The Legal News.

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THE KENTUCKY TRAGEDY.

Kentucky has furnished a most extraordinary incident of judicial life in a land where it would be flattery to say that the law is duly respected. Judge Reid, of the Superior Court, had rendered a decision against a lawyer named John S. Corneilson. The latter publicly assaulted and 'cowhided' the Judge, and the Judge's wife, it is said, urged her husband to go forth and slay his assailant. The Judge felt keenly that this mode of vindicating his honor was ill-suited to his office. He resisted the promptings of his wife, which were echoed by two-thirds of the community; but in the end, he felt unequal to the burden of his position, and committed suicide. The strangest part of the affair is, that when Judge Reid had been treated as above described, there was no law to reach the offender—that is to say, no one seems to have thought that the matter could be settled by the punishment of the ruffian in the ordinary course of justice. The *Kentucky Law Journal* laments this condition of things. "There seems the oddest disposition in this community," it says, "to leave the settlement of such affairs to the prowess of the individuals concerned. Any appeal to the law for reparation is considered as a confession of weakness. It is true that the indignity to which Judge Reid has been subjected cannot be over-estimated, but for this very reason the magnitude of the offence demands reparation from the law. Yet one will hear it said, the outrage is too great a matter to be left to the law. The sufferer must right himself. The law is not strong enough. His own greater powers are called for. Could there be greater presumption, or a sentiment more characteristic of a barbarous people, where law is weak and individuals strong?" This was written before the suicide, but Judge Reid seems to have imagined that he had been condemned by public opinion because he would not murder his assailant: even his wife lost respect for him, and life under such a cloud became intolerable. The whole affair is strange, and utterly discreditable. If the trained intellect of a Judge discharging his functions in a Superior Court succumbs to the influence of his surroundings, we need not wonder that tragic occurrences in other classes of society are so frequent.

LAW REFORM IN ENGLAND.

Mr. Justice Manisty does not feel happy under the order of things introduced by the Judicature Acts, and at the opening of the Summer Assizes for the County of Northumberland, July 9, he took occasion to indulge in a long lament over the general uprooting of the good old institutions. The cost of litigation was supposed to be too great, but now, exclaimed the learned Judge, "the cost was simply double what it was." They had done away with two Chief Justices, and had but one chief over the whole fifteen of the Queen's Bench Division. They had two men to do the work of four. "What was the consequence? Judges were but men. They differed often, and then there was one to one. That was the tribunal that was held up as certain to work right. So far did it go that three judges were never to sit together if it could be avoided. What was the result at the present moment? A Court of Appeal burdened with work, with appeals at the rate of four to one. Thus we had the number quadrupled and the cost doubled. That was one of the effects of the Judicature Acts and the grand system by which everything was to go right. They had been experimenting for years, and he could not see that they were getting a bit further forward. He looked forward with very great doubt as to the effect of all those changes;" and so on for more than a newspaper column. The learned Judge wound up by describing the little petty changes and economies as "nibblings at institutions," and he declared that "such nibblings did not seem right according to his way of thinking." Surprise was expressed in some quarters recently because one of our Judges ventured to criticise legislative and executive changes, and it was said that in England this would be considered an impropriety. But here we find an English Judge handling the subject of legislative and executive reforms in anything but a meek and reverent spirit,

NEW PUBLICATIONS.

THE CONSTITUTIONAL POWERS OF PARLIAMENT AND OF THE LOCAL LEGISLATURES under the British North America Act, 1867. By J. Travis, Esq., LL.B., of the New Brunswick Bar.

This is a treatise of 184 pages devoted to one of the most important topics that can engage the attention of a Canadian lawyer. The first thing that attracts notice on opening the work is the author's style. "*Le style c'est l'homme.*" The Earl of Lytton, in a recent *causerie* in the *Fortnightly Review*, has endeavoured—not altogether successfully—to sustain the truth of this saying of Buffon. If it be applicable in the present case the author is certainly not afflicted with diffidence, or distrust of his own judgment, for the impression is strongly conveyed that the world in general, and the judicial bench in particular from the humblest tribunal to the highest, is filled by persons little better than idiots. The author tells us that his work is intended to bring Order out of Chaos (the capitals are not ours), and in the execution of this laudable undertaking he launches his bolts right and left without the slightest respect for persons or dignities. At the outset (p. 1) the Hon. T. J. J. Loranger's pamphlet recently adverted to (p. 147), receives notice as a work abounding in "crude absurdities," "in which the author makes the most ludicrous efforts to 'darken counsel with words without knowledge.'" Then on page 2, the Supreme Court of New Brunswick, since it lost its late Chief Justice (now Sir Wm. J. Ritchie), is referred to as a court not "of any very high authority," and on p. 19, we are further told that the ability of the court left it when the Chief Justice was promoted to the Supreme Court of Canada. On p. 37 we are informed that the same court "does not contain, among its judges a single lawyer possessing anything like thorough scientific legal knowledge," and, in some respects, its decisions are "supremely ridiculous." On page 34, Mr. Loranger (now Mr. Justice Loranger) is bracketed with his brother, the Hon. T. J. J. Loranger, who is charged with appropriating his ideas and language wholesale. On page 35, Mr. Blake's attempts to deal with sections 91 and 92 of the British North America Act are said to be "as bad as the very weak attempts of Mr. Loranger and of Mr. Justice Wetmore." On p. 100, the Supreme Court of Canada (the Chief Justice excepted) come in for a share of polite attention, their judgments in the case of the *Citizens Insurance Co.* v. *Parsons*, "fairly overflowing with error." On p. 131, Mr. Justice Mathieu is described, on the strength of a newspaper paragraph about a judgment, as treating the subject "*à la Loranger.*" And lastly, the highest tribunal of all—the Privy Council—is thus referred to *apropos* of the judgments in the cases of *Dobie* v. *The Temporalities Board* and *Russell* v. *The Queen*: "It is almost painful (a kind of, as Byron would call it, 'pleasing pain'), in the excessively ridiculous aspect in which their views are presented, to follow them further. Their ignorance (to be perfectly candid and strictly just); actual, stupid, stolid ignorance, of the matter they are examining, when we consider that that is our highest, authoritative, Appellate Court, is positively painful!"

The above are but a very few of the references to courts and individuals with which Mr. Travis' work overflows. So much for the style. Our space will not permit us at present to do more than describe in a general way the contents of the work. The author has analysed and criticized the constitutional cases in the several courts since Confederation. He seems to hold a middle course between the views enunciated by the champions of "provincial autonomy," and those which are espoused by the extreme supporters of the dominant powers of Parliament. Mr. Travis has evidently studied his subject with much care, and his examination of the decided cases, whether his readers agree with his conclusions or not, will be found interesting and valuable. We are disposed to think he is right in a good deal of his criticism, though we deprecate the trenchant style in which he deals with adverse views. The subject is confessedly intricate, and it does not follow that because Mr. Travis sees one side in a very bright light indeed there is nothing to be said on the other. The work (copies of which may be procured from the author at

St. John, N.B.) will not make unprofitable reading for the vacation, and we commend it to the attention of the profession.

CODIFICATION IN THE STATE OF NEW YORK. By Robt. Ludlow Fowler, Albany: Weed, Parsons & Co., printers.

Pamphlets continue to issue from the press on the burning question of codification, and we are afraid we have not even acknowledged all that have reached us. The present treatise was prepared at the suggestion of Mr. Field, and is an answer to Mr. James C. Carter's paper against codification.

NOTES OF CASES.

COURT OF QUEEN'S BENCH.

MONTREAL, May 27, 1884.

Before DORION, C.J., RAMSAY, TESSIER, CROSS, and BABY, JJ.

PRATT (plff. below), Appellant, and BERGER (deft. below), Respondent.

Evidence—Aveu—Commencement de preuve.

To an action pro socio, alleging a partnership and asking for an account of the profits, the defendant pleaded that the plaintiff was only an employee, but at the same time he admitted that there was an understanding that he was to have half the profits as salary, and the defendant repeated this when examined as a witness. Then T., a witness, was asked whether he had had any transaction with the parties and whether they acted therein individually or as partners. Held, that the aveu of the defendant was indivisible, and did not constitute a commencement de preuve par écrit; and therefore verbal evidence of the partnership was inadmissible.

The plaintiff moved for leave to appeal from the following interlocutory judgment rendered by the Superior Court, Mathieu, J., April 9, 1884, in which the case is fully stated:—

"La cour, parties ouïes sur la motion du défendeur produite le 3 mars dernier, demandant que la décision rendue par son Honneur le juge Doherty, présidant la cour d'enquête, renvoyant l'objection du défendeur à la preuve testimoniale tentée par le demandeur, soit révisée par cette cour, et à ce que la dite objection soit maintenue avec dépens, avoir examiné la procédure et délibéré;

"Attendu que le dit demandeur allègue dans sa déclaration que, dans le cours du mois de décembre 1878, le gouvernement de la Province de Québec ayant demandé des soumissions pour le contrat de l'ameublement de l'école normale à Montréal, le demandeur fit des démarches pour l'obtenir et proposât au défendeur de se joindre à lui; qu'ils se mirent en société pour les fins du contrat, le demandeur devant faire l'ouvrage et le défendeur devant fournir les fonds nécessaires pour l'achat des matériaux et les gages des ouvriers, les associés, l'ouvrage terminé, devant se partager les profits nets; que le défendeur a retiré du gouvernement $18,895.59 sur laquelle il a perçu un profit net d'au moins $12,000, dont il n'a pas rendu compte au demandeur; et conclut à ce que le défendeur soit condamné à lui rendre un compte à l'amiable si faire se peut, si non en justice, de la société qui a existé entre eux pour ce contrat, si non et faute par le défendeur de ce faire, qu'il soit condamné à payer au demandeur $6,000 pour tenir lieu du reliquat du dit compte, et qu'en cas de reddition de compte le défendeur soit condamné à payer au demandeur le reliquat qui se trouvera fixé définitivement;

"Attendu que le dit défendeur a plaidé qu'il était faux qu'il ait jamais formé la société alléguée dans la déclaration du demandeur; que le contrat a été pris au nom du défendeur seul et que les travaux y mentionnés furent exécutés par le demandeur sous sa conduite et d'après ses ordres, et que le demandeur n'était que son employé; que sur les représentations du premier ministre de la Province de Québec d'alors, que le défendeur n'était pas un homme de l'art, le défendeur connaissant les aptitudes du demandeur s'assura les services de ce dernier pour l'exécution et la surveillance des ouvrages se rapportant plus particulièrement à l'ébénisterie; que le dit défendeur demanda alors au dit demandeur de vouloir bien lui prêter son concours dans l'exécution du contrat en question et que sur les profits réalisés, si profit il y avait après avoir payé au dit demandeur ce qui serait convenable pour l'indemniser du temps qu'il y mettrait et l'aider

à supporter sa famille, et ce à titre de salaire, il donnerait crédit au dit demandeur de la moitié des dits profits sur les différents montants que le dit demandeur devait au dit défendeur; qu'il ne fut aucunement convenu que le demandeur serait responsable des dettes ou des pertes résultant de ce contrat; que le demandeur accepta la proposition qui lui fut faite par le défendeur et consentit à prêter son concours et son travail au défendeur aux conditions susdites;

"Que durant la confection des ouvrages le défendeur a payé au demandeur une somme de $400 à titre de salaire, ou plutôt comme avance faite par le défendeur, sans tenir compte des profits ou des pertes qui pourraient résulter; que depuis l'exécution finale du contrat le défendeur a rendu compte au demandeur du coût de ce contrat, et que la balance revenant au demandeur n'était pas suffisante pour payer le défendeur de ce que le demandeur lui devait;

"Attendu que le dit défendeur examiné comme témoin, a d'abord déclaré dans une première séance qu'il n'avait jamais promis au demandeur une part dans les profits du contrat, mais qu'il s'était seulement engagé à le payer généreusement pour son travail en tenant compte des montants que le demandeur lui devait, et que la rémunération qu'il devait accorder au demandeur était laissée complètement à sa discrétion, et qu'il n'avait jamais été question entre eux de part dans les profits; qu'il admet ensuite que le demandeur devait avoir une part dans les profits comme salaire en sa qualité d'employé du défendeur, mais que dans une autre séance le défendeur a déclaré que lorsqu'il a demandé au demandeur de l'aider dans ses ouvrages le demandeur se trouvait en faillite, et que le défendeur n'a jamais dit à personne ce qu'il entendait lui donner de crainte d'être troublé par les créanciers du demandeur, mais que son intention était de lui donner la moitié des profits; que c'était entendu qu'il n'y avait pas de prix d'établi vu qu'il était en faillite, et que le défendeur ne voulait pas être troublé par les créanciers du demandeur, et que cela a été une des raisons pour lesquelles le défendeur n'a pas établi de prix avec le demandeur; que c'était arrangé de telle sorte que si une saisie-arrêt avait été prise entre les mains du défendeur il aurait juré que le demandeur n'avait aucune part, vu que le défendeur ne savait pas le montant de profit qu'il ferait sur ce contrat, et que le demandeur lui devait une somme aussi élevée pour que dans aucun temps le défendeur eût pû faire serment qu'il ne lui devait rien;

"Attendu que la question suivante a été posée par le demandeur au témoin J. Rosaire Thibaudeau :—'Avez-vous eu quelque transaction avec les parties en cette cause, savoir le défendeur et le demandeur relativement au contrat entre le gouvernement et le défendeur pour l'ameublement de l'école normale, et les deux parties en cette cause ontelles fait cette transaction individuellement ou comme associés?';

"Attendu que le dit défendeur a objecté à cette question comme illégale et comme tendant à prouver par témoin des faits qui ne sont pas susceptibles de preuve testimoniale;

"Attendu que par jugement rendu par l'Hon. Juge Doherty à l'enquête le 25 février dernier, la dite question a été permise sous réserve de l'objection;

"Attendu que le dit défendeur a fait motion pour faire réviser la décision de son honneur le juge Doherty, et demandant que l'objection soit maintenue;

"Considérant que le dit demandeur réclame du défendeur un compte de la moitié des profits faits pour l'exécution du contrat susdit et le paiement de cette moitié des dits profits, et allègue, comme cause de l'obligation du défendeur, une société qu'il prétend avoir existé entre eux;

"Considérant que le dit défendeur dans son plaidoyer et dans sa déposition, admet son obligation de rendre compte au demandeur de la moitié des dits profits, et lui fournit même un compte que cette cour n'a pas maintenant à apprécier, mais soutient dans son plaidoyer et dans sa déposition que la cause de son obligation n'est pas celle qui est mentionnée dans la déclaration du demandeur, mais qu'elle résulte d'une convention par laquelle le défendeur aurait contracté cette obligation comme salaire du travail que devait fournir le demandeur dans l'exécution de ce contrat;

"Considérant que par l'article 1243 du Code Civil l'aveu ne peut être divisé contre celui qui le fait, et que l'aveu du défendeur fait en cette cause ne peut être divisé contre lui;

"Considérant que le demandeur n'ayant pas de commencement de preuve par écrit pour établir qu'il existait une société entre le défendeur et le demandeur, ni les plaidoyers du défendeur ni sa déposition n'étant suffisants pour constituer tel commencement de preuve par écrit, ne peut prouver par témoins qu'il existait une société entre lui le dit demandeur et le défendeur;

"Considérant que sous ces circonstances la question posée au témoin Thibaudeau est illégale;

"A révisé et révise la décision rendu par son honneur le Juge Doherty, présidant la cour d'enquête le 25me jour de février dernier, permettant la question sous réserve de la dite objection, et a maintenu et maintient l'objection du dit défendeur à la dite question avec dépens distraits," etc.

RAMSAY, J. (*diss.*) This case comes up on a motion for leave to appeal from an interlocutory judgment setting aside a ruling at *enquête*, by which ruling certain evidence appears to have been admitted under reserve. The effect of the judgment appealed from is to exclude parol testimony, and therefore it is clearly one of those cases in which leave to appeal should be granted, if appellant's pretentions are sustainable on the merits, for the judgment orders the doing of what cannot be remedied (at least fully and conveniently) by the final judgment. We must therefore examine the merits of the question as to the right of the moving party to make parol proof.

The action is *pro socio* and to account for half of the profits of an enterprise.

By the defence the "*contrat auquel il est fait référence dans la dite déclaration*" is recognized, and the defendant goes on to admit he had transactions with plaintiff with respect thereto—that he had advanced him money, and that he had promised to give "*crédit au dit demandeur de la moitié des dits profits sur les différents montants que le dit demandeur devait au dit défendeur* POUR LES CONSIDÉRATIONS CI-DESSUS MENTIONNÉES;" but defendant specially denies that there was a partnership.

The precise question was this: "*Avez-vous eu quelque transaction avec les parties en cette cause, savoir, le demandeur et le défendeur, relativement au contrat entre le gouvernement et le défendeur pour l'ameublement de l'école normale, et les deux parties en cette cause ont-elles fait cette transaction individuellement ou comme associé.*" The Court, reversing the decision of the judge at *enquête*, held that there was no *commencement de preuve par écrit*, owing to article 1243 C. C., and that this question could not be put. It is conceivable that if the witness had answered it was as "*associé*," on the merits, it might be held not to be proof of a partnership; but how the alternative could be excluded, as a logical operation, I cannot understand.

But there is more in the matter before us than a defective form of question, for if this were all, the plaintiff might perhaps renew the question leaving out the words "*ou comme associé*," and so an appeal might be avoided. But it seems to me that the reason of the judgment is wholly bad, and that therefore it should be questioned at once. It evidently takes for granted that the article 1243 creates an artificial or purely arbitrary restriction of evidence. It does nothing of the kind. It simply states somewhat inartistically a manifestly wise rule for the appreciation of evidence, and one which has always existed under the French law. To that law it has neither taken away nor added a tittle [1]. It expresses a truth for the guidance of courts and judges, and its interpretation is to be determined by the limits of that truth. It warns the judge not to concoct a confession, but it is not intended that everything that a party may choose to say must be taken together and be equally believed. So far as I know, the pretention I combat has never been held theoretically by the writers under our law or practised by the courts.

(1) Toullier, (10,336) has remarked that the Code Napoléon had copied Pothier exactly. He says:—L'indivisibilité de l'aveu était regardée comme une règle soumise à des exceptions livrées à la prudence des juges. Pothier, No. 799, énonça simplement la règle sans parler des exceptions. Le code l'énonça de la même manière dans l'article 1356. The article has to be interpreted, Ib. 338, 2 Carré & Chauveau, 682.

The commonest illustration of divisibility, so-called, is in pleading, where a contract is alleged, and admitted with a plea in avoidance or exception. In that case the burthen of proof is transferred invariably to the defendant.

What the code means by "aveu" and "admission" is confession. (1) If A on interrogatories answers he borrowed from B, but paid him, the confession must be taken as a whole, because judgment could not pass against A on his confession—"*nam inanis inutilisque confessio est nisi sit certi confessio.*" *l. certum ff. de confess. quod est in controversia.* But if he pleads payment he must prove it, otherwise we should get into a violation of the rule that he who alleges must prove—*ei incumbit probatio, qui dicit, non qui negat.* (2) It will be found that what is uppermost in the thoughts of all the writers who treat of the indivisibility of the confession, is the indivisibility of the judicial confession, and principally on interrogatories. Again, there are cases of its divisibility which are left to the prudence of the judge, and to a doctrine which is too well known to require me to do more than allude to it. (3) By entering into it I should add nothing new, and I should fail to convert those who think they have all the law and the prophets when they can exclaim, "I have the article of the code on my side," meaning thereby, that they have got the most superficial doctrine that does not violate grammatical construction. (4)

There has, however, been a question as to whether the rule *in civilibus non scinditur confessio* is applicable to the *commencement de preuve par écrit.* It seems to me that the reasoning which leads to the conclusion that it is not is irresistible; and had it not been for an allusion by Serpillon (323 C. C.) to the indivisibility of the admission tending to admit proof, I should not have thought it possible to see any common principle. As I have already explained, the doctrine of the indivisibility of a confession is based on a principle of justice, which forbids one's taking the *testimony* of a man as one's whole evidence and then rejecting a part. The statutory rule that verbal evidence shall not be received without a *commencement de preuve par écrit* is simply to prevent false witnesses fabricating a story (1). All that was necessary either under the French ordinances or under the statute of frauds was something to give reality to the evidence. Here is how Pothier puts it, the evidence is to be "*non à la vérité du fait total qu'on a avancé, mais de quelque chose qui y conduit ou en fait partie.*" If this be the law, it will be hard to justify the judgment in this case. However, I find everywhere the same doctrine: "*Les contradictions et demi-aveux, résultants d'une interrogatoire ou de la défense d'une partie, sont aussi un commencement de preuve par écrit.*" 1 Pigeau, 268. And Serpillon, C.C. 321, says: "*Un commencement de preuve par écrit, c'est lorsque l'on a un titre par écrit, non de la vérité totale du fait, mais de quelque fait qui y conduit, ou qui en fait partie.*" "*On entend par un commencement de preuve par écrit un écrit qui prouve seulement, ou un fait préparatif à la convention, ou une partie de la convention sans prouver l'autre, ou quelque suite de la convention.*" Prévost de la Jannes, Pr. de la Juris. 2, p. 407. Under the C. N. art. 1347, there can be no doubt, for it distinctly tells us what a *commencement de preuve* is: "*On appelle ainsi tout acte par écrit qui est émanée de celui contre lequel la demande est formée, ou de celui qu'il représente, et qui rend vraisemblable le fait allégué.*" This is not even a new way of stating the old law (2).

Mr. Justice Loranger made this very clear in the case of *Cox & Patton*, and then, curiously enough, dissented. (18 L.C.J. 320). Now the case of *Cox & Patton* amounts to

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(1) "L'aveu de la partie, que l'on appelle aussi en droit confession," 10 Toullier, 260.

(2) Cujas decides the special point: "*Si reus allegat solutionem probare debet,*" 7, c. 874, C.

(3) 10 Toullier, 336, where the whole question, its history and authorities are fully stated.

(4) It is not uninteresting to compare the operation of doctrine on the text of the French ordinances and of the English statute. Lately a school of philosophers has sprung up, both in England and France, who regret the abandonment of the most simple exposition of their statutory evangel. The English innovator is embarrassed by precedent, his French parallel has no such superstitious terror before his eyes.

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(1) It was not intended to exclude verbal testimony, but to check its abuses.

(2) Prevost de la Jannes, Pr. de Juris. 2 p. 407. N. Denisart, *vbo.* commencement de preuve.

this—Patton talked of buying Cox's horse. He was told the price, and went to see it, and offered a cheque for the price demanded. He then took the horse away, drove it to Lachine, brought it back to his own stable and returned it lame the next day. His story was that he took it on trial and that he gave the cheque as security. The majority of the Court held that these answers to interrogatories rendered a sale *vraisemblable*, and allowed the introduction of parol testimony. On the evidence, if admissible, there was no doubt of the sale, and there was no attempt to avoid it.

There is another view of this case which was scarcely touched upon at the argument, but which appears to me conclusive, apart from the question of evidence under the French law, as to the mover's right to have leave to appeal. The matter is commercial, and under the English laws of evidence there could be no doubt the plaintiff could prove his claim (1206 C. C.)

Dorion, C. J., remarked that there were two questions which were not to be confounded—the divisibility of the *aveu* and the *commencement de preuve par écrit.* The Article of the Code (1243) says the admission cannot be divided whether extra judicial or judicial. That had nothing to do with the question of *commencement de preuve.* A *commencement de preuve* is incomplete evidence which you may complete by verbal testimony. In the case of an *aveu* the indivisibility exists whether it would make complete proof or whether it would make a beginning only. The point came up clearly in the case of *Fulton & McNamee* (1) which went to the Supreme Court and was there confirmed. The answer is divisible when the facts are not connected, when the answer is contradictory of the pleas, or when there are contradictions in the answer. These exceptions do not apply in this case, and we say the evidence was properly excluded.

Motion for leave to appeal rejected.

Laflamme, Huntington, Laflamme & Richard for appellant.

Geoffrion, Rinfret & Dorion, for respondent.

(1) 2 S. C. R. 470.

SUPERIOR COURT.

Montreal, July 5, 1884.

Muldoon et al. v. Dunne et al.

Action of account—Costs.

The rendering of an account à l'amiable which has not been accepted does not relieve a rendant compte from the obligation of rendering an account en justice, but the defendant will not be condemned to pay costs.

The facts and circumstances of the case will be found sufficiently explained in the judgment which follows.

The defendants pretended that it was not true either in fact or in law that they had refused to render an account, as alleged in the declaration. They had in fact rendered their account in due form, and the action should have been *en débats de compte* or *en réformation ;—Trudelle* v. *Roy*, 4 L.C. Rep. 222, and *Cummings & Taylor*, 4 L. C. Jur. 304. Under any circumstances the plaintiffs should not have asked that the defendants should be condemned to pay costs, and they had the right to contest the action to that extent.

The plaintiffs on the other hand claimed that the action *en débats* had no existence and was something unheard of. The action *en réformation* only applied where the account rendered had been accepted. The plaintiffs were entitled to sue for an account with the view that such disputed points as had arisen might be decided by the court, a result which otherwise it would never be possible to reach; Dalloz, Jur. Gén. Vo. Compte, Sec. 2, Nos. 31, 35 and 36. As to the costs the defendants should pay them, since they have asked the dismissal of an action which was in every way legal and regular; instead of at once admitting that they were bound to render their account in court. Had they done this they no doubt might have asked that the costs of the action should be reserved, until it should appear upon the discussion of the account itself, which of the two parties to the dispute was really in the wrong; or they might possibly have pleaded as in *Trudelle & Roy*, 4 L. C. Rep. 222,—with the view that should it turn out upon the *débats de compte* that the defendants had always been in the right, the plaintiffs should be condemned to

pay not only the costs of the contested account, but the costs of the action itself which asked for the rendering of an account. But in the present case the account tendered by the defendants does not come up to the date of the action, there being a period of four months administration which has never been accounted for at all; which was not the case in *Trudelle & Roy*; in the second place the amount which appears by the defendants' own account to be due has neither been paid nor duly tendered to the plaintiffs, as in *Trudelle & Roy*, and finally the account tendered in the latter case was in every way regular on its face, whereas here it is not. As to the plaintiffs' right to ask for costs, that right in a case where the account has been duly tendered and is entirely regular in point of form—and the entire dispute is as to the correctness of the account—should depend on the result. If the items disputed were properly disputed and made the defendants the debtors of the plaintiffs, why should not the costs of an action which the defendants rendered necessary, be paid by them, as well as the costs of the contestation of the account? Take the converse case: The *ayant compte* sues for his discharge praying that he may be allowed to render his account in due form in court, with the view that the defendants may be bound to admit it or contest it. Suppose that the account, having been contested, is found by the court to be correct, would not the plaintiff be entitled as well to the costs of his action as to the costs of the contestation of his account?

The following is the judgment:—

"La cour, après avoir entendu les parties par leurs avocats sur le mérite de cette cause, et examiné la procédure, les pièces produites et la preuve, et délibéré;

"Considérant que les défendeurs James Dunne et Patrick J. Durack en leur qualité d'exécuteurs-testamentaires de feu Patrick Muldoon ont, le 26 mai 1883, été requis par les demanderesses représentées par Edmund Barnard, avocat et procureur de la Reine, de fournir un compte à l'amiable de leur administration comme exécuteurs-testamentaires de feu Patrick Muldoon, et qu'ils ont acquiescé à cette demande et produit un compte au dit Edmund Barnard représentant les demanderesses;

"Considérant que ce compte requis et fourni comme susdit n'a pas été accepté par les demanderesses;

"Considérant que lorsque les parties ne peuvent convenir de rendre le compte à l'amiable, il y est procédé en justice, et que les demanderesses n'étant pas satisfaites du compte que leur rendait les défendeurs, pouvaient demander cette reddition de compte en justice aux frais et dépens des dites demanderesses;

"Considérant que les défendeurs sont mal fondés en demandant le renvoi de l'action des demanderesses qui est bien fondée quant à la demande pour un compte en justice;

"Considérant cependant que les demanderesses, vû les dispositions des défendeurs à rendre un compte à l'amiable, ne pouvaient demander contre ces derniers des dépens comme elles l'ont fait dans leur déclaration, si ce n'est en cas de contestation, et que la contestation des dits défendeurs quant à la demande des dépens est bien fondée;

"Considérant que les défendeurs ont fourni avec leur plaidoyer un compte qui parait régulier dans sa forme;

"A maintenu et maintient l'action des dites demanderesses quant à la reddition de compte, et a déclaré et déclare que les dits défendeurs lors de l'institution de la dite action étaient tenus de rendre en justice un compte tel que demandé par les dites demanderesses et comme les défendeurs l'ont fait d'ailleurs, a donné et donne acte aux dits défendeurs de la production qu'ils font du dit compte qui pourra être débattu suivant la loi, chaque partie payant ses frais sur la dite action, les frais de reddition de compte devant être à la charge des demanderesses."

Barnard & Barnard for the plaintiffs.

Curran & Grenier for the defendants.

(E.B.)

REPORTER'S NOTE. — *Vide Woods et ux.* v. *Wilson*, 27 L. C. Jur., p. 149, where the Court of Review reversed a judgment which like the above granted *acte* to the defendants of the production of the account, and condemned the defendants purely and simply to render their account in due course within 30 days. This seems to rest on the ground that upon the action the only issue is whether the defendants are or are not liable to render an account. To give *acte* of the production of the account is to pass upon its regularity in point of form which it seems cannot be done at this stage. But in *Woods et ux.* v. *Wilson*, a difficulty also arose as to the costs, the majority, Torrance and Rainville, JJ., holding that each party to the action should pay his own costs, while Johnson, J., held that all the costs should fall on the plaintiff. The case of *Woods et ux.* v. *Wilson* and the above, however, appear to be entirely different, so far as the equities are concerned. It would, it seems, be an advantage if the conditions which entitle the plaintiff to his costs of action were exactly defined by a higher court.