite de se porter caution de Dumouchel, et qu'en loi, le fait que le demandeur n'a point fait connaître au dit feu Primeau sa détermination de l'accepter comme caution du dit Dumouchel, a libéré le dit Primeau de toutes ses offres de garantie et a rendu nulles et comme non-avenues ses offres de cautionnement contenues dans le dit écrit et conséquemment cette action qui repose sur cette prétendue garantie ne peut se maintenir.

Qu'il est bien vrai qu'elle est légataire universelle en usufruit de feu Marc Antoine Primeau son époux, et qu'il est encore vrai que le dit feu Marc Antoine Primeau a, le 26 mai 1856, adressé et livré au demandeur une lettre par laquelle il lui fit offre de cautionner le nommé Dumouchel jusqu'au montant de £50 pour avances de marchandises suivant les termes de paiement qui seraient établis entre lui (le demandeur) et le dit Dumouchel.

Et la défenderesse allégue, que depuis le 26 mai 1856 jusqu'au 19 juin 1857, le demandeur a vendu et livré au dit Dumouchel des marchandises au montant de £187 8s. 7d. ou environ ; que la première vente de telles marchandises qui fut faite au nommé Dumouchel par le demandeur le fut le 26 mai 1856 après que le demandeur eut été mis en possession de la dite lettre, et s'est élevé à £50 5s. 11d. et que les autres ventes ont été faites à différentes dates subséquentes, pour des montants moins élevés, et tel qu'il appert par l'état de compte qui a été tout récemment fourni à la défenderesse par le demandeur et qui est produit au soutien des présentes.

Que les susdites marchandises vendues au dit Dumouchel l'ont toutes été sur un délai et à un crédit de trois mois, à dater de chaque vente.

Que depuis le 27 juin 1856 au 21 août 1857 inclusivement, le dit Dumouchel a payé au dit demandeur en différents termes en déduction du prix des susdites marchandises £131 9s. 3d. et ce, aux dates et de la manière exprimée au dit état marqué P auquel il a été déjà fait allusion.

Et la défenderesse allègue que le feu Marc Antoine Primeau en s'offrant comme caution du dit Dumouchel pour achat de marchandises jusqu'au montant spécifié dans sa dite lettre et suivant les termes et de la manière exprimés en telle lettre, ne s'est en loi obligé de garantir que le paiement des premières ventes de marchandises qui seraient faites au dit Dumouchel jusqu'au montant de la somme de cinquante livres et ce suivant les termes et conditions usités en pareil cas.

Leblanc v. Rousselle.

Que le dit Marc Antoine Primeau est mort le 9 octobre 1856, et ce à la connaissance du dit demandeur qui aurait appris ce décès le jour où il est arrivé.

Que pendant le laps de temps qui s'est écoulé depuis le moment où le demandeur a reçu la dite lettre de garantie jusqu'au jour du décès de Marc Antoine Primeau inclusivement, le demandeur a avancé au dit Dumouchel des marchandises et effets de commerce au montant de £115 19s. 10d. et que pendant la même période de temps, il a reçu du dit Dumouchel sur le prix de telles marchandises £71 10s. ce qui était plus que suffisant pour couvrir le montant de la susdite garantie du dit Primeau.

Que la convention faite entre le demandeur et le dit Dumouchel comportant que le cautionnement du dit Primeau jusqu'à concurrence de £50 que le dit Dumouchel pourrait lui devoir, a été et est une convention qui n'a pu en loi lier et obliger le dit Primeau au paiement d'une telle somme d'argent et que cette stipulation a été faite entre le demandeur et Dumouchel pour frauder le dit Primeau et en contravention à la lettre et au sens de la dite lettre de garantie, et que le dit Primeau n'a pu en loi être lié ou obligé en aucune façon par une telle stipulation, que suivant la teneur de la dite lettre de garantie le dit Primeau s'est obligé de garantir jusqu'au montant de £50 de ventes que le demandeur ferait au dit Dumouchel suivant les délais généralement accordés en matières commerciales, savoir, sur un délai déterminé lors des ventes et ordinairement limité à trois et six mois.

Que par la dite lettre de garantie le dit Primeau n'a point cautionné au demandeur le paiement d'une somme de £50 payable suivant les stipulations que rapporte le demandeur, que par la loi la dette cautionnée par le dit Primeau était la dette la plus onéreuse que le dit Dumouchel eût intérêt d'éteindre et que les premiers deniers payés par le dit Dumouchel doivent être imputés sur cette créance ainsi cautionnée et que cette créance est celle formée par les marchandises vendues au dit Dumouchel par le demandeur, et que la défenderesse qui représente aujourd'hui le dit Primeau est fondée en loi à demander telle imputation.

Que par la dite lettre de cautionnement, la créance reclamée par le demandeur n'a jamais été cautionnée ou garantie.

La contestation ayant été liée ; le demandeur examina le dit Dumouchel comme témoin qui prouva entr'autres faits les suivants :

Ayant vu la lettre de garantie produite en cette cause par le demandeur comme son exhibit numéro "deux," le témoin déclare que la dite lettre lui a été donnée par feu Marc Antoine Primeau et qu'il s'est rendu avec cette lettre de garantie chez le demandeur le 26 mai 1856. Témoin a remis cette lettre entre les mains du demandeur qui l'a acceptée comme sûreté collatérale telle qu'entendue entre nous, la dite lettre devait rester entre les mains du demandeur comme étant applicable sur aucune balance qui resterait due. Il a été entendu entre le témoin et le demandeur que cette lettre de crédit couvrirait toute balance au montant de £50 qui resterait due sur le compte qu'il commençait à ouvrir chez le demandeur.

Par le reçu du 8 septembre 1857 la défenderesse a entre ses mains la somme de £155 1s. 6d. pour se garantir des lettres de garantie qui sont encore entre

les mains des créanciers du témoin, et la défenderesse sachant qu'elle devait retirer toutes ces lettres de garantie, a accepté à compte cette somme-là.

La balance du compte courant dû au demandeur sur le prix et la valeur des marchandises qu'il a vendues et livrées au témoin depuis le 26 mai 1856 au 19 juin 1857 est de £55 19s. 4d.

Le témoin a eu occasion de dire à la défenderesse vers le mois de septembre 1857 qu'il restait des balances de compte courant dues par le témoin chez différents de ses créanciers couvertes par des lettres de garantie. C'est là-dessus que la défenderesse a pris des sommes d'argent, et des crédits et des billets pour s'indemniser des déboursés qu'elle devait faire sur le compte du témoin.

Lafrenaye pour le demandeur cita le Statut Provincial 10 & 11 Vic. cap. 11, sec. 7, pour établir que l'acceptation d'une telle lettre de garantie n'est pas nécessaire, et il prétendit que la convention entre le demandeur et Dumouchel était conforme à la teneur de la lettre de crédit et avait eu l'effet de lier Primeau.

Cassidy pour la défenderesse soutint que l'imputation des différentes sommes de deniers que Dumouchel avait payées au demandeur, devait par l'opération de la loi, se faire de plein droit sur la dette cautionnée, en sorte que le cautionnement de Primeau avait été anéanti par les premiers paiements faits par Dumouchel.

Le jugement déboute le demandeur de son action avec dépens.

Lafrenaye & Papin avocats du demandeur.

Leblanc & Cassidy avocats du défendeur.

(P. R. L.)

COUR SUPERIEURE.

MONTREAL, 27 AVRIL 1859.

Coram BERTHELOT, J.

No. 153.

Blackburn vs. *Walker & Walker opposant.*

OPPOSITION PÉRIMÉE.

Jugé,—Qu'une opposition est sujette à la péremption d'instance.

L'opposition qui fut déclarée périmée par le jugement rendu en cette cause n'avait pas été contestée. Le 13 Avril 1859, le Demandeur donna avis à l'opposant qu'il ferait motion le 17 Avril 1859 pour péremption d'instance de son opposition afin d'annuller.

Cette opposition avait été produite le 13 Juillet 1859, et rapportée par le Shérif du district d'Ottawa, le 3 Août 1850, devant la Cour Supérieure, siégeant à Montréal, et aucun procédé n'avait eu lieu depuis. La motion du Demandeur est en ces termes:

" Motion on behalf of the said plaintiff in as much as it appears by the certi-
" ficate of last proceeding in this cause signed by the prothonotary of this Court
" hereto annexed, that the said opposant has failed to proceed with his said
" opposition in this cause within 3 years last past, that the recourse, claim,
" pretensions and interest in and by said opposition claimed in this cause be held
" to have been and to be lost *périmé*, and that the said opposition be hence
" dismissed with costs."

Blackburn v. Walker.

Le certificat du greffier est daté du 2 Avril 1859.
Le jugement rendu par la Cour est conforme aux termes de la motion.
A. & G. Robertson, avocats du Demandeur.
Bethune & Dunkin, avocats de l'Opposant.

(P. B. L.)

MONTREAL, 31st MARCH, 1859.

Coram SMITH, J.

No. 712.

Booth v. *The Montreal and Bytown Railroad Company.*

Held,—That a service of process on the "last President," on the "late Secretary," and on the "last Secretary," of a Corporate Company, in the absence of any known or discoverable office of such Company, is insufficient.

This was an exception *à la forme* to the writ of summons in this cause and the return of the Bailiff thereon written. The Bailiff certified, in effect, that he had made diligent search and enquiry for the office of the Company Defendant, but had been unable to find it; and that he had been credibly informed that the Company had no office or place of business, in consequence whereof that he had served the writ and declaration on the "last President," the "late Secretary," and the "last Secretary" of the Company.

Per Curiam.—(After stating facts.) The question to be determined here is, is a service on the *last* President, the *late* Secretary, and the *last* Secretary of a corporate body like the Defendant a good service? I think not. The charter of the Company Defendant, makes no provision as respects service. Grant and Angell & Ames say that until allowed by the statute no service of summons could be made on a corporation. In the absence of any provision in this respect in the statute containing the Company's charter, we have no common law on the subject, and the exception must therefore be maintained.

Exception maintained.

Mackay & Austin, for Plaintiff.

Edward Carter, for Defendant.

(S. B.)

IN APPEAL

FROM THE SUPERIOR COURT, DISTRICT OF MONTREAL.

MONTREAL, 1st DECEMBER 1858.

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

IRA GOULD, *(Plaintiff in the Court below,)*
Appellant.

AND

THE MAYOR, ALDERMEN, AND CITIZENS OF THE CITY OF MONTREAL,
(Defendants in the Court below,)
Respondents.

Held,—That a party holding land within the City of Montreal, under a lease from Government for twenty-one years, renewable on certain conditions, is an owner of such land, within the meaning of the Bye-Law, of the Corporation imposing assessments on real property.

This was an Appeal from the judgment of the Superior Court rendered at Montreal, on the 30th of April 1858, and reported in the 2d volume of the Jurist, p. 260 and seq.

The Court of Appeal confirmed the Judgment of the Court below, (the Hon. Mr. Justice Aylwin dissenting).

AYLWIN, J.—The Statute of the 10th and 11th of the Queen, cap. 17, has enacted that "hereafter all property held by or in Trust for the Crown in whatever part of this province the same shall be situate shall be exempt from all local rates and taxes."

The preamble of this law states that "by the laws of that portion of the province formerly the Province of Upper Canada all such property is exempt from local taxes and assessments," and that "it is expedient that the same should be so exempt in that portion of the Province formerly Lower Canada."

The Statute of Upper Canada to which allusion is made in the preamble of that above cited is the 59 Geo. cap. 7 which excepts and takes from out the exemption from taxes "the Crown and Clergy reserves actually leased to individuals," which it is expressly enacted "shall be liable to the same rates and assessment as other lands." And Section 4, is to the effect that "All lands shall be considered as rateable property which are holden in fee simple or promise of a fee simple by Land Board Certificate, Order of Council or Certificate of any Governor of Canada, OR BY LEASE."

As a remedial Statute our Act of the 10th and 11th is to receive a "large liberal and benign construction." The Respondents claim that the Appellant is liable to assessment "As owner and proprietor of the Mills, Stores and premises described in the assessment Books for the St. Anne's Ward, not as holding them by lease."

They do not assert that he has the fee simple or absolute property, but they contend that he holds by *bail emphyteotique*, and therefore has a qualified right

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of property in the said mills, stores, and premises which subjects him to taxation. The first question then which arises in this case as I view it, is whether Crown property held by *Bail emphyteotique* is an exception to the exemption granted by the 10th and 11th of the Queen. If the Act was restricted solely to Lower Canada, a qualified right of property, peculiar to our local law, might be supposed to have entered into the contemplation of the Legislature in framing it, but it extends to the whole Province, to Upper Canada also where the Doctrine of *emphyteusis* is unknown and does not obtain. The Upper Canada Act excepts lands holden by lease, and does this in express terms: no such exception is to be found in the Act in question. Is it then to be inferred or tacitly understood? I am decidedly of opinion that it cannot. The construction put upon the Statute by the Respondents is in my opinion forced, harsh and unnatural, the exemption from taxation is given to "all property held by or in trust for the Crown," whether leased or unleased held by *bail emphytéotique* or *bail à loyer*. The exemption attaches to the Crown property however held, and to *all* Crown property without distinction. The exemption is favorable to the Crown, in the interest of the people, and is not to be taken away by implication particularly, any reference to such abstractions as the qualified *dominium* under the doctrine of *emphyteusis* seems to me plainly at variance with the terms as well as the spirit of the act.

To recognize a distinction so subtile is in fact to legislate, and in merely interpreting the will of the Legislature, the sound rule is, *ubi lex non distinguit nec nos distinguere debemus.*

Admitting a qualified or special property in the Appellant, the property has never ceased to be Crown property, or property held by the Crown, and therefore exempt from local assessment. The exemption from taxation gives additional value to the property of the Crown, such property is more valuable to a tenant by the amount of taxes from which he is exempt, and the tenant will pay for his lease a larger sum in consequence, the Crown will be a loser *pro tanto* if the tenant is to be taxed, and notwithstanding the comprehensive and general terms of the statute, "*all property*" the Crown property will yet be liable to taxation if held under, lease though not so if under direct government management.

In Lower Canada there will be tacitly inferred an exception which under the law of Upper Canada required in direct terms to be expressed.

If the legislation of Canada intended to restrict the exemption it [illegible] why was not the exception contained in the Upper Canada statute [illegible] the new act, or at least in some manner referred to so as to qualify the universality of the terms "all property," But as the statute of the 10th and 11th is made expressly to apply to the whole province being the last in order of time with reference to Upper Canada, it impliedly repeals the exception in the 59 Geo. 3, Cap. [illegible] grants immunity from taxation to Crown and Clergy lands and Crown property held under lease in that part of the province.

I see no way to [illegible] this statute for the claim of the Respondents, and I am of opinion that they cannot retain the money they have received from the appellant and must be made to refund and pay it back.

But it is to be considered before putting the true construction upon the statute, whether the allegation of special property under a bail emphytéotique, upon which the clause of the Respondent rests, is made out. To ascertain the nature of the Appellant's holding or tenancy, the lease must necessarily be looked at. It is from the Commissioner of Public Works in charge of the Lachine Canal to the Appellant, &c., as follows:—

"All that certain lot of ground situate on the south side of the Lachine "Canal, basin number two, within the limits of the City of Montreal, and "known and distinguished on the plans in the office of the said Commissioner, "as hydraulic Lot number fourteen, commencing it as line parallel with, and "ten feet distant from the face of the wharf or dock wall, and having a breadth "of frontage thereon of 80 feet and extending backwards for the same breadth, "to the River St. Lawrence but securing a roadway of 40 feet at a distance of "150 feet back from the said dock wall for a means of communication which the "said Commissioners intend to construct, and also a quantity of the water pas-"sing and to pass from the said basin sufficient to drive and propel four runs of "ordinary mill stones by means of the most approved description of wheel, or "sufficient to propel any other description of machinery, requiring a not greater "amount of power to be applied and used by the said Ira Gould for the work-"ing of any mill or machinery which may be erected or built upon the said lot, "subject, however, to the conditions hereinafter mentioned, being the final and "express conditions upon which the lease of lot 14, and the supply of water "thereto is granted, to have and to hold the said lot and water as aforesaid "unto the said Ira Gould, his heirs, &c., from the first day of May instant, for, "and during the term of 21 years from thence next ensuing, renewable and subject "as hereinafter mentioned, yielding and paying yearly, and every year during "the said term, unto her Majesty's Receiver General of the said Province, his "successors in office, the sum of £108, for the said lot and water, which shall "become due and payable half-yearly on the 1st October and 1st April in every "year of the said term, subject as aforesaid, that is to say: "That the said Ira "Gould shall not erect any building whatever, within ten feet from the face of "the dock wall, nor in any way whatever, obstruct a free passage of 10 feet "wide in front of the said lot for all persons to pass and repass, and for towing "vessels, but in making his buildings on the said lot he will be allowed so to "construct them, that they may project over the passage way to a line even "with the dock wall, provided a clear space of 10 feet be preserved between "the top of the dock wall and the lower part of the beams supporting the pro-"jection."

"That vessels may be taken alongside in front of the said lot for discharging "or receiving cargo, but subject to such canal regulations as may be established "from time to time for regulating the traffic of the Canal.

"That the water hereby leased is designed for the effectual working of four "runs of stones and the necessary machinery connected therewith, but no more, "and will be supplied through two sluices or apertures in the dock wall, each "of them, to be two feet in perpendicular depth by four feet in length."

"That should it hereafter be found that the said sluices will admit a greater

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" volume of water than will be sufficient to propel four runs of mill stones and " machinery by means of the most approved wheels, the said Ira Gould shall " not be entitled by his lease to receive the whole thereof, but the said Commis- " sioners shall and may regulate and lessen the volume of supply to him by " lowering the sluice gates."

" That the said sluices shall be placed near the north eastern boundary line " of the said lot, and the top thereof will be 5 feet below the ordinary surface " of the water in the basin."

" That the said Commissioners shall construct at their own expense and main- " tain in repair the sluices for supplying the water, together with the flume for " correcting the same to the wheel for a distance of 12 feet from the face of " the dock wall, from which front the said flume shall be constructed completed " and maintained in repair by the said Ira Gould and Messrs. Thorne and " Heward, the purchasers of the adjoining lot at their joint expense, and be so " placed that 8 feet of the breadth thereof should be upon the lot hereby leased " with a partition formed so as to separate the water for each lot if necessary."

" That the said flume shall be maintained by the said Ira Gould and the " occupiers of lot number 13 in such good and sufficient repair to the satisfac- " tion of the said Commissioners, as that no waste of water or danger to the " navigation of the said Canal may be likely to arise by leakage therefrom or " otherwise."

" That where the said flume shall cross under the space hereinafter reserved " for roadway, it shall be made at such a grade and in such a manner as the " Engineer of the said Commissioners shall direct."

" That the entire control and management of the said sluices and gullies, " together with the machinery for regulating the supply of water, shall be pro- " vided, placed and governed by the said Commissioners, and their successors " in office as their officers, and shall not in any manner whatever be interfered " with or regulated by the said Ira Gould, his executors, administrators, or " assigns."

" That in the event of its being found necessary to reduce the amount of " water power granted to all the lessees of hydraulic lots now sold on account of " the too great current of waters through the canal, the said Commissioners " shall and may make a reduction in the supply hereby granted to the said Ira " Gould, without being liable to reduce or allow any part of the rent hereby " made payable."

" That in the event of temporary stoppage of the supply of water or a por- " tion thereof, by reason of the same being required for the navigation of the said " canal, or by reason of repairs or alterations being deemed necessary to be " made to the same, or to meet the demands of extreme high water in the St. " Lawrence, or from frost or ice or any other cause whatever, no abatement of " rent shall be allowed, nor any claim for compensation whatever be allowed or " admitted on account thereof."

" That the said Ira Gould shall pay all rates and taxes of whatever descrip- " tion that may become payable in respect of the lot and water power hereby " leased and the buildings that may be erected, and that he shall not sublet the

" said lot or water power without having first obtained the consent in writing of " the said Commissioners or their successors."

" That should the rent hereinbefore reserved or any part thereof remain due " for twenty days after the same shall have become payable, or if the said Ira " Gould, his executors, &c., shall not in all things observe and perform the con- " ditions and covenants herein contained, and each and every part thereof on " his and their part to be observed and performed, it shall and may be lawful " for the said Commissioners and their successors in office to stop the supply of " water hereby leased, until the said rent is paid."

" That the said Commissioners and their officers may at all seasonable times " have access to the said premises, for any purpose that they may consider " necessary, connected with the management of the said Canal or for the pur- " pose of examining the condition of the said flume, or for ascertaining the " amount of water used or supplied through the sluices."

" And the said Commissioners, &c., on behalf of Her Majesty, covenant and " agree to and with the said Ira Gould, &c., that he shall enjoy quiet possession " of the said lot during the said term, and that the water shall be supplied in " the manner and to the extent hereinbefore mentioned, (subject nevertheless to " the condition respecting a temporary or unavoidable stoppage thereof,) and " also that the said Commissioners shall and will upon the expiration of the " term hereby granted, lease to him, the said Ira Gould, his heirs, &c., the said " lot of ground and supply of water for a further term of 21 years, provided " the same shall not be required for public purposes or for the use of the canal, " and that the said Ira Gould should desire a lease for such second term, upon " and subject to the same conditions as are hereinafter expressed, and contained, " with the exception of the amount of yearly rent which shall be payable there- " fore, and which said rent shall be fixed and settled by experts, &c. And fur- " ther, in case it should be determined by the said Commissioners, &c., not to " grant a lease of the said lot and supply of water, (under the provision con- " tained in the last covenant,) for a further term of 21 years, after the expira- " tion of the term hereby granted, that they, the said Commissioners, will pay " or cause to be paid to the said Ira Gould, &c., the then value of all the build- " ings, fixtures and machinery that may be upon the said lot, according to a " valuation to be made thereof; and lastly, the said Ira Gould doth hereby " further covenant, that he will give up quiet possession of the said lot and " buildings thereon, at the expiration of the term hereby granted, if the said " Commissioners shall require it, upon payment of the then value of the build- " ings, fixtures and machinery as aforesaid. But in case a further term should " be leased, that he, the said Ira Gould shall and will at the expiration of such " further term, yield up the quiet possession thereof together with all the build- " ings, improvements, fixtures, and machinery that may be thereon, without any " claim or pretence to be reimbursed for the value thereof, or any compensa- " tion whatever, therefore, he the said Ira Gould hereby declaring that such " second lease, in case it shall be granted, will be considered by him full com- " pensation for the outlay he may make upon any buildings, machinery or other " improvements and moreover, that he will preserve the said buildings and all

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"other improvements, fixtures and machinery in good order and condition and "to yield the same up at the expiration of the said second term, fair wear and "tare, loss by fire or flood only excepted."

With such conditions of lease, I cannot perceive any dominium passing to the tenant, or any qualified right of property which can be carved out of the right of the Crown, so as to vest a title in the Appellant. The subject matter of the lease, is a hydraulic power a water lot upon which mills are to be constructed by the tenant, they are not in *esse*, but in *posse*, are to be built for the Crown, to which they must belong by the rule *ædificium solo cedit*, they are to be paid for by the Crown at the end of 21 years. The Commissioners have right of entry at all times when necessary, the enjoyment of the subject matter of the lease depends upon the supply of water which they are to provide, and which they may altogether stop upon non-payment of rent. The occupation by the tenant is subject to mutual and concurrent conditions, *in faciendo*, mutually and reciprocally dependent upon lessor and lessee, I can perceive no alienation by the Crown in this contract, and on the part of tenant or lessee I can perceive no right or semblance of property susceptible of being acquired or transferred to third parties. There is no transferable interest with which the covenantee is clothed, to which the covenant can attach itself. It is expressly provided that the tenant shall not sublease. The covenant is a mere personal one, operative only between the immediate parties thereto. What is there, which the tenant is at liberty to hypothecate or to alienate? Can he sell that which he is not permitted to sublease? Can he substitute a stranger in his place, and compel the Crown to continue towards him the supply of water power stipulated for in the lease? Could the lease of the Appellant be taken in execution, and a purchaser, *par decret*, be put in possession adversely to the Crown? *The lease is a simple building lease for* 21 *years, not renewable for ever, but only for one term additional, and then upon altered conditions.* I can find no authority among the writers, who have discussed the question of *emphyteusis*, to apply to the lease in question, in terms as it is made. All that the tenant took was *droit de jouir*, much more limited and fettered, than under the ordinary *bail à loyer*. It has been said that the assessment in question is not upon the land which is Crown property, but the buildings which belong to the tenant. But the tenant never built for himself, he bound himself expressly to build for the Crown, at the expiration of the term the buildings are to be valued and paid for by the Crown, to whom then do they belong, if not to the Crown? Is the Appellant to be paid the price, and is the thing yet to be his? Every stone and each pice of timber as soon as laid becomes Crown property, not to be alienated or to pass to a third party, but with the consent of the Crown.

A question has also been raised, as to the application of the 92 section of the 14th and 15th Vict., Chap. 128, to the assessment in question, upon this I am also of opinion with the Appellant. This clause is a transcript of Sect. 76 of the 8 Vict., c. 59, anterior to the 14 and 15 Vict., c. 128. By the terms of the lease, the property in question was under the description of "wharves and grounds under the direction of the said last mentioned Commissioners." As depending upon the Lachine Canal, it would lead to direct conflict, if the Cor-

poration of Montreal in any way interfered with the lot leased to the Appellant, and the others similarly situated. The proper control should be and is in the Provincial, not in the Civil government, and the property in that view of the case would again be exempt from taxation. Whether the last mentioned statute be prior or subsequent to the leases, is indifferent, if the *locus in quo* be under the direction of the Commissioners, and it is so, by the terms under which the Appellant holds. Gould vs. The Mayor, &c.

In every view which I can take of the case, I believe the Judgment of the Court below to be incorrect, and I am of opinion to reverse it, that Judgment should be entered up in favor of the Appellant.

LAFONTAINE, *Juge en chef*:—L'appelant possède sur les bords du canal de Lachine, dans les limites de la cité de Montréal, trois lots de terre, désignés sous les Nos. 12, 13 et 14.

Le dernier de ces lots, il le possède en vertu d'un acte fait en langue anglaise le 27 mai 1847, dans lequel les commissaires des travaux publics, agissant au nom de Sa Majesté, ont déclaré "to have granted, demised, and leased unto the said Ira Gould, his executors, administrators, and assigns, all that certain lot, etc., etc., to have and to hold the said lot and water unto the said Ira Gould, his executors, administrators and assigns.....," et cela pour le terme de 21 ans, et à la charge de payer annuellement au Receveur-Général, la somme de £108.

Il est stipulé, entre autres choses, que les bâtisses que ferait ériger le dit Ira Gould, "shall be subject in all particulars to the laws of the corporation of the city of Montréal..... the said Ira Gould shall pay all rates and taxes of whatever description that may become payable in respect of the lot and water power hereby leased and the buildings that may be erected thereon..... that he shall enjoy quiet possession of the said lot during the said term." Gould vs. Corporation.

A l'expiration de ce terme, le bail pourra être renouvelé pour un autre terme de 21 ans. S'il n'était pas renouvelé, les commissaires devaient payer à l'Appelant la valeur de ses bâtisses, mais s'il était ainsi renouvelé, le terrain devait être rendu aux commissaires, à l'expiration du second terme, avec toutes les bâtisses, et cela sans indemnité. Le 28 mai 1847, semblable bail a été fait des lots Nos. 12 et 13 à MM. Thorne et Heward, et sous les mêmes conditions; et par acte de vente du 4 juin 1853, l'Appelant a acquis leurs droits à ces deux lots, et les possède maintenant avec le lot No. 14.

Le 24 décembre 1853, dans la cour du *Recorder*, l'Appelant a été condamné à payer à l'Intimée la somme de £123 15s., montant de certaines cotisations ou taxes imposées par elle sur ces terrains et les bâtisses qui y sont érigées, laquelle somme il a payée sous protêt; il a de même depuis payé sous protêt une autre somme de £56 pour les cotisations ou taxes de l'année subséquente.

L'objet de l'action de l'Appelant est de reclamer le remboursement de ces deux sommes. Il prétend que le réglement municipal sous l'autorité duquel ces cotisations ont été imposées, ne peut atteindre les lots en question, ni les édifices sus-érigés, vu qu'il n'en a pas la propriété, mais qu'au contraire la propriété en appartient à Sa Majesté: que les lieux forment partie des quais et des terrains qui sont sous le contrôle des commissaires des travaux publics, que, par conséquent, ils ne tombent pas sous la jurisdiction ou l'autorité de la corporation de

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Montréal, et sont exempts des dites cotisations qui sont *illégales*, *injustes* et *vexatoires*.

L'Intimée s'est contentée de présenter une défense au fonds en fait. Par jugement du 30 avril 1858, l'Appelant a été débouté de sa demande; il a interjeté appel.

Cette cause est d'une grande importance, non seulement à raison de la principale question de droit qu'elle soulève, mais encore à raison des intérêts engagés. Plusieurs autres personnes sont dans la même situation que le Demandeur; s'il réussit à faire reconnaître l'exemption qu'il invoque, la ville perdra une portion assez considérable de son revenu.

La question à examiner, et de laquelle dépend la décision de cette cause, est celle-ci :

Dans l'ancien droit français qui est celui du Bas-Canada, le contrat emphytéotique était-il translatif de propriété? Et s'il avait cet effet, l'avait-il en emphytéose temporaire comme en emphytéose perpétuelle?

Ce contrat a pris son origine dans le droit romain; il fut adopté en France, où les institutions et les mœurs féodales, en modifiant sous quelques rapports, ses règles et son caractère, assujétirent ce contrat à une théorie et à une jurisprudence qui lui furent propres.

"Il est incontestable," dit un auteur moderne, Le Halleur, dans son *histoire de l'emphytéose*, page 221, "qu'il ne faut pas s'attendre à retrouver dans l'ancien droit français la *pure théorie* romaine de l'emphytéose."

Ce contrat a donc ses règles particulières, puisées et dans le droit romain et dans le droit français.

Dans l'un et l'autre de ces deux droits, on distinguait deux sortes d'emphytéose, l'emphytéose perpétuelle et l'emphytéose temporaire. Si elles avaient des règles communes, elles en avaient aussi quelques unes qui étaient propres à chacune d'elles. C'est en partie la cause des controverses sans fin, auxquelles les auteurs se sont livrés sur cette matière, et qui rendent si pénible l'étude de cette partie du droit.

On peut examiner la question sous plusieurs points de vue, entre autres sous le point de vue des droits seigneuriaux.

Cela aide considérablement à la solution, en ce qui concerne la nature et l'effet du contrat emphytéotique, dans le droit du Bas-Canada.

La plupart des auteurs feudistes se prononçaient pour l'ouverture des droits seigneuriaux "lorsqu'il y avait *bourse déliée*, ou *promise*." Le plus grand nombre des coutumes, il est vrai, entre autres celle de Paris, ne contenaient pas de disposition expresse à cet égard; mais il y en avaient quelques-unes qui consacraient ce principe en termes formels. De ce nombre était celle de Rheims, dont le 153e article porte : "Pour l'héritage pris à titre de sur-cens, *emphytéose*, ou louage à plus de trente ans, ne sont dues *ventes*, *s'il n'y a bourse déliée*, auquel cas seront dues *ventes* au Seigneur censuel par le preneur, jusqu'à la concurrence des deniers par lui déboursés." (*Coutumier général*, t. 2, p. 501, 1e col.; *Nouv. Dénisart*, t. 7, au mot "emphytéose, § 2, p. 540, No. 3.)

Cet article de la coûtume de Rheims a formé le droit commun, disent les auteurs. Ils regardaient donc le bail emphytéotique, même temporaire, comme

un acte d'*aliénation*, un *acte translatif* de *propriété*; et lorsqu'il y avait *deniers déboursés ou promis*, ce contrat devenait donc un contrat mêlé de vente jusqu'à concurrence de ces deniers. C'est pour cette raison qu'il connait ouverture aux droits seigneuriaux de *quint* ou de *lods*, puisqu'il n'y a que les contrats de vente, ou équipollents à vente, qui ont cet effet. Tel était le droit commun; tel était l'opinion de presque tous les auteurs.

L'opinion contraire avait néanmoins quelques partisans, mais ils étaient en petit nombre.— *Hervé* paraît être le principal. Le système de ces auteurs consiste à soutenir que l'emphytéose n'est pas un acte d'aliénation, qu'elle n'est pas autre chose qu'un *bail à ferme* ou *à loyer*; en d'autres mots, ce contrat n'est suivant eux, qu'un simple contrat de louage.

C'est en partant ainsi de ce faux système, que *Hervé* dans sa *théorie des matières féodales et censuelles* en est venu à conclure que l'emphytéose, n'est pas sujette au droit de *rachat* ou *relief*, t. 2, pp. 320 et suiv.; et qu'il ne donne pas, non plus, ouverture au *quint* ou aux *lods*, t. 3, pp. 92 et suivantes; mais l'on voit de suite que l'opinion de l'auteur est la conséquence naturelle du principe, par lui adopté, que l'emphytéose temporaire ne transférait aucune espèce de propriété au preneur, que ce bail était *véritablement de la même nature que les baux à ferme ou de louage*, t. 2, p. 333; ce que *Merlin* traite de paradoxe, comme on le verra plus loin, dans ses *Questions de droit*, Ed., in 8o. de 1829, au mot "emphytéose," t. 6, §. 5, p. 278.

Remarquons que *Hervé* n'a soutenu cette doctrine que pour l'emphytéose temporaire. Quant à celle faite à perpétuité, elle était suivant lui, "un vrai bail à cens, ou un vrai bail a rente," t. 2, p. 329. Aussi, dans une note au bas de cette page, admet-il que, "si le bailleur avait reçu des deniers, le bail pourrait suivant les circonstances être considéré comme un contrat équipollent à vente, ou comme un contract mêlé de vente."

Des deux systèmes que je viens de signaler, il faut donc examiner lequel est le mieux fondé dans les vrais principes de la matière.

Que l'emphytéose temporaire présente quelqu'analogie ou quelque rapprochement avec le contrat de louage, c'est ce qu'on ne peut nier. Mais qu'elle en diffère également dans quelques points essentiels, c'est ce qu'on ne peut non plus nier. Et c'est ce qui a fait dire à plusieurs auteurs, en parlant de cette analogie et de cette différence, que l'emphytéose était un contrat qui participait et du louage et de la vente.

"Les contrats qu'on désigne par la dénomination de *baux emphytéotiques*," dit *Duvergier*, du *contrat de louage*, No. 142, "ont toujours différé et diffèrent encore aujourd'hui des baux à ferme ou à loyer proprement dits." (*Nouv. Denisart*, t. 7, au mot "*emphytéose*," p. 538, § 1, No. 2.)

Puis *Duvergier*, sous le No. 155, en parlant d'un arrêt de la cour de cassation du 26 juin 1822, qui détermine le caractère et les effets d'un bail emphytéotique antérieur au code civil, ajoute: "On y trouve nettement exprimée cette opinion qu'un bail emphytéotique est maintenant, *comme autrefois*, un contrat *spécial régi par des règles* particulières." (1)

(1) Il était question dans cet arrêt de 1822 d'un bail emphytéotique du 2 août 1750 fait pour 99 ans.

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En effet ce bail a une très grande analogie avec plusieurs autres actes d'aliénation, entre autres, surtout dans les parties les plus essentielles, avec le bail à fief, à cens ou à rente foncière non rachetable. *Henrion de Pansey*, dans son analyse du "Traité des fiefs," de Dumoulin, p. 345, a inséré la note suivante, extraite du président *Bouhier* sur la coutume de Bourgogne:

"On doit convenir que le fief ressemble tellement à l'emphytéose qu'on peut dire que l'emphytéose a fourni l'idée du droit des fiefs, en effet il y a si peu de différence entre l'un et l'autre, que les anciens qui n'avaient pas encore subtilisé sur ces matières confondaient souvent ces deux espèces de contrat et donnaient à l'un le nom de l'autre."

Fonmaur, t. 1, p. 98, No 120 *in fine*. "..... L'emphytéose ressemble au bail à cens en tant que l'un et l'autre assujetit le redevable à une *prestation annuelle* et au droit de *lods*, en cas de vente, elle ressemble encore à quelqu'égard aux baux à rente foncière, ou à locaterie perpétuelle."

Dunod, des *Prescriptions*, p. 340: "..... L'empereur a encore décidé qu'il (le bailleur ou maître) aurait la cinquantième partie du prix de la vente, *en y consentant et investissant* le nouvel emphytéote. C'est à mon sens l'*origine* et la cause des droits de lods et de retenue, qui sont en usage parmi nous à l'égard des fonds qui sont chargés de cens *emphytéotiques* ou seigneuriaux."

Guyot, rép. t. 6, au mot "emphytéose," p. 680, 1e col.: "En France, dans les pays de droit écrit, l'emphytéose faite par le seigneur de l'héritage, a le même effet que le bail à cens en pays coutumier, et l'emphytéose faite par le simple propriétaire de l'héritage, y est ordinairement confondu avec le bail à rente foncière."

Prevost de la Jannès, t. 1, p. 280. "Le bail à cens par son essence emporte la retention de la seigneurie directe, on doit dire la même chose du bail à champart, et du bail emphytéotique."

Fonmaur, déjà cité, "quoique dans les pays de droit écrit, notre commerce avec le droit Romain nous ait fait adopter les expressions d'emphytéose et de prélation, le vrai est pourtant qu'il n'y a pas de véritable emphytéose parmi nous, mais seulement des baux à cens comme dans la France coutumière."

Nouv. Denisart, t. 7, au mot "emphytéose." § 1, No. 5, p. 538, autorité semblable, et § 2, No. 8, p. 540.

"Quoique les emphytéoses *emportent aliénation*, elles ne donnent pas cependant ouverture aux lods et ventes. Le même principe qui décharge de ces droits seigneuriaux le bail à rente non rachetable, milite en faveur de l'emphytéose. Dans celle-ci comme dans le bail à rente non rachetable, la redevance ou la rente représente l'héritage."

"Mais s'il y a une somme d'argent donnée ou promise, les lods et ventes sont dus proportionnellement aux deniers déboursés, *parce que l'acte est alors mêlé de vente.*

Bouteiller, "Somme rurale," aux notes de Le Caron, sur le titre 63, p. 384: "Quant à l'emphytéose, encore que Zéno empereur en ait fait un contrat separé de l'emption et de la location, toutefois il leur est grandement semblable." [1]

(1) *Freminville*, t. 5, p. 101, de sa "Pratique universelle des terriers."

Troplong, l'auteur sur lequel s'est le plus reposé l'avocat de l'appelant, dit, dans son traité du *louage*, t. 1, sous le No. 31, p. 166 :

"A moins des stipulations les plus expresses et les plus claires, il faut interpréter ce contrat avec les modifications que les mœurs féodales avaient introduites, *et qui le rapprochaient singulièrement du bail à cens.*

Puis p. 169, Après avoir constaté quelques légères différences entre l'emphytéose et le bail à cens, différence empruntée plutôt au droit Romain, qu'au droit Français, *Troplong* fait la remarque suivante : "Mais ces deux contrats avaient des rapports de ressemblance capitale, c'est que l'un et l'autre laissaient subsister, entre le bailleur et la chose baillée un lien de dépendance qui réduisait le droit du bailliste à *un domaine imparfait*. C'est que dans le bail emphytéotique comme dans le bail à cens, une prestation annuelle venait témoigner de l'infériorité de position du preneur. C'est enfin que l'un et l'autre contrats faisaient porter la perte totale par le propriétaire direct, et la perte partielle par le détenteur."

Boutaric, p. 427, "L'emphytéose et le bail à cens ne diffèrent presque que de nom."

J'ai cité ces autorités, pour démontrer plus clairement la justesse de la remarque de *Duvergier*, que l'emphytéose est un contrat *spécial régi par des règles particulières.*

L'emphytéose transfère la propriété. C'est ce que je vais établir, en ajoutant aux autorités déjà citées qui ont trait à ce point, des autorités encore plus directes et plus précises. Il serait oiseux de discuter cette question spécialement quant à l'emphytéose perpétuelle. S'il est vrai que dans cette dernière, le bailleur était censé retenir un droit de propriété dans l'héritage baillé, ce droit devait se réduire à bien peu de chose. En effet comment séparer le droit de *jouissance perpétuelle* d'un héritage, du droit de propriété de ce même héritage? La distinction, si elle est faite, est d'une subtilité trop grande, pour qu'on doive s'y arrêter un moment. Disons plutôt que ce droit du bailleur devait être nécessairement restreint à la retention du *domaine direct* et de *supériorité*, et à l'exercice, le cas échéant *par la faute du preneur*, du droit de reprendre l'héritage, c'est-à-dire dans le cas de *commise* résultant de la demeure du preneur, pendant un certain temps, de payer le canon ou redevance emphytéotique. Encore fallait-il que la commise fut prononcée par les tribunaux qui le plus souvent pouvaient, dans leur discrétion, accorder à l'emphytéote un nouveau délai pour s'acquitter. Aussi les auteurs, même ceux qui ont soutenu que l'emphytéose temporaire assimilée par eux à un simple contrat de louage, n'était pas translative de propriété, ont-ils reconnu qu'il en était autrement dans l'emphytéose à perpétuité. Il faut donc examiner la question de la translation du droit de propriété dans l'emphytéose temporaire. Les vrais principes de la doctrine admettent-ils, sous ce rapport, quelque différence essentielle entre l'emphytéose à perpétuité et l'emphytéose à temps?

Remarquons que, chez les Romains, l'emphytéose temporaire avait été connue avant l'emphytéose perpétuelle. Nous lisons dans le Répertoire de *Guyot*, t. 6, au mot, "emphytéose," p. 680 : "Dans l'origine, elle n'attribua chez eux au preneur qu'une jouissance à temps, soit pour la vie du preneur, soit pour deux ou

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trois générations; c'est pour cela que les lois romaines n'ont donné le titre de seigneurie au droit de l'emphytéote, que *quand l'emphythéose est devenue perpétuelle.*"

Nouv. Denisart, t. 7, au mot "emphythéose," §. 1, No. 3: "L'emphytéose était en usage chez les Romains. *Dans son origine*, elle n'avait pour objet que le défrichement et la culture des terrains stériles. Les propriétaires qui ne pouvaient affermer ces terres à cause des dépenses que le défrichement entrainait, les concédaient *pour un certain temps*, moyennant modique redevance."

Loyseau, du *déguerpissement*, liv. 1, ch. 4, No. 27; Ils (les Romains) avaient l'emphytéose, qui, *de son origine* et première institution, était *temporelle*, comme a bien prouvé *Dumoulin* sur la rubrique du titre 2, et sur l'article 55, glos. 4."

Duvergier, du *louage*, No. 146; D'abord les emphytéoses furent *temporaires;* ensuite elles devinrent *perpétuelles*, sans cependant que la *perpétuité* fût considérée comme un élément essentiel." *Troplong*, déjà cité, l'admet lui-même. Après avoir dit, p. 146, que les concessions à bail emphytéotique étaient "habituellement perpétuelles," il ajoute à la page 147: "Toutefois, il y avait des exemples de concessions de biens communaux faites à temps. Paul nous apprend cette circonstance. Mais il parait qu'elles sortaient des HABITUDES ordinaires, et que les véritables tenures vectigaliennes et emphytéotiques étaient perpétuelles."

Le mot "habituellement" dont *Troplong* s'est servi dans ce passage, n'est pas ainsi employé par lui pour prouver que l'emphytéose à perpétuité avait existé avant l'emphytéose à temps, dans le droit romain, mais seulement pour énoncer que, dans l'opinion de l'auteur, l'emphytéose perpétuelle, une fois connue, devint plus "habituelle" que l'emphytéose temporaire.

Il est donc constant, d'après le témoignage des auteurs qui viennent d'être cités, que, chez les Romains, l'emphytéose temporaire avait précédé l'emphitéose perpétuelle. Si je tiens à constater ce fait, peu important en lui-même, c'est seulement pour faire pressentir à l'avance qu'il est plus que vraisemblable que dans l'origine de ce contrat, la doctrine des jurisconsultes Romains sur la transmission du droit de propriété comme étant l'un de ses effets, avait du s'appliquer à l'emphytéose temporaire, de même qu'elle s'appliqua plus tard à l'emphytéose perpétuelle lorsque celle-ci prit naissance. Le doute est d'autant moins permis à cet égard, qu'en point de fait sur la question de translation de propriété comme étant un des effets de l'emphytéose, il n'y avait pas de différence, dans les deux jurisprudences du droit Romain et de l'ancien droit français, entre l'emphytéose perpétuelle et l'emphytéose temporaire. Il n'y en a pas non plus, sur la même question, entre ces deux droits et le nouveau droit de la France qui admet encore l'emphytéose à temps, bien qu'il ait répudié l'emphytéose perpétuelle. Quand je dis qu'il n'y avait pas de différence à cet égard, je ne prétends pas dire que c'est là l'opinion unanime des auteurs. Je sais que quelques auteurs, *Hervé* entre autres, ont été d'un sentiment contraire; mais encore une fois, disons-le, c'est parcequ'il avait adopté le principe erroné que le contrat emphytéotique n'était pas autre chose qu'un contrat de *louage*; ce qui, avec raison, a été traité de *paradoxe* par *Merlin*.

Voyons d'abord la définition que les auteurs donne de l'Emphytéose.

Domat, liv. 1, tit. 4, sect. 10, No. 5: "La translation de propriété que fait

l'emphytéose, est proportionnée à la nature de ce contrat où *le maître baille le fonds et retient la rente*, et par cette convention, il se fait *comme un partage du droit de propriété*, entre celui qui baille à rente et l'emphytéote."

Nouv. Denisart, t. 7, au mot "emphytéose," p. 533, §, 1, No. 1, "L'emphytéose, prise dans son véritable sens est un contrat par lequel le propriétaire d'un fonds en cède à un autre *la propriété*, soit *à perpétuité*, soit *pour un temps*, à la charge que le preneur bâtira ou améliorera, et qu'il paiera au bailleur une redevance annuelle." No. 2, "Le bail emphytéotique peut-être perpétuel ou à temps."

"Quoiqu'il ne soit qu'à temps, il ne faut pas le confondre avec un simple bail à longues années. Il en diffère en ce que le bail à longues années ne transfère que le droit de jouir, au lieu que le bail emphytéotique, *transfère au preneur* une propriété, qui, *pour être résoluble*, n'en est pas *moins réelle*." No. 6. "*Dans les pays coutumiers*, l'emphytéose est *rarement* perpétuelle. La durée en est ordinairement fixée à un temps qui excède le nombre de neuf années, et qui ne surpasse pas celui de cent ans."

"Quoique le preneur à bail emphytéotique à temps n'acquière pas, *à perpétuité*, la propriété du fonds qui lui a été concédé à ce titre, il jouit cependant *pendant la durée de son bail*, des droits attachés *à la qualité de propriétaire*. Il peut hypothéquer, aliéner et vendre l'héritage emphytéotique, sauf la résolution du droit des créanciers et des acquéreurs à l'expiration du temps fixé par le bail."

§, 2, p. 540, No. 2: "Les emphytéoses, par une suite de l'*aliénation* qu'elles renferment, sont assujetties au droit de centième ou demi centième denier, selon que leur durée est au-dessus ou au-dessous de trente ans," p. 541, sous le No. 4. Après avoir condamné l'opinion de *Hervé* qui assimile l'emphytéose au simple bail à ferme, les auteurs ajoutent, "Quoique cette espèce d'emphytéose, (celle à temps), ne transfère qu'une propriété résoluble, le preneur est cependant regardé comme *propriétaire pendant la durée du bail:* ce qui nous paraît suffire pour opérer, dans la possession du *fief*, *une mutation* qui donne ouverture au relief, quand même la charge de porter la foi n'aurait pas été expressément imposée au preneur."

Rep. de *Guyot*, t. 6, au mot, "emphytéose," p. 681, 2° col.: "Le bail emphytéotique est une aliénation de la propriété utile au profit du preneur pendant tout le temps que doit durer le bail, la propriété *directe* demeurant au bailleur."

"Le preneur étant *propriétaire* peut vendre, aliéner, échanger ou hypothéquer l'héritage.

"De ce que les baux emphytéotiques *emportent aliénation*, quelques coutumes ont voulu qu'ils donnassent ouverture au retrait lignager. "Baux à 99 ans, ou longues années," porte l'article 149 de la coutume de Paris, "sont sujets à retrait." p. 682, 2e. col. "Les créanciers du preneur d'un bail emphytéotique, peuvent faire saisir et vendre la jouissance de ce bail. (1)

Freminville, t. 5, p. 98: "Le propriétaire des héritages donnés à emphytéose, *en aliène la propriété utile* en la personne du preneur *pendant toute la durée*

(1) *Nouv. Denisart*, t. 7, au mot "emphytéose," p. 542, No. 8.
"Actes de Notoriété," p. 47 "acte du 19 Juillet 1687."

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du bail, il lui reste *seulement*, la propriété *directe*, d'où il résulte que les héritages donnés à emphytéose, peuvent être échangés, donnés, même vendus, en chargeant les acquéreurs d'exécuter toutes les clauses du bail, auxquels cas leurs droits seront éteints de plein droit, lorsque le temps de la concession sera expiré, *resoluto enim jure dantis, resolvitur et jus accipientis.*

P. 99. "Le preneur de l'emphytéose peut en hypothéquer les héritages, mais elle ne subsiste que pendant le cours du bail, à l'expiration duquel, le bailleur ou ses héritiers les reprennent aussi libres qu'ils ont été donnés."

P. 101. "Quelques-uns ont admis en controverse que le bail emphytéotique ne transférait pas la propriété, et que le preneur ne devait être considéré que comme un fermier; ce qui est contraire à la loi 12, *cod. de fund. patrim.*: *emphyteucarii fundorum domini.* Le preneur est appelé seigneur; il lui appartient la *dominité* dans les choses transportées par ce contrat."

P. 102. Après avoir rapporté le passage ci-dessus cité de *Domat*, *Freminville* ajoute: "en un mot, le droit d'un emphytéote, est celui *d'un vrai propriétaire*, qui peut poursuivre tous les droits attachés à son emphytéose, en son propre nom, parcequ'il est le véritable et immédiat seigneur de la chose." "Le contrat d'emphytéose est si bien une *aliénation* qu'il est sujet à retrait, si vrai que la coutume de Paris en a fait un article."

Prevost de la Jannès, t, 1, p.p. 219 et 220; La propriété ainsi retenue et qui n'est plus exercée que par ces devoirs et ces redevances dont le fonds est chargé envers le propriétaire, s'appelle *Seigneuri edirecte*, et la jouissance accordée à perpétuité *Seigneurie utile.* Par là il arrive qu'il y a deux propriétés *in solidum* de la même chose, mais sous différents rapports."

Ferrière, dans son grand commentaire, t, 2, p, 893, No 1. sur l'article 149 de la coutume, qui assujetit le bail emphytéotique au retrait lignager; "La raison en est," dit-il, que ces baux contiennent *une espèce d'aliénation qui équipolle à la vente*, comme dit *Tiraqueau.*"

"En effet ces baux équipollent à vendition, et produisent une vraie *translation de propriété* en la personne des preneurs; de là vient qu'ils sont obligés aux charges réelles et redevances annuelles aux-quelles les héritages sont sujets. (1)." Pothier, des *Retraits*, No. 28, appelle "Seigneurie utile," et "droit réel," le droit de l'emphytéote, et dit que c'est pour cela qu'il est sujet au retrait.

Bacquet. "Baux des boutiques du Palais," p, 599; "autre chose est parler d'une inféodation ou d'une emphytéose, qui sont... *translatifs de la propriété* et possession utile aux héritiers, et cessibles par une libre disposition soit entrevifs ou à cause de mort."

Renauldon, "Dict. des Fiefs," t. 1, au mot "emphytéose," p. 260, No 76; "L'emphytéose est communément regardée comme *une aliénation;* mais elle ne transfère que la propriété utile au preneur, tandis que la propriété directe demeure au bailleur.

Argou, t. 2, ch. 28, p. 300: "Le bail emphytéotique, ou l'emphytéose, à le prendre dans son véritable sens, est un contrat par lequel le propriétaire d'un héritage ou d'une maison en cède à un autre *la propriété utile* à la charge que l'emphytéote y fera des améliorations, et paiera, outre cela, une redevance annuelle

(1) *Ferrière*, G, C. t. 1, sur l'art, 78, p.p. 1163—4.

au bailleur en reconnaissance de la Seigneurie directe qu'il s'est reservée." Cette rente ou redevance est appellée *pension*, ou *canon* emphytéotique.

Troplong, dans son traité du *louage*, a appellé "domaine imparfait," le domaine que transfère l'emphytéose, soit qu'elle soit perpétuelle, soit qu'elle soit temporaire. C'est de même qu'il a aussi, au même endroit, désigné le domaine que transfère le bail à cens. Il a appliqué la même dénomination à l'un et à l'autre; et c'était suivant lui, ce qui constituait une *ressemblance capitale* entre ces deux contrats. Dans un autre endroit du même ouvrage, t. 1, p. 168, il a cru devoir désigner sous un autre nom le *domaine* de l'emphytéote. Il l'a qualifié de *quasi domaine*, empruntant cette expression à *Cujas*.

Cette dernière dénomination, si elle était exacte, devait-elle, dans les idées de *Troplong*, modifier le caractère et les effets que le contrat emphytéotique a eus jusqu'à présent; ou bien, n'a-t-il voulu que substituer une expression à une autre comme étant une expression plus convenable et plus propre pour désigner le *domaine* de l'emphytéote, sans néanmoins que cette nouvelle dénomination dût exercer aucune influence sur le caractère et la nature de ce *domaine*, tels que reconnus dans le droit, surtout dans l'ancien droit français. C'est ce qu'il est bien difficile, même impossible de comprendre, après avoir lu la longue dissertation dans laquelle il s'est engagé à cet égard, dissertation tout à fait métaphysique, et assurément plus subtile qu'utile. Il cherche à combattre l'opinion des auteurs qui avaient reconnu la distinction du domaine de propriété en "domaine direct" et en "domaine utile" et qui l'avaient appliquée à l'emphytéose. Il combat ainsi l'opinion non seulement de ceux qui attribuaient à l'emphytéose à temps l'effet d'opérer la translation du *domaine utile* en la personne du preneur, mais encore de ceux qui n'attribuaient cet effet qu'à l'emphytéose à perpétuité, entre autres, l'opinion de *Dumoulin* qui était du nombre de ces derniers, et de qui *Troplong* a cru devoir dire à cette occasion, p. 175: "On retrouve ici l'inexpérience indocile qui signale trop souvent les excursions de *Dumoulin* dans le domaine du droit Romain." Remarquons néanmoins que dans le cours de sa dissertation, et sans doute pour mieux faire goûter son opinion, du moins au point de vue de la nouvelle législation *française*, *Troplong* a été forcé de reconnaître que, dans l'ancien droit, l'emphytéose avait d'autres éléments que ceux qu'il cherche à lui attribuer: "Mais nous" dit-il "qui cherchons précisément à dégager l'emphytéose *des éléments qui l'absorbaient dans l'ancien régime*, nous qui voulons la retrouver dans son état normal, nous ne saurions attribuer à l'emphytéote *les droits de propriété dont le bail à cens investissait* le vassal," p. 181. Cependant à quelques pages de là, il lui avait attribué ces mêmes droits.

Ce n'est donc qu'après l'avoir, dans sa pensée, dégagée de ces éléments qu'il admettait que l'emphytéose avait dans l'ancien droit, que *Troplong* en vient à la conclusion que le domaine transféré par l'emphytéose n'est qu'un *quasi domaine*; mais, pour conclure ainsi, il est obligé de dire "que le plus sûr serait de ne pas parler de *domaine utile* en cette matière." p. 182, (1.) "Car en droit Romain," avait-il d'abord observé, "le domaine utile est reconnu," p. 177.

(1) Cependant il en avait parlé dans son traité des privilèges et hypothèques, "t. 2, No. 405.

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Est-il bien vrai que cette distinction entre *le domaine direct et le domaine utile*, qui a été admise dans l'ancien droit Français, n'est pas née du droit Romain? Tout, au contraire, porte à croire qu'elle a été empruntée aux principes de ce droit dans lequel, en outre, il semble que c'est le contrat même de l'emphytéose, qui l'a fait naître. En effet voici ce que nous lisons dans le premier tôme des "Dissertations féodales" de *Henrion de Pansey*, au mot "cens," § 6; "On inventa du temps des Empereurs un *contrat particulier* qui fut appelé emphytéose." On trouva qu'il était juste de donner une action au preneur pour *revendiquer* l'héritage de son chef et pour exercer tous les droits concernant cet héritage. Cette action fut appelée utile, *actio utilis*, c'est-à-dire une action fondée sur une considération d'équité; mais l'action qui appartenait au bailleur ou véritable propriétaire, fut appelée directe.....

"Or la distinction que les Romains avaient faite entre l'action utile et l'action directe, à l'égard des héritages baillés à perpétuité sous une redevance annuelle, produisit la distinction entre le domaine direct et le domaine utile, et l'on ne disait plus que le preneur avait l'action utile, mais qu'il avait le domaine ou la propriété utile. C'est ce qui a été fort bien expliqué par *Coquille* sur la coutume de Nivernois; et quoique ce soit une chose très simple, elle a pourtant embarrassé plusieurs auteurs, lesquels, ne voyant pas cette origine, ont dit que la distinction de la propriété ou de la Seigneurie directe, d'avec la propriété utile, est une invention des anciens Français, ou de quelqu'un des peuples qui démembrèrent l'empire Romain.

"Voila ce qui regarde l'origine de cette division de la Seigneurie privée, en *directe et utile*.

Cette opinion est adoptée par *Merlin*, dans ses "Questions de droit," t. 6, au mot "emphytéose," §§. 5, p. 275, Ed. in 8vo de 1829, qui dit que *Henrion de Pansey* "établit parfaitement que si la distinction de la propriété en domaine direct et en domaine utile n'est pas écrite dans les lois Romaines, c'est du moins de ces lois qu'elle tire son origine."

Il n'y a rien de plus connu dans l'ancien droit Français que cette division de la propriété en domaine direct et en domaine utile, c'est l'un des principaux éléments de nos lois qui règlent et affectent la transmission de la propriété des héritages, que cet élément ait été créé par le droit Romain, ou qu'il ne l'ait été en France, que par le système féodal.

Et toujours est-il vrai que sous ce dernier système, cet élément affectait tellement l'emphytéose en France, que *Troplong* lui même, dans un passage déjà cité, n'a pas pu s'empêcher de le reconnaître, lorsqu'il a dit, p. 166. "Il faut interpréter ce contrat avec les modifications que les mœurs féodales avaient introduites, et qui le rapprochaient singulièrement du bail à cens." Encore *Troplong* est-il obligé d'admettre la translation d'un *quasi domaine*. Mais quelle serait la nature du droit dont cette expression présente l'idée? Ne serait-ce pas un droit réel, une espèce de propriété par lui-même, une espèce de domaine dans la chose elle-même?

"Domaine imparfait," si l'on veut, suivant *Troplong*, mais qui n'en serait pas moins un domaine aussi réellement transmis au preneur que celui qui l'est par le bail à fief ou à cens, ou à rente foncière.

Troplong n'a-t-il pas, à la page 169 déjà citée, en parlant de la "ressemblance capitale" qu'il reconnaissait à l'emphytéose et au bail à cens dans l'ancien droit, placé sur la même ligne le domaine que transféraient l'un et l'autre de ces deux contrats? "Domaine imparfait," encore une fois il est vrai, nous a-t-il dit; mais c'était toujours le même domaine, selon ce savant auteur. Et s'est-on jamais avisé de dire que le preneur à bail à cens n'était pas propriétaire? Pourquoi ne reconnaîtrait-on pas cette qualité à l'emphytéote, puisque, sous ce rapport, il y a une "ressemblance capitale" entre l'emphytéose et le bail à cens?

Remarquons encore que la définition que *Troplong*, à la page 174, donne de l'emphytéose, comme étant, dit-il, "plus en harmonie avec *les altérations* subies par le droit Romain," s'accorde parfaitement avec l'opinion des auteurs qui attribuaient aux deux emphytéoses la translation du domaine utile.

"L'emphytéose, dit il, n'est pas seulement un contrat qui a pour but l'amélioration des terres stériles, c'est encore une convention par laquelle un propriétaire *concède à perpétuité, ou pour un long temps*, un terrain même productif, à l'effet, par le preneur, d'en jouir moyennnant une modique redevance annuelle, *et de ne pouvoir en être privé par le concédant qu'en cas de non paiement du canon.*

Troplong dit encore, au No. 40, p. 192, que la tacite reconduction n'était pas applicable en matière d'emphytéose, "parce que ce contrat opérait un *démembrement trop grave de la propriété.*" Ce démembrement, s'il l'a appelé quelquefois "*quasi domaine*" d'après *Cujas*, il l'a aussi appelé, comme on l'a déjà vu, "domaine imparfait," mais en même temps semblable à celui opéré par le bail à cens, c'est-à-dire, "le domaine utile" de l'ancien droit français et des meilleurs commentateurs de ce droit.

Mais ce que *Troplong* dit de plus important comme applicable à notre espèce, c'est que le domaine que transfère l'emphytéose et qu'il a lui-même appelé "domaine de propriété," dans une autre partie de ses ouvrages, est le même en emphytéose temporaire qu'en emphytéose perpétuelle, ce domaine, dit-il, "ayant du reste la même étendue, soit que l'emphytéose soit perpétuelle, soit qu'elle soit constituée à tempe." No. 32, p. 182, ce qu'il avait déjà dit sous le même No., p. 177.

Troplong reconnait encore à la page 190, sous No. 38, que l'emphytéote "a l'action possessoire contre les tiers et même contre le véritable propriétaire; que l'action réelle lui appartient aussi. Enfin, dans son traité des "Priviléges et hypothèques," t. 2, No. 405, il reconnait que l'emphytéose à temps, la seule qui existe aujourd'hui en France, est un droit immobilier soumis à l'hypothèque, parce que dit-il, "bien différent du simple bail, cette emphytéose comprend *une aliénation temporaire du domaine utile.*

"L'emphytéose, ajoute-il, est soumise aux contributions publiques, et cet impôt profite pour la jouissance des droits électoraux."

C'est aussi ce qu'enseigne *Duvergier*, du *louage*, t. 3, No. 170: "l'emphytéote est tenu au paiement des contributions, même de la contribution foncière, par ce qu'elles sont une charge *inséparable de la propriété utile dont il jouit*, No. 171. "Par une juste réciprocité, c'est à lui, *et à lui seul*, qu'elles doivent être comptées pour la formation du cens électoral." Le même auteur avait déjà dit, au No. 159: "l'emphytéote jouit *en qualité de propriétaire.* Il peut aliéner et

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hypothéquer l'héritage, sauf les droits du bailleur à l'expiration du terme fixé, ou au moment de la résolution du contrat." No. 160: "L'emphytéote est recevable à exercer l'action possessoire contre les tiers, et même contre le propriétaire, si celui-ci le trouble dans sa jouissance." No. 161: "Il profite de l'alluvion, sans être obligé d'augmenter la redevance, alors même que le bail a déterminé l'étendue du fonds."

Il a déjà été remarqué que la nouvelle législation française a aboli l'emphytéose perpétuelle, mais qu'elle a laissé subsister l'emphytéose temporaire de l'ancien droit. Ainsi, la jurisprudence des arrêts des tribunaux en France, et l'opinion des auteurs qui ont écrit sur le nouveau droit, doivent être d'un grand poids sur la question de savoir si l'emphytéose à temps est translative de propriété.

Dans l'édition in 8o. de 1829, des "Questions de droit de Merlin," t. 6, au mot "emphytéose," § 5, nous trouvons la question traitée de la manière la plus claire et la plus précise, et résolue, à l'aide des principes tant de l'ancienne que de la nouvelle législation, en faveur de la translation de la propriété en la personne de l'emphytéote. Cet article de *Merlin* s'applique si bien à l'espèce actuelle que je crois devoir en donner une analyse, qui, quoique nécessairement un peu longue, n'en sera pas moins trouvée très utile.

A la page 275, après avoir fait remarquer que dans le droit Romain, l'emphytéote perpétuel avait l'action réelle, même contre son bailleur, et qu'il avait aussi le droit d'hypothéquer, *Merlin* dit: "assurément l'emphytéote n'aurait pas pu ni revendiquer ni hypothéquer les fonds qu'ils possédait à ce titre, s'ils ne lui eussent pas appartenu; car, dans le droit Romain, comme parmi nous, l'action en revendication ne pourrait être exercée que par le propriétaire, et dans le droit Romain, comme parmi nous, il n'y avait que le propriétaire d'un immeuble qui pût l'hypothéquer valablement.

Merlin rapporte au long le passage déjà cité en partie de *Henrion de Pansey* sur la division du domaine; puis, à ce sujet, il dit: p. 276, 2e col., *in fine*. "C'est donc une chose bien constante, que, dans l'ancienne jurisprudence, l'emphitéote perpétuel participait à la propriété du fonds emphytéotique, en ce sens qu'il en avait le *domaine utile*, tandis que le bailleur en retenait le domaine direct."

A la page 277, il dit que ce domaine direct entre les mains du bailleur à emphytéose avait "une parfaite similitude avec la seigneurie directe du bailleur à fief ou à cens seigneurial." (C'est ce que *Troplong* a dit lui-même.)

Ensuite *Merlin* cite *Boutaric*, dans son commentaire sur les Institutes de Justinien, liv. 3, tit. 24, § 3; *Pothier*, traité de la *propriété*, No. 3.; *Henrion de Pansey*, à l'article "Lods et ventes" des deux premières éditions du Rép. de jurisprudence, § 11.

Après avoir cité au long la définition que *Pothier* donne du "domaine direct," *Merlin* ajoute: "Le domaine direct du bailleur à emphytéose n'était donc pas non plus autre chose que le domaine *ancien*, *originaire* et *primitif* (expressions de Pothier) duquel l'emphytéose avait détaché le *domaine utile*; il n'était donc pas non plus autre chose qu'un *domaine de supériorité*, c'est-à-dire le droit qu'avait le bailleur de se faire *reconnaître propriétaire ancien, originaire et pri-*

mitif, et d'exiger certains devoirs et redevances récognitifs de son ancienne qualité, ce n'était donc pas dans le bailleur que résidait ce que Pothier appelle au même endroit le *domaine de propriété*, et qu'il dit lui-même consister dans le *domaine qui renferme tout ce qu'il y a d'utile dans un héritage, comme d'en percevoir les fruits, d'en disposer à son gré.*

Aprés avoir traité ainsi la question relativement à l'emphytéote à perpétuité, *Merlin*, à la page 277, pose la question suivante:

"L'ancienne jurisprudence plaçait-elle, à cet égard, l'emphytéote temporaire sur la même ligne que l'emphytéote perpétuel?

Il répond "oui, car ce que décidait pour celui-ci les lois 1 et 2, D, *Si ager vectigalis vel emphyteuticarius petatur*, la loi 3 du même titre l'étendait expressément à celui-là, *idem est* (disait-elle) *etsi ad tempus conductum sit nec tempus locationis finitum sit.* L'emphytéote temporaire avait donc, tout le temps que durait son bail, la même action réelle, le même droit foncier que l'emphytéote perpétuel, et dès là, il est clair qu'il n'existait, quant à la qualité de propriétaire, de possesseur *animo domini*, aucune différence entre l'emphytéote perpétuel et l'emphytéote temporaire."

P. 278.—Il invoque la définition donnée de l'emphytéose par *Julien* dans son commentaire sur les "Statuts de Provence," t. 1, p. 61. Puis il rappelle le fait que les biens tenus à emphytéose étaient sujets au retrait lignager, et à ce sujet, il cite ce qu'en dit *Pothier*, traité des retraits, No. 28. Il rapporte l'opinion de *Hervé* qui avait soutenu que l'emphytéose n'était qu'un bail à ferme ou à loyer, ce qu'il traite de *Paradoxe* comme il le prouve bientôt. Alors Merlin ajoute: "Tenons donc pour bien constant que, dans l'ancienne jurisprudence, l'emphytéote était *réellement propriétaire*; qu'il l'était à toujours, (sauf les cas de *commise* réglés par les lois Romaines, par les usages locaux, ou par les conventions des parties) lorsque son titre était perpétuel, et qu'il l'était à temps, lorsque son titre était temporaire.

"Mais remarquons en même temps que, dans l'un et l'autre cas, il n'avait que le domaine utile, et que tant que durait l'emphytéose, le bailleur conservait le domaine direct des fonds concédés à ce titre."

Merlin passe ensuite à la législation intermédiaire de la France, d'abord à la loi du 18, 29 décembre 1790, concernant le rachat des rentes foncières, p. 279.

Le premier article de cette loi déclare rachetables "toutes les rentes foncières perpétuelles, soit en nature, soit en argent, de quelqu'espèce qu'elles soient et quelque soit leur origine."

Cette loi comprenait l'emphytéose perpétuelle, elle portait que le possesseur qui voudra racheter la rente foncière ou emphytéotique, sera tenu, outre le capital de la rente, de racheter les droits casuels *dûs aux mutations*; "Or," dit *Merlin*, "permettre à l'emphytéote perpétuel de racheter la rente fixe et les droits casuels qui forment le prix de sa concession, lui permettre d'éteindre par ce moyen, tous les droits réservés au bailleur par l'emphytéose, c'est assurément reconnaître de la manière la plus positive, comme je l'ai établi dans des conclusions du 25 juin 1813, rapportées dans le rép. de jurisprudence, aux mots "rente seigneuriale," § 2, No. 8, *bis*, que c'est dans les mains de l'emphytéote que réside le *domaine de propriété, la véritable qualité de propriétaire.*

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" Quant à l'emphytéote temporaire, la même disposition, en limitant aux rentes foncières perpétuelles, la faculté de rachat qu'elle accorde, fait évidemment entendre qu'il n'est pas dans son intention d'étendre cette faculté jusqu'à lui; mais ce qui prouve qu'elle ne veut pas pour cela le priver de la qualité de propriétaire à temps qu'il avait dans l'ancienne jurisprudence, c'est la manière dont est conçue la seconde disposition du même article: " Il est défendu à l'avenir, " de créer aucune redevance foncière non remboursable sans préjudice des baux " à rente ou emphytéose et non perpétuels, qui seront exécutés pour toute leur " durée, et pourront être faits à l'avenir pour 99 ans ou au-dessous."

" On voit qu'ici la loi place l'emphytéose *temporaire* sur la même ligne que le bail à rente *non-perpétuel*. Or, on ne s'est jamais avisé d'assimiler le bail à rente non perpétuel à un simple contrat de louage; jamais on ne s'est avisé de contester à un bail à rente non-perpétuel, l'effet de transférer la propriété jusqu'à l'expiration du temps pour lequel il était consenti. Si donc on ne peut pas douter qu'en maintenant le bail à rente non perpétuel, la loi ne lui ait conservé l'effet de transférer le *domaine de propriété* pour tout le temps de sa durée, on ne peut pas douter non plus qu'en maintenant l'emphytéose temporaire, elle ne lui ait conservé le même effet."

Merlin invoque ensuite, pour mieux expliquer la pensée de la loi de 1790, le premier article de la loi du 15 Sept., 16 Oct. 1791:

" Il sera libre soit au preneur, possesseur actuel du fonds *à titre de bail emphytéotique, ou à rente non perpétuel*, soit au bailleur propriétaire de la rente, et *ayant droit à la propriété réversible*, de racheter les droits ci-devant seigneuriaux, fixes ou casuels, dont le dit fonds se trouve chargé, et dont les dits bailleur et preneur sont respectivement tenus, en se conformant, *pour chacun d'eux* aux règles ci-après."

" Ainsi," observe *Merlin*, " pendant la durée du bail emphytéotique non-perpétuel, le bailleur n'est, en sa qualité de propriétaire de la rente, qu'un ayant droit à la propriété reversible du fonds, et dès là, il faut bien que pendant la durée du bail, la propriété actuelle réside dans les mains du preneur."

Merlin cite ensuite un rapport de *Tronchet* sur le projet de cette loi, rapport fait pour servir d'instructions, et dans lequel on remarque le passage suivant: p. 280. " Le preneur, (dans le bail à rente non perpétuel) acquiert une *propriété*: il est reputé *propriétaire pour toute la durée du bail;* et comme tel, il est tenu des charges réelles et annuelles; mais il n'a qu'une propriété résoluble."

" Ce rapport et la loi qu'il a amenée," dit *Merlin*, " sont une preuve legislative, et par conséquent irréfragable, du parfait accord qu'il y a relativement aux droits de l'emphytéote temporaire entre les maximes de l'ancienne jurisprudence, et l'esprit de l'article premier de la loi des 18, 29 décembre 1790."

P. 290, ici *Merlin* énonce et pose le vrai principe qui sert de fondement à toute la doctrine sur cette matière.

" La faculté d'aliéner et d'acquérir à temps," dit-il, " n'est pas moins de droit naturel que la faculté d'aliéner et d'acquérir à perpétuité."

P. 292, Il cite l'arrêt de la cour de cassation du 26 Juin 1822, cité plus haut de *Duvergier*, du *louage*, sous le No. 155. (1)

(1) Dans cet arrêt, il s'agissait d'un bail emphytéotique, du 2 août, 1750.

Voici quelques uns des *considérants* de cet arrêt.

" Attendu que ses effets (l'emphytéose) sont de diviser la propriété du domaine donné à emphytéose, en *deux* parties, l'une formée du *domaine direct*, dont la rente que se retient le bailleur est représentative, l'autre appelé *domaine utile*, qui se compose de la jouissance des fruits qu'il produit.

" Que le preneur possède le *domaine utile* qui lui est transmis par l'effet de ce partage, *comme propriétaire*, pouvant, *pendant la durée du bail*, en disposer par vente, donation, échange ou autrement, avec la charge toutefois, des droits du bailleur, pouvant, *pendant le même temps*, exercer l'action *in rem* pour se faire maintenir contre tous ceux qui l'y troublent et contre le bailleur lui-même."

" Que ces dispositions des lois Romaines ont été admises en France, tant en pays de droit écrit qu'en pays coutumier ; et que le code civil qui n'a pas traité du bail emphytéotique, ne les a ni changées ni modifiées."

Troplong lui-même, aux notes de la page 180 du tome 1er de son traité du *louage*, remarque deux autres arrêts de la cour de cassation, qui ont jugé dans le même sens et consacré les mêmes principes, ils sont du 1er avril 1840.

Dalloz, Juris-gen. du Royaume" année 1831, rapporte un arrêt du 10 mai de la même année, rendu par la cour royale de Paris, qui a jugé la même chose. (1)

2me. Partie, p, 121 : " Considérant qu'avant la promulgation du code civil, la jurisprudence de toutes les cours avait admis, comme principe constant, que la concession à titre d'emphytéose à longues années, conférait au preneur une *propriété immobilière*, susceptible d'hypothèque. . . . .

" L'emphytéose qui ne peut être assimilée à un contrat de louage, et qui confère tout à la fois une jouissance usufruitière, à longues années, et une copropriété entre le bailleur et le preneur ; que la propriété des biens donnés à emphytéose est *divisée en deux parties*, dont l'une est transmise au preneur, avec faculté, pendant la durée de son droit, d'en disposer par vente, donation et affectation hypothécaire, à la charge des droits du bailleur."

M. de *Vatimesnil*, qui suivant *Troplong*, était " jadis l'une des lumières de la cour de cassation." (2), avait fait pour les appelants, dans l'espèce qui vient d'être rapportée, un mémoire dont *Dalloz* publie un extrait en tête de l'arrêt de 1831, et auquel *Troplong* faisait allusion dans son éloge de Mr *Vatimesnil*, après avoir lui-même cité cet arrêt de 1831, pour prouver que l'emphytéote peut *hypothéquer* son droit. " M. *Vatimesnil*, avait fait dans cette cause," disait *Troplong*, " un mémoire qui mettait cette vérité dans tout son jour."

Or quels étaient les principes qui servaient de base aux raisonnements de M. *Vatimesnil ?* Les voici : " Le droit que le contrat d'emphytéose transférait au preneur, était réel et immobilier.

" La législation intermédiaire a aboli l'emphytéose perpétuelle, mais elle a maintenu l'emphytéose temporaire, et conservé *tous les principes qui la régissaient*. . . " Si je puis aliéner à perpétuité, je dois pouvoir le faire pour un temps.

" L'emphytéote est soumis aux contributions publiques. . . Il profite de cet impôt pour l'exercice des droits électoraux."

(1) Il s'agissait d'un bail emphytéotique du 22 avril 1828.

(2) *Troplong*, " *priviléges et hypothèques, t. 2, p. 33, aux notes.*

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Fœlix et *Henrion*, dans leur traité des "rentes foncières," p.p. 24 et 25, reconnaissent qu'avant la loi de 1790, "l'emphytéote à temps avait, conformément au droit Romain, acquis la *copropriété* du fonds pour le temps de la durée du contrat;" Mais ils soutiennent que, sous la législation intermédiaire de la France, cette propriété a retourné au propriétaire originaire." Cependant, aux notes, ils remarquent que la cour de cassation avait jugé le contraire par l'arrêt déjà cité du 26 juin 1822.

Toutes ces autorités font voir que, si sous la nouvelle législation de la France, il s'est élevé des doutes dans l'esprit de quelques écrivains, sur les effets de l'emphytéose temporaire relativement à la translation de la propriété, il ne pouvait pas y en avoir dans l'ancien droit où l'emphytéose à temps était un droit réel, immobilier, translatif de propriété, en un mot une vraie copropriété. Aussi *Loisel*, dans ses "Institutes coutumières," t. I, liv. 2, tit. § 2, p. 262, dit-il: "Immeubles sont... Baux d'héritages à bail emphytéose," *Nouv. Denisart*, t. 7, au mot emphytéose," p. 539; "Le fond donné à bail emphytéotique est susceptible de la qualité de *propre*, lorsqu'il a fait souche dans la famille du preneur; il est partagé comme propre dans les successions, et s'il est vendu à des étrangers, il est soumis au retrait lignager."

Si les droits de l'emphytéote n'étaient pas *immeubles*, s'ils ne lui conféraient pas la propriété de la chose baillée, pourraient-ils avoir la qualité de propre réel et être sujet au retrait lignager? L'article 149 de la coutume de Paris qui declare en termes exprès que "Baux à 99 ans, ou longues années, sont sujets à retrait," me parait être décisif et doit ôter à l'opinion ci-dessus citée de Dumoulin sur laquelle *Troplong* s'est appuyé en partie, la force qu'elle pouvait avoir en apparence lorsque *Dumoulin* écrivait. Il écrivait vers 1540, sous l'ancienne coutume de Paris qui n'avait pas de disposition semblable à cet article 149. C'est à la réformation de la coutume en 1680 que cet article a été ajouté.

En soumettant au retrait le bail emphytéotique temporaire, la nouvelle coutume a reconnu sa qualité immobilière, elle a reconnu qu'il était translatif du domaine utile, comme l'était le bail à fief, à cens ou à rente foncière, c'est la conséquence de cet article 149. Et l'on doit croire que, si cette disposition expresse eût fait partie de l'ancienne coutume de Paris, *Dumoulin* n'aurait pas pu faire autrement que d'admettre cette conséquence, et d'attribuer à l'emphytéose temporaire l'effet d'opérer, en faveur du preneur, la translation du *domaine utile*, comme il l'avait attribué à l'emphytéose perpétuelle, et alors *Troplong*, n'ayant plus son appui, n'aurait peut-être pas cherché à affaiblir, comme il l'a fait dans son traité du *louage*, la première opinion qu'il avait émise dans son traité des *privilèges et hypothèques* en faveur de la translation du domaine utile comme effet de l'emphytéose temporaire.

Au reste, l'article 149 de la nouvelle coutume n'a fait que consacrer un principe qui avait pris racine en France à la suite du droit Romain, à savoir la translation et l'aliénation d'une propriété immobilière dans le contrat d'emphytéose temporaire.

Le caractère emphytéotique des baux qui excèdent neuf années, et qui comme tels sont dans l'ancien droit français, translatifs du domaine utile, est virtuelle-

ment reconnu par notre ordonnance des bureaux d'enrégistrement, dans cette disposition qui porte que "les dispositions de cette ordonnance, et aucune chose y contenue, ne s'étendront point à des baux pour une période moindre que neuf années."

L'ordonnance frappe donc les baux qui excèdent neuf années, et si elle les frappe ainsi, c'est parcequ'elle reconnait qu'ils ont le caractère, non d'un simple bail à loyer, mais bien celui d'un bail emphytéotique qui emporte l'aliénation, et cela sans distinguer entre l'emphytéose perpétuelle et l'emphytéose temporaire.

La propriété ainsi acquise par l'appelant, étant située dans les limites de la cité de Montréal, doit contribuer aux charges municipales, à moins qu'elle n'en ait été exemptée par quelque loi spéciale; c'est ce que prétend l'appelant, et il invoque à l'appui de cette prétention, le statut de 1847, chap. 17, mais toujours en partant du principe erroné que les baux en vertu desquels il jouit des terrains, ne sont que de simples baux à loyer. Cette erreur ayant été démontrée, la prétention d'une exemption acquise en vertu du statut tombe d'elle-même. Cependant je n'ai pas d'objection de l'examiner un peu en détail, étant bien facile de faire voir, que l'appelant dans la position où il se trouve, n'est nullement fondé dans sa prétention.

Avant la promulgation du statut de 1847, les propriétés appartenant à Sa Majesté dans le Bas-Canada, étaient imposables sous l'autorité de la loi des chemins, 36, Geo. 3, chap. 9. Mais celles qu'elle possédait dans le Haut-Canada, ne l'étaient pas. L'abolition de cette différence entre les deux législations fut l'objet du statut de 1847. Le préambule en explique le motif et le but: "Attendu que par les lois de cette partie de la province, ci-devant la province du Haut-Canada, toutes les propriétés possédées par la couronne, ou en son nom (*in trust*) sont exemptées de taxes et de cotisations locales, et qu'il est expédient que les dites propriétés soient aussi pareillement exemptées dans cette partie de la province, ci-devant le Bas-Canada." La partie de l'acte de la 36e Geo. 3, qui créait l'imposition est d'abord abrogée; puis il est dit: à l'avenir toutes telles dites propriétés comme susdit, dans quelque partie de la province qu'elles soient situées, seront exemptées de toutes taxes et impositions locales, etc., etc."

L'exemption pour le Haut-Canada, se trouve dans un statut de 1819, chap. 7, dont la deuxième section, après avoir donné l'énumération des propriétés imposables, contient le *proviso* suivant: "Nothing herein contained shall extend, or be construed to extend, to any property, goods or effects, matters or things, herein mentioned or enumerated, which shall belong to or be in the actual possession or occupation of his Majesty, his heirs or successors, except the crown and clergy reserves actually *leased* to individuals, which shall be liable to the same rates and assessments as other lands herein before mentioned," et par un statut subséquent, celui de 1825, chap. 7, qui permet de faire vendre les terrains imposables, faute de paiement des cotisations, il est dit, sec. 15, "Nothing in this act contained shall extend to authorize the sale of any greater or other interest in the reserved lands of the crown or clergy, *held in lease*, for payment of arrears of assessments, than is possessed by such *lessee* or his *assignee*."

Ainsi les propriétés tenues à bail (*leased*) de la Couronne dans le Haut-Canada,

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étaient et sont encore imposables, sans distinction du plus ou moins de temps que doit durer le bail (*lease*). Ce genre de propriété profite au tenancier pour les droits électoraux; si l'appelant aspire aux honneurs de la représentation, soit dans le conseil de ville, soit dans la législature, la propriété en question comptera pour former sa qualification foncière, s'il veut exercer la franchise élective, la même propriété lui comptera encore pour former sa qualité d'électeur comme propriétaire, et non pas comme locataire. Il ne pourrait pas être admis à voter en cette dernière qualité à raison de cette propriété.

A tout évènement, on ne saurait disconvenir qu'il a du moins acquis la jouissance et *l'usufruit* des terrains en question, *pour son propre usage et bénéfice.* A ce titre encore, il a seul le droit de voter à l'élection d'un député à l'assemblée législative (acte de 1849, chap. 27, s. 38).

Enfin ce qu'il possède, il le possède pour lui-même, pour son profit et non celui de la couronne (*in trust*). Ainsi il n'y a pas lieu à l'exemption des charges municipales; cette exemption, s'il y avait une taxe sur le revenu, ne pourrait tout au plus porter que sur le canon ou rente emphytéotique que la couronne a stipulé, comme représentant le domaine direct ou de supériorité qu'elle a seulement retenu.

Sur les autres questions moins importantes, qui ont été plaidées à l'audience, qu'il me suffise de dire que je partage l'opinion du juge qui a décidé en première instance.

Judgment of Court below confirmed.

Henry Stuart, for Appellant.
Joseph Papin, for Respondents.
[S. B. & F. W. T.]

IN APPEAL

FROM THE SUPERIOR COURT, DISTRICT OF MONTREAL.

MONTREAL, 3rd MAY, 1859.

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

MOLSON ET AL., *(Plaintiffs in the Court below.)*
Appellants.

AND

BURROUGHS, *(Defendant in the Court below.)*
Respondent.

HELD,—1st. That the sheriff may, on motion of the plaintiffs, amend his return to a writ of *saisie gagerie*, so as to correct an error or supply an omission, caused through his inadvertence.
2nd. That a motion for permission to amend such return may be properly made by the sheriff.

This action was commenced by process of *saisie gagerie par droit de suite*, and was founded upon a notarial lease. By the terms of the writ, the sheriff was commanded to seize in the hands of the defendant, all the goods, furniture, chattels and effects which had been removed within the last eight days from the

premises leased, to certain other premises, which are secondly described in the writ.

The Sheriff returned that he had, by the ministry of James McMahon, a bailiff of the Superior Court, attached the goods and effects mentioned in the *procès verbal* annexed to the writ and produced by the sheriff as part of his return. The *procès verbal* sets forth that the bailiff seized the goods and chattels therein enumerated in the possession of the defendant; but it is not stated either in the sheriff's return, or in the *procès verbal*, in what premises the seizure was made.

On the 24th June, 1857, the defendant fyled an *exception à la forme*, founded in part upon the insufficiency of the Sheriff's return, inasmuch as it did not appear by the return that any goods or effects were seized on the premises indicated as those to which defendant had removed his goods.

On the 18th of September following, the Sheriff moved the Court, composed of Day, Smith, and Mondelet, Justices, for permission to amend his return, by stating therein *where* the effects were seized. This motion was rejected upon the ground that the Sheriff, not being a party in the case, had no right to move in the matter, the court intimating that the proper course was for the plaintiffs to move.

The plaintiffs, on the 24th of March, 1858, made a motion, supported by the affidavit of the bailiff who made the seizure, for permission to the Sheriff to amend his return, so as to shew in what premises the seizure was made. This motion was dismissed by Mr. Justice Mondelet, on the 30th of April, 1858. The following term the plaintiffs moved to revise this judgment, and their motion to revise was rejected by Mr. Justice Smith, on the 29th of May, 1858, on the ground that he would not revise the judgment of his brother MONDELET, although he had no doubt but that the motion ought to have been granted. From these two judgments the plaintiffs appealed, and on the 3rd of May, 1859, the Court of Appeals reversed the judgments of the court below, and granted the amendment sought by the plaintiffs' motion. The court at the same time expressed a decided opinion that the Sheriff had a right to move to correct his return, and that his motion made in this cause for permission to do so ought to have been granted. The reason was manifest: for instance, the plaintiff might have an adverse interest to the Sheriff or he might collude with the defendant to defraud the Sheriff.

The judgment of the court is recorded as follows:—

"La Cour après avoir entendu les parties par leurs avocats sur le mérite de cet appel, examiné le dossier de la procédure en Cour de première instance, les griefs d'appel, et les réponses à iceux et sur le tout murement délibéré:—Considérant que la motion des Demandeurs, faite le vingt-quatre mars mil huit cent cinquante huit, à l'effet de permettre au Shérif de ce district d'amender son rapport en la manière y mentionnée, procédait valablement, et qu'elle aurait du être accordée, les parties ne devant pas, d'un côté, souffrir, ni de l'autre profiter d'une omission ou d'une erreur commise par inadvertence par le dit Shérif, que par conséquent, dans le jugement de la Cour Supérieure siégant à Montréal du trente avril mil huit cent cinquante huit qui rejette la dite motion, il y a mal

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jugé, infirme le susdit jugement, avec dépens contre l'intimé sur le présent appel et cette Cour procédant à rendre le jugement que la dite Cour Supérieure aurait du rendre, accorde la dite motion, et par suite, met au néant le second jugement dont il y a également appel, savoir le jugement de la dite Cour Supérieure de vingt-neuf mai mil huit cent cinquante huit qui rejette la motion faite par les Demandeurs le dix-sept du même mois, pour faire reviser le susdit jugement du trente avril mil huit cent cinquante huit, laquelle dite dernière motion sera, vû le présent jugement donnant aux demandeurs le profit de la motion de vingt quatre mars mil huit cent cinquante huit, regardée comme non-avenue, et condamne l'intimé aux dépens sur les dites deux motions en la dite Cour Supérieure; et il est ordonné que le dossier soit remis à la dite Cour Supérieure siégeant à Montréal.

Dorman for appellants. Judgment reversed.

Cross & Bancroft for Respondent.

(S. W. D.)

IN APPEAL

FROM THE SUPERIOR COURT, DISTRICT OF MONTREAL.

MONTREAL, 4th MAY, 1859.

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

ARCHAMBEAULT, *(Plaintiff en garantie in the Court below.)*
Appellant.

AND

BUSBY, *(Defendant en garantie in the Court below.)*
Respondent.

PEREMPTION SUSPENDED.

Held,—That a judgment discharging an inscription for hearing on the merits in an action *en garantie*, on the ground that the inscription was "premature," (the original action, "not having been heard and adjudged") has the effect of suspending such action *en garantie* and of preventing *péremption d'instance*.

This was an Appeal from a judgment of the Superior Court, rendered at Montreal on the 23rd of September 1856, declaring the *instance* in the case pending in the Court below *périe* for want of proceedings during 3 years.

The action in the Court below was one *en garantie*, instituted by the Appellant against the Respondent and several other parties. The Defendants pleaded to the action, denying the Plaintiff's right to sue them *en garantie*, and the case was urged on to final hearing by the Defendants. At the argument the Court expressed a doubt as to the power of the parties to press for judgment so long as the original action was undecided and subsequently discharged the *délibéré*, rendering the following judgment on the 15th of December 1852:—"The Court,**** considering that the inscription of the said cause is premature, inasmuch as Judgment cannot be rendered on the merits of Plaintiff's demand *en garantie* until the cause in his declaration, wherein he is Plaintiff, and Michel

Frappier, in his said declaration mentioned, is Defendant, hath been heard and adjudged, doth discharge the said cause from *délibéré*."

No proceeding being had in the cause, during the succeeding 3 years, the Respondent moved and obtained the judgment *en péremption d'instance* which gave rise to the present appeal.

The Court of Appeals considered the *instance* suspended by the judgment of the 15th of December 1852, and reversed the judgment of *péremption*, in the following words:—"La Cour**** considérant que tant que le jugement interlocutoire du quinze décembre mil huit cent cinquante deux restait en pleine vigueur, l'instance sur l'action en garantie était suspendue par ordre de la Cour, et non par le fait de l'Appelant qui avait mis sa cause en état d'être jugé; que pendant cette suspension, il ne pouvait y avoir lieu à la péremption d'instance; considérant, par conséquent, qu'en accordant le profit de la motion faite par le dit Thomas J. G. Busby, l'un des Défendeurs, à l'effet de faire déclarer périe l'instance sur l'action en garantie, et débouter le Demandeur de sa dite action, et en déclarant en effet *périe* la dite instance et en déboutant le dit Demandeur de sa dite action, le jugement dont est appel a mal jugé, infirme le susdit jugement, savoir le jugement rendu le vingt-trois septembre mil huit cent cinquante-six, par la Cour Supérieure siégeant à Montréal, avec dépens sur le présent appel contre le dit Thomas J. G. Busby; et cette Cour procédant à rendre le jugement que la dite Cour Supérieure aurait dû rendre rejette la susdite motion avec dépens, et ordonne que le dossier soit remis à la dite Cour Supérieure siégeant à Montréal."

Judgment of the Court below reversed.

Loranger, Pominville & Loranger, for Appellant.

M. Morison, for Respondent.

(S. B.)

IN APPEAL

FROM THE SUPERIOR COURT, DISTRICT OF MONTREAL.

MONTREAL, 4TH MAY, 1859.

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

No. 82.

LEVERSON ET AL., *(Plaintiffs in the Court below.)*
Appellants.

AND

BOSTON, *(Mis en cause in the Court below.)*
Respondent.

Held,—1. That proof of the value of goods, ordered to be restored by a *gardien*, under a Rule for *contrainte par corps*, may be established by the verbal admission of the Plaintiff, as to such value made at the time of the seizure of the goods.

2. That a tender to the attorneys *ad litem* of the Plaintiff, who resides beyond the limits of the Province, of the value so proved and of the costs on the Rule, made in a case where the Rule has been dismissed and an Appeal sued out in consequence, but made before service of Appeal, will entitle

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the Respondent to the costs of Appeal, where the judgment in Appeal does not award a larger amount than that tendered.

3. That on a Rule such as the one in question, where the Plaintiff resides beyond the limits of the Province, the Court will order the *gardien* to be relieved from the *contrainte*, on depositing the established value of the goods in the hands of the Prothonotary.

This was an Appeal from the judgment of the Superior Court reported at p. 97 of the 3rd vol. of the Jurist. Before the service of the writ of Appeal, the Respondent tendered to the Attorneys *ad litem* in the Court below of the Appellants the sum of £50 alluded to in the Report referred to, together with £5 for the costs of the Rule, declaring his willingness to pay any further amount at which the costs might be taxed, and in the Respondent's answers to the reasons of Appeal, he specially set up these facts, and declared that he desisted from the judgment of the Court below, but prayed for costs in the Court of Appeals against the Appellants.

The proof of the value of the goods being £50 was established by the verbal admission made by one of the Plaintiffs at the time of the seizure of the goods, and it was contended by the Appellants that such an admission could not under our law be proved by parol evidence, and that under the circumstances under which it was made, it could not amount to proof of the fact which it was incumbent on the Respondent to establish, and consequently that the Appellants were entitled to have the Rule declared absolute, purely and simply.

The following is the Judgment rendered by the Court of Appeals:

"La Cour*** 1. Considérant que les parties à cet appel ont, en conformité du jugement rendu par cette Cour le troisième jour du mois de Septembre dernier procédé à la preuve de la valeur des effets saisis et non représentés par l'Intimé dont il s'agit, que cette valeur a été prouvée ne pas excéder la somme de cinquante louis, cours actuel, ainsi que le shérif l'avait allégué dans ses réponses par écrit à la demande de contrainte par corps formée contre lui; qu'il n'y a pas eu de mauvaise foi de la part du dit Shérif, que, dans les circonstances, il a fait la seule preuve qu'il fut en son pouvoir de faire, preuve qui aurait pu être contredite ou attaquée par les Demandeurs qui, néanmoins se sont volontairement abstenus de le faire.

2. Considérant que la demande de la contrainte par corps procédait valablement contre le dit Shérif; qu'elle aurait dû être prononcée contre lui, avec l'alternative de s'en libérer en payant aux Demandeurs la dite valeur des susdits effets ainsi prouvée, que par conséquent, dans le jugement qui fait le sujet du présent appel, il y a mal jugé en ce que la demande de la contrainte par corps est rejetée, infirme le susdit jugement, savoir le jugement rendu le vingt-huitième jour d'Octobre dernier, par la Cour Supérieure siégeant à Montréal, et cette Cour procédant à rendre le jugement que la dite Cour Supérieure aurait du rendre, declare bonne et valable la demande de la contrainte par corps formée contre le dit Shérif *mis en cause*, et en conséquence ordonne que le dit John Boston soit contraint par corps, et emprisonné dans la prison commun du district de Montréal à moins que sous huit jours du prononcé du présent jugement, il ne dépose entre les mains des greffiers de la dite Cour Supérieure vû l'absence des Demandeurs de ce pays la sus-dite somme de cinquante louis cours actuel pour leur tenir lieu du prix et valeur des dits effets saisis et non représentés,

comme sus-dit, quoi faisant, sera le dit John Boston bien et valablement déchargé de la dite contrainte par corps, sinon et à faute de ce faire sera la dite contrainte après l'expiration des dits huit jours, exécutoire contre lui jusqu'à ce qu'il ait fait le susdit dépôt, entre les mains des dits greffiers de la dite somme de cinquante louis cours actuel, ou l'ait autrement valablement acquitté de tout avec dépens contre le dit John Boston en Cour Supérieure, mais avec dépens contre les Appelants au profit du dit John Boston sur le présent appel."

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Judgment of Court below reversed.

T. K. Ramsay, for Appellants.
Bethune & Dunkin, for Respondent.
(S. B.)

SUPERIOR COURT.

MONTREAL, 31ST MARCH, 1859.

Coram SMITH J.

No. 741.

Leger, vs. *Jackson, et. al.*

Held,—In the case of a collision between two vessels in the Lachine Canal, where the injured vessel was, in violation of the Rules and Regulations of the Canal, on the wrong side of the Canal, that the owner of the other vessel is not liable in damages in the absence of proof of "any wilful act or negligence" on the part of the crew of the latter.

This was an action for the recovery of £80 cy., for damages alleged to have been suffered by the Plaintiff in consequence of the Defendant's steamer coming into contact with the Plaintiff's barge in the Lachine Canal, through the gross negligence and malice of those in charge of the steamer.

The Defendants pleaded that the collision was the result of pure accident and would not have occurred had the barge of the Plaintiff been on the side of the Canal it was bound to occupy, according to the rules and regulations of the canal.

The following was the Judgment of the Court: considering that the said Plaintiff hath failed to establish the material allegations in his said declarations contained, and that the said Defendants have established, that at the time of the collision referred to in the declaration, and for the recovery of damages arising from which collision, the present action is brought, the barge of the said Plaintiff, was in a position in the Lachine Canal in which she ought not to have been, and in violation of the rules and regulations made and provided for the navigation of the said Lachine Canal, and that at the time of the collision there was blowing a strong wind from the west which forced the boat of the Defendants towards the side of the Canal where the said Barge was then moored, and that the collision was the effect of accident and did not arise from any wilful act, or negligence of the crew in charge of the said steamer at the time, the Court doth dismiss the action of the said Plaintiff with costs."

J. M. Desjardins, for Plaintiff.
Cartier & Berthelot, for Defendants.
(S. B.)

Action dismissed.

MONTREAL, 31st. MARCH, 1859.

Coram BERTHELOT, J.

No. 254.

Delvechio vs. *Joseph.*

ACTION EN GARANTIE SIMPLE.

Held,—1. That an action *en garantie simple* will lie by a Proprietor for damages caused to his Tenant, by a third party by reason of the demolition of a *mitoyen* wall.

2. And this although the Plaintiff *en garantie* may himself be liable for a part of the damages recoverable by said third party.

3. That to maintain the right of action in such case is to facilitate procedure and avoid a circuit of actions.

This was a hearing upon demurrer by the Defendant to the Plaintiff's declaration in an action *en garantie*, by which the Plaintiff seeks to charge the Defendant with damages alleged to have been caused by him to one Gates, the tenant of the Plaintiff, by reason of the demolition of a *mitoyen* wall. For these damages, Gates in April 1858, brought his action against the Plaintiff which is still pending.

The declaration of Gates sets out: That on the 3rd February, 1854 he leased from Delvechio by notarial lease for the term of five years, a certain house in St. Paul street, Montreal, known as the Albion Hotel, with the yard and outbuildings belonging thereto. That he took possession about the 1st May, 1854, and although he had paid his rent and fulfilled his own obligations under the lease, yet that Delvechio had failed to continue him in quiet possession of the premises, and to keep them in a habitable condition, but that he had been disturbed in such possession about the first day of May, 1857; that the outside walls in rear and on both sides, and the roof of said house and of the outbuildings had been removed and taken away, and his property and furniture were thereby exposed to the weather for a period of six months, that he suffered injury to his furniture and in his business as a Hotel-Keeper, for which he had leased the premises, which business was ruined for a year, alleging that these damages were caused "by reason of the state and condition of the said house, "and by the negligence and carelessness of the Defendant, (Delvechio) and by "his servants and agents who failed to use reasonable diligence to have the house kept habitable, &c." He claimed £350 damages.

The present action was instituted in January 1859. The declaration sets out, that the Plaintiff was proprietor of the property above referred to. That there is an addition in the rear of the Hotel which extends some 70 feet, along the line dividing the property from that of the Greenes and the Defendant, (Joseph) and that at the end of the addition along the same line there is a wood shed and stable. The Lease to Gates is then set out; that he took possession 1st May 1854, and had since occupied the property as a Hotel; that about the 1st May 1857, Defendant demolished the *mitoyen* wall, between his and Plaintiff's said property in order to build. That this was the wall of the addition to the Hotel above referred to, and also of the Shed and Stable, and by its demolition the interior of the buildings was exposed for some fifty feet. That the wall was

in good condition at the time it was taken down. That the Defendant did not repair Plaintiff's premises, but left them open for six months, whereby Gates, his tenant, lost the use of his premises, suffered by exposure of his goods and furniture, and also by loss of custom. That Gates, his tenant, had brought his action as above referred to, claiming £350 damages, to which Plaintiff had not yet pleaded, the Plaintiff then alleges, that the damages which were caused or which may have been caused were so caused in great part by the fault and negligence of the Defendant (Joseph) in not closing by a partition the part of the building uncovered, and by leaving them exposed for six months, and for not having restored the buildings of the Plaintiff to the condition in which they were before the wall was taken down. That Delvechio as the Lessor of Gates is liable to him for his damages in the premises, and that Joseph is bound to guarantee Delvechio in the action of Gates and to indemnify him for any condemnation he may suffer in respect to the acts of Joseph.

The Defendant among other pleas pleaded a *défense en droit*, which was by the present Judgment dismissed, the reasons of demurrer sufficiently appear in the remarks of the learned Judge who gave the Judgment,—

Berthelot, J.—La défense en droit a pour but de nier au Demandeur le droit de l'appeler par une action en garantie simple, à le garantir des dommages qu'il pouvoit avoir causés lui Défendeur, au locataire du Demandeur, en démolissant le mur mitoyen qui séparait leurs héritages, et en laissant à découvert le locataire, plus longtemps qu'il n'était nécessaire.

Raisons de la défense :

1o. Parce que le Défendeur n'était pas partie au contrat pour l'infraction duquel le Demandeur est poursuivi.

2o. Parce que le Demandeur n'admet pas que des dommages aient été causés.

3o. Parce que le Demandeur ne prétend pas que tous les dommages ont été causés par Joseph, et qu'il ne dit pas lesquels ont été causés par lui.

4o. Parce que le Demandeur ne se plaint que de la négligence du Défendeur en faisant un acte légal, ce qui ne peut donner lieu à une action en garantie.

5o. Parce que supposant les allégués vrais, il s'ensuivrait deux actions indépendantes l'une de l'autre par Delvechio, et par Gates contre Joseph.

La question peut se réduire à celle-ci. Peut-on être passible d'une action en garantie simple, sans être ou avoir été partie à la convention, ou au contrat qui a donné lieu à la poursuite contre la garantie.

Ou encore la garantie peut-elle être exercée sans le secours d'aucun contrat qui oblige le garant, mais seulement par suite des obligations que la loi lui impose formellement ou tacitement.

Si le Défendeur s'était obligé par quelqu'*acte* à garantir le Demandeur de ce qui fait le sujet de la demande principale, il y aurait moins de difficulté, et il suffirait de faire l'application des principes et de la doctrine maintenus par la Cour d'Appel dans la cause de Gauthier et Darche rapportée au 1er Vol. du Jurist, p. 291.

Mais dans l'espèce actuelle, ce qui fait la difficulté, c'est que s'il y a garantie a exercer par le Demandeur, contre le Défendeur, elle résulte uniquement de la seule force de la loi, qui en donnant au Défendeur, le droit de démolir le mur

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mitoyen, des héritages des parties, a voulu aussi qu'il fut responsable et même garant des dommages, qu'il ferait encourir au locataire du Demandeur par négligence.

La garantie de droit celle qui est établie par la loi, qui est de la nature du contrat, etc., n'a pas besoin dès lors d'être stipulée.

Merlin la définit, " Un acte par lequel le Défendeur au principal, appelle en " cause la personne contre laquelle il a un recours à exercer."

Rodier—" Le garant simple est celui qui est tenu par le droit, ou par con- " vention, de relever et indemniser celui qui est recherché par action person- " nelle."

Roger Collard—" Le garant n'est tenu d'assister le garanti que lorsque celui- " ci n'est pas en état de se procurer justice par lui-même."

Ce serait bien le cas dans l'espèce actuelle puisqu'il n'y a que le Défendeur en garantie qui puisse bien expliquer ce qui a été fait.

Ferrière—Grand Coutume, Article 203. Il y est dit que celui qui fait la démolition du mur mitoyen pour son utilité seule, est obligé de garantir son voisin des dommages.

Fournel—Du voisinage, vol. 2. De la reconstruction du mur mitoyen, page 323. Après avoir parlé de ce que les maçons sont tenus de faire aux termes de l'article 203 de la coutume avant de procéder à la démolition d'un mur mitoyen et de l'inconvénient qui pourrait résulter de l'insolvabilité des maçons s'ils étaient seuls responsables. Il ajoute. C'est pourquoi les propriétaires qui font faire les ouvrages doivent être *garants* envers leurs voisins, des dépens, dommages et intérêts causés par les démolitions, percements, et réédifications faits au mur mitoyen.

Si les propriétaires qui bâtissent sont garants envers leurs voisins des dommages qui leur sont causés par la démolition du mur,—pourquoi ne le seraient-ils pas aussi de ceux causés à leurs locataires. Je ne vois pas qu'il y ait raison de faire une différence. L'article de la Coutume a dérogé au droit commun en permettant à celui qui veut bâtir de forcer son voisin à souffrir la démolition.

Il y a pour ainsi dire suspension du droit de jouissance de la propriété au profit du voisin. Et il ne serait pas tenu de garantir le Demandeur de tous les dommages qu'il peut lui avoir occasionnés ? Ce serait une grande injustice.

Le Demandeur ne peut bien se défendre de l'action intentée contre lui; qu'en ayant en cause pour l'aider, celui qui a causé les dommages, et qui a dirigé les travaux qui y ont donné lieu. L'on pourrait même dire qu'il est de l'intérêt du garant de connaître ce que l'on prouvera contre le garanti sur l'action principale, puisqu'il doit être tenu au moins pour une partie des dommages réclamés, ne fut-ce que par action ordinaire, en recours d'indemnité.

La procédure sera facilitée en maintenant la demande, et en évitant le circuit d'action qu'il faudrait faire autrement.

La preuve qui sera faite démontrera quelle portion des dommages doit être supportée par M. Delvechio, et quelle portion par M. Joseph.

Défense en droit déboutée.

Leblanc & Cassidy, for Plaintiff *en garantie*.
Cross & Bancroft for Defendant *en garantie*.
(H. B.)

MONTREAL, 30TH APRIL, 1859.

Coram BERTHELOT, ASST. J.

No. 2335.

Fawcett et al. v. *Thompson et al.*

Held,—That an action *en revendication* of stolen goods, although between merchant and merchant, is not susceptible of Trial by Jury.

This was a motion by the Defendants to set aside the inscription for *enquête* by the Plaintiffs, on the ground that the Defendants had by their plea declared their option and choice of a trial by jury. The action was brought to revendicate a large quantity of leather, which the Plaintiffs alledged had been stolen from them, and the plea set up a *bonâ fide* purchase in open market.

Robertson, in support contended, that inasmuch as the parties were merchants, and that the Defendants had by their plea alleged a purchase of the goods in good faith and in open market, they had a right to have that issue of fact tried by a jury, if not under the old law regulating the trial by jury in civil cases, at least under the provisions of the 8th sub-section of the 4th section of the Act 14 & 15 Vic. ch. 89.

Bethune, *contra*, argued, that the nature of the Plaintiffs' demand, and not the issue raised by the Defendants' plea, must determine the question as to whether or not the case was susceptible of trial by jury. Now the Plaintiffs' demand here being one *en revendication*, for the purpose of recovering stolen property, was clearly not a "debt, promise, contract or agreement of a mercantile nature," and was not therefore subject to a trial by jury. As to the provisions of the Act 14 & 15 Vic., they made no change in the requirements of the 25 George 3. chap. 2, s. 9, as far as the nature of the action was concerned; the sub-section relied upon merely impliedly admitting that the suit or action need not necessarily be between merchant and merchant, provided the cause of action be of a mercantile nature. Moreover, the judgment of the Court of Appeals in the case of Davidson et al. v. Moffatt et al., had settled the jurisprudence on the point in controversy.*

The Court was with the Plaintiffs and the motion was rejected.

Motion rejected.

Bethune & Dunkin, for Plaintiffs.

A. & W. Robertson, for Defendants.

(S. B.)

* The case here referred to was No. 176, Davidson et al. v. Moffat et al., Q. B. Montreal, and was instituted by the Assignees of the Bankrupt estate of Ferguson Millar & Co., to revendicate certain barges from Messrs. Gillespie, Moffatt & Co. The case was tried before a special jury, and a verdict given for the Plaintiffs. The Defendants then moved in arrest of judgment, praying that the Court would "revise and set aside the interlocutory order of this Court, made upon the twenty-ninth day of July last, upon the motion of the said Plaintiffs of the fifteenth day of July last, and also that this Court would revise, and set aside, and declare null and void all other orders, rules and proceedings had and taken in this cause upon and since the said fifteenth day of July, and declare the same to be illegal and null and void, and that this Court would

MONTREAL, 30TH APRIL, 1859.

Coram MONDELET, (C.) J.

No. 1079.

The Mayor, Aldermen and Citizens of the City of Montreal, Appellants.
and Wood, Respondent.

Held,—That the 14 & 15 Vic., ch. 128, did not confer on the Corporation of the City of Montreal power to impose a duty on the Agents in this City of Foreign Insurance Companies doing business therein, and consequently that any Bye-Law affecting to impose such duty is null and void.

This was an Appeal from a judgment of the Recorder of the City of Montreal, rendered on the 6th day of May, 1858, dismissing a summons sued out by the Appellants, to recover from the Respondent, as the "Agent to the Ætna Fire Insurance Company of Hartford, Connecticut, one of the United States of America, a Foreign Insurance Company established elsewhere than in this city, but carrying on the business of insuring against loss by fire in this city, by Agency therein," the sum of £200 cy., as and for 4 year's of duty imposed upon and payable by the said Respondent, "on the business of Agent to the said Insurance Company," according to the provisions of the City Bye-Law, No. 220, passed on the 10th of May, 1852.

The portion of the Bye-Law relied upon is in the following words:—"That an annual duty of fifty pounds currency, shall be and the same is hereby imposed upon, and shall be payable annually, by each and every Fire Insurance Company in this City, and by each and every person or firm of persons, body corporate or association, carrying on the business of insuring against loss by fire in the said city; and by the Agent or Agents of each and every Foreign

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arrest and stay the pronouncing of, and not pronounce judgment on the verdict rendered by the special jury." The Court (composed of Justices ROLLAND, GALE and DAY,) rendered judgment on the 28th of September, 1844, as follows:—"The Court, * * *, considering that this action was not susceptible of a trial by jury, doth grant the said motion, and the Court hereby declaring the Interlocutory order made in this cause, on the twenty-ninth day of July last, illegal, doth set aside the same, and declare null and void all the proceedings had in this cause since the fifteenth day of July last." From this judgment an appeal was sued out, and by the judgment rendered on such appeal on the 10th day of July, 1846, the Court of Appeals (composed of SIR JAMES STUART, Chief Justice, and Justices BOWEN, BEDARD, MONDELET, (D.), and GAIRDNER,) confirmed the judgment of the Court of Queen's Bench. The following was the judgment of the Court of Appeals:—"The Court * * *, considering that the subject matter of the action of the Respondents, in the Court below, was not such as legally to admit of a trial by a jury, and their verdict thereupon, and that the Interlocutory judgment of the Court below, ordering a trial by jury in this cause, and the proceedings thereupon had, and the verdict of the jury in this cause rendered were and are illegal, and considering therefore that in the judgment of the Court below, which hath been appealed from, there is no error; It is by the said Court now here adjudged, that the judgment appealed from, namely the judgment of the Court below in this cause rendered on the twenty-eighth day of September, in the year of our Lord one thousand eight hundred and forty-four, be, and the same is hereby in all things affirmed, with costs to the said Respondents against the said Appellants."

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Fire Insurance Company, or other Insurance Company established elsewhere than in this City, but carrying on the business of insuring against loss by fire in this city, by Agency therein."

The Respondent pleaded six pleas in the Court below, in the fifth of which he in effect alledged that the Bye-Law under which the tax had been imposed did not comprise the Respondent, and that the imposition was illegal and unjust, and that the Bye-Law was utterly void.

The following is the judgment rendered by the Recorder, the Hon. Joseph Bourret:—"The Court * * * , considering that the said Prosecutors had no power or authority by their Act of Incorporation, 14 & 15 Victoria, chap. 128, intituled 'An Act to amend and consolidate the provisions of the Ordinance to Incorporate the City and Town of Montreal, and of a certain Ordinance and certain Acts amending the same, and to vest certain other powers in the Corporation of the said City of Montreal,' to impose a duty or duties on the Defendant as Agent to the Ætna Fire Insurance Company of Hartford, Connecticut, one of the United States of America, a Foreign Insurance Company established elsewhere than in the City of Montreal, doth dismiss the said Prosecution with costs.

The power (if any) to make the Bye-Law is contained in the 58th Section of the Statute referred to, and is in the following words:—"On all Insurance Companies and on all Agents of, or for any Insurance Company or Companies in the said City, and all premises occupied by such Insurance Companies, or by any Agent or Agents of or for any such in the said City."

Per Curiam.—(After stating facts.) It is evident from the wording of the Statute that the Company must be one in the City and not a Foreign Company having an Agency here,—and, to make it clearer, we find the following enactment a little farther down in the same section of the law, and as it were in contradistinction to the other provision:—"on all Agents of Merchants residing in any other city or place in this said Province or elsewhere." Now, however powerful the Corporation may be, they must learn that they are not omnipotent, and that on the contrary they are subject to be restrained by this Court. Had I any doubt, which I have not, I would have given it in favour of mercantile freedom. So, under any aspect of the case, I am disposed to confirm the judgment rendered by the Recorder.

The following is the judgment rendered by the Superior Court:—

The Court * * *—Considering that the Council of the City of Montreal have not and never had the power to impose a tax, such as they illegally have done in and by a certain Bye-Law, No. 220, at a special meeting of said Council, held on the 19th day of May, 1852, upon the Agent or Agents of each and every Foreign Fire Insurance Company, or other Insurance Company established elsewhere than in the City of Montreal, but carrying on the business of insuring against loss by fire in said City by Agency therein;—considering that the said Council hath thereby transcended its authority, and assumed rights and powers which their Charter, the Statute 14 & 15 Vic., chap. 128, doth not vest in them;—considering that the judgment of the Recorder of the City of Montreal, of the 6th day of May, 1858, wherefrom the present Appeal hath been instituted,

h Mayor et al. vs. Wood.

hath rightly declared the aforesaid Bye-Law null and void, and that there is no error in the said judgment. Doth confirm the said judgment, and dismiss the said appeal, with costs against the Appellants, both in the Recorder's Court and in this Court.

Judgment of Recorder confirmed.

Henry Stuart, for Appellants.
Rose & Monk, for Respondent.
(S. B.)

MONTREAL, APRIL 30TH, 1859.

Coram C. MONDELET, J.

No. 1233.

CARDEN *et al.* vs. FINLEY *et al.*

NOTE—PROOF OF PAYMENT.

HELD,—1st. That the omission of the usual words "*y persiste*" at the end of the deposition of a witness is not fatal.

2nd. That the payment of the amount of a promissory note, as between parties not traders, cannot be proved by witnesses.

The action was for the purpose of establishing the payment of the amount of a promissory note, payable to order, held by the executors of the late Seneca Paige, and was directed against the executors, the declaration alleging payment of the note, and the conclusion of the declaration prayed that the note might be declared to have been paid; and the defendants held to deliver it up to the plaintiffs, the makers thereof, or to grant them discharges. The plaintiffs proved by three witnesses the payment of the note.

Doherty, for the defendants, contended that the note was not a commercial transaction, not being between traders, and therefore the English laws did not regulate the matter so as to admit of proof of payment by witnesses, but only the French laws of Canada, according to which, the evidence of witnesses to prove a payment was inadmissible. He also moved that certain depositions taken in the cause, be rejected from the record as illegal, from not having the sacramental words at the end, that the witness under examination "persisted" in his statement.

PER CURIAM, after stating the facts; The counsel for the defendants, Mr. Doherty, made a singular objection as to the validity of a deposition, which did not state at its close that the witness "persisted" in his statement. I always thought that the word "persist," in that connection, was a necessary word; but I find I am mistaken on reference to the ordinance of 1667, Tit. 32, Art 16, and the objection therefore falls to the ground.

The other question is a much more serious one. Three witnesses swear to the payment of the note. Is it a legal proof? The Act 12, Vic., c. 22, s. 25, enacts that in all matter relating to bills and notes, not therein specially provided for, recourse should be had in all Courts in Lower Canada, to the laws now in force there, and in the absence of such laws, to the laws of England in force at the time of the passing of the act, and in the investigation of all facts in actions

and suits founded upon bills and notes, recourse should be had in all such courts to the laws of England in force at the time of the passing of the act. I hold, that under this act, the parties not being traders, the laws of Lower Canada, if they exist, shall govern, and otherwise, the laws of England. In this case, the law of Lower Canada does not admit of the evidence of witnesses.

The judgment was recorded as follows:—

"La Cour après avoir entendu les parties par leurs avocats, sur le merite de cette cause et sur la motion du defendeur du vingt-cinq avril courant pour reviser et décider sur les objections par eux faits au témoignage en cette cause à l'enquête et reservés pour la décision de cette Cour et que les dites objections a ce témoignage soient maintenues, examiné la procédure et preuve et avoir sur le tout délibéré considérant que les demandeurs n'ont pas fait une preuve légale et suffisante des alléguées essentiels de leur declaration et nommément du payement de deux cent piastres, en acquit décharge et extinction d'un billet qu'ils alléguent avoir des avant fait et consenti au dit Senéca Paige et qu'à raison et par suite de ce défaut de preuve leur action doit être déboutée, déboute la dite action avec dépens distraits a Mr. Doherty, avocat des defendeurs.

Action dismissed.

Leblanc & Cassidy pour les Demandeurs.
M. Doherty pour les Defendeurs.
(R. W. T.)

MONTREAL, 30TH APRIL, 1859.

Coram MONDELET, (C.) J.

No. 1903.

Footner, vs. *Joseph*.

Held,—In an Action, by an Architect for drawing plans, and specifications and superintending building, that proof as to value of services cannot be made by adducing evidence as to custom to pay a certain percentage on the outlay by the proprietor.

This was an action by an architect to recover from the Defendant the sum of £96 cy., for drawing plans and specifications, and superintending the building of a block of houses erected by the Defendant.

The declaration was in the usual *assumpsit* form, with the additional expressions "and for commission as customary in like cases and usual, to wit, upon the amount expended upon said houses, at the special instance and request of Defendant; the whole as per statement and account herewith fyled, to which Plaintiff refers as part hereof."

The statement or account contained a charge of 4 per cent on £2400 cy., amount said to have been expended by the Plaintiff.

The plea was the general issue. The Plaintiff's and Defendant's witnesses both attested to the custom of remunerating architects by payment of a Commission on the outlay, but differed as to the amount in a case like the present, the Plaintiff's witnesses stating it at 4 per cent and the Defendant's at 2½ to 3 per cent.

PER CURIAM:—(After stating facts)—The Court is against Plaintiff. I know of no right in architects or any other body of men, be they medical men, law-

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yers or others, to make tariffs for themselves. Mere proof that a charge of the kind in question is usual, is wholly insufficient. It is moreover an unjust rule to establish even in favor of the architects themselves, for it might happen that 4 per cent was utterly inadequate as a remuneration in certain cases. The action is therefore dismissed.

The following is the judgment of the Court:—"The Court * * * considering that the Plaintiff hath not proved and established the material allegations of his declaration, namely, that he has against Defendant any right of action for a commission of 4 per cent, as in and by his declaration, and in and by his action claimed:—Considering moreover, that the Plaintiff hath not proved and established that he ever was employed or requested by Defendant to perform any of the services by him, said Plaintiff in and by his declaration and action alleged and claimed:—And considering that the Plaintiff hath not proved and established, that he hath any legal right to recover of and from the Defendant any sum of money, for the causes in said declaration set forth, and claimed by the present action:—Doth dismiss the said Plaintiffs' action with costs."

Action dismissed.

Mackay & Austin for Plaintiffs.

Cherrier, Dorion & Dorion for Defendant.

(S. B.)

CIRCUIT COURT, 1859.

FOR THE COUNTY OF ARGENTEUIL,

LACHUTE, 14TH MAY, 1859.

Coram SMITH J.

The Corporation of the parish of St Jerusalem vs. *Quinn.*

1.—A Corporation must sue in its own name and be itself before the Court; and an action in which it purports to be represented by its executive, will be dismissed.
2.—In such a case there is nothing to amend by.

This was an action instituted by the corporation of the parish of St. Jerusalem D'Argenteuil, for an assessment to which defendant appeared to be liable for the building of a bridge. The suit was by "the corporation of the Parish of St. Jerusalem *represented by the Municipal Council of the Parish of St. Jerusalem*, Plaintiff".—The Defendant pleaded by *exception à la forme*, objecting amongst other alleged defects in the proceedings, to this mode of instituting the action.

The case was argued in February term.

Abbott for Defendant argued that the corporation was not before the Court—and that the defect was fatal.

Burroughs for Plaintiffs contended, that as the municipal and road act of 1855 provided that all municipal corporations should act by their Councils, the Corporation was well before the Court by its Council.

After argument, *Burroughs* for Plaintiffs moved to amend the declaration by striking out the words "represented by the Municipal Council of the Parish of St. Jerusalem," which was objected to by *Abbott* for Defendant, on the ground that there was nothing to amend by, that the whole proceedings were absolutely null and that an amendment would create Plaintiffs when none previously existed.

SMITH, J., had given the case his best consideration, had consulted his brother Judges on the subject, and had also had the advantage of referring to a number of cases in point adjudicated upon by three judges. There was no doubt whatever that the action was wrongly instituted. None but the Queen could sue by an attorney or representative, and that was what the Plaintiffs here had attempted to do. It was quite true that its Municipal Council was the instrument or agency by which a Municipal Corporation acted, but it was the Corporation itself which had received as one of its corporate powers, that of suing and being sued, and it must itself do so in its own corporate name. Unless, therefore, an amendment was possible the action must go. But what was there to amend? If the Plaintiffs' motion were granted, the effect would be to remove entirely from before the Court, the Council, which now was the only body in Court. The Corporation were not in Court, and if by the granting of the motion the Council should disappear there would be no Plaintiffs at all. The nine cases of Exparte Guines and eight others, decided at Montreal in October 1856, by three Judges were in point. Three similar suits were instituted before a magistrate in a similar manner to this, and the Defendants were condemned, but on *certiorari* the whole of the judgments were quashed on the ground that there was no jurisdiction in the magistrate to entertain suits brought by attorney. If there was no jurisdiction there could be no amendment.—The action must be dismissed.

Burroughs, for Plaintiffs.
McLeod, for Defendant.
Abbott, counsel for Defendant.
(J. J. C. A.)

NOTE.—Eight other cases instituted by the same Plaintiffs and in the same manner as the foregoing, were dismissed at the same time upon the same grounds. There was only this difference, that no *exception à la forme* was pleaded to them—they being actions for small amounts and non-appealable.

COUR SUPERIEURE.

MONTREAL, 23 MAI 1859.

Coram C. MONDELET, J.

ET

MONTREAL, 26 MAI 1859.

Coram C. MONDELET, J.

No. 169.

La Société de Construction Canadienne de Montréal vs. *Lamontagne*

ET

La dite Société, Demanderesse incidente en Désaveu, vs. *Lafrenaye*, Défendeur en Désaveu.

DÉSAVEU.

Jugé 1o. Que la demande en désaveu est non recevable, avant le jour régulier du rapport, si avis de la production n'est pas donné.

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Jugé 2o. Que l'action, dans laquelle le désaveu est institué, étant en délibéré, la demande en désaveu est non recevable, quoique rapportée régulièrement d'ailleurs.

Le 23 mai 1859, la demande principale étant sur le rôle, pour audition au mérite *ex parte*, la Demanderesse fit motion qu'il lui fut donné acte de la production qu'elle faisait d'une demande incidente en désaveu, par elle instituée contre le procureur qui prétendait la représenter au dossier, laquelle demande avait été signifiée au dit procureur le 21 mai courant (1859), et était rapportable le 25 du dit mois de mai, sauf au dit procureur à n'être tenu d'y répondre qu'après le jour du rapport.

Doutre, pour la Demanderesse en désaveu, expliqua que la demande n'ayant pu être formée et rapportée plutôt, il croyait qu'il suffisait de mettre la cour au fait de l'institution du désaveu, pour obtenir la suspension des procédés et notamment de l'audition au mérite; que la production anticipée de la demande en désaveu ne pouvait préjudicier à personne et que la motion réservait spécialement les droits du Défendeur en désaveu. En France, le désaveu verbal et même la menace d'un désaveu suffisait pour suspendre les procédés.

Merlin, Rép. Vo. Désaveu, p. 601.

Carré et Chauveau, t. 3, No. 1314.

Ici il y a plus qu'un désaveu verbal, plus qu'une menace,—il y a un désaveu formellement institué et le but de la motion n'est que d'en saisir la cour, par anticipation.

Per Curiam. Il suffit que l'avis de cette production anticipée n'ait pas été donné à la partie adverse, pour que la cour refuse d'en prendre connaissance.

Motion rejetée.

Le 25 mai, jour du rapport de la requête et demande incidente en désaveu, la cause principale était en délibéré sur le mérite,—et la requête ou demande en désaveu fut produite; l'hon. juge éprouvant des doutes, sur la possibilité de recevoir un désaveu, quand la cause était en délibéré, reçut la demande en désaveu, sauf à prononcer le lendemain sur son admissibilité.

Doutre, pour le désaveu, dit qu'il était incontestable que le désaveu pouvait être formé, en tout état de cause et même après jugement; et que lorsqu'il était institué avant jugement, l'effet immédiat de la production du désaveu, était de suspendre tous les procédés et que cette interruption durait jusqu'à ce qu'il fut adjugé sur le désaveu. Il cita :

Carré et Chauveau, t. 3, pp. 267, 274, 275 et suivant.

Pigeau, Proc. civ., t. 1, p. 348.

Bioche, Dict. de Proc., Vo. Désaveu Nos. 65, 113.

Merlin, Rép., Vo. Désaveu, § VII, p. 601.

Curiam. La cause principale étant en délibéré, la demande en désaveu ne peut être reçue.

Requête et demande incidente en désaveu rejetée.

J. Doutre, pour la demanderesse en désaveu.

J. Papin, pour le Défendeur.

(J. D.)

MONTRÉAL, 28 MAI 1859.

Coram C. MONDELET, J.

No. 1309.

Beaudry vs. *Pliniguet.*

PEREMPTION D'INSTANCE.

Jugé: Que la péremption d'instance peut être couverte, par une procédure valable, tant qu'il n'est pas intervenu un jugement qui déclare l'instance périmée.

Faits.—Le 9 mai 1859, le Défendeur fait signifier aux avocats du Demandeur une motion demandant qu'attendu qu'il s'est écoulé plus de 3 ans depuis le dernier procédé fait en cette cause, ainsi qu'appert au certificat du protonotaire de cette cour, produit avec la présente, cette instance soit déclarée périmée, etc. Cette motion fut signifiée entre midi et une heure de l'après-midi. Le même jour, après deux heures et demi de l'après-midi, le Défendeur, par ses avocats, déposa au greffe une réponse aux défenses du Défendeur, filles plus de 3 ans auparavant. Le certificat du protonotaire, produit à l'appui de la motion, portait la date de la signification de la motion et constatait que le dernier procédé enrégistré au greffe, jusqu'à deux heures et demi, ce jour-là, était la production des défenses, le 5 mai, 1856.

Morin, pour le Demandeur.—Au moment où cette motion est présentée à la cour, les régistres de cette cour établissent qu'un procédé utile a été fait, durant les 3 ans qui précèdent, savoir le 9 mai courant et l'instance ne peut en conséquence, être déclarée périmée.

Doutre, pour le Défendeur.—Si la prétention du Demandeur était confirmée par cette cour, il ne serait guère possible d'obtenir une péremption d'instance, car comme une demande de cette nature ne peut être faite qu'après avis donné à la partie, il serait toujours facile de faire un procédé quelconque entre l'avis et la présentation de la demande et de couvrir ainsi la péremption. Le Défendeur a un droit acquis à la péremption du moment que son avis est signifié, et il ne doit pas être loisible à l'autrepartie de détruire ce droit acquis, par un procédé postérieur à l'avis.

PER CURIAM. Il parait que jusqu'à l'Ordonnance de Roussillon, rien n'était bien défini quant à la péremption d'instance; car, par l'Ordonnance de 1539, (François 1er) il ne fut statué que ce qui suit: "Il ne sera dorénavant baillé aucune lettre de relièvement de désertion ni péremption d'instance, pour quelque cause et matière que ce soit; et si elles étaient baillées, défendons d'y avoir aucun égard, ainsi les instances des susdites devront être jugées tout ainsi que si les dites lettres n'avaient été obtenues ni impétrées."

Merlin (Rép., Vo. Péremption, § 1, p. 241, 4e Edit.) remarque à ce sujet: "Cette ordonnance ne défini ni ne caractérise la péremption; le législateur suppose que l'on sait parfaitement en quoi elle consiste et comment elle s'acquiert; il se borne à déclarer qu'à l'avenir on ne pourra plus en faire cesser l'effet par des lettres de chancellerie." Il ajonte que les auteurs de ce temps-là, nous apprennent qu'alors, comme aujourd'hui, il fallait 3 ans de cessation de procé-

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dures pour qu'une instance fut périmée. Mais on prétendait, continue-t il, d'une part, qu'une fois la contestation en cause engagée, il ne pouvait plus y avoir lieu à la péremption ; et de l'autre, que l'instance périmée devait encore avoir l'effet d'interrompre la prescription.....C'est pour condamner ces deux systèmes qu'à été fait l'article 15 de l'Ord. de Roussillon, du mois de janvier 1563. "L'instance intentée (porte-il) *ores* qu'elle soit contestée, si, par laps de 3 ans, elle est discontinuée, n'aura aucun effet de perpétuité ou proroger l'action ; ainsi aura la prescription son cours, comme si la dite instance n'avait été formée ni introduite, et sans qu'on puisse prétendre la dite prescription avoir été interrompue."

L'Ord. de 1629 succéda à celle de Roussillon, et voici ce que porte l'art. 91 : "L'art. 15 de l'Ord. de Roussillon sera gardé par tout notre royaume, et même en nos cours de parlement et autres jurisdictions où elle n'a été jusqu'ici observée, et voulons que toutes instances de criées pèrissent, par la discontinuation de trois ans, nonobstant l'établissement de commissaires; comme encore toutes saisies et arrêts de deniers, encore qu'il n'y eut aucune assignation donnée en consequence d'iceux, pareillement que les causes mises aux rôles soient sujettes à peremption, à compter du jour que l'on cesse de plaider les dits rôles, soit que le règlement au conseil soit levé ou non."

Voilà à peu près tout ce que l'on a jusqu'à cette époque. Car il semble que ce n'est ni dans les lois Romaines, ni dans l'Ord. de Philippe le Bel, qui la suppose établie et dès lors en usage, qu'on trouve l'initiative de la péremption d'instance. Hévin, dit Merlin, la qualifiée de *jus verè gallicum.* Elle ne fut pas introduite dans toute la France.

Merlin, *loco citato* XIX, dit : "La péremption, dans les pays et les cas où elle a lieu, ne s'acquiert pas de plein droit ; il faut la demander, et avant cette demande la moindre procédure couvre la péremption et fait subsister l'instance." Il réfère à son recueil de questions de droit, pour établir la jurisprudence à cet égard. (Vo. Péremption, § II et III.) Il réfère à l'Ord. de 1667, tit. 27, art. 5, et dit à la page 707 : "Jusqu'à présent, nous ne voyons le législateur occupé, par rapport à la péremption, que du soin de déterminer les cas où elle a lieu, et l'effet qu'elle produit relativement à la prescription ; mais s'acquiert-elle de plein droit, par le seul laps de trois ans, ou faut-il, après ce temps, que le juge la déclare acquise ? C'est ce qu'aucune loi ne décide encore.

Avançons, continue-t-il, et nous trouverons là-dessus quelques lumières dans l'art. 75, du titre 27 de l'Ord. de 1667. Les sentences et les jugements qui doivent passer en force de chose jugée, sont ceux rendus en dernier ressort et dont il n'y a pas appel, ou dont l'appel n'est pas recevable, soit que les parties y eussent formellement acquiescé, ou qu'elles n'en eussent interjeté appel dans le temps, *ou que l'appel ait été déclaré péri.*"

Ou que l'appel ait été déclaré péri ! ajoute Merlin ; il faut donc que la péremption soit déclarée par un jugement ; il faut donc un jugement déclaratif de la péremption pour qu'elle puisse avoir lieu, la péremption n'est donc pas acquise de plein droit par le seul laps de trois ans, et c'est aussi ce qu'enseigne Pothier, dans son traité des obligations, No. 663. "Quoique ce temps soit accompli,

(dit-il) la péremption de l'appel n'est pas acquise, jusqu'à ce qu'il soit intervenu un jugement qui l'ait déclarée acquise."

Jousse, t. 2, sur l'art. 5 du titre 27 de l'Ord. de 1667, dit à la page 175 : "La péremption ne s'acquiert pas de plein droit par discontinuation de procédures pendant trois ans ; mais il faut une sentence ou jugement qui déclare l'instance ou l'appel péri."

"Mais tant qu'il n'y a point eu de jugement qui ait déclaré l'instance périe, la péremption n'a pas lieu, dans les affaires qui y sont sujettes, si la partie qui a acquis la péremption reprend l'instance, si elle forme quelque demande, fournit défense, ou si elle fait quelque autre procédure ; et s'il intervient quelque appointement ou jugement interlocutoire ou définitif, pourvu que ses procédures soient connues de la partie et faites par son ordre."

Pigeau semble révoquer en doute cette doctrine, au t. 1 de la procédure civile du Châtelet pp. 355, 356 et 357 (Edit. de 1787). Après avoir indiqué, par une formule de requête, comment se doit demander la péremption, il observe, à la p. 357, "Cette demande formée, celui qui a élevé l'instance périe, ne peut plus couvrir la péremption ; cependant, M. Jousse sur l'art. 5 du tit. 27 de l'Ord. de 1667, prétend qu'il faut un jugement qui déclare cette instance périe ; mais l'opinion générale est que la demande est suffisante pour l'acquérir, autrement une partie pourrait négliger une instance qu'elle aurait introduite, et parer la péremption qu'on demanderait, en poursuivant, sur cette instance, avant le jugement de péremption, au moyen de quoi, l'établissement de cette péremption serait illusoire."

M. Pigeau paraît croire que M. Jousse a hasardé une opinion, tandis que ce dernier n'a fait rien autre chose que de s'en tenir au texte même de l'Ord. dont Pigeau ne tient aucun compte. Pigeau néanmoins remarque à la page 355 que l'opinion générale est que le Demandeur peut couvrir la péremption, en poursuivant sur sa demande, même après le temps de la péremption accomplie, pourvu qu'il le fasse avant que cette péremption soit requise. Il ajoute que *la défaveur de la péremption* a fait introduire cette interruption. A la page 356, il continua, "Au surplus, de quelque côté que vienne cette interruption, elle s'opère par le *moindre acte valablement fait*, sur la procédure négligée, avant la demande en péremption, comme un avenir, etc., mais il faut que cet acte soit régulier et utile."

On demandera peut être si l'avis que l'on donne d'une motion, pour péremption d'instance, est une demande, dans le sens que le donne Pigeau ; si on répond dans l'affirmative, alors supposé que l'on adopte le sentiment de Pigeau, des procédures, subséquentes à cet avis, ne couvriraient pas la péremption. Si, au contraire, on ne regarde pas l'avis comme une demande, tout procédé utile et valable, fait entre l'avis et la présentation de la motion, couvrirait la péremption. Le troisième sentiment serait que tant que le jugement de la cour n'aurait pas déclaré l'instance périmée, on la pourrait couvrir, par un procédé utile et valable. Cependant, quant à ce dernier sentiment, l'on pourrait dire qu'une fois la motion ou demande prise en délibéré, on ne pourrait, dans notre système en Canada, faire aucun procédé.

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En Canada, le sentiment le mieux fondé, c'est que l'avis n'est pas la demande, qu'un procédé utile et valable entre l'avis et la motion ou la demande, couvre la péremption. En conséquence la motion est rejetée avec dépens.

Motion rejetée.

Ouimet, Morin et Marchand, pour le Demandeur.
Doutre et Daoust, pour le Défendeur.

[J. D.]

Autorités citées par l'Hon. Juge.

Merlin, Rép. Vo. Péremption, § I, XIX.
" Quest. de D., Vo. Péremption, § III.
Pothier, Oblig. No. 863.
Pigeau, (Edit. de 1787) pp. 355, 356 et 357.
Jousse, Ord. de 1667, t. 2, p. 175, tit. 28, art. 5.

MONTREAL, 31st MAY, 1859.

Coram BADGLEY, J.

No. 737.

Greenshields et. al. vs. *Plamondon.*

COMPOSITION OR ATERMOIEMENT.

Held,—That a promissory note or any consideration given by an insolvent debtor to a creditor, in contemplation of a deed of composition, and as a preference to such creditor, without the knowledge of the other creditors, is null and void, and will be declared so even as against the compounding debtor himself.

This action was brought on a promissory note given by the Defendant in favour of the Plaintiffs, or order, on the 11th Dec., 1854, for the amount of £100, payable at 20 months from date, with interest.

The Defendant alleged in his plea, that, subsequent to the date of said note, to wit: on the 5th January, 1855, the said Defendant being unable to meet his engagements, he compounded with his creditors, by an instrument in writing, bearing the above date, in virtue of which he obtained a discharge from all his creditors, in consideration of ten shillings in the pound, which he undertook to pay, at certain and specified terms, by notes endorsed in favour of said creditors; that the Plaintiffs were parties to the said composition, which was duly executed and carried into effect; that the note declared upon by Plaintiffs being anterior to the date of the said composition, it ought in law to be covered and discharged by the composition deed; that if the note was not covered by the said composition, it ought to be held as fraudulent and void, as destroying the principle of equality which is the necessary basis of such arrangements between creditors and debtors; that by law and by the usage of commerce any preference given by a compounding debtor to any of his creditors is null and void and that the note sought to be recovered should be declared so.

The Plaintiff, in answering to this plea, alleged that the amount of the note in question was not one of the debts for which the Defendant compounded, as mentioned in his plea; that at the date of said note, the Defendant, besides his personal debts to the Plaintiffs, owed them £230 4s. 4d., being the balance of an account due by one Desrosiers, whom the Defendant had introduced to the Plaintiffs, and for whose debt the Defendant was the guarantor; that when the Defendant applied to Plaintiffs to have their consent and signature to the deed of composition, the Plaintiffs made it a condition that the Defendant should give his note for £100 in payment and discharge of Desrosiers' debt, which Defendant did.

The evidence establishes that in fact Desrosiers owed to Plaintiffs the above amount of £134 4s. 4d.; that when the Defendant applied for the Plaintiffs' signature to the deed of composition, they told him that besides the amount mentioned in the schedule of the deed, [illegible] was the Defendant's personal indebtedness, he owed them for the account of Desrosiers, and that unless he would give them a £100 note, for Desrosiers' debt, they would not sign the composition. The Defendant, says the witness, acknowledged his responsibility for Desrosiers' debt, and gave the note mentioned in this cause. Being cross-examined, the witness states that he is not aware of the Plaintiffs having any writing from the Defendant, except the said note, for Desrosiers' debt, and that the Plaintiffs neither transferred over their claim against Desrosiers to the Defendant nor gave him any receipt or acknowledgment of the settlement of their claim, so as either to discharge Desrosiers or enable the Defendant to recover anything from Desrosiers.

Laflamme, for Plaintiffs, contended that it being proved that the consideration of the note was not included in the composition, and, furthermore, that this consideration was not the personal indebtedness of the Defendant, for which alone the composition was entered into, the principle invoked by the Defendant could not receive any application in this cause; that the principle of equality amongst creditors, parties to a deed of composition was incident to and an integral part of the bankruptcy law, where it was in existence; that the composition which is in common usage in Canada was not regulated by the [illegible]ptional principles of bankruptcy, but had no other foundation than the common law principles, which contained no provision to prevent a creditor from making his condition as favorable as possible; that the composition as known and practised in this country was neither the *atermoiement* of the old French law, nor the *concordat* under the actual code of commerce, both of which were and are nothing more nor less than the mode of settlement between creditors, as it was known to us when we had a bankrupt law. Under the rules governing the *atermoiement* and the *concordat*, the equality between creditors and the prohibition of all underhand preference, were both equally necessary, as a portion of the creditors could force the composition upon the other creditors; but here no creditor is obliged to accept of any arrangement agreed to by any number of creditors, each creditor signs when he is satisfied with the mode of settlement agreed upon between himself and his debtor. And even in the case where it would be found by the court, that the principle of equality should govern our mode of composi-

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tion, the violation of that principle could not be set up as a bar to an action like this by the debtor himself who is *particeps* in the fraud, if any was practised; the other creditors, who have suffered from such fraud, should have the exclusive right of complaining of having been lead to compound on an unequal footing.

Doutre, for the Defendant, answered that this cause disclosed a kind of transaction which was as commonly practised as it was manifestly fraudulent and void. The Plaintiffs being applied to by the Defendant to sign a deed of composition, and contriving to secure the full amount of their debt, while the other creditors would only receive ten shillings in the pound, bring to recollection that one of their debtors (Desrosiers) had been introduced to them by the Defendant. Their refusal to sign placing the Defendant at their absolute mercy, the introduction of Desrosiers, which was probably a simple and ordinary courtesy between man and man, assumed the complexion of a positive guaranty by Desrosiers to pay, and they shaped the bargain in this way:—Our debt against Desrosiers is lost and dead; but if you agree to give life to it and pay it by a £100 note, we will sign your composition; if not, we will prevent you from compounding and keep you in the impossibility of earning an honest living for yourself and your family. Any creditor striving to make his condition better than that of his co-creditors, will easily find a motive to explain his harshness with his debtor,—his debt is more sacred than that of his neighbour,—it was created under peculiar circumstances which should either morally justify him to refuse to compound or entitle him to a preference. In this case, Desrosiers was the pretence, and the evidence establishes that it was even a poor pretence. The Plaintiffs had no kind of action against the Defendant for Desrosiers debt; and the note was understood, between the parties, as such a manifest preference, that when paid, the amount was an absolute loss for the Defendant, who could never claim reimbursement from Desrosiers,—while the Plaintiffs remained in possession of their action against Desrosiers for the full amount of their claim. In fact, it is sufficient to read the Plaintiffs' answer to the plea, to understand fully that the note was given to induce the Plaintiffs to sign the composition, and as the price of their so doing.

The facts being such, it remains to consider whether a court can maintain an action like this.

The distinction which exists between our composition and the *atermoiement* or *concordat* is readily admitted to a certain extent; but it is unquestionable that, though the principle of equality was for a time the subject of discussion in France, it is now admitted both here and in England as forming part of the common law, wherever a debtor entered into a composition either in or out of a court of bankruptcy. If it had been an exceptional legislation, co-extant only with a bankrupt law, as it is pretended by the Plaintiffs, it would be astonishing that so many cases should have come to light; because it is almost impossible to find a bankruptcy law, as remote as it can be searched, without a positive provision, declaring null and void any preference given to a creditor, party to a composition under such bankrupt law. How then could it be explained that so many attempts would have been carried to the point of facing a court of justice in direct oblivion or contempt of a positive provision of the law? The question

naturally arose, as in this cause, under the presumption that the common law being silent on a matter positively settled by the commercial statutory law, no restriction was imposed upon creditors, preventing them from receiving preferences from their debtors.

The doctrine upon which the Defendant relies is this:—That all compositions between debtors and creditors are entered into under the positive, though tacit, understanding that those who ostensibly agree to receive a portion of their debt, in full discharge thereof, do not in reality receive the whole, or more than the others; that the natural inducement for a creditor to sign a composition lies on the common conviction amongst the creditors that it is necessary for them to sacrifice a portion of their debt to save the rest; and by that sacrifice, the debtor is enabled to resume his business and to pay the composition. If the principle of equality was destroyed, the deed of composition would become the usual mode, for certain creditors of practising glaring fraud, by means of which they would succeed in getting the payment of their debts not only from their actual debtor, but indirectly from their co-creditors. It is a principle of both the commercial and the civil law, that when a man becomes bankrupt, *en déconfiture*, his property is invested by law in the person of his creditors. The man who applies to his creditors to obtain a composition is manifestly *en déconfiture*, and if he remain in possession of his property, it is only as the representative or the legally appointed agent of his creditors, until they dispose of it in one way or another. Then, if a creditor, by some underhand transaction, succeed during that unsettled state of things in securing from the common agent of the creditors something more than his share, what he so obtains is in reality taken out of the common stock of the creditors. A few weeks or a few months after this composition, the debtor, exhausted by the satisfaction of the exacting creditors, might be made unable to meet the terms of the composition itself, fall into *déconfiture* again and call for mercy; and in the meantime his stock, which had been the common stock of the creditors, would have decreased by so much given to favoured creditors.

There is no doubt, then, that a contract, having for its object to give a preference to one creditor over the others, is fraudulent towards them, and that there would be no difficulty for the court to declare it null and void if its nullity were demanded by a creditor.

The only serious difficulty which existed for some time in France in the application of the principle involved in this cause, was, with reference to the nullity of such a contract, *quoad* the debtor himself; but it is now universally settled that the debtor must be admitted to claim his release from an obligation of this kind. First of all, it is a matter of public policy that a contract founded upon fraud should receive no sanction from a court of justice.

Another cause of nullity is found in the common law principle, which declares null all contracts subscribed under the influence of violence or coercion, and there are several instances of moral violence, which are assimilated to physical coercion. The man, who, by misfortune, has been brought into insolvency, is placed in such a state of dependency, as to his creditors, that the moral violence inflicted upon him, by a creditor who threatens to reduce him to beggary, is very easily conceived. The common law affords him a protection against the obligations assumed

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under the influence of that violence, by declaring those obligations null, when they are attempted to be enforced by legal remedy or action.

For these reasons, and others fully developed in the authorities that will be submitted to the court, the Defendant is entitled to claim the nullity of the contract or promise contained in the note in this cause.

Authorities cited by Defendant's Counsel:—

FRENCH LAW.—Pardessus, Dr. Com., t. 5, p. 294, No. 1238.
Dalloz, Dict. Gén., t. 2, Vo. Faillite, Nos. 568, 569, 570, 572.
" Jur. du Royaume, An 1827, 2nde partie, p. 148.
Boulay—Paty, Faillites et Banqueroutes, t. 2, Nos. 571, 1141.
De Villeneuve, Dict. du Cont. Com., Vo. Faillite, Nos. 1066, 1067, 1068, 1085.
Code de Com., Art. 598.
ENGLISH LAW.—Ellis, Law of Debtor and Creditor, pp. 202, 204, 206.
Chitty, Com. Law, t. 3, pp. 713, 714, 716, 717, 719, 720.
Atkyns, Rep., t. 1. p. 352.
Vesey, Rep., t. 15, p. 55, Saddler vs. Jackson.
East, Rep., t. 4, p. 371, Leicester vs. Rose.
Durnford & East's Term, Rep., t. 2, p. 765, Cockshott vs. Bennett.
" " " " t. 4, p. 166, Jackson vs. Lomas.

PER CURIAM.—The note in suit was made and given to the Plaintiffs by the Defendant when he was insolvent and trying to settle with his creditors for their respective claims against him at 10s. in the £. The Plaintiffs at first declined, because his schedule of liabilities did not show, as they alleged, his entire indebtedness to them, exhibiting only his personal debt, but omitting their claim upon his guarantee for goods sold by them to one Desrosiers. He explained the cause of omission, by stating that he did not wish to include that in his schedule of liabilities, on the face of which he was endeavouring to effect his composition settlement, because his offered securities, Messrs. Desmarteau, Plamondon, & Mousseau, were not aware of the Plaintiffs' claim against him as security for Desrosiers; but after several days of negociation between them, and after the Plaintiffs' positive refusal to accede to the composition contract upon any other terms, they agreed with him to sign the contract, as upon the face of the schedule, on condition of receiving from him this note for £100 in discharge of their demand upon the guarantee. The note was thereupon given by him and they signed the composition contract. His liabilities per schedule amounted to £5,833 12s. 11d., distributed in various sums among thirty creditors, whereof the Plaintiffs appear at the head of the list, and are among the earliest in signature to the contract, followed by the largest portion in number and amount of the creditors.

The composition contract stipulated that his undersigned creditors, in consequence of his having shewn by his schedule that he was unable to meet his engagements in full, agreed and consented to *settle with him for* 10s. *in the £ on their respective claims*, payable by his notes at 6, 9, 12, 15, and 18 months, with interest, and secured by the indorsement of Messrs. Desmarteau, &c. Before adverting to the facts of record and the authorities of law applicable to the case, it will be convenient to state *in limine* some generally received legal points bearing upon the matter, namely, that a debtor in failing circumstances, *en déconfiture*,

can make no change in the rights of his creditors as they were at the time of his insolvency, nor can he give any preference to nor secure the debt of one to the prejudice of others of them, Toubeau says, *un failli est interdit de droit:* that a contract will be deemed in fraud of creditors when the obligee knew the failing circumstances of the obligor debtor and derived any preference or advantage by the obligation; that such a contract is contrary to law as being opposed to good morals and public order, and cannot be enforced for the benefit of creditors any more than for the direct personal advantage of either of the parties; that no action can be enforced upon an obligation without a cause or with a false or unlawful one, whoever may demand it; that courts will not lend their aid to settle disputes and transactions which are reprobated and forbidden by law, but will notice *ex-officio* the illegality of the subject and allow it to be suggested without any plea and at any stage of the proceeding. These principles deduced from our own law are common to the jurisprudence of all commercial countries where honesty and fair dealing prevail in commercial pursuits, and are to be found *in extenso* in the sister jurisprudence of Louisiana. Reverting now to the facts of this case, we have a debtor in a state of declared insolvency, evinced by the Plaintiffs and his other creditors treating with him and accepting his offered composition of 10s. in the £; a verbal guarantee without the statutory requirement to give it a legally binding effect; a concealment of the guarantee itself as well as of the alleged indebtedness thereby from the creditors and parties interested in the composition contract; a private agreement between Plaintiffs and Defendant for his discharge by means of the note in question from a demand not enforceable at law, and an advantage thereby obtained by the Plaintiffs securing payment of this inoperative portion of their claim; a promissory note without consideration; a consent by the Plaintiffs of and their subscription to the composition contract. The note is dated 11th of December, 1854, the contract 5th January, 1855; and the note became due only after the instalments of the composition had all matured and been liquidated. After this statement from the record, the law of the case appears in the following authorities:—

Mr. Justice Story, in Sec. 378-9 of his Equity Jurisprudence, thus sums up the matter:—"There are other cases of constructive fraud upon creditors, which the whole moral justice of the law has equally discredited and denounced. We refer to that not infrequent class of cases, in which, upon the failure or insolvency of their debtor, some creditors have, by secret compromises, obtained undue advantages, and thus decoyed other innocent and unsuspecting creditors into signing deeds of composition which they supposed to be founded upon the basis of entire equality and reciprocity among the creditors, when, in fact, there was a designed or actual imposition upon all but the favoured few. The purport of a composition deed, in cases of insolvency, is that the property of the debtor shall be assigned, collected, and distributed among the creditors according to the order and terms prescribed in the deed itself, and, in consideration of the assignment, the creditors parties generally agree to release all their debts beyond what the funds will satisfy. Now, it is obvious that in all transactions of this sort, the utmost good faith is required, and the very circumstance that other creditors of known reputation and standing have already become parties to the deed, will operate as a

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strong inducement to others to act in the same way. But if the signatures of such prior creditors have been procured by secret arrangement with them, more favourable to them than the general terms of the composition deed warrant, those creditors act as decoy ducks upon the rest." Sec. 379. In modern times, the doctrine has been acted upon in Courts of Law as it has long been in Courts of Equity, that such arrangements are utterly void and ought not to be enforced against the assenting debtor, or his sureties or his friends. There is great wisdom and deep policy in the doctrine, and it is found in the best of all protective policy that it acts by way of precaution rather than by mere remedial justice, for it has a strong tendency to repress all frauds upon the general creditors by making the cunning contrivers the victims of their own illicit and clandestine agreements. The relief is granted not for the sake of the debtor, for no deceit or oppression may have been practised upon him, but for the sake of honest, humane, and unsuspecting creditors, and hence the relief is granted equally, whether the debtor has been induced to agree to the secret bargain by the threats or oppression of the favoured creditor, or whether he has been a mere volunteer, offering his services and aiding in the intended deception. Such secret bargains are not only deemed incapable of being enforced or confirmed but even money paid under them is recoverable back, as it has been obtained against the clear principles of public policy. And it is wholly immaterial whether such secret bargains give to the favoured creditor a larger sum or an additional security or advantage, *or only misrepresent some important fact*, for the effect on the other creditors is precisely the same in each of these cases. They are misled into an act to which they might not otherwise have assented." Similar opinions will be found in Addison on Contracts, page 139, and Story on Contracts, Sec. 326. The adjudged cases fully bear out the text-writers. They are briefly summed up in Byles on Bills:— "The consideration or contract on a bill or note must not be in fraud either of the Defendant or third persons, for fraud totally avoids all contracts both in law and equity." "Equally unavailing is the instrument if it were given in fraud of third persons." "An insolvent proposed to compound with his creditors, but the Plaintiffs being creditors, refused to execute the deed of composition unless the insolvent gave them a promissory note for the residue of the debt due to them. He did so without the knowledge of the other creditors, and the Plaintiffs and others signed the deed. The note was held void as a fraud on the other creditors." Cites Cockshott vs. Bennett, 2 T. R. 763; Knight vs. Hunt, 5 Bing. 432, and others. "So the note is equally void if given not by the insolvent but by a third person." "So the note being given with a fraudulent intention, would have been void, though the composition had never been effected." Wells vs. Girling, 1 B. & B. 447, "and any better security than the other creditors have, though for the same amount, if taken without their knowledge, is void as a fraud on them." Leicester vs. Rose, 4 East, 372. In the leading case of Cockshott vs. Bennett, Lord Kenyon, Chief Justice, observes:—"On grounds of law, the security taken to give this note was a fraud on the creditors, parties to the contract, in which their debt was to be cancelled in consideration of receiving a composition. This agreement between Plaintiff and Defendant prevented their being put in that situation which was the inducement to the other creditors to sign the deed and

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to relinquish part of their demands, thereby rendering abortive all that the creditors intended to do for the bankrupt by compounding for their debts: the transaction is bottomed in fraud, which is a species of immorality, and not being available, as such cannot be revived by such promise." Buller, J., said, "the Defendant was absolutely in the power of the Plaintiffs when the note was given, and they took advantage of his distressed situation: if the note had been obtained by actual compulsion, it would be void—now this is equivalent." See also Anstr. 910, 1 Atk. 352, Chief Justice Lee, 4 East. 371, 6 Scott, Alsager vs. Spalding, 11 Ad. and E. R. 1033, 1 Stark 329. "So if a man becomes surety for another for the price of goods, as by joining with him on a joint and several note, and the party to whom the surety is responsible conceals from him a stipulation for an additional sum which it is secretly agreed between himself and the principal that the latter shall pay in liquidation of an old debt, that is a fraud on the surety," &c. Pidcock vs. Bishop, 3 B. and C. 605. "So *a compounding creditor cannot split his demand and compound for part, and afterwards sue for the residue unless he acquaints the other creditors with his proceeding.* See 1 Esp. 131, 2 Holmer vs. Vicnor—case of two claims, one for goods sold the other for two bills—5 Bing. 460, Britton vs. Hughes, held, *if a creditor keep back a portion of the debt due to him, and does not correctly state the amount of his claim in the composition deed, his conduct is fraudulent, and he will not be allowed to sue the debtor for the debt omitted.* See 3 Y. and J. 217, Coleman vs. Waller, 4 B. and C. 511, Lewis vs. Jones. The same principle runs uniformly through all the cases, from Cockshott vs. Bennett in 1788 to very recent days. "All creditors are presumed to bargain for equality of benefit and mutuality of security; they are not fairly or honestly dealt by if any of them bargains for or receives better terms than others, or makes his position or claim better than it was at the debtor's insolvency." "The question is not alone whether the composition was entered into or not; but whether the transaction was meant as a fraud upon the other creditors, where a creditor undertakes to represent that he had agreed to take 10s., and secures more in fact." In the Revue de Legislation, 2 vol., p. 27, a case at Quebec is reported as follows:—"A promissory note to a creditor for the balance of his claim in consideration of his having signed a deed of composition is void, Blackwood vs. Chinic, 1809, No. 887, sustaining the authorities cited above. The French law is not at variance with the English law in this matter. Pardessus observes:—"La bonne foi qui ne permet pas qu'une personne s'enrichisse aux dépens d'une autre, et qui commande l'équité dans les négociations interessées, veut qu'aucun des contractans ne fasse entendre à l'autre, des faits contraires à la vérité pour le décider à prendre une résolution qu'il n'aurait pas prise sans cela. Elle ne permet pas d'avantage qu'il dissimule rien de ce qu'il importe a ce dernier de savoir, lorsque cette connaissance l'aurait naturellement empêché de conclure le marché ou lorsqu'il en aurait consenti certaines conditions dans l'ignorance des choses dissimulées et dans la supposition de la vérité de ce qu'on lui a dit ou laissé croire." The bankrupt system of France prevents cases of this kind coming ordinarily before the common law tribunals, *atermoiements* being specially regulated by the bankrupt law

of the country. It is the same principle of common honesty and equal good faith, which, in the textual provision of the Article of the Custom, places all unprivileged creditors of the insolvent upon the same equal footing in his means of payment, also prevails in all the courts in matters of contracts. Again referring to Pardessus, No. 1238, the point is put strongly in support of Defendant's plea, and again at No. 1228:—"Nous avons fait connaître les présomptions légales en vertu desquelles certains actes étaient frappés de nullité. Il ne s'ensuit pas que tous les autres actes soient valables de plein droit. Il faut toujours en revenir au principe que ce qui est reconnu fait en fraude des créanciers doit être annullé. Rejet, 3 février 1829, D. 29, 1, 140, et ce principe doit être appliqué non seulement par les tribunaux de commerce dans les matières de leur compétence, ou par les tribunaux civils dans les autres cas, etc. Lorsque la fraude est prouvée, quelle que soit la date de l'acte, il doit être annullé. Ce n'est plus là le cas d'une présomption fondée sur la seule proximité de la faillite." [illegible] the indicia of fraud, presumptions from the position of the parties [illegible] of the contract, its date, character, and nature and other circumstances [illegible] all if the *acte attaqué est intéressé de part et d'autre, et equipollent à un équivalent a été donné par celui qui le fait valoir ou si cet acte [illegible] avantage, purement gratuit,*" in fact, if there have been a consideration, which Pothier defines, "la cause de l'engagement que contracte l'une des parties est ce que l'autre des parties lui donne ou s'engage de lui donner sur le risque dont elle se charge," and which the English authorities define in nearly the same terms: "Consideration means something which is of some value in the eye of the law moving from the Plaintiff. It may be some benefit to the Defendant or some detriment to the Plaintiff; but at all events it must be moving from the Plaintiff. A good and sufficient consideration is essential to the validity of any simple contract, and the agreement or some memorandum thereof must be in writing—without these the law supplies no means nor affords any remedy to compel performance." Using the language of Lord Mansfield in Holman vs. Johnson, Cowp. 343: "The objection that a contract is immoral or illegal, as between the Plaintiff and Defendant, sounds at all times very ill in the mouth of the Defendant. It is not for his sake however that the objection is ever allowed; but it is founded on general principles of policy, which the Defendant has the advantage of, contrary to the real justice as between him and the Plaintiff,—by accident if I may so say. The principle of public policy is, *ex dolo malo non oritur actio.* No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If, from the Plaintiffs own stating or otherwise, the cause of action appear to arise *ex turpi causâ* or a transgression of a positive law, there the court says he has no right to be assisted. It is upon that ground the court goes, not for the sake of the Defendant, but because they will not lend their aid to such a Plaintiff. There is not in this case the *par delictum* between the parties which is the gist of the case of Holman vs. Johnson, but, as observed by Lord Ellenborough in a somewhat similar case to the present, "Oppression on one side and [illegible] on the other: it can never be predicated as *par delictum* when one [illegible]

rod and the other bows to it." Smith vs. Cuff, 6 M. and S. 160. Under all these circumstances, the action is dismissed with costs." Greenshields vs. Plamondon.

Action dismissed.

R. & G. Laflamme, for Plaintiffs.
Doutre & Daoust, for Defendant.

(D.)

MONTREAL, 31 MAI 1859.

Coram BADGLEY, J.

No. 941.

Rolland et al. vs. *Loranger.*

LETTRE DE GARANTIE—DISCUSSION.

Jugé,—1o. Qu'une lettre de garantie donnée à l'un des membres d'une société de commerce, confère un droit d'action à cette société.

2o. Que la caution n'est pas tenue de payer les frais de la discussion du débiteur principal.

Par leur déclaration les Demandeurs alléguaient: "Que le 12 juillet 1851, le dit Défendeur s'obligea envers le dit Gabriel Lenoir dit Rolland un des dits Demandeurs alors en société avec l'autre Demandeur, et faisant commerce ensemble en la cité de Montréal dit district sous la raison sociale de "Rolland et Lapierre," et ce longtemps auparavant; à payer le cuir que le nommé Pierre Chrysologue Dugal là et alors de la dite cité, cordonnier; prendrait ce jour-là chez le dit Gabriel Lenoir dit Rolland, savoir: au magasin des dits Demandeurs en cette cause, et ce, au montant de $60, si le dit Dugal ne payait point au temps de l'échéance du délai que le dit Gabriel Lenoir dit Rolland devait lui donner, tel que le tout appert à l'écrit alors dressé par le dit Défendeur et par lui signé et remis au dit Dugal, qui là et alors le remit au dit Gabriel Lenoir dit Rolland. (1)

Que sur la foi du dit écrit et sur le cautionnement ainsi donné par le dit Défendeur, les dits Demandeurs alors associés comme susdit, ont avancé et vendu, et livré là et alors au dit Dugal du cuir au montant de £16 3s. 9½d. et que sans le dit écrit, ils n'auraient jamais avancé ni livré ce cuir au dit Pierre Chrysologue Dugal qui était alors notoirement insolvable et en déconfiture.

Que le dit Défendeur connaissant bien tout ce que ci-dessus, a néanmoins toujours négligé et refusé de payer aux dits Demandeurs quoique de ce souvent requis la somme de $60, montant de son dit cautionnement en autant que le dit Dugal n'a jamais payé le dit cuir ainsi à lui là alors vendu et livré par les dits Demandeurs, à et alors associés comme susdit et a laissé poursuivre le dit Dugal par les Demandeurs, pour le paiement du dit cuir et a laissé faire des frais considérables pour parvenir à la discussion du dit Dugal, et ce, à sa pleine connaissance.

(1) Cet écrit était rédigé comme suit: "Montréal, 12 juillet, 1851. Je m'oblige envers M. Rolland à lui payer le cuir que M. Dugal prendra ce jour, chez lui jusqu'au montant de soixante piastres; si M. Dugal ne le paye point au temps de l'*échéance* du délai que M. Rolland doit lui donner." (Signé) T. J. J. Loranger.

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Que le dit Dugal a été discuté suivant la loi, pour établir son insolvabilité et ce à la réquisition même du dit Défendeur qui a toujours promis de payer le montant de son dit cautionnement aussitôt l'insolvabilité du dit Dugal constatée, mais a toujours néanmoins négligé de ce faire quoique de ce souvent requis.

Et les dits Demandeurs allèguent en outre : que le 12 juillet 1851, en la dite cité de Montréal, le nommé Pierre Chrysologue Dugal là et alors cordonnier de la dite cité et maintenant de la paroisse de Ste. Anne d'Yamachiche, dans le district des Trois-Rivières était endetté envers les dits Demandeurs là et alors associés sous la raison sociale de "Rolland et Lapierre" et faisant commerce comme tels en la dite cité, en la somme de £16 3s. 9½d. montant du compte détaillé ci-annexé pour le prix et valeur de divers effets et marchandises vendus et livrés le 14 juillet 1851 en la cité de Montréal, dans le district de Montréal, par les Demandeurs là et alors commerçants de cuir et associés en la dite cité et y faisant commerce sous la raison sociale de "Rolland et Lapierre" au dit Pierre Chrysologue Dugal à sa demande et requisition, et pour autant que les dits Demandeurs méritent avoir du dit Pierre Chrysologue Dugal pour le prix et valeur des dites marchandises vendues et livrées comme susdit, et pour autant que le dit Pierre Chrysologue Dugal a souvent reconnu leur devoir et promis leur payer à demande.

Les Demandeurs déclarent : que cette vente et livraison eurent ainsi lieu en autant que le dit Défendeur par un écrit antérieur en date du 12 de juillet 1851, s'obligea et se porta bien duement caution du dit Pierre Chrysologue Dugal et se fit fort et s'obligea de payer pour et à l'acquit de ce dernier à défaut par lui de ce faire dans le délai qui serait là et alors donné au dit Dugal, aux dits Demandeurs la dette qu'il aurait pu contracter vis-à-vis de ces derniers et ce jusqu'au montant de $60 égalo à celle de £15 courant, suivant qu'il appert à l'écrit produit en cette cause et signé comme suit ; "T. J. J. Loranger" par le Défendeur lui-même.

Que discussion des biens du dit Pierre Chrysologue Dugal ayant été légalement faite en vertu du jugement rendu contre lui le 15 septembre 1854, en la Cour de Circuit dans et pour le district de Montréal, en faveur des dits Demandeurs, sur la poursuite par eux faite contre le dit Dugal, aux fins de recouvrer et percevoir le paiement de la susdite créance, il ne s'est trouvé aucuns meubles ni effets d'une valeur suffisante pour effectuer le paiement de la susdite créance, pas même pour faire face aux frais d'exécution, suivant que le tout appert aux retours des writs d'exécution émanés en la dite cause, et lesquels retours sont annexés aux susdits Writs ou Brefs d'exécution, dont et du tout copies sont produites avec les présentes pour en faire partie.

Que depuis le 12 juillet 1851 le dit Dugal est insolvable et en déconfiture.

Que les frais taxés sur le dit jugement sont de £4 9s. 9d. et les frais subséquents encourus sur l'émanation des Writs de Saisie-Exécution contre les biens-meubles du dit Dugal et la mise en force d'iceux sont de £2 11s. 8d. courant, formant en tout la somme de £7 1s. 5d. courant, qui jointe à £15 forme £22 1s. 5d. courant.

Que partant le dit Défendeur qui fut bien et duement notifié de tout ce que ci-dessus et qui en eut pleine et entière connaissance et à qui demande de paie-

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ment de la susdite créance fut bien et duement faite, depuis la susdite discussion des biens du dit Pierre Chrysologue Dugal, est bien et duement endetté envers les dits Demandeurs en la dite somme de £22 1s. 5d. courant, laquelle somme les dits Demandeurs ci-devant marchands associés comme susdit, méritent avoir dû dit Défendeur; et pour le recouvrement de laquelle ils sont bien fondés à se pourvoir en justice contre ce dernier qui a souvent reconnu la leur devoir et promis la leur payer, ce qu'il néglige et refuse maintenant de faire quoique de ce souvent requis.

Le Défendeur ayant plaidé à cette action, par une défense au fonds en fait et la contestation étant liée, les parties procédèrent à leur preuve.

Le Défendeur ayant été examiné sur faits et articles, au 11e interrogatoire qui est comme suit: 11e N'est-il pas vrai que le dit Dugal qui n'a jamais payé le prix du cuir ainsi vendu et livré par les dits Demandeurs associés comme susdit, a été poursuivi par eux pour le susdit montant à votre demande et requisition? Il a répondu ainsi: Il est vrai qu'il a été poursuivi, ayant été menacé moi-même de poursuite, j'ai dit aux avocats des Demandeurs que si j'étais poursuivi, j'invoquerais une exception de discussion et je crois que c'est sur ma réponse qu'il a été poursuivi. Au 12e interrogatoire qui est comme suit: N'est-il pas vrai que depuis le 12 et le 14 juillet 1851, le dit Dugal a été poursuivi par les dits Demandeurs associés comme susdit, *et ce, à votre requisition*, et qu'il a été discuté suivant la loi, et que son insolvabilité a été constatée? Le Défendeur répondit, cela est vrai.

Il fut prouvé que Gabriel Lenoir dit Rolland ne faisait point de commerce séparé de celui de leur société à la date de la lettre de garantie.

Lafrenaye, pour les Demandeurs, cita les autorités suivantes pour établir que cette lettre de garantie quoiqu' adressée à un seul des associés donnait à la société commerciale de Rolland et Lapierre un droit d'action en recouvrement: Smith's Mercantile Law, p. 68, 4 B. & C. 664, 3 C. & P. 162, 2 Camp. 548.

Loranger, pour le Défendeur prétendit qu'il pouvait avoir une compensation à opposer à cette réclamation, si elle eut été faite au nom de Rolland seul, et que conséquemment la demande faite au nom d'une société avec laquelle il n'avait pas contracté le privait de ce droit.

Cette proposition n'avait pas été soulevée par la défense au fonds en fait.

PER CURIAM:—Quand la letire de guarantie fut accordée, la société de Rolland et Lapierre existait, et Rolland ne faisait pas commerce séparé. Les effets étaient demandés au magasin de la société, leur livraison était là, et ils étaient entrés dans leurs comptes. Une telle garantie ne doit être interprétre strictement, mais d'après ce qui paraît généralement être l'intention des parties, et même dans l'absence d'une preuve positive sur ce point, l'interprétation doit être prise fortement contre le donneur de la lettre. La Cour a condamné le Défendeur à payer le montant du cautionnement et a refusé d'accorder les frais de la discussion de Dugal. Le jugement est motivé en partie comme suit:

"The Court having heard the parties by their Counsel upon the merits of this cause, examined the proceedings and proof of Record, and having deliberated thereon, considering that the guarantee filed in this cause by the Plaintiffs and given by the Defendant in favor of Gabriel Lenoir dit Rolland one of the

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firm of the Plaintiffs, the said firm existing at the time when the said guarantee was carried into effect and accepted, inured to the benefit of the said Plaintiffs co-partners aforesaid, the said Leno[illegible] Rolland also then and there not engaged in trade separately, con[illegible]dant to pay to the Plaintiffs, the sum of £15 amount of sa[illegible]th interest thereon from the 29th day of January 1856, until actual payment, and costs of Circuit Court."

Lafrenaye et Papin, avocats des Demandeurs.

Pominville, avocat du Défendeur.

(P. B. L.)

MONTREAL, JUNE 30TH, 1[illegible]

Coram BERTHELOT, J.

No 2223.

Frothingham et al., v. *The Brockville and Ottawa Railway Company and Dickinson et al., Garnishees.*

ABSENTEE DEFENDANTS—JURISDICTION.

Held that absent defendants who have had no domicile in Lower Canada, must possess real or personal property within the District where the suit is instituted to give jurisdiction to the Court, and that property of the defendants within the district of Quebec, held by A. resident within the District of Montreal, is not property of the defendants within the District of Montreal.

This was a Saisie Arret before judgement sued out by the plaintiffs against the defendants, who were a Foreign Corporation, upon a judgment rendered against them in Upper Canada.

The action was instituted under authority of the 94th clause of the Judicature act of 1849, which permits of persons who have no domicile in Lower Canada, but who have personal or real estate within the same, being impleaded in the Superior or Circuit Court, in the District or Circuit, where such property may be situated.

The writ was served in Upper Canada, upon the Defendants at their domicile in Upper Canada, under the provisions of the 58th section of the Act amending the Judicature Acts 22nd Vic., c[illegible] 5.

The Defendants appeared and fyled a declinatory exception and an exception *à la forme*, whereby they represented, that they had no domicile in Lower Canada—that the *debt* sued for, was not contracted in Lower Canada, and that they had no personal or real property in Lower Canada.

It appeared in evidence, that though the Defendants had no property in the District of Montreal, yet they had personal property in the District of Quebec, which however was in the custody of the agent[illegible] of the Tiers Saisi Dickinson, and that Dickinson resided in the District of Montreal.

It was claimed by the Plaintiffs that the residence of Dickinson within the District of Montreal, and the holding by him of property of the Defendants though it was situate in the District of Quebec, gave jurisdiction to the Court.

After hearing, the Court maintained the exceptions, and dismissed the action with costs.

Action dismissed.

Abbott & Baker for Plaintiffs.

Torrance & Morris, for defendants.

(A. M.)

MONTREAL, 30TH JUNE, 1859.

Coram BERTHELOT, J.

No. 129.

Beaudry, vs. *Laflamme & Davis*, Intervening party.

Held,—That an intervening party whose intervention has been allowed, is entitled to plead to the merits of the action in order to the conservation of his rights, and this though another and separate issue is raised on the intervention by the Plaintiff pleading thereto.

This was an action of Revendication instituted by the Plaintiff to recover four Horses which he alleged to be his property.

The intervening party by his intervention claimed that he had purchased the horses of the Defendant in good faith, alleging further that the horses were seized in his possession and not in the Defendant's, and in order to protect his rights he filed an intervention which was allowed by the Court.

The Plaintiff filed answers to the intervention. The intervening party replied to these, but in addition thereto he pleaded several pleas to the *demande* of the Plaintiff.

The Plaintiff then moved to reject the pleas of the Intervening party to the action on the ground that he was not entitled to plead to the action, or do more than join issue in the intervention.

The motion was after the hearing of Counsel taken *en délibéré*, and thereafter dismissed.

E. Carter, for Plaintiff. Motion dismissed.

Torrance & Morris, for Intervening party.

(A. M.)

CIRCUIT COURT.

MONTREAL, 14 JULY, 1859.

Coram S. C. MONK, J.

No 2341.

Bedard vs *Dorion*.

DOMMAGES.—STATUT 18 VIC. CAP. 108.

Jugé:—La Demanderesse a une action par le Statut Provincial 18 Vic. ch. 108 (Des Locateurs et Locataires) pour réclamer simplement des dommages résultant de la violation d'une clause du bail, quoique ce bail soit expiré. Le loyer annuel règle la juridiction dont ressortissent ces causes.

Cette action était en recouvrement de $380, pour dommages causés par le Défendeur à une propriété que lui avait louée la Demanderesse, pour cinq ans à dater du 1er mai 1854, à raison de $60 par an, avec clause expresse que le Défendeur y résiderait lui-même et ne pourrait sous-louer, ni en tout ni en partie. On allègue que le Défendeur un an après avoir pris possession, abandonna la propriété et la sous-loua à plusieurs familles pauvres qui l'ont tellement détériorée, qu'à l'expiration du bail les dommages ne pouvaient être estimés à moins de $380, pour lesquels on se pourvoit en cour de circuit sous les provisions du statut.

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Le Défendeur décline la compétence du tribunal par *Exception Déclinatoire*, et propose deux moyens; 1o. Le montant réclamé par l'action excède la juridiction du tribunal. 2o. Le loyer stipulé au bail excède £50.

A l'audition *Roy* expose que l'action est portée sur le paragraphe 5 de la 2e clause de la 18me Vict. ch. 108. qui donne telle action *pour recouvrer les dommages provenant d'une violation d'une convention de bail*; il est indifférent que le bail soit expiré ou non, la loi ne faisant pas telle distinction, et la Demanderesse se trouvant dans les termes exprès de cette loi, en poursuivant *pour recouvrer les dommages provenant d'une violation d'une convention de bail*. En outre la clause 8 permet à la cour *d'entendre et décider toutes les causes originant en vertu du présent acte, ou des relations de locateur et locataire, &c.* Quant au montant réclamé, il ne détermine pas la juridiction de la cour, mais, d'après la clause 5, c'est la *valeur annuelle ou loyer de la propriété* qui règle cette juridiction; le mot *annuelle* s'applique à *loyer* tout aussi bien qu'à *valeur*, et cette interprétation est confirmée par le texte anglais, *annual value or rent*, et par la dernière partie de la clause *quelque puisse être le montant des dommages et du loyer réclamés.*

Dorion argua que l'action ne pouvait être intentée en vertu du statut qu'en y joignant une demande en rescision; il résulte de l'ensemble du statut, que le législateur a établi un tribunal exceptionnel pour rescinder les baux en certains cas, mais a permis de demander le montant du loyer en même temps que la rescision. D'ailleurs le bail est expiré, les relations de locateur et locataire n'existent plus entre les parties, et la Demanderesse devait se pourvoir devant les tribunaux ordinaires, comme il a été jugé dans la cause de "Close vs Close," 3 L. C. Jurist, 140: Il est vrai que quand il n'y a pas de bail, c'est la valeur annuelle de la propriété qui détermine la juridiction, mais il n'en est pas de même quand il y a un bail, et le terme *annuel* ne s'applique pas à loyer; or dans l'espèce, le loyer étant pour 5 ans à $60 par an, forme la somme de $300 qui excède la juridiction de la Cour de Circuit;—

Jugement.—"The court having heard the parties by their counsel upon the "*Exception déclinatoire* made and fyled in this cause by the Defendant, having "examined the proceedings and proof of record, and deliberated thereon, consi- "dering that the cause and causes of action mentioned and set forth in the Plain- "tiff's declaration in this cause fyled, arise and have arisen out of a violation of a "clause in the deed of lease between the Plaintiff and the Defendant dated 19th "April 1854, during the existence of the said lease, considering further that the "causes upon which the present action rests, arise and have arisen from and "out of the relation of lessor and lessee—considering further that the annual rent "of the property mentioned in Plaintiff's declaration stated and agreed upon, "by and between the Plaintiff and Defendant, in and by the said deed of lease, "did not exceed the sum of £15 annual rent, and was of that sum, payable "quarterly.—Considering therefore that the *Defendant's Exception déclina-* "*toire* is unfounded, the court doth dismiss the said exception with one pound "costs *distraits* to Messrs Roy & Bruneau, the attornies of the Plaintiff."

Roy and Bruneau, pour le Demandeur.

Dorion, Dorion & Sénécal, pour le Défendeur.

(R. R.)

MONTREAL 20th July, 1859.

Coram SMITH J.

IN CHAMBERS.

No 712.

Clairmont & vir vs. Dickson.

IN EJECTMENT—PROCEEDINGS IN VACATION.

Held.—That the Defendant is not bound to fyle a plea or otherwise proceed during the vacation between the 10th July and last day of August inclusive, in cases of ejectment upon the lessors and lessees consolidation act (18 Vic. c. 108) under the 54th sect. of the Judicature act (22 Vict. ch. 5) even where it is alleged that the lease has expired and Defendant refuses to quit.

The Plaintiffs set out in their declaration a lease (and also a use and occupation by their permission) to Defendant of a furnished house for the space of five months, which period having elapsed, and Defendant refusing to pay the rent or quit the house, they prayed that he might be ejected.

The Defendant appeared by his counsel *Mr. Bovey* before noon on the return day. (19th July 1859,) and at noon of the following juridical day, being called on to fyle a plea, moved that the cause be continued to the 1st September then next for pleading thereto inasmuch as by law he was not bound to proceed during the then pending vacation; and in support of this relied on the 59th section of the judicature act, 22 Vict. ch. 5, by which section no party to a suit can be compelled to fyle any plea, &c., or otherwise proceed between the 10th of July and 31st August inclusive, save only as excepted in the 10th sec. of the 16 Vic. ch 194 viz., unless commanded so to do by express order of the court or judge, (which the court or judge may always make,) or unless ordered to obey any process or order of the court issued or made in or with reference to a particular suit or case, or to do the thing which he might thereby be commanded to do at the time mentioned in such process or order.

The Plaintiffs' counsel replied that the case was exactly one in which the exception should be applied and a special order to proceed be made, not only from the nature of the case but with a view to prevent the manifest injustice that would flow from the defendant's keeping possession of the furnished house for several weeks after the expiration of the term of lease against the will of the lessors, while the lessors had nothing whatever to secure the payment of the rent, the furniture in the house being their own. That the present case was different from a simple case of non-payment of rent. It was the unjust detention of the property after the termination of the lease.

PER CURIAM.—After consulting with my brother judges, (Justices Badgley, Monk and Berthelot) they and I are of the unanimous opinion that the Defendant is not bound to proceed in the present case during this vacation. Such has been the uniform rule in the district of Quebec and I held the same in the case of Barclay vs Stephens last year, as well as in other cases. The intention of the statute was to shut up the law courts and to do away with judicial proceedings unless in cases of absolute necessity during these two summer months. The 16 Vict. c. 194 does not specify the exceptional cases in which the judge

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should make the special order, while the terms of the 22 Vict. are express and almost absolute, that the Defendant shall not be held to proceed. In cases of great emergency where it would be clearly essential for the preservation of property or rights of any kind, that no delay should take place I would then avail myself of the authority given under the 16th Vict. There is nothing in this case however that should distinguish it from any ordinary action for debt or on covenant so far as the question now at issue is to be considered. The case therefore is continued to the 1st September next for plea.

Defendant's motion granted.

Ouimet & Morin, for Plaintiffs.
Bovey, for Defendant.

(W. A. B.)

COURT OF QUEEN'S BENCH.

IN APPEAL

FROM THE SUPERIOR COURT, DISTRICT OF MONTREAL.

MONTREAL, 1ST SEPTEMBER, 1859.

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

DAWSON (*Defendant in the Court below*), Appellant;

AND

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

FYLING OF FACTUM—DEFAULT.

Held,—That the Appellant who has failed to fyle his *factum* within the delay prescribed by the rules of practice, will be relieved from the consequences of his default, by producing the *factum* when the Respondent makes a motion to have the Appeal dismissed in consequence of the Appellant not having fyled his factum within the delay prescribed. Party in default to pay costs of motion.

Motion dismissed, with costs to mover.

E. Barnard, for Appellant.
Belle & Germain, for Respondent.

(T. W. T.)

IN SUPREME COURT OF MISSOURI.

UNITED STATES.

[Held at St. Louis, October Term, 1857.]

Mary Charlotte vs. *Gabriel S. Chouteau, et al.*

SLAVERY IN LOWER CANADA.

Opinion of Supreme Court, by RICHARDSON, Judge:—

The Plaintiff asserts her right to freedom on the ground that her mother, a negress, was born in Montreal, in Lower Canada, about the year 1768, and that her mother was not born a slave, because slavery did not exist in Canada at the time of her birth.

On the trial the plaintiff gave parol evidence tending to prove that her mother was born in Montreal about the year 1768, and that slavery did not actually exist and was not tolerated by law at that time in Canada.

The defendant, on his part, gave parol evidence tending to prove the actual existence of slavery in Canada in the year 1768, that slaves were recognised as property, and that Rose, the plaintiff's mother, was held and sold as a slave in Canada.

The Defendant* also gave the following documentary evidence.

First. The articles of capitulation of the surrender of Montreal by the French to the English forces, signed on the 8th September, 1760, by Lord Amherst, Commander-in-Chief of the British forces in North America, and the Marquis de Vaudreuil, Governor and Lieutenant General for the King of the French in Canada.

The 27th article secured to the Canadians the free exercise of the Roman Catholic religion.

The 47th article is as follows: "The negroes and panis of both sexes shall remain in their quality of slaves, in the possession of the French and Canadians to whom they belong; they shall be at liberty to keep them in their service in the colony, or to sell them; and they may also continue to bring them up in the Roman religion."

"Granted, except those who shall be made prisoners."

Second. The definitive treaty of peace concluded between the Kings of Great Britain and France the 10th day of February, 1763, by which the French ceded and transferred to the Crown of Great Britain, Canada with all its dependencies. The King of Great Britain agreed to grant the liberty of the Catholic religion to the inhabitants of Canada, and that he would give the most effectual orders that his new Roman Catholic subjects might profess the worship of their religion according to the rites of the Romish Church, as far as the laws of Great Britain permitted; and that the French inhabitants or others who had been the subjects of France in Canada, might retire with all safety and freedom wherever they should think proper, and might sell their estates to British subjects, or take away their property without restraint. But the treaty is, in every respect, silent in reference to the persons or property of the Canadians.

* An error: the first three documents referred to were adduced by the Plaintiff.

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Third. The proclamation of George III. dated 7th October, 1763. It begins by reciting that extensive and valuable acquisitions in America had been secured to the Crown by the treaty concluded at Paris on the 10th of February, 1763, and being desirous that his subjects, as well of his kingdoms, as of his colonies in America, might avail themselves of the great benefits which would accrue to them from their commerce, &c., he had thought fit to issue his proclamation and thereby, to publish and declare to his subjects that he had granted letters patent to erect within the countries and islands ceded and confirmed by said treaty four distinct governments called by the names of Quebec (Canada,) East Florida, West Florida and Grenada.

It then designates the extent and boundaries of said Governments, and declares as follows: "And whereas, it will greatly contribute to the speedy settling our said new Governments, that our loving subjects should be informed of our paternal care for the security of the liberty and properties of those who are, and shall become inhabitants; we have thought fit to publish and declare, by this our Proclamation, that we have in the letters patent, under our great seal of Great Britain, by which the said governments are constituted, given express power and directions to our Governors of our said colonies, respectively, that so soon as the state and circumstances of our said colonies will admit thereof, they shall, with the advice and consent of the members of our Council, summon and call general assemblies within the said governments respectively, in such manner and form as is used and directed in those colonies and provinces in America which are under our immediate government; and we have also given power to the said Governors, with the consent of our said Councils, and the representatives of the people, so to be summoned as aforesaid, to make, constitute and ordain laws, statutes and ordinances for the public peace, welfare and good government of our said colonies, and of the people and inhabitants thereof, as near as may be, agreeable to the laws of England, and under such regulations and restrictions as are used in other Colonies; and in the mean time, and until such assemblies can be called as aforesaid, all persons inhabiting or resorting to our said colonies may confide in our royal protection for the enjoyment of the benefits of the laws of our realm of England; for which purpose we have given power, under our great seal, to the Governors of said colonies respectively, to erect and constitute with the advice of our said Councils, respectively, courts of judicature and public justice within our said colonies, for the hearing and determining of all causes as well criminal as civil, according to law and equity, and, as near as may be agreeable to the laws of England."

There is nothing else in the Proclamation that relates to this subject.

Fourth. The act of the British Parliament of 1774, 14 George III, chap. 83. entitled "An act for making more effectual provision for the government of the Province of Quebec in North America." (30 British Stat. at large, 549.) There is nothing in this act that bears on the subject but the two following sections:

"SEC. 4. And, whereas, the provisions made by the said proclamation in respect to the civil government of said province of Quebec, and the powers and authorities given to the Governor and other civil officers of the said Province, by the grants and commissions issued in consequence thereof, have been found

upon experience to be inapplicable to the state and circumstances of the said Province, the inhabitants whereof amounted at the conquest to above sixty-five thousand persons professing the religion of the Church of Rome, and enjoying an established form of constitution and system of laws, by which their persons and property had been protected, governed and ordered for a long series of years from the first establishment of the said Province of Canada; be it, therefore, further enacted by the authority aforesaid, that the said proclamation, so far as the same relates to the said Province of Quebec, and the commission under the authority whereof the government of the said Province is at present administered, and all and every the ordinance and ordinances, made by the Governor and Council of Quebec, for the time being, relative to the civil government and administration of justice in the said Province, and all commissions to Judges and other officers thereof, be and the same are hereby revoked, annulled and made void, from and after the first day of May, one thousand seven hundred and seventy-five."

"SEC. 8. And be it further enacted by the authority aforesaid, that all his Majesty's Canadian subjects, within the Province of Quebec, the religious orders and communities only excepted, may also hold and enjoy their property and possessions, together with all customs and usages relative thereto, and all other civil rights, in as large, ample and beneficial manner as if the said proclamation, commissions, ordinances, and other acts and instruments had not been made, and as may consist with their allegiance to his majesty, and subjection to the Crown and Parliament of Great Britain; and that in all matters of controversy relative to property and civil rights, resort shall be had to the laws of Canada, as the rule for the decision of the same, and all causes that shall hereafter be instituted in any of the courts of justice, to be appointed within and for the said province by his majesty, his heirs and successors, shall, with respect to such property and rights, be determined agreeably to the said laws and customs of Canada, until they shall be varied or altered by any ordinance that shall from time to time be passed in said province," &c.

Fifth. The act of the British Parliament of 1790, 30 Geo. III, chap. 27, entitled "An Act for encouraging new settlers in his Majesty's plantations in America," (37 British statutes at large 24,) as follows: "Whereas, it is expedient that encouragement should be given to persons who are disposed to come and settle in certain of his Majesty's colonies and plantations in America and the West Indies, be it therefore enacted by the King's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and commons in this present parliament assembled, and by the authority of the same, that from and after the first day of August, one thousand seven hundred and ninety, if any person or persons, being a subject or subjects of the territories or countries belonging to the United States of America, shall come from thence, together with his or their family or families, to any of the Bahama or Bermuda or Somers Islands, or to any part of the Province of Quebec, or of Nova Scotia, or any of the territories belonging to his Majesty in North America, for the purpose of residing or settling there, it shall be lawful for any such person or persons, having first obtained a license for that purpose from the Governor, or in his absence the

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Lieutenant Governor of said Island, colonies or provinces respectively, to import into the same in British ships owned by his Majesty's subjects, and navigated according to law, any negroes, household furniture, utensils of husbandry and clothing free of duty; provided always, that such household furniture, utensils of husbandry and clothing shall not in the whole exceed the value of fifty pounds for every white person that shall belong to such family, and the value of forty shillings for every negro brought by such white person; and if any dispute shall arise as to the value of such household furniture, utensils of husbandry, or clothing, the same shall be heard and determined by the arbitration of three British merchants, at the port where the same shall be imported, one of such British merchants to be appointed by the Governor, or in his absence by the Lieutenant Governor of such Island or Province; or by the Collector of Customs at such port, and one by the person so coming with his family.

II. *And be it further enacted.* That all sales or bargains for the sale of any negro, household furniture, utensils of husbandry, or clothing so imported, which shall be made within twelve calendar months after the importation of the same, (except in cases of the bankruptcy of the owner thereof,) shall be null and void to all intents and purposes whatsoever."

The third and last section relates only to the oath of allegiance required to be taken by the immigrant.

Sixth. The act of the Provincial Parliament of Upper Canada, passed July 9th, 1793. (chapter VIII, 1 Rev. Stats. of Upper Canada 18.)

The first section of this act recites, that it is highly expedient to abolish slavery in the Province, so far as the same may gradually be done without violating private property. It then repeals so much of the act of 1790 as enables the Governor or Lieutenant Governor to grant license for the importation of negroes, and forbids any negro or other person subjected to the condition of a slave from coming or being brought into the Province after the passage of the act, to be subject to the condition of a slave.

The second section provides that nothing in the act should be construed to extend to liberate any negro subjected to service, or to discharge him from the possession of his owner, who should have come or been brought into the Province in conformity to the conditions of the act of 1790, or should have otherwise come into the possession of any person by gift, bequest or purchase.

The third section declares that, in order to prevent the continuation of slavery within the Province, every child thereafter born of a negro woman who was a slave, should remain with his or her mother or mistress until such child should arrive at the age of twenty-five years, and then be free.

At the request of the defendant the Court gave the following instruction:

1st. "If negro slavery existed by virtue of the laws and ordinances of the French Government in Canada, prior to the acquisition of that country by the English, and if the articles of capitulation, the treaty of cession, the acts of Parliament of 1774 and 1790, and the King's proclamation of 1763 be correct copies of the genuine documents, then negro slavery was sanctioned and permitted by law in the country called the Province of Canada, (which includes Montreal,) at all times from the year 1760 to the year 1790.

And afterwards at the plaintiff's instance gave this: "Whether Rose was lawfully a slave in Canada is a question for the jury to decide from the evidence on the trial."

These two instructions are incompatible and both cannot stand. The first declared as a matter of law, the legality of the documents named in it, and the Court in giving it assumed, that it was its duty, and not the province of the jury, to pass on their meaning and operation. The second submitted every proposition of law in the case, to be determined by the jury. If it was a conclusion of law from the documents read in evidence, to be decided by the Court, that slavery was sanctioned in Canada, it was not proper to refer the question whether or not it was *lawful* to the jury. But if the last instruction was proper, though inconsistent with the first, the defendant cannot complain, and if the first was correct, the other was wrong, and was calculated to mislead the jury to the defendant's prejudice. The quality of these instructions must be determined by the question, whether it is the duty of the Court or the jury to construe a foreign law.

It is universally admitted that Courts do not take judicial notice of the laws of a foreign country, but they must be proved as other facts in a trial. It will not be presumed that a foreign law is in writing, and if it does not appear that it is written, it may be proved by parol. (Livingston vs. Maryland Insurance Company, 6 Cranch, 280.) But like the proof of every other fact, the best evidence of which the cause is susceptible, must be produced; and as a witness may speak of the terms and nature of an unwritten contract, so he may testify of the existence of a foreign law, but, as when the contents of a written instrument are sought to be proved, the instrument itself must be produced. So foreign written laws must be proved by the laws themselves. 2 Starkie's Ev. 331; Consequa v. Willing, Pet. C. C. 229; Robinson v. Clifford, 2 Wash. C. C. I.; United States v. Ortega, 4 Wash. C. C. 533; Dougherty v. Snyder, 15 Lery & R. 87; Kinney v. Clarkson, 1 John 394; Camparet v. Jernegan, 5 Black. 375; Gardner v. Lewis, 7 Gill 379; McNeil v. Arnold, 17 Ark. 155. The English cases are contradictory. In Millar v. Hernwick, (4 Cam. 155) Gibbs, Ch. J. said: "Foreign laws, not written, are to be proved by the parol examination of witnesses of competent skill. But when they are in writing, a copy properly authenticated must be produced." Whilst Lord Denman, in Baron De Bode's case (8 Adol. and El. N. S. 250) permitted a witness to speak of the effect and state of the law in France, resulting from a decree, but Patterson, J. dissented. In this country the question is well settled; but the cases are not uniform on the point, whether the evidence of the existence of a foreign law is addressed in the first instance to the Court or to the jury. In Consequa v. Willing it is said that whether the law or usage is sufficiently proven or not, is a question of fact for the jury, and so also, in the case of the State v. Jackson, (2 Dev. 566) Ruffin J., held that the "existence of a foreign law is a fact. The Court cannot judicially know it, and therefore it must be proved, and the proof, like all other, necessarily goes to the jury." And in Moore v. Gergan, (3 Ire. 190) where the question did not arise under statute, but under the common law of Virginia, and the testimony was conflicting, it was decided that it ought to be left to the jury.

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But the decided weight of the American authorities goes to the length of establishing the doctrine, not only that it is the province and duty of the Court to instruct the jury as to the meaning and effect of a foreign law, when proved, whether the law is written or unwritten, but that the proof must be made to the Court. Mr. Justice Story, in his Conflict of Laws, (section 638) says: "All matters of law are properly referable to the Court, and the object of the proof of foreign law is to enable the Court to instruct the jury what, in point of law, is the result of the foreign law to be applied to the matters in controversy before them. The Court are therefore to decide what is the proper evidence of the laws of a foreign country; and when evidence is given of these laws, the Court are to judge of their applicability, when proved, to the case in hand." And Mr. Greenleaf, in his treatise on evidence, (1 Greenl. Ev., sec. 486,) quotes this section from Story, and incorporates it into the text of his work as containing the proper rule. Gibson, Chief Justice, observed, in Sidwell vs. Evans, (1 Penn. 383) that "municipal law is a matter of compact, and as such, the construction of foreign statutes, as in the case of any other written compact, belongs to the Court. A plausible distinction might be taken in this respect between written and the unwritten law, which necessarily rests on parol, but it seems to have been disregarded."

Though the Supreme Court of North Carolina, in the case of the State vs. Jackson, deciding that a foreign law was to be proved as a fact to the jury, held, that when it is established "its meaning, its conclusion and effect is the province of the Court. It is a matter of professional science, and as the terms of the law are taken to be ascertained by the jury, there is no necessity for imposing on them the burden of affixing a meaning on them more than on our own statutes. And in a late case (5 Iredell) the same Court decided, that where the question arises under a statute, it is the province of the Court to decide, both as to the existence of the statute and its proper construction. The case in Inge vs. Murphy (10 Ala., 897) turned on the construction of a foreign statute, and the Judge in delivering the opinion of the Court observed: "It seem to us a self-evident proposition, that laws, whether written, statute, domestic or foreign, must be ascertained in the general, and always construed by the Court, and equally so, that it is manifestly not the province of the jury to place the construction upon it under any circumstances."

Again, in a very recent case in Pennsylvania (Bock vs. Lauman, 24 State Rep. 447) the doctrine was reasserted, that though the law of another State is a matter of fact, it is not necessary to be found by the jury, but by the Court, and that all the analogies of the law inclined the Court to regard the interpretation of foreign laws, whether written or unwritten, as falling within the province of the Court.

It may be doubted whether the rule ought to be applied, or can be practically enforced, when the foreign law offered in evidence is unwritten, or is the common law of the country where it prevails; for in many instances, as in the case in 5th Iredell, the evidence may be conflicting, and all the witnesses may state the law differently, in which case it would be extremely difficult for the Court to determine either the fact sought to be proved, or to declare the legal effect of the

evidence. And whilst it may be the better rule to submit, as a question of fact, the existence of a foreign law to the jury, we think that when it is written and received in evidence, it is the duty of the Court to construe it, and to instruct the jury as to its meaning and effect. We do not mean by the written law the statements of text writers or the decisions of Courts; but these may be used, like the evidence of experts, to enlighten the Court in expounding the foreign laws. For when a foreign law has received a local construction, judicial decisions and law writers may be consulted, and professional witnesses may be examined for the purpose of ascertaining the meaning.

The first instruction, then, given by the Court at the defendant's request, to the effect, that negro slavery was sanctioned and permitted by law in the Province of Quebec from 1760 to 1790, was proper, if the conclusion was legitimate from the facts stated in it; and it will therefore be necessary to recur to the evidence.

The plaintiff read the depositions of two learned and intelligent witnesses—Judges Reid and Gale, each of whom held high judicial positions for many years in Lower Canada. The former testified that slavery existed in Canada to a certain extent, while under the dominion of the French, although he could find no law by which it was introduced prior to the year 1709; when, by an ordinance of the Intendant of the colony, permission was given to the colonists to purchase negroes and panis from the Indians, because they would be useful in the cultivation of the soil. That this ordinance would seem to have been made in order to confirm a practice which had previously existed, though there was no law of the French Government authorizing slavery in Canada. That it had been doubted whether the Intendant, or any Governor of a particular colony, could establish therein such a general principle of public law as slavery. But he says, "it is certain, however, that from the time of this ordinance and before, slavery of negroes and panis, as therein stated, had been practiced and still continued in the Colony in 1736, as by an ordinance of Mr. Hocquart, the then Intendant, of the first of September of that year, a form for the emancipation of slaves was established, and directed to be observed. So far, the existence, if not the legality of slavery would appear." He also states that the ordinance of 1736 assumed the legal existence of slavery. Judge Gale, the other witness, in speaking of the ordinance of 1709, says, it declared that it would be useful to the Colony to hold negroes and Indians of a distant nation, called Panis, as slaves, and, therefore, the negroes and Panis who had been or might be bought, should be held by the purchasers as their slaves. And that the ordinance of 1736 required masters, who emancipated their slaves, to do so only by written documents, passed before public notaries, and declared other forms of emancipation void. In answer to the question, whether slavery of negroes or other persons was recognized and allowed by law in Canada while the country belonged to France? he replied: "I believe that a modified system of slavery respecting negroes, and some others, was *de facto* exercised in Canada, in various instances, while the country remained under the French dominion, but I cannot undertake to say that such *de facto* exercise of slavery was justifiable under sufficient legitimate enactment, and a correct interpretation of the laws as they then stood. My opinion is to the contrary."

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Both of these gentlemen prove that slavery existed in Canada from a period at least as early as from 1709 to 1760; and though they say there was no act of the French Government legalising it, we know that France permitted slavery in her West India colonies, and it cannot be supposed that she was ignorant of the state of things in Canada for so long a time. And it may be assumed that slavery existed in Canada under the French rule, not only *de facto* but *de jure*. Slavery existed in nearly all of the North American colonies, though no law or royal decree has been found introducing it; but it was permitted, and afterwards sanctioned by laws concerning it, passed by Colonial Assemblies with the knowledge of the home government.

The facts developed by the testimony of these witnesses in reference to the state of things in Canada before 1760, explains, if explanation was necessary, the purpose of the 47th article of the capitulation. It will be observed, by an examination of the articles of capitulation, that they make very few provisions affecting the inhabitants of Canada; and it is hardly probable that a besieged army, in the face of an enemy's guns, would stipulate in a separate article for the protection of an interest that had no real existence. No other allusion is made to the property of the inhabitants who intended to remain in the colony, and the 47th article is not only a clear recognition of the existence of slavery but of the value of the interests connected with it. Only the most prominent objects seem to have engaged the attention of the retiring Governor, for he secures nothing for his master's subjects but their religion and their slaves.

The national religion of England was protestant, and the French king was therefore jealous of the religion of his Canadian subjects, and the reason is obvious, why the treaty of 1763 secured to the Canadians the enjoyment of the Roman Catholic religion, and did not stipulate for any other rights of conscience or property. No argument can be drawn from the silence of the Treaty on the subject of slavery or any other peculiar institution, for the inhabitants of Canada, without any special guaranties, were entitled to all their rights of property after the change of government, which they possessed under their former sovereign. The cession of a territory only passes the sovereignty and does not interfere with private property. This is an established rule of public law, and is acknowledged and respected by all civilized nations. The subjects or citizens of a conqured or ceded country retain all rights of property which are not taken away by the new sovereign, and remain under their former laws until they are changed. Strother vs. Lucas, 12 Peter, 438; Mitchell vs. United States, 9 Peters 734; Black's Com. 107. In the United States vs. Percheman (7 Pet. 87.), Chief Justice Marshall, in speaking of the rights to property acquired in Florida before its cession to the United States remarks: "The people change their allegiance; their relations to their ancient sovereign is dissolved, but their relations to each other, and their rights of property, remain undisturbed." If this be the modern rule in cases of conquest, who can doubt its application to the case of an amicable cession of territory. Had Florida changed its sovereign by an act containing no stipulations respecting the property of individuals, the rights of property in all those who became subjects or citizens of the new government would have been unaffected by the change. This principle was recognized in

England in reference to Jamaica as early as 1693, in Blankard vs. Goldy, 4 Modern Rep. 222. Also by Lord Mansfield, in Rex vs. Vaughan, 4 Bur. 2500. Slavery now exists in Louisiana, Missouri and Florida, without any act of legislation introducing it, and none was necessary, for being in existence under the implied sanction at least of France and Spain in 1803 and 1819, it was continued, and was not dependant on any positive law for recognition.

It is insisted, that the Royal Proclamation of October 7, 1763, had the effect of abolishing slavery in Canada. Admitting that the King's prerogative included the power of making laws for the English colonies, we have searched through every clause of the proclamation to find a word or sentence which, in terms or by implication, remotely touches the subject. We have been directed to the clause of the proclamation set out in the first part of this opinion, but on looking at it, it will be seen that no new law is decreed, but only the assurance is given, that, until provincial assemblies can be called, all persons inhabiting or resorting to the colonies of Quebec, East Florida, West Florida and Grenada, may confide in the Royal proclamation for the enjoyment of the benefit of the laws of England, and that orders had been given to the Governors of said colonies respectively, to erect courts of justice for the hearing and determining of all causes, as well criminal as civil, as near as may be agreeable to the laws of England. The Judge's whole testimony we have noticed, says, that this proclamation introduced into all the colonies mentioned in it, the "common law of England," and that the genius and spirit of the common law is so hostile to slavery that whenever it is introduced or prevails it operates *ipso facto* to abolish slavery.

In 1763 the English acquired, besides Canada, Florida, Dominico, Saint Vincent and Tobago, in all which slavery existed, and though the proclamation expressly applied to all, it is well known, and these gentlemen admit, that it did not have the effect of abolishing slavery in Florida and the Grenadines. It is strange that it was potential for the purpose imputed to it in one place, and not in the others. The Supreme Court of Louisiana remarked, in Seville vs. Chretien (5 Mar. 285), that they have not been able to find any trace of a legislative act of the European powers for the introduction of slavery into their American dominions.* Yet it is an undisputed historical fact, that slavery existed in nearly all the English colonies, now included in the United States, and that in each of them the "common law" was claimed as their birth-right, and causes in their courts were determined agreeably to the laws of England. If the opinion of the Canadian Judges is correct, it is evident that the common law was not uniform in its operation, for it did not perform the work in the thirteen colonies ascribed to it in Canada.

The Common law of England was introduced in Missouri by an act of the Territorial legislature of the 19th of January, 1816, and nobody ever supposed that it was equivalent to an act of emancipation.

In the case of the Attorney General v. Stewart, (2 Merwale, 156,) the question arose, whether the proclamation we have been considering extended the laws

* Then, the S. C. of L. must certainly have overlooked the French Edict of March 1685, known as the *Code noir*. Ed. Jur.

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of England to Grenada, and it was certainly doubted in that case whether they were carried by force of the proclamation to the Province of Quebec. Master of the Rolls, Sir William Grant, observes; "It seems to be supposed that this was done by the proclamation of 1763, which is set forth in the report. With regard to three of the four governments to which this proclamation related, viz: East Florida, West Florida and Grenada, I am not aware that any controversy as to the effect of it ever arose. Perhaps there may have been with respect to them, other acts and instruments more directly expressive of his Majesty's intention to introduce the laws of England. But as to the fourth, viz: the government of Quebec, which was included in the same proclamation, and where it must have had the same legal effect as in the others, it became a matter of great and long-continued discussion whether the laws of England had thereby been generally introduced in abrogation of the ancient municipal laws of the country. In a report made by the Attorney and Solicitor General in 1766, little other effect was ascribed to this proclamation than of extending to the inhabitants of Canada the benefit of the criminal law of England." But no matter whether or not the proclamation introduced the laws of England into Canada, or whether they produced any change as to the rights of property, it is certain, that the act of Parliament of 1774 repealed so much of the proclamation as related to the laws of England, and enacted, that the Canadians within the Province of Quebec might "hold and enjoy their property and possessions, together with all customs and usages relative thereto, and all other their civil rights, in as large, ample and beneficial manner as if the said proclamation" had not been made; "and that in all matters of controversy relative to property and civil rights," resort "should be had to the laws of Canada as the rule for the decision of the same."

The Act of 1790 is only consistent with itself on the idea that it assumed the existence of slavery in Canada. The mention of negroes is only in connection with other property which is exempted from the payment of an import duty, and the prohibition on the sale of negroes or furniture, imported under the act within twelve months, was to prevent frauds on the revenue, and it implied that sales of negroes were lawful after the expiration of a year from the time they were imported. It is said that this act was for the benefit of British subjects whose homes were uncomfortable to them in the United States, after our independence was achieved. This is doubtless true, but it is hardly probable that out of tenderness to them, Parliament would have established in Canada, for their benefit alone, a system of slavery which had never before existed there, and which it is alleged is so repugnant to the genius of the common law.

The Province of Quebec was divided into the Provinces of Upper and Lower Canada, by an order in Council, August 24, 1791, which took effect 26th December following.

The act of 1793, passed by the Parliament of Upper Canada, not only repealed the emigration act of 1790, but provided for the prospective and gradual emancipation of the slaves born thereafter. It assumed that there were other slaves in the province than such as had been imported under the license granted by the act of 1790, for the 2d section provided that the act should not apply to

slaves then in being, who had been brought in under the act of 1790, or to such as had otherwise come to the possession of any person by gift, bequest, or purchase. And if there were no other slaves than such as had been imported under the act of 1790, there was no reason for mentioning them.

It is true this law was the act of Upper Canada, which did not include Montreal; but it was passed very soon after the Province was divided, and if slaves were lawfully held in the upper part of the division it must be supposed that the law which permitted uniformly throughout the whole Province.

The Parliament of Upper Canada, at its first session introduced the English law quite as effectually as the King's proclamation have done it, as the rule of decision in all matters of controversy relative to property and civil rights; and it could not have thought that the common law was effectual to abolish slavery, otherwise there would be no necessity for the subsequent act of 1793.

If a controversy should arise in our courts as to whether slavery was authorized by law in Kentucky or Virginia, it is probable that no legislative act could be found in either State which in express terms legalized it; but the conclusion would force itself upon the mind of a judge, and he would feel himself compelled to decide that it was lawful, as a necessary inference from disconnected acts regulating the subject. And, in our opinion, if slavery existed in Canada under the French government, before the English acquired the country, it continued to exist and was lawful until it was abolished; and, after a careful examination of the documentary evidence in this cause, and for the reasons which are here hurriedly given, we have arrived at the conclusion which the Circuit Court announced in the first instruction given for the defendant. The last instruction for the plaintiff is inconsistent with the first for the defendant, and was therefore improperly given. If the word *lawfully* had been omitted in the last instruction, it would have been unobjectionable, for though slavery was sanctioned by law in Canada, if in fact Rose was not a slave there, her children would not now be.

By omitting to notice the other instructions given for the defendant, our silence is not to be construed into an approval of them. The third instruction is very objectionable, for it implies that the plaintiff must make out her case by a higher degree of evidence, and that she must connect every link with more conclusive proof, than is ever required in civil cases of other persons. If a negro sues for his freedom, he must make out his case by proof like any other plaintiff; but the law does not couple the right to sue with ungenerous conditions, and he may prove such facts as are pertinent to the issue, and may invoke such presumptions as the law raises from particular acts. Our statute provides that in suits for freedom, "if the plaintiff be a negro or mulatto, he is required to prove his right to freedom," (Revised Statutes, 1845, Section 533,) but this is not a common law rule of evidence, and with this exception we are not aware of any other rule peculiarly applicable to such suits.

Judge Napton concurring, the judgement will be reversed and the cause remanded.

Scott, Judge, dissenting: Whatever may be the province of the Court in the

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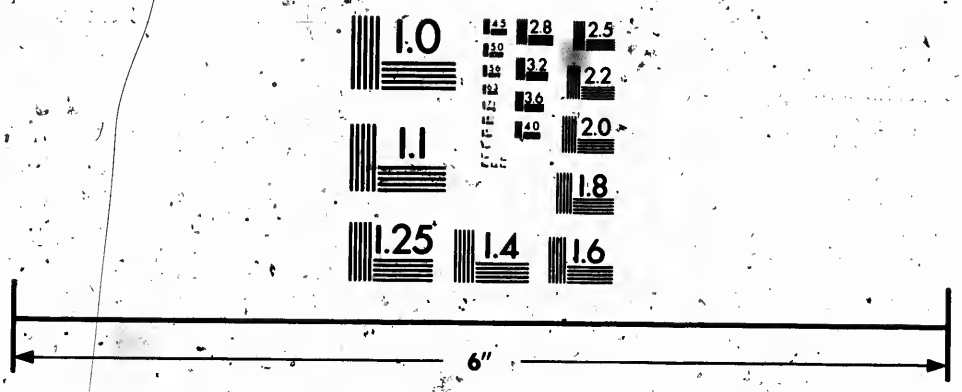

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interpretation of foreign laws for the benefit of the jury, I do not deem necessary to determine, as I conceive no such question is involved in this record. The question for the jury was, whether slavery existed in Canada. No statute was produced creating or establishing that institution which called for the interpretation of the Court. From the fact that there were laws and documents in which reference was made to slaves, or which contemplated a state of slavery, it was to be inferred that slavery lawfully existed in Canada. That inference was one of fact, to be made by the jury. As the jury have found the fact, whose exclusive province it was to do so, the practice of this Court, now established for a number of years, forbids that a judgement should be reversed, because a verdict is against the weight of evidence.

The State of Missouri, ss:

I, WILLIAM S. GLANVILLE, Clerk of the Supreme Court of said State, held at St. Louis, certify the foregoing to be a full, true and complete transcript of the opinion of said Court, and of the dissenting opinion aforesaid, delivered in the cause first before stated, at the October Term, A. D. 1857, on appeal from the St. Louis Circuit Court.

In testimony whereof, I hereto set my hand and the seal of said Court, at Office, in St. Louis, this 25th day of December, A. D. 1857.

WM. S. GLANVILLE, Clerk.

(L. S.)

COUR SUPERIEURE.

MONTREAL, 26 MARS 1859.

Coram BERTHELOT, ASST. J.

No. 966.

Martineau vs. *Karrigan, alias Kerrigan*, fils, et le dit *Karrigan, alias Kerrigan*, fils, Demandeur en faux vs. le dit *Martineau*, Défendeur en faux.

Jugé:—Que le Défendeur en faux, Demandeur principal, n'est pas tenu de répondre au plaidoyer de l'action principale, avant que l'inscription en faux ne soit vuidée.

Le Défendeur Karrigan s'inscrit en faux contre un exhibit du Demandeur après avoir plaidé à l'action principale et avant que le Demandeur ait répondu au dit plaidoyer. Longtemps après l'inscription de faux, mais avant qu'elle soit vuidée par aucun jugement ou autrement, le Défendeur principal signifie au Demandeur principal une demande de réponse de plaidoyer à l'action principale.

Là-dessus, le Demandeur principal fait motion que délai pour répondre au dit plaidoyer du dit Défendeur lui soit accordé jusqu'à ce que la dite inscription de faux soit vuidée et que cette honorable Cour y ait fait droit.

Motion accordée.

Louis Ricard, pour le Demandeur principal.

McKay & Austin, pour le Défendeur principal.

L. R.)

MONTREAL, 30TH JUNE, 1859.

Coram SMITH J.

No. 1685.

Huston vs. *The Grand Trunk Railway Company of Canada.*

Held.—1. That a common carrier is "liable for all loss or damage, except that occasioned by the Act of God and by the King's enemies and by inevitable accident and *vis major*."

2. That proof, to the effect, that the goods placed by the Plaintiff in the custody of the Defendant were destroyed by a fire which could not be accounted for otherwise than by the presumption that it was the result of spontaneous combustion, does not constitute inevitable accident or *vis major*.

3. That proof, to the effect, that the Defendant had previous to and at the time of the fire posted up in all the Company's stations with other printed conditions a Notice that the Company would not be responsible "for damages occasioned by delays from storms, accidents or unavoidable causes, or from damages from fire, heat, &c."; that a similar notification and similar conditions were printed on the back of the Company's advice notes to consignees as to the arrival of goods, and that the Plaintiff had been seen on a previous occasion reading such condition and notification, does not constitute an agreement between Plaintiff and Defendant that the goods in question were to be carried on those terms, particularly in the face of a simple unconditional receipt given by the Company for the goods as in the present case.

4. That a common carrier cannot be exempted from liability even where such agreement is proved, if he be guilty of negligence.

This was an action for the recovery of £63 18s. 2d. cy., being the value of certain goods delivered to the Company Defendant, at the Point Levi Station, on the 12th of December 1856, for the purpose of being forwarded by rail to Stanfold, and there delivered to the Plaintiff, but which were not so delivered; the Company's Agent at Point Levi signing a simple receipt therefor containing an undertaking to forward and deliver the goods as above.

The Defendant, besides the general issue, pleaded, that the goods were so delivered for transport by its ordinary freight trains only, which, at that time, to the Plaintiffs' knowledge, left Point Levi on the Monday, Wednesday and Friday only in each week, that, being delivered on a Friday, they could not be despatched before the following Monday, that on that Monday there occurred so heavy a fall of snow that the trains of the day could not leave, that during the night following, the goods were totally destroyed, without fault of the Defendant, by a purely accidental fire which consumed also the whole of the Defendant's Station House at Point Levi, in which they were, with all its other contents, to the loss of the Defendant in an amount of at least £20,000; by reason whereof the Defendant prayed for the dismissal of the action.

This plea was subsequently amended by consent, by the addition to it of the further averment, that through the year 1856 the Company had kept posted up at Point Levi and at its other Stations, notices whereby it had made known to the public and to the Plaintiff in particular (who, as was alleged, had before caused goods to be forwarded on its Railway on the same conditions) that it would not be responsible for accident from delays occasioned by bad weather, or from fire, heat, cold or other like cause, or from *forces majeure*.

Issue was joined generally, and the Plaintiffs' case made out by admissions as to the delivery and value of the goods; he, in return, admitting the fact of their destruction by a fire which during the night of Monday the 15th December 1856 wholly destoyed the Point Levi Station House where they were.

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The Defendant examined several witnesses as to the origin of the fire, who proved, that the fire was first seen in the lamp room of the Station, and could not be accounted for otherwise, than by the presumption that the waste in that room had spontaneously ignited. The Defendant also proved, that the freight train had not been forwarded on the Monday morning in consequence of a snow storm, but that the passenger train had been despatched by the aid of the only two engines then at the Point Levi Station.

At *Enquête* the Defendant fyled copies of the printed conditions and notifications referred to in the Defendant's plea as amended. These were proved to have been posted up for a long time before the fire at the Point Levi and other Stations, and to have been printed on the back of the advice notes furnished from time to time by the Company to the consignees of goods of the arrival of goods for delivery, and it was also proved that the Plaintiff had been seen on an occasion, previous to the fire, reading the conditions and notification thus printed on an advice note. The condition especially relied on by the Defendant, was in the following words, "The Company will not be accountable for damages occasioned by delays from storms, accidents or unavoidable causes, or for damages from fire, heat, &c."

Bethune, for Plaintiff argued, that the Company Defendant had wholly failed to establish its plea of *vis major*,—1st. as to the fire,—It was in evidence that the Station house in which the fire occurred was built entirely of wood, that the fire was first seen in the lamp room which was partitioned off in wood, and was moreover warmed by a stove,—that in this wooden room, thus warmed, the Company kept a considerable quantity of waste, a material well known, and in fact proved, by the Defendant's own witnesses, to be most liable to spontaneous combustion, and that the fire could only be accounted for by the presumption that the waste had spontaneously ignited. It is quite clear therefore that so far from the fire being the result of a *vis major*, it was solely attributable to the culpable neglect of the Company, in exposing such combustible materials, in such a quantity, and in such a combustible apartment; 2nd. as to the snow storm,—It is not satisfactorily proved that the storm was so violent as to prevent the freight train from being forwarded had the Company had on hand (as they were bound to have had) the necessary locomotive power to propel it, and on the contrary it is evident, from the fact that the passenger train, which was despatched at the hour the freight train ought in ordinary course to have left, with the only two engines then at the Station, went through without accident or difficulty, that it was not the storm, but rather the want of the necessary locomotive power, which prevented the freight train from leaving as it otherwise would have done. Then as to the pretended limitation of liability of the Company by reason of certain printed notices, he submitted as a legal proposition, that nothing short of an absolute agreement by the Plaintiff to have his goods forwarded on the terms contained in such notices, could make the Plaintiff amenable to them,—that in the present case, not only was no such agreement proved, but on the contrary the receipt given for the goods, which was the contract between the parties, contained no conditions whatever in favor of the Company, and was a simple undertaking on its part to carry the goods

to Stanfold, and there deliver them to the Plaintiff. The fact that the Plaintiff was once seen reading the printed conditions on one of the Company's advice notes, and which it may even be said could only be held to have application to goods in the position of those contained in the advice note, that is goods ready for delivery, is so unimportant in the face of the Company's written undertaking as recorded in the receipt, that no weight whatever can be attached to it by the Court. But, even supposing the plaintiff had specially agreed to the terms of the printed conditions, the manifest negligence of the Company, both as respects the fire, and the detention of the freight train for want of an engine or engines to draw it, must still render the Defendant liable to pay for the loss of the goods.

The following authorities were submitted on behalf of the Plaintiff. Angell on Carriers §156, 236, 237. 1 Bell's Com. p. 472 and seq., Art. Limitation of Responsibility. Flanders on Shipping, Nos. 457 to 462 inclusively. Samuel v. Edmonstone et al., 1 L. C. Jurist, p. 89.

Mackay, for Defendant contended, that the French law must govern in this case, that where no *faute lourde* was to be seen on the part of the Carrier, he was relieved in all cases of *force majeure* and *cas fortuits*. Rep. de Guyot, *verbo* Cas Fortuits, p. 732. An. Den. Vo. Incendie. Rep. de Guyot, Vo. Incendie, pp. 119, 123 et Vo. Faute, pp. 297, 299, Code de Com. Art. 103, Code Civil, Art. 1784. In France fire was regarded as a *damnum fatale*, for which *personne n'en est garant*. An. Den. Vo. Incendie. Also in Scotland, 1 Bell's Com. p. 470. Even under the English law, before the XI Geo. IV & I Wm, 4 Defendant would not in a case like this be held liable, and this by reason of the printed notices of which the Plaintiff had knowledge. 4 Campbell's R. pp. 40, 41. 2 Greenleaf on Ev. §216, 218. Shelford on Railways (by Barnett) Note 1 on page 714.

PER CURIAM.—(After stating facts.)

The defence in this case rests on two points: 1st. That the goods were received by the Defendant on a Friday to be forwarded by the first freight train. That a violent snow storm occurred on the night of Sunday, which rendered it impossible to forward the train on Monday morning; Although the passenger train was sent foward with two engines; That during the necessary detention the fire occurred; That it was the result of inevitable accident, and that no blame could attach to the Defendant, and that by law they are not liable for the loss.

2nd. That the general liability of the Defendant as Common Carrier, was restricted by printed notices to that effect posted up in all the Stations and printed on the back of the Company's advice notes; That this restricted liability was known to the plaintiff not only from previous dealing but from actual knowledge, and that by these printed notices the company declared that it would not be held liable for delays occasioned by snow storms, and for losses by fire.

The Plaintiff in answer to these two grounds of defence, maintained, that the freight train might have been forwarded as well as the passenger train; That there was no great or sufficient cause for not sending on the goods according to the tenor of the contract, that they should be forwarded without delay. That

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in this there was negligence on the part of the Defendant, and therefore a liability in law to account for the value of the goods which were destroyed or lost to the Plaintiff during this unjustifiable detention; and 2d ground of defence; That the liability in law of the common carrier was for all losses except those occasioned by the act of God and the Queen's enemies. That this common law liability could not be restricted by mere general notice, even if knowledge of such notice had been brought home to the Plaintiff, which it was not. That the fire was the result of negligence on the part of the Defendant, who must be held liable in law, and that it was not competent to the Defendant to limit his liability by any general notice so as to avoid liability for losses caused by negligence.

As to the first ground of defence, that the delay in forwarding the goods by the snow storm, is one for which the Defendant cannot be held liable, it is necessary to distinguish. The mere detention of the goods by the forwarder during a time of stress of weather, such as a violent snow storm, cannot of itself render the carrier liable, provided the carrier exercised a sound and wise discretion—no doubt the carrier is bound to exercise diligence in the transmission of the goods confided to his care, but it cannot be contended that a carrier is bound, at all events, to forward goods when it would be either dangerous or unwise to start on the journey. Now, in a climate such as ours is in the winter months, it would be manifestly unjust to say that a Railroad carrier should be compelled to proceed on his journey in the face of a violent storm which would of necessity arrest him altogether or impede him in his journey. Some discretion must be allowed to the carrier, and the law allows, and justly so, to the carrier the exercise of this sound discretion in carrying safely the goods confided to his care. Their detention by snow storms must necessarily enter into consideration in settling the liability of Railroad carriers in this country, for otherwise it would be imposing obligations on the carrier which sometimes it would be wholly out of his power to meet, and to impose duties on him which are not consistent with the essential and inherent obligations of his contract. It is a question of evidence entirely to determine whether or not, in not forwarding the goods the carrier exercised a sound discretion or not. On this occasion, a violent snow storm arose which blocked up the road, and so impeded the track, as to justify a delay until the track was cleared, and in so far as the mere delay is concerned, I think the Defendant was justified in not proceeding on his journey. It is no argument to show that a passenger train was despatched although with two Engines, and that if a passenger train could start a freight train might have been sent on. This does not follow, for there might exist many reasons for endeavouring to forward passengers, which would not exist in respect of freight, and it is not a question of possibility, but a question of prudence. In so far then as the mere fact of the detention is concerned the Defendant cannot be held liable. But the liability of Defendant is not in this case altered by the detention. For the goods once received by the Defendant, and placed on board of the cars for transportation, the carrier is liable during the necessary detention in the same manner, as if the goods were in process of transportation, and this brings me to the point of the defence, that the loss under the

circumstances is not one for which the Defendant can be held liable at all, in other words, that the limitation of liability by the Printed Notices in respect of accidents by fire, is binding on the Plaintiff, and that the accident itself in arising, as it is pretended it did, from no fault or negligence of the Defendant, and being the result of inevitable accident or *vis major*, the Defendant is not liable. The Defendant contends that by the law of Lower Canada, he is not liable for the loss of the goods by the fire in question: 1st. On the ground that the Printed Notices restricted his liability, and 2nd. That it was an accident in respect of which no fault or negligence can be imputed to him. The Defendant contended that the strict rule of the English law, which rendered Common carriers liable for all loss except that which arose from the Act of God and the Queen's Enemies, did not exist in Lower Canada, and that the more indulgent rule of the French law which must be the rule in Canada relieves them from all liability for loss arising from mere casualty, or inevitable accident or from *vis major*.

By the law of England the rule has been well settled from the time of Ld. Holt, vide case of Cogge and Bernard, 2 Ld. Raym, R. 909.

Angell in laying down the principle says; (S. 148.) "That a common carrier is answerable, as has been already stated, for all losses which do not fall within the excepted cases of 'the act of God' and the 'King's (public) enemies,' and with reference to the doctrine of *vis major* he remarks; (S. 155) "the term *vis major* (superior force) is used in the civil law in the same way that the words "Act of God" are used in common law, and so also is the term *casus fortuitus*." It is true one or two cases can be found in which there has been a departure from this uniform rule. But these cases have formed no precedent for the English Courts, and they have been uniformly rejected in the United States Courts, and they have been justly considered as a departure from the sound principles of law. Moreover, these few cases on which such decisions have been based, refer to this class of cases, when valuable goods were transmitted, for the usual prices of small parcels of no great value, without mention of their valuable contents to the carrier, and notice has been given by the usual posting up in the offices of the carriers, that they would not be held liable for the loss of such valuable parcels, containing jewellery and precious stones, unless notices of their contents had been given and an adequate remuneration paid for transmission. The case cited, and others which might be cited have reference exclusively to this class of cases, but I think none can be found in which a notice restricting liability in case of fire, has been held as binding. This departure from established principle created much inconvenience, and at length the statute 11 Geo. 4, and 1 Wm. 4, was enacted which settled the point, and by this Act in England general notices are therefore declared not to take away the general liability of carriers.

At this present time, therefore, in England the doctrine is now well settled, that a special notice and undertaking must be alleged and proved, in order to limit the liability, in cases in which a limited liability can be by law set up, and in cases in which no fault or negligence can be imputed to the carrier.

This principle also obtains in France, with the exception that the carrier is

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not liable, when the loss can be fairly imputed to *vis major* or inevitable accident. On this point I refer again to Angell, (S. 148.) Story. Bail, (S. 488,) in which this principle is laid down.

The doctrine on this point in England and in France is based on the edict of the Roman Prætor.

But the English rule is even more strict in this respect than the Roman law; for it excludes the carrier from protection in all cases except where the loss has arisen from the Act of God or the Queen's Enemies, whereas the Roman law saved the carrier in cases of loss from *vis major;* this is the only difference in the two systems. In all other respects they are alike. This principle of the Roman Law is incorporated into the French law, and it is to be found confirmed in the code de Commerce. In Persil & Croissant, on Commissionaires p. 181, and seq., the whole doctrine is well discussed, and plainly laid down. A judgment is there cited which was discussed on all the points and finally decided in the Cour de Cassation. The decision there clearly established the principle that the Carrier is liable for loss by fire, which is not the result of *vis major*, or of inevitable accident, and where the carrier could by no possibility exercise any control, and this decision also equally establishes the fact that between the English and French Systems there is no difference except in this, that the carrier is relieved in the cases of *vis major*. This view of the case has been sanctioned in our Provincial Court of Appeal in the case of Hart & Jones, Stuart's Reports, p. 589.

This distinction then between the two systems of law leads to the consideration of the meaning of the words *vis major* or inevitable accident. On this point Angell says, as before shown, that the expression *vis major* in the civil Law is used in the same way that the words "Act of God" are used in the Common Law. The true principle is that the loss occurred from some cause in which the act of man cannot be traced, for if the act of man be traceable either in some act of commission, or some cause of omission, which involves an act of negligence or fault of any description, then it is no longer a case of *vis major* or inevitable accident, for the law presumes that such loss might have been avoided. To suppose that because a loss could not be prevented simply from the fact of not being able to prevent the loss, although the cause of that loss is to be traced up to some source having its origin in the act of man, is a departure from true principle. The case of irresistible force supposes some act independent of the act of man, and which no prudent foresight or care on the part of the carrier could by any possible means prevent. Thus in the present instance the origin of the fire has not been established in evidence, for the evidence of the Defendant goes merely to the effect, that in the opinion of the witnesses it arose from spontaneous combustion in the waste room. This however is mere opinion. It is not said particularly to have arisen from that cause. But supposing it to be so proved, it simply proves that an undue amount of combustible matter was left in the room, and that it therefore ignited; now it is quite possible the fire under the circumstances could not be prevented, but surely the cause of the fire could have been prevented. This is an act of negligence and want of care to allow a quantity of combustible matter to accumulate where it

was liable to create combustion. It was then the duty of the person employed by the Defendant to know that a fire might be the result of this undue accumulation. The carrier is bound to possess sufficient skill in the use of the vehicles of transportation employed by him in his calling to ensure safety in their use. If it be necessary to use oils and other materials in the running of the Railroad Carriages employed by him in his trade, it is equally incumbent on the carrier to know how to use the vehicles with safety. To allow an unnecessary accumulation of materials in the waste Room, by means of which a fire may be the result, is clearly in my opinion, a want of sufficient skill and care which must carry with it a liability to make good all losses proceeding from that cause. The carrier has complete control over his own department. The merchant trusts his goods to him on the implied contract, that there is nothing dangerous in the means of transportation, and if there be danger, that the carrier possesses the requisite skill to avoid that danger, now if any material be allowed to accumulate which possesses in itself the element of destruction, and a fire ensues, it is to my mind negligence which renders the carrier chargeable with the loss resulting from it. But in this case, the cause of the fire has not been shown in evidence, and in such a case the law imputes negligence to the carrier unless he can account satisfactorily for the fire. The *onus* of proof is thrown on the carrier, and the rule is that unless persons charged with the custody of the property of others can account satisfactorily for the loss, the law imputes to them negligence, and consequently liability. The Defendant also contended that, as by the notices on the advice notes, loss by fire was excluded, that in this case the Defendant could not be held liable. But admitting that the notices in question had such effect, it remains to be shown whether under the supposition that the fire might be fairly attributed to the negligence of the Defendant, such a contract even if proved could discharge the Defendant from liability. On this point I am against the Defendant. See Addison on contracts, p. 509 and sec. 9, (Am. Ed. 1857.)

By the authorities it appears to be that such a contract could have no legal effect. From the preceding remarks I draw the following conclusions.*

1. That by the law of Lower Canada carriers are liable for all losses, not resulting from the Act of God, the Queen's Enemies, or from *vis major* or. inevitable accident.

2. That by the law of Lower Canada *vis major*, and inevitable accident are equivalent terms.

3. That mere knowledge of the existence of general notice does not restrain the liability.

4. The knowledge of the existence of these general notices is not proved.

5. That the fire in question was not caused by *vis major* or inevitable accident, but was the result of negligence on the part of the Defendant, and that the cause of the fire not being established, the law presumes that it was caused by negligence.

* The learned Judge cited the following authorities:—Anc. Denisart, t. 2, Vo. Incendie. Guyot, Paris, A.D. 1784; Vo. Incendie, t. 9, pp. 121—127. Nouv. Denisart, Paris, A.D. 1786; Vo. Cas Fortuits, t. 4, p. 252, Nos. 1, 2, p. 254, n. 2, p. 265, n. 4. Pothier & Croissant, sur les Commissionnaires, Paris, A.D. 1836; Art. 103, pp. 184—192, 199—200, Nos. 4, 6, 9, 10, 12.

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6. That any stipulation made by the Defendant not to be held liable for loss by fire resulting from the negligence of the Defendant either proved or implied is illegal and cannot restrict the liability of Defendant. I am therefore of opinion that the Defendant must be held liable for the loss complained of and Judgment should go against Defendant.

The following was the Judgment, as recorded by the Court.

"The Court * * considering that the said Plaintiff hath fully established the material allegations of his said action; and further considering that the said defendant hath failed to prove by legal and sufficient evidence, the existence of any special contract or undertaking between the said Plaintiff and the said Defendant, or of the knowledge by the said Plaintiff of the existence of any general notice, by which the Defendant sought to limit his common law liability as a common carrier, or of any acceptation of such limited liability by the said Plaintiff, of any act done by the said Plaintiff, by reason of which he can be considered to have contracted with the said Defendant, so as to limit the general liability of the said Defendant, as such common carrier, by reason of which or by law, the common law liability of the said Defendant, as common carrier can in this case, be limited or restrained, and further considering, that by law the Defendant is liable for all loss or damage, except that occasioned by the Act of God, and by the King's enemies, and by inevitable accident and *vis major;* and further considering, that the said Defendant cannot be exempted by agreement from liability for any Act, or from loss and damage caused by the negligence or fault of the said Defendant; and further considering, that the loss in question was occasioned by the negligence of the said Defendant, and was not occasioned by inevitable accident or *vis major*, and for which the said Defendant is liable in law to indemnify the said Plaintiff, the court doth condemn the said Company, Defendant, to pay to the said Plaintiff" * * *.

Judgment for Plaintiff.

Bethune & Dunkin, for Plaintiff.
Cartier & Berthelot, for Defendant.
R. Mackay, Counsel.

(S. B.)

NOTE.—A similar Judgment was rendered in a case No. 2553, S. C. Mountain vs. The Grand Trunk Railway Company of Canada; the only difference between the two cases being that no knowledge whatever as to the notice was brought home to the Plaintiff in the case of Mountain.

MONTREAL, 28TH MAY, 1859.

Coram BERTHELOT, A. J.

No. 1794.

Merritt vs. *Lynch.*

AVAL—NOTICE OF PROTEST—MOTIONS FOR NEW TRIAL AND JUDGMENT *non obstante veredicto.*

Held:—That the signature of a person, not the payee nor subsequent holder under the payee, written in blank upon a promissory note, may be considered an *aval;* and that the *donneur d'aval*, in such case, is not entitled to notice of protest.

That the fact to be determined, whether such signature in blank shall be taken as an indorsement or an aval, is a matter to be determined by the Jury, from the evidence adduced at the trial.

That a motion for a new trial cannot be received after the first four days of the term next following the day on which verdict was recorded.

This action was instituted on the 17th November, 1858, to recover the sum of £54 16s. 10d., balance of a promissory note in the following terms:—

"One day from date I promise to pay D. B. Merritt, or bearer, ninety-five "pounds and twelve shillings currency, for value received, on account of wood "for the Ontario and St. Lawrence Steamboat Company in the year of 1856.

"Montreal, July 31st, 1857.

(Signed) "W. T. BARRON."

(Indorsed) "OWEN LYNCH."

The plaintiff alleged in his declaration, that on the 31st of July, 1857, the defendant was indebted to him in the sum of £95 12s. 0d., for cash theretofore advanced to him, and that being so indebted he procured from W. T. Barron the said promissory note, made payable, at the request of the defendant, to the plaintiff or bearer one day after date, the note being given by Barron for a debt due by the said Steamboat Company (whose agent Barron was) to the defendant. And that the defendant, having procured the note from Barron, retained it in his hands till after it became due, and then indorsed and delivered it to the plaintiff. That the defendant so indorsed and wrote his name upon the said note to secure the payment thereof to the plaintiff, and that the balance sued for still remained due and unpaid.

The defendant pleaded two exceptions:—

1. He denied that the note was delivered to the plaintiff after due, and alleged that he indorsed the note under the condition of ordinary indorsements, and that the plaintiff was bound to protest the note at maturity and to give him notice of its dishonour, which he had not done. And that, even supposing the note to have been delivered after due, the defendant's indorsement would not legally bind him.

2. That supposing, from the nature of the indorsement, that formal protest and notice were not necessary, still the plaintiff was bound to use all possible diligence to recover the amount of the note from the maker, but that the plaintiff had not adopted any legal proceedings against the maker. That at the date of the note the Steamboat Company and Barron, their agent, were solvent, and had since become insolvent, so that he, the defendant, was deprived of his recourse against them. That, by commercial usage and by law, the plaintiff was bound to use reasonable diligence against the maker of the note; that he had not done so, and his action was therefore unfounded.

The defendant by his plea made option of a trial by jury, and a written consent to a general verdict was fyled by the parties.

It was admitted by the *articulation de faits* and answers thereto, that Lynch procured the note from Barron for a debt due by the said Steamboat Company to Lynch; that the defendant, at the time he indorsed the note, was indebted to the plaintiff in the amount specified in the note; and that from the 13th of August to the 8th of September, 1857, the plaintiff collected from the maker of the note £41 5s. 0d. cy.

On the 16th of March, 1859, the cause was tried before Mr. Justice Smith and a special jury, composed of merchants and traders, one half speaking the English and one half the French language.

SMITH, J., charged the jury as follows:—

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"Two important questions arise: 1. Whether the defendant's signature upon "the note sued upon is to be considered as an *aval*, or as an ordinary and regu- "lar indorsement. 2. Whether, if it be considered as an *aval*, the defendant "was entitled to notice of protest.

"The ordinary indorser of negotiable paper contracts a particular obligation, "viz., that he will pay the holder of the note, if the maker fail to do so at "maturity, provided due notice of protest be given to him. The person who "signs or indorses as *aval* undertakes to pay, if the person guaranteed does not. "The undertaking is unconditional, and no notice of protest is in that case "necessary.

"The note in this cause was made by Barron, payable to Merritt, the plaintiff, "or bearer, one day after date, and Lynch, the defendant, wrote his name on "the back of it. Looking merely at the note and the signatures upon it, the "presumption would be that Barron owed Merritt, and gave him his note for "the amount, and that Lynch put his name on it to guarantee the payment of "it to the plaintiff, there being no relation between the parties to support any "other presumption. In this view of the case the indorsement would be consi- "dered an *aval*. But the allegations of the plaintiff's declaration tend to con- "tradict this presumption. The plaintiff alleges that the note was given for a "debt due by Barron to Lynch, and was delivered to Merritt by Lynch for a "debt due by Lynch to him. There is no collateral evidence to shew what "Lynch's intention was. There was no debt due by Barron to Merritt. How, "then, could Lynch sign for the purpose of guaranteeing Barron's note? Was "there a new contract, changing the original contract, so as to make Barron "the debtor of Merritt, and Lynch the mere guarantor for the payment of that "debt (of which no evidence whatever is brought forward), or must we not, "under the circumstances, rather presume that Lynch did not intend to indorse "as security, but that he put his name on the note (he being then indebted to "Merritt), intending only to be bound as an ordinary indorser of negotiable "paper? The fact that Lynch's name is not in the body of the note makes no "difference; the note was payable to bearer, and therefore negotiable, and this "made Lynch the legal holder of the note, in the same manner as if Merritt's "name had not been in the body of the note.

"Whether Lynch intended, under the circumstances, to sign as indorser or "as *aval*, is a question for the jury to determine. If they come to the conclusion "that he signed simply with a view to guarantee the payment of Barron's note, "they will find for the plaintiff, as no protest or notice of protest was necessary. "If on the contrary the jury are of opinion that he signed as an ordinary endor- "ser, they will find for the defendant, as in that case a protest and notice thereof "were required by law to charge him as indorser."

The jury gave a verdict for the plaintiff for the amount demanded.

On the 19th of March, the third day of the ensuing term, the defendant gave notice to plaintiff's attorney that he would move for a new trial on the 22nd of March, and on the 21st of March, in the absence of plaintiff's attorney, fyled his motion for a new trial, which was received by the Court, subject to all objections. On the 22nd the plaintiff's counsel objected to the reception and hearing of said

motion, on the ground that it was irregularly, without notice, fyled on the 21st, and could not be made on the 22nd, that being the fifth juridical day of the term next after the verdict, and cited in support of his objection the 76th and 77th Rules of Practice; case of Thomas and Jones, 4 Meeson & Welsby, p. 26; Moore and Robinson, 14 M. & W., p. 427, and other English cases; and at the same time moved for judgment pursuant to verdict. By judgment of the 31st March, Mr. Justice Berthelot maintained the plaintiff's objections and rejected the defendant's motion for a new trial, and suspended adjudication upon the plaintiff's motion for judgment.

On the 18th of April following the defendant moved for judgment *non obstante veredicto*, assigning the following reasons in support of his motion:—

1. Because at the trial the plaintiff had wholly failed to prove that the said promissory note had been transferred and indorsed to the plaintiff on a day subsequent to its date.

2. Because the finding and verdict of the jury, that the promissory note so indorsed by the said defendant was not an ordinary indorsement, but an *aval*, was an assumption of authority not devolving upon the said jury, but on the contrary a question of law to be decided by the judge presiding at the trial.

3. Because the promissory note, being an ordinary negotiable note, payable at one day's date, and indorsed by the defendant, requires by law that the same should be protested at maturity to bind the indorser, and that the jury in finding for the plaintiff, in the absence of such protest, decided a question of law and not of fact, and thereby exceeded the powers to them attributed by law, and by reason thereof the said finding and verdict was erroneous and illegal, and ought not to be disregarded by the Court in the pronouncing of the judgment in this cause.

4. Because by law, on the evidence adduced the finding and verdict ought to have been against the plaintiff and in favour of the defendant, the *lâches* and gross neglect of the plaintiff in suing out the recovery of the said note against the maker thereof having been such as to preclude the defendant from all useful recourse against said maker, who has become and been proved insolvent, at the time of the institution of this action, while such maker was and has been proved solvent, at the date and posterior to the date of said note.

5. Because the finding and verdict of the jury was contrary to law, evidence and justice.

This motion and plaintiff's motion for judgment were heard and taken *en délibéré* at the same time, and on the 25th of May defendant's motion was dismissed and judgment given for the plaintiff, according to the verdict.

BERTHELOT, assistant-judge, after recapitulation of the facts of the case and the judgment rejecting the motion for a new trial made by the defendant, said in effect:—

"This is a motion for judgment *non obstante veredicto*, founded upon various grounds, some of which are applicable only to a motion for a new trial. The question first to be looked to is, as to the effect of the signature on the note, whether it was an *aval* or an ordinary indorsation. Both the *aval* and the indorsement may be looked upon as being, in a certain sense, security to the

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holder; but the effect of the aval is more extended than that of the indorsement: it creates *solidarité de plein droit* and renders the signer liable to all the obligations of the party for whom it was given, whether such party be the maker, endorser or acceptor of the bill or note, unless the contrary is clearly stipulated. (1 Gouget & Merger, pp. 512, 513, Nos. 3—12. Pardessus, Nos. 394, 396. 1 Savary, l. 3, cap. 8, p. 27.)

"The note here was evidently not signed by Lynch for the purpose of transferring it to Merritt, for Merritt's name is mentioned in the note as payee, the note being moreover payable to bearer. Lynch's signature was only put to guarantee the payment of the note, and the effect of putting it there was to render him liable with Barron *solidairement*.

"The next question, taking the note to be *pour aval*, is as to whether there was any necessity of protest and notice of protest to the defendant. It was contended by the defendant that the *Ordonnance* of 1673 regulated the matter in his favor: that by the 32nd Article the party signing *pour aval* should be assimilated to the indorser, and was entitled to notice of protest. But in answer to this it is only necessary to say:—Firstly, That this ordonnance has never been held as enregistered in this country. Secondly, It was not received even in France as being declaratory, *loi déclaratoire*, in all its clauses; and Savary, at the page cited by the defendant's counsel, vol. 1, p. 205, speaks of the contradictory decisions on this subject by the tribunals in France previous to the *Ordonnance* of 1673, which may therefore be looked upon as fixing the jurisprudence on a point formerly in controversy.

"The authority cited from Merlin, vo. *Aval*, p. 206, 208, and 2 Savary, p. 132, are to be taken with reserve, because they comment upon the article of the *Ordonnance* of 1673.

"The jurisprudence of Lower Canada does not seem to have adopted the rule of the ordonnance, but rather to be in conformity with the 142nd Article of the *code de commerce*, which binds the *donneur d'aval* by the same means as the drawer and the indorser, and leaves him the right of using those defences only which could be raised by the principal debtor. (See, on this subject, Persil, *Lettre de Change*, p. 229. Pothier, *Change*, Nos. 122, 123. Guyot, v. *Aval*, p. 709. Also the case of Pariseau, appellant, and Ouilette, respondent, in appeal from the Circuit Court, and decided by Justices Day and Smith, quoted by the plaintiff's counsel. Also the case 10 Louisiana Reports, page 374, Smith and Gorton, where, under analagous circumstances, the signature was held to be *pour aval*.)

"As to the point raised, that the jury decided as to whether the signature was an endorsation or an *aval*, it is not necessary to give any opinion now. The jury found a general verdict, without specially determining the signature to have been put *pour aval*; but if they had so found, that would clearly not be a ground in support of a motion for judgment *non obstante veredicto*, although it might have been raised on a motion for a new trial. But I would be inclined to adopt the doctrine to be found in Gouget and Merger—and in the case of Smith and Gorton, that the jury, being the judges of the fact—(to use the expressions of Gouget and Merger, "*Les juges du fait ont à cet égard un pou-*

voir discrétionnaire d'appréciation,")—that it was not for the judge to invade their province and to dictate to them in this particular;—for it was for them to say from the evidence and the circumstances, whether the signature of defendant should be taken simply as an indorsation, or as an *aval* for the drawer. Merritt vs. Lynch

"There is in this case a clear admission of record by the defendant's answer to the articulation of facts (No. 1) that the defendant was indebted to the plaintiff in £95 12s. for cash advanced. Articulations and the answer to No. 3 admit that the note was endorsed and delivered in consideration of this sum. Here we have of record an express admission of a debt, and that the note was delivered in consideration of the debt.

Looking, therefore, upon the signature of the defendant as an *aval*, and being of opinion also that, according to the jurisprudence of the tribunals here, the *donneur d'aval* for the drawer of a bill or the maker of a note has no right, whether he signs on the *back* of the instrument or otherwise, to complain of want of notice of protest; that consequently there was no *lâcheté* on the part of the plaintiff, the motion of the defendant must be rejected, and judgment entered upon the plaintiff's motion."

Judgment for Plaintiff.

S. W. Dorman, for Plaintiff.
R. Laflamme, Counsel.
Doutre, Daoust et Doutre, for Defendant.
H. Stuart, Counsel.
(S. W. D.)

AUTHORITIES CITED ON BEHALF OF PLAINTIFF.—1. To shew that motion for new trial must be made within four days after verdict:—Rules of Practice, 76 & 77; Thomas vs. Jones, 4 Meeson & Welsby, page 28; Moon vs. Robinson, 14 M. & W., p. 427; 2 Tidd's Practice, 912; Weston vs. Foster, 2 Bing., N.C., 701.

2. In what cases judgment *non obstante veredicto* may be granted:—Lush's Practice, pp. 529, 530; 2 Archbold's Practice, 261; 2 Tidd, 920; Rand vs. Vaughan, 1 Bing., N.C., 767; 3 Harrison's Digest, p. 2590.

3. That defendant's indorsement is to be considered an *aval*, and extent of liability of *donneur d'aval*:—Pothier, Change, No. 122; 2 Pardessus, Droit Commercial, Nos. 393, 396 and 397; *Massé*, Dic. du Contentieux Commercial, ver. *aval*, Nos. 14, 15, 16; 1 Guyot, Rép. de Jur. ver. *aval*, p. 709; Story, Promissory Notes, sec. 132 and 133; Story, Bills, sec. 200 and 455; 1 Gouget & Merger, Dic. Droit Com., pp. 512, 513, Nos. 3—12; Smith vs. Gorton, 10 Louisiana Reports, p. 374; Lawrence vs. Oakey, 14 Louisiana Reports, page 386; McCausland vs. Lyons et al., 4 Louisiana annual Reports, 273; Guidry vs. Vives, 7 Martin's Reports, 701.

4. The *donneur d'aval* not entitled to notice of protest:—*Massé*, Dic. du Con. Com., ver. *aval*, Nos. 7, 18; Paillet, Manuel Droit Français, p. 759, Note *d*, No. 5, on Art. 142 of Code de Commerce, and p. 763, Note *c*, No. 4, on Art. 168, Code de Commerce; 6 *Massé*, Droit Commercial, No. 372; 1 Locré, Code de Com. p. 454, on Art. 142, Code Com., and p. 525, on Art. 168, Code Com.; Persil, Change, pp. 228—231; 2 Pardessus, No. 394; 1 Nouguier, Change, Nos. 525—530; Smith vs. Gorton, Guidry & Vives above cited; Gasquet vs. Thorn, 14 Louisiana Reports, p. 506; Pariseau vs. Ouellette, No. 24 Superior Court, Montreal, April 1859, Judges Day and Smith.

AUTHORITIES CITED BY DEFENDANT.—1. Sur le procedé adopté par Defendeur:—Shaw vs. Melkleham, L. C. Jurist, vol. 3, p. 5; Will's Reports, p. 366; 2 Strange, p. 873; 2 Tidd's Practice, pp. 928—1081.

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2. Definition de l'aval :—Savary, vol. 2, p. 94; 1 Gouget & Merger, vo. *aval*, p. 513, No. 3; 1 Nouguier, Lett. de Change, No. 495.

3. L'endossement ne peut être présumé un aval :—1 Nouguier, Nos. 497—520.

4. Si l'aval a été souscrit après l'échéance, il n'y-a-pas solidarité :—1 Nouguier, No. 518.

5. Necessité de protêt ou au moins de diligences :—2 Savary, pp. 133 and 260—620; 1 Savary, p. 205; Merlin, Quest. de Droit, vo. *aval*, Additions vo. *aval*, p. 206—208; Story, Prom. Notes, Nos. 460—472, and Notes jusqu'à, 477; Ross, Bills and Notes, pp. 37 and 39, cas da Grant vs. Vaughan; Story on Contracts, No. 873; Gouget & Merger, p. 517, No. 29 *in fine*.

SHERBROOKE, 30TH OCTOBER, 1856.

Coram DAY J., MEREDITH J., SHORT J.

No. 799.

Ingham v. *Kirkpatrick*.

Held,—That money paid to a contractor in advance on account of the consideration of a contract for building cannot be recovered back by ordinary action of Assumpsit.

This was an action for the recovery of the sum of £52. The action was in the ordinary form of an action of assumpsit, the declaration setting forth the common counts.

The defendant pleaded that the sum claimed by the plaintiff was paid to him, defendant, as part of the consideration for the building of a house by defendant for Plaintiff, but he did not allege that he had fulfilled the obligations undertaken by him.

The evidence adduced by the Plaintiff consisted of receipts signed by the defendant, by which it appeared that the money sought to be recovered had been paid in advance as part of the consideration of the contract pleaded by defendant. The fact was also established that the defendant had done very little of the work.

Sanborn, for plaintiff, argued that the proof was sufficient to entitle the plaintiff to judgment. The defendant did not even allege that the work which he had undertaken to do had been performed. He had received advances in money from the plaintiff, upon the faith of his fulfilling his contract. As he had failed to do so, the plaintiff had a right to recover back the sums advanced.

Ritchie, for defendant. The action of assumpsit is based upon a promise express or implied. In this case no promise such as is alledged in the common counts in the declaration has been proved. The defendant had undertaken by a written contract to build a house for the plaintiff. His liability towards the plaintiff was to do the work, not to repay the money advanced. The only action to which the plaintiff was entitled was an action of damages for non-performance of the work.

Action dismissed.

Sanborn & Brooks, attorneys for Plaintiff.
Ritchie, attorney for Defendant.

(T. W. R.)

MONTREAL, 20th MAY, 1856.

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

No. 966.

The New City Gas Company of Montreal vs. *Macdonnell.*

PEREMPTION.

Held.—That a cause will be adjudged *périmée* for want of proceeding during three years, although the plaintiff has not been represented in consequence of his attorneys having abandoned their profession.

A rule was taken out against the plaintiffs and served both upon them and upon their attorneys *ad litem* for *péremption d'instance*, returnable the 23rd May, 1856.

Torrance for plaintiffs showed cause against the rule on the following facts: That Messrs. Abbott & Molson had been the attorneys *ad litem* of the plaintiffs till they abandoned the profession in 1853, and became merchants, and no new attorneys for the plaintiffs had been appointed.

Documentary proof was submitted to the Court; 1o. Declaration by Abbott & Molson that they had formed a partnership as merchants of date 2nd August, 1853; 2o. Declaration by them that they had ceased to practise their profession as attorneys at law in November 1853; both of these declarations being fyled with the Prothonotary of the Court.

There were also the depositions of C. C. Abbott, one of the firm of Abbott & Molson, of John Honey, deputy Prothonotary, and J. J. C. Abbott, advocate in support.

The deposition of C. C. Abbott further stated that the last proceeding in the cause was the discharging of the inscription of the cause on the *rôle* for final hearing on the merits which was done at the instance of the defendant's counsel.

Upon these facts the counsel for the plaintiff contended that when the attorney *ad litem* changed his *status* and abandoned his profession, the peremption was interrupted until a new attorney was named, which should be done at the instance of the Defendant. Pigeau, t. 1, 357: Rules of Practice, p. 8. Further, that it was the act of both parties and their common negligence which retarded the present case, and that prevented the peremption. *Regnaud*, de la péremption d'instance, p. 58, n. 38. There was another consideration of importance, and that was that so long as the Bar and attorneys were a close corporation, the policy of the country was to regard with disfavour any blending of two callings like those of an attorney and a merchant. *Vide* 13 & 14 Vict., ch. 37, imposing a tax upon attorneys.

R. Macdonnell, contra.

PER CURIAM.—The rule is declared absolute. The rule of peremption is peremptory though the plaintiff be not represented by attorney. The Court has previously so decided.

F. W. Torrance, Counsel for Plaintiffs.
R. Macdonnell, for Defendant.

Rule declared absolute.

(F. W. T.)

MONTREAL, 30 JUIN 1859.

Coram BERTHELOT, J.

No. 369.

Kennedy vs. *Bédard.*

Jugé:—Que l'action en séparation de biens doit être portée dans le district où les parties ont leur domicile.

La Demanderesse ayant instituée une action en séparation de biens contre le Défendeur son mari, devant la Cour Supérieure siégeant à Montréal, dans le district de Montréal, en assignant le Défendeur qui se trouvait momentanément en la cité de Montréal, procéda contre lui par défaut; la preuve ayant été régulièrement faite, la cause fut inscrite au mérite et soumise à la décision de la cour.

Le 30 juin 1859, la cour a renvoyé cette action sur le principe que comme elle tendait à changer l'état civil de la Demanderesse, elle aurait dû être intentée dans le lieu de leur domicile.

Le jugement est motivé comme suit:—La cour après avoir entendu la Demanderesse par ses avocats, le défendeur ayant fait défaut, examiné la procédure et avoir délibéré. Considérant que les parties en cette cause ont contracté mariage à Trois-Rivières, district des Trois-Rivières, qui a été depuis et est encore leur domicile de mariage, et que l'action de la Demanderesse qui a pour but de changer son état devait être intentée dans le district ou les parties ont eu et avaient leur domicile comme susdit, a renvoyé la Demanderesse de sa demande, pour se pourvoir dans le district des Trois-Rivières.

Lafrenaye et Papin, avocats de la Demanderesse.

(P. E. L.)

IN APPEAL.

FROM THE SUPERIOR COURT, DISTRICT OF MONTREAL.

MONTREAL, 7TH JUNE, 1859.

Coram LAFONTAINE, Bart., C. J., AYLWIN, J., DUVAL, J., MEREDITH, J.

CHAPMAN, *(Plaintiff in the Court below.)* Appellant.

AND

MASSON, *(Defendant in the Court below.)* Respondent.

WITNESS—COMPETENCY.

Held,—that one of two partners *primâ facie* liable for a debt, is not a competent witness to prove that a third person is jointly liable as a co-partner with them, for such debt.

The circumstances under which this question arose, are stated at length in the report of the case, 2 Jurist, page 216. The Judgment having been appealed from, the case was argued in appeal by the same Counsel; and in May term 1859, the Court of Appeal confirmed the Judgment of the Court below.

MEREDITH, J., delivering the opinion of the Court, said:

The main question in this case is as to whether one of two partners, *primâ facie* liable for a debt, is a competent witness to prove that a third person is, as a Copartner, jointly liable with them for such debt.

It appears that William W. Snaith and William S. Ball, by a notarial agreement bearing date the 21st day of May 1855, entered into co-partnership as Grocers, under the firm of Ball & Co., for the period of one year, to be reckoned from the first day of May then instant.

Ball & Co., carried on business for some months, and having become insolvent, the Defendant in this cause has been sued for a debt contracted by Ball & Co., on the ground that he was a dormant partner in that firm.

Snaith (one of the members of Ball & Co.,) was examined as a witness for the Plaintiff to establish, that although according to the notarial agreement, already referred to, the firm of Ball & Co., was composed of Ball and Snaith, yet that by a verbal agreement between Ball, Snaith and the Defendant, the latter was a member of the firm of Ball & Co., and was to receive one third of the profits to be made by that concern.

The evidence of Snaith tending to establish the liability of the Defendant, was taken, subject to an objection made by the Defendant, and that evidence having been rejected by the Judgment appealed from, we now have to adjudicate upon its admissibility.

The question thus raised is one of great importance, and considerable difficulty, but after giving to it the best consideration in my power I am inclined to think the Judgment in the Court below is right.

According to the notarial articles of co-partnership the debt in question is due by Snaith and Ball, and the direct tendency of the Evidence of Snaith, even as between Snaith, Ball and Masson, is to make the latter contribute to the payment of that debt to the extent of one third. If it be said that Masson by proving that he was not a member of the firm of Ball & Co., can recover from

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Snaith and Ball the amount he may be compelled to pay the Plaintiff, it may be answered that if the Defendant be condemned he will (even as between him and the witness) be liable to contribute, unless *he can shew he was not* a partner in the firm of Ball & Co., whereas if the action be dismissed the Defendant will not be liable to contribute unless *Ball & Snaith can prove that he was* a co-partner.—Snaith therefore even according to this view of the case is interested in aiding the Plaintiff to recover a judgment against the Defendant, because such a judgment by establishing *primâ facie* a liability against the Defendant, and placing him in the same position as Snaith, has the effect, even as between Snaith and the Defendant, of shifting the burden of proof, from the former to the latter.

The learned counsel for the Appellant cited three English cases, namely, Blackett and Weir, Fawcett and Wrathall, and Hall and Curzon, in which a person admitting himself to be liable for a debt, as a copartner, was held to be a competent witness for the Plaintiff to prove that the Defendant was also liable as a copartner for the same debt; and considering the great importance of the question raised in this case, I think it may be well to refer to the leading features, as well, of each of those cases, as of some other cases of importance cited at the argument; and I deem it the more important to do so because although the amount involved in the present case is not very large, yet a judgment maintaining the present action, would, in effect, make the Defendant liable for the whole of the debts of the insolvent firm of Snaith and Ball.

The first case in the order of date cited by the Appellant was Lockhart, v. Graham (1st Strange 35.)

In this case there were three obligors to a bond, and the action being brought against one of the obligors, another of them was allowed to be a witness to prove the execution of the bond. I will not comment upon this case because it is the authority upon which York v. Blott, the next case cited by the Appellant, was decided, and the observations I propose to make upon York v. Blott will be equally applicable to Lockhart v. Graham.

York v. Blott, (5 M. & S. 71) Chitty's Collection 957.

In this case one of two makers of a promissory note, was admitted as a witness for the Plaintiff, to prove the signature of the other, on the authority of Lockhart v. Graham (just cited), the reason given being, that if the Plaintiff recovered against the Defendant, the witness would be liable to the Defendant for contribution; and if the Plaintiff failed, and that the witness had to pay the whole, the Defendant would be liable for contribution towards him.

The point decided by this case is now too firmly settled to be questioned, but I may observe that according to the principles of the French law the witness would I think be deemed interested.

The supposed balance of interest seems to me to be arrived at in York v. Blott by assuming as genuine the signature of the Defendant which he had denied. If the witness spoke truly, that is, if the signature of the Defendant was genuine the witness was disinterested, but if he spoke falsely and that the signature of the Defendant was forged he was, I think, interested. By paying the Plaintiff the witness could obtain a subrogation in the Judgment obtained

upon his own evidence, (as to subrogation, see 3, Phillips, 111, 112,) and thus force the Defendant to contribute to the payment of the debt without any further evidence; whereas without such judgment the witness could not have forced the Defendant to contribute without proving the genuineness of the signature of the Defendant.

It may also be observed, that in York v. Blott it is mentioned, that the witness acknowledged his own signature at the same time that he proved the signature of the Defendant. He therefore, apparently, admitted as much against himself as he proved in his own favor, thus as it were balancing his interest; whereas in the present case the liability of the witness is established by an authentic deed, so that this evidence, although making proof in his own favour by establishing a liability against the Defendant admits nothing of any importance against himself.

I now come to the first of the three cases in which the evidence of a copartner was admitted for the purpose, already mentioned, and refer to Blackett v. Weir, 5 Barnewall & Cresswell, 385. This was an action for a cargo of coals sold and delivered to a steam yacht. In order to prove that the Defendant was a copartner, a witness was called who admitted on the *voir dire* that he himself was a partner; and notwithstanding this objection his evidence was received.

A rule *nisi* for a nonsuit having been obtained, Chief Justice Abbott, in rendering the Judgment of the Court, observed; "It is said that the witness had "an interest; he had so, but it was his interest to defeat the Plaintiff, for in the "event of his recovery, the Defendant would be entitled to contribution from "the witness."

Mr. Justice Bayley observed that the witness to a certain extent had an interest in obtaining a verdict for the Defendant; for having admitted his own liability he made himself liable to pay a part of the costs, as well as the debt, if the Plaintiff recovered. This, I may observe, would not be the case under our law, for as Masson has not called Snaith into the suit, he can have no claim against him for his costs.

Judge Littledale observed: "If the Plaintiff recovers, the Defendant will have "contribution. If he fails, he may sue the witness for the whole and the latter "may then claim contribution from the Defendant. To this it is answered—in "such an action he may not be able to establish that the Defendant was a "partner. But it must be remembered that the admission of the witness was "the only proof of his own liability; it is therefore reasonable to take the "whole of his evidence together, and that shewed the Defendant to be jointly "liable."

It is to be borne in mind, that the liability of the witness, Snaith, as already mentioned, is established by a notarial agreement, he therefore virtually admits nothing against himself; so that as to this important particular, there is the same difference between Blackett v. Weir and the present case, that there is between the latter and York v. Blott.

The case of Fawcett v. Wrathall (2 Car. and Payne, 305) was cited by the learned counsel for the Appellant as being in all respects exactly similar to the present. In that case the Plaintiff, an attorney, sued a bankrupt trader for

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services rendered "for preparing briefs for counsel to attend before the Commissioner, on behalf of the Defendant and a person who was in copartnership with him, when they had become bankrupt." It appeared that separate bills had been delivered to the Defendant and the other partner.

The latter who had paid his bill, was called as a witness for the Plaintiff. The Defendant objected to his testimony on the ground of interest. Pollock for Plaintiff stated "that in a case from the Northern Circuit, the Court of "King's Bench a few days previously had decided that if a contract is joint, "and only one is sued, if there be no plea in abatement, the party who is not "sued is a competent witness even to prove the Defendant's liability." The Reporter adds merely, Abbott, C. J., disallowed the objection.

In this case it seems that the services sued for were rendered after the Defendant and the witness had become bankrupt.

They were therefore no longer trading together as copartners when the services were rendered; and consequently it does not appear that there was a joint and several liability on the part of the witness and the Defendant.

The Plaintiff seems to have taken this view for he rendered separate accounts to the Defendant and to the witness, and accepted payment from the witness of his own share of the charges. If, as seems probable, the witness in the case under consideration *was not* liable for that debt, on account of which the Defendant was sued, his evidence was clearly admissible; if on the other hand the witness *was* liable for that debt, then as it does not appear that his liability was proved otherwise than by his own admission, the case in this respect would stand upon the same footing as Blackett v. Weir, in which the witness was held admissible, because according to Judge Littledale he admitted as much against himself as he proved in his own favour. The case of Fawcett v. Wrathall—assuming that the witness in that case was liable for the debt for which the Defendant was sued, is also distinguishable from the case now to be decided in this respect also: that in this case the witness seeks to make the Defendant pay a deb for which *primâ facie* the witness and another are liable to the exclusion of the Defendant, whereas in Fawcett v. Wrathall the liability, if it existed, *primâ facie* rested upon the Defendant as well as the witness.

I now pass to the case of Hall v. Curzon & al., (9 Bar. & Cres., p. 646.)

In this case the Defendants were sued as Members of a Trading Company, called the City of London Central Street and Northern Improvement Co. In order to shew that the Defendant Lett was a member of the Company, the Plaintiff called a Shareholder and Director of the Company, proved to be so, not only by his own admission but by other evidence in the case. His evidence was objected to on the ground that he had an interest in fixing the Defendant as copartner, inasmuch as he would be liable to contribute in a certain proportion, and the witness's contribution would be proportionably diminished.

Lord Tenterden overruled the objection, reserving however to Defendant liberty to move for a nonsuit.

Campbell moved accordingly and contended that this case was distinguishable from Blackett v. Weir, because in that case it appeared by the admission of the witness alone that he was jointly liable; whereas in the case in which he was

moving that fact was proved by other evidence; and he further contended that the case in which he so moved was distinguishable from Lockhart v. Graham, (1st Strange, 35) because there the joint liability appeared by the bond, whereas in Hall v. Curzon the witness was called to prove the existence of the joint contract.

Lord Tenterden in rendering Judgment briefly alluded to Blackett v. Weir and Lockhart v. Graham, and said "We have considered the point and think there "is not sufficient ground to distinguish this in principle from former cases. The "case is similar in principle to that of co-trespassers. The recovery against one "of several co-trespassers is a bar to an action against the others. In practice "the co-trespasser is constantly called to prove that he did the act by the com-"mand of the Defendant."

The present case differs from Hall v. Curzon as to one point of some importance, namely, that in this case the verbal declaration of the witness is at variance with the authentic deed signed by himself whereas there was no such discrepancy in Hall v. Curzon.

I will now allude succinctly to a case of some importance cited by the Respondent, namely, Browne v. Browne, (4 Taunton, 752), in which it was held, that in an action upon a joint contract against two, one of the Defendants who has suffered judgment by default is not admissible as a witness against the other to prove that he joined in the contract. In this case it is true the witness was a party to the record, but from the observations of Chief Justice Mansfield (the only Judge who spoke in the case) it appears the witness was rejected on the ground of interest.

Chief Justice Mansfield said "The question here was on the admissibility of "William Brown whom Judge Bayley did not receive as a witness, and we are "of opinion he was right in the rejection. It appears that the witness was "interested in the event of the suit, and certainly in respect of the very evidence "which he was called to give, because he came to prove that the other Defen-"dant was equally liable with himself, which would give him a right of contri-"bution from Jubb (the other Defendant) if the Plaintiff succeeded; but if the "action failed against Jubb, then the consequence would be, that the witness "alone would be responsible to the Plaintiff for the whole amount."

There is another English case which was not cited at the argument but which seems to me to support the Judgment of the Court below, namely Ripley v. Thompson, (12, Moore, 55.)

In that case a witness named Gray was brought up to prove that although he bought four horses in his own name, yet that the Defendants were copartners with him in the purchase. The evidence was rejected, and Lord Chief Justice Best observed "*prima facie*, Gray (the witness) was the principal; the "contract was with him, and if he were allowed to prove that others were liable "jointly with him his evidence would tend to exonerate himself from paying "three fourths of the debt and throw the burden upon the Defendants."

In like manner in the case now to be decided, *prima facie*, and according to the notarial articles of copartnership, Snaith and Ball are alone the debtors of the Plaintiff, and each of them according to the articles of copartnership must pay

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to him a moiety of his claim; but if they can fasten a liability upon the Defendant Masson, they would have to contribute each for a third instead of each for a half of the debt.

Having thus noticed the most important English cases bearing upon this important subject, I may observe that of those cases, the two most closely resembling the present case are Hall v. Curzon in which the witness was admitted, and Ripley v. Thompson in which the witness was rejected.

If those two cases are to be deemed opposed to each other and it be necessary to choose between them, I do not hesitate to say I prefer the ruling in Ripley v. Thompson; as it appears to me most dangerous, in any case, to allow a witness, liable for a debt, to prove that another person is his copartner; the direct tendency of such evidence being to relieve the witness from a part of the debt sued for, and to impose it upon the Defendant.

Starkie (Starkie, Vol. I, p. 89, Am. Ed. of 1834) does not speak of Blackett v. Weir and Hall v. Curzon on the one hand, and Ripley v. Thompson on the other, as being opposed to each other. Referring to the cases of Blackett v. Weir, Hall v. Curzon and others, that author says "A copartner in a Company, "whether proved to be such by examination on the *voir dire*, or by independent "Evidence, is a competent witness to prove the liability of the defendant as a "copartner, for being a copartner he is liable for his contributory share of the "damages and costs." And in the same page, referring to the case of Ripley v. Thompson and some other cases, the author observes, "It has been held that "where the witness is *primâ facie* liable to the Vendor of goods which he has "purchased in his own name, he is not a competent witness for the Vendor "against a third person to prove that the Defendant is either solely or jointly "liable for the goods, for in such case the witness has a direct interest in "causing another to pay, or contribute to the payment of, the debt."

According to the distinction which Starkie seems to draw, the Courts in England, although they allowed a person, liable under a contract, to give evidence for the purpose of enforcing its provisions against another person whose liability was disputed, yet they did not allow this to be done, where *prima facie* the witness was liable to pay the debt to the exclusion of the Defendant.

In Ripley v. Thompson and al., the witness Gray had bought certain horses in his own name and therefore was not allowed to prove that the Defendants were, as his copartners, jointly liable with him to pay the same debt. So in the present case, the goods were sold to a firm which, *prima facie*, and according to a notarial instrument, was composed of Snaith and Ball, and therefore I think, according to the ruling in Ripley v. Thompson, Snaith and Ball ought not to be admitted as witnesses to make the Defendant jointly liable with themselves towards the Plaintiff.

I must admit I am not prepared to shew that either Ripley v. Thompson, or the present case is, in strict principle, distinguishable from some of the cases cited by the learned counsel for the Appellant, but this I think I may confidently assert, that the present case differs from each of those cases as to some important fact bearing upon the point to be decided.

The present case differs from Lockhart and Graham (1st Strange 35) and York v. Blott (5 M. & S. 71), both cited by the Appellant, in this respect, that in Lockhart v. Graham it appeared by the bond, and in York v. Blott by the promissory note, that the defendant *was liable*; whereas in this case it appears from the articles of copartnership that the Defendant *is not liable*.

The difference between this case and Blackett v. Weir (5 Bar. & Cres. 385) and Fawcett v. Wrathall (2 Car. & Payne 305) has already been sufficiently noticed.

As to Worrall v. Jones (7 Bingham 395), also cited by the Appellant, the witness was admitted because being the principal debtor he could never claim contribution from the defendant, and in Pipe v. Steel (2 A. and E. N. S. p. 734) the witness was admitted because for reasons peculiar to the English law his interest was clearly adverse to that of the Plaintiff who called him.

Hall v. Curzon, which, of the cases cited by the Appellant, is the one which most closely resembles the case before us, differs from it, as do all the other cases cited by the Appellant, in this respect, that the evidence of Snaith was opposed to a solemn deed signed by himself establishing his own liability to the exclusion of the Defendant.

This tedious, but I think necessary, review of the leading cases cited by the Appellant, shows not only the difference which exists between those cases and the present, but also, that the objection against the evidence offered in this case is stronger than was the objection in any of the English cases in which evidence of the same nature seems to have been received; and when in addition to this we find, that in Ripley v. Thompson, which, of all the cases above alluded to, is, I think, the one most similar to the case before us, evidence such as that tendered in the present case was rejected I think the Court below may be considered justifiable in having rejected the evidence of the witness Snaith.

In adopting this view I feel I am influenced by what I believe to be the dangerous tendency of the rule acted upon in Blackett v. Weir and Hall v. Curzon, and also by the consideration that in this country, where the Judges have rarely the aid of a Jury in weighing evidence, the objection to that rule would even be graver than in England.

I would probably deem it my duty to apply the rule acted upon in Blackett v. Weir and in Hall v. Curzon to any case exactly similar to them, but for the reasons already explained, I am not disposed to extend the application of that rule; and I think it would be necessary to do so in order to apply it to the present case. I have the less hesitation in preferring the ruling in Ripley v. Thompson to that in Hall v. Curzon because the judgment in the latter case is opposed to the reasoning of Judge Littledale in Blackett v. Weir; also to the reasons assigned by Chief Justice Mansfield in support of his Judgment in Brown v. Browne; and I may add to the weight of authority in the United States.*

* See 6 Meeson and Welsby, in the note, and more particularly the case of Maquand v. Webb, 16 Johnston, Rep. p. 90.

In that case which was for repairs done to a vessel against a part owner who neglect-

Upon the whole it appears to me that the English cases do not establish any rule of Evidence opposed to the Judgment of the Court below rejecting the evidence of Snaith; and that, that Judgment, as being in accordance with the general principles of law on this subject, ought to be confirmed.

Aylwin, J., and *Duval, J.*, stated shortly their concurrence in the Judgment of the Court, on the ground that the witness Snaith was interested in the result of the case, and also intimated their opinion, that a secret or dormant partner was not responsible for the debts of the firm of which he was a member.

Judgment confirmed.

Abbott, for Appellant.
R. Roy, for Respondent.
(J. J. C. A.)

IN APPEAL

FROM THE SUPERIOR COURT, DISTRICT OF MONTREAL.

MONTREAL, 5TH MAY, 1859.

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

ISAAC BLANCKENSEE (*Defendant and Petitioner in the Court below*).
Appellant.

AND

RICE SHARPLEY, (*Plaintiff in the Court below.*)
Respondent.

CAPIAS—PETITION FOR DISCHARGE—APPEAL.

Held,—That an appeal will lie from an interlocutory judgment of a Judge of the Superior Court rejecting the summary petition of a defendant arrested by *capias* to be discharged in the terms of 12 Vic., Cap. 42, S. 2.

On the 10th of January, 1859, the Appellant was arrested under a Writ of *Capias ad Respondendum* sued out of the Superior Court, Montreal, by one Rice Sharpley, the Respondent.

Soon after the return of the Writ, the Appellant fyled a petition for his discharge in virtue of the Provincial Statute 12 Vic., c. 42.

The 2nd section of that Statute enacts, amongst other things, that "it shall "be lawful for the Court, or any Judge of the Court whence any process shall "have issued to arrest any person, either in Term or in Vacation, to order and "such person to be discharged out of custody, if it shall be made to appear to

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ed to plead the non-joinder of others in abatement. The Court held that "another part "owner is not an admissible witness for the Plaintiff to prove the ownership of the "Defendant, for although he would be liable as an owner to the Plaintiff in case he "failed, or if he succeeded would be answerable to the Defendant for contribution, yet "he has an interest by [illegible] the Defendant (a verdict against whom would be "evidence of his joint [illegible]) to increase the number of part owners and thus "diminish the amount [illegible] loss, which he would otherwise himself be "obliged to sustain."

See also, Pierce v. [illegible], 7 Hill, A. Y. 82, in which it was held by Nelson Chief Justice, "That where the dispute is whether the Defendant ever contracted the debt for "which the suit is brought, one claiming to be a co-contractor with him is not a com-"petent witness for the Plaintiff."

"him on summary petition and satisfactory proof, that there was *not* sufficient "reason *for the belief* that the Defendant was immediately about to leave the "Province with fraudulent intent."

The Appellant by his petition set forth, that the allegations of the affidavit made by the Respondent, and upon which the Writ of *capias* had issued, were false and untrue, and that he was not about to leave the Province of Canada with fraudulent intent, and that there was not sufficient or any reason for the alleged belief of the Respondent expressed in the said affidavit to that effect. A general issue was pleaded by the Respondent to the Appellant's petition for discharge, and the parties proceeded to proof.

The court below (Mr. Justice Badgley,) by judgment of date 11th March 1859, dismissed the Petition.

Thereupon the petitioner desirous of appealing from the judgment sued out a rule from this Court in the following terms:—

"Pursuant to notice given, it is moved on behalf of the said Isaac Blanckensee "of the City of Montreal, in the district of Montreal, trader and jeweller, the "defendant and Petitioner in the said cause, that an appeal be granted and "allowed him from the Interlocutory Judgment rendered against him in the "cause No. 2296, now pending in the said Superior Court for Lower Canada, at "Montreal, wherein (the said) Rice Sharpley of the City of Montreal, in the "district of Montreal, merchant, is Plaintiff, and Isaac Blanckensee of the same "place, trader and jeweller, to wit, the said Isaac Blanckensee, is defendant and "Petitioner, the said Judgment, rendered on the eleventh day of March, 1859, "rejecting the petition of the said Isaac Blanckensee in the said cause fyled, to "be discharged out of custody and liberated from the writ of *Capias ad "Respondendum* issued in this cause upon the affidavit of and at the suit of the "said Plaintiff, and under which he was arrested, and that he, the said Petitioner "and his bail in this cause be discharged and relieved from all liability and res-"ponsibility incurred under and by virtue of and in consequence of the writ of "*Capias ad Respondendum*, and that Her Majesty's writ of appeal do issue "accordingly in due course of law to cause the record and proceedings in this "cause to be brought before this Honorable Court, for the purposes of such "appeal *Nisi Causa* on the third day of May next.

"And the said Isaac Blanckensee fyles eight exhibits in support of his motion. "It is ordered that a rule do issue accordingly."

The rule was made absolute in the following terms:

"The Court having heard the parties by their Counsel respectively, on the "rule issued in this cause on the twenty-seventh day of April last, doth declare "the same absolute, and in consequence doth allow an appeal to issue from the "Interlocutory Judgment rendered on the eleventh day of March, 1859, by the "Superior Court for Lower Canada at Montreal, and that a writ of Appeal do "issue accordingly for Appellant."

Rule made absolute.

J. Bleakley, for Appellant.
B. Devlin, for Respondent.

(P. W. T.)

EN APPEL.

DU DISTRICT DE MONTREAL.

MONTREAL, 6 JUIN 1859.

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

No. 60.

PIGEON, *(Demandeur en cour inférieure,)*
Appelant.

ET

LE MAIRE, LES ECHEVINS, ET LES CITOYENS DE LA CITE DE MONTREAL,
(Défendeurs en cour inférieure,)
Intimés.

Jugé,—Qu'aux termes de l'acte 7 Vict., ch. 44, sec. 26, l'action pour dommages résultant du défaut d'entretien de clôtures et fossés par la corporation de Montréal conformément aux dispositions du statut provincial 16 Vict., ch. 127, sec. 10, est prescriptible par le laps de six mois.

Par sa demande l'appelant réclamait de la corporation de Montréal des dommages au montant de £144, qu'il prétendait lui avoir été causés par la négligence des intimés de faire des clôtures et fossés pour séparer la terre de l'appelant de l'aqueduc construit par les intimés, depuis les rapides de Lachine à la cité de Montréal; alléguant que par cette négligence il avait été pendant deux années privé de l'usage de quinze arpents de sa terre, sur laquelle il n'avait pu rien récolter ni prendre d'animaux en pacage, comme il en avait l'habitude.

Les intimés prétendirent que n'ayant pris, pour construire l'aqueduc, aucune partie de la terre de l'appelant, mais qu'ayant simplement acheté le terrain qui bornait la terre de l'appelant en profondeur, ils n'étaient tenus que comme des voisins ordinaires, à faire et entretenir leur part de la clôture qui se trouvait au trait-quarré de la terre de l'appelant et qui était mitoyenne entre les parties, comme entre voisins ordinaires; que l'appelant n'avait pas fait sa part de clôture et que les intimés avaient, sans y être obligés, construit toute la clôture qui sépare l'aqueduc de la terre de l'appelant; et que l'appelant n'avait souffert aucuns dommages.

Puis les intimés plaidèrent aussi par une défense en fait.

Par le statut 16 Vict., ch. 127, § 10, il est statué: "Que la dite corporation construira et entretiendra, à ses frais, des clôtures et fossés convenables, de chaque côté de la terre dont elle aura fait l'acquisition pour les fins du dit canal et le long de la ligne de division entre le dit canal et les propriétés qui se trouveront de l'un ou de l'autre côté d'icelui."

La cour supérieure, siégeant à Montréal avait renvoyé cette demande en motivant ainsi son jugement:

"La cour après avoir entendu les parties, etc., considérant que le demandeur n'a pas établi que les défendeurs aient causé à son égard des dommages, que par la loi, ils soient tenus de réparer envers lui, considérant que les dispositions de la loi, en vertu de laquelle les défendeurs ont fait faire les ouvrages pour pratiquer l'aqueduc dont il est question en cette cause, n'ont aucunement affranchi le demandeur de l'obligation de faire et entretenir ses clôtures de mitoyen

neté rurale; considérant que la preuve de dommages faite par le demandeur, est tellement vague qu'il n'y a aucun moyen d'après cette preuve de préciser quels sont ces dommages, et que la cour ne pourrait en accorder s'il en était prouvé qu'en les fixant arbitrairement, ce qu'elle ne peut et ne doit faire, et qu'attendu, le doute qui en résulte, les défendeurs en doivent avoir l'avantage déboute l'action du demandeur avec dépens."

Ce jugement fut confirmé en appel sur le principe que l'action était prescrite lors de son institution par le laps de six mois.

Le jugement rendu par la cour d'appel est comme suit:

"La cour après avoir entendu les parties par leurs avocats sur le mérite, examiné le dossier de la procédure en cour de première instance, les griefs d'appel et les réponses à iceux et sur le tout murement délibéré:

Considérant que l'action n'a pas été intentée dans les six mois qui ont suivi la cessation des dommages qu'elle a pour objet de réclamer, et que, par conséquent, aux termes du statut provincial de 1843, ch. 44, le demandeur appelant était non recevable à porter la dite action, confirme le jugement dont est appel en autant qu'il déboute le dit demandeur de la dite action avec dépens, et le condamne aux dépens d'appel."

Laflamme, Laflamme et Barnard, avocats de l'appelant.

Papin, avocat des intimés.

(P. R. L.)

EN APPEL

DU DISTRICT DE MONTREAL.

MONTREAL, 7 JUIN 1859.

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

No. 69.

GRENIER, (*Demandeur en Cour Inférieure.*)
Appelant.

ET

LEPROHON, (*Défendeur en Cour Inférieure.*)
Intimé.

Jugé:—1. Que le propriétaire d'un pont de péage est tenu de maintenir en bon état de réparation le chemin conduisant de ce pont à la rive opposée.

2. Qu'à défaut par lui d'y faire les réparations requises, il est tenu de payer les dommages occasionnés par le mauvais état du chemin.

Le jugement rendu le 30 avril 1858, par la Cour Supérieure siégeant à Montréal, déboutait l'Appelant de sa demande en dommages contre l'Intimé; sans dépens.

Les allégués de la déclaration de l'Appelant sont comme suit:

Que le dit Défendeur est le propriétaire d'un pont de péage sur la branche de l'Ottawa, entre la paroisse de St. Eustache et la paroisse de Ste. Rose, dans le district de Montréal.

Que le dit Défendeur a obtenu une charte ou privilége par autorité législative pour la construction de tel pont et est, par sa charte et par la loi, obligé et tenu d'entretenir le chemin qui conduit au dit pont.

Grenier vs. Leprohon.

Que la partie du chemin conduisant au dit pont qui relie le pont au chemin de front sur l'Ile Jésus, dans la paroisse de Ste Rose, et qui s'étend presqu'à un ilot sur lequel aboutit le dit pont du Défendeur, est un chemin privé en la possession du Défendeur comme propriétaire et est la propriété du dit Défendeur, fait partie et doit être considérée comme partie du dit pont en dépendant, et le Défendeur est par la loi, et doit être considéré comme propriétaire de telle partie du chemin comme partie ou accessoire indispensable du dit pont pour lequel il a obtenu sa charte, en vertu de laquelle il prélève le péage de tous ceux qui se servent et qui sont obligés de se servir du dit pont.

Que le, ou vers le 18 mai dernier, la susdite partie du chemin, la propriété ou en la possession du dit Défendeur, était depuis plus d'un mois dans un état dangereux pour les passants, que le dit Défendeur avait négligé d'y faire aucune réparation et avait laissé cette partie du chemin dans un état impraticable, exposant tous ceux qui était soumis à la nécessité de passer sur le pont à de graves dangers.

Que le dit Défendeur a été souvent informé de l'état dans lequel se trouvait le dit chemin, a été requis de le réparer et d'y porter remède, et le dit Défendeur n'a jamais ignoré l'état dans lequel il se trouvait, et malgré telles connaissance, informations et requisitions, le dit Défendeur a constamment négligé et refusé de réparer le dit chemin.

Que le dit Défendeur est et était par la loi obligé de voir à l'entretien convenable de la dite partie du chemin comme sa propriété et comme devant et faisant partie du dit pont de péage.

Que le dit jour, 18 mai dernier, le dit Demandeur venant à la ville de Montréal où ses affaires l'appelaient, ignorant l'état dans lequel était le dit chemin, et nécessairement obligé de passer sur le dit pont, et de là par la dite partie de chemin ci-haut décrite, en la possession du Défendeur, pour rejoindre le chemin public dans la dite paroisse de Ste. Rose, ayant avec lui sa femme et une autre personne dans sa voiture, après avoir payé le péage requis pour le passage d'une voiture sur le dit pont, arriva à la susdite partie du chemin, laquelle était dans l'état ci-haut mentionné, l'eau passant par-dessus la partie réservée au passage des voitures, laquelle n'ayant aucune clôture ou garde pour indiquer où l'on pourrait passer ou pour prévenir la chûte des voitures dans l'eau de chaque côté du dit passage, et par suite de tel mauvais état du chemin, résultat de la négligence du Défendeur, la voiture du dit Demandeur se brisa et tomba dans l'eau, entraînant le dit Demandeur et sa femme et leur causant des injures considérables et sérieuses, l'eau étant, à cette saison, très froide.

Que le dit Demandeur fut exposé à perdre la vie par suite de tel accident, et en a éprouvé une maladie grave qui l'a enlevé à ses occupations et dont il ne peut guérir, qui a nécessité des soins de médecins et a occasionné au dit Demandeur des dépenses considérables en outre des dommages par lui soufferts.

Que la voiture, les hardes et des effets que le Demandeur et son épouse avaient, ont été, par suite de tel accident, complètement endommagés, lesquels dommages le dit Demandeur réduit à la somme de trente louis.

Qu'il est resulte au dit Demandeur, par suite de l'accident ci-haut relaté, occasionné par la faute et la négligence du dit Défendeur, tant dans ses biens que

dans sa personne, des dommages considérables, que le dit Demandeur réduit à la somme de £500 que le dit Défendeur refuse et néglige de payer. vs. Leprohon.

Qu'en conséquence le dit Demandeur est bien fondé à réclamer du dit Défendeur, la dite somme de £500 de dommages et intérêts.

L'Intimé rencontra cette demande par une exception péremptoire en droit perpétuelle et par une défense au fonds en fait.

L'exception contient les allégués suivants :

Que le chemin, dont il est question en cette cause, et qui conduit au pont de péage du Défendeur et dont il est question en cette cause, n'appartient pas et n'a jamais appartenu au Défendeur, mais que le dit chemin est et a toujours été un chemin public.

Qu'avant la construction du pont du Défendeur, le dit chemin existait et était la propriété du public, et servait au public pour se rendre à la traverse qui se faisait, en cet endroit, au moyen de bacs et autres embarcations.

Que le dit chemin existe depuis un temps immémorial et a toujours été un chemin ou route publique, et a toujours été entretenu et réparé par le public et par divers individus possédant des propriétés dans la localité, conformément à la loi faite et pourvue en pareil cas.

Que le Défendeur n'est point tenu, et ne l'a jamais été, à l'entretien ou à la réparation du dit chemin en aucune façon.

Que le dit chemin est maintenant, et ce, depuis plusieurs années, sous le contrôle de la corporation de la paroisse de Ste. Rose, et ce, en vertu des lois faites et pourvues en pareil cas, et depuis quelques années a été par elle et sous sa direction, réparé et entretenu.

Que la dite corporation a même donné au rabais, le 27 octobre 1856, l'entretien et la réparation du dit chemin.

Que c'est la dite corporation qui est responsable de tous dommages qui peuvent être éprouvés par le public par suite du mauvais état d'aucun des chemins ainsi placés sous son contrôle par les lois du pays.

Que le dit Défendeur n'est point, par sa charte, obligé et tenu d'entretenir le dit chemin, ni par aucune loi.

Que le dit chemin ne conduit pas en hiver au pont du Défendeur, et qu'il n'est point entretenu en hiver pour conduire au pont du Défendeur et ne l'a jamais été, mais qu'il a toujours été fait en hiver de manière à conduire sur la glace à côté du pont du Défendeur.

Que le dit chemin est le seul chemin qui conduit à St. Eustache, et le public n'a pas d'autre chemin pour s'y rendre.

Que partant, l'action du dit Demandeur est mal fondée et doit être renvoyée.

L'Intimé a obtenu sa charte en 1847, 10 et 11 Vic., c. 99, et à cette époque le chemin en question existait, en sorte que l'Intimé prétendait que c'était un chemin public, et qu'il devait nécessairement être entretenu par les intéressés et le public. *Vide* 18 Vic., c. 100, sec. 41, par. 98.

Le jugement de la Cour supérieure est motivé comme suit :—"The Court having heard the parties by their counsel upon the merits, and examined the proceedings and evidence of record, and having deliberated thereon, considering that the plea of peremptory exception *en droit* fyled in this case by

Grenier vs. Leprohon.

Defendant is unfounded in law, (1) doth dismiss the same, and considering that the Plaintiff hath not established the material averments of his declaration, and considering that the injury suffered by the Plaintiff, and by him complained of in this suit, was in fact occasioned by the overloading of the Plaintiff's vehicle, and by its defective condition at the time of the injury so suffered, doth dismiss the Plaintiff's action without costs to either party."

En appel ce jugement fut renversé pour les motifs qui sont énoncés dans le jugement rendu par la Cour du Banc de la Reine, et qui est comme suit:

La Cour après avoir entendu les parties par leurs avocats, sur le mérite de l'appel interjeté en cette cause, examiné le dossier de la procédure en cour de première instance, les griefs d'appel et les réponses à iceux, et sur le tout mûrement délibéré: * * * * * Considérant que le 18e jour de mai 1857, le Défendeur était propriétaire en possession du pont de péage construit sur la Rivière Jésus, au village de St. Eustache, entre les paroisses de St. Eustache et de Ste. Rose, en vertu du statut provincial passé dans la session de la législature tenue les dixiéme et onziéme années du règne de sa Majesté, c. 99. Que comme tel propriétaire le Défendeur était tenu de maintenir tant le dit pont que le chemin conduisant du dit pont à la rive opposée en bon état de reparation. Que le dit jour, 18 mai 1857, le dit chemin conduisant à la rive opposée, n'était pas en bon état de réparation, mais au contraire était dans un état dangereux et presque impraticable par la négligence du Défendeur qui avait omis d'y faire les réparations requises. Que le Demandeur passant en voiture sur le dit chemin, la dite voiture, par suite du mauvais état du chemin, se brisa et tomba dans l'eau, entraînant le Demandeur ainsi que sa femme qui l'accompagnait, et leur causant des dommages, et que pour le recouvrement des dits dommages soufferts par le Demandeur, il a droit d'action contre le Défendeur, et qu'en conséquence, dans le jugement de la Cour Inférieure, prononcé le 30e jour d'avril 1858, qui déboute le Demandeur de son action sans frais contre aucune des parties, il y a erreur. Infirme le dit jugement ainsi prononcé par la Cour Inférieure le 30e jour d'avril 1858, et ce avec dépens contre l'Intimé sur le présent appel, et cette cour procédant à rendre le jugement que la Cour Inférieure aurait dû rendre, condamne le Défendeur à payer au Demandeur la somme de £5 courant, pour les causes sus-mentionnées, avec intérêt de ce jour. Et cette cour condamne le Défendeur à payer au Demandeur les frais par lui encourus dans la Cour Inférieure comme dans une action de première classe appelable dans la Cour de Circuit.

R. et G. Laflamme, avocats de l'Appelant.
Lafrenaye et Papin, avocats de l'Intimé.

(P. R. L.)

(1) *Vide* 2 L. C. Jurist, p. 118.

EN APPEL

DU DISTRICT DE MONTREAL.

MONTREAL, 7 JUIN 1859.

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

LUSSIER & AL., *(Défendeurs en cour inférieure,)* Appelants.

ET

GLOUTENEY, *(Demanderesse en cour inférieure,)* Intimée.

Jugé,—1o. Que l'action des domestiques pour leurs gages est prescriptible par un an.

2o. Que le serment en pareil cas est déféré au maître lorsque par ses défenses il a offert d'affirmer qu'il ne devait rien.

3o. Qu'en l'absence de la preuve d'aucune convention pour le paiement de ce salaire, le maître sera reçu à affirmer sous serment sur la quotité des gages et le paiement des arrérages.

4o. Qu'en un tel cas le serviteur doit être condamné aux dépens de l'enquête faite inutilement.

Par son action, rapportée en cour inférieure, le 12 octobre 1857, l'intimée reclamait des appelants la somme de deux cent soixante-quinze livres, cours d'Halifax, qu'elle prétendait lui être due pour onze années de salaire expirées le 17 novembre 1856, temps pendant lequel elle alléguait qu'elle était demeurée chez feu Louis Lussier en qualité de ménagère et gouvernante à raison de £25 par année, que le dit feu Louis Lussier avait toujours promis de lui payer, ce qui, d'ailleurs, était au-dessous de la valeur de ses services.

L'intimée alléguait, de plus, par son action, que le dit Louis Lussier était décédé, en la paroisse de Verchères, le 15 Novembre 1856, et que les appelants tous ses parents en ligne collatérale, avaient accepté sa succession et par conséquent étaient responsables, envers l'intimée, du montant qu'elle alléguait ainsi lui être dû.

A cette action, les appelants offrirent différents plaidoyers dont voici la teneur

" 1o. Les défendeurs, pour fins de non recevoir à l'action, *et sans admettre " les allégués de la demande*, disent que la demanderesse est non recevable à " réclamer son salaire pour les années écoulées avant le 17 novembre 1856, et " les défendeurs sont bien fondés à invoquer la prescription contre la reclama- " tion quelle fait pour salaire comme servante, pour la période de temps avant " le 15 Novembre 1856.

" Pourquoi les défendeurs, offrent d'affirmer *qu'ils ne doivent rien*, concluent, " " etc..

" 2o. Les défendeurs pour défense à l'action, disent, sous la réserve de ce que " dessus plaidé, que la demanderesse était engagée comme servante chez le dit " feu Louis Lussier, à un salaire fixe et arrêté par mois.

" Qu'elle fut payée régulièrement au fur et à mesure que son salaire était dû.

" Que lors de l'inventaire des biens du dit feu Lussier, la demanderesse n'a " fait aucune reclamation, et elle a là et alors déclaré que son salaire lui avait " été bien et dument payé, suivant la convention entre elle et le dit feu Lussier.

Lussier vs. Gloutency.

" Que le salaire alloué à la demanderesse a varié, mais n'a jamais dépassé " deux dollars par mois ;

" Que le salaire qui lui était payé était le salaire donné par les autres culti- " vateurs de la localité pour les mêmes services ;

" Que les défendeurs *ne doivent rien* à la demanderesse ;

" Pourquoi, etc.

" 3o. Les défendeurs, pour défense en fait à l'action, disent *qu'ils nient* " *expressément tous les allégués de l'action*, excepté ceux qu'ils ont admis par " leur défense, et qu'ils sont mal fondés en fait.

" Pourquoi, etc."

L'intimée répondit en droit à la première exception des appelants, celle de prescription, et généralement aux deux autres plaidoyers.

Le 27 mars dernier, après audition sur la dite réponse en droit, la cour inférieure débouta le plaidoyer de prescription des appelants qui firent et produisirent une exception au dit jugement.

Les parties procédèrent ensuite à l'enquête. L'intimée n'avait pas établi que les appelants étaient héritiers du dit feu Louis Lussier, ni qu'ils avaient pris possession de sa succession comme elle l'avait allégué. L'intimée n'a produit aucun document ni aucun témoin tendant à faire cette preuve qui était indispensable pour soutenir son action, vû que les appelants, loin d'admettre cette qualité, l'avaient niée par leurs défenses.

Malgré ce défaut de preuve, la cour inférieure, par son jugement final du 23 novembre 1858, condamna les appelants à payer à l'intimée une somme de £132 avec dépens.

C'est de ces deux jugements qu'appel avait été interjeté.

La cour d'appel a maintenu la fin de non-recevoir des appelants invoquant la prescription et leur a déféré le serment.

Ce jugement est motivé comme suit :

"La cour après avoir entendu les parties par leurs avocats, sur le mérite, examiné le dossier de la procédure en cour de première instance, les griefs d'appel et les réponses à iceux, et sur le tout mûrement délibéré :

Attendu que l'intimé par son action réclame la somme de £275 courant, pour onze années de salaire qu'elle prétend lui être dues par les appelants, représentants la succession de feu Louis Lussier, pour ses services en qualité de gouvernante et ménagère, et pour avoir eu la surintendance et administration des fermes et du ménage de son défunt maître jusqu'au jour de son décès à raison de £25 par année.

Attendu qu'il est constaté par la preuve que l'intimée pendant le dit espace de temps a résidé dans la famille de son dit maître en qualité de servante, et domestique, et a été employée aux travaux ordinaires des serviteurs à gage chez les habitants à la campagne,

Attendu qu'il est aussi constaté qu'avec la permission de son dit maître ou de son aveu, l'intimée, de temps à autre, pendant son séjour chez lui, a travaillé à son compte et pour son propre profit et pour d'autres,

Attendu que la dite intimée, ne tient compte d'aucun paiement quelconque sur les gages qu'elle réclame pour un si long espace de temps, et qu'il est con-

staté que sans avoir d'autres moyens de subsistance que son travail journalier, elle a toujours été convenablement vêtue et même au-delà des besoins ordinaires d'une personne de son état.

Attendu que la dite intimée n'a pu faire preuve d'aucune convention pour le paiement d'un salaire annuel de £25 et qu'en estimant la valeur de ses services au plus haut, elle ne se monte pas au-delà de 20s. par mois.

Attendu que les appelants en réponse à la demande de l'intimée, ont invoqué la prescription pour les années écoulées avant le 17 novembre 1856, et ont offert d'affirmer qu'ils ne doivent rien.

Attendu que dans la jurisprudence française telle qu'établie pour le Bas-Canada, l'action des domestiques pour leurs gages est prescriptible par un an, et que de tout temps les tribunaux ont déféré le serment en pareil cas au maître, et que notamment tel était l'usage constant au chatelet de Paris, et que cette manière de juger est conforme à la loi et au droit.

Vû que la fin de non-recevoir opposée par les appelants, prise dans le sens ordinaire des mots, invoque suffisamment, au désir du statut provincial 12 Vic., ch. 38, sect. 86, la prescription fondée sur la présomption de paiement reconnue par la loi, et que la cour supérieure, en renvoyant la dite fin de non recevoir et exception de prescription, a mal jugé, et qu'en rendant jugement contre les appelants, surtout pour une somme aussi forte que celle de £132 courant, sans exiger l'affirmation des appelants, tant sur la quotité des gages que sur le paiement il y a aussi mal jugé; La cour infirme, annulle et met au néant tant le jugement interlocutoire rendu par la cour supérieure à Montréal, le 27 mars 1858, portant renvoi et débouté de la dite fin de non recevoir, que le jugement final rendu au profit de l'intimée le 23 novembre 1858, et procédant à rendre le jugement que la dite cour aurait dû rendre, il est ordonné que les appelants comparaissent en personne devant la dite cour supérieure à Montréal, à tel jour qui leur sera indiqué par icelle pour affirmer sous serment, au meilleur de leur connaissance et croyance sur la quotité des gages et le paiement des arrérages tant pour le passé que pendant l'année qui a précédé le décès du dit Louis Lussier, et qu'à défaut par les appelants de faire telle affirmation, le serment soit déféré à l'intimée sur la dite quotité ainsi que les dits paiements tant pour le passé que pour l'année susdite, pour sur ce, être fait ce que de droit, et de raison, et la cour condamne la dite intimée aux dépens de l'enquête faite en la cour supérieure ainsi qu'à ceux en appel."

Citations de l'intimée: Ord. de 1512 art. 67. Legrand sur Troyes, art. 200 Glose 1er No. 9. Ferrière sur l'art. 127 p. 543 No. 19.

Vide 2 L. C. Jurist., p. 185.

Lafrenaye et Papin avocats des appelants.

Laflamme, Laflamme et Barnard avocats de l'intimée.

(P. R. L.)

MONTREAL, 20TH SEPTEMBER, 1859.

Coram BADGLEY, J.

No. 1796.

MacDonald et al. vs. *Roy*.

Held,—That a mere notice of motion for *péremption d'instance* does not amount to a *demande* of such *péremption*, and that it is competent to the opposite party to prevent the effect of *péremption* by taking a proceeding in the cause between the giving of the notice and the actual making of the motion.

This was a motion by the defendant for *péremption d'instance*.

The Plaintiffs resisted it on the ground that between the reception by them of the notice, and the actual making of the motion they had taken a proceeding in the cause. And they relied on the judgment in Beaudry vs. Pilinguet, 3 L. C. Jurist, p. 237.

The Court was with the Plaintiffs, and dismissed the motion.

Motion dismissed.

Bethune & Dunkin for Plaintiffs.

Quimet, Morin & Marchand for Defendant.

(S. B.)

NOTE.—A similar judgment was rendered by the same Judge on the 30th of September, 1859, in the cause No. 2639, S. C. Montreal, Higginson *vs.* Hoskins, *et al.*

(S. B.)

MONTREAL, 30 SEPTEMBRE 1859.

Coram BADGLEY, J.

No. 1528.

The Trust & Loan Company of Upper Canada, vs. *Doyle & al.*, & *Stanley*, adjudicataire, mis en cause.

Jugé:—Que l'adjudicataire sur folle enchère n'est point contraignable par corps au paiement des frais encourus, sur la revente de la propriété, mais seulement pour la différence du prix des deux adjudications.

Par la règle qui avait été émanée contre l'adjudicataire, l'opposant non-colloqué, Sébastien Clément dit Larivière, réclamait la somme de £9 pour frais encourus sur l'émanation du writ de Venditioni Exponas pour parvenir à la revente de la propriété adjugée à Stanley qui avait négligé de payer au shérif le montant de son prix d'adjudication; et cela indépendamment de la somme de £25 qui était la différence entre le montant des deux adjudications. Stanley fit défaut lors du rapport de la règle et la cour après audition n'accorda la contrainte par corps que pour la somme de £25 et rejeta le surplus de la demande de l'Opposant en remarquant que la contrainte par corps n'existe pas pour le paiement de tels frais.

Vide 16 Vic., ch. 194, sec. 29.

Sed Vide No. 570, Monarque vs. Marteau et Reignier, adjudicataire, en 1845.

Lafrenaye & Papin, avocats de l'Opposant.

(P. B. L.)

MONTREAL, 30 SEPTEMBRE 1859.

Coram BADGLEY, J.

No. 1616.

Exparte *Lenoir*, Requérant ratification de titre, et *Lamothe & al.*, Opposants.

Jugé:—1°. Que le créancier hypothécaire indiqué dans le contrat de vente n'est point tenu de faire une opposition afin de conserver à la demande en ratification de ce titre.
3°. Qu'une telle opposition sera maintenue; mais sans frais.

Le Requérant Joseph Lenoir demandait la ratification d'un contrat de vente passé le 26 février 1859, et que lui avait consenti, Joseph B. Bronsdon, d'un lot de terre sur lequel les Opposants avaient un privilége de bailleurs de fonds au montant de £100 avec intérêt depuis le 1er novembre 1858. Dans ce contrat Joseph Lenoir s'obligeait d'acquitter cette créance avec intérêt à compter du jour de la passation du contrat seulement. La clause est comme suit:

"And he the said Joseph Lenoir doth hereby promise and bind himself to pay the further sum of one hundred pounds said currency, being the balance of a larger sum to wit: the sum of two hundred pounds, to the heirs and representatives of the late Joseph Maurice Lamothe being in payment of the balance of consideration money due to the said heirs and representatives of the said late Joseph Maurice Lamothe by the said Nelson Vosburgh, as assignee of one Louis Brosseau under and by virtue of the said Deed of Sale to the said Nelson Vosburgh, (who was the former proprietor of the premises sold) by Deed of Sale by the said Nelson Vosburgh to the said Joseph B. Bronsdon, by the Deed of Sale last aforesaid, and which the said Joseph B. Bronsdon assumed under the said Deed of Sale, and due under and by virtue of and as mentioned in a certain Deed of Sale bearing date and executed before D. E. Papineau and his colleague Notaries, the seventeenth day of march, one thousand eight hundred and fifty-one, in equal yearly payments of twenty-five pounds said currency each, on the first day of november in each year, with interest thereon and payable the said interest at the time of the payment thereof respectively, and that the interest therein such as may be *is paid up to this date*, the whole to be done by the said Joseph Lenoir his heirs and assigns to the perfect exoneration, acquittal and dischargo of the said Joseph B. Bronsdon his heirs and assigns."

Par leur opposition les Opposants réclamaient le montant en capital indiqué au contrat de vente, mais avec intérêt depuis le premier novembre 1858.

Lors de l'audition sur l'inscription de la cause pour le jugement de ratification:

Laflamme exposa, que le Requérant ne devait pas être condamné aux frais de cette opposition, vû qu'il s'était chargé de payer aux opposants le montant de leur créance et que telle était la jurisprudence sanctionnée par la cour d'appel. 1 Jurist page 112. Ex parte *Vallée*, No. 309 en 1842. Ex parte *Desrosiers*, No. 1147, Oct. 1853.

Lafrenaye pour les Opposants, prétendit, que l'indication de paiement portée dans l'acte de vente ne les privait pas de leur droit d'opposition, vû que ce n'était qu'une délégation imparfaite révocable entre les parties au contrat; que la jurisprudence invoquée par le Requérant faisait voir que le droit de former opposition est un droit facultatif de la part des Opposants; que dans l'espèce actuelle

Lenoir vs. Lamothe.

leur créance n'était pas suffisamment indiquée au contrat quant au montant des intérêts.

Per Curiam.—L'opposition est admise, attendû que les Opposants avaient bien le droit de faire leur opposition, mais *sans frais*, car l'indication de paiement contenue au contrat de vente les dispensait de la faire.

R. & G. Laflamme, avocat du Requérant.

Lafrenaye & Papin, avocats des Opposants.

(P. R. L.)

MONTREAL, 30TH APRIL 1858.

Coram BADGLEY, J.

No. 2463.

Kerr v. *Gildersleeve.*

CONSTRUCTION OF 6 Wm. IV, CAP. 28.

Held,—1o. That the judicial sale, under 6 Wm. IV, cap. 28. of a steamer not registered in Lower Canada, is invalid and void.

2o. That a purchaser at such judicial sale, to whom delivery under such sale has been made, and who has been by force deprived of the vessel by the real owner, will not recover possession by proceeding by a Writ of *Saisie revendication.*

The declaration of the Plaintiff alleged that, on the 13th August 1855, at the Parish of St. Michel de Lachine, the Plaintiff became possessed as proprietor of a steamer called "The Canadian," having acquired the same at a judicial sale there had of the steamer her tackle and apparel, by John Bates of Montreal, constable, acting in the execution of divers warrants of distress legally issued and by competent authority, at the instance of John Flanagan, &c. &c., complainants, against one John McCormick, the defendant in said complaints, for the levying of certain wages claimed by and duly and legally adjudged, together with the costs and expenses in that behalf, to the said several complainants, for their services as seamen employed on board the said steamer, and at which judicial sale, the plaintiff being the highest and best bidder, the steamer her tackle and apparel were then and there adjudged to him for the sum of £300 which he then paid to the said constable, got delivery of the said vessel, and removed her to Montreal, where plaintiff remained in peaceable possession of her until the 15th then instant.

That the said vessel and tackle, &c., were worth £1250.

That the defendant on the last mentioned day took forcible possession of the vessel and took her up the Lachine Canal with the intention of removing her to Upper Canada, to the plaintiff's damage of £2000.

The conclusions of the declaration were in the usual form of a declaration in revendication.

The pleas of the defendant in effect alleged, that the defendant was the owner of the vessel and in possession of her at the time of the pretended judicial sale mentioned in the plaintiff's declaration;—That the vessel was neither owned

nor registered in Lower Canada; that in fact the sale to the plaintiff had been effected by the fraud, collusion, and contrivance of the plaintiff, and the complainants mentioned in his declaration.

The answers of the plaintiff in effect among other things averred that the vessel was owned and navigated by John McCormick in Lower Canada.

PER CURIAM. The evidence shews that the defendant had made a conditional sale of the vessel to McCormick, not to be absolute or effective until the performance of the condition by McCormick, but till then the Defendant was still the registered owner in Upper Canada. The suit which preceded the sale at which the Plaintiff bought the vessel, was a suit before Magistrates here, under the provisions of 6 Wm. 4, c. 28, which provided means for the recovery of wages due to seamen of vessels belonging to or registered in Lower Canada, and which only gave them jurisdiction over vessels registered and owned in Lower Canada. This vessel being registered in and belonging to Upper Canada the proceedings against her by the Magistrates here were, an absolute nullity, including the adjudication and sale to the plaintiff under the distress, and therefore the action is dismissed.

The judgment was recorded as follows:—

The Court * * * * * * Considering that the said vessel or steamer, in the said declaration mentioned, was not at any time belonging to or registered in the heretofore Province of Lower Canada; Considering that the said Justices of the Peace in the said declaration mentioned, at the making of the several orders for the payment of Seamen's wages for alleged service on board the said vessel or steamer in the said declaration set forth, had no jurisdiction, power or authority to order or cause the amount of such wages and of the expences incurred by reason of the complaints before them therefor, and by reason of the distress and levy thereon, and in the enforcement of the said orders on the said vessel or steamer in respect of such service or wages, and the tackle and apparel of the said Vessel or Steamer or the said tackle and apparel thereof to be levied on the same and that the said orders were absolutely null and void as also the adjudication of the said vessel or steamer and the said tackle and apparel thereof to the said Plaintiff as set out in his said declaration.

Considering that the said Plaintiff hath not ever had any legal right or title of property in or to the said vessel or steamer with the said tackle and apparel by reason of the said adjudication distress and orders aforesaid doth dismiss his action in this behalf and doth annul and set aside the attachment made in this cause without costs.

Action dismissed.

E. Carter for Plaintiff.
Rose and Monk for Defendant.

(F. W. T.)

MONTREAL, 31st MAY, 1859.

Coram BADGLEY, J.

No. 2750.

Browning vs. *The British American Friendly Society.*

Held,—That the acceptance of a Bill of Exchange by the officer of a Society, if not within the scope of his regular duties as such officer, is, unless specially authorized by the Society, not binding upon it.

The Plaintiff sued as holder of a Bill of Exchange drawn by one James H. Phillips, President and General Manager of the Defendant, in his individual name, upon David Hunter, Secretary-Treasurer of the same Society, individually, and accepted by him as Secretary-Treasurer.

The Defendant pleaded a want of authority on the part of its officers to bind the Society by transactions beyond the purposes of its creation as defined by the Act of Incorporation, without special authorization from the Board of Direction which in the present instance had not been given.

Judgment was as follows:

"The Court having heard &c., * * * * * * considering that the "Plaintiff hath not established the material allegations of his declaration, and "that the acceptance in this cause fyled by the Plaintiff, and drawn by one "James H. Phillips, individually, upon David Hunter, Esquire, individually, "and accepted by David Hunter as Secretary-Treasurer of the British American "Friendly Society of Canada, to wit: by the Defendant, was unauthorized, and "did not make the Defendant liable therefor, doth dismiss the said action "with costs."

Action dismissed.

Bovey, for Plaintiff.

Doutre & Daoust, for Defendant.

(W. F. G.)

MONTREAL, 31st MAY, 1859.

Coram BADGLEY, J.

No. 1839.

Macfarlane vs. *Beliveau.*

Held,—That a summons to appear "before *our Justices* of our Superior Court," is sufficient and as available as a summons to appear before the *Court*.

This was an exception *à la forme* to a writ of summons, by which the defendant was summoned "to be, and appear before *our Justices* of our Superior Court;" the defendant contending, that the proper mode was to summon the party to appear before the *Court*, and not before the *Justices*, and that the writ in the present case was consequently null and void.

PER CURIAM:—(After stating facts.)—This case is one of some difficulty, for I find it was decided by this Court in the case of Macfarlane vs. Delesdernier, 4 L. C. Law Reports, p. 25. that such a writ as the present one was bad, but in a case of Grant & Brown, decided in Appeal, 6 L. C. Law Reports, p. 187, the Chief Justice said "I do not think that making the writ returnable before one or more of the Judges of the Superior Court would vitiate the writ." It is true,

that in the case last referred to the writ was set aside, but not on the ground that the summons to appear before the Judges of the Court was bad, but because the writ, which was one in an action of ejectment, summoned the defendant to appear (as under the old law) "in the Hall in the Court House where-"in are usually held the sittings of our said Court." Now am I to follow the judgment rendered by the Superior Court, or the opinion expressed in Appeal. As the opinion thus expressed in Appeal squares with my own view of the matter I shall adopt it here, and I therefore dismiss the exception.

Exception à *la forme* dismissed.

Laflamme & Laflamme, for Plaintiffs.

Cartier, Berthelot, & Pominville, for Defendant.

(S. B.)

MONTREAL, 25 MAI, 1859.

Coram BERTHELOT, J.

No. 1991.

Hyp. Martin, vs. *Ed. Martin*.

Jugé:—1o. Que la résolution d'une donation ne peut être demandée, pour *ingratitude*, contre le tiers acquéreur, cessionnaire du donataire, quoique ce tiers acquéreur ait assumé le paiement des charges de la donation.

2o. Que le défaut de paiement des arrérages d'une rente viagère, qui n'est pas une cause de résolution sous le code français, l'est sous notre droit Canadien.

3o. Que la résolution d'un acte ne peut être poursuivie, sans mettre en cause toutes les parties à cet acte.

Faits.—Le 3 Oct. 1854, Hyp. Martin, donne différentes propriétés à Toussaint Martin, son fils, à la charge d'une rente viagère, payable en grains, etc.

Le 25 Avril 1857, Toussaint Martin, le donataire, échange une partie (presque tout) de ce qu'il a reçu de son père avec Edouard Martin, son frère, qui se charge de toutes les obligations de Toussaint Martin, envers son père. Hyp. Martin, (le père donateur) intervient à l'acte d'échange, et "déclare avoir l'échange "pour agréable, l'approuve, confirme, et ratifie, voulant qu'il soit suivi et exé-"cuté en tout son contenu, suivant sa pleine forme et teneur, *en autant que le* "*dit Edouard Martin remplira envers lui toutes les mêmes obligations que le dit* "*Toussaint Martin était tenu, en vertu de l'acte de donation consenti par lui au* "*dit Toussaint Martin le* 3 *Oct.*, 1854."

Le 1er Déc. 1858, Hyp. Martin, le donateur, poursuit Edouard Martin (échangiste, non donataire,) demandant la révocation de l'acte de donation du 3 Oct. 1854 et la résolution de l'acte d'échange du 25 avril 1857, et concluant "à ce "qu'il soit déclaré que par le jugement à intervenir le dit Ed. Martin est déchu "de tout droit à la propriété des terres et choses en question (les terres et choses "données le 3 Oct. 1854) pour défaut d'accomplissement de ses obligations et "son ingratitude, et à ce que les parties soient remises au même et semblable "état qu'elles étaient avant la passation du dit acte de donation, et à ce qu'il "soit déclaré que le Demandeur est le propriétaire des terres et choses par lui "données, et à ce que le Défendeur soit condamné à lui délaisser la jouissance "et possession d'iceux, sous le plus bref délai qu'il plaira à cette cour de fixer, "sinon et ce délai expiré, en sera le Demandeur mis en possession par main de "justice, etc."

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Le Défendeur plaida, par une défense en Droit, entr'autres raisons, 1o. que l'ingratitude ne pouvait être la cause de la résolution de la donation faite par le Demandeur à Toussaint Martin, le 3 Oct. 1854, vû que d'après les allégations de la déclaration, il apparaissait que le Défendeur ne possédait pas en vertu de cet acte, mais en vertu de l'acte d'échange entre le Défendeur et Toussaint Martin;

2o. Qu'en supposant que l'action fût portée contre le donataire lui-même, le défaut de paiement des arrérages d'une rente viagère ne pouvait donner lieu à la résolution du contrat qui crée cette rente.

3o. Qu'en supposant que le Défendeur fût coupable du refus allégué de remplir les obligations de Toussaint Martin, contenues en l'acte du 3 Oct. 1854 et assumées par le Défendeur, dans l'acte d'échange du 25 Avril 1857, la résolution de ces deux actes ne pouvait être poursuivie, sans mettre en cause l'échangiste du Défendeur, savoir Toussaint Martin; que le but de l'action étant de remettre les choses dans l'état où elles étaient avant la donation, ce résultat ne pouvait être obtenu, quant au Défendeur, sans que la condamnation demandée ne rétablit en même temps les choses entre les deux échangistes, dans l'acte du 25 Avril, 1857.

Doutre, pour le Défendeur, cita à l'appui de la première proposition, celle de l'*ingratitude:*

Poncet, Législation et Procédure, t. 1, p. 174, No. 121. Sur la seconde proposition, celle qui niait l'action en résolution pour défaut de paiement des arrérages d'une rente viagère, il prétendit que notre droit étant silencieux sur le sujet, l'article 1978 du code civil français devait recevoir application, vû les motifs raisonnables sur lesquels était fondée la législation actuelle de la France. Le motif qui fait repousser l'action en résolution est que le créancier d'une rente viagère absorbe le capital de la rente, avec chaque partie d'arrérages qu'il reçoit. —Dans le contrat de rente viagère, à titre onéreux, comme dans la présente instance, la rente annuelle vaut plus que l'intérêt légal ou les fruits du capital de la rente, puisque ce capital est acquis au débiteur de la rente, sans indemnité, à la mort de la personne sur laquelle elle est créée. Cette opinion est développée par les auteurs suivants:

Duranton, t. 16, No. 371, t. 18, No. 168.
Berriat St. Prix, t. 2, p. 488, Nos. 1840 et suivant.
Duvergier, t. 1, No. 451.
Troplong, Vente, t. 2, No. 647.
Sirey, XXIX, 2, 248, Id. XXV, 1, 19.
Zaccharia, No. 356, Note 16.

Sur la troisième proposition, celle de la nécessité de mettre toutes les parties en cause, il argua que si la délégation, par Toussaint Martin au Défendeur, était parfaite, il pourrait y avoir du doute, pour savoir si le Défendeur, ne devait pas être tenu, à l'égard du Demandeur, à toutes les conséquences du défaut d'accomplissement des charges par lui assumées, sauf pour lui à chercher son remède ailleurs; mais que le doute s'évanouissait en présence d'une délégation aussi imparfaite que celle contenue dans l'acte d'échange. En réalité ce dernier acte ne contient qu'une indication de paiement. Le Demandeur déclare n'accepter

le Défendeur, comme débiteur, qu'*en autant qu'il remplira les obligations de Toussaint Martin.* Donc il demeure créancier de Toussaint Martin, si le Défendeur ne remplit pas fidèlement ses obligations.

Pour que la délégation soit parfaite, il faut que le premier obligé soit libéré. *Delvincourt*, t. 2, p. 567, Note 3.

En supposant même que la délégation fût parfaite, comment parvenir au résultat demandé, c'est-à-dire la résolution de l'échange, et remettre les parties dans l'état où elles étaient, sans mettre en cause les deux échangistes? Le rôle des tribunaux, en déclarant un acte résolu, consiste à contraindre les parties à cet acte, à défaire ce qu'elles ont fait, et à se faire réciproquement les remboursements et prestations que l'équité les obligerait à remplir. On en a un exemple dans la résolution de la vente, pour défaut de paiement lorsqu'elle est prononcée entre les deux parties contractantes. Dans ce cas, le vendeur doit rembourser ce qu'il a reçu, compensation faite des fruits et revenus.

Pothier, Vente, No. 469.

Toullier, t. 6, No. 563 et suiv. 567 in fine.

Dans tous les cas de rescision, poursuivie contre des tiers acquéreurs, pour dol, lésion, erreur, l'acquéreur originaire et le tiers détenteur doivent être et sont mis en cause.

Bédarride, Dol et Fraude, t. 1, No. 299.

Duranton, t. 12, Nos. 564, 556.

Il en est ainsi de la résolution demandée en cette cause.

Duranton, t. 8, No. 543.

" t. 16, No. 361.

Sirey, Cassation, t. 17, (1816, 11 mars) 2ème partie.

Poncet, Législation et Procédure, t. 1, p. 179.

Décisions des Tribunaux, Bas-Canada, t. 7, p. 66, Patenaude et Lériger.

" " " t. 2, p. 251, Mignier et Mignier.

" " " t. 6, p. 486, Joseph et Brewster.

Loranger, pour Demandeur, répondit, que l'objection fondée sur l'ingratitude alléguée dans la déclaration paraissait à la vérité, d'accord avec les principes; mais que l'action ressortait principalement du défaut d'accomplissement, par le Défendeur, des charges de la donation; que la délégation contenue en l'acte d'échange ayant personnellement obligé le Défendeur envers le Demandeur, ce dernier n'avait pas à s'inquiéter si son action créerait plus ou moins d'embarras au Défendeur; que le Demandeur ayant droit de s'adresser directement au Défendeur, en vertu de la délégation, il n'était pas tenu de mettre Toussaint Martin en cause, qui s'y trouvait d'ailleurs, pour ce qui concernait le Demandeur, en la personne du débiteur délégué; que la distinction faite par le Défendeur entre le contrat de rente viagère et le contrat de vente, relativement à l'action résolutoire n'existait pas sous notre droit.

PER CURIAM. Si la défense en droit, plaidée en cette cause ne pouvait réussir qu'à la condition d'affirmer la seconde proposition, énoncée par le Défendeur, savoir que le défaut de paiement des arrérages d'une rente viagère n'est pas une cause de résolution de l'acte constitutif de la rente, la cour serait contrainte de débouter la défense en droit; car tout en reconnaissant que cette proposition est

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conforme à l'art. 1978 du code Napoléon, il est constant qu'elle est repoussée par le droit ancien qui nous régit.

Chabot, questions transitoires, t. 2 §1, sur ce même article, dit que les rentes viagères, créées avant le code, sont résolubles pour défaut de paiement des arrérages.

Mais les autres propositions légales de la défense en droit suffisent, si elles sont affirmées, pour faire débouter l'action; et la cour est d'opinion, pour les raisons développées dans les autorités citées par le Défendeur, 1o. que l'ingratitude n'est une cause de résolution qu'à l'égard du donataire lui-même; 2o. que la résolution des deux actes mentionnés dans la déclaration ne pouvait être poursuivie sans mettre en cause les parties stipulant dans ces actes. En conséquence, la cour maintient la défense en droit et déboute l'action.

Action déboutée.

Loranger et Frères, pour le Demandeur.

Doutre et Daoust, pour le Défendeur.

(J. D.)

SUPERIOR COURT.

MONTREAL, 31st MARCH, 1859.

Coram Badgley, J.

No. 1812.

Leprohon vs. *Globensky*, Tutor.

Held,—That a convoying or crossing of persons, &c., over a river within the limits of another's exclusive right of ferriage and transport, although done gratuitously, if it ultimately produces gain to the person working the unauthorized ferry or crossing, is a crossing for hire and gain within the meaning of the statute, and an infringement of the exclusive rights created thereunder.

This action was brought against Globensky as tutor to a minor, proprietress of a Seigniorial mill at St. Eustache, and who in the course of the action took up the instance, to recover damages for the infringement of an exclusive right of ferry held by Plaintiff under the Provincial Statute 10 & 11 Vict., ch. 99, and to obtain a judicial prohibition of such infringement for the future. The Plaintiff was proprietor of a bridge from St. Eustache to Isle Jesus, with exclusive privilege of crossing persons, cattle and carriages for toll. By the act a penalty was imposed upon any other person who should build a bridge, or work or use a ferry for transport across the river, for hire, within a league above or below the Plaintiff's bridge, of, in case of a bridge, three times the toll chargeable on Plaintiff's, and in case of a ferry, forty shillings for each person, animal or carriage, conveyed across the river for hire or gain. The Defendant in order to draw customers to her mill, on the St. Eustache side of the river, provided a boat and made no charge for bringing them over; and this practice continued from 1849 till 1853. The Plaintiff complained of this as an interference with his rights.

The Defendant fyled a *défense en droit*, to the effect that the Plaintiff had no action in damages, but that a penalty having been fixed by the act, he could only sue for its enforcement before the prescribed tribunal. Two Exceptions were also pleaded, setting forth that the Defendant had not contravened the

statute, because no charge had been made for her ferry, and also, that the Plaintiff had suffered no damage by the existence of the ferry, since, if there had been no such convenience, those persons who had made use of it to come to her mill, would not have crossed the Plaintiff's bridge, but would have taken their grist to another mill, further up the river, where also free crossing was offered.

BADGLEY, J. (After stating the facts.) The ground of the demurrer has already been overruled in this Court; and in the 16th Louisiana Reports is to be found a case, *Fenner* vs. *Watkins*, where a similar decision was given. The law in fixing a penalty provides a punishment for the public offence of infringing the law, but does not take away the common law right, to seek redress in damages for injury committed. The Defendant's ferry disturbed the Plaintiff's exclusive privilege, it being not more than half a league away, but it appears that if the people had not been able to cross in Defendant's boat, they would have gone to Mr. Viger's mill, higher up the river over his bridge, as he too made no charge for crossing to those using his mill. The question is, could the proprietress of the St. Eustache seigniorial mill, by offering free carriage across, attract grist to her mill to the injury of the owner of the bridge; I think not. At common law an action lies at the suit of the owner of a ferry or bridge, having exclusive privilege within certain limits, against one who erects any other ferry or bridge within those limits. This is a general principle of the text books, and cases sustain it; see in 6 B. and Cr. 703, a case of disturbance of ferry, by Defendant plying a boat from and to the same places from and to which Plaintiff's ferry-boat plied. So also it is applicable to a toll bridge with exclusive right. Where a person does anything injurious to such a right, the bridge owner has an action against him. In this case the exclusive right is granted by the legislature, and the point is, has the Defendant contravened that right by crossing persons, &c., without charge, the act having declared that no person, &c., shall be conveyed or passed *for hire or gain*? This point has to a certain extent been ruled by our own local jurisprudence, in the year 1842, in the case of Mr. Lachapelle, who obtained judgment in his favor. He was owner of a bridge with exclusive right of transport, and some persons with the object of forming a crossing by which they secured certain advantages, sent down masses of ice against his piers, where they lodged and made a crossing. However, it is no disturbance if one having a boat for his own convenience, cross himself, or even lend his boat to his neighbour gratuitously, because the taking of toll for passage is essential to the establishment of a ferry. But it is otherwise where the gratuitous passage is only a cover for gain, as in the case of *Fenner* vs. *Watkins* above. There the Defendants were tavern-keepers, and carried across gratuitously all persons who stopped at their hotel; and in that case it was held that the profits which they made from such customers, enabled them to bear the expense of taking them over the river, and this obligation which the customers were under when no ferriage was charged, to put up at the Defendant's house, was as advantageous to the latter as the ferriage, and perhaps more so, and consequently equally injurious to the Plaintiff. The principle of this judgment manifestly applies to the present case. It is established by the proof of record that the Defendant passed over persons, animals and carriages, by a boat or *chaland* expressly kept

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for the purpose, true, without charge, but for the special benefit of her mill, and for the grinding of the grain conveyed by them, which would otherwise have been lost to the Defendant, inasmuch as these grain owners on Isle Jésus would rather have gone to Mr. Viger's mill, a few miles further, where they were crossed without charge, than to the Defendant's mill, paying bridge toll, notwithstanding the proximity of the Defendant's mill and its making better flour, worth 1s. per quintal over the flour made at the other mills. The Defendant charged nothing for her ferry, but still she made gain by it. It was to her advantage to offer this inducement, and she profited pecuniarily by it, though she took no pay for the mere ferry. The Plaintiff must have judgment. As to the damages, they will be only nominal, £5, as none are specially proved, but a prohibition will issue against Defendant, forbidding her to continue the ferry.

The judgment was recorded as follows :—

"La cour condamne les Défendeurs, par reprise d'instance, à payer aux Demandeurs, par reprise d'instance, la somme de £5, cours actuel de cette province du Canada, pour dommages et intérêts causés aux Demandeurs, par reprise d'instance, pour les causes mentionnées en la déclaration filée en cette cause, pour avoir gardé ou fait garder un bac ou chaland (pour leur profit) pour traverser des personnes, bestiaux et voitures sur la rivière Jésus, au-dessus du pont des Demandeurs, par reprise d'instance, mais dans les limites du privilége de ces derniers, et aussi en ayant pratiqué et fait pratiquer, pour leur profit, illégalement, au moyen de ce bac ou chaland, des voies de passages et traverse, pour le transport des personnes, bestiaux et voitures, à travers la dite rivière Jésus, au mépris du statut provincial 10 et 11 Victoria, c. 99, et des droits acquis des Demandeurs, par reprise d'instance, et pour les priver depuis 1849 à l'année 1853 des droits et profits de péage du dit pont, tel que plus amplement mentionné et détaillé dans la déclaration du Demandeur produite en cette cause, le tout avec intérêt sur la dite somme de £5, cours susdit, à compter de ce jour jusqu'au parfait paiement, et aux dépens. Et la cour au désir des conclusions du Demandeur fait par ces présentes défense aux Défendeurs, par reprise d'instance, de recevoir ou de tenir et maintenir le dit bac ou chaland, ou aucune autre voiture d'eau pour, au moyen d'iceux, pratiquer pour leur profit, aucune voie de passage ou traverse des personnes, bestiaux et voitures, dans les limites du susdit privilege des dits Demandeurs par reprise d'instance.

Judgment for Plaintiff.

Lafrenaye et Papin, for Plaintiffs.

Cherrier, Dorion & Dorion, for Defendants.

(W. F. G.)

AUTHORITIES CITED BY THE PLAINTIFFS :—*Vide* 7 Pickering's Reports, 344, the case of the Charles River Bridge Company and the Warren Bridge Company; 5th volume Peters, 428; American Jurist for July 1831, vol. 6, pages 86—184; Paschal Persillier Lachapelle v. Lessort et al., Montreal, April, 1842; Sed contra, Mots appellant, and Rouleau et al., respondents, November, 1848.

MONTREAL, 22ND MARCH, 1856.

Coram DAY, J., SMITH, J., (C.) MONDELET, J

No. 997.

The Commissioner of Indian lands for Lower Canada vs. *Payant dit St. Onge et Payant dit St. Onge* (*Plaintiff en garantie*), vs. *On8anoron*, (*Defendant en garantie*).

Held; 1o. That Indians have not by law any right or title by virtue whereof they can sell and dispose of the wood growing upon their lands set apart and appropriated to and for the use of the tribe or body of Indians therein residing.

2o. That such wood is held in trust by the Commissioner of Indian lands for Lower Canada.

This was an action *en saisie-revendication* brought by the Plaintiff in the principal demand for the recovery of twelve cords and upwards of fire-wood of the value of £10, cut, felled and carried away by the Defendant in the principal demand; in November 1854, from and upon the unconceded lands of the Seigniory of Sault St. Louis, which for more than 20 years has been set apart and appropriated to and for the use of the tribe or body of Indians therein residing and as such is vested in the said principal Plaintiff. Besides the value of the wood, the principal Plaintiff claimed £50 for damages.

Before answering this demand; the principal defendant took out an action *en garantie* against the Indian On8anoron with whom he had made a contract for the wood; alledging; "Que par acte reçu à St. Isidore, devant Mtre. Lan-"gevin et son confrère Notaires, le 18 Décembre 1854, le demandeur et le dé-"fendeur convinrent ensemble et déclarèrent ce qui suit, savoir: que le dit dé-"fendeur avait donné, le 1er Novembre dernier au demandeur, un morceau de "terre d'environ un demi arpent en superficie, sur sa terre qu'il occupait alors "dans le dit Sault St. Louis, située au côté sud-est du chemin de fer de Mon-"tréal et New-York, à nettoyer et faire la terre du demi arpent en superficie au "rateau, (les souches exceptées) et livrable au printemps prochain, pour être "ensemencées, ce à quoi le dit demandeur consentit et s'obligea par le dit acte, "Et pour toute indemnité de la part du dit défendeur envers le dit demandeur "ce dernier enleverait dedans le dit morceau de terre tout le bois qui s'y trouvait "et en disposerait comme bon lui semblerait; tel fut expressement convenu." The defendant *en garantie* having appeared took up the *fait et cause* of the said principal defendant and pleaded as follows:

"Le défendeur en garantie prenant le fait et cause du défendeur principal et n'admettant en rien les allégations du demandeur principal, dit: pour exception péremptoire à sa demande:

"Que lui le défendeur en garantie à été pour plus de cinq ans, propriétaire en possession, et a joui pour son propre usage et avantage, et cela d'une manière distincte des autres terres formant partie des terres qui sont sous le contrôle du demandeur principal, d'un certain lot de terre sis et situé dans la Seigneurie du Sault St. Louis, au côté sud-est du chemin de fer de Montréal et New-York; lequel lot de terre est encore occupé par le dit défendeur en garantie.

"Qu'il en était ainsi en possession le ou vers le 1er Novembre dernier ainsi que du bois qui avait crû sur ce lot de terre.

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"Que ce jour là il a permis au defendeur principal d'enlever du bois qui se trouvait sur le lot, et de le convertir à son propre usage ainsi qu'il a été convenu plus tard par acte fait le 18 Décembre 1854 devant Mtre. J. F. Langevin et son confrère Notaires, lequel acte est produit avec les présentes pour y référer comme en faisant partie.

"Que par les us et coutumes suivis dans la tribu Indienne du Sault St. Louis lui le défendeur en garantie avait droit de jouir du dit lot de terre et de convertir à son propre usage le bois qui avait crû sur ce lot.

"Que le défendeur principal qui avait acquis le bois du défendeur en garantie n'en pouvait être en aucune façon quelconque dépossédé par le demandeur principal et qu'ainsi la saisie de partie de ce bois faite en cette cause a été pratiquée à tort et le demandeur principal ne peut revendiquer la propriété du bois saisi.

"Pourquoi le défendeur en garantie demande le débouté de la dite action et saisie avec dépens."

To this Plea, the principal Plaintiff answered specially as follows:

"That even if the defendant *en garantie* did occupy the land mentioned in the said pleas, which the Plaintiff does not admit but on the contrary denies; yet the occupation thereof or the possession thereof under the customary Indian Title could confer no right on the occupant to sell and dispose of the wood thereon or any part thereof.

That the whole of the lands of the said Seigniory are held in trust by the Plaintiff for the benefit of the whole tribe of Indians therein residing and under the local regulations of the chiefs of the said tribe, duly appointed by competent authority.

That the right to take wood from off the said lands, by the said regulations and by law extends only to the taking of such wood as may be required for the individual uses of the Indians residing therein and confers on no party the right to sell and dispose of the same, and plaintiff specially denies that the defendant *en garantie* had any legal right to sell and dispose of the wood seized in this cause to the Defendant or to any other persons whatever and particularly to such persons as are by law prohibited from selling or holding property within the Indian lands of this province and of which persons the Defendant is one.

That both the defendant and the defendant *en garantie* were well aware of these facts yet contriving to despoil the said property of the wood growing thereon to the loss and injury of the community of Indians for whom the said plaintiff holds the said lands in trust, the defendant with the connivance of the defendant *en garantie* took the wood mentioned in the plaintiff's declaration from off the lands of the said Seigniory and removed the same out of the possession of the said plaintiff and to give a colour to the said unlawful act; the agreement fyled by the defendant *en garantie* was afterwards drawn up.

The parties having gone to proof; the following admissions were agreed upon by them:

The parties to avoid costs, admit:—

1°. That the plaintiff is vested with the lands of the Seigniory of Sault St. Louis in trust for the whole tribe of Indians therein residing as provided for in the statute in that behalf and that the land from which the wood seized in this

cause was cut and carried off was within the limits of the said Seigniory and that the principal defendant is not of Indian blood.

2°. That the Indians residing in the said Seigniory of which the defendant *en garantie* is one, have certain rights of property to wit: The power to enter upon portions of the uncleared lands of the said Seigniory, for the purpose of clearing and cultivating the same for their own use and profit.

3°. That all Indians residing in the said Seigniory have the right to cut whatever wood they may require for fire or other purposes for their own use.

4°. That the possession or occupation of any portion of land in the said Seigniory by any individual Indian gives him right of property therein as against any other Indians.

5°. That the defendant *en garantie* had the common Indian right to the land from which the wood in question in this cause was cut.

6°. That the question of the right of Indians to sell wood off the lands of the said Seigniory has agitated the said community of Indians for a considerable period and that the chiefs thereof had warned the said Community not to traffic in wood, but the said parties defendants do not admit that the chiefs had any right to forbid the sale of wood so cut as aforesaid, and neither the defendant nor defendant *en garantie* plead ignorance that such traffic was forbidden by the said chiefs, but on the contrary the said parties were well aware of the said traffic being forbidden as aforesaid.

That the wood seized in this cause has grown upon the lot of ground in question, that is to say, the lot of ground described in the plea fyled by defendant *en garantie*, which lot of ground was at the time of the seizure and at the time of the sale made by the said defendant *en garantie* to the principal defendant of the wood in question, in the occupation of the said defendant *en garantie* in virtue of the right of property belonging to Indians as set forth in the admission, No. 2, and that it is in virtue of the agreement and bargain made between the defendant and the defendant *en garantie*, according to the sale and permission made and given by the latter to the former that the defendant has cut the wood or caused the said wood, to be cut and carried off.

The Plaintiff does not admit however the right of the defendant *en garantie* to sell the wood aforesaid, leaving to the Court the appreciation of that right.

The parties having been heard upon the merits, the Court gave judgment in favor of the principal plaintiff, which is *motivé* as follows:

"The Court having heard the plaintiff and the defendant *en garantie* by their counsel upon the merits of this cause as well upon the principal demand as upon the *demande en garantie*; the principal Defendant not having pleaded to the said principal demand and being foreclosed from so doing, having examined the proceedings, proof of record, and seen the admissions made and given by the parties respectively in this cause, and having deliberated, considering that the Plaintiff hath established by evidence the material allegations of his declaration and that the Defendant *en garantie*, Saro Onsanoron, who hath taken the *fait et cause* of the Defendant Louis Payant dit St. Onge had not by law any right or title by virtue whereof he could sell and dispose of the wood in this cause leased to him the said Louis Payant dit St. Onge and that he the said Louis Payant dit St.

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Onge did not by reason of the agreement dated the eighteenth day of December one thousand eight hundred and fifty-four and by him in the said cause filed as his exhibit number one, acquire any right to cut the said wood and to remove thence the same in manner and form as in and by the said agreement and by the exception of the said Defendant *en garantie* is set forth, dismissing the said exception and adjudging upon the merits of the said principal demand; doth declare the attachment or *saisie revendication* made in this cause of about twelve cords of fire wood good and valid and doth declare the same to be the property of the said Plaintiff in his said capacity, and it is ordered that the said twelve cords of fire wood be delivered up and restored to the said Plaintiff in his said capacity and the Court doth condemn the defendant Louis Payant dit St. Onge to pay the costs of this action and as to any other or further conclusions by the Plaintiff in and by his said declaration taken the same is hence dismissed; and the Court adjudging upon the *demande en garantie* in this cause: it is considered and adjudged that the said Defendant *en garantie* Saro Onsanoron do guarantee indemnify and hold harmless the said principal Defendant and Plaintiff *en garantie* Louis Payant dit St. Onge from the condemnation herein pronounced against him."

Dunlop, Attorney for principal Plaintiff.

Loranger et Pominville, Attorneys for principal Defendant and Plaintiff en garantie.

Coursol, Attorney for Defendant en garantie.

P. R. L.)

COURT OF QUEEN'S BENCH.

IN APPEAL.

FROM THE DISTRICT OF MONTREAL.

MONTREAL, 9TH JUNE, 1859.

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

No. 51.

NIANENTSIASA, Appellant.

AND

AKWIRENTE ET AL., Respondents.

Held,—That the security bond given in appeal by Indians is valid, inasmuch as in the present case, the Indians who became securities were, as appeared by the affidavits, in possession as proprietors according to the Indian customary law, of certain real estate situated and lying within the tract of land appropriated to the uses of the tribe to which they belonged.

The Respondents having made a motion to set aside the security given by the Appellant, (which security consisted of two Indians, Ignace Kaneratahere and Thomas Tahantison), a rule was issued returnable on the 20th April, 1859, and which rule is in the following words:

"It is moved on the part of the said Respondents inasmuch as the Appellant has not given good and sufficient security in the manner required by law to entitle him to the present appeal, and inasmuch as the security by the appellant in this cause given is insufficient, the sureties in the security bond mentioned being valueless and not worth the amount in which they justified as will more fully appear by the affidavits herewith fyled, that the security given by the appellant upon the present appeal be declared insufficient and null and void, and this appeal dismissed with costs, unless cause to the contrary be shown on the 30th April instant;—"

It is ordered that the appellant do shew cause to the contrary on Saturday the thirtieth day of April instant, sitting the Court.

The Respondents fyled in support of their rule four affidavits to establish the insolvency of the securities. On the part of the appellant, four counter affidavits were produced in which it is stated: que le dit Thomas Tahantison est propriétaire et en possession de l'immeuble décrit en l'acte de donation en date du 31 Mars 1859, Mtre Lepailleur, N.P., et depuis environ cinq ans et qu'il a continué à l'être jusqu'à ce jour sans interruption. Il arrive souvent que les Sauvages, dans l'étendue de la Seigneurie du Sault St. Louis, possèdent des terres et en sont réputés et en sont réellement propriétaires sans avoir de titre devant notaires, ni par écrit sous seing-privé. La moitié indivise de l'immeuble décrit à l'acte de donation susmentionné vaudrait pour des blancs, au moins quatre cent piastres. Sur la dite moitié indivise de l'immeuble appartenant au dit Thomas Tahantison, il y a une maison neuve qu'il a construite l'automne dernier, et une écurie. C'est une maison de vingt pieds quarrés couverte en bardeaux. L'écurie est couverte en planches et bien bonne. Je sais que Ignace Kaneratahere possède un emplacement situé au Village du Sault St. Louis, sur lequel il y a une maison en pierre à deux étages, dans laquelle il réside et qui vaut au moins huit cents piastres. Il possède cet emplacement depuis que j'ai l'âge de connaissance comme propriétaire, une terre d'âpeu près quatrevingts arpents en superficie, dans la Seigneurie du Sault St. Louis, près de la paroisse St. Isidore, valant à peu près six cents piastres; je sais qu'il possède aussi comme propriétaire trois Isles sur lesquelles il cultive du foin, dans les limites de la dite Seigneurie, et cela depuis plus de dix ans—ces trois Isles peuvent valoir cent piastres. Le dit Ignace Kaneratahere tient maison comme susdit, avec sa famille, et possède un ménage aussi bien qu'en ont les Sauvages à l'aise; je ne lui connais pas de dettes, et je n'ai pas connaissance qu'il ait été poursuivi en justice.

The appeal bond had been given in December 1858. The deed of gift fyled by the Appellant with his affidavits was made and passed on the 31st March, 1859.

Carter, for the Respondents contended that Indians could not hold in their own name immoveable property situated within the limits of such tracts of land as were occupied by them in this Province, and cited the following authorities:

13 & 14 Vic. ch. 42.—Sect. 1.—Indian lands vested in a commissioner.
Sect. 2.—All suits to be brought by or against commissioner.
Sect. 3.—Commissioner has power to concede, lease or charge any such lands.
Sect. 4.—Rights of individual Indians as *possessor* or *occupant* preserved.

Niaucntsiaua vs. Akwirente.

No. 997. The Commissioner of Indian lands for Lower Canada *vs.* Louis Payant dit St. Onge, and Onganoron defendant *en garantie.* Under this statute, *Justices* Day, Smith, and Mondelet, on 23rd March 1855, rendered judgment sustaining a *revendication* of wood cut in the seigniory in question. Referred to 7th head of admissions fyled, establishing that ten cords of the wood had been cut on land *in the occupation* of Defendant *en garantie.*

The judgment declares he had no right or title by virtue whereof he could sell the wood and *Carter*, for Respondent contended that it sustains the proposition that the lands in Sault St. Louis and the right of property are vested in the commissioner.

Rev. Statute p. 573.

17 Geo. 3, ch. 7 S. 3.—Prohibits persons living in any Indian village without a license.

Rev. Statute, p. 574.

3 & 4 Vic. ch. 44, sec. 2. Governor may order any person resident in Indian village to remove therefrom under a penalty and imprisonment.

The rule taken by the Respondents was discharged with costs.

The judgment was as follows:

La cour après avoir entendu l'Intimé sur sa motion du trente Avril dernier, ainsi que l'Appelant, par leurs avocats, examiné le dossier en cour de première instance et les pièces justificatives à l'appui de la dite motion ainsi que celles à l'encontre et sur le tout mûrement délibéré; rejette la dite motion avec dépens.

Doutre & Daoust, Attorneys for Appellant.

Carter, Attorney for Respondent.

(P. B. L.)

IN APPEAL.

FROM THE SUPERIOR COURT, DISTRICT OF MONTREAL.

MONTREAL, 6TH JUNE, 1859.

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

WHITNEY, (*Plaintiff in the Court below.*)
Appellant.

AND

CLARK, (*Defendant in the Court below.*)
Respondent.

CLERK—COMPETENT TO CONTRADICT HIS OWN RECEIPT.

Held. 1o. That a clerk is competent to prove that a receipt given by him for his employer to a custom a for a sum of money was given by error, and that he did not actually receive the money acknowledged by the receipt.

2o. That the weight to be given to the testimony of the clerk is a question as to his credibility which depends upon the circumstances of the case.

The facts of this case fully appear from the report of the judgment of the Court below, 3 L. C. Jurist, p. 89-93.

Sir, L. H. Lafontaine, Bart., Juge-en-chef.—L'objet de cette action est de recouvrer du défendeur la somme de £50, balance d'un billet fait par lui à l'ordre du demandeur, le 7 Mai 1856, pour le principal de £162 17s., 1d. payable à six mois.

L'action a été intentée en Août 1857.

Le Défendeur oppose à cette demande deux reçus, l'un du 3 Septembre 1856, donné et signé par le demandeur lui même, pour £55 *en à compte du billet*, et l'autre du 17 Novembre de la même année, donné et signé par Dufresne, teneur de livres du demandeur. Ce dernier reçu est en ces termes. "Received from "Mr. W. C. Clark the sum of £112 17s., 1d. cy., being *on account of note* due "10th instant."

Les montants réunis des deux reçus forment une somme de £167 17s., 1d. que le défendeur prétend avoir payée; ce qui fait £5, qu'il aurait payés de trop. Aussi, par l'une de ses conclusions, se reserve-t-il le droit de les repéter.

Le demandeur répond que c'est par erreur et sur les fausses représentations du défendeur, que son commis Dufresne a été porté à lui donner, le 17 Novembre, un reçu de £112 17s. 1d. tandis que ce jour là le défendeur n'avait de fait payés que la somme de £57 17s. 1d. ce qui, avec les £55 reçus le 3 Septembre précédent, faisait la dite somme de £112 17s., 1d. laissant encore due la dite balance de £50.

Voici comment les faits sont expliqués dans le témoignage de Dufresne. Le matin du 17 Novembre 1856, le défendeur va le trouver et lui paie £57 17s., 1d. Il obtient un reçu de cette somme. Il part en disant qu'il reviendra dans l'après-midi et que probablement il paiera la balance. Il revient en effet dans cet après-midi, et dit qu'il a disposé de ses fonds chez d'autres marchands, et qu'il ne peut pas payer la balance. Il représente à Dufresne qu'il avait auparavant payé £55 qu'il ne pensait pas en avoir de reçu, et il le prie de vouloir bien lui en donner un. Dufresne, le croyant sur parole, reprend le reçu de £57 17s., 1d. qu'il lui avait donné le matin, et lui en fait un autre pour la somme de £112 17s., 1d. Dufresne n'avait pas vu le reçu donné par le demandeur le 3 Septembre précédent. Si ce témoignage est admis, la preuve du demandeur est complète; le reçu du 17 Novembre ne doit valoir que pour £57 17s., 1d. Il y a plusieurs circonstances qui viennent appuyer ce témoignage. Le reçu du 17 Novembre n'est, comme celui du 3 Septembre, donné qu'en *à compte* du billet, C'est là une déclaration que le défendeur accepte en prenant le reçu du 17 Novembre, qu'il cherche à faire valoir aujourd'hui. Il ne demande pas qu'on lui remette son billet, au contraire, ce billet continue à rester entre les mains du demandeur, ce qui est une très forte présumption que le billet n'était pas entièrement acquitté. De plus, si le reçu du 17 Novembre doit valoir pour la somme de £112 17s., 1d. alors le défendeur aurait payé £5 de plus que le montant du billet. Il est vrai que le défendeur répond à celà que le demandeur avait un petit compte courant contre lui, mais ce compte n'était pas encore arrivé à son échéance, et le reçu fait expressément mention que la somme payée ne l'est qu'en à compte du billet. Dans les livres du demandeur, crédit n'est donné au défendeur que de deux sommes, l'une de £55, payée le 3 Septembre, et l'autre de £57 17s., 1d. payée le 17 Novembre

Whitney vs. Clark.

Dufresne n'est pas le seul témoin examiné. Un autre commis du demandeur Gravelle, a eu des conversations sur ce sujet avec le défendeur qui lui a déclaré, "that he kept no Cash Book" mais "that he had in his mind that he had paid "it long ago but was not positive." Et après que Gravelle lui eût dit que les livres du demandeur ne lui donnaient crédit que de deux sommes susdites de £55 et de £57 17s., 1d, "the defendant" ajoute Gravelle "was satisfied that the "plaintiff's Books were all right."

Le défendeur veut tirer avantage d'une lettre que le demandeur lui a fait écrire par Gravelle, le 2 Mai 1857, et dans laquelle le demandeur ne reconnait avoir reçu en tout que £112 17s., 1d. savoir, £55 le 3 Septembre, et £57 17s., 1d, le 27 Novembre, 1856. "But "dit-il" if you have a separate receipt for the £55 "paid in September you are all right."

Le reçu *séparé* s'il existait, n'était pas un reçu qui dut s'appliquer aux £55 que le demandeur reconnaissait lui-même avoir reçu le 3 Septembre, parce qu'alors ce n'eût pas été un paiement *séparé*, distinct de celui-là, mais ce devait être un reçu qui eût établi le paiement d'une seconde somme de £55 *séparé* distincte de la première, puisque le défendeur prétendait avoir fait un tel paiement sans avoir pris un reçu.

Je crois que c'est un cas dans lequel les circonstances justifient la preuve par des explications de l'effet dont se trouve nanti le défendeur, et qu'il cherche à faire valoir au préjudice du demandeur pour toute la somme qui, par suite de ses fausses représentations, s'y trouve être par erreur énoncée.

The judgment in appeal was *motivé* as follows:—

The Court, &c. * * * *

"Seeing that the said Respondent, on the seventh day of May, 1856, at the "city of Montreal, made the promissory note mentioned in the declaration in this "cause, filed for one hundred and sixty-two pounds seventeen shillings and one "penny, in manner and form as in the said declaration mentioned, and then and "there delivered the said promissory note to the Appellant.

"Seeing also that the said Respondent, on the 3rd day of September, 1856, "paid to the said Appellant, on account of the said promissory note, the sum of "fifty-five pounds, currency, and on the seventeenth day of November, one "thousand eight hundred and fifty-six, the sum of fifty-seven pounds seventeen "shillings and one penny, and considering that the said two sums of money are "the only sums of money paid by the Respondent to the Appellant on account "of the said promissory note, the receipt of the 17th day of November, 1856, "filed in this cause, as the Defendant's Exhibit Number Two having been given "by error as an acknowledgment of the said two payments, in consequence of "the Respondent having erroneously informed one Luc. A. Dufresne, a clerk in "the employ of the Appellant, and who gave the said last-mentioned receipt, "that he the said Respondent had not been given a receipt for the said payment "of fifty-five pounds, currency, at the time it was made. And considering that "by reason of the premises, a balance of fifty pounds currency, with interest "from the 10th day of November, 1856, remained due by the Respondent to "the Appellant upon the said promissory note at the time of the institution of "the present action, and therefore that in the judgment pronounced by the

"Court below, on the 30th day of April, 1858, dismissing the action of the "Appellant there is error, doth in consequence reverse, set aside, and annul "the said judgment so pronounced by the Court below, on the 30th day of "April, 1858, and this Court proceeding to give such judgment as the Court "below ought to have given, doth condemn the said Respondent to pay the said "sum of £50, currency, being the balance so due upon the said promissory note, "with interest from the 10th day of November, 1856, until paid.

"And it is ordered that the said Appellant do recover from the said "Respondent the costs by him the Appellant incurred as well in the Court "below as in this Court.

"(The Honorable Mr. Justice Duval *dissentiente.*")

Torrance & Morris, for Appellants.

H. Stuart, for Respondent.

(P. W. T.)

COUR SUPÉRIEURE.

DISTRICT DE TERREBONNE.

ST. SCHOLASTIQUE, LE 16 MAI 1859.

Coram BADGLEY, J.

No. 16.

Prevost vs. *Leroux.*

Jugé.—Qu'un prix de vente peut se compenser au montant de dommages résultant de la fraude ou du dol évident, et que dans l'espèce la fraude est palpable, et compensation doit s'établir.

Le 29 Octobre 1847, J. A. Berthelot, écuier, vend une terre située à St. Jérôme, à Joseph Leroux *alias* Cardinal, le Défendeur, moyennant 1000 livres ancien cours, payable en 10 paiemens de 100 livres chaque, avec intérêt de l'échéance; à cet acte Paschal Persillier dit Lachapelle intervint et se porta caution simple du Défendeur, à la garantie du prix de vente, et hypothèqua une terre aussi située à St. Jérôme, à l'effet de son cautionnement. Enrégistrement de l'acte de vente, le 13 Novembre. 1847.

Le 20 Janvier 1856, le Défendeur vend sa terre à Cyrille, son fils, qui la vend le 16 Mars 1856, à Paul Deschambault.

Le 3 Novembre 1848, M. Berthelot transporte la balance de son prix de vente à Toussaint Barbeau, acceptation du transport par le Défendeur le 25 Mars 1856. Le 23 Mai 1856, Toussaint Barbeau transporte la balance du dit prix de vente à Melchior Prévost, notaire, à St. Jérôme. Signification au Défendeur le 5 Février 1857. Le 6 Mars 1857, action hypothécaire par Melchior Prévost, contre Paul Deschambault, alors détenteur actuel de l'immeuble affecté au dit prix de vente, s'élevant alors en capital et intérêt à £49 18s 8d. Le 18 Avril 1857, Paul Deschambault délaisse l'héritage, et curateur est créé au délaissement. Le 21 Juillet 1857, exécution contre l'immeuble. Le 23 Décembre 1857, vente de la terre adjugée pour £10. Les frais de la poursuite s'élèvent à £13 4s 2d, et frais de la vente par le Shérif £14 8s 6d. Toutes ces

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sommes forment celle de £85 12s 8d., sur laquelle il faut déduire celle de £10 montant de la vente opérée par le shérif, laissant ainsi celle de £75 12s 8d, encore dûe, pour le recouvrement de laquelle Melchior Prévost, ayant discuté l'immeuble vendu au Défendeur, avait le droit de poursuivre M. Lachapelle, la caution. Que le Défendeur se trouve propriétaire, possesseur et détenteur de l'immeuble affecté par M. Lachapelle à la garantie de son cautionnement par l'acte du 29 Octobre 1847. Le 11 Janvier 1858, Melchior Prévost transporte à Wilfrid Prévost, le Demandeur, la balance dûe, savoir, £75 12s 8d, et tous les intérêts échus et à écheoir.

L'action est donc portée pour le recouvrement de la dite somme de £75 12s 8d. hypothécairement contre le Défendeur.

A cette action le Défendeur a plaidé: 1o. par exception péremptoire que Toussaint Barbeau, cédant de Melchior Prévost, étant curateur à la succession vacante de Luckesey, et voulant se démettre de sa curatelle, s'addressa au Défendeur, et lui remit ce qu'il avait en mains appartenant à cette succession, déduction faite du prix de vente dû alors par l'acte du 29 Octobre 1847, et conclut à la nullité des transports et plaidait paiement; 2o. Par une autre exception péremptoire, le Défendeur allègue, qu'il a été fraudé par Melchior Prévost; que le jour fixé pour la vente, par le shérif, de la terre saisie et vendue sur le curateur, au délaissement, le défendeur se trouvait au bureau de Melchior Prévost à St. Jérôme, que là et alors, Prévost aurait dit à une vingtaine de personnes alors présentes et s'addressant au Défendeur de ne pas enchérir sur la dite terre, que le Dr. Dorion était un des créanciers du Défendeur, qu'il avait trompé le Défendeur et qu'il fallait lui faire perdre sa créance, que le Défendeur était pauvre et qu'il fallait lui faire avoir sa terre et épargner des frais, qu'il (Prévost) allait acheter la dite terre pour une bagatelle et la remettrait de suite au Défendeur, qui pourrait ainsi la vendre et payer ses créanciers; que rendu à l'enchère, personne ne mit, et la propriété fut adjugée à Melchior Prévost pour £10, que la terre valait alors et aurait pu se vendre £125, au moins, que se fiant sur la promesse et la parole de Melchior Prévost, le Défendeur serait entré en arrangement immédiatement pour revendre la dite terre à un nommé Robert. Que Robert et lui se sont ensuite addressé plusieurs fois au dit Melchior Prévost, pour se faire consentir la remise de la terre, mais en vain, et que Melchior Prévost l'a ensuite revendue au même Paul Deschambault qui l'avait déjà délaissée; que si Melchior Prévost n'eut pas agi de fraude et par dol pour se faire adjuger la dite terre, pour un prix nominal et très modique, elle se serait vendue audelà de £125, somme plus que suffisante pour éteindre la dette du Défendeur; qu'ainsi le dit Melchior Prévost a causé au Défendeur des dommages de £100, et audelà, somme plus que suffisante pour éteindre et compenser celle que le Demandeur réclame; le Demandeur comme cessionnaire de Melchior Prévost est garant de la fraude de ce dernier. Conclusion en conséquence.

Le Demandeur a répondu, en niant les allégués de la première exception, et alléguant en réponse à la seconde, que le Défendeur était débiteur du dit Melchior Prévost, pour les sommes considérables, qui ces créances étaient chirographaires et le seul dol de Melchior Prévost a été, de vouloir essayer de s'indemniser de ces créances, en ayant la terre de la manière qu'il l'a obtenue; qu'il n'y a aucun dol ni fraude et que le Défendeur n'a souffert aucun dommage.

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Le Défendeur n'a pas établi, en preuve, sa première exception, mais il a prouvé par deux témoins, ce qui s'est passé le jour de l'adjudication de la terre en question, avant et après, de manière à ne laisser aucun doute sur les promesses de Melchior Prévost au Défendeur, de lui remettre la terre, et de son refus de le faire ensuite, et enfin des dommages consistant dans la différence depuis £10 à £125.

Per Curiam.—La fraude est prouvée. Il n'y a aucun doute qu'il y avait intention de tromper le Défendeur et aucun homme de position de ne devrait se rendre coupable de tels actes. La preuve des témoins est positive. Le cédant a promis avant l'adjudication d'acheter la terre pour le Défendeur, il se fait adjuger la terre pour £10,—il empêche les personnes présentes d'enchérir, sous prétexte qu'il veut faire du bien au Défendeur, lui venir en aide et épargner les frais; afin d'arriver plus sûrement à ses fins, il dit à Lachapelle, un des témoins produits, vous êtes créancier du Défendeur, vous venez pour enchérir; sur réponse affirmative, il dit à Lachapelle, je vais payer votre dette, mais, n'enchérissez pas, celui-ci ne le fait pas quoique décidé à porter son enchère jusqu'à 3000 livres. Après l'adjudication, le cédant renouvelle ses promesses, mais alors et alors seulement il dit au Défendeur, tu me dois, mais tu me payeras, l'autre consent; le Défendeur avait pris des arrangemens avec Robert, l'autre témoin, pour lui vendre la terre, tous deux font différents voyages chez le cédant mais sous différents prétextes, il les éloigne et enfin il vend la terre à Paul Deschambault. S'il eut eu l'intention de remettre la terre au Défendeur, ne pouvait il pas de suite faire mettre le nom du Défendeur au lieu du sien, comme adjudicataire, et alors il aurait accompli ses promesses, mais non, dans un but de fraude, il éloigne les enchérisseurs, en désintéresse un, et se fait adjuger la terre pour une bagatelle. Plus encore, le Demandeur a produit le compte du cédant contre le Défendeur, où l'on trouve des charges énormes et que les hommes les plus haut placés dans leur profession, comme avocat ou notaire, n'auraient voulu coucher par écrit, et il charge même au Défendeur le contrat du shérif et ses voyages et vacations pour être venu à Montréal, et obtenir ce contrat, £7 10s. Ensuite totalisant le tout, il donne crédit au Défendeur de la valeur de sa terre qu'il estime lui-même à £125. Il reconnait donc par là que cette terre valait au moins cette somme; la transaction de sa part a donc été faite contre la bonne foi, et la Cour est d'avis que les dommages sont prouvés exister au montant de la différence depuis £10 que la terre a été adjugée à celle de £125, que le témoin Lachapelle déclare lui-même qu'il l'aurait payée en sorte que la compensation est admise; le Demandeur frère du cédant ne parait avoir eu part dans cette fraude, même il dit en ignorer l'existence, l'eut-il connu, il est probable que le savant demandeur n'aurait pas consenti à en prendre cession. Malheuresement pour lui il a oublié de nier l'articulation de faits filée en cette cause par le Défendeur où il est dit avoir connu tous ces faits et n'ayant pas nié ces allegués il est censé par la loi les admettre, ainsi pour cette cause et comme cessionnaire du dit Melchior Prévost, étant garant des faits de son cédant, la compensation doit être admise, et l'action est déboutée avec depens.

Action déboutée.

Arthur Dumas, avocat du demandeur.

Ouimet et Denis, avocats du Défendeur.

G.O.)

MONTREAL, 31 MARS, 1859.

Coram SMITH, J.

No. 80.

Russell vs. *Fournier*, and *Rivet*, opposant.

Jugé. 1o. Que la femme sous puissance de mari ne peut valablement renoncer à son hypothèque sur les biens de son mari au profit des créanciers de ce dernier, pour le paiement d'une rente viagère que son contrat de mariage lui donne pour tout douaire.

2o. Que telle renonciation est en contravention aux dispositions de la 4 vic: ch: 30: comme étant un cautionnement indirect.

L'opposant, Louis Rivet, réclamait par son opposition afin de conserver les arrérages d'une rente viagère créé, en faveur de la Défenderesse, par feu Charles Rocbrune dit Larocque son époux décédé, en vertu de leur contrat de mariage reçu le 22 Avril 1833, Mtre Girouard N.P. et enrégistré le 30 Septembre 1844. L'opposant alléguait qu'il avait une hypothèque sur les biens immeubles saisis et vendus sur la Défenderesse en sa qualité de tutrice aux enfants nés de son mariage avec le dit Larocque et que ses biens formant partie de la succession de ce dernier, il devait être payé des arrérages de cette rente sur le produit de la vente de ces immeubles. L'opposant était créancier de cette rente en vertu de divers transports.

La Demanderesse contesta cette opposition par divers moyens de contestation et entr'autres elle alléguait: que par acte de renonciation reçu le 26 Octobre 1846, par devant Mtre Labadie N.P. et enrégistré, la Défenderesse avait renoncé à son hypothèque sur les immeubles saisis et vendus; pour le paiement de cette rente.

L'opposant ayant répondu spécialement que cette renonciation avait été faite par la Défenderesse durant son mariage; que conséquemment elle était nulle, vû surtout qu'elle était un véritable cautionnement indirect en faveur de son mari qui avait obtenu d'elle cette décharge en faveur de sa créancière la Demanderesse, et la preuve de ces faits ayant été administrée devant la Cour; les parties furent entendues au mérite.

L'opposition fut maintenue par le jugement de la Cour et la renonciation fut déclarée nulle sur les conclusions conformes de la réponse spéciale.

Le jugement de la Cour est motivé comme suit:

"The Court having heard the said plaintiff, and the said opposant Louis Rivet, by their respective Counsel, upon the contestation and *moyens* of contestation made and fyled in the cause by the said plaintiff to the opposition of the said Louis Rivet, and also to that part of the draft of collocation and distribution prepared by the Prothonotary of this Court, and fyled herein on the tenth day of May, 1858, awarding the sum of £311 6s. 7d. to the said opposant on his said opposition as therein mentioned, having examined the proceedings, proof of record, and deliberated, considering that the said opposant, Louis Rivet, hath established the material allegations of his said opposition, and that he is legally vested in the rights of the said Dame Julie Fournier, the widow of the said late Charles Rocbrune dit Larocque, as by him set out in his said opposition under the marriage contract of the said Charles Rocbrune dit Larocque and the sai

Dame Julie Fournier his wife, by which she, the said Dame Julie Fournier, was endowed, by the said Charles Rocbrune dit Larocque, with the annual rent of thirty-six pounds *per annum*, as fully set forth in the said opposition and moyens of opposition of the said Louis Rivet; and further considering that the said plaintiff in this cause, contesting the said opposition of the said Louis Rivet, hath failed to establish the material allegations of her said contestation, and that by law the renunciation of the said Dame Julie Fournier to the hypothèque created by the marriage contract of the said Dame Julie Fournier, in her favor, on the immoveable property of her said husband, and the proceeds of which are now before the Court for distribution, and set up by the said contestant in bar of the said claim of the opposant, Louis Rivet; cannot be considered as valid to bar the right of the said Louis Rivet to obtain the conclusions of his said opposition; and further considering, that by law the convention agreed upon by the said Charles Rocbrune dit Larocque and the said Dame Julie Fournier his wife, and stipulated in the ante-nuptial contract of the said parties, cannot be altered or changed, even by consent of the said parties, husband and wife, and that any such change as is contained in the said renunciation of the said Dame Julie Fournier executed by the said Dame Julie Fournier, while *sous puissance de mari*, is null and void, and of no effect to bar in law the right of the said Dame Julie Fournier, to claim all the rights of hypotheque existing in her favor under the contract of marriage or the rights of the said Louis Rivet, as the assignee of the said Dame Julie Fournier, to claim the said rights of hypothèque in favour of the said annual rent; and further considering that the said renunciation so set up by the said plaintiff is in violation of the provisions of the fourth Victoria, chapter thirty, and therefore also null and void, the Court doth dismiss the contestation of the said plaintiff of the opposition of the said opposant, Louis Rivet, and doth maintain the said opposition with costs."

A. & G. Robertson, avocats de la demanderesse.

Lafrenage & Papin, avocats de l'opposant.

(P. R. L.)

MONTREAL, 30 SEPTEMBRE 1859.

Coram SMITH, J.

No. 284.

Jodoin v. *Dubois.*

Jugé:—1° Que le droit de convocation quant aux Sociétés de Construction, organisées en vertu des Statuts 12 Vict., ch. 57; 14 et 15 Vict., ch. 28; et 18 Vict., ch. 116, réside dans la personne du président ou secrétaire de telles associations.

2°. Que la réquisition doit être addressée au président et directeurs;

3°. Que cette réquisition doit indiquer spécialement les objets pour lesquels la réunion est convoquée;

4°. Que la 1ère section de l'acte 18 Vict., ch. 116, n'a pas abrogé les dispositions contenues en la 7me section de l'acte 12 Vict., ch. 57 et qui sont ci-dessus rapportées;

5°. Que les réglements de ces associations doivent être enregistrés au désir de la 5me section de l'acte 12 Vict., ch. 57;

6°. Que l'élection des directeurs doit se faire un à un, et non pas tous à la fois par un même scrutin;

7°. Que le président de ces associations doit présider toutes leurs assemblées et que c'est sous sa présidence que les réglements doivent être passés et modifiés.

Jodoin vs. Dubois.

Par sa requête libellée, le demandeur alléguait les faits suivants:

"Que le dit Amable Jodoin est un des actionnaires de la "Société de Construction Canadienne de Montréal" étant un corps public et incorporé en vertu des lois du pays, nommément en vertu des statuts 12 Vict., ch. 57; 14 et 15 Vict., ch. 23; et 18 Vict., ch. 116, faisant affaires en la dite cité et tenant son bureau d'affaires en la dite cité de Montréal, au numéro 35, sur la rue St. François Xavier de la dite cité.

Que le dit Amable Jodoin est un des membres prêteurs de la dite Société de Construction Canadienne de Montréal, et ce, depuis sa fondation.

Que la dite Société de Construction Canadienne de Montréal, a fait et adopté des réglements qui sont encore en force et qui n'ont jamais été changés, modifiés ni rappelés depuis son organisation et depuis la première élection de ses directeurs et autres officiers.

Qu'entre autres réglements il en existe un dont la teneur est comme suit: article 9.....

Que le dit requérant est intéressé dans le bon fonctionnement et la bonne administration de la dite société et a été élu un des directeurs d'icelle à l'assemblée générale semi-annuelle des actionnaires et membres de la dite société, régulièrement convoquée et tenue en la dite cité de Montréal, le 4 Avril 1859.

Que le dit requérant a été ensuite, savoir: le 7 Avril 1859, élu président de la dite société, par les directeurs de la dite société, élus à la dite assemblée, tenue le dit jour 4 avril 1859.

Qu'Alexis Mousseau, agent de change, courtier et marchand à commission, de la dite cité, est le secrétaire et le trésorier de la dite société depuis le 13 Avril 1859.

Que le dit Amable Jodoin et le dit Alexis Mousseau en leur qualité de président et de secrétaire-trésorier, respectivement, sont investis par la loi: (savoir 12 Vict., ch. 57, sec. 12) de tous les biens meubles et immeubles et deniers, ainsi que des titres, obligations pour deniers, autres instruments portant obligations et actes appartenant à la dite société ainsi que des droits et réclamations d'icelle.

Que les directeurs de la dite société qui ont été élus le 4 Avril 1859, sont au nombre de sept, savoir: le dit requérant, Jean Bte. Alexandre Cuillard, marchand, J. Emery Coderre, médecin, Olivier Deguise, commerçant, Jos. Barsalou, encanteur, Jacques Grenier, marchand, et Louis Gonzague Fauteux, marchand, tous de la cité de Montréal, et que leur élection a là et alors été dûment faite en vertu des et conformément aux réglements de la dite société, pour le terme et espace de six mois à compter du jour de leur dite élection.

Que tous les susdits directeurs ainsi élus, ont ensuite accepté la dite charge de directeurs et ont ensuite en différentes occasions, agi comme tels directeurs et ont ensuite élu comme susdit, le dit requérant, président de la dite société, conformément aux réglements de la dite société.

Que le ou vers le 3 Mai dernier et depuis ce jour jusqu'aujourd'hui, le nommé Etienne Alexis Dubois, bourgeois de la paroisse de Montréal, dans le district de Montréal, a prétendu publiquement, avoir été élu, le dit jour, 3 Mai dernier, directeur de la dite société, qu'il a répandu et fait répandre dans la dite cité de Montréal, le bruit qu'il avait ainsi été élu directeur de la dite société, quoique

la chose soit entièrement fausse, que le dit Etienne Alexis Dubois n'ait pas été, le dit jour, 3 Mai dernier, ni aucun autre jour, élu directeur de la dite société, dont il a depuis le dit jour usurpé l'office. Jodoin vs. Dubois.

Que le dit Etienne Alexis Dubois, exerce la dite charge de directeur et en usurpe les fonctions depuis le dit 3 Mai 1859, en prétendant tenir et faire tenir un bureau d'affaires, pour et au nom de la dite société, au numéro 16 de la rue St. Gabriel, en la dite cité de Montréal, et en prétendant y transiger et y transigeant des affaires au nom de la dite société et ce, sans avoir droit ou titre à ce faire.

Que le dit Etienne Alexis Dubois, se prétendant un des directeurs de la dite société, a pris possession d'une partie des biens-meubles de la dite société et des livres, documents et papiers de la dite société et les détient dans le susdit bureau qu'il tient et fait tenir au numéro 16 de la rue St. Gabriel, en la dite cité de Montréal.

Que le dit requérant, ni les directeurs de la dite société, ni aucun des officiers d'icelle, ne peuvent avoir accès aux susdits registres pour en obtenir des copies authentiques.

Que le dit requérant étant intéressé dans la dite charge comme susdit, se considère lésé et injurié par cette usurpation et détention de la part du dit Etienne Alexis Dubois et se croit bien fondé à se pourvoir en justice comme il le fait par la présente requête libellée.

A ces causes, le dit requérant appuyé des affidavits requis par la loi et annexés à l'original des présentes, supplie vos honneurs de faire émaner un Writ ou Bref, ordonnant au dit Etienne Alexis Dubois de comparaître devant la dite Cour Supérieure à Montréal, en la salle d'audience, au Palais de Justice, pour répondre à la présente requête, et votre requérant conclut; à ce que vos honneurs faisant droit sur la présente requête, la déclarent bien fondée et à ce que par le jugement à intervenir, il soit déclaré que le dit Etienne Alexis Dubois a usurpé la charge et office de directeur de la dite Société de Construction Canadienne de Montréal, le et depuis le 3 Mai dernier; à ce qu'il soit ordonné au dit Etienne Alexis Dubois d'abandonner et délaisser immédiatement la dite charge de directeur de la dite Société de Construction Canadienne de Montréal; à ce que le dit Etienne Alexis Dubois soit exclus et évincé de la dite charge et qu'il lui soit défendu d'en exercer les fonctions, à ce que le dit Etienne Alexis Dubois, soit en outre, condamné à payer à votre requérant les frais de la présente requête et de tous les procédés qu'elle aura occasionnés et de plus, à payer comme amende et pénalité, pour l'usurpation dont il s'est rendu coupable comme susdit, la somme de cent livres ou quatre cents dollars, cours du Canada ou telle autre somme à laquelle vos honneurs jugeront convenable de le condamner suivant la loi faite et pourvue à cette effet, pour être la dite somme payée à qui de droit et suivant que pourvu par la loi."

A cette requête libellée, le défendeur plaida l'exception suivante:

"Le dit défendeur sans admettre aucun des allégués du demandeur, mais au contraire les niant tous spécialement, à l'exception de ceux qui seront admis aux présentes, pour exception péremptoire à cette action, dit:

Qu'il est faux qu'à l'époque de l'institution de cette action, la dite société ait fait affaires à l'endroit indiqué en la requête du dit requérant.

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Que par les lois en vertu desquelles la dite société a reçu et continué à avoir une existence légale, les différents membres de la dite société, étaient et sont autorisés à s'assembler de temps à autre et de faire établir et constituer toutes les règles et réglements convenables à sa régie, que la majeure partie des membre de la dite société ainsi assemblée jugerait à propos d'établir, comme aussi d'amender et modifier de temps à autre, les dits réglements suivant que l'occasion l'exigerait ou de les annuler et abroger et d'en faire de nouveaux sous les restrictions contenues dans la loi (12 Vict., ch. 57) et que la dite société est également autorisée par la loi, à choisir et nommer de temps à autre, un nombre quelconque de ses membres, lequel doit être déterminé, ainsi que leur qualification, par des réglements de la dite société, aux fins de former un bureau de directeurs, qui doivent élire un président et un vice-président, avec pouvoir de déléguer aux dits directeurs tous ou chacun les pouvoirs qui leur sont conférés par la loi (12 Vict., ch. 57) pour être exécutés, lesquels directeurs ainsi élus et nommés doivent continuer à agir en cette qualité pendant tout le temps fixé par les réglements de la dite société, les pouvoirs des dits directeurs, étant préalablement définis dans les réglements.

Que par la loi, il est spécialement pourvu que rien de contenu en icelle n'aura l'effet d'empêcher aucune modification ou amendement des dits réglements pour la direction de la dite société, en la manière qui serait de temps à autre prescrite par les réglements de la dite société et que tous les réglements faits et établis de temps à autre pour la direction de la dite société, et enrégistrés suivant que prescrit par la loi dans un livre tenu à cette fin, seraient obligatoires pour les membres et les officiers de la dite société et ses contributeurs et leurs représentants, lesquels sont tous censés en avoir eu pleine connaissance par la confirmation et l'enregistrement susdit.

Que par les lois affectant l'existence et la régie de la dite société, il est pourvu que la dite société sera et est autorisée à passer et faire telle modification, amendement, rescision ou abrogation des réglements de la dite société à toute assemblée générale des actionnaires de la dite société, sans limitation quant au nombre des actionnaires présents à telle assemblée, pourvu que plus de la moitié du nombre des membres de la dite société signe une requisition convoquant telle assemblée générale des actionnaires et recommandant une modification, rescision ou abrogation des réglements de la dite société, spécifiant les termes d'icelles, et que chaque membre soit notifié du changement par la voie de la poste dans un délai de 15 jours.

Que le 4 Avril dernier il existait un réglement de la dite société conçue dans les termes suivants, savoir:

" Art. 14.—Une assemblée générale, semi-annuelle des membres se tiendra au bureau de la société ou à tout autre place que le bureau désignera, le premier lundi du mois d'Avril et du mois d'Octobre chaque année, commençant en Octobre prochain, (et dans le cas ou ce serait des jours de fête, le jour suivant) dans le but d'élire des directeurs pour le semestre suivant, et pour tout autre objet d'intérêt général, ayant rapport à la régie de la société et à chacune des dites assemblées semi-annuelles il sera soumis un rapport clair et complet de l'état des affaires de la société durant les six mois précédents et chacun de ses rapports périodiques sera attesté par deux auditeurs nommés par les directeurs."

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Qu'en vertu du dit réglement, une assemblée générale semi-annuelle des membres de la dite société a eu lieu le 4 Avril dernier, et que les personnes nommées en la dite requête, savoir:—Amable Jodoin, Jean Bte. A. Couillard, Joseph Emery Coderre, Olivier Deguise, Joseph Barsalou, Jacques Grenier et Louis Gonzague Fauteux ont été élus directeurs de la dite société.

Que les membres de la dite société, jugeant à propos de modifier, amender rescinder et abroger le réglement suscité, réglant l'époque de l'élection des directeurs de la dite société et la durée de leurs fonctions, auraient adopté les voies indiquées par la loi pour opérer telle modification, amendement, rescision et abrogation et que plus de la moitié du nombre des membres, auraient dès avant le 16 avril dernier, signé une réquisition convoquant une assemblée générale des actionnaires de la dite société et recommandant une modification, rescision et abrogation du réglement suscité, spécifiant les termes d'icelles, le tout dans les termes suivants, savoir:

"Attendu qu'il est expédient d'amender le 14ème article des réglements de cette société, de manière à ce que le dit article soit conçu comme suit, savoir:—

"Une assemblée générale annuelle des membres, se tiendra au bureau de la société ou à tout autre place que le bureau désignera, le premier mardi du mois de Mai chaque année, commençant le premier mardi du mois courant (1859) et dans le cas où ce serait un jour de fête, le jour suivant, dans le but d'élire des directeurs pour l'année suivante, et pour tout autre objet d'intérêt général, ayant rapport à la régie de la société, et à chacune des dites assemblées annuelles, il sera soumis un rapport clair et complet de l'état des affaires de la société, durant l'année précédente, et chacun de ces rapports périodiques sera attesté par deux auditeurs nommés par les directeurs."

"Les soussignés formant plus de la moitié du nombre des membres de la dite Société de Construction Canadienne de Montréal, convoquent, par les présentes, une assemblée générale des actionnaires de la dite société, pour être tenue dans les salles de l'Institut Canadien, le troisième jour de Mai prochain, à 7½ heures du soir, pour prendre en considération la modification susdite que les soussignés recommandent ainsi que la rescision et abrogation du dit 14ème article des réglements de la dite société, tel qu'existant et pour là et alors adopter tous procédés nécessaires pour mettre à exécution l'article des réglements ainsi amendés, Montréal, 16 Avril 1859," ainsi que le tout appert à la dite convocation produite avec les présentes pour en faire partie.

Que la convocation ainsi formulée et signée, aurait été adressée à tous les membres de la dite société et que chaque membre aurait été notifié du changement suggéré et demandé par la majorité des membres de la dite société par la voie de la poste, dans un délai de 15 jours, avant le premier mardi du mois de Mai courant, savoir:—un délai de 15 jours avant le trois Mai courant, jour fixé dans la dite convocation pour la dite assemblée générale.

Que le trois Mai courant l'assemblée générale des actionnaires de la dite société convoquée par la réquisition sus-citée a régulièrement eu lieu, aux jour, heure et lieu indiqués en icelle, qu'il a été là et alors constaté que la dite assemblée avait été régulièrement convoquée par plus de la moitié des membres de la dite société, et qu'à telle assemblée, l'amendement recommandé comme susdit a été adopté

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par les membres présents à la dite assemblée, ainsi que le tout appert aux procédés de la dite assemblée produits avec les présentes pour en faire partie.

Que l'adoption du dit amendement ayant anéanti le réglement en vertu duquel les personnes élues comme directeurs, le 4 Avril dernier, pouvaient agir en la dite qualité de directeurs, les pouvoirs des dites personnes comme tels directeurs se sont terminés avec l'existence du dit réglement, savoir, par l'adoption de l'amendement sus-mentionné et que la dite société était tenue de procéder à l'élection de nouveaux directeurs, afin de mettre le dit réglement tel qu'amendé à exécution.

Que de fait, les membres de la dite société assemblés comme susdit, le 3 Mai courant, auraient là et alors procédé à l'élection d'un bureau de directeurs pour servir comme tels directeurs durant l'époque fixée par le réglement tel qu'amendé et que les personnes suivantes, auraient là et alors été duement élus, choisis et nommés comme tels directeurs, savoir:—Etienne Alexis Dubois le défendeur en cette cause, Joseph Emery Coderre, écuier, médecin, Olivier Deguise, Charles Lacaille, David Beauchamp, John Feron et Joël Leduc, commerçant et tous sept de la cité de Montréal ainsi qu'appert aux dits procédés.

Que le requérant en cette cause a concouru dans les procédés de la dite assemblée, délibéré et voté en icelle.

Que le 5 Mai courant, une assemblée du bureau des directeurs élus à l'assemblée générale du 3 Mai courant, aurait eu lieu et que les directeurs suivants auraient été présent à icelle, savoir:—David Beauchamp, Olivier Deguise, Joël Leduc, Joseph Emery Coderre, John Feron et le défendeur en cette cause, et qu'à telle assemblée le dit défendeur aurait été régulièrement et unanimement nommé président de la dite société pour l'année courante, ainsi qu'appert à l'extrait produit avec les présentes, du livre des procédés du bureau des directeurs.

Que vû ce que dessus, le dit défendeur est bien fondé à exercer les charges de directeur et président de la dite société, et que la présente requête et action est mal fondée et doit être déboutée.

Pourquoi le dit défendeur conclut au débouté de la présente requête, action ou instance, avec dépens."

Le demandeur répondit spécialement à cette défense comme suit:—

"Que par la septième clause de l'acte du parlement de cette province, passé dans la douzième année du règne de Sa Majesté, intitulé: "Acte pour encourager l'établissement de Sociétés de Construction dans le Bas-Canada." Il est statué:—"Qu'aucun réglement enrégistré comme susdit, ne sera changé rescindé ou abrogé, à moins que ce ne soit à une assemblée générale des membres de telle société, convoquée par le secrétaire ou président de telle société, à la suite d'une réquisition à cet effet, d'au moins quinze membres de telle société; laquelle réquisition indiquera les objets pour lesquels la réunion est convoquée, laquelle sera adressée au président et directeurs, et sur ce, chaque membre sera notifié du changement par la voie de la poste, dans un délai de quinze jours, et telle assemblée devra être composée d'au moins un tiers des actionnaires, dont les trois quarts devront concourir dans telles modifications ou adoptions."

Que par un acte du parlement de cette province, passé dans la dix-huitième année du règne de Sa Majesté, pour amender l'acte ci-dessus cité, il est statué

comme suit:—" 1°. La partie de la septième section du dit acte qui prescrit qu'aucun réglement ne sera changé, rescindé ou abrogé à moins que ce ne soit à une assemblée générale des membres d'une telle société, laquelle assemblée devra être composée d'au moins un tiers des actionnaires, sera et elle est par les présentes abrogé. 2°. Pourvu que plus de la moitié du nombre des membres d'une Société de Construction signe une réquisition convoquant une assemblée générale des actionnaires, et recommandant une modification, rescision ou abrogation des réglements de la dite société, spécifiant les termes d'icelles, la dite assemblée, sans limitation quant au nombre des actionnaires présents, sera et est par le présent acte, autorisée à passer et faire telle modification, amendements, rescision ou abrogation."

Que par les dites clauses des actes ci-dessus cités, aucune assemblée ne peut être convoquée dans le but d'abroger un réglement de toute telle société, à moins que la réquisition convoquant telle assemblée, ne soit adressée au président et directeurs de la dite société et que la dite assemblée ne soit convoquée par le secrétaire ou président de telle société; et que l'acte ci-dessus en dernier lieu cité, n'amende l'acte ci-dessus en premier lieu cité, que quant au nombre des signataires de la dite réquisition et des membres qui devront être présents à la dite assemblée.

Que le 4 Avril dernier et le 3 Mai courant, il existait des réglements dûment adoptés et enregistrés pour régir la Société de Construction Canadienne de Montréal, parmi lesquels se trouvent les suivants;

" Article 9.—Les affaires de la société seront sous le contrôle et la décision d'un bureau de sept directeurs dont quatre formeront un quorum et qui choisiront entre eux un président et un vice-président."

" Art. 12.—Les directeurs demeureront en charge jusqu'à ce que leurs successeurs aient été élus, à moins qu'ils ne cessent de l'être par leur résignation ou aucune des causes suivantes, savoir: décès, absence aux assemblées durant trois mois consécutifs, insolvabilité, banqueroute et arrestation pour crime ou délit.

" Art. 14.—Une assemblée générale, semi-annuelle des membres, se tiendra au bureau de la société ou à tout autre place que le bureau désignera, le premier lundi du mois d'Avril et du mois d'Octobre chaque année, commençant en Octobre, prochain (1857) (et dans le cas où ce serait des jours de fête, les jours suivants) dans le but d'élire des directeurs pour le semestre suivant."

Que c'est en vertu des réglements susdits que le demandeur et les autres personnes mentionnées dans la déclaration en cette cause, ont été légalement élus directeurs de la dite société, le premier lundi d'Avril dernier, et que le demandeur a été ensuite légalement élu président de la dite société, ainsi qu'allégué dans la dite déclaration et admis par l'exception du défendeur.

Que tous les procédés allégués par le défendeur, concernant une certaine assemblée de la dite société que le défendeur prétend avoir eu lieu le trois Mai courant, sont nuls, illégaux et contraires aux statuts ci-dessus cités et aux réglements de la dite société, et ne peuvent avoir conféré au défendeur aucun droit à la charge qu'il prétend exercer.

Que la dite prétendue assemblée n'a pas été convoquée d'une manière légale.

Que la réquisition convoquant telle assemblée n'a pas été signée par plus de la moitié du nombre des membres de la dite société, ni même par la moitié d'iceux.

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Que tous les noms apposés au bas de la dite réquisition n'y ont pas été mis par les personnes que ces noms indiquent, et ne sont pas leurs signatures.

Qu'un grand nombre des signatures qui se trouvent au bas de la dite requisition ont été obtenus par fraude, par surprise et sur de fausses représentations, la personne qui demandait et sollicitait ces signatures disant qu'il ne s'agissait que de faire un changement au moyen duquel les directeurs seraient à l'avenir élus que pour un an au lieu de six mois, mais prenant bien soin de ne pas dire qu'il s'agissait de faire immédiatement de nouvelles élections.

Qu'un grand nombre des personnes dont les noms se trouvent au bas de la ite réquisition n'étaient pas, lorsque leurs noms ont été ainsi apposés et ne sont s encore membres ni actionnaires de la dite société.

Que la dite réquisition ne porte aucune date et que la dite prétendue convocation n'a pas été avertie par la voie des journaux ni transmise à tous les actionnaires de la dite société.

Que la dite requisition n'a pas été adressée au président et directeurs de la dite société et que la dite prétendue assemblée n'a pas été convoquée en la manière prescrite par la loi et par les réglements de la dite société.

Que le but de la dite assemblée n'était pas suffisamment indiqué dans la dite prétendue convocation et laissait des doutes, savoir: si l'on devait amender ou abroger certain réglement alors en force.

Que la dite prétendue convocation ne mentionnait nullement qu'on élirait de nouveaux membres à la dite assemblée du 3 Mai dernier, ni que l'on démettrait ou destituerait les directeurs alors en charge et qui avaient été le 4 Avril précédent, élus pour six mois.

Que de plus, en supposant, ce qui est formellement nié, que la dite assemblée aurait été convoquée régulièrement et légalement, les personnes composant la dite assemblée n'avaient aucun droit de démettre et destituer les directeurs qui avaient été le 4 Avril précédent, légalement élus pour six mois, ni de les remplacer par de nouveaux directeurs.

Que le prétendu nouveau réglement que le défendeur allègue avoir été adopté à la dite prétendue assemblée du 3 Mai courant, ne pouvait dans tous les cas avoir d'effet que pour le futur, mais ne peut avoir d'effets rétrospectifs ni priver les directeurs élus le 4 Avril dernier, du droit qui leur était acquis par loi et les règlements de la dite société, de demeurer en charge pendant un semestre.

Que tous les procédés qui ont pu être adoptés par la dite assemblée du 3 Mai dernier n'ont pu affecter la position du demandeur ni des autres directeurs de la dite société, et n'ont pu avoir l'effet de les mettre hors de charge ni de faire cesser leurs fonctions.

Que les procédés dont le défendeur produit de prétendus extraits comme ayant été adoptés le 3 Mai dernier sont nuls et illégaux sous tous les rapports.

Que la dite prétendue assemblée n'a pas été convoquée et organisée légalement ni régulièrement, qu'elle n'a pas été présidée par le président de la dite société, et que les prétendus procédés n'ont jamais été signés par le président ni par le secrétaire de la dite société.

Que le dit jour, 3 Mai courant, un grand nombre des actionnaires et membres

de la dite société se sont rendus dans les salles de l'Institut-Canadien, en la cité de Montréal, et là et alors ont signifié aux personnes assemblées pour procéder au nom de la dite société et spécialement aux personnes qui prétendaient agir comme président et secrétaire de la dite assemblée et de la dite société, un protêt par lequel ils signalèrent quelques unes des illégalités des dits prétendus procédés, lequel protêt signé en *triplicata* par les dits actionnaires est produit avec les présentes, et a été lu à haute voix aux personnes présentes à la dite assemblée du 3 Mai courant.

Qu'il est faux que le demandeur ait participé aux procédés de la dite assemblée du 3 Mai courant.

Qu'il est également faux qu'il ait été là et alors constaté que la dite assemblée avait été régulièrement convoquée par plus de la moitié des membres de la dite société, mais qu'au contraire, un des actionnaires et membres de la dite société ayant requis spécialement ceux qui prétendaient ainsi procéder, de montrer la liste des actionnaires afin de constater quel en était le nombre, on refusa de ce faire et l'on prit indistinctement les votes de toutes les personnes présentes sans qu'il fut possible de constater si les personnes qui votaient étaient ou non membre de la dite société.

Que vû tout ce que dessus, il est évident que le défendeur n'a pas été et n'a pas pu être élu directeur de la dite société à la dite prétendue assemblée du 3 Mai courant, que la dite prétendue élection par lui invoquée est nulle et illégale et ne peut lui conférer le droit d'exercer la dite charge de directeur, ni celle de président de la dite société, lesquelles charges il a usurpé et détient illégalement.

La contestation ainsi liée, les parties furent entendues au mérite après une très longue enquête.

Doutre pour la défense, prétendit à l'argument:

1°. Que toutes les questions soulevées dans cette cause, sont dominées par le principe que les corporations sont républicaines et démocratiques et qu'à moins de restrictions positives, la majorité doit tout gouverner, (1) que si des questions nouvelles surgissent, les tribunaux doivent s'abstenir d'intervenir (2) et que c'est en ce sens que tend la législation moderne, ainsi que le prouvent nos derniers statuts, touchant les institutions municipales.

2°. Que la forme de la convocation, même lorsqu'elle dévie de la loi, ce qui n'est pas le cas en cette instance, peut être régularisée par la présence de ceux qui ont droit de vote, (3) que si l'avis de convocation émane de personnes qui n'ont pas le droit de le donner, la présence de ceux qui s'en plaignent est un acquiescement, (4) et que le pouvoir de faire des réglements résidant chez les membres, le pouvoir de convoquer l'assemblée pour faire les réglements est coexistant et accessoire. (5)

3°. Que la charte (12 Vict., ch. 57) autorisant les membres à nommer des officiers et à les remplacer de *temps à autre*, ce serait violer cette charte que de

(1) Angell and Ames, on Corporations, No. 499,
(2) Grant, on Corporations, p. 211.
(3) Wilcock, on Corporations, No. 69.
(4) Angell and Ames, No. 491.
(5) Id. No. 321.

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limiter les pouvoirs des membres à cet égard, par des réglements ou autrement, ce qui ne se peut, (1) que le pouvoir de rappeler un réglement est co-existant avec celui d'en faire. (2)

4°. Que le pouvoir de démettre un officier est inhérent à toute corporation, (3) et qu'il suffit d'en élire un pour le remplacer, pour qu'il soit démis *ipso facto*. (4)

5°. Que le rappel d'un réglement a le même effet que le rappel d'un statut, par le parlement (5) et que les officiers dont la durée d'office est fixée par un réglement, perdent leur office par le rappel de ce réglement. (6)

6°. Que quant à la présidence de l'assemblée, celui qui l'avait présidé l'avait fait sans contestation, que ni la coutume ni la loi, ni aucun réglement n'exigeait que le président de la corporation fut au fauteuil, dans une assemblée générale et extraordinaire, que la présence du président à l'assemblée était un acquiescement à la forme des procédés, sinon au fonds. (7)

7°. Que quant à la prétention que le réglement tel qu'amendé devait être enrégistré avant que l'élection eut lieu, en vertu de ce réglement,—en premier lieu, cela n'est pas plaidé et en second lieu le réglement amendé ayant été extrait du livre tenu à cet effet, il devait, à moins de preuve contraire, être présumé enrégistré *instanter*, du moment qu'il était passé,—comme les jugements des cours sont censés enrégistrés au moment où ils sont prononcés.

8°. Que la doctrine soutenue par Wilcock sur la nécessité de proposer les candidats un à un, n'est pas applicable à l'élection faite au scrutin, *vote by ballot*, surtout lorsque l'élection a lieu sans contestation, comme dans le cas actuel, et qu'elle est faite de bonne foi. (8)

9°. Que le mode de convocation observé en cette circonstance était celui qu'avait suivi la société, dans une circonstance antérieure.

10°. Que la convocation de l'assemblée dont on attaquait les procédés indiquait clairement les objets pour lesquels cette assemblée avoir lieu. Que les deux seuls objets pour lesquels elle était convoquée étaient: 1°. amender le 14ème article des réglements; 2°. mettre a exécution le réglement tel qu'amendé, en faisant des élections, et que ces deux objets se trouvent clairement indiqués dans la convocation (voir le texte de la convocation dans l'exception du Défendeur.)

SMITH, J., after having stated the facts of the case and the pleadings, said that the principal issue was set forth in the pleadings, but that a variety of incidental questions came up at the hearing on the merits. He would not however go into all the details as it was unnecessary, inasmuch as those questions upon which the judgment of the Court is based, would be sufficient to dispose of the case,

(1) Angell and Ames Nos. 327, 343. Wilcock, Nos. 11, 12, 227. Grant, pp. 80, 81.
(2) Angell and Ames No. 329. Wilcock. 237.
(3) Angell and Ames p. 100.
(4) Wilcock, Nos 75, 649, 652, 703
(5) Dwarris, on Statutes, p. 676.
(6) Wilcock, No. 764.
(7) Grant, p. 245 et suivante.
(8) Angell and Ames, No. 138.

The pretention of the Petitioner, that he having been elected for the space of six months, other Directors could not come in before the end of his term of office was unfounded, if the By-law had been regularly and legally altered.

There is no prohibition in the Charter or in the By-laws to alter such a By-law and therefore to abridge the term of Office, but on the contrary, the Members of the Association are empowered to make all By-laws which they may deem conducive to the welfare of the Association. The Directors have no freehold in their Office and the Corporators have a right to pass a By-law abridging their existing term of Office.

The point now to be considered is whether the By-law invoked by the Defendant was regularly passed and whether it is in force. By the seventh section of the Provincial Act of 1849 it is enacted: "Qu'aucun réglement enrégistré comme susdit, ne sera changé, rescindé ou abrogé, à moins que ce ne soit à une assemblée générale des membres de telle société convoquée par le secrétaire ou président de telle société à la suite d'une requisition à cet effet d'au moins quinze membres de telle société, laquelle requisition exprimera les objets pour lesquels la réunion est convoquée, et sera adressée au [illegible] et directeurs, et sur ce, chaque membre sera notifié du changement, par la voie de la poste, dans un délai de quinze jours; et telle assemblée devra être composée d'au moins un tiers des actionnaires dont les trois quarts devront concourir dans telles modifications ou abrogations."

The Defendant said that this provision of the law has been changed by the 1st section of the Provincial Act of 1855, which is as follows: "La partie de la septième section du dit acte, qui prescrit qu'aucun réglement ne sera changé, rescindé ou abrogé, à moins que ce ne soit à une assemblée générale des membres d'une telle société, laquelle assemblée devra être composée d'au moins un tiers des actionnaires, sera et est par le présent acte abrogée," and Vide section 2.

The whole Act of 1855 is in the nature of a proviso to the Act of 1849, and never had the effect of revoking *in toto* the seventh clause and the abrogation which the Defendant pretends to have been made of the seventh clause is unfounded.

The seventh section is still in full force and effect, and the duty [illegible] Members of the Association is to call upon the President to convene the meetings.

The rules of Law concerning Corporations, support this view of the case. Corporations are created to carry out the objects of the Associated Members, and the law takes out of the whole body the administrative powers and vests them in a body of Directors. In every Corporation the powers are legislative, elective and administrative, and if the Members of a Corporation could control absolutely the administration of the Directors, it would have the effect to establish an *imperium in imperio* and to bring at once the dissolution of the Corporate Body. No Corporation could exist under such a state of things and these rules are recognised even by common law. Taking up the By-laws of the Association we find that it is there stated:—"Art. 12.—Les directeurs demeureront en charge jusqu'à ce que leurs successeurs aient été élus, à moins qu'ils ne cessent de l'être par leur résignation ou aucune des causes suivantes, savoir: décès, absence aux assemblées durant trois mois consécutifs, insolvabilité, banqueroute et arrestation

Jodoin vs. Dubois.

pour crime ou délit. Tout directeur se trouvant dans un de ces cas, sera de fait démis de sa charge, et le bureau de direction le remplacera à une assemblée spéciale convoquée à cet effet par le président."

Now such a By-law was not required. The President is always in charge as long as his successor is not appointed and has a right to preside over meetings till a new President is elected, so that the meeting of the 3rd May presided over by Mr. Tellier was illegal on that account. Wilcock, on Corporations No. 69, p. 45. The summons must be issued by order of some one who has authority to assemble the Corporation for that particular purpose.

To constitute an assembly there must be a President, and the President of the Association is by common law the head of the body, he must submit the By-laws and have them enregistered and such powers are delegated to him by law. Wilcock, No. 94, p. 53. The legal Head Officer, must be present, or the Corporate Assembly is incomplete; No. 95, not only must the Head Officer be present, but he must attend in his Office and preside.

The convocation of the Meeting of the 3rd May was illegal, not having been made by the President or Secretary according to the provisions of the seventh section of the law of 1849, therefore the By-law which was passed at that Meeting presided over by Mr. Tellier is null and the election which then took place of the Defendant as a Director of the Association must be set aside. There are a variety of other minor considerations which it is unnecessary to notice, but there is one which ought to be stated. A By-law cannot be changed without a special notice of the whole proceedings which are intended to be had at the Meeting convened for such change. Now the notice which was given was insufficient with respect to these words: et pour là et alors adopter tous procédés nécessaires pour mettre à execution l'article des réglements ainsi amendés. Another point also to which at first I did not attach much importance, but which is however well founded in law, is: that an election of several Directors cannot be made *in toto* by one simple vote upon the whole board. The election must be made one by one, of each Director singly. (1)

The conclusions of the *requête libellée* are therefore granted and the judgment is *motivé* as follows:

Considering that the said Petitioner hath fully proved the material allegations of his said *requête libellée*; Petition and that on the 4th April 1859 the said Petitioner was duly elected to fill the Office of Director of the Association called, "Société de Construction Canadienne de Montréal," for the time and period pointed out by the By-laws of the said Association and that he was afterwards duly elected to be the President of the Board of Directors duly elected, and further considering that the said Defendant hath failed to establish his right to act as a Director or President of the said Association, and further considering that the Meeting called by the majority of the said Association to be held on the 3rd day of May 1859, was illegally convened and illegally presided over and contrary to the provisions of the existing By-laws of the Association and that

(1) No. 544, p. 215, form of Election, Candidates how proposed.

the By-law then and there passed was illegal null and void and inoperative, and further considering that the said Defendant hath failed to establish in evidence the existence of the said By-law, there being no evidence of its enregistration as required by the said By-laws aforesaid, and that by reason thereof and by law the Defendant hath shown no legal right or title to hold and occupy the Office of Director and President of the said Association and that he has thereby illegally intruded himself into the said Office of Director and President of the said Association, the Court doth maintain the said *requête libellée* of the said Petitioner with costs and the Court doth order and condemn the said Defendant, &c.

Jodoin vs. Dubois.

La Frenaye and Papin, Attorneys for Petitioner.
Doutre and Daoust, Attorneys for Defendant.
Henry Stuart, Counsel for Defendant.

(P. R. L.)
(J. D.)

IN THE CIRCUIT COURT FOR THE DISTRICT OF MONTREAL.

MONTREAL 15TH NOVEMBER, 1859.

Coram BERTHELOT, J.

No. 3521.

Mann vs. *Wilson.*

Held.—That no action is maintainable against a person for a promise made to pay a COMMERCIAL debt contracted while a minor, unless such promise be in writing. (1)

The Defendant being impleaded by the Plaintiff for the sum of $14.85 for haberdashers' wares, contested the action on the ground that at the time of the sale and delivery to him of such articles, he was a minor aged only 18 years and seven months, and that consequently the Plaintiff was *non recevable* in his *demande*.

The Plaintiff filed a special answer to this plea, alleging, that long since the defendant became of age, to wit in the month of April and May 1859, he acknowledged the debt and promised to pay it to Plaintiff.

The Plaintiff having proved the sale and delivery and the acknowledgement as by him alleged, the parties were heard upon the merits.

BERTHELOT, J.—This action must be dismissed, as the acknowledgement of the Defendant has never been made in writing. The statute of Limitations requires such promise or ratification after full age of a COMMERCIAL debt or contract to be in writing.

Action dismissed.

J. & W. A. Bates, for Plaintiff.
Desjardins, for Defendant.

(P. R. L.)

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(1) Vide 10 & 11 Vic., c. 11, sec. 6.

LISTE

DES JUGEMENS RENDUS EN COUR D'APPEL A COMPTER DU 13 DECEMBRE 1858, JUSQU'AU 17 DECEMBRE 1859, INCLUSIVEMENT.

APPELANTS.	INTIMÉS.	DATE.	JUGES.	JUGEMENS.
			QUEBEC.	
Arnold,	Campbell,	13 Décembre,	Juge en Chef, Aylwin, Duval, Caron dissent,	Confirmé.
Lampson,	Smith,	" "	Juge en Chef, Aylwin, Duval, Caron,	"
Kilborn,	Boswell,	14 "	"	Infirmé.
Kilborn,	Boswell,	" "	"	"
			MONTREAL.	
Webster,	Grand Tronc,	5 Mars,	Juge en Chef, Aylwin, Duval, and C. Mondelet,	"
			QUEBEC.	
Nesbitt,	Bank of Montreal,	12 Mars,	Juge en Chef, Aylwin, Duval, and C. Mondelet,	Confirmé.
Wensley,	Price,	18 "	Juge en Chef, Aylwin, Duval, and Meredith,	"
Adam,	McPhee,	" "	" and Stuart,	"
			MONTREAL.	
Partridge,	Wood,	3 Mai,	Juge en Chef, Aylwin, Duval, and Meredith,	"
Pinsonnault,	Dubé,	" "	"	"
Molson,	Burroughs,	" "	"	"
Leverson,	Boston,	4 "	"	Infirmé.
Archambault,	Busby,	" "	"	"
White,	Nye,	" "	"	"
Loranger,	Boudreau,	6 Juin,	"	"
Boulanget,	Corporation de Montréal,	" "	" Meredith dissent,	"
Gorrie,	"	" "	" "	"
Whitney,	Clark,	" "	"	"
Pigeon,	Corporation de Montreal,	" "	" Duval dissent,	"
Ouimet et al,	Papin,	" "	Juge en Chef, Aylwin, Duval, and Meredith,	Confirmé.
Stevenson,	Wilson,	" "	"	Infirmé.
Vondenvelden,	Milette,	" "	Juge Aylwin, Duval, Meredith, and Guy,	Confirmé.
Corporation Montreal,	Guy,	" "	"	Appel renvoyé.
Municipality Beauharnois,	Carson,	7 "	Juge en Chef, Duval, Meredith, Aylwin dissent,	Infirmé.
Jubinville,	Bombardier,	" "	Juge en Chef, Aylwin, Duval, Meredith,	"
		" "	"	Confirmé.

APPELANTS.	INTIMÉS.	DATE.	JUGES.	JUGEMENS.
Municipality Beauharnois,	Carson,	" "	Juge en Chef, Duval, Meredith, Aylwin dissent,	Infirmé.
Jubinville,	Bombardier,	" "	Juge en Chef, Aylwin, Duval, Meredith,	"
			"	Confirmé.

MONTREAL.

APPELANTS.	INTIMÉS.	DATE.	JUGES.	JUGEMENS.
Corporation Terrebonne,	Valin,	7 Juin,	Juge en Chef, Aylwin, Duval, Meredith,	Confirmé.
Mercille,	Fournier,	" "	Juge en Chef, Aylwin, Meredith. Duval dissent,	"
Lavoie,	Crevier,	" "	Juge en Chef, Aylwin, Duval, Meredith dissent,	Infirmé.
Grenier,	Leprohon,	" "	Juge en Chef, Aylwin, Duval, and Meredith,	"
Chapman,	Masson,	" "	"	Confirmé.
Fauteux,	Boston,	" "	Juge Aylwin, Duval, Meredith, Juge en Chef dissent,	"
Henderson,	Bradford,	9 "	Juge en Chef, Aylwin, Duval, Meredith,	Infirmé.
Brault,	Corporation Montréal,	" "	"	Confirmé.
Lussier,	Glouteney,	" "	"	Infirmé.
Rousselle,	Demers,	" "	"	"
Thomson,	Brewster,	" "	Juge en Chef, Duval, Meredith, Aylwin dissent,	Confirmé.
Gundlach,	Bonacina,	" "	Juge en Chef, Aylwin, Duval, Meredith,	Appel renvoyé.

QUEBEC.

APPELANTS.	INTIMÉS.	DATE.	JUGES.	JUGEMENS.
Dinning,	Douglass,	13 Juin,	Juge en Chef, Aylwin, Duval, Meredith,	Confirmé.
Gosselin,	Compagnie Grand Tronc,	" "	"	Infirmé.
Gagné,	Métivier,	" "	"	"
Warren,	Morgan,	" "	"	"
Corbin,	Mansell,	15 "	"	Appel renvoyé.
Frechette,	Charland,	" "	Juge Aylwin, Duval, Meredith, Juge en Chef dissentiente quant aux frais,	Confirmé.
Casgrain,	Perrault,	16 "	Juge en Chef, Aylwin, Duval, Meredith,	Confirmé en partie chaque partie payant ses frais d'appel
Paradis,	Alleyn,	" "	"	Infirmé.

MONTREAL.

APPELANTS.	INTIMÉS.	DATE.	JUGES.	JUGEMENS.
Woodyard,	Belknap,	6 Septembre,	Juge en Chef, Aylwin, Duval, Meredith, Mondelet,	"
Lauzon,	Choquette,	" "	" Meredith, Duval dissent,	"
Vondenvelden,	Prince,	" "	Juges Aylwin, Duval, Meredith, C. Mondelet,	Confirmé.
Bélanger,	Durocher,	" "	"	"
Bernier,	Beauchemin,	8 "	Juges Aylwin, Duval, Meredith, Juge en Chef dissent,	"
Coté,	Morrison,	9 "	Juges Aylwin, Meredith, Mondelet, Badgley, Duval dis't,	"

QUEBEC.

APPELANTS.	INTIMÉS.	DATE.	JUGES.	JUGEMENS.
Fry,	The Richelieu Company,	17 Septembre,	Juges Aylwin, Duval, Meredith, C. Mondelet	Infirmé.

MONTREAL

Palliser,	Lapensée,	1 Decembre,	Juge en chef, Duval, Meredith, C. Mondelet, Aylwin dis.	Confirmé.
Trust and Loan Company,	McKay,	" "	" " " " Aylwin, C. Mondelet dis.	Infirmé.
Rousseau,	Lefebvre,	" "	" " " " Bruneau, Aylwin dis.	Confirmé.
Hempsted,	Drummond,	" "	" " Aylwin, Berthelot, Meredith dis.	"
Bank of B. N. America,	Cuvillier,	" "	" " C. Mondelet, Monk, Aylwin dis.	"
Wyman,	Edson,	" "	" " Aylwin, Meredith, C. Mondelet dis.	Infirmé.
Ryan,	Montreal and Champlain R.R. Company	5 "	" " Meredith, Guy	"
Métrissé,	Brault,	" "	Juge en chef, Aylwin, Duval, Meredith, Bruneau, Guy dis.	"
Cumming,	Smith,	6 "	" " C. Mondelet, & Duval dis. Meredith dis.	"
Larocque,	DeMontigny,	7 "	" " Duval, C. Mondelet	Appel renvoyé.
Dickson,	Clairmont,	" "	" " " " "	Confirmé.
Prevost,	Gauthier,	" "	" " " " "	Appel renvoyé.
Osgood,	Kellam,	" "	" " " " "	Infirmé, chaque partie payant ses frais.
McGarvey,	Montreal and New York Railroad Company,	" "	" C. Mondelet, Monk, and Duval dissentient.	Infirmé.
Kierakowski,	Grand Tronc,	9 "	" Aylwin, Duval, Meredith, A. Lafontaine.	Réformé. J. en chef et J. Meredith *dissentientibus* quant à l'indemnité. J. Aylwin et A. Lafontaine *dissentientibus* quant aux lods et ventes.

QUEBEC.

QUEBEC.

APPELANTS.	INTIMÉS.	DATE.	JUGES.	JUGEMENS.
Chabot,	Guay,	12 Decembre,	Juge en Chef, Aylwin, Duval, Meredith, Mondelet,	Confirmed.
Provancher,	La Haye,	"	" " " " "	"
Marchildon,	Fabrique de Batiscan,	"	" " " " "	"
Belle,	Ross,	"	" " " " "	"
Kilborn,	Boswell,	13 "	" " " " C. Mondelet dis.	Reversed.
Coxworthy,	Giles,	"	Juge en Chef, Aylwin, Duval, Meredith, Mondelet,	Confirmed.
Quebec Bank,	Gibb,	"	" " " Mondelet, Chabot *adhoc*, (absent)	"
Cary,	Johnston,	"	Chief Justice, Aylwin, Duval, C. Mondelet,	"
Normand,	Grevier,	17 "	" " " Meredith, A. Stuart *adhoc*.	Reversed.
Grand Trunk,	Dalsaire,	"	" " " " Mondelet dis.	Confirmed.
DaHaire,	Grand Trunk,	"	The five Judges,	" but modified.
McCaffrey,	Dorval,	"	Duval, Meredith, Mondelet, Juge en Chef dis. Aylwin dis.	Confirmed.
Levallée,	Trigge,	"	Juge en Chef, Aylwin, Duval, Meredith,	Reversed.
Bateau,	Fortier,	"	" " " " Mondelet dis.	"
Supple,	Kennedy,	"	" Duval, Meredith, Aylwin dis. Mondelet dis.	Confirmed.
Lemieux,	Grand Trunk,	"	Duval, Meredith, Mondelet, Juge en Chef dis. Aylwin dis.	"
Boswell,	Denis,	"	Juge en Chef, Duval, Meredith, Mondelet, Aylwin dis.	"
Withall,	Michon,	"	Juge en Chef, Aylwin, Duval, Mondelet, Meredith dis.	Reversed.
Laterrière,	Verret,	"	The five Judges,	"
Paton,	Ardouin,	"	" " " " Meredith dis.	"
Regina,	St. Louis,	"	Chief Justice, Aylwin, Duval, C. Mondelet,	Conviction set aside.

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TO THE PRINCIPAL MATTERS IN THE THIRD VOLUME

OF THE

LOWER CANADA JURIST.

COMPILED BY

STRACHAN BETHUNE, *Advocate.*

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ACCROISSEMENT takes place in the donation of a usufruct even by *acte entre vifs*, if such deed, by its disposition, and by its clear expression create a *substitution reciproque*; and the substitution created by a donation and by a will are regulated by the same rules of law. (Joseph vs. Castonguay et al., S. C.)... 141

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" EN GARANTIE:—*Vide* GARANTIE SIMPLE.

" EN REVENDICATION:—*Vide* JURY TRIAL.

" *quanto minoris* cannot be brought *de plano* by an *adjudicataire* of real property against a party as plaintiff, *poursuivant le décrêt*, to recover the value of a deficiency in the extent of land sold, until such deficiency shall have been established in an action to reform the Sheriff's title granted to the *adjudicataire* and correct the description of the quantity of land, to which action the *poursuivant* and the *saisi* must be parties. And, until such deficiency is so ascertained, the title granted by the Sheriff operates as a bar to any action merely personal against the plaintiff, and is conclusive evidence of the quantity of land sold and conveyed, as between the plaintiff and defendant, until it be legally set aside or reformed. (Desjardins vs. La Banque du Peuple, S. C.) 75

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" :—When application has been made for a writ of, from an interlocutory judgment, and, in consequence of an equal division of the Court as to whether or not there was a quorum, the motion has been lodged (as directed by the judicature Act of 1857) with the Clerk of the Court, proceedings in the Court below will *not* be suspended in consequence. (Scott et al., vs. Scott et. al., S. C.)..... 134

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" :—Where the declaration of a garnishee does not fully disclose the facts of the case, the garnishee must pay the costs of Contestation. (Do.).. 163

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COMPENSATION :—Damages, resulting from fraud, may be offered in compensation against the purchase money of Real Estate. (Pr[illegible] vs. Leroux, S.C.) 321

COMPOSITION :—A deed of, is not rendered null by default of payment within the specified delays, if the creditor has consented to alter the composition without the assent of the debtor who compounded. (Boudreau et al. vs. Damour, S. C.) 124

" :—*Vide* PROMISSORY NOTE.

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" :—*Vide* EVIDENCE.

" must sue in its own name and be itself before the Court; and an action in which it purports to be represented by its executive will be dismissed. In such a case there is nothing to amend by.. (The Corporation of the Parish of St. Jerusalem vs. Quinn, C. C) 234

COSTS :—*Vide* JURY TRIAL.

" :—*Vide* OPPOSITION *à fin de distraire.*

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CROSS :—*Vide* EVIDENCE.

DAMAGES :—In action for, for false imprisonment, the defendant acting *bonâ fide* and under the reasonable belief that he was authorized by statute is entitled to one month's notice of action, under 4 & 5 Vic. ch. 25, and 14 & 15 Vic. ch. 54, and a plea of want of such notice may rightly conclude to the country. (McNamee vs. Hines, S. C.) 109

" :—A shareholder in a Railway Company, who has transferred his shares as collateral security, may bring an action of damages against the Company for refusing to register such transfer during a period of several months, and thereby causing him great pecuniary loss, although such transfer be prepared in the form of the Company's charter. And the allegations that the transferees had offered to surrender such transfer to the Company, and had demanded that the Company should transfer the shares on their books, are sufficient to meet the requirements of the Company's charter. (Webster, appellant, and Grand Trunk Railway Company of Canada, respondent, Q. B.)..... 148

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" :—The demand thereof cannot be received while the cause is *en délibéré.* (Do.) 23

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DOMICILE :—In the case of a Scotchman who originally had his domicile in Scotland, but abandoned that domicile and established a new one in Jamaica, and finally gave up and left his Jamaica domicile with the intention of returning to Scotland, but died before his return, his domicile at the time of his death will be held to be Scotland. (Ferguson vs. Pow and others, Scotch case.)..... 127

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" :—Tenant owing 3 months rent cannot be ejected for that cause alone, under the provisions of the above statute. (Healy vs. Labelle, S. C.) 45

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" :—Costs of, when made uselessly, will be awarded against party making same. (Lussier et al., appellants, and Glouteney, respondent, Q. B.) 299

EVIDENCE :—In an action between parties who are not traders, the plaintiff's nephew is incompetent to prove the sale and delivery of fire-wood. (Desbarats vs. Murray, S. C.)..... 27

" :—An executory contract cannot be proved by parol. (Trudeau et al. vs. Ménard, S. C.) 52

" :—*Vide* INSURANCE.

" :—*Vide* CARRIER.

" :—In a non-commercial case, the payment of money may be proved by subscribing Witnesses to a receipt, to which the party receiving the money has affixed his mark or cross, but in the examination of such witnesses it is irregular to begin by asking whether or not the amount has been paid. (Neveu, père et *ux.*, vs. DeBleury, S. C.) 87–88

" :—A clerk is incompetent to prove, that a receipt given by him for his employer to a customer for a sum of money was given by error, and that he did not actually receive the money acknowledged by the receipt. (Whitney vs. Clarke, S. C.)..... 89

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" :—*Vide* INSURANCE.

" :—*Vide* BILL OF LADING.

" :—A Corporator may be a witness for the Corporation, if it appear that he has no interest in the result of the suit. (Moss vs. Carmichael, and Railroad Car Company, opposants, S. C.)..... 166

" :—A party to the record, although not interested *cannot* be examined in the cause as a witness. (Ouimet et al. vs. Senécal et al., S. C.)... 179

" :—A party to the record, and not interested, *can* be a witness in the cause. (Do.) 182

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" :—The payment of a note, as between parties not traders, cannot be proved by witnesses. (Do.)..... 232

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" :—A clerk is competent to prove that a receipt given by him for his employer to a customer for a sum of money was given by error, and that he did not actually receive the money acknowledged by the receipt; and in such a case the weight to be given to the testimony of the clerk is a question to his credibility which depends upon the circumstances of the case. (Whitney, appellant, and Clark, respondent, Q. B.)..... 318

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" " " cannot be fyled to a *saisie arrêt* after judgment, and will be rejected on motion. (Molson vs. Burroughs, and the Bank of Montreal, T. S.)..... 93

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" :—Where two executions issue, at the suit of different parties, against the same defendant, the Sheriff cannot unite both seizures in one *procès verbal*. (Sanderson vs. Roy dit Lapensée, and Roy dit Lapensée, opposant, S. C.)..... 119

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FAITS ET ARTICLES :—A Director of an Incorporated Company, in a suit between him and a member of the same Company, is held to answer categorically such Interrogatories *sur faits et articles*, as have been proposed to him by the defendant, touching transactions of the Directors of such Company, notwithstanding his declaration on oath that the matters inquired of are unknown to him. (Lacroix vs. Perrault de Linière, S. C.)..... 136

" " may be served and returned before any inscription on the *Rôle d'Enquête*, (Moreau and *oir* vs. Léonard, S. C.)..... 168

FALSE IMPRISONMENT :—*Vide* DAMAGES.

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FOLLE ENCHÈRE :—The *Adjudicataire* is not *contraignable par corps* to the payment of costs incurred on the resale of the property, but only for the difference of price of the two adjudications. (The Trust and Loan Company of U. C., vs. Doyle et al., and Stanley, *adjudicataire*, S. C.)..... 302

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GARANTIE SIMPLE, (*Action en*) will lie by a proprietor for damages caused to his tenant by a third party by reason of the demolition of a *mitoyen* wall, and this, although the plaintiff *en garantie* may himself be liable for a part of the damages recoverable by said third party; the maintaining the right of action in such case being moreover to facilitate procedure and avoid a Circuit of actions. (Delvechio vs. Joseph, S. C.)..... 226

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GARDIEN :—In the case of a rule for *contrainte* against the Sheriff, as *gardien*, allowing no alternative but payment of plaintiffs' debt, where, in consequence of the Sheriff having pleaded that the value of the effects was only of a certain amount, the Court of Appeals has ordered that proof be made of such value, and that the Rule be made absolute with power to the Sheriff to liberate himself from the *contrainte* on payment of such value; notwithstanding such judgment of the Court of Appeals, and the proof made thereunder, the Rule will be dismissed, on the ground that it does not itself give the alternative of paying the value of the effects seized. (Leverson et al., vs. Cunningham and Boston, Sheriff, *mis en cause*, S. C.)..... 97

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" of moveable property cannot, during the pendency of the seizure, compel the surrender to him of such moveable property of the defendant, in the absence of positive proof that the defendant is deteriorating it by

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improper use. (Palsgrave vs. Sénécal et al., and Prieur, *gardien*, Petitioner, S. C.) 116

GARDIEN of moveable property, under a seizure suspended by opposition, cannot oppose the sale of the same property seized under a subsequent execution. (Donally vs. Nagle, and McDonald, Opposant, S. C.) 135

" :—Proof of the value of goods, ordered to be restored by a *gardien*, under a Rule for *contrainte par corps*, may be established by the verbal admission of the plaintiff as to such value, made at the time of the seizure of the goods. (Leverson et al., Applts., and Boston, Respondent, Q. B.) 223

" :—A tender to the Attorneys *ad litem* of the Plaintiffs, who reside beyond the limits of the Province, of the value so proved as above and of the costs on the Rule, where the Rule has been dismissed and an Appeal sued out in consequence, but made before service of Appeal, will entitle the Respondent to the costs of Appeal, where the judgment in Appeal does not award a larger amount than that tendered. (Do.) 223

" :—On a Rule such as the above, where the plaintiffs reside beyond the limits of the Province, the Court will order the *gardien* to be relieved from the *contrainte*, on depositing the established value of the goods in the hands of the Prothonotary. (Do.) 223

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" :—The Defendant *en faux* (Principal Plaintiff) is not bound to answer the plea to the principal action, before the inscription *en faux* is terminated. (Martineau vs. Karrigan, S. C.) 268

INSINUATION :—*Vide* DONATION ONÉREUSE.

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" :—An endorsement on a Policy issued under the provisions of said Act, consenting to the removal of the goods insured from the building described in the Policy to another building, and signed by the Secretary alone, is binding on the Company. (Do.) 2

" :—An action on a policy against fire, for the value of a house attached on both sides to other buildings and inhabited for a portion of the time during which the policy was running by four tenants, is maintainable, though the house is described in the policy as detached from other buildings and inhabited by two tenants; provided it be proved,

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that the error in the description of the house was made by the agent of the insurers, and that the increased number of tenants were not in the house either at the time of the effecting of the Policy, or at that of the fire. (Somers vs. Athenæum Insurance Society, S. C.)..... 67

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" :—An answer to a plea by defendant alleging the misdescription may be made, admitting the misdescription, but charging the error upon the Plaintiff's agent, and it is no departure. (Do.)..... 67

" :—The parol testimony of the Agent is sufficient to sustain the answer and sustain the action. (Do.)..... 67

" :—It makes no difference that the policy was for a year before the fire in plaintiff's possession unobjected to, with a printed notice upon it to examine it and see if it was correct. (Do.)..... 67

" :—Or, that the diagram to which reference was made, both in the interim receipt and in the policy, corresponded with the description in the policy. (Do.)..... 67

" :—Under a clause in a policy of Insurance, that if there appear fraud in the claim made to a loss, or false swearing or affirmation in support thereof, the claimant shall forfeit all benefit under such policy, the Court will reject the claim of the Policy holder, if the Company establish that the claim is unjust and fraudulent, and far in excess of the actual loss, to the knowledge of the policy holder. (Grenier et *vir*, vs. The Monarch Fire and Life Assurance Company, S. C.)..... 100

" :—In a case such as the above general evidence may outweigh positive testimony, where the latter is not consistent, and where there are presumptions against its truth. (Do.)..... 100

" :—The condition of a policy imposing the penalty of a forfeiture of all remedy upon it, in the event of any fraudulent overcharges is not comminatory, but will be carried out, if such overcharge be proved. (Thomas et al., vs. The Times and Beacon Fire Assurance Company S. C.)..... 162

" :—A promissory note payable to the order of a Mutual Insurance Company given in payment of premium of Insurance, is negotiable. (Wood et al., vs. Shaw, S. C.)..... 169

" :—A memorandum at the foot of such a note indicating its consideration does not limit its negotiability. (Do.)..... 169

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" :—Of a concert room, has no lien on a piano temporarily placed there for an evening concert, for the rent of the room, as against the proprietor of the piano, who is not the lessee of the room. (Pearce vs. the Mayor, Aldermen and Citizens of the City of Montreal, S. C.)..... 122

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" :—The Superior Court has *no jurisdiction* in an action such as the above. (Do.)..... 140

" :—An action of damages caused by bad usage may be brought under 18 Vic. ch. 108, even after the lease has expired. (Bédard vs. Dorion, C. C.)..... 253

" :—In action instituted under the 18 Vic. ch. 108, the defendant is not bound to plead between the 10th of July and the 31st of August, in consequence of the provisions of the 54th Section of the 22 Vic. ch. 5, even where it is alleged that the lease has expired and defendant refuses to quit. (Clairmont and *vir* vs. Dickson, C. C.)..... 255

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" :—*à fin d'annuller* may be fyled to a *venditioni exponas de terris*, if land *en rôture* has been advertised to be sold in a parish other than that in which it is situated. (Do.) 73

" :—*à fin d'annuller*, the effect of which has been removed by a subsequent amendment of the proceedings, will be rejected on motion, but without costs. (The Trust and Loan Co. of U. C. vs. Doyle and Stanley oppts. S. C.) 138

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" :—*Vide* LETTER OF GUARANTEE.

SEPARATION DE BIENS :—Action for, must be brought in the district in which the parties have their domicile (Kennedy vs. Bédard S. C.) 284

SHAREHOLDER :—*Vide* DAMAGES.

SHERIFF'S SALE :—*Vide* LESSOR AND LESSEE.

SHERIFF :—*Vide* GARDIEN.

" may, either on his own motion or on that of the plaintiff, amend his return to a writ of *Saisie Gagerie*, so as to correct an error of ...

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omission caused through his inadvertence. (Molson et al., Appellants, & Burroughs, Respondent, Q. B.)..... 220

SHERIFF:—*Vide* GARDIEN.

SHIPPING:—The party having open possession and control of a vessel and using it for his own benefit and profit, is liable, and not the registered owner, for supplies furnished to it. (Morgan vs. Forsyth et al., S. C.) 98

SLAVERY IN L. C.:—Charlotte vs. Chouteau et al. (American Case)..... 257

STOPPAGE *in transitu*:—*Vide* CARRIER.

SUBSTITUTION:—Where a will in effect bequeaths the usufruct to A., during his lifetime only and the property to the oldest male issue of A., and in case A. should die without lawful male issue, then to the son born in lawful wedlock of B., &c. &c., the oldest son of A. living at his death will have it the legacy, whether he had an older brother predeceased or not. (McCarthy et al., Appellants, and Hart, Respondent, Q. B.) 29

" :—*Vide* tig, cannot institute an action *en déchéance d'usufruit*. (Gauthier vs. Boudreau et al., S. C.)..... 54

" :—*Vide* ACCROISSEMENT.

TACIT RECONDUCTION, in relation to moveables, only arises when the lessor is a dealer in and makes a business of letting moveables, and parties remaining in possession of leased moveables, after the expiration of the lease, will be deemed to be the owners thereof. (Bell vs. Rigney et al., Milne, oppt. S. C.)..... 122

THIRD SAISI:—Declaration of, cannot be contested after the expiration of eight days from the fyling thereof, unless by express permission of the court. (Bruneau, Appellant, and Charlebois, Respondent, Q. B.)..... 56

" :—A Cashier or other officer of the Bank, receiving money, as the Attorney of another party, acts individually, and the Bank is in no way affected by the transaction. (Lynch vs. McLennan et al., and The Bank of Upper Canada, T. S., S. C.)..... 84

" :—To be admitted to contest declaration of, after the expiration of eight days from the fyling thereof, it is necessary to shew sufficient cause why the contestation was not fyled within the prescribed delay. (Lynch vs. McLennan et al., and The Bank of Upper Canada, T. S). 114

" :—being a foreign Insurance Company, may be legally served with process, at its Agency or Office within the jurisdiction of the Court issuing the same, and be condemned on such service to pay the amount of a policy, though such policy may have been effected at another agency beyond the jurisdiction of the Court. (Chapman vs. Clarke, Cur. and the Unity Life Insurance Association, T. S., S. C.)..... 159

TOLL-BRIDGE:—Proprietor of, is bound to maintain the road leading thereto in good repair, and in default is liable for all consequent damages. (Grenier, Appellant, and Leprohon, Respondent, Q. B.)..... 295

TUTELLE will not be set aside, on the petition of the mother of the minors, on the ground that the tutor appointed is not a relation, if it appear that the mother, from her habits and character, is totally unfit to be appointed tutrix herself, and that there is no objection to the fitness of the tutor appointed, and that there has been no irregularity in the proceedings for his appointment, and that there are no other relatives of the minors within the jurisdiction of the Court except the mother. (Mitchell, Petitioner, and Brown et al., Defendants, S. C.)..... 111

TUTOR:—*Vide* SUBSTITUTION.

" *ad hoc*, not of kin or a relative to the minor, has a right to present a

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petition *en destitution de tutelle*, when the minor has no kin or relative in Canada. (Dooley, Petitioner, vs. Wardley et al., S. C.) 73

USUFRUIT:—*vide* ACCROISSEMENT.

VENDITIONI EXPONAS DE TERRIS:—*Vide* OPPOSITION *à fin d'annuller*.

VENDOR of merchandize, who is named consignor in the bill of lading, is nevertheless not liable for the freight of said merchandize which he has delivered to vendee's agent before shipment, according to contract, and to the knowledge of the ship's agent. (Fowler vs. Stirling et al., S. C.) 103

" VERDICT of a jury cannot be set aside in Appeal, when no motion has been made in the Court below either for a new trial, in arrest of judgment, or for judgment *non obstante veredicto*. (Shaw et al., Appellants, and Meiklelam, Respondent, Q. B.) .....

" :—*Vide* JURY TRIAL.

VESSEL:—A judicial sale of a, not registered in L. C., will convey no title to the purchaser, as against the real owner, and cannot be revendicated by such purchaser whose possession has been forcibly destroyed by such real owner. (Kerr vs. Gildersleeve, S. C.) 304

WAGES:—*Vide* ELECTION AGENT.

" :—Action for recovery of, is prescribed by lapse of one year, (Lussier, et al, Appellants, and Glenteney, Respondent, Q. B.) 299

" :—Oath of master taken, in the absence of proof of any convention, as to the rate of wages, and payment of arrears, (Do.) 299

" :—In case of plea of prescription, the oath of the master will be taken when offered by plea that he owes nothing, (Do.) 299

WIFE, *separée de biens*, is not liable for goods sold and delivered to her, without proof that the husband expressly authorized the purchase, (Benjamin et al, vs. Clarke and vir, S. C.) 131

" *sous puissance de mari*, cannot validly renounce, in favor of her husband's creditors, to the payment of a *rente viagere* which her contract secures, her instead of dower; such renunciation being moreover in contravention of the provisions of the 4th Victoria, Ch. 30, (Russell vs. Fournier and Rivet, Opposant, S. C.) 324

WILL:—*Vide* DÉLIVRANCE DE LEGS.

" :—*Vide* SUBSTITUTION.

" executed *en forme solemnelle* need not contain mention by Notary that he wrote it. (Bourassa vs. Bédard, S. C.) 48

" :—A party may legally alienate by, notwithstanding the prohibition in his title to sell during his lifetime. (Bourassa vs. Bédard, S. C.) ... 48

" , declaring that a farm of the testator should be held by the male heirs of the testator's family in the manner hereinafter limited, and the giving one half to William and his lawful male heir after him, and one half to Duncan and his lawful male heir after him; and, in the event of William or Duncan dying without lawful heir or issue, giving the share of him so dying to the survivor; and, if both should die without lawful issue, giving the farm to Sophia Mackintosh, and unto her eldest son on taking the name of Mackintosh, and, to prevent all misconstruction, declaring that the eldest son of William and the eldest son of Duncan and no other could inherit the farm, does not mean a bequest of the farm to the eldest son of Sophia Mackintosh. William dying without issue, and Duncan dying leaving no son and only a daughter—so long as Duncan has a daughter. (Bonacina vs. Bonacina, and Gundlack, Tutor, Opposant, S. C.), ... 80

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WRIT OF SUMMONS, issued before the change of districts in Lower Canada came into effect, but served *after* that period, cannot be attacked by *exception déclinatoire*. Semble, it might be successfully met by an exception *à la forme*. (Monty vs. Ruiter, S. C.), ... 26

" necessary to give jurisdiction in a case, notwithstanding that the defendant may have appeared and made no objection. (Taylor vs. Sénécal et al, S. C.), ... 53

" may be legally served on the husband of a wife *séparée de biens*, temporarily absent from her home, but the service must be made by delivering the writ to such husband or some other reasonable person of her family, and a service made, by leaving the writ on the floor of an open porch of her domicile, (the husband having opened the door and closed it before the bailiff could state his errand,) is insufficient. (The Trust & Loan Company of Upper Canada vs. Mackay & *vir*, S. C.), ... 154

[Reversed in Appeal, 1st. December, 1859.]

" against a municipality cannot be served at the domicile of the Secretary Treasurer, although made personally there. (School Commissioners of the Municipality of the parish of St. Pierre de Sorel vs. School Commissioners of the Municipality of the town or borough of William Henry, S. C.), ... 189

" served on the "last President," on the "late Secretary," and on the "last Secretary," of a corporate Company, in the absence of any known or discoverable office of such Company, is insufficient. (Booth vs. the Montreal and Bytown Railway Company, S. C.), ... 196

" served on a party residing in Upper Canada, under the 78th section of the Judicature Act of 1858, on the ground that he has personal or real property in Lower Canada, cannot be maintained when such property is situate in a district other than that in which the writ is issued. (Frothingham et al, vs. The Brockville and Ottawa Railway Company, and Dickinson et al, Gs. S. C.), ... 252

" calling on a party to appear "before *our Justices* of our Superior Court" is sufficient and as available as a summons to appear before the *Court*. (Macfarlane vs. Belivean, S. C.), ... 306

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