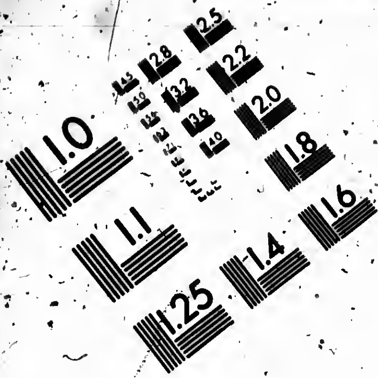

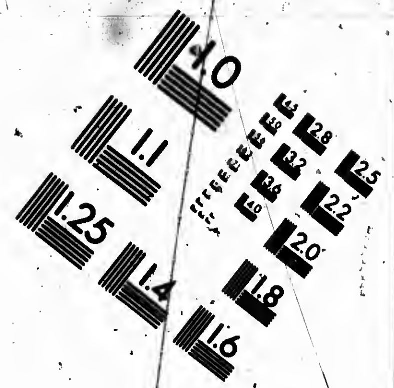

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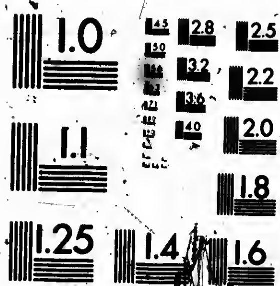

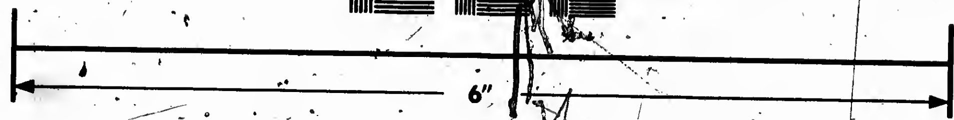

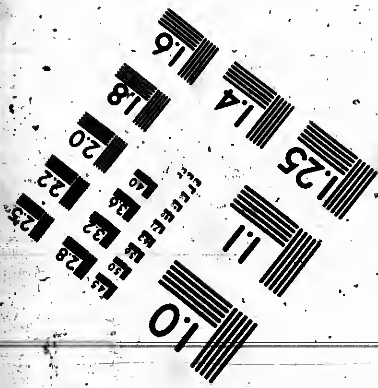

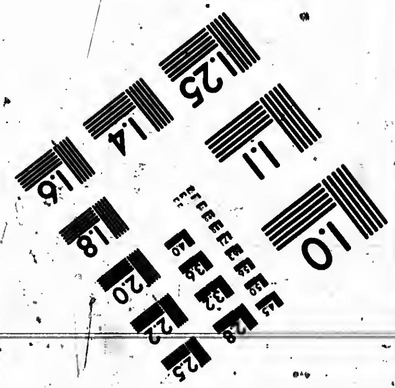

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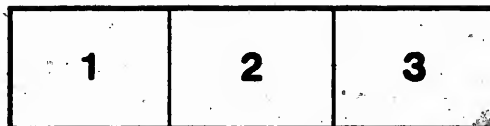

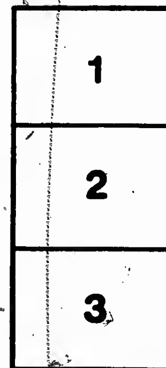

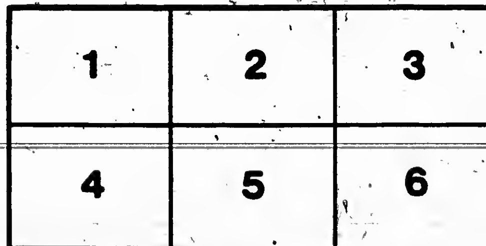

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THE

LOWER CANADA Jurist.

COLLECTION DE DÉCISIONS

DU

BAS-CANADA.

VOL. II.

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

Managing Editor.
F. W. TORRANCE.

THE INDICES
BY S. BETHUNE.

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U.W.O. LAW

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ERRATA.

P. 149, line 9, for "du" read "pu."
" " 12, *dele* "par."
" " 22 and 23, for "père et mère" read "père ou mère."
" " 25, for "l'act" read "l'art."
" " 32, for "dit" read "lit."
" " 40, for "s'élèvent" read "s'élevèrent."
P. 151, line 16, for "comme sont" read "connue sous."
" " 17, for "Coûtume de Paris" read "Coûtume. Donc la legitime dans la coûtume de Paris"
P. 152, line 17, for "qu'elle fût" read "que l'une fût."
" " 34, for "qui y donne atteinte ;" read "qui y ont donné atteinte :"
" " 36, for "délaissés" read "laissés."
" " 15 and 16, *dele* "et aucun ne peut avoir une même date."
" " 17, for "pour cause qui" read "pour cause pie."
P. 223, line 1, *dele* "made up for the Privy Council."
P. 250, near bottom, for Macfarlane v. Scriver No. , read Macfarlane v. Scriver, No. 998.

U.W.O. LAW

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PREFACE TO THE SECOND VOLUME.

THE Editors in concluding the Second Volume of the LOWER CANADA JURIST, would repeat the expression of their obligations to the BENCH for their courteous aid in the preparation of the reports; and also to their *Confrères* of the BAR for the assistance they have rendered.

A work like the present is published under great disadvantages, owing to the multiplicity of the engagements of the Editors, which have only allowed them to put the cases through the press, under the disturbing influences of a variety of matters requiring attention.

For the errors and mistakes which may be detected, they humbly crave indulgence and forgiveness, for no one who has any conception or experience of the labour and care required in carrying such a work through the press, will feel surprise at some blemishes and inaccuracies.

> " *Non ego paucis*
> *Offendar maculis, quas aut incuria fudit,*
> *Aut humana parum cavit natura.*"
>
> HORATII Ep. ad. Pis. 352.

The labour has been attended with no pecuniary recompence, but it has been a work of love; and if the editors and contributors have in any degree fulfilled a portion of the debt which a great English lawyer has said every man owes to his profession, they are well and fully repaid for their toil.

The present volume has been completed under the editorial superintendence of Messrs. BETHUNE, LAFRENAYE and TORRANCE, and of these, Mr. TORRANCE has had the general superintendence of the work, and been the medium of communication with the printer.

Mr. LAFRENAYE has had charge of the revision and correction of the reports in French.

The number of cases reported in the volume, including five election cases (reported by Mr. ABBOTT) is 138.

Each case reported has the initials of the contributor.

In conclusion, those who value this publication, are under great obligations to the liberal publisher, Mr. JOHN LOVELL, who has issued it at his own risk and cost; and without this remarkable act of liberality on his part, it is unlikely that the present volume would have been published, for it does not pay expenses, although the staff of editors and contributors is honorary, and receives no pecuniary compensation.

U.W.O. LAW

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IN APPEAL.

FROM THE DISTRICT OF ST. FRANCIS.

MONTREAL, 3rd OCTOBER, 1857.

Coram LAFONTAINE, C. J., AYLWIN, J., DUVAL, J., CARON, J.

BENJAMIN WILCOX *et uxor*, (*Defendants in the Court below*,)
Appellants.

ET

BARNABAS WILCOX, (*Plaintiff in the Court below*,)
Respondent.

SOCCAGE LANDS.—TENURE.

Held 1o. that before the British act, 6 Geo. 4, cap. 59, commonly called the Canada Tenures Act, became law in Lower Canada, the Customary Dower of the Custom of Paris was claimable on lands in Lower Canada granted and held by the free and common soccage tenure.

2o. That by the above British Act, the Law of England as to dower, descent, and alienation, was introduced into Lower Canada, as an incident of the tenure of lands held in free and common soccage.

3o. That the defendant Sophia Blodget being married to Joseph Wilcox on the 31st January, 1825, before the above act became law, while the said Joseph Wilcox was proprietor of land in Lower Canada held by the tenure of free and common soccage, was entitled to claim on the land in question her customary dower under the custom of Paris.

This was a petitory action wherein the Respondent, as Plaintiff in the Court below sought to recover the possession of a farm and its appurtenances, part of Lot No. 3 in the 2nd range in the township of Orford, in the District of St. Francis. His title was alleged to be a deed of lease and release, executed before Ritchie, N. P., and witnesses, 2nd February, 1826, from the late Joseph Wilcox to him. The respondent was the eldest son of said Joseph Wilcox, by his first marriage. The land was held in free and common soccage.

The appellant, Sophia Blodget, was the wife by second marriage, of said Joseph Wilcox, who several years prior to the institution of the action, died, and Benjamin Wilcox, the other appellant, was, at the time of the institution of the said action, and thereafter continued to be the husband of the said Sophia Blodget.

The appellants met the action by several grounds of defence contained in one special plea of peremptory exception *en droit.* 1o. That the said late Joseph Wilcox from the 1st November 1815, when he acquired said piece of land, up to the 28th April 1847, when he died, held and occupied the same as the absolute legal proprietor *animo domini*, without interruption or molestation.—That on the 31st January 1825, at the township of Ascot, in the said District, the said Joseph Wilcox, was married to the said Sophia Blodget without any prenuptial contract, and that the usual customary dower *douaire légal et coutumier* existed by reason of such marriage, that on the 6th March 1846, the late Joseph Wilcox made his last will before William Ritchie and colleague, and thereby

NOTE.—In order to render the report of this important case more complete, it has been thought advisable to print in an appendix *inter alia* the opinions of the judges who sat in the famous case of Stuart v. Bowman, in which the tenure of the lands granted in Lower Canada in free and common soccage was fully discussed. These opinions have been already published in the reports of Stuart *et ux.* v. Bowman, to be found in the 2d and 3rd volumes of the Lower Canada Reports. (*Vide Appendix.*)

U.W.O. LAW

Wilcox v. Wilcox.

constituted the said Sophia Wilcox his sole testamentary legatee. That under the said will, the said Sophia Blodget held possession of the said land from the death of Joseph Wilcox to the date of the institution,—that Sophia Blodget thereupon claimed the long prescription of 30 years against the respondent arising from the foregoing possession,—that the said land had been acquired by the prescription of *dix ans entre présents, vingt ans entre absens*,—that no tradition of the property had been made to the respondent, and that no tradition was intended to be made until he should have paid a certain note for £200, made by the respondent in favour of the late Joseph Wilcox on the 19th February 1826; which was produced by the Appellants,—that no consideration was given by the respondent for the deed of sale,—that the respondent never had, and therefore never lost possession :—that respondent before the institution of the action had divested himself of all interest, right, and claim to the land, having exchanged it with one Lemual Cushing, passed before Howard, N.P., on the 8th December 1852,—that Sophia Blodget had always been and still was in possession, and respondent never was, and that therefore she was entitled to be kept in possession in preference to respondent, even if his title was as good as hers, that their titles had both been derived from the same person Joseph Wilcox, and that *melior est conditio possidentis.*

The appellants also by a *défense en fait*, denied the respondent's allegations, and particularly negatived the acquisition by the respondent of the land in question.

The respondent on the other hand contended that most of these grounds were unfounded in law, and such as were not, were unfounded in fact.

But the point in the Court below which gave rise to serious discussion, was the question as to the *douaire coutumier*, customary dower extending to the land in question. The case brought before the Court in definitive form, the question whether lands held in free and common soccage were subject so far as relates to descent, dower, and alienation, to the rules of French law, as in force in Lower Canada, or to those of the English law.

The Court below, composed of Bowen, Chief Justice, and Day, and Meredith, Puisne Justices, rendered the following Judgment, at Sherbrooke, on the 30th January, 1856.

"The Court, &c., * * * * * * * * * * * * * * *

Considering that the Plaintiff hath proved the material allegations of his declaration, and that the defendants have failed to establish that by reason of the marriage of the said Sophia Blodget with the late Joseph Wilcox, and by virtue of the laws in force, in that behalf the land and premises in the said declaration described and sought to be recovered, were made and became subject or liable to be taken or held by the said Sophia Blodget, by right of dower for her legal and customary dower, *douaire légal et coutumier*, in the manner by her alleged, and that neither by reason of such pretended right nor of any other matter or things by the defendants alleged in their pleas in this cause fyled, ought the plaintiff to be prevented from obtaining the conclusions of his said declaration, doth dismiss the said plea, and doth adjudge and declare the plaintiff to be the owner and proprietor of one hundred and fifty nine acres of land,

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&c., (*description*,) and the said defendants who are in the unjust and illegal possession of said one hundred and fifty-nine acres of land, hereinbefore last described and founded, adjudge and condemn to desist from, quit, and abandon the same, and deliver up the same and every portion thereof, to the said plaintiff, * * * * * * * * * Saving to the said Sophia Blodget such recourse as by law she may have, in or upon the said lot of land and premises, by reason of her marriage with the late Joseph Wilcox. The honorable Chief Justice Bowen, dissenting."

The Judgment of the Court of Appeals composed of Lafontaine, C.J., Aylwin, J., Duval, J., Caron, J., now reversed the Judgment of the Court at Sherbrooke, Mr. Justice Aylwin, dissenting.

Lafontaine, *C. J.*, spoke as follows:

1. La question de savoir quelles sont les lois qui ont régi les terres en *franc et commun socage*, depuis la cession du Canada à l'Angleterre, et si ce sont encore les mêmes lois qui les régissent dans le Bas-Canada, est la principale question de droit que cette cause présente à notre examen.

Cette question, qui naguères a créé une si vive agitation, parceque malheureusement elle a été le plus souvent discutée au point de vue des intérêts privés et sous l'influence des préjugés, plutôt qu'au point de vue purement légal, n'offre plus aujourd'hui le même intérêt qu'elle a pu avoir par le passé. Bientôt elle ne sera plus que du domaine de l'histoire, si je comprends bien la portée d'un acte récent de notre législature, intitulé : " Acte pour fixer la loi relativement aux terres tenues en franc et commun socage dans le Bas-Canada, " (chap. 45), promulgué le 10 juin 1857, par conséquent depuis que cette cause a été plaidée devant ce tribunal. Cependant le nouvel acte excepte de ses dispositions les procès encore pendants ; ces procès devant être jugés comme ils eûssent du l'être avant sa promulgation. L'on nous dit que cette cause sera probablement la dernière dans laquelle la question puisse être soulevée ; si c'est le cas, je m'en félicite. Celui qui voudra écrire l'histoire de notre législation, aura seul le privilége de s'en occuper à l'avenir.

Pour être traitée à fond, la question exigerait une bien longue dissertation, étayée, non seulement de citations d'auteurs qui font autorité, mais encore de documents historiques qu'il faudrait transcrire et expliquer. Cette tâche, je n'ai pas le temps de l'entreprendre. Du reste, en ce qui regarde la présente cause, le rapport qui a été fait de celle de *Stuart* et *Bowman*, me permet d'abréger considérablement. Je dois donc me borner pour le moment à renvoyer aux 2e et 3e volumes des " Décisions des tribunaux du Bas-Canada, " où ce rapport a été publié. L'on y trouvera les moyens des parties et les opinions des juges qui ont eu à prononcer dans la cause, en première instance et en appel. Les réponses que je donnerai aux diverses questions qui se présentent, feront connaître quelles sont celles de ces opinions que j'adopte, et quelles sont celles que je n'adopte pas. Comme plusieurs des arguments à l'aide desquels j'ai formé mes conclusions, ont déjà été exposés dans cette cause de *Stuart* et *Bowman*, j'éviterai, autant que possible, de les répéter ici. (1)

(1) La cause de *Stuart* et *Bowman* a été jugée en première instance, à Montréal, le 26 mars 1851, et, en appel, le 12 juillet 1853.

En première instance, cette cause a été plaidée devant les Honorables Juges Smith,

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2. Les principaux points de la discussion sont ceux-ci :

1o. Le changement de domination, a-t-il eu, par lui seul, l'effet de substituer les lois anglaises aux anciennes lois du pays ?

Ou, si ce changement n'a pas eu, par lui-même, un tel effet ;

2o. La proclamation du Roi d'Angleterre, du 7 octobre 1763, a-t-elle eu cet effet ?

Ou, si cette proclamation a été elle-même impuissante à cet égard ;

3o. La substitution des lois anglaises aux lois françaises, a-t-elle été opérée par l'ordonnance provinciale, du 17 septembre 1764 ?

Ou, si les lois anglaises n'ont pas été introduites en Canada, soit par le seul fait du changement de domination, soit par la proclamation de 1763, ou l'ordonnance de 1764 ;

4o. L'acte impérial de 1774, chap. 83, ordinairement appelé "l'acte de Québec," a-t-il eu l'effet d'introduire ces lois, ou de les conserver, (en supposant qu'elles eûssent été introduites auparavant), en ce qui regarde les terres concédées en franc et commun socage ?

Vanfelson et Charles Mondelet. Le jugement, qui a eu l'assentiment de ces deux derniers contre l'avis du juge Smith, déclare que jusqu'à l'acte impérial de 1825, appelé ordinairement "l'acte des tenures," aucune partie des lois civiles anglaises n'avait été introduite en Canada.

En Cour d'Appel, elle fut plaidée devant les Honorables Juges Rolland, Panet et Aylwin, juges de cette cour, et devant l'Honorable Dominique Mondelet, juge suppléant. Leur jugement, rendu à l'unanimité, donna gain de cause à l'Appelant, Sir James Stuart, qui était alors le juge en chef de la même cour. Mais ce jugement, *de fait*, ne comporte pas de décision sur la question dont il s'agit ; le juge Aylwin, quant à cette question, différant *toto cœlo* de ses confrères, et surtout du juge Rolland, comme l'on peut s'en convaincre par leurs opinions rapportées dans *l'Appendice* à ce rapport de la présente cause de *Wilcox* et *Wilcox*. En effet, dans le compte rendu de la cause de *Stuart* et *Bowman*, le juge Rolland aurait dit : "L'on comprendra donc facilement qu'individuellement je n'ai pas dû trouver de difficulté à prononcer *d'après notre droit commun* sur le titre des demandeurs. Le jugement est formulé de manière à ne pas repousser l'idée qu'il serait fondé sur un droit exceptionnel. C'est pourquoi il est prononcé à l'unanimité, *quoique les juges ne soient pas tous d'accord sur cette question controversée*, chaque juge pouvant avoir son opinion particulière sur ce point."

Il est aussi à propos de remarquer que dans le *factum* des Appelants, se trouve le passage suivant :

"1st reason" (assigned by the judgment appealed from) ; "The civil laws of England have not, either by the proclamation of 1763, or by the act of the Imperial Parliament of 1774, ch. 83, been introduced into Canada."

"This proposition is entirely irrelevant, and wholly foreign to the subject in dispute in this action. It is not necessary to contend, nor has it been contended, or asserted by the Plaintiffs in this action, (though it be a point on which difference of opinion has been entertained by high authorities,) that the civil law of England was introduced into Canada by the proclamation of 1763."

Il parait en outre qu'une moitié des chefs de la déclaration dans la cause de *Stuart* et *Bowman*, reposait sur le droit français, et l'autre moitié sur le droit anglais. "The Plaintiffs title," remarque le juge Smith, "has been alleged by various counts as subsisting under both the english and french systems of law." Ce qui ne prouve pas que les demandeurs fûssent bien certains du succès, s'ils n'avaient eu à invoquer que le droit anglais.

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5o. Enfin, quel a été, quant à ces mêmes terres, l'effet de la 8e section de l'acte impérial de 1825, chap. 59, ordinairement appelé "l'acte des tenures du Canada"?

3. Sur le premier point, celui de l'effet du changement de domination; je réponds négativement à la question posée plus haut. Et empruntant au juge en chef Hey ses propres expressions, je dis avec lui: "It is a well known and "indisputable maxim of the law of nations, adopted and confirmed by the law "of England, that the laws of a conquered people continue in force, till they "are expressly changed by the will of the conquering nation." (1). Voir *appendice*, No. 1.

Lewis (2) s'exprime de même, en parlant de colonies où régnait déjà un système de lois régulier, acquises par l'Angleterre, soit par cession, soit par conquête. "The body of the english law does not obtain in dependencies so acquired...... If a territory belonging to an independent state, or being itself independent, is acquired by cession or conquest, the system of law which obtains in it at the time of the acquisition, can hardly fail to be considerably different from that of the dominant country which acquires it. In general, a country thus acquiring a dependency, is satisfied with re-organizing its local government, and modifying its public law, and is contented to leave its civil law (or *jus privatum*) unchanged. By this mode of proceeding, the dominant country secures its own dominion, and avoids the production of confusion which must inevitably ensue in any community upon a sudden change of its law of property and contracts......

"Thus Trinidad retains much of the spanish law; Demerara, the Cape of Good Hope, and Ceylon, retain much of the dutch law; *Lower Canada retains the french civil law according to the Coutume de Paris;* Ste. Lucie retains the old french law as it existed when the island last belonged to France; Mauritius retains such of the french codes as were extended to it...... Blackstone (3) properly remarks that the common law of England does not obtain, as such, in an english dependency acquired by conquest or treaty."

4. C'est là un principe fondamental du droit public anglais, qui étend sa protection pleine et entière à tous ceux qui, étant habitants d'une colonie acquise par le Souverain de la Grande Bretagne, deviennent par cela même citoyens anglais. C'est un droit sacré auquel ce Souverain ne peut porter atteinte, encore bien moins un de ses généraux, qui accepte une capitulation. Je n'ai jamais pu comprendre le raisonnement au moyen duquel on a quelque fois tenté de faire déduire, *de plano*, de la réponse du général Amherst à l'article 42 de la capitulation du 8 sept. 1760, la substitution des lois anglaises aux lois françaises. L'article 42, proposé par le Marquis de Vaudreuil, était en ces termes:

(1) M. Hey a été le second juge en chef de la province de Québec, sous la domination anglaise. On lui attribue, et avec raison, je crois, "a view of the civil government and administration of justice in the Province of Canada, while it was subject to the Crown of France;" écrit dont est extrait le passage cité et qui vient d'être publié par les éditeurs du *Jurist* du Bas-Canada.

(2) "Essay on the government of dependencies." London, 1841, p. 202 et suiv:

(3) Commentaries, vol. 1, p. 108.

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"Les Français et Canadiens continueront d'être gouvernés suivant la Coutume de Paris, et les lois et usages établis pour ce pays ; et ils ne pourront être assujétis à d'autres impôts qu'à ceux qui étaient établis sous la domination française."

Le général anglais dit : "Répondu par les articles précédents, et particulièrement par le dernier ;" c'est-à-dire, "ils deviennent sujets du roi."

Voici la différence qu'il y a entre cette réponse et une réponse affirmative qui eût été donnée par le général Amherst, en disant sans réserve, comme il l'avait déjà fait relativement à d'autres articles : "accordé."

Une telle réponse, par ce mot pur et simple "accordé," eût été une promesse, un engagement solennel, obligatoire pour le roi et le parlement anglais. Ceux-ci eûssent été liés, par la loi des nations, à maintenir inviolable le 42e article de la capitulation.

Le général Amherst, en répondant, "ils deviennent sujets du roi," n'a fait que la seule réponse qu'il pût faire, s'il ne voulait pas prendre sur lui, par un "accordé" solennel, d'engager l'honneur et la parole de son souverain et de son gouvernement. Le droit public anglais ne lui permettait pas de faire une autre réponse ; et ce même droit public maintenait et continuait, dans toute leur force, après la capitulation, les lois du Canada, jusqu'à ce qu'elles fûssent abrogées ou modifiées par une *autorité compétente.* Le résultat eût été le même, si l'article 42 n'eût pas été proposé.

Observons que le traité de Paris, de 1763, par lequel le Canada a été cédé à l'Angleterre, n'a rien changé à cet état de choses ; au contraire, il l'a confirmé et maintenu.

5. Voulant suivre, autant que possible, l'ordre des dates, je crois à propos de consigner ici l'opinion du procureur-général NORTON, dans sa réponse aux "Lords Commissioners for trade and plantations," du 27 juillet 1764. La question posée était celle-ci : "Whether such of the french or spanish inhabitants of *Canada*, Florida, &c., &c., as being born out of the allegiance of His Majesty, and also remain in the said countries under the stipulations of the definitive treaty (1763), are, or are not, under the legal incapacities and disabilities, put upon aliens and strangers by the laws of this kingdom in general, and particularly by the act of navigation, and the other laws made for the regulating the plantation trade."

Si, d'un côté, cette question nous fait voir qu'il y avait des personnes qui ne connaissaient pas la loi des nations, et le droit public anglais en particulier, aussi bien que le général Amherst qui avait répondu ; "ils deviennent sujets du roi ;" de l'autre côté, elle nous fait voir en même temps, en autant qu'il s'agit du Canada, l'origine des luttes incessantes que le pays a eu à subir, dans un esprit mal compris de domination, ou d'intérêt privé, ayant pour effet de méconnaître des lois civiles, dont, plus tard, on a été forcé d'avouer la supériorité sur celles que l'on voulait leur substituer. Pour justifier cette assertion, il suffit d'en appeler à la législation locale de ces dernières années, et principalement, dans le cas actuel, à l'acte précité du 10 juin 1857.

6. Que répond le procureur-général NORTON ? "I am humbly of opinion, that those subjects of the Crown of France and Spain, who were inhabitants of

Canada, Florida, and the ceded Islands in the West Indies, and continued there under the stipulations of the definitive treaty, having entitled themselves to the benefit thereof, by taking the oath of allegiance, &c., are not to be considered, in the light of aliens, as incapable of enjoying, or acquiring, real property there, or transmitting to others for their own benefit; for, I conceive that the definitive treaty, which has had the sanction, and been approved, and confirmed, by both Houses of Parliament, meant to give, and that it has, in fact, and in law, given to the then inhabitants of those ceded countries, a permanent transmissible interest in their lands there; and that to put a different construction upon the treaty, would dishonour the Crown, and the national faith, as it would be saying that, by the treaty, they were promised the quiet enjoyment of their property, but, by the laws, were to be immediately stripped of their estates." (1)

7. Ainsi, ni la domination temporaire et à main armée de 1760 à 1763, ni la domination permanente, cédée par le Traité de Paris, ni ce Traité, et encore bien moins la capitulation, n'ont pu avoir l'effet de faire disparaître les anciennes lois du pays. La loi des nations, et le droit public anglais en particulier, répudient la proposition contraire. (Voir *appendice*, No. 1.)

8. Vient à présent, dans l'ordre que j'ai adopté, la proclamation du 7 octobre 1763. (Voir *appendice* No. 2, lettre C; opinion du juge C. Mondelet.)

Il y a eu, à cet égard, diversité de sentiments. Sur ce point encore, je concours dans l'opinion des juges qui, dans la cause de *Stuart* et *Bowman*, ont soutenu que cette proclamation n'avait pas eu l'effet d'introduire les lois anglaises, (le *jus privatum*). J'adopte, sur cette question, la plupart des raisons qu'ils ont données, et qui y ont immédiatement rapport; car il y en a d'autres dans lesquelles je ne saurais concourir.

Il me semble qu'on ne doit et qu'on ne peut voir, dans cette proclamation en autant qu'il s'agit des lois anglaises, qu'une déclaration de l'intention du Roi d'en faciliter plus tard l'introduction *graduellement*, selon les circonstances, par l'entremise d'une législature provinciale, telle que celle dont l'établissement était promis par cette même proclamation; promesse qui, évidemment, en faisait le principal objet. C'était une législature qui devait être composée de trois branches, d'un gouverneur, d'un conseil, et des représentants du peuple. Du reste, sur ce point, je ne peux mieux faire que de renvoyer à la dissertation si fortement raisonnée de M. le juge en chef Hey, celle dont j'ai déjà présenté un extrait. (Voir *appendice*, No. 1).

9. Le troisième point de la discussion a trait à l'ordonnance du 17 septembre 1764, promulguée par le gouverneur Murray, avec l'assistance et l'avis de son conseil *seulement*. (Voir *appendice*, No. 2, lettre F, opinion du juge Aylwin.)

Dans l'incertitude où étaient les personnes qui voulaient, à tout prix, être régies par les lois anglaises; et c'était assez naturel, pour celles qui avaient été élevées sous le régime de ces lois; dans l'incertitude, dis-je, où étaient ces personnes, de savoir sur quoi se fonder, pour soutenir leur prétention que les lois anglaises avaient été substituées aux lois françaises, elles invoquaient tour-à-tour, ou l'article 42e de la capitulation, auquel le général Amherst avait répon-

(1) Chalmers: "Opinions of Eminent L[illegible]s, &c.," vol. 2. p. 364-5-6.

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du, " ils deviennent sujets du roi, " ou bien, la proclamation de 1763, ou bien encore, l'ordonnance de 1764, ou enfin, le simple fait du changement de domination.

Il n'y avait, en cela, rien qui doive surprendre. D'abord ces personnes étaient, comme bien d'autres, dans tous les temps et dans tous les lieux, facilement disposées à subir l'influence des préjugés nationaux, et de plus l'influence de l'intérêt privé, influence qui n'est point celle qui fausse le moins le jugement, même chez les personnes les plus capables de bien apprécier une position quelconque, dans des circonstances données, lorsque cette influence n'existe pas. Ensuite ces mêmes, personnes avaient, pour les justifier en quelque sorte, l'opinion du Baron Masères, *lorsqu'il était procureur-général de la province de Québec.* (1) Mais plus tard, après que la révolution américaine eût éclaté, Masères a, dans son *Canadian Freeholder*, publié à Londres en 1779, soutenu des principes et des règles d'interprétation légale, bien plus avouables et mieux reconnus dans le droit public, que ceux qu'il s'était efforcé de faire prévaloir à Québec.

Sur cette partie de la discussion qui se rapporte à l'effet que peut avoir eu l'ordonnance du 17 sept. 1764, je concours non seulement dans l'opinion du juge en chef Hey, (*appendice* No. 1), mais encore dans celle exprimée par Masères lui-même dans son projet de rapport au gouverneur Carleton. Il y reconnait que si les lois anglaises n'avaient pas été introduites antérieurement à l'ordonnance en question, cette ordonnance n'avait pu, par elle-même, avoir l'effet de les introduire.

We (2) shall say nothing concerning the validity of your Majesty's proclamation of the 7th of October, 1763, and the high legislative authority which your Majesty has therein thought proper to exercise with respect to your Majesty's new colonies, though there are persons who think that this branch of your Majesty's royal prerogative ought rather to have been exercised in conjunction with both houses of parliament: but we should suppose that what your Majesty has thought fit to do in this respect by the advice of your Majesty's privy council must be legal, and consequently that the operation of the words above cited from your Majesty's said proclamation is complete and incontestable so far as the true meaning of them can be ascertained. But if your Majesty in your royal wisdom should interpret them in a different sense from that in which they have been generally understood, and should declare that they were not meant to introduce the whole body of the laws of England that were not in their nature local, but only to introduce some particular parts of them that were more immediately beneficial to your Majesty's subjects, agreeably to the sense in which they were understood by your Majesty's attorney and solicitor general in April, 1766; or, if your Majesty should declare that they were not meant to introduce immediately any part of the laws of England into those provinces, but only to promise and assure your Majesty's British subjects that your Majesty would, in due time and place, and by particular and express promulgations, introduce some select parts of the laws of England that were more im-

(1) Voir le *projet* de son rapport au gouverneur Carleton, qui fut délivré le 27 Février 1769, "but had not the good fortune," dit Masères, "to be approved by his Excellency." (Collection of several commissions and other public instruments, proceeding from His Majesty's royal authority, relating to the Province of Quebec. Collected by Francis Masères, Esq., His Majesty's Attorney-General in the said Province London, 1772.)

(2) Maseres, pp. 24-27

mediately conducive to their welfare and satisfaction; in either of these cases we beg leave to submit it to your Majesty's consideration, whether the ordinances above mentioned, of the 17th of September and the 6th of November, can be deemed of sufficient validity to introduce any part of the laws of England that were not already established by your Majesty's said proclamation. Our reasons for doubting this are as follows:

Your Majesty by your commission to General Murray, dated the 21st day of November in the 4th year of your Majesty's reign, to be governor in chief of this province, was pleased to delegate unto him a certain limited legislative authority, to be exercised by him by and with the advice and consent of your Majesty's council of the province, and of the general assembly of the freeholders and planters in the same therein directed by your Majesty to be summoned, to wit, an authority to make, constitute, and ordain laws, statutes, and ordinances for the public peace, welfare, and good government of the said province, not repugnant, but, as near as may be, agreeable to the laws and statutes of your Majesty's kingdom of Great Britain. But your Majesty did not in any part of the said commission delegate either this or any other legislative power to your said governor to be exercised by him with the advice and consent of the council only, without the concurrence of an assembly. Now no assembly of the freeholders and planters has hitherto been summoned; consequently all the ordinances that have hitherto been made, so far as they have a legislative tendency, have been made without any warrant or authority from your Majesty's commission to your governor, and perhaps may, upon that account, be justly contended to be null and void.

If this be so, the words in the ordinance of the 17th of September 1764, which direct the court of King's Bench to determine all civil and criminal causes agreeably to the laws of England, and the other words of that ordinance, and of the ordinance of the 6th of November following, which purport to introduce the laws of England into this province, can have no legal operation to change the laws which were then subsisting in the country; and the ordinance of the 17th of September must be considered only as an executive act of government, erecting and constituting courts of judicature in the province for the administration of the laws in being, whatever those laws might be; and in this view it is certainly a legal and valid ordinance, because your Majesty had, by an express clause in your commission aforesaid, given your said governor full power to erect such courts with the advice and consent of the council only.

It is true indeed that your Majesty did give a private instruction to your late governor, purporting to communicate to him a certain degree of legislative authority to be exercised by him, by and with the consent of the council only, without any assembly; to wit, *an authority to make such rules and regulations as shall appear to be necessary for the peace, order, and good government of the said province, taking care that nothing be passed or done that shall any ways tend to affect the life, limb, or liberty of the subject, or to the imposing any duties or taxes.* But we submit it to your Majesty's consideration, whether a power of this kind can be communicated by any other instrument than letters patent under your Majesty's great seal of Great Britain, publicly read and notified to the people, to the end that the acts done by virtue of them may have a just claim to their obedience; for otherwise they may alledge that they are faithful and loyal subjects to your Majesty, and ready to pay obedience to every thing that your Majesty's self shall ordain, and likewise to every thing that shall be ordained by your Majesty's governor by virtue of powers properly communicated to him by your Majesty; that consequently they will obey him in every thing he shall do by virtue of the powers conveyed to him in your Majesty's commission which has been publicly read to them; but that in the things not warranted by the said commission, but said to be done in pursuance of certain private instructions that have not been made known to them, and which they are therefore uncertain whether he has received or not, they cannot presume that he acts by your Majesty's authority, and therefore are not bound to obey him. For this reason we humbly apprehend, that the private instruction before-mentioned cannot have

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legally conveyed to your Majesty's governor and council the legislative authority mentioned in it, small and narrow as it is.

But secondly, if a private instruction should be deemed to be a legal method of communicating a legislative authority, yet the power conveyed to the governor and council of this province by the instruction above-mentioned is much too confined an authority to warrant the general introduction of the English laws; particularly of the criminal laws, which all affect either life, or limb, or liberty; and the process of arrests of the body in civil suits for debt and trespass; and the power of committing persons to prison for contempts of court committed in the presence of your Majesty's judges; and that of granting attachments of the body for disobedience or resistance to the orders of your Majesty's superior courts of judicature, when such acts of disobedience or resistance are committed out of court; which all immediately affect the personal liberty of your Majesty's subjects in this province.

These are the reasons upon which, we conceive, the legality of the introduction of the laws of England into this province by the provincial ordinances above-mentioned may be called in question.

But these reasons have no relation to the other high instruments of government by which these laws may be supposed to have been introduced here, namely, the articles of capitulation in 1760, the 4th article of the definitive treaty of peace, and your Majesty's royal proclamation of the 7th of October 1763. If these instruments have introduced the laws of England, they may have a legal existence in this province, notwithstanding the want of legal authority in the two provincial ordinances above-mentionned. But if your Majesty should determine that these instruments have not introduced the laws of England into this province, then, as we conceive, it will follow, that the whole body of those laws has not yet been legally introduced into it, but that those parts only of the laws of England have a legal existence in this province which are contained in the acts of parliament above-mentioned, which by their own import and operation, and without needing any new instrument of government to introduce them, extend to all your Majesty's dominions in America.

10. Sur les questions qui précèdent, on peut, on doit même consulter les opinions données par le procureur-général Yorke et le solliciteur-général De Grey, dans leur rapport au Roi, du 14 avril 1766, et ensuite par le procureur-général Thurlow, citées par l'Honorable Juge Charles Mondelet dans la cause de *Stuart* et *Bowman*. (1) (*Appendice* No. 2, lettre C.) Ces opinions justifient ce que je viens de dire sur la non-introduction des lois anglaises (du *jus privatum*). A ces opinions des premiers officiers en loi de la couronne, en Angleterre, j'en ajouterai une autre qui n'est pas citée dans la cause de *Stuart* et *Bowman*, et qui se trouve rapportée dans un écrit publié à Londres, en 177[illegible] [illegible]ment après la promulgation de "l'acte de Québec," et en défen[illegible]. (2). Je ne connais pas le nom de l'auteur de cet écrit, mais il [illegible] qu'il était bien au fait de toutes les questions agitées alors relativement au Canada et qu'il a du être dans une position à prendre une part active à la passation de l'acte [illegible]rial. Et son opinion et les faits qu'il rapporte doivent avoir d'autant

(1) "De[illegible]ib. du B. C.", t. 2. p. p. 408 et suiv : aussi, Smith, History of Canada, [illegible] : contenant au long le rapport de MM. Yorke et de Grey.

(2) "T[illegible] policy of the late act of Parliament for making more effectual provision [illegible] government of the Province of Quebec, asserted and proved; and the conduct of administration respecting that Province stated and vindicated. London. Printed for J. Wilkie, at No. 71, in St. Paul's church-yard." On trouve cet écrit dans un volume de pamphlets appartenant à la bibliothèque du Parlement du Canada.

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plus de poids sur la question légale qui nous occupe, qu'il est loin de se montrer exempt de préjugés sous plus d'un rapport.

" In 1765, the Lords of trade sent the following query to Sir Fletcher Norton and Sir William de Grey, then Attorney and Solicitor General : " Whether His Majesty's subjects, being *Roman* catholics, and residing in the countries ceded to His Majesty in America by the treaty of Paris, are not subject, in those colonies, to the incapacities, disabilities and penalties, to which Roman Catholics in this kingdom are subject by the law thereof ? " To which query those great men answered on the 10th of June, " that they were not." And the Advocate, Attorney and Solicitor General, in their joint report to the Privy Council upon the propositions of the Board of trade, presented on the 18th January 1768, state to be their opinion, " that the several acts of Parliament, " which impose disabilities and penalties upon the public exercise of the Roman " Catholic religion, do not extend to Canada, and that His Majesty is not by " His prerogative enabled to abolish the Dean and Chapter of Quebec, *nor to " exempt the protestant inhabitants from paying tithes to the persons legally " entitled to demand them from the Roman Catholics.* (1).

11. Les citations qui précèdent n'ont été faites que pour démontrer la proposition que, d'après les règles reçues de l'interprétation des lois, et les principes de droit qui prévalent en cette matière, la proclamation du 7 octobre 1763, n'a pas eu, et n'a pu avoir, sous le rapport de l'introduction des lois anglaises, l'effet que les défenseurs du système adopté par l'Intimé se sont efforcés d'attribuer à cette proclamation ; qu'au contraire ma proposition a eu pour elle, à une époque rapprochée de la proclamation, l'assentiment des premiers officiers en loi de la couronne, en Angleterre, bien plus, l'assentiment de ceux-là mêmes qui remplissaient les fonctions de Procureur et de Solliciteur-général, Yorke et Norton, lorsque cette proclamation fut émanée, et qui, en toute probabilité, l'avaient eux-mêmes rédigée.

12. Si donc la proclamation de 1763, n'a pas eu l'effet de substituer les lois anglaises aux lois françaises, l'ordonnance de 1764 a encore bien moins pu avoir cet effet. J'en ai plus haut assigné la raison, en invoquant l'opinion du juge en chef Hey, et celle du Baron Masères, même lorsqu'il était Procureur-général de la Province de Québec.

13. D'un autre côté, je dois admettre qu'il est *de fait* qu'à l'ombre de cette ordonnance de 1764, les tribunaux qu'elle avait établis, appliquaient quelquesfois, dans leurs décisions, la loi civile anglaise ; ce qui paraît avoir eu lieu en matière personnelle, principalement dans ce qui se rattachait aux affaires commerciales ; mais il est également constant, (et il suffit de parcourir les régistres de ces tribunaux pour s'en convaincre), qu'ils adoptaient le plus souvent en matière personnelle, et presque toujours, si ce n'est même toujours, en matière

(1) D'après la préface du 1er volume de la collection de *Chalmers*, déjà cité, (voir page 44, 45 et 46), il paraît que le 7 Octobre 1763, Yorke était Procureur-général, et Norton Solliciteur-général ; que le 10 Juin 1765, Norton était en effet Procureur-général, et de Grey Solliciteur-général ; que le 14 Avril 1766, Yorke était de nouveau Procureur-général, et de Grey Solliciteur-général ; que le 18 Janvier 1768, de Grey était Procureur-général, et Ellis Solliciteur-général.

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réelle, les anciennes lois du pays, c'est-à-dire les lois françaises, comme règles de leurs décisions.

"All disputes," dit Christie, (1) "from this time forward, between the new subjects concerning rights in land and real property, inheritance, succession to, and division of the same among coheirs, continued as previous to the conquest, to be determined according to the ancient customs and civil laws of Canada, and by judges conversant with those laws, selected from among their own countrymen; and these also were the rules of decision in the like matters, between the old subjects of the King who had immigrated hither and settled in the province. Most of these expected, however, that in all cases wherein *they* were personally concerned, civilly or criminally, the laws of England were to apply, in conformity as they read it, with His Majesty's proclamation, imagining also that in emigrating, they carried with them the whole code of English civil and criminal laws for their protection.

"The criminal law of England following the conqueror, as a matter of right prevailed as the proper code under which the innocence or guilt of "*British subjects*" on trial ought to be tested, and the new subjects were not long without feeling its superiority over the laws it supplanted. In all cases of personal contracts and debts of a commercial nature the English laws, it would also seem, practically ruled, but as in all civilized countries the laws which regulate such matters are nearly the same, they were cheerfully acquiesced in, and although anomalies, unavoidable in the novel and transition state in which the colony and its judicature were placed, did undoubtedly occur in the administration of civil justice occasionally, (there not being wanting those who have asserted that there was no fixed rule in administering it, justice being sometimes dealt out according to the one code, and at times according to the other, and perhaps imperfectly, in reference to either,) it seems clear that justice was intended, and in the main fairly dealt out by those entrusted with it."

14. Le témoignage de notre historien, M. Christie, n'est pas sans avoir une grande importance en cette matière. Elevé au Barreau du Bas-Canada, il a été appelé, il y a déjà plusieurs années, à remplir des fonctions judiciaires; membre de la législature durant une période de temps assez considérable, il a pris part aux luttes politiques qui distinguent particulièrement l'époque dans laquelle il s'est ainsi trouvé engagé. La nuance politique à laquelle il appartenait, était celle qui avait, du moins dans le passé, prétendu que de 1764 à 1774, les lois anglaises avaient été substituées aux lois françaises.

15. Si donc il est vrai que, de 1764 à 1774, les lois civiles anglaises ont pu quelquefois servir de règles de décision, surtout en matière commerciale, ce n'en est pas moins un fait incontestable, reconnu par M. Christie lui-même, que ce sont les anciennes lois du pays, les lois françaises, qui, durant la même période, ont été généralement administrées et mises en force, surtout dans ce qui intéressait le plus la société, le droit de propriété, par n'importe quel titre il fût créé. Si ce fait, que les régistres publics ne permettent pas de révoquer en doute, atteste d'un côté la persistance et le maintien des lois françaises, il atteste en même temps que l'administration des lois civiles anglaises ne constituait qu'un *fait*, et non pas un *droit*, puisque ces lois n'avaient été introduites, ni par le changement de domination, ni par la proclamation de 1763, encore moins par l'ordonnance de 1764.

16. Quant au criminel, c'est encore *un fait* que les lois criminelles an-

(1) "History of the late Province of Lower Canada," Quebec, 1848; vol. 1, p. 2.

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glaises furent celles que l'on suivit dans l'intervalle de 1764 à 1774. Je me contenterai de remarquer qu'on n'y fit aucune objection ; qu'il paraît même y avoir eu une espèce d'assentiment général ; ce qui s'explique facilement par la comparaison de ces lois avec les anciennes lois criminelles françaises. Du reste, il est juste de constater ici que MM. Yorke et de Grey, tout en déclarant de la manière la plus formelle que la proclamation de 1763 n'avait pas eu l'effet de substituer les lois civiles anglaises aux lois françaises, ont néanmoins dit que cette proclamation pouvait être interprétée comme ayant eu un effet différent quant aux lois criminelles. " This certainty and leniency, (in matters of crown law, affecting life and liberty), *are the benefits intended by Your Majesty's royal proclamation as far as concerns judicature.*" Nous avons déjà vu que M. Christie s'était exprimé ainsi sur ce sujet : " The criminal law of England following the conqueror, as a matter of right, prevailed as the proper code under which the innocence or guilt of " British Subjects", on trial, ought to be tested, and the new subjects were not long without feeling its superiority over the laws it supplanted."

17. Avant de passer à "l'Acte de Québec" (1774), je dois faire une autre observation. Si, par la proclamation de 1763, ou par l'ordonnance de 1764, les lois Anglaises ont été substituées aux lois Françaises, toutes ces dernières lois ont du disparaître. On ne saurait admettre ni exception, ni terme moyen, en pareil cas. Alors, comment se fait-il que, sous le gouvernement Anglais, on ait maintenu, (contre le sentiment des marchands, il est vrai,) que les droits imposés par le Roi de France sur les effets de commerce importés dans la province, étaient encore exigibles en vertu des Edits de Sa Majesté Très Chétienne? Il y a là une contradiction manifeste. (Voir *Appendice* No. 6.)

18. Le 4e point de la discussion repose sur l'Acte de Québec (1774). Sous l'autorité de cet acte, les terres en franc et commun socage ont-elles été régies par les lois anglaises?

De ce que la coutume de Paris gouvernait le Canada, il ne s'ensuivait pas que le Roi de France fût obligé de concéder en fief, ou en censive, toutes les terres incultes de ce pays. Je ne connais aucune loi qui l'empêchât de faire une concession sous une tenure parfaitement libre, telle que celle de franc-aleu roturier. C'est un principe incontestable que dans le droit naturel, tous les biens sont libres Le Roi d'Angleterre, après avoir succédé au Roi de France, pouvait concéder en franc-aleu roturier, de même qu'il pouvait concéder en fief ou en censive. Cela s'entend, si les lois anglaises n'avaient pas été substituées aux lois françaises. Car, si cette substitution eût eu lieu, ne peut-il pas se faire que le Roi eût été, par cela même, astreint à ne faire de concessions des terres incultes du Canada que sous la tenure de franc et commun socage, en conséquence du statut de la 12e Charles 2, chap. 24, dont la 4e section porte : "That all tenures hereafter to be created by the King's Majesty, his heirs or successors, upon any gifts or grants of any manors, lands, tenements or hereditaments, of any estate of inheritance at the common law, shall be in free and common soccage, and shall be adjudged to be in free and common soccage only, &c. &c."

Mais le fait que le Roi d'Angleterre a donné en ce pays des concessions en

seigneuries, est une nouvelle preuve que les lois anglaises n'avaient pas été substituées aux lois françaises. Il pouvait donc également concéder sous une autre tenure, comme aurait pu le faire le Roi de France. Quant aux incidents qui se rattachent à la translation de la propriété, une fois l'héritage entré dans le domaine privé, le nom de la tenure ne faisait rien à la chose, en ce sens qu'il ne pouvait par lui-même soustraire ces incidents à l'application des règles du droit municipal du pays.

19. Ceux qui ont prétendu que, sous l'autorité de l'acte de Québec, les terres en franc et commun socage devaient être régies par le droit anglais, se sont fondés sur la neuvième section de cet acte. Sur ce point, je partage l'opinion des juges qui, dans la cause de *Stuart* et *Bowman*, ont été d'avis que, pour être intelligible et avoir quelqu'effet sans contredire ou nullifier d'autres parties du Statut, cette section ne pouvait être interprétée que comme décrétant, par exception, que ce qui du droit français avait rapport à la tenure seigneuriale, ne s'appliquerait pas aux terres en franc et commun soccage. Il me semble qu'en effet ce n'est là qu'une disposition de cette nature, n'ayant d'autre objet que d'apporter une exception à la règle générale, si bien connue, de l'ancien droit français, *nulle terre sans seigneur*, sous l'empire de laquelle toute terre était présumée assujettie au régime seigneurial, à moins qu'on ne fit apparaître d'un titre au contraire. En outre, cette disposition, on peut raisonnablement l'attribuer à la crainte dans laquelle a pu être le Parlement Anglais, que, sous le prétexte du maintien des "lois et coutumes du Canada" qu'il venait de confirmer par la 8e section du Statut, pour "*tous* les sujets canadiens de Sa Majesté en la dite Province de Québec", il ne fût peut-être possible de prétendre que toutes les terres incultes de la Couronne devaient être concédées sous la tenure seigneuriale, et que, par contrecoup, celles déjà concédées en franc et commun socage devaient être assujetties à la même tenure. Je crois que ce n'a été là qu'un surcroit de précaution qui, il est vrai, ne pouvait par lui-même faire aucun mal, mais qui me paraît avoir été adopté par suite d'une appréhension bien mal fondée. La 9e section du Statut, eût-elle été omise, on n'en aurait pas moins eu la faculté de continuer de faire des concessions sous une tenure entièrement libre, sans qu'il y eût eu à craindre de voir les terres ainsi concédées, déclarées assujetties à des droits seigneuriaux. Du moins, c'est ce que je pense ; si au contraire, je suis dans l'erreur sur ce point, alors on a bien fait d'avoir eu recours à cette précaution.

20. D'un autre côté, il faut avouer que les mots, *rien de ce qui est contenu dans cet acte*, rendent la phraséologie de la 9e section bien défectueuse. Car, s'ils sont pris au pied de la lettre, ils donnent à cette section un sens qui conduit à presque toutes les conséquences absurdes que l'un des juges de première instance, dans la cause de *Stuart* et *Bowman*, a signalées. (Voir *appendice* No. 2, lettre C.)

21. La 9e section ne parle en aucune façon de tel ou tel système de lois préexistant, comme devant, exclusivement à tout autre, régir les terres en franc et commun socage. Elle ne parle que de tenure d'une certaine espèce, et de concessions qui ont pu être faites ou qui pourraient être faites à l'avenir sous cette forme, c est-à-dire sous la tenure socagère. Si, par cela seul qu'on a fait

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usage de mots qui désignent en même temps une tenure connue dans le droit anglais, toutes les lois de l'Angleterre qui, là, régissent cette tenure, ont été introduites ici par la 9e section de l'acte de Québec, il faudra nécessairement, et pour la même raison, attribuer un effet semblable à la 10e section du même acte, qui permet de faire un testament "suivant les formes prescrites par les lois d'Angleterre." Si la 9e section doit être considérée comme ayant apporté à la 8e qui maintient et confirme en bloc les anciennes lois et coutumes du Canada, une modification tellement étendue qu'elle a eu l'effet, ainsi que l'Intimé le prétend, d'introduire le droit anglais relativement à la propriété des terres dont il s'agit, à plus forte raison la 10e section doit-elle être considérée comme ayant produit un effet semblable, puisqu'elle donne une plus grande liberté de disposer par testament que ne donnaient nos anciennes lois, et qu'en outre elle permet de le faire sous une forme qui était inconnue à ces mêmes lois (1). Si donc les simples mots, *franc et commun socage*, ont eu l'effet d'introduire les lois anglaises quant aux terres concédées sous cette tenure, n'y a-t-il pas la même raison de prétendre que les mots de la 10e section, *suivant les formes prescrites par les lois d'Angleterre*, ont du avoir le même effet en matière de succession testamentaire, de manière à soumettre au régime des lois anglaises la succession de tout habitant du Canada, qui aura jugé à propos de faire un testament *suivant la forme anglaise* ? Et s'il arrive que cette personne n'ait, par un tel testament, disposé que d'une partie de ses biens, il s'ensuivrait cette conséquence plus que bizarre, à savoir qu'une partie de sa succession serait réglementée par le droit anglais, et l'autre partie par le droit français ! A-t on jamais émis de pareilles prétentions ? Si on l'a fait, ces prétentions ont-elles jamais été accueillies ? Je n'en connais pas d'exemple. Cependant l'on doit admettre que le raisonnement que l'on fait dans un cas, pour soutenir la proposition de l'introduction des lois anglaises, s'applique à l'autre cas, avec autant, sinon même avec plus de force. (Voir *appendice* No. 3).

22. Si la 9e section du statut de 1774 a eu l'effet d'introduire les lois anglaises en ce qui regarde les terres soccagères, alors *tout* le corps de ces lois applicables à cette tenure, a du par conséquent être introduit pour tout ce qui concerne les incidents du droit de propriété à ces mêmes terres. On ne pouvait donc plus disposer valablement de ces terres, les aliéner, les engager, les hypothéquer, etc., suivant "les lois et usages du Canada," c'est-à-dire suivant l'ancien droit du pays. C'est la proposition de l'Intimé. Combattant cette proposition, il me sera permis d'appeler à mon secours l'autorité des deux Législatures du Haut et du Bas-Canada.

Dès sa première session, en 1792, le Parlement du Haut-Canada a passé un

(1) Statut Impérial de 1774, Section 10 :

"Pourvu aussi, qu'il sera et pourra être loisible à toute et chaque personne, propriétaire de tous immeubles, meubles ou intérêts, dans la dite Province, qui aura le droit d'aliéner les dits immeubles, meubles ou intérêts, pendant sa vie, par ventes, donations, ou autrement, de les tester et léguer à sa mort par testament et acte de dernière volonté, nonobstant toutes lois, usages et coutumes à ce contraires, qui ont prévalu, ou qui prévalent présentement en la dite Province ; soit que tel testament soit dressé suivant les lois du Canada, ou suivant les formes prescrites par les lois d'Angleterre."

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acte (chap. 1,) à l'effet de révoquer cette partie de la 8e section du Statut Impérial de 1774, qui portait " que dans *toutes* affaires en litige, qui concerneront leurs propriétés et leurs droits de citoyens, ils auront recours *aux lois du Canada*, comme les maximes sur lesquelles elles doivent être décidées ; " (version anglaise : " 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.") Mais à peine cette révocation est-elle prononcée, que le statut du Haut-Canada ajoute : " Provided that nothing in this act shall extend to extinguish, release or discharge, or otherwise to affect any existing right, lawful claim or incumbrance, to or upon *any lands, tenements or hereditaments* within the said Province (Upper Canada), or to rescind or vacate, or otherwise to affect any contract or security already made and executed *conformably to the usages prescribed by the said laws of Canada*." (Section 2). Puis il est statué qu'à l'avenir : " In all matters of controversy relative to property and civil rights, resort shall be had to the *laws of England*, as the rule for the decision of the same." (Sect. 3).

23. A peine la province de Québec est-elle divisée en deux parties distinctes, chacune avec sa législature, que la partie qui est habitée presqu'uniquement par une population anglaise, et dans laquelle toutes les terres sont sous la tenure de franc et commun socage, adopte *pour l'avenir* et sans effet rétroactif, le régime des lois anglaises, et reconnait en même temps que, pour le passé, son territoire et les concessions qui y avaient été faites, de même que les incidents de la propriété, avaient été jusque là soumis aux " lois et coutumes du Canada," c'est-à-dire à l'empire de l'ancien droit français du pays. N'est-ce pas là déclarer que la 9e section de l'acte de Québec n'avait pas eu l'effet d'assujétir au régime des lois anglaises les terres concédées en franc et commun socage ? Introduire en 1792, les lois anglaises dans le Haut-Canada, c'est bien admettre de la manière la plus solennelle que ces lois n'y existaient pas auparavant.

24. Voyons maintenant l'autorité que nous fournit le parlement du Bas-Canada. Je ne citerai qu'un seul de ses statuts. Je choisis ce statut parce qu'il a particulièrement rapport à la partie du pays, dans laquelle est située la terre dont il s'agit en cette cause. Il a été promulgué en 1823 (chap. 17). Son titre porte : " Acte pour ériger certains townships y mentionnés en un District Inférieur qui sera appelé le district inférieur de St. François, et pour y établir des cours de judicature."

Que l'on remarque que ce nouveau district ne se compose que de townships, dans lesquels toutes les terres concédées l'ont été en franc et commun socage ; et par conséquent dans le système de l'Intimé, toutes ces terres devraient être sous le régime dn droit anglais.

(14e. section du statut.) " Et qu'il soit de plus statué par l'autorité susdite, que le Juge de la dite cour Inférieure de St. François aura pouvoir, soit en cour ou hors de cour, ou hors de Termes, de procéder à l'interdiction de personnes insensées, aux élections de tutelle, curatelle, et autres avis de parenté ou amis, clôtures d'inventaires, affirmations de compte, insinuations, oppositions et levées de scellés, et autres matières de même nature, qui ne doivent souffrir aucun délai ; Et qu'il aura le même pouvoir et autorité accordés par la loi aux Juges

du Banc du Roi des districts de Québec ou de Montréal, ou à aucun d'eux, d'appointer un notaire, sur l'application des parties ou quelqu'autre personne convenable, pour recevoir les avis de parents ou amis, et qu'il procèdera sur telle matière en la manière et forme prescrites par la loi" (1).

Ce statut dont la promulgation avait été recommandée par un message spécial du gouverneur, ne contient-il pas une reconnaissance solennelle de la Couronne et des deux autres branches de la Législature; que "les lois du Canada," c'est-à-dire notre droit commun, l'ancien droit français, celui dont il est fait mention dans la 8e section de l'acte de Québec, étendait son empire, non seulement sur la partie du pays qu'on a appelée "le Canada seigneurial," mais encore sur tout le reste du Bas-Canada, et que par conséquent les lois civiles anglaises n'y étaient pas en force? En effet les attributions spéciales, conférées au nouveau juge par la 14e section du statut de 1823, formaient une partie assez considérable du droit français, et étaient exercées par les juges des autres districts, qui avaient, en première instance, une juridiction illimitée. Le nouvel acte, en conférant ces attributions au juge de St. François, n'établissait pas un droit nouveau pour cette partie du pays, où il devait exercer sa juridiction. Mais cette juridiction ayant été, par la 2e section de l'acte, limitée aux actions personnelles "dans lesquelles le montant reclamé n'excèderait point vingt livres sterling," il était nécessaire d'attribuer spécialement à ce juge *inférieur* les pouvoirs énumérés dans la 14e section, pour qu'il en fût revêtu et pût les exercer lui-même (2.)

Il me semble que les deux actes des législatures du Haut et du Bas-Canada, que je viens de citer, suffisent par eux-mêmes pour lever tous les doutes sur la question qui nous occupe. Mais, chose assez étrange, c'est qu'il paraît, d'après le *rapport* qui a été publié de la cause de *Stuart* et *Bowman*, que, lorsque cette cause a été plaidée et jugée tant en Cour de Première Instance qu'en Cour d'Appel, on a paru ignorer l'existence de ces deux actes, ou les avoir perdus de vue. Le rapport, en effet, n'en contient aucune mention.

25. Je passe à présent au 5e point de la discussion. Quel a été l'effet de la 8e section du statut impérial de 1825, chap. 59, appelé ordinairement, "l'Acte des Tenures?"

Cet acte a pour titre: "Act to provide for the extinction of Feudal and Sei-

(1) Voir aussi la 15e section du même statut.

(2) Extrait du témoignage de l'honorable M. le Juge Gale, devant un comité de la Chambre des Communes, le 15 mai 1828.

"Il y en a qui nient que les lois anglaises, excepté le droit criminel, aient jamais été légalement introduites dans le Bas-Canada, soit antérieurement au statut de 1774, ou par les dispositions de ce statut...."

"Cette dénégation est-elle simplement un sujet de conversation ordinaire, ou les Chambres ou l'Assemblée Législative vont-elles jusqu'à reconnaître cette dénégation dans leur pratique?—Dans quelques-uns des actes passés dans l'Assemblée, elle a paru considérer la loi française comme en force dans les townships."

"Voulez-vous dire des actes ou des bills?—Je veux dire des actes. Il y a eu un acte en 1823, qui établissait une Cour avec une juridiction de peu d'étendue dans une certaine partie des townships, savoir, une juridiction limitée à £20; et il se trouve dans cet acte des expressions dont on pourrait conclure qu'on regardait les lois françaises comme en opération dans les townships."

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gniorial rights and burthens on lands held *à titre de fief* and *à titre de cens* in the Province of Lower Canada; and for the gradual conversion of those tenures into the tenure of free and common soccage, and for other purposes relating to the said Province." D'après ce titre, on devait guères s'attendre à trouver dans ce statut la 8e section. Elle y est cependant, et il faut l'interpréter.

La section est en ces termes :

" And whereas doubts have arisen whether lands granted in the said Province of " Lower Canada, by His Majesty, or by any of his Royal predecessors, to be holden in " free and common soccage, shall be held by the owners thereof, or will subsequently " pass to other persons, according to the rules of descent and alienation in force in " England, or according to such rules as were established by the ancient laws of the " said Province, for the descent and alienation of land situate therein: Be it therefore " declared and enacted, that all lands within the said Province of Lower Canada, which " have heretofore been granted by His Majesty, or by any of his Royal predecessors, to " any person or persons, their heirs and assigns, to be holden in free and common soc- " cage, or which shall or may hereafter be so granted by His Majesty, his heirs and " successors, to any person or persons, their heirs and assigns, to be holden in free and " common soccage, may and shall be by such grantees, their heirs and assigns, held, " granted, bargained, sold, aliened, conveyed and disposed of, and may and shall pass " by descent in such manner and form, and upon and under such rules and restrictions, " as are by the law of England established and in force, in reference to the grant, bar- " gain, sale, alienation, conveyance, disposal and descent of lands holden by the like " tenure, therein situate, or to the dower or other rights of married women in such lands, " and not otherwise, any law, custom or usage to the contrary in any wise notwith- " standing: Provided nevertheless, that nothing herein contained shall extend to pre- " vent His Majesty, with the advice and consent of the Legislative Council and as- " sembly of the Province of Lower Canada, from making and enacting any such laws " and Statutes as may be necessary for the better adapting the before mentioned rules " of the laws of England, or any of them, to the local circumstances and condition of " the said Province of Lower Canada, and the inhabitants thereof."

26. Sur ce point de la discussion, je concours dans l'opinion exprimée par M. le juge Rolland, et j'y renvoie. Cette disposition du statut impérial, loin de tendre à faire disparaître la confusion qu'on prétendait exister, n'était propre qu'à l'augmenter, si déjà elle existait, ou bien à la faire naître, si elle n'existait pas encore. Bien que, dans le préambule de la 8e section, il soit dit qu'il s'est élevé des doutes sur la question de savoir si les terres en franc et commun soccage devaient être régies "according to the rules of *descent* and *alienation* in force in England, or according to such rules as were established by the ancient laws of the said Province, for the *descent* and *alienation* of land situate therein," je m'accorde à dire avec M. le juge Rolland qu'on ne saurait attribuer à cette disposition un effet rétroactif. Dans la partie *statuante*, le langage dont on s'est servi, est celui qu'on emploie ordinairement quand on dispose seulement pour l'avenir, (*may and shall*). Lorsque je réfléchis que par le passé on appliquait les anciennes lois du pays aux terres en franc et commun socage; que cette application avait donné lieu à une infinité de transactions, et par conséquent à l'existence de droits acquis, il m'est impossible de croire qu'il soit entré dans la pensée du parlement impérial de porter une loi qui pût rétroagir sur le passé, sans du moins conserver ces droits acquis de bonne foi. C'eût été bouleverser presque tous les titres des possesseurs de ces terres, et créer une

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confusion qui, sous l'opération des anciennes lois du pays, ne pouvait pas exister. Il eût fallu des termes plus formels qu'une simple assertion, dans le préambule, de l'existence de doutes ; il eût fallu une déclaration expresse que cette loi était ainsi faite pour rétroagir sur le passé, pour me convaincre que telle aurait pu être en effet l'intention de la législature impériale. Mais comme il aurait pu se faire que des efforts fussent tentés pour attribuer à cette loi un effet rétroactif, au risque de violer tous les droits acquis, nous avons vu la législature du Bas-Canada promulguer l'acte de 1829, chap. 77, (communément appelé "*Bowen's Act*") dans la vue de prévenir les inquiétudes et les alarmes que de tels efforts étaient de nature à faire naître. Que ce dernier acte ait été, ou n'ait pas été sanctionné à temps ou valablement, c'est une question qu'il n'y plus à discuter depuis la promulgation de la loi du 10 juin dernier, chap. 45, (voir *Appendice* No. 7).

27. A ce que j'ai déjà dit du statut impérial de 1825, j'ajouterai une autre remarque. Dans la partie *statuante*, ou le dispositif de la 8e section de ce statut, il n'est parlé que de trois choses que l'on veut soumettre aux règles du droit anglais, savoir : *alienation*, *descent* et *dower or other rights of married women*. N'est-ce pas un aveu formel, de la part du parlement anglais, qui contredit, on ne peut plus fortement, l'assertion, 1o. que toutes les lois anglaises avaient été substituées aux anciennes lois du pays, soit par le seul fait du changement de domination, soit par la proclamation de 1763, soit enfin par l'ordonnance de 1764 ; 2o. que ces lois seules avaient régné de 1764 à 1774 ; 3o. que, par l'acte de Québec, elles avaient été conservées en entier pour ce qui regardait les terres concédées en franc et commun socage ? Si cette assertion eût été vraie, la 8e section du statut de 1825 serait inexplicable ; elle serait en quelque sorte un non-sens. En effet, si toutes les lois anglaises ont régi le Canada avant 1774, nos terres socagères ont du être soumises à leur empire d'une manière aussi étendue et aussi entière, que l'étaient, en Angleterre, les terres possédées sous cette tenure, et non pas seulement sous les rapports restreints de *descent, dower* et *alienation*. Il a du en être de même depuis 1774 jusqu'à 1825, si les lois anglaises supposées avoir régné en Canada avant l'Acte de Québec, ont été, par cet acte, maintenues dans leur intégralité, en autant qu'elles avaient rapport à la tenure socagère. Il me semble que, dans l'hypothèse de l'introduction des lois civiles anglaises, c'est là une conséquence qu'il faut nécessairement admettre. Alors, je le demande, comment se rendre compte de la loi de 1825 qui ne reconnaît, ou n'établit que trois cas où la tenure en franc et commun socage dans le Bas-Canada, puisse être soumise aux règles du droit anglais ? Ce n'est pas à moi à répondre.

28. De plus ; en déclarant, dans son préambule, que les *doutes* qui s'étaient élevés, ne portaient que sur les lois de *succession* et *d'aliénation*, (*descent and alienation*), le statut de 1825 déclarait, par cela même, qu'il n'y avait pas de doute sur la non-introduction du reste des lois anglaises relatives à la tenure en franc et commun socage, y compris même le *douaire* ou les *autres droits* de femmes mariées. Ainsi, lorsque la 8e section dit que les terres socagères *seront* (*may and shall*) assujetties, en faveur des *femmes mariées* au *douaire* du droit anglais, elle établit donc un droit nouveau pour le Bas-Canada, puisque jusque

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là il n'y avait pas eu de doute sur la non-existence d'un tel droit. Ceci me paraît être incontestable. Puis, lorsque l'on voit que c'est dans la même disposition, dans la même sentence et avec les mêmes termes, qu'il est dit que ces terres *seront* (*may and shall*) soumises aux règles du droit anglais, en ce qui regarde la *succession* et *l'aliénation*, il me semble tout-à-fait naturel de conclure que, même pour ces deux derniers cas, le législateur n'a entendu disposer que pour l'avenir, puisqu'il n'a point distingué entre les effets que devait avoir sa loi, selon qu'il dût s'agir, ou de *succession* et d'*aliénation*, ou de *douaire*. Ayant voulu que l'effet fût le même dans les trois cas, et cet effet, quant au *douaire*, ne pouvant opérer que pour le futur, il s'ensuit donc que le législateur a voulu qu'il en fût de même en matière de *succession* et d'*aliénation*.

29. Bien que la question de l'introduction des lois civiles anglaises n'offre plus aujourd'hui, ainsi que je l'ai déjà fait remarquer, le même intérêt qu'elle a pu avoir autrefois ; et bien encore que je pense avoir démontré que ces lois n'ont jamais été ainsi introduites dans le Bas-Canada avant l'acte impérial de 1825, je crois néanmoins à propos d'ajouter quelque chose à ce que j'ai déjà dit sur cette question.

Personne n'a été plus en état d'expliquer le sens et la portée de la proclamation royale du 7 octobre 1763, que les hommes de loi qui remplissaient, à cette époque, en Angleterre, les charges de Procureur-général et de Solliciteur-général, *Yorke* et *Norton*. Ce sont eux qui ont du rédiger cette proclamation ; ou, dans tous les cas, elle n'a pas du être émanée, sans avoir été préalablement soumise à leur examen. Lorsque ces deux hommes éminents furent quelque temps après consultés sur le sens de cette proclamation, ils se sont accordés à dire qu'elle n'avait pas eu l'effet d'introduire en Canada les lois civiles anglaises. Et loin qu'aucune partie de ces lois eût été ainsi introduite, nous avons déjà vu que le Procureur-général de Grey et le Solliciteur-général Ellis avaient maintenu, en 1768, que Sa Majesté ne pouvait pas même, en vertu de sa prérogative, exempter les habitants *protestants*, en Canada, "*from paying tithes to the persons legally entitled to demand them from the* Roman *Catholics.*" C'est ce qui rend compte de l'exemption de cette obligation, qui est accordée, avec la plus grande justice, par cette disposition de l'Acte de Québec, qui porte, " that the Clergy of the said Church (the Church of Rome) may hold, receive and enjoy their accustomed dues and rights, with respect to such persons *only*, as shall profess the said religion"...... " A clause, " remarque l'auteur de l'écrit dont j'ai déjà donné un extrait, " which expressly takes away from the parish priests their *legal* title to tithes of the lands held by *protestants*, and which our great crown lawyers declared the king could not deprive them of by his prerogative."

30. L'exemption dont je parle, n'était pas absolue, c'est-à-dire, les protestants n'étaient pas relevés de l'obligation de payer la dime que les lois françaises avaient imposée, et que les prêtres catholiques avaient le droit d'exiger. Seulement, les protestants ne devaient plus être obligés de la payer à ces derniers. Et c'était *juste*, car il y a de la tyrannie à contraindre des personnes qui n'appartiennent pas à une dénomination religieuse, à payer la dime au clergé de cette dénomination.

Je dis que l'exemption, pour les protestants, de payer la dime, accordée par

la 5e. section de l'Acte de Québec, n'était pas une exemption absolue ; et, pour le prouver, il me suffit de transcrire ici la 6e section de cet acte, qui est ce qu'on appelle un *Proviso :* " Pourvû néanmoins qu'il sera loisible à Sa Majesté, ses héritiers et successeurs, de faire telles applications du *résidu* des dits dûs et droits accoutumés, pour l'encouragement de la religion protestante, et pour le maintien et la subsistance d'un clergé protestant dans la Province, ainsi qu'ils le jugeront, en tout temps, nécessaire et utile. " (Version anglaise :) " Provided nevertheless, that it shall be lawful for Her Majesty, His Heirs and Successors, to make such provision out of the *rest* of such accustomed dues and rights, for the encouragement of the protestant religion, and for the maintenance and support of a protestant clergy, within the said Province, as he or they shall, from time to time, think necessary and expedient. "

Le *résidu*, le *reste* de la dime, dont il est fait mention dans la 6e section, était ce que les protestants avaient à payer. "His Majesty," dit l'Auteur de l'écrit déjà cité, en parlant de cette clause de l'Acte de Québec, " is enabled to appropriate the tythes and other dues, *which protestants were obliged to pay* to the *Romish* Clergy, before the passing of this Act, " for the encouragement of the protestant religion, as well as for the maintenance and support of a protestant Clergy."

31. Il serait tout à fait absurde de prétendre que le droit à la dime, dont il s'agit, était un droit reconnu par les lois anglaises, en supposant même que ces lois eûssent été introduites en Canada, avant la promulgation de l'Acte de Québec, et que cet acte n'avait fait que conserver ce droit. C'eût bien été pour la première fois que, d'un coté, les prêtres catholiques auraient appris que les lois anglaises leur donnaient le droit d'exiger la dime, surtout des protestants, et que, de l'autre coté, ces derniers auraient découvert que ces mêmes lois les obligaient de payer la dime à des prêtres catholiques. Non, le droit à la dime, dont il s'agit, repose sur une loi française qui était en vigueur dans la Nouvelle France, lorsque ce pays fût cédé à l'Angleterre. Cette loi avait donc continué, dans toute son intégralité, jusqu'à l'acte de 1774 ; et il n'a fallu rien moins qu'un acte du parlement Impérial pour la modifier, de manière à exempter légalement de son opération une certaine classe de personnes, qui, jusque là, avait été soumise au service de la dime envers le Clergé catholique, par cela seul que cette loi française avait continué d'exister.

Pour l'autre classe des sujets de Sa Majesté, cette même loi était, non rétablie, mais maintenuè en vigueur, comme ayant toujours régné jusqu'à cette modification ; modification qui proclame hautement la continuation de l'existence de cette loi. Or la loi en question ne formait qu'une *partie* des "lois du Canada" dont il est parlé dans la 8e section de l'Acte de Québec. Quelles étaient donc les *autres parties* de ces mêmes lois, qui, assurément, devaient être pour le moins sur le même pied, aux yeux du parlement anglais, que cette loi relativè à la dime, si ce ne sont toutes les autres lois françaises, qui réglaient les droits civils des habitants Canadiens ? Si l'une de ces lois a continué d'être en vigueur jusqu'à l'acte de 1774, (et nous avons dans cet acte même, la déclaration solennelle qu'il en a été ainsi), comment peut-on soutenir qu'il n'en a pas été de même des autres de ces lois ?

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32. Un autre moyen invoqué à l'appui du système de l'intimé, reste à examiner. C'est le dernier auquel on a eu recours, sans doute parce qu'il est si faible qu'il peut à peine soutenir la discussion. Avant de l'examiner néanmoins, je ferai remarquer que l'Acte impérial de 1774, en parlant des lois qui doivent servir de règles de décision en matière civile, ne fait usage, pour désigner ces lois, que des mots suivants: "LOIS ET COUTUMES DU CANADA," (section 8). Depuis la promulgation de cet acte, juges et justiciables ont toujours bonnement cru que ces mots, *lois et coutumes du Canada*, signifiaient les lois civiles françaises qui avaient gouverné ce pays. Eh bien, ainsi qu'on va le voir bientôt, il parait que ça été là une grosse erreur!

Le moyen dont il s'agit consiste à dire que, si jusqu'à 1774 il y a eu des doutes sur la question de la substitution des lois civiles anglaises aux lois françaises, la 4e section de l'Acte de Québec a fait disparaître tous ces doutes, et a proclamé que cette substitution avait réellement eu lieu. C'est bien; mais on demandera tout naturellement si l'acte a eu cet effet, c'est sans doute parce qu'il a déclaré en termes exprès que les lois anglaises avaient été valablement, ou devaient être censées avoir été valablement introduites, soit par la capitulation, soit par la proclamation de 1763, ou par l'ordonnance de 1764, ou enfin par le fait seul qu'une partie de ces lois avait été plus ou moins suivie en Canada depuis le changement de souveraineté? Eh! bien ce n'est pas cela, puisque la 4e section du Statut ne dit rien de la sorte. Que dit-elle donc, cette 4e section? Sur quoi donc peut être fondée cette prétention de l'intimé? Le voici. La 4e section porte que proclamation, commissions et ordonnances (toutes choses qui avaient vu le jour dans ce temps de malaise et de confusion (1) seront *infirmées, révoquées et annulées*, à compter du 1e Mai 1775; et de cette circonstance, l'on se croit autorisé à conclure, sans se mettre en frais de prouver autrement l'introduction des lois anglaises, que ces lois ont dû nécessairement avoir été introduites, et avoir régné *légalement* durant la période en question, et ce à l'exclusion de tout autre système de lois, c'est-à-dire des lois françaises. Supposons pour le moment qu'il en ait été ainsi: alors, dans cette hypothèse, il faut admettre de toute nécessité une autre conséquence: c'est qu'il n'y avait plus de lois françaises régnant dans le pays durant la même période. Il a bien continué d'y avoir des "lois et Coutumes du Canada;" c'est le langage de l'Acte de Québec (Sect. 8); mais ces "lois et Coutumes," qui formaient alors le Code Canadien, ne pouvaient être, dans le système de l'intimé, autres que les lois civiles anglaises. Cela parait être de la dernière évidence. En effet, lorsque la 8e section parle des "lois et coutumes du Canada," elle ne fait mention, nommément, ni de lois *françaises* ni de lois *anglaises*, ni d'un système particulier de lois qu'elle veut supprimer, ni d'un autre système particulier de lois qu'elle entend substituer au premier, ni du fait que tel ou tel système particulier a été administré durant la période dont il s'agit. Rien de tout cela. En parlant des "lois et coutumes du Canada," elle parle d'un système de lois civiles comme *existant dans ce moment là-même* (1774),

(1.) Le Solliciteur Général Wedderburne a dit quelque part: "After the treaty of peace, a government succeeded *which was neither military or civil*, and it is not surprising that the Canadians should have often expressed a desire to return to a pure military government, which they had found to be less oppressive."

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système qu'elle reconnait, qu'elle maintient, qu'elle confirme, sous la désignation pure et simple des « lois et coutumes du Canada. » Or, selon les prétentions de l'intimé, par ces mots « lois et coutumes du Canada, » le législateur de 1774 ne peut être censé avoir eu en vue que les lois civiles anglaises comme formant alors les dites « lois et coutumes. » Dans la manière de voir et de raisonner de ceux qui soutiennent le système de l'Intimé, c'est là la conséquence nécessaire et logique de la proposition que, durant la période en question, les lois anglaises avaient été *légalement* substituées aux anciennes lois civiles du Canada. Mais cette conséquence en entraine une autre que les partisans du même système ne peuvent éviter d'admettre : c'est que, dans ce cas, l'Acte de Québec doit être censé, non pas avoir maintenu, encore moins avoir *retabli* (s'ils préfèrent cette dernière expression), ces anciennes lois du Canada, mais bien avoir continué et perpétué le prétendu règne des lois anglaises ! Personne, cependant, ne s'en était le moindrement douté jusqu'au moment où l'on nous a fait part de ce nouvel argument, de cette nouvelle découverte ! Il faut avouer que législateurs, plaideurs et juges sont réellement à prendre en pitié, puisque depuis bientôt un siècle, ils ont tour-à-tour législaté, plaidé et jugé, comme si les « lois et coutumes du Canada, » dont il est fait mention dans le Statut impérial de 1774, étaient les lois françaises, et non les lois anglaises.

33. Si j'ai eu recours à la 8e section de l'Acte de Québec, c'est afin de mieux démontrer toute la futilité de l'argument que l'Intimé cherche à tirer de la 4e section, pour soutenir son système de l'introduction *antérieure* des lois anglaises. En effet, s'il est vrai que, depuis le changement de souveraineté, ces lois aient été les seules qui aient régi, ou qui aient du régir le Canada, il est évident que l'intimé n'aurait du attacher aucune importance à cette partie de la 4e section du statut, qui *infirme*, *révoque* et *déclare nulles*, la proclamation de 1763, les ordonnances du gouverneur en conseil, et les commissions des juges et autres officiers publics.

Deux choses encore à remarquer. La première, c'est que ce système repousse celui qui attribue à la capitulation l'effet d'avoir substitué les lois civiles anglaises aux lois françaises ; la deuxième, c'est que, si la capitulation avait eu réellement cet effet, la proclamation de 1763 et l'ordonnance de 1764 seraient sans force ou sans poids à cet égard, puisqu'on ne pourrait plus dire qu'elles ont eu l'effet d'introduire ce qui était déjà introduit depuis trois ou quatre ans auparavant, et avait une existence indépendante d'elles. Ainsi le fait de leur révocation par l'acte de 1774 serait de même sans force et sans poids dans cette discussion.

34. Je reviens maintenant à l'autre système, celui de l'existence et du maintien des lois françaises.

Il est facile d'expliquer la 4e section de l'Acte de Québec, et de démontrer qu'on ne saurait déduire des mots, *infirmer*, *revoquer*, et *annuler*, qui s'y trouvent, une reconnaissance de l'introduction antérieure des lois civiles anglaises ; reconnaissance qui, du reste, serait hautement contredite par la 8e section, puisque cette section, par les mots « lois et coutumes du Canada » comme existant alors, n'a voulu parler et n'a en effet parlé que des lois françaises.

D'abord, quant à la proclamation de 1763 ; il est évident qu'il était à propos

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de *l'infirmer* ou *revoquer*, puisqu'on ne jugeait pas convenable de donner suite à la promesse qui y était contenue, celle de convoquer une législature dont l'une des branches eût été élective. Si cette proclamation, toute valable qu'elle pût être, n'a pas eu par elle-même l'effet d'introduire les lois anglaises, il me semble qu'il serait absurde de prétendre que du fait de sa *revocation*, l'on doive déduire une reconnaissance de cette même introduction, c'est-à-dire d'une chose qui n'aurait jamais eu d'existence.

Il en est de même de la *revocation* ou *infirmation* des *commissions* des juges et de quelques autres officiers publics. Je crois qu'il faudrait un effort surhumain pour chercher à déduire de la simple *révocation* de ces commissions, la reconnaissance d'un système de lois qui n'aurait jamais existé, et qui du reste, eût-il existé, aurait été tout-à-fait indépendant de ces commissions.

Ainsi, quant à la proclamation de 1763 et aux commissions, du moins en ce que celles-ci pouvaient avoir de valable, il y avait lieu, puisqu'on ne voulait plus les laisser subsister, à *revocation* ou à *infirmation*. Ce sont là les mots du statut, qui sont applicables à ces documents, considérés sous le rapport de leur validité. S'il y avait dans les commissions quelque chose qui fût *nul*, le mot *annuler* ou *déclarer nul* du statut pouvait s'y appliquer *pro tanto*.

Quant aux ordonnances du gouverneur en conseil, elles ne sont pas énumérées dans l'Acte de 1774, pas plus que ne le sont les commissions. Il aurait bien pu se faire que quelques-unes de ces ordonnances n'eûssent pas excédé les attributions de ceux qui les avaient décrétées, ou qu'elles les eûssent excédées en partie seulement. Dans le premier cas, il y avait lieu à " révocation ; " dans le second, à " déclarer nul" *pro tanto*. On ne déclare pas *nul* ce qu'on reconnait en même temps avoir toujours été *valable*. Dans ce dernier cas, on *abroge*, on *révoque*. Puisque le statut s'est servi des mots *déclarer nul*, c'est qu'il y avait, ou dans les ordonnances, ou dans les commissions, quelque nullité. Par exemple, l'une de ces ordonnances pouvait être valable ou considérée l'être sous un rapport, et ne l'être pas sous un autre. C'est ce que Masères dit lui-même de l'ordonnance de 1764, dans le cas où la proclamation de 1763 n'aurait pas eu, par elle-même, l'effet d'introduire les lois anglaises. Si la proclamation, dit-il, n'a pas eu cet effet, l'ordonnance n'a pu l'avoir. Ainsi, dans l'hypothèse par lui posée, il regardait une partie de cette ordonnance comme *nulle*, celle qui enjoignait aux juges de faire, *autant que possible*, l'application des lois anglaises. Mais sous d'autres rapports il regardait cette ordonnance comme valable. Dans ce cas, ajoutait-il, " the ordinance of the 17th September must be considered only as 'an executive act of government, erecting and constituting courts of judicature in the Province for the administration of the laws in being, *whatever those laws might be*'; and in this view, it is certainly a legal and valid ordinance, because Your Majesty had, by an express clause in your commission aforesaid, given your said governor full power to erect such courts with the advice and consent of the council only."

Si donc il y avait lieu d'appliquer à une partie de cette ordonnance le mot *révoquer* du statut de 1774, il y avait aussi lieu d'appliquer à l'autre partie les mots *déclarer nulle* du même statut, non seulement d'après l'opinion de Masères dans l'hypothèse qu'il avait posée da la non-introduction des lois civiles anglaises

par la proclamation de 1763, mais encore bien plus d'après l'opinion des officiers en loi de la couronne en Angleterre, qui avaient maintenu que la proclamation n'avait pu avoir l'effet d'introduire des lois. L'on avait donc raison de *déclarer nul* un acte qui n'était pas valable. Mais ne serait-il pas plus qu'étrange qu'on pût faire déduire de cette déclaration de nullité, la reconnaissance de l'introduction antérieure des lois anglaises par la seule force de l'ordonnance?

35. Enfin je me résume, en disant que jusqu'à la promulgation de l'acte impérial de 1825, chap. 59 (l'acte des tenures), le seul régime légal auquel les terres en franc et commun socage dans le Bas Canada ont pu être assujetties, a été celui des anciennes lois du pays, et non celui des lois anglaises; qu'en ce qui regarde la disposition de l'acte des tenures, relative à ce sujet, cette disposition limitée à trois cas seulement, n'a pas eu d'effet rétroactif, n'ayant pu opérer que pour l'avenir.

36. Je termine en citant l'opinion de M. James Stephen, conseil du département colonial. On la trouve dans le témoignage qu'il a donné, le 24 juin 1828, devant le comité de la chambre des communes, chargé de faire une enquête sur les affaires du Canada (1).

What, in your opinion, would be the law which in Lower Canada would regulate the inheritance of land held in free and common soccage; if an owner of such land died without a will, leaving children, how would it be distributed among them?—The question, I presume, refers to the state of law as it stood before the enactment of the Canada Tenures Act, 6 Geo. IV. c. 59. The law since that statute is quite clear. My opinion is, that before the enactment of the Canada Tenures Act, lands held in free and common soccage in Lower Canada would have descended in the same manner, and according to the same rules, as seigneuries holden of the Crown. The grounds of that opinion are, that the words "free and common soccage," in their proper and legal sense, are always used in contradistinction to the ancient tenures in chivalry. The essential quality of a free and common soccage tenure is, that the services to be rendered by the tenant are definite and certain. In tenures in chivalry they were fluctuating, and depended on many accidental events. Such is the case at this day with the feudal tenures subsisting in Lower Canada. Therefore the provision in the statute of 1791, that lands in Lower Canada might be granted in free and common soccage to those who should desire it, meant, as I conceive, only that the the lands should be holden, not upon those varying services which the ancient feudal tenures of the province would have imposed upon the tenants, but by services fixed and certain. The policy of this enactment was obviously to promote cultivation and improvements, and to relieve the agriculturist. What is essential to that end is enacted, and nothing more. The rule of law established by the Act of 1774, that in all matters of civil right resort should be had to the laws of Canada, was invaded so far, and only so far, as was necessary for giving effect to this general policy. The departure from the ancient code was precisely co-extensive with, and limited by, the motives which required it.

You are probably aware that subsequent to the enactment of that law the courts of justice in Canada, and the people in Canada, both seem to have concurred that the old French law should be applicable, in all its parts, to those lands that had been granted in free and common soccage, and those lands have therefore descended from that time

(1) "Report from the select committee on the civil government of Canada, ordered by the house of Commons, to be printed, 22 July 1828.
Quebec: reprinted by order of the House of Assembly of Lower Canada, 1829." p. 241 and 243.

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to the present according to the principles of the old French law. Does it occur to you that that circumstance of the courts of justice having governed themselves upon the principles of French law, does not give validity to those titles which have been thus conveyed?—My own opinion is, that the courts were right in those decisions. And at present the only doubt is, as to the effect of the Canada Tenures Act upon the question. That Act recites that doubts have arisen whether lands granted in the Province of Lower Canada in free and common soccage will be held and alienated, and will descend according to the Canadian or to to the English law; and proceeds to enact that such lands *may and shall pass*, by conveyance or descent, according to the law of England. But the statute does not contain any retrospective language. I suppose the Legislature to have meant to legislate only for the future, leaving the past to be regulated by judicial decisions.

In those colonies where the Dutch law and different foreign laws exist, do they exist concurrently with English law?—No; all lands in Trinidad are holden under Spanish law; and in Demerara and the Cape under Dutch law. This applies even to lands granted by the King of England.

37. Avant la promulgation de l'acte impérial de 1825, la question dont il s'agit a été soulevée directement par une exception péremptoire dans une cause de dame M. A. Tarieu de Lanaudière, veuve Baby, contre les héritiers de son mari. Le contrat de mariage contenait stipulation de communauté de biens, avec, de plus, une clause d'ameublissement. Durant cette communauté, M. Baby avait obtenu de la couronne la concession de plusieurs terres en franc et commun socage. Sa veuve, prétendant que ces terres étaient tombées dans la communauté, en réclamait la moitié. Le moyen d'exception des défendeurs était que "les dites terres ayant été ainsi données par Sa Majesté le Roi au dit " François Baby *in free and common soccage*, icelles n'étaient pas tombées en " la communauté d'entre la dite Dame demanderesse et le dit défunt Sieur " Baby, mais que suivant les lois d'Angleterre en force à cet égard en cette " Province, les dites terres étaient demeurées propres au dit François Baby en " son vivant, et étaient demeurées depuis son décès et étaient et demeuraient " encore en la succession du dit défunt."

Cette cause fut jugée, le 8 octobre 1824, par l'ancienne Cour du Banc du Roi du district de Québec (1). Le jugement déclare que les terres en question sont tombées dans la communauté, et en ordonne le partage entre Madame Baby et ses enants.

38. La même question a été de nouveau soulevée devant le même tribunal dans une cause de *Paterson* et *McCallum* (2), mais c'était après la promulgation de l'acte impérial de 1825. Dans cette cause, il s'agissait d'une *hypothèque générale* résultant d'une obligation notariée du 27 novembre 1816. Il fut décidé que cette hypothèque frappait les terres socagères. C'était, comme dans la cause de la famille Baby, déclarer qu'en 1816, ces terres étaient soumises au régime des lois françaises, et, de plus, que l'acte impérial de 1825, ne devait pas avoir un effet rétroactif. Mais sur appel à l'ancienne cour provinciale d'appel, le juge en chef Reid infirma la décision de la cour de Québec, regardant l'acte impérial de 1825 comme un acte déclaratoire. (Voir *appendice* No. 4). Il déclare cependant, après avoir fait allusion aux doutes que l'Acte de Québec

(1) Présents : Le juge en chef Sewell, et les juges Kerr, Perrault et Bowen.

(2) *Stuart's Reports*, p. 429.

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avait créés, que les anciennes lois du Canada avaient, jusqu'à la passation de l'acte impérial de 1825, été appliquées aux terres en franc et commun socage. Le jugement de la cour d'appel dans la cause de *Paterson* et *McCallum* est du 17 novembre 1830. (1)

Duval, J.—The Chief Justice has entered into such minute details that I do not consider it necessary to do more than state a few general principles of law, which I may say, at this day, are not questioned.

Chitty, in his Treatise on the Law of the Prerogative of the Crown, p. 30, says, "until the laws of a country thus acquired, (by conquest or treaty) are changed by the new sovereign, they still continue in force; as observed by Lord Mansfield, the absurd exception as to an infidel country, maintained in Calvin's case, shows the universality and antiquity of the maxim." We find the same opinion expressed by the greatest names that have adorned the English Bench—Lords Hardwicke, Mansfield, Thurlow, Ch. J. DeGrey, indeed all the great constitutional lawyers of England have so expressed themselves. I here refer to the opinions collected in Cavendish's Debates in the House of Commons on the Canada Bill in 1774, also to the opinion given by Mr. Stevens before a committee of the House of Commons in 1827, on the very question we are now deciding. Mr. Faribault of Quebec, has a copy of an opinion given by Lord Thurlow, as attorney general, in which the same principle is strongly insisted upon. In the 30th volume of the State Trials, will be found a most able, and in my opinion, conclusive argument of Mr. Nolan, as counsel in the case of General Picton. The question will be found most ably treated by Baron Masères in his Collection of Commissions and Public Instruments relating to the Province of Quebec.

Merlin in the 7th Vol. of his Questions de Droit p. 258, says "c'est un principe de droit public que le peuple conquis, en ce qui concerne les lois privées, et nommément celles relatives aux successions, continue d'être régi par les anciens statuts, jusqu'à ce que le conquérant lui ait donné une autre législation.

Story in his comm: on the Constitution of the U. S. Vol. 1., p. 133, speaking of conquered and ceded countries which have laws of their own, says, "Until new laws are promulgated, the old laws and customs of the country remain in full force."

To the above, the opinion of several writers on international law might be added: but those cited suffice to show that the rule laid down is that recognized by the Courts of Justice in England, France and the United States.

Let us now see how the rule was understood and acted upon in Canada, immediately after the conquest and up to the time of the passing of the Imperial Statute, commonly called the Canada Tenures Act.

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(1) Extrait de la "Gazette de Québec" (Neilson), du 3 Février 1831 :

"Hier au soir, dans l'assemblée, il s'éleva des débats au sujet de la revision de nos lois ; et M. Peck (avocat) des townships déclara de la part de ses constituants, qu'ils ne désiraient nullement avoir les lois anglaises, et qu'ils ne les avaient jamais demandées. Il qualifia ces lois d'injustes sous le rapport de la primogéniture, d'onéreuses dans les aliénations, et dit qu'elles étaient ignorées, *et qu'on ne les avait jamais regardées comme étant en force.*

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Lands held in free and common soccage were seized, sold by the Sheriff, and the moneys arising from such sale distributed by the courts according to the old laws; the English mortgage, the English Statute of Distributious were not even mentioned.

The question was raised in Quebec in 182– before the Court of King's Bench in the case of Delanaudiere vs. Baby, *et al.* and the opinion of the Court was unanimous in declaring that lands held in free and common soccage were subject to the old laws of the country and not to the English laws.

Moreover, as applied to Canada, the proposition is an absurdity too glaring to be overlooked, How could you apply the laws of England to lands held in fief and seigneurie? How could the relations of seigneur and censitaire be maintained according to English laws? The introduction of the laws of England into Canada must necessarily have been followed by an act of spoliation either of the seigneur or of the censitaire, perhaps of both, unless the authority of the Imperial Parliament had intervened, and legislated specially for the numerous class of cases existing, and to which the laws of England could not, by any possibility, be made applicable.

Further, the Common law courts of England require the assistance of a Court of Equity. In many cases they cannot afford the relief that is required. Take for instance, trust-deeds, marriage settlements, estates-tail, the statute de donis, the statute of uses, the administration of minor's property and the care of his person, a bill of discovery, demands to compel specific performance; in all these cases a Court of Equity alone can give the relief the party desires. Did any lawyer or statesman ever think of having such a court established in Canada, or of vesting the powers of a Court of Equity in one of our own courts? And why not? Simply because the principle we are now laying down, was publicly acknowledged and acted upon throughout Lower Canada.

Having thus established that the laws of England were not introduced into Canada by the conquest, I shall here proceed to show they were not introduced by treaty.

The answer given by the commander of the British forces, at the time of the capitulation "They become British subjects," so often referred to, in support of the assertion that the laws of England had been introduced into Canada, proves the very contrary. They became British subjects, and consequently subject to and protected by those principles of constitutional law, which the laws of England recognise. I have shewn above what these are.

The Plaintiff next contends that whatever may be said on the question above discussed, the Royal Proclamation of the 7th of Oct., 1763, has set the question at rest. The legality of this proclamation was questioned before the court of K. B. in England, in the well-known case of Campbell *vs.* Hall, 1 Cowper's Rep. 204, and judgment was given for the plaintiff, that is, against the legality of the Proclamation.

Baron Masères, in the volume above referred to, has stated several objections to this Proclamation. One is, that it was not issued under the great seal. In the opinion of every well read Constitutional Lawyer, who will ever bear in mind, the principle,—the King can do no wrong,—this objection must be held

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conclusive against the legality of the Proclamation. Wherever the Constitution of England has conferred power, there it has imposed responsibility, and in this instance, in the absence of the Great Seal, on whom would rest the responsibility, and yet, it must be admitted the altering of the Laws of a country, the imposing on the Inhabitants laws written in a language they did not speak and did not understand, was no trifling matter, but, on the contrary, are calling for all the security and protection which a British subject has a right to claim.

Then comes the Ordinance of the Governor,—on this, Baron Maseres remarks the Governor had not followed his instructions, and therefore the Ordinance was not legal. In truth, the Inhabitants never yielded obedience to it. In their transactions, some were guided by the old Laws, others by the Laws of England—in all probability, each man followed the laws he considered most favorable to his own claims—and how could it be otherwise, when the Judges were told to administer justice according to Law and Equity, and as *near as may be* according to the Laws of England,—was this not sanctioning a most arbitrary rule, and giving each Judge the power of deciding cases according to the caprice of the moment, without the least responsibility. Such a power is unconstitutional, neither King nor Governor could confer it.

I will remark there is here a strange inconsistency on the part of those who uphold the legality of this Proclamation. If the Laws of England were introduced here by the Conquest or by Treaty, what right had the King subsequently to repeal them and introduce a new rule. The Imperial Parliament alone could do it.

I shall say nothing of the Canada Tenures Act, as the remarks of the Chief Justice are conclusive.

I close these remarks by referring to the opinion I gave in answer to the Seignorial questions.

Aylwin, J. A question of importance presents itself in the present case, as to the existence of *douaire coutumier*, with respect to lands held under the tenure of free and common soccage. The action is a petitory action.

The plea sets up a claim for customary dower on one half of the property in dispute.

I differ from the majority of the Court, and think that the *douaire* of the French law is an impossibility under this tenure. The tenure being an Anglo-Saxon one, repels the supposition of the customary dower of the Custom of Paris existing under it. But apart from this, there are declarations and provisions of a legislative character, such as to show that the *douaire coutumier* could not exist as to Township lands. To begin with the conquest, upon the capitulation of the French at Montreal, a demand was made on the British Commander that the French laws should be continued. The answer was that the inhabitants of the Colony became British subjects.

After the conquest, military tribunals were established which decided cases in civil and criminal matters according to equity and good conscience, and seemed to give general satisfaction, and many were of opinion that these Courts of a military character were the best we ever had. They lasted about four years when civil institutions became necessary. Thereupon, the King's proclamation of 1762 was

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issued, inviting settlers *i. e.* British subjects from New England and from home, and assuring them the country should be governed as nearly as possible by English laws. General Murray received instructions to summon an assembly as soon as possible. The ordinance of 17th September, 1764, created civil and criminal Courts, and be it remarked, at the time of the conquest, French Courts and the French mode of proceeding, disappeared for ever. Under this ordinance the Court of King's Bench, also the Court of Common Pleas, were established both from similar Courts in England, the one to decide according to English law, and the other as nearly as possible to the laws of England. It was found necessary in course of time to modify these laws which were found to be inapplicable and expensive. The Government of Great Britain being desirous of doing right, passed the Act 14 Geo. III., c. 87, of the Imperial Parliament. This Act recited the proclamations and ordinances, and commissions relative to the civil Government and administration of justice, thereby giving them a legislative sanction if they needed it, which I don't believe; but respectively they were to cease, new provisions being made for the future. Hence it is that from the first establishment of Civil Government in the Province up to the present hour, we have the English criminal law in the Province.

With reference to soccage lands, there is a provision in the 9th section that nothing in this Act contained, shall extend or be construed to extend to any lands that have been granted by His Majesty, &c., to be holden in free and common soccage." This is said to be unmeaning, and contrary to the words of the statute. The words mean no more than the assertion that the law of real property in Canada, as to soccage lands, should *continue* to be the law of England, not to introduce it, for it was in force before. The next Act worthy to be mentioned is the Act of 1791, the 31st Geo. III, c. 31, which made provisions for the Province of Upper Canada, which was settled by people of British descent and origin. In plain terms their laws were to be the laws of England; lands were to be granted in free and common soccage, and not *en fief* or *en roture.* But there was a proviso that when lands should be granted in Lower Canada, where the grantee should desire them to be granted in free and common soccage they should be so granted subject to any alterations that might prospectively be effected by legislative enactments. No alterations were made. It stood as it then was; there being often doubt as to the extent of the soccage tenure, as to whether it had all the consequences of the English law, or was restricted to descent, alienation and dower. I would here refer to Smith's History of Canada, a very useful book, which contains in vol. 1, pp. 42 and seq., information respecting a report of the Governor and Council on the Judicature of the Province of a very interesting nature, of date August 28th, 1767.

ABSTRACT OF THE REPORT.

1. Whether any and what defects are now subsisting in the present state of Judicature in Quebec.

2. Whether the Canadians are, or think themselves aggrieved, according to the present administration of justice therein; and in what respects, together with our opinion of any alterations or amendments that we can propose for the general benefit of the Province, and that they be transmitted in form of ordinances, but not passed, by the

Governor, Chief Justice and Attorney General. If they differ, different opinions, with reasons of such differences.

They then represented, that the Laws of England were generally thought to be in force.

The commission of the Chief Justice refers to them. He was to decide according to the Laws and Customs of England. And the Laws, Ordinances, Rules, and Regulations of your Majesty's Province of Quebec, hereafter in that behalf to us ordained and made. That the Ordinance of the 17th of September, 1764, set forth and erected, a Superior Court of King's Bench, an Inferior Court of Common Pleas to decide in all causes above £10. Appeals to King's Bench in all above £20. Judges of this Court are to determine, according to Equity, regarding Laws of England and Ordinances of the Province, under £5, before a single Justice; above £5, and under £10, before a single Justice, or others, at weekly or Quarter Sessions.

Then the Report sets forth the Ordinance of the 6th of November, 1764; on which it is observed: That all the lands in the Province, whose owners died since the 10th of August, 1765, *are subject to English Law of Inheritance, Custom of Dower, Rules of Forfeitures, Escheat.*

These Ordinances have been transmitted, and never disallowed. Canadian laws since supposed to be abolished, and Judges conceive themselves bound to proceed according to the English laws.

Besides, there are public instruments in support of the supposition: Statute of I. Elizabeth, chap. 1, abolishing the authority of the Bishop of Rome; vide fol. 16, 17, 24, 27. This clearly extends to after acquisitions of the Crown. Statute 15 Car. 2, chap. 7, fol. 7.; Statutes 7 and 8 William III., chap. 22.

We suppose other Acts of Trade, less positive in terms, extend also. Hence the Governor's commission directs him to take the oath prescribed for Plantation Governors relating to Trade. And the Commissioners of the Customs have appointed a Collector at Quebec to carry them into execution. They also understand Statute of XII. Anne, Statute 2, chap. 16, for preserving ships stranded; and the fourth, Geo. I., chap. 12, making it perpetual. The Attorney and Solicitor General in June, 1767, gave an opinion to the Board of Trade, that it extends to the Plantations; and this opinion is transmitted to the Governor of Quebec. These before the Conquest of Quebec. There are other Statutes passed since, as—

4 Geo. III., chap. 2, continuing that part of 8 Geo. I., concerning importation of naval stores. A copy of this is sent to the Collector of Quebec.

4 Geo. III., chap. 19—An Act for importing Salt, &c.

4 Geo. III., chap. 15—for granting duties.

Besides these Statutes, there is a series of public instruments for introducing laws of England:

The Articles of Capitulation in 1760; vide articles 42, 27, 30.

The Treaty of Peace of 10th of February, 1763, article 4: That Canadians are to have Romish Religion, as far as laws of England permit.

The Proclamation of October, 1763; upon which they observe:—The British subjects in the Colony understand English Laws to be thereby introduced, and not the municipal laws of a conquered people continued. That they emigrated on this confidence.

The late Governor so understood it, who, by the ordinance of September, 1764, did not mean to overturn all the Canada laws, but to erect Courts for Exercised English Law, supposed to be already introduced.

The Lords of Trade understood it so; for in the 7th and last articles of their Report of 2nd September, 1765, upon memorials complaining of the ordinances of the Governor and Council, proposes: That in all cases where rights and claims are founded on events prior to the conquest of Canada, the several Courts should be governed in their proceedings by the French usages and customs, which have heretofore prevailed in respect

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to such property. It is clear, then, that if upon events posterior to that conquest, then the Courts are to be governed by English Laws.

We know that the Attorney and Solicitor General, in April 1766, understood the proclamation in a more confined sense, as introductive of only some fewer parts of the law of England, particularly beneficial to English subjects, and not of the whole body of the laws. This they took to be the purport of the word in the proclamation—the *enjoyment* of the benefit of the laws of England; and they were of opinion that the criminal laws, now almost the only laws that came under that description, and that the laws of Descent, Alienations, Settlements, Incumbrances, and Distribution, were not comprehended under it. Your Majesty must determine, Bracton says; *cujus est condere ejus est interpretare.* We lay public instruments before you to judge upon.

The next evidence of introduction of English Laws is: General Murray's Commission in 1764, to be Vice-Admiral. By this the Laws of the English Court of Admiralty take place of French laws and customs. This commission as Governor, and the instructions in the same year.

Not the least intimation of any saving of any part of the Laws of England. It seems as if the Capitulation and Treaty of Peace was deemed to be notice enough of introducing English laws with respect to religion; especially as they continued in the country and took the oaths, when they had eighteen months to withdraw.

Those are the public instruments for evidences of introduction of English Law; but as the Proclamation and Governor Murray's Commission have never been published in French, and the two Ordinances of February and March, 1764, which have been, are very concise, and do not specify the laws introduced,—the greater part of the people remain ignorant of the extent of the changes, and imagine ancient laws in many points still in force. When they come to know the change there will be great uneasiness. Hence at present there is a diversity in the practices of the English and Canadian subjects, with respect to letters of administration and the distribution of intestate's effects. Also in the practices of conveying and mortgaging British subjects according to English mode. French, by Notaries and Scriveners, according to French modes, and so the same lands are conveyed by both modes. Leases by Jesuits are made for twenty-one years, though by French law good only for nine years; and sundry other instances of diversity are assigned.

In criminal matters, all proceeding according to the English law.

The same as to proceedings in the civil business of the King's Bench.

In the Common Pleas, the pleadings are drawn as the parties please—some in French and some in English.

Our arresting body for debt, on the mesne process, surprises the French.

Here follow remarks on the foregoing instruments:

1. They submit it as a doubt whether the ordinances of September and November, 1764, are sufficient to introduce such laws as were not established by the proclamation of 1763.

By the King's commission to the Governor, a certain degree of Legislative authority is communicated to him, to be exercised with advice of Council and Assembly, and no Legislative authority without the Assembly; and, therefore, the ordinances are considered to be void. If so, they are good only as to the erection of Courts.

True, there is a private instruction, with advice of Council to make fresh rules as appear necessary for peace and order, not extending to life, limb or liberty, duties or taxes. But we doubt whether such power can be given, except under the Great Seal, read and notified; and, therefore, we think the instruction void as to the conveying a Legislative authority.

If it is not void, the authority is too small for the introduction of English laws, particularly the criminal (which all affect life, limb or liberty,) and the arrest of the body, commitments for contempts. But these reasons do not touch the higher Instrument for

the introduction of English laws, viz.: the Articles of Capitulation, the Treaty, and the Proclamation of 1763.

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12th July, 1769—Council Book B.

Inconveniences from the present state of the Laws and administration of Justice. Their uncertainty is the greatest: either English or French should be avowed. A remedy is necessary. There are inconveniences in Judicature; proceedings expensive, tedious, and more severe than under the French. These evinced and explained. A plan held up. A Judicature proposed for each District of Quebec, Montreal, and Three Rivers. One Judge in each: a Barrister of five years standing, and a French assistant; the latter to have no deciding power. A Court to be held once a week. The method of proceeding to be this:

1. A plaint in French or English. A summons, if good cause found. If Defendant does not appear, a compensation to Plaintiff for his trouble. Another summons. On default, judgment. If he appears, Plea in writing. Then the Judge to interrogate parties on disputed facts, and answers to be reduced to writing. Then he is to state the facts in difference, and ask whether they will have a Jury; if they do, a Jury to be summoned next Court. He that desires a Jury, to pay their expenses, 5s. sterling each. They are to be appointed as Special Juries in England, by striking out twelve, each. No challenges to be allowed. A majority to carry a verdict. The verdict is to be a special one. All examinations *viva voce*. Executions to run against goods and lands. An inventory of Defendant's estate may be required upon his oath, if there is not enough found to satisfy the judgment. Penalty of perjury, if twenty pounds, omitted. Costs according to Judge's discretion.

A Sheriff to be for each District. A King's Attorney in each. Appeals to Governor and Council and thence to the King.

The three Chief Judges and Attornies General to be of the Council, that the board may not want law knowledge.

These appeals should be only in the nature of writs of error, except in the instance of a Judge's proceeding without a Jury, when the evidence should be reduced to writing, as in a General Court Martial.

New Trials at law to be by a double Jury, and to be final. These the outlines of the plan.

It remains to consider the first and greatest inconveniencies arising from the uncertainty of the law. Four methods occur:—

I. A code of Laws for this Province, that shall contain all the laws by which it is to be governed for the time to come, to the entire exclusion or abolition of every part o the Laws of England and French Laws that shall not be set down in the Code itself.

II. To revive all the French Laws to the exclusion of the English Laws, except the statutes above mentioned, and a few eminently favorable to the liberty of the subject, and to introduce those by a particular ordinance or proclamation published in the Province, as to take away torture, the punishment of the rack, introduce the *habeas corpus*.

III. A third method:—Making law of England the general law, with an exception of particular subjects, to permit former customs, at the time of the Conquest, or

IV. The law of England to be the general law, with an exception in favour of the former customs, and with respect to these, to enumerate them, and abolish all not enumerated in the proclamation.

As to the first, it would be troublesome. Canadians would think it rash and dangerous. A speech is put into their mouths and the compilers supposed to be incapable to answer it, from the immense difficulty of the undertaking. Some of the old to be rejected, other parts retained. There will be omissions, imperfections and obscurities. An intimate and long experience necessary to make the choice. There is a strong

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connection between the parts, and dangerous to break it. If the old is left, no Code is wanting. The greatest lawyer in Paris not equal to the work. An Englishman would not know where to look for it. On the other hand, the advantages will be these:— The Judges would have a short rule, not be misled by French lawyers in citing and misapplying, &c. The English subjects would know the law easily. It would deface the idea of French law, and the attachment to a French government. Imperfections might be removed as experience brought them to light. It would be sufficiently exact at the beginning for all common cases. As to the second method, the inconveniencies would be these:—

1. Keep up a respect for the French laws and government.
2. Disgust the English who think they have right to the English laws.

1. Imagining the conquest rendered the French laws void, though in this the law is otherwise.

2. That they were really introduced by the Proclamation of 1763. The second method has these inconveniencies.

1. Maintain a reverence for the laws of Paris, though less than the other methods.
2. The Canadians will make the following objections:—

1. That the whole of the French law should have been maintained to preserve the chain of connexion and avoid dangers.

2. The English laws ought to be particularly enumerated, and published in French at full length. But a few Canadians will make these objections.

As to the fourth method, it would wear out the very remembrances of the French Laws, Edicts, Government, &c., and have many advantages beyond the other method. But it would be troublesome to the ministers to form the Code.

It would be liable to many imperfections, from the inaccurate manner of setting forth the French laws and customs, and to the two last objections made to the third method, viz.: a part of their French law would give but an imperfect satisfaction, and they would complain of the not setting forth the English law introduced at large.

Conclusion. That they cannot draw a balance in favor of any one of these methods in preference of the other, nor find a new one preferable to them all, being unequal to the task. We have no other merit than that of giving some information of facts. Your Majesty is best able to decide.

Again, the author remarks:—Vol. 2, p. 184 and seq:

With a view to report a statement of the comparative advantages and disadvantages of the tenure in free and common soccage and the tenures of the Province, of a different description, the Governor (in the year 1788) appointed a Committee of Council for that purpose. The Committee was empowered to call upon the Attorney General and Solicitor General for their opinions on the subject matter of the reference, and to take all such other means as they might think expedient for acquiring the necessary information. The advantages of the soccage tenure are apparent in every country where that system has been introduced, and the disadvantages of the other have manifested themselves wherever the latter has taken place. A Canadian Seigniory is ordinarily of, &c. The Council stated in their resolves, &c., that the population of the Province depending now upon the introduction of British subjects, who are known to be all averse to any but English tenures, and the Canadian Seignors of course be left without a hope of multiplying their *censitaires*, except from the predilection of the descendants of the French planters, to usages no longer prompted by the motives of interest nor recommended by example, *That the grant of the waste lands of the Crown in free and common soccage is essential to the growth, strength, defence and safety of the farmers.* * * * * * *That the prerogative is competent to put the waste lands of the Crown under a soccage tenure. But the legislative intervention is necessary to make that tenure universal.* That if this is to be the work not of Parliament, but of the Colony Legislature, the

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Royal instructions given for the greater security of the property of the subject, will require an act, with a probationary or suspending clause, until His Majesty's approbation can be obtained. That an absolute and universal commutation of the ancient tenures, *though for a better*, would be a measure of doubtful policy; but that no substantial objection occurs against giving such individuals that benefit as desire it, and especially to such of the Seigniors who tenants or *censitaires* shall conceive it to be for their own as well as for the interest and benefit of their landlords, and may therefore signify their consent to the change.—*Smith's History*, vol. ii., pp. 184—212.

As to the King's power to legislate at all by proclamation, it was once a mooted point,—but the principle that the King had such power was adopted in the case of Campbell vs. Hall, (1 Cowper, 209), by Lord Mansfield, and it has ever since been recognized.

But apart from decisions, we have legislative enactments. A third ordinance was passed at the same time as those already mentioned in 1764, requiring the registration of deeds of conveyance or mortgage, and contrary to the law of France, proof of the execution of the instrument was required, (though notarial) by the oath of the parties to the instrument.

In process of time there were increased doubts as to free and common soccage lands.

As to the Eastern Townships, they were remote, suits were few, and with reference to marriage contracts, probably not more than 120 or 150 have even been executed.

At last the Legislature of Great Britain interfered in an extraordinary manner, and all doubts were removed by it. The Canada Tenures Act, 6th Geo. IV., cap. 59, by its 8th sec. declares, "whereas doubts have arisen whether lands granted in the said Province of Lower Canada, by His Majesty, or by any of His Royal predecessors, to be holden in free and common soccage, shall be held by the owner thereof, or will subsequently pass to other persons according to the rules of alienation and descent in force in England, or according to such rules as were established by the ancient laws of the said Province, for the descent and alienation of lands therein;" it is therefore enacted "that all lands within the Province of Lower Canada, which have heretofore been granted by His Majesty, &c., to be holden in free and common soccage, or which shall or may hereafter be so granted, &c., may and shall be, &c., held, granted, bargained, sold, alienated, conveyed and disposed of, and may and shall pass by descent, in such manner and form, &c., as are by the law of England established and in force in reference to the grant, &c., or to the dower or other rights of married women." And the Act goes on to reserve to the Colonial Legislation the power of modifications "for the better, adapting the before mentioned rules of the law of England to the local circumstances and condition of the said Province of Lower Canada, and the inhabitants thereof."

After this came the Act of the Lower Canada Legislature, commonly called "Bowen's Act," the 9th Geo. IV., cap. 77. It is true that doubts have been expressed as to whether it was in force from its not having been proclaimed within two years after the passing thereof, in conformity with the requirements of 31st Geo. III., cap. 31, sec. 33; but it is on our statute book as in force; I am of opinion that it is in force, and it is certain that the Legislature of Lower Ca-

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nada have declared the existence of the Imperial Act, and of the Act of 1794, by 10th and 11th Geo. IV. Bowen's Act was necessary in consequence of the extremely loose way of dealing with land which had grown up. We find in it the words "right of *dower*," which could not be said to refer to *douaire coutumier*; but I understand that it referred to the english barring of dower, which could only be done by certain forms.

There is still another recognition by our Legislature of the English law, in the Registry ordinance of the special council, 4 Vic. cap. 30, of which the 34th sec. has the following words:—"Whereas, the alienation of the real estates of married "women held in free and common soccage, and those held under other and differ- "ent tenures in this Province, is governed by different rules, and whereas it is "expedient that such alienations of real estates should be governed by the same "rules." Here we have a recognition of the difference of the tenure, and that the *douaire coutumier* cannot exist with the soccage tenure. It is said that this tenure is the same as the *franc alleu*,—but this is a great fallacy. There is an essential difference between the two; for land in *franc alleu* descends to the children in equal shares, and soccage lands rightly or wrongly recognize primogeniture, as the rule of descent. Again under the custom of Paris, the tenure *en fief* has one rule of descent and that *en roture* another.

The last observation that I would make is that the soccage tenure having its incidents or "nature and consequences," which are characteristic and distinctive, the King who granted these lands by this tenure had a right to make his grants subject to such customs as he pleased; the acceptance of them was voluntary. Parties may in their marriage contracts derogate from the Custom of Paris. Why should not the King do the same in his grants. The grantor may make such conditions as he pleases. He imprints his will on the grant, and that cannot be altered. At common law a grant of lands in free and common soccage carries certain conditions with it, and just as lands *en fief*, are descendible by one rule, and those *en roture* by another, the free and common soccage tenure carries with it its own rule of descent, alienation and dower. Having expressed my opinion at length in the case of Stuart and Bowman which is reported, it would be waste of time upon the present occasion to say more than to refer to it. I would merely observe, that at this argument reference was made to a case of *Delanaudière and Baby.* I have a particular knowledge of that case. The suit was one of an amicable kind, between a mother and her children. It was not a case of *douaire* at all, but a very different one, the partition of the *biens de la communauté* between the widow and her children. There was a contract of marriage, by which *communauté de tous biens présens et à venir* was stipulated.— Subsequently to this marriage a grant of Crown lands in free and common soccage was made to the husband; of course either the lands or their equivalent fell into the *communauté*. I am persuaded that the judgment of Chief Justice Sewell*

* **Chief Justice Sewell, as Attorney General took a very active part in the grants of lands made by the Crown in the townships, all of which are in the English form of Letters Patent. One or two of these grants were made to the patentees "as tenants in common", under the English rule regulating such tenancy. To remedy the evils arising from grants in such form, a Statute of Canada, the 10 and 11 Victoria Cap. 37 was passed, and the**

intended to go that length but no farther. I am constrained then to adhere to my former opinion, and I would dismiss the appeal, but am in the minority.

The *motifs* of the Judgment in Appeal were as follows;—

"The Court * * * * * * considering that the late Joseph Wilcox, father of the Respondent, by his first marriage, died on the 31st January, 1825, contracts a second marriage with the Appellant, Sophia Blodget, and that at the time of the celebration of this second marriage the said Joseph Wilcox held and possessed, as proprietor, the immoveable property claimed by the Respondent by his present action;—considering that at the time of the marriage of the said Sophia Blodget with the said Joseph Wilcox, lands held in free and common socage in Lower Canada were subject to dower, in favour of married women and of their children, in the manner prescribed by the custom of Paris; that no contract of marriage having been executed by and between the said Sophia Blodget and the said Joseph Wilcox, anterior to the celebration of their said marriage, the lot of land described in the Plaintiff's declaration became subject to dower in favor of the said Sophia Blodget and of the children born of her marriage with the said Joseph Wilcox, as prescribed by the custom of Paris, by which the children of the said late Joseph Wilcox, born of his marriage with the said Sophia Blodget, may claim a right of property in the one undivided moiety of the said lot, subject to the usufruct now claimed by the said Sophia Blodget;—considering, therefore, that on the day of the decease of the said Joseph Wilcox, that is, on the 28th day of April, 1846, the said Sophia Blodget and the children of her marriage aforesaid, were by law entitled to claim the said dower, and that by reason thereof, the right of usufruct in the one divided moiety of the said lot of land was vested in the said Sophia Blodget; of which one undivided moiety she is now in possession, having retained possession of the whole lot from the time of the decease of the said Joseph Wilcox:—considering that for the reasons above stated, the Respondent's claim to the whole of the said lot of land, in virtue of his purchase thereof, from his late father on the second day of February, 1826, is not founded in law, but that the said claim must for the present be limited to the one undivided moiety of the said lot, and the conclusions of his declaration restricted to the said one undivided moiety; considering that the further claims set up by the Appellants, by their plea of peremptory exception are not founded in law;—considering lastly that in the final Judgment pronounced by the Court below, there is error, inasmuch as the said Judgment does not admit the said claim of dower, the Court, now here, doth reverse, annul and set aside the Judgment so pronounced by the Court below, on the 30th of January, 1856, and doth condemn the Respondents to pay to the Appellants the costs of the present appeal. And this Court proceeding to render the Judgment which the Court below ought to have rendered doth, declare and adjudge that the claim of the said Sophia Blodget to the usufructuary possession of the one undivided

very last session of Parliament, our Canadian Legislature made provisions further to facilitate a partition by passing the Statute of the 20 Victoria, Cap. 139. The term "tenant in common" and the phraseology of the Patents universally, shew that the framer had in contemplation English and not French law.

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moiety of the said lot of land is well founded in law and appertains to her *à titre de douaire coûtumier*, and the right of property therein to such of her children aforesaid as may hereafter claim the same, and that the claim of the said Respondent to the right of property in the aforesaid one undivided moiety of the said lot, is, for the present, unfounded in law, but that the claim of the Respondent to the other undivided moiety of the said lot is well founded in law; in consequence doth condemn the Appellants within thirty days from the day of the service of the present judgment to deliver up to the Respondent possession of the one undivided moiety of the aforesaid lots of land described in the judgment pronounced by the Court below, on the 30th day of January, 1855, together with the issues and profits of the moiety of the said lot or the value thereof to be computed from the 13th day of April, 1853, and the costs incurred in the said Court below.

And this Court doth reserve to the Respondent such recourse as he may lawfully have for the recovery of the right of property and possession of the undivided moiety of the said lot, now in the possession of the Appellant, Sophia Blodget, after the expiration of her right of usufruct aforesaid.

And it is ordered that the record be remitted to the Court below, sitting at Sherbrooke. The honorable Mr. Justice Aylwin dissenting.

Judgment reversed.

W. L. Felton, for Appellants.
Christopher Dunkin, Counsel.
Sanborn & Brooks, for Respondent.
(F. W. T.)

The editors are deeply indebted to the judges of the Court of appeals for the very great assistance afforded by their honors in the preparation of the report given above in the Wilcox case. For the arrangement and for many of the materials forming the appendix to this case, they are under obligations to the president of the Court, Sir L. H. Lafontaine Bart. who has also had the goodness to revise the entire report.

EN APPEL.

DU DISTRICT DE ST. FRANCOIS.

MONTREAL, 1er OCTOBRE, 1857.

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

MORSE, (*Demandeur en Cour de 1ère Instance.*)

Appelant.

ET

BROOKS & al., (*Défendeurs en Cour de 1ère Instance.*)

Intimé.

ASSIGNATION—DESCRIPTION DU DOMICILE.

Jugé: que la désignation d'une partie résidant dans la ville de Sherbrooke, comme étant "of the Township of Orford" est, suffisante, vû que le Township d'Orford comprend dans ses limites la section de la ville de Sherbrooke qu'habitait la partie désignée comme étant du Township d'Orford.

Sir L. H. Lafontaine, Baronnet, Juge en Chef:

Les deux Défendeurs Intimés, poursuivis pour le paiement d'un billet à ordre qu'ils avaient souscrit conjointement et solidairement, ont été assignés à comparaître le 7 juillet 1855 devant la Cour Supérieure siégeant à Sherbrooke, dans le District de St. François. L'un d'eux, William Brooks, est désigné dans le bref de sommation et la déclaration du Demandeur, comme étant du Township d'Orford, et l'autre Charles Brooks, comme étant du Township d'Ascot, lesquels deux Townships sont dans les limites du district judiciaire de St. François.

Les Défendeurs se sont joints dans une seule et même *Exception Péremptoire à la forme*, à l'appui de laquelle ils ont allégué trois moyens, dont le second ne regarde que le dit William Brooks. Le jugement dont est appel et que les Juges ont oublié de *motiver*, (1) maintient l'Exception quant à William Brooks, et déboute le demandeur de son action contre lui avec dépens; mais en ce qui concerne l'autre Défendeur Charles Brooks, l'exception est rejetée avec dépens, circonstance qui doit nous faire inférer que la cour de première instance a regardé comme de nulle valeur, ou comme n'étant pas prouvés, le premier et le troisième moyens d'exception, et que ce n'est que sur le second qu'elle a dû se fonder pour débouter l'appelant de sa demande quant à William Brooks. En effet c'est le seul moyen qui a fait le sujet des débats en appel. Ce moyen d'exception consistait à prétendre que William Brooks avait été *improprement désigné* comme étant du Township d'Orford, tandis que de fait il résidait et avait son domicile dans la ville de Sherbrooke.

A l'enquête le Demandeur a admis que William Brooks, lors de l'introduction de la demande, résidait et avait son domicile dans les limites assignées à "la ville de Sherbrooke" par une Proclamation publiée dans la Gazette du Canada le 3 Juillet 1852, le lieu de sa résidence ayant été, avant la publication de cette Proclamation, dans le Township d'Orford; et de leur côté, les défendeurs ont en même temps admis que la partie de la ville de Sherbrooke, où résidait le dit William Brooks était, avant la date de la dite Proclamation, une partie du Township d'Orford.

Le District de St. François érigé pour les fins judiciaires, par un acte de la Législature du Bas-Canada, de l'année 1823, chap. 17, comprend plusieurs

(1) MM. les juges C. Mondelet, Short et Badgley, 24 Janvier 1857.

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Townships indiqués dans la première section de cet acte, nommément ceux d'Orford et d'Ascot. Dans la 12e. section il est dit que la Cour se tiendra dans "le village de Sherbrooke," sans plus ample désignation. Ce village n'avait pas encore d'existence légale, comme tel, ni de limites définies. Dans l'Acte de 1829, chap. 73, qui subdivisait le Bas-Canada en Comtés pour les fins de la représentation en Parlement, il est déclaré (sect. 1, art. 14e.) que le nouveau Comté de Sherbrooke sera composé d'un certain nombre de Townships qui y sont nommés, entre autres de ceux d'Orford et d'Ascot, et (sect. 3,) que l'élection pour ce Comté se tiendra à "Sherbrooke" et à "Richmond". Dans l'Acte impérial de 1840, chap. 35, (l'Acte d'Union,) Sherbrooke est mentionné sous le nom de "Ville de Sherbrooke," mais sans indication de limites. Plus tard, pour les fins de cet Acte, une Proclamation de Lord Sydenham en date du 4 Mars 1841 (1) a assigné à la Ville de Sherbrooke les limites suivantes, "toute cette partie du Township d'Ascot, dans le district de St. François, qui est renfermé dans les 5e. et 6e. rangs du dit township, depuis le lot No. 10 jusqu'au lot No. 17, inclusivement, et dans les 17e. et 18e. rangs d'icelui, depuis le lot No. 14 jusqu'au lot No. 20, inclusivement; aussi toute cette partie du Township d'Orford, dans le dit District, qui est renfermée dans les 1er et 2nd rangs d'icelui; les dites parties et sections renfermant et circonscrivant la dite Ville de Sherbrooke et le village adjacent de Lennoxville avec leurs voisinages respectifs."

L'Acte de 1847, chap. 7, qui a eu pour objet de rétablir les municipalités de Comtés, permettait aussi d'ériger, pour les fins municipales, des villes et des villages qui devaient avoir un conseil d'administration distinct de celui du Comté. Il ne paraît pas que Sherbrooke ait été érigé en municipalité séparée, avant que l'Acte de 1847 ait été amendé par celui de 1851, chap 96. La 21e. section de ce dernier Acte porte "que nonobstant toute chose contenue dans la 66e. section de l'Acte ci-dessus cité en premier lieu (c-à-d l'Acte de 1847) il sera loisible au conseil municipal du Comté de Sherbrooke, de fixer les limites de la ville de Sherbrooke, dans la vue d'établir un conseil de ville en icelle, conformément aux dispositions du dit Acte cité en premier lieu, sans référence aux limites de la dite ville, maintenant établie pour les fins de la représentation de la dite ville dans le Parlement Provincial."

C'est sous l'autorité de ces deux actes de 1847 et 1851, qu'a été émanée la proclamation dont il est parlé dans les admissions ci-dessus des parties en cette cause, et qui est en date du 28 Juin 1852. Cette proclamation déclare que la Ville de Sherbrooke, dans les limites qu'elle lui assigne, sera "une ville pour toutes fins municipales, conformément aux dispositions des dits actes." Ces limites sont ainsi énoncées:

"La dite Ville de Sherbrooke, qui se trouve située, partie dans le Township d'Orford, et partie dans le Township d'Ascot, dans le Comté de Sherbrooke, et dans le District de St. François, comprendra les lots Nos. 7, 8, 9 et 10 dans le premier rang du dit Township d'Orford; les lots Nos. 16, 17, et 18 dans le 8e rang du dit Township d'Ascot; les lots Nos. 16, 17, 18, 19, 20 et 21 dans le 7e rang du dit Township d'Ascot; et les moitiés Ouest des lots Nos. 16, 17, 18, 19, 20 et 21, dans le 6e. rang des lots dans le dit Township d'Ascot."

(2) Gazette de Québec, 6 Mars, 1841 (Neilson's.)

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Dans le nouvel Acte. concernant la représentation en parlement, passé en 1853, il est dit, sect. 1 art. 40, que "la Ville de Sherbrooke comprendra, pour les fins du présent Acte, la Ville de Sherbrooke dans ses présentes limites, et les Townships d'Oxford et Ascot tout entiers."

L'on voit que la Ville de Sherbrooke a subi plusieurs transformations dans sa circonscription territoriale, depuis qu'elle a été déclarée ville par l'Acte impérial de 1840. Ses limites qui lui sont assignées par l'acte de 1853, sont aussi celles qui lui sont reconnues par l'acte de 1856, chap. 140, qui a rendu le Conseil Législatif électif. Il y a donc deux villes de Sherbrooke, l'une pour les fins municipales et l'autre pour les fins politiques. Qui sait, s'il n'y a pas même une troisième ville de Sherbrooke pour les fins des écoles communes, car nous avons des municipalités scholaires, distinctes, quant à leur circonscription territoriale, des autres municipalités.

Remarquons qu'aucun des actes que j'ai cités et qui assignent à la ville de Sherbrooke certaines limites pour les fins municipales, et des limites différentes et plus étendues pour les fins politiques, ne déclare que les unes ou les autres de ces limites serviront pour les fins judiciaires. Cependant il est évident que la Cour de 1re. instance a vu, dans la circonscription purement *municipale*, une circonscription judiciaire. Sur quel principe, sur quelle règle s'est-elle fondée ? Je l'ignore, car nous sommes sans renseignements à cet égard. Puisqu'elle rejetait la circonscription originaire du Township, évidemment indiquée pour les fins judiciaires par l'acte de 1823, il me semble qu'il y aurait eu autant de raison pour elle d'adopter la circonscription territoriale pour les fins politiques, puisque celle-ci est supérieure à la circonscription municipale. William Brooks se serait trouvé avoir son domicile dans la première, et par conséquent avoir été réu ò-rement désigné et assigné.

D'un autre côté, la paroisse et le township ont toujours été regardés en ce pays comme étant les circonscriptions territoriales propres à remplir le but de l'administration de la justice, surtout en matière d'assignation devant les tribunaux. Par exemple, la *Cité* de Montréal fait partie de la *Paroisse* de Montréal, de même qu'une partie de la ville municipale de Sherbrooke est enclavée dans le Township d'Orford. Or, je ne sache pas qu'un Défendeur, résidant dans la Cité de Montréal, assigné comme étant de la Paroisse de Montréal, ait jamais été reçu à faire valoir une *exception à la forme*, fondée sur le motif qu'on aurait *improprement* indiqué son domicile.

Je suis donc d'opinion que l'exception aurait dû être rejetée, même quant à William Brooks, et que par conséquent le jugement dont est appel devrait être infirmé.

Le jugement est comme suit :—"La Cour * * * * * * * * * *

Considérant, que l'endroit où le dit William Brooks avait son domicile lors de l'assignation à lui donnée en la Cour de première instance, est dans le Township d'Orford, dans le District de St. François ; qu'en étant ainsi assigné comme étant du dit Township, il a été valablement assigné ; que par conséquent, l'exception à la forme qui a été conjointement plaidée par les deux Défendeurs Intimés, et qui n'a été rejetée que quant à l'un d'eux, le dit Charles Brooks, aurait dû être également rejetée en entier quant au dit William Brooks : Infirme le jugement

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dont est appel, savoir le jugement rendu le vingt-quatrième jour de janvier dernier, par la Cour Supérieure, siégeant à Sherbrooke, en autant seulement qu'il maintient la dite exception à la forme quant au dit William Brooks, et déboute l'Appelant de son action contre lui; et cette Cour procédant à rendre le jugement que la dite Cour de première instance aurait dû rendre à cet égard, rejette la dite exception à la forme en ce qui regarde le dit William Brooks, et condamne les Intimés aux dépens tant en appel qu'en cour de première instance, et ordonne la remise du dossier à la dite Cour Supérieure, siégeant à Sherbrooke."

Jugement infirmé.

T. Lee Terrill, pour l'Appelant.

Sanborn & Brooks, pour les Intimés.

(F. W. T.)

SUPERIOR COURT.

MONTREAL, 18TH NOVEMBER, 1857.

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

No. 2467.

McCord v. *Bellingham, et. al.*

1. The fees allowed by the election petitions act, to a commissioner for the taking of evidence are assignable.
2. If the party contesting an election, and the sitting member, join in applying for the appointment of a commissioner, they are liable jointly and severally for the fees of such commissioner.

The particulars of this action are stated in 1 L. C. Jur. 174.

The case having come up for argument on the merits, upon the general issue:

Abbott, for Plaintiff, argued that the defendants should be condemned *solidairement*, upon the general principle, that they were jointly interested in the employment which formed the object of the contract between them and the commissioner.

The test whether liability arising *ex mandato* is joint or several, is whether the interest of the mandators in the services to be performed is joint or several. If it be joint they are liable *in solidum*. This rule has been applied to claims by Attorneys, Notaries *experts* of all kinds, arbitrators and others—and its principle is equally applicable to this case in which the duties of the Commissioner approximate closely to those of an *expert*. Pothier Mandat. No. 82. Troplong, Mandat, pp. 633 et seq. Nos. 685 to 691. 1 Bell, p. 346.

Holmes for Defendants contended that apart from the evidence which he urged was insufficient, there were two points for the consideration of the Court. The first was that debts of the nature of the one now sued for, were not susceptible of being transferred. The second point was that there could be no joint and several condemnation against the Defendants:—each could only be held responsible for the portion of the Commissioners time which he himself had occupied. This must be presumed to have been his intention when he consented to the appointment. In the present case the Defendant, Bellingham, had made use of the services of the Commissioner, but for a very small pro-

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portion of his time, and it would be the height of injustice to compel him to pay for the remaining and much larger portion which had been taken up in the examination of the testimony adduced by the Defendant Cushing. To illustrate this, it is only necessary to see the effect of such a principle if carried a little farther. As, if the one party only examined one witness and the other five hundred, yet under its operation the first would be condemned in the same manner and to the same extent as the other.

Abbott in reply. It would be necessary to shew some positive enactment or powerful motive of public policy, to prevent the transfer to the Plaintiff from being held valid. In reality the debt is one of an ordinary character; though it is probable, it would have been more conducive to the dignity of the judicial office, from the holders of which these Commissioners are compulsorily taken, had the government placed their remuneration for such services on the same footing with their regular salary. As to the arguments adduced against the solidity of the Defendants liability, it is sufficient to say, that the one Defendant was interested to the same extent in the taking of the testimony of the others witnesses as he was in that of own; and therefore it is impossible equitably to divide the responsib[illegible]

Smith, J.—Th[illegible] with the Plaintiff in this cause—being of opinion that he has fully made out his case, and must have his judgment jointly and severally against the Defendants. It is impossible to sever their liability, for each was interested in every act of the Commissioner.

Judgment for Plaintiff.

Abbott and Baker, for Plaintiff.
Holmes, for Defendant, Bellingham.
Rose and Monk, for Defendant, Cushing.
(J. J. C. A.)

IN APPEAL.

FROM THE DISTRICT OF MONTREAL.

MONTREAL, 6TH OCTOBER, 1857.

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

NYE, (*Defendant in the Court Below*).

Appellant.

AND

MALO, (*Plaintiff in the Court Below*.)

Respondent.

USURIOUS INTEREST.—16 VIC. CAP. 80.—FAITS ET ARTICLES.

Held, 1.—That any excess of interest above 8 per centum is usurious and illegal.

2.—That such excess of interest can be claimed from the creditor by the debtor, by way of exception to the action.

3.—That where a party interrogated *sur faits et articles* on a matter which he should know, answers that he does not remember; as in this case the Plaintiff being asked what amounts he had advanced and what sums had been received by him, answered that he did not keep journal, memorandum or account book, and further stated as an excuse that he had forgotten the amount of the sums advanced by him on the one hand, and received by him on the other; the interrogatories will be taken *pro confessis*.

This action was brought by the Respondent Plaintiff in Court Below, for the recovery of the sum of £155 0 0 amount of four promissory notes: two made

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by the Defendant and endorsed by one J. R. Fleming, and two made by J. R. Fleming and endorsed by Defendant, and interest from the time they became due.

To this action, Appellant Defendant in Court Below, pleaded by a peremptory exception and a *Défense au fonds en fait*, and Plaintiff replied generally.

By his exception, the Appellant admitting that there was due to the Respondent the sum of forty-five pounds, eight shillings and eight pence, alleged that: the promissory notes, on which Plaintiff's action was brought, were given in exchange for similar notes, of which they were renewals, which notes with the exception of two destroyed, he produced and fyled with his plea, That large sums of money had been paid on account of said notes to Plaintiff, which the Plaintiff imputed to interest, at the rate of 37½ per centum, per annum, that the Defendant had a right to have this excess over legal interest, imputed on account of the principal amount, which left the balance already mentioned, that the notes in so far as they exceeded that sum, were usurious, null and void, for want of a legal consideration and as being made for an usurious and illegal consideration.

Wherefore, he prayed the dismissal of Plaintiff's action, save for the sum of forty-five pounds, eight shillings and eight pence.

The Defendant also pleaded the general issue and fyled the the retired notes already mentioned, and also a statement or account showing the various amounts advanced by Plaintiff on said notes, and the payments made to him thereon with legal interest, and balance remaining due.

At the Enquete, the Defendant produced as a witness J. R. Fleming who proved the renewal of the notes and the various payments made to Plaintiff and the correctness of the account fyled by Defendant.

Appellant also fyled a Rule and Interrogatories *sur faits et articles* by him submitted to Respondent.

At the hearing on the merits, Appellant moved to have the Interrogatories served on Plaintiff taken *pro confessis*, the Plaintiff having refused to answer some of them, and having answered others evasively, and on the 20th of March, intervened the Judgment from which this appeal is brought. (1)

By this Judgment the Court below rejected the motion to take Interrogatories *Pro confessis*, and overruling the Defendant's exception with costs, gave Judgment in favor of the Plaintiff for the whole amount claimed and interest—The grounds or motives of Judgment being—That the Defendant had failed to prove that at the time of the discounting of the promissory notes on which Plaintiff's action was brought any loan of money on which more than six *per centum* was retained by the plaintiff, was made to the Defendant, that the Defendant had failed to prove or to alledge for whom or on whose account said notes were discounted; That it appears by the Declaration that the Interest retained by Plaintiff on discounting the said Promissory notes, was in reality taken before and at the time of the transfer of said notes referred to in the said Declaration.—That the Defendant had failed to show that he had by Law any action to recover back from the plaintiff, any excess of interest retained by the Plaintiff for or by reason of the discounting of promissory notes mentioned in Plaintiff's declaration

(1) For this judgment *vide* 1 L. C. J., 155, 6.

or that he could set off by way of compensation the several sums of money alledged to have been paid at the time of the discounting of the said four Promissory notes.

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The Appellant contended that the said Judgment ought to be reversed.

Because the Plaintiff having refused to answer, or having answered evasively interrogatories pertinent to the issues, they ought to have been taken *pro confessis*, and the Defendant's motion granted.

Because it was not necessary to prove that the loan was made to the Defendant, or on whose account the notes were in reality discounted—and that the Defendant had proved that the loan was made on account of notes of which he was endorser, and of which the notes declared on by plaintiff were renewals,—and that several sums of money exceeding the rate of six per cent *per annum* had been paid to the Plaintiff for giving time of payment of the amounts by Plaintiff alledged to be due on notes on which Plaintiff brought his action.

Because usury (that is the taking of excessive or illegal interest), viciates the substance of the contract—is not purged by the making of a new instrument bond or security, and may be set up by any person against whom the contract, so originally tainted, is attempted to be enforced.

Because the said motive is unfounded in Law, it being immaterial whether excess of interest was paid before or after transfer of said notes, and is contrary to the fact, large sums of money having been paid after the transfer of said notes.

Because it does not appear by Plaintiff's declaration or by any of the pleadings in the case that the sums of money alledged to have been paid were paid before or at the time of the transfer of said notes.

Because the Appellant had by Law a right to set up in compensation of the capital amount lent and advanced on said notes—the excess of interest over six per cent paid thereon.

Because the said Defendant as endorser of said notes had a right to set up any matters in discharge of said notes which could have been pleaded by the maker or any antecedent party thereto.

Because the payments made by J. R. Fleming on account of said notes and interest, extinguished the debt *pro tanto*.

Because the holder receiving from any party to a note more than the legal interest due, is bound by Law to impute the same on account of the capital, and the other parties if sued for the debt may require the same to be so imputed.

Because by the said Judgment interest was awarded the Plaintiff on said notes, whereas it was proved by Appellant, that said interest had been already paid.

Because by the said Judgment there is no decision respecting the several sums of money, paid to Plaintiff on said Promissory notes, after the transfer, thereof to him—and after the maturity of the same, as set forth in Defendant's Plea.

Because it does not by the said Judgment appear that the Plaintiff had proved any of the allegations of his declaration.

Because it was proved by the Defendant and was tacitly admitted by the Plaintiff in his answers on *faits et articles* that he had received on account of

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the said notes, and of the interest thereon, the several sums of money specified in the account fyled by Defendant and that the said sums and the sum of forty-five pounds, eight shillings and eight pence currency form the whole amount advanced by the Plaintiff, with legal interest thereon."

Because the said four promissory notes, in so far as they exceed the said sum of forty-five pounds, eight shillings and eight pence currency, are bonds or securities for the excessive and usurious interest, over six per cent, and as such, null and void.

At the argument the Respondent contended, that as the transactions had all taken place since the Act of 1853, 16 Vict. Ch. 80, (the learned counsel here cited 2nd section,) the Defendent could not claim to impute on the amount demanded, the monies which he might have paid for interest agreed upon at the time of the contract. He contended that the penalties existing before the passing of this law, and which consisted in the loss of the debt when the usurious interest had been stipulated and no part of it received, and in the loss of treble the amount paid when any part of it was received had thereby been abolished, and that the debtor had not even the right to recover back the amount of interest he might have paid beyond six per cent, since *all action whether civil or criminal was denied to him.* That allowing the Defendant to impute the interest he had paid on account of the debt would be tantamount to giving him an action to recover back such interest, which could not lie under the provisions of the new statute. That the only thing that remained of the laws prohibiting usury was the exception which the debtor could oppose to that part of a demand whereby more than six per cent interest was claimed, so as to have the demand for interest reduced to the rate fixed by law.

That supposing the interest paid over and above the rate of six per cent could be recovered back, this could only be done by Fleming who had paid the same.

Further the Respondent contended that it was not proved that he had received any more than six per cent interest.

Lafontaine, C. J., prononcing judgment, said :—

Quel est l'effet de la nouvelle loi promulguée en 1853, chap. 80, intitulée, "Acte pour *modifier* les lois d'usure?" Le débiteur de qui [illegible] exigé plus de six par cent d'intérêt, peut-il être reçu à imputer sur le principal de la créance et les intérêts légaux, ce qu'il a ainsi payé au-delà de ces six par cent? Telle est la question qui, pour la première fois, se présente devant ce tribunal.

Tout le monde sait que les anciennes lois françaises prohibaient le prêt d'argent à intérêt, et qu'à différentes époques, ces lois avaient prononcé des peines plus ou moins sévères contre les personnes qui se rendaient coupables d'usure ; le fait étant réputé crime ou délit lorsqu'une personne s'y livrait habituellement.

Il paraît, néanmoins, que dans le dernier état de la jurisprudence sous l'ancien droit français, "quand l'usure ne consistait que dans la stipulation de l'intérêt "de l'argent qu'on avait prêté par promesse ou par obligation, et que cet inté-"rêt n'excédait pas le taux autorisé par la loi dans les cas où *la loi* pouvait pro-"duire des intérêts, les juges se contentaient de déclarer une telle stipulation "*nulle* et *usuraire*, et d'ordonner que les intérêts qui avaient pu être payés en "conséquence seraient imputés sur le principal."

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Guyot, Rep. de Jurisprudence, tome 17, au mot "usure," p. 418.

Notre Ordonnance Provinciale de 1777, chap. 3, avait réglementé cette matière pour tout le Canada, et la disposition qu'elle contient à cet égard, dans sa cinquième section, a été en pleine viguenr dans le Bas-Canada jusqu'à la promulgation de la loi de 1853. Une semblable disposition avait été reproduite dans le statut de la Législature du Haut-Canada, 51 Geo. 3, (1811) chap. 9 par lequel toute l'ordonnance de 1777 avait été abrogée. Enfin ces deux dispositions, tant pour le Haut que pour le Bas-Canada, ont été elles-mêmes abrogées par la loi de 1853. (Sect. 1.)

Il y a trois parties principales et bien distinctes à remarquer dans la 5e section de l'ordonnance. Je citerai la version anglaise, car elle renferme quelques termes qui se trouvant reproduits dans la loi de 1853, tendront mieux que la version française, dans laquelle ils n'ont pas été rendus d'une manière bien exacte, à faciliter l'intelligence de cette nouvelle loi.

1ère partie : "From and after the publication of this Ordinance, it shall not be "lawful, upon any contract, to take directly or indirectly, for loan of any monies, "wares, merchandize, or other commodities whatsoever, above the value of six "pounds, for the forbearance of one hundred pounds for a year, and so after "that rate for a greater or lesser sum or value, or for a longer or shorter time; "and the said rate of interest shall be allowed and recovered in all cases where "it is the agreement of the parties that interest shall be paid."

2ème partie. "And all Bonds, contracts, and assurances whatsoever, where-"upon or whereby a greater interest shall be reserved and taken, shall be utter-"ly void."

3ème partie. "And every person who shall either directly or indirectly take, "accept and receive a higher rate of interest, shall *forfeit* and *lose*, for every "such offence, treble the value of the monies, wares, merchandize and other "things lent or bargained for, to be recovered by action of debt in any of the "Courts of Common Pleas, in this Province; a moiety of which forfeiture shall "be to His Majesty, and the other moiety to him or them that will sue for the "same."

Dans la *première partie*, l'ordonnance permet de stipuler des intérêts n'excédant pas six par cent, et donne au créancier un droit d'action pour en obtenir le paiement. En cela, l'ordonnance a dérogé au droit commun. Mais des intérêts au-delà de six par cent, sous l'empire de cette ordonnance, continuent d'être, quant à cet excédant, des intérêts illégaux, et, par conséquent usuraires. Sous ce rapport, nul changement dans le droit commun. En France, le débiteur eût eu le droit d'imputer ces intérêts usuraires sur le principal de sa dette; car, nonobstant le fait d'avoir exigé de *tels* intérêts, le créancier était admis à répéter le principal légitime de sa créance sauf à subir la déduction de ces mêmes intérêts. Guyot, déjà cité, p. 418, rapporte un arret qui, dans un cas semblable, avait condamné les débiteurs à payer leur créancier, "déduction faite des intérêts usuraires qui avaient été indûment exigés d'eux, et qu'ils avaient payés, "ou qui avaient été compris dans les obligations ou autre titres de créance "qu'ils avaient passés." Il en eût été de même en Canada, après l'ordonnance, si le législateur se fût arrêté à cette *première partie* de sa disposition.

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Mais il a cru devoir aller plus loin, ainsi que nous le voyons dans la *deuxième partie.* Il a voulu que, non-seulement un excédant d'intérêts au-delà du taux qu'il venait d'autoriser, fût frappé de nullité, mais encore que l'obligation qui aurait donné lieu à un tel excédant d'intérêts, fût elle-même " totalement nulle." C'était d'avance entacher cette obligation d'une *nullité absolue.* C'était par conséquent, ôter au créancier son droit d'action pour le principal réel et légitime de son prêt. Il y a plus encore; le législateur n'a pas voulu s'arrêter à cette " pénalité," à cette " perte," qu'il faisait subir au créancier prévaricateur, par cette *deuxième* partie de son ordonnance. Il a cru que son décrêt prohibitif d'un taux *excessif* d'intérêt pourrait manquer d'une sanction suffisante, s'il n'attachait pas en même temps, à la violation de ce décrêt, une pénalité encore plus forte, en sus de celle qu'il venait d'établir par la *deuxième* partie de la section dont il s'agit. De là, la *troisième partie* précitée de cette disposition de l'ordonnance, laquelle, pour chaque *offense* résultant de l'infraction faite à la loi, assujétit celui qui s'en est rendu coupable, à la *confiscation* et à la *perte* (" shall forfeit " and lose") du triple de la valeur de ce qui a fait l'objet du contrat usuraire. L'ordonnance, tout en autorisant le prêt à intérêt jusqu'à concurrence de six par cent, et en le prohibant au-delà de ce taux, reconnaissait donc, pour pouvoir parvenir à son but, que sa sanction devait comprendre trois choses, qui néanmoins étaient bien distinctes entre elles, puisque chacune pouvait exister par elle-même.

La *première*, c'était *l'illégalité* de l'exaction d'un taux excédant six par cent, et par conséquent la nullité du paiement qui aurait pu être fait de cet excédant. Sous ce rapport, en autant qu'il s'agit de cet excédant d'intérêts, nul changement au droit commun, sous lequel le créancier eût continué d'avoir son action pour ce que sa créance aurait pu avoir de légitime, si le législateur n'avait pas été au-delà de la *première partie* de sa loi. Dans ce cas, il n'y eût eu ni *confiscation*, ni *perte*, pour le créancier, car ce n'est point *perdre*, ni souffrir de *confiscation*, que d'être privé seulement de recevoir, ou d'avoir à rembourser une chose qui n'est pas dûe, telle qu'une somme d'argent pour des intérêts déclarés illégaux. La *première* partie de l'ordonnance n'établissait donc pas une " pénalité" proprement dite. Mais il n'en est pas de même de la *deuxième* et de la *troisième* des choses que le législateur a cru devoir exiger, comme devant assurer l'efficacité de son décrêt prohibitif. Ce sont réellement, pour le créancier, des " pénalités" ; c'est, d'abord une " perte" réelle qu'il doit subir, par la *nullité absolue* dont son contrat même est frappé, et qui le prive par conséquent du recours que lui laissait encore le droit commun ; et c'est ensuite, une *confiscation*, ou plutôt une *amende*, selon le mot employé dans la version française de l'ordonnance, puisqu'en pareil cas, il est rendu passible du triple de la valeur de ce qui a fait l'objet du contrat. C'est donc dans cette *nullité absolue* du contrat même, dans cette *confiscation*, ou cette *perte*, ou cette *amende* du triple, que consistent les " prohibitions" et pénalités," dont parle le *préambule* de la loi de 1853, ainsi qu'on va bientôt le voir.

Remarquons d'abord que le titre même de cette loi annonce qu'elle n'a pas pour but d'abroger en entier les lois sur l'usure ; " Acte pour *modifier* les lois d'usure", porte ce titre. Puis le préambule s'exprime ainsi : " Attendu qu'il est " expédient d'abolir toutes *prohibitions* et *pénalités* sur le prêt de l'argent à

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"quelque taux d'intérêt que ce soit, et de faire exécuter, *jusqu'à un certain* "*point*, et pas d'avantage, toute convention de faire payer l'intérêt sur l'argent "prêté, et *d'amender* et *simplifier* les lois relatives au prêt de l'argent à intérêt." Comme on le voit, l'objet du statut est d'abolir les "prohibitions et pénalités" pré-existantes, et non pas de faire disparaître tous les règlements sur l'usure. Le législateur continue d'autoriser l'intérêt conventionel en matière de prêt, et il veut que la convention puisse être exécutée, mais seulement "jusqu'à un cer- "tain point, et pas d'avantage." Voyons comment il s'y est pris pour produire ce résultat.

Il commence par révoquer purement et simplement la 5e section de l'ordonnance, mais pour en reproduire ensuite l'une des dispositions, celle de la *première partie*. Après, il statue "qu'aucune convention qui sera faite à l'avenir dans au- "cune partie de cette province pour le prêt ou crédit d'argent ou valeur d'ar- "gent, *à n'importe quel taux d'intérêt*, et qu'aucun paiement fait en vertu de "cette convention, *ne rendra* aucune des parties à cette convention ou paiement, "*sujette à aucune perte, confiscation* (loss, forfeiture," dans l'anglais) *pénalité* ou "*poursuite* civile ou criminelle *pour usure*, nonobstant toute loi ou statut à ce "contraire." (Section 2.)

Cette disposition porte sur les mêmes objets, mais dans un sens tout-à-fait contraire, que ceux de la *deuxième* et de la *troisième* parties de la 5e section de l'ordonnance; c'est-à-dire qu'à l'avenir, quelque soit le taux d'intérêt qui ait été demandé et reçu par le créancier, dût-il excéder celui fixé par cette loi de 1853, le créancier ne sera plus atteint, d'un côté, par la déchéance de son droit d'action pour le principal légitime du prêt qu'il aura fait, et pour les intérêts légaux exigibles sur ce prêt, et, de l'autre côté, par la pénalité de payer le trible de ce prêt. Telles étaient les "prohibitions et pénalités" décrétées par l'ordonnance, celles qui exposaient le prêteur *à perdre*. En effet, si l'on rapproche les termes, *perte, confiscation pénalité* ou *poursuite*, dont on fait usage dans la 2e section du statut, de ceux que le législateur a employés dans l'ordonnance, l'on voit de suite que ces termes ne se rapportent qu'à la *deuxième* et à la *troisième* parties de l'ordonnance: les mots même, "confiscation" et "perte," sont ceux de la *troisième partie*, ("shall *forfeit* and *lose*.") On pourrait être porté à ne voir, dans la 2e section du statut, qu'un surcroit de précautions de la part du législateur. Il semble qu'il eût du suffire de l'abrogation pure et simple de la disposition de l'ordonnance, pour faire disparaître les "prohibitions et pénalités" qu'elle avait établies, à moins qu'on ne suppose que le législateur ait craint que cette abrogation pure et simple ne pût être suffisante pour assurer au prêteur la protection qu'il voulait lui donner, à l'avenir, et qu'il ne fût encore au pouvoir de l'emprunteur de faire surgir de l'ancien droit en vigueur avant l'ordonnance, quelques autres "prohibitions et pénalités."

Ce qui prouve, au-delà de tout doute, que le législateur de 1853, tout en abolissant les "prohibitions et pénalités," ne voulait pas néanmoins laisser le prêt à intérêt entièrement libre et sans règlement, c'est la disposition que, sous la forme d'un *proviso*, renferme la troisième section du statut: cette disposition qui n'est que la reproduction de celle que contenait la *première partie* de la 5e section de l'ordonnance, est en ces termes: "Pourvu toujours, néanmoins, qu'il soit

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" statué, que toute convention comme susdit, et toute garantie pour icelle, *sera* " *nulle*, en autant, et en autant seulement, qu'il s'agira de l'excédant d'intérêt " devenu en conséquence payable (*thereby made payable*, dans l'anglais) au-dessus " du taux de six louis pour le prêt de cent louis pour une année, et le dit taux " de six pour cent d'intérêt, ou tel autre taux d'intérêt moins élevé qui pourra " avoir été convenu, sera alloué et recouvré dans tous les cas où il sera convenu " entre les parties que l'intérêt devra être payé."

Cette dernière disposition du statut est trop clairement exprimée, pour qu'il soit besoin de l'accompagner d'aucun commentaire. L'excédant d'intérêt au-delà de six par cent, continue d'être *illégal* et la convention au moyen de laquelle on voudrait l'exiger, est expressément déclarée *nulle*; par conséquent le paiement qui en aura été fait est atteint de la même nullité, et n'est pas obligatoire pour le débiteur. Car c'est un intérêt déclaré *usuraire*, et celui qui l'a payé doit avoir le droit de le répéter ou de l'imputer sur le principal et les intérêts légalement exigibles, c'est-à-dire jusqu'à concurrence de six pour cent. S'il n'avait pas ce droit, la troisième section du statut serait un non-sens, et la nullité qu'il prononce serait tout-à-fait dérisoire, surtout en présence de la 21e section de l'acte des billets à ordre de 1849, chap. 22, qui porte "que toute personne, en escomptant " aucune lettre de change ou billet promissoire, pourra retenir, recevoir ou exi- " ger le montant de l'escompte ou l'intérêt sur le montant principal y spécifié au " temps où il sera ainsi reçu ou escompté." Il suffirait donc au prêteur de retenir 25 ou 50 pour cent en prenant le billet d'un individu pressé par le besoin, pour pouvoir le repousser ensuite, lorsque cet individu, se confiant au sens naturel des mots du statut, invoquerait la nullité de la convention en ce qui regarde l'intérêt excessif. Le créancier serait donc bien venu à lui répondre : vous m'avez payé cet intérêt ; donc cet intérêt est parfaitement légal, et il n'y a pas lieu à répétition ! Que deviendrait alors la sanction que le législateur a donnée à sa loi, en déclarant qu'il y aurait *nullité* en pareil cas? Il serait donc permis aux parties d'ôter à une convention le caractère *usuraire* dont la loi l'aurait d'avance entachée ! En d'autres mots, il serait permis de fait de prêter à quelque taux d'intérêt que ce soit ! Telle serait, ce me semble, la conséquence inévitable de l'interprétation que l'Intimé s'est efforcé de donner au statut. Si une telle interprétatation doit prévaloir, il serait infiniment mieux de faire disparaître le plus tôt possible la troisième section du statut, car le résultat de cette interprétation exposerait cette loi au reproche mérité de n'avoir d'autre effet que celui de tendre un piége, en trompant les espérances de recours qu'elle est de nature à faire naître dans l'esprit d'un malheureux débiteur livré aux étreintes de son avare créancier.

Donner un pareil effet aux dispositions du statut, c'est contredire le but dans lequel il a été fait, tel qu'indiqué clairement dans le préambule. Ce ne serait plus " faire exécuté, *jusqu'à un certain point*, et *pas d'avantage*, la convention de payer l'intérêt, lorsque cet intérêt excéderait le taux légal de six par cent ; ce serait, au contraire, faire exécuter une telle convention, quelqu'excessif que fût l'intérêt exigé par le prêteur. Je ne puis donc pas concourir dans cette interprétation du statut.

Je n'ai plus qu'une remarque à faire, c'est que les 2e et 3e sections du statut me paraissent tout-à-fait remplir le but avoué dans le préambule. La personne qui aura prêté à un taux excédant le taux légal, n'est plus exposée à *perdre* comme ci-devant. Les pénalités ont disparues ; et le droit d'action est restitué au prêteur, non-seulement pour le principal réellement avancé au débiteur, mais encore pour les intérêts légaux sur ce principal, quand même la convention aurait violé la loi en portant l'intérêt à plus de six pour cent. La convention pouvant, nonobstant cette violation être exécutée jusqu'à due concurrence du principal et des intérêts légaux, la loi permet ainsi de la faire exécuter, *jusqu'à un certain point et pas d'avantage.* Le but et les dispositions expresses du statut se trouvent ainsi remplis.

Caron, J.—Les faits dans la cause ne paraissent souffrir de difficultés, il n'est probablement pas nécessaire de s'occuper de la question de savoir si le Défendeur était ou non tenu de répondre aux questions qui lui ont été soumises sur faits et articles, sans cela, le montant payé est établi par Fleming, qui prouve l'état produit. Pourtant, je dirai, en passant, que malgré les décisions qui ont déclaré qu'en pareil cas, la partie à qui l'on impute l'usure n'est pas obligée de répondre, cependant, depuis les changements faits à notre loi sous ce rapport, je doute que l'on dût persévérer dans ces décisions, et il me parait que telle partie devrait à présent du moins, si elle ne le devait pas déjà avant la loi, être tenue de répondre à peine de les voir déclarer confessés et avérés.

Mais sans s'occuper de cette question plus qu'il ne vient d'être fait, examinons le jugement au mérite. La question qu'il soulève est celle de savoir si ce qui a été payé par le Débiteur en sus et en outre de l'intérêt légale de six pour cent doit être imputé sur le capital, ou si cet excédant peut être légalement gardé par le créancier, parce que et pour la raison qu'il a été volontairement payé par le Débiteur.

La solution de cette question dépend de l'interprétation à donner à la loi qui a modifié nos lois d'usure. (Acte de 1853, 16 Vic., ch. 80.)

Depuis la promulgation de cette loi, le Débiteur qui a payé plus de six pour cent, par forme d'intérêt, a-t-il droit de demander à ce que cet excédant soit déduit du capital et des intérêts légaux qu'on lui demande?

L'acte modifié par cette dernière loi, est le 17e., George III, ch. 3, (1777), la clause 5e de cet acte est la seule qui touche le sujet. Or, cette 5e clause, qui, quant à nous, contenait toute la loi au sujet des intérêts et de l'usure, comprenait trois parties ou dispositions différentes.

1o. Elle fixait à six pour cent le taux légal de l'intérêt; c'était le seul qui pût être accordé et recouvré dans les cas où l'intérêt était exigible et dû.

2o. Elle déclarait nuls tous actes, contrats ou obligations dans lesquels un intérêt plus considérable aurait été stipulé.

3o. Elle décrétait que toute personne qui directement ou indirectement prendrait, accepterait ou recevrait un taux plus élevé d'intérêt, pourrait être condamnée à payer trois fois la valeur des argents ou autres choses qu'elle aurait prêtés et sur lesquels tel intérêt excessif aurait été reçu.

Ainsi, d'après l'ancienne loi, vous pouviez sur un prêt, recevoir six pour cent, et en poursuivre le recouvrement en justice s'ils avaient été stipulés et non

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payés. Si vous faisiez un contrat quelconque contenant stipulation d'un taux d'intérêt plus élevé, cet acte était nul, et vous ne pouviez pas exiger le montant stipulé et encore moins les intérets promis. Et enfin, si vous aviez fait un tel acte, ou si vous aviez prêté des argents sur lesquels des intérêts usuraires avaient été exigés, payés et reçus, vous pouviez être poursuivi et condamné, sur preuve, à payer le triple de ce que vous aviez ainsi prêté.

Par l'acte qui régit maintenant le sujet, (l'acte de 1853, ch. 80) cette 5e clause de l'acte de 1777, ch. 3, a été rappelée en entier, ainsi depuis 1853 cette loi n'existe plus et c'est à celle qu'il l'a remplacée qu'il faut regarder pour juger la contestation qui nous est soumise. Cette nouvelle loi ne contient que trois clauses applicables au procès. La 1ère est celle qui abroge l'ancienne et elle se borne à cela. La seconde n'est autre chose qu'une explication pour partie de ce que le législateur a voulu et entendu faire par la première. Celle-ci, comme on l'a vu, fesait main basse sur toutes nos lois d'usure; le taux des intérêts, les prohibitions, les pénalités tout était aboli, comme si le législateur eut craint de n'être pas compris, il a voulu s'exprimer en propres termes quant aux prohibitions et pénalités qui jusque là avait existées, lesqu'elles étaient dans le préambule de l'acte censées en devoir être abolies en entier; c'est ce qu'il a fait par la seconde clause de l'acte, qui en résumé, et traduite dans le language ordinaire, signifie deux choses: 1o. Qu'aucun contrat où auraient été stipulés des intérêts quelqu'élevés qu'ils pussent être, ne sera pas nul à l'avenir comme il l'était par le passé;—c'est ce que la clause veut dire par les mots "que la partie qui aura fait tel contrat ne sera rendu *sujette à aucune perte*," c'est-à-dire que sa créance ne sera plus perdue comme elle l'aurait été avant la loi. 2o. Que la personne qui aura fait tel contrat et qui aura stipulé et reçu des intérêts à un taux quelconque, ne sera plus en conséquence de ce, sujette à aucune confiscation, pénalité ou poursuite pour usure, soit au civil, soit au criminel, ce qui veut dire par suite de cette disposition, le prêteur ne pourra plus être poursuivi pour et condamné à payer la valeur du triple de ce qu'il aurait prêté à un taux plus élevé que six pour cent.

L'on voit que la première et la seconde clause du statut sont faites dans un seul et même but, celui d'abolir à l'avenir les nullités existant par le passé pour tout contrat entaché d'usure, et aussi de mettre fin à toutes poursuites au moyen desquelles l'on pouvait, avant, obtenir les condamnations au triple dont il vient d'être parlé. Ainsi, au moyen de ces deux clauses, le législateur a accompli l'énoncé qu'il avait fait dans le préambule de son acte lorsqu'il avait dit "qu'il "est expédient d'abolir toutes prohibitions et pénalités sur le prêt de l'argent à "quelque taux d'intérêt que ce soit."

Or, le taux de l'intérêt sur l'argent prêté, ayant été aboli par le rappel de la loi qui le règlait, et les prohibitions et pénalités ayant aussi été abolies, comme on vient de le voir, si le législateur s'en fût tenu là, il n'y aurait plus eu sur le prêt d'argent aucunes limites ni restrictions. Ces prêts auraient pu être faits librement et à tous taux quelconques dont il aurait pu être convenu entre les parties; et tous contrats faits sur le sujet, auraient été légaux et valides en entier, et les intérêts stipulés quelqu'excessifs et outrés qu'ils eussent pu être, auraient pu être demandés en justice, et auraient dû être accordés sans diminution ni

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réduction. En un mot, d'après l'effet de ces deux premières clauses, les stipulations au sujet des transactions pécuniaires auraient été aussi libres et aussi illimitées que toutes autres transactions quelconques.

Mais le législateur ne s'est pas arrêté à ces deux clauses, il avait aussi annoncé dans le préambule de son acte, que son intention était non d'abolir les lois d'usure, "mais seulement d'amender et simplifier les lois relatives au prêt de "l'argent à intérêt," et aussi il avait déclaré que son intention était de faire "exécuter jusqu'à un certain point *et pas davantage* toute convention de payer "l'intérêt sur de l'argent prêté."

C'est cette intention ainsi énoncée que le législateur a voulu mettre à effet au moyen des dispositions contenues en la troisième clause de l'acte, laquelle sous forme de proviso y est clairement [illegible] l'effet de restreindre et limiter l'abolition des lois d'usure, laquelle, d'[illegible] dispositions précédentes, était entière et absolue. Tout ce qui reste [illegible] de ces *lois d'usure*, se trouve dans cette troisième clause, de l'inte[illegible] laquelle uniquement dépend la décision de la difficulté entre les pa[illegible]. Cette clause ne revient pas sur ce qui a été déclaré dans les précédentes, quant aux confiscations, pénalités et poursuites qui ont été abolies, elle laisse, sous les rapports, les choses dans l'état ou les ont mises les clauses précédentes, c'est-à-dire, ces pénalités, confiscations et poursuites demeurent abolies et éteintes, elle ne revient pas non plus sur ce qu'elle a décrété quant à la *nullité* de ceux qui serait entachés d'usure. Cet acte lui-même, quelques soient les stipulations qu'il contienne, ne sera pas nul, il pourra être exécuté jusqu'à un certain point, mais *jusqu'à un certain point seulement* comme le dit le préambule, et au-delà de ce *certain point*, le proviso le déclare nul dans les termes suivants :

"Toute convention comme susdit, (c'est-à-dire toute convention faite au sujet "du prêt d'argent) et toute garantie par icelle, sera nulle *en autant* et en *autant* "*seulement*, de l'excédent d'intérêt devenu en conséquence payable, au-dessus "du *taux* de *six louis* pour le prêt de cent louis, pour une année, et le dit *taux* "de *six* pour cent d'intérêt ou tel autre taux moins élev[illegible] pourra avoir été "convenu, sera aloué dans tous les cas où il sera convenu entre les parties que "l'intérêt devra être payé."

Ainsi, l'on voit que cette clause d'abord rétablit le *taux* de *l'intérêt* aboli par la première clause, à ce qu'il était auparavant, savoir, à *six pour cent*, elle le rend le taux légal, qui sera payé de plein droit, chaque fois que l'intérêt sera dû soit par la loi ou la convention, si un taux *moindre* n'a pas été stipulé, comme de raison, liberté franche de prendre moins que ce taux légal, mais aussi prohibition expresse de prendre et exiger un taux plus élevé, prohibition faite, non à peine de nullité de l'acte, pour le tout, comme avant, mais à peine de nullité quant à cette stipulation de la partie excédant le taux légal. L'acte subsiste quant au principal et quant aux intérêts au montant de six pour cent. Action eut été portée et jugement obtenu dans toutes Cours de justice pour le capital et le taux d'intérêt légal ; mais la demande qui pourra être faite, pour plus que six pour cent d'intérêt doit être rejetée, cette stipulation est nulle et parlant ne peut avoir d'effet, elle doit être traitée comme non avenue.

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Ainsi, avant la nouvelle loi, tout contrat usuraire, c'est-à-dire contenant stipulation d'un intérêt plus élevé que le taux légal, ne pouvait faire le sujet d'une action légale et devait être repoussé dans son entier; à présent il peut faire le sujet d'une action, la nullité n'est pas totale, elle n'est que relative à l'excédent du taux légal; mais à ce montant, jusqu'à ce point elle existe comme auparavant—et toute demande portée en justice pour cet excédant, ne peut pas être mieux vue à présent que ne l'aurait été celle fondée sur un acte affecté d'usure. Que l'on remarque bien que les termes dont se sert la clause en question sont, *toute convention* et toute *garantie* pour *icelle.* C'est cette convention quelqu'elle soit, verbal ou par écrit, et *toute garantie* faite pour la constater et l'assurer, qui est déclaré nulle quant à l'excédant d'intérêt qu'elle pourra contenir.

Ainsi je conviens de vous prêter £100 pour un an—je ne vous en compte que £90,—mais vous promettez verbalement ou par écrit, de me payer £100 avec intérêt,—au bout de l'an, je porte mon action pour £100 et un an d'intérêt à six pour cent—personne ne peut douter que, si d'une façon ou d'une autre, vous prouvez que je n'ai fourni que £90, je n'obtiendrai jugement que pour cette somme, avec l'intérêt légal—la convention faite entre nous, et la promesse que vous m'avez faite de me payer, pour le prêt que je vous ai fait, £10, audelà du taux légal, étant à ce montant, nulle et devant être déclarée telle.

Mais supposons qu'au lieu de ne vous compter que £90, dans le même cas de prêt, je vous en de fait prêté et compté £100, mais que pour obtenir ce prêt, vous m'ayez d'avance et de votre propre argent payé £10, et que vous vous soyez, comme dans l'autre cas, obligé de payer £100 avec intérêt. Cette circonstance fera-t-elle quelque changement quant à la nature de la transaction et la légalité de la convention?—Il me semble que non—la transaction variée quant à la forme, quant au fond reste la même. Toujours est-il dans un cas comme dans l'autre que nous avons fait entre nous, une convention d'après laquelle vous m'avez payé et j'ai accepté et reçu £10 de plus que le taux legal. Or, cette convention est déclarée nulle quant à cet excédant, et partout, si je vous poursuis pour £100 et l'intérêt légal, il me parait clair que vous pourrez m'opposer le paiement de cet excédant, et non dire qu'elle fait partie de notre convention, et que cette convention étant, aux termes de la loi, nul pour cet excédant, il doit vous être déduit. Si cette déduction ne devait pas être faite, il faudrait demander par demande incidente, ou par action directe, le remboursement de cette somme, procédé inutile et contraire à l'intérêt de toutes les parties. Ce que vous pouvez obtenir par reconduction ou action directe, vous devez pouvoir l'obtenir par exception.

En France, où le contrat usuraire n'était pas toujours nul pour le tout, le mode que l'on adoptait lorsque des intérêts usuraires avaient été payés et reçus, était de les déduire sur le capital de la créance.

17 Rep. Guyot, Vo. Usure, page 419, II vol. et 418.—3 Chardon, dol. No. 548.

Je suis donc d'avis que toute intérêt payé au-delà du taux de six pour cent, d'après notre droit actuel, peut être offert en compensation du capital et des intérêts légaux, lorsque le débiteur est poursuivi; ou bien cet excédant peut être répété par action directe si le capital et cet excédent avaient été payés.

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Faisant l'application de ces considérations aux faits de la présente cause, il est nécessaire d'en venir à la conclusion que le Défendeur était fondé à prétendre qu'il avait droit de conserver par son exception; de même que s'il eut payé il aurait droit de répéter par action directe, sur les diverses transactions pécuniaires qu'il a eu avec le Demandeur et pour le résultat desquelles il est poursuivi en cette cause, tout ce qu'il justifie avoir payé, dans un temps ou un autre, sous une forme ou une autre, en sus et au-delà de l'intérêt légitime et légal de six pour cent.

Pour soutenir le contraire, l'Intimé a été forcé d'aller jusqu'à dire que les lois d'usure avaient été abolies en entier et à toutes fins, par l'acte de 1853; c'est une erreur grave, ainsi que je l'ai démontré, et partant, pour que l'Intimé eut raison dans ses prétentions, il lui aurait fallu faire bonne, cette proposition, qui est repoussée par les termes et l'esprit de la loi même, et aussi par les démarches subséquentes de la législature, qui à plusieurs reprises depuis cette loi, et notamment durant la session dernière, a délibéré sérieusement sur l'à propos d'abolir complètement les lois sur l'usure, déclarant par là que sûrement il en restait encore quelque chose, le quelque chose qui en reste, d'après les discussions qui ont eu lieu, c'est la fixation d'un taux légal d'intérêt au-delà duquel, il n'est pas permis de stipuler, à peine de nullité quant à cet excédant.

C'est également à tort que l'Intimé a pretendu par son conseil, que quans même cette nullité quant à l'excédent existerait, qu'elle ne pouvait affecter let billets sur lesquels est fondée l'action, pour que l'excédent payé, promis ou stipule, n'etait pas compris aux billets, mais avait été payé en dehors et n'en faisait pas partie.

Le contraire me parait établi par la preuve, mais en admettant la vérité de cet allégué, il n'en serait pas moins vrai que la convention de payer plus de six pour cent, faisant partie des transactions pour lesquelles les billets ont été donnés; que cette convention étant nulle, donnait au défendeur poursuivi pour les billets l'exception de répétion ou de compensation, de même qu'il aurait eu l'action en répétition, s'il eut eu payé. L'on peut répondre a l'intimé dans les termes de Lord Mansfield: "There is no contrivance whatever by which a man may cover "usury."

J'étais fortement sous l'impression que le statut contenait une clause ou une disposition allant à dire, que l'on ne peut exiger par action plus de six pour cent au cas où il aurait été stipulé, il n'y avait pas cependant droit à répétition, sur ce qui aurait été payé de plus;—je crois qu'une telle clause était contenue au bill lorsqu'il fut présenté, et que depuis elle en aura été retranchée.

Quant à l'objection faite par l'Intimé, que les intérêts usuraires, ce n'est pas l'Appelant qui les a payés, c'est le nommé Fleming et que les déduisant à l'Appelant ce serait le faire profiter de ce qui a été payé par un autre.

La réponse à cette objection, au cas où elle serait fondée en fait, c'est que sur les transactions pécuniaires dont le Demandeur poursuivait l'exécution, il n'avait droit de recevoir qu'un certain montant d'intérêt, réglé et décrété par la loi, que tout ce qu'il demandait ou avait reçu en sus était illégal, et que s'il l'avait reçu, il devait le déduire, ou s'il ne l'avait pas reçu, il ne pouvait pas le demander. Ce qui est certain, c'est que dans cette cause le Demandeur ne peut obtenir

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jugement que pour le montant qu'il a prêté et pour l'intérêt légal sur ce montant; ainsi lui accorder d'avantage et le laisser profiter de ce qu'il aurait reçu en sus, serait lui accorder ou lui laisser ce que la loi déclare ne lui pas appartenir; ainsi, pourvû que le Demandeur obtienne jugement pour ce qui lui est légitimement dû, qu'il soit satisfait et qu'il ne s'occupe nullement de la manière dont les choses se règleront entre l'Appelant et Fleming, les deux débiteurs, qui tous deux ensemble ne doivent pas être condamnés à lui payer plus qu'il ne lui est dû.

Je suis donc d'avis que le jugement doit être infirmé et que l'exception de l'Appelant doit être maintenu, et que sur le jugement à rendre doit être déduit tout ce que l'Intimé a reçu sur le prêt constaté par les billets en cette cause, en sus et en outre de l'intérêt légal, si l'état produit par Fleming est prouvé et correct, le jugement devrait être pour la balance qui y est établie.

Faits et articles pris pour confessés et avérés complètent la preuve.

Aylwin, J.;—I wholly concur in the opinion expressed by his Honor. I have only to draw particular attention to the answers upon *faits et articles.* The Respondent, confessedly a dealer in money, keeps no books of account, and when an account is presented to him, exhibiting day and date for each payment made to him, by his supposed debtor, ignores it. If, upon the present occasion he loses anything, he has himself alone to blame. The evasion to answer is glaring; he ought to know what he has received, and if he knows it not, with what face does he make his charge? In a commercial community, and between traders, above all those who deal in money, the keeping of books is a matter of absolute necessity. Without this, fraud would be uncontrollable. In giving to the Appellant the benefit of an honest and direct answer, to the 36th and 37th interrogatories propounded, I hold that we do the Respondent no wrong. The examination upon *faits et articles* is designed to wring out the truth from an unwilling party. To attain this end, public and oral examination is now had in England. In Lower Canada the interrogate is not subjected to a test so severe, but the milder doctrine of examination upon questions in writing, produces the same result. That doctrine is to be found in the law of Rome, (Digest 42, tit. 2, de confessis 6, de omnibus tribunalibus § 1, si quis incertum confiteatur, urgeri debet, ut certum confiteatur.) See in explanation, Brissonius de formulis, lib. 5, page 354, No. xiii. *Jurisjurandi* in actionibus personalibus formula: Dari oportere vel non oportere. It was acted upon in France, though so great a master as Pothier, has questioned the value of its operation. With all reverence for so high a name in matters of *procedure*, even *his authority has been questioned*, and in this respect I think rightly.

In the practice of old France, the interrogate was sometimes ordered to answer *categoriquement*; in my opinion, this is not a proper case to take that course. The Respondent has had his day in Court to answer, and must abide the result of that answer.

Duval, J., dissented from the Judgment rendered, and in substance said:

The Plaintiff contends: 1st. That the money over and above the legal rate of interest was paid by Fleming and not by the Defendant, and therefore that Defendant cannot recover it back or deduct it from the amount demanded. 2nd. That the statute denies the action *condictio indebiti* for the monies so paid.

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The argument of the Plaintiff is, that whatever the Debtor has willingly paid on account either of interest or of capital, he cannot by law recover back, and what he cannot recover back by direct means ought not to be allowed him indirectly. The late statute evidently intended that courts should not interfere in the case of usurious contracts, where the parties had faithfully executed them either in whole or in part according to agreement.

The Defendant answers that the 3rd section makes the contract void for the excess of interest, and that it is this contract the court is called upon to enforce.

I am of opinion that the Plaintiff ought to recover the amount demanded. The Court is not called upon to enforce the payment of any interest beyond six per cent. The Plaintiff only asks a Judgment for his capital and the legal interest. It is the Defendant who wishes to revert to past transactions and get back money willingly paid. The second section of the Act 16 Vict., chap. 80, appears to me to condemn such a pretension, and the preamble of the statute explanatory of the intention of the Legislature confirms this view.

The judgment was motivé as follows:—

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1o. considérant que la cinquième section de l'ordonnance de 1777 (17 Geo. 3) chap. 3 qui avait reglementé le taux de l'intérêt, contenait trois dispositions ou parties distinctes; la première permettant, en dérogeant au droit commun, de stipuler des intérêts n'excédant pas six par cent, et donnant au créancier un droit d'action pour en obtenir le paiement; de sorte que les intérêts stipulés ou perçus au delà de six par cent, ont continué d'être, quant à cet excédant, des intérêts illégaux et par conséquent usuraires; la seconde allant jusqu'à déclarer que, "tous contrats, obligations ou conventions quelconques," qui aurait donné lieu à un tel excédant d'intérêt, serait "totalement nuls;" et la troisième imposant une autre pénalité, en décrétant que "tous particuliers qui prendraient directement ou indirectement, accepteraient ou recevraient une plus forte demeure (intérêt) encourraient, pour chaque contravention, une amende du triple de la somme d'argent, de la valeur des marchandises ou autres effets quelconques" qui auraient fait l'objet de tels contrats obligations ou conventions. 2o. Considérant qu'il est vrai que le statut de 1853, chap. 80, révoque dabord la cinquième section de l'ordonnance de 1777, et déclare ensuite (2e. section) "qu'aucune "convention qui sera faite à l'avenir dans aucune partie de cette province pour "le prêt ou crédit d'argent, à n'importe quel taux d'intérêt et qu'aucun paiement "fait en vertu de cette convention ne rendra aucune des parties à cette convention ou paiement, sujette à aucune perte, confiscation, pénalité ou poursuite "civile ou criminelle pour usure, nonobstant toute loi ou statut à ce contraire." 3o. Mais considérant, d'un autre côté, que le statut de 1853 n'a pas eu pour but d'abroger en entier les lois sur l'usure, ce qui resulte clairement, 1er. de son titre même qui porte, "Acte pour modifier les lois d'usure;" 2e de son *préambule* qui est en ces termes: "Attendu qu'il est expédient d'abolir toute prohibition et "pénalité sur le prêt de l'argent à quelque taux d'intérêt que ce soit et de faire "exécuter, *jusqu'à un certain point, et pas d'avantage*, toute convention de payer "l'intérêt sur de l'argent prêté et *d'amender* et *simplifier*, les lois relatives au prêt de l'argent à intérêt;" 3e. de la troisième section du même statut, puisquelle reproduit, dans les termes suivants, le dispositif de la première partie précitée de

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la cinquième section de l'ordonnance: "Pourvu toujours néanmoins, et qu'il "soit statué, que toute convention susdite, et toute garantie pour icelle, sera nulle, "en autant, et en autant seulement, qu'il s'agira de l'excédant d'intérêt devenu "en conséquence payable audessus du taux de six louis pour le prêt de cent "louis, pour une année, et le dit taux de six pour cent d'intérêt, ou tel autre "taux d'intérêt moins élevé qui pourra avoir été convenu, sera alloué et re- "couvré dans tous les cas où il sera convenu entre les parties que l'intérêt devra "être payé;"—4o. Considérant que tout l'effet du statut de 1853, a été de faire disparaître seulement "les prohibitions et pénalités" pré-existantes, c'est-à-dire, celles décrétés par les deuxième et troisième parties précités de la cinquième section de l'ordonnance; et de maintenir la convention, quoiqu'entachée d'usure, et de donner au créancier un droit d'action pour le principal et aussi pour les intérêts stipulés, mais seulement jusqu'à concurrence de six pour-cent; que l'excédant d'intérêt au delà de ce taux, continuant d'être illégal, et, parconséquent, usuraire, et la convention, au moyen de la quelle on prétendait exiger cet excédant, étant expressément déclarée nulle *pro tanto*, il s'ensuit que le paiement qu'en a été fait, est atteint de la même nullité, et n'est pas obligatoire pour le débiteur qui, en pareil cas, a droit d'en faire l'imputation jusqu'à due concurence sur le principal ou les intérêts légitimes de la créance.—Considérant que bien que l'intimé en répondant, au vingtdeuxième interrogatoire sur faits et articles, ait admis qu'il faisait le négoce d'effets de la nature de ceux dont il s'agit en cette cause, il a néanmois déclaré qu'il ne tenait ni journal ni mémoire, ni livres de compte; que d'ailleurs, il a répondu d'une manière évasive, surtout en ce qui regarde les trente-sixième et trenteseptième interrogatoires, prétextant qu'il avait oublié le montant des sommes par lui avancées d'un côté et par lui reçues de l'autre; qu'à raison de ce que dessus les dits interrogatoires doivent être tenus pour confessés et avérés; et vu la preuve requise en conséquence à l'appelant, ainsi que la déposition de John R Fleming, témoin entendu en cette cause, et vu aussi le mal jugé du tribunal dont est appel, en rejetant la motion de l'appelant du vingt-troisième jour de Février dernier.—Infirmé le jugement dont est appel, savoir le jugement rendu le vingtième jour de Mars mil huit cent cinquante-sept, par la Cour Supérieure siégeant à Montréal avec dépens contre l'intimé sur le présent appel; Et cette cour procédant à rendre le jugement que la dite Cour Supérieure aurait dû rendre, condamne l'Appelant suivant ses offres, à payer à l'intimé, pour balance et parfait paiement du montant réuni des quatres billets produit par l'intimé au soutien de sa demande, la somme de quarante-cinq livres, huit chelins, huit deniers et demi, cours actuel, avec intérêt à compter du neuf Juin 1856 et les dépens encourus par l'intimé en la dite Cour Supérieure depuis l'introduction de son action jusqu'au dixseptième jour de Novembre 1856, inclusivement; et quant aux dépens encourus par l'appelant depuis cette dernière époque en la dite Cour Supérieure, cette Cour en adjuge le profit au dit Appelant et en conséquence condamne le dit intimé à les lui payer; Et enfin il est ordonné que le dossier soit remis à la dite Cour Supérieure siégeant à Montréal.

L'honorable M. le Juge Duval différant d'opinion.

Henry Stuart, for Appellant.

Cherrier, Dorion et Dorion, for Respondent.

(F.W.T.)

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SUPERIOR COURT.

MONTREAL, 27TH JUNE, 1857.

Coram SMITH, J., MONDELET, J., CHABOT, J.

No. 416.

Forsyth v. *Morin & al. and divers opposants.*

OPPOSITION—CONTESTATION—DELAY.

Held,—that a party who shews upon affidavit, error and inadvertence in omitting to fyle a contestation to a report of distribution within the eight days fixed by the rules of practice, will not afterwards be allowed to fyle such contestation although he makes special application founded upon affidavit.

The plaintiff was opposant in this cause for the proceeds of the sale of immoveables. An Attorney of Montreal, some days previous to the 18th May last, had been charged by the Plaintiff's Attorneys, M.M. Sicotte and Chagnon of St. Hyacinthe, to examine the report of distribution, so soon as it had been posted up, to ascertain whether the plaintiff as opposant had been collocated, and to write them forthwith respecting the matter. The Montreal Attorney had accordingly examined the report, within a day or two after it was posted up, the 18th May being the day it was posted up, and seeing that the plaintiff was collocated for the amount of his demand, did not notice that he had demanded a further sum by his opposition for which he was not collocated. He reported to M.M. Sicotte and Chagnon that their client was collocated for his entire demands. The non-collocation of Plaintiff for the amount of his opposition was only discovered the 19th June, following, and on the 20th June, the Court was moved upon affidavit to allow the plaintiff to contest the oppositions of the opposants Cadoret and Dufresne who had been collocated before him as to his opposition.

Per Curiam.—This is an application to contest a report of distribution after the lapse of 8 days allowed for doing so. It is refused; otherwise there would be nothing fixed or stable.

Motion dismissed.

Sicotte & Chagnon, for opposant Forsyth.
Laframboise & Papineau, for opposants Cadoret and Dufresne.
(F.W.T.)

MONTREAL, 23 NOVEMBRE 1857.

Coram Day, J., Smith, J., C. Mondelet, J.

No. 2580.

Jones v. Saumur dit Maxs & Leroux, Tiers-Saisi.

Jugé,—que sur une saisie arrêt après jugement il n'est pas nécessaire de signifier le writ au Défendeur lorsqu'il est absent.

Dans cette cause le Défendeur étant absent, aucune signification ne lui fut faite du writ de saisie arrêt émané le 24 janvier 1857, après le jugement qui avait été rendu les 25 février 1856 à Montréal contre lui.

[illegible] le Défendeur avait été assigné par la voie des journaux [illegible] pays, en conformité à la section 9me de l'acte de judicature de 1849 [illegible] 38.

Day, J.—[illegible] saisie-arrêt en cette cause valable, ordonne au tiers-saisi [illegible] celles du demandeur, quoique le Défendeur n'ait pas été assigné [illegible] cour envisage la saisie-arrêt comme une exécution, et cette cour [illegible] de le décider ainsi. La pratique de la Cour a été d'accorder la saisie-arrêt après jugement en pareil cas et nous [illegible] cette pratique judicieuse.

Mondelet, J.—Je diffère de la majorité de la Cour; car je ne considère pas que la saisie-arrêt soit une exécution, c'est une demande. C'est une instance et rien ne fait voir que c'est une exécution. Le titre 33 de l'ordonnance de 1667 nous indique ce que c'est que la saisie-exécution.—Je ne vois rien qui empêche que le défendeur ne soit assigné par la voie des journaux dans une instance en saisie-arrêt comme dans toute autre action.

Saisie-arrêt maintenue.

A. & G. Robertson, pour le Demandeur.

Editor's Note. The Statute 14 and 15 Vict., ch. 60, section 3, enacts: "That in all "actions brought in conformity with the 94th section of the act passed in the 12th year "of Her Majesty's Reign, &c., &c., against any absent party, all notices or proceedings "subsequent to the advertisement required by way of summons to appear and required "by law or by any Rule of Practice, in order to obtain or *execute* any judgment against "such absent party, &c. &c., may be lawfully made and notified at the office of the "Prothonotary or Clerk of the Court in which such action may be pending.

Vide also—6 L. C. Reports, p. 148.

(P. R. L.)

MONTREAL, 20th NOVEMBER, 1856.

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

No. 2411.

Laviolette vs. Martin.

MARITAL AUTHORIZATION.

Held, that a married woman abroad does not need the express authorization of her husband to convey land in Lower Canada, provided the deed of conveyance be sufficient according to the laws of her domicile where such deed was made.

On the 23rd November, 1837, Dame Marie Clothilde Pinsonnault, wife of François Baby, gave three obligations, passed before Gibb and colleague, Notaries, in favour of Messieurs Cameron, Cowie, and Dease—the first for £1000, and the two others for £250 each; for securing the payment of which, she hypothecated 750 arpents of land in the Seigniory of Lasalle. These obligations were registered, on the 11th December, 1837, at the Registry Office of the County of L'Acadie, and on the 21st January, 1838, at the Registry Office of the County of Huntingdon.

On the 15th December, 1837, Baby and his wife, being then refugees at Albany, in the United States, sold to Orville Clarke the said 750 arpents, mortgaged as above by Mme. Baby, and being her own family property (*propre*); and it was not alleged in the deed of sale that Mme. Baby was thereto authorized by her said husband.

On the 23rd January, 1839, Clarke sold the land so acquired to Comstock; and on the 21st March, 1851, by *acte* passed before Brisset, Notary, and his colleague, Milligan, both in his own name and as Attorney of Comstock, sold to Toussaint Martin a portion of the land in question, to wit: three arpents by twenty-seven. Martin obtained sentence of ratification of his purchase on the 18th June, 1842, without opposition, and registered his title on the 30th Oct., 1844, in the Registry Office for the County of Huntingdon, within which was situate the land.

On the return of Mr. and Mrs. Baby to Canada, Clarke, apprehensive that he had not received from them a sufficient title to the land by the deed of the 15th December, 1837, procured from Mme. Baby, authorized by her husband, by *acte* received before Louis Panet and colleague, Notaries, at Quebec, on the 24th June, 1844, a ratification of the deed of the 15th December, 1837,—a new sale of the same land, subject to the above mortgages, as had been stipulated in the deed of the 15th December, 1837; and it was then declared that the supplementary deed was given to supply the omission of the clause of marital authorization in the deed of 15th December, 1837. On the 17th April, 1847, Comstock procured from Clarke, an *acte* passed before Crawford and colleague, Notaries, to the same effect, and nearly in the same terms.

On the 13th August, 1842, before Guy and colleague, Notaries, Cameron, Cowie and Dease transferred their obligations to Nathan Colborn. These transfers were registered by memorial on the 31st August, 1842, at the Registry Office for the County of St. Johns, for securing the capital sums, and the arrears of interest accrued.

On the 30th May, 1843, before the same Notaries, Colborn transferred the

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same obligations, "To the President, Directors and Company of the Mechanics and Farmers' Bank of Albany, and to the President, Directors and Company of the Canal Bank of Albany;" these last transferred their rights by deed of date 1st July, 1843, passed before Belle and colleague, Notaries, to George Weekes, in his quality of Assignee to the bankrupt estate of Colborn. On the 22nd January, 1844, by *acte* passed before Belle and colleague, Notaries, Weekes, in his said capacity of Assignee, transferred the said obligations to the said Banks. Finally, the plaintiff, by deed of transfer passed before Lacoste and colleague, Notaries, of date 2nd May, 1850, obtained from the said Banks the cession of the said three obligations and claims; and the present action has been instituted by the plaintiff, as assignee, of the entire sum of £1500, for which he sued the defendant hypothecarily in January, 1851.

The plaintiff, by his action, alleged the absolute nullity of the deed of sale of 15th December, 1837, by Mme. Baby, of the immoveables therein described; that she remained proprietor until the 28th June, 1844, when she sold them under the authorization of her husband; that the title under which the defendant held, only took effect from the 28th June, 1844, day of the legal sale by Mme. Baby; and that, consequently, the judgment of ratification obtained by the defendant on the 18th June, 1842, could not in any way discharge the immoveable, as he had not at that time a legal and perfect title.

The chief ground of defence of the defendant was, that Baby and his wife being in the United States at the date of the deed of the 15th December, 1837, Mme. Baby did not require the special authorization of her husband to contract or sell her land; that her incapacity ceased on leaving the limits of Lower Canada, where she had married; and that the ratification of 28th June, 1844, had the effect of making valid what was previously null; and, besides, the plaintiff had admitted the legality of the title of the defendant in sueing him in this Court in 1847, as assignee of his vendor, Comstock.

The second exception of the defendant averred that there had not been a sufficient enregistration in order to preserve the *hypothèque* in question, the land being *en censive*, and not held in free and common soccage; and that the defendant had registered his title of acquisition at a proper time, on the 30th October, 1844.

The third exception of the defendant alleged that the transfer of 2nd January, 1844, by Weekes, Assignee, had been without effect, having been made without authority.

The fourth exception of the defendant alleged that there had never been any signification of the said transfers, at the place required by law to Mme. Baby; and that the original creditors, Cameron, Cowie and Dease, were still proprietors of these claims.

The last exception set up *impenses* made by the defendant.

To the first exception, the plaintiff answered that the pretended deed of sale of 15th December, 1837, was an absolute nullity, for want of the authorization of Baby the husband; and that the judgment of ratification, of date 18th June, 1842, was consequently without effect. That furthermore, by the judgment of March 12th, 1850, rendered in the action of the plaintiff against the defendant,

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for the recovery of the price of the sale, the Court had recognized that the obligation for £1000 abovementioned, was hypothecary, inasmuch as the judgment was only rendered on condition that the plaintiff should give security to the defendant that he should not be troubled for the payment of this hypothèque, and that this judgment of the 12th March, 1850, had the effect of a judicial contract between the plaintiff and defendant.

To the second exception, the plaintiff answered that the defendant being a purchaser before the ordinance 4th Vic., c. 30, came into force, the registration of his title was a vain formality, not required by the 4th section of this law, and that such registration could not militate against general and special hypothèques existing before the putting in force of the ordinance; that these hypothèques should have full effect against the defendant, who was not a purchaser in good faith subsequent to the putting in force of the ordinance.

To the third exception, the plaintiff answered that Weekes, the assignee to the bankruptcy of Colborn, did not require the authority of the Judge in Bankruptcy, to make this transfer; which, moreover, was effected before the dividends were declared; and, besides, the defendant could not *exciper du droit d'autrui.*

To the fourth exception, the plaintiff answered that the 4th November, 1850, before Panet, Notary, at Quebec, Baby and his wife had acknowledged and accepted the signification of all the said transfers, and that from that time it was competent to the plaintiff to proceed as well against the personal debtors as against the *tiers detenteurs* hypothecary debtors.

To the fifth exception, the plaintiff answered in law and in fact.

The chief question of law raised by the issues, and that determined by the Court, was the issue raised by the first exception: the incapacity of Mrs. Baby to contract, even in foreign parts, without the authority of her husband; or, in other words, the statute regulating the *status* of a married woman, according to the 223rd, 226th and 234th Articles of the Custom: Is this statute real or personal, or a mixed statute, as some authors contend?

The parties went to evidence, and were afterwards heard on the merits.

Berthelot, for the plaintiff, at the argument, contended for the following propositions:—1st. That Baby and his wife being married in Lower Canada, under the empire of the 223rd, 226th and 234th Articles of the Custom, which incapacitated the wife from contracting without the authorization of her husband; this incapacity continued to attach to her person, notwithstanding the change of domicile of her husband: (Merlin, Autorisation Maritale, sec. 10, § 4; Bouhier, ch. 23, No. 3; Boullenois Tom. 1, tit. 2, ch. 5, obser. 29.) That this doctrine had been recognized by a judgment rendered in the case of Rogers vs. Rogers, in January 1848, Rev. de Leg., Tom. 3, p. 255, by Rolland, Gale, Day, and Smith, Justices. 2nd. That the principal object of the indenture of 15th December, 1837, being the alienation of the estate of Mme. Baby, this alienation required to be regulated by the rules of a real statute; that this sale was therefore radically null for want of authorization by the husband, and also because Baby was selling the *propre* of his wife. The ratification which was made on the 28th June, 1848, could not render it valid, so that it was only by the

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new sale that Madame Baby made a legal alienation of her property. If this were the case, then the plaintiff was well founded in enforcing his hypothecary claims against the lands of [illegible] fendant. This right was recognized by the judgment of the 12th [illegible] his first suit against the defendant, and the same right shou[illegible] now. 3rd. That the judgment of the 12th March, 1850, had the effect of establishing a judicial contract between the parties; and the defendant could not claim at the present time conclusions contradictory of those pronounced in his favour against the plaintiff by that judgment.

Loranger, Q. C., for the defendant, [illegible] following propositions:

1st. That on the 15th December, 1837, date of the sale from Baby and his wife to Clarke, the vendors had their domicile at Albany, place of the sale; that the laws of the State of New York should regulate the form of the deed of sale, and this deed, being in conformity with these laws, was binding on the parties.

2nd. That the marital authorization required in Lower Canada to make valid the contract of a married woman, is restricted to the territorial limits where the custom is in force, and the parties domiciliated beyond these limits can dispose of the property within these limits, without mention of this formality.

3rd. That Mme. Baby could legally sell to Comstock the property situate in Lower Canada, in following the forms required by the laws of New York, and that these laws did not require the marital authorization as did the laws of Lower Canada.

4th. That this sale being valid, the sale by Clarke to Comstock, and by the latter to the defendant, were valid also; consequently, the defendant rightly registered his deed of acquisition, and the ratification of title obtained by him on the 18th June, 1842, purged the mortgage of the Hudson's Bay Company.

5th. That the ratification made by Mme. Baby, on the 28th June, 1844, was a useless formality; so also of the second sale, of date the 17th April, 1847, by Clark to Comstock.

6th.—That the want of registration of the obligations creating the mortgage, while the defendant had registered his title, was a fact fatal to the action, apart from any other ground.

On the 29th November, 1850, the Court gave judgment, dismissing the action; Mr. Justice Mondelet dissenting as follows:

Mondelet, J., dissenting, said:—There could be no doubt but that had Mme. Baby made the conveyance in question in Lower Canada, it would have been null and void under the 123rd article of the *Coutume de Paris*. The question then was, whether such contract was valid when made in the State of New York, where the authorization of the husband was not necessary. This brought up the question, whether the law of the matrimonial domicile, or of the new domicile, was to govern this case. And if the latter, be the one that governed in case of personal contracts, the question then arose whether such law could regulate the present case, where the alienation of real estate was concerned; or, in other words, was the law requiring the authorization of the husband a real or personal statute. If it be held to be personal, the sale would undoubtedly be good; but, if real, it would be radically null, and no means would exist of reme-

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dying the defect. The rule of law that regulated this question was to see whether the principal object had reference to personal action or real estate. Here the principal object of the contract had reference to the alienation of real estate, and consequently the laws governing it must be held to be a real statute, and therefore confined to the State of New York; so that the deed of sale, being governed by our laws, must be held to be absolutely null and void. His Honor cited Merlin, *Authorisation Maritale*, sec. 10; Demolombe, vol. 1, No. 76; Pothier, *Puissance Maritale*, No. 5; and Story, Conflict of Laws, *verbo*, Domicile.

Day, J., rendered judgment; and, after reciting the facts as above set forth, said:—The first question to be decided was, did the judgment of ratification purge the land in question from the hypothèques, and this involved the question whether the deed of 1837 was valid or not, or, in other words, whether the want of authorization by the husband was sufficient to invalidate a deed executed in a country where such authorization was not required by the law of the land. There could be no doubt but that the *status* of the wife was governed by her matrimonial domicile, and that the laws of such domicile governed her legal capacity to contract. There was no difference of opinion among the authorities on this point. But, when we come to the question whether the law of the matrimonial domicile could be abrogated by a change of domicile, we find that there is considerable difference of opinion among Jurisconsults; although it would be found that a majority, and it might be said all the French Jurisconsults were in favour of this position. Merlin, after holding the opposite opinion for forty years, was compelled at last to declare it untenable; and President Bouhier appeared to be the only person of note who adhered to the opposite opinion. The law then, that must be held to govern the status of wives was the law of the local domicile. Applying this view to the present case, it would appear that Madame Baby, although married in Canada, must be governed by the laws of the State of New York as to her capacity to enter into contracts; and that, therefore, she could validly contract without the authorization of her husband, as that formality was not required there. His Honor cited Felix, *Droit International*; Merlin, *Repertoire, verbo Autorisation Maritale*. The question then arose whether the law that governed the capacity of the wife was real or personal; and, if held to be personal, whether such law could rule and over-ride real property here. In fact, the whole question turned upon the difference between a real and personal statute. He thought that his learned brother had confounded the thing with its consequences in the view he had taken of the question. Of course, if the law that maintained the necessity of marital authority in contracts by the wife, was real in its nature, then the opinion of the majority of the Court would be unfounded; but, if its essential character be held to be personal, every consequence of that law, whether it affected moveables or immoveables, must be governed by that statute. His opinion was, that the chief object of that law was to regulate the status of husband and wife, and the protection of the property of families; and the mere fact, that questions concerning real estate were sometimes involved, did not of itself determine the nature of the law. It was difficult, however, to draw out the nice distinctions involved in this ques-

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tion without having the advantage of that precision which was only to be obtained by reducing one's thoughts to writing; and, therefore, he considered that it would be more satisfactory to determine the question by authority. His Honor cited Merlin, *Autorisation Maritale*, sec. 10, and, applying the rule there laid down, said it was evident that if Madame Baby, while in Canada, had undertaken to transfer property situate in the State of New York, without being authorized by her husband, such transfer would have been null and void. Also, Felix, *Droit Internationale*, p. 30, No. 22, and page 40, No. 30. There were several analogous cases to be found under those customs where the authorization of the husband was necessary, in order that the wife might make a valid will, *vide* Pothier, *Puissance Maritale*, No. 44, and *Passim*, 2nd vol. Journal du Palais, where by an *arrêt* of 16th July, 1673, the view of the question taken by the Court was sustained by an exactly analagous case, with respect to a will made at Paris. In Merlin, vo. *Majorité* sec. 5, p. 419, the same rule was laid down with respect to *Puissance Paternelle*, and that being a personal law in the same degree as the *Puissance de Mari*, the rules applying to one would equally apply to the other. Merlin, p. 615, vo. *Autorisation Maritale*, cites two *arrêts* to the same effect. See also Merlin, vo. Testament, p. 266, sec. 1, art. 5; Story, Conflict of Laws, No. 52, cited by his learned brother,—where, he must say, that he found the reasoning of Judge Story very inconclusive and unsatisfactory; *Idem*, p. 127, No. 137; Froland, *Mémoire*, ch. 7, p. 150; 1 vol. Burge, p. 149, No. 59, sec. 633; Hubert, No. 12, sec. 1, 5, 6 and 7; Nouveau Denisart, vo. *Autorisation*, sec. 2, p. 795, Pothier, *Coutume d'Orléans, Traité de Communauté*, c. 8, No. 144, p. 327, No. 247. Upon the whole, the Court had no hesitation in saying that the capacity of wife involving the necessity of marital authority was a personal statute; and, being such, must be measured, not by its consequences, but by its essential character, which was universal, running into territories where other laws prevailed, and governing the alienation of real property within such territory; and, under this view of the question, the deed of sale was valid, and there existed no necessity for any subsequent ratification. The defendant became proprietor in 1837, obtained since a judgment of ratification, and by virtue thereof purged the land from all hypothèques,—those sought to be enforced among the number.

The judgment of the Court was 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 it appears by evidence that the deed of indenture and conveyance, made and executed on the fifteenth December, one thousand eight hundred and thirty-seven, by Francis Baby and Marie Clothilde Pinsonnault, his wife, to and in favour of Orville Clarke, of the land and premises situate in the township of Sherrington in this Province, and described in the Plaintiff's declaration, was so made and executed in the city of Albany, in the State of New York, one of the United States of America, then being the actual domicile of her, the said Marie Clothilde Pinsonneault, and according to the laws and usages then in force in the said State, and that by the usages and laws of the said State it was not necessary that any marital authorization should be given by the said

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Francis Baby to the said Marie Clothilde Pinsonneault, his wife, in order to confer upon her the capacity to make and execute the said deed, or to render the same valid and effectual for the alienation and conveyance of the said land and premises.

"And considering that by virtue of the said deed and of the capacity of the said Marie Clothilde Pinsonneault so to contract and alienate without the marital authorization of the said Francis Baby, her husband, the said Orville Clarke became and was by the laws in force in this Province the lawful proprietor of the said land and premises, and his conveyance thereof was valid and effectual, and that the Defendant by virtue of the deed of sale, bearing date the twentieth of March, one thousand eight hundred and forty-one, to him made by David Milligan as well as his own name as acting for Peter Comstock, legally acquired the land and premises thereon described and intended to be conveyed. And further considering that by reason of the judgment of ratification and confirmation of the said last mentioned deed, rendered on the eighteenth day of June, one thousand eight hundred and forty-two, on the application and in favor of the Defendant, and by force of the Statute in that case provided, the said last mentioned land and premises became and were purged, freed and discharged from the hypothecations and mortgages in the said declaration set forth, and from all other hypothecation created or existing thereupon, up to the said twentieth day of March, one thousand eight hundred and forty-one. Doth maintain the exception of the Defendant, in that behalf pleaded and it is considered that the action of the Plaintiff be and the same is hence dismissed, with costs."

Mr. Justice Mondelet's dissent does not appear in the judgment as recorded.

Action dismissed.

Cartier & Berthelot, for Plaintiff.

Loranger, Pominville & Loranger, for Defendants.

(F.W.T.)

Authorities cited by Plaintiff:—

Pothier, tom. 3, De la Puissance du Mari, nos. 74, 78; tom. 1, Transport de Créance, pp. 670, 671, nos. 554–558.

Solon, tom. 2, Nullité, nos. 300, 301; Sur Difference entre Ratification Générale et Spéciale, pp. 266, 267, no. 309; Femme ne peut ratifier tant que dure la Communauté, p. 297, pp. 328, 329, nos. 364, 365, 366; Ratification ne prejudicie pas aux Tiers, pp. 333, 334, 335, nos. 370, 371, 372.

Ancien Denisart, tom. 4, Ratification, p. 95, nos. 2–7.

Story, Conflict, p. 54, n. 53; pp. 126–133, nos. 136–143; pp. 198–204, nos. 238–244; pp. 218–220, nos. 261–263.

Coutûme de Paris, Petit Ferriere, t. 2, art. 223, 226, 234.

Poncet, Des Jugemens, tom. 1, 12–16, nos. 9, 10; pp. 43–45, nos. 32, 33; pp. 103–105, n. 79; p. 114, n. 85; tom. 2, p. 39, n. 356.

Félix, Droit International, pp. 28–33, nos. 22, 25; pp. 43–45, n. 30; pp. 39, 40, n. 29; pp. 52–54, n. 31; p. 55, n. 32; pp. 85–87, nos. 47–49; p. 95, n. 54; p. 111, nos. 62, 66; pp. 116–119, nos. 65, 66; pp. 124, 125, n. 69.

9 Geo. IV. cap. 20, s. 1; 4 Vic. cap. 30, s. 4; 7 Vic. cap. 22, s. 12; 7 Vic. cap. 10, ss. 31, 32, 66, 67.

No. 1535, Wurtele v. Kurczyn, and Tobin, opposant, judgment at Montreal 20th Oct. 1843, declaring null the cautionnement of wife without authorization of husband. Confirmed in Appeal.

Rogers v. Rogers, Rev. de Leg. 3, p. 255.

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Burge 1, ch. 7, sec. 8, pp. 159, 607, 613, 619, 620, 623.
Louisiana Condensed Reports, tom. 3, p. 663, &c., 667, 675, 679.
Saul and his creditors.
Ex parte Joseph and Leslie et al, opposants, and Auldjo, inter.
Demolombe, tom. 1, n. 75-77, pp. 86, 87.
Merlin, Rep. Autor. Mar., sec. 10, §§ 3, 4; Effet Retroactif, sec. 3, § 2, art. 5; Ratification, sec. 3.
Boullenois, tom. 1, p. 45, 48, 50; tom. 1, pp. 201, 202; and vol. 2, tom. 1, ch. 2, obser. 5, pp. 101, 102; tom. 1, pp. 105-108.
Bourjon, tom. 1, De la Loi qui s'applique à la Personne; tom. 2, c. 4, s. 3, n. 15.
Lacombe, Il faut que le mot *autorisé* soit apposé.

Authorities cited by Defendant:--

Art. 223, 226, et 234 de la Coutume.
Merlin, Autori. Mar. sec. X, § 4.
Bouhier, chap. 23, no. 3.
Boullenois, tom. 1er, titre 2, chap. 5, obser. 29,
Revue de Jurisprudence, 3d vol. p. 255, Rogers v. Rogers.
Boullenois, Traité de la Personalité et de la Réalite des Lois, titre 1re, chap. 2, de la page 44 à la page 52.
Froland, Memoires concernant la Qualité des Statuts, chap. 5, no. 1.
Bouhier, Sur les Coutumes de Bourgogne, chap. 23, no. 59.
Œuvres de D'Aguesseau, vol. 4, p. 660, 54ème plaidoyer.
Froland, Mémoires sur les Statuts, chap. 7, vols. 1 and 2.
Pothier, Coutume d'Orléans, chap. 1, sec. 1, art. 6.
1 Merlin, Verbo. Statut.; Idem, Autorisation Maritale, sec. 10, nos. 2 and 3.
Merlin, vol. 12, Verbo Testament, sec. 1re, s. 5, art. 1re; idem, art. 2.
Story's Conflict of Laws, chap. 8, ver. 260, et les suivants et les autorités qui y sont citées.
Félix, Droit International, livre 2, titre 1re, chap. 1, et chap 2, sec. 1re.
Pothier, Coutume d'Orléans, Tit. de la Com. Int., ch. 8, § no. 144, p. 322, and no. 147, p. 323.
A. Den. Vo. Aut. § 1, nos. 5, 6, 7; § 3, no. 4, p. 799.
Pothier, Coutume d'Orléans, Int. Gen., chap. 1, § 1, no. 6.
N. Den, vo. Autorisation 2, no. 18, p. 795.
2 Journal du Pal, p. 75.
R. de Merlin, vo. Testament, sec. 1, § 5, art. 1, pp. 265, 266 (1st and 2d col.), 267, 268.
Foelix, De Inst., p. 30, no. 22.
Pothier, Puis. Mar., no. 44.
4 D'Aguesseau, p. 660, 54ième plaidoyer.
Merlin, R. vo. Test., sec. 1, § 5, art 1st.
Journal du Palais, Arrêt du 26 Juillet 1673.
R. de Mer. Maj., § 5, p. 419.
Félix de Int., p. 41, no. 30.
Rep. de Merlin, Test., sec. 1, § 5, art. 1, p. 266.
Story, No. 52.
Boullenois Dissert. Mixtes, quest. 1, p. 19.
No. 137, Story [illegible],
Froland, chap. 7, p. 156.
Félix, Droit Int., nos. 29 and 30.
R. de Merlin, Aut. Mar., sec. 10, pp. 614, 615.
Effet Rétroactif, sec. 3, § 2; art. 5, pp. 544, 545.
1 Burge, 244-259, 633.
Hubert—Poth. Puissance Mar., no. 44 and the whole treatise.

MONTREAL, 27TH SEPTEMBER, 1853.

Coram DAY, J., SMITH, J., VANFELSON, J.

No. 685.

Lovell v. *Meikle.*

Held, That a promissory note *à terme* in case of insolvency, is immediately exigible.

This was an action brought upon a promissory note for £200, payable with interest, four years after date, and having yet two years or thereabouts to run. The declaration alleged the making of the note, and set forth that the defendant had left his domicile in Lower Canada, and had become insolvent *en deconfiture*, and that he had made an assignment of his effects in Upper Canada, and by its conclusions, prayed that the note might be declared to have become due and payable, and that the defendant should be adjudged to pay the same.

The defendant demurred to the declaration, on the grounds that the plaintiff had not alleged any act of fraud or secretion of his estate on the part of the defendant, and that the alleged deed of assignment was made in foreign territory and without the jurisdiction. The demurrer, after hearing, was dismissed. The defendant also pleaded a further answer admitting the making of the note, alleging the due payment of the interest, and denying the allegations of the declaration in other respects.

This plea also alleged, that the defendant had never secreted his goods with a view to defraud his creditors, and that the deed of assignment was in fact made for the benefit of his creditors.

The case proceeded to evidence, and the payment of a composition to defendant's creditors and generally insolvency, was established by the plaintiff.

After hearing on the merits,* judgment was given overruling certain objections, "taken as to the legality and admissibility of certain testimony," and considering that the plaintiff "had established by evidence the material allegations of his declaration," condemning the defendant to pay to the plaintiff the amount of the note with interest and costs.

Alexander Morris, for Plaintiff.

R. Abraham, for Defendant.

M. Morrison, Counsel.

A. M.

MONTREAL, 30 SEPTEMBRE, 1857.

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

No. 100.

Groom, Appellant, v. *Boucher*, Intimé.

Jugé, que la signification d'une requête en appel est nulle, si elle est faite au greffe de la Cour de Circuit ; lorsque l'huissier omet de constater que le procureur de l'Intimé n'a pas de domicile élu ou n'a aucun domicile, dans l'étendue du circuit.

Le rapport de l'huissier qui avait signifié la requête de Dame Mary Groom pour appel à la Cour Supérieure à Montréal d'un jugement rendu par la Cour de Circuit dans et pour le Circuit de St. Hyacinthe, faisait rapport qu'il avait

* Authorities cited by Plaintiff's counsel :—Pothier, No. 234, oblig. ; Domat, Lib. IV Title V. sec. 2 ; Pigeau, Tom. II. Lib. 1, Part I., p. 35 ; and 12 Vic. cap. 22, sec. 25, as to the laws governing in matters not specially provided

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signifié cette requête aux procureurs de l'Intimé en leur en laissant une copie au greffe de la susdite Cour de Circuit.

L'Intimé, vu ce rapport qui ne constatait point si ses procureurs n'avaient réellement pas de domicile élu aux termes de la loi ou si même ils n'avaient pas leur domicile dans l'étendue du circuit, fit motion pour le rejet de cet appel fondée sur la nullité de ce rapport.

La Cour a maintenu la motion de l'Intimé dans les termes suivants:

"The Court.... Considering that inasmuch as it doth not appear that the "office of the Clerk, *greffier*, of the Circuit Court of the circuit of St. Hyacinthe "was the elected domicile of the Attorneys of the Respondent or that the said "Attorneys have no domicile at St. Hyacinthe aforesaid, &c."

Appel renvoyé.

Sicotte et Chagnon, Avocats de l'Appellante.

Piché et Prévost, Avocats de l'Intimé.

P. R. L.

MONTREAL, 31st OCTOBER, 1857.

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

No. 616.

Magreen v. *Aubert.*

Held, In the liquidation of the rights of husband and wife, domiciliated in a Township, under a judgment of *séparation de corps et de biens*, both parties being alive, real estate acquired during the marriage, by purchase, and held in free and common soccage, will be considered as forming a part of the community.

The parties in this cause resided in the Township of Chatham where Defendant owned a farm acquired during his marriage. The person appointed by the Court, after a judgment of separation, to report upon the rights of the parties, included the farm in his statement of the community property.

Abbott, for Plaintiff, moved to homologate the report, and for the appointment of experts to pronounce upon the possibility and mode of dividing the farm in question between the parties.

De Bleury, for Defendant, objected on the ground that the real estate held in free and common socage was regulated as to the rights of married women by the law of England.

Abbott, in reply, cited the statute 20 Vic. cap. 45, sec. 4, and the case of Wilcox v. Wilcox, recently decided in appeal.

Smith, J. There can be no longer any question that in such a case as the present the rights of the parties must be regulated by the common law of this country. The Court of Appeals have so decided; and if any doubt remained, the section of the statute cited at the bar completely removes it.

Motion granted.

Abbott, for Plaintiff.

De Bleury, for Defendant.

(J. J. C. A.)

IN CHAMBERS.

MONTREAL, 10TH NOVEMBER, 1857.

Coram MONDELET, J.

No. 2720.

Chapman v. *Blennerhasset.*

Held, 1. The sufficiency of an affidavit for a *capias* cannot be tried by a petition.
2. A petition for the discharge of a defendant from arrest under the 12 Vict. cap. 42, may be made after issue joined.

In this case a petition for the release of the defendant from arrest was presented in Chambers, containing allegations that certain essential expressions were omitted in the affidavit, and that therefore the capias had irregularly issued; and also averring that the defendant had no intention of leaving the country. This petition was not presented till after issue had been joined and the case inscribed upon the *rôle d'enquête.*

Abbott, for Plaintiff, contended that the petition came too late. The only object of the arrest, as stated in the writ itself, was to bring the defendant before the Court that he might answer the declaration. There was no summons to appear contained in it, as in ordinary attachments against goods. In such cases, doubtless, the Defendant was well before the Court even if the indictment was quashed, but under a *capias* it might well be questioned whether a case could be proceeded with after the body of the defendant had ceased to be before the Court. If therefore the whole object and purpose of the writ was to have the defendant in person before the Court, that he might answer the Plaintiff, surely by answering and thereby actually fulfilling the purpose of his arrest, he must be considered to have waived his objection to such arrest. This was the view taken in similar proceedings in England under a statute containing the same provision as ours, and from which in fact ours was copied. Thus it is expressly held that though the statute says "the defendant may at any time move," &c., yet he must do so within a reasonable time after his arrest; and after eight days, unless cause for delay be shown, they will not receive a petition. Sugars vs. Concannon, 5 M. & W. 30.

A similar construction is put upon a similar statute in Upper Canada.

A part of the petition, however, is open to another objection; namely, that it sets up alleged defects in the affidavit, and to that part of it the Plaintiff should not be called upon to reply.

Stuart, in reply, argued that he did not now apply to have the *capias* quashed, but only asked to have the defendant liberated. Even if the Defendant were set free, the writ of *capias* remained intact, and the case would go on as if he had remained in custody. Were it necessary, it might not be difficult to establish the proposition that the action might proceed even if the *capias* were quashed, but the application was not to quash, and there could be no question on that head. As to the right of petition for release being lost by delay or waived by pleading, he could not imagine the possibility of such a proposition being maintained. There was no limitation in the statute, and when the liberty of the subject was in question, no waiver of his rights to such liberty could be presumed.

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Mondelet, J. I have not examined any of the authorities cited by the counsel for the Plaintiff, my mind being fully made up that no conclusive presumption of waiver of right to petition for release arises from delay or from pleading to the action. I am therefore of opinion that the petition is in time, and that the Plaintiff must answer it; and in this opinion my two colleagues in Chambers concur. I shall, however, only order the Plaintiff to answer that portion of the petition in which the Defendant alleges that he had no intention of leaving the Province with intent to defraud.

Abbott & Baker, for Plaintiff.

J. Ogden, for Defendant.

H. Stuart, counsel for Defendant.

(J. J. C. A.)

MONTREAL, 23rd NOVEMBER, 1857.

Coram SMITH, J. AND MONDELET, J.

No. 624.

Molson vs. *Burroughs.*

An *inscription de faux* will not be permitted against a document purporting to be a copy of a declaration in another case, and certified to be so by the Attorneys of the party producing it; although such document be fyled as an exhibit.

A paper purporting to be a copy of the declaration in cause No. 28, between Molson and another *vs.* Burroughs, but only certified to be a true copy by the Attorneys of the present Plaintiff, was produced by him as an exhibit.

Cross, for Defendant, moved to be permitted to inscribe *en faux* against it.

Abbott, for Plaintiff, contended that the Court would not permit an issue *en faux* to be raised on such a paper. It possessed no character of authenticity, nor was it of itself either proof in the case, or susceptible of being proved. It could serve no purpose whatever beyond being made the vehicle of proof, either by comparison with the original, or by being enquired of by interrogatories *sur faits et articles.* It was in fact no more a *piece* within the meaning of that expression, than the copy of a promissory note which was usually put in at the return of an action on such an instrument; and was no more susceptible of being inscribed against *en faux.* To avoid, however, the possibility of being exposed to such an absurd, unnecessary and expensive proceeding, the Plaintiff prayed *acte* of his consent that the correctness of the copy should be investigated by the ordinary proceeding at Enquête; which consent the Court considered sufficient in the case of Charlton *vs.* Cary, 6 L. C., Rep. 268.

Cross, in reply, considered that his right to inscribe *en faux* against any exhibit whatever produced by a party, did not admit of a doubt. He would only cite in reply to the argument for the Plaintiff, Nouveau Denizart *vo.* Faux incident, where the rule is laid down broadly, that such an inscription may be made *lorsqu'une des parties ayant signifié, communiqué ou produit quelque pièce que ce puisse être, dans le cours de la procedure, l'autre partie pretend que la dite pièce est fausse ou falsifiée.*

Smith, J.—This is an application by the Defendant to be allowed to inscribe *en faux* against a document produced by the Plaintiff as an exhibit, with

his special answer to the Defendants' plea; being the copy of a declaration in another cause. The Court are against the application. They think it unnecessary. The document in question is not produced to make evidence as an authentic instrument.

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Mondelet, J.—The paper in question is not an *acte de procedure* in this cause.

Motion rejected.

Abbott & Baker, for Plaintiffs.
Cross & Bancroft, for Defendants.
(J. J. C. A.)

MONTREAL, 29 DECEMBRE, 1857.

Coram MONDELET, J.

No. 1363.

Jameson vs. *Larose.*

Jugé,—Que dans une action contestée, sur un billet promissoire le demandeur est bien fondé à inscrire sa cause pour audition au mérite sans enquête, aux termes du statut 20 Vic. ch. 44, sec. 87.

Le Writ d'assignation émané en cette cause avait été signifié au défendeur le 10 Novembre 1857. L'action fut rapportée le 23 Novembre 1857.* Cette action était portée pour le recouvrement d'un billet promissoire signé par le défendeur et protesté à défaut de paiement.

Le défendeur répondit à cette action par une défense au fonds en fait.

Aussitôt la contestation liée, la demanderesse inscrivit la cause pour audition au mérite, sans ouvrir aucune enquête.

Le défendeur fit motion le 19 Décembre 1857, à ce que la cause fut rayée du Role de droit, en autant que l'inscription au merite était prématurée, et vû qu'une défense ayant été produite, la cause devait être préalablement inscrite à l'enquête. Cette motion fut discutée en même temps que le mérite de la cause.

La Cour par son jugement final a rejeté cette motion et a maintenu l'inscription au mérite comme suit:

"La Cour * * * considérant qu'aux termes du statut provincial, 20 Vic. ch. "44, sec. 87, la demanderesse était en droit d'inscrire, comme elle l'a fait, la "présente cause pour audition au mérite et que la dite inscription a été régu-"lièrement faite; rejette la motion du défendeur avec dépens, et adjugeant sur "le mérite," etc.

Dorman, avocat de la demanderesse.
Archambault & Duhamel, avocats du défendeur.
P. R. L.

MONTREAL, [illegible] DECEMBRE, 1857.

Coram SMITH, J.

No. 1983.

Warner, vs. *Blanchard*, et *le maire, les échevins, et les citoyens de la cité de Montréal*, TIERS-SAISIS.

Jugé,—Que le demandeur qui a laissé écouler le délai de huit jours sans contester la déclaration d'un tiers-saisi, est déchu de son droit de le faire, sur motion faite à cet effet.

Une saisie-arrêt après jugement ayant été pratiquée entre les mains des tiers-saisis en cette cause, fut rapportée devant la cour supérieure à Montréal:

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* Le statut 20 Vic. ch. 44, ne fut mis en force que le 24 Novembre 1857.

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Les tiers-saisis firent leur déclaration affirmant ne rien devoir au défendeur et alléguant des raisons spéciales à cette fin.

Le demandeur fit motion à ce que les tiers-saisis fussent tenus de faire une nouvelle déclaration ; mais cette motion fut renvoyée.

Le 19 Décembre 1857, le défendeur fit motion "à ce qu'en autant que le "demandeur a laissé écouler plus de huit jours depuis la production de la déclaration faite en cette cause par les tiers-saisis, sans offrir aucune contestation à "l'encontre d'icelle, il soit déclaré déchû du droit de contester la dite déclaration."

Après audition des parties, cette motion fut accordée.

Carter, avocat du Demandeur.

Lafrenaye & Papin, avocats du Défendeur.

P. R. L.

MONTREAL, 30TH JUNE, 1857.

Coram SMITH, J. C., MONDELET, J., CHABOT J.

No. 1739.

Smith v. Fisher, et al.

Held,—That under the Religious Congregations Act of L. C. 2 Vict., cap. 26, one member of a congregation has not an action at law to compel the Trustees of the Church property to take certain formalities in order to enable certain vacancies in the Trusteeship to be filled up. The remedy is not by action but by prerogative writ by which the court could compel a specific performance.

This action was brought by a pewholder in the St. Gabriel Street Presbyterian Church, Montreal, against John Fisher and Andrew Shaw, two of the trustees under the will of the late Reverend James Somerville, to compel them to call a meeting of the proprietors of said Church for the election of three other trustees in the room of William Hutchison resigned, David Handyside deceased, and Walter M. Peddie left the city. The declaration stated that Somerville made his will 21st February 1833, of which the following portion is narrated:— "Firstly, I give and bequeath the sum of £1000 lawful current money of Canada unto John Fisher, William Peddie, Andrew Shaw, Robert Simpson, David Handyside and Thomas Blackwood, Esquires, merchants, and James Charles Grant, Esquire, advocate, all of the said city of Montreal, or to the survivors or survivor of them upon the special trust, that they, the said John Fisher, William Peddie, Andrew Shaw, Robert Simpson, David Handyside, Thomas Blackwood, and James Charles Grant, or the survivors or survivor of them shall and will faithfully lay out and expend as soon as may be practicable after my decease, the said sum of £1000 bequeathed, or cause the same to be laid out and expended as far as the same may go towards purchasing a lot of ground and thereon building and erecting a suitable mansion or parsonage for the residence of the clergyman or minister of the Scotch Presbyterian Church in St. Gabriel Street of the said city of Montreal and his successors in office, and further, it is my wish and desire that the said John Fisher, William Peddie, Andrew Shaw, Robert Simpson, David Handyside, Thomas Blackwood and James Charles Grant, or the survivors or survivor of them, shall do, execute and perform all and every act or acts, deed or deeds, necessary and requisite for more effectually securing the possession of the said lot of ground so intended to be purchased,

and the manse or parsonage thereon erected, or to be erected, to the clergyman or minister of the said Scotch Presbyterian Church, and his successors in office, as it is my express wish and desire that the lot of ground so intended to be purchased as aforesaid with the manse or parsonage thereon erected or intended so to be, shall belong to, and be the property of, the clergyman or minister of the said church for the time being, or shall belong to the corporation of the said church, should any such corporation ever be erected, for the sole use of the said clergyman or minister and his successors in office, whichever may be the most effectual method of securing the possession thereof as aforesaid."

He appointed executors and extended their powers beyond the period limited by law.

Somerville died 2nd June, 1837, and by vote of the proprietors of St. Gabriel Street Church, of the 6th and 8th November, 1837, the Defendants together with Robert Simpson, David Handyside, and Thomas Blackwood, being then the surviving trustees under Somerville's will, were named trustees on behalf of the church and congregation, with power to carry into effect the intentions of the testator, and to receive the property from the trustees under the will, and for the survivors of them, in case of a vacancy in the number of five, by death, absence from the city for more than twelve months, or resignation, to call a general meeting of the proprietors for the election of others to fill such vacancy or vacancies, so that the number of five should be kept up, and in them and their successors so to be elected, the said trust to be vested in perpetual succession according to law, three to be competent for the transaction of business and a majority to decide.

They accepted the trust, and by deed dated 21st March, 1840, the trustees acquired for themselves and their successors in office, certain lots of land on Sherbrooke Street for the building of the manse or parsonage, declaring by the deed, the powers given them by the will and by the resolutions of the proprietors of the St. Gabriel Street Church, as above stated.

That the deed and a description of the property by a sworn surveyor, was registered under the ordinance 2 Vict., cap. 26, enabling religious societies to hold lands, and on the 16th April, 1844, at a general meeting of the proprietors of the church, William Hutchinson and Walter M. Peddie, had been named trustees in the room of Thomas Blackwood and Robert Simpson deceased, who continued to act until the 22nd July, 1854, when Hutchinson resigned. On the 15th March, 1855, David Handyside died, and Walter M. Peddie had been absent from the city for several years, that plaintiff being a proprietor in the said church and a member thereof, had a right to complete the number of trustees and supply the vacancies, and in order to the due election of Trustees the defendants were bound to call a general meeting of the proprietors of the church which they had neglected to do, whereby the plaintiff, the congregation, and the officiating minister had been injured and had an interest in demanding the completion of the trustees.

That by the rules and regulations of the church, the temporal committee were elected annually, Bertram Picken and others being the present committee.

The conclusions demanded that the defendant's should be declared bound by

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law to take the necessary steps to preserve the number of trustees and to call a meeting of the proprietors of the church for the election of trustees in the room of Hutchinson, Handyside, and Peddie, that the defendants should be condemned to call such meeting at a day and hour to be fixed for that purpose, and after notice given two Sundays previous in the said church from the pulpit or precentor's desk therein, and that in default thereof such meeting be called by order of the court, and on notice given agreeably to the judgment, and posted and published as thereby directed, and after two Sundays notice in said church, and that plaintiffs be authorised to give such notice and that the election should be proceeded with pursuant to such notice.

To this the defendants pleaded by *exception à la forme* whereof the following were the grounds.

Firstly.—That the plaintiff was not a member of the church in connection with the Established Church of Scotland, for which the church property was acquired by deed of the 2nd April, 1792, that St. Gabriel Street Church being under the fundamental rules and regulations of date the 4th April, 1804, a church in connection with the Established Church of Scotland, the plaintiff, not being a member of said church, could have no quality or interest to bring such action.

Secondly.—That Peddie had not been absent from the city Montreal, but on the contrary regularly attended divine worship in said city, and being a trustee ought to have been impleaded with the defendants.

Thirdly.—That there is and can be no such action at law, in the form set forth in plaintiff's declaration, seeking to compel the defendants to perform such acts as are therein sought to be performed, and such action in the name of such a person as the plaintiff, and in the form in which it had been instituted is wholly irregular, informal and illegal.

Fourthly.—The conclusions are vague, informal, and could not be granted, especially in asking the defendants to be required to take the necessary steps without specifically pointing out what should be done, and are otherwise insufficient.

Lastly.—General informality of conclusions.

Evidence was taken with a view to establish that when the church was founded it had been declared to be and recognised as a church in connection with the Established Church of Scotland, that up to the time of the disruption in the church, known as the Free Church movement in 1844, the clergymen of said church had always been and were in fact required to be by the rules and regulations of the church, regularly ordained ministers of the Church of Scotland or of the Presbyterian Church in Canada in connection with the Church of Scotland; but in the year 1844 a majority of the congregation had declared for the Free Church, assumed the power of revising and rescinding the rules and regulations and expelling the members adhering to the Church of Scotland, also to shew that although Mr. Peddie lived out of the city limits, yet he attended church and market continually and regularly within the city.

Smith, J.—The defendants have attempted under an *exception à la forme* to raise the question as to the control by a majority of members, of property

held by presbyterian congregations previous to the Free Church movement in the Scotch Presbyterian Church, such majority having declared their adherence to the Free Church.

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The Court does not think that question can come up under this form of pleading.

The real point in the case seems to be whether the action can be brought at all under this form.

Seven trustees were named under the will of the late Reverend James Somerville to whom he gave the legacy left by him for the building of a manse or parsonage house for the clergyman of the St. Gabriel Street Church and his successors, and five of them by resolutions of the church proprietors, were regularly appointed trustees on behalf of the congregation of that church, to carry into effect the intentions of the testator; the resolutions providing that the number of five were to be kept up, by the adoption of proceedings pointed out by the resolutions in question; in cases of vacancy said proceedings were to be taken by the surviving trustees. The plaintiff pretends that, as a member and proprietor of the church, he has a right to get an order of the court to compel the defendants to observe certain specified formalities, contemplated by the resolutions already mentioned and thereby to call a meeting of the proprietors to fill up the vacancies in the trustees, by the holding of an election for that purpose, in default of which, the Court is to call the meeting, and the plaintiff is to be authorised to give the requisite notices. An individual member of the church has no right by such an action as this, to have the remedy he seeks, the way to attain the object he seems to have in view, is by prerogative writ, by which the court could compel a specific performance. I know of no such action as the present. The action in its present form is dismissed.

A. & G. Robertson for plaintiffs.

Cross & Bancroft for defendants.

A. C.

MONTREAL, 27TH FEBRUARY, 1858.

Coram DAY, J.

No. 1819.

Willis et al. v. *Pierce.*

Held, That a *Commission Rogatoire* may issue *de plano* on motion therefor, without affidavit of any kind.

This was a motion by Defendant for a *Commission Rogatoire* to England to examine witnesses there, and was opposed by *Bethune*, showing cause for Plaintiffs, on the ground that it was unsupported by any affidavit, to the effect that there were witnesses resident in England whose testimony was material and necessary to establish certain facts, to be stated in such affidavit, which it was incumbent on the Defendant to prove.

Day, J. I know of no practice requiring such affidavit, or any affidavit whatever. The motion is in my opinion one of right, and must therefore be granted.

Motion granted.

Bethune & Dunkin, for Plaintiffs.

Cross & Bancroft, for Defendant.

(S. B.)

[illegible], 28th DECEMBER, 1857.

Coram MONDELET, (C) J.

No. 311.

Kingan, et al., vs. *The Mayor, Alderman and Citizens of the city of Montreal.*

Held, that a City Corporation is liable for damage caused by the overflowing of their drains, where those drains have become obstructed. That where packages of bottled Porter and Ale are rendered unmerchantable, damages may be claimed, although the contents of the bottles are not damaged.

The Plaintiffs brought an action for £26 7s. 6d. for damages done to goods on their premises by the overflowing of the city drains in the summer of 1857. The Defendants met the action by a defense *au fonds en fait.*

It was in evidence that about the 31st day of July last, the Plaintiffs found that water had penetrated their cellars during the night, through their private drain, connecting with the street drains, under the control and care of the Defendants, at the corner of St. Peter and St. Paul streets, Montreal. There had been a heavy shower during the afternoon of the previous day, and on the night in question the water rose in the cellars in some places to the height of two feet, thereby causing damage to some casks of Ale and Porter which stood in the cellars. The cellars had for some time been damp from the same cause. Complaint having been made to the city authorities, the drains were by them in the month of September last opened and repaired. They were found to have been nearly totally obstructed. It further appeared that the drain in St. Peter street, below St. Paul st[illegible] at one place entirely obstructed by the falling in of one of the conn[illegible]ins, owing to a defect in its construction, and also that no sufficient w[illegible]en provided in the main drain, running under the St. Ann's Market. [illegible] proved that the labels and capsules on the bottles which contained the Porter and Ale were in a measure destroyed, and that the straw in which they were packed was damp, and that the packages were thus rendered unmerchantable.

Per curiam.—After reading the evidence, it is apparent that the Defendants neglected their drains, nor can they be held exonerated, because a heavy shower of rain may have been the immediate cause of the flood of water into the premises of the Plaintiffs. We do not know that the damage would have been suffered if the drains had been in good order. The shower was a *cause naturelle*, the effects of which should have been provided against. The damage proved is only to the packages, to the labels upon the bottles, &c., but it is evident that this would impair the value of the goods as articles of merchandise. The Plaintiffs having proved the damages claimed by them, judgment will go in their favor.

Judgment for Plaintiffs.

Cross & Bancroft, for Plaintiffs.
J. F. Pelletier, for Defendants.
(H. B.)

MONTRÉAL, 10 OCTOBRE, 1857.

Coram BRUNEAU, J.

No. 1020.

Champagne v. *Boston*.

Jugé—Que le Shérif n'est point tenu en loi de payer les [illegible] par un constable pour conduire à la prison commune de ce di[illegible] une offense criminelle et qui traduite devant un juge de paix à [illegible] prison pour y attendre son procès.—(1).

La déclaration alléguoit :

"Qu'un nommé François X. Desrosiers ayant été [illegible] vant Louis Gonzague Lafontaine, Ecuier, un des Juges de l'aix de sa [illegible] dans et pour le dit district de Montréal, sous l'accusation d'avoir assailli Mané Idée Hervieux, son épouse, "avec l'intention de lui faire des blessures graves, et de l'avoir menacée de lui causer la mort," et que le dit Juge de Paix ayant été d'opinion que la peine était suffisante contre le dit Desrosiers pour lui faire subir un procès pour un délit poursuivable par indictement, le dit Juge de Paix aurait en conséquence par un *Warrant* fait emprisonner le dit François Xavier Desrosiers dans la prison commune du dit District de Montréal, et ce le ou vers le vingt-sept d'aout dernier (1856)."

"Que le dit *Warrant* d'arrestation ayant été adressé et remis au dit Demandeur es-qualité, celui-ci aurait conduit le dit prisonnier, François Xavier Desrosiers, dans la dite prison commune du dit district de Montréal indiqué dans le dit *Warrant* et aurait remis le dit prévenu ainsi que le dit *Warrant* entre les mains du géolier de la dite prison, le dit jour vingt-sept d'août dernier, (1856), lequel donna au dit demandeur un reçu conçu dans les termes suivants, et produit avec les présentes pour en faire partie en y référant."—

"I hereby certify that I have received from Norbert Champagne, constable of the district of Montreal the body of François X. Desrosiers together, with a *Warrant* under the hand and seal of Louis G. Lafontaine, Esquire, one of her majesty's Justices of the Peace for the said District of Montreal, and the said François X. Desrosiers was sober at the time he was delivered into my custody, charged with having assaulted his wife and threatened her life."

27th day of august, 1856,

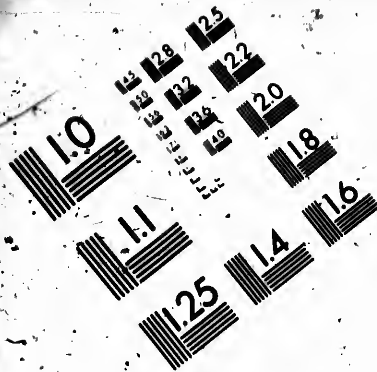
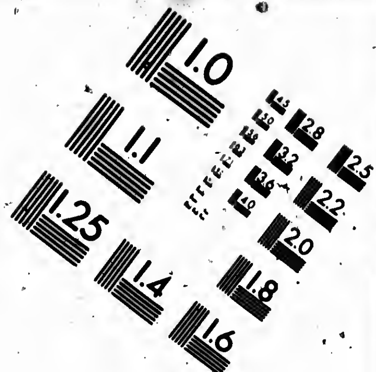
(Signed,) Thomas McGinn,

Gaoler.

"Que les frais et dépenses du dit demandeur pour avoir arrêté le dit prévenu et l'avoir conduit à la dite prison, et les frais et dépens du Demandeur pour retourner chez lui ont été dûment constatés par le dit juge de paix Lafontaine, se montant à la somme de quatorze livres treize chelins et dix deniers et demi courant, et que là-dessus le dit Juge de Paix adressa au dit Défendeur en sa dite qualité de shérif du dit District de Montréal (dans les limites duquel le dit délit aurait été

(1) *Vide* 14 and 15 Vic., cap. 96, sec. 14.

McGILL LAW

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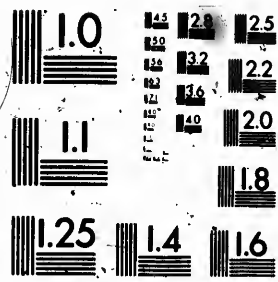
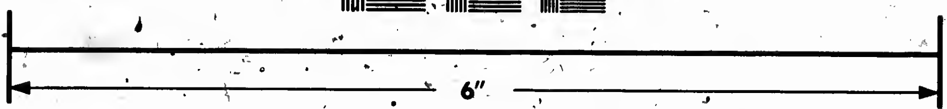

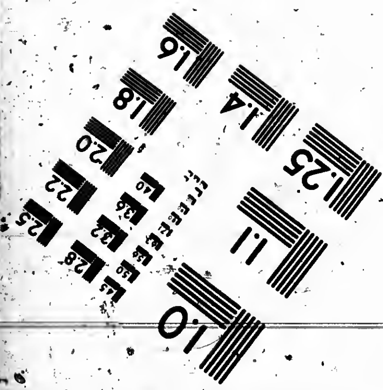
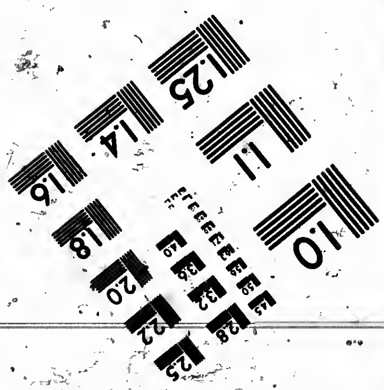

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Champagne v. Boston.

commis) un ordre conçu dans les termes suivants et produit avec les présentes pour en former partie."

A John Boston, Ecuier, Shérif du district de Montréal.

"Attendu que Norbert Champagne constable du dit District de Montréal m'a "remis a moi Louis Gonzague Lafontaine, un des Juges de Paix de Sa Majesté, "dans et pour le dit district de Montréal le reçu ci-dessus de Thomas McGinn, "Géolier, de la prison commune à Montréal, et attendu qu'en conformité du "Statut fait et pourvu en pareil cas, j'ai constaté que la somme qui doit être "payée au dit Norbert Champagne pour avoir arrêté et conduit le dit François "Xavier Desrosiers de la paroisse de Lanoraie, dans le dit District, à la dite pri- "son commune à Montréal est de dix livres et un denier et demi courant, et "que les frais raisonables du dit Norbert Champagne pour retourner se montent "en outre à une somme de quatre livres treize chelins et neuf deniers, formant "ensemble la somme de quatorze livres treize chelins et dix deniers et demi "courant; En conséquence les présentes sont pour vous informer comme shérif "du dit district de Montréal de payer au dit Norbert Champagne, la dite somme "de quatorze livres treize chelins et dix deniers et demi courant en conformité "au Statut fait et pourvu en pareil cas, et le présent ordre sera pour vous une "autorisation suffisante de faire le dit paiement.

"Donné sous mon seing ce huitième jour de du mois d'août, mil huit cent "cinquante six."

(Signé,) Louis G. Lafontaine,
J. P.

"Que malgré la production faite au dit Défendeur du dit ordre à son Bureau au dit lieu de Montréal, le ou vers le premier de septembre dernier, (1856), par le Demandeur en personne, et malgré en outre le protêt fait à la réquisition du Demandeur par le ministère de Mtre. Jobin et son confrére, Notaires, et la production du dit ordre, le ou vers le trois de septembre dernier, (1856), au dit bureau du dit défendeur a l'effet de requérir le paiement du montant du dit ordre, le Défendeur a là et alors refusé et refuse de payer la dite somme, qui jointe au coût du dit protêt, valant au moins vingt chelins courant, forme la somme de seize livres, treize chelins et dix deniers courant, mais que pour éviter à frais, il réduit a celle de quinze livres, dit cours que le Demandeur est bien fondé et mérite d'avoir du Défendeur qui refuse de la lui payer, après avoir, au moins, un mois de calendrier, avant la signification du writ qui accompagne la présente, savoir; le sept de Février dernier (1857), reçu avis par écrit de la présente action, conformément a la loi et au Statut fait et pourvu en pareil cas."

"Pourquoi le Demandeur conclut à ce que le Défendeur es-qualité soit condamné à lui payer la dite somme de quinze louis courant et les dépens dont distraction aux soussignés."

"Montréal, 3 avril, 1857."

Le Défendeur plaida: "qu'il n'est pas tenu au paiement de la somme reclamée; que comme shérif il n'est que dépositaire de deniers publics, et que "comme tel ne peut être poursuivi, que d'ailleurs, la prétendue taxe du Demandeur est injuste et la somme reclamée exorbitante et nullement en rapport "avec les ouvrages allégués avoir été faits, et que d'ailleurs les allégués du "Demandeur sont faux et mal fondés."

La preuve ayant été faite; la cour débouta le Demandeur de son action avec dépens.

Le jugement est motivé comme suit :

La cour après avoir entendu les parties par leurs avocats examiné la procédure et les admissions produites et avoir sur le tout délibéré; considérant que le Défendeur en sa qualité de shérif n'est que le dépositaire des deniers publics, ne peut être tenu en cette qualité envers le Demandeur pour la créance qu'il peut avoir contre le gouvernement provincial pour les services par lui rendus, ainsi qu'allégués dans la déclaration, a débouté et déboute la dite action avec dépens.

Piché et Prévost, pour le Demandeur.

Ouimet, Morin et Marchand, pour le Défendeur.

P. R. L.

EN APPEL,

DU DISTRICT DE MONTREAL.

QUEBEC, 7 JUILLET, 1857.

Coram Sir L. H. Lafontaine, Bart., J. C., Aylwin, J., Duval, J., Caron, J.

No. 175.

SLACK, *Demandeur en Cour Inférieure*, Appelant.

ET

SHORT, *Défendeur en Cour Inférieure*, Intimé.

Jugé,—Que si dans une action en bornage, sans notification préalable, le Défendeur se déclare prêt à borner ; le Demandeur doit être condamné aux dépens de son action. (1).

Le jugement final qui avait été rendu le 30 Septembre 1856 homologuoit le rapport de l'arpenteur Henry McFarlane, dans une action en bornage; et condamnait l'Appelant (Demandeur en Cour Inférieure) aux dépens de l'action, vû que l'Intimé qui n'avait jamais refusé le bornage n'avait aucunement été mis en demeure ou notifié de le faire à l'amiable par le ministère d'un arpenteur.

L'Appelant ayant actionné l'Intimé en bornage sans aucune réquisition préalable; l'Intimé qui n'avait jamais refusé de borner, n'en ayant même jamais été requis; loin de contester la demande en bornage de l'Appelant, rapporta l'acte de vente en vertu duquel il était devenu propriétaire et allégua ce qui suit :

" Que le Défendeur en prenant possession et en jouissant du lot de terre par " lui ainsi acquis, *n'a jamais empiété sur le terrain du Demandeur*, mais " qu'au contraire le Défendeur n'a pas la jouissance de tout le terrain qu'il a " acquis du dit Frédérick Stemm, tandis que le Demandeur a jouissance et " possession de plus de terrain que ne lui en donnent ses titres. Que le Défen-

(1) La Cour d'Appel fut également partagée sur l'espèce que présente cette cause et qui avait été ainsi décidée par la Cour Supérieure à Montréal.

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Slack v. Short.

" deur n'a jamais refusé de faire mesurer, borner et diviser son terrain, et celui " du Demandeur, qu'au contraire il a toujours été et est encore prêt de le faire " à frais communs, mais que le Demandeur ne l'en a jamais requis.

" Que vû ce que dessus le Défendeur ne peut être tenu de payer les frais de " cette action. A ces causes le Défendeur demandant acte de la déclaration " qu'il fait par les présentes; Qu'il est prêt, comme il l'a toujours été à faire " mesurer et borner son terrain sus-décrit, et à établir les bornes et lignes qui " doivent le diviser du terrain du Demandeur; les dites opérations devront se " faire en la manière légale à frais communs; et de plus le dit Défendeur se ré-" servant tout recours que de droit contre son vendeur ou autres, suivant qu'il " pourrait y avoir lieu, conclut à ce que le Défendeur soit débouté du surplus " de ses conclusions, avec dépens dont les soussignés demandent distraction en " leur faveur."

L'Appelant a répondu spécialement qu'il prenait acte de la déclaration de l'Intimé qu'il était prêt à procéder au bornage; que les allégués de l'Intimé étaient mal fondés en fait, et que l'Intimé avaient usurpé une partie de son terrain, ainsi que lui, l'Appelant, l'avait déjà allégué dans sa déclaration; et en conséquence, il conclut à ce que l'Intimé soit condamné aux dépens de l'action. Dans sa déclaration l'Appelant *prétend que l'Intimé à usurpé une partie de son terrain* sans en donner aucune indication précise. Néanmoins aucune preuve ne fut faite de la part de l'Appelant qui se contenta d'inscrire la cause au mérite (sans inscrire la cause à l'Enquête) et la cour, avant faire droit, rendit un jugement interlocutoire à l'effet de faire nommer un arpenteur pour procéder au bornage qui eut lieu sans la moindre contradiction. Le jugement final de la Cour fut d'homologuer le rapport et confirmer le bornage avec les dépens de l'action contre l'Appelant et divisant les frais du bornage également.

L'Intimé dans son factum, prétendait que l'Appel de ce jugement n'était que pour une simple question de frais, qui sont les frais de son action en bornage qu'il aurait pu éviter en ne portant pas une action intempestive; que les frais sont toujours à la discrétion de la Cour qui est appelée à les adjuger; que c'est une jurisprudence constante suivie en ce pays; qu'elle est comforme à l'art: 1er du titre 31 de l'ordonnance de 1667 (amendé) lors de l'enrégistrement de cette ordonnance au conseil supérieur de Québec; qu'une question de dépens doit être finalement décidée par le tribunal devant lequel elle se présente; et que conséquemment l'Appelant était non recevable en son appel.

Quant au mérite même de la question soulevée par l'Appelant, il est hors de doute que les voisins doivent procéder au bornage de leur héritages respectifs à l'amiable, si l'un ou l'autre n'élève aucune contestation, 3 vol: de Toullier, no. 172, page 119. " Le bornage, c'est-à-dire, le placement des bornes nouvelles ou " la reconnaissance des anciennes peut se faire de concert et à l'amiable, si les " deux voisins sont majeurs. Ils dressent alors le procès-verbal de l'opération " par un acte double sous seing privé, ou, ce qui est beaucoup plus sur, le font " rapporter par un notaire."

C'était le droit commun de la France, traité du voisinage par Fournel 1er vol: de l'édition 1834, page 237.

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" En effet, lorsqu'il est question de mettre de nouvelles bornes, au défaut " d'anciennes, ce bornage peut s'effectuer de deux manières, soit de concert " entre les voisins et par leur fait seulement, soit avec l'intervention de l'autorité " judiciaire.

" La faculté de poser des bornes de concert, et sans l'intervention de l'auto-" rité judiciaire, n'est pas universelle en France, et il existe des coutumes qui " l'interdisent, telles que Anjou, Art: 280; Maine, Art: 297; Loudun, titre 1er. " Art. 1er; Touraine, Senlis, &c., &c.

" Et même Loisel, en a fait une règle de droit: " bornes se mettent par auto-" rité de justice. Art. 38 du tit. 11 du liv: II (1). Règle 255.

" Néanmoins, il ne faut prendre ces dispositions coutumières, que comme " *une exception au droit commun*, étant certain que, *dans la majorité de la* " *France*, ce bornage privé est autorisé d'après l'usage le plus antique.

" Beaumanoir en fait mention:

" Toutes gens, dit-il, qui requièrent borne le doivent avoir, et bien peuvent " les parties, se elles se accordent, borner sans justice. Chap: 30. page 151.

" Bouteiller atteste la même pratique.

" S'il avenait que parties fussent d'accord de mettre et asseoir borne entre " eux, faire le peuvent, sans appeler la loi ne autres fors voisins, " Somme Rur. " liv: 1er. page 366." Boutellier, Somme, Rurale, titre 57, page 366.

" Les parties peuvent elles-même asseoir bornes; mais à la borne ainsi mise, " n'y aura nul caillet dessous, comme témoins d'échevins, pour ce que les éche-" vins n'y ont été appelés."

" Pardessus. Traité des servitudes 1er. vol. no. 119. page 300. Tout bor-" nage doit nécessairement être ordonné par justice, s'il n'est pas consenti par " toutes les parties intéressés. Page 301." " Lorsque ces experts sont choisis " volontairement par des parties capables de contracter et de disposer de leurs " biens, leur mission est ordinairement déterminée par l'acte de nomination ou " par les pouvoirs qu'ils reçoivent " No. 121, page 303." Quand l'objet du bor-" nage est de provoquer un renouvellement de signes qui ont disparu, qui ont " été déplacés, ou que de toute autre manière on prétend n'être pas à la véri-" table limite des propriétés qu'ils doivent séparer, et quand les parties sont " d'accord, toute l'opération consiste dans le fait matériel de ce placement."

Nouveau Dénisart vo: Bornage, page 655, §3, No. 1.

" Le bornage peut se faire de deux manières; par ordonnance du juge, ou à " l'amiable, du commun consentement des parties intéressées."

Ibidem, No. 3.

Ainsi, le bornage *conventionnel* existe en loi indépendamment du bornage judiciaire qui est l'action de bornage considérée simplement quant au droit que deux propriétaires voisins ont de faire borner leurs possessions respectives.

" Mais entend-on," disent les auteurs du nouveau Dénisart vo: bornage, page 627, No 3, du 4ème sommaire; " par le droit d'intenter l'action en bornage,

(1) " Loisel " dit M. Jules Minier, " à trop généralisé ses idées; les maximes qu'il a " publiées reproduisent souvent des règles qui n'étaient que locales, &c., page 596, " Précis-Historique du droit Français."

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" le droit de demander que la possession d'un propriétaire soit limitée et bornée
" conformément à son titre? C'est une question d'un tout autre genre, c'est
" proprement la question de savoir si on peut prescrire au-delà de son titre."

L'Appelant n'ayant fait aucun genre de preuve et s'en étant tenu à l'admission de la contiguité des héritages que comporte l'offre de l'Intimé de borner ci-dessus rapportée, a donc alors considéré son action comme une action en bornage pure et simple dégagée de tous ses accessoires, et n'ayant prouvé aucun des allégués de sa déclaration, à part ce fait admis, il devait nécessairement être condamné aux dépens de l'action.

L'action de l'Appelant était vexatoire ; il n'avait aucun intérêt à la porter ; et pour établir cette proposition légale, l'Intimé réfère au traité des actions par M. Poncet, à la page 107, No. 135.

" On dit qu'une action est fondée, lorsque la prétention, qui en est l'objet, a
" pour fondement, ou pour appui la justice, ou la loi."

" Mais de ce qu'une action est ainsi juste au fond, il ne s'en suit pas toujours
" qu'on soit admis à l'exercer. Pour cela en effet, trois conditions sont rigou-
" reusement nécessaires, savoir : 1° la qualité, 2° l'intérêt, 3° la capacité.

" A défaut de l'une ou l'autre de ces conditions, l'action, quoique juste et
" légitime, n'est point recevable en justice."

Et à la page 206, vo : 143 du même auteur.

" De l'intérêt."

" 143. Il ne suffit pas d'avoir qualité, c'est-à-dire prétention, même légitime,
" pour être recevable à figurer dans une instance judiciaire ; une seconde condi-
" tion indispensable est d'y avoir intérêt.

" On ne peut nier que les discussions entre les citoyens ne soient plus ou
" moins préjudiciables à la paix et à l'ordre public. Elles entretiennent les
" animosités et les haines, elles peuvent entraîner la ruine des familles ; en un
" mot, on les considère avec raison comme un mal que l'obligation de faire
" justice peut seule rendre nécessaire.

" Si l'on suppose donc le plaideur sans intérêt dans la cause, il ne reste plus
" aucun motif pour admettre ses réclamations, puisque rien ne balance de sa
" part l'intérêt de la paix publique qui s'oppose à toute discussion sans objet.

" Indépendamment de cet intérêt public, un intérêt particulier forme encore
" obstacle à sa prétention, c'est celui de son adversaire ; QU'IL NE PEUT AVOIR
" DROIT D'INQUIETER SANS UTILITÉ POUR LUI-MEME."

Traité des fins de non recevoir par M. Lemerle, page 233.

" Des actions susceptibles d'être déclarées non recevables comme tardives
" ou intempestives, bien qu'elles ne soient atteintes d'aucune prescription pro-
" prement dite.

" Il est des droits qui doivent être constatés ou conservés à leur naissance,
" ou leur ouverture, ou avant un évènement, soit par des réclamations, soit PAR
" DES DILIGENCES, de telle sorte que les actions qui en résultent *sont non rece-*
" *vables*, quoique d'ailleurs elles ne soient pas atteintes d'une prescription pro-
" prement dite."

Dans son factum l'Appelant énonçait ainsi ses prétentions.

Slack v. Short.

On the 30th of september, 1856, (the Appellant having previously moved for the homologation of the Surveyor's report and plan, and inscribed the cause for final hearing) the Court below composed of Day, Smith and Mondelet, Justices, pronounced Judgment, homologating the Surveyor's report, and, without dismissing any of the conclusions of the Appellant, condemned the Appellant to pay the costs of the Action.

The Appellant complains of that portion of the Judgment which condemns him to pay the costs of the Action.

The Judgment is not *motivé*, but the reason for condemning the Appellant to pay costs—assigned by the Court below, at the time of rendering the Judgment—was, that the Appellant had not, previous to the institution of the Action, summoned the Respondent to draw lines.

It is submitted by the Appellant that the said Judgment ought to be reversed, in so far as it condemns Appellant to pay costs.

Every proprietor has, by law, the right to institute the Action *en bornage* against his neighbour, without making any previous demand, and the only plea that could defeat this Action would be subsisting boundaries still visible.

That inasmuch as the Appellant was not by law bound to summon his neighbour to draw lines, previous to bringing his Action, he ought not to have been condemned to pay costs; but that in the view of the case most favourable to the Respondent, the Judgment of the Court could only have divided the costs of the Action between the parties, which, it is submitted, is the general rule where both parties consent to the *bornage*. (1)

Each party is both Plaintiff and Defendant; each alledging an encroachment upon his land by the other. And it is manifest from the Surveyor's plan that the Respondent had encroached upon the land of the Appellant to a considerable extent, and this being a fact in issue, determined favourably to the Appellant, the Respondent ought to have been condemned to pay costs to the Appellant.

It is submitted that the only way the Respondent could avoid costs would be by notifying the Appellant of his readiness to consent to a survey, previous to the return of the Action into Court.

Le jugement de la Cour Supérieure à Montréal fut confirmé par l'opération de la loi; vû que l'honorable Juge en Chef Sir L. H. Lafontaine et M. le Juge Duval étaient pour le maintien du jugement de la Cour de première instance, et les honorables Juges Aylwin et Caron, pour son infirmation.

S. W. Dorman, pour l'Appellant.

Lafrenaye & Papin, pour l'Intimé.

(1) Vide, 2 L. C. Reports, page 486, Weymess & Cook.

P. R. L.

U.W.O. LAW

(IN APPEAL FROM THE DISTRICT OF QUEBEC.)

MONTREAL, 5TH OCTOBER, 1857.

Coram AYLWIN, J., MEREDITH, J., SHORT, J., BADGLEY, J.

No. 89.

The Queen Appellant, v. *Comte et al*, Respondents.

Held, 1. In the case of a general *hypothèque*, dating as far back as 1815, and claimed in respect of land situate in the County of Sherbrooke, and duly registered in accordance with the provisions of the Registry Ordinance 4 Vic. cap. 30, that the want of registration during the period that the 10 and 11 Geo. IV. cap. 8 was in force cannot be invoked, without averment and proof that the debtor held the land whilst that statute was in force.

2. That a *hypothèque* duly created during the lifetime of the debtor may be preserved by registration after his death.

3. That *hypothèques legales* are *not* exempt from registration under the 4th section of the Registration Ordinance 4 Vic. cap. 30.

This was an appeal from a judgment of the Superior Court, rendered at Quebec on the 17th of February 1852, dismissing a contestation fyled by the Crown to a judgment of distribution, by which the respondents were collocated in preference to Her Majesty.

The claims of both the appellant and the respondents were general *hypothèques*, the latest of which bore date in 1826.

The monies which formed the subject matter of dispute were the proceeds of certain immovable property situate in the County of Sherbrooke, where the statute 10 and 11 Geo. 4, cap. 8 was in force, from 1830 until the coming in force of the Registry Ordinance 4 Vic. cap. 30, and by the second clause of this statute it was enacted: "That from and after the passing of this Act no act or deed in law, or instrument in writing, by which mortgage or *hypothèque* was or is created, shall bind or affect as a mortgage, incumberance or *hypothèque* any immovable property situated within the counties aforesaid, unless such act or deed in law, or instrument in writing, be duly enregistered in the manner hereinafter directed within twelve months next after the passing of this Act;" but no allusion is made in this statute to the necessity of registration on the part of the Crown.

The Respondents failed to register their *hypothèques* during the period that the statute above referred to was in force, but duly enregistered the same within the delay prescribed by the Registry Ordinance. The Crown abstained from registration altogether.

Under these circumstances the Respondents were collocated in preference to the Crown, and the report of collocation was accordingly contested by the Crown, on the ground mainly that the *hypothèques* of the respondents were inoperative, for want of registration during the period prescribed by the 10 and 11 Geo. 4, ch. 8, that the estate of the debtor was vacant and insolvent at the time of the registration under the 4 Vic. ch. 30, and that the claims of the Crown, being a *hypotoèque légale*, was not liable to registration under the povisions of either the statute above referred to or the Registry Ordinance.

The Queen v. Comte et al.

By the judgment of the Superior Court the contestation of the Crown was dismissed.

Meredith, J.—This case comes before us upon an appeal from the judgment of the Superior Court, which overruled the contestation by the Crown of the collocation in favor of the opposant, the Rev. Joseph Comte.

The principal claim of the Crown is for a balance exceeding £40,000 due upon a judgment recovered on the 20th October 1825, against Sir John Caldwell, for money due by him as having been Receiver General of the Province to which office he was appointed by letters patent bearing date in 1809. The Crown has also another claim for about £800; but as it is not, in so far as regards the present controversy, in any respect of a more favorable nature than the larger claim just alluded to, it is needless to revert to it further.

The claim of the Rev. Mr. Comte is founded upon four general hypotheses, bearing date, respectively, in the years 1815, 1816, 1817, and 1823, and the real estate, the proceeds of the sale of which are now before the Court for distribution, are certain township lands situated within the County of Sherbrooke.

The judgment of the Court below overruled the contestation on the part of the Crown of the collocation which had been made in favor of the opposant Comte, on the ground that the hypothecary claims of the latter had been duly registered, as required by the provisions of the Registry Ordinance, 4 Vict. c. 30; whereas no registration whatever had been made of the claims of the crown.

The judgment thus rendered has been impugned by the law officers of the Crown on several grounds.

In the first place, it is contended that as the lands in question are situated in the County of Sherbrooke, that the notarial deeds upon which the claim of the opposant Comte is founded, became altogether inoperative as hypothecs, in consequence of their not having been registered in that County within twelve months from the passing of the 10 and 11 Geo. IV. cap. 8, as required by the provisions of that statute.

The answer given to this objection is that upon the contestation of the report of distribution, we cannot look beyond the pleadings, and that it does not appear upon the face of the pleadings that Sir John Caldwell was seized of the lands in question at any time whilst the 10 and 11 Geo. IV. c. 8 was in force. This answer appears to us conclusive.

In order to have raised the question as to the bearing of the 10 and 11 Geo. IV. c. 8, upon the claims now before us, the Crown ought to have contested the opposition of the Rev. Mr. Comte, and to have alleged and proved that Sir John Caldwell held the lands in questionwhilst the statute already mentioned was in force.

This may yet be done, for the judgment appealed from merely overrules the contestation, but of course, does not homologate the report. We therefore abstain from the expression of any opinion on this point, but at the same time think it may be well to mention, that the question seems to have been formally adjudicated upon in the year 1845, by the late Court of Queen's Bench for the District of Quebec, in the case No. 266, Modeste Pratt, plaintiff, vs. John Davidson, defendant, and Henry Black, opposant.

The Queen v. Comte et al.

The Judges were Sir James Stuart and Judges Bowen, Panet and Bedard; and one of the points decided was that a hypothec not registered as required by the provisions of the 10 and 11 Geo. IV. c. 8 was void *as against subsequent purchasers for valuable consideration, but not absolutely void.*

The next point connected with the question of registration to which our attention was called by the learned counsel for the Crown, is, that the hypothecs of Mr. Comte were not registered until after the death of Sir John Caldwell, and it is contended that the registration of a hypothec against the estate of a person deceased cannot be productive of any legal effect.

I can well understand, and authorities are not wanting to establish, that the creditors of a vacant estate cannot acquire hypothecs upon the real property of the vacant estate to the prejudice of each other. But I can see no reason for saying, and I know of no law or authority which requires me to say, that a hypothec legally created during the life of a debtor, may not as legally be registered after his death. After the death of a debtor, his heirs may grant new hypothecs, and therefore it would seem most unreasonable to say that the death of a debtor a few days, or perhaps a few hours, after the creation of a hypothec should prevent the creditor from taking those measures which may be necessary for the preservation of such hypothec.

To do so, would in effect, in the case supposed, make the rights of the creditor dependant upon the duration of the life of the debtor.

Under the *Code Civile* it would seem that the inscription of a claim cannot legally be made against a *succession vacante*, Troplong, P. & H., Vol. III. No. 659, but there is an important difference between the French inscription and our enregistration. Under the French system the inscription was necessary for the perfect creation of the hypothecary right, Troplong, Vol. III. p. 11; whereas under our laws the enregistration merely preserves a right which has already been created. I may add, that the provisions of the *Code Civile* on the subject have not received the approbation of the most esteemed commentators on that system. Troplong, for instance, speaking of the Art. 2146 of the *Code Civil* bearing on this subject, says:—"*Il est empreint d'une grande exageration et sa généralité conduit à des resultats que la raison repousse très-souvent; et qui sont j'en suis sûr contraires à sa penseé primitive.*" Troplong. Priv. & Hyp., Vol. III., p. 8, No. 649.

Our law, however, does not prohibit the registration of a hypothec after the death of the debtor, and in the absence of such a provision I see no sufficient reason for declaring a registration so made null.

There remains one point urged by the Crown, also connected with the question of registration to which I desire to advert; it is, that the Crown, in addition to the hypothec resulting from the judgment recovered against Sir John Caldwell, has a legal hypothec for the money due by him as Receiver General, dating from the period of his appointment; and that under the fourth section of the Registry Ordinance legal hypothecs, *hypothèques légales*, are not required to be registered.

The question, as to whether the registration of legal hypothecs was rendered necessary by the fourth section of the Registry Ordinance, was, after full argu-

ment, decided in the affirmative by the Superior Court at Quebec, in the case of Girard vs. Blais, Q. L. C. Rep. p. 95. Considering the great importance of the question, I availed myself of that opportunity of stating at length the grounds upon which I concurred in the judgment; and now, after reading over the report of that case, I see no reason for changing in any respect the opinion I then expressed; nor do I see that I can add anything to the observations which I then made.

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The only other point of importance raised by the contestation of the Crown, is, that the opposant Comte is not entitled to be collocated for more than five years' arrears of the constituted rents mentioned in his opposition. This point need not, however, at least for the present, be discussed; for the money before the Court will not suffice to pay the capital sums due to the opposant, and five years' arrears of interest. It may, however, be added, that in order to give the Crown the benefit of the prescription of five years contended for, it would have been necessary to have contested the opposition of Mr. Compte; for the ordinance which establishes the prescription in question, says it must be taken advantage of as a *fin de non recevoir*.

For these reasons, therefore, after giving to the case the best consideration in my power, I see no reason for disturbing the judgment of the Court below.

As the judgment of this Court reserves to the Crown the right to contest the report of distribution *de novo*, it may be proper to observe, that our reason for making this reservation is, that the report of distribution seems to present an important question which is not raised, and therefore cannot be discussed, under the contestation already filed by the Crown in this cause.

Under the 3d section of the 9th Geo. IV. cap. 77, it is in effect declared, that general hypothecs created before the passing of that Act, should be deemed valid as regarded lands "*now holden*," that is to say, *holden at the time of the passing of that statute*, in free and common soccage, and the other parts of the statute distinguish between lands holden in free and common soccage *at the time of the passing of the Act*, and those *to be thereafter holden by that tenure*. It may therefore, it is thought by some of the Judges, be contended, that as Mr. Compte's claim is founded upon general hypothecs, his opposition ought to have alleged that the lands in question were holden in free and common soccage "*at the time of the passing of the 9 Geo. IV. c. 77*," and that, for want of that allegation, it does not appear, even according to his own showing, that he has a valid hypothec.

This question, it is clear, is not raised by the contestation now before us; by which it is contended, *not* that the Rev. Mr. Compte *never had a hypothec*, but that *having had a hypothec he lost it for want of a registration* within the time allowed by law. Our present judgment is of course confined to the points raised by the contestation before us; but as the point just alluded to may be of importance when we come to the homologation of the report, we wish to afford the Crown an opportunity of bringing the question formally under the consideration of the Court.

Judgment of the Court below confirmed.

Hon. Lewis T. Drummond, Attorney General, *pro Regina*, Appellant.

Caron & Baillargé, for Comte, Respondent.

Pentland & Pentland, for Chandler, Respondent.

MONTRÉAL 20 NOVEMBRE, 1854.

Coram SMITH, J., VANFELSON, J., MONDELET, J.

No. 771,

LAFLEUR, (Appelant.)
vs.
GIRARD, (Intimé.)

Jugé, 1er. Que la révocation d'une donation onéreuse n'entraine pas l'extinction des hypothèques crées par le donataire sur l'immeuble rétrocédé.

2me. Que les donations onéreuses n'ont pas besoin d'être insinuées et que le donateur ou ses ayant cause n'en peuvent invoquer le défaut à l'égard d'un créancier du donataire.

L'appelant ayant porté une action hypothécaire contre l'intimé devant la Cour de Circuit du Circuit de Richelieu pour £20 3s. 1½ étant le montant d'une obligation consentie en sa faveur le 17 Décembre 1838 par Pierre Arrelle fils et enrégistrée le 9 Novembre 1843, en autant que l'intimé avait acquis l'immeuble hypothéqué à la créance de l'appelant, de Pierre Arrelle père par donation reçue le 23 janvier 1849; et que cet immeuble avait été possédé par Pierre Arrelle fils en vertu d'une donation de ses père et mère reçue le 8 mars 1842 jusqu'au 26 novembre 1844, jour auquel il l'avait rétrocédé à son père par acte reçu ce jour là;

L'intimé plaida: que Pierre Arrelle fils n'avait jamais eu la possession de cet immeuble comme propriétaire lorsqu'il avait consenti cette obligation; que la révocation de la donation entre le père et le fils avait eu l'effet de détruire toutes les charges et hypothèques que le donataire avait imposées sur cet immeuble, et que cette donation n'avait jamais été ni insinuée ni enrégistrée, il s'en suivait que le donataire n'avoit jamais pu devenir propriétaire de cet immeuble de manière à pouvoir l'hypothéquer.

L'appelant ayant prouvé la possession de Pierre Arrelle fils, comme propriétaire de cet immeuble depuis le 8 Mars 1842, à venir au 26 Novembre 1844, les parties furent entendues au mérite.

La Cour de Circuit ayant débouté l'appelant de son action le 21 Juin 1854, ce dernier interjeta appel à la Cour Supérieure à Montréal.

Lafrenaye, pour l'appelant prétendit: que la révocation de la donation n'entraine point l'extinction des hypothèques crées par le donataire sur l'immeuble rétrocédé, et qu'il fallait distinguer ce cas d'avec celui du réméré qui produit un effet tout contraire, (1) et celui du retrait lignager; (2) il cita les autorités suivantes:

Anc. Den. vo. hypothèque, page 659, No. 61.

Pothier, des propres. 6 J. des Audiences, p. 189, 3 avril 1716.

Pothier donations, sec. 2 art. 3 par. 1.

Que la Donation onéreuse est une vente et n'a pas besoin d'être insinuée.

Ricard. 1 vol. Donations, No. 1101, p. 278.

Ord. de Moulins, art. 58.

5 Toullier, p. 189, No. 185 et p. 193.

(1) Rép. Guyot, vo. faculté de rachat p. 271, 7 vol. "5me, le vendeur reprend l'immeuble vendu sans la charge des hypothèques et des autres droits réels que l'acquéreur y avait imposés, etc."

(2) Dict. de Droit, vo. hypothèque p. 1060.

Lefeuvr v. Girard.

Le jugement est motivé comme suit :

"The Court * * * * considering that the said appelant hath established by legal evidence and in law, that the lot of land described in the Declaration of the said Plaintiff, as amended in the court below was mortgaged and hypothecated to and for the payment of the sum of money mentioned in the obligation set forth in the said Declaration ; towit : the obligation of the 17th day of December 1838 executed before Mtre. Piette and colleague Notaries ; and further considering that the said Pierre Arrelle fils could not by the retrocession invoked by the said Defendant in the said Plea to the said action in any way affect or destroy the right of mortgage or hypotheque secured by him in favor of the said Plaintiff by the possession of the said Pierre Arrelle fils and in the Donation to him of the said eighth day of March 1852.—And further considering that the said Donation was not required by law to be *insinuée* in order to give it legal effect in the person of the said Pierre Arrelle fils.

Doth reverse the judgment rendered in this cause in the court below, on the 21st. day of June 1854, and the court now here proceeding to render the judgment which the court below ought to have rendered ; it is adjudged that the above mentioned and described lot of land be and the same is hereby declared charged and hypothecated for the payment of the sum of £20 3s. 1½ current money of the Province of Canada with interest upon the sum of £12 12s. ½d. said current money from the seventeenth day of December 1848 until actual payment and costs of suit."

(Appel maintenu.)

Lafrenaye et Papin, pour l'Appelant.
Laframboise et Papineau, pour l'Intimé.
[P. R. L.]

MONTREAL, 31st MARCH, 1857.

Coram Day, J. ; (C.) Mondelet, J. ; Chabot, J.

No. 1132.

Freligh vs. Seymour.

LEGACY—CONDITION—VARIANCE.

Held :—1st. That a legacy by a father to a daughter, conditional upon her not doing certain things, is forfeited by her doing such things. 2nd. That it is a fatal variance in a declaration to allege an absolute legacy when the legacy is only conditional as above.

The plaintiff, Jane Freligh, demanded from the defendant £525, being for seven annual payments of a legacy of £75 *per annum*. She alleged a Notarial will of her father, the late Richard Van Vliet Freligh, of date 20th November, 1849, whereby, amongst other things, he gave, devised and bequeathed to the defendant, all his property, moveable and immovable, upon trust ; nevertheless, that the defendant should and would, well and truly, pay or cause to be paid unto the plaintiff, the annual sum of £75, from and after the day of the decease of the Testator, for and during the natural life of the plaintiff ; and did also thereby direct the defendant to comply with and fulfill certain other trusts and directions contained in said will.—Further, that said legacy was for her aliment.

The first Plea of the defendant set up that the said legacy was only made and

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given to the plaintiff on condition that she was satisfied therewith; but, in case she should, at any time thereafter, institute an action in any of the Courts against the executor of the Testator, for and in respect of the estate and succession of the late Mary Marvin, in her lifetime the Testator's wife, or to disturb or interrupt the will by her made in favour of the Testator, that then and in such case the said Testator did thereby revoke the said sum of £75 per annum to the said Jane Freligh, so made and given to her as aforesaid, anything therein before contained to the contrary in any wise notwithstanding, if any such action should be made or instituted by her during her natural life. That the plaintiff had not set forth said condition, or that she was satisfied with said legacy—nor could she; but, on the contrary, she had instituted divers actions against the defendant as executor of the will of her father, and as legatee in trust thereunder for and in respect of the estate and succession of said Mary Marvin, and to interrupt and disturb the will of said Mary Marvin, and that the Plaintiff had violated and broken the terms and conditions under which said legacy of £75 *per annum* was given, and the defendant further specifically set up the acts and proceedings of the plaintiff, which he complained of.

The second plea was a plea of compensation.

Lastly, the defendant pleaded the general issue.

Day, J.—By the documentary evidence of record, it has been abundantly proved that the plaintiff has acted in contravention of the conditions of the will, on which the legacy was bequeathed, and consequently that she has forfeited all claim to the legacy. It is further to be observed that the form of the action is bad. The legacy is set up in the declaration as an absolute one, and a conditional legacy is proved. This is not setting up the legacy as it is in the will; and there is as great a variance in setting up absolutely that which only exists conditionally as if totally different matter had been set up. This is a fatal variance, and would of itself be sufficient to justify the dismissal of the action.

The *motifs* of the judgment were as follows:—

"*The Court* &c., considering that the plaintiff hath failed to establish the material allegations of her declaration, inasmuch as she hath alleged an absolute bequest and legacy in her favour by the late Richard VanVliet Freligh, in his last will and testament, in the said declaration set forth, of the annual sum of £75; whereas by the said will and testament it appears that the said bequest and legacy was made upon condition that she should be satisfied therewith; which said condition the said plaintiff hath failed to allege or prove, and hath not declared that she is satisfied with the said legacy and bequest. And further, considering that the said bequest and legacy was so made, as well upon the said condition as upon another special condition, that in case she, the plaintiff, should, at any time thereafter, institute an action in any of the Courts of this Province against the executor of the said testament, for and in respect of the estate of the late Mary Marvin, in her lifetime the wife of the said Testator, or to disturb or interrupt the will and testament by her made and executed in favour of the said Testator, that then and in any such case, the Testator did revoke the said bequest and legacy; and that the plaintiff by her action against the defendant, instituted in this Court and returned on the first day of April, 1850, and by her

special answer to the exception of the defendant in that cause fyled; and also by her intervention in this Court, fyled in a cause wherein the said defendant was plaintiff and the Bank of Montreal was defendant; and also by her opposition in this Court, fyled in a cause wherein the said defendant was plaintiff and Freeman Buck was defendant,—hath manifested, and in effect declared, that she was not satisfied with the said bequest and legacy, and hath instituted an action and actions in a Court of this Province against the said defendant, executor of the said last will and testament, for and in respect of the estate and succession of the said late Mary Marvin, maintaining the exception by the defendant in this cause firstly pleaded, doth declare and adjudge that the plaintiff hath infringed and violated the conditions upon which the said bequest and legacy was so made to her, as aforesaid, and by reason thereof and by law hath forfeited all right to recover the same, and doth dismiss the action of the plaintiff with costs."

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Action dismissed.

Cross & Bancroft, for Plaintiff.

A. & G. Robertson, for Defendant.

(F. W. T.)

NOTE.—The rule as to variance in the English practice is no doubt as stated by the learned Judge, but the rule is not always applied with the same rigour in our Courts, as for example in actions on policies of insurance, in which the conditions of the policies, although some of them conditions precedent, are seldom set forth with the fulness and precision required in the English Courts, where a plea of *non est factum*, it is apprehended, would be successful, while in our Courts it would be of no avail.

MONTREAL, 31ST OCTOBER, 1857.

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

No. 2679.

St. Denis vs., Grenier & vir.

Held:—That a witness may be examined twice by the same party.

In this case a witness of the name of Maréchal had been examined as a witness on behalf of the Plaintiff, and was subsequently brought up by the same party to give further evidence in his favor. The evidence having been objected to a motion was made to reject it, on the ground, that it was incompetent for a party in a cause to examine the same witness twice in his own favor.

Day, J.—There is nothing illegal in examining the same witness twice on behalf of the same party. It is a mere matter of discipline and entirely within Province and control of the Court, and as we see no injustice in allowing the double examination in the present case, the motion to reject the witness' second deposition is disallowed.

Motion rejected.

Sicotte & Chagnon, for Plaintiff.

Jules R. Berthelot, for Defendant.

(S. B.)

MONTREAL, 31st OCTOBER, 1857.

Coram Day, J., Mondelet, (C.) J., Badgley, J.

No. 679.

Dubois vs. Gauthier.

Held:—In an action by default for rent, where new conclusions are reserved by the Declaration, in respect of rent accruing, that such new conclusions may be taken, without service thereof on the defendant.

This was an action for the recovery of £23 10s. of rent, and by the declaration, reservation was made to take new conclusion for the accruing rent. The Defendant having made default, and a quarter's rent having became due before the case was ripe for judgment, new conclusions were taken in respect of such rent so accrued, but no service was made of such new conclusions on the Defendant.

The want of service of the new conclusions induced the Court to reserve the case for consideration, and after deliberation, it was determined that such service was unnecessary, and judgment was rendered accordingly.

Cherrier, Dorion & Dorion, for Plaintiff.
(S. B.)

MONTREAL, 31 OCTOBRE 1857.

Coram Mondelet, J., Badgley, J.

No. 906.

Brosseau, Requérant Writ de Mandamus, vs. *Bissonnette*, Défendeur.

Jugé que la nomination d'un Conseiller Municipal par le Gouverneur peut être considérée comme non avenue si le conseil municipal avait rempli la vacance suivant les dispositions de l'acte municipal de 1854.

Le Demandeur adopta la voie du *mandamus* par requête libellée exposant l'existence d'un conseil municipal pour la paroisse de St. Athanase, son organisation en juillet 1855, l'élection de Denis Doody comme maire, et l'absence de ce dernier, de la paroisse pendant un espace de trois mois échus le 23 février 1856, ce qui le rendait par là même incapable d'exercer ses fonctions, et opérait la vacance de son siége de conseiller. En vertu de la 31e section de l'acte des municipalités, les conseillers doivent à la première session après cette période nommer parmi les habitans de la paroisse un autre conseiller, et à la séance immédiatement suivante faire choix d'un maire; cette séance étant celle du 3 mars 1856, jour auquel le conseil avait omis de procéder à tels devoirs.

Que vû telle omission le gouverneur avait le 23 mars nommé le requérant conseiller municipal, charge que le Défendeur, Jean Baptiste Bissonnette, avait usurpé sous prétexte de l'élection faite par les conseillers illégalement, le requérant concluant en conséquence à sa destitution.

En réponse le Défendeur plaida que la première séance régulière du conseil qui eut lieu fut celle où il fut choisi conseiller remplaçant.

Que le conseil avait en outre quarante-cinq jours après les trois mois expirés pour procéder à telle nomination, et que la nomination n'était pas dévolue au

gouverneur durant ce délai, et que toute nomination qu'il pouvait faire devait être considérée comme soumise à la condition de l'existence d'une vacance.

Brosseau v. Bissonette.

Il fut constaté par la preuve que la première séance régulière après les trois mois fut celle où le conseil nomma Bissonnette.

Per Curiam. La Cour par son jugement déclare que la nomination de Bissonnette par le conseil est conforme à la loi, et que la nomination de Brosseau par le Gouverneur avait été obtenue sur de fausses représentations, et que telle nomination était censée faite avec la condition tacite qu'il y eut vacance, que la franchise d'élire devait être favorablement envisagée par les tribunaux, et le droit de nomination par le gouverneur considéré comme un remède au défaut d'action des municipalités.

Le jugement est motivé comme suit :

" La Cour.... attendû que lors de la nomination du Requérant, comme " maire, par le gouverneur, il n'y avait aucune vacance qui aux termes du statut " provincial 18 Vict. c. 100, sec. 31 par. 2, autorisât telle nomination par le " gouverneur à qui on avait aucunement fait connaître le choix qu'avait fait du " Défendeur comme maire, le conseil municipal suivant qu'il en avait le droit et " le devait par la loi, renvoie avec dépens la dite requête libellée."

Requête refusée.

Ouimet, Morin et Marchand, pour le Requérant.

R. et G. Laflamme, pour le Défendeur.

(R. L.)

MONTREAL, 28th NOVEMBER 1857.

Coram SMITH, J.

No. 754.

Palsgrave vs. *Ross and Ross, Opposant and Plaintiff* En faux, *and Palsgrave, Defendant* En faux.

Held, that draft of Judgment may be legally amended, even after the judgment has been pronounced, provided it has not been registered.

Smith. J.—This is an inscription *En faux,* on the part of the Defendant and opposant who contends that the original draft of judgment as well as the copy served on him has been falsified, by striking out certain words therein since the judgment was drawn and pronounced in open court. The difficulty arose in this way. Ross, the Defendant was only in possession of 3 lots, although, the declaration referred to 4 as being in his possession. When the judgment was pronounced, the draft of judgment was in terms of the declaration, but had not yet been examined and initialed by the judge, and subsequently, after discovery of the error as to the number of lots in the actual possession of the Defendant, the draft of judgment was amended to meet the facts of the case before the same had been registered, and before the judge had approved thereof by writing his initials thereon in usual course. Under the circumstances, the Court is of opinion that the judgment must stand as approved of by the judge pronouncing the same, and that the Inscription must be dismissed.

Inscription dismissed with costs.

Rouer Roy, for Oppt. and Plff. *En faux.*

A. & G. Robertson, for Plfft. and Defdt., *En faux.*

[S. B.]

McGILL LAW

MONTREAL, 28th NOVEMBER 1857.

Coram MONDELET, (C.) J.

No. 360.

Falardeau vs. *Couture.*

Held, in an action for damages in consequence of Plaintiff's child being severely bitten by Defendant's dog which was trained and kept as a fighting dog and suffered to run unmuzzled, that exemplary damages will be awarded.

This was an action for the recovery of damages, in consequence of the Defendant's dog, which was declared and proved to be a bull dog, and to have been trained and kept by the Defendant for the purpose of fighting other dogs, and suffered to run unmuzzled, having severely bitten the Plaintiff's child. The only special damage proved was the doctor's Bill, which amounted to £4 10s., but owing to the fact that the Defendant kept a dog of the character above mentioned, for the purpose of fighting, and suffered him moreover to run unmuzzled, the court assessed the damages at £25 Cy.

Leblanc and Cassidy, for Plaintiffs.

J. M. Desjardins, for Defendant.

[S. B.]

MONTREAL, 28TH DECEMBER, 1857.

Coram SMITH, J.

No. 1535.

Turner v. *Boyd.*

Held,—That in the absence of the original record it is not competent for the Court to pronounce *péremption d'instance.*

SMITH, J.—This is a motion *en péremption d'instance* and has been resisted by the Plaintiff on the ground, that the original Record is missing and has been so for a long time. It was contended on the part of the defendant, that the certificate of the Prothonotary, to the effect, that it appeared by the registers of the Court that no proceedings had been had during three years was sufficient, and that the absence of the record was perfectly immaterial, and in support of this view, reference was made to the cases of Chapman et al. v. Aylen and Gore v. Gugy,* but the Court thinks they are not analogous. In the cases referred to, important exhibits and pleadings were missing from the record, but the Record itself, although incomplete, was before the Court, but here the Court has no Record whatever, and is called on to base a judgment solely on the certificate of the Prothonotary that such a Record once existed and that no proceedings have been had therein during three years. The motion must be rejected.

Motion rejected.

Bleakley & Andrews, for Plaintiff.

Bethune & Dunkin, for Defendant.

(S. B.)

* *Vide* page 264 of the 1st Vol. of the Jurist.

MONTREAL, 28TH NOVEMBER, 1857.

Coram MONDELET, (C.) J.

No. 1194.

Filiatrault v. *The Grand Trunk Railway Company of Canada.*

Held,—In an action by a tutrix to minors for damages, in consequence of the death of their father through the negligence of the Defendant, that the demand is subject to the prescription of one year.

This was an action by a tutrix to minors for the recovery of damages, in consequence of their father having been killed by an accident on the railway, which was alleged in the Plaintiff's declaration to have occurred through the neglect of the Defendant. The Defendant pleaded a *défense au fonds en droit*, on the ground that the action was prescribed, by the lapse of a year, as shewn by the allegations of the declaration itself.

The Court sustained the demurrer and the action was dismissed.

Sabrevois DeBleury, for Plaintiff.

Cartier & Berthelot, for Defendant.

(S.B.)

MONTREAL 28th DECEMBER, 1857.

Coram SMITH, J.

No. 1037.

Ex parte Brodeur, for Certiorari.

Held.—That where a case has been heard before and taken *En délibéré* by two commissioners for trial of small causes, it is incompetent for *one* of each two commissioners to render judgment *alone.*

This was an application for a writ of *certiorari* from a judgment rendered by the commissioner's Court for the Parish of Ste. Anne de Varennes.

The affidavit of circumstances set forth amongst other things, that the case had been tried before and taken *en délibéré* by two Commissioners and that one of such two Commissioners alone rendered judgment therein against the present Petitioner, the other Commissioner being absent.

Smith, J., It was contended at the argument that where one Commissioner could hear the cause one could decide, but the jurisdiction in the present instance was not originally assumed by one Commissioner alone but by two, and then one of such two Commissioners affected afterwards to have power to render judgment alone. This of course cannot be and the writ must consequently be allowed.

Writ ordered.

Ouimet, Morin et Marchand, for the Petitioner.

Cherrier, Dorion et Dorion, for the Justice.

[S. B.]

MONTREAL, 28TH NOVEMBER, 1857.

Coram C. MONDELET, J.

No. 1383.

Torrance et al. v. *Thomas.*

ATTACHMENT UNDER 177TH ART. OF COUTUME—MOTION TO QUASH.

Held, that the legality of an attachment under the 177th Article of the Custom of Paris cannot be tried on a motion to quash the attachment.

The plaintiffs commenced their action against the defendant on the 9th November, 1857, to recover £715 1s. 11d. cy., value of 85 half-chests of young-hyson tea sold by them to the defendant. The declaration alleged the sale and delivery of the tea; that the defendant, in acknowledgment of the price, had given him two several promissory notes, the one payable on the 5th November, 1857, for £357 10s. 11d., the other payable on the 5th January, 1858, for £357 11s.; that the defendant had failed to pay the first of said notes, although due and demanded; that the said 85 chests of tea were still in the possession of the defendant in the original packages and unbroken, and in the same state and condition in which they were when so sold and delivered; that the defendant was then insolvent *en état de déconfiture*, and unable to pay his debts, and that the whole price of £715 1s. 11d. was therefore exigible; by means whereof the Plaintiffs, without the benefit of a writ of attachment under the 177th article of the Custom of Paris might lose and be deprived of their privilege and lien upon the said goods, and might lose their said debt and sustain damage.

The conclusions of the declaration were that a writ of *saisie* or attachment under the 177th article of the Custom of Paris might in due course of law issue to seize and attach the said goods or so much thereof as might be in the possession of the Defendant, in order that the same might be forthcoming to abide the future order and judgment of the court, that the Defendant might be summoned to have the attachment declared good and valid, and thereupon condemned to pay and satisfy to the Plaintiffs the sum of £715 1s. 11d., with interest on £357 10s. 11d. from the 5th November, and on £257 11s. from the 5th January; that the goods so seized might be identified as the goods so sold and delivered by the Plaintiffs to the Defendant, and be declared liable and subject to and affected with the said privilege and lien of the Plaintiffs thereon, as the vendors thereof, for the payment of the said sum of £715 10s. 11d., and interest and costs, and that the said goods so to be seized and attached may be ordered to be sold in due course of law and the proceeds thereof paid over to the Plaintiffs, under and by virtue of the said special privileges so given to them by law, and by preference to all others the creditors of the Defendant in satisfaction wholly or in part according to their sufficiency of the said debt, interest, and costs.

The Plaintiffs sued out a writ of attachment upon affidavit, in conformity with the allegations of their declaration, and sixty chests of the tea were attached in consequence.

The Defendant appeared by attorney on the return day, and on one of the

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first days of the November term moved to quash the attachment, stating several grounds which in substance attacked the legality of the *saisie conservatoire* resorted to by the Plaintiffs.

PER CURIAM. The Court is of opinion with the Plaintiff that the process adopted in this cause cannot be attacked by motion, which is borrowed from the English practice. The processes borrowed from the English Courts should be attacked by English form; but the present is an entirely French proceeding, under the 177th article of the Custom which is in force in Lower Canada.

The judgment dismissing the motion is *motivé* as follows:

"The Court, considering that the Plaintiffs have in this case proceeded under the operation of the 177th article of the *Coutûme de Paris*, which is in its full force in Lower Canada, and has in no way or manner been abrogated or modified by the Provincial ordinance of 1785 or 1787, nor by any law subjecting such process as that issued in this case to the practice which, in and by the Courts of Justice in Lower Canada, has been tolerated or sanctioned, to wit, of moving for the quashing of writs of attachment or *capias ad respondendum*, for want of a legal or sufficient affidavit; considering further that the process issued in this cause professedly under the 177th article of the *Coutûme de Paris* cannot and ought not to be questioned or attacked, by a motion, but by an exception in the usual course of *procedure*, it being the legitimate matter of a *fin de non procéder*, doth reject the defendant's motion with costs.

Motion dismissed.

Torrance & Morris for Plaintiff.
Rose & Monk for Defendants.
(F. W. T)

MONTREAL, 27TH FEBRUARY, 1858.

Coram C. MONDELET, J.

No. 1383.

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Held. that the vendor has a privilege on the goods sold *à terme* and delivered to the vendor and still in his possession but who has subsequently become insolvent, and that such goods may be attached by a conservatory process to prevent their disappearing.

The facts of this case have been stated at p. 98 of the present volume of the Jurist. The Defendant did not plead to the action, and the Plaintiffs proceeded *ex parte*. The defendant admitted the sale and delivery, the insolvency, and the identity of the chests seized with those sold, and thereupon the Plaintiffs inscribed for hearing on the merits.

The judgment was as follows:

"It is considered and adjudged that the Plaintiffs do recover from the Defendant the sum of seven hundred and fifteen pounds one shilling and eleven pence current money of this Province of Canada, as and for the price of eighty-seven half-chests of young-hyson tea, sold and delivered by the said Plaintiffs to the said Defendant on the 2d day of June 1857, and for which the said Defendant then gave to the said Plaintiffs his two promissory notes, each bearing the date, Montreal, 2d June 1857, the one for the sum of £357 10s. 11d. said

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current money, payable five months after date to his the Defendant's own order at the Bank of Montreal, and endorsed by the Defendant and delivered to the Plaintiffs, and the other for the sum of £357 11s. said current money, payable seven months after date, to the order of him the said Defendant, at the Bank of Montreal, and by the said Defendant endorsed and delivered to the Plaintiffs; with interest upon the said sum of £357 10s. 11d., the amount of the said firstly mentioned note from the fifth day of November 1857, date of the maturity of the said first note, and on the sum of £357 11s. said current money, amount of the note secondly above mentioned from the 5th day of January 1858, the date of the maturity of the said second note, and costs of suit, *distraits* in favor of Messrs Torrance and Morris, the attornies of the said Plaintiffs. And the Court considering that it appears in evidence in this cause that at the time of the seizure made in this cause of sixty of the said eighty-seven half-chests of young-hyson tea sold as aforesaid, that the said Defendant was insolvent *en état de déconfiture*, and that the said sixty half-chests of young-hyson tea were then in his possession in their original packages and unbroken, doth declare the attachment *saisie* made in this cause of the said sixty half-chests of young-hyson tea good and valid, and doth declare the same liable and subject to and affected with a privilege and lien in favor of the said Plaintiffs thereon as the vendors thereof, and it is ordered that the said sixty half-chests of young-hyson tea so seized be sold in due course of law and the proceeds thereof paid over to the said Plaintiffs by special privilege and in preference to all the other creditors of the said Defendant, in satisfaction of the present judgment in whole or in part, according to their sufficiency.

Judgment for Plaintiff.

Torrance & Morris, for Plaintiffs.

Rose & Monk, for Defendant.

(F. W. T.)

The plaintiff relied upon the following authorities:

Domat, Lois Civiles, lib. 4, tit. 5, sec. 2, n. 3, p. 326, fol. ed.
Pigeau, Proc. Civ. 1, 465.
Rousseaud de la Combe, Recueuil de Jurisprudence, p. 602, 2nd col., p. 603, 1st col. verb. *Vente*.
Bourjon, Droit Commun de la France, tom. 1, 423; tom. 2, tit. 8, des Executions, nos. 78, 80, 84.
Brodeau sur Louet, art. 177, p. 435.
Ferrière, Dictionnaire de Droit, p. 817, 1st col., verb. *Revendication*.
7 Toull. 739.
Pothier, *Vente*.
Despeisses, I. 28, 29.
Lemaitre, Coût. de Paris, art. 177.
Grand. Coût., tom 2, 1340, 1339, no. 4.
McClure v. Kelly et al., in appeal 1829. Rev. de Leg. 2, 126, 127.
No. 231, K. B. Montreal, Dinning et al. v. Young, retble. Oct. 1836, Driscoll for Plaintiffs, and Walker for Defendants.
No. 2405, K. B. Montreal, Scott et al. v. Dodge, retble. 19th Oct. 1830, judgment *exparte* rendered by the Court, composed of C. J. *Reid* and J. *Rolland* and J. *Pyke*, of date the 14th April, 1831; Driscoll, for Plaintiff, and De Montigny, for Defendant.
No. 204, K. B. Montreal, James Fox et al. v. Thomas M. Smith et al., judgment rendered 18th Feb. 1837, the Court composed of C. J. *Reid*, and *Pyke*, *Rolland*, and *Gale*, Justices; Messrs. Buchanan & Andrews, for Plaintiffs, and Walker, for Defendant. This last was a keenly contested suit, but the Plaintiffs got judgment in their favor.
No. 671, S. C. Montreal, Chance et al. v. Henderson, A. D. 1855. This action was dismissed *faute de preuve* the 22nd May, 1855, the Court composed of MM. *Smith* and *Vanfelson*, Justices; Cross & Bancroft for Plaintiffs, A. & G. Robertson for Defendant.

MONTREAL, 22ND FEBRUARY, 1858.

Coram C. MONDELET, J.

No. 1643.

Sinclair v. *Ferguson.*

No. 1653.

Robertson et al. v. *Ferguson.*

No. 1654.

Mills et al. v. *Ferguson.*

VENDOR'S PRIVILEGE.

Held 1st. That the vendor selling on credit *avec terme*, may revendicate in the hands of the vendee who has subsequently become insolvent, the goods previously delivered.
2nd. That service of the declaration in such case may be made at the Sheriff's Office, (7 Geo. 4, C, 8.)
3rd. That an affidavit is not *de rigueur* in order to obtain a Writ of revendication in such case.

These three suits were issued under the 177th Article of the *Coutume de Paris*, and claimed thereby a privilege, which, previous to the Bankrupt Act, 7 Vic. c. 10, s. 39, was sometimes asked for in the Courts of Lower Canada. The plaintiffs set up the sale and delivery of merchandize on a term of credit to the defendants—that subsequent to the sale the plaintiffs became insolvent—that in consequence of the insolvency, the debts became due—that the goods they sold, or a greater part of them, still remained in the defendants' possession, and, therefore, they prayed to be allowed to retake possession of the goods they had sold, and recover judgment against the defendant for the value of whatever portion of the said goods as may not be found in the defendant's possession at the time of the seizure.

Macrae and *Carter* for defendant, urged, among other objections :—

1. That the affidavits upon which the writs issued were informal.
2. That the writs were defective.
3. That the 177th Article of the Custom of Paris did not give the vendor of goods, sold on a term of credit, the right to revendicate.
4. That the privilege given by this article of the Custom was lost to the vendor if the goods were not *en totalité*, in an entirety, at the time of seizure.
5. That the service of the declarations at the Sheriff's office was insufficient.

Popham, for the Plaintiffs, in support of the sufficiency of the writs and declarations maintained :—

I. That the privileges mentioned by the 176th and 177th Articles of *Coutume de Paris* were not new privileges introduced, but simply the application of a privilege which had always existed in the laws of France (and which had its origin in the *Commissory Pact* of the Roman law) to cases where otherwise it may be supposed such privilege would not apply.

II. That under the 177th Article of the *Coutume de Paris*, the vendor has the choice of three things :—

1. If the goods sold be under seizure at the suit of another creditor, he could, by opposition, claim to be paid the proceeds of the sale of these goods, in preference to all other creditors of the purchaser.

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2. But, if the goods remain in the undisturbed possession of the purchaser, the vendor could sue out an attachment seizing the goods, and asking them to be sold, and the proceeds thereof given to him by special privilege.

3. Or, he had, in addition, another privilege, which, though it may not have been acted upon, still existed by our law, namely, the right, when the merchandize remains in the undisturbed possession of the purchaser, who has become insolvent, to demand back the goods, or such of the goods as may be found in the Defendant's possession; and at the same time, to demand that he be compelled to pay for such of the said goods as may not be found in his possession at the seizure.

III. That by reference to the Ordinance 7 Geo. IV. Cap. 8., it will be seen that the service of the declarations in the Sheriff's office was sufficient.

Mondelet, J., rendered judgment.

These cases were of importance to the commercial community. They came before the Court on an issue raised by an *Exception a la forme.* They had been argued with great zeal and ability, and he had given them a careful consideration. They were professedly taken under the 177th Art. of the Custom of Paris, and demanded repossession of merchandize sold on a term of credit, in consequence of the insolvency of the purchaser. The Affidavits, Writs, and Declaration's had been met by the Defendants with *Exceptions a la forme.*

The first question which thus arose was—Is an affidavit necessary in such cases? He held that it was not. These articles of the Custom of Paris were in full force. They were not affected either by the Ordinance of 1777, or by the Ordinance of 1785, which required affidavits in suits issued under their provisions. In France he could not find that any affidavit was required; and, therefore, he held an affidavit to be unnecessary. As it was unnecessary, it would be idle to take up any of the objections which had been urged against those made in the present suits.

The second question for consideration was, whether the present actions had been properly taken out under this 177th Article of the Custom? He thought they had. The Article applied to several cases. 1st. To the case where the goods sold were seized by another creditor, when the vendor could ask, by opposition, to be paid by special privilege the proceeds of the sale. 2nd. To the case where the goods sold remained in the undisturbed possession of the Debtor, where the vendor can seize the merchandize and ask that it be sold and the proceeds paid to him by special privilege.

It was the jurisprudence of the country that the article applied to a third case, where the purchaser had become insolvent, the vendor can retake possession of goods sold on a term of credit.

As to the question of the validity of the service of the declarations he held, that the service at the Sheriff's office was sufficient.

Exceptions dismissed with cost.

The Judgment was as follow:

"The Court, &c................ considering that in and by his Exception *à la forme* in this cause fyled, the Defendant hath neither alleged nor shown that the Plaintiffs have omitted any essential formality in and previous to and

to the end of the issuing of the process in this cause complained of by Defendant. Considering that by the laws of Lower Canada the process which has been issued in this cause under the 177th article of the *Coutume de Paris*, is not, in all respects, subjected to all and every the formalities required in connection with other seizures or attachments, and namely that an affidavit such as is prescribed in other cases is not *de rigueur* in a proceeding and on a process such as the present. Considering that the present process is and may be classed among those which by the Laws of Lower Canada are issuable against and for attaching the estate debts and effects of what nature soever, whether in the hands of the owner, the debtor or of a third person, and inasmuch that in such case or cases—by a statute in force in Lower Canada (7 Geo. IV. c. 8,) service of the declaration specifying the cause of action upon which such writ or writs shall have respectively issued, may be made upon the Defendant, either personally, or by being left at the office of the Sheriff of the Court into which such writ shall have been made returnable, at any time within three days next after the service of such writ, if the same have issued in term, or within eight days next after such service, if the writ have issued in vacation; and whereas the service of the writ or process in this cause hath been made according to law as well as of the declaration, and is in all respects good valid and sufficient.

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Considering further, that the process or writ in this cause issued cannot and ought not to be assailed or called in question as to its validity, nor the issuing, nor the execution thereof by any reason or cause alleged or set forth in the said Exception *à la forme*.

Doth dismiss the said Exception *à la forme*.

Popham, for Plaintiff.

Monk & Macrae, for Defendant.

E Carter, Counsel.

The defendant had previously moved in the December Term, 1857, to set aside the attachment, but the Court (Mr. Justice Smith) dismissed the motion.

For authorities cited by Plaintiff on both occasions, *vide* reports of *Torrance* v. *Thomas*, *ante*, p. 98 and *seq.*—also *Pattenaude* v. *Leriger de Laplante*, 1 Jurist, p. 106.

CIRCUIT COURT.

MONTREAL, 13TH FEBRUARY, 1858.

Coram C. MONDELET, J.

No. 4523.

Charbonneau vs. *Benjamin.*

Held,—That a merchant is justified in dismissing his clerk before the termination of his engagement for a breach of duty or discipline, such as absence without leave; and that the clerk cannot in such case recover salary accrued subsequent to his dismissal and prior to the termination of the agreement.

Plaintiff sued for £7 10s., being one month's salary, under a yearly engagement, accrued since his dismissal and prior to the termination of his engagement, alleging his dismissal to have been without sufficient cause.

The defence was, that Plaintiff had absented himself for half an hour or more without permission, and had otherwise infringed the rules of the establishment; and on the return of Defendant from England, the latter being made aware of this, had dismissed him.

Charbonneau v. Benjamin.

[illegible], J.—I base my decision on one fact alone, viz., the Plaintiff's absenting himself without leave. It was all important for the proper conduct of an establishment like the Plaintiff's that the clerks should be punctual and attentive to their duties; and it is well that clerks should know that they cannot enforce an engagement against their employers if they are the first to violate it.

Action dismissed.

Morin, for Plaintiff.
Carter, E., for Defendant.
(W. A. B.)

SUPERIOR COURT.

MONTREAL, 27 FEVRIER, 1858.

Coram SMITH, J.

No. 2611.

Ducondu v. *Bourgeois.*

Jugé, 1o. Qu'un compte rendu en bloc par un tuteur à son mineur devenu majeur et par lui accepté sans pièces justificatives, est nul, *ipso jure*.
2o. Que sur une demande en reddition de compte par le mineur, une exception lui opposant un tel compte ne constitue aucune fin de non recevoir.
3o. Que le tuteur doit être condamné à rendre compte de nouveau.

L'action du Demandeur était portée contre le Défendeur son ci-devant tuteur pour reddition de compte.

A cette action le Défendeur plaida par exception ou fin de non-recevoir; que le 23 janvier 1854, pardevant Mtre. Jobson et son confrère notaires, il avait rendu son compte de tutelle au Demandeur, qui l'avait approuvé et accepté, et qui avait déclaré avoir pris communication des pièces justificatives à l'appui. Le Défendeur produisit le compte et son acceptation par le Demandeur.

Le Demandeur répondit spécialement à cette fin de non-recevoir comme suit:

"Que le prétendu compte en date du vingt-trois janvier mil huit cent cinquante quatre et reçu devant Mtre. Jobson et son confrère notaires publics, invoqué par le dit Défendeur n'a jamais été rendu légalement, n'a jamais été accompagné des formalités voulues par la loi en pareil cas, et n'a jamais été accompagné des pièces justificatives d'icelui.

Que le dit prétendu compte a été fait en abrégé et rendu en bloc, et n'est pas exact et fidèle ainsi que le veut la loi du pays.

Que le dit prétendu compte et sa prétendue acceptation par le Demandeur ont été reçus par Mtre. Jobson, notaire, qui est le neveu par alliance du [illegible]deur.

Que le dit prétendu compte est d'une nullité radicale et absolue, le [illegible]fendeur n'ayant jamais produit aucune pièce justificative d'icelui et partant le Défendeur n'a encore rendu aucun compte au Demandeur qui n'a pu approuver valablement un [illegible] nul et de nul effet, et que sous ces circonstances le Demandeur n'est point [illegible] de débattre ses droits avec le Défendeur et l'obliger de lui rendre un [illegible]le et [illegible]ract sous serment par chapitres de recette, dépense et reprise, [illegible] de toutes les pièces justificatives d'icelui et en conformité aux lo[illegible]

A ces causes le Demandeur conclut autant que besoin est, à ce que le prétendu compte abrégé en date du vingt-trois janvier mil huit cent cinquante-

quatre, reçu devant Mtre. Jobson et son confrère, notaires, et invoqué par le Défendeur en cette cause, ainsi que l'acceptation ou ratification d'icelui par le dit Demandeur, par acte en date du même jour devant les mêmes notaires soient déclarés insuffisants, informes, incorrects, incomplets, nuls et de nul effet, et en conséquence rescindés et annulés et déclarés nuls et comme non faits et à ce que le Demandeur soit en autant que besoin est, relevé de toute obligation par lui contractée envers le dit Défendeur au regard du susdit compte, et partant à ce que le dit Défendeur soit tenu de lui rendre un compte fidèle et sous serment ainsi que par lui demandé dans et par les conclusions de sa déclaration et partant à ce que la dite exception soit renvoyée avec dépens."

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Le Défendeur ayant été examiné, sur faits et articles déclara "qu'il ne se "rappelait pas, si lors de la reddition de compte avec le Demandeur aucune "pièce justificative lui ait été soumise."

Lafrenaye, pour le Demandeur. En demandant une reddition de compte au Défendeur, le Demandeur a considéré le premier compte rendu comme nul et n'a pas cru devoir en demander la nullité de prime-abord, mais seulement dans le cas où ce compte lui serait opposé. Aux yeux de la loi ce compte rendu en bloc sans être appuyé d'aucune pièce justificative est nul *ipso jure*.

Brodeau sur Louet, lettre T, no. 2, p. 978.

Sommaire 3, no. 6, arrêt du 17 janvier 1612, etc.

Ordonnance, 1667 tit. 29, arts. 7 et 9.

Actes de notoriété p. 152 et p. 154, nos Cr

Cassidy, pour le Défendeur, prétendit que le Demandeur aurait dû porter une action spéciale demandant la nullité du compte et concluant ensuite à une nouvelle reddition de compte.

Par le jugement de la Cour, le Défendeur a été condamné à rendre compte sous un mois à compter de la signification du jugement avec dépens.

Lafrenaye et Papin, pour le Demandeur.

Leblanc et Cassidy, pour le Défendeur.

(P. R. L.)

SUPERIOR COURT.

MONTREAL, 16TH MARCH, 1858.

IN CHAMBERS.

Coram DAY, J.

No. 2063.

Warner vs. *Fyson.*

No. 2064.

Crawford vs. *Fyson.*

No. 812.

Merritt vs. *Fyson.*

Held,—1st, That Defendant arrested under Writ of *Capias ad Respondendum*, at suit of different Creditors, is entitled to alimentary allowance from each Plaintiff.

2d, That tender of payment made in any gold, silver or copper coin, defaced or stamped (by bending or stamping) is illegal.

3d, That the provisions of the Imperial statute, 16 & 17 Vict., cap. 102, respecting the legality of such tender, apply to this country.

In these causes each of the Plaintiffs arrested the Defendant on process of *Capias ad Respondendum*, last August, and the Defendant remained in custody ever since.

Crawford v. Fyson.

On the 4th February last the Defendant obtained orders, in all three cases for payment by the Plantiff of 5s. per week each, as alimentary allowance.

On the 1st March inst., the Plaintiff's agent tendered to the Defendant, in the office of the gaoler, ten English shillings and seven English sixpences, as payment of the allowance. The Defendant requested him to indicate the coins composing the separate payment by each Plaintiff, but he refused, stating his inability to do so. The Defendant therefore refused to accept the money, which was consigned into the hands of the Gaoler.. The Defendant on the sixth of March presented petitions for his discharge from imprisonment, on the ground that no legal payment or sufficient tender had been made to him by the Plaintiffs on the 1st instant. Thomas McGinn, Esq., the Gaoler and the Plaintiff's agent were examined by the Defendant and established the facts above detailed. It was also proved that one of the shilling pieces was defaced by a mark or dinge across it, apparently the result of an attempt to bend it; another shilling had a cross drawn by a knife or other sharp instrument upon it; and a sixpence, the date of which could not be deciphered, had a letter or figure "V," stamped on it.

Herbert for the petitioner contended that by the refusal of the Plaintiff's agent, to enumerate or indicate the particular coins, which were paid by each Plaintiff, the tender was bad for want of *enumeration des especes;* more particularly since such refusal precluded the Defendant from exercising his right of objection to the coins tendered, on the score of light weight or other defect, because of the impossibility of identification.

And 2nd,—That the tender was bad in toto. By our Currency Act 16 Vic., cap. 158, sec. 8, it is declared that the silver coin of the United Kingdom, *while lawfully current therein*, shall pass current in this Province, for sums in currency, proportionate to their sterling value; and by the Imperial Statute 16 and 17 Vic., cap. 102, sec. 2, it is enacted that no tender of payment, made in gold, silver, or copper coin, defaced or stamped (by bending or stamping) shall be a legal tender.

Now there can be no doubt, but that those of the silver coins, tendered by the Plaintiff are marked and defaced, so as to render them no longer lawfully current in the United Kingdom, and the conclusion is inevitable, that no sufficient legal tender has been made, and the Defendant ought therefore to be discharged.

Lafrenaye in reply,—The payment was a good one, inasmuch as it is shewn in evidence, that the current, or market value, of coin tendered exceeded 15s., and the defendant could in reality procure for the money, so tendered, more than 15s. worth of aliment. The Plaintiff has complied with the law and the tender ought to be declared valid. Moreover, the defendant had not attempted to shew, by the evidence of skilful persons, that the coin was deficient in weight, or that any of them was counterfeit.

Day, J.—I have considered the questions submitted, and do not think it incumbent on the Defendant to prove the deficiency in the weight or that coins counterfeit, it would be the duty of the Plaintiffs to prove the validity of the payment; but the point upon which these petitions are decided is that raised under the Imperial Statute, 16 & 17 Vic. Several of the coins tendered

clearly fall within the intendment of that statute, and are not now lawfully current in the United Kingdom. Nor, as a consequence, a legal tender here.

Crawford v. Fyson.

I therefore order that the Defendant be discharged.

E. Carter, for Plaintiff.

Lafrenaye, Counsel.

Rose & Monk, for Petitioner.

A. H.

MONTREAL, 20TH MARCH, 1858.

Coram Smith, J.

No. 28.

Molson et. al., vs. Burroughs.

PROCEDURE.

Held,—That a judgment on confession after entry thereof in the Plumitif, could not be attacked by motion on the ground of alleged irregularities in the procedure apparent on the face of the record.
That the fact of the same Attorney appearing for both Plaintiff and Defendant was not such an irregularity as to cause the judgment after such entry to be held to be an absolute nullity.
That the signing of a judgment on confession by one of two Attorneys, partners, who had appeared for the Plaintiffs is *primâ facie*, sufficient to constitute the judgment after such entry a judgment of the Court.

On the 14th July, 1856, Abbott & Baker, two Attorneys practising as co-partners, appeared for the Plaintiffs in an action returnable on the 1st Sept. following. On the return of the action the declaration and list of exhibits were signed by Baker alone as Attorney for Plaintiffs. On the 3rd April, 1857, Abbott fyled an appearance as Attorney for the Defendant, by the consent of Baker as Attorney for Plaintiffs, and also a confession of judgment signed by the Defendant, countersigned by Abbott as his Attorney, and accepted by Baker as Plaintiff's Attorney. An inscription for judgment was then fyled as of the 3rd April, 1857, but was not paraphed by the prothonotary, the day on which it was paid for being the 17th April, as appeared by the entry thereon of the prothonotory. A judgment was then drawn up as of the 3rd April, 1857, and signed by Baker as Attorney for Plaintiffs, and an entry was made in the Plaintiff that judgment had been rendered as of the 3rd April, 1857. The judgment, however, not having as yet been registered.

The Defendant moved to reject and set aside the said confession of judgment and all proceedings subsequent thereto, on the ground that the same were utterly null and void, inasmuch as the essential requirement of the 83rd sec. of 12 Vic., cap. 38, had not been complied with.

Hemming in support of motion, contended that the case of a judgment on confession was entirely different from that of a judgment pronounced by the Court. That the validity of a judgment on confession depended solely upon the fact whether the essential conditions of the said 83rd sec. had or had not been complied with, the prothonotary being merely a ministerial officer. That the appearance of and countersigning of Abbott who was then one of the Plaintiff' Attorneys on behalf of the Defendant, was not such an appearance and countersigning as the law required; but was, on the contrary, wholly null and

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void, and on that ground alone the confession and subsequent proceedings must be held to be null and void also, and consequently that Defendant had a right to ask the Court in which the action was instituted to reject such irregular proceedings from the record. That even supposing the said appearance and countersigning not to be absolutely null and void, that the judgment had never been signed either by the Plaintiffs or their Attorneys *ad litem* being signed by Baker alone, and that until such signature was apposed the judgment could not be held to be a judgment of this Court, and could therefore be attacked by motion on the ground of irregularities. He cited in support of his views, as showing the English practice in similar cases, Scott's Reports, 6 vol., p. 895, Rice vs. Linstead; do. vol. 8, p. 399, Kempt vs, Matthew, and notes and particularly *dictum* of Parke, B., as to an impossibility of an Attorney appearing on both sides of the record; also Tidd's Practice, vol. 1, p. 550 and 9; Imp. 1 and 2 Vic., cap. 110, sec. 9; and the case of Gugy *et al.* vs. Craig M. Q. B., as to the impossibility of an Attorney acting for both Plaintiff and Defendant under our law, in the case of a confession of judgment.

Dorman contra argued that the English precedents cited did not apply to confessions of judgment under our law, and that it was impossible to attack a judgment of this Court by motion, the recourse being by appeal. That the Defendant's motion raised questions of fact, not apparent on the face of record. He moved to reject a confession of judgment made, signed, and filed by himself, and countersigned by J. J. C. Abbott, who had filed an appearance as Defendant's Attorney *ad litem*, and accepted by J. C. Baker as Plaintiff's Attorney, and by whom the declaration served upon the Defendant and filed in this cause, and referred to in the confession of judgment, was also signed. This motion amounted to a disavowal by the Defendent of his Attorney *ad litem*, a question which can only be determined by a proceeding *en desaveu*, which the Defendant has in fact taken, and which is now pending.

Smith, J. said the difficulty that presented itself to his mind, and which prevented his according this motion was, that the judgment in this cause had already been entered up and must therefore be considered a judgment of this Court and could not consequently be attacked by motion grounded on irregularities that had taken place anterior to the entering up of the judgment, as in his opinion the fact of the same Attorney appearing on both sides of the record was not one of those absolute nullities that would justify the rejection of a judgment after entry. The proper course in a case of this kind was by appeal.

Motion dismissed.

Abbott & Baker for Plaintiff.
Cross & Bancroft for Defendant.

E. J. H.

MONTREAL, 21st SEPTEMBER, 1857.

Coram Day, J., Smith, J., (C.) Mondelet, J.

No. 307.

Adam vs. *Sutherland.*

SECURITY FOR COSTS.

Held, that the Plaintiff having failed to give security for costs within the delay fixed by the Court, the action will be dismissed with costs on motion of Defendant to that effect.

The last proceeding in this cause is reported in 1st vol. L. C. *Jurist*, p. 196. On the 27th June last, the Court, on the motion of the Defendant, ordered the Plaintiff to give security for costs on or before the 1st September then next, and that in default of the Plaintiff not giving such security within such time, that the action be dismissed with costs.

The Plaintiff did not obey this order of Court, and on the 18th September last, the Defendant made the following motion :—

"Motion on behalf of the said Defendant, that inasmuch as the said Plaintiff "hath not given security for costs within the delay prescribed by this Honorable "Court, the action of the said Plaintiff be hence dismissed with costs."

The judgment of the Court was as follows :—

"The Court, &c., ... doth grant the said motion, in consequence doth dismiss this action with costs, inasmuch as the said Plaintiff hath failed to give security for costs, within the delay prescribed by this Court."

Motion granted.

De Boucherville for Plaintiff.

R. & G. Laflamme for Defendant.

(F. W. T.)

MONTREAL, OCTOBER 31st., 1857.

Coram Day, J., Smith, J., Mondelet, (C.) J.

No. 1746.

Nye vs. *McDonald.*

Held,—in an *action Petitoire* where the Plaintiff's title depends on the validity of a Power of Attorney executed *sous seing privé* in Upper Canada and duly attested by a Notary Public of U. C., under his seal of office, with a certificate of the Administrator of the government of this Province annexed, that the mere production of such Power of Attorney, with the certificates aforesaid annexed, is not sufficient proof of its execution.

This was a Petitory action wherein the Plaintiff's title deed purported to have been executed by virtue of a Power of Attorney annexed to the original minute of the Deed in the office of N. B. Doucet, N. P. The Power of Attorney was executed under private signature and seal, before two witnesses (one of whom was a Notary Public of U. C.) at Kingston in Upper Canada, and was accompanied by an attestation of the Notary, under seal, and likewise by a certificate in the usual form by the Administrator of the Government of this Province, with regard to the official character of the Notary. And the original power with the Notary's attestation and the Administrator's certificate were duly produced and fyled at *Enquête* by the Notary before whom the deed of sale was executed, but no other evidence was adduced with reference to the execution of the power.

Nye v. McDonald.

The argument of the case on the final hearing having turned mainly on the sufficiency of the proof as to the execution of the power of Attorney, the Court rendered the following judgment.

"The Court having heard the parties by their counsel upon the merits of this cause, examined the proceeding, and evidence of record, and having deliberated thereon, considering that the Plaintiff hath failed to establish by evidence the material allegations of his declaration and more especially that William Teeples therein mentioned was the Attorney of Mary wife of James Lake mentioned in the will of David Rankin in the special answers of the Plaintiff in this cause fyled, set forth duly authorized and appointed to sell the land and premises in the said declaration described and that by reason of such defect of proof, and by Law, the action of the Plaintiff ought to be dismissed, the court doth dismiss the said action with costs. Reserving to the Plaintiff such right as by Law he may have."

Action dismissed with costs.

Edward Carter, for Plaintiff.
Rose & Monk, for Defendant.

(S. B.)

MONTREAL, 18TH NOVEMBER, 1857.

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

No. 684.

Fraser vs. Bradford.

1. Liability over to a party to a suit for the costs of such suit, disqualifies the person so liable from being examined as a witness for such party.
2. A person who receives money from the maker of a note before its maturity, and undertakes to pay it, is not a competent witness for the defendant in an action against the maker, to prove that he did so; for, in the event of a judgment for the plaintiff, he would be liable over to the defendant for the costs of such action, as damages for the non-fulfilment of his undertaking.

This was an action by the endorsee of a promissory note against the maker. The defendant pleaded that he made the note in favor of one McKenzie, who endorsed it to the plaintiff, and that before the maturity of the note he gave McKenzie the money with which to pay it when due; which he undertook to do, and actually did; and that plaintiff had frequently promised to give it up, but had never done so. Issue was joined upon this plea; and the defendant, at *enquête*, brought up McKenzie to prove the allegations of the plea. He stated on his examination, on the *voire dire*, that he had received the amount of the note in question from the defendant, and had given him a written acknowledgment for it, coupled with an undertaking to retire it at maturity. He also admitted that he had endorsed the note in question to the plaintiff to avoid any question with the defendant as to its consideration. The plaintiff then objected to his being examined on the ground of interest in the suit, but the objection was reserved, and his evidence taken. He then swore that he handed the note to the plaintiff for collection, to be applied, when collected, to his credit in the general account between them; that he settled with the plaintiff for it, by giving him two other notes; that the plaintiff promised to give him up the note in question on those two notes being paid, and that they had been paid;—admit-

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ting, however, on cross-examination, that there was a considerable balance against him in the plaintiff's books, which might not be covered even by the amount of the note now sued upon.

The plaintiff proved, by McKenzie's book-keeper and by his own, that two accounts current had been rendered to McKenzie since the receipt of the two notes said to have been given for the defendant's note, in which the proceeds of those notes were placed to McKenzie's credit in his general account with the plaintiff; that these accounts had not been objected to by McKenzie, but on the contrary had been treated by him as correct; and that he had promised to pay the balance they exhibited, which amounted to much more than the note in question.

The case having been inscribed for hearing on the merits,

Abbott, for plaintiff, moved to reject the testimony of McKenzie, on the ground that he was incompetent as a witness for defendant, by reason of interest in the event of the suit. There could be no doubt, that the evidence obtained from McKenzie went directly to his own discharge; for, if the action were dismissed, he would be freed from all responsibility towards both parties; while, if it were maintained, the defendant would have an action against him for the recovery of the money paid, and for the costs of the present action, as damages for the non-performance of the contract he had entered into to pay the note. (*Smith, J.:* Is there not a distinction between interest arising out of the instrument sued upon, and that springing from a separate contract?) No such distinction appears to be warranted by the principles which regulate the admissibility of witnesses. The rule of exclusion is enforced when a legal right or liability, or a discharge from liability, would immediately result from the judgment, (1 Starkie, 113; 1 Greenleaf, sec. 390.) In Edmonds vs. Lowe (8 B. and C. 407) the acceptor of a bill was rejected as a witness for the drawer, not because he was a party to the instrument sued upon, but because he had undertaken with the defendant to place the bill in the plaintiff's hands for a certain purpose; which, if he had done, would have relieved the defendant from the action, and if he had not, would expose him to an action of damages; of which damages the costs of the action on the bill would form part. He was therefore brought up as a witness for the party, whose success would relieve him from liability, and from whose failure a liability on his part would immediately result, and he was held inadmissible on that ground. (*Smith, J.:* Is not his being endorser on the note the simplest ground of exclusion? for, if the maker proves payment to the holder, the endorser is relieved.) The endorser is not always, or necessarily, incompetent for the maker; and the position taken by the plaintiff, that the witness is brought up to prove, in his own interest, that he fulfilled his own contract, and is therefore inadmissible, is the stronger, and is completely supported by the authorities. (*Badgley, J.:* The defence is really for the benefit of the witness, and he is giving evidence for himself.) There is no doubt of it. This case is precisely within the rule laid down in 1 Starkie, p. 114, and 1 Greenleaf, sec. 394, 5, 6 and 7, that a witness called to support an issue involving any breach of duty or default for which he would be liable over to the party calling him, is inadmissible. McKenzie's duty under his contract with defendant was

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to pay the note with the money given him for the purpose; and the issue was, whether he had fulfilled that duty, or was in default to fulfil it.

Again, a liability over to the extent of costs is sufficient to exclude a witness; as in Jones vs. Brooke, (4 Taunt., 464), the drawer of an accommodation bill was rejected as a witness for the acceptor, because, though indifferent as to amount, he was liable over for the costs. So, in Townend vs. Downing, (14 East, 465), a principal was excluded from proving the application to his account of a payment by his surety, because he would be liable to his surety for costs. See also Larbalestier vs. Clarke, 1 B. and Ad. 899; Stanley vs. Jobson, 2 M. and Rob. 103.; Starkweather vs. Mathews, 2 Hill 131; Hubly vs. Brown, 16 Johns 72; Lewis v. Peake, 7 Taunt. 153; 1 Greenleaf, sects. 401 and 402, and cases there cited; Harman vs. Lasbrey, Holt's cases, 390.

If McKenzie's evidence were rejected, the case would be clear for the plaintiff. If the objection were only allowed to go to his credibility, the probabilities, and the evidence of the other witnesses, were strongly against the truth of his statements.

A. Robertson, for defendant, argued that the interest of McKenzie was not such as would exclude him. If he had an interest at all, it was not an interest direct and immediate in the event of this suit, but a remote and contingent one, which afforded no ground of exclusion. In fact, his interest in this suit amounted to nothing at all. Suppose the plaintiff did get judgment for the amount of the note, the record in this cause would not be evidence for the defendant against the witness in an action to recover back the money. It would still be competent for him to prove, if he could, that he had really paid over the money to Fraser. But the witness was admissible on another ground. He was clearly the agent of the defendant for the payment of the money in question, and as such was admissible *ex necessitate rei.* Suppose, instead of giving him the money the defendant had given it to his own clerk, and directed him to pay the note, could it be said that the clerk was inadmissible? Yet the issue would involve the fulfilment or breach of the duty of the clerk, just as much as in the present case the issue involves the fulfilment of duty or default of McKenzie; and McKenzie was just as much the defendant's agent for the payment of the note in question, as his clerk would have been, had he been entrusted with the money. He therefore falls within the exception to the rule excluding persons on the ground of interest, which admits agents *ex necessitate rei.* There is no question that the evidence of McKenzie clearly makes out the defendant's case. He swears most positively that he settled the note in question, and that the plaintiff repeatedly promised to give it up to him. No presumption or inference to be gathered from his having received the accounts current without objection, could outweigh positive testimony as to these facts. It must also be observed that McKenzie declares the plaintiff only had the note for collection, and therefore really has not such a title as warrants him in bringing an action upon it.

Abbott, in reply, contended that the record would establish the amount of costs incurred by the defendant, and therefore to that extent McKenzie was interested to prevent a judgment; and this was sufficient to exclude him under

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the authorities cited. As to the exception based upon necessity, that only applied to general agents, and not to persons employed for particular acts only. This argument was used in Edmonds & Lowe, a case closely analogous to the present, and was disregarded by the Court for the reason now given. As to the right of a holder for collection to sue, it had been repeatedly held that such a title would support an action; but in this case he was more than a mere holder for collection, as McKenzie says that, when collected, the proceeds were to be applied to the payment of his account with the plaintiff.

Smith, J.—The question upon which this case principally turns is one of considerable interest. McKenzie, the witness, is endorser on the note sued upon, and he has undertaken with the defendant to pay it, with money given him by the defendant for the purpose. In the first place, then, is he, as endorser, admissible to prove payment; and secondly, is he rendered incompetent by his position as having contracted with the defendant to pay the note. Upon the first point the Court is clearly of opinion, that, though an endorser upon the paper, he is not thereby rendered incompetent to prove payment. Whatever may be the result of this suit, he may be sued upon the note, and his liability will not be affected by the judgment in this cause. But the agreement with the defendant to pay the note introduces another species of interest: which lies in the guarantee he is subjected to towards the maker as respects the costs of this action, for which he is plainly liable to indemnify the maker if judgment be rendered against him. The authorities are somewhat conflicting as to the sufficiency of an interest to the extent of costs only, to exclude a witness; but the weight of authority appears to the Court to be against his admissibility. The case of Birt vs. Kershaw, 2 East 458, is in favor of the admissibility of a witness whose interest only extends to costs; but the rule there laid down was broken in upon in Jones vs. Brook, cited by the counsel for the plaintiff. In addition to the cases cited at the Bar, the following authorities are referred to as settling the question:—2 Starkie, pp. 257, 8; Humphrey vs. Moxon Peake's, c. 52; Byles on Bills, and cases cited; 1 Phillips on Evidence, pp. 57, et seq.

But, even if the evidence were admitted, it would be open to objection as to its credibility; and the Court considers that, even with the testimony of McKenzie in the record, the evidence for the plaintiff is sufficient to make out his case.

Mondelet, J.—Would be disposed to exclude the witness on the principle that he was interested for the defendant to the extent of the costs of the action, and as such was incompetent. The question of interest was never one of amount: it was sufficient to exclude a witness if he was interested to any amount whatever; and he must express his surprise that such a conflict of opinion could have arisen in England on the subject.

Badgley, J.—Concurred in the judgment. It appeared to him that McKenzie, by his own showing, had placed himself in the position of *garant* of the defendant, and as such could not be a witness for him. He had not only given a written undertaking to take up the note, but his admissions went far to shew that it was really a note made by Bradford for his accommodation. Under either of these circumstances an action *en garantie* would lie against him, and

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he could never be permitted to relieve himself from such a liability by his own testimony. He concurred also in the opinion already expressed, that, if the objection were only directed to his credibility, the plaintiff must still succeed upon the evidence generally.

Judgment for Plaintiff.

Abbott & Baker, for Plaintiff.

A. & G. Robertson, for Defendant.

(J. J. C. A.)

[Birt vs. Kershaw was decided upon the authority of Ilderton vs. Atkinson, 7 Term 480. Both cases have been finally overruled. Greenleaf's overruled cases, pp. 37, 190.—Editor's Note.]

MONTREAL, NOVEMBER 23rd, 1857.

Coram Smith, J., Mondelet, (C.) J., Badgley, J.

No. 2046.

Cockburn vs. *Starnes*.

Held,—That the action accorded to creditors by the 19th Section of the 14th and 15th Vic. Ch. 51, against the Shareholders of Railway Companies incorporated after the passing of that Act, is in no way affected by the failure of the Directors of such Companies to make calls in accordance with the 19th Section of said Act.

This was an action by a judgment creditor of the Montreal and Bytown Railway Company against the Defendant as a Shareholder in that Company, to compel him to pay the Plaintiff an amount equal to the amount unpaid on the stock held by him, the Defendant in such Company.

The action was instituted in virtue of the 19th Section of the 14th and 15th Vic. Ch. 51 commonly known as "The Railway clauses consolidation Act."

The Defendant demurred to the Plaintiff's declaration mainly on the ground that it failed to allege, that any call or calls for money had ever been duly made by The Company on the shares of its capital stock, or that any indebtedness whatever subsisted on the part of the Defendant to the Company.

Smith, J.—The pretension of the Defendant here is, that until calls have been duly made under the provisions of the Company's charter, he, as a shareholder, cannot be called on either directly or indirectly to pay any portion of the stock for which he subscribed, that the Plaintiff has in point of fact no greater rights against the Defendant than the Company can have, and inasmuch as by omitting the necessary formalities required by its charter in regard to the making of calls, the Company has plainly no right to sue for the payment of any portion of such stock, that the action of the Plaintiff is premature and must consequently be dismissed. On the other hand it has been argued by the Plaintiff's Counsel, that the Plaintiff's right to sue as a creditor is in no way dependent upon the action of the Company or its Directors, and that the failure of the latter to adopt the requisite measures for the calling in of their stock can in no degree affect such right. That the action granted to the creditor in such a case as the present is not one for the recovery of unpaid *calls*, but specifically for the recovery of so much of the shareholder's *stock* as may not have been ac-

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tually paid into the hands of the Company. Now the words of the Statute are in the opinion of the Court distinctly in favor of the view taken by the Plaintiff's Counsel. The words are "each shareholder shall be individually liable to "the creditors of the Company to an amount equal to the amount *unpaid* on "the stock held by him" &c. There is no allusion whatever here to *calls* and whatever necessity there might be to make calls previously to suing in any action between the Company and its shareholder, we can see no necessity for so doing where the suit is brought at the instance of a creditor of the Company. *

Demurrer dismissed with costs.

Bethune and Dunkin, for Plaintiff.

F. Griffin, Q. C., for Defendant.

(S. B.)

* A similar Judgment was rendered at the same time in the cases 2049 vs. Jodoin, 2019 vs. Masson and 1978 vs. Taylor, all at the suit of Cockburn.

MONTRÉAL, 28 NOVEMBRE, 1857.

Coram SMITH, J.

No. 832.

La Corporation de la paroisse de Verchères vs. *Boutillet.*

Jugé,—1er. Que par l'Acte des Municipalités et Chemins du Bas-Canada de 1855, un conseil municipal qui désire abolir une Rue, ne peut le faire que par Procès-Verbal et non pas par règlement.
2me. Un règlement pour l'établissement d'un enclos public dans une paroisse; au moyen duquel une rue serait fermée pour former partie de cet enclos; est nul. (1)

La déclaration de la Demanderesse alléguait; Qu'à une Session spéciale et mensuelle du conseil municipal de la dite paroisse de Verchères, duement requise en vertu de la loi, tenue le cinq mai dernier, le dit conseil, comme il en avait le droit, fit un règlement pour l'établissement d'un enclos public, dans la dite paroisse de Verchères, par lequel règlement il ordonna et statua, entre autres choses: "Que le quarré formé par un bout de la rue et par les terreins enfermés dans les bornes suivantes, savoir: au Nord-Est la cour du collége, au Sud-Est la rue, le terrein de François Vilbon, au Sud-Ouest par les terreins concédés par Hubert Larose, Ecr., au Nord-Ouest le chemin de la Reine, serait pris pour en faire un enclos public, pour y mettre en fourrière les animaux divaguant et que le secrétaire de la municiplité informerait le surintendant du comté du dit règlement, afin de procéder suivant la loi."

Que le dit règlement aurait été publié, lu et affiché suivant les exigences de la loi.

Que dans le quarré dont le conseil avait ainsi décidé de s'emparer, se trouvait une portion de terre alors appartenant au Défendeur, étant de quarante pieds de front sur cinquante quatre pieds de profondeur, bornée au Nord-Ouest par une portion de terre appartenant à Luc Robert, au Sud-Est par une portion de terre appartenant à François Xavier Tétro, au Nord-Est la rue et au Sud-Ouest aux terreins Concédés par Hubert Larose.

Que le dix-neuf du dit mois de Mai dernier, les évaluateurs ou estimateurs de la municipalité de la dite paroisse de Verchères, auraient, après que tous les

(1) 18 Vic. ch. 100, Sec. 41, par. 10

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procédés avis et formalités, requis par la loi eussent été faits, donnés et observés, fixé à la somme de vingt-deux louis dix chelins courant, le montant de la compensation à être accordée au dit Défendeur pour le terrein ci-dessus en dernier lieu désigné, et auraient constaté la dite compensation par un certificat qu'ils auraient transmis au Surintendant du comté; lequel certificat ce dernier aurait déposé dans les archives de son bureau et en aurait délivré copie au sécrétaire-trésorier de la dite municipalité.

Que le premier Juin dernier le conseil municipal de la dite paroisse de Verchères auraient payé entre les mains de son secrétaire-trésorier, avec plus forte somme, celle de vingt-deux louis dix chelins susdite à être payée au Défendeur pour le montant de la compensation qui lui aurait été ainsi accordé.

Qu'en vertu de ce que dessus le terrein ci-dessus en dernier lieu désigné comme ayant appartenu au Défendeur est devenu la propriété de la municipalité de la dite paroisse de Verchères, la Demanderesse.

Que malgré ce que dessus, et en dépit des fréquentes requisitions verbales et par écrit à lui faites par la Demanderesse, le Défendeur aurait toujours refusé de lui livrer le dit terrein, en sorte qu'elle serait très fondée à se pourvoir pour s'en faire mettre en possession, et elle concluait en conséquence à ce que le terrein ci-dessus en dernier lieu désigné fut déclaré lui appartenir, à ce que le Défendeur fut condamné à quitter et délaisser le dit terrein et à en abandonner et remettre la possession à la Demanderesse; et qu'à défaut par lui de le faire il fut expulsé du dit terrein, et la Demanderesse fût mise en posession par l'autorité de la dite Cour.

Le Défendeur répondit à cette action par une exception dans laquelle il alléguait entr'autres choses: "qu'au temps de l'institution de la dite action, depuis et encore actuellement, le dit Défendeur était et est le seul et unique propriétaire de la portion de terre reclamée par la dite Demanderesse en cette cause (sur laquelle *il y a* une maison et autre dépendances) du dit Défendeur qui l'avait acquis antérieurement de ses propres deniers.

Que le prétendu règlement du cinq Mai dernier, passé par le dit conseil municipal de Verchères pour l'établissement d'un enclos public dans la dite paroisse de Verchères et qui est mentionné et en partie relaté dans la déclaration en cette cause est entièrement nul, illégal, vexatoire, injuste et contraire à la loi, et ne peut avoir eu l'effet de faire passer la propriété de la dite portion de terre, maison et dépendances, des mains du dit Défendeur en celles de la dite Demanderesse, et que tous les procédés faits par le dit conseil ayant rapport au dit règlement sont pareillement nuls, illégaux, informes irréguliers, vexatoires, et contraires à la loi.

Que le dit conseil ne pouvait en loi s'approprier, par la voie d'un semblable règlement, le terrein en question et abolir le bout de la rue enclavé dans le quarré dont la dite Demanderesse prétend être devenu propriétaire en vertu du dit prétendu règlement, mais qu'il aurait fallu au moins qu'il fût procédé par le dit conseil, par la voie d'un Procès Verbal, après avis dûement donné aux intéressés suivant la loi en tel cas faite et pourvue.

Que la loi en tel cas faite et pourvue, veut et ordonne que les chemins et par conséquent les rues qui sont comprises sons la dénomination de chemin public,

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ne puissent être abolis que par procès verbal et non autrement, et que le dit prétendu réglement ordonne la fermeture et abolissement, d'une rue ou partie d'une rue dans le dit village, contrairement à la loi, qu'en conséquence, le dit conseil a, en passant le dit règlement ; excédé ses pouvoirs.

Le Défendeur, concluait à la nullité de ce règlement, et au renvoi de l'action.

Après enquête et audition des parties la Cour en rendant son jugement a débouté l'action sur le principe que le conseil municipal aurait dû procéder par procès verbal et non par règlement.

Per Curiam. L'action portée par la Demanderesse contre le Défendeur est à l'effet de faire déclarer la Demanderesse propriétaire d'un certain terrain que, par un règlement du conseil municipal de la dite paroisse, fait et passé le cinq Mai 1856, la dite corporation avait résolu de prendre avec deux autres terrains et un bout de rue dans le village de Verchères, pour l'établissement d'un enclos public dans la dite paroisse de Verchères, toutes les formalités, telles que l'estimation du dit terrain par les estimateurs qualifiées à cet effet, l'offre et dépot de l'argent suivant la loi et la publication du dit règlement ayant été remplies et observées.

Entre autre moyens que le Défendeur offre pour faire renvoyer cette action il prétend que le dit règlement est nul et en conséquence n'a pu avoir l'effet de faire passer la propriété du dit terrain à la Corporation.

1°. Parce que la loi en permettant à la Corporation de la dite paroisse d'établir un enclos public pour y mettre les animaux en fourrière, (voir le § 3 de la Sect. III de l'acte des municipalités et des chemins de 1855) n'a pas eu l'intention de lui donner le pouvoir d'établir cet enclos dans le village en s'emparant pour cela de terrains même bâtis, puisque par le § 11 de la Sect. LII du même acte il est déclaré, qu'il ne sera pas en son pouvoir de tracer un chemin neuf, ou de détourner ou élargir un ancien chemin de manière à passer à travers un jardin, verger ou basse-cour entourée d'une muraille ou d'une clôture en planche ou en piquets debout, ou d'une haie vive ou à endomager une maison, grange, moulin ou autre bâtiment quelconque, ou à nuire à un canal ou chaussée de moulin ou à en détourner le cours d'eau, sans le consentement du propriétaire.

2°. Parce qu'il est pourvu par le même acte, au § 10 de la Sec. XLI, que tout chemin pourra être aboli ou sa position en aucune partie d'icelui changée par procès verbal, mais qu'il ne pourra être aliéné d'aucune autre manière ;

Procédés à faire pour faire un Procès verbal—Sect. XLVII.

Les rues sont des chemins, § 7, Sect. XLV.

La cour maintient ces raisons et déclare le règlement nul et en conséquence la Demanderesse n'a et ne peut reclamer aucun droit de propriété sur le terrein du Défendeur.

Pour arriver à cela, la Cour a eu une autre question à décider, et qu'elle a décidé en faveur du Défendeur, c'est celle-ci : Il a été prétendu de la part de la Demanderesse que le règlement ne pouvait être attaqué que par appel au Conseil de Comté et non par exception, comme le fait le Défendeur dans cette cause, s'appuyant sur la Sect. XLIX du dit acte ; Et de son côté le Défendeur prétendit que le règlement en question étant contraire à la loi ne pouvait être

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validé par l'homologation qui en avait été de fait faite par le Conseil de Comté du Comté qui comprend cette paroisse.

Le Jugement est comme suit :

Considering that the said Plaintiff hath failed to establish the material allegations set forth in the Declaration of the said Plaintiff, or any right in law to have and maintain the conclusions taken in and by the said Declaration doth dismiss the action of the said Plaintiff with costs.

Lafrenaye et Pepin, avocats de la Demanderesse.

Pelletier, Bélanger et Ricard, avocats du Défendeur.

(P. R. L.)

MONTRÉAL, 27 FÉVRIER 1858.

Coram BADGLEY, J.

No. 1243.

La Corporation de la paroisse de Ste. Rose vs. *Leprohon.*

Jugé,—que l'occupant ou propriétaire d'un pont de péage est seul tenu d'entretenir la route conduisant à tel pont en vertu de l'acte des municipalités et chemins du Bas-Canada de 1855.

La Demanderesse ayant poursuivi le Défendeur devant la Cour de Circuit, pour le Circuit de Montréal pour le recouvrement de la somme de £7 qu'elle alléguait avoir payée pour faire réparer une route qui conduit au pont de péage du Défendeur ; ce dernier évoqua la cause à la Cour Supérieure à Montréal, et l'évocation ayant été accordée, les parties procédèrent devant la Cour Supérieure. La Déclaration alléguait : Que le Défendeur est actuellement, et l'est depuis plus d'un an, seul propriétaire du Pont Public de péage érigé sur la Rivière Jésus, conduisant de la paroisse Ste. Rose vis-à-vis le village de la paroisse St. Eustache, et que le dit Pont est un Pont de péage, autorisé par le Statut en tel cas fait et pourvû.

Que le chemin qui conduit au dit Pont de péage, part de la Grande Côte de Ste. Rose et se poursuit jusqu'au dit Pont de Péage du Défendeur, le dit chemin longeant une propriété appartenant à L. M. Séers, Ecr., et traversant aussi une propriété connu comme "la propriété St. Germain" jusqu'au rivage de la dite Rivière Jésus sur laquelle est construit le dit Pont de péage.

Que par les lois municipales la Demanderesse est investie de la propriété de tous les chemins et routes, est obligé de veiller, au moyen de ses officiers de voirie, à leur entretien et amélioration, et aussi de veiller à ce que les chemins de front de même que les routes dont l'entretien retombe sur un ou plusieurs intéressés, soient faits et entretenus conformément à la loi.

Que le ou vers le 27 octobre 1856, au dit lieu de Ste. Rose, la route qui conduit au dit Pont de péage du Défendeur, depuis la Grande Côte de Ste. Rose au rivage de la Rivière Jésus, et situé le dit chemin dans les limites de la Défenderesse, aurait été vendue au rabais, suivant la loi, pour être entretenue et réparée depuis le premier Novembre dernier jusqu'au premier de Mai aussi dernier, à raison de sept louis dit cours, pour le dit temps, appert l'acte produit. —Que cette vente a été faite par ordre du Conseil Municipal de la Demanderesse, et par l'entremise de l'inspecteur préposé à cette fin. Que la dite somme de sept louis dit cours est exigible du Défendeur seul obligé, suivant la loi, à l'en-

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tretien du dit chemin qui conduit à son dit Pont de péage. Que l'adjudication de ce chemin a été faite dans le temps et suivant les dispositions de la loi ; et le Défendeur comme l'occupant du dit Pont de péage est obligé de payer, solder et rembourser le coût de l'entretien du dit chemin pour le dit temps, et ce en entier.

Le Défendeur plaida spécialement à cette action comme suit ;

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 fesait 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.

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 et en la possession 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 fait donner l'entretien et la réparation du dit chemin.

Que c'est la dite corporation qui est responsable de tous les 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.

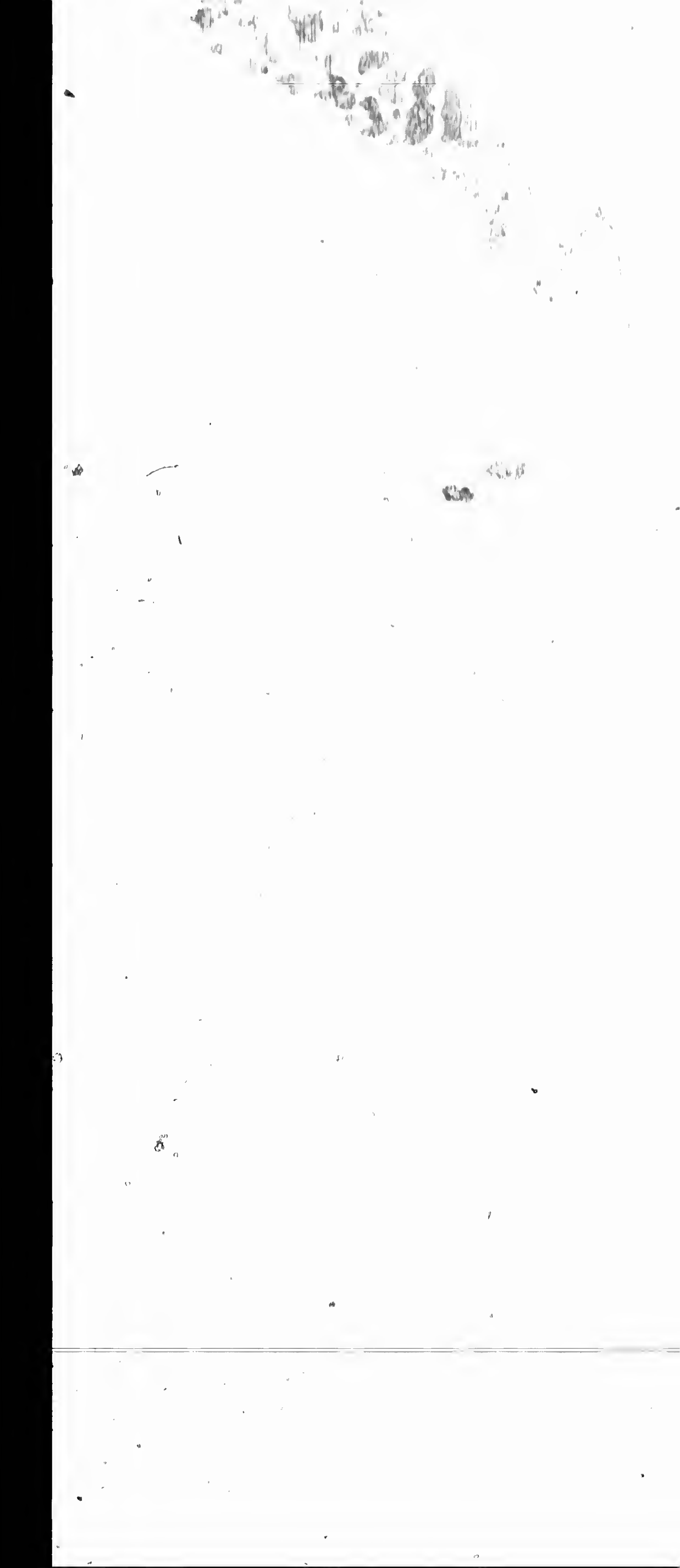
Que le dit chemin ne conduit pas en hiver au Pont du Défendeur et qu'il n'est point fait ni entretenu en hiver pour conduire au Pont du Défendeur et ne l'a jamais été en hiver, mais a toujours été fait en hiver de manière à conduire sur la glace à côté du Pont du Defendeur.

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.

Une défense en droit avait été renvoyée sur audition ; en sorte que les parties procédèrent à leur enquête et prouvèrent leurs allégués respectifs.

Ouimet, pour la demanderesse. La loi 18 Vic. ch. 100, Sect 45 par. 4, établit "que les routes conduisant à un moulin où à une traverse, où à un Pont "de péage, seront faites, et entretenues, par l'occupant du moulin ou de la tra- "verse ou du Pont de péage ;" l'acte est postérieur a la charte du Défendeur 11 et 12 Vic. ch. 99 qui lui donne le pouvoir d'acquérir une route pour conduire à son Pont. C'est au Défendeur à faire voir que l'entretien de cette route n'est pas à sa charge.

Lafrenaye, pour le Défendeur, s'appuyant sur le paragraphe 8 de la 45me. clause de l'acte des municipalités et chemins du Bas-Canada de 1855, qui dé-



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clare que: "la preuve à faire pour établir qu'un chemin n'est pas assujetti aux "dispositions précédentes, sera toujours à la charge de la partie qui réclamera "l'exemption;" prétendit, que le Défendeur avait prouvé que cette route était et devait être considérée un chemin public à être entretenu par le public, le Défendeur ne l'ayant jamais acquis et cette route étant ouverte au public lors de la construction de son Pont en 1847, 18 Vic. ch. 100 Sec. 4 par. 9.

Que l'ouvrage avait été donné au rabais sans notification préalable au Défendeur, qu'il avait été prouvé que la route telle qu'entretenue l'hiver par la Demanderesse, loin de conduire sur le Pont du Défendeur conduisait à un chemin tracé par ses ordres sur la glace.

Le jugement de la Cour est comme suit

The Court. * * * considering that by the provisions of the Lower-Canada municipal and Road act of 1855, roads leading to mill, ferry or toll bridge are classed as By-Roads, whereof the Road in question in this cause is one, and considering that it is provided by the said act that By-Roads shall be made or maintained by the owners and occupants of lots in the concession to which they lead from or front on older concession in proportion to the frontage of the lots so occupied by them, except By-roads leading to mill, ferry or toll bridge, whereof the road in question is one, which are required to be made or maintained by the occupants of the said mill, ferry or toll bridge, and that the work done in such By-roads shall be by contribution in money, the work to be given out by the road Inspector, after public notice in the manner in the said act provided, and the sum required for payment therefor to be paid by the occupant thereof; and considering that the sum required for the repairs of the said road in question was £7, which had been paid therefor by the said Plaintiff, and that the said Defendant is by law liable therefor to the Plaintiff, condemn the Defendant to pay to the Plaintiff £7.... but without costs. (1)

Ouimet, Morin et Marchand, pour la Demanderesse.

Lafrenaye et Papin, pour le Défendeur.

(P. R. L.)

MONTREAL, 27TH MARCH, 1858.

Coram DAY, J.

No. 1016.

Dalpé dit Pariseau vs. *Rochon*.

Held, that in actions of damages for improvident issue of *saisie arrêt* before judgment, the Court will only give nominal damages where there is serious ground for distrust, although not amounting to a complete justification of the process.

Day, J.—This is an action of damages for the issue of a *saisie arrêt* before judgment without probable cause. There is the usual plea of justification From the evidence the plea is not made out; it does not appear that there was any sufficient ground for the issue of this process, but the conduct of the parties

(1) Le Défendeur n'ayant pas été notifié au préalable par la Demanderesse.

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was such as to give subject of distrust. There were suspicious circumstances to make the creditor uneasy. I will, therefore, only give nominal damages. The judgment will, therefore, be for the Plaintiff, with 50s. damages.

Leblanc & Cassidy, Attornies for Plaintiffs.

Cherrier, Dorion & Dorion, Attornies for Defendant.

T. K. R.)

CIRCUIT COURT.

MONTREAL, 15TH APRIL, 1858.

Coram BADGLEY, J.

No. 1400.

The Attorney General, pro Regina, vs. *McPherson, et al.*

Held under the 87th section of the Judicature Act of 1857, in an action on a bond alleged to have been executed by the Attorney of Defendants, that the Bond in question is an act in writing of the description of those contemplated by the Judicature Act of 1857 and where the authority of the Attorney to execute such bond is denied, it is necessary to fyle an affidavit of the denial with the plea containing the allegation thereof.

This action was for the amount of a bond alleged to have been entered into by Defendants, acting therein by their duly authorised Attorney. To this action the Defendant pleaded a *a defense au fonds en fait*, containing a special denial of the authority of the Attorney to enter into the bond, but did not fyle any affidavit containing a special denial of this fact.

On the 14th April, 1858, Mr. Pominville, on behalf of the Attorney General, moved that the said plea be rejected, inasmuch as no affidavit had been fyled therewith, and that judgment be entered against Defendants.

Pominville, in support, said that by the Act the instrument itself, as well as the signature, is held to be genuine, unless an affidavit is fyled to the effect that such instrument, or some material part of it, is not genuine, and that this proviso extended to the particular denial urged by Defendant.

Herbert, contra, said that no such affidavit was requisite under the 20th Vic., cap. 44, sec. 87; that the clause only required an affidavit where the signature was impugned, but that the present case was a different one, for here the power to execute was called in question; that the clause of the Act requiring an affidavit did not cover the present case.

Per Curiam :—After referring to the clause of the Act in question, I am of opinion that the affidavit should have been fyled; but inasmuch as the members of the bar have not yet become familiar with this new law, I shall discharge the *enquete*, and permit the Defendants, on the first day of next Term, to produce the necessary affidavit.

Pominville for the Attorney General.

Herbert for Defendants.

(W. A. B.)

MONTREAL, 12TH APRIL, 1858.

Coram BADGLEY, J.

No. 800.

Burry et al. vs. *Shepstone et al.*

Held, in a suit by two co-partners on a promissory note, that where one of them dies during the pendency of a suit, it is not necessary that the instance should be taken up on behalf of the deceased, when the cause is *en état d'être jugée.*

This action was for £23, amount of a promissory note by two co-partners, traders, against the Defendants, also traders. After issue was joined, and before *enquete*, Wm. Burry, one of the Plaintiffs, died, and on the 12th March, the day fixed for proof, and hearing on the merits, the Defendants, praying *acte* of the declaration by them made of his decease, moved that the proceedings be suspended until the *instance* should be taken up, on his behalf, according to law, and produced an *extrait mortuaire* of Mr. Burry's death.

Bovey, in support of his motion, said that the question must be decided by our own law, the French law, and not by the law of England; and cited from 1st Pigeau to shew that where any of the parties to a suit died during its pendency the proceedings ought to be suspended. That this rule was founded in strict justice, because the partnership being dissolved by the death of one of the partners, the Defendants might be liable to an action on the part of the representatives of the deceased partner. That, moreover, it was evident that the survivor could not have brought the suit himself, if his co-partner had died before institution of the action; and that there was no reason why the same objection should not lie to the carrying on of the suit.

Hemming, contra, contended that the usual practice in commercial cases did not require that the *instance* should be taken up on behalf of the deceased Plaintiff; that the defendant had no interest in demanding such *réprise*, inasmuch as the Plaintiff, as surviving partner, had full power to give a valid discharge; that the surviving co-partner and Plaintiff was competent to carry on the suit without any formality being had; that this was a commercial case, and must be governed accordingly.

Per Curiam:—This question is to be decided by our own law, and it is the practice not to require that the *instance* should be taken up in such cases, as this in its present position and pleadings and which is *en état d'etré jugé*. If one of the Defendants had died, the question might have been different. But here the sole enquiry is, whether the survivor, in case judgment is entered against the Defendant, is able to give a receipt that will discharge from the judgment; and there is no doubt that he can.

Motion rejected.

Bethune & Dunkin for Plaintiffs,

Bovey for Defendants.

(W. A. B.)

IN APPEAL

From the District of Montreal.

MONTREAL, 1ST OCTOBER, 1857.

Coram SIR L. H. LAFONTAINE, BART., CH. J., AYLWIN, J., DUVAL, J., CARON, J.

No. 37.

SIR JAMES STUART, Bart. (*Plaintiff in the Court below,*)

Appellant,

AND

BLAIR, (*Defendant in the Court below,*)

Respondent.

PRESCRIPTION.—ENTRE PRESENS.

Held,—In an hypothecary action, instituted in the *District of Montreal* in respect of a property situated there, by a party who has always resided in the *District of Quebec*, that the prescription of ten years was available to the Defendant; the Plaintiff under such circumstances being considered *présent* within the meaning of the 116th article of the Custom of Paris.

This was an appeal from a judgment of the Superior Court, composed of M. M. Day, Smith, C. Mondelet, Justices, (Smith, *dissentiente*), at Montreal, rendered on the 24th September, 1850.

The action in the Court below was an hypothecary one, to which several pleas were fyled, and amongst others the plea of prescription of ten years.

By the evidence of record it was established that during the whole of these ten years and upwards the *Plaintiff had constantly resided in the district of Quebec*, whereas the land, sought to be declared hypothecated, was situate *in the district of Montreal.*

The judgment of the Court below was in the following words:—

"The Court having heard the parties by their Counsel, examined the proceedings and proofs of record, and having deliberated thereon, considering that "the Defendant hath failed to establish that the obligation in the declaration of "the Plaintiff mentioned, and in part recited, and in the exception of the Defendant in this cause firstly pleaded, also mentioned, was extinguished by the "prescription by the lapse of thirty years, as in and by his said exception, he "hath alleged, doth dismiss the said exception, and considering that it appears "that the Defendant personally and by his predecessors had before the institution of this action possessed and enjoyed the lot of land and premises, in the "said declaration and in the said exception by him secondly pleaded described, "for a period exceeding ten years, without trouble or molestation (*inquiétation,*) "and that during the same period the Plaintiff and Defendant were both residents, *domiciliés*, in that part of the Province of Canada heretofore called "Lower Canada, *through which the same laws prevail and are in force*:—The "Court doth declare that the Defendant hath acquired prescription of ten years, "*entre présens agés et nos privilégiés*, against the hypothecation and action of "the Plaintiff, and maintaining the exception of the Defendant in that behalf "pleaded, doth dismiss the said action with costs. Mr. Justice Smith dissenting "from the said judgment."

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Henry Stuart for Appellant. By the 113th Article of the Custom of Paris, it is declared:—Si aucun a joui et possédé héritage ou rente à juste titre, et de bonne foi, tant par lui que par ses prédécesseurs, dont il a droit et cause, franchement et sans inquiétation, par dix ans entre présens, et vingt ans entre absens, agés et non privilégiés, il acquiert prescription sur héritage ou rente."

This Article, which made part of the old Custom of Paris, previous to its reformation, appears to have been borrowed from a law in the Code of Justinian, by which a similar prescription was established, *inter præsentes;* and by a subsequent law of the same Emperor, a definition was given of the persons who were to be deemed *présents*, in the following words:—" *Sancimus debere in hu-" jus modi specie tam petentis quam possidentis spectari domicilium ; ut tam is " qui questionem inducit, quam is qui rem possidet, domicilium habeat in uno " loco, id est in unâ Provinciâ.*"

In the construction of the word *présens*, as contained in the old Custom of Paris, at a remote period of the French law, those persons were held to be present who had their abodes in one and the same Diocese, (Etablissement de S. Louis, liv. 1.) But, subsequently, instead of referring, as before, to an ecclesiastical division of a Province, to determine the point of presence or absence, a civil division was adopted, and throughout the parts of France governed by *Customs*, with the exception of a few Customs, the divisions of *Bailliages* was either by express enactment, or constructively, held to be that within which the parties in cases of prescription must be resident, to render them *présent*. The deficiency in the old Custom of Paris, on this head, was supplied in the reformed Custom, by an express declaration in the 116th Article, by which it is said:— " *Sont réputés présens ceux qui sont demeurants en la ville, Prévoté et Vicomté " de Paris.*"

This construction put on the word *présens* was consistent with the spirit and policy of the law establishing the prescription of ten years, and with justice. In extinguishing the right of property, by an adverse possession, for so short a period as ten years, the legislator required that the proprietor should, by a reasonable proximity to his adversary, have an opportunity of becoming informed of the usurpation of his estate, and be enabled to adopt legal measures against him, to repossess himself of it. These conditions were fulfilled, to a certain degree, by requiring the residence of the parties to be within the minor divisions of a Province, in which judicial power capable of affording redress was exercised, that is, within the *Bailliages*, or judicial districts of the Provinces, and in this respect, the provision of the Custom was more judicious than that of the Roman Law, which made the residence of the parties in any part of an entire Province sufficient. But the purpose of the legislator would certainly have been better accomplished, if such residence had been required to be within the particular *Bailliage*, in which the land in dispute lies, as has been done in the modern Code of France, by which the residence of the person prescribing and the person prescribed against, is required to be within the limits of a *Cour Royale*, in which the land in question is situated.

In the parts of France, governed by the Roman Law, *le pays de droit écrit*, and in some of the Customs, the rule of Justinian's Code obtained, rendering

persons residing in the same Province, *présent*. But neither in these parts and Provinces of France, nor in the Provinces governed by Customs, was any regard had in the establishment of this regulation, to the identity of the laws under which the parties lived: jurisdiction only was considered; and the judicial power of a Roman governor, which extended throughout his Province, without any subordinate jurisdiction, was the motive for assigning the limits of a Province, as those within which resident persons would be deemed present. The reason for adopting the tract of country comprised in a Province by the Roman law, and that of a *Prévoté* or *Bailliage*, as determining the question of presence, is stated in the Repertoire of Guyot, under the word *absent*, and by other writers: "*La raison de la différence est, que chez les Romains il n'y avait dans chaque Province qu'un gouverneur, qui rendait la justice à tous ses sujets, dans l'etendue de son gouvernement, ou par lui-même, ou par des juges délégués, qu'il commettait pour connaître des causes légères. En France, au contraire, il y a dans chaque Province plusieurs Baillages ou Sénéchaussées, et souvent plusieurs Coutumes.*"

The principle which has been stated, as governing under the Custom of France, with a few exceptions, that the presence or absence of persons, with reference to the Prescription of ten years, was to be determined by the fact of their being domiciliated in the same Province, or *Bailliage*, is recognised by all the writers on this subject, and Loisel, among the number, considers it as a part of the *Droit commun de la France*.

The word *Prévoté* being used in the 116th Article of the Custom of Paris, while that of *Bailliage* is used for the same purpose, in other Customs; it is material to ascertain the import of these words. The *Prévoté* of Paris was a circumscribed tract of country, including Paris itself, within which civil and criminal justice was anciently administered, in a Court of original jurisdiction, (*de première instance*,) held by an officer called a *Prévot* formerly in person, and in more modern times, by a *Lieutenant civil*, and a *Lieutenant criminel* in his name, from whose decisions an Appeal lay to the Parliament of Paris. This tract of country could not be of large extent, as it was a seigniory, bearing the name of a *Vicomté*, and was probably of the extent of an ordinary *Bailliage*. *Bailliages*, in France, were judicial districts, into which the Provinces were divided, in which civil and criminal justice was administered by a Court of original jurisdiction (*de première instance*) in the name of a *Bailli*, from whose decisions an Appeal lay to the Parliament of the Province. A *Prévoté* and a *Bailliage* were, therefore, the same description of judicial districts, and in reality one and the same thing, under different names.

It being incontrovertibly established that, except under a small number of Customs, those were to be deemed *présent* who lived in the same *Prévoté*, or *Bailliage*, it remains to be shown that the same law has been transplanted in Canada, and now obtains in Lower Canada. By the Edict of 1663, by which a Superior Council was constituted in Canada, it was declared that it was so constituted:—"*Pour y juger souverainement, et en dernier ressort, selon les lois* "*et ordonnances de notre royaume, et procéder autant qu'il se pourra, en la forme* "*et manière qui se pratique et se garde dans le ressort de notre Cour du Parle-*

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"*ment de Paris*." The general laws of France, and the Custom of Paris, in particular, were therefore things introduced into Canada. The 113th and 116th Articles of the Custom above mentioned, have therefore been introduced, in so far as they can receive application here. The 113th Article is of a nature to receive application in any country, and the 116th Article, which is merely explanatory of one of the words contained in it, must go with it.

After the erection of the Superior Council, a Judicature was established in Canada, on the model of the Judicature of France, consisting of a *Prévoté* at Quebec, *Justices Royales* at Three Rivers and at Montreal, and Seigniorial Courts in the Seigniories. The *Prévoté* of Quebec, in name, and in the judicial power with which it was invested, corresponded with the *Prévoté de Paris;* the *Justices Royales*, in like manner, corresponded with the *Bailliages* in France, and the *Conseil Supérieur*, in its jurisdiction and attributes, corresponded with the Parliaments in France; so that, with the laws of France, including the Custom of Paris, Courts were established perfectly analogous to those in France, and competent to execute the laws as would be done in France. As a substitute for these judicatures, it is provided by the Provincial Statute, 34 Geo. III., chap. 6, that there shall be Courts of King's Bench in the several districts, into which the Province was divided by that Statute, and to these Courts, the jurisdiction formerly exercised by the *Prévoté*, the *Justices Royales* and the *Superior Council*, was given. "By this enactment, the several Courts of King's Bench, in the several districts then established, became in reality, for all the purposes of the 113th and 116th Articles of the Custom, *Prévotés* and *Bailliages*, not in name indeed, but in substance and effect.

It seems to have been strangely imagined in the Court below, that because the words *Prévoté de Paris* are used in the 116th Article of the Custom, and the word *Bailliages* is used in other Customs, and because there is no division in Lower Canada now, bearing either of these names; the law respecting *présent* in these divisions has not been transplanted in Canada. This, it is conceived, is an error, inasmuch as it is the existence of the thing, and not the name of it, which is material in such cases. There are minor divisions, or judicial districts, in Lower Canada, which, though not called *Prévotés* or *Bailliages*, correspond in their nature and the purposes of their establishment, with the districts in France, known under these names, and this is sufficient to render applicable to the former the law which was applicable to the latter in France, in what respects the 116th Article of the Custom, and the use of the word *Bailliages* in other Customs. But if it were assumed, contrary to the fact, that the 116th Article of the Custom, is not a part of the law of Lower Canada, it would still be necessary to put a construction of the word *présens* in the 113th Article, and what other construction could be deemed proper, than that which, by the common law of France, making part of the law of Lower Canada, is put on this word, namely, that the required presence must be in a judicial district, in which a jurisdiction similar to that of a *Bailliage*, is exercised.

In the reasons assigned by the majority of the Court below, for the judgment, it is made the ground of their decision, that there were two systems (rules) in France, according to one of which persons were deemed *présent*, if resident

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within a *Bailliage*, and according to the other of which they were deemed *présent*, if resident under the same system of Law. With the latter alleged rule we are wholly unacquainted. The two rules which obtained in France, on this head, were:—1st, That established by the law *Sancimus*, in Justinian's Code above mentioned, which was adopted in the *pays de droit écrit*, and in some Provinces governed by customs, according to which persons were deemed *présent*, who lived in the same Province; and 2nd. That which made part of the common law of France, and obtained generally throughout the Customs of France, according to which persons were deemed *présent*, who lived in the same *Prévôté* or *Bailliage*. No other distinction on this head is to be found in the French Law writers. The reason for this difference between the Roman and the French Law is stated in Guyot's Répertoire, under the word *absent*, as follows, and is similarly given by other authors:—"*La cause de la différence est que chez les Romains, il "n'y avait dans chaque Province qu'un gouverneur qui rendait la justice à tous "les sujets dans l'étendue de son gouvernement ou par lui-même, ou par des juges "délégués qu'il commettait pour connaître des causes légères. En France, au "contraire, il y a dans chaque Province plusieurs Bailliages ou Sénéchaussées, et "souvent plusieurs Coutumes.*"

Here is no reference to identity of laws, as a ground for inferring *présence* from a residence under them; but, by the Roman Law, as under that of France the consideration of the legislator has been directed to the residence of the parties, within the same jurisdiction as affording to the owner of an estate, who is about to be despoiled of it, by an adverse possession, greater facility in obtaining redress against him, than if he lived in another jurisdiction. Jurisdiction is so essentially the point that governs, that even in the "*pays de droit écrit*," in which (except those within the *ressort* of the Parliament of Paris, to which the rule as to *Bailliage* is applied) the limits of the Province are those within which the parties must reside, the word *Province* is understood to mean, not the extent of territory comprehended in it, but "*l'etendue du ressort de chacun des Parlemens; ainsi, suivant la jurisprudence de ces Coutumes, les personnes domiciliées dans le ressort de la même Cour, sont censées presentes.*" (Old Dén., *verbo*, Prescription, No. 48.)

To illustrate the unreasonableness, and even absurd consequence of the doctrine adopted by the majority of the Court below, we may suppose that after the establishment of the Superior Council at Quebec, and the local Judicatures, under the old régime in Canada, a question of prescription should have arisen between the two persons, the one resident at Cape Bréton, or on the coast of Labrador, or on the shores of the Gulf of St. Lawrence, and the other beyond the Rocky Mountains, or on the shores of the Pacific, as to a real estate situate at Quebec or Montreal, to which one of them set up a title against the other, by the prescription of ten years. The whole of Canada, a vast country extending over a continent, was then governed by one and the same system of laws, the *Coutume de Paris*, and the general laws of France, and these two persons were then living under this system. According to the doctrine of the Court below, both these persons would be deemed *present together*, and the one might prescribe against the other. What idea does this convey of the opinion of the

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Court below, on this point? Is it at all likely that the *Prévoté de Quebec*, or the *Justice Royale* of Montreal, would have held these two men, with a continent between them, to be present together, and have applied the law of prescription of ten years to meet such a case? Now take the reduced limits within which the French system of law is at present confined, namely, those of Lower Canada. We may suppose that a question will arise between two persons, the one resident in the remote townships on the Ottawa, and the other on the coast of Labrador, or on the Magdalen Islands, or at Gaspé, as to a real estate situated in the forests on the Ottawa, or in the wilds of the Saguenay; to which one of them sets up a title by prescription against the other? The whole space between these tracts of country is governed by the same system of law, and is many hundred miles in extent, (it might be 1500 or 2000, considering the remote distance to which the settlements on the Ottawa have been carried, and are carrying) presenting much difficulty in obtaining access to the land in dispute. Are these men to be held to be *present*, in the sense of the 116th Article of the Custom, is the prescription of ten years applicable to such a case? The doctrine of the majority of the Court below would require an affirmative answer. Can such an answer be given, consistently with law or reason?

Having said enough to settle what I consider to be the law on this subject, I beg leave now to state the facts to which it is to be applied. The Respondent lives, and has lived, during all the time of the alleged prescription, in the Township of Chatham, in the district of Montreal, while the Appellant lives, and has lived during the same period, at Quebec. On these facts conjoined with the law, as now explained, it is considered by the Appellant, that the plea of Prescription was not maintainable, and ought to have been overruled and dismissed, and that the judgment of the Court below, by which it has been maintained, ought to be reversed.

SIR L. H. LAFONTAINE, *Bart. Ch. J. dissentiens*:—Action en déclaration d'hypothèque intentée en décembre 1846, par l'appelant contre l'intimé.

1re. exception : prescription trenténaire, non pas celle qu'un tiers-détenteur peut acquérir par une possession pendant trente ans, de l'immeuble hypothéqué, mais bien celle qui est acquise par le débiteur personnel, lorsque trente ans se sont écoulées sans que le créancier ait intenté son action contre lui, cette exception a été renvoyée. 2me exception : prescription de dix ans, *entre presents*, âgés non privilégiés, cette exception a été maintenue. 3me exception; défaut d'enrégistrement, on n'a pas insisté sur cette exception. La preuve a établi que l'appelant avait eu son domicile, dans le district de Québec depuis l'année 1825, tandis que l'intimé était domicilié dans le district de Montréal. Le jugement dont est appel, après avoir débouté l'intimé de son exception fondée sur la prescription trenténaire, déboute l'appelant de sa demande en maintenant l'exception qui a pour base, la prescription de dix ans entre présents : "considering that it appears that the defendant personally and by his predecessors had "before the institution of this action possessed and enjoyed the lot of land and "premises, in the said declaration and in the said exception by him secondly "pleaded described, for a period exceeding ten years, without trouble or molestation (inquiétation,) and that during the same period the plaintiff and de-

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" fendant were both residents, *domiciliés*, in that part of the province of Canada, " heretofore called Lower Canada, through which the same laws prevail and " are in force :—The court doth declare that the defendant hath acquired prescrip- " tion of ten years, (entre présents âgés et non privilégiés,) against the hypo- " theeation and action of the plaintiff, and maintaining the exception of the " defendant in that behalf pleaded, doth dismiss the said action with costs. " Mr. Justice Smith dissenting from the said judgment."

La question est donc de savoir ce qu'il faut entendre par les mots de la coutume : *entre présents*, dans leur application au Bas-Canada.

La coutume de Paris, après avoir, dans les articles 113 et 114, établi la prescription de " dix ans entre présents et vingt ans entre absents " ajoute, art. 116 : " sont reputés présens, ceux qui sont demeurans en la ville, Prévoté et vicomté " de Paris."

Sur cette matière, la coutume de Paris régissant le Bas-Canada, l'intimé soutient qu'il y a *présence* lorsque le créancier hypothécaire, et le détenteur de l'immeuble demeurent dans l'étendue de son territoire, quand bien même ils auraient leur domicile dans des districts différents, c'est-à-dire dans des juridictions différentes, par exemple ainsi que c'est le cas dans cette instance, l'un dans le district de Québec et l'autre dans le district de Montréal. L'appelant, au contraire, soutient qu'en pareil cas il y a *absence ;* que l'article 116 de la coutume de Paris ne doit pas être pris à la lettre, qu'il ne doit s'entendre que de la jurisdiction et non de la circonscription territoriale sur laquelle la coutume de Paris étend son empire, que c'était ainsi qu'on l'interprétait en France, où la jurisdiction généralement connue sous le nom de bailliage ou sénéchaussée, serait de règle en cette matière ; que le nom particulier donné arbitrairement à la juridiction ne fait rien à la chose, pourvû que la juridiction elle-même existe ; que nos jurisdictions de première instance *par districts*, autrefois sous le nom de Cour des Plaidoyers communs, ensuite sous celui de Cour du Banc du Roi, et enfin comme aujourd'hui sous la désignation de " Cour Supérieure " ont succédé à la *Prévoté* de Québec, aux *justices royales* du gouvernement de Montréal et de celui des Trois-Rivières, sous la domination française, et répondent, sous le rapport de l'administration de la justice, aux Prévoté, aux Bailliagés, aux Sénéchaussés en France.

Je crois que cette comparaison est exacte, ce n'est pas là que pour moi, git la difficulté. Je la trouve, cette difficulté, dans la première partie de la proposition de l'appelant, savoir : si l'article 116 de la coutume ne doit s'entendre que de la jurisdiction. Cette question est habilement traitée dans le factum de l'appelant qui, en outre a eu le soin de joindre à ce factum un grand nombre de citations. Et bien que je me sois déterminé pour l'affirmative, ce n'est pas, je dois l'avouer, sans avoir hésité beaucoup.

Deux points me paraissent bien établis dans l'ancienne jurisprudence française : 1o. que ce n'est pas la situation de l'héritage qu'il faut considérer en cette matière, mais seulement le domicile de celui qui prescrit, et de celui contre lequel on prescrit. 2o. que si les deux parties demeurent dans la même province ou dans la même coutume (laissant de côté pour le moment la question du Bailliage,) la prescription de dix ans a lieu, bien que l'héritage soit situé

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dans une autre province ou une autre coutume, car dans ce cas il y a *présence*, et cela suffit.

Maintenant s'il fallait prendre au pied de la lettre l'article 116 de la coutume de Paris, il me semble que, sur le second point ci-dessus posé, on arriverait de toute nécessité à une conclusion contraire à celle que la jurisprudence nous montre bien établie. Il faudrait dire qu'il y a *absence*. " Ces termes (ceux de " l'article 116), dit M. de Lamoignon dans ses *arrêtés*, t. 2, p. 195, n'expliquent " pas assez la proposition; car, en disant absolument que ceux-là sont réputés " présents qui ont leur domicile en la Prévoté et Vicomté de Paris, en prenant " le texte de l'article à la rigueur de la lettre, on pourrait conclure, par un sens " contraire, que le demandeur et le tiers-détenteur étant tous deux demeurant " hors la coutume de Paris, ils devraient être réputés *absents* ce qui n'est pas " néanmoins véritable; car supposé que l'un et l'autre fussent domiciliés en " une même coutume voisine, la prescription de dix ans suffirait quoiqu'ils fus- " sent demeurans hors le détroit de la Prévoté et Vicomté de Paris puisqu'ils " sont domiciliés en une même coutume et bailliage."

Bourjon, t. 2, p. 655 à la note sous l'art. 18; après avoir fait remarquer que " l'article 116 de la coutume répute présents, non seulement ceux qui sont demeu- rants dans la ville, mais encore ceux qui sont demeurans dans la Prévoté et Vi- comté de Paris," l'auteur ajoute: " mais pour ce dernier cas, ne serait-ce pas préférer la lettre à l'esprit de la loi?" aussi s'exprime-t-il ainsi, (même page) aux articles 17 et 18: " Il y a *présence* si tous les deux c'est-à-dire le créancier " et le possesseur sont domiciliés dans l'étendue d'une même jurisdiction...... " Il y a *absence* si le possesseur de l'héritage et le créancier sont domiciliés dans " l'étendue de deux différentes jurisdictions."

Lamoignon à l'endroit déjà cité: " Parmi nous quelques-uns estiment que, " pour faire la distinction de la présence et de l'absence, il faut suivre les bail- " liages et sénéchaussés; et les autres s'attachent aux fins et limites des coutu- " mes." Vient ensuite le passage déjà transcrit plus haut puis il ajoute: " Et " d'ailleurs quand l'article parle de ceux qui demeurent en la Prévoté et Vi- " comté de Paris, on ne voit pas si les réformateurs qui ont ajouté cet article, " ont prétendu parler de la coutume de Paris ou de la jurisdiction du Chatelet, " qui est le siége de la Prévoté et Vicomté de Paris, ce qui mériterait une ob- " servation particulière." Cette observation, voici comment il l'a formulée dans ses arrêtés, t. 1, à l'article 34 du titre 29: " sont réputés présents ceux qui ont leur domicile dans *un même bailliage* ou *sénéchaussée principale* de chacune province, et les autres sont réputés absents. " C'est là la nouvelle rédaction qu'il proposait de substituer, pour mieux rendre le sens qu'évidemment il attachait à l'article 116 de la coutume.

On lit dans l'édition de 1678 de la coutume de Paris, contenant les notes de Dumoulin et les observations de Tourpet, Joly et L'Abbé ce qui suit sous l'article 116; " Les présens sont ceux qui sont en même bailliage, sénéchaussée, ou province." Tournet se sert ici du mot *Province*, comme s'appliquant aux pays de droit écrit où la règle du droit Romain avait été conservée.

Pothier, des prescriptions, No. 103 en expliquant les termes de l'article 116, dit: la prescription est censée être entre présens lorsque, tant le possesseur qui

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prescrit que le propriétaire contre qui il prescrit demeurent l'un et l'autre sous le ressort du même bailliage royal, ou de la même sénéchaussée royale ; elle court au contraire entre absens lorsqu'ils demeurent en différents bailliages. La coutume de Meaux art. 82, s'en explique ; elle dit : " on tient pour présents ceux qui demeurent en même bailliage royal."

Duplessis, des prescriptions, p.p. 497-8. " Les présens sont ceux qui demeurent dans la ville, Prévoté et Vicomté de Paris, c'est-à-dire *en même bailliage*, quoique ce ne soit pas en même lieu ; et si l'on n'a point usé ici de ce terme c'est qu'il n'y a pas de bailliage royal dans cette coutume, mais Prévoté," et les annotateurs de Duplessis ajoutent : ' Par notre droit Français, ceux-là sont réputés présens qui ont leur domicile dans le *même bailliag prévoté* ou *sénéchaussée.* Paris, art. 116 ; Melun, art. 70 ; Sédan, art. 312 ; Meaux, art. 87 ; Calais, art. 208." Il est évident que les mots *bailliages*, prévoté et sénéchaussée, sont ici employés comme signifiant, chacun juridiction, " si le créancier " continuent les mêmes annotateurs, p. 418, " a toujours demeuré dans le *bailliage* où est situé l'héritage et que le possesseur ait son domicile en un autre *bailliage* la prescription ne peut être accomplie que par vingt ans. Il faut le domicile effectif du créancier et de l'acquéreur, *dans un même bailliage.* Ce n'est point la chose que l'on considère, ce sont les personnes."

" Ceux qui sont demeurans en divers bailliages royaux sont tenus pour absens." (Règle 7me du tit. 3, du liv. 5, des " Institutes Coutumières " de Loysel.)

Enfin Lange et Pigeau qui ont plus particulièrement traité de la procédure, de ce qui se pratiquait tous les jours sous leurs yeux, dans les tribunaux Français, nous disent : le premier, que " ceux qui sont réputés absens sont ceux qui demeurent en différents bailliages (1) ; et le second, que " l'opinion assez commune est de réputer *présents* ceux qui demeurant *en même bailliage royal* ou *autre* juridiction royale ressortissant nuement à un parlement ou conseil supérieur." (2)

On lit dans l'*Ancien Denisart*, au mot " Bailli " : " Par les mots, Baillis et Sénéchaux on entend en général un officier chargé de rendre la justice dans un certain *district* appelé *bailliage.*"

La règle établie par l'art. 116 de la coutume de Paris, telle qu'expliquée par Pothier et les autres auteurs que j'ai cités, est reproduite dans le code Napoléon, art. 2275, c. civ. : " Celui qui acquiert de bonne foi et par juste titre un immeuble, en prescrit la propriété par dix ans si le véritable propriétaire habite dans *le ressort de la Cour Royale*, dans l'étendue de laquelle l'immeuble est situé ; et par vingt ans, s'il est domicilié *hors du dit ressort.*"

Et en commentant cet article du nouveau code, Troplong et d'autres auteurs modernes reconnaissent que l'interprétation qui avait été donnée à l'article 116 de la coutume de Paris, comme s'entendant de la *juridiction*, soit que cette juridiction existât sous la désignation de *prévoté* ou de *bailliage* ou de *sénéchausée* était celle que la jurisprudence avait consacrée. Dans la nouvelle édition des " Institutes de Loysel, publiée en 1846 par MM. Dupin et Laboulaye,

(1) " Praticien *français*," 13e Ed., 1755, t. 1, p. 313.
(2) t. 1, Ed. de 1779, p. 592.

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on lit à la suite de la règle 7me ci-dessus citée la note suivante : " Aujourd'hui sont *absens dans le sens de cette règle* ceux qui habitent *le ressort d'une autre cour royale*, art. 2265 du code civil."

Voilà pour ce que je trouve de positif, et dans ce qui me paraît avoir été l'ancienne jurisprudence française, et dans le sentiment des principaux auteurs tant anciens que modernes, sur l'interprétation que devait recevoir, non d'après sa lettre, mais d'après son esprit, l'article 116 de la coutume de Paris, c'est-à-dire que le domicile des deux parties dans une même *jurisdiction* établissait la *présence*, tandis que dans le contraire, il y avait *absence*.

Maintenant, si nous cherchons quelle a dû être la raison de cette règle, nous la trouvons dans Bourjon déjà cité, p. 655, expliquée en ces termes : " Ce domicile étant ce qui facilite, ou ce qui augmente les difficultés sur la découverte et sur la poursuite."

Si d'un côté l'acquéreur de bonne foi doit être protégé après un certain laps de temps, de l'autre, le propriétaire, ou le créancier hypothécaire, a droit à une égale protection, si celui-ci à son domicile dans la même jurisdiction que celui qui prescrit contre lui, l'on peut facilement concevoir qu'il sera plus à même de connaître les actes ou les transactions dans lesquels ce dernier s'engage, que s'il demeurait dans une autre jurisdiction. Il est en effet peu de changement, dans la propriété des héritages qui ne donnent pas lieu à quelque procédures, ou à quelques formalités à remplir, de manière à bientôt faire connaître, dans la localité de la résidence des parties, la mutation qui peut affecter celui contre lequel on prescrit, ou du-moins à lui " faciliter " cette connaissance.

AYLWIN, *J., dissentiens.*—J'embrasse l'opinion émise par l'honorable Juge en chef, que le domicile des parties doit être dans l'étendue de la jurisdiction, pour les faire réputer présens en matière de prescription. Sous le gouvernement français, les trois jurisdictions de Québec, Trois-Rivières et Montréal, étaient réellement trois bailliages, dont l'appel ressortissait au Conseil Supérieur de Québec. Ces jurisdictions distinctes et indépendantes se sont conservées depuis que le Canada est passé sous la domination de l'Angleterre, et existaient lorsque l'action a été intentée, et l'appelant et l'intimé n'étant pas alors domiciliés dans le même district, ne pouvaient être censés présens.

CARON, J.—La Cour Supérieure a décidé que la possession a été *entre présents*, c'est-à-dire que le créancier et le détenteur ayant tous deux résidé dans la Province du Bas-Canada, le Demandeur ne peut être considéré comme ayant été *absent* de manière à ce qu'une possession de 20 ans fut requise pour le priver de son droit d'hypothèque qu'il réclame.

L'Appelant prétend que la résidence du créancier dans un district et celle du détenteur dans un autre, constituent l'*absence* qui requiert 20 ans de possession. L'Intimé soutient la thèse contraire, se fondant sur les motifs énoncés au jugement de la Cour inférieure.

C'est la Coutume de Paris qui devrait être notre guide dans la décision de cette question, et comme elle a sur le sujet, une disposition expresse et positive, il n'y aurait pas de difficulté, si d'après nos circonstances particulières et notre position locale, cette disposition nous était applicable. Mais comme elle ne l'est pas dans ses termes, c'est à l'esprit et non à la lettre de ses dispositions qu'il faut avoir recours pour décider la question qui nous occupe.

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La Coutume de Paris, après avoir statué dans l'art. 114, "que celui qui a "joui d'un héritage, à juste titre et de bonne foi par *dix ans entre présents* et "*vingt ans entre absents*, tel possesseur a acquis prescription contre toutes rentes "et hypothèques prétendues sur le dit héritage," explique dans l'art. 116, ce qu'il faut entendre par *présents* et par *absents*, en disant "sont réputés *pré-"sents* ceux qui sont demeurants en la ville, prévoté et vicomté de Paris."

En interprétation de cet article, Duplessis nous dit: "Les *présents* sont ceux "qui demeurent dans la ville, prévoté et vicomté de Paris, c'est-à-dire en même "bailliage; quoique ce ne soit pas en même lieu, et si l'on a pas usé de ce "terme (bailliage dans l'art. 116) c'est qu'il n'y a pas de bailliage royal dans "telle Coutume mais prévoté." D. pres., livre I, p. 497.

Il ajoute, "D'où il suit que les *absents* sont leur demeurants l'un dans le pré-"voté de Paris, ou une autre province, que nous interprétons *bailliage*, et l'autre "dans une autre." Ainsi Duplessis nous apprend ici que le mot *bailliage* est synonyme de province.

Carondas, en commentant le même art. 116, dit: "La distinction que fait la "coutume entre les présents par dix ans et les absents par 20 ans, dépend aussi "du droit romain" il ajoute, "La loi dernière du code de *usucapionibus*, dé-"finit qui sont les *présents* et les *absents*, et à la décision qu'il en fait convient "le 116 art." "Celui est réputé présent soit pour prescription de la propriété "ou de l'hypothèque, qui *est demeurant* en la province, que nous interprétons "*bailliage* ou sénéchaussée; tellement que si le possesseur a son domicile en "une *province*, et celui qui prétend la propriété ou l'hypothèque sur l'héritage "en autre *province*, ils seront réputés *absents parce qu'ils sont* demeurants en "*diverses provinces*."

Cette citation établit 1er: que l'art. 116 de la Coutume est tiré du droit romain et y est conforme. 2o: que sous l'empire de cette Coutume on interprétait les mots de bailliage ou sénéchaussée par celui de province. 3o: que d'après le droit romain la résidence du créancier et du possesseur dans deux *provinces* différentes, était ce qui constituait l'*absence* et cela indépendamment de la situation de l'immeuble.

Ferrière, petit commentaire, sur l'art. 116, p. 260, dit: "Cet article nous mar-"que ceux qui sont en même bailliage, sénéchaussée *ou province* sont réputés "présents touchant la prescription." Ainsi la prescription de dix ans a lieu, supposé "que le créancier et l'acquéreur tiers-détenteur de l'héritage seraient de-"meurant dans une *même province*, quoique dans des villes différentes et quoi-"que la chose dont est question soit située dans une province éloignée des do-"miciles des partis."

1 Laurière, sur l'art. 116, p. 369.
Pothier, prescription, nos. 103 et 104.
Tournet, sur l'art. 116, page 185.
Biret, traité de l'absence, page 319.
Serres, institutes, 159.

S'il est vrai que nous soyons régis par les dispositions de la coutume de Paris; que l'art. 116 doive être notre règle; que cet article doive s'interpréter, comme le disait Carondas, Duplessis, Ferrière et Serres, cités plus haut, il s'en

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suit que pour constituer l'*absence* ou la *présence* pour les fins de la prescription, il ne faut pas considérer la résidence des parties dans ou hors la même jurisdiction judiciaire, mais ce qu'il fallait consulter était de savoir, si elles résidaient ou non dans la province, interprétation conforme au droit Romain, duquel a été pris l'article qui doit nous servir de guide. Les termes de cet article ne peuvent nous être applicables, il faut en prendre l'esprit, d'après lequel il nous paraît nécessaire d'en venir à la conclusion que dans le pays (savoir le Bas-Canada soumis en totalité à l'empire de la coutume de Paris,) doivent être réputés présents ceux qui résident dans la province, dans quelque partie que ce soit; et qu'il n'y a pas absence de manière à nécessiter une possession de vingt ans, en matière de prescription, par le fait que le créancier a demeuré dans un des districts de la province, tandis que le détenteur résidait dans un autre.

Il me paraît donc que de la part de l'intimé, il est démontré que la possession qu'il a eu de l'immeuble pour lequel il est poursuivi, a été une possession *entre présents*; qu'elle a été de plus de 10 ans, et que partant, elle suffit pour avoir fait acquérir à l'intimé la libération de l'hypothèque, que l'appelant dans la cause avait eu sur l'immeuble en question.

Le jugement me paraît correct et devrait être confirmé.

The Judgment of the Court below was confirmed in consequence of the Court being equally divided;—Sir L. H. LaFontaine and Judge Aylwin being in favor of *reversing*, and Judges Duval and Caron in favor of *confirming* the judgment

Henry Stuart, for Appellant.

Drummond and Loranger, for Respondent.

(S. B. & F. W. T.)

By the courtesy of Mr. JUSTICE DAY who pronounced the judgment of the Superior Court, we are enabled to give the substance of his observations on that occasion.

Day, J.—The second exception sets up the prescription of ten years *entré presens*. The fact of the possession under title for upwards of ten years is established. The only question is whether the Plaintiff is to be considered present in the meaning of the 116th Article of the Custom of Paris. The presence of the party invoking the prescription of ten years under the 113th Article of the Custom is a substantive requirement of the law. Without an allegation of it, the exception would be bad, and upon the party bound to allege it, rests by necessary consequence, the onus of proving it. Who then are *presens* under the rule established by the 116th Article of the Custom. The words of the Article are:—"*Sont réputés presens ceux qui sont demeurans en la ville, prévôté et vicomté de Paris.*" Taking it according to the direct meaning of these words, it merely defines a geographical limit which cannot of course be transferred to this country, but although in that respect, it furnishes no absolute answer to the question before us, yet the reason of the rule established by it is apparent and of general application, and it affords a sufficient and safe guide for a decision in the present case. The "*ville prévôté et vicomté de Paris*" included the territory in France which was subject to the *Coutume de Paris*, and the rule to be deduced is that, according to the spirit of the 113th Article, those were considered present who were resident within the jurisdiction of the same law. Such I am satisfied would have been the decision at the Chatelet, and my opinion is confirmed by what Ferrière says in his commentary that although MELUN and MEAUX, which had their own customs, were within the jurisdiction of the Chatelet, yet their people would not be regarded as present within the Custom of

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Paris, because they were not ruled by that Custom. Without doubt, there existed in France out of the jurisdiction of the Custom of Paris two classes of rules which had grown out of the state of the country with respect to its judicial divisions, and the distribution of jurisdiction within it. According to one of these the parties were present if resident within the Bailliage Royal, that is to say within the jurisdiction of the same Royal Court, and the reason given for it by Duplessis is that a party is liable to suffer inconvenience and difficulty by being obliged to sue out of the jurisdiction within which he resides. The Customs of Meaux and Melun afford an example of this rule. By them, those only were considered present who were within the same Bailliage Royal, and so constant was the rule that persons who were considered present under it in an existing Bailliage were held to be absent when by the creation of a new Bailliage they found themselves in different jurisdictions. The other doctrine was that parties within the limits of the same Custom were reputed present, and this seems to me to be the better rule. An obvious reason for it is that two persons within the jurisdiction of the same law were presumed to know their mutual rights, but when separated by different laws, neither could know the rights of the other. This latter rule prevailed in the Province of Artois and Poitou, although no specific provision was made on the subject by the Custom of either. Each Province was divided into a great number of *Bailliages*, but those persons were held to be present who were within the Province, although residing in different Bailliages. The same rule would apply in this Province even supposing that the different judicial districts in Lower Canada could be regarded as in all respects similar to the Bailliages in France, (which in my opinion they cannot) and that no specific rule could be found under our Customs. But whatever difference may have existed in those portions of France lying out of the jurisdiction of the Custom of Paris, it seems to me that under that Custom the jurisprudence was fixed. A. DENISART *vo.* PRESCRIPTION, No. 49. "A Paris si ceux qui ont droit d'interrompre la prescription sont l'un et l'autre domiciliés dans le ressort de la Coutume, ils sont reputés presens et 10 ans de possession suffisent contre ceux là." DICT. de DALLOZ vo. PRES. n. 822. "D'apres la Coutume de Paris l'absence ou la presence pour la prescription de 10 ou 20 ans determinait suivant que les parties avoient leur domicile dans l'étendue de la même coutume on des coutumes differentes et non pas dans la même Bailliage ou dans des Bailliages differents." 13th Mars 1817, Paris.

2. G COM. de FERRIERE, Art. 116, No. 4, p. 400.
Coût de Meaux. Coût Gen. p. 80.
Coût de Melun, Art. 171. Coût Gen. p. 110
AN. DEN. vo. PRES. Nos. 51-4.
Coût d'Artois, Art. 72.
Coût de Poitou, Art. 377.
DICT. DE DROIT. vo. BAILLI.
REP. de JUR. vo. ABSENS. p. 70.

C. Mondelet, J.—Made a few remarks to the effect that the argument, *ex inconvenienti*, ought not to influence Judges who had to follow the law, and that there never had been any *Bailliages* in Canada.

Smith, J., dissentiens, maintained as his opinion that the presence of parties under the 113th Article of the Custom was determined, not by the identity of the laws under which they lived, but by the jurisdiction: e. g., a *Prévôté* or *Bailliage*.

MONTREAL, 24 MARS 1858.

Coram Smith, J.

No. 1037.

Moreau et Vir vs. Léonard.

Jugé, que le procès verbal de la pièce arguée de faux doit être fait immédiatement après le compulsoire de cette pièce.

Les Demandeurs en cette cause s'étant inscrit en faux contre une quittance notariée produite par le Défendeur et ce dernier ayant déclaré qu'il entendait se servir de la pièce attaquée; il prit une règle sur le notaire instrumentaire pour lui faire déposer sa minute au greffe de la Cour en conformité à la règle de pratique 105.

Le notaire ayant rapporté sa minute au greffe le 17 de mars 1858, le Défendeur en faux notifia le Demandeur en faux de ce fait. Le Demandeur en faux au lieu de fournir ses moyens de faux deux jours après cette notification en conformité à la règle de pratique 106, fit motion le 23 mars 1858 pour qu'un procès verbal de la pièce arguée de faux fut préalablement fait.

Lafrenaye pour le Défendeur, s'objecta à cette motion, prétendant qu'elle était prématurée et que ce procès verbal ne doit avoir lieu qu'après que les moyens de faux ont été déclarés pertinents et admissibles et il référa aux règles de pratique 106 et 109. Règle 109 " that immediately after the rendering of " the said Judgment declaring the *moyens de faux* relevant and admissible, the " Plaintiff or Defendant *en faux* may move that a *procès verbal*, descriptive of the " Exhibit filed, be made in the presence of the adverse party, or his Attorney " *ad lites*."

Smith, J. Cette motion doit être accordée. La loi du pays ordonne qu'un procès verbal soit fait de la pièce attaquée de faux aussitôt après son dépot au greffe, et c'est la procédure à suivre en pareil cas.

Motion accordée.

Ouimet, Morin et Marchand, pour les Demandeurs.
Lafrenaye et Papin, pour le Défendeur

(P. R. L.)

LISTE

DES JUGEMENS RENDUS EN COUR D'APPEL A COMPTER DU 1er DÉCEMBRE 1857, JUSQU'AU 14 JUIN 1858, INCLUSIVEMENT

LISTE

DES JUGEMENS RENDUS EN COUR D'APPEL A COMPTER DU 1er DÉCEMBRE 1857, JUSQU'AU 14 JUIN 1858, INCLUSIVEMENT.

[*Vide* 20 *Vic. Cap.* 44, s. 15.]

MONTREAL.

APPELANTS.	INTIMÉS.	DATE.	JUGES.	JUGEMENS.
Lee, et al.,	Poudrette,	4 Déc. 1857,	Juge en chef, Aylwin, Duval, Caron,	Confirmé.
Charlebois,	Malo,	"	"	"
Leamy,	Lionais,	"	"	"
Cousineau,	Chauret,	"	"	"
Western Assurance Co.,	Atwell,	5 " "	Mêmes Juges, D[illegible]issents,	Infirmé.
Childs, et al.,	Tylee,	" " "	Juge en chef, & [illegible]onfirm, Aylwin & Duval *dissent*,	Confirmé.
Twiss,	De Lanaudière, et al.,	" " "	Mêmes Juges,	"

QUEBEC.

APPELANTS.	INTIMÉS.	DATE.	JUGES.	JUGEMENS.
Huot,	Danais,	12 Déc. 1857,	Juge en chef, Aylwin, Duval, C. Mondelet,	Confirmé.
Huot,	Dion,	" " "	Juge en chef, Aylwin, Duval, Caron,	"
Regina,	Bois,	14 " "	Mêmes Juges, Caron dissent,	"
Russell,	Anderson,	" " "	Mêmes Juges,	Infirmé.
Maguire,	Scott,	" " "	Mêmes Juges, Caron dissent,	Confirmé.

MONTREAL.

APPELANTS.	INTIMÉS.	DATE.	JUGES.	JUGEMENS.
Leclerc, et ux.,	Perrin, et al.,	1 Mars 1858,	Mêmes Juges,	"
Colette, et al.,	Nantell,	" " "	"	Infirmé.
Quintin, et al.,	Girard, et al.,	" " "	"	Confirmé.
Casson,	Truax,	" " "	"	"
Hart,	Saucisse, et al.,	" " "	"	"
Black,	Beaubien,	" " "	"	"
Loranger,	Roy,	" " "	"	"
Woodbury,	Garth,	" " "	"	"
McDonald,	Dunlop,	" " "	Mêmes Juges, Duval dissent,	"
Dunlop,	McDonald,	" " "	Mêmes Juges, Caron dissent,	Infirmé.
Larocque, et al.,	Michon,	" " "	Mêmes Juges,	"
McGoey,	Verret,	" " "	"	Confirmé.
Languedoc, et ux.,	Laviolette,	" " "	Juge en chef, J. Duval, J. Caron, J. Aylwin dissent,	Infirmé.
Lalouette, et al.,	Delisle,	4 " "	Les 4 Juges,	
		"		

U.W.O. LAW

QUEBEC.

APPELANTS.	INTIMÉS.	DATE.	JUGES.	JUGEMENS.
Mirant,	Jobin,	12 Mars, 1858,	4 Juges,	Confirmé.
McMaster,	Walker,	"	"	"
Gallagher,	Allsopp,	15 "	Juge en chef, Duval, Caron, Aylwin dissent,	Infirmé.
Hall,	McDougall,	16 "	Les 4 Juges,	Confirmé.
Lindsay,	Fontaine,	"	"	"

MONTREAL.

APPELANTS.	INTIMÉS.	DATE.	JUGES.	JUGEMENS.
Larocque,	Franklin County Bank,	1 Juin,	Les 4 Juges,	Confirmé.
McNaughton,	Madore,	"	"	"
McNown,	Madore,	"	"	"
Watson,	Reid,	"	"	"
Barber, et al.,	Richardson,	"	"	"
Montreal and New York R.R.	Germain,	4 Juin,	"	"
Tyler,	Vaughan,	"	"	Infirmé.
158 Berthelet,	Guy, et al.,	"	"	"
41 même,	Mêmes,	"	"	"
Vondenvelden,	Brady,	"	"	Confirmé.
Johnson,	Williams,	"	Juge en chef, Duval, Caron, Aylwin, dissent,	"
Bellingham, et al.,	J. S. McCord,	5	Les 4 Juges,	Appel débouté.
Vadeboncœur,	Trust and Loan Co.,	8	"	"
Piché,	Gauthier,	"	"	"
Sullivan,	Smith,	"	"	"

QUEBEC.

APPELANTS.	INTIMÉS.	DATE.	JUGES.	JUGEMENS.
Larue,	Têtu,	12 Juin,	"	Confirmé.
Hall,	Dubois,	" "	"	"
Bradshaw,	Lampson,	" "	"	"
Tremblay,	Noad,	" "	"	"
Fraser,	Roche,	" "	"	"
Blais,	Simoneau,	" "	"	"
Levey,	Sponza,	14 "	"	"

MONTRÉAL 27 MARS, 1858.

Coram SMITH, J.

No. 1366.

Ex parte Casavant, Requérant ratification de titre.

ET

Paul Lemieux, Opposant.

Jugé,—que la garantie résultant d'un Acte d'échange ne confère aucun droit d'hypothèque s'il n'y a eu une somme stipulée pour déterminer le montant de telle garantie.

A une demande en ratification de titre d'un acte d'échange entre le Requérant et un nommé Joseph Piédalue reçu devant Blanchard, N. P., le 2 juillet 1858, l'Opposant Paul Lemieux formula son opposition réclamant une hypothèque qu'il établissait comme suit :—

L'Opposant prétendait que l'immeuble au sujet duquel le Requérant demandait ratification était hypothéqué en sa faveur, attendu que Joseph Piédalue dit Prairie, l'échangiste du Requérant avait obtenu ce même immeuble par un acte d'échange avec lui l'Opposant, et ayant donné à l'Opposant en contréchange, un immeuble que lui, Joseph Piédalue, avait acheté des héritiers Choquette sur lequel restait due une balance du prix d'acquisition.

Que l'Opposant ayant reçu de Piédalue un immeuble hypothéqué, il avait en vertu de son acte d'échange une hypothèque sur l'immeuble qu'il avait donné à Piédalue jusqu'à concurence du montant de l'hypothèque dont il était menacé. L'immeuble que l'Opposant Lemieux avait ainsi donné à Piédalue en échange de celui sur lequel telle hypothèque existait étant le même que celui transmis au Requérant, il reclamait en conséquence hypothèque jusqu'au montant de £166, la balance du prix de vente dû sur l'immeuble que Piédalue avait cédé à l'Opposant.

A part cet exposé de faits il avait allégué l'enregistrement de son échange avec Piédalue, et une convention verbale alléguée comme intervenue entre Joseph Piédalue et le Requérant avant l'acte d'échange, par laquelle le Requérant aurait promis payer le montant de la balance due aux héritiers Choquette.

A cette opposition le Requérant fit une réponse en droit ; alléguant que l'Opposant n'établissait par son opposition aucun droit d'hypothèque, et les raisons de cette défense se réduisaient à cette proposition : qu'il n'y avait pas d'hypothèque même de garantie aux termes de l'ordonnance d'Enregistrement, à moins qu'elle ne fût déterminée par une somme quelconque ; que n'alléguant aucune telle stipulation comme accompagnant la clause de garantie dans l'acte d'échange de l'Opposant, il ne pourrait prétendre aucun droit d'hypothèque sur l'immeuble qu'il avait cédé.

La Cour adopta cette proposition.

Smith, J., en rendant le jugement dit ; que la question se réduisait à celle de savoir si une simple déclaration de garantie dans un acte d'échange avec les stipulations usitées—mais sans aucune stipulation quant au montant auquel devait s'élever telle garantie, pouvait conférer en faveur du co-échangiste sur l'immeuble donné en échange un droit d'hypothèque qu'il pouvait exercer à raison

Masson et al. v. Corbeille.

de l'existence d'une hypothèque dont il était menacé sur l'immeuble par lui reçu en échange; la Cour n'entretenait aucun doute que la garantie d'un acte d'échange ne faisait pas exception à la disposition du statut qui exigeait que toute stipulation d'hypothèque fut déterminée pour un montant jusqu'à concurrence duquel seulement l'hypothèque peut être exercée; et qu'une telle convention était essentielle pour la convention d'une hypothèque, et l'opposition ne démontrant pas que cette condition existat, elle devait être renvoyée.

Jugement maintenant la défense en droit du Requérant et renvoyant l'opposition.

R. et G. Laflamme, Avocats du Requérant.

G. de Boucherville, Avocat de l'Opposant.

[R. L.]

MONTRÉAL, 24 MARS 1858.

Coram SMITH, J.

No. 2229.

Masson et al. v. Corbeille.

Jugé: 1o. Que l'Acquéreur d'un immeuble dans la contenance duquel il y avait déficit pourrait réclamer du cessionnaire du prix de vente une diminution sur le prix cédé proportionnelle au défaut de contenance.

2o. Que l'acceptation du transport ne rendait pas le débiteur non recevable à opposer au cessionnaire les exceptions qu'il aurait pu opposer au créancier cédant.

Les Demandeurs comme cessionnaires de Joseph Robin dit Lapointe, réclamaient du Défendeur la balance du prix de vente d'un immeuble, Acte devant Mtre. S. A. Berthelot et son confrère, notaires, le 2 Mars 1847; la balance ayant été cédée aux demandeurs par acte du 9 octobre 1852.

Les demandeurs relataient un acte du 13 octobre 1852, reçu devant Savard et confrère, par lequel le défendeur reconnut le transport comme bien et dûment signifié, et promit payer la balance transportée, comme dûe au cessionnaire.

Le défendeur plaida à cette action par deux exceptions, la première alléguant l'acte fait entre lui et Robin dit Lapointe, son vendeur, le titre originaire de la créance—et alléguant spécialement la clause de cet acte par lequel il était dit que si le terrain vendu n'avait pas la contenance indiquée, il y aurait réduction sur le prix de vente, si l'acquéreur dût être juridiquement évincé d'aucune partie du terrain vendu.

Le défendeur déclarait par cette exception qu'il n'avait jamais eu la livraison de tout le terrain indiqué au contrat,—que par suite le cessionnaire n'avait pu obtenir plus de droit que n'en avait son cédant et que l'acceptation qu'il avait faite du transport ne lui enlevait pas le droit de demander une diminution sur le prix et sur la balance transportée aux demandeurs correspondante au déficit.

Par la seconde exception, le défendeur invoquait le même principe sous une forme plus ample.

A ces deux exceptions les Demandeurs produisirent deux réponses en droit mettant en question les propositions suivantes:

Le défaut de contenance ne donne pas droit à l'acquéreur de demander une

Quintin v. Girard.

déduction sur le prix, dans l'espèce surtout, attendu qu'aux termes du contrat il ne pouvait le faire qu'en autant qu'il serait juridiquement évincé.

2. Le débiteur ne pouvait invoquer cette exception à moins qu'il n'eût informé le cessionnaire de tel "déficit" dans un délai plus court que celui qui s'était écoulé.

3o. L'acceptation pure et simple du transport avec la promesse de payer au cessionnaire, mettait le débiteur dans l'impossibilité d'opposer cette exception au cessionnaire.

Après audition sur ces deux réponses en droit la Cour maintient les deux exceptions et renvoie les deux réponses en droit—négativant ces propositions.

Smith, J., rendant le jugement dit qu'il n'y avait aucun doute sur le droit de l'acquéreur de demander une diminution sur le prix à raison du défaut de contenance, l'exception *quanto minoris* existait même à l'encontre du cessionnaire du prix de vente. La seule question était de savoir si l'acceptation du transport changeait la position du débiteur. La Cour était d'opinion que l'acceptation n'enlevait aucun droit à l'acquéreur, il n'y avait pas là une renonciation aux exceptions. On avait prétendu lors de l'argument que l'acte de vente avait limité l'exercice de cette réclamation au cas d'éviction juridiquement constatée mais les exceptions alléguaient l'absence de tradition, et il n'était pas nécessaire dans ce cas de constater le deficit juridiquement pour demander une réduction, la loi admettant cette réclamation.

Jugement en conséquence, renvoyant les réponses en droit des demandeurs, et maintenant les exceptions.

Cartier et Berthelot, pour les Demandeurs.

R. et G. Laflamme, pour les Défendeurs.

(R.L.)

EN APPEL.

DU DISTRICT DE MONTRÉAL.

MONTREAL, 1er MARS, 1858.

Coram Sir L. H. Lafontaine, Bart., J. C., Aylwin, J., Duval, J., Caron, J.

Quintin dit Dubois et al,

Demandeurs en Cour Inférieure

Appellants.

et

Girard et al,

Défendeurs en Cour Inférieure,

Intimés.

Jugé,—Que suivant l'esprit de la législation de 1774 et 1801 (1) sur la liberté illimitée de tester; la demande en légitime n'existe plus en Bas-Canada. (2)

Les Appelants, par leur action en Cour Inférieure, réclamaient la légitime d'Elizabeth Sénécal, épouse de Joseph Quintin, de Sophie Sénécal représentée

(1) Imp. Act. 14 Geo. 3, Prov. Act. 41 Geo. 3 ch. 4.

(1) Vide, 1st vol. L. C. Jurist, p. 163.

Quintin v. Girard.

par Louis Monjeau Tuteur à ses enfants Mineurs, de Marie Reine Sénécal épouse de Joseph Savaria et d'Angélique Sénécal épouse de Damien Girard, dans la succession de leur mère Angélique Favreau, en son vivant veuve de feu Amable Sénécal.

Leur déclaration exposait : que les dits Amable Sénécal et Angélique Favreau avaient laissé onze enfants, issus de leur mariage célébré le 21 février 1808, savoir : Elizabeth, Sophie, Marie Reine, Angélique, Adéline, Anastasie, Julie, Emélie, Eugène, Amable et Toussaint Sénécal.

Que les dites Elizabeth, Sophie, Marie Reine, Angélique, et Adeline Sénécal avaient respectivement épousé Joseph Quintin dit Dubois, Louis Monjeau, Joseph Savaria, Damien Girard et Louis Girard.

Que Sophie Sénécal était décédée laissant plusieurs enfants, auxquels Louis Monjeau leur père avait été nommé Tuteur, et que cette Tutelle avait été enrégistrée.

Qu'Amable Sénécal, père, était décédé le sept Novembre, 1849, après avoir fait son testament devant Demuy, Notaire, le 6 Août 1845, par lequel il institua ses enfants à l'exception de Sophie Sénécal, ses légataires universels en propriété de tous ses biens, pour en prendre possession après le décès d'Angélique Favreau son épouse, a qui il en légua l'usufruit. Que par un acte d'accord et de transaction du 27 Mars 1851, la dite Angélique Favreau fit avec ses enfants, légataires en propriété des biens de feu Amable Sénécal, une transaction par laquelle ces derniers lui cédèrent une terre située à Varennes, un autre lopin de terre et une coupe de bois, le tout aux charges et conditions détaillées au dit acte d'accord.

Que par contrat de mariage entre Louis Girard et Adeline Sénécal reçu devant Mtre. Girard le 13 Octobre 1851, la dite Dame Angélique Favreau céda aux futurs époux " une terre située à Varennes, une coupe de bois, et de plus la jouissance et usufruit la vie durant de la donatrice d'un demi-arpent de terre de front sur neuf arpents de profondeur à prendre dans une portion de terre appartenant à Toussaint Sénécal, et aussi tous les meubles de ménage, animaux, grains, argents et autres effets et valeurs qui appartiendraient à la dite Donatrice lors de son décès, excepté ses hardes et linges qui seraient partagés également entre ses filles."

Que la dite Angélique Favreau est décédée le dix Mai 1854, sans avoir fait de testament.

Que par cet Acte d'accord et ce contrat de mariage, Mde. Sénécal, (la dite Angélique Favreau) avait avantagé les dits Amable Sénécal, Toussaint Sénécal Eugène Sénécal et la dite Adeline Sénécal, tandis que ses autres enfants et entr'autres les Appelants n'avaient rien reçu d'elle soit par Acte entrevifs ou de dernière volonté.

Que si la dite Angélique Favreau n'eût pas disposé de tous ses biens par actes entrevifs, elle aurait laissé des biens à partager dans sa succession pour une valeur d'au moins quarante quatre mille livres ancien cours, laquelle somme divisée en onze parts aurait donné pour la part héréditaire de chacun de ses

héritiers, les enfants du dit Louis Monjeau comptant pour une souche, la somme de quatre mille livres ancien cours.

Quintin v. Girard.

Que les Appelants et les enfants du dit Louis Monjeau n'ayant rien reçu de la dite Angélique Favreau,étaient bien fondés à demander leur légitime qui était de deux mille livres, ancien cours, pour chacune des dites Elizabeth Sénécal, Marie Reine Sénécal et Angélique Sénécal et de cinq cents francs pour chacun des enfants du dit Louis Monjeau et de la dite Sophie Sénécal, et à reclamer cette somme de l'Intimée qui avait été la dernière gratifiée et qui tant par elle-même que par son mari avait reçu la plus grande partie des biens de sa mère et dont la valeur excédait trente mille livres ancien cours.

Et les Appelants concluaient à ce que les Intimés fussent condamnés à leur payer la somme de dix mille livres, ancien cours, avec intérêt à compter du décès de la dite Angélique Favreau et aux dépens, si mieux n'aimaient les dits Intimés venir à compte et partage légal tant des biens laissés à l'Intimée qu'à ses frères et sœurs, par acte de donation entre-vifs et de ceux qu'elle aurait pu laisser à son décès, afin d'établir et de déterminer la part que chacun des Appelants aurait eue dans les dits biens et que sur tel compte et partage les Intimés fussent condamnés à payer telle somme à laquelle pourrait se monter la légitime des Intimés et conclurent en outre aux dépens.

A cette demande les Intimés opposèrent que le 6 Octobre 1845 la dite Angélique Favreau avait fait devant Demuy Notaire et témoins son testament par lequel elle avait légué le résidu de tous ses biens meubles et immeubles à ses dix enfants, Demandeurs et Défendeurs en cette cause, qu'elle avait institués ses légataires universels, devant les dits biens être partagés entr'eux par égales parts, sujets néanmoins les dits enfans à rapporter ce qu'ils avaient reçu de la Testatrice, afin de s'égaliser entr'eux.

Que la dite Angélique Favreau était décédée sans changer son testament.

Qu'antérieurement au dit testament les Intimés n'avaient reçu de la dite Angélique Favreau aucun avantage dont ils pussent être comptables envers les Appelants à titre de légitime.

Qu'antérieurement au dit testament les Intimés n'avaient reçu de la dite Angélique Favreau aucun avantage dont ils pussent être comptables envers les Appelants à titre de légitime.

Que par son testament la dite Angélique Favreau n'ayant ordonné le rapport pour établir l'égalité entre ses enfans que des avantages qu'ils auraient pu recevoir antérieurement à icelui et non de ceux qu'ils recevraient après, la présomption de droit était qu'elle s'était réservée le privilége d'avantager par la suite ceux de ses enfans qu'elle voudrait et cela sans rapport et sans ouverture au droit de légitime en faveur de ses autres enfans.

Qu'il n'existait en faveur des Appelants aucune action semblable à celle qu'ils avaient intentée du chef de leur mère qui n'était pas morte *intestat* ainsi que faussement allégué dans leur déclaration, mais qui, au contraire, avait laissé des ordonnances de dernières volontés.

Par une seconde exception les Intimés alléguaient que du vivant de la dite Angélique Favreau, l'Intimée n'avait reçu d'elle aucun avantage excédant ceux

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que la dite Angélique Favreau avait faits à ses autres enfans de la quotité voulue par la loi, pour donner ouverture aux droits de légitime ; que les Appelants avaient reçu de la dite Angélique Favreau des avantages égaux à ceux que la dite Intimée avait reçus et qu'ils étaient d'une qualité et quantité qui les empêchaient d'exercer leur action ;—que l'Acte de transaction et accord récité en la déclaration des Appelants équivalait à Inventaire et avait réglé les droits des parties concernées.

Ces exceptions étaient accompagnées d'une défense au fonds en fait.

Les Appelants ont nié les allégués contenus dans les Exceptions péremptoires des Intimés et ont répondu spécialement qu'en supposant que le prétendu testament mentionné dans les exceptions péremptoires des Intimés existerait, les Appelants seraient encore fondés à se pourvoir comme ils l'avaient fait par leur action, attendu que ni les Intimés ni aucun des autres légataires n'avaient accepté les legs y contenus, mais qu'au contraire les dits légataires avaient refusé de les accepter.

Les parties n'ayant fait d'autre preuve que celle qui résultait des pièces produites de part et d'autre furent entendus au mérite le 23 Mars 1857, et le 31 Mars 1857 en déboutant l'action des Appelants la Cour Supérieure a rendu le Jugement suivant :

" La Cour après avoir entendu les parties, etc.............. Vu que les " Demandeurs n'ont pas allégué en leur demande, ni prouvé que la nommée " Angélique Favreau n'a pas laissé de biens dans sa succession suffisamment " pour fournir aux Demandeurs leur légitime ; Vu que la dite Angélique Fa- " vreau n'est pas décédée *intestat* tel qu'allégué dans la dite demande et qu'au " contraire elle a disposé de tous ses biens par son testament solennel reçu de- " vant Mtre. Demuy Notaire et témoins en date du 6 Août 1845, tel qu'elle en " avait le droit par la loi, en faveur de ses enfants au nombre desquels sont les " Demandeurs et Défendeurs qu'elle a institués ses légataires universels ; Vu " qu'il n'appert pas en preuve que les dits légataires universels ont renoncé au " dit legs et vu que les Défendeurs ne sont pas tenus en loi, d'après la preuve " faite en cette cause de payer la légitime réclamée en cette cause, déboute et " renvoie l'action des Demandeurs avec dépens."

Les Appelants dans leur factum ont exposé ainsi leurs prétentions.

Ainsi l'action des Appelants a été renvoyée parce qu'ils n'ont ni allégué ni prouvé que Mde. Sénécal n'avait pas laissé dans sa succession des biens suffisants pour leur fournir leur légitime et parce qu'ils n'ont pas prouvé que les légataires universels de Mde. Sénécal avaient renoncé à leur legs universel.

Que la légitime doive se prendre d'abord sur les biens laissés dans la succession de celui qui par ses aliénations a donné lieu à cette demande, puis sur ceux dont il peut avoir disposé par legs universel, puis par legs particuliers et enfin par donation en commençant par les dernières dans l'ordre de leur date, c'est ce que tous les auteurs enseignent. Mais ce n'est pas à dire pour cela que celui qui demande sa légitime à un donataire, fut-ce le plus ancien, soit tenu d'alléguer et de prouver successivement que le donateur n'a pas laissé de biens dans sa succession, qu'il n'a pas fait de testament ou qu'il n'a pas laissé de légataires,

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soit universels soit particuliers et enfin que les donations subséquentes ne suffisent pas à payer la légitime reclamée. Cette obligation entraînerait nécessairement avec elle celle de discuter successivement d'abord l'héritier ou le légataire universel, puis les légataires particuliers, puis tous les donataires en commençant par les derniers même lorsqu'il y aurait certitude de ne rien avoir ; cela serait absurde.

L'exception de discussion n'étant dans tous les cas où elle peut être opposée que facultative, ne se supplée pas (1.) C'est au débiteur à l'invoquer et cela dans son propre intérêt afin qu'il ne soit pas exposé à des frais inutiles. S'il y avait eu d'autres biens sur lesquels les Appelants devaient d'abord exercer leur légitime, c'était aux Intimés à les indiquer et à en demander la discussion, ce qu'ils n'ont pas fait.

D'ailleurs les auteurs distinguent dans l'action pour légitime deux objets. Le premier qui est de faire fixer et déterminer le montant de la légitime, le second qui est de la faire payer. Pour faire fixer la légitime, le légitimaire peut s'adresser à tous ceux qui ont eu part dans les biens de la succession soit à titre d'héritiers, de légataires ou de donataires pourvu qu'ils aient à rapporter pour composer la masse sur laquelle la légitime doit être fixée. Il peut aussi s'adresser à ceux seulement qui par l'évènement seront tenus de la payer, parce qu'ils sont seuls intéressés comme dans la cause actuelle, les Intimés étant les derniers donataires par ordre de date.—Mais lorsqu'une fois la légitime a été liquidée et comme en faisant la masse sur laquelle elle a été fixée, tous les biens de la succession sont connus, le légitimaire doit suivre un certain ordre pour se faire payer et c'est ce que les auteurs appellent discuter, c'est-à-dire, faire vendre ces biens qui sont en premier lieu tenus à ce paiement, comme s'il s'en trouvait encore dans la succession, dont le défunt n'eût pas disposé, pour ensuite s'ils ne suffisent pas revenir sur ceux qui n'y sont tenus que subsidiairement. Les auteurs n'ont jamais voulu dire autre chose, lorsqu'ils ont parlé de la discussion à laquelle ceux qui réclament leur légitime sont tenus. C'est cette pratique qu'atteste une longue suite de décisions que l'on trouve rapportées par les arrétistes et qui est appuyée de l'opinion des plus célèbres jurisconsultes (2).

(1) Pothier, oblig. No. 410.—Ancien Dénisart, v. Discussion No. 4.—Toullier, T. 6, pp. 376 et 377, Nos. 344 et 347.—Bernard et Lanctot, jugée en appel le 10 Mars 1849.
M. de Lamoignon, dans ses arrêtés au Titre des Discussions, a rédigé sur ce sujet, un article qui est ainsi conçu : " Le bénéfice doit être demandé avant la condamnation définitive et ne peut être suppléé d'office par le Juge."

(2) Journal des Audiences, T. 4, p. 78 et suivantes.—Arrêt du 19 mars 1688.—Action portée contre le premier Donataire.—L'Arrêt de Dubuisson, 2 septembre 1686, est cité. —Discussion opposée.
Idem, T. 4, p. 544.—Arrêt du 5 février 1695.—Demande formée contre deux Donataires. Le Donataire le plus ancien assigne le dernier Donataire pour être déchargé de la demande du Légitimaire.
Idem, T. 5, p. 619.—Arrêt du 26 avril 1706.—Demande formée contre le premier Donataire, qui met en cause le second Donataire pour être indemnisé des condamnations.
Note.—Dans toutes ces causes, il n'est nullement question de discuter les biens de la succession.
Journal des Audiences, T. 5, p. 702.—Consultations et Avis des Avocats, etc.,... alinéas 4, 5, 6 et 7.
Idem, p. 720.—Cause rapportée dans laquelle la discussion d'un second Donataire a été demandée par le premier en date.

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De plus l'énoncé contenu au Jugement que les Appelants n'ont pas allégué ni prouvé que Mde. Sénécal n'avait pas laissé dans sa succession des biens suffisants pour fournir aux Appelants leur légitime, est tout-à-fait inexact, puisque après avoir allégué que par le dit Acte d'accord et transaction et le dit contrat de mariage, la dite Angélique Favreau avait fait des avantages considérables à quelques-uns de ses enfants, savoir ; aux dits Amable Sénécal fils, Toussaint Sénécal et Eugène Sénécal et à la dite Adeline Sénécal, tandis que ses autres enfants et entr'autres les Appelants n'avaient reçu rien d'elle soit par Acte entrevifs ou de dernières volontés, ils ajoutaient :

" Que si la dite Angélique Favreau n'eût pas disposé de *tous ses biens* par acte entrevifs comme elle l'a fait en faveur de ses dits enfants susnommés (les dits Amable, Toussaint, Eugène et Adeline Sénécal, l'Intimée) elle aurait laissé dans la masse de ses biens à partager dans sa succession une valeur d'au moins quarante-quatre mille livres anciens cours." Cet allégué qu'elle avait disposé par acte entrevifs de tous ses biens, semble devoir indiquer suffisamment qu'elle n'avait rien laissé dans sa succession, mais outre cet allégué les Appelants ont prouvé de la manière la plus concluante que Mde. Sénécal n'avait rien laissé dans sa succession et cela par l'Inventaire que les Intimés ont eux-mêmes fait des biens de la dite Dame Sénécal. Cet inventaire ayant été fait avec les Appelants et les autres enfants appelés à sa succession, constate qu'elle ne possédait rien lorsqu'elle est décédée dont elle n'ait disposé par le contrat de mariage des Intimés.

Il est à remarquer que la donation faite aux Intimés était une donation d'immeubles et de tous les meubles qui lui appartiendraient à son décès, en sorte qu'elle ne pouvait laisser aucun meuble dans sa succession et que pour laisser des immeubles il lui aurait fallu en acquérir après qu'elle ne se fût dépouillée par le contrat de mariage du 13 Octobre 1851 de tout ce qu'elle avait, ce qui était tout-à-fait improbable.

Pour ce qui est du second considérant invoqué dans le Jugement, il parait évident que la Cour Inférieure a confondu le légataire avec l'héritier. L'héritier est saisi de la succession du moment qu'elle est ouverte. Il est tenu de renoncer pour se libérer des obligations que lui impose sa qualité d'héritier ou d'habile à se dire héritier. Le légataire au contraire ne se soumet aux conditions et charges du legs que par l'acceptation qu'il en fait (1). L'héritier doit renoncer, car il est saisi de la succession par la mort de son auteur ; le légataire n'a qu'à s'abstenir. Il n'y a donc pas de légataire à proprement parler tant que le legs n'est pas accepté et les Appelants n'étaient pas tenus de produire de renonciations. Il leur suffisait d'alléguer comme ils l'ont fait que les légataires n'avaient pas accepté leur legs, pour mettre les Intimés en demeure de prouver le contraire, s'ils voulait faire valoir ce testament à l'encontre de la demande des Appelants. La testatrice n'ayant rien laissé dans sa succession, ses légataires se sont bien gardés d'accepter un legs qui n'aurait fait que soumettre plusieurs d'entr'eux au nombre desquels se seraient trouvés les Intimés, à rapporter ce qu'ils avaient reçu par acte entrevifs même après la date du testament.

(1) Guyot, Répertoire vo. Légataire.

Ce qui démontre que les légataires n'ont jamais entendu accepter ce legs' c'est que dans l'inventaire qu'ils ont fait faire après le décès de Mde. Sénécal, ils n'ont fait aucune mention de cette qualité de légataires, quoique le testament fût alors connu, puisqu'il a été inventorié avec les autres papiers et titres de la succession.

La troisième raison donnée par la Cour pour renvoyer l'action des Appelants est que d'après la preuve faite dans la cause, les Intimés n'étaient pas tenus de leur payer de légitime.

Pour répondre à cette dernière objection les Appelants soumettent qu'ils ont prouvé ce que la loi exige en pareil cas. Ils ont établi que de son vivant Mde. Sénécal avait fait des donations qui avaient épuisé tous ses biens, que les Intimées les avaient reçu en très-grande parties, qu'elles étaient les dernières qui avaient été gratifiées, que les Appelants n'avaient rien reçu et que par conséquent ils étaient fondés à demander leur légitime e[illegible]ire payer par les Intimés. A tout événement la Cour ne devait pas re[illegible]n mais ordonner qu'un compte fût préparé afin de constater sur qu[illegible]it se prendre la légitime des Appelants, *sauf* à décharger ensuite les In[illegible]action s'ils se trouvaient d'autres biens sur les quels elle dût être payée, c[illegible]ont il n'y avait aucune preuve.

Il semble que la Cour a considéré cette demande de *légitime* comme odieuse et comme devant être repoussée par tous les moyens, puisqu'elle a été jusqu'à suppléer des exceptions qui n'étaient pas plaidées et a s'appuyer sur des raisons auxquelles les parties n'avaient pas même songé.

Cependant il est peu d'actions qui soient aussi favorables que la demande de la légitime. Non seulement elle est fondée sur le texte précis de la Coutume, mais elle est si comforme à l'esprit de notre droit dont toutes les dispositions en matières des successions tendent à faire prévaloir l'égalité dans les partages ou du moins d'assurer aux enfants une juste participation dans les biens de leurs parents, que le sentiment unanime des auteurs est qu'elle doit être reçue favorablement.

" La loi (dit Merlin Repertoire Vo. légitime, Sect, 1.) qui accorde la légitime " aux enfans peut être appelée *non scripta, sed nata lex*; elle est né[illegible] ainsi " dire avec l'espèce humaine; elle a précédé toutes les constitutions civiles et " politiques, et c'est la nature elle-même qui l'a gravée dans le cœur de tous les " pères. On sent en effet que nourrir l'enfant auquel on a donné le jour et lui " laisser de quoi se procurer à lui-même des aliments lorsqu'on ne pourra plus " lui en fournir, sont deux devoirs liés intimment entr'eux, et dont l'un est la " conséquence nécessaire de l'autre."

Et à la Sect. 32, Art. 1. Quest. 1. No. 22. 6 al., le même auteur dit encore: .... " Rien n'est plus sacré dans l'ordre des successions que la " portion d'un légitimaire; et dans le doute le meilleur avis est celui qui le fa- " vorise."

M. Bigot Préamenen, en exposant lors de la discussion du code civil les motifs de cette réserve, s'exprimait ainsi:

" Les pères et mères qui ont donné l'existence naturelle ne doivent pas avoir " la liberté de faire arbitrairement perdre, sous un rapport aussi essentiel, l'exis-

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"tence civile; et si le père doit rester libre de conserver son droit de propriété, "il doit aussi remplir les devoirs que la paternité lui a imposés envers ses enfants "et envers la société."

"C'est pour faire connaître aux pères de familles les bornes au-delà des- "quelles ils seraient présumés abuser de leur droit de propriété, en manquant "à leurs devoirs de pères et de citoyens, que dans tous les tems et chez presque "tous les peuples policés, la loi a réservé aux enfants sous le titre de légitime "certaine quantité des biens de leurs ascendans." (*Locré* T. 11, p. 69, No. 2.)

Sir L. H. Lafontaine, Bart., J. C.—Du mariage d'Amable Senécal avec Angélique Favreau sont nés plusieurs enfants, du nombre desquels se trouvent les trois Demanderesses et la Défenderesse, et feue Sophie Senécal, mère des quatre mineurs Monjeau qui sont aussi demandeurs.

Angélique Favreau, dans la succession de la quelle cette légitime est réclamée par les Demandeurs, avait survécu à son mari, celui-ci étant décédé en Novembre 1849, et sa femme seulement en Mai 1854.

Il est allégué dans la déclaration, entre autres choses, que la dite Angélique Favreau avait, par divers Actes entrevifs, fait des avantages considérables à quelques-uns de ses enfants, savoir à trois de ses fils et à la Défenderesse Adeline Senécal, tandisque les autres enfants, et entre autres les Demanderesses, n'avaient rien reçu d'elle, soit par Acte entrevifs ou de dernières volontés; que, sans ces dispositions entrevifs, la dite Angélique Favreau aurait laissé à partager dans sa succession, des biens d'une valeur d'aumoins 44,000 francs, ce qui aurait fait pour chacun de ces héritiers, au nombre de onze, (les enfants Monjeau comptant pour une souche), une somme de 4000 fr.

Puis la Demanderesse et les enfants Monjeau prétendent que n'ayant rien reçu, ils sont bien fondés à demander leur légitime.

Il est à remarquer que, dans leur déclaration, ils ont allégué que la dite Angélique Favreau était décédé *sans avoir fait de Testament.* Cette assertion a été contredite par les Défendeurs qui ont invoqué et produit un Testament solennel fait par elle le 6 Août 1845, par lequel Testament, après avoir legué aux enfants Monjeau la somme de 300 francs pour être partagée entre eux, elle institue ses dix autres enfants ses légataires universels en propriété, "sujets néanmoins ses dits enfants à rapporter tout ce qu'ils ont reçu par actes de la dite testatrice leur mère afin de s'égaliser entre eux."

Les avantages conferés aux Défendeurs par Acte entrevifs, sont ceux qui résultent de la cession ou donation que la dite Angélique Favreau leur a faite, par leur contrat de mariage du 13 Oct. 1851. 1° d'une terre à Varennes de trois arpents sur trente; 2° d'une certaine coupe de bois; 3° de la jouissance et usufruit, la vie durante de la donatrice, d'un demi-arpent de terre sur neuf; 4° enfin de tous les meubles de ménage, animaux et grains, argents et autres effets et valeurs qui appartiendraient à la dite donatrice lors de son décès, excepté néanmoins ses hardes et linges qui devaient être partagés également entre ses filles lui survivant, sa future épouse (la Défenderesse) non comprise.

La principale question est celle de savoir si, dans les circonstances qui viennent d'être exposées, le droit de légitime peut être valablement reclamé, ou si

au contraire les dispositions du Statut Imperial de 1774 (l'Acte de Québec) et de notre Statut Provincial de 1801 rendent les Demandeurs non recevables à faire valoir cette reclamation.

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"La légitime," porte l'art. 298 de la Coutume de Paris, "est la moitié de telle part et portion que chacun enfant eût eue en la succession des dits père et mère, ayeul ou ayeule, ou autres ascendants, si les dits père et mère ou autres ascendants n'eûssent disposé par donation entrevifs ou dernière volonté: sur le tout déduit les dettes et frais funéraires." C'est, comme on le voit, une portion de ce que l'enfant aurait du avoir *ab intestat.*

L'article 272 de la même Coutume permet à toute personne dûement âgée de disposer par donation *entre-vifs* "de tous ses meubles et héritages propres, acquêts et conquêts à personne capable," et par l'Article 292 lui permet de disposer par Testament et Ordonnance de dernière volonté, de tous ses biens "meubles, acquêts et conquêts immeubles, et de la cinquième partie de tous ses propres héritages, et non plus avant. "La défense de tester au-delà du quint des propres avait donc l'effet de conserver aux héritiers les quatre autres quints c'était une réserve que l'on appelait *réserve contumière,* parce qu'elle était établie par la Coutume elle-même.

Puis, selon l'Article 303, "Père et mère ne peuvent par donation faite entre-vifs, par Testament et Ordonnance de dernière volonté, ou autrement en quelque manière que ce soit, avantager leurs enfants, venans à leur successions, les uns plus que les autres;" et "les enfants venans à la succession de père et mère, doivent rapporter ce qui leur a été donné pour avec les autres biens de la dite succession, être mis en partage entreux, ou moins prendre." Art. 304, "néanmoins," ajoute l'act 307, "où celui auquel on aurait donné se voudrait tenir à son don, faire le peut, en s'abstenant de l'hérédité, *la légitime réservée aux autres.*"

Enfin notre ancien droit établissait chez certaines personnes des incapacités de recevoir par testament etc.

Voyons à présent quelles sont les dispositions de nos deux Statuts de 1774 et de 1801. . . .

On dit dans le premier, Section 10: "Il sera et pourra être loisible à toute et chaque personne, propriétaire de tous immeubles, meuble ou intérêts, dans la dite Province, qui aura le droit d'aliéner les dits immeubles, meubles ou intérêts pendant sa vie, par ventes, donations ou autrement, de les tester et léguer à sa mort par testament et Actes de dernière volonté, nonobstant toutes lois usages et coutumes à ce contraires, qui ont prévalu, ou qui prévalent présentement en la dite Province; soit que tel Testament soit dressé suivant les lois du Canada, ou suivant les formes prescrites par les lois d'Angleterre."

Des doutes s'élèvent sur le sens de cette disposition. Il parait que l'on a prétendu qu'elle n'allait pas assez loin pour faire disparaître les incapacités de recevoir, dont étaient frappées certaines personnes, et abolir toutes les réserves que la Coutume de Paris avait consacrées en faveur des héritiers du sang. On a pensé, et c'est ce que nous a dit l'avocat des Appelants, que l'Acte de 1774 n'avait eu d'autre effet que de donner à la faculté de disposer par Testament la même

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étendue qu'avaient celle de disposer par Acte entre-vifs; c'est-à-dire qu'à l'avenir un Testateur pourrait léguer "tous ces meubles et héritages propres, acquêts et conquets à personne capable," (Art. 272 de la C. de Paris). Supposant donc que ce soit là le seule effet qu'ait du produire le Statut impérial, c'est dumoins reconnaître de la manière la plus formelle qu'il a aboli la *réserve* coutumière des quatre quints des propres dont l'article 292 de la Coutume ne permettait pas de disposer par Testament. Ainsi, si, dans l'Acte déclaratoire de 1801, l'on retrouve le mot *réserve*, il devra nécessairement s'entendre d'une autre réserve que celle des quatre quints.

Les doutes dont je viens de parler donnèrent lieu à la disposition suivante de l'acte de 1801 : "Il est et sera loisible à toutes personne ou personnes saines d'entendement et d'âge, usant de leurs droits, de léguer et disposer, par Testament ou Actes de dernière volonté, soit entre conjoints par mariage en faveur de l'un ou de l'autre des dits conjoints, soit en faveur de l'un ou plusieurs de leurs enfants à leur choix, ou en faveur de qui que ce soit, de *tous* et *chacuns* leurs biens, meubles ou immeubles, quelque soit la tenure des dits meubles, et soit qu'ils soient propres, acquêts ou conquêts, *sans aucune réserve, restriction et limitation*, nonobstant toutes lois, coutumes et usages à ce contraires : Pourvû néanmoins, que le Testateur ou la Testatrice, étant conjoints ou conjointe par mariage, ne pourra tester que de sa part des biens de sa communauté ou des biens qui lui appartiennent autrement, ni préjudicier par son Testament au droit du ou de la survivante, ou au douaire coutumier ou préfix des enfants : Pourvu aussi que le droit de tester, tel que ci-dessus spécifié et déclaré, ne pourra être considéré s'étendre à donner pouvoir de léguer et donner par Testament, ou Ordonnance de dernière volonté, en faveur d'aucune corporation ou autre gens de main morte, excepté dans les cas où telle corporation ou gens de main morte auront la liberté d'accepter et recevoir suivant la loi."

Ce Statut proclame la liberté illimitée de tester; et en fait d'incapacités de recueillir par legs, soit absolues, soit seulement relatives, il établit pour règle génerale qu'il n'y en aura plus, à l'exception d'une seule qu'il laisse subsister; et cette exception ne fait que donner une plus grande sanction à la nouvelle règle qu'il décrète.

Le Testament fait la loi de la famille; et si, par ce Testament, une personne a disposé de tous ses biens, tous ces biens sont soumis à cette loi. Si cette personne n'a fait aucune donation préalable entre-vifs; tous ses biens sont dévolus à titre de succession testamentaire, succession qui doit être recueillie et gouvernée par les dispositions de dernière volonté du testateur, sans que personne puisse avoir le droit de les changer ou modifier quant à leur effet ou à leur étendue. Le statut donne le droit à toute personne de tester de *tous* ses biens, quels qu'ils puissent être soit en faveur de son conjoint, soit en faveur de l'un ou de plusieurs de ses enfants à son choix, ou *en faveur de qui que ce soit*, et cela *sans aucune réserve, restriction et limitation*. Si lorqu'une personne a ainsi disposé par Testament de tous ses biens, l'un de ses enfants pouvait encore, à l'aide de quelques textes de la Coutume de Paris, limitatifs du droit de disposer, réclamer une détraction sur ces mêmes biens, soit à titre de légitime ou à autre titre, le Statut

de 1801, serait *nullifié*, serait *un non-sens.* Au moyen de la diminution que ce droit de détraction aurait l'effet de produire, le testateur n'aurait pas pu de fait disposer de *tous* ses biens *sans réserve, restriction et limitation.* Néanmoins le statut lui en donne la faculté. Donc, toutes les lois antérieures, contraires à l'exercice de cette faculté, ont été abrogées par ce Statut.

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J'ai déja fait remarquer que, dans le système d'argumentation des Appelants eux-mêmes, la réserve des quatre quints des propres avait été abolie par le Statut de 1774. Or à quelle autre *réserve, restriction et limitation,* peuvent s'appliquer ces mots du Statut de 1801, si ce n'est avant tout, et principalement, au droit de légitime de l'Art. 298 de la Coutume de Paris. La légitime est une *réserve* aux termes mêmes de l'un des textes de la Coutume ; "la légitime *réservée,* aux autres," dit l'Art. 307 ; et nous lisons dans MERLIN, Rep. au mot "réserve," "nous entendons, par cette expression, une portion de biens déclarée indisponible par le Code Civil, en faveur de certains héritiers. En consultant les Articles *légitime* et *portion disponible,* on pourra se former une idée de l'ancienne législation relative à la *réserve,* qui était alors comme sont le nom de *légitime,* tant dans les pays de droit écrit que dans ceux de Coutume de Paris, était une *réserve* ; donc le mot "réserve, dans le Statut de 1801, s'applique à la *légitime,* et ce, d'autant plus, 1o. que les Appelants reconnaissent eux-mêmes que l'Acte de 1774 avait déjà fait disparaître la *réserve* des quatre quints des propres ; 2o. que, si le douaire coutumier doit être considéré comme *réserve,* il fait l'objet d'une exception dans le Statut de 1801 ; or cette *réserve* étant la seule que le Statut laisse subsister, donc il a eu l'intention d'abolir, et a en effet aboli toutes les autres *réserves* entre autres celle de la *légitime.* Donc, dans une succession testamentaire, il ne peut y avoir lieu à la *légitime* de la Coutume de Paris, puisque l'exercice de ce droit de *légitime* aurait l'effet par la détraction qu'il entraine sur les biens d'un testateur, de priver ce dernier de la faculté de disposer de *tous* ses biens comme il le veut et l'entend, faculté que néanmoins le Statut de 1801, explicatif de celui de 1774 a eu non seulement l'intention de donner, mais qu'il lui donne en termes exprès.

Remarquons encore qu'aux mots *sans réserve,* le Statut de 1801 ajoute, sans *restriction* et *limitation.* Donc, le législateur a voulu donner à toute personne, capable de disposer par Testament, une liberté illimitée de tester de tous ses biens. Ce serait, néanmoins, contrevenir à l'exercice de cette liberté, si l'un des enfants du testateur pouvait encore, nonobstant la loi portée dans ce Testament, réclamer, à titre de *légitime,* une portion de ces mêmes biens, et par conséquent diminuer à son gré, les forces de cette succession testamentaire. En effet la légitime n'est qu'une quote part des biens et non de l'hérédité (Merlin vo. *légitime,* Sect 2 ¶ 1.)

Mais l'on dira ; la Coutume de Paris a établi le droit de légitime non pas seulement pour le cas où le défunt a fait des dispositions testamentaires, mais encore pour celui où il a fait des donations entrr-vifs, qui, par leur excès, diminuent ou anéantissent la portion à laquelle on avait un droit légal. (Merlin, au mot "Légitime," Sect. 4). Or les Statuts de 1774 et de 1801 n'ayant trait qu'aux donations testamentaires, et non aux donations entre-vifs, l'on prétend

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que celles-ci continuent d'être assujéties à la détraction de la légitime, et que, dans le cas actuel, la dite Angélique Favreau ayant donné entre-vifs, presque tous ses biens aux Défendeurs, les Appelants sont bien fondés à leur demander leur légitime.

Il est vrai que les Statuts de 1774 et de 1801 ont eu principalement pour objet la liberté de tester, et qu'ils ne parlent pas en termes exprès de celle de disposer par donation entre-vifs, néanmoins, la liberté de donner tous ses biens par acte entre-vifs existait déjà sous l'autorité de l'Art. 272 de la Coutume de Paris. Ce droit est reconnu par le mot "donations" que l'on trouve dans ce passage de l'Acte de 1774, "toute personne qui aura le droit d'aliener les dit immeubles, meubles ou intérêt, pendant sa vie, par ventes, *donations*, ou autrement." C'était "la faculté de tester qui était restreinte, et non celle de disposer entre-vifs. Le Législateur de 1774 et de 1801 en faisant disparaître les restrictions à la première, a évidemment voulu mettre ces deux facultés sur le même pied, et leur faire produire les même effets. Il n'y a pas de raison de prétendre qu'il ait pu vouloir qu'une donation fût à l'avenir plus favorable que l'autre, et qu'elle fût soumise à des *réserves* de droit, lorsque l'autre ne le serait pas, l'intention de la nouvelle loi, est que l'on respecte la volonté de celui qui dispose de ses biens, que cette volonté s'exerce librement et sans entrave aucune. Or cette volonté est toujours censée plus libre dans un acte entre-vifs que dans un Testament qui souvent est suggéré, ou arraché à la faiblesse d'une personne mourante.

Si donc le Législateur de 1774 et 1801 a voulu que la donation testamentaire ne fût plus soumise à la détraction de la légitime, et cela, dans mon opinion, résulte pleinement des termes du Statut de 1801, il me semble que la raison qui lui a fait porter ce décrèt doit nous faire supposer qu'il a eu la même volonté à l'égard de la donation entre-vifs.

Ceci paraîtra plus évident, si l'on considère quels seraient les effets de la nouvelle législation, dans le système qui continuerait de soumettre au retranchement les donations entre-vifs pour la légitime des enfants, tandisque les biens recueillis par succession testamentaire n'y seraient pas sujets.

"Les donations entre-vifs," dit Pothier, Don. entre-vifs, Sect. 3, Art. 5 ¶ 5., ne peuvent souffrir du retranchement pour la légitme des enfans du donateur, que lorsque ce sont elles qui y donne atteinte ; et on ne peut dire qu'elles y aient donné atteinte, que lorsqu'il ne se trouve pas dans les biens que le Donateur a délaissés, même dans ceux dont il a disposé par Testament, de quoi la remplir : car s'il se trouve dans ce bien de quoi la remplir, il est vrai de dire que ce sont les dispositions testamentaires, et non les Donations entre-vifs qui y ont donné atteinte ; puisque, si le Donateur n'eût pas fait ces dispositions testamentaires, il y aurait eu, malgré la Donation, de quoi remplir la légitime, et que la donation étant irrévocable, et ayant son effet du jour de la date, il n'a pas dû demeurer au pouvoir du Donateur d'y donner atteinte par des dispositions testamentaires ; ce qui arriverait néanmoins si ces dispositions testamentaires ne devaient être épuisées entièrement pour la légitime des enfants avant qu'on pût attaquer les Donataires entre-vifs. Cela a lieu quand même le Testament au-

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rait été fait avant la Donation ; car il n'est pas plus permis au Donateur de donner atteinte à la Donation, en conservant un Testament précédemment fait, que d'y donner atteinte par un Testament qu'il ferait depuis ; les Testament en quelque temps qu'il soient faits, n'ayant d'effet que depuis la mort du testateur, ils ne peuvent donner atteinte aux Donnation entre-vifs, qui ont effet du jour de leur date."

"Suivant ces principes, lorsqu'après toutes les dettes acquittées, mêmes après avoir pris ce qui était nécessaire pour remplir les enfants héritiers de ce qui leur restait dû par le défunt, s'il ne reste pas dans les biens dont le défunt a disposé de quoi remplir la légitime de quelqu'enfant, elle doit se prendre d'abord sur les légataires universels, qui doivent la fournir avant les légataires particuliers, car ils ne sont légataires que de ce qui reste après les legs particuliers acquittés ; ensuite tous les légataires particuliers y doivent contribuer, chacun au sol la livre de leur legs : car tous les legs n'ayant d'effet que du jour de la mort du testateur, ils sont censés avoir une même date, et aucun ne peut avoir une même date, et aucun ne peut avoir d'avantage sur l'autre ; les légataires pour cause qui n'ont pas même à cet égard plus d'avantage que les autres."

"Si, après que tous les legs ont été épuisés, il manque encore quelque chose à la légitime de l'enfant à qui elle est due, il peut demander ce qui en manque aux Donataires entre-vifs, en commençant par celui qui est le derniers en date."

"Les Donations antérieures ne peuvent souffrir de retranchement pour la légitime, que les postérieures ne soient épuisées ; car tant qu'il reste de quoi les remplir dans ce qui a été donné postérieurement, il est vrai de dire que ce ne sont pas les Donations antérieures qui y ont donné atteinte."

L'on voit que la nouvelle législation est entièrement contraire à l'ancienne. Une donation entre-vifs, si elle doit continuer d'être assujettie à la détraction de la légitime, devra de suite subir cette détraction, bien que le Donateur ait laissé, dans sa succession testamentaire, à des légataires universels ou particuliers, des biens plus que suffisants pour fournir la légitime. Ce ne serait plus subsidiairement, mais en premier lieu ; que le légitimaire attaquerait la Donation entre-vifs. La position du Donataire ne serait donc plus celle que lui avait faite la Coutume de Paris, et si elle est changée, c'est parce que la loi sur la matière l'a été aussi. Je pense donc que ne pouvant y avoir, d'après la nouvelle législation, de légitime sur les biens donnés par Testament, il ne doit pas être permis de la prendre en pareil cas sur ceux donnés entre-vifs, on peut encore dire qu'on doit présumer que la volonté du père ou de la mère, qui fait un Testament disposant de tous les biens qu'il laissera, a été que ses enfants n'eussent pas de légitime ni sur ces biens, ni sur ceux donnés auparavant entre-vifs. S'il en devait être autrement, c-à-d si, dans ce cas, la donation entre-vifs devait subir la détraction de la légitime, la conséquence serait qu'un Donateur qui aurait à laisser à son décès assez de biens pour fournir la légitime sans que le Donataire entre-vifs fût exposé à être troublé à cet égard, pourrait néanmoins, en faisant un Testament, changer l'effet de la Donation entre-vifs en assujettissent par cela même le Donataire à un retranchement. Tel serait le résultat inévitable dans l'hypothèse que j'ai posée ; résultat qui non seulement est loin d'avoir été pré-

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vu par le Législateur [illegible] 1774 et 1801, mais qui est tout-à-fait contraire au but et à l'esprit de sa loi.

On nous a cité deux causes, l'une décidée par la Cour du district des Trois-Rivières, en 1821 (Houde vs. Duval) et l'autre décidée à Montréal en 1849 (No. 2121 Lefebvre et ux. vs. Boyer) (1) dans lesquelles le droit de légitime a été reconnu. Dans la première la défense ne souleva pas la question, dans la seconde, la cour déclara qu'il n'y avait pas lieu d'accorder la légitime, la donation étant regardée comme onéreuse, et n'ayant de donation que le nom.

Je dois faire remarquer que, dans l'une et l'autre cause, on ne représentait pas de Testament des Donateurs ; et je dois ajouter que, quoique j'aie exprimé ci-dessus l'opinion que, même dans un tel cas, l'esprit de notre nouvelle législation est de ne pas admettre le droit de légitime, la question ne laisse pas néanmoins que de souffrir des doutes.

Jugement confirmé.

(1) 1st vol. L. C. [illegible]

Cherrier, Dorion et Dorion, [illegible] Appelants.

Ouimet, Morin et Marchand, [illegible]

(P. R. L.)

SUPERIOR COURT.

MONTREAL, 30TH APRIL, 1858.

Coram SMITH, J.

No. 1340.

The Bank of British North America, vs. *Cuvillier, et al.*

1. A deed of warranty will not cover a class of debts not contemplated by the parties at the time it was executed—though the terms of the deed be so general, as to purport to extend to all debts whatsoever.
2. If the recital of a deed of warranty indicate the purpose for which the deed is executed ; its effect will be restricted to that purpose, though the dispositive portion of the deed be couched in general terms.
3. A deed of warranty stating that M. C. proposes to carry on business in Montreal and elsewhere ; and that to enable him to do so, and to meet the engagements of a firm in liquidation of which he had been a partner, he would require Bank accommodation ; and that the sureties were willing to become his security with a view of making the Bank perfectly secure with respect to any debts then due or which might thereafter become due by him : and then containing an agreement by the sureties to become liable for all the present and future liabilities of the said M. C., whether as maker or drawer, endorser or acceptor of negotiable paper, or otherwise, howsoever : will not make the sureties liable for debts contracted by the said M. C. by endorsing, or procuring the discount of, negotiable paper in his own name for the benefit of a firm of which he became a member subsequent to the execution of the deed of warranty ; although such paper had been discounted at his request, and placed to his individual credit in the Bank.
4. A defendant may be a witness for his co-defendants, if he be not interested, or if his interest be removed by a discharge.

In July 1849, the Defendant Maurice Cuvillier as principal, and the other Defendants as sureties, executed a deed of agreement between themselves of one part, and the Plaintiff and the Bank of Montreal of the other, to the effect following to wit :—

That the late Austin Cuvillier, and his sons Austin and Maurice, [illegible] trade extensively under the firm of Cuvillier and Sons until the 11th [illegible] July, when the firm was dissolved by the death of Austin, the father.

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That Maurice hath since carried on, and proposes to carry on trade and commerce at Montreal and elsewhere.

That to enable him to do so, and to meet the engagements of the said late firm of Cuvillier and Sons, he will require discounts and pecuniary assistance to a considerable extent from the said Banks; and that with a view of making the Banks perfectly secure with respect to any debts which now or hereafter may be due to them respectively, by the said Maurice Cuvillier; and with respect to the present and future liabilities of the said Maurice Cuvillier to the said Banks respectively, the said parties (sureties) are willing to become security to the said Banks as herein before set forth.

Now therefore the parties (sureties) do hereby make themselves jointly and severally liable to the said Banks for all debts heretofore contracted, or that may hereafter be contracted to and in favor of the said Banks by the said Maurice Cuvillier; and generally for all the present and future liabilities of the said Maurice Cuvillier towards the said Banks, whether as maker or drawer, endorser or acceptor, of negotiable paper, or otherwise, and whether resulting from discounts, pecuniary advances or any other cause whatever—they obliging themselves to meet and pay the said present and future debts and liabilities of the said Maurice Cuvillier, as if they were the principal debtors thereof.

In 1851 Maurice entered into partnership with Austin, under the firm of A. Cuvillier & Co.

In 1852, Edward Chaplin became a partner in the firm, which continued under the same name.

In 1853, Maurice became a partner in the firm of Bull & Co., of Belleville in U. C., but retained his connection with the firm of A. Cuvillier & Co.

At the time he became a parter of Austin's, the estate of A. Cuvillier & Sons had been wound up and closed, by the purchase of its assets by Maurice and Austin: and at the same time Maurice ceased to carry on any business on his individual account—apart from that of the firm. The Bank account, however, which he had previously opened with the Plaintiffs was continued in his name, and the financial accommodation required by A. Cuvillier & Co., or Bull & Co., was obtained in his name, either by his endorsing the paper of those firms or their customers' paper; or by obtaining letters of credit for their benefit: the Plaintiffs having refused to open an account with either of these firms. A. Cuvillier & Co's funds were deposited to the credit of Maurice in this account, and their Bills receivable, payable to their order, were discounted by Maurice, he superadding the endorsement of his own name to that of the firm.

In the latter end of 1854, the firm of A. Cuvillier & Co. became insolvent, and there was then in the hands of the Plaintiffs certain negotiable paper made in October and November, 1854, for the amount of which the present action was brought, as well against Maurice Cuvillier, as against his sureties under the deed already referred to.

The paper consisted of four drafts by C. H. Castle upon M. C. accepted by him; a promissory note payable to and endorsed by the firm, and afterwards by Maurice; and three drafts drawn by the firm upon H. Bull & Co., and endorsed

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by Maurice. All of which paper was procured to be discounted by Maurice, and placed to the credit of the account kept in his name as already mentioned. The Defendants severed. Maurice confessed judgment; but the sureties set up as a defence to the action, that by the terms of the deed and the intention of the parties, the suretyship was confined to liabilities incurred by Maurice either for his individual business, or for that of A. Cuvillier & Sons, in liquidation: that the paper in question was not accepted or endorsed by Maurice for either of those purposes, but for the benefit and use of the firm of A. Cuvillier & Co., and in fact was not intended, or used, for any purpose which would make the sureties liable for it, under the terms of the deed: the whole to the knowledge of the Plaintiffs.

Dunkin, for Plaintiffs, relied entirely upon the terms of the bond, which he considered were so full as to admit of no exception nor limitation. The mere statement in the recital that Maurice was then carrying on, and proposed to carry on, business at Montreal, was no limitation as to the future, and was not true in fact, for it was proved that he was not then carrying on any business whatever: and there was nothing to shew that this business was to be carried on individually or singly. He was certainly carrying on business in the ordinary and well understood sense of the term, when he did so as merchants usually do, viz: by forming a partnership; and the deed was so worded, as properly to bear the construction, that the sureties were to be responsible for all the debts he might contract, in carrying on business of any kind with the Plaintiffs. It made them responsible, in so many words, for all paper which he should draw, accept, or endorse; terms which covered every item of the debt for which they were now sued. Moreover it was in evidence that all the paper sued on was discounted at the request, and placed in the Bank to the individual account, of Maurice Cuvillier. Maurice Cuvillier was incompetent as a witness, for he was interested to prevent a judgment against his sureties, as they would then bring an action against him; and though the mere fact of his being a defendant would not absolutely exclude him, yet his position as such, justified a severe scrutiny of his liabilities towards the sureties.

Berthelot pour les défendeurs soumit les propositions suivantes :—

Qu'il s'agissait d'un cautionnement, contrat de droit étroit, qui ne pouvait être étendue d'un cas à un autre, ou d'une personne à une autre ; et que pour en faire l'interprétation, la cour devait être guidée par les règles du plus strict droit.

Que dans un pareil contrat, l'on ne pouvait rien présumer, ou suppléer, et que l'on devrait se renfermer dans les termes mêmes du contrat, et rechercher ce que les *parties* avaient en vue, au temps de leur engagement, et rien au delà.

Que les cautions dans l'espèce, et à la date de l'acte par elles souscrit, n'avaient eu en vue que d'assurer le règlement des affaires de feu l'honorable Mr. Cuvillier, dont Mr. Maurice Cuvillier était resté chargé ; et du commerce que ce dernier ferait en son nom seul, en sa capacité personnelle et individuelle, et qu'elles n'avaient pu aucunement avoir en vue, d'assumer la responsabilité qu'il pourrait encourir quelques années plus tard, non seulement comme l'associé commercial d'autres personnes dans Montréal, mais encore la responsabilité qu'il en courrait comme tel, dans plusieurs pays étrangers, ou plusieurs places différentes.

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Que la banque de l'Amérique Britannique, et son caissier Mr. Davidson, avaient été informés que les affaires de la succession de feu Mr. Cuvillier avaient été réglées, et que Maurice Cuvillier ne faisait pas d'autres affaires que celles qu'il faisait comme associé de la maison "A. Cuvillier & Cie," et que la demanderesse ne pouvait en ce cas, retirer aucun avantage de la lettre de crédit à l'encontre des cautions ; qu'autrement ce serait encourager la dissimulation et la mauvaise foi.

Que Maurice Cuvillier était un témoin compétent n'ayant pas un intérêt personnel et direct dans la contestation, depuis l'acte de décharge à lui consenti par les défendeurs ses cautions.

AUTORITES.

Pothier, Cautionnement. Nos. 365, 370, 404, 405.
Domat, Des Cautions, Liv. 3 Tit. 4, Sect. 1, No. 5.
Lacombe, Recueil de Juris : Verbo. Caution p. 61.
Nouveau Denisart. Caution, pages 319, 322.
Ancien Denisart, Caution, p : 400. Nos. 6, 32, 37.
Argou. Tom 2 des Cautions, p. 315.
Troplong. Cautionnement, Nos. 133 et suivants, Nos. 150 et suivants, et No. 164 et suivants.
Ponsot. Du Cautionnement, Nos. 27 et suivants, Nos. 88 et suivants.
Sur l'admissibilité de Maurice Cuvillier comme témoin.
Précédent No. 1095 Dorion vs. Workman et al—C. S. Montreal.

Abbott, for Defendants submitted and commented upon the following propositions and authorities :—

I.—As between the creditor and the surety the contract is *strictissimi juris*.

Burge on Suretyship, pp. 46, et. seq. and authorities there cited, both from the civil and common law.

II.—A change in the position, or status of the debtor *quoad* the employment or business in respect of which the bond has been executed, relieves the surety ; unless the creditor shows conclusively that such change was contemplated when the contract was made.

Simpson vs. Cook, 1 Bingham, 452 ; Burge, 69 ; 1 Bell's Comm. 370 ; Liverpool Water Co., vs. Atkinson 6 East 512 ; Anderson vs. Thornton, 3, Q. B. 276 ; Hassel vs. Clarke, 2 M. & S. 363 ; Bellairs vs. Ebsworth 3 Campbell, 52 ; Peppin vs. Cooper, 2 B. & Ad. 427 ; 7 Louisiana Rep. (O. S.) 103. ; Addison on contracts, 665, 666 ; Evans vs. Earle, 23 Law Journal (exc.) 265.

III.—The creditor has the *onus* of proving that any change of condition was contemplated at the time of executing the Bond.

Simpson vs. Cook, Loc. Cit.

IV.—The recital in a bond, as being expressive of the facts and circumstances influencing the intentions of the parties, will control the condition of it.

Bell vs. Bruen, 17 Peters, 161, Parker vs. Wyse, 6 M. & S. 239, 247 ; Pearsall vs. Summersett, 4 Taunton, 593 ; Addison on contracts (Ed. 1857,) pp. 662 to 666.

APPLICATION.

I.—When the bond was executed, Maurice Cuvillier's position was that of a person individually carrying on "trade and commerce" and winding up the estate of a dissolved partnership.

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II.—His position was changed materially, *quoad* his business, and the probable amount of his undertaking and liabilities, by ceasing to carry on trade and commerce individually; by completing in 1851 the winding up of the estate in liquidation; and by afterw[illegible] three successive copartnerships.

III.—The liability incurred b[illegible] name in the manner proved, was that of a surety for A. C[illegible] Co.

IV.—No proof, nor even any presumption of these changes having been contemplated by the sureties has been offered by the Plaintiffs; but the contrary appears by the recital in the deed.

The sureties therefore must be relieved.

Again,—

I.—The debt now claimed is proved to be a debt incurred for the benefit, and on the behalf of A. Cuvillier & Co., and this to the knowledge of the Bank; and to form part of Bank accommodation furnished by the Bank for the support of this firm.

II.—Maurice Cuvillier as a member of the firm of A. Cuvillier & Co., being indebted to the Bank as onerously as he could be; the addition of his name as endorser could bind him no more, and no otherwise than he was already bound.

III.—But it is not contended that the sureties are liable for A. Cuvillier & Co.'s debts.

IV.—The name of Maurice Cuvillier, therefore, could only have been placed on the paper for the purpose of bringing the transactions within the letter of the deed, they being admittedly not within the spirit and intent of it.

V.—To permit such a device to succeed, would not be to treat the contract as one *strictissimi juris*, but the reverse. It would be giving it the broadest literal construction possible, as against the sureties, contrary to those principles of Law which enunciate a directly contrary rule of interpretation.

The sureties therefore must be relieved.

Maurice Cuvillier, though a Defendant in this case, was admissable as a witness for his sureties;—having confessed judgment and received from them a discharge as to costs.

1 Greenleaf on evidence, 356; Worrall vs. Jones, 7 Bingham, 395; Pipe vs. Steele, 2 Ad. & E. N. S., p. 734.

Smith, J.—(After stating the facts, and pleadings,)—The first point to be decided is the construction to be put upon this bond. The Plaintiffs are under the impression that it is a deed of suretyship *in omnem causam*, covering all debts due by Maurice Cuvillier, and they do not [illegible] up the nature of the value given for the paper in question. The Defendants consider, that their liability [illegible] restricted to debts contracted by Maurice Cuvillier individually for his own business, or the winding up the estate of his former firm. To arrive at a correct opinion upon this point, the whole deed, which is an extremely loose one, must be looked at. It is true that in the *dispositif* part there is no limitation; the words are as general as they can be made—but the recital also must be read, and the only proper mode of settling the question, is to take the recital as indicating the intentions of all parties—and controlling the body of the deed within

the limits of those intentions. To do otherwise, would be to extend the effect of the deed beyond the intentions of the parties themselves, and to make the obligations of the sureties apply to transactions, which it is impossible to suppose the parties ever contemplated.

The limitation contended for by the Defendants, must therefore, be adopted; and it only remains to ascertain whether or not the debts now sought to be recovered, fall within the two classes to which the obligations of the sureties extend.

The learned Judge, then proceeding to examine and comment upon the evidence, stated the result of it to be,

1. That the paper in question was all negotiated for the firms of A. C. & Co., and H. Bull & Co.

2. That the business of the old firm had been long previously wound up.

3. That Maurice carried on no individual business.

4. That he was trading as a partner in the firms of A. C. & Co., and H. Bull & Co.

5. That the account kept with the Plaintiffs in Maurice's name, was for A. C. & Co., and consisted of deposits of their funds, and financial operations for their benefit.

6. That the Plaintiffs were aware of those facts.

There could be no question, therefore, that the debts, though nominally incurred by Maurice, were in reality those of A. C. & Co.; and that the account was kept in his name, and his endorsation taken, for the purpose of holding the sureties.

But it is contended by the Defendants, that by thus putting his individual name upon the paper, the debts became his, and were brought within the bond. How was Maurice's liability altered by endorsing? He was already liable as a partner, and could not be made more so, and his position was not altered in the least. The nature of the debt could not be changed by any process of that kind, nor could by such means the obligations of the sureties be extended beyond the intention fairly deducible from the deed. The competency of a Defendent to be a witness, if not interested, was settled in Dorion vs. The Savings Bank.

The action must therefore be dismissed.

Bethune & Dunkin for Plaintiffs.

Cartier & Berthelot for Defendants.

Abbott, Counsel for Defendants.

J. J. C. A.

IN APPEAL.

FROM THE DISTRICT OF MONTREAL.

MONTREAL, 8TH JUNE, 1858.

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

No. 119.

SULLIVAN, (*Defendant in the Court below,*) APPELLANT.

AND

SMITH, (*Plaintiff in the Court below,*) RESPONDENT.

NOTICE OF MOTION.

Held.—That a notice subsequently given of security in appeal is a waiver and revocation of a notice of such security already given for a previous day.

The Plaintiff recovered judgment in the Court below. On the 15th May, 1858, following, being a Saturday, the defendant by his attorney, B. Devlin, Esquire, gave notice to R. & G. Laflamme, Esquires, attorneys of plaintiff, that on Monday then next, the 17th May, 1858, the defendant would enter security for the costs of an appeal from the judgment. Immediately afterwards, on the same Saturday, the defendant gave notice that on Tuesday then next, the 18th May, 1858, he would enter security for the costs of an appeal from the judgment, naming for his sureties the same individuals whom he had named in his first notice.

On Monday, the 17th May, 1858, the defendant entered security in the terms of his first notice.

On the 1st June, 1858, the plaintiff, respondent in the higher Court, made a motion before the Court of Appeals, that the notice given by the appellant on the 15th May, 1858, for Monday morning, the 17th May, be declared irregular, insufficient, and contrary to law, and that the security by said appellant on said notice be declared irregular, insufficient, and irregularly produced, and that, in consequence, the appeal be dismissed with costs, for reasons given in the motion.

The judgment in appeal was recorded in the following terms:—

"La Cour . . . . après avoir entendu les parties par leurs avocats, sur la motion faite par l'intimé le 1er. jour de Juin courant, que l'avis donné par l'appellant en cette cause le 15 Mai dernier pour lundi matin à neuf heures, le dix sept du même mois et annexé au writ d'appel soit declaré irregulier, et insuffisant, et contraire à la loi et que le cautionnement par le dit appellant sur tel avis, soit declaré irregulier, insuffisant, et irregulierement produit, et qu'en consequence, l'appel soit renvoyé avec dépens pour les raisons contenues en la dite motion, considérant que le dit avis sur lequel le cautionnement de l'appelant à été ainsi donné avait été abandonné par le dit appelant et était sans effet et censé mis au néant par un avis subséquent donné par le dit appelant informant le dit intimé, que le dit appelant produirait les mêmes cautions le mardi le dix huit du dit mois de Mai: En conséquence déclare le dit cautionnement irrégulier et insuffisant et déboute l'appel interjeté en cette cause, avec dépens contre l'appelant en faveur du dit Intimé et ordonne le renvoi du dossier à la Cour Supérieure siégeant à Montreal. Appeal dismissed.

Devlin for Appellant.

R. & G. Laflamme for Respondent.

(F. W. T.)

CIRCUIT COURT.

MONTREAL, 11TH MAY, 1858.

Coram C. Mondelet, J.

No. 309.

Read v. *Birks.*

Held,—That an action upon a contract made by an agent in his own name may be brought in the name of the principal.

This was an action of assumpsit to recover the sum of £15 3s. 10d., the price of a hogshead of high wines sold and delivered to the Defendant. The Defendant pleaded that he had not bought from the Plaintiff, but from one G. D. Watson and produced an account rendered to him in Watson's name. The Plaintiff answered that Watson was acting as his agent and sold for his account. At the trial it appeared from W's. evidence (who was examined first on the *voir dire* as to his interest) that the sale was made by him in his own name, without mentioning any principal, and that the account was also rendered in the same manner. He also proved his own agency and that the goods were the property of the Plaintiff.

Popham, for Defendant, contended that the Plaintiff could not sue on the contract as proved.

Lunn, for Plaintiff, cited *Smith's Mercantile Law*, p. 189 (Amer. ed.)—"If "an agent, acting for an undisclosed principal, have made a contract in his own "name, the principal may sue upon it, and it follows as a branch of this rule that, if "a person lend money nominally on his own account but really on account "and as the loan of another, the real lender may sue for the money: but in such "a case the Plaintiff who alleges that he was in reality the lender, must prove "that fact clearly and distinctly."

Mondelet, J., said there could be no doubt that this was the correct principle. Judgment for Plaintiff.

Hemming & Lunn, for Plaintiff.
J. Popham, for Defendant.
(A. H. L.)

SUPERIOR COURT.

IN CHAMBERS.

MONTREAL, 9TH APRIL, 1858.

Coram Day, J.

No. 2444.

Hogan et. al. v. *Gordon.*

Hogan, et al., v. Gordon.

Held,—That petition for liberation from arrest under *ca. ad resp.*, concluding that *capias* be quashed cannot be entertained by Judge in vacation, for want of jurisdiction.

The Defendant presented a petition in Chambers for his discharge from arrest under *capias ad respondendum*, alleging that the allegations of the affidavit for *ca-*

Hogan, et al., v. Gordon.

pias were untrue; that he is a minor; that at the time of the arrest he had not the means of leaving the province,—and that he never had any intention of leaving the province with a view to defraud any of his creditors. And concluding that the *capias* be quashed and the Defendant liberated.

The Plaintiff answered in law that the matters alleged in petition could not be urged after final judgment rendered.

Day. J., was of opinion that the matters alleged could not be taken cognizance of by a Judge in vacation, he having no jurisdiction. The conclusion of the petition was, that the *capias* be quashed. If the Defendant could obtain this at all, it must be by a motion in term. Petition rejected with costs.

A. H.

IN CHAMBERS.

MONTREAL, 17TH APRIL 1858.

Coram C. MONDELET, J.

The same parties.

Held,—That exceptions to the affidavit for *capias*, or the matter therein disclosed, cannot be taken after final judgment rendered.

On the 15th April, 1858, a second petition was presented by the same Defendant setting forth that the allegations of the affidavit were false; and that Plaintiff had not, at the time of the arrest, sufficient reasons for the belief, that the Defendant was about immediately to leave this province with fraudulent intent; and concluding merely for his liberation from arrest.

The Plaintiff by answer in law contended that the Court could not after final judgment, pronounce upon the validity or invalidity of the arrest, and that the Plaintiff could not be compelled after final judgment to enter upon an *enquête* to substantiate the allegations of the affidavit.

Mondelet, J., had examined the English authorities, particularly the Statute 1 and 2 Vic., cap. 110, of which our Statute is almost a transcript, and also the decisions there. Had also consulted with the other Judges, and they were unanimously of opinion, that the petition must be rejected as coming too late. The Judges in England had held that exception to the arrest, upon the grounds stated in this petition, must be taken within eight days after the arrest. Here the practice had been to allow the Defendant arrested that privilege at any time during the pendency of the suit, but there could be no doubt that a petition presented after final judgment rendered, came too late. The Court is no longer seized of the cause, and cannot entertain a proceeding, the object of which is, to test the legality or sufficiency of an incident of the suit.

Petition rejected with costs.*

* *Vide* 5 M. and W. 30.

Rose & Monk, for Plaintiff.
J. K. Elliot, for Defendant.
(A. H.)

MONTREAL, 27th MARCH, 1858.

Coram C. MONDELET, J.

No. 2515.

Strother v. *Torrance*,

PRESCRIPTION UNDER 10 & 11 Vic., Cap. 11.

Held, 1o. that the prescription of six years under 10 & 11 Vic. Cap. 11 is applicable to the action of a purser of a steamboat for wages:

2o. That such plea is not waived by pleas of payment and compensation.

The declaration of the Plaintiff alleged that the Defendant was proprietor of the Steamer "Otttawa" plying between certain ports in this province, and sought to recover from the defendant £48 16s. 9d. cy. alleged to be due for the Plaintiff's services on board that steamer as purser in the years 1849 and 1850, at the request of the Defendant.

The Defendants met the action by six pleas.

The FIRST PLEA alleged that the Defendant at the period in question was not owner of the steamer, but that the owners then were John Torrance, David Torrance, James Torrance, John Andrew Torrance, and Lonson Hilliard, and that the alleged causes of action accrued against them and not against the Defendant.

The SECOND PLEA invoked the prescription of six years under the Statute 10 & 11 Vic. Cap. 11.

The THIRD PLEA invoked the perscription of one year against the Plaintiff's demand as being a demand for wages, alleging their payment before action, and and offering to make oath of the same.

The FOURTH and FIFTH PLEAS were pleas of offset and compensation.

The SIXTH PLEA was the *défense au fonds en fait.*

After the evidence taken the parties were heard.

PER CURIAM.—The plea of prescription of six years is the plea on which the action is dismissed.

The Court does not regard the further pleas of payment as any waiver of the other pleas.

The judgment as recorded was as follows:—

"The Court &c. * * * * * * * * * *

Considering that the Defendant has justified of and proved his second Plea, to wit, that there hath accrued to him and in his favour and against Plaintiffs' demand a prescription of six years, by and in the virtue of the Provincial Statute 10 & 11 Vic. Cap. 11 whereby and by the effect whereof the Plaintiff at the time he instituted the present action had no right in law so to do.

And considering further that the Plaintiff hath not proved that there hath been any interruption to the said prescription, doth dismiss the Plaintiff's action with costs.

Action dismissed.

Devlin & Fleming for Plaintiff.

Cross & Bancroft for Defendant.

(F. W. T.)

Berthelet v. Guy.

SUPERIOR COURT.

MONTREAL, 27TH FEBRUARY, 1858.

Coram BADGLEY, J.

No. 138.

Berthelet v. *The Montreal and Bytown Railway Company & Guy & al.* opposants.

SEIZURE OF LAND,—CONTENTS.

Held that an advertisement by the Sheriff of the Seizure of land, of which land the contents are not stated in said advertisement, is defective, and gives ground for an opposition *à fin d'annuller*.*

The Plaintiff having obtained judgment against the Montreal and Bytown Railway Company for the price of a sale of land, had the land taken in execution by the Sheriff for payment of the judgment.

In the *procès verbal* of Seizure and the publications of the Sheriff, the land was described as follows;

"Un Lot de Terre situé dans le Faubourg St. Louis de la ville de Montréal, de la contenance qu'il peut avoir tant en front qu'en profondeur, et renfermé dans les limites suivants, savoir: depuis la rue Mignonne jusqu'au pied du Côteau Barron à la clôture de division entre le dit Terrain et celui de Joseph Charles Hubert Lacroix, écr., et entre la propriété du dit Joseph Charles Hubert Lacroix, du côté Nord-Est, et celui de l'hon. D. B. Viger, du côté Sud-Ouest; sujet néanmoins à l'arrangement fait par les Exécuteurs-testamentaires Louis Guy et le dit Lacroix, devant Lamontagne, Notaire, à Montréal, le vingt-unième jour d'Octobre, mil huit cent cinquante-cinq, pour une ruelle commune, chacune des parties au dit arrangement fournissant dix pieds français sur leurs propriétés respectives."

The opposants fyled an opposition *à fin d'annuller* to the seizure. They alleged in substance in this opposition that on the 29th December, 1856, they had sold to the Railroad Company the land seized for £4000 cy., and that they had transferred this amount to the plaintiff to pay him his claims to that amount against the succession of Louis Guy, the plaintiff having his recourse against the succession for the amount which he should fail to recover from the Company. That the plaintiff had obtained judgment against the Company under the transfer, and had seized the land sold; but that the *procès-verbal* of seizure and the publications did not mention the contents of the land seized, and that this omission was of a nature to affect the sale and the price that the land would bring, inasmuch as the extent of the land could only be known by intending purchasers by a regular measurement, and that consequently the seizure was null.

The plaintiff CONTESTED the opposition alleging that the description was sufficient, that it was contained in the deed of sale given by the opposants themselves to the Railroad Company, and finally that the opposants could not demand the nullity of the seizure but only the rectification of the description.

At the argument, DORION for the opposants contended that the description of the land was insufficient inasmuch as the contents were not given nor the size

* Reversed in appeal, 4th June, 1858.

Berthelet v. Guy.

or position of the lane mentioned in the description; that the question here was not respecting an ordinary city property of which the simple indication of the name, the sign, or the number of the street would suffice to make it perfectly known; it was a property in the country, a field of considerable value, containing about 12 arpents in superficies. How could the purchaser know what he was buying, if the extent and contents were not made known. Must he buy at hazard? then the price must be chance price, and the parties interested, must be exposed to caprice, what the law did not permit, especially in the case in question in which the interests of an unsettled succession were in question.

Authorities of Opposants;—

Coutume de Paris, Art.: CCCXLVI.

Ferrière, Do., Tome IV, p. 1298, par. 1 et 8 du sommaire.

Héricourt, Ventes des Immeubles, pages 307 et 308.

Bruneau, Traité des criées, page 30.

Carré et Chauveau, Procédure Civile, Tome V, Question 2228.

Barnard for plaintiff said that it was to be remarked that the opposants themselves did not give the exact contents of the land, they only said it was very near twelve arpents. The mention of the contents was not required by any law; all that the 346th article of the Custom required was the mention of the "*tenans et aboutissans.*" The opposants had not proved any of the allegations of their opposition. If the opposants had proved that there really was danger that the sale of the property in consequence of the omission in question would be less advantageous, and that they had offered to pay the costs of a single advertisement (for what need of three advertisements?) their pretension would have been reasonable enough, moreover the appellant would have had to submit to but a short additional delay, and would not have been otherwise injured. But here the nullity of the seizure was a right the opposants contended they could exercise: if the contents required to be mentioned in the procès verbal of seizure and in the publications, on pain of nullity, it would follow that the validity of the seizure would depend upon the exactness of the statement of contents, and the institution of actions *en bornage* would be a preliminary to the seizure of the most of immoveables. If the opposants were well founded, all the sales by the sheriff, against which such an objection could be urged, might be called in question.

He would remark in conclusion that the opposants had cited authors writing under the empire of the code which would appear to require but not *à peine de nullité* that the contents of land in the country parts should be stated. Here the property seized was a property situated in the city of Montreal and moreover the code did not govern us. Besides, the opposants cited the old authors attaching to the word "*consistance,*" which the authors used, the meaning of the word "contenance," which was a manifest error.

Authorities relied upon by Plaintiff.

Ordre du 3 Sept. 1551 (Henri 2,) art. 1er. Huissier ou Sergent tenu lors de la saisie de déclarer et spécifier par le menu en icelle saisie et première criée par *tenans et aboutissans.*

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1 Duplessis, p. 630. Par tenans s'entend en expliquant la situation de chaque fonds et ses confins.

Pothier, Proc. Civile. De la saisie réelle, "Jamais l'étendue et la contenance ne peuvent être si bien désignées que par les tenans et aboutissans."

Voyez surtout Ferrière, sur l'art. 346.

2 Bourjon, p. 713.

Orléans, 466.

Héricourt, 6, 12.

1 Pigeau, Proc. Civile, p. 701.

6 Wm. 4, Cap. 15 for form of advertisement.

Per Curiam.—This is the case of a seizure of land in which the boundaries are given but not the contents. The land is in the City of Montreal, and valuable. On the authorities, I think the opposition well founded.

The judgment was recorded in the following terms;

"The Court, * * * * * * * * * * * * * * * * *

Considering that the said Opposants are interested in the piece or parcel of land under seizure by the Sheriff of this District at the suit of the Plaintiff against the Defendants and in causing the same to realize and bring the highest price that can be obtained therefor, and considering that for that purpose the contents of the said piece of land, should have been contained in the advertisement thereof by the said Sheriff and further considering that the said advertisement is defective and not in conformity with law from want of specification of the contents of the said lot of land, doth maintain the seizure of the said lot of land, made by the Sheriff, and doth order that the said lot of land be advertised *de novo*, in the manner and for the time required by law, and that in the said advertisement there be inserted therein the contents of the said piece or parcel of land in addition to the bounds and limits and description of the same in and by the advertisement already made, each party paying their own costs."

Cherrier, Dorion, & Dorion, for Opposants.

Laflamme, Laflamme & Barnard, for Plaintiff.

(F. W. T.)

COURT OF QUEEN'S BENCH.

IN APPEAL.

FROM THE DISTRICT OF MONTREAL,

MONTREAL, 4TH JUNE, 1858.

Coram Sir L. H. Lafontaine, Bart., C. J. Aylwin, J., Duval, J., Caron, J.

No. 41.

OLIVIER BERTHELET, (*Plaintiff in the Court below.*) Appellant.

AND

THE MONTREAL AND BYTOWN RAILWAY COMPANY, (*Defendants in the Court below.*)

AND

HYPOLITE GUY, et al., (*Opposants in the Court below.*) Respondents.

SEIZURE OF LAND,—CONTENTS.

Held that an advertisement by the Sheriff of the Seizure of land of which land, the contents are not stated in said advertisement, does not give ground for an opposition *à fin d'annuller*.

The facts of this case appear in the report of the Judgment in the Court below:—2 L. C. Jurist, p. 164 *et seq.* It is sufficient to add the *motifs* of the judgment in appeal which reversed that of the Court below.

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"La Cour, &c., * * * * * * * *

1.—Considérant que dans la procédure sur la Saisie faite en cette cause, l'immeuble saisi est désigné comme suit, savoir: "Un lot de terre situé dans "le faubourg St. Louis, de cette ville, de la contenance qu'il peut avoir tant en "front qu'en profondeur et enfermé dans les limites suivantes, savoir; depuis la "rue Mignonne jusqu'au pied du coteau Baron, à la cloture de division entre le "dit terrein et celui de Joseph Charles Hubert Lacroix, écuier, et entre la pro- "priété du dit Joseph Charles Hubert Lacroix, du coté Nord Est, et celle de "l'honorable D. B. Viger, du coté sud ouest, sujet néanmoins à l'arrangement "fait par les Executeurs Testamentaires Louis Guy, et le dit Lacroix, devant "Lamontagne Notaire à Montréal le vingt-unième jour d'octobre mil huit cent "cinquante cinq pour une ruelle commune, chacune des parties au dit arrange- "ment fournissant dix pieds français sur leurs propriétés respectives."

2.—Considérant qu'a raison de cette désignation, il n'y avait pas lieu d'attaquer la dite saisie de nullité et d'en demander la main-levée; que par conséquent l'opposition *afin d'annuler*, présentée par les intimés par laquelle ils concluent purement et simplement à cette nullité et à cette main-levée, est mal-fondée et aurait dû être renvoyée; qu'ainsi dans le jugement dont est appel, il y a mal-jugé en ce que la Cour de première instance n'a point débouté les Intimés de leur dite opposition; Infirme le susdit jugement, savoir le jugement rendu le 27 Fevrier 1858, 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; déboute les Intimés de leur susdite opposition, et les condamne aux dépens d'icelle en la dite Cour Supérieure, des quels dépens distraction est accordée à Messieurs Laflamme, Laflamme et Barnard, Avocats et procureurs du dit Olivier Berthelet; et il est ordonné que que le dossier soit remis à la dite Cour Supérieure Siégeant à Montréal.

Et la Cour sur motion de Messieurs Laflamme, Laflamme et Barnard, Procureurs de l'appelant, leur accorde distraction de leurs frais sur le présent appel."

Judgment reversed.

Laflamme, Laflamme & Barmard for appellant.
Cherrier, Dorion & Dorion, for Respondents.
(F. W. T.)

SUPERIOR COURT.

MONTREAL, 18TH MARCH, 1852.

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

No. 1987.

Forsyth v. *The Canada Baptist Missionary Society*, and *John Leeming, et. al.* Garnishees.

GARNISHEES—PIECES JUSTIFICATIVES.

Held,—That when the declaration made by a *tiers-saisi* under oath refers to documentary evidence he may be required to furnish that evidence at his own expense as *pieces justificatives* in support of his declaration.

Three of the Garnishees in this cause, Robert Morton, Charles Seraphim Rodier, and David Moss, on the 23d and 24th February, 1852, made declarations in which they referred to certain written instruments.

Forsyth v. C. B. M. Soc.

Thereafter, on the 2nd March following, the plaintiff moved the Court, (Day, Smith and Mondelet, Justices,) that the attachment or *Saisie Arrêt*, in the hands of the several Garnishees be continued until the further order of the Court thereon; and that the said Robert Morton, Charles Seraphim Rodier and David Moss, three of the Garnishees, be respectively held to produce and fyle in this cause, within three days, the several written instruments mentioned and referred to in their respective declarations on oath in this cause fyled; and further, that the time for fyling contestations of the said declarations of the said Garnishees, be held to run from the time only when notice shall have been duly given to the plaintiff of the said written instruments having been duly fyled, unless cause to the contrary be shown on the eighth instant, sitting the Court, and fyled a notice of the said motion duly served upon the defendant's attorney.

DAY, J. In this case there was an application for a rule upon the *Tiers Saisi*, ordering him to produce and fyle copies of certain Notarial documents. At the first blush, the Court was against this application, on the ground that the *Tiers Saisi* should not, at his own expence, be bound to produce papers in a cause in which he had no direct interest, to support his oath that he did not owe the defendants. But on looking into the Books of Practice, which treated of this subject, Pigeau and others, it was found that he was bound to do so. The declaration of the *Tiers Saisi* was contested. As to the merits of the contestation, the Court would hold its opinion in suspense. But on the motion now made, the rule was granted.

The rule obtained was in the following terms:—

"The Court (*Smith*, *Vanfelson* and *Mondelet*, Justices,) having heard the Plaintiff and the Defendant by their respective counsel, upon the motion of the Plaintiff in this cause, made and fyled on the second day of March, instant, it is ordered that the attachment or *Saisie Arrêt* in the hands of the several Garnishees, be continued until the further order of this Court, and that the said Robert Morton, Charles Seraphim Rodier and David Moss, three of the Garnishees, be respectively held to produce and fyle in this cause, within three days, the several written instruments mentioned and referred to in their respective declarations, on oath in this cause fyled; and further, that the time for fyling contestations of the said declarations of the said Garnishees, be held to run from the time only when notice shall have been duly given to the Plaintiff of the said written instruments having been duly fyled. Unless cause to the contrary be shown by the said Robert Morton, Charles Seraphim Rodier and David Moss, three of the Garnishees in this cause, on Monday the twenty-second day of March, instant, at half-past ten o'clock in the forenoon, sitting the Court."

This rule was returned into Court on the 22d March, and heard on the 23rd March, before *M. M. Day*, *Smith*, and *Mondelet*, Justices, on which day the Plaintiff prayed acte of the declaration he then made that the Garnishees had fyled the instruments in writing, demanded of them by the rule. The rule was made absolute on the 30th March, 1852.*

F. Griffin, for Plaintiff.

A. & G. Robertson, for Defendants.

(F. W. T.)

* *Vide* Pigeau 1, p. 557; Roger, Saisie Arret, p. 345, n. 566.

MONTREAL, 30TH SEPTEMBER, 1857.

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

No. 1899.

Syme et. al. v. *Janes et. al.*

1. The liability of a forwarder for a quantity of wheat shipped on board a barge, established by an acknowledgment in writing of its receipt, cannot be affected by parol testimony that the barge was not his, or that he acted only as agent for the owner.
2. When the measurement and delivery of a cargo of wheat have been properly commenced in presence of both the carrier and the consignee or their representatives, it is their duty to attend till delivery is completed; and if either party absent himself the other may proceed without him.

The Plaintiffs in this cause shipped 3925 minots of wheat on the schooner Sebastopol for transmission to the steamer Toronto, for which the Defendants gave a receipt in writing. The delivery on board the Toronto occupied two days, with an interval of two days. On the first day tallymen were present representing both Plaintiffs and Defendants. On the evening before the second day of delivery the Defendants' tallyman was notified of the intention to proceed on the following morning. He attended accordingly, but finding the parties were not ready to go on he left the vessel, directing the mate to inform him when they were prepared to proceed. They went on, however, in his absence, and when he returned he found a quantity had been delivered. Thinking it useless to commence an account then, he allowed the delivery to be completed without keeping any check upon it, and did not even remain while it was being proceeded with. On the first day it appeared that 1625 minots were delivered; on the second 2205 minots, thus leaving unaccounted for a deficiency of 95 minots, for the value of which the present action was brought.

The Defendants by their plea alleged that they acted only as agents for the owners of the Sebastopol with whom in reality the Plaintiffs had contracted, and that all the wheat placed in the Sebastopol was really delivered on board the Toronto.

The Plaintiff proved the measurements and delivery from the Sebastopol of 3830 minots and no more.

The Defendants examined the Plaintiffs' clerk to prove that they were only agents in the transaction; and the master and mate of the Sebastopol to prove that whatever came into the schooner was delivered on board the ship. In addition they adduced evidence tending to show incapacity on the part of Plaintiffs' measurers; and establishing the facts already stated in reference to the absence of the tallyman the second day.

Abbott for Plaintiffs argued that the Plaintiffs had actually done more than was necessary to entitle them to recover. The *onus probandi* of the delivery of the wheat on board the Toronto should have been upon the Defendants; but the Plaintiffs having the means in their possession of proving the non-delivery, had done so, and should have the value of the deficiency. The receipt given by the Defendants for the wheat bound them for its delivery, and could not be got rid of by verbal testimony as to understandings or agreements tending to relieve them for that liability. That being the case, they were responsible to the Plaintiffs for the deficiency, which the witnesses had established at 95 minots. The absence of the tallyman on the second day could have no effect

Syme v. Janes.

as impairing the weight of Plaintiffs testimony, for he had been notified to be present. The Plaintiffs could not be held, after delivery had commenced, to wait till Defendants sent a person to superintend its continuance. It was Defendants' business to be present either by themselves or their representative if they wished to check the delivery. The evidence of incapacity of the measurers was insufficient.

Robertson for Defendants urged that the evidence of record established that the Sebastopol was really hired from her Captain, merely as a place for stowing the wheat till it could be shipped on the Toronto, and that the Defendants, as the Plaintiffs were aware, acted only as intermediaries, and were not treated with by the Plaintiffs as principals in the transaction. That the captain and mate, who had been constantly on board the schooner while the wheat was there, swore positively to its having been safely kept and all delivered. That it was the duty of the Plaintiffs to have given the Defendants the opportunity of being present on the second day; and that their having proceeded in the absence of Defendants' tallyman with measurers who had previously been employed in measuring salt, and were not skilled measurers of wheat, was sufficient to neutralise the evidence they had put of record, as to the deficiency; and to relieve the Defendants from liability of it. In addition, it had been shewn that as great and even greater discrepancies between amounts of grain received and delivered frequently occurred, merely from the difference in the mode of measurement of different measurers, and that this fact taken in connection with the evidence of the captain and mate ought to be conclusive in Defendants' favor.

Smith, J.—(After stating the facts). This receipt must be taken under the circumstances as conclusive against the Defendants, as to the quantity received and their liability to deliver that quantity, and they should have proved that they had fulfilled their obligation in that respect. On the contrary the Plaintiffs have established a deficiency of 95 minots for the value of which they must have judgment. It was urged by Defendants that this difference might have occurred from the uncertainty of measurements; but as the Plaintiffs' measurer was present the first day, and concurs with Plaintiffs to the amount then delivered, it must be presumed that the measurements made on that day were correct. The discrepancy therefore must have occurred, if at all, in the measurement of 2206 minots on the second day, and the Court think the proportion borne to the whole amount, by the deficiency, too great to be accounted for in that way. As to the Plaintiffs having proceeded without the Defendants' measurer on the second day, the Court are of opinion that when bulk is once broken in similar deliveries, both parties are bound to be in attendance till the discharge of cargo is complete; and if either thinks proper to absent himself, the other may go on in his absence. There must, therefore, be judgment for Plaintiffs for the value of 95 minots, at the price proved.

Abbott & Baker for Plaintiffs.

A. & G. Robertson for Defendant.

J. J. C. A.

IN APPEAL.

FROM THE DISTRICT OF MONTREAL.

MONTREAL, 1st OCTOBER, 1857.

Coram Sir L. H. LAFONTAINE, Bart., C. J., A[illegible]N, J., DUVAL, J., CARON, J.

No. 137.

JAMES IRWIN (Plaintiff in the Court below),

Appellant;

AND

JOHN BOSTON, ET AL., (Defendants in the Court below),

Respondents.

Held,—1. That the Sheriff is responsible for goods seized by him, in the same way as the *gardien*, except where a solvent *gardien* has been appointed by the *saisi*, and the Sheriff proves that such *gardien* was solvent, or reputed so to be, to the extent of the property seized, at the time of his appointment. 2. That in an action *en revendication* against the Sheriff, for certain effects seized by him and ordered to be delivered up to the *saisi*, it is not competent for the Sheriff to plead want of the notice of action prescribed by the Statute 14 and 15 Vic., ch. 54.

This was an appeal from a judgment rendered by the Superior Court at Montreal, on the 19th October, 1856, dismissing the Appellant's action.

The action in the Court below was instituted to revendicate certain moveable effects which had been seized by the Sheriff, in a case of McPherson et al. against Irwin, the Appellant, and which had been ordered by the Court to be given up to the Appellant, the seizure thereof having been set aside.

The Respondents pleaded a *défense au fonds en droit*, which was maintained by the Superior Court, composed of MM. Day, Smith, Mondelet, justices, dismissing the action on the 27th October, 1853. This judgment was reversed by the Court of Appeals, composed of MM. Lafontaine, C. J., Aylwin, Duval, Caron, justices, on the 12th of March, 1855, as reported in the 5th volume of the L. C. Law Reports, p. 307.

This *défense en droit* was followed by six peremptory exceptions and the general issue.

The points raised by the pleadings may be briefly stated as follows :—

1. That the Respondents as public officers were entitled to one month's notice of action, under the provisions of the Statute 14th and 15th Vict., ch. 54.

2. That the action illegally combined a demand in damages with a demand for the articles seized.

3. That the Appellant's recourse was by rule and not by action.

4. That a rule had been taken against the Respondents in the case of McPherson et. al. *vs.* Irwin, and proceedings had thereon, which were still pending and undetermined.

5. That the Respondents were not liable for the acts of the Bailiff, he having been appointed by the Court.

6. That the goods seized had been duly placed in the hands of a *gardien*, appointed by the Bailiff in obedience to the law, and that by reason thereof the responsibility of the Respondents ceased.

The action in the Court below, composed of MM. Day, Smith, C. Mondelet, justices, was dismissed on the 19th October, 1856, for the following reasons :—

"Considering that the Defendants in this cause are impl[illegible]r certain acts by them done in their capacity of joint Sheriff of the dis[illegible] Montreal, in the performance of their public duty as such, and that by virtu[illegible] the Statute

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in that case provided, the writ in the cause issued ought not to have been sued out against them, for or by reason of such acts, without notice in writing of the said writ having been first given by the Plaintiff or his Attorney, at least one calendar month before the said writ was so sued out; and considering that the Plaintiff hath failed to prove, that any such notice was at any time given to the said Defendants."

Sir L. H. Lafontaine, Bart., C. J.—

Il parait que l'appelant s'était obligé envers la maison de McPherson, Crane et Cie, il y a déjà quelques années, à construire une machine à vapeur qui devait être placée sur l'un de leurs bateaux, destiné à la navigation entre Bytown et Grenville, sur l'Ottawa. Une grande partie des pièces dont cette machine devait être composée, avait été délivrée et transportée à Bytown dans l'hiver de 1848—49. Il y avait encore un certain nombre de pièces à délivrer plus tard. Elles étaient dans la fonderie de l'appelant à Montréal, les unes finies, et les autres non encore achevées complètement, lorsque le 4 Avril 1849, McPherson, Crane et Cie, prétendant en être les propriétaires, intentèrent contre l'appelant une action accompagnée d'une saisie revendication de ces mêmes objets.

Par jugement interlocutoire du 24 Juillet 1849, le bref de saisie revendication fut déclaré nul, mainlevée de la saisie donnée à l'appelant, et il fut enjoint au Shérif de remettre à ce dernier les effets saisis. Puis un jugement rendu sur le mérite de la demande, le 22 décembre 1851, débouta McPherson, Crane et Cie. de leur action contre l'appelant.

Les Intimés qui, lors de la saisie revendication, remplissaient la charge de Shérif pour le District de M[illegible] ne s'étant pas conformées à l'injonction qui leur avait été donnée par l[illegible]nt du 24 juillet 1849, de délivrer à l'appelant les effets saisis, celui[illegible] contre eux la présente action, par laquelle il conclut, 1º à ce que les intim[illegible] soient condamnés à lui remettre et délivrer les effets saisis, sous tel délai qui sera fixé à cette fin, et qu'à défaut de ce faire, ils soient déclarés contraignables par corps et incarcérés dans la prison de ce district, jusqu'à ce que les dits effets soient remis et délivrés à l'appelant, ou jusqu'à ce que les intimés lui aient payé la somme de £1,000 courant, pour la valeur de ces effets, 2º. à ce que les Intimés soient de plus condamnés à lui payer la somme de £250 pour dommages intérêts. L'appelant s'est désisté depuis de cette seconde partie de ses conclusions. La cour de première instance eut d'abord à prononcer sur une *défense au fonds en droit*, à l'appui de laquelle les Intimés n'avaient pas allégué moins de quatorze raisons par écrit; ce que la cour fit par jugement du 27 Octobre 1853, maintenant cette défense et déboutant l'appelant de son action, "considering that the judgment in the said declaration alleged to have been rendered in the cause of John McPherson and others against Jas. Irwin, on the 24th day of July 1849, ought to be enforced and carried into execution by Rule or other process in that cause according to law and the practice of this court, and that no action can by law be brought in the manner and form in which the Plaintiff hath now impleaded the defendants for the *revendication* or recovery of the goods and chattels, which the Defendants are therein and thereby ordered to deliver to the Plaintiff."

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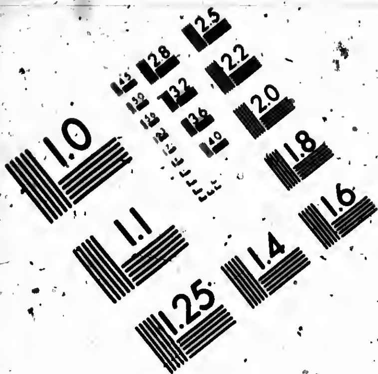
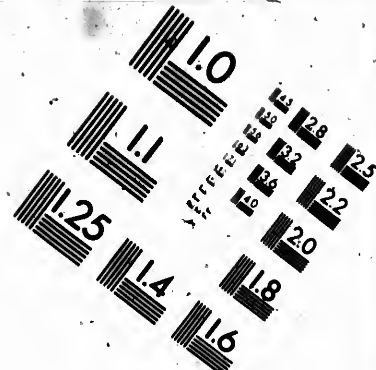
Sur appel, ce Jugement a été infirmé par cette Cour, le 12 mars 1855, "Considering that the allegations contained in the Plaintiff's declaration in the Court below, are sufficient in law, if proved, to entitle the said Plaintiff to the conclusions by him taken in and by the said declaration, considering further, that the causes assigned by the defendants in support of the demurrer by them fyled in the said Court, are insufficient in law to entitle the said defendants to the conclusions of the said demurrer or to any part thereof".

Outre la défense au fonds en droit, il y a eu une *déf*[illegible] six exceptions péremptoires. Quelques unes de ces exceptions [illegible] moyens qui avaient déjà été employés dans la défense en d[illegible] eu de s'en occuper ici. La première des exceptions que nous [illegible] a été accueillie par la Cour de première instance, qui, en cons[illegible] veau débouté l'appelant de son action, par le jugement dont est [illegible] le 19 octobre 1856, : "Considering," y est-il dit, that the defendants in th[illegible] are impleaded for certain acts by them done in their capacity of joint Sheriff of the District of Montreal, in the performance of their public duty as such, and that by virtue of the statute in that case provided, the writ in the cause issued ought not to have been sued out against them, for or by reason of such acts, *without notice in writing* of the said writ having been first given by the Plaintiff or his attorney, at least one calendar Month before the said writ was so sued out, and considering that the Plaintiff hath failed to prove that any such notice was at any time given to the said defendants."

Les Intimés nous ont dit que ce jugement repose sur le statut provincial de 1851, chap. 54, intitulé "acte pour amender et refondre les lois pour la protection des magistrats et autres, dans l'exercice de leurs devoirs publics." En effet, pour qu'une action de la nature de celles qui sont prévues par ce statut, puisse procéder valablement contre "un juge de paix ou autre officier ou personne remplissant aucun devoir public," le statnt exige (Sec 2) qu'un *avis par écrit*, spécifiant la cause de l'action, soit donné au défendeur un mois avant que l'exploit d'assignation soit émané. L'objet de cet avis préalable, est de fournir à la partie que l'on veut actionner, l'occasion de prévenir cette poursuite, si elle le juge à propos, en offrant de payer un dédommagement ou compensation (*amends*, dans la version anglaise)—(Sect. 3.)

Il me semble évident, d'après la teneur et les termes mêmes du statut, qu'il ne s'agit que d'actions qui ont uniquement pour objet des dommages-intérêts, et non pas d'actions dans lesquelles une demande de dommages-intérêts n'est qu'accessoire à une demande principale fondée sur l'inexécution d'un contrat ou d'une obligation imposée soit par la convention, soit par la loi. Il ne s'agit que d'actions dont *l'officier public* peut devenir passible par suite d'un fait qui constitue un tort, un délit ou une injure, si l'on veut, par conséquent d'un fait illégal ou non justifiable *commis* (c'est l'expression même du statut) par cet officier dans l'exercice de ses devoirs publics ; en un mot d'une *offense dont on se plaint*, c'est encore là le langage du statut (sect. 8, version française.) Cela résulte encore clairement des mots employés dans la 3e section, pour indiquer l'espèce de condamnation qui devra être prononcé sur une telle action : "la Cour ou le Jury,"





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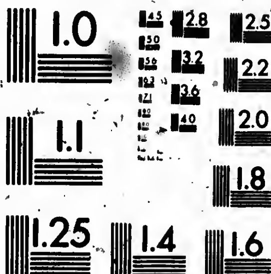

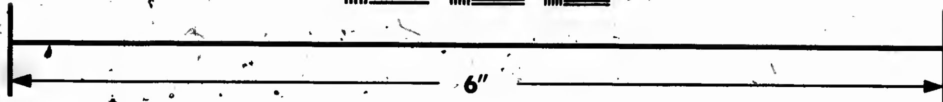

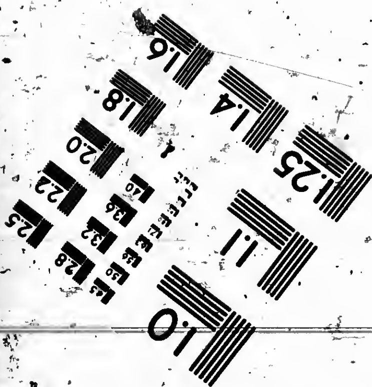

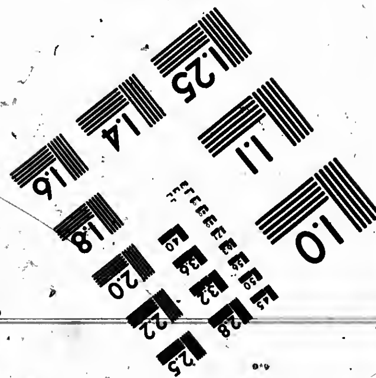

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y est-il dit, "rendra son jugement ou verdict en faveur du demandeur, avec *tels dommages* qu'il jugera convenables." Ce ne sont donc que des *dommages*, qui doivent et peuvent faire l'objet de la condamnation. Il ne peut donc s'agir que d'une action dans laquelle ces dommages forment le principal et unique objet, et non l'accessoire, de la demande, enfin d'une action qui, d'après sa nature, peut-être, ainsi que l'a prévu le statut, instruite devant un corps de jurés. Or, l'on sait qu'à part des affaires de commerce, nos lois n'autorisent le recours à un Jury, en matières civiles, que dans les actions qui naissent de torts, délits ou injures. Assurément une action en revendication d'effets mobiliers, même lorsqu'elle serait accompagnée de conclusions en dommages-intérêts, comme accessoires à la demande principale, n'est pas une action qui tombe sous les dispositions du statut. Une telle action, quoique ayant pour objet de réclamer, comme accessoire, des dommages-intérets, ne serait pas, je pense, de nature à être instruite devant un Jury. En effet le statut de 1829, chap. 10 qui autorise le procès par Jury dans une action "pour quelque tort souffert à raison de délits ou quasi délits," s'exprime ainsi : action "dans laquelle on aura recours à une compensation en dommages-intérêts et dépens *seulement*."

L'officier public poursuivi dans les cas prévus par le statut, peut obtenir (4e. Section) que la *venue* de l'action soit changée, c'est-à-dire que le procès soit instruit dans un autre district, "S'il appert à la Cour ou au Jury que la dite "cause ne peut être décidée avec justice ou sans préjugés dans le comté ou dis-"trict ou circuit dans lequel la dite action est rapportable." Si le statut s'applique à l'espèce actuelle, il devra s'appliquer également à toute autre contestation qu'une partie engagera avec le Shérif, ou que celui-ci voudra bien engager avec elle, et cela pour la seule raison que le Shérif est un officier public. Ainsi s'il s'agit de demander au Shérif le paiement d'une collocation sur des deniers qu'il a entre les mains, il faudra donc lui donner l'avis préalable d'un mois ; et si à l'expiration de ce mois, le Shérif refuse de payer, le créancier forcé d'engager une contestation avec lui, sera donc exposé à voir porter cette contestation dans un autre district ! Si le Shérif peut agir ainsi dans un cas, il peut en agir de même dans tous les autres. Il sera donc admis à dire aux Juges de la Cour dont il est l'officier : "Je ne crois pas que ma cause puisse être décidée par vous "avec justice ou sans préjudice !" Et il aura le droit d'appeler ses Juges à lui "répondre. Oui, Mr. le Shérif, vous avez raison, ou bien ce qui est plus probable, "non Mr. le Shérif vous avez tort, énormement tort." ! Si c'est là ce que la législature a voulu dire, elle aurait du s'expliquer plus clairement. J'attendrai donc qu'elle le fasse par un acte déclaratoire, avant d'adopter l'interprétation que les Intimés donnent au statut.

Voyons quel serait le résultat de cette interprétation, dans une autre hypothèse. Supposons qu'au lieu des pièces de fer saisies, dont le Shérif ne saurait sans doute que faire, à moins qu'il n'en eut besoin pour completer une machine à vapeur dans son moulin, c'eut été un beau cheval qui eut été saisi par le Shérif, à la requete de McPherson, Crane & Cie. Cette saisie eut pu devenir une bonne fortune pour cet officier public, s'il est amateur de chevaux. Il eut pu garder pour lui le cheval saisi, si le statut est applicable à l'espèce, et cela, nonobstant

la main levée de la saisie, et malgré la volonté du propriétaire. Il lui eut suffit pour repousser l'action, d'offrir en argent une *compensation suffisante*, et d'en déposer le montant devant la cour. Le statut lui donnait en effet le droit d'opposer cette exception : "dans le cas où la compensation" offerte par l'officier public, "ne serait pas acceptée," porte la 3e section, "il pourra alléguer la dite offre comme exception ou fin de non recevoir contre toute action intentée contre lui et motivée sur le dit writ, ensemble avec la défense de *non coupable*, et toute autre défense et si la Cour ou le Jury trouve que le montant offert était suffisant, il rendra un verdict en faveur du défendeur." Voila quel pouvait être le résultat dans l'hypothèse ci-dessus posée ! Allons encore un peu plus loin. Le statut est applicable à l'espèce, dit-on. Soit. Alors l'action du demandeur est prescrite. L'officier public a acquis la prescription de six mois. La disposition du statut est absolue. Elle porte (8e section) "qu'aucune telle action ou poursuite ne sera intentée contre aucun juge, officier ou autre personne agissant comme susdit, pour aucun acte ou chose fait par lui dans l'exécution de ses devoirs publics comme susdit, à moins qu'elle ne soit commencée dans les six mois de calendrier qui suivront la perpétration de l'offense dont on se plaint." Le fait ou l'offense aurait été la saisie qui a été déclarée nulle et dont on a donné main levée, une saisie pourrait durer plusieurs années avant que la cour prononcât sur le mérite de la contestation entre les parties. Et bien que, pendant toute la durée de cette saisie, les effets étant sous la main de la justice, la partie saisie ne puisse les réclamer, elle serait néanmoins exposée à les perdre, par le seul laps de six mois, s'il arrivait que la nullité de la saisie ne fut prononcée qu'après l'expiration de ces six mois ! Et ce serait l'officier public qui en profiterait, s'il ne voulait pas les remettre au légitime propriétaire ! Peut-on raisonnablement soutenir que la législature ait voulu porter jusque là, en faveur de l'officier public, la "protection" et le "privilège" dont il est parlé dans le préambule du statut, comme étant les motifs de cette loi ?

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La 8e section, elle seule, suffit pour repousser le système des intimés, en déclarant prescrite ou non recevable après un laps de six mois, l'action contre laquelle elle a pour objet de protéger l'officier public, la loi n'a en vue, par cela même, qu'une action née d'un fait qui y donne ouverture du moment même de sa perpétration. Cela me parait être de la dernière évidence. Or cette action ne pouvant être celle dont il s'agit en cette cause, il s'ensuit que le statut de 1851 ne s'applique pas à l'espèce, et que, par conséquent, l'appelant n'était pas tenu, avant de se pourvoir contre le shérif, de lui donner un mois d'avis, en supposant même, (ce qui me parait être fort douteux pour le moins,) qu'il pût y avoir quelque cas où en matières civiles un shérif pourrait être admis à invoquer les dispositions du statut.

C'est en vain que les intimés prétendent d'abord qu'il ne sont pas responsables des actes de l'huissier Kell qui a été chargé de faire la saisie, et, ensuite, qu'un gardien ayant été nommé par Kell suivant la loi, toute responsabilité de leur part a cessé, par cela même. Ce sont là des propositions qui sont tout à fait insoutenables, et qui ne devraient plus être débattues, surtout en présence du statut de 1836, chap. 15, intitulé ; "Actes pour faire certains reglements au sujet de l'office de Shérif."

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Il n'y a qu'un cas où, aux termes de ce dernier statut, le shérif peut prétendre être exempt de responsabilité, lorsque les effets saisis ont été confiés à un gardien. Ce cas est indiqué dans la 9e section. Il y est dit, que : " Lorsqu'un " défendeur ou des défendeurs *offriront* un gardien, ou des gardiens *surs et suffi-* " *sants* au shérif ou coroner qui saisira les biens et effets de tels Défendeur ou " défendeurs, en vertu de tout *writ* de *fieri facias*, arrêt-simple, ou de revendi- " cation, tel shérif ou coroner *sera obligé d'acccepter* tels gardien ou gardiens, et " *ne sera pas jugé responsable des actes de tels gardien ou gardiens, pourvu qu'il* " *puisse établir et prouver, que tels gardien ou gardiens, lorsqu'il les a acceptés,* " *étaient solvables ou réputés être tels, au montant de la valeur des articles* con- " fiés à la garde de tels gardien ou gardiens."

Loin de prouver que le gardien nommé avait été *offert* par l'appelant, les intimés se sont efforcés d'établir, sans néanmoins avoir réussi à le faire, qu'il avait refusé de suggérer à *offrir* un gardien. Le fait est qu'on ne lui en a pas fait la demande ; et tout ce qui s'est passé, lorsque la saisie a été pratiquée démontre qu'on était bien loin de vouloir confier la garde des effets à une personne que le saisi aurait lui-même nommée. En effet ce n'eut pas été le moyen de parvenir au but que Mr. McPherson, Crane & Cie., s'étaient évidemment proposé en faisant pratiquer cette saisie, celui de s'approprier de suite les effets saisis, quelles qu'en fussent les conséquences. D'un autre coté, le gardien nommé eut il été *offert* par le saisi, cela n'eut pas été suffisant pour soustraire les intimés à toute responsabilité. Il leur eût été nécessaire encore de prouver la solvabilité du gardien, lors de sa nomination. Ils n'ont pas même tenté de le faire. La responsabilité du Shérif comme officier saisissant, ou comme gardien des effets saisis, ne date pas du statut de 1836, ci-dessus cité. Du moment que cet officier a été appelé à remplir, en matières civiles, les devoirs de l'huissier, du gardien, sous l'ancien droit français, il a été assujetti à la même responsabilité qui atteignait ces derniers. En matière de saisie, le shérif devenait de [illegible] droit le gardien des effets saisis. C'est ce qui a été reconnu par l'une de [illegible] lois statutoires, déjà assez ancienne, puisqu'elle remonte à l'année 1787. Je veux parler de l'ordonnance de l'ancien conseil législatif, 27 Geo : 3. chap. 4. qui porte (11e section) qu'à moins de l'exercice de certaine faculté donnée au saisi, celle de fournir caution, " les effets ainsi saisis-arrêtés resteront sous la garde du Shérif ou " huissier pour satisfaire au jugement."

Si les intimés se fussent rappelé ce qui a été jugé à Québec en 1813, dans la cause de McClure contre le Shérif *Shepherd* (*Stuart's Reports*, p. 75,) cause tout à fait analogue à la présente, ils se seraient, sans nul doute, abstenus de soulever des questions décidées depuis longtemps, parfaitement en accord avec les principes qui doivent régir cette matière. Une note du rapporteur, à la page 79, nous apprend que, dans cette cause de McClure, contre Shepherd, il y eut appel à la Cour provinciale d'appel, et ensuite à sa Majesté en conseil, et que sur l'un comme sur l'autre de ces appels, la décision de la Cour du Banc de la Reine pour le district de Québec, fut confirmée.

Dans cette même cause, on a reconnu que le propriétaire des effets saisis, a la voie de l'action directe contre le shérif pour les revendiquer, ou en réclamer la valeur, après que la saisie est déclarée nulle, et que main levée en est donnée.

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Du reste, il faut bien remarquer que, dans l'espèce ce n'est pas parceque le shérif a agi illégalement en saisissant les effets de l'appelant, que celui-ci réclame contre lui. Point du tout. Le shérif était obligé d'opérer cette saisie, du moment qu'il en recevait l'ordre par le mandat de saisie revendication. Cet ordre lui servait de justification, pourvu qu'il l'exécutât dans les formes légales. Il continuait d'avoir la garde des effets saisis, sans pouvoir être recherché à cet égard, aussi longtemps que la saisie devait subsister. Mais du moment que la saisie était mise à néant, que l'appelant en obtenait main levée, et que le shérif recevait l'ordre de lui remettre les effets saisis dont il avait ou était censé avoir la garde ou la possession, son devoir résultant de l'obligation que la loi lui impose en pareil cas, était d'obéir à cet ordre, de l'exécuter, en remettant au saisi ces mêmes effets. C'est, parceque les intimés n'ont pas, dans la présente espèce rempli cette obligation, qu'ils sont aujourd'hui actionnés par l'appelant, et ce droit d'action a déjà été reconnu par cette Cour. Les conclusions du demandeur doivent donc être maintenues, si les faits articulés dans la déclaration de l'appelant, sont prouvés.

Quant à cette preuve, je dois dire qu'elle me paraît complète, et que, par conséquent, sur le fonds de sa demande, l'appelant doit obtenir une condamnation contre les intimés.

L'huissier Kell a été, par un ordre signé des intimés, chargé d'exécuter le mandat de saisie revendication. David L. McPherson. de la maison McPherson Crane & Cie, s'est rendu sur les lieux, pour aider à l'opération, avec une espèce de *posse commitatus*, composé de commis, de journaliers et de charretiers au service de leur société, ces derniers ayant leurs voitures prêtes pour enlever et transporter ailleurs les effets qu'on allait saisir. C'est le même David L. Mc Pherson qui a fourni à l'huissier recors et gardien, tous gens employés par lui et ses associés et inconnus jusqu'alors à l'huissier saisissant, le gardien était un de leurs commis, et le neveu des McPherson, ou généralement réputé l'être. Il parait même qu'il était mineur. L'huissier Kell dit, dans son procès verbal, qu'il a constitué *gardien* Alexandre McKenzie, "nommé et fourni par le dit David L. McPherson, l'un des demandeurs." Aussitôt la saisie faite, on a chargé les effets dans les voitures, et McPherson les a fait transporter à la fonderie de Mr. Parkin dans le faubourg de Québec, pour y faire parachever ce qu'il pouvait rester à faire pour rendre quelques une des pièces saisies, propres à servir à leur destination. De la fondérie de Parkyn, les effets ont été transportés, par l'ordre de McPherson, Crane & Cie, à bord de leur bâteau à vapeur sur l'Ottawa, et depuis ce temps, ils sont restés en la possession de ces derniers.

Les intimés prétendent que n'ayant jamais eu, de fait, la garde ou la possession de ces effets, ils n'en doivent pas être responsables. Cette prétention est tout à fait insoutenable. Les intimés ont eux-mêmes admis, en répondant sur faits et articles, que l'huissier Kell était ce qu'on appelle ordinairement *un huissier du shérif*. Du reste l'assertion des intimés qu'ils n'ont pas eu connaissance de la saisie, et qu'ils n'ont pas eu la garde des effets, est en contradiction directe avec leur propre rapport des procédés sur le mandat de saisie : "We do hereby "certify and return, that under and by virtue of the writ of *saisie revendication*,

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"we have attached and seized in the possession of James Irwin in the said writ "named, as belonging to John McPherson and others in the said writ also "named, all and every the goods, chattels and effects mentioned and set forth, "in the schedule marked A hereunto annexed, being the *procès verbal* of seizure "thereof: all which said goods, chattels and effects so attached and seized, we "have put into the guardianship of Alexander McKenzie, of the city of Montréal "in our district, gentleman, to abide the order of this honorable Court."

Enfin cet ordre a été prononcé, les intimés doivent remettre à l'appelant les effets saisis, ou lui en payer la valeur.

Je dois à présent dire un mot d'une autre prétention des intimés, qui, à mon avis, n'est pas plus soutenable que les autres. Elle a été émise bien tardivement, car il n'en est pas question dans les exceptions péremptoires; cela seul devrait suffire pour en interdire l'examen. C'est à l'enquete que l'intention des Intimés de faire valoir cette prétention commence à apparaitre. Une certaine somme de deniers a été payée à Parkyn par McPherson, Crane & Cie, pour les ouvrages qu'il y avait encore à faire, lors de la saisie, pour rendre quelques unes des pièces saisies, propres à servir à la machine à vapeur. Les intimés prétendent que l'appelant doit souffrir sur la somme qui pourra lui être adjugée contre eux pour la valeur de ses effets, la déduction de celle qui a été ainsi payée à Parkyn. Accueillir cette prétention de la part d'une partie qui a été étrangère au contrat intervenu entre l'appelant et McPherson, Crane & Cie, et qui n'a aucun droit de s'immiscer dans cette affaire: prononcer contre l'appelant la déduction qui est ainsi demandée, sans qu'il ait occasion de débattre ses droits avec l'autre partie à ce contrat, puisque cette partie n'est pas en cause; ce serait décider d'avance et bien injustement, au préjudice du premier, au profit d'un étranger, et en faveur de McPherson Crane & Cie., quoiqu'absents, ce qui pourrait recevoir une solution toute différente dans une contestation qui serait engagée à cette egard entre ces derniers et l'appelant; ceux-ci étant les seuls entre lesquels une telle contestation pourrait être valablement engagée. Ce serait admettre une créance qui peut être n'existe pas, ce serait déclarer l'appelant débiteur de McPherson, Crane & Cie, lorsqu'il est peut-être leur créancier; et cela, sans que ces derniers aient formulé aucune réclamation, et sans que l'appelant ait l'occasion de faire valoir ses droits contre eux, en ce qui regarde l'exécution de leur contrat! Et le shérif, quoiqu'étranger lui même à ce contrat, voudrait néanmoins en exciper aujourd'hui, et encore, sans l'avoir même invoqué dans ses exceptions! C'est là une prétention tout à fait inadmissible. L'obligation des intimés est de remettre les effets en entier, ou d'en payer la valeur totale, sauf le secours qu'ils peuvent avoir contre qui de droit.

Aylwin, J.—The pretensions of the Respondents cannot be maintained by this Court. The object of the Statute was to afford magistrates and others, acting in the performance of their public duty, the occasion of tendering amends in cases where it is attempted to hold them liable in damages for their acts. In the case before us, the Appellant seeks to recover his own property, seized by the Sheriff under a process which has been set aside, or the value of such pro-

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perty, and the nature of the action excludes the idea of notice. The Sheriff in neglecting to obey the order of the Court to deliver up the property was not acting in the performance of his duty, but, on the contrary, neglected to perform a duty imposed on him as well by law as by the order of the Court. Supposing a Sheriff to refuse bail in the case of a party arrested on a *capias*, or to demand excessive bail, or to refuse to pay monies under a judgment of the Court, will it be pretended he is entitled to the notice referred to in the Statute in such cases? And in this case, if he is to be allowed to disobey the order of the Court and to demand notice of action, as if he had been performing his duty, the Sheriff, who is the right hand of the Court, would in effect be setting the authority of the Court at defiance. As to the Sheriff's responsibility for the acts of his Bailiffs, the law imposes on him this responsibility. The property was in his custody. He has the right to exact and to take care to get security from his Bailiffs, and it is in vain for him to seek to force the Appellant to wage his recourse either against the Plaintiff or against the Bailiff or *gardien*. The Plaintiff may be a foreigner or not worth a shilling. The Bailiff merely performed the duty of the Sheriff himself in making the seizure, and the guardian was named without demand on the Appellant to name one, and the one named appears to have been in the employ of the Plaintiff *en revendication*, and to have left the country. It is manifest that the Appellant had the right to the immediate restoration of his property, and the detention of it for an hour after the order for its restoration cannot be justified. The Appellant suffered damage by his being so long deprived of his property, but this damage does not come up here, as his demand in damages has been discontinued. It is in my view of the case evident that the Court below misinterpreted the Statute.

Duval, J.—Entirely concurred in the opinions expressed, and as to the cases in England, referred the Counsel to 2 Chitty's General Practice, p. 64; 1 Tidd, p. 33; 7th edition; 1 Barn and Alderson, p. 42; 2 M. and S., p. 259, and 3 Burr. To entitle a party to notice under similar Statutes there, he must have acted, if not within the strict line of his duty, at least under a reasonable and *bonâ fide* opinion that he was so acting. In this case the officer acted in direct violation of his duty, and might have been punished for a contempt of Court. It would be unsound policy to afford protection to an officer who has wilfully disobeyed the writ of which he was bearer.

The *motifs* of the final judgment in appeal were as follows :—

"La Cour, * * * * * * * * * * * *

1. Considérant que les effets qui font l'objet de la présente action sont des effets qui appartenaient à l'Appelant ; et qui, en Avril mil huit cent quarante-neuf, avaient été injustement saisis revendiqués à la poursuite de McPherson, Crane et compagnie, dans une cause ou ils s'étaient portés Demandeurs contre le dit James Irwin. 2. Considérant que la dite saisie revendication a été déclarée nulle et les dits McPherson, Crane et compagnie déboutés de leur demande ; qu'il a été enjoint aux Intimés qui en leur qualité de Shérif du District de Montreal avaient executé la dite saisie, de remettre et délivrer à l'Appelant les dits effets qui auraient été ainsi saisis par l'hussier Kell, employé à cette fin par

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les dits Intimés et qui avaient ensuite été confiés à un gardien nommé par le dit Kell, des faits duquel Huissier et duquel Gardien les Intimés sont responsables. 3. Considérant que les Intimés ne se sont pas conformés à l'injonction qui leur avait été donnée de remettre et délivrer à l'Appelant les dits effets ainsi saisis; que, par conséquent, la présente action qui a pour objet d'en faire la revendication ou d'en obtenir la valeur en argent, est une action qui, dans l'espèce, procédait valablement contre les Intimés; que pour être admis à diriger cette action, il n'était pas nécessaire de donner aux Intimés l'avis préalable d'un mois qui, dans certains cas, est prescrit par le Statut de mil huit cent cinquante et un, chapitre cinquante quatre, l'espèce actuelle ne tombant pas sous les dispositions de cette loi. 4. Considérant, par conséquent, que, dans le jugement dont est appel et qui déboute l'appelant de sa dite action à raison du défaut d'un tel avis il y a mal jugé; et considérant de plus que l'Appelant s'est désisté de cette partie de ses conclusions, par laquelle il réclamait des dommages-intérêts; que la valeur des dits effets a été prouvée être de la somme de cinq cent soixante livres, dix chelins, cours actuel, de laquelle il convient néanmoins de déduire celle de vingt cinq livres, même cours, pour tenir lieu de la valeur des ouvrages qu'il restait à faire pour rendre quelques uns des dits effets propres à leur destination; Infirme le susdit jugement, savoir le Jugement rendu le dix-neuf d'octobre mil huit cent cinquante six, par la cour supérieure, siégeant à Montréal, avec dépens sur le présent appel contre les Intimés; et cette cour procédant à rendre le jugement que la dite cour supérieure aurait dû rendre, condamne les défendeurs, (Intimés) conjointement et solidairement à remettre et délivrer au demandeur sous quinze jours de la signification du présent jugement, tous les susdits effets, lesquels sont mentionnés dans la déclaration comme suit savoir: "A "cut off, in a number of pieces, a number of valves with gearing, throttle valve "and handle, valve lifters, eccentric rod and bands, cross head socket, air pump, "piston rod and bucket, head and straps for air pump, piston, piston rod, pump "cover, and about four hundred bolts and nuts;" et adjuge et ordonne qu'à défaut de ce faire dans le susdit délai, les dits Défendeurs et chacun d'eux soient contraints par corps et emprisonnés dans la prison commune du dit district, jusqu'à ce que les dits effets soient remis et délivrés au dit demandeur (l'appelant) ou jusqu'à ce que les dits défendeurs lui aient payé la somme de cinq cent trente cinq livres, dix chelins, dit cours, pour lui tenir lieu du prix et valeur des dits effets, quoi fesant, ils seront valablement déchargés, et condamne les intimés aux dépens de l'action en la cour supérieure."

Judgment reversed.

A. & G. Robertson for appellant.
H. Stuart for Respondents.
(S. B. & F. W. T.)

IN APPEAL FROM THE DISTRICT OF MONTREAL.

MONTREAL, 8TH DECEMBER, 1857.

Coram Sir L. H. Lafontaine, Bart, C. J., Aylwin, J., Duval, J., Caron, J.

THE WESTERN ASSURANCE COMPANY, *Defendant in Court below,*
Appellant.

AND

ATWELL, *Plaintiff in Court below,*
Respondent.

Held,—That the condition usually endorsed on Policies of Insurance respecting double Insurance is binding in law, and that its performance will not be held to be waived by the Company, if their Agent, on being notified of such double insurance *after the fire*, make no specific objection to the claim of the assured on that ground.

This was an appeal from a judgment rendered by the Superior Court, at Montreal, on the 26th June, 1857, rejecting an application of the Appellant for a new trial, and recording judgment against the Appellant on the verdict of the jury, a full report of which judgment is to be found in the first volume of the Jurist, at page 278 *et seq.*

The judgment of the Court of Appeals was in the following words:—

"Seeing the condition endorsed upon the Policy, whereupon the Respondent brought his action in the Court below, to the effect that notice of all assurances either prior or subsequent, effected or to be effected by the party assured at other offices, should be given to the Appellant; in default whereof it was agreed beween the parties that the said Policy should thenceforth cease, and be of no effect. Seeing that the Respondent infringed the said condition, effecting assurances with the Liverpool and London Assurance Company upon the property assured without giving due notice thereof. Seeing that no proof whatever was adduced in the Court below before the Jury who tried the cause, to establish the waiver by the Appellant of the performance of the said condition, as pleaded and set forth by the Respondent, and that therefore the said Jury should have been charged to find, and should have found a verdict for the Appellant. Seeing therefore, that in the charge of the learned Judge who presided at the trial there was mis-direction, and that the verdict is contrary to evidence; and that, therefore, in the judgment of the Court below, to wit, the judgment rendered at Montreal on the 27th June last, by which the motion of the Respondent for judgment pursuant to verdict was granted, and the motion of the appellant for a new trial was rejected and refused, there was error; the Court here doth reverse, annul and set aside the said judgment and proceeding to render such judgment as the Court below ought to have rendered, doth hereby refuse and reject the said motion of the Respondent, and doth hereby set aside and vacate the judgment entered up in his favour, and doth hereby grant the motion of the Appellant for a new trial as prayed for; and further, it is ordered that the Respondent do pay to the Appellant the costs incurred by that party, as well in the Court here as in the Court below in this behalf; and lastly, it is ordered that the record be remitted. *Dissentiente*, the Honorable Mr. Justice Duval."

Judgment of the Court below reversed and new trial ordered.

Henry Stuart, for Appellant.

A. & G. Robertson, for Respondent.

(S. B.)

MONTREAL, 11th MARCH, 1858.

Coram C. MONDELET, J.

Nos. 216 and 217.

The Attorney General, Informant, v. *McPherson, et al.*

These were two actions on Custom House Bonds, executed by the Attorney of the obligors, whose power of Attorney was fyled at enquête.

The Defendants pleaded the general issue, alleging specially that they had not given authority to the Attorney to execute the bonds in question.

Winesses were produced by Informant.

Herbert, for the Defendants, claimed the dismissal of one action, because proof had not been made of the handwriting of the Attorney who executed the bond; and of the other, because no proof of the signatures of the Defendants to the power of Attorney had been made; and also, because it had not been proved that the Defendants composed the respective firms whose bonds were sued upon.

Pominville, for Informant, contended that under the 20 Vic., c. 44, s. 87, no proof of the handwriting or signature was necessary, unless an affidavit denying their genuineness was fyled.

Herbert, for Defendants, replied that powers of Attorney were not comprised by that section, and that the proof was defective.

Mondelet, J., held that the power of Attorney did not fall within the intendment of the section cited, and should have been proved, and was also of opinion that bonds of the description sued upon did not come within its scope.

Actions dismissed without costs, *sauf recours.**

Pominville, for Informant.

Herbert, for Defendants.

A. H.

SUPERIOR COURT.

MONTREAL, 27th MARCH, 1858.

Coram DAY, J.

No. 1163.

Devlin vs. *Tumblety.*

Held,—That an advocate may recover, by action on the *quantum meruit*, fees for professional services which are of a nature sufficiently defined to come under a general and regular rule of charges, but not for services of an indefinite kind, such as consultations, for which the rate of charge is arbitrary.

The Defendant was arrested in September last (1857), on a charge of felony, and retained the Plaintiff as his counsel at the investigation which ensued before the Police Magistrate in Montreal. On the conclusion of the investigation, the Plaintiff, at the defendant's request, presented and supported an application for a writ of *habeas corpus*, which was refused; but a second application, made before another judge, was successful, and the Defendant was released on bail. While the Defendant lay in gaol, the Plaintiff, by request, paid him several visits, to take his instructions with regard to the trial which, it was expected, would follow, and to advise him in his difficulties. The declaration, after setting forth these facts, laid the value of the Plaintiff's services, on the whole, at £125, of which sum the payment of £25 was acknowledged, and concluded for £100.

* *Vide* contrary decision, 2 L. C. Jurist, p. 121.

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The Defendant pleaded that the declaration greatly overstated the length and value of the Plaintiff's services, and that a larger payment on account had been made than was admitted, and tendered a sufficient sum to make up £50, which he alleged to be ample remuneration for the Plaintiff's services.

Evidence was taken to shew the important nature of the case, and the care and attention which the Plaintiff had bestowed upon it, and in the depositions of some of the witnesses examined to prove the value of the Plaintiff's services, the reputed wealth of the Defendant and the interest taken by the public in the suit were mentioned as considerations influencing the witnesses' estimates.

Day, J., rendered judgment and said;—This action sought to recover a balance of £100 for professional services rendered to the Defendant, and was brought on the *quantum meruit*. It was a very difficult matter to say how far an action brought on that ground by an advocate, for intellectual work of a general character, and of which the value was so difficult to estimate with anything like precision, could be maintained. The labour of an advocate might be of the most delicate and important character, and yet there might be very little to shew for it which would allow us to form any appreciation of its value. This was the case when the services were not rendered in open Court, where a fixed rate of fees was established by law. In France, the Corporation of Advocates would not sanction the bringing of such an action by one of their body, and in England a barrister had no suit for his fees. These facts, however, implied not the least reproach on a gentleman in this country, who might take this method of obtaining what he considered fair compensation for his services. The tone of the profession and the condition of society were here very different from the European, and admitted of such a proceeding as perfectly honorable. But the instances of France and England were mentioned to shew how much the difficulty had been felt of placing a money value on such an intangible and variable commodity as intellectual labour. There was no ascertaining it with any approach to precision. The circumstances under which the labour was performed would modify or increase its value to an immeasurable extent. A lawyer of great reputation might give advice for which he would make such a charge as his position in the profession warranted, and yet which might be unsound and be the means of bringing great loss upon his client. On the other hand, a lawyer of inferior standing might give the most able advice, and yet not feel justified in making more than a comparatively moderate charge. In such cases it would be impossible to name a rate of fees. The quality of the services and the position of the men would determine their charges. In the present instance, certain grounds were set forth as tending to enhance the value of the Plaintiff's services, as for instance, the interest excited by the case out of doors and the consequent anxiety which filled the Advocate's mind, which could not enter into the Court's estimation. Neither could the reputed wealth of the Defendant, however it might operate privately between the parties, be allowed to influence the Court in fixing the amount to be recovered, for it could not be said that the positive value of services rendered to a rich man was greater than of the same given to a poor man. The details of labour were here very inde-

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finite: no bill of particulars was fyled. The Plaintiff averred that his exertions lasted through twelve days. But the mere duration of them was no guide to their worth. A *quantum meruit* claim must be for things having a tangible fixed value. The only good evidence was that of Mr. Schiller who proved that the Plaintiff was constantly employed during four days in behalf of the Defendant, arrested on a charge of felony, which services Mr. Schiller valued at £5 a day. There were, besides, two applications for writs of *habeas corpus*, and the attendances and labour incident thereto, which Mr. Schiller placed at ten guineas for each. Then, some small items made an additional sum of about £1 10s. The Defendant alleged that he had paid £32 10s. and tendered into Court the further sum of £17 10s. to complete the £50 which he deemed a proper remuneration. The Court thought the tender sufficient. Mr. Devlin's services might have been extremely valuable, but of such a nature as could not be judicially determined, and the Court could only recognize those which were definite and appreciable. Advocates must take their choice of two courses, either to trust entirely to the honour and liberality of their clients to do them justice for their high and confidential services, or to make an arrangement, beforehand, and say, "I cannot undertake your case unless I receive such a fee." The latter was the safe plan: no mistakes could arise out of it. Although the Defendant asserted that he had paid £32 10s., he made proof of no greater payment than £25 and judgment went for the remaining £7 10s. and the £17 10s. tendered, making together £25, and costs of suit.

The judgment of the Court was in the following terms:

"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 Defendant by his exception in this cause fyled, "doth allege that before the institution of this action he had paid to the Plaintiff, "on account of the professional services by him rendered to the Defendant, the "sum of £32 10s. currency and hath tendered the further sum of £17 10s. "currency in full payment of any balance which the Defendant may be adjudged "to owe the Plaintiff, the said sums making together the sum of £50 currency, "with the further sum of £4 9s. 3d. for costs, and considering that the Defen- "dant hath failed to prove the payment of the said sum of £32 10s. as by him "alleged or of any other or greater sum than £25, doth declare his tender and "deposit insufficient and doth adjudge and condemn the Defendant to pay to "the Plaintiff the sum of £25 for the balance due to him for his professional "services by him rendered to the Defendant, in the matters and in the manner "in the said Declaration set forth, with interest upon the said sum of £25 "from the second day of November, 1857, date of service of process in this "cause, until actual payment and costs of suit."*

Devlin for Plaintiff. Judgment for Plaintiff.

Drummond & Dunlop for Defendant.

(W. F. G.)

* *Sed vide*, Veitch v. Russell, 3 Q. B. 928; Egan v. The Guardians of the Kensington Union, 3 Q. B. 935; Dupin, Profession d'Avocat; Troplong, Mandat; Case of Ouimet v. Rochon, No. 1660, C. C. Montreal, decided January, 1853, J. S. McCord, Justice; Same case in appeal before Superior Court, No. 769, decided 27th Sept., 1853, Day, Vanfelson, Mondelet, Justices.

(F. W. T.)

MONTREAL, 27 MARS, 1858.

Coram SMITH, J.

No. 400.

Glouteney v. *Lussier, et. al.*

Jugé,—Que la prescription annale en vertu de l'article 127 de la coutume de Paris, ne s'applique quant aux gages et salaires que lorsque le serviteur a cessé d'être à l'emploi du maître durant l'espace d'une année.

La demanderesse réclamait des héritiers de feu Louis Lussier, décédé le 15 Novembre 1855, £275 pour onze années de salaires à raison de £25 par an pour avoir administré ses fermes et son ménage comme gouvernante et ménagère.

L'action avait été émanée le 25 Septembre 1857, et rapportée en cour le 12 Octobre 1857.

Les Défendeurs opposèrent une fin de non-recevoir à cette demande qui est dans les termes suivants: " Les défendeurs pour fin 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 réclamation qu'elle fait pour salaire comme gouvernante pour la " période de temps avant le 15 Novembre 1856.

" Pourquoi les Défendeurs offrent d'affirmer qu'ils ne doivent rien, concluent " à être déchargés de la demande pour tout ce qui est demandé pour salaire " avant le 17 Novembre 1856, et au renvoi de l'action avec dépens."

Les parties ayant été entendues en droit sur cette fin de non-recevoir, la cour rendit son jugement le 27 Mars 1858.

Per Curiam—La prescription annale qui est invoquée par les Défendeurs en cette cause se trouve dans l'article 127 de la Coutume de Paris; or cette prescription ne s'applique que lorsque le serviteur a quitté le service de son maître depuis plus d'un an. Dans le cas actuel, la Demanderesse réclame son salaire jusqu'au jour du décès de feu Louis Lussier dans l'emploi duquel elle est toujours restée. Sous ces circonstances la fin de non-recevoir doit être renvoyée. Le jugement de la cour est motivé comme suit:

" The Court having heard the parties by their counsel upon the exception of *fin de non-recevoir*, pleaded by the said Defendants, having examined the declaration and the pleadings in this cause, and having deliberated thereon, considering that the said Defendants have failed to establish by Law, the existence of any prescription such as is set up by the *fin de non-recevoir* in their *défense* to the present action; doth maintain the *réponse en droit* filed by the said Plaintiff to the said *fin de non-recevoir*, and doth dismiss the said exception, with costs."

Laflamme, Laflamme et Barnard, avocats de la Demanderesse.

Sicotte et Chagnon, avocats des défendeurs.

P. R. L.

MONTREAL, 20th MAY, 1858.

Coram SMITH, J.,

No. 277.

Henderson vs. *Enness.*

CAPIAS—MOTION TO QUASH.

Held,—That a capias cannot be quashed by motion on the ground that the *reasons* of belief in the affidavit do not specifically allege any fraudulent intent on the part of the Defendant.

The affidavit of the Plaintiff set forth the following as the grounds of his belief that the Defendant had secreted his property; and also was immediately about to leave this Province with intent to defraud his creditors.

"The Deponent was informed by one Kilgore of Quebec, baker, and by others, "that Defendant had secreted his property, and was immediately about to leave "this Province: that the Defendant hath actually left his domicile at Quebec, "and is now in custody in Montreal, under a writ of *Capias ad Respondendum* "issued at the suit of one Doyle of Quebec, aforesaid, upon the ground that the "Defendant had secreted his property and was immediately about to leave this "Province."

The Defendant moved to quash the *Capias* on the ground that no fraudulent intent whatever was disclosed in the above reasons, and also on the ground of their vagueness and uncertainty.

Hemming, for Defendant, contended that inasmuch as under 12 V. c. 42, the Plaintiff's belief in the fraudulent intent of the Defendant was the whole gist of the remedy by *Capias*, and the Plaintiff was bound to assign the grounds for such his belief, it was in consequence necessary that the reasons given should allege or disclose a fraudulent intent on the part of Defendant, (and in this case he contended that they did not) that the remedy by summary petition was intended to apply to the case when the facts alleged in the reasons of belief were disputed, but that where the reasons assigned did not necessarily disclose on the face of them such fraudulent intent, the Defendant was entitled to his remedy by motion, and as to the second point, that the Plaintiff was bound to specify and particularize the facts and circumstances set forth in his affidavit as to names, time and place in such a manner that it might be possible for Defendant to disprove the facts alleged, if untrue.

Baker, contra argued that there was no necessity that the reasons assigned should contain an allegation of such fraudulent intent, but that it was quite sufficient to allege the fraudulent intent in the body of the affidavit, and that it was for the Court to decide whether the reasons were sufficient to infer fraud, and further that the allegations of affidavit were set forth with sufficient certainty and that time, place and circumstance of information were never exacted.

Smith, J., said that there was nothing in the act that required that the fraudulent intent on the part of the Defendant should be alleged in the reasons of belief. That in the present case the fact of the Plaintiff having been informed that the Defendant had secreted his goods and actually left his domicile, was *primâ facie* sufficient to justify the Plaintiff's belief that he intended to defraud

his creditors, and that the only remedy left to the Defendant was by Summary Petition.

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Motion dismissed.

Abbott & Baker, for Plaintiff.

Hemming & Lunn, for Defendant.

(E. J. H.)

MONTREAL, 22nd MAY, 1858.

Coram, SMITH, J.,

No. 277.

Henderson vs. *Enness.*

PRACTICE.

Held,—That the 30th Rule of practice allowing the Defendant to move to dismiss the action whenever the particulars of any *demande* are not disclosed by the Declaration, and no Bill of Particulars is therewith fyled does not apply, even in the case where the Defendant is in gaol under Capias where a paper purporting to be a Bill of Particulars is fyled with the Declaration, though such paper should not contain a detailed statement of the whole of Plaintiff's demand, or even to the amount of £10 cy. of such demand aside from the first item "Balance of former account rendered."

Abbott & Baker, for Plaintiff.

Hemming & Lunn, for Defendant.

(E. J. H.)

MONTREAL, 29 MAI 1858.

Coram C. MONDELET, J.

No. 1564.

Chalifoux, v. *Thouin.*

Jugé,—Qu'une action portée contre un défendeur, mineur lors de l'émanation du writ, mais majeur lors de sa signification; doit être renvoyée sur exception à la forme.

Par sa déclaration le Demandeur alléguait un acte de vente en date du 2 Mai 1854, par feu Noël Pepin, au Demandeur, contenant une faculté de reméré pour l'espace de deux années; et que par son testament reçu le 25 Avril 1857, feu Noël Pepin avait institué le Défendeur son légataire universel qui avait accepté ce legs, et il concluait contre lui à la déchéance de ce droit de réméré qui n'avait pas été exercé dans le délai stipulé par le vendeur Pepin.

Le Défendeur par sa première exception, plaida sa minorité lors de l'institution de cette action.

Par l'extrait baptistaire du Défendeur, il appert qu'il était majeur, lors de la signification qui lui fut faite du writ d'assignation.

Per Curiam—Ceci est une demande en déchéance d'une faculté de réméré, mais il est inutile pour la cour d'en examiner le mérite, car le Défendeur a prouvé qu'il était mineur lors de l'émanation du writ de sommation. Il est bien vrai qu'il était majeur lorsque ce writ lui a été signifié; mais néanmoins il n'était pas capable d'ester en jugement, lorsque l'action a été dirigée contre lui; car ester en jugement c'est être partie en un procès et dans une cause. Le Défendeur lorsque l'action a été émanée ne pouvait pas être partie en cette cause. Il en serait de même de la femme mariée dans les cas où l'autorisation lui est nécessaire. Il faut que lors de l'émanation du writ d'assignation, la

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femme soit autorisée, c'est un principe analogue qui régit des questions semblables à celle qui se présente dans l'espèce actuelle.

"La cour.......... considérant que la première exception plaidée par le défendeur est bien fondée en autant que lors de l'institution de la présente action il était mineur, maintient la dite exception et déboute la dite action avec dépens."

Laflamme, Laflamme et Barnard, avocats du Demandeur.

De Bleury, pour le Defendeur.

(P. R. L.)

MONTREAL 28 JUIN 1856.

Coram Day J., Smith, J., C. Mondelet J.

No. 775.

Boyer dit *Laderoute*,

Req. pour writ de *Certiorari*.

Jugé, que si le requerant pour writ de *certiorari* laisse écouler plus de six mois sans adopter aucun procédé pour faire casser la condamnation rendue en cour inférieure, il peut-être déchu de tout droit lui résultant du writ de certiorari par lui obtenu; en vertu d'une simple motion de la part du poursuivant en cour inférieure.

Un writ de certiorari ayant été obtenu en cette cause par Jean Baptiste Boyer dit Laderoute, les papiers et la condamnation prononcée en cour inférieure furent rapportés devant la cour inférieure siégant à Montréal.

Le requerant fit émaner une Règle le 23 Mai 1855, pour faire annuller la condamnation rendue par le Juge de Paix, mais ne procéda pas plus avant dans la cause.

Le 18 Juin 1856, François Xavier Mallet le poursuivant en cour inférieure fit la motion suivante.

Motion de la part du dit François Xavier Mallet le poursuivant en cour inférieure, qu'attendu qu'il appert par le record en cette cause que le Requérant n'a adopté aucun procédé depuis l'émanation de la règle pour casser la conviction rendue par le Juge de Paix (Rule to quash) émanée le 23 Mai 1855, et qu'il s'est écoulé plus de six mois depuis le prononcé du jugement ou conviction en cour inférieure la dite règle (Rule to quash) soit déclarée non avenue, nulle et de nul effet et le writ de certiorari cassé et annullé en conséquence avec dépens.

Cette motion fut accordée le 28 Juin 1856 et le jugement est dans les termes suivants:

"La cour après avoir entendu le dit François Xavier Mallet, le poursuivant "en cour inférieure, sur la motion du 18 Juin courant, le dit Jean Baptiste Bo-"yer dit Laderoute, quoique notifié, n'ayant pas comparu pour répondre à "la dite motion avoir examiné la procédure, et avoir délibéré accordée la dite "motion et déclarée non avenue, nulle et de nul effet, la règle émanée le 23 Mai "1855, pour casser la conviction rendue par le Juge de Paix, et en conséquence "casse et annulle le writ de *certiorari* émané en cette cause, avec dépens.—Et "la cour ordonne que la procédure soit remise à la cour inférieure."

D. D. Bondy, avocat du Requerant.

Ouimet, Morin, Marchand avocats du poursuivant.

Note.—Un semblable jugement fut rendu le 27 Mars 1858, Exparte, Prefontaine, No. 251 Montréal C. S. Sed Vide 2 L. C. Report. p. 302. 16 Vic. ch. 199 Sec. 2. P. R. L.

MONTREAL, 29 MAI 1858.

Coram SMITH, J.

No. 485.

Domina Regina sur l'application de Joseph Chagnon, Requerant pour un writ de Certiorari.

ET

B. Lareau et al., Commissaires.

Jugé; que sur une motion de la part des commissaires en cour inférieure, le writ de certiorari doit être cassé et annullé, lorsque le requérant n'a adopté aucun procédé durant l'espace de six mois depuis sa demande pour writ de certiorari.

Un writ de certiorari ayant été accordé au requérant en cette cause le 27 Septembre 1854, et ce dernier n'ayant jamais fait émaner ce writ; les commissaires en cour inférieure pour la décision sommaire des petites causes........ firent motion "qu'attendu qu'il appert par le record en cette cause que la Re-"quérant n'a adopté aucun procédé depuis la demande d'un writ de certiorari "en cette cause et qu'il s'est écoulé plus de six mois depuis le prononcé du ju-"gement en cour inférieure, le writ de certiorari soit cassé et annullé en consé-"quence avec dépens contre le dit Joseph Chagnon."

La cour supérieure à Montréal accorda la motion le 29 Mai 1858, et le jugement est motivé comme suit:

"La cour après avoir entendu les dits commissaires en cour inférieure par "leurs avocats sur leur motion du 22 Mai courant, le dit Joseph Chagnon Re-"quérant ayant été notifié de la dite motion, et n'ayant pas comparu lors de "l'audition d'icelle, examiné la procédure et avoir délibéré, accorde la dite mo-"tion, et paraissant que le Requérant n'a adopté aucun procédé depuis la de-"mande d'un writ de certiorari en cette cause, et qu'il s'est écoulé plus de six "mois depuis le prononcé du jugement en cour inférieure, casse et annulle en conséquence le dit writ de certiorari, avec dépens contre le dit Joseph Chagnon."

Writ cassé.

Sicotte & Leblanc, Avocats du Requerant.

R. & G. Laflamme, Avocats des Commissaires.

(P. R. L.)

MONTREAL, 5TH JUNE, 1858.

IN CHAMBERS.

Coram SMITH, J.

No. 1659.

Bruneau v. *Miller*.

ALIMENTARY ALLOWANCE.

Held,—That tender of payment made by an American gold dollar is not a legal tender.

On the 20th May last, the Defendant being confined in gaol under process of capias ad Respondendum, issued in this cause, obtained an order for the payment of five shillings currency per week as an alimentary allowance.

On the 24th May following, the Plaintiff, in pursuance of such order, tendered to the Defendant an American gold dollar in payment of such allowance, which the Defendant refused to accept on the ground that the coin tendered was not current in Canada; and on the 27th May the Defendant presented a petition

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for his discharge, on the ground that the Plaintiff had failed to comply with the said order, and had not paid or tendered him five shillings currency, as ordered. The fact of the tender of the gold dollar was admitted by the Defendant.

Hemming, for Petitioner, contended that under the 16th Vic. chap. 158 s. 9. the only American coins current in Canada were the eagle; and the *multiples* or *halves* of an eagle, of a certain date and weight. That a gold dollar was neither a multiple nor a half of an eagle; that, although in the French version of said section the word "halves" was translated by "des divisions" it was evidently an error, and in case of doubt, the English version was to be followed; that, moreover, allowing that the gold dollar was comprised under the word "division," it was incumbent on the Plaintiff to show that it was of the proper date and weight.

Laflamme, R. & G., for Plaintiff, argued that the French version was of equal authority with the English; that the gold dollar was evidently a division of the American eagle, that the legal presumption was, that it was of a proportionate weight, and that the *onus* of proving the contrary fell upon the Petitioner.

The *motifs* of the judgment were as follows:

"The Court considering that the Petitioner hath fully proved the allegations of his said Petition, and that the said Plaintiff hath failed to tender in good legal or current money, the amount of the alimentary provision ordered to be made to the said defendant now in custody at the suit of the said Plaintiff, the said gold dollar not being under the provisions of the 16th Vic. ch. 158, a division of the American gold eagle, the said Petition is granted, and it is ordered that the sheriff do discharge from custody the body of the said Defendant, unless otherwise detained under legal process."

R. & G. Laflamme, for Plaintiff.

Hemming & Lunn, for Petitioner.

(E. J. H.)

CIRCUIT COURT.

MONTREAL, 11th JUNE, 1858.

Coram BADGLEY, J.

No. 228.

McKenna, vs. *Tabb.*

ARBITRES—COSTS.

Held,—That arbitres to whom the matters in dispute between the parties to a suit have been referred, and who find a sum of money to be due to the Plaintiff, have no right to adjudicate on the costs of suit and to decide that each party pay his own costs.

The matters in dispute in this cause had been referred to *arbitres, amiables compositeurs*, who gave an award of £20 in favor of Plaintiff, (being £5 less than Plaintiff's demand,) and they adjudged that each party should pay his own costs of suit.

At the final hearing, *Herbert*, for Plaintiff, stated that the only point of difference between the parties now, was the question of costs, and submitted a

motion, that the award, in so far as it found the Defendant indebted for the causes stated in the Declaration, be homologated, and the Defendant accordingly adjudged to pay £20 and costs of suit; and that in so far as the award assumed to adjudicate upon the question of costs of suit, the same be rejected and set aside, as illegal and beyond their powers as *arbitres*. He cited in support of this motion *Ord. Civ.* T. xxxi, Art. 1 and 2, (*Des Dépens.*)

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Macrae, for Defendant, moved that the award be homologated according to its form and tenor; and contended, that in their quality of *amiables compositeurs*, the *arbitres* had a right to adjudicate upon the costs.

By Judgment rendered 12th June, the Plaintiff's pretentions were sustained and so much of the award as pretended to decide upon the question of costs of suit, was rejected; the power to do so not having been specially confided to them by the *compromis*. The costs of arbitration were however divided, each party paying one half.

Herbert, for Plaintiff.

Monk & Macrae, for Defendant.

(A. H.)

SUPERIOR COURT.

MONTREAL, 27TH FEBRUARY, 1858.

Coram DAY, J.

No. 101.

Fisher* v. *Russell et al.

Held,—That the admissions of one partner on *Faits et Articles*, after the dissolution of partnership, are binding on all the members of the firm.

This was an action to recover back an amount of £450, alleged to have been charged twice in an account rendered many years ago by the Defendants, whilst co-partners under the firm of Hector Russell & Co., to the Plaintiff. The action originally involved the recovery of other sums of money; but before final hearing, the whole issue between the parties was narrowed down, by a special consent in writing, to the question of whether or not there had been a *double emploi* in the account in question.

Day, J.—The sole question involved in the present case, is whether or not it is competent for one member of a dissolved firm, by his answers on *Faits et Articles*, to make evidence against his late co-partners, in regard to a transaction which occurred during the existence of the partnership. The *double emploi* complained of by the Plaintiff is alone established by the answers of Mr. Mackenzie, one of the Defendants, on *Faits et Articles*, and the question arises how far such answers can bind the other Defendants. This is a matter entirely of English law, and I hold that it is competent for a co-partner so to bind his late co-partners; and although a different doctrine has been held in the Supreme Court of the United States, yet the question there was somewhat different, it being whether an admission given by a partner, after the dissolution of the firm, was a new promise sufficient to bind the other members of the firm, and to take the case out of the Statute of Frauds. In support of the view I have taken, I

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would refer to a very old case, Burroughs v. Adams, and to a case of Russell v. Esdaile et al., decided in 1847.

Judgment for Plaintiff.

Mackay & Austin, for Plaintiff.
M. McIver, for Russell, Defendant.
W. E. Holmes, for Mackenzie, Defendant.
(S. B.)

MONTREAL, 27TH FEBRUARY 1858.

Coram BADGLEY, J.,

No. 210.

Edmonstone et al., vs. *Childs et al.*

Held,—That it is competent to Defendants who are sued as copartners carrying on trade under the name of "The Montreal Rail-Road Car Company," to prove under the general issue, that the Company was incorporated and that the debt sued for was a debt of the Corporation.

This was an action on a promissory note, signed in the name of "The Montreal Rail-Road Car Company," by John Leeming one of the Defendants, styling himself Trustee of such Company, and was instituted against the Defendants who were alleged in the Declaration to be copartners, carrying on business under the above name. The plea was the general issue.

Badgley, J.—The Defendants here are sued as Copartners, but the evidence clearly establishes that there never was any such Copartnership as that mentioned in the declaration, and that on the contrary the Defendants were duly incorporated, under the provisions of the Statute 13 and 14 Vic. ch. 28, under the name of "The Montreal Rail-Road Car Company." The Registrar's certificate and the copy of the Canada Gazette containing the required notice are fyled, and there can be no doubt that the Company was regularly established in accordance with the Statute. There is no other Car Company proved to have existed and the Defendants were moreover the original trustees of the Company. The note sued on is plainly a note of the Company and not of the Defendants, either as individuals or Copartners. It is true that the Defendants have only pleaded the general issue but as they were sued as Copartners, I think, under that plea, they had a right to prove that they were not so and that on the contrary they were a corporation. Under all the circumstances I have no hesitation in dismissing the Plaintiff's action.

Action dismissed.

Rose & Monk, for Plaintiffs.
A. & G. Robertson, for Defendants.
(S. B.)

MONTREAL, 27th FEBRUARY, 1858.

Coram DAY J.

No. 1668.

Bernier v. *Beauchemin.*

Held,—That in an action for an infringement of a Patent right, it is not necessary to set out at length in the declaration the preliminary formalities required to be observed in order to obtain the Patent.

This was a hearing on law on the *Défense en Droit* fyled by the Defendant to the Plaintiff's declaration. The action was one in damages for an infringement of a Patent right, and was met by demurrer on the gronnd principally that the declaration failed to set out at length the preliminary formalities required to be observed in order to obtain the Patent.

DAY, J.—The declaration seems to me quite sufficient. The Plaintiff has set out the Patent at length, and alleged substantially that he was the first inventor. There is no necessity of stating the formalities which were gone through to get the Patent. The case of Smolenski & Idler, which was cited, is not analogous to the present one, for there the Plaintiff failed to allege that he was the first inventor, and moreover there was a misjoinder of defendants in that case.

Demurrer dismissed.

Leblanc & Cassidy for Plaintiff.

Lafrenaye & Papin for Defendant.

REP. NOTE.—There was a similar judgment rendered at the same time in No. 1825, Bernier v. Beliveau, S. C.

(S. B.)

MONTREAL, 27TH FEBRUARY, 1858.

Coram DAY, J.

No. 2089.

Gigon vs. Hotte.

Held,—That the designation of Defendant's residence in writ of summons as "St. Jean Baptiste," when in fact he resided in "St. Jean Baptiste *de Rouville*," is sufficient.

This was an exception *à la forme* fyled by defendant, on the ground that he was described in the writ of summons and return as residing in the Parish of St. Jean Baptiste, whereas the proper name of the Parish where he resided was St. Jean Baptiste *de Rouville.*

At *enquête*, it was proved that in the District of Montreal there are two Parishes bearing the name of St. Jean Baptiste, namely, St. Jean Baptiste *de Rouville*, and St. Jean Baptiste *de Roxton.*

DAY, J.—I see no false description here. The defendant undoubtedly lives in the Parish of St. Jean Baptiste; and, although it is proved that there are two Parishes of that name in the District—the one in Rouville and the other in Roxton—it does not follow that the simple description, "St. Jean Baptiste," is bad. Moreover, Pigeau says that there is no necessity for describing the residence of the defendant.

Exception dismissed.

Leblanc & Cassidy, for Plaintiff.

Cartier, Berthelot & Pominville, for Defendant.

(S. B.)

MONTREAL, 27TH FEBRUARY, 1858.

Coram DAY, J.

No. 1658.

Malo vs. Labelle.

Held, in an affidavit for *capias pendente lite*, that a reference to the declaration fyled in the cause for the cause of debt is sufficient.

This was a motion to quash a writ of *capias ad respondendum* on the ground, amongst others, that it did not appear by the affidavit that any legal or sufficient cause of debt existed to justify the issuing of the writ, inasmuch as the affidavit in effect merely stated that the defendant was indebted in a particular sum of money, *for the reasons mentioned in the declaration in the cause.*

Motion to quash rejected.

Cherrier, Dorion & Dorion, for Plaintiff.
Laflamme, Laflamme & Barnard, for Defend nt.
(S. B.)

MONTREAL 27TH FEBRUARY, 1858.

Coram DAY, J.

No. 211.

Boudreau v. Lavender.

Held, that where it results from the proof that the allegations do not correspond precisely with the facts proved, that the declaration may be amended, on payment of 50s. costs, without prejudice to the evidence, and with power to Defendant to replead within 8 days.

This was a motion to amend the Plaintiffs' declaration, in consequence of the proof not according precisely with the allegations of the declaration, and particularly in regard to the date of a note on which the action was partly based.

DAY, J. I see no difficulty in granting this motion, and it is granted according on payment of 50s. costs, and without prejudice to the evidence, with the right also to the Defendant to replead within 8 days.

Motion granted.

Cherrier, Dorion & Dorion, for Plaintiff.
Monk & Macrae, for Defendant.
(S.B.)

MONTREAL, 27th FEBRUARY, 1858.

Coram DAY, J.,

No. 340.

Westrop v. Nichols, et al.

Held,—That when the particulars of Plaintiff's *demande* are not disclosed by the Declaration, and no Bill of Particulars is therewith fyled, such Bill of Particulars may be fyled at the *enquête*, if the Defendant instead of moving to dismiss pleads to the action.

This was a motion to reject certain Bills of Particulars fyled by Plaintiff at *enquête*, on the ground that they should have been fyled with the Declaration, and were fyled without leave of Court, and on a day on which they could not, according to the Rules of Practice, be so fyled.

DAY, J.—This motion comes too late. The Exhibits referred to were fyled before the Plaintiff's *commission rogatoire*, in which the Defendants joined, was sued out. Besides the Defendants, under the Rules of Practice, might have

moved to dismiss the Plaintiff's action as being unsupported by any Bill of Particulars, instead of which they pleaded to the declaration, and thus waived the necessity of fyling such Bill of Particulars at the return of the action.

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Motion rejected.

Rose & Monk for Plaintiffs.
A. & W. Robertson for Defendants.
(S. B.)

MONTREAL, 27TH MARCH, 1858.

Coram DAY, J.

No. 225.

Cumming et al. v. *Mann*, & *Smith et al., Opposants.*

Held,—That a sale *omnium bonorum*, made by a trader whilst notoriously insolvent, and after meetings of his creditors which failed to result in any unanimous arrangement, to two of his creditors who (as the sole consideration for such sale) became responsible for the payment of the dividend he was desirous of paying, by giving their notes for an amount sufficient to cover the dividend, all of which notes actually paid were so paid out of the proceeds of the sales of a portion of the goods assigned, is not either a simulated sale or a sale *in fraudem creditorum*.

2. That an assignment of the interest of the bankrupt in his lease is a sufficient delivery in law of the goods sold as above, as against creditors or other third parties, and precludes the necessity of a *déplacement* or other species of *tradition réelle*.

This was an opposition *à fin d'annuller* fyled by the opposants, John Smith and Joseph M. Ross, to a seizure of household furniture and goods, in a house in Notre Dame Street, of this city, occupied by the Defendant, and of goods in a shop in McGill Street, which the Sheriff returned to be also in the occupation of the Defendant. The opposition alleged, that by a deed of sale and transfer executed on the 24th day of October, 1855, before Gibb and colleague, notaries, the Defendant sold to the opposants the whole of the moveable property w ich he then possessed, and which was lying partly in the premises, No. 120 Notre Dame Street, and partly in the premises No. 74 McGill Street, for and in consideration of the price or sum of £2181 16s, currency, which the opposants undertook to pay, at the times in said deed stated, by certain negotiable notes of the opposants, then and there delivered to the Defendants, and which were, in so far as they had matured, paid by the opposants to the holders thereof, in and by which deed it was also alleged that the Defendant had duly transferred to the opposants his interests in the leases he then held of the two premises aforesaid. That after the execution of said deed the opposants had taken due delivery of all the property assigned, and that ever since the date of the deed the business had been carried on in the Notre Dame Street premises by the opposants and their clerks, and likewise in the McGill Street premises from the date of the deed to the expiry of the lease of those premises, when the stock was removed into certain other premises leased by the opposants in their own names. That the property seized was composed, in part of a portion of the property originally assigned, and in part of goods purchased by the opposants with their own money since the date of the deed.

The Plaintiffs contested the opposition, and for reasons or *moyens* of contestation (denying the truth of the allegations of the opposition) averred, in effect, that at the time of the execution of the preten[illegible] deed of sale and [illegible]nsfer, in part recited in the said opposition, the said Defendant was and for more than six

months immediately preceding that date had been to the knowledge of the said opposants, notoriously insolvent, *en deconfiture*, and that they the said Plaintiffs were then, and had been for several years previously, to the knowledge of the said opposants, creditors of the said Defendant, in respect of the debt for which judgment was rendered in the cause against the said Defendant on the 31st day of March, 1856. That the said pretended deed was so executed by the said Defendant, for the purpose of defrauding certain of his creditors, and especially the said Plaintiffs, and of preventing if possible the exercise in due course of law of the said Plaintiffs' remedy as of right against the property pretended to be conveyed by such deed, in satisfaction of the Plaintiffs' said debt, such property so pretended to be conveyed being in fact all the estate and property whatsoever of the said Defendant which he then owned and possessed or to which he was in any way entitled. That the pretended price, stipulated in and by the said pretended deed to be paid by the said opposants, was far below the real value of the said property and estate. That, at the time of the execution of the said pretended deed, they the said opposants well knew all the premises aforesaid, and became parties to the said pretended deed for the mere purpose of aiding and abetting the said Defendant in his attempt aforesaid to defraud his said creditors, the Plaintiffs, and deprive them of their legal and just remedy aforesaid. That, moreover, no real delivery, *tradition réelle*, ever took place or was made of the aforesaid property and estate to the said opposants, and that on the contrary, notwithstanding the execution of the said pretended deed, the said Defendant, then, and at all times thereafter, continued in the absolute physical posession of the whole of such property and estate. That the said pretended deed was a mere simulated deed and was, as regards the said Plaintiffs and the seizure by them effected in the cause, wholly inoperative, null and void, and ought so to be declared by the court, and so far as might be necessary, be rescinded and set aside. That at the time of the seizure of the moveable effects seized in this cause under and by virtue of the writ of execution therein issued, all and singular the aforesaid moveable effects were and had been for a long time previously in the absolute physical possession of the said Defendant, and were not in the possession of the said opposants, as falsely pretended in, and by their aforesaid opposition.

The opposants replied specially to the following effect (after denying the truth of the Plaintiffs' allegations) :—That at the time of the execution of the said deed of sale and transfer of the 24th October, 1855, the opposants gave to the said David Mann the full value of the goods thereby made over to them, and that the said David Mann divided the price so obtained for the goods among his creditors, and, among the rest, offered to the said Plaintiffs their share of such price and value. That, at the time of the seizure of the said goods, the opposants were in possession of the same, and the said David Mann was their clerk and servant in their employ, and real delivery had been and was made to the opposants. That the said sale was not made to secure any pre-existing debt, but that full value was given at the time of the execution of the said deed of sale. That whether the said David Mann was or was not able to pay his debts, of which the opposants were ignorant, the opposants purchased the said goods and effects in good

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faith, and paid the full value of the same to the said David Mann, at the time of the execution of the said deed of sale, and that the proper share of such value or price was offered to the Plaintiffs by the said David Mann, and the rest divided among his creditors. And that the said sale was made in perfect good faith, and in consideration of a *bonâ fide* value given by the opposants, and without any intention or purpose of defrauding the Plaintiffs, or of preventing them from prosecuting any just claim they might have against the said David Mann. And that the opposants formally denied all the averments of fraud and covin set forth in the said contestation.

Monk, Q. C., for Opposants :—(After setting forth the facts). The questions raised by the Plaintiffs' contestation may be reduced to two, namely, whether the deed invoked by the opposants was a simulated or fraudulent deed, and, if not, whether there has been a sufficient delivery in law of the property conveyed by that deed. On the first point, I apprehend the court can have little or no hesitation. There can be no doubt that so far from its being proved that the deed in question is a simulated one it is clearly and satisfactorily established in evidence that the purchase was made by the opposants in good faith, and was in fact a serious and *bonâ fide* transaction. These gentlemen, who are two of the most respectable merchants in this town, gave full consideration for this purchase, by placing in the hands of Mann their negotiable promissory notes for no less an amount than £2181 16s., currency, and by retiring those notes at maturity by their own checks on the City Bank. Moreover, there was not only no secrecy about the transaction; but the whole matter was conducted in the most open manner, and with the entire approbation of the great mass of Mr. Mann's creditors. Independently, however, of the special considerations that may be urged in the present case in support of the position assumed by the opposants, I would refer the court with confidence to the judgment of the Court of Appeals in the case of Sharing & Meunier, which will be found reported in the 7th volume of the L. C. Law Reports, page 250. This was a judgment confirming a judgment of this court which sustained a deed of sale which had been executed under circumstances somewhat analogous to those in the present case. And on the second point I feel satisfied the court will have equally little hesitation. It would appear that by the deed Mann transferred to Smith & Ross all his interest in the leases he then held of the premises in which the property transferred was lying, and one of these leases having expired (namely the one in McGill Street), the opposants actually leased other premises in that street, to which they removed the goods which were on hand at the time in the former premises. What better form of tradition can be required than this? The transfer of the leases had surely the legal effect of vesting the possession of the premises leased in the opposants, and no *déplacement*, such as contended for on the other side, could be at all requisite or necessary under such circumstances. Moreover, the property seized here forms but a very small portion of the original stock sold by the deed of October, 1855, and was in the main composed of goods bought and paid for by the opposants themselves at various periods since that time.

Bethune, for Plaintiffs :—In order to the proper understanding of this case it is necessary to explain that Mann failed twice, once in December, 1853, and

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again in July, 1855. Under the first failure a composition was agreed to of 15s. in the pound, payable in 15 monthly instalments, eight of which only were paid before the second failure. At the meetings of creditors held after the second failure it was proposed to pay all those whose claims had accrued after the first failure 8s. in the pound, and 4s. in the pound on the balance of such claims after deducting the 8s., and to pay all those whose claims had not so accrued 4s. in the pound, only on the balance of their claims, after deducting the 8s already received. The injustice of this proposal, as regards those who were merely creditors under the first failure, will appear manifest by one simple illustration. For example, Mr. Whitney who has been examined in this case as a witness, was a creditor subsequent to the first failure to the extent of £600, out of which he was paid in cash between the two failures (a period of some 18 months only) no less an amount than £400, or 13s. 4d. in the pound, and by this proposal he was to be paid 8s. in the pound on the balance remaining after deduction of these £400, namely, on £200, and 4s. in the pound on the balance, whereas on the other hand the Plaintiffs, who were old creditors, and others in the same position, and who had received only 8s. in the pound on their original claims, the last instalment of which was paid as far back as January, 1855, were by this proposal to be paid only 4s. in the pound on their balances. Quite a number of other new creditors have been also examined, including the opposants themselves, who acknowledge to have likewise been paid between the two failures considerable sums of money, and in no instance less than 7s. in the pound. On account of the manifest injustice of this proposal, to say nothing of its utter illegality, the Plaintiffs and several others declined the offer, and in consequence, the deed of the month of October, 1855, was executed, for the purpose of placing the Defendant's property beyond the reach of the dissentient creditors, and thus coercing them if possible to accept the proposed dividend. Having thus shewn the injustice of the proposed arrangement I shall now proceed to point out the illegality of the transaction which supervened on its rejection by the Plaintiffs. At the time of the execution of the deed in question, Mann was admittedly notoriously insolvent, to the knowledge of the opposants, and could not therefore legally assign to two of his creditors (as the opposants were) the whole of his estate and property, which by law was the property or at least the *gage* of all his creditors. For this reason alone, the deed on [illegible] opposants' opposition is based is null and void in law. But if there [illegible] on this point there can be no doubt, from the facts disclosed by [illegible] this case, that the deed was a simulated one, and was executed by the defendant in fraud of the Plaintiffs and certain other of his creditors, and that the opposants knew all this and participated in the fraud. In the first place, the fact of the notor[illegible] insolvency of Mann is of itself a legal presumption of simulation and fraud [illegible] render the deed utterly null and void, and when we superadd to this [illegible] the patent fact, that the deed was passed not only when Mann [illegible] declared bankruptcy, but after the several meetings of creditors, [illegible] the opposants assisted, had failed to result in any unanimous arrangement, and for the avowed purpose (as admitted by Mann and Mr. John Smith, one of the opposants, to Mr. Barry who has been examined as a witness for the Plaintiffs) of placing the property beyond the reach of seizure, there is no

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room left for doubt that the deed was executed by Mann for the purpose of defrauding the Plaintiffs and certain others of his creditors, and that the opposants participated in the fraud thus committed. The simulated character of the deed moreover is to be gathered from the fact sworn to by Mann's clerks, that the notes which were given as the apparent consideration of the sale were never paid by any moneys of the opposants, but were paid by checks drawn by them on a special fund in the City Bank, which was composed solely of the proceeds of sales of portions of the very goods affected to be assigned by the deed, and likewise from the fact that Mann never abandoned the possession of the premises where the property was deposited, but continued to occupy them in every respect as if no deed of sale had ever been executed. In addition to all which, it is proved by the statements now handed in that the pretended price stipulated in the deed was fully 75 per cent., or £1636 7s., below the real value of the estate, and £314 5s. 10d. below even the reduced value put upon the estate by the parties themselves, as shewn by the schedules annexed to the deeds. The whole of which excess has plainly resulted in a gain to the debtor of an amount more than sufficient to pay the Plaintiffs the 8s. in the pound they were justly contending for. In addition, however, to all these considerations, the deed is plainly inoperative for want of tradition. There is abundance of authority to establish that what is technically known as a *déplacement* was essentially necessary to vest this property which was moveable in the opposants. In the present instance nothing but a symbolical delivery took place, Mann uninterruptedly retaining the actual and physical possession of the whole of the furniture and goods pretended to be conveyed and of the premises in which they were deposited. It is contended by my learned friend on the other side, that the transfer contained in the deed of all Mann's interest in the leases constituted a sufficient delivery in law. How can a mere transfer of a party's right of lease be construed into a delivery over of the premises, and consequently of the contents of those premises, in the face of an absolute and uninterrupted retention by such party of these very premises and their contents? No authority has been cited in support of such a proposition and I feel satisfied the court will agree with me in saying that it is wholly untenable. As regards the furniture, therefore, which has never ceased to be in Mann's possession, and which has been seized in the same condition as when pretended to be sold, there can be no doubt whatever that the Plaintiffs are entitled to succeed. As to the goods, the opposants contend that, inasmuch as it is impossible to distinguish among those seized what belonged to the old stock and what to the new purchased since the date of the deed, the Plaintiffs' contestation must fail; but a word of explanation will suffice to shew that the seizure of the goods must be equally sustained with that of the furniture. I take it that I have sufficiently demonstrated that the deed, as regards both furniture and goods, must be regarded as simulated and fraudulent, and therefore null and void, and that, for want of tradition, moreover, it failed to vest any property in the opposants. Let us now examine into the facts connected with the purchases of the new goods. It is in evidence that all the new goods were selected and purchased by Mann personally, and were delivered at the respective shops in Notre Dame and McGill Streets, occupied by

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him, and that all monies paid on account thereof were paid, either by Mann personally or some one of his clerks, in money, or by checks drawn by the opposants on the special fund in the City Bank, composed as before stated, of the proceeds of sales in the two shops in question. It will be thus seen that not one single farthing of the opposants' own money was ever spent in connexion with these purchases, and that they never were concerned in the selection, purchase, or delivery of the goods. It is true, that a great number of witnesses who have been examined in the interest of the opposants, have stated in examination in chief, in general terms, that they sold their goods to the opposants; but when submitted to the test of cross-examination they are obliged to admit that, instead of the opposants buying, it was in fact Mann who bought, and that the only assurance as to payment which they had from the opposants was a mere verbal one, and that only in a very few instances, given by Mr. Ross at one time, and by Mr. Smith at another, that it would be all right, or they would see them paid, or something to that effect. So that at most we have only the opposants proved to have promised, in an illegal and unbinding form, to be sureties for Mann as regards some very few of the very numerous purchases made by him after the execution of the deed of October, 1855. The only other point requiring notice is the leasing of new premises in McGill Street in the name of the opposants, but the mere fact of their lending their names for that purpose could never, in the face of an adverse physical possession of these very premises by our debtor Mann, and the proof of the fact that all rent paid was paid by Mann in the same way as the goods were paid for, that is either by cash or check on the special fund in the City Bank, constitute of itself conclusive evidence that the opposants were the *bonâ fide* proprietors of the goods deposited in those premises.*

Day, J.—(After stating facts). It is quite plain that the Plaintiffs' pretensions in this case must rest upon some one of these three propositions: either that the open and declared insolvency of Mann precluded him from making any valid conveyance of his property, except for the common benefit of all his creditors, and consequently that the deed of sale in question is for that reason alone null and void in law,—or that the deed was a simulated one and merely executed for the purpose of defrauding a certain portion of Mann's creditors,—or that even presuming the deed to be a *bonâ fide* one and not voided by the insolvency of Mann, no legal tradition of the property had been made, and that, therefore the deed was inoperative as regards the Plaintiffs and other third parties.

On the first of these propositions I should say, that I know of no law in force in this country prohibiting or preventing an insolvent debtor from selling his property, so long as no fraud is proved in the transaction. It is true, that the *ordonnance du commerce* declared all transfers and sales made by bankrupts within a certain time before their declared insolvency null and void; but this was an innovation on the old common law of France, which can be our only guide here, and I am relieved from the necessity of discussing the principles of this latter law by the judgment of the Court of Appeals in the case of Sharing &

* Authorites cited by Plaintiffs' counsel:—6 Vol. *Digeste de Justinien, par Hulot*; p. 414 and *seq.* Pothier, Vente, Nos. 320, 1, 2; 7 Touillier, No. 34 and *seq.* Bonacina & Seed, 3 Vol. L. C. Law Reports, p. 446, and authorities there cited.

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Meunier, which was cited at the bar, confirming by an equal division of the Judges the judgment rendered by this Court. This judgment has unmistakeably sanctioned the rule of law which I have just laid down as applicable to the present case, and as I am not disposed to disturb the precedent thus established or in any way to question its correctness, I must hold, that the deed executed by Mann, although passed at a time when he was admittedly in open and declared insolvency, is a legal proceeding, unless fraud has been proved to have accompanied it. - Now, as to the character of the sale itself, I am clearly of opinion that it is not a simulated or fraudulent one, but an open *bonâ fide* transaction. Its object manifestly was that the Defendant might be enabled to pay his creditors a certain dividend, and the evidence shews, that when the opposants gave their promissory notes, they fully intended to become proprietors of the goods. There was nothing like a speculation about the matter, and the notes were taken up at maturity, by Smith & Ross's joint cheques in the regular way. It had been said that no value was given for those notes and cheques, that Smith & Ross merely advanced the money and then paid themselves back from the proceeds of the sale of the goods. This was a matter of no importance. Every man making a purchase of goods intends as a matter of course to pay himself out of them. The sale was none the less real for this expectation. The notes were given, and if the goods had in the meantime perished by fire or otherwise, the notes would have remained, binding the opposants for their amounts. There was here not the least appearance of fraud, and every indication that Smith & Ross intended to become the owners of Mann's stock; and the Court's opinion on this point, as well as on the former is decidedly against the Plaintiffs' pretensions. Then, as to whether the tradition was sufficient to complete the sale. On this point also the Court is against the Plaintiffs; the tradition must be considered sufficient. Not much importance was to be attached to the delivery of a few of the articles symbolically for the whole. Had this fact stood alone there might have been a good deal of doubt in determining whether the sale was complete or not; but there were in this instance so many confirming evidences of sale that the Court would have no hesitation in declaring the contract good. At the time of sale the houses in which the goods were stored were rented by the opposants, who, for the rent of one of them, gave their cheque to the proprietor, Mr. Ferrier, as was proved by the testimony of McFarlane. Besides the stock made over to the opposants forms but a part of that seized, for much of the original stock had been sold off by degrees, and the store replenished with newly purchased goods. It was not pretended that the supplies received at various times could be distinguished from each other. And it was shown in evidence that, in the new purchases, the parties selling were paid by Smith & Ross, and looked to them for payment. The great bulk of stock seized by the Plaintiffs had been, since the sale, purchased by Mann, as agent of Messrs. Smith & Ross, and Mann was not shown to have any interest in the reversion of these goods, or in any surplus that might remain after the opposants had recovered back the amount of the purchase money. The shop in McGill Street was, as before stated, not leased by Mann at all, but directly from the proprietor by Smith & Ross. The only remaining question, and it was one that did not interfere with the judgment,

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was in regard to the price at which the sale to the opposants was made, which the Plaintiffs stated to be too low. They maintained that a public sale would have allowed a larger dividend to have been declared, and that they were justified in refusing to accept the composition offered on that ground, without losing their recourse against the property of the Defendant. The Plaintiffs and a very few other creditors objected to the sale, but the great majority of the creditors concurred in the arrangement. This point might perhaps have been a ground for a special revocatory action in which it would have been competent to the Plaintiffs to establish the quality of the sale, and any injustice or fraud that might have been attached to it; but the Court now was bound to declare, that no creditor could *de plano* enter in and execute property previously conveyed from his debtor to a third person by a *bonâ fide* sale, whatever opinion might be entertained of the insufficiency of the price given. On the whole three points, therefore, the Court is with the opposants and the Plaintiffs' contestation must be dismissed with costs, the opposition of Smith & Ross maintained and *main lévée* granted them of the goods under seizure.

Judgment maintaining Opposition.

Rose & Monk, for Opposants.

Bethune & Dunkin, for Plaintiffs Contesting.

(S. B.)

MONTREAL, 27TH MARCH, 1858.

Coram SMITH, J.

No. 251.

EXPARTE *Préfontaine* for *Certiorari*.

Held, that a *certiorari* in which no proceedings have been had during six months, will be dismissed on motion.

SMITH, J.—This is a motion to quash a *certiorari* for want of proceedings during six months, and a case, EXPARTE *Boyer*, has been cited as a precedent. The Court adopts the precedent, and the *certiorari* is accordingly quashed.

Motion granted.

R. & G. Laflamme for Petitioner.

Loranger & Pominville for Prosecutor.

(S. B.)

MONTREAL, 27TH MARCH, 1858.

Coram SMITH, J.

No. 1343.

Elliott v. *Bastien et al.*

Held, where an *exception déclinatoire* has been fyled which requires proof to support it, and Plaintiff, instead of inscribing for *enquête*, inscribes for hearing, on the merits of the exception, that the exception must be dismissed for want of proof.

SMITH, J.—This is an *exception déclinatoire* fyled by the Defendant, alleging that the promissory note sued on was not made at Montreal, but at Vaudreuil. The Declaration states that the value for the note was received at Montreal. The Plaintiff, instead of inscribing for *enquête*, inscribes for hearing on the

merits of the Exception. Under the circumstances, I cannot look at the note, and, there being nothing to support the allegations of the Exception, I have no alternative but to dismiss it.*

Elliott v. Battison.

Exception dismissed.

Louis Bétournay for Plaintiff.
Ouimet, Morin, & Marchand for Defendants.
(S. B.)

* Reporter's Note.—Would it not have been more correct to discharge the Inscription?

MONTREAL, 27TH MARCH, 1858.

Coram Mondelet (C.), J.

No. 2137.

Adams v. *Gravel.*

Held, that a material reference in a Surveyor's report to a plan not of record in the cause is bad, and sufficiently so to cause the report to be set aside.

Mondelet (C.), J. This is a motion by the defendant to reject a Surveyor's report, on the ground that it makes reference in a material particular to a plan deposited and of record in the Office of a Notary Public. No copy of this plan accompanies the report nor is any evidence of the existence or character of the plan of record in this cause. This is a fatal defect and the report must consequently be set aside.

Motion granted.

Drummond and Dunlop, for Plaintiff.
Cartier and Berthelot, for Defendant.
(S. B.)

MONTREAL, 27TH MARCH, 1858.

Coram Mondelet (C.), J.

No. 2494.

Ryan et al. v. *Robinson, and the Montreal & Champlain Railroad Company, T.S.*

Held, that a *verbal* acceptance of a draft by the secretary of a corporation and of another draft by the accountant of such Corporation is sufficient to prevent the attachment by *saisie arrêt après jugement* of the money covered by such drafts.

This was a contestation of the declaration of the *tiers-saisi*, on the ground that at the time of the service of the writ of attachment the Company had in its hands certain monies belonging to the Defendant, in addition to those admitted by the declaration of the *tiers-saisi* and that notwithstanding the attachment the Company had paid them away.

It was admitted in writing that when the attachment was served the Company owed the Defendant £36 6s. 9d. cy. for salary. That the Secretary of the Company had *verbally* accepted a draft of the Defendant some six months before the attachment for £25 cy., and that the accountant had likewise *verbally* accepted another draft of the Defendant, also before the attachment, for £3 15s. 10d. cy., and that both drafts were paid to the payees thereof by the Company *after* the attachment had been served.

At the hearing Bethune for Plaintiffs contended that these *verbal* accep-

Ryan vs. Robinson & T.S.

tances by two subordinate officers of the Company could never bind the Company and were wholly insufficient to prevent the Plaintiffs, who were judgment creditors from attaching the monies covered by the drafts before they were actually paid.

MONDELET (C.), J. The only party who had any right to complain of the insufficiency of the acceptances was the Company, and as the Company afterwards paid the drafts, it recognized the validity of the acceptances. I must therefore dismiss the contestation.

Contestation dismissed.

Bethune & Dunkin, for Plaintiffs.
Rose & Monk, for T. S.
(S. B.)

MONTREAL, 27TH MARCH, 1858.

Coram MONDELET (C.), J.

No. 1813.

Macfarlane v. *Thayer*.

Held. 1. In an action *en bornage*, that the existence for upwards of ten years of a *mur mitoyen* along a portion of the division line between two properties, and of a fence along the remaining portion of such division line, is no bar to the Plaintiff's right of action.

2. That where it is established by the surveyor's report that the wall and fence encroach on the Plaintiffs' property, the Defendant must pay the costs of the action, and the costs of the survey be equally borne by both parties.

This was an action *en bornage*, in which the Defendant pleaded, in effect, that for upwards of ten years before the institution of the action, Defendant had possessed his property, in good faith and under a good title, and that during all that time, there had existed between the Plaintiff's and Defendant's properties well known and recognized legal boundaries, in the shape of a *mur mitoyen* along a portion of the division line, against which both parties had built their stables, and of a fence along the remaining portion of such division line, and prayed that the action should be dismissed.

Issue having been joined generally, the case was inscribed for *Enquête*, when the Plaintiff proved that no legal *bornes* existed establishing the division line between the respective properties, and on the other hand the Defendant proved the existence for more than ten years of the *mur mitoyen* and fence referred to in his plea, and that both parties had equally contributed towards the cost of the erection of the wall and built their stables against it; the plaintiff also proving that when the wall was being built he had protested notarially, to the effect, that it was not in the right line. The case was then inscribed for hearing on the merits.

At the hearing, BETHUNE, for Plaintiff contended, that the action *en bornage* was imprescriptible (1) and that fences and walls existing between properties as in the present case served merely to indicate what is termed in legal phraseology a *délimitation* between the properties and could in no degree determine the legitimate bounds of each property or answer the requirements of a *borne* properly so called (2).

(1) 3 Touillier, No. 170.
(2) Curasson, des actions possessoires, *verbo* Bornage, p. 430.
Dévoyau & Watson, 1 L. C. Jurist, P. 137.

Macfarlane vs. Thayer.

On the 27th of June 1857, the Court, composed of Justices SMITH, MONDELET (C.) and CHABOT, rendered the following judgment:—

"La Cour,.... attendu qu'il appert qu'il n'y a jamais eu de bornes et lignes légalement tirées et fixées entre les terreins contigus des parties... ; attendu que la possession invoquée par le Défendeur par son plaidoyer n'est pas en loi une fin de non recevoir à l'action du Demandeur; attendu qu'il résulte de la preuve qu'un mur a été érigé près des limites respectives des dits terreins, lequel mur a été considéré depuis longtemps par les parties comme mur mitoyen et a servi comme tel; ordonne, que par arpenteur juré.... les dits terreins des parties seront mesurés, chainés et arpentés en présence des dites parties ou elles duement appellées. Et le dit arpenteur dressera procès verbal et plan figuratif des lieux indiquant qu'elle est et doit être la ligne de séparation et division des dits terreins d'après les titres des parties, et la vraie position et assiette du susdit mur mitoyen et sa longueur, dont et du tout le dit arpenteur fera rapport...."

On the 17th of October 1857, the Surveyor fyled a report with a plan, by which it was established that the wall and fence were both on the Plaintiff" side of the true line of Division between the properties in question. On the 28th of November 1857, the Court, composed of DAY, J., homologated the Report and ordered *bornes* to be planted according to the Report, and a new report and plan to be fyled shewing the actual position of the division line and *bornes* as actually planted. The *bornes* were thereupon planted and a report and plan fyled as ordered, and on the 27th of March 1858, they were duly homologated and confirmed, and final judgment rendered in the premises declaring that the line as established by the Surveyor and indicated on his plan should forever stand as the line of division between the two properties, and condemning the Defendant to pay the costs of suit. The costs of the Survey to be borne equally by Plaintiff and Defendant.

Judgment for Plaintiff.

Bethune & Dunkin, for Plaintiff.
S. W. Dorman, for Defendant.
(S. B.)

MONTREAL, 30TH APRIL, 1858.

Coram SMITH, J.

No. 2440.

Mercille v. *Fournier and vir.*

Held, in an action on two notarial obligations signed by a wife *séparée de biens* in which she acknowledges herself personally indebted to the Plaintiff, that it is competent for her to plead, and prove by verbal testimony, that the statement of personal indebtedness contained in the obligations is false, and that on the contrary it was the husband who was really indebted and that she was merely his security, on the ground that such contracts are in fraud of the law of the land.

This was an action on two notarial obligations, signed by the female Defendant duly authorized and assisted by her husband, in which she as *séparée de biens* from her husband acknowledges herself personally indebted in certain sums of money to the Plaintiff. The wife pleaded, to the effect, that the allegation of personal indebtedness on her part contained in the deeds was untrue, that on the contrary it was the husband who was the party really indebted to

the Plaintiff and that she signed the deeds, at the instance of the Plaintiff and tho solicitation of her husband, for the mere purpose of securing the debt so due by her husband.

The Plaintiff was examined on *faits et articles*, and at *Enquête*. The Defendant tendered verbal testimony in support of her plea, on the ground that there was a *commencement de preuve par écrit* in the answers of the Plaintiff sufficient to allow of the adduction of such verbal testimony, and that at all events, inasmuch as the allegations set forth in the plea imported a fraud and violation of the Registry Ordinance 4th Vic. ch. 30, she was entitled to establish such fraud by parol evidence. DAY, J., who presided at the *Enquête* refused to admit the evidence and at the final hearing a motion was made to revise his ruling.

SMITH, J., (after stating facts,) I am against the Defendant's pretension that the answers on *faits et articles* afford a *commencement de preuve par écrit*, but I am with the Defendant on the question of adducing verbal evidence to prove the fraud set up in her plea. The defence in this case rests entirely on motives of public policy. The law declares that all contracts entered into by the wife, as surety in any way for the debts of her husband, are absolutely null and void. Any contract therefore which she may so attempt to make, although disguised under a different name and made to appear as an obligation for an individual debt of her own, is in fraud and violation of the law, and it is competent, in my opinion, for the party pleading such fraud to prove it by parol testimony. The law was plainly made to protect the wife, and it would be a contradiction to say, that its enactment could be defeated by the rule of the French Law which excludes verbal testimony *outre le contenu d'un acte*. I am under the necessity consequently of reversing the decision of my brother DAY and of sending the parties back to *Enquête*.

Inscription on *Rôle de Droit* discharged and case sent back to *Enquête*.

L. Bétournay, for Plaintiff.

J. Papin, Counsel.

F. P. Pominville, for Defendant.

H. Stuart, Counsel.

(S. B.)

MONTREAL, 30TH APRIL, 1858.

Coram SMITH, J.

No. 1054.

Côté et al. v. *Morrison*.

Held, that the prescription of five years under the 12 Vic. ch. 22 applies to a note due before the passing of that Statute, and on which no action is brought within five years after it came into force.

This was an action on a promissory note, bearing date at Mackinaw, in the State of Michigan, the 24th of July 1826, and payable in one year from date. The defendant pleaded, amongst other things, the prescription of 5 years under the 12th Victoria, chapter 22. The Plaintiffs replied, that that prescription did not apply to the note in question, and called on the Defendant to make oath of payment, under the 34th Geo. 3, cap. 2, and moreover alleged that prescription

Côté vs. Morrison.

had been interrupted by promises to pay, and particularly by a letter dated the 13th of March 1847, in which defendant recognized the existence of the debt. Issue was joined generally, and the letter was proved, but no other evidence of interruption of the prescription before the date of the action was adduced.

SMITH, J., rendered judgment in favor of the Defendant, giving the following as the motives of his judgment: "Considering that the said Defendant hath established that more than five years have elapsed between the bringing of the present action and the day on which the 12th Victoria chapter 22nd became law and in force in this Province, and that the promissory note sued on by the said Plaintiffs *ès qualités* was, at the time of the institution of the present action, by force of the said Statute 12th Victoria, chapter 22nd, prescribed in law, the said promissory note being due and exigible at and before the time of the passing of the said law, and the action of the Plaintiffs in this behalf barred; and further, considering that the said Plaintiffs have failed to establish by legal and sufficient evidence that the said prescription so set up as a bar to the said action was in any way interrupted, by reason of which and by force of law the action of the said Plaintiffs could be maintained, or by reason of which the conclusions of the said Defendant in his said plea of prescription secondly pleaded should not be granted. The Court . . . ."

Action dismissed.

Doutre & D'Aoust for Plaintiffs.
Henry Stuart for Defendant.
(S. B.)

MONTREAL, 30TH APRIL, 1858.

Coram MONDELET (C.), J.

No. 2450.

Picault v. *Demers.*

Held, in an action *en rescision* of a deed of sale on account of *dol*, where defendant pleads prescription of ten years, that an answer to the effect that the *dol* was only discovered within the ten years, is good in law.

This was a hearing on law, on the issue raised by the Defendant's demurrer to the Plaintiff's special answer to the Defendant's plea. The action was one *en rescision* of a deed of sale, on the ground of *dol*, and the Defendant, amongst other things, pleaded the prescription of ten years, and the Plaintiff replied specially to the effect that the *dol* was only discovered within the ten years. To this answer the Defendant demurred, on the ground that the discovery of the *dol* in no way interrupted the prescription pleaded.

MONDELET (C.), J.—I am against the party demurring, and consider that the discovery of the *dol* within the 10 years can be legally pleaded in answer to the plea of prescription.

Demurrer dismissed.

J. R. Fleming for Plaintiff.
Leblanc & Cassidy for Defendant.
(S. B.)

MONTREAL, 30TH APRIL, 1858.

Coram SMITH, J.

No. 2172.

Gardner v. *McDonald.*

Held,—That the costs of *expertise* are in the discretion of the court, and that in the exercise of such discretion the court will at least divide them between the parties, where the report has the effect of materially reducing the Plaintiff's demand.

This was an action *in assumpsit* for some £37, for work and labour and materials. An *expertise* having been ordered the result was that the Plaintiff's claim was reduced to about £3.

Smith, J.—As a general rule the costs of *expertise* are in the discretion of the court, and as the Plaintiff's demand has been so materially reduced as in the present case, I have no hesitation in ordering that the costs shall be borne equally by Plaintiff and Defendant.*

Costs of *expertise* divided.

M. Doherty, for Plaintiff.

C. R. Bedwell, for Defendant.

* REPORTER'S NOTE.—A judgment similar in principle was rendered by the same Judge on the same day, No. 1535, *Beautrom* v. *Holmes*. In this case there was no diminution, and consequently Defendant was condemned to pay full costs. And on the 30th of June, 1858, in the case No. 220, *Munro* v. *The Bank of Montreal*, the same Judge ordered the costs of *expertise* to be divided, as the Plaintiff was awarded some £[illegible]0 less than he demanded.

(S. B.)

MONTREAL, 30TH APRIL, 1858.

Coram BADGLEY, J.

No. 2406.

Rowell v. *Darah.*

Held,—That a person confined in the Provincial Penitentiary, under a conviction for forgery, is not *mortuus civiliter*, and that a signification of a transfer during that period on his wife is valid.

This was an action to recover a debt due by Darah to one Stephen S. Phelps, and by him transferred to Plaintiff. The transfer was signified on Defendant's wife whilst he was confined in the Provincial Penitentiary under a conviction for forgery. The Defendant pleaded that at the date of the transfer the debt affected to be assigned by it was compensated and extinguished by reason of certain debts then legitimately due by Phelps to the Defendant, and, moreover, that the signification on his wife was of no avail, he being at the time civilly dead, by reason of his being confined in the Provincial Penitentiary under a conviction for forgery.

BADGLEY, J.—The fact of the Defendant being confined in the Penitentiary for forgery did not make him civilly dead, and I therefore consider the signification on the wife to be sufficient; but on the other hand, I think the plea of compensation has been made out, and I must consequently dismiss the action.

Action dismissed.

A. & G. Robertson, for Plaintiff.

Cross & Bancroft, for Defendant.

(S. B.)

MONTREAL, 30TH APRIL, 1858.

Coram MONDELET, (C.), J.

No. 2517.

Clarke, et al. v. *Clarke et ux.*

Held,—That it is not competent for the parties to a suit to desist from a judgment dismissing a pleading and obtain a re-adjudication of the court in regard thereto.

This was a hearing on law, on the issue raised by the Plaintiff's demurrer, to a preliminary plea fyled by Defendant, the nature of which is explained in the report published at page 99 of the 1st vol. of the *Jurist*. It would appear that on the 19th of May, 1857, the demurrer had been maintained and the plea dismissed in consequence of the accidental absence from court of the Defendant's counsel when the cause was called, and on the 17th of June, 1857, the parties fyled a written *désistement* from that judgment, and the cause was subsequently re-inscribed for hearing on the demurrer.

Mondelet, (C.), J.—The court is of opinion that as judgment has been once solemnly rendered on the point now attempted to be re-submitted, there is an end of the matter, and the inscription is consequently discharged.

Inscription discharged.

A. & G. Robertson, for Plaintiffs.
David & Ramsay, for Defendants.
(S. B.)

COUR DU BANC DE LA REINE, 1858.

EN APPEL.

DU DISTRICT DE MONTREAL.

MONTREAL 4 JUIN 1858.

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

No. 158.

OLIVIER BERTHELET,

(*Opposant en Cour Inférieure*,)

Appelant.

ET

HYPOLITE GUY ET AL.,

(*Demandeurs en Cour Inférieure*,)

Intimés.

ET

LA COMPAGNIE DU CHEMIN DE FER DE MONTRÉAL ET BYTOWN,

(*Défenderesse en Cour Inférieure*.)

SAISIE—OPPOSITION—CESSIONNAIRE.

Jugé: 1. Que le cessionnaire d'une somme d'argent a droit de se rendre maître du procès commencé par son cédant contre le débiteur, et de diriger la procédure comme il l'entend, soit en arrêtant, soit en continuant les procédés du shérif sur une saisie précédemment faite, selon qu'il le juge conforme à ses intérêts.

2 Qu'une opposition exposant de tels faits, et avec telle conclusion comporte une demande en intervention dans l'instance de la nature de celle que tout tel cessionnaire a droit de formuler pour être admis à diriger lui-même la procédure de cette instance.

Les Intimés, exécuteurs testamentaires et administrateurs des biens dépendant de la succession de feu l'Hon. Louis Guy, ayant obtenu, le 31 mars 1856,

Berthelet vs. Guy.

dans la cause No. 1101, Cour Supérieure, à Montréal, un jugement pour la somme de £1,360 qui leur était due en vertu d'un acte de vente qu'ils avaient consenti à la Compagnie du chemin de fer de Montréal et Bytown, firent saisir sur cette Compagnie la propriété qu'ils lui avaient vendue.

Le 13 février 1857 l'Appelant produisit au bureau du Shérif une opposition afin d'annuller, dans laquelle il allégua: 1°. La vente faite par les Intimés à la Compagnie du chemin de fer de Montréal et Bytown pour £4,000; 2°. Un transport du 26 Juin 1855, passé devant Doucet, notaire, et par lequel les Intimés lui avaient transporté la somme qui leur était due en vertu de cet acte de vente; 3°. Que ce transport avait été signifié à la Compagnie du chemin de fer; 4°. Que les Demandeurs avaient obtenu jugement contre la Compagnie, et qu'en vertu de ce Jugement ils avaient fait saisir la propriété qu'ils avaient vendue à la Compagnie; 5°. Qu'en conséquence, l'Appelant était le seul propriétaire de la créance en vertu de laquelle la saisie avait eu lieu, et il concluait à ce qu'ordre fût donné au Shérif de suspendre tous les procédés sur les criées, vente, adjudication, et publication de la dite terre ou immeuble, à ce que cette saisie fût déclarée nulle, si mieux n'aimaient les Intimés consentir à ce que la vente fût faite au nom et au profit de l'Appelant.

Les Intimés contestèrent cette opposition, en alléguant que le transport du 26 Juin 1855 n'avait conféré à l'Appelant d'autres droits que celui de percevoir le montant de la créance transportée, pour l'appliquer au paiement des dettes de la succession de feu l'Hon. Louis Guy;

Que l'Appelant n'était à cet égard que le mandataire des Intimés, ce qui ne les empêchait pas d'adopter eux-mêmes les procédés nécessaires pour recouvrer leur créance;

Que le jugement rendu en cette cause avait été obtenu depuis le transport et sur une poursuite intentée au nom des Intimés, à la connaissance et du consentement de l'Appelant;

Que les Intimés avaient encouru des frais d'au moins £25 pour obtenir ce jugement et faire faire la saisie, et que ces frais seraient perdus si l'opposition de l'Appelant était maintenue, et qu'à tout événement l'Appelant aurait dû offrir ces frais en demandant à faire suspendre la vente;

Que l'Appelant n'avait aucun intérêt à faire cette opposition, ni aucun droit de demander que la vente fût faite en son nom, et ils conclurent au renvoi de l'opposition.

L'Appelant a répondu à cette contestation que le transport du 26 Juin lui avait été fait pour bonne et valable cause, qu'à cette époque il était créancier de la succession Guy au montant de £3,000 courant;

Que par cet Acte il avait assumé toutes les dettes de la succession Guy, qu'il avait promis de payer, et qu'il avait de fait alors payé plus de £1,000 des dites dettes;

Que par cette acte de transport il avait renoncé à l'hypothèque qu'il avait sur la terre de Berry appartenant à la succession Guy.

Que cet acte était un véritable transport, et non un mandat, et que l'Appelant n'avait jamais consenti à ce qu'une action fût portée par les Intimés pour recouvrer cette créance.

Les Intimés ont répliqué que ces réponses de l'Appelant étaient mal fondées en droit et en fait ;—que longtemps avant qu'il eût filé son opposition, l'Appelant était payé des deux jugements qu'il avait invoqués dans ses réponses ; que quant à la créance qu'il prétendait avoir comme représentant Mlle. Josephte Guy, c'était la succession de cette dernière qui leur était endettée ; que la renonciation faite par l'Appelant à son hypothèque sur la terre de Berry n'était pas la considération qui avait engagé les Intimés à lui faire ce transport, mais que cette renonciation n'avait été faite que pour faciliter le partage de la terre connue sous le nom de Berry, cette renonciation n'étant, d'ailleurs, que conditionnelle ; qu'enfin l'Appelant n'avait payé aucune des dettes mentionnées au transport.

Par ses réponses sur Faits et Articles, l'Appelant a admis qu'il avait autorisé une poursuite contre la Compagnie du chemin de fer do Montréal et Bytown, au sujet de la créance en question, mais il ne se rappelle pas la nature de la poursuite.

Sur cette preuve la Cour Inférieure (les Juges Smith, C. Mondelet, Chabot,) a, le 27 Juin 1857, rendu le jugement suivant :

The Court, &c., considering that the said Opposant hath failed to establish, by reason of any of the allegations in his said opposition, any right in Law to the conclusions of the said opposition, nor any interest whatever to oppose the sale and adjudication of the Lot of land seized and taken in execution in this cause as mentioned and described in the *Procès-verbal* of seizure annexed to the Writ of execution issued in this cause, doth dismiss the said opposition *afin d'annuler* with costs, distraits to Messrs. Cherrier, Dorion et Dorion, Attornies for the Plaintiffs.

Sur cet exposé de faits, les Intimés dans leur *factum* ont remarqué comme suit :

L'Appelant a jugé à propos d'appeler de ce jugement ; mais il suffit de faire remarquer que s'il est réellement le cessionnaire de la créance en question, toutes les poursuites que les Intimés peuvent faire contre la Compagnie du chemin de fer ne peuvent affecter sa créance. La Compagnie pourrait peut-être s'opposer à ces poursuites, mais l'Appelant est sans grief. Il est de plus certain que les poursuites faites au nom du cédant profitent au cessionnaire, et sous ce rapport l'Appelant n'a aucun intérêt à empêcher ces poursuites. Mais les Intimés qui sont les vrais créanciers du chemin de fer et qui n'ont transporté leur créance que pour mettre M. Berthelet à même de payer leurs dettes, ont un bien grand intérêt à ce que ces poursuites se fassent sans délai. L'Appelant y a consenti, et sa prétention d'empêcher la vente de la propriété, parcequ'elle se fait à la poursuite des Intimés, et de faire substituer son nom aux leurs dans le Writ d'exécution, n'est aucunement fondée.

Lafontaine, Juge en chef ; prononçant jugement en appel, a dit :—

Par l'acte de transport dont il s'agit, Berthelet, créancier lui-même de la succession Guy à un très fort montant, commence par "assumer les dettes des différentes parties mentionnées en l'état qui y est annexé, autres que les siennes propres, et promet acquitter les dites créances à quelques sommes qu'elles puissent se monter, à l'entier acquit et décharge de la succession Guy qu'il promet

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garantir et indemniser contre tous troubles, frais et poursuites provenant et étant a conséquence des dites créances mentionnées au dit état."

Il y est ensuite dit que "l'obligation de Berthelet de payer ces créanciers, commencera et ne datera que du jour du jugement de collocation dans la cause de De Bleury contre Hyp. Guy et autres, pourvu qu'il ait été colloqué utilement, et son obligation ne s'étendra qu'à la somme qui lui sera adjugée et autres deniers qu'il percevra sur les transports ci-après mentionnés."

Berthelet s'engage de ne pas faire, dans la cause de De Bleury contre la succession, d'opposition pour la créance de Mlle. Josephte Guy.

Les exécuteurs lui transportent la somme due à la succession par les sœurs de la charité que Berthelet dit bien connaître.

Ils lui transportent, *sans garantie*, la somme due par la défenderesse, (la Cie. du chemin de fer) en vertu de l'acte du 29 Décembre 1853.

Puis comme propriétaire de la créance de Mlle. Guy, de celle de Samuel Gerrard, et de la somme de £700 mentionnée au susdit état, Berthelet décharge de toute hypothéque à cet égard la terre de Berry appartenant à la succession. Il est ajouté ; "cette rénonciation étant conditionnelle et ne devant avoir son effet qu'au cas où il ne se découvrirait aucune autre hypothéque que celles mentionnées au dit état sur la terre de la Bourgogne.

Enfin vient la clause suivante :—" Il est entendu entre les parties qu'attendu " que les dites sommes ainsi transportées pourraient se trouver plus considérables " que le montant des dettes que M. Berthelet assume, surtout si le montant de " sa collocation dans la dite cause de Bleury contre Guy et autres est élevé, le " dit M. Berthelet s'oblige de rembourser à la dite succession la différence entre " la somme qu'il aura ainsi retirée en vertu des dits transports et la somme ré- " ellement due par la succession, aux créanciers mentionnés en l'état annexé " aux présentes, une fois que ce montant réel aura été constaté, M. Berthelet " promettant faire toutes les démarches nécessaires pour faire déterminer la cré- " ance de mademoiselle Josephte Guy et des héritiers Etienne Guy sous le plus " court délai, et les dits exécuteurs testamentaires et administrateurs s'engageant " de lui donner toutes les facilités en leur pouvoir pour atteindre le dit objet, et " de lui tenir compte de toutes les dépenses et déboursés qu'il fera avec l'inten- " tion et dans le but d'être utile à la succession, et d'en promouvoir les intérêts " à l'égard des présentes." L'action a été intentée au nom de la succession, la cédante, et le jugement obtenu avant la signification du transport en question, laquelle signification n'a eu lieu que le 26 Novembre 1856 ; Que Berthelet y eût donné son consentement ou non, l'action n'en procédait pas moins valablement au nom de la cédante tant que le transport n'était pas signifié ; ce n'est que par cette signification que Berthelet est devenu saisi de la créance. Mais du moment qu'il en a été ainsi saisi, il est devenu maître de la créance, maître du jugement, et maître de la procédure à faire pour l'exécuter.

C'est à tort que les Intimés prétendent que Berthelet n'est que leur mandataire. Rien dans l'acte du 26 Juin 1855 ne justifie cette prétention. C'est une cession réelle, en bonne et due forme, et qui, ayant été suivie de signification, a fait passer sur la tête de Berthelet la créance dont il s'agit. Si Berthelet n'était que mandataire, les Intimés n'avaient pas besoin de son consentement pour por-

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ter l'action, obtenir jugement, et faire exécuter ce jugement. Cependant ils ont si bien compris que tel n'était pas le cas, qu'au contraire Berthelet seul était le maître de cette créance, que pour se justifier ils ont invoqué un tel consentement de la part de Berthelet, et qu'ils l'ont interrogé sur faits et articles pour en obtenir la preuve par ses aveux. Si ce consentement a été demandé et qu'il ait été donné, ce n'est donc pas Berthelet qui est mandataire des Intimés, mais bien les Intimés qui, dans ce cas, seraient devenus les mandataires de Berthelet. Ils n'ont pas d'autre qualité, d'autre autorité, pour continuer la procédure, que ce même mandat résultant du consentement qu'ils invoquent. Or, un tel mandat est révocable à volonté, soit expressément, soit tacitement. "Le mandat peut être revoqué en tout état de cause. Le mandant ne doit au mandataire aucune explication, et ce dernier ne saurait élever de controverse pour prouver que la révocation est intempestive, injuste, capricieuse, ou dictée par l'erreur et la colère. La volonté du mandant est souveraine; *stat pro ratione voluntas*, le mandataire doit l'accepter et s'y résigner." Troplong, mandat, No. 765; "Supposez," ajoute le même auteur, au No. 780, "que dans une affaire qui se traite par mandataire, le mandant intervienne lui-même, et se mette en rapport direct avec les tiers, prenant qualité, décidant les difficultés, arrêtant les résolutions, etc., etc. Il est évident que cette comparution du mandant fera évanouir les pouvoirs du mandataire."

Il y a ici même plus qu'une révocation tacite, elle est expresse, puisque Berthelet conclut, en présence des Intimés et contre eux, "à ce qu'ordre soit donné au shérif de ce district, de suspendre tous ces procédés sur les criées, vente, adjudication, et publication de la dite terre ou immeuble," qu'il va même jusqu'à demander que la saisie soit déclarée nulle. Supposant que Berthelet ait donné le consentement dont il s'agit, et par conséquent l'autorité de poursuivre qui en découle, est-ce qu'un tel mandat est irrévocable? Où est la loi qui lui imprime cette irrévocabilité? Autant vaudrait dire qu'un procureur *ad litem* qui aurait été chargé directement par Berthelet de commencer ce procès aurait eu le droit de le continuer non seulement jusqu'à jugement, mais encore jusqu'à expropriation forcée du débiteur malgré les défenses et les ordres au contraire de son client! Cependant tel est de fait la prétention plus qu'étrange des Intimés, qui, quoique bien et dûment dessaisis de la créance, disent à celui qui en est seul saisi, et par conséquent le seul maître: "Vous avez consenti à la poursuite, nous en ferons maintenant ce que nous voudrons, vous n'avez pas le droit d'intervenir, nous procéderons malgré vous à un décret forcé, bien que vous soyez d'avis, et peut-être avec raison, que la propriété saisie sera sacrifiée à un décret fait dans les circonstances actuelles, nous savons mieux que vous ce qu'il vous convient de faire, en un mot, de notre propre autorité, et cela seulement, parceque nous sommes vos cédants, nous vous mettons sous notre tutelle." Si vraiment les Intimés sont maîtres du procès, et qu'à ce titre ils aient le droit, malgré la volonté de Berthelet, de procéder à l'exécution du jugement, au même titre et pour la même raison, ils auraient aussi le droit de se refuser à cette exécution, bien que Berthelet voulût y faire procéder. Pour moi je dois avouer que je trouve la prétention des Intimés plus qu'étrange.

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On ne saurait nier que Berthelet soit celui qui a le plus grand intérêt à ce procès, puisque ce procès a pour objet sa propre créance. Le procès n'étant pas introduit en son nom, il a donc le droit d'y intervenir pour se faire reconnaître, et veiller à ses intérêts. "On appelle intervention," dit Merlin, 'collectivement et l'action par laquelle on intervient dans une contestation dans un procès, et les suites de cette action."

"L'intéret étant la mesure des actions, on a le droit d'intervenir dans une contestation, toutes les fois qu'on a intérêt à être en cause," Bioche, vo., Intervention, No. 5.

"Ainsi peuvent intervenir, 1o. celui dont la chose, les droits ou la qualité sont l'objet des prétentions respectives des parties, ou l'occasion du procès," No. 6

"Le cessionaire d'une créance dans une instance rélative à cette créance pendante entre le cédant et le débiteur, quoiqu'il n'ait pas encore fait signifier son intervention au débiteur, alorsque dans sa requête, il a signifié ses titres à ce dernier." No. 10. "Un créancier inscrit, qui, par la date de son inscription, se trouve exposé à perdre le montant de sa créance, si l'adjudication est maintenue, est recevable à intervenir sur l'Appel et à conclure de son chef à la nullité des poursuites; *on dirait en vain qu'il a été representé par le poursuivant.*" Dalloz, au mot, "Intervention," p. 584.—Sabatier vs. Debosque, 30 Décembre 1816. Une partie qui a intérêt d'être en cause y intervient de différentes manières; tantôt c'est par une réprise d'instance, tantôt par une requête d'intervention proprement dite ou par une opposition. Ce procédé prend des noms différents, suivant l'état de la canse, lors de son introduction. Il s'appelle particulièrement *opposition*, lorsqu'il est relatif à une saisie. Tel est le cas dans la présente instance.

Admettant même que Berthelet ait consenti à la saisie, ce consentement n'en était pas moins toujours révocable à sa volonté. Il pouvait intervenir en tout temps pour en arrêter les suites, s'il trouvait qu'il était de son intérêt de le faire. Et en cela c'est son seul interêt, sa seule volonté, qui doivent être écoutés. Berthelet n'étant pas partie dans la cause, le Shérif ne pouvait recevoir de lui, l'ordre de suspendre les procédés sur la saisie; il ne pouvait recevoir un tel ordre que du procureur *ad litem*, qui a fait émaner le mandat d'exécution, ou du tribunal d'où ce mandat a été ainsi émané. Pour obtenir ce dernier ordre, Berthelet devait intervenir; c'est ce qu'il a fait par son opposition, au moyen de laquelle, présentant les titres qui l'ont saisi, lui seul, de la créance, il devait être reconnu comme tel, déclaré maître de la procédure, et obtenir du moins, dans tous les cas, la première partie de ses conclusions, celle qui tend à la suspension des procédés sur la saisie.

Si, comme l'a décidé la Cour de première instance, Berthelet n'avait pas le droit d'intervenir comme il l'a fait pour l'objet en question, il semble qu'il y aurait eu la même raison de repousser toute intervention de sa part, dans le cas où la saisie étant faite de son consentement, aurait néanmoins plus tard été arrêtée par ordre des Intimés, à son préjudice, et malgré sa volonté et son intérêt de continuer les procédés jusqu'à leur fin, car si les Intimés, et non Berthelet, sont les maîtres du procès, ils avaient le droit de suspendre de même que de continuer cette saisie à leur gré, sans entraves de la part du vrai et seul créancier,

qui, par là, se trouve être à leur merci. Pour la même raison, admettant toujours le cas d'une saisie faite de son consentement, si cette saisie eût été contestée par le Défendeur, Berthelet n'aurait pas été reçu à entrer en cause pour soutenir ses droits et ses intérêts en défendant la validité de la saisie, même dans le cas possible où les Demandeurs ses cédants se seraient abstenus de faire valoir la régularité et la légalité de la saisie. Si c'est la une position que la loi fait à un créancier qui se trouve dans les circonstances où est Berthelet, j'avoue candidement que j'ignore où trouver cette loi. Je connais bien un texte qui dit que le transport signifié saisit le cessionnaire, mais je n'en connais pas qui porte que, nonobstant transport signifié, le cédant restera néanmoins maître de la créance qu'il a cédée, ainsi que des procédures à adopter pour en faire le recouvrement.

Les Intimés ont encore prétendu qu'en supposant que Berthelet eût le droit d'être admis à intervenir, comme il a voulu le faire, l'exercice de ce droit devait être subordonné à la condition de faire au préalable offres réelles de payer les frais déjà encourus par les Intimés pour lui Berthelet. Je ne connais pas de loi qui le soumit à cette condition. Que l'on remarque que cette dernière proposition des Intimés est une admission de leur part que, dans ce qu'ils ont fait dans cette cause, ils n'ont agi que comme mandataires de Berthelet. En effet ils n'ont pu avoir d'autre qualité que cette qualité de mandataire. Or, comme tout mandataire, ils ont droit de se pourvoir contre leur mandant pour le remboursement de ce qu'ils ont déboursé pour lui dans l'accomplissement du mandat et d'obtenir condamnation, si le mandant ne fait pas voir qu'il est à l'abri d'un pareil recours de leur part, ce sur quoi il peut y avoir débat entre eux, ayant probablement des raisons réciproques à se faire.

Admettant, quoique je ne sois pas bien satisfait de la preuve à cet égard, que la procédure jusqu'à saisie même inclusivement, a eu lieu du consentement de Berthelet, je serais d'avis de lui accorder seulement la première partie de ses conclusions, et non la seconde par laquelle il demande que la saisie soit déclarée nulle et de nul effet.

Le jugement en appel est motivé comme suit :

" La Cour * * * *

1. Considérant que lors du jugement qui a condamné la Défenderesse à payer aux Demandeurs ès-noms et qualités, Intimés, la somme portée au dit jugement, le dit Appelant Berthelet était le seul propriétaire et créancier de la dite somme, comme faisant partie d'une plus forte créance qui lui avait été cédée par les dits Intimés, par acte de transport du 26 Juin 1855, lequel transport, en outre, a été duement signifié à la débitrice le 28 Novembre 1856, c'est-à-dire postérieurement à la saisie immobilière pratiquée en cette cause, et tandis que la dite saisie était encore pendante et en pleine opération.

2. Considérant que si l'action a été introduite au nom des Intimés, et la procédure subséquente en y comprenant la dite saisie, conduite par eux, cela n'a été que du consentement du dit Appelant Berthelet, lequel consentement ils ont eux-même invoqué pour leur propre justification ; que l'autorité résultant d'un tel consentement ne pouvait constituer en faveur des dits Intimés qu'un simple mandat révocable à la volonté du dit Berthelet ; que ce mandat n'a pas eu et

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n'a pas pu avoir l'effet d'empêcher le dit Berthelet de s'introduire dans l'instance pour veiller directement lui-même à ses propres intérêts, et même se faire subroger au lieu et place des Intimés, des droits desquels il est le cessionnaire; que ce droit d'intervenir dans l'instance appartient à tout cessionnaire dûment saisi et placé comme l'est l'Appelant; qu'en pareil cas le cessionnaire a droit de se rendre maître du procès et de diriger la procédure comme il l'entend, soit en arrêtant, soit en continuant les procédés du shérif sur une saisie précédemment faite selon qu'il le juge conforme à ses intérêts.

3. Considérant, que dans les circonstances, l'opposition formée par le dit Berthelet comporte une demande en intervention dans l'instance, de la nature de celle que tout tel cessionnaire a droit de formuler pour être admis à diriger lui-même la procédure de cette instance.

4. Considérant que les conclusions prises par le dit Berthelet en sa dite demande doivent lui être accordées, à l'exception de celle qui tend à faire déclarer nulle et de nul effet la susdite saisie, puisqu'il n'a pas établi que la procédure sur cette saisie jusqu'à sa dite intervention soit entachée de nullité; que par conséquent dans le jugement dont est appel, il y a mal jugé, en ce qu'il rejette en entier la demande et les conclusions du dit Berthelet; infirme le susdit jugement, savoir, le jugement rendu le 27 juin 1857 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, admettant partie des conclusions prises par le dit Berthelet dans son opposition, déclare et adjuge que, comme cessionnaire et seul créancier comme susdit, il était bien fondé à intervenir dans l'instance, le reçoit ainsi partie dans icelle; et, conformément à l'une de ses conclusions, cette Cour adjuge et ordonne qu'ordre soit donné au shérif du district de Montréal, de suspendre tous ses procédés sur les criées, vente, adjudication de l'immeuble saisi en cette cause, jusqu'à nouvel ordre de la part de la dite Cour Supérieure, mais déboute le dit Berthelet de sa susdite conclusion tendant à faire déclarer la dite saisie nulle et de nul effet; des frais de laquelle saisie, ainsi que de l'action, le dit Berthelet est déclaré être responsable envers qui de droit, de même que si l'instance eût été originairement conduite en son propre nom; enfin condamne les Demandeurs Intimés aux dépens encourus en la dite Cour Supérieure, sur la contestation de la dite opposition du dit Berthelet, et ordonne la remise du dossier à la même Cour siégeant à Montréal." Jugement infirmé.

Laflamme, Laflamme et Barnard pour l'Appelant.

Cherrier, Dorion et Dorion, pour les Intimés.

(F. W. T.)

SUPERIOR COURT.

MONTREAL, 30TH APRIL, 1858.

Coram SMITH, J.

No. 1060.

Chapman vs. Masson.

A. and B., being ostensibly the only members of a co-partnership, A. is incompetent as a witness for the plaintiff in an action against C. for a debt of the firm, alleging him to have been a secret partner thereof.

This was an action for goods sold, against the defendant, as having been a secret partner with Ball and Snaith, in the firm of Ball & Co.

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It appeared that in May, 1855, Ball and Snaith entered into partnership under articles in which two-thirds of the profits were assigned to Snaith and one-third to Ball. During the summer of the same year the goods in question were sold to Ball & Co.; and the action was now brought against Masson, alleging him to have been a secret partner in that firm.

At the *enquête*, the plaintiff proved, by Thompson, declarations to him by defendant, in February and March, of his intention to form such a partnership; and subsequent ones, tending to shew that it had gone into operation; by McNevin, that he had given orders and directions about the fitting-up of the shop in which the business of Ball & Co. was to be carried on. The defendant stated, on being interrogated, that he had at one time contemplated and discussed such a partnership, but had never finally completed the agreement respecting it. Snaith, one of the partners, on being examined for the plaintiff, proved the plaintiff's account. He also swore positively to the partnership, and to the details of its conditions; stating the reasons for the concealment of defendant's name; and that the Company was insolvent, and largely indebted to the defendant. The questions put to him relative to the co-partnership were objected to by the defendant, and the objections reserved.

At the hearing, *Abbott*, for plaintiff, submitted that his case was made out in evidence, and that judgment should go for the full amount claimed.

Roy, for defendant, moved to reject those of the questions put to Snaith, and their answers, which related to, or tended to prove, the partnership. He contended that a partner of a firm is incompetent to prove that another party is also a member of that firm; that the witness was interested in proving the partnership, inasmuch as by so doing he made the defendant liable for contribution. The proof by him of the sale of the goods to Ball & Co. was not objected to, but proof of the partnership was; and the witness could not be permitted to give evidence which had a direct tendency to relieve him from a portion of his liability. That part of his testimony, therefore, must be rejected.

Again, the account he gave of the formation and conditions of the alleged co-partnership was incredible. The terms of the co-partnership between Snaith and Ball were settled by an authentic deed, which they alone executed; and they had duly recorded in the proper office a declaration stating themselves to be the only members of that firm. Snaith pretended, in the face of these documents, that so important an agreement as the defendant was stated to have made with him and Ball, had not been established by any writing whatever; and that the defendant had trusted an interest of such magnitude to his honesty alone. This, he urged, could not be believed. As to the evidence of Thompson and McNevin, it referred to a period anterior to the time at which it was said the partnership had been formed, and therefore could not be held to support the evidence of Snaith.

Abbott, in reply, urged that Snaith had no direct interest in this suit, except one which was adverse to the plaintiff. If he could get the plaintiff's action dismissed, by negativing the sale of the goods to Ball & Co., it was plainly his interest to do so, as he would thereby relieve himself both from debt and costs, or rather from that portion of both, for which, as a member of the firm of Ball

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& Co., he was otherwise liable. The interest he had to prove Masson a partner was of an indirect and secondary character; for, by doing so, he was relieved from no liability; and the record in this cause could not serve as evidence, or the judgment as *chose jugée*, between him and the defendant, in regulating the affairs of the co-partnership afterwards. The firm of Ball & Co. was insolvent, and the witness also, and the firm was already heavily indebted to the defendant; and if defendant should be compelled to pay this debt also, it would be no defence in an action by him against the witness for the amount, that the Court had in this case declared him to be a partner. The witness was therefore a competent witness in this case, and the questions were therefore properly put; but they might apply to his credibility, were his testimony not amply supported. The evidence of Thompson and McNevin, and the answers of the defendant on *faits et articles*, shewed the intention to form the partnership to have existed; which intention, Snaith proved, had been carried out. Their evidence, therefore, was strongly confirmatory of his. As to the probability of so important an agreement having been made without a writing as evidence of it, it was plain that every precaution had been taken to ensure the concealment of the defendant's connection with the firm; and, to have executed any written document, would have added to the risk of discovery. The circumstances also were such that the firm was completely in the defendant's power; and he could, without difficulty, force them to abide by any arrangement, however informal.

SMITH, J.—This case involves a question of great difficulty, and one in which the authorities are conflicting in the highest degree. It has not previously been decided in this country, to my knowledge; and it is to be hoped that it will be taken to appeal, that it may be finally settled and determined. This question is, can a partner be examined as a witness for the plaintiff to prove a co-partnership between him and the defendant?

I have carefully examined the authorities cited by the Counsel for the plaintiff; and, although they appear at first sight to bear strongly in his favor, they do not, to my mind, conclusively establish the view he contends for. In both Hall vs. Curzon, and Blackett & Weir, the companies of which the witness and the defendant were members, were not ordinary partnerships; they were joint-stock companies; and, though unincorporated, are distinguishable from partnerships in many respects. On the other hand, the text-writers unanimously agree in laying down the rule that the declarations or admissions of a partner are not admissable in evidence until the co-partnership has been proved *aliunde*. Those declarations or admissions cannot be received to prove the partnership; but after, by other means, the facts necessary to shew the joint interest have been established, the admissions and declarations of any partner become admissable as evidence against the firm. Upon this doctrine there was perfect unanimity in the text-writers. But there were cases also to be found which tended to shew the incompetency of a partner as a witness to prove the partnership. Brown vs. Brown, 4 Taunt. 752, was in point; and also Mant vs. Mainwaring, 8 Taunton, 139. The real test in all these cases was the interest. Worrall vs. Jones, 7 Bingham, 395. Here it could not be denied that the witness had an interest of the strongest character. He was now himself liable for the debt;

but his present testimony tended directly to shift that responsibility upon another. The power of so doing might lead to the grossest injustice; and its exercise was contrary to the weight of authority previous to the passage of the Imperial Act, which in England deprived interest in the suit of its disqualifying character, except in a very limited class of cases.

I therefore am under the necessity of rejecting the evidence of Snaith, on the ground that he is incompetent to be a witness in this cause; and the remaining testimony, being insufficient to establish that the defendant was a secret partner in the firm of Ball & Co., the action must be dismissed.

The judgment was recorded as follows:—

"The Court having heard the parties by their Counsel upon the merits of this cause, and upon the motion of the defendant, of the 17th April instant, to reject portion of the evidence of William W. Snaith, a witness examined in this cause, examined the proceedings and evidence of record, and having deliberated thereon, considering that the plaintiff hath failed to establish by legal and sufficient evidence that the said defendant was a co-partner in the firm of Ball & Co., as alleged in the declaration, by reason of which the said defendant could be considered liable in law, as set up in and by the said declaration; and further considering that the evidence of William W. Snaith, a witness produced on behalf of the said plaintiff, is inadmissible, by reason of the interest of the said witness, in obtaining a condemnation against the said defendant, as sought in and by the said declaration,—The Court doth reject the evidence of the said Snaith, and doth dismiss the action of the said plaintiff, with costs, *distraits* to Messieurs Roy and Roy, the Attornies for the defendant."

Action dismissed.

Abbott & Baker, for plaintiff.
Rouer Roy, for defendant.
(J. J. C. A.)

The authorities cited on behalf of the plaintiff were the following:—Pothier Société, No. 81; 1 Greenleaf, 279; Blackett vs. Weir, 5 B. and C. 385; Bulkley vs. Dayton, 14 Johns., 387; Hall vs. Curzon, 9 B. and C. 646.

Those cited on behalf of defendant were:—1 Greenleaf on Evidence, p. 229 § 177, p. 487-493; 2 Starkie, Ev., p. 587; 2 Bingham, p. 133 *et seq.*

MONTREAL, 28TH JUNE, 1858.

Coram BADGLEY, J.

No. 2486.

Lemesurier et al. v. *McCaw*, and *Dolan, Opposant*, and *Plaintiffs' Opposants contesting Opposition of Dolan.*

PRIVILEGE.—JUDGMENT CREDITOR AND VENDOR.

Held,—That the vendor's privilege of *bailleur de fonds* is postponed to that of the judgment creditor whose judgment was registered before the deed of the vendor.

By Report of Distribution prepared in this cause, the Opposant Dolan was collocated as *bailleur de fonds* for the proceeds of the Sheriff's sale of a lot of land, which had been originally sold by Dolan to Defendant, by deed dated 8th July 1853, and which deed was registered on the 18*th December*, 1853.

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The Plaintiffs who had fyled an opposition claiming to be collocated for their claim, according to priority of their *hypothèque*, created by enregistration of their judgment, on the 9th *December*, 1853, contested Dolan's collocation on the ground that inasmuch as he had omitted to cause his deed to be registered within 30 days from its date, in conformity to the Statute 16 Vic., cap. 206, sec. 5, his privilege of *bailleur de fonds* had been lost, and the Plaintiffs were entitled to the amount of the collocation by priority of *hypothèque*.

The Opposant contended that the certificate of enregistration written upon the copy of judgment produced by Plaintiffs, was defective; it is conceived in these terms:—

"No. 2411. I certify that this document was entered at the hour of nine of the ninth "day of December, one thousand eight hundred and fifty-three, and registered under "No. twenty-four hundred and eleven, on pages 221 and 222 of Register B., vol. fifth of "Registers for the County of Drummond.

Signed,

R. Millar, D. Regr."

Badgley, J. pronounced judgment in of favor the Plaintiffs, maintaining their contestation, and ordering that the Report of Distribution be reformed, according to the conclusions of the contestation.

The motives are as follows:—Considering that the judgment obtained by the Plaintiffs and contesting Opposants in this cause, rendered on the 5th day of December, 1853, was duly registered on the 9th day of the said month of December, and that the deed of sale by the Opposant Dolan to the Defendant, of the lots of land and premises sold under the number 17, and whereby he claims to be collocated for the proceeds of the said lots of land and premises as *bailleur de fonds* thereon, was dated on the 8th day of July, 1853, and was registered on the 18th December, 1833, whereby full and valid prior effect was given to the enregistration of the said judgment, in preference to the claim of the said Opposant, doth order, &c.

Contestation maintained.

Rose & Monk, for Plaintiffs and contestants.

LeBlanc & Cassidy, for Opposant Dolan.

(A. H.)

MONTREAL, 30th APRIL, 1858.

Coram Badgley, J.

No. 2058.

Vannier et ux. v. *Larche dit Larchevêque.*

Held,—That a proprietor is not responsible for damages caused to a neighbouring proprietor by explosions in quarrying carried on on his property by his tenant.

This was an action of damages alleged to have been caused partly by obstructions placed on the Plaintiffs' land by the Defendant and his agents, and partly by explosions in quarrying on the Defendant's property adjoining. The plea amounted to the general issue.

Badgley, J.—The only part of the Plaintiffs' demand which is at all made out is that arising from the explosions on the Defendant's property, but it is in evidence that these explosions were not caused by the Defendant, but by his tenant. Now even if real damage were proved the Defendant is clearly not lia-

ble, and although these explosions have been of course very annoying to the Plaintiffs, it has not been satisfactorily established that any damage was really caused by them. The action must therefore be dismissed.

The following are the motives of the judgment:—Considering that the Plaintiffs have not established the material averments of their declaration, and that at the time of the commission of the several acts in the Plaintiffs' declaration complained, the said Defendant was not in possession and occupation of the said lot of land and premises in the Plaintiffs' declaration alleged to be in his possession, and that the same, together with the quarry thereon, were in the possession of one Louis Limoges, as tenant of the same, who worked, *exploité*, the same, for his own advantage; and considering that the said acts complained of were so done by the said Louis Limoges without any participation therein by the Defendant.

Action dismissed.

Pelletier & Bélanger, for Plaintiffs.

S. DeBleury, for Defendant.

(S. B.)

MONTREAL, 27TH MARCH 1858.

Coram SMITH, J.

No. 1973.

Peck et al. v. *Murphy et al., and the Mayor, Aldermen and Citizens of the City of Montreal, T. S.*

Held,—That a motion, praying that action be dismissed for want of proceedings during 3 years, and not asking that case be declared *périmé*, is irregular and will be rejected

SMITH, J.—This is a motion by the *tiers-saisis* for *péremption d'instance* as regards the *saisie-arrêt*; but instead of asking that action be declared *périmé*, it asks that the action be dismissed. This is irregular and the application must therefore be rejected, but without costs.

Motion rejected.*

A. Cross, for Plaintiffs.

J. F. Pelletier, for the T. S.

(S. B.)

COURT OF QUEEN'S BENCH.

IN APPEAL FROM THE DISTRICT OF MONTREAL.

QUEBEC, 7TH JULY, 1857.

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

The Montreal Assurance Company,

(Defendants in the Court below,)

Appellants,

AND

Dame Elizabeth McGillivray,

(Plaintiff in the Court below,)

Respondent.

Held, 1. A contract of insurance with the Montreal Assurance Company, may exist without the execution or issue of any policy, or of any interim receipt.

* The motion is in the following words:—Motion des dits tiers-saisis en cette cause, qu'attendu qu'aucun procédé n'a eu lieu sur la tiers-saisie émanée en cette cause et signifiée aux dits tiers-saisis, depuis plus de trois ans, savoir depuis le treize avril mil huit cent cinquante trois, ainsi qu'appert au certificat ci-joint du protonotaire de cette cour, l'action ou instance des dit demandeurs par voie de la dite tiers-saisie soit renvoyée et déboutée, en autant qu'elle concerne les dits tiers-saisis, avec dépens.

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2. A promissory note given for the premium by a third party to the Company's manager, payable to his order and endorsed by him to the Company, though dishonored, is a sufficient consideration to support such a contract.
3. Such a contract may be proved by parol evidence.
4. The evidence of the mortagor, who undertook to effect the insurance for the mortgagee, is admissible to prove that he did so.
5. Evidence of the Declarations of the Manager that the insurance had been effected, &c.; and his promises of a policy, made about the date of the contract, is admissible.
6. A hypothetical plea will be rejected on demurrer.
7. The sale by the proprietor and mortgagor, of real estate, pending a contract of insurance upon it effected and held by the mortgagee, does not affect such insurance, though part of the consideration of such sale be a promise by the purchaser to pay the mortgagee her debt, and though she be a party to it.
8. Interest upon the amount of loss may be awarded, calculated from the day of the fire.

The facts of this case as alleged by the Plaintiff and Respondent are as follows:—

On the 18th February 1852, the Respondent, Mrs. Reid, was the holder of an over-due mortgage-claim of about £4000 upon the "Hays House," belonging to Moses Judah Hays. With the view of obtaining further delay for the payment of his debt, Mr. Hays undertook to procure insurance upon the premises in Mrs. Reid's name, to the extent of her mortgage; and accordingly negotiated with the appellants, through their manager and general agent, Mr. William Murray, an insurance upon the Hays House to the extent of three thousand pounds, for the premium upon which he gave his note, payable to Mr. Murray's order, which was afterwards endorsed by him, and placed by the Company in the Bank of Montreal for collection, but dishonored at maturity. No policy or interim receipt was issued by the Company. The Hays House was destroyed by fire on the 8th July, 1852, and the Company refusing to pay the amount insured for, an action was instituted against them in the Court below.

The Appellant's defence turned principally upon the following pretensions:

1. That Mrs. Reid had lost her insurable interest in the mortgage in question, by assigning it to Hugh Taylor.

2. That she had novated her claim by accepting the promise of Myer V. Hays (who had purchased the Hays House pending the alleged insurance) to pay her debt, and to procure her a policy of insurance upon the premises in question.

3. That the value of the property was covered by mortgages anterior in privilege to hers, and that she consequently had no insurable interest.

4. That no contract of insurance could be made under the powers possessed by the Appellants, except in the mode fixed by their charter and by-laws; and that no such contract had been made with the Respondent.

6. That if any such contract had been made, it could only have been so made upon the conditions usual in the Company's assurances, and that these conditions had not been fulfilled by the Appellants.

The plea embodying this latter pretension was dismissed on demurrer, as being hypothetical, and the remainder of the issues were submitted to a special jury.

The pleadings in the case, and the numerous questions of law and fact, are so fully stated and discussed in the opinions of the Honorable Judges in the

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Court of Appeal, made up for the Privy Council, that it isc onsidered unnecessary to occupy any further space with them here.

At the trial, the Respondent offered Mr. Hays as a witness, to prove, verbally, a contract of insurance with the appellants. His competency as a witness in the case was objected to, but the objection was overruled by the presiding Judge.

It was then urged by the counsel for the Appellants that parol evidence of a contract of insurance with them was inadmissible; first, on the general ground that parol evidence of a contract of insurance could not be admitted; and second, that under their charter and under their by-laws, a verbal contract of insurance was not binding upon them. This objection also was overruled, and the witness was permitted to testify to an agreement between himself and Mr. Murray on behalf of the Company, corresponding to that set up by the Respondent.

Mr. McGill and Mr. Taylor, the one a confidential friend, the other a nephew of Mrs. Reid, were then called to prove that on the day of the making of the contract, and on the day after, they had enquired of Mr. Murray if it had been completed, and were assured by him that it had; that Mrs. Reid might rest easy; that her mortgage was covered. To this evidence it was objected that such conversations formed no part of the *res gestæ*; that the admissions contained in them could not bind the appellants; and that evidence of them was inadmissable. This objection also was overruled and the evidence taken.

Mr. Murray the manager was also called, who swore to a temporary and conditional contract only, which was to terminate at the end of the month if the note was not paid. He also produced, under a *subpœna duces tecum*, a register-book containing the following entry:

Policy No., and for what period.	Name, Residence, and Profession of person Insured.	Description & Situation of Property Insured	Of what materials the Buildings are constructed.	Sums Insured in.	Rate of Premium.	Total amount of Premium received.
8951 One year from 18th February 1852, dated same day.	Dame Elizabeth McGillivray, widow of the late Hon. James Reid, sole universal legatee under the last will & testament of the said late Hon. James Reid.	On a block of buildings, built of stone and covered with tin, occupied as a hotel, and known as the "Hays House," situate and forming the corner of Notre Dame Street and Dalhousie Square, Montreal; bounded on Notre Dame Street by a stone building covered with tin, owned by the Hon. D. B. Viger, on Dalhousie Square by a similar building owned by Judge Mondelet, and in rear by Champ de Mars Street.	Stone, covered with tin.	£3000 0 0	£0 15 0	Null. £22 10 0

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But which entry, he stated, had been cancelled soon after the note for the premiums was dishonored.

Upon this and other less direct evidence the jury found a verdict for the Plaintiff; upon which a judgment was unanimously rendered by the Court below, condemning the Appellants to pay the amount claimed, with interest from the date of the fire, and costs.

The case was appealed; and on the 7th July, 1857, judgment was rendered by the Court of Appeals, Aylwin, J, *dissentiente*, affirming the judgment of the Court below.

The following are the opinions of three of the Judges in Appeal:

Aylwin, J., dissenting in appeal.—In this case I dissent from the judgment about to be rendered, and am desirous that the grounds of my dissent should be clearly understood. The case is one of very great importance as to principle, and on this account as well as from the large amount sought to be recovered, I think it necessary to explain my views somewhat at length.

The appeal is brought as well to revise the interlocutory judgments in the cause, as the final judgment, rendered against the Appellants "*The Montreal Fire Assurance Company*," condemning them to pay the Respondent the sum of £3000 for a loss on a Fire Policy. To understand the case fully, the precise ssues raised by the pleadings must be carefully noted

The declaration sets forth the incorporation of the Appellants as a body politic, under certain Provincial Statutes referred to; that by a notarial obligation of the 20th Nov. 1847, duly enregistered, one Moses Judah Hays acknowledged himself indebted to the hon. Jas. Reid in the sum of £3000, and that for securing the payment of this sum with interest to accrue thereon, Hays hypothecated certain real estate which is described and the buildings thereon, being the premises afterwards destroyed by fire; that the Plaintiff is the Executrix and universal legatee of said hon. James Reid, her late husband, under his last will and testament; that on the 18th Feb. 1852, the full amount of the obligation with interest accrued, being £4300, and the Plaintiff "did verbally covenant and agree "with the said Moses Judah Hays, that, for and in consideration of a further "delay to be granted to him for the payment of the said sum of monies and "interest, he, the said Moses Judah Hays would, and he did thereby agree "and promise to insure or cause to be duly insured at his own proper expense, "the said building and premises in the name and for the benefit and behoof of "the said Plaintiff as mortgagee, for the sum of £3000 cy., against all loss and "damage by fire for and during the space of one year, to be accounted and "reckoned from and after the said last mentioned day, and that in accordance "with the said agreement, the said Moses Judah Hays did then and there in "the name, and on behalf, and for the benefit, and behoof of the said Plaintiff, "verbally covenant and agree with the said Defendants, and they the said "Defendants did then and there for and in consideration of the premium or "sum of £22 10s. cy. to them then and there in hand paid by the said Moses "Judah Hays, acting as aforesaid, promise and bind themselves to insure, and "they the said Defendants did insure, and become insurers to, and towards,

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"the said Plaintiff of the said buildings and premises, in favor of the Plaintiff "to the extent of £3000 cy., from said 10th day of February until the 18th "day of February 1853, against all such immediate loss and damage as should "happen to said buildings and premises by fire, provided that the said Company "should not be liable to make good any loss or damage by fire, which should "happen by any foreign invasion, insurrection, riot, civil commotion, or any "military or usurped power, or by any earthquake or hurricane."

Next follows an allegation that on the same day, the 18th February 1852, "the said Defendants did promise and agree to and with the said Moses Judah "Hays, acting as aforsaid, that they would forthwith, to wit, within two hours "from the making of the agreement lastly herein before mentioned, cause a "policy of Insurance to be made out and executed in due form, embodying the "conditions and stipulations hereinbefore in part recited, and to transmit the "same to the Plaintiff without delay;" that on the 7th July 1852, the Plaintiff went to the office of the Company and demanded the policy, and the Defendants acting by William Murray their manager and agent, acknowledged and declared that Hays had duly procured and effected an insurance upon the said buildings and premises for the benefit of the Plaintiff as mortgagee for the £3000 from the 18th February 1852 to the 18th February 1853, and then and there again promised to execute the Policy and to deliver it to the Plaintiff on the following day, and declared that the interests of the Plaintiff were fully insured during the period mentioned and they were bound to deliver the Policy; that the Plaintiff confiding in the good faith and integrity of the Defendants, and their ordinary course of dealing, considered the mortgage fully and formally insured;—that the Defendants, by reason of alleged hurry of business, delayed and put off the delivery of the policy until the 8th July 1852, on which day the premises in question were accidentally and by misfortune consumed by fire;—and that on the 27th September 1852 the Plaintiff delivered to the Defendants an account of the loss under her hand and verified by her oath, with a declaration that no other insurances existed on the premises, except an insurance of £900 in favor of Plaintiff, and an Insurance of £3000 by another mortgagee in an office not mentioned, and that the Defendant declared themselves satisfied with such prelimary proof and waived any further proof of the loss, but failed to pay the money. Conclusion for £3000 with interest from the date of the loss.

The Appellants demurred to this declaration. The following is an abstract of the reasons given in support of the demurrer.

The 1st, 2nd, 3rd, reasons, are based on the absence of allegations of any agreement between the Appellants and Respondent, and want of privity of contract.

4th. Want of specification as to the manner in which it was pretended Appellants (a corporate body,) bound themselves, whether under their seal or through any person duly authorized.

5th. There was alleged at most an undertaking to execute a policy, for which action not brought.

6th. No insurable interest shown.

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7th. No damage to mortgage shown.

8th. Not alleged that Respondent accepted executorship or legacy, or had the proper authority to sue as representative of her deceased husband.

9th. Pretended loss not within what is alleged to be insured against.

10th. Insolvency not insured against.

11th. General insufficiency.

The pleas to the merits were as follows :—

1st. Plea or exception denies alleged contract, and declares the usage of the Appellants to be, to insure by policies in form of one produced, under signatures and seals of three directors, in accordance with the Rules and Regulations adopted at a general meeting of the Stockholders and in conformity with the Statute of Incorporation (their charter), that when a premium is paid and it is intended to issue a policy, they give an *ad interim* receipt, (a form is produced) until the policy is prepared; that they insure in no other manner and never made nor can make any verbal contracts. That about the 16th February 1852, M. J. Hays made an application for an insurance, and paid no premium, that Appellants refused to give a receipt or policy or bind themselves until the premium were first paid, which Hays promised to do by 1st March but failed to do, and that after this time the application was considered abandoned, and Hays made other arrangements. That if an insurance had been consented to, a policy would have been issued in the name of the person who might have been agreed on as possessing the insurable interest, but there was nothing but mere overtures; that Hays was at the time insolvent, and that under any circumstances no Insurance would have been effected for him on credit.

2nd. *Exception.* That M. J. Hays had ceased to have an insurable interest in the property, having sold it for £8500 currency, to M. V. Hays by deed dated 25th January 1852, payable the capital in five years, the interest in six months, to wit: £4600 currency with interest to Madame Masson as *Bailleur de fonds*, and £3900 currency with interest to Respondent, who was party to the deed and accepted thereof, the purchaser promising to insure Respondent's claim until paid; that this deed remained in force, and that Respondent contemplated no other insurance than that therein stipulated for; the obligation or mortgage became entirely different from that pretended to have been insured; Appellants could not be subrogated in rights such as alleged by declaration.

3rd. *Exception.* That by transfer executed 23rd June 1852, Respondent assigned without any kind of warranty, to Hugh Taylor, in his capacity of Curator to the substitution, created under the will of A. McKenzie, £3000, being part of the obligation from M. J. Hays to the late honorable Jas. Reid, intended to be referred to in Respondent's declaration; the transfer referred to the same debt in the deed to M. V. Hays, who with M. J. Hays became parties to the transfer, and promised to pay the money to H. Taylor. That by another transfer of the same date, Respondent assigned without warranty to H. Taylor, M. McCulloch and W. Ermatinger, Executors of the will of T. C. Cameron, accepting by Taylor, £1826 with interest, being part of the same obligation, with costs of judgment, &c., referring in the same manner to the deed of M. V. Hays, who with M. J. Hays also became parties to the transfer, agreeing to

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pay the Executors. No mention was made of insurance in these transfers. That the Respondent was by these transfers divested of all interest in the claim.

4th. *Exception.* That the Appellant had no insurable interest; also, that the deed to M. V. Hays fixed the value at £8500, and there were anterior mortgages to a sum far exceeding the value; among others the rights of Hays' children as representing their late mother who was *commune en biens* with Hays.

5th. *Exception.* Denies insurance, but declares, if effected, it could only have been in accordance with the conditions of the policies in use by Appellants, of which conditions there are narrated those in the printed form Nos. 1, 3, 7, 9 and 11 [see Appendix], as well as the stipulation on the face of the policies, excluding the assigns of the insured property from the benefit of the Insurance, and making it optional with the insurer to pay or reinstate; none of which conditions had been complied with.

Lastly, the general issue.

To the *second* of these pleas, the Plaintiff answered that she had caused enquiries to be made on and since the 18th February 1852, and was informed that the insurance was completed and that after the fire she learned that the Defendants had taken Hays' note in payment which was in accordance with their usual course of dealing.

To the fourth plea she pleads a *contre lettre* dated 24th June 1852, signed by H. Taylor declaring that the transfers were made *pro forma* and without any consideration and were of no force or validity, and that in fact the transfers *had been long since cancelled and annulled.*

On the 23rd September 1853, Plaintiff moved for a jury trial, and that a *venire facias* do issue to summon a jury for the trial. Such jury to be composed of merchants and traders speaking the English language. This motion was on the 27th October 1853, by a majority of the Court below rejected under the 9 section of the 25 Geo. III, ch. 2, on the ground stated in the judgment, "that "the Plaintiff is not a trader or merchant and by law is not entitled to the "trial of the said cause by a jury."

From this judgment the Plaintiff appealed, and it was reversed by this Court, and the case sent down to be tried by a jury. A hearing on law being had on the law issues tendered, the demurrer to the *declaration* was dismissed as was also the Defendants' 5th *exception* on the Plaintiffs' demurrer.

On the 28th June 1855, the Court, under the recent statute (14 & 15 Vict. ch. 89, see appendix) defined and fixed the questions of fact to be submitted to the consideration of the jury and answered by them, but the trial did not come on, and on the 22nd March 1856, a *venire* was again ordered and the same articulation of facts made by the Court.

Under this Statute the merits of the case come up in this appeal fully before this Court. The notes of evidence, certified by the judge below, and fyled of record and sent up to this Court by the Statute, are to be considered as forming "the true records of the evidence adduced on the trial." We have in this case the charge of the judge sitting at the trial, and can deal with the case either by ordering a new trial, or by dismissing Plaintiff's action as in the case of David and

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Thomas. Without now referring to the interlocutory judgment on the law issues raised, or to the judgment of this Court that the case was susceptible of a trial by Jury, I am of opinion, in the first place, THAT THE QUESTIONS OF FACT SUBMITTED TO THE JURY DO NOT COVER THE CASE, and that on this point there is error, and indeed great injustice done to the Appellants in as much as their real pretensions were not put before the jury.

The questions submitted to the jury were the following:

1st. "Did the Defendants on or about the 18th day of February 1852, "insure for one year from that date in favor of the Plaintiff as mortgagee thereof, "to the extent of three thousand pounds currency, the four story cut stone "building and theatre, described in the Plaintiffs' Declaration?

2nd. "Was said building and theatre destroyed by fire on or about the 8th "day of July 1852?"

3rd. "Was the Plaintiff at the time of effecting the said insurance, and at "the time of said fire, a mortgagee upon the said real estate, possessing an "insurable interest therein to the extent of £3000 or more?"

4th. "Did the Plaintiff sustain damage to the extent of £3000 by the said fire?"

5th. "Do you find for the Plaintiff or Defendant, and if for the Plaintiff, for "what amount?"

These questions are put, as if studiously to avoid the matters really at issue between the parties. It was stated at the argument, by the Appellants' counsel that the questions were sent up to the Court below, by the Plaintiff's counsel, and were adopted *verbatim* by the Court, and knowing now from the evidence, what the Court below could not possibly have known previous to the trial, without settling the questions, as ought to have been done, after personal conference with the counsel, one can easily see how ingeniously the questions were framed in Plaintiffs' interest. The Defendants' pretentions as disclosed by the Pleadings, were that they could only insure in the mode pointed out by their charter; that a verbal insurance could not be made and was not in fact made, there being only a proposal for insurance; that there was no payment of premium, and consequently no insurance. The complex question, "Did the Defendants insure?" avoids all these difficult points.

Then again, the Defendants say to the Plaintiff, you had no insurable interest at the time of the fire: you had transferred all your interest in the debt to Mr. Taylor by notarial obligations referred to by date and fyled in the cause. The Plaintiff answered, Yes, I did make such transfers, but they were made without value, and were cancelled. Not an allusion in the questions to this most essential point in the case, for nothing can be more certain than that the law requires the Plaintiff's interest to be in existence both at the date of the insurance and of the *sinistre*.

Again, the Defendants say there were anterior mortgages above the value of the premises; but under the questions submitted it could have served no purpose to prove such anterior mortgages to the highest conceivable amount, for not a word could the jurors say as to that fact, which, in its bearing on the merits of the case, might have been of the highest importance, if some of the

legal propositions contended for by the Appellants can be maintained or examined into in this cause. Then again, admitting the insurance as contended for by Plaintiff, admitting also the loss and an insurable in'erest in the Plaintiff, the Defendants raised by their *fifth* exception another ground, which should not have been overruled by the Court, namely, that the insurance was made under certain conditions set forth in the plea.

Surely all this, as matter of fact, should have been put to the jury. Were there any, and what conditions? Was there any, and what compliance with them by Plaintiff? Or was there, as is alleged, a waiver of any of them? so that the important allegation of Plaintiff herself that she had complied with the conditions of the contract was not submitted to the jury, nor the equally important fact of waiver. In addition to this, and as showing the necessity of having specific questions put to the jury in reference to the conditions, it may be stated here that there is no proof whatever that the notice of loss, under oath, alleged as given on the 27th September, 1852, was ever delivered to the Defendants: the contrary seems to be established. Wm. Murray distinctly states, in cross-examination, that he had no knowledge of the affidavit and claim. Alexander Murray, one of the Company's clerks, also states that the Plaintiff's Exhibit No. 6, containing the pretended notice and affidavit, was never received by him.

The judge in his charge held, erroneously in my opinion, that the contract of insurance as made was without conditions. It is sufficient to say here, that I hold it as manifestly the right of the Defendants to have the fact as to the existence of the conditions and the compliance with them brought distinctly under the consideration of the jury. This was not done, and the court below erred in failing to do so, as well as in dismissing the 5th exception. Even if there had been no exception as to conditions, it may safely be argued that the Plaintiffs were bound to have *proved* as well as to allege, as was done in the declaration, compliance with the usual conditions of the Company's policy, at least those which are in the nature of conditions precedent.

Again, the last of the questions, "Do you find for the Plaintiff or for the Defendant?" is in my view wholly inadmissible and contrary to the spirit and meaning of the statute, which requires the jury, in every case, to return a special verdict in relation to the facts. If such questions are allowed, there is nothing reasonable or useful in requiring facts to be defined, or evidence to be written down, or in doing away with bills of exception and the proceedings usually had in jury trials in England.

Were there nothing else in the case but this single point, that the issues are not covered by the questions, I would reverse the judgment, and order a new trial on new questions. It cannot be permitted for counsel to suggest questions covering only part of the real points in contestation, still less questions framed so as to evade all the tender points of the case; and if cases come up here from judgments in jury trials, with defective questions, I would invariably send them down. On this point I have more than once expressed my views. Notwithstanding the great and confessed difficulty imposed upon the Courts to shape questions so as to cover the case, I think it would be in the interest of justice to send cases back and to have the facts defined anew. If this were done,

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and if the judges below or their officers settled the facts after personal conference with counsel, and elimination of all extraneous points, the object of the law would be better attained.

It was contended that the Defendants should have appealed at once from the judgment settling the questions, and no doubt it was competent to them to take such an appeal; but it is equally true that the appeal from the final judgment brings up the correctness of all the interlocutory orders; and we have besides, at this stage of the case, the advantage of the proof made, and are thereby enabled to see the bearing of the questions on the real merits of the case.

The next point to which I shall advert, is that raised by the Appellant, and insisted upon so strongly at the argument, namely, that *a policy of insurance such as that in question cannot be made without writing or be proved by verbal evidence.* This question, distinctly raised by the pleadings and relied on in the Court below, is manifestly one of the very greatest importance. It was ruled by the judge at the trial adversely to the Appellants, and in my opinion was erroneously ruled.

The fact that no case has been cited of an action in any court of justice against an insurer being maintained without some written evidence of the contract, goes far to show what the law in this matter is understood to be in all commercial countries. I have been unable to find any such case; and it is certainly not in an action like the present, and with evidence such as to be found in this record, that a precedent for such an action should be furnished, under our law. The case of Smith v. Irving, referred to by the Respondents, is the only instance of an action having been *brought* to recover a loss by fire without a writing; but the charge of the late Chief Justice Vallières, read from his MSS. by the Appellant's counsel, shows that such an action was not, in the opinion of that able judge, maintainable under the law of Lower Canada. (See Appendix.) Authors can be cited to maintain the doctrine, that there is nothing in the contract of insurance to require a writing or to render a verbal contract absolutely and of itself void.

But it is certain that there is authority to be found as well in the usages as in the laws of the most considerable commercial states, extending back to the very remotest periods against such verbal insurances. The history of insurance proves this, as may be seen from the valuable treatise of Duer on Insurance (see note 2, p. 100, vol. 1). I shall quote a few authorities on the point: and first, the *Ordonnance de la Marine*, tit. 6, art. 2, which is recognised as law at this day in courts of all civilized countries having cognizance of maritime matters:—"Le contrat appellé police d'assurance sera redige par ecrit et pourra "être fait sous signature privé."

Pothier, Assurance, No. 99, holds, that, under the ordonnance above cited, although a contract of assurance may be made, it cannot be proved without writing.

Nouveau Denisart v. Assurance, p. 497, § 7: "Il est necessaire pour établir la preuve de l'existence du, contrat d'assurance, que la police en ait été "redigé par ecrit."

Alauzet, T., Des Assurances, 1 vol. No. 180, considers the danger of allow-

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ing assurance to be otherwise than in writing, and says: "Ces motifs qui mili-"tent pour la necessité de l'ecriture ont une gravité qu'il est impossible de "reconnaître," and strongly approves the Modern French Code, in requiring contracts to be in writing.

Merlin (*Rep. de Jur. v. Police d'Assurance*), while contending that under the rule laid down in Le Guidon a verbal insurance was not in itself null, admits that it was necessary to have a writing to prove the contract, "pour *faire* "conster de l'existence de la convention contre ceux qui voudraient la nier."

The 4th Ordonnance of Barcelona, that of 1484, (Casaregis 183,) expressly enacts, not only that the contract shall be reduced to writing, but that the instrument shall in all cases be executed before and signed by a public notary: all insurances otherwise made to be wholly void."

Le Guidon, Clejrac Us. et Cout., pp. 187, 188, holds writing indispensible.

French Code de Com., liv. 2, art. 10, art. 332.

Emerigon, Ass., chap. 2, sect. 1, holds, "que l'ecriture est un point de ri-"gueur, et qu'à son defaut, on ne peut quelque modique que soit la somme, et "dans aucun cas, ni admettre la preuve par temoins, ni faire interroger la "partie ni l'appeler a serment." See also 2 Dalloz, Juris. Gen., p. 16.

As to the law of Scotland, it is laid down that "the contract must be by "policy on stam[illegible]per. But the agreement may be so conclusively fixed "before delivery [illegible] policy, as to ground an action for implementing it by "the furnishing of a regular policy." Bell's Principles of the Law of Scotland, p. 508. The allegations in the Plaintiff's Declaration in this case, are such as rather to warrant a conclusion for the *issuing of a policy* than the conclusions actually taken as on a completed assurance.

There is an authority in *Miller on Insurance*, p. 30, to the point: "The im-"portance of the contract of assurance, and the singularity of those obligations "which it is intended to create, have in all commercial states rendered a deed "in writing essential to its validity."

Angel, Fire Insurance, p. 57, sect. 19, "There is nothing in the common "law of England which appears to render it absolutely necessary that the con-"tract of assurance *should be in writing*, though the custom has been to have "this sort of evidence of such a contract. We have seen that the name of the "instrument 'policy,' derived from the Italian, necessarily imports a *written* "*contract*. In this country there is no statute in any state, which requires that "the contract should be in writing; but the opinion has been entertained and "expressed, that as the usage of a contract in this form has long and univer-"sally prevailed, it has probably acquired the force of law, and that it is at most "doubtful whether an action on the contract, if merely *oral*, could now be "sustained." *Ib.* sect. 4: "As all the positive stipulations of the policy that "may be enforced by law are on the part of the insurer, it is not necessary that "it should be signed by both parties; and this mode of executing the instru-"ment, though sanctioned by usage, is derived from the peculiar nature of the "contract."

1 *Duer*, pp. 60, 61, ed. 1845, lays down the law as quoted in the first extract from Angel, and adds: "Insurance, as a branch of the law Merchant, we

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"have already seen, does not depend solely on the rules of our municipal law, "but upon questions not settled by positive decisions, is governed by the gene-"ral usage of the commercial world;—hence, I adopt the opinion, that the "general and uniform practice of merchants from the earliest times ought to be "considered as evidence of the *legal necessity of a written contract*, with the "same propriety that a bill of sale is held, by the universal maritime law, to "pass a valid title on the transfer of a ship. There has been no express deci-"sion on this point in any of our Courts, nor is there more than a single case to be "found in our Reports, where the question has been agitated; and in this "the judges finding they could place their decision upon other grounds, pur-"posely abstained from the expression of an opinion."

In Note II. of same volume, p. 100, Duer refers to this single case of Smith and Odlin (4 Yeates' Penn. Reports, p. 468, in which it is said by Mr. Phillips that C. J. Tilghman "expressed a doubt whether valid insurance could be made "otherwise than in writing," 1 Phillips, 8. The question in this case, was, whether the plaintiffs, as assignees of one Yard, a bankrupt, were entitled to a premium of insurance which the bankrupt, in his accounts with the defendant, had charged against him. The court decided they were entitled to it, and Mr. Duer seems to think this might involve the decision that a parol policy was valid, but adds that "the propriety of the decision is *more than questionable*."

This case does not certainly appear to me to be at all conclusive of the question, which Mr. Duer thinks was in effect decided. Mr. Phillips' view of the matter is thus given: "In Great Britain and the United States the law does not di-"rectly and positively prescribe the form of this contract or the mode in which "it is to be executed. . . . . . The English statutes requiring the assured in "certain cases to be named in the policy *imply that the contract is in writing*." 1 Phillips, Ins., p. 8.

"The policy of insurance is a written instrument by which the contract of insurance is effected and reduced into form." 1 Marshall, Ins., p. 290.

"It is very probable that the form of a policy of insurance nearly similar to "that which we have now in use was introduced into England by the Lom-"bards, with their other commercial improvements." 4 B. & A., p. 210.

"Though a policy of insurance, not being under seal, is but a simple con-"tract, yet it is always looked upon as an instrument of great solemnity, *being* "*the only evidence of a contract* of the utmost importance to the parties in-"tended." Marshal, Ins., p. 349.

Ib., p. 352: "It is indeed a general rule that the policy alone shall be con-"clusive evidence of the contract, and that no parol evidence shall be received "to vary the terms of it."

The next point is one of scarcely less importance, *as to the power of the insurance company and of Mr. Murray its agent to contract in the manner disclosed in the evidence.* This is obviously a question distinct in many important respects from the general question just considered as to the legality of verbal contracts of insurance in the abstract. Corporations are, by their very nature, limited by rules inapplicable to private individuals in respect of their mode of contracting. Their powers and the mode of exercising them are limited by the

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general rules and restrictions imposed by law, and frequently by the charter creating them and defining their powers and duties. This was the case with the Company now appealing. By its charter, 6 Victoria, c. 22, sect. 4, it is enacted as follows: "And be it enacted that all policies of insurance whatever "made under the authority of this Act, or of the Ordinance aforesaid, which "shall be subscribed by any three Directors of the said Corporation, and countersigned by the secretary and manager, and shall be under the seal of the "Corporation, shall be binding upon the Corporation, though not subscribed in "the presence of a board of trustees, provided such policies be made and subscribed in conformity to a by-law of the Corporation."

It is said that this is merely directory, and that assurances made in other forms may be valid. Now when we consider that the mode of contracting is generally regulated in the Statutes creating corporations, it may be fairly held, and it is the opinion I have arrived at, that the Statute does prescribe the mode which it is imperative on the Company to follow. It is quite certain that the Company had power to make by-laws not inconsistent with law or with its charter, and that such by-laws were made, and that the form in which contracts of insurance were to be made is provided for in the very manner set forth in the section of the law just quoted. The by-law is in the following terms: "The directors shall have authority, together with the manager and "secretary, to make and effect contracts of assurance in the name and on the "behalf of the Corporation, with any person or persons, body politic or corporate, against loss and damage by fire, on any houses, stores, shipping or other "buildings whatsoever, and on any goods, chattels, or personal estate whatsoever; and all policies of insurances so made shall be signed by three directors, and countersigned by the manager and secretary, and under the seal of "the said Corporation, and shall be binding and obligatory on the whole corporation in the same manner and with like force as if under the hand and "seal of each individual member of the Corporation."

With such a charter and with such a By-law, I am at a loss to conceive how it can be fairly pretended that the abstract question of the validity of a verbal contract as raised, even if decided against the Company should be held as deciding this case. The instrument prescribed by the charter is not merely a written instrument but one under seal. Is it not more reasonable to hold, that the Legislature meant to prescribe a mode of contracting to bind the Company thereby and also to *protect the public?*

It is to be remarked, there is no evidence that contracts in any other than the prescribed form have ever been made by the Company nor that they have deceived the public or ratified irregular and illegal acts of their agents, and I hold that the Statute and By-laws must be taken to have been known to the party contracting in the instance before us, whether it were Mr. Hays or the Respondent. I shall refer merely to one French authority as bearing out the view, I have taken on this point. It is to be found in Boudousquié *de l'Assurance*, No. 85, after speaking of contracts made by agents in contravention of particular instructions, but in conformity with the public Acts or Regulations by which the Company was created, as for instance taking a less rate of premium,

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than that provided by the tarif and holding such contracts valid as against the Company leaving to them recourse against their agents he adds, No. 86: "Mais "la question doit être jugée différemment lorsque les conditions auxquelles il a "été contrevenue sont celles qui résultent des Statuts approuvés par le gouver-"ment; ces statuts étant rendus publics par les insertion au bulletin des lois "qui a lieu en même temps que celle de l'ordonnance d'autorisation, la compa-"gnie au nom de laquelle le contrat a été souscrit, est fondée à prétendre, "*premièrement, que ces statuts contiennent les conditions de son existence, con-"ditions imposées par le gouvernement dans l'intérêt public et auxquelles il "n'est pas permis de déroger, en second lieu, que l'assuré est présumé avoir "connu ces statuts et les restrictions qu'ils apportent aux pouvoirs de l'agent "puisque nul est censé ignorer la condition de celui avec lequel il contracte.* "L'assurance dans ce cas est donc nulle en ce qu'elle a de contraire aux statuts "sans même que l'assuré puisse exercer un recours contre l'agent."

There is a case of *Head & Armory* v. *The* PROVIDENCE INSURANCE COMPANY (2 Cranch p. 166) which was much relied on in the argument by the Appelants' counsel. It is the leading case on the subject in the United States, and the doctrine laid down as to the powers of Corporate Bodies by Chief Justice, Marshall will be found transcribed *totidem verbis* in all the recent American treatises on the subject of insurance. The case bears a strong analogy to the present one, in respect of the form of policy. The question arose as to whether a certain policy of Insurance on a vessel effected by Plaintiff at the office of the Insurance Company (Defendants) was or was not cancelled by an agreement in certain correspondence. The Plaintiff made a proposition by letter to cancel the policy which was rejected. The Defendants afterwards by *their secretary*, sent an unsigned letter assenting to the proposition, but before it reached the Plaintiff, the vessel was captured. Without quoting the facts of the case more particularly the following extracts from the opinion of Chief Justice Marshall will shew the views taken by him.

"It is a general rule that a Corporation can only act in the manner pre-"scribed by law. When its agents do not clothe their proceedings with those "solemnities which are required by the incorporating act to enable them to "bind the Company, the informality of the transaction as has been very pro-"perly urged at the bar is itself conducive to the opinion, that such Act was "rather considered as manifesting the terms on which they were willing to bind "the Company, as negotiations preparatory to a conclusive agreement, than as "a contract obligatory on both parties. . . . . . This leads us "to enquire, whether the unsigned note of the 6th of September be a corporate "Act obligatory on the Company. Without ascribing to this body, which in "its corporate capacity is the mere creature of the act to which it owes its "existence, all the qualities and disabilites annexed by the common law to "ancient institutions of this sort, it may correctly be said to be precisely what "the incorporating act has made it, to derive all its powers from that act, and "to be capable of exerting its faculties only in the manner which the act "authorizes. To this source of its being then, we must recur to ascertain its "powers, and to determine whether it can complete a contract by such commu-

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" nications as are in this Record. The act after incorporating the Stockholders
" by the name of the Providence Insurance Company, and enabling them to
" perform, by that name, those things which are necessary for a corporate
" body, proceeds to define the manner by which these things are to be perform-
" ed. Their manner of acting is thus defined :—*Be it further enacted that all*
"*policies of assurance and other instruments made and signed by the president*
"*of the said Company or any other officer thereof according to the ordinances*
"*bye-laws and regulations of the said Company or of their board of Directors*
"*shall be good and effectual in law to bind and oblige the Company to the*
"*performance thereof in manner as set forth in the constitution of the said*
"*Company herein after recited and ratified.*"

" An instrument then to bind the Company must be signed by the president
" or some other officer, according to the ordinances bye-laws and regulations of
" the Company or Board of Directors. A contract varying a policy is as much
" an instrument as the policy itself and therefore can only be executed in the
" manner prescribed by law. The force of the policy might indeed have been
" terminated by actually cancelling it, but *a contract* to cancel it is as solemn
" an act as a contract to make it, and to become the act of the Company must
" be executed according to forms in which by law, they are enabled to act."
" The original constitution of the Company which is engrafted into the act of
" incorporation does not aid the defendants. That agreement does not appear to
" dispense with the solemnities which the law is supposed to require. It
" demands the additional circumstance that a policy should be countersigned
" by the Secretary. It appears to the Court that an act not performed accord-
" ing to the requisites of law cannot be considered as the act of the Company
" in a case relating to the formation or dissolution of a policy, if the testimony
" of Mr. Jackson is to be understood as stating that an assent to the formation or
" dissolution of a policy if manifested according to the forms required by law, is
" as binding as the actual performance of the act agreed to be done, it is proba-
" ble that the practice he alludes to is correct. But if he means to say that
" this assent may be manifested *by parole, the practice cannot receive the sanction*
"*of this Court.* It would be to dispense with the formalities required by law
" for valuable purposes and to enable these artificial bodies to act and contract
" in a manner essentially different from that prescribed to them by the Legis-
" lature. Nor do the cases which have been cited by the gentlemen of the bar
" appear to the Court to apply in principle to this. An individual has an original
" capacity to contract and bind himself in such manner as he pleases. For the
" general security of society, however, from frauds and perjuries, this general
" power is restricted and he is disabled from making certain contracts by parol.
" This disabling act has received constructions which take out of its operation
" several cases not within the mischief but which might very properly be
" deemed within the strict letter of the law. He who acts by another,
" acts for himself. He who authorizes another to make a writing for
" him makes it himself, but with those bodies which have only a *legal*
"*existence* it is otherwise. *The Act of incorporation is to them an enabling*
"*act, it gives them all the power they possess, it enables them to contract, and*

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" *when it prescribes to them a mode of contracting they must observe that mode* " *or the instrument no more creates a contract than if the body had never been* " *incorporated. It is then the opinion of this Court that the Circuit Court* " *erred in directing the Jury, that the communications contained in the record* " *in this base amounted to a contract obligatory on the parties* and therefore " the Judgment must be reversed and the cause remanded for a new trial."

I concur fully in the doctrine thus laid down, and it would be easy to cite English cases long previous to the date of the judgment to the same effect. The modern authorities, as it seems to me wisely, are coming back to the older and stricter views of the powers even of trading Corporations unless increased and unusual powers are given by their charters.

I refer to another authority: " Where the insurance is made by an incorpo-" rated company, the execution of the policy must be attested by the officer or " officers designated for that purpose by its charter or by-law." Duer, Ins., p. 65, sect. 9.

"It is necessary, therefore, in contracting with such a body (or corporation) " to see not only that the contract is one within its authority to make, and that " the person acting as the agent of the company is authorized to bind it, but " also that the contract is in a form by which the company, *according to its* " *constitution, may be bound.*" Phillips, Ins., p. 10.

How, then, could Murray the manager bind the Company by his acts and declarations, admitting them to be proved as contended for by the Respondent. He would have exceeded his powers. He was only the servant of the Company, competent doubtless to take offers of insurance, to receive and discharge premiums, to hand any policies executed in due form. But where did he get authority to make a verbal contract of insurance, or to take a note to his own order, or to say that he would consider the property insured until the note matured? Certainly not from the Statutes of incorporation, nor from any by-law produced in this case. Nor is there any kind of evidence to establish acquiescence on the part of the Directors in such irregular, and in my view reprehensible conduct. Had such acquiescence been established, the question as to the powers of the *directors themselves* thereby to bind the company might have arisen. But there is no evidence to show that this is not the first case of such irregularity. It is hoped that it may be the *last.* The point just considered is in my opinion, decisive of the merits of the appeal.

Another point raised in this cause is this: *Had the Plaintiff any insurable interest in the subject-matter insured at the date of the loss?* The answer to this question, if properly given in the negative, is also decisive to the fate of the Plaintiff's action. It was admitted by the Respondent's counsel at the argument, that if she had no insurable interest at the date of the loss, her action could not be maintained. This point could not but be conceded, for the authorities under the old law of France and under the Code, as well as under the English law, are unanimious in saying that such interest must exist both at the time of effecting the insurance and at the date of the loss. It is unnecessary to quote many authorities, as all concur in the doctrine laid down in the following extract:—" Il ne suffit point d'avoir été partie capable de stipuler une assurance

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"à l'epoque de la formation du contrat pour être en droit de reclamer dans le "cas de sinistre, le benefice de l'assurance; il faut avoir encore à l'epoque du "sinistre le même droit de propriété, ou au moins le même interêt. A la conservation des objects assures l'existence de cette condition essentielle pour la formation du contrat d'assurance est particulièrement indispensable à l'epoque du sinistre." Quenault, Ass., p. 164.

"Hence on every suit on a policy for the recovery of a loss, the declaration "must aver that the person on whose account the policy was effected was not "only interested in the property insured when the policy was effected or the "risks commenced, but also at the time of the happening of the loss; and if this "averment is contradicted by the evidence of a previous transfer not accompa- "nied by an assignment of the policy itself, the plaintiff is not permitted to "recover." 1 Düer, p. 54.

Let us now look at the facts as they appear in evidence. The loss happened on the 8th July 1852. On the 22d June 1852 the Respondent transferred to Hugh Taylor, as curator to the substitution created under the will of A. McKenzie, £3000, and transferred to H. Taylor, M. McCulloch, and W. Ermatinger, executors of the last will of one F. C. Cameron, accepting by Taylor £1826, part of the obligation consented to by Hays in favor of the Respondent's husband. The first transfer states that the said Elizabeth McGillivray, "in consideration of the sum of £3000 cy. to her in hand well and truly paid "at and before the delivery of these presents, by the said Hugh Taylor, in his "capacity aforesaid, the receipt whereof is hereby acknowledged, declared to "have sold, assigned, transferred, and made over, and by these presents "doth sell, assign, and make over, without any warranty except of her *faits et* "*promesses* to the said Hugh Taylor, in his said capacity, accepting thereof a "like sum of £3000, &c. . . . . . And doth hereby substitute, subrogate, the "said Hugh Taylor in his said capacity in all and every the rights, privileges, "claims, actions, and mortgages, *nom, raisons, actions, privileges*, and *hypo-* "*thèques* acquired and now held by the said Elizabeth McGillivray, to be re- "ceived, recovered," &c. &c.

The second transfer is to the same effect.

No language can be plainer, or more emphatic than that of these transfers, admitted to be authentic and produced in the case. The Plaintiff's interest in the debts transferred, and all the hypothèques by which the debts were secured, passed to the transferees as fully, to all intents and purposes, as they were vested in her previous to the execution of the transfers. She had acknowledged the receipt of full consideration by instruments having the same effect in solemnity as a deed duly sealed and delivered would have in England. Such transfers of rights are and always have been recognised by our law; and as between the parties therefor a complete change of creditor had been effected. How was the state of things altered? In the first place, says the Respondent, by the *contre lettre* signed by Hugh Taylor, and bearing date on the 24th June 1852. This *contre lettre* upon its face contains an admission: "It is hereby acknowledged "by the undersigned," &c., that the transfers were *pro formâ*, without consideration, &c.

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It is signed by Taylor alone, without any reference to his capacity as curator in the one case, or as one of the executors, in the other. To shew how dangerous it is to hold that this letter could alter the legal relations between the transferor and the transferees, let us suppose that instead of the receipt of the money being acknowledged in the instruments of transfer Taylor had bound himself to pay the consideration money at some future date, say in three months. Such an agreement could not alter the character or legal effect of the instruments, it would simply create the obligation to pay *at the time agreed on.* Suppose the Plaintiff to have brought her action for the recovery of the consideration money after the delay elapsed. Would it have availed Taylor for a moment, to urge as a defence to the action, "I acknowledged by a letter dated "on the day subsequent to the transfers that the whole transaction set forth in "the transfers was *pro forma* and without value or consideration, &c."

Manifestly such a plea could not be sustained in a Court of Justice, for if sustained it would establish a principle that a party bound to another by a solemn instrument, can himself set aside and vacate his obligation; that a debtor can by letter missive, get rid of the suit by his own declaration, and even if it were proved that the letter was signed and delivered contemporaneously with the title of debt, and that it was delivered at the same moment to the creditor and received and kept by such creditor, the legal relations between the parties would not be changed; the creditor Respondent agreed to nothing by the receipt of such a letter; she gave up none of her rights by keeping it, and apart from the anomaly and illegality of allowing Taylor to prove his own proper avowal or admission (for the *contre lettre* amounts to nothing more) to contradict the authentic instruments which I shall refer to hereafter, it would lead to the greatest injustice if the Appellant's liabilities could be altered by holding that such a letter could operate as a reconveyance to the Respondent of the rights transferred? Or test the transaction in another way, suppose an action brought by the representatives of the Mackenzie and Cameron estates against Taylor stating in effect "you received a transfer of Mrs. Reid's claim for us and you acknow- "ledged by authentic instruments that the transfer was for us and on our be- "half; account to us therefore for the monies?" Could Taylor's own *contre lettre* be pleaded as answer to such action? Or suppose the action brought by such parties directly against the debtor Hays? Could he, who promised to pay Taylor in his capacity mentioned, plead any such *contre lettre* of H. Taylor's as a discharge to them or as a proof that the transfers were *pro formâ?* Manifestly not. So that neither the rights of Mrs. Reid nor the liabilities of the debtors could be lessened by the *contre lettre.* But it was argued by the Respondent and put in issue by an express averment in the answers to the pleas that the transfers were cancelled and set aside. Up to the date of cancellation therefore, the transfers were in full vigor, or why take the trouble to cancel them and plead such a cancellation as answer to the pleas; at all events the Plaintiff appears to have done nothing previous to the date of cancellation to invalidate the transfers. Observe too that the fire took place more than twelve months previous to the cancellation; that the action was returned on the 1st December 1852, the plea fyled on the 19th January 1853, and the answers fyled on the

20th May 1853, and the copy of cancellation was only produced on the day of the trial.

In whom, then, was the insurable interest in the mortgage debt, at the time of the action brought, as well as at the date of the fire? I have no hesitation in declaring it as my opinion that *Taylor, es qualités*, was such creditor, and *not* the Plaintiff. Taylor, then, was the real Plaintiff, and was interested in the event of the suit, and incompetent as a witness,—not the less, though nominally another was the Plaintiff. The objection, therefore, taken by the Appellants to his evidence, was well taken, and, in overruling such objection, the Honorable Judge who presided at the trial erred, and that on an essential and vital point, and in my opinion the verdict on that account alone, were it on no other, should be set aside.

I am of opinion also that there is error equally fatal in that portion of the charge which says that "There is no evidence of fraud, and the declaration and "statement of Mr. Taylor must be allowed to explain the assignments." Supposing Taylor to have been a competent witness, it still remained to be determined how far he should have been permitted, I will not say to *explain*, but formally to *contradict* authentic instruments, and to set them aside; for it is impossible to suppose that the pretended cancellation made in April 1853, if it were necessary to restore to the Plaintiff the interest she had lost by the instruments of transfer, could have had the effect of vesting her with that interest on the date of the fire. This was not the case of a ratification which could have a retroactive effect. It was rather an attempt to avoid the plea, which, if not got rid of, was felt to be fatal to Plaintiff's action. It is scarcely necessary to advert to authorities, to show that parol evidence will not be allowed to contradict or set aside formal and authentic instruments, nor even to explain them, except in certain cases of ambiguity. This is elementary, and the reason given by the Honorable Judge for admitting such evidence, namely, that there was no evidence of fraud, was a reason for the exclusion of the evidence. When fraud is alleged, parol evidence may be adduced *by the party alleging it*, to contradict the averments of the deed; but in this case there was no such allegation, and, besides, the party against whom the authentic transfers were set up, was allowed, contrary to principle, to destroy the averments of formal transfers, by the parol evidence of one of the contracting parties.

Another point was raised at the trial, *as to the proof of admissions made by Murray*. The general principle contended for by the Appellants was sanctioned by the presiding judge, namely, that the admission of an agent binds his principal only when they are contemporaneous with the contract, when they are part of the *res gestæ*. There is really no proof that Murray had the powers and capacity of a general agent. Let us see whether the application of the principle was correctly made in allowing evidence of conversations between Murray and Taylor, and Murray and McGill, to go to the jury. This will of course depend upon the precise point of time the contract is considered as having been made. The Plaintiff's declaration alleges the contract as made on the 18th of February; but as, if not satisfied with that allegation, it goes on to allege that on the 7th July 1852, the Plaintiff repaired to the Company's office

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and demanded the policy, and sets up that the Defendants, acting by Murray their agent, "did acknowledge and declare that the said Moses Judah Hays "had duly procured and effected an insurance upon the said building, ... "and did then and there promise and agree to make out and execute a policy "of such insurance." Is not all this vague and useless, and evidently intended to meet the anticipated conflict in the evidence, and to produce an effect upon the jury? Manifestly this pretended acknowledgment on the 7th July (which has not a particle of proof to support it) cannot be the contract itself; it could be no part of the *res gestæ*. If the contract was made at all, it must have been made in the Company's office in presence of McAulay, the Appellant's clerk, since dead. This must be true, whether we assume the Plaintiff's statement that the contract was a verbal one, or that of the Hon. Judge that it was a written one. If so, then Mr. Murray's conversations with Mr. McGill and Mr. Taylor formed no part of the *res gestæ*, and were not contemporaneous with the contract. But, in addition to this, *Murray had no capacity or power to bind the Company by conversations with the Plaintiff's friends.* "An agent is "authorised to *act*, and therefore his acts, explained by his declarations *during* "*the time of the action*, are obligatory on the principal, but he has no authority "to make confessions after he has acted." 1 Phillips, Evidence, p. 169.

A word or two as to the conditions of the insurance. In the charge, which must be taken as accurately given in the papers of record, because it is before us signed by the Honorable Judge, it is stated, "It was contended also that if in "this case a contract of insurance was made, it was made subject to the usual "conditions of the Defendant's policies as proved in the forms produced by the "Defendants. On this point also I am against the Defendants. The conditions "cannot enter into the contract as made in this case, there being no mention "of any such condition, as no policy was issued."

The Plaintiff's declaration sets up no such doctrine. It refers to the exceptions usual in policies, as to losses occasioned by riot, &c., and alleges the loss to have been occasioned by other than the excepted causes. It alleges notice of loss as forthwith given under oath, and also notice of other insurances, and that the Company agreed "within two hours to cause a policy of insurance to "be made out and executed in due form, embodying the conditions and stipu- "lations hereinbefore in part recited, and to transmit the same to the Plaintiffs "without delay."

In a case in Massachussetts, *McCulloch* v. *Eagle Insurance Company*, (1, *Peck, Mass.* R. p. 278, (cited Angel Ins. p. 75,) an action was brought against a Company on an alleged consummated agreement to insure, contained in correspondence which the Court did not think sufficient proof of such contract. It was held that an action of *assumpsit* was not the proper form of action, but that it should have been special, stating as a breach the refusal of the Defendants to deliver the policy according to the terms of the agreement, setting forth also the terms in which the policy ought to have been made, shewing *that the loss claimed would have been recoverable under it* and alleging as a special damage that the Plaintiff had been deprived of the remedy the policy would have given. It is added "And to entitle the Plaintiff to recover, the Plaintiff would be bound

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"to give the same evidence as if the action had been founded on the policy "itself; Evidence of a compliance on his part with all the conditions that the "policy if *executed* would have imposed," see also *Harding* v. *Carter.* (*Park, Ins.* 3. Ed. p. 4.)

This doctrine seems to me far more consistent with law and with the nature of the contract of assurance than the doctrine laid down to the jury on this essential part of the case. If the contract in the case before us, was made subject to the usual conditions of policies acctually issued, or even if there was no other condition than that formal notice of loss should be given, then the Plaintiffs' case wholy failed because there is no proof either of the alleged performance or alleged waiver of the conditions. There is no evidence that the alleged notice on oath in September of the fire in July ever reached the Company. If this judgment is maintained, it will sanction the principle that an insurance without policy is better [illegible] insured than a *written* one; as being without any condition whatever [illegible] would certainly simplify actions by parties insured, for they will no[illegible] to allege and prove compliance with the numerous and import[illegible] precedent indorsed on policies which form the very gist of the con[illegible] of insurance as usually made. It is no wonder that an insurance company should appeal to a higher tribunal before submitting to consequences so grave and so disastrous, but which are nevertheless in my opinion the legitimate consequences of the doctrine ruled at the trial of this case.

As to the somewhat remarkable passage in the charge, which contains the statement, that *even if the contract as made required the payment of the premium note before the policy should be issued, there was laches on the part of the Defendant in not notifying the Plaintiff of the non-payment of the note*, it is not, in the view I have taken of the case, necessary to express any positive opinion. It was strongly urged at the argument in appeal that the charge of the judge on this point had great weight, with the jury. As to this, we have no means of judging here. But it may be said, that the correctness of the ruling in this respect, is fairly open to doubt. It is plain, that the Appellants treated the matter as at an end on the non-payment of the note. [illegible] cash column of the book was added up without including the premium; the entry crossed out and the word *null* written across the Register. The insurance although stated as having been effected for the benefit of the Plaintiff, was made, if made at all, with Hays. The contract between the Plaintiff and Hays, that the latter should insure the premises is alledged in the declaration, as a contract anterior to, and independent of, the contract between the parties in this cause. But assuming the contract to have been made with the Plaintiff through Hays as her agent authorized to make it, I am disposed to think that notice to the agent, of the non-payment of the note, should be taken as sufficient notice to the principal. The rule seems to be, that "notice of facts to an agent is constructive notice to the principal where it arises from or is connected with the subject matter of his agency; for upon principles of general policy, it is presumed that the agent has communicated such facts to his principal. This doctrine is laid down in *Story's Agency*, sec. 140. That Hays had notice of the

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non-payment of the note is evident, and the notice is stated by him to have been handed to Mr. Badgley the Respondent's legal adviser, Mr. Murray thinks Hays was notified that the contract was at an end. As to the correctness of the finding of the jury on the questions of fact submitted to their consideration, I am bound to express my opinion. This Court is not confined under our statutes, to consider the question of fact found in the same way as Courts in England would do on motions for a new trial. The Appellants made no attempt to obtain the decision of the Court in Banco as to the law of the case. They made no motion there for a new trial; nor for a judgment *non obstante veredicto.* Nor were they bound to do so. The case is before us in all its parts both as to law and fact; as a Court of Appeal; and it would seem that the Appellants from the importance of the questions presented, treated the trial before the jury as merely a formal trial with a view to obtain before this Court an authoritative decision on the whole merits of the case. My own view of the evidence in respect to the proof of the contract, even waving the serious points of law to which reference has been made, is favorable to the Appellants. I look upon the evidence of Murray as containing the true and more reliable statement of facts as they occurred. His position was such as to render it more probable that his recollection should be clearer as to what actually occurred, and it is consistent with itself. He speaks positively as to two interviews with Mr. McGill; Mr. McGill recollects only *one.* It was at this *second* interview that Murray says he mentioned to Mr. McGill that it was unreasonable to think that he Murray should assume a risk without payment of premium on behalf of a lady with whom he had no acquaintance. Mr. McGill denies that this was said to him, and also denies that he blamed Mr. Murray for taking the note; and says *he does not recollect* Mr. Murray saying to him "There is no harm done, the build-" ing is insured for ten or twelve days and it can easily be remedied by realiz-" ing the money and paying the premium." But whether Murray's statements are to be believed or not in respect to these points is wholly immaterial to the question of contract or no contract, and as to the question also whether it was or was not a contract conditioned on the payment of the note. Mr. McGill was not present at the time the contract was made, and the conversations had by him with Hays and Taylor are manifestly no evidence as to what the contract really was.

The same remarks are applicable to Mr. Taylor's evidence. He called on Mr. McGill, who mentioned to him, Mr. Hayes' statement that the insurance was effected, and Mr. Taylor's own statement as to Mr. Murray having made no mention of the insurance being conditional, or about the payment of the note, and that the mortgage was insured, although in express contradiction to what is sworn to by Mr. Murray, cannot be looked on as part of the *res gestæ*, or as proof of what really took place on the visit of Hays to the Company's office when the contract, such as it was, must be considered as having been made.

As to the testimony of Hays, it was insisted on by the Appellants at the trial, and at the argument in appeal, that he *Hays* was an incompetent witness. It was argued that by the sale to M. V. Hays of the 25th January 1852, of the property insured, Hays had parted with all his interest in the pro-

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perty, and that the Plaintiff, by intervening and becoming a party to that deed had accepted M. V. Hays as her debtor without discharging Hays, who therefore had an interest in paying the debt, and getting rid of his personal liability to the Plaintiff, by the proceeds of the insurance. It was further argued that if such payment were made out of the insurance monies, Hays could turn round and say to M. V. Hays: "You were bound personally in your contract with " me to pay Plaintiff's debt; that debt is now discharged, not by you, but from " another fund; pay me, therefore, the sum you were bound to pay, but never " paid to the Plaintiff, as part of the *prix de vente*." To this the Plaintiff answered that the debt, if paid from the insurance money, would not be extinguished, but by operation of law would become vested in the insurance company, who thus would be subrogated by operation of law in all the Plaintiff's rights, and would be entitled to enforce against M. V. Hays payment of the monies. Without giving any opinion as to whether such legal subrogation would take place, a matter about which grave doubts may be entertained, I am not prepared to hold Hays to be a competent witness; but it is not necessary to decide this point, nor is it necessary to do so in the view taken by me of the whole evidence as to the alleged contract. Taking Mr. Hays' evidence as admissible, it must be borne in mind that both he and Murray were witnesses for the Plaintiff. The one states that nothing was said as to the nsurance being conditional, or that the policy was not to be issued until the note matured and was paid. The other states *precisely the reverse.* Both are Plaintiff's witnesses. The only other party present (McAulay) is dead. Where, then, is the evidence of the contract as alleged in the declaration? and yet without satisfactory proof of the contract, which proof is thrown on the Plaintiff by the issues, the jury were not justified in finding the contract proved. This very case shows the necessity of adhering to what, I take to be, the wise rule of the law, requiring some writing as necessary for the formation and to the proof of such a contract of insurance as in question here. It was Hays' duty to require, and it appears to be the usage of insurance offices to give an *ad interim* receipt. Had this been done, the difficulties which have arisen in this case might have been avoided. It is unnecessary to say much as to the proof made as to the usage in other offices, as to verbal assurances. Such as it is, I consider it as favorable to the Appellant's pretensions. But I am not prepared to sanction the doctrine that an insurance against loss by fire can be legally made, without any writing of any kind, by a casual conversation in the street, even with a private party as principal, still less with an agent of a corporation. I attach no importance to the book produced at the trial as proving the written contract referred to in the judge's charge. It was part of Murray's duty to take offers for insurance, &c., and this was done by entries in the books in question of the property, premium, &c. The entry appears to have been cancelled soon after it was made, and, if the entry is to be taken against the Company, it must be taken as a whole as it stands, and as explained by Murray's acts.

Two other points were mentioned at the argument: first, that interest was erroneously awarded from the date of the *loss*, instead of from the date of the

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judgment. In my opinion, the judgment should be reduced. See 1 Ellis, Ins., p. 254, Shaw's ed. 1854; and other authorities, if necessary. The other point was to the error in the date of the obligation, creating the mortgage which is alleged to bear date on the 20th November, the obligation produced bearing date the 20th December, 1847. This might have been material if mortgages were in fact proved which could have destroyed the priority of Plaintiff's, but the question as submitted did not admit of any answer being given as to the existence or non-existence of anterior mortgages.

Lafontaine J. en Chef. Cette instance présente des questions relatives au contrat d'assurance. La principale question, en fait, est celle-ci: Dans les circonstances particulières de la cause, peut-on dire qu'une assurance a été réellement effectuée au profit de l'Intimée au bureau de la compagnie? La principale question, en droit, est celle de savoir si le contrat d'assurance peut subsister sans qu'il y ait une police.

La question de fait, soumise à un corps de jurés, a été résolue dans l'affirmative; et le verdict ayant été homologué par la cour de première instance, la question de droit se trouve également décidée dans l'affirmative par ce tribunal. La Compagnie a interjeté appel, prétendant qu'il y a eu mal jugé et en fait et en droit. A mon avis, la compagnie est dans l'erreur. Nous n'avons aucune loi qui fasse dépendre d'un écrit la validité du contrat d'assurance. Ce contrat est du droit des gens; il peut donc exister indépendamment de la loi civile. Il est néanmoins au pouvoir du législateur de réglementer la forme de ce contrat en ce qui peut regarder l'admissibilité ou l'inadmissibilité de la preuve de son existence, et alors le contrat participe du droit civil; mais nos lois municipales ne contiennent aucun règlement à cet égard. La Compagnie a appelé à son secours quelques statuts anglais, qui ne sont que des édits bursaux, ayant pour objet l'établissement d'un droit de timbre. C'est en vain qu'elle invoque ces statuts, puisqu'ils n'ont pas force de loi en Canada. L'on sait que l'ordonnance de marine, (art. 2, titre des assurances) portait que "le contrat appelé *police d'assurance* sera rédigé par écrit." Suivant Pothier (1) cette forme n'est pas nécessaire à la validité du contrat, et ne peut être requise que pour la preuve. "Les raisons qui me portent à croire que cette forme que l'ordonnance prescrit, n'est que pour la preuve, et non pour la validité du contrat," dit Pothier, "sont, 1o que cette forme est absolument étrangère à la substance du contrat, 2o que l'ordonnance ne la requiert pas *à peine de nullité*." Au reste, l'ordonnance de marine n'a pas été enrégistrée en Canada. Il est vrai que l'ord. de 1667 qui l'a été, exige (art. 2 du titre 20) qu'il soit passé acte par devant notaires ou sous signature privée, de toutes choses excédant la somme ou valeur de cent livres." Mais cette disposition générale est suivie de l'exception suivante, (même art.), "sans toutefois rien innover pour ce regard, en ce qui s'observe *en la justice des juge et consuls des marchands*," c'est-à-dire en d'autres mots, en affaires commerciales. Je crois donc avoir eu raison de dire qu'aucune de nos lois municipales ne réglemente le contrat d'assurance, et que, comme le remarque Merlin (2), après Pothier déjà cité, "il est évident (sous l'ord. de

(1) Assurance, No. 96. (2) Rép. Vo. Police d'Assurance.

marine) que l'écriture n'était nécessaire que pour faire conster de l'existence de la convention contre ceux qui auraient voulu la nier." (1) Il me semble même que dans ce dernier système, l'assuré devait être admis au bénéfice d'un *commencement de preuve par ecrit* s'il en existait, ou du serment judiciaire pour obtenir de sa partie adverse l'aveu de l'existence du contrat. "Il y aurait abus," dit Alauzet, "à établir contre la vérité et la nature des choses, que l'assurance elle-même n'existera que sous ces conditions (conditions exigées par une loi pour la preuve,) et qu'une des deux parties pourra convenir de la vérité de toutes les assertions de l'autre, et se refuser à exécuter le contrat parcequ'il n'aurait pas été écrit."

Telle est mon opinion sur la question de droit. Quant à la question du fait de l'assurance, je crois que la décision du jury est exacte et conforme à la juste appréciation qui doit être faite de la preuve. Il est certainement à regretter de voir autant de contradictions qu'il y en a entre le témoignage de M. William Murray, l'Agent ou Gérant (*Manager*) des Appelants, d'un côté, et celui de l'Honorable Peter McGill, de M. Hugh Taylor et de M. Hayes, de l'autre. Mais, dans l'état de la cause, les assertions isolées du premier, ne sauraient, à mon avis, l'emporter sur celles des derniers, qui toutes concordent les unes avec les autres, se prêtent un mutuel appui, et, de plus, empruntent un nouveau degré de crédibilité, du fait qu'il existe un écrit constatant qu'une assurance avait été réellement effectuée au bureau de la compagnie au profit et au nom de l'Intimée. Nous verrons bientôt si cette assurance, admise par M. Murray lui-même, était une assurance qui, comme il le prétend, n'a duré que quelques jours, ou si au contraire c'était une assurance qui devait durer une année.

M. Hayes devait à Madame Reid, l'Intimée, une somme d'environ £4000, pour la sureté de laquelle il lui avait constitué une hypothèque sur son grand hôtel de la rue Notre-Dame dans la Cité de Montréal, connu sous le nom de "Maison Hayes," lequel hôtel fût détruit par le vaste incendie de 1852. M. Hayes qui s'y était engagé envers l'Intimée, obtient le 18 février précédent, au bureau des Appelants, une assurance sur cet hôtel, au nom de sa créancière, au montant de £3000. De la part des Appelants, cette assurance est consentie par l'entremise de leur agent ou gérant, le dit William Murray, qui fait faire aussitôt, dans un régistre tenu à cette fin par la Compagnie, une entrée qui constate, en substance, que l'assurance est faite pour une année à courir du 18 février 1852, au nom de l'Intimée et pour son profit, sur l'hôtel en question qui est spécialement désigné dans cette entrée; que cette assurance est donnée sous le No. 8951, dans l'ordre des Nos. insérés au régistre, et que la police devra porter ce No.; que l'assurance est faite pour la somme de £3000; que la prime convenue est de £22 10s. et que le montant de cette prime a été alors *reçu*.

Il paraît que M. Murray prit en paiement de la prime d'assurance un billet de M. Hayes, payable le 1er mars suivant, lequel billet fut déposé par la Compagnie à la Banque de Montréal, et protesté à son échéance, protêt dont il n'a été, soit dit en passant, donné aucun avis à l'Intimée. M. Murray avait-il fait du paiement du billet une condition de la continuation de l'assurance après le 1er mars?

(1) Alauzet, t. 1, No. 181. Grun et Joliat No, 197. Phillips, t. 1, 2nd Ed. p. 8.

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C'est ce qu'il a prétendu et affirmé dans son témoignage devant le jury. En cela il est contredit par MM. McGill, Taylor et Hayes. Ce serait une perte de temps que de transcrire ici des extraits de ces divers témoignages. Comme, pour la raison que j'ai donnée plus haut, ce sont ceux des trois derniers témoins qui doivent prévaloir, qu'il suffise de dire qu'il résulte de la preuve que l'assurance n'a pas été conditionnelle; qu'elle a été faite purement et simplement pour l'espace d'une année; que M. Murray avait promis de délivrer et d'envoyer le même jour la police d'assurance à l'Honorable Peter McGill entre les mains duquel il savait qu'elle devait être déposée selon le désir de Mme. Reed; que, cependant, cela n'a pas été fait; que, dès le même jour de l'assurance, M. Murray a informé MM. McGill et Taylor que cette assurance avait été effectuée, sans, de sa part, faire mention d'aucune condition, ce qui se trouve corroboré par l'entrée dans le régistre de la Compagnie, puisque nulle condition n'y est énoncée; qu'en conséquence de cette information, MM. McGill et Taylor qui prenaient un intérêt bien vif dans cette affaire, l'un comme ami, l'autre comme neveu de l'Intimée, sont demeurés persuadés, et par suite l'Intimée elle-même, et cela de bonne foi, que l'assurance avait été effectuée purement et simplement en la manière ordinaire de manière à donner à Mme, Reid, pendant une année, toute la protection qu'elle en attendait. M. McGill partit pour l'Angleterre dans le mois de juin suivant, et s'il eût eu raison de penser que l'assurance ne fût pas bonne, "I would not have gone to England," dit-il, "without having informed Mrs. Reid of the fact of the insurance being vitiated." Le jour de l'assurance même, M. Taylor se présente au bureau de la Compagnie pour s'enquérir si cette assurance a été effectuée: "Mr. Murray told me it had been effected, and said, tell Mrs. Reid the insurance has been effected, the mortgage is covered. M. Murray said nothing to me about the insurance being conditional on the payment of a note; if he had, I would have insured it myself as I had the money in my pocket." On ne saurait donc avoir de doute sur la bonne foi avec laquelle Mme Reid a dû se croire bien et duement assurée; et cette bonne foi ne doit pas tourner aujourd'hui à son préjudice.

Si, comme le prétend l'agent de la Compagnie, l'assurance eût été conditionnelle, le billet devenait de nulle valeur à son échéance faute de paiement; et l'assurance tombant par cela même, les Appelants n'étaient plus exposés à aucune perte, et par conséquent n'avaient plus d'intérêt dans le billet. Cependant ce billet est endossé par M. Murray individuellement, et la compagnie le fait déposer dans la Banque de Montréal, puis protester. Ce protêt n'a pas seulement l'effet de mettre M. Hayes en défaut, mais il a encore celui de conserver le recours de la Compagnie contre l'endosseur; et l'on peut raisonnablement croire que c'était l'intention de la Compagnie, en agissant ainsi, de s'assurer et d'exercer ce recours contre lui, par le fait seul que les frais du protêt ont été portés au compte de M. Murray lui-même. Le vaste incendie de 1852, en détruisant l'hôtel de M. Hayes, a pu peut-être exercer une grande influence sur le mode d'action de la Compagnie à l'égard de son agent, mais cela ne saurait en rien altérer les droits acquis à Mme Reid.

Un témoignage qui me paraît avoir une grande valeur quant à ce point de la contestation, est celui d'un des employés de la Compagnie, le fils même du dit

William Murray. Ce témoin dit: "My father, in February 1852, had no private account with the Montreal Bank. The expense of protest is charged to my father's private account.... The reason why he charged the price of the protest to his own private account, was that as it was going to be a loss to the Company, *as well as the whole note*, which was taken for premium, he thought it but fair to charge the price of the protest to his own private account. The entry in cash book is on the 27th March."

Puisqu'à raison de l'insolvabilité de M. Hayes, non seulement le coût du protêt, mais même le montant du billet allait être une perte pour la Compagnie, il s'ensuit donc qu'on ne regardait pas le défaut de paiement de ce billet comme ayant eu l'effet de le rendre non avenu, et d'annuler par contré coup l'assurance, en paiement de la prime de laquelle le dit billet avait été ainsi accepté. La Compagnie a donc continué, après le protêt, d'être créancière du montant du billet. Et comment aurait-elle pu continuer de l'être, si l'assurance ne subsistait plus?

Tous les autres moyens d'objection invoqués par les Appelants tombent d'eux mêmes en présence de l'admission du contrat d'assurance entre l'Intimée et les Appelants, et je ne crois pas qu'il soit nécessaire d'en parler ici, si ce n'est de celui tiré du prétendu transport que Mme Reid aurait fait de sa créance. Les Appelants disent que, depuis ce temps-là, elle est sans intérêt. Cette prétention est repoussée par la contre-lettre de M. Taylor, laquelle contre-lettre est valablement invoquée dans cette instance, et doit avoir toute sa force en faveur de la conservation de l'intérêt de Mme Reid dans la créance assurée. "Les contre-lettres sous seings privés," dit Toullier, t. 8, No. 188, "qui ont un autre objet que celui de dissimuler le prix d'une vente, eûssent-elles même pour objet de l'annuler, et de la déclarer simulée et feinte, ont entre les parties contractantes la même force que *les contre-lettres notariées.* Des présomptions ne suffisent pas pour en détruire l'effet et les anéantir, ainsi que l'a jugé la Cour de Paris, dont l'arrêt fut confirmé par la Cour de Cassation, le 9 avril 1807."

Enfin les Appelants ont invoqué la disposition de l'acte provincial de 1842, ch. 22, qui porte "que toutes les polices d'assurance que ce soit, faites en vertu du présent acte ou de l'ordonnance susdite, qui seront signées par trois directeurs de la dite Corporation (c'est-à-dire de la susdite compagnie) et contre-signées par le secrétaire et les régisseurs, et revêtues du sceau de la dite corporation, obligeront la dite corporation, quoique non-signées en présence du conseil des syndics, pourvû que ces polices soient faites et signées conformément aux règles et règlements de la corporation." Cette forme, si elle est employée, est un moyen de constater l'existence du contrat; elle peut par elle-même suffire à cet effet; mais la disposition du statut qui l'autorise, ne doit pas être, à mon avis, interprétée comme affectant l'essence du contrat et excluant tout autre moyen d'en établir l'existence suivant les règles ordinaires de la preuve des conventions. Au reste, il est constaté, et M. Murray l'admet lui-même, que c'est l'usage de la Compagnie des Appelants, ainsi que de plusieurs autres Compagnies d'assurance dans Montréal, d'effectuer même verbalement des assurances et de les regader comme obligatoires pour un temps plus ou moins long, sans police, et même sans avoir reçu la prime.

McGillivray vs. Assurance.

Caro[illegible] [illegible]id.

Action [illegible] l'Intimée contre l'assurance de Montréal (Appelante) ; pour £3000 montant d'une créance qu'elle avait contre le nommé Hays, par [illegible] sur une propriété nommée *Hays [illegible]* ; créance qu'elle prétend [illegible] à la dite *Assurance*, et qu'elle a droit de reclamer elle, vû que la [illegible] laquelle elle était hypothéquée est détruite par le feu.

Outre une défense en droit qui a été renvoyée, la Défenderesse [illegible] défense au fonds en fait et plusieurs exceptions qui peuvent se resumer.

I.—D'après les règles de l'Institution, il ne pouvoit y avoir d'assurance effectuée sans l'émanation de *police* ; or il n'y a jamais eu de *police* en faveur de Dame Reid ; il n'y a pas eu d'assurance, mais seulement des pour parlers sur le sujet ; une offre par Hays d'assurer offre qui refusée, la prime n'ayant pas été payée ; l'assurance étant conditionelle, si la prime était payée, ce qui n'a pas été fait.

II.—Le 29 [illegible] 1852, vente de la propriété hypothéquée à Hays fils, pour £8,[illegible] [illegible] promis payer à Dme. Reid £3000. Elle a comparu à l'acte, a accepté [illegible] novation et partant la novation de cette dame et de Hays [illegible] changé.

III.—Dme. Reid n'[illegible] plus d'intérêt assurable sur la propriété en question ayant [illegible] sa créance à Hugh Taylor, par acte du 23 juin 1852.

IV.—Elle n'avoit pas d'intérêt assurable parceque les hypothèques préférables et antérieures à la sienne sur le dit immeuble en absorbaient la valeur, tellement que l'intimée ne perdait rien par l'incendie de la propriété.

D'après la Défense en fait, c'était à la Demanderesse, Intimée, à faire preuve du contrat qu'elle allèguait avec l'assurance. Elle n'a pu produite la police, il n'y en a jamais eu pour y suppléer, elle a fait venir, comme témoin, le nommé William Murray, lequel est le premier témoin interrogé de la part de la poursuite devant le juré devant lequel ce procès a été pris, lequel a été présidé par M. le Juge Smith.

Ce témoin a prouvé l'entrée faite au livre de la compagnie, constatant qu'une assurance au montant de £3000 avait été effectuée, en faveur de M. Reid, à la demande de Hays, dont le billet promissoire avait été pris et accepté par Murray pour la prime £22 10s.

Mais Murray dit que cette entrée était conditionnelle, et était pour constater une assurance conditionnelle, savoir, que l'assurance ne devait subsister que jusqu'à l'échéance du billet ; que si à cette époque il était payé, alors l'assurance continue pour l'année, l'assurance devant être nulle si le billet n'était pas payé ; que de fait le billet n'a pas été payé à son échéance ; qu'il a été protesté ; que Hays a été informé que l'assurance était *cansellée ;* que de fait elle l'a[illegible] avant le feu, et que partant à l'époque où il a eu lieu, il n'y avait pas d'a[illegible] en faveur de M. Reid.

Hays qui a fait *l'applicatio[illegible]* pour assurance nie positivem[illegible] la [illegible] en question, il dit au contraire [illegible] Murray a pris son billet po[illegible] de la prime, l'a informé que la c[illegible] de M. Reid était assurée, [illegible] aucune mention de la condition dont il parle dans sa témoignage.

L'assurance était définitive et completée, si bien qu'il a été [illegible] la

police serait envoyée à M. McGill, l'ami de Mad. Reid, que lui, Hays, en a de suite informé M. McGill qui a promis aller prendre la police.

Mess. McGill et Taylor, entendus comme témoins, prouvent que Murray leur a dit à tous deux, en différents temps, que l'assurance était effectuée, que le billet de Hays avait été accepté pour la prime et qu'il n'a été fait aucune mention de la condition, si ce n'est après le feu.

En un mot ces trois témoins contredisent le témoignage de Murray complétement et établissent, par ses propres aveux, que l'assurance était complète.

Ainsi si ces témoignages sont légalement pris et qu'on les préfère à celui de Murray, il faut tenir que le contrat d'assurance allégué par l'Intimée est prouvé légalement et suffisamment.

Sous le rapport de la respectabilité, chacun des témoins: Hays, McGill et Taylor, valent, à tous égards celui de Murray.

La preuve testimoniale était admissible, d'abord c'est affaire de commerce, et en outre il y avait preuve écrite du contrat.

Hays est admissible; son intérêt étant *balancé*, il doit la somme. Si l'assurance paye, de droit elle est subrogée et Hays ne fait que changer de créancier.

Quant à Taylor, il est également sans intérêt, le transport qui lui a été fait n'étant pas serieux, ainsi qu'il le dit lui même, et ainsi que le montre la contre lettre prouvée dans la cause.

Quant à M. McGill, pas un mot n'a été dit contre son témoignage, qui cependant est en contradiction manifeste avec celui de Murray.

Les aveux de Murray, l'agent, l'âme de l'assurance, blient sûrement cette Corporation; or ces aveux établissent le contrat.

Du reste, dans le cas actuel, Murray n'a fait que ce que lui et les autres représentants d'assurance, étaient journellement dans l'habitude de faire—prendre des risques verballement et quelquefois sans avoir été préalablement payé de la prime.

Sur la question de fait, je n'ai pas de doute le contrat est prouvé.

Sur la question de droit je suis d'avis

1°. Que le contrat d'assurance peut être valable sans être par écrit; l'écrit n'est requis que pour la preuve et il a été dit déjà que, dans le cas actuel, il y avait écrit, et que c'était affaire de commerce qui aurait pu se prouver sans écrit.

2°. Que la novation alléguée n'existe pas, quant à la propriété assurée, la quelle était affectée au payment de la créance de l'Intimée et sur le produit de laquelle elle comptait entièrement pour son paiement. C'est cette sûreté sur l'immenble ou plutôt l'hypothèque qu'elle avait sur cet Immeuble qu'elle assurait; ainsi que le débiteur fût le père ou le fils, ce changement n'influerait en rien sur la nature du contrat fait avec l'assureur. Il n'y a pas eu de novation, l'immeuble est resté après la date comme avant sujet à l'hypothèque de l'Intimé, qui était la chose assurée.

3°. Lors de l'assurance et lors de l'incendie, l'Intimée avait un intérêt *assurable*, puisque le transport à Taylor du 23 Juin 1852, n'était que *pro formâ*, ainsi que le prouve Taylor lui-meme, et encore mieux la contre lettre du 24 juin 1852.

La charge du Juge me parait conforme aux faits prouvés et ses décisions,

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quant aux questions de témoignage et de droit, me semblent en tout correctes.

J'approuve également les décisions de la Cour Inférieure, qui a renvoyé la défense en droit, celle qui a mis de côté le 6e moyen des défenses aussi bien que l'ordre réglant l'articulation de faits, qui me parait suffisante et propre à couvrir tous les points de la cause sur lesquels, les Jurés avoient à se prononcer.

Les considérations d'équité et d'honnêteté sont tout à fait en faveur de l'Intimée ; si l'assurance était conditionnelle, Mad. Reid aurait dû en être informée. Si le billet eut été pris conditionnellement, comme c'était l'intérêt de M. Reid qui était assuré, elle aurait dû être avertie. La prétention que Murray a outre passé ses pouvoirs, est absurde, peu digne d'une institution *publique*. En fait et en droit le Jugement de la Cour Inférieure est correct et devrait être confirmé.

Cross & Bancroft, for Appellants.
A. Robertson, Counsel.
Abbott, for Respondent.
Rose, Q. C., Counsel.
(J. J. C. A.)

RESPONDENT'S AUTHORITIES :—

As to hypothetical plea :

Macfarlane v. Scriver, Sup. Court, Montreal, 22d April, 1850.
Griffith v. Eyles, 1 Bos. & Pull. 413.
Cook v. Cox, 3 M. & S. 114. Rex. v. Morley, 1 You. & Jer. 221.

As to parol evidence of contract generally :

3 Boulay Paty, 246 ; 2 Valin, 20 ; Pothier, Ass., No. 96, 97 ; Boudousquié, pp. 243 et seq. to 250 ; 3 Pardessus, No. 792 ; Persil, p. 59, No. 46 ; 1 Alauzet, 339 ; 2 Pardessus, 563 ; 1 Alauzet, 181 ; Quesnault, 97, 104 to 107. English rule as to policy was only fiscal, 25 Geo. III. c. 44 ; 28 Geo. III. cap. 56 ; 1 Phill., Ev., 8 ; Harding v. Carter, 1 Park, 4 ; Hamilton v. Lycoming Ins. Co., 5 Burr. 339 ; Angel on Ins. §§ 19, 68, 69, 71 ; cap. 1, § 19, cap. 3, §§ 31 to 38 ; 1 Duer, 60, 61, 100, 101, 110 ; Thayer v. Middlesex Ins. Co., 10 Picken, 325 ; Ellis, p. 35, note.

As to exclusion of it by Appellant's charter and by-laws :

6 Vic. cap. 22, § 4. Only directory, Angel & Ames, p. 248, No. 253, 229, 237, 292 ; Story on Agency, p. 58, No. 53 ; Safford v. Wyckoff, 4 Hill, 446 ; 2 Pardessus, 565, No. 593 ; Marshall, 303 ; Boudousquié, 108, 109.

As to award of interest :

2 Phillips on Ins., 750 ; 3 Car. & P., 496.

As to insurable interest :

Ellis, p. 26, English ed. ; pp. 63, 64, 69, 70, Amer. ed.

As to note for premium :

2 Alauzet, 328, 329, 332 ; Angell on Ins., p. 95.

As to admissibility of evidence as to declarations of agent :

1 Greenleaf, Ev., 113 ; Story, Agency, Nos. 134 et seq. ; 8 Bingh. 453.

Macfarlane v. Scriver, Superior Court, Montreal.

No.

22d April, 1850.

Coram DAY, SMITH, and VANFELSON.

In this case the action was directed against the defendant, as having been *commune en biens* with her husband deceased.

She pleaded that her marriage with him took place in the United States, and there-

fore that she was not *commune en biens* with him; but if she was so, then she had renounced to the community.

The Plaintiff demurred to this plea as being hypothetical, and the court maintained the demurrer and dismissed the plea.

SUPERIOR COURT.

MONTREAL, 27TH FEBRUARY, 1858.

Coram BADGLEY, J.

No. 2050.

Ramsay v. *Judah et al.*

Held, that money paid into Bank by Receiver General to credit of Seigniorial Commissioners and upon which they can draw their checks for a certain purpose, payable to the order of the lawful recipient, is not money in their hands.

This was an action brought against the Seigniorial Commissioners for the amount of a half year's approximate revenue as indemnity for the suppression of Lods et Ventes.

The declaration set up that the Plaintiff was a Seignior in Lower Canada and that Defendants were the Seigniorial Commissioners appointed under the Seigniorial Act of 1854 and the Acts amending the same; that Plaintiff had given in his approximate statement as required by law, which Defendants had accepted and had already paid Plaintiff for several terms of this interest, that moreover the Defendants had received the necessary funds from Government to pay the Seigniors generally, and particularly the Plaintiff, for the term due on the 1st of July, 1857, but that in order to annoy Plaintiff, they the Defendants had maliciously refused to pay this instalment without any just cause or excuse although they had frequently promised to pay Plaintiff.

The Defendants who severed in their defence met this action by raising the general issue.

The evidence established the facts that the Defendants were charged by Government with the payment of this interest, and that funds for this purpose were placed in one or other of the chartered Banks in the City of Montreal to the credit of two of them (Judah and Dumas) to pay the Seigniors in the District of Montreal these instalments, and that the said two Commissioners were always in funds in this manner to pay such demands, and that they could draw their joint checks for any such payment; that the funds had never been exhausted. It was also proved that Plaintiff's name appeared on the Government books as the lawful recipient of the sum sought by him to be recovered, and that it was intended he should be paid. Defendants endeavoured to show that they had no money at their credit for this purpose, and that they could not give checks but only joint drafts to the order of the Seignior to be paid. The only witness who did not call them cheques was the Secretary of the Commission: in the letters of the Receiver and Deputy Receiver General they received no other name than cheques, and the bank clerks were equally undiscriminating.

Ramsay, for Plaintiff, contended that the liability sought to be imposed upon two of the Defendants, Judah and Dumas, a *desistement* having been entered as to the other two, was not one arising solely from the Statute. None of the Seigniorial Acts imposed upon the Commissioners the duty of paying these instalments to the Seigniors. The personal liability of the Commissioners arose

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from their having in their hands funds destined to the use of Plaintiff and which they refused to pay over. It was a liability arising from a rule of the common law, and which has equal force in England and in France. Vide Greenleaf on Evidence p. 10[illegible] [illegible]arue v. Crawford et al., Stuart's Reports, p. 141, and authorities th[illegible]ecially 5 Cochin p. 763, argument of M. Cochin, where the [illegible] action is clearly admitted.

Judah, Q. C., contended that one commissioner might be liable but not four that the Statute said that the Receiver General should pay the Seignior and that no such liability was imposed upon the Commissioners, they were not Government agents,

Badgley, J. This action, originally [illegible]inst the four Commissioners appointed under the Seigniorial Tenure Acts for establishing the indemnity Revenue to be paid to Seigniors, subsists at this stage of the proceedings only against the two defendants, Commissioners resident in the District of Montreal. It appears that an approximate statement had been made up in their office and furnished to the plaintiff as the guide for his claim to the statute indemnity, and upon this statement he received the first half year's amount by means of a cheque or draft officially certified by the defendants; a misunderstanding afterwards occurred between the parties, and thereupon the Defendants declined the plaintiff's application for the certificate of next half year's revenue, which he applied for upon the same approximate statement, which remained unimpugned and unobjected to by the parties. Hence this action, which charged the Commissioners, the defendants, with a personal liability to him for the payment of money alleged to be in their possession for that purpose. It is sufficient to observe that the record does not establish the allegation, nor does the law make them the legal distributors of the funds appropriated for the payment of the indemnity, whatever arrangement may have been agreed upon by the Government with them for facilitating the payments. The plaintiff has misconceived his action; he might probably, by the power of a mandamus, overcome any refusal by the Commissioners to give him the requisite statement or certificate upon which he might apply to the Government for his indemnity revenue, but such is not this case, and his demand being unsupported, must fail; but it will be without costs. The defendants, as observed, are public officers, Seigniorial Commissioners. The misunderstanding which originated the action was between the plaintiff and themselves, by reason of a similar claim to that already certified by them upon the same statement, which was not disputed by any of the parties. At the return of the action the two defendants, Commissioners, being also practising attornies of this court, entered appearances of record for each other, severed in their defences with pleas of general issue only, and conducted their defences to judgment, being at the same time the Commissioners as defendants and attornies at law acting professionally for each other on the record. Under these circumstances no costs will be allowed upon the dismissal of the plaintiff's action.

Action dismissed without costs.

Ramsay, for Plaintiff.

Judah, Q. C., for Defendants.

(T. K. R.)

MONTREAL, 28TH FEBRUARY, 1857.

Coram SMITH, J.; MONDELET, J.; CHABOT, J.

No. 2054.

Duncan v. *Wilson*, and *McLennan* par reprise, and *Wilson* opposant, and *Wood* opposant and contestant.

Held,—That an opposant, on an hypothecary claim, is not bound to allege registration of the *hypothèque* to maintain his privilege as regards chirographary creditors.

The opposant Jane Wilson had claimed from the moneys before the court to be paid the amount of her *hypothèque* under an obligation before notaries granted her by the deceased Wilson on the 25th April 1855.

The opposant Wood had claimed out of the same moneys to be paid the amount of his chirographary debt.

The prothonotary collocated the claim of the Opposant Wilson by preference.

The Opposant Wood contested the opposition of Jane Wilson, alleging various reasons, and by one of his pleadings averred that Jane Wilson had not alleged by her opposition that the obligation under which she claimed a hypothecary privilege, had been registered in due course of law in the county where the land hypothecated was situate, and for want of this allegation Jane Wilson could not maintain her preferential claim.

This pleading of Wood was demurred to by the Opposant Wilson, on the ground "qu'elle n'était pas obligée en loi d'alleguer l'inscription de l'obliga-"tion qu'elle invoque au soutien de sa dite opposition au bureau des hypo-"thèques, attendu que cet allegué n'était pas nécessaire pour établir son privi-"lège vis à vis des autres opposans en cette cause, qui sont des créanciers chi-"rographaires et que ce privilège ressort de l'obligation hypothécaire elle-"même."

The Court maintained the demurrer, and dismissed the pleading.

Demurrer maintained.

Doutre & Daoust, for Jane Wilson.
Leblanc & Cassidy, for Wood.
(F. W. T.)

MONTREAL, 27TH JUNE, 1857.

The same Court and Justices.

No. 2054.

The same Parties.

Held,—That a *hypothèque* given by an insolvent in favor of one creditor confers no privilege in favor of the latter as regards contemporaneous chirographary creditors.

The opposant Wood contesting the collocation in favor of Jane Wilson, who claimed a *hypothèque*, alleged among other things and proved, that at the date of the obligation creating the *hypothèque*, the 25th April, 1855, the debtor Wilson, who created it, was insolvent and unable to pay his debts, which far exceeded his assets, the debt due Wood being among these.

The Court maintained the contestation in the following words:

Duncan vs. McLennan.

"Considering that the said opposant David R. Wood, in his contestation of the order of distribution of the proceeds of the real estate of the said John Wilson now before the Court for distribution of the claim of the said Jane Wilson, to be collocated for the amount claimed in and by her said opposition by privilege of mortgage (hypothèque), in preference to the said David R. Wood contesting, hath fully established by legal and sufficient evidence that at the time of the execution of the said deed of obligation by the said John Wilson in favor of the said Jane Wilson, and bearing date the 25th April, 1855, that he the said John Wilson was in a state of bankruptcy and insolvency, *en etat de déconfiture*, and that by reason thereof and by law the said John Wilson could not grant, and the said Jane Wilson could not acquire, any privilege hypothèque in preference to other creditors of the said John Wilson, so as to prevent his estate from being equally divided and distributed among the creditors of the said John Wilson; the Court doth maintain the contestation of the said David R. Wood, with costs; and doth order and adjudge that the judgment of distribution in this cause produced and fyled by the said Prothonotary be reformed and set aside in this that the said David R. Wood and the other creditors be collocated *au marc la livre* to the amount of their respective claims on the proceeds to be distributed under the said judgment of distribution, and doth condemn the said Jane Wilson to pay the costs."

Contestation maintained.

Doutre & Daoust, for Jane Wilson.
Leblanc & Cassidy, for Wood.
(F. W. T.)

MONTREAL, 31ST OCTOBER, 1857.

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

No. 2505.

Stevenson v. *Wilson.*

Held,—That a magistrate charged with the preservation of the peace in a city, who causes the military to fire upon a person, whereby the latter is wounded, is not liable in an action of damages at the suit of the injured party, if it be made to appear that though there was no necessity for firing, yet the circumstances were such that a person might have been reasonably mistaken in his judgment as to the necessity for such firing.

By this action the Plaintiff sought to recover damages for injuries suffered by him in consequence of wounds received from the firing of the troops, on the 9th of June 1853, on the occasion of a lecture given by one Gavazzi at Montreal.

The Plaintiff declared that the Defendant was then Mayor of Montreal and a Justice of the Peace; and that on the 9th of June 1853, the Defendant, acting in his said capacity, called out a body of Her Majesty's troops, then stationed in Montreal, for the alleged purpose of suppressing a riot in the vicinity of Zion Church, and then and there assumed the command and direction of the said troops, and ordered and caused them to load their muskets with ball cartridge secretly, and at a distance from the place of the pretended riot, and out of view of any commotion whatever; and afterwards caused them to be marched to, and drawn up near Zion Church, in Radegonde Street; and that while the said troops were there under his direction and control, the defendant, wrongfully,

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illegally, and needlessly, and without any provocation or reasonable cause, and without any lawful authority to that effect in him vested, and without giving any legal or sufficient notice or warning to those present of his intentions, ordered the said troops to discharge their said muskets towards and in the direction of the Plaintiff and divers other persons, then lawfully being in or near said Radegonde Street, in the Queen's peace. That in obedience to the said Defendant's orders and commands, and by reason thereof, the said troops did then and there discharge their said loaded muskets towards the Plaintiff and divers other parties; and that by the said discharge of muskets the said Plaintiff was shot and grieviously wounded in the shoulder, and disabled and crippled for the remainder of his life. That at the time the Defendant gave the said orders, and at the time the troops fired as aforesaid, there was no riot, disturbance, or cause whatsoever to warrant the Defendant in giving such orders, or to render necessary, excuse, or justify the said discharge of musketry; but that Plaintiff was shot and wounded as aforesaid, by the wrongful acts, neglect, default, gross carelessness, and culpable conduct of the defendant, for which he was answerable to the Plaintiff in damages.

The declaration contains a second count, substantially the same as the first, varied by the allegation, that the defendant ordered and caused divers persons, to the Plaintiff unknown, who were then and there present with the Defendant and under his orders and direction, to discharge loaded fire-arms, and thereby shot and wounded the Plaintiff, &c.

A third count sets forth that the acts complained of were committed by the Defendant and divers other persons, to the Plaintiff unknown, but who were then and there acting under orders and direction of the Defendant, and instigated, aided, and abetted by him.

The Defendant pleaded the general issue.

At the *enquête* the Plaintiff examined the Defendant on *faits et articles*, and also examined twenty-three witnesses in support of the allegations of his declaration.

The Defendant examined sixteen witnesses, by whom he attempted to establish, 1. That it was not upon his orders that the troops fired; 2. That there was a riot at the time sufficient to warrant the reading of the Riot Act and to justify the firing of the troops.

At the final hearing of the case, *Dorman*, for the Plaintiff, contended, that all the material allegations of the Plaintiff's declaration were fully established by the evidence. The troops were called out by the requisition of the Defendant, acting as the chief magistrate of the city of Montreal. He assumed the command and direction of them. Before marching to the place of the apprehended riot, they, by his orders, loaded their muskets with ball-cartridge. By his orders they were drawn up near Zion Church, across Radegonde Street, in two divisions, the one facing Beaver Hall, the other McGill Street. After they had remained in that position about half an hour, and when the audience who had attended at Gavazzi's lecture were leaving the church and quietly dispersing, and men, women, and children, totally unapprehensive of danger, were passing along the street, in front of the troops, the Defendant, taking his position near

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the lower division, in a hurried and unintelligible manner read the Riot Act, and immediately, addressing himself to the troops of the lower division, in a loud voice gave the orders, "Fire! in the Queen's name, fire!" Upon this the soldiers of both divisions discharged their muskets among the people in the street, killing and wounding several persons. By the fire of the lower division the Plaintiff was shot and dangerously wounded in the shoulder, disabled and crippled for life.

To establish that the Defendant gave the order to fire, the Plaintiff relied on three classes of evidence: 1. The testimony of witnesses who were near the Defendant at the time, and *saw* and *heard* him give the order. One of these witnesses, a magistrate from the country, was standing so near as to touch the Defendant's person, observing minutely his every act. 2. That of witnesses intimately acquainted with the Defendant, who heard the order, recognized the Defendant's voice, directed their attention to him, and saw him with his hand raised facing the troops, apparently in the attitude of addressing them. 3. That of witnesses who prove that on the next day the Defendant admitted that he had ordered the lower division to fire, and also that when repeatedly charged, upon the ground, and immediately after the fatal occurrence, with having given the order and wantonly murdered his fellow-citizens, he made no denial of the fact, but replied, "What else could I do?—the Riot Act was read." Several of Defendant's own witnesses also swear that he gave the order.

It was also submitted that there was no riot at the time the troops fired, and no legal cause or justification for the extreme proceedings adopted by the Defendant. All the Plaintiff's witnesses concur in saying that there was no riot at the time; that the only disturbance was between the engine-house and the American Church, about two hundred yards from the troops, and out of the range of their fire. Several witnesses who were passing at the time between the engine-house and the troops, say that all was perfectly quiet in their vicinity, and between them and the troops; and all were struck with horror at the unexpected and fatal discharge of the troops. There had undoubtedly been a serious riot near the church before the arrival of the troops, and about half an hour before they fired, and some of Defendant's witnesses have manifestly confounded this with the state of affairs at the time the troops fired; whilst others, in cross-examination, admit, that the only riot they refer to was the disturbance between the engine-house and the American Church. Several of the soldiers who fired, and who are Defendant's witnesses, say there was no riot at the time.

Again, the firing took place in daylight, when the Defendant could easily see that there was nothing to call for extreme measures. The whole circumstances showed that he failed to exercise the least degree of prudence. The fact that the whole division of troops was ordered to fire, indiscriminately, upon peaceable and unoffending citizens, showed a reckless disregard of human life, which rendered the Defendant deeply culpable.

It was contended that the Defendant had far exceeded the authority vested in him as a magistrate and conservator of the peace; that he was chargeable with the most culpable imprudence and recklessness, in consequence of which

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the Plaintiff had suffered serious injury and sustained irreparable damage. That the Defendant was answerable in damages for injuries caused by his fault, whether through malice, carelessness, imprudence, or ignorance of what, in his position, he ought to know. Several authorities were cited in support of this position, and as to the liability of magistrates for their acts when in the performance of public duties.

Loranger, for Defendant, contended that if any order was given at all by the Defendant, it was addressed to the officers and not to the soldiers; and that if the order were given to the officers, and they in consequence ordered the soldiers to fire, this state of facts was not covered by the declaration, inasmuch as it was therein alleged that the Defendant gave the order directly to the troops, and that they fired in obedience to such order. The evidence was quite contradictory. It was alleged that the order was given in the words "Fire! fire!" Now it was proved that the word "fire" was unknown in the service, and that no soldier would have fired on such an order. There was proof, that, even supposing the Mayor did give the order, the troops did not discharge their muskets upon that order, but upon the proper military order of their officers. This was proved by the troops themselves. Only one of the officers examined (Lieut. Quartley) stated that the troops took their order from the Defendant. The others said they neither heard the Defendant give such order to the troops nor to themselves. He denied that the Defendant gave the order at all. One witness, the Widow Parker, says that she heard the regular military order given by a person in the crowd. There was another class of witnesses who say that they heard the order "Fire" given by persons in the crowd. He admitted that if the Defendant had acted in this case without proper precaution, he would be responsible for the damage done; but the case would be entirely different if it were made out that he had acted under a just sense of the responsibility weighing on him, to maintain the peace and at the same time protect the individual citizens. Now it had been established that the riot being imminent, the Mayor had before asked the Colonel in what manner the troops acted if called upon to [illegible] Col. Hogarth said they fired by files. Therefore the Mayor could not [illegible] any such volley as actually took place. It might also be remarked that Col. Hogarth warned the men not to fire upon any order except his own, showing the known probability of such an order being surreptitiously given for mischievous purposes. Again, it was to be remarked that the civil magistrate was not responsible for the firing at all. He came there to preserve the peace, and, when the means derived from the civil force in his hands were exhausted, he directed the military officer to act, after which the whole responsibility rested on the latter. In this case, the state of affairs did justify the civil magistrate in calling out the troops, and in calling on the military officer to use his discretion.

DAY, J.—This is an action of damages for the sum of one thousand pounds brought against the Defendant for having on the ninth of June, one thousand eight hundred and fifty-three, in his capacity of Mayor of the city of Montreal, ordered her Majesty's troops to fire on a number of the citizens of this city without any justification for so doing, by which fire the Plaintiff received a serious wound from which he will suffer for the rest of his life. The question is one of

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evidence. To maintain his action it was incumbent on the Plaintiff to prove three principal points: 1st. That the order to fire was given by the Defendant in his capacity of Mayor; 2d. That the firing took place in pursuance of such an order; 3d. That the circumstances did not warrant such an order being given. As to the first and second points, the Plaintiff has, in the opinion of the majority of the Court, made out his case. As to the third, however, the evidence is very conflicting. It is true that when calmly reviewing the occurrence by the light of subsequent information, we are inclined to think that no serious riot existed at the time the order was given; but the question was not what was the true state of affairs at the time, but whether a magistrate acting in exercise of his discretion at a time of great difficulty had reasonable grounds for doing what he did. The evidence on both sides has been carefully examined, and the Court, after mature deliberation have come to the conclusion that the Defendant cannot be said, in the course which he took, to have acted entirely without cause. On the one hand, many most respectable citizens have been brought up who state positively that there was no riot or tumult going on at the time; and on the other, an equal number have been examined who state the very reverse. Two in particular, namely, McIver and Sharing, are very strong in their statements. They say that a serious riot was going on, and that pistol-shots were fired in the crowd. The policemen also say there was a riot, and there are several others who depose to the same effect. The evidence no doubt shows that immediately before the reading of the Riot Act a serious riot did take place, and the Court do not feel justified in saying that the responsibility for the consequences of what followed shortly afterwards must be fastened upon the Defendant. He certainly seems to have shown a want of coolness and self-possession, but we must remember that he was placed in a position of much difficulty. He had to choose between the responsibility of allowing the riot to go on, and the responsibility of stopping it by forcible measures which might be the cause of bloodshed. There is a difference of opinion among the witnesses as to whether the course which he adopted was justified by the actual state of affairs. The Defendant's position was a most trying one, and the Court cannot say that he acted entirely without grounds.

SMITH, J., said the position of the magistrate in this case was one of peculiar difficulty, and he was entitled to claim the protection of the law when acting in the exercise of his discretion. Unless there could be shown such an absolute want of discretion on his part as almost to amount to malice, the Court would not hold him responsible for the consequences of what occurred. The evidence on this point must be strong and conclusive. But here there was a great contradiction, so that the effect of the evidence on one side was completely neutralized by that on the other. The Court could not put aside one portion of it, and look only to the other. They must take the whole record as it came before them, and the conclusion they had come to was that the case was not satisfactorily made out against the Defendant.

MONDELET, J.—This was a case of such public importance that he could not let it pass without saying a few words on the subject. Before proceeding to the merits of the question, he could not help expressing his opinion that the

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rioting that took place on the 9th of June was a disgrace to the nineteenth century. Before that occurred he would not have believed that a single man could have been found in Montreal possessing such brutal and ferocious passions as were exhibited by the men from Griffintown who attacked Zion Church on that occasion. It was indeed perfectly disgraceful that men could be found amongst us who should attempt to justify an attack upon a church and congregation assembled therein, merely on the ground that a lecture was being delivered in which views were held distasteful to their opinions and prejudices. And for his part he considered that all those who concerted measures for defending themselves from such a brutal and cowardly attack were deserving of all praise, and would have been perfectly justified in shooting them down. In considering the present case, then, it must be remembered that the Mayor, upon whom devolved the responsibility of keeping the public peace, was placed in a situation of peculiar difficulty, for as much harm might ensue from not using sufficiently stringent measures as from the use of over stringent. His Honor cited cases which occurred in England and the United States, and more particularly the riots in Montreal in 1849, giving it as his opinion, that had sufficient firmness been shown upon the latter occasion the Houses of Parliament would never have been burnt, nor the Representative of Her Majesty pelted with eggs and dirt. The learned President had stated that the Court was unanimous in dismissing the action, yet that only a majority were of opinion that the Mayor had given the order to fire, and that the soldiers had fired upon such order. Now his Honor (M., J.) had no hesitation in saying that he did not concur in the views of the majority of the Court on that portion of the question, and he thought that he should be able to prove conclusively that he was right in the views he held. Indeed he was as perfectly satisfied that the soldiers did not fire from any order of the Mayor as he was of his own existence. All the witnesses for the Plaintiff swear that the Mayor called out "Fire! fire!" but, when cross-examined, not one of them actually saw the Mayor give the order,—that is, saw his lips move,—but only heard him. Two soldiers who were examined stated they did not fire from the word "Fire," but from the regular military command, which consisted of three separate orders,—namely, first "Attention," then "Ready," and lastly "Present,"—and that it would be morally impossible for a soldier, drilled as they were in the British service, to fire on hearing the word "Fire." The officers, however, Col. Hogarth and Capt. Cameron, both swear positively that no such military command was given by any of the officers. It was to be borne in mind that none of this testimony was impeached in the slightest degree, and consequently that it was his duty, both as a Judge and a Christian, to consider that all the parties were in good faith. How, then, were the seeming contradictions in the evidence to be reconciled? On looking at the deposition of Widow Parker, whose testimony is unimpeached, we find the whole mystery solved most satisfactorily. She testifies that she saw and heard a man, who was probably a discharged soldier, give the military words of command, "Attention, Ready, Present," and that immediately after the soldiers fired. Now there was nothing extraordinary in the fact of the soldiers mistaking the voice as that of their officers, and it

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would fully account for their having sworn that their officers gave the word of command; at the same time it would also explain how the officers could swear that they had given no such command. He did not in the smallest degree wish to impugn the good faith of the Plaintiff's witnesses, amongst whom were to be found some of our most respectable citizens. But it must be borne in mind, that at a time of such excitement nothing was easier than for them to mistake the voice of the Mayor, in the same manner as the soldiers had done that of their commanding officer, particularly as none of them actually saw him give the word to fire. Again, as to the question whether the Mayor would have been justified in ordering the troops to fire (although the evidence was very conflicting as to whether there was a riot going on at the time or not), the witnesses for the defence, including the military officers and all the police, all swear that a very serious riot was going on at the time, while the Plaintiff's witnesses deny the fact altogether. It nevertheless appeared in evidence which was not contradicted, that a large body of men from Griffintown were in the act of coming up by the American Church at the time the fatal volley was fired by which the Plaintiff was injured, and, as the record comes before us, we had nothing whatever to do with the volley that was fired up the hill. Under these circumstances of the case, ought the Court to hold the Mayor liable, even supposing that there was no rioting going on in his immediate vicinity, merely because, in a moment of intense excitement, he and the other witnesses had not judged quite correctly the position and distance of the rioters? He thought not. By taking this view of the question and this only, all the witnesses might be considered as having deposed in the greatest good faith at the same time that they were swearing to such manifest contradictions. For the reasons above stated, he had no hesitation in saying that the action must be dismissed.

Action dismissed.

Dorman, for Plaintiff.

Loranger, T. J. J., for Defendant.

(F. W. T. & S. W. D.)

MONTREAL, 30TH APRIL, 1858.

Coram BADGLEY, J.

No. 236.

Gould vs. *The Mayor, Aldermen, and Citizens of the City of Montreal.*

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 action *en repétition*, to recover back certain sums of money levied from the plaintiff by compulsion for assessments, in respect of certain property occupied by him within the city limits, under a lease from the Provincial Government for 21 years, renewable on certain conditions. The plaintiff contended that as he held the property merely under a lease *à longues années*, he was not the owner of the property. That Her Majesty, from whom he held the right to occupy the property, was in reality the owner thereof, and that the land itself

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was in no way liable to assessment. That as the mere occupant of the land he could only be legally called upon to pay such assessments as the owner of the land was bound to pay, and as in this case the owner was Her Majesty, and therefore not liable to be assessed, that he, as the mere occupant, was likewise clearly exempt.

Badgley, J.—Some of the legal points involved in this contestation have been considered by the Superior Court in the cases *ex parte* Gould, the now plaintiff, and *ex parte* Hervey, in the year 1854; but being proceedings by *certiorari*, their adjudication in some degree was restricted to the question of the jurisdiction of the Recorder, whose judgment was impugned, and to the settlement of abstract principles of law raised in the discussion before the Court. This case being a direct action, presenting facts and law of record, and being strongly urged by the Plaintiff's counsel, necessarily demands a close examination and something more than a reference to those decisions as the guide in this, and not only on that account, but because of the great importance to the Plaintiff of the subject-matter of the action, and from the fact of the doubts cast *arguendo* upon the correctness of those decisions. The action is for the recovery back from the City Corporation of certain assessments charged upon certain mills and a store belonging to the Plaintiff, and situated in the City of Montreal. It appears that in 1847 certain lots of land, the property of the public, on the line of the Lachine Canal, were disposed of by the Commissioners of the Public Works, under titles from them drawn in the English form, and styled "Indentures of Lease." They were so disposed of under the provisions of the 9th Vict., ch. 37, which authorized those Commissioners "to dispose of all lands, streams, and water-courses acquired but not required for the use of the Public Works, and also to dispose by sale or lease of all hydraulic power created by the construction of any public work, but not required for public works." The lands were granted and demised for 21 years, renewable for ever at similar periods of continuance, at the option of the holder, but conditioned that buildings should be erected thereon, to be paid for at the termination of the lease, if the condition allowing of their retention by the holder were not availed of by him. It was also further expressly conditioned, that the buildings should be subject in all particulars to the laws of the City Corporation, and that the acquirers should pay all rates and taxes of whatever description that might become payable in respect of the lots and water-powers leased and of the buildings that might be erected thereon. Now, by the Act of Incorporation, the City Corporation had a right to assess all real and personal property within the city, and to levy the same on the owners and occupiers thereof, a power which was exercised by the passing of the Bye-Law under which the claim for assessments was made upon and paid by the Plaintiff, and which is the ground of this action. It is undeniable that the buildings in question, with the land on which they are erected, are within the acknowledged limits of the City of Montreal, and subject to municipal rates and assessments, unless specially relieved therefrom. This relief is demanded by the Plaintiff on two grounds: first, from the alleged leasehold nature of the property assessed, the *domaine utile* only being in him, the *domaine directe* being in the Crown, representing the public and thereby free from local rates; and, secondly,

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from the legislative exemption of the property from the power of the Corporation, under the provision of the exclusion of such property contained in the Incorporation Act itself. It is necessary to investigate both of these grounds, and, firstly, the nature of the Plaintiff's title to the property, and with it the quality of his estate in that property, according to our law. This point will briefly be touched upon, because it has been in principle discussed and settled in the cases above adverted to; and it will be only necessary to observe that the Indenture of Lease appears to have all the legal characteristics and qualities of the *Bail Emphytéotique*, and certainly is neither the common and ordinary *Bail à loyer* (lease from year to year), nor the *Bail à longues années* (for a certain term of years agreed upon by the parties), but differs from both the latter in this: That these latter convey and transfer "que le droit de jouir au lieu que le Bail Emphytéotique transfere au premier une propriété, qui pour "être résoluble n'en est pas moins réelle." (Nouv. Denisart, *Emphytéose*, § 1, part 1.) The *domaine utile* is not alone conveyed: "Dans les pays coutumiers l'Emphytéose est rarement perpétuel. La durée en est ordinairement fixée a un temps qui excède le nombre de 9 années, et qui ne surpasse pas *celui de* 100 *ans*." This lease is renewable every twenty-one years, for ever, at the will of the holder, and the legal consequence follows: "Quoique le preneur "n'acquière pas à perpetuité la propriété du fonds 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 resolution "des creanciers à l'expiration du temps fixée par le bail. Le fonds donné à bail "emphytéotique est susceptible de la qualité de propre, lorsqu'il fait souche "dans la famille du preneur, et il est partagé comme propre dans les successions &c." The quality of the Plaintiff's estate is thus established as being that of property, a quality which no legal authority before the Revolution in France has impugned, and since that time only Merlin and Troplong, who have both been opposed by Duvergier in his 3d volume, and by Prudhon in his *Domaine de Propriété*, and by other eminent modern legists whose opinions have been sustained by several decisions of the *Cour de Cassation*, maintaining such a lease to be an alienation of the estate to the holder, and his possession thereof that of a proprietor. For all purposes of municipal taxation, therefore, the Plaintiff cannot in law be deemed a mere tenant or occupant. It may be here observed, that the alleged freedom from local rates is not supported by law. The statutory exemption of the 10th and 11th Vic., cap. 17, does not seem to apply here. That act was passed on the 27th of July, 1847, two months after the execution of the Indentures of Lease of the lots of land held by the Plaintiff, and which were executed the 27th and 28th of May, 1847. The Statute is altogether prospective from the date of its operation. The alienation of the lots of land was complete from the date of the Indentures. The preamble of the Statute declares the expediency of exempting all property held by, or in trust for the Crown in Lower Canada, as the same is exempt in Upper Canada, and from the passing of the Act it repeals all laws of Lower Canada authorizing the imposition of local rates upon property belonging to, or held in trust by any officer or person for the use of Her Majesty, or the payment of such rates out of

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the provincial revenue, and thereafter exempts such property from such rates— a legislative description of property which does not appear to include property already out of Her Majesty's holding and in the holding of the Plaintiff for his own use, certainly not in trust for the use of Her Majesty. Moreover this conclusion appears to be quite legitimate, and fully borne out from Her Majesty's condition in the Indentures charging the holder with the payment of all rates and taxes in respect of the land and water-power acquired from the Commissioners, and also in respect of the buildings erected or to be erected thereon. In the next place, the Plaintiff's claim of relief does not seem to receive support from the exclusion of power of the Corporation contained within the 92d section of the Act of Incorporation. That section takes out of the operation of the Act the powers and authority of the Montreal Trinity House, of the Commissioners for improving and enlarging the Harbour of Montreal, and of the Commissioners for making the Lachine Canal and the *wharves and slips erected or to be erected by the Harbor Commissioners, and the wharves and grounds under the direction of the Lachine Canal Commissioners.* As matter of fact, the Plaintiff's property forms no part of the wharves or slips of the harbour of the city, nor any part of the wharves and grounds under the direction of the Canal Commissioners. In all such cases as this demand of relief, that relief must be free from doubt, and the exclusion or exemption must be clearly defined, being for an individual benefit at the public charge. Again, the proviso of the Act of Incorporation of 1851 could not apply to land which had passed out from the possession of the Crown in 1847, and held as private property at the date of the Bye-Law, and which was manifestly not within the powers and authority of the Trinity House, the Harbour Commissioners, or the Commissioners of the Lachine Canal, as contemplated by that section. It may be remarked, in conclusion, that the assessment claimed and paid, as appears of record, has been stated in the above cases to be for the buildings erected on the land, namely, on the mills, store, etc. Upon this point it is unnecessary to express an opinion, as the other points adverted to appear to govern the cause, which cannot be maintained.

Action dismissed.

Henry Stuart for Plaintiff.

J. F. Pelletier for Defendant.

(S. B.)

* Reporter's Note. There was a judgment rendered by the Superior Court at Montreal on the 20th of May, 1854, in the case *Exparte* GOULD, for a writ of *Certiorari*, by Justices DAY, SMITH, and MONDELET, (C) on which occasion DAY, J. is reported by *The Montreal Herald* to have said:—This was a motion to quash a judgment in the Recorder's Court against Mr. Gould for £131, being taxes assessed on certain mills and other property owned and occupied by him. The motion was grounded on six points. 1st. That the Recorder's Court had no jurisdiction, inasmuch as the statute creating it only gave it jurisdiction under by-laws then existing, whereas this by-law was not passed until a subsequent period. The Court conceives the authority of the Recorder's Court was made by the act to apply, as well to cases under future as well as under existing by-laws. 2nd. That the process did not set forth a sufficient ground of action, as the by-law was not set forth in the complaint. The plaintiff, however adverted in specific terms to the by-laws, and at any rate, as a point of pleading, the matter fell very much

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within the rule of practice of the Recorder's Court. If it were not so, however, the Court would not adopt the English rule, that the by-law must be fully set out. It was sufficient that the defendant should be thoroughly informed of the charge against him. 3rd. That the matter adjudged was already *chose jugée*; there was no evidence of that. 4th. That the law creating the Recorder's Court was unconstitutional, this would be adverted to presently. 5th. That the property was not in the City of Montreal, there was no evidence that it was not. 6th. That it belonged to Government, and was not taxable. This and the fourth were probably those chiefly relied on. The unconstitutionality of the law was said to arise from the Corporation being made the judge in its own case. The Corporation did not decide in its own case, for the Recorder, though paid by the Corporation, was appointed by the Government, and had no greater interest than one of the Judges of the Superior Court, in the collection of the revenue. But as the point had been insisted on, it might be respectful to Counsel to say a word on it. The Provincial Legislature was created by the Union Act, by which Her Majesty was authorized by and with the advice of the Legislative Council and Legislative Assembly, to enact laws for the peace and welfare and good government of the Province. These laws were not to be repugnant to any thing in any other imperial act having relation directly or by necessary intendment to the Province. There were also special provisions with respect to the prerogative, and a provision that laws affecting Crown and Clergy Lands should not become law until they had lain thirty days before the Imperial Parliament. With these exceptions, the Parliament had a general and unfettered power, and who but itself could decide whether the laws it passed were or were not for the peace and welfare of the Province. No court could declare that they were not so. With regard to the last point it appeared that the property was leased by the Government to Mr. Gould for a term of 21 years, during which he was to erect the buildings upon it, and at the end of which, those buildings were to become the property of the Government, on payment for them, unless arrangements were made to continue the lease. As at the argument the Court still thought that these long leases constituted a property *jus in re* in the hands of the lessee. They were in error indeed, in supposing that either a *bail à longues années*, or a *bail emphytéotique* carried *lods et ventes*, and they had read with attention the very beautiful argument of MERLIN in the *Repertoire* to prove that such cases did not create a *jus in re* more than a *bail à ferme*. But MERLIN admitted that all the authorities were against him on this main point, though they differed about such leases carrying *lods et ventes*. TROPLONG on *Louage* summed up all these arguments, and the authors he referred to would be found in a note to No. 48. There was, however, a circumstance in the present instance which seemed to take it out of the general rule —it was that the lessee was not allowed to sublet, and the authors agreed that, in that case, there was no *domaine utile*. But in truth this discussion did not come up, for the assessment was not made upon the land, but on the buildings, which undoubtedly belonged to Mr. Gould, as he was to get paid for them at the end of the lease, if he did not avail himself of the condition allowing of their retention. The judgment which was drawn with a great deal of skill, and covered the whole case, must be sustained."

Rose & Monk, Attorneys for Ira Gould.

J. F Pelletier, Attorney for Corporation.

(S. B.)

A similar judgment was also rendered by the Superior Court, Montreal, composed of M. M. Day, Vanfelson, and C. Mondelet, Justices, on the 18th October, 1854, in *Ex parte* HERVEY.

DAY, J. expressed himself as follows:—This case came before the Court on a writ of Certiorari, which brought the Record up from the Recorder's Court, which had condemned the defendant to pay City Taxes and Assessments on two hydraulic lots at the Lachine Canal, the one being vacant and the other having buildings.

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The defendant, by his exception, took the position that the Recorder, in condemning him, had exceeded his jurisdiction: firstly, inasmuch as the property had not vested in the defendant, but was only held by him on a lease from the Board of Works, which gave him no *jus in re*, and the property as belonging to the Government was exempt from taxation; secondly, because under [illegible] terms of the Act of Incorporation of the city itself, this particular property was exempt from all authority conferred upon the Corporation.

The first of these points, urged by the applicant in the present case, had already been decided by the Court in the case of Ira Gould where the opinion was expressed that this case was not a common *bail*, but partook of the nature of the *bail emphytéotique*, and therefore the lessee was liable for the city taxes, that the crown had no other right in the land than the *domaine directe*, and that the *domaine utile* was in the hands of the lessee, that in consequence the lessee was liable for all taxes, that the case was thereby taken out of the operation of tenth and eleventh Vict., cap., thirty seven, which enacted that property belonging to Her Majesty should not be liable to taxation. The Court then held that the land under consideration did not belong to Her Majesty, but had become the property of the lessee. Such was the opinion of the Court in the former case. The Court had gone over the case again, as the argument at the bar in the present case was close, able, and correct; but the result of the new examination was not to change their decision.

The first point the Court now looked at, was the authority by which the Commissioners of the Board of Works disposed of the property. By 9 Vic. cap. thirty-seven, sec. thirteen, it was in substance enacted, that all lands, real property streams or water courses acquired for the use of the Public Works, not required for the said works, might be disposed of under the sanction of the Governor in Council, and all such hydraulic powers as were created by the construction of any Public Work, not required for Public Works, might be disposed of under the same sanction, by sale or lease. The term "disposed," here used, applied in all instances, in the recollection of the learned Judge, to alienation, and never to the ordinary lease by landlord to tenant from year to year, and it must be taken as equivalent to a sale. The intention of the Legislature evidently was to vest the Commissioners with the power of alienation. There were two leases in the case, one made in September, one thousand eight hundred and forty-nine, the other made in January, one thousand eight hundred and fifty-one, the one of land on the canal, the other of land and water. The lease set out that the Commissioners did "grant demise and lease" for the period of twenty-one years to Hervey, to be computed from one thousand eight hundred and forty-six, the date at which he purchased the same at Public Auction. This bore out the view of the Court that the contract in question was a sale. The deed then went on to say that the lease was made for twenty-one years, and at the end might be renewed at the rate payable by other leases for another period of twenty-one years, and so on for ever, so that the property had for ever passed from the hands of the crown and could never come back again into its possession. It was further stipulated that buildings should be erected by the lessees; also, that all taxes imposed by the city should be paid by the lessees, and that the property should be subject to all the regulations that the city authorities might impose. All this showed what the intentions of the parties had been, and the case was taken out of the ordinary class of cases. Under these circumstances the Court was compelled to adhere to its old view, and had no hesitation in saying that these deeds could not be ordinary leases, but that they partook of and were clothed with the character of the *Bail Emphytéotique*, and were an alienation of the *domaine utile*, which placed the lessees in the same position as an *Emphytéotique* or holder by *bail à rente*.

This opinion was not alone formed on general principles, but sustained by all the authors in an unqualified manner. Some called such a case, *Bail Emphytéotique*, some *Bail à rente*. Authorities; Nouveau Denisart, *Verbo* [illegible] *terme*, p. 28, n. 1. "Baux peuvent être au dessous de neuf ans; mais ils ne peu[illegible]céder ce temps; autrement

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Ils passent pour une aliénation." Pothier *Louage* n. 27 : Ferriere ; Dictionnaire de droit verbo *bail*, Domat p. 21[illegible] Duplessis ; Traité des Fiefs, Art. 35, p. 60 or 50, and with the exception of a few authors [illegible]ven in Troplong *Louage*, n. 25, there w[illegible]o dissent from the proposition, that the lease passing *nine* years was more than [illegible]inary lease. Merlin : *Repertoire* verbo *bail*, p. 4, n. 2, was very strong in his opinion against this view, unless the lease was *à perpetuité*, but admitted that most of authors were the other way of thinking. Troplong 1, p. 125-6, said it was a question whether such a Case was a mere *droit de jouir* or a title *translatif de proprieté* ; also Dalloz, Dict. *Louage Emphytéotique*, *Nos.* 5, 38, 39, 40, 44, 54. Same author ; Supplement, Nos. 2, 9, 16.

Under the circumstances the Court entertained no doubt that the lease gave the lessee the property of the *domaine utile*, conveying to him a *jus in re*, and rendering him liable to taxes which the proprietor was bound to pay. Secondly, it was contended for the applicant that under 14 and 15 Vic. chap. 128, sec. 92, the land was taken out of the jurisdiction of the Corporation. The words were as follows :—"That nothing in this Act shall extend or be construed, to extend, to revoke, alter, abridge, or in any manner affect the powers and authority now by law vested, or which may hereafter be vested in the Master, Deputy Master, and Warden of the Trinity House of Montreal, or in the Commissioners appointed or to be appointed for the execution of any act now in force or hereafter to be in force, relating to the improvement and enlargement of the Harbor of Montreal, or any of them, or in the Commissioners appointed, or to be appointed, for making, superintending, repairing and improving the Lachine Canal, nor to the wharves and slips erected or to be erected by the first mentioned Commissioners, nor to wharves and grounds under the direction of the said last mentioned Commissioners. Provided always that the said Corporation of the City of Montreal shall have power, so often as the same may be requisite, to open any drain leading from the said city to the River St. Lawrence, to employ the constabulary force of the said city in the maintenance of peace and good order o[illegible] said wharves, and to appoint and designate stands or places of rendezvous for [illegible] carriages thereon." It was contended that the proviso in this clause, giving [illegible]wers to the Corporation, and specially referring to these powers, took all othe[illegible]ay which were put under the direction of the Commissioner of the Board of Wo[illegible] The Court after giving this question, which was not raised in the former case, a good deal of attention, were against the applicant. In fact the land under consideration was not, at the time of the passing of this last act, under the power of the Commissioners, and, in truth, this question was decided in the first. The act was passed after the making of the two leases, and therefore the section 92 could not refer to them. The two leases were an alienation, and therefore the lands conveyed by them could not be affected by the act passed subsequently.

Rule to quash judgment discharged, and rule to quash certiorari absolute.

Henry Stuart, Attorney for Ira Gould.

J. F. Pelletier, Attorney for Corporation.

(F. W. T.)

IN APPEAL.

FROM THE DISTRICT OF MONTREAL.

MONTREAL, 1st MARCH, 1858.

Coram Sir L. H. LAFONTAINE, Bart., C. J.; AYLWIN, J.; DUVAL, J.; C[illegible]RON, J.

No. 113.

LAROCQUE ET VI[illegible]

([illegible])

[illegible]PELLANTS.

AND

MICHON,

(*De*[illegible] *below*.)

RESPONDENT.

MARRIAGE OF MINOR.

Held,—1o. That the celebration by a priest of the marriage of a minor without consent of parents is illegal, and gives ground for an action of damages against the priest.

2o. That the parent may claim damages without being first obliged to take proceedings to have the marriage set aside.

The Action of the Appellant was for damages. The Respondent performed the functions of *curé* in the Parish of St. Jean Baptiste de Roxton, and while so engaged he celebrated the marriage of Demoiselle Adèle Berthelot, minor, aged 15 years, daughter of the Appellant, issue of her marriage with the late Isidore Berthelot, Esquire, Physician, without publication of banns, and without having first obtained the consent of the mother, or tutor of the minor; the complaint of the Appellants alleged the facts, charging the Respondent as participator in the unlawful marrying of the minor, in sanctioning by his ministry, and in violation of the civil and ecclesiastical law, an act in which the law exacted as essential condition the consent of father, mother and tutor.

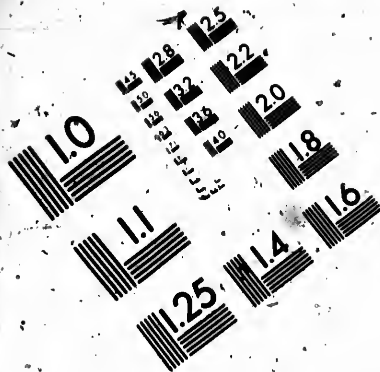
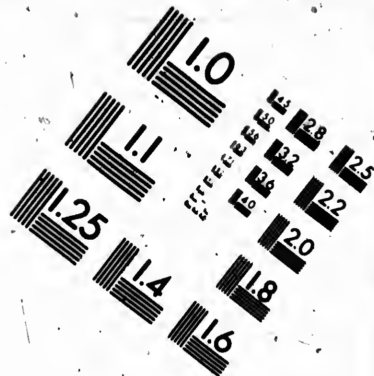
The PLEA of the Respondent was to the effect that he had only celebrated the marriage on a dispensation granted by his Ecclesiastical Superior the Bishop of the Diocese, and denied the damages.

The case was heard in the Superior Court at Montreal, before MM. Day, Smith and Chabot, Justices, who dismissed the action on 30th April, 1857, holding that the marriage of a minor daughter celebrated without banns in consequence of a dispensation of the Diocesan Bishop, and without consent of parents, did not give rise to any action of damages against the *curé* celebrating the marriage. (1)

The Court of Appeal unanimously held a contrary doctrine.

LAFONTAINE, Chief Justice. Il s'agit d'une action en dommages-intérêts, action qui, à raison des circonstances particulières qui l'ont fait naître, présente une question de la plus haute importance, puisqu'elle a trait, d'un côté, à l'autorité des ministres de la religion en fait de mariage, et de l'autre, à l'autorité des pères et mères sur leurs enfants mineurs.

(1) The decision of the Superior Court is reported 1 L. C. Jurist 187. One of the members of that Court giving the Judgment appeared to think that the parents could not demand damages without having the marriage set aside.

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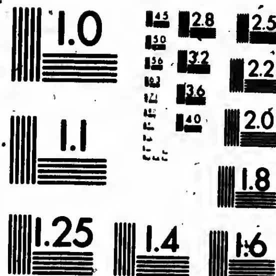

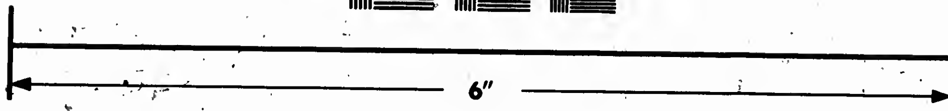

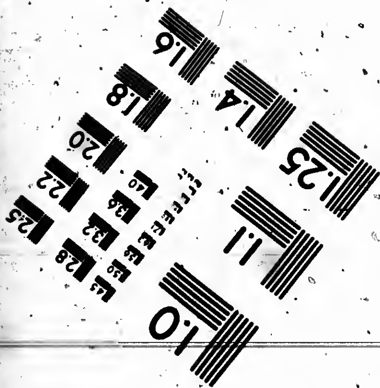
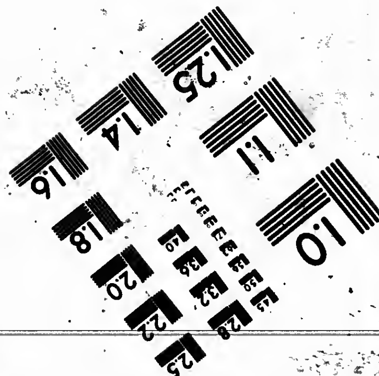

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Larocqu vs. Michon.

Au mois d'Octobre 1855, le Défendeur Intimé remplissait les fonctions de curé dans la paroisse de St. Jean-Baptiste de Roxton.

Du premier mariage de l'Appelante avec le docteur Isidore Berthelot sont nées deux filles, dont l'une déjà mariée demeurait à la même époque à Roxton avec son mari. Sa jeune sœur alla la visiter avec la permission de leur mère qui a son domicile à Montréal; et il y avait à peine un mois qu'elle était arrivée à Roxton lorsqu'elle y épousa le notaire Amable Archambeault, qui, après un long séjour aux Etats-Unis, n'était lui-même arrivé à Roxton que depuis un mois ou deux sans autre moyen de subsistance que ce que l'exercice de sa profession aurait pu lui procurer; ce qui, soit dit en passant, ne lui promettait pas un avenir brillant à Roxton, puisqu'il paraît que peu de temps après son mariage il quitta cette paroisse pour aller s'établir ailleurs.

Ce mariage a été célébré à Roxton par l'Intimé le 12 Octobre 1855. Madame Archambeault avait alors à peine quinze ans, étant né le 23 Octobre 1840, et elle avait pour tuteur son oncle maternel, M. Louis Isaac Larocque.

L'Appelante prétend que l'Intimé a célébré le mariage de son enfant sans son autorisation, sans même celle du tuteur, que par là le curé a méconnu et méprisé l'autorité de la mère sur son enfant: et que, dans les circonstances, il est passible, pour l'injure qu'il lui a ainsi faite, des dommages-intérêts qu'elle réclame de lui par son action.

Voici le plaidoyer écrit de l'Intimé:

"Le Défendeur niant toutes et chacune les allégations contenues en la déclaration des dits Demandeurs, dit, pour défense à cette action qu'il n'a causé aucun dommage aux Demandeurs; qu'il n'est point coupable en la manière et forme portées en la dite déclaration, et qu'en célébrant le mariage dont il est question en cette cause, le Défendeur n'a fait que suivre les instructions de ses Supérieurs Ecclésiastiques et que les Demandeurs ne peuvent exercer la présente action contre le Défendeur."

Les Demandeurs ont *répliqué* que le Défendeur "n'est pas recevable à invoquer comme justification de la célébration du mariage en question les instructions de ses Supérieurs Ecclésiastiques."

A l'Enquête le Défendeur a produit une *admission* que lui a donnée l'autre partie à l'effet suivant, "que le mariage dont il est question en cette cause a été célébré avec le consentement et autorisation et instruction de Monseigneur Prince, Evêque du Diocèse de St. Hyacinthe, dans les limites duquel le dit mariage a été célébré; que le dit Evêque avait accordé dispense de publication de bans pour la célébration du dit mariage; que le Défendeur est un missionnaire et remplissait lors de la célébration du mariage les fonctions de curé, au dit lieu de Roxton où fut célébré le mariage."

Le Jugement du 30 Avril 1857, dont est appel, n'est pas motivé; il y est seulement dit que l'action est déboutée *faute de preuve.* Les parties déclarent néanmoins dans leurs *factums* que la raison du débouté de l'action, donnée *viva voce* par la Cour, a été que "semblable action n'existe pas en loi avant d'avoir fait prononcer la nullité du mariage."

En plaidant en appel, l'avocat de l'Intimé a admis qu'en pareil cas, le consentement des parents était nécessaire, et qu'il y aurait eu lieu de déclarer le mariage nul, si cette nullité avait été demandée.

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Ajoutons que l'Intimé n'ignorait pas la minorité de madame Archambeault, puisque lui-même dans son acte de célébration du mariage certifie qu'elle était mineure.

Les faits énoncés à l'appui de la demande sont clairement établis. Le curé a célébré le mariage d'une fille mineure sans l'autorisation de sa mère, sans avoir obtenu celle du tuteur. Il y aurait eu une espèce d'excuse de la conduite de l'Intimé s'il avait procédé avec le consentement de ce dernier, bien que, légalement parlant, ce n'eût pas été une autorité suffisante, la mère de la mineure vivant encore.

POTHIER, *contrat de mariage*, No. 333: "Lorsqu'un mineur n'a ni père ni mère, il doit faire intervenir pour son mariage le consentement de son tuteur ou curateur. Le curé ne doit pas le marier sans que le mineur lui ait fait apparoir de ce consentement; et lorsque dans le fait il l'a marié, le mariage est présumé de droit entaché du vice de séduction; et sur l'appel du tuteur ou curateur, il doit être déclaré nul, et abusivement contracté." No. 335: "Le consentement des tuteurs et curateurs n'est nécessaire que lorsque le mineur n'a ni père ni mère."

Cette Cour est d'avis que l'action de l'Appelante procédait valablement et qu'elle aurait dû être maintenue par le tribunal de première instance. Dans le fait seul de la célébration du mariage sans l'autorisation de la mère, il y a eu pour celle-ci une injure grave en méprisant son autorité maternelle, le curé l'a outragée dans ses sentiments et ses affections; il l'a privée de la garde qu'elle avait de la personne de son enfant, du droit qu'elle avait de veiller à son éducation et de diriger sa conduite jusqu'à son âge de majorité. Pour un tel outrage, une telle injure, la mère a droit de demander une réparation, et cette réparation doit lui être accordée. Mais, dit-on, cette réparation ne peut être poursuivie que par un père ou une mère qui a fait prononcer la nullité du mariage! Quoi! ce ne sera donc pas assez pour des parents de subir en silence la douleur et l'outrage de se voir enlever leur fille, de la voir livrée aux mains d'un individu auquel ils n'auraient peut-être jamais consenti à l'unir, s'ils eûssent été consultés! Il faudra encore lorsqu'il ne sera plus temps de sauver l'honneur et la vertu de leur fille, que ces père et mère adoptent au préalable des procédés qui doivent nécessairement avoir l'effet de réduire la victime toute sa vie à une condition plus déplorable pour elle-même, et plus outrageante pour eux, que celle que le mariage, quoique célébré au mépris de leur autorité et de leurs affections, lui ont faite! Une telle proposition est tout-à-fait insoutenable.

L'Intimé aurait dû savoir qu'il n'est pas permis à un curé, pas même à son Supérieur Ecclésiastique, de soustraire un enfant mineur à l'autorité de ses père et mère. Et c'est néanmoins ce qu'il a fait. Il a été admis qu'il avait agi ainsi d'après les instructions de son Evêque diocésain. Le fait que l'Intimé n'a pas produit ces instructions, me porte à croire qu'il a dû se méprendre sur leur sens ou leur portée. Ces instructions n'ont pas pu aller jusqu'à l'autoriser à procéder à la célébration du mariage de Mme. Archambeault, sans le consentement de sa mère; en toute probabilité, elles ne contenaient qu'une dispense de publication de bans.

Même, dans ce cas, cette dispense seule n'était pas suffisante; l'Intimé était encore obligé de se faire représenter une semblable dispense pour le diocèse de

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Montréal, dans lequel était le domicile de la mineure; ce domicile étant celui de sa mère. Ces deux dispenses eûssent-elles été obtenues, il fallait encore le consentement de l'Appelante pour justifier l'Intimé.

Il n'y a pas de doute que ce mariage eût pu être déclaré nul si cette nullité eût été demandée par la mère. Le Conseil Supérieur de Québec nous a laissé sur la matière un arrêt du 12 juin 1741, rapporté par M. Perrault dans ses *Extraits*, p. 40, (1) relativement au mariage du Sieur de Rouville, mineur, quoique célébré après dispense des trois bans accordée par le vicaire général du diocèse, lequel arrêt dit: "qu'il a été mal, nullement et abusivement procédé et célébré, déclare le dit mariage non valablement contracté, etc."

Duval, *J.* This cause may, with truth, be said to be one of an unprecedented character. When we bear in mind that the Catholic Priest holds marriage to be a Sacrament and the nuptial tie indissoluble, the secret marriage of a young girl of the tender age of 15 years at nine o'clock at night, without the slightest intimation to her parents, residing within a short distance of the Parish where the marriage is celebrated, must necessarily create suspicions of a very grave nature. I cannot believe the Defendant acted in good faith. He must have known and did know he was acting in violation of the laws of the Church as well as the laws of the State; these are elementary truths which no priest can possibly ignore. By the laws of the Church he exposed himself to interdiction; by the laws of the State to proceedings of a very serious nature. It is to be regretted that the dispensation granted by the Bishop has not been fyled. By it we would have been informed for what causes it was granted. We might then have asked who certified the truth of the causes assigned? Was the Priest a stranger to this certificate?

We have been told that the action was dismissed on the ground that the marriage had not been yet declared null, and that until this was done no action could be maintained against the priest. [illegible] cannot assent to such a doctrine. No law has been referred to; no autho[illegible]ed in its support. To require the mother to take proceedings to have the marriage declared null would be to add to the injury she has already sustained and might cause the ruin of her child. The damages are smaller than I should have wished to have given; but I believe this is of little moment, as the Defendant is a missionary from whom the Plaintiff is not likely to recover much.

I omitted to mention as an additional consideration in the cause, that neither of the contracting parties belong to the Parish of the Defendant.

In my opinion, the matter ought to be further investigated by the Ecclesiastical authorities.

Caron, J. La conduite de l'Intimé me paraît d'après la preuve aussi extraordinaire que regrettable. Il est difficile de s'expliquer les motifs qu'il pouvait avoir en agissant, comme il l'a fait: la production de la dispense de l'Evêque aurait pu jeter quelque jour sur ce point, mais du consentement des parties, cette dispense n'a pas été produite, non plus que la demande qui en a été faite.

Telle que la cause se présente, le curé en célébrant le mariage de la fille mineure de l'Appelante clandestinement et sans son consentement a enfreint les

(1) *Vide* page 273 for this *Arrêt*.

lois ecclésiastiques aussi bien que les lois civiles. Il serait presque désirable que l'on pût supposer qu'il ignorait les lois, il serait à mes yeux moins coupable, mais cette supposition même est impossible.

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Plusieurs des prétentions de l'Intimé paraissent mal placées dans la bouche d'une personne revêtue du caractère qu'il porte, et entre autres celle par laquelle il entend se mettre à couvert de la responsabilité de son acte, en disant qu'il n'est pas passible d'une action en dommages, tant que le mariage qu'il a célébré et dont on se plaint n'aura pas été déclaré nul par un tribunal compétent. Cette doctrine est trop injuste pour qu'elle soit légale. L'admettre serait virtuellement dénier aux parents dont les droits, comme dans le cas actuel, auraient été violés, tous moyens d'obtenir réparation de l'injure qui leur aurait été faite, quelque grave et pénible qu'elle soit. Quel est, en effet, le père ou la mère qui ne préfèrerait pas se soumettre en silence au malheur de voir dans sa famille un gendre d'un mauvais caractère et indigne d'en faire partie, quoiqu'on l'y eût introduit contre son gré, plutôt que d'exposer et afficher dans les cours de justice sa propre honte, et le déshonneur de sa fille pour ensuite être obligé de la reprendre des bras de son séducteur, avec lequel elle aurait vécu pendant les longueurs indéterminées d'un procès qui ferait le désespoir de toute famille honnête. Sous de semblables circonstances, les parents préfèreraient toujours, même dans l'intérêt de leur fille, laisser subsister un mariage qui les afflige, plutôt que d'en acheter la nullité par les voies judiciaires, insuffisantes pour apporter un remède au mal qui leur a été fait.

Mais de ce que pour ces raisons ils sont tenus de se soumettre à cette dure nécessité, s'en suivra-t-il que l'auteur de ce mal, que le ministre qui, en violant son devoir, et en abusant de sa position, leur a imposé cette fâcheuse nécessité, devra rester impuni et protégé par son propre délit. Non, telle n'est pas la loi. Le recours civil du père injurié pour dommages et intérêts contre le ministre qui a célébré sans son consentement le mariage de son enfant mineur, est tout différent et indépendant du droit qui lui appartient exclusivement de faire annuler ou de laisser exister un tel mariage qu'il lui est permis de tolérer. L'action d'injures existe contre le curé pour le fait seul qu'il a célébré ce mariage, et pour cette cause indépendamment de toute autre, il est passible d'une action civile.

En France dans une action pareille le ministère public serait intervenu, le procureur du roi aurait au nom de la société outragée pris des conclusions particulières pour faire punir le Défendeur plus ou moins suivant la gravité du délit prouvé contre lui, en sus de la condamnation en faveur de la partie civile; par ce moyen le Demandeur n'obtenait qu'une indemnité égale au dommage qu'il avait éprouvé, tandis que le Défendeur au moyen de l'amende qui lui était imposée était puni autant que le méritait son offense.

Comme cette procédure n'existe pas ici, il est du devoir des cours de justice de concilier ensemble, par un seul et même jugement, l'indemnité due au Demandeur et la punition que mérite le Défendeur. C'est ce que cette cour a essayé de faire au moyen du jugement qu'elle va rendre. Dans mon opinion les dommages devraient être plus considérables, ils l'auraient été en toute probabilité. Je n'aurais pas hésité à les porter même à la somme de £500, si

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j'avais cru que les moyens du Défendeur lui eûssent permis de payer cette somme, tant je désapprouve sa conduite, tant il me paraît nécessaire de donner un exemple qui puisse à l'avenir empêcher la repétition d'un abus de pouvoir aussi condamnable.

Il ne m'appartient pas de dicter aux autorités ecclésiastiques les devoirs qu'elles ont à remplir, mais il me semble qu'il devrait y avoir de leur part une enquête sur cette mystérieuse affaire, et si l'Intimé ne justifiait pas sa conduite devant ses supérieurs mieux qu'il n'a réussi à le faire devant les tribunaux civils auxquels elle a été soumise, il serait peut-être avantageux et convenable dans l'intérêt de tous que la désapprobation de ses supérieurs ne demeure pas tout à fait cachée.

The judgment in appeal was recorded in the following words:—

"La Cour, * * * 1. Considérant que le Défendeur, (Intimé) en célébrant, sans le consentement de l'Appelante, le mariage de sa fille mineure, a violé les lois du pays, et a fait à l'Appelante, en méconnaissant l'autorité légale, de celle-ci sur son enfant, une injure d'une gravité extrême, injure pour la réparation de laquelle l'Appelante est bien fondée à reclamer du Défendeur (Intimé) des dommages-intérêts.

2. Considérant que l'Appelante est recevable à demander la réparation de cette injure, sans être obligée au préalable d'adopter des procédés pour faire déclarer nul le mariage de sa fille mineure, ainsi célébré sans son consentement et son autorité.

3. Considérant, par conséquent, que l'action en dommages-intérêts, dirigée par l'Appelante contre l'Intimé, procédait valablement dans les circonstances établies par la preuve; et que, dans le jugement dont est appel, et qui déboute l'Appelante de cette action, il y a mal jugé.

Infirme le susdit jugement, savoir le jugement rendu par la Cour Supérieure, le 30 avril 1857; et cette Cour procédant à rendre le jugement que la dite Cour Supérieure aurait du rendre, condamne le Défendeur (Intimé) à payer à l'Appelante, pour les causes d'action, la somme de £100 cours actuel, en forme de dommages-intérêts, avec intérêt sur icelle à compter de ce jour jusqu'à parfait paiement, et, de plus, condamne le Défendeur (Intimé) aux dépens tant en Cour de première instance que sur le présent appel; et il est ordonné que le dossier soit remis à la dite Cour Supérieure, siégeant à Montréal."

Judgment reversed.

Laflamme, Laflamme & Barnard, for Appellants.

Loranger & Loranger, for Respondent.

(F.W.T.)

Authorities cited by Appellants.

Ordonnance de Blois, Art. 40, Ord. de Henri III.

1 Dareau, Injures, 1.

Larocque vs. Michon.

(Arret of the Conseil Superieur referred to at page 270.)

DU 12 JUIN, 1741. (1)

Dame Marie Anne Beaudoin, veuve Rouville, Appelante.

CONTRE

Le Sieur de Rouville, mineur et Al., Intimés.

Le Conseil a reçu et reçoit le Procureur Général du Roi appelant comme d'abus de la dispense des trois bans accordés par le dit Vicaire Général du diocèse de cette ville, au dit Sieur de Rouville, mineur, pour épouser la Dlle. André, fille majeure, tient le dit appel pour bien relevé et faisant droit tant sur icelui, que celui de la Dame veuve de Rouville, mère et tutrice du dit Sieur de Rouville mineur, de la célébration du dit mariage, dit qu'il a été nullement et abusivement procédé et célébré; déclare le dit mariage non valablement contracté, fait défenses au dit Sieur de Rouville et à la dite Dlle. André de prendre la qualité de mari et de femme et de se hanter et fréquenter sous les peines de droit; déboute les dits Sieur et Dlle. André de leur demande en réparation portée tant par leur requête du deux de ce mois que par leur acte du sept de ce dit mois de la dite requête de restriction, et les condamne solidairement en tous les dépens de la plainte et appel comme d'abus envers la dite Dlle. de Rouville; faisant droit sur le réquisitoire du dit procureur général du roi fait défenses à tous notaire de passer des contrats de mariage de mineurs que les dits mineurs ne soient duement assistés et autorisés de leur pères, mères, tuteurs et curateurs qui signeront au dit contrat et qu'en vertu de procuration en bonne et due forme des dits pères, mères, tuteurs ou curateurs, dont la minute ou expédition demeurera annexée au dit contrat sans pouvoir, par les dits notaires, recevoir seulement ni la déclaration des dits mineurs de se porter fort de leurs dits pères, mères, tuteurs ou curateurs, ni leur promesse de leur faire agréer, approuver et ratifier le dit contrat de mariage, enjoint au Vicaire Général du diocèse de cette ville et à tous autres vicaires généraux d'observer les ordonnances et constitutions canoniques concernant la publication et dispense des bans, laquelle dispense ne pourra être accordée pour marier des mineurs, sans le consentement des pères et mères, tuteurs ou curateurs, ou qu'il n'y ait un jugement rendu en connaissance de cause sur les oppositions ou défaut de consentement des dits pères, mères, tuteurs ou curateurs; enjoint pareillement à tous curés et prêtres, tant séculiers que réguliers de marquer dans les actes de célébration de mariage si les contractants sont enfants de famille, en tutelle ou curatelle, ou en la puissance d'autrui, d'y énoncer pareillement les consentements de leur pères et mères, tuteurs ou curateurs, ou jugements rendus sur les dites oppositions, ou défaut du consentement et d'y faire appeler et assister, non pas seulement deux témoins mais quatre témoins, suivant les ordonnances, édits, déclarations et règlements; ordonné qu'en conformité des articles VIII et IX de la déclaration du Roi du 9 avril 1736, les actes de célébration de mariage seront inscrites sur les régistres de l'église paroissiale du lieu ou le mariage sera célébré, et en cas que pour des causes justes et légitimes il ait été permis de le célébrer dans une autre église ou chapelle; les régistres de la paroisse dans l'étendue de laquelle la dite église ou chapelle seront situées, seront apportés lors de la célébration du mariage pour y être l'acte de la dite célébration inscrite, fait défense d'écrire et signer, en aucun cas, les dits actes de célébration sur des feuilles volantes, à peine d'être procédé extraordinairement contre le curé et autre prêtre qui aurait fait les dits actes, lesquels seront condamnés en telle amende, ou autre plus grande peine qu'il appartiendra suivant l'exigence des cas, et à peine contre les contractants de déchéance de tous les avantages et conventions portés par le contrat de mariage ou autres actes, même de privation d'effets civils s'il y échet; et sera le présent arrêt lu et publié, l'audience tenante, et enregistré aux greffes de la prévosté de cette ville et des jurisdictions des Trois-Rivières et de Montréal; enjoint aux substituts du procureur général du Roi d'en certifier le conseil dans les délais ordinaires.

MONTREAL, 30TH APRIL, 1858.

Coram MONDELET, (C), J.

Ryland. v *Ostell.*

DEMURRER.

Held,—That the irregularities in the nomination or appointment of the directors of a Railway Company, incorporated under a special charter, or in the time of holding its first meeting, will not discharge the liability of the shareholders, under the 14 and 15 Vic., cap. 51, sec. 19.

This was an action brought by the *cessionnaire* of a creditor of the Montreal and Bytown Railway Company, against one of the stockholders of the Company, under the Railway clauses consolidation Act (14 and 15 Vic., cap. 51, sec. 19), for the amount unpaid of his stock. The declaration set out the cause of indebtedness, that judgment had been obtained against the Company by Plaintiff's *cédant*, and that execution had been issued and been returned unsatisfied. The Defendant after admitting that he was a stockholder, and that the Company was incorporated by Act of Parliament, pleaded: 1stly. That the original meeting of shareholders had been called before a fifth of the stock had been subscribed, as required by law; that the directors named were therefore not directors, and had no right to contract with Plaintiff or his *cédant*; that defendant had a right to set up this want of consideration, and moreover that this premature organization of the Company was done by the directors in fraud of the shareholders. 2ndly. Defendant pleaded the same matter, but said that the fifth part of the stock was not subscribed, because the stock which stood in the name of the Corporation of the City of Montreal had been illegally subscribed for.

Plaintiff met these two pleas by Demurrers.

Ramsay in support said that if there was fraud it was not alleged that Plaintiff or his *cédant* were parties to it, that the cause of indebtedness could not be inquired into by Defendant, that it was *chose jugée* between the Plaintiff and the Company, for whose debts Defendant was liable to the amount unpaid of his stock.

Robertson for Defendant contended that [illegible] whole acts of the directors who had not complied with the requirements of the law were void, and did not bind the Company.

Ramsay.—The cases referred to on the part of the Defendant applied solely to Corporations created under general Acts of Incorporation, and the very existence of which depended upon the performance of some condition precedent, which must be fulfilled to the letter.

MONDELET (C.), J., maintained the Demurrers, and said that the irregularities invoked by the Defendant could not affect the rights of Plaintiff to obtain his judgment against Defendant.

Demurrer maintained.

T. K. Ramsay, for Plaintiff.

A. & W. Robertson, for Defendant.

(T.K.R.)

MONTREAL, 13TH APRIL, 1858.

Coram BADGLEY, J.

No. 1190.

Bristow vs. Johnston.

Held that, in an action for the recovery of amount of Subscription to a Newspaper, it is sufficient to prove delivery of the paper, without proof of any order for the same, and that a verbal refusal to receive the paper, and notification to the carrier to discontinue it, is not sufficient.

This was an action brought for the recovery of £4 10s., three years subscription to the "Argus" newspaper.

The Plea set up that the Defendant had never ordered the paper, but on the contrary had always refused to receive it from the carrier.

In evidence the Plaintiff failed to prove the order for the paper, and the Defendant fully supported his plea.

Dorion for Plaintiff. It is not necessary to prove the order of the paper, as the Defendant must be presumed to have acquiesced by receiving it for so long a period. If he did not wish the paper he should have notified the Plaintiff at his Office.

Snowdon for Defendant.—The Plaintiff has no right in law to compel the Defendant to give such notice. In this instance, however, the Plaintiff was notified through his agent, the carrier, not to leave the paper—which is more than sufficient. Besides, the paper should not have been sent without an order.

Badgley, J.—The Plaintiff is entitled to recover for two years and a half subscription, although it may seem hard for one to pay for a paper he has not ordered, still it was the duty of the Defendant to notify the Plaintiff at his Office:—Judgment for £3 15s.

Cherrier Dorion & Dorion, for Plaintiff.

H. L. Snowdon, for Defendant.

(H. L. S.)

CIRCUIT COURT.

MONTREAL, 14TH. MAY, 1858.

Coram C. MONDELET, J.

No. 1408.

Parsons et al., vs. Kelly.

Held that delivery of a Newspaper at the house of the Defendant is not sufficient to maintain an action for the amount of the subscription to the paper, without proof that the Defendant ordered it.

The Plaintiffs were proprietors of the *Commercial Advertiser*, and brought this action against the Defendant, to recover from him the sum of $13.33, the amount alleged to be due for two years and seven months subscription to their newspaper.

The delivery of the Newspaper, at the Defendant's residence, to his wife, was proved by the carrier boy, as also the admission of the Defendant that he had received the paper, though it came irregularly at times.

Per Curiam.—Inasmuch as the order authorizing the Plaintiffs to send the paper to the Defendant was not produced, the action must be dismissed for want of proof.

Browne, for Plaintiff.

Devlin, for Defendant.

Action dismissed.

(D. B.)

MONTREAL, 29TH MAY, 1858.

Coram SMITH, J.

No. 252.

Hall, vs. *Douglas and McDougall, et al, Adjudicataires.*

Held, that where on the face of the proceedings the *adjudicataires* are non-residents in Lower Canada, but have paid the capital of their purchase, a rule for *folle enchère*, founded on a claim for interest on such capital, and served on the "Agent and Attorney at law" of the *adjudicataires*, will not be maintained.

This was a Rule for *folle enchère* by Andrew Strang opposant, against the *adjudicataires*, who, on the face of the proceedings, were residents in Upper Canada, and was taken out to secure merely the interest on the purchase money, the capital having been paid. The service was made on the "Agent or Attorney at law," of the *adjudicataires*.

SMITH, J.—It was contended at the argument, that, inasmuch as the Court allowed a Rule for *folle enchère* against an Upper Canadian *adjudicataire*, on a simple return of a Bailiff, that the purchaser could not be found, in the case of Guy vs. Clarkson & McLean, *adjudicataire*, (1, L. C. Jurist, p. 198) that *à fortiori* the Rule in this case, which was served on the "Agent and Attorney at law," of the parties, should be declared absolute. In my opinion there is a wide distinction between the two cases. In the case of Guy & Clarkson no part of the purchase money was paid, while here the *adjudicataires*, under the sanction and authority of the Court, paid into the hands of the Sheriff the full amount of the adjudication. The present Rule is not strictly for the recovery of the purchase money, but for a supposed claim for interest thereon, from the date of adjudication to the day on which the capital was paid. The service of the Rule on the Agent or Attorney at law is plainly insufficient, and I very much doubt whether such a proceeding as a Rule for *folle enchère* can obtain at all in a case like the present.

Rule discharged.

MacKay & Austin for Andrew Strang.

Cherrier Dorion & Dorion for *Adjudicataires*.

(S. D.)

MONTREAL, 29TH MAY, 1858.

Coram MONDELET, (C.) J.

No. 1010.

Beaupré vs. *Martel & Martel, opposant.*

Held,—That a declaration by a Bailiff in a *procès verbal de saisie mobilière*, that he elects his domicile in a particular Parish, without specifying in what part of it, is insufficient, and that the *saisie* is consequently null.

2. That a notice of sale at the foot of a *procès verbal de saisie*, for a specified day of the month, without mention of the year, is null, although such *procès verbal* be fully and correctly dated.

This was an opposition *à fin d'annuller* fyled by the defendant to a *saisie mobilière* on the ground that the *saisie* was null, there being no sufficient election of domicile by the seizing Bailiff, and no sufficient notice of sale.

The election of domicile in the *procès verbal* was simply in the Parish of St. Roch, and the notice of sale written at the foot of the *procès verbal* which was fully and correctly dated, was to the effect that the sale would take place on a particular day in May, without any mention being made of the year.

The following is the judgment which was rendered, maintaining the opposition, with costs:—"La Cour * * considérant que l'opposant est bien fondé dans sa prétention que la saisie faite en cette cause, est nulle, attendû que l'huissier saisissant n'a pas dans et par son procès verbal de saisie, fait une élection de domicile suffisante et au désir de la loi, qui l'exige, à peine de nullité.

Beaupré vs. Martel.

Considérant de plus que l'huissier saisissant n'a pas donné au défendeur l'opposant avis légal du jour que la vente des effets saisis aurait lieu; maintient quant à ce, l'opposition de l'opposant, déclare nulle la saisie faite en cette cause, et donne main levée d'icelle au dit opposant avec dépens."

Opposition maintained.

Loranger, Pominville & Loranger for Plaintiff.
Leblanc & Cassidy for Defendant.
(S. D.)

MONTREAL, 20TH MAY, 1858.

Coram MONDELET, (C.) J.

No. 2516.

Hastie, vs. Morland.

Held 1.—that a servant refusing to obey a lawful order of his master and discharged in consequence, can only recover wages to date of discharge, notwithstanding proof of previous uniform good conduct.

2.—That a clerical error of date in a pleading can be amended at the final hearing.

This was an action by a servant against his master for wages up to the time of the institution of the action, and beyond the time of his dismissal, on the ground that he was unlawfully dismissed.

The Defendant pleaded that the Plaintiff had refused to obey a lawful order and tendered him his wages till date of dismissal, with costs to date of fyling plea, and, in consequence of a clerical error of date in the plea, the Defendant's counsel moved to amend at the final hearing under the 86th Section of the judicature act of 1849.

At the argument DEVLIN for Plaintiff contended, that his client had been proved to have served the Defendant during a period of five years, and that his mere refusal to return to work after seven o'clock on a Saturday evening was no sufficient cause for his dismissal. And that as to the motion to amend the plea, the error was known at the time of the *Enquête*, and ought to have been corrected long since, and not left till the case was down for final hearing.

BETHUNE for Defendant contended on the other hand, that proof of uniform good conduct was no excuse in the present case. If the order to come back to Defendant's store after seven in the evening had been proved to be unnecessary, there might have been a show of justice on the Plaintiff's side, but it was proved here that in consequence of an accumulation of work caused by the holydays at the time of the Railway Celebration, the Plaintiff's services were absolutely required. Then as to the motion to amend, there could be no doubt that it came strictly within the meaning and intention of the Judicature act of 1849.

MONDELET, (C.) J.—(After stating facts,) this case is not without some interest, the disobedience of orders being confined to one single occasion, and the

Hastie vs. Morland.

previous uniform good conduct of the Plaintiff being established beyond doubt. But I cannot admit the distinction urged by the learned counsel for the Plaintiff. I have but one question to deal with, did the Plaintiff disobey the lawful order of his master the Defendant, or did he not?—now not only did the Plaintiff disobey a lawful order given to him, but he was distinctly warned of the consequence. I have no hesitation therefore in giving judgment in favor of the Defendant, and as to the motion to amend, it is one of that kind that I should have felt inclined to allow, even without the aid of the act of 1849.

Tender declared good, motion to amend granted and action for excess dismissed with costs.

B. Devlin, for Plaintiff.

Bethune & Dunkin, for Defendant.

(S. B.)

MONTREAL, 29TH. MAY, 1858.

Coram DAY, J.

No. 196.

Lamothe vs. Ross & Ross et al., opposants, and the Trust & Loan Co. of U. C. opposants.

Held,—that no *hypothèque* attaches to the property of an executor, by reason of the registration of the will under which he is appointed.

This was a contestation of an opposition *à fin de conserver*, fyled by the Trust and Loan Co., on a special mortgage, granted by the Defendant in their favor, and duly enregistered, and of the Collocation predicated thereon in the Report of Distribution, prepared by the Prothonotary.

The contestation was fyled by the opposants Ross et al. surviving executors of the last will and testament of the late Joseph Ross, of which the Defendant had been also an executor, on the ground that the Defendant as such executor was indebted to Mr. Ross' estate in the sum of £3000 cy. and Interest, as a *reliquat de compte*, and that by reason of the enregistration of the will, at a date anterior to the execution and enregistration of the Trust and Loan Co.'s mortgage, the estate had acquired a *hypothèque* on the Defendant's property, superior in rank and prior to that of the Company.

Day J., (after stating facts) the point of law involved in the present contestation is whether the will of the testator or its registration created a mortgage on the testator's property. This point was long since determined in the negative, in the case of David and Hays, 3 L. C. Law Reports, p. 440, and in the case of Weekes and Pothier therein cited. It was there held that it is only by acceptance of Office, by some *acte authentique*, that the executor's property can be hypothecated, and as I still adhere to the opinion then expressed. I must dismiss the opposant's contestation.*

Contestation dismissed.

Rose & Monk, For opposants Contesting.

Henry Judah, Q. C. for Trust and Loan Co.

(S. B.)

* Reporter's Note. As the will in the case now reported bears date in 1850, could any *hypothèque* subsist on the executor's property, even under an acceptance of Office by *acte authentique*? *vide* Reg. Ord. S. 28 and 29. P. 206 and 207, Rev. Stat.

MONTREAL, 29TH MAY, 1858.

Coram SMITH, J.

No. 2663.

McGrath vs. Lloyd & Keith et al. opposants.

Held, that a Rule by an opposant *à fin de distraire*, calling on a Plaintiff to contest his opposition, and ordering in default that *main levée* be granted, is irregular and will be dismissed.

This was a Rule by an opposant *à fin de distraire* on the Plaintiff, in the following words:—It is ordered, that the Plaintiff be held to contest the opposition *à fin de distraire* in this cause fyled, within such time as this Court shall direct, and in default thereof that *main-levée* of the seizure of the goods * * be granted, the whole with costs, unless cause to the contrary * * *.

SMITH, J. This Rule is altogether irregular. It ought at least to give the Plaintiff the alternative to admit or contest. And moreover the Court cannot order *main levée* on the mere failure of the Plaintiff to contest.

Rule discharged.

T. K. Ramsay, for opposant.
Abbott & Baker, for Plaintiff.
(S. B.)

MONTREAL, 29TH MAY, 1858.

Coram DAY, J.

No. 632.

Lefebvre, vs. De Montigny.

Held, that the *aveu* of a party in a suit, cannot be divided.

This was an action to recover the sum of £75 for use and occupation of a property described in the declaration.

The Defendant pleaded amongst other things that the plaintiff in the quality in which he sued, owed him a much larger sum, for so much paid on account of, and at the request of, the party the plaintiff represented, in the purchase of the property in question.

The Plaintiff replied specially to the effect, that true it was the money was paid, but not at the request of the party deceased, and was so paid by defendant merely to place such party who was his daughter on the same footing as his other children.

Day, J. (after stating facts.) The true issue in this cause, is whether the *aveu* contained in the special answer can be divided, I clearly think it cannot, and I therefore give judgment for the Plaintiff.*

Judgment for Plaintiffs.

Cartier & Berthelot, for Plaintiff.
Cherrier Dorion & Dorion, for Defendant.
(S. B.)

* Authorities cited by Plaintiff, 10 Toullier ch. 6. S. 4.
1 Vol. Revue de Leg. year 1846, P. 18.

MONTREAL, 27TH MARCH, 1858.

Coram MONDELET, (C.) J.

No. 1886.

Kemp, vs. Kemp.

Held, in the case of a *Saisie exécution*, where a Defendant who was outside his dwelling house, the door of which was locked, and within which were his wife and family who were visible from the outside, and who neglected to open the door on being called on by the Bailiff to do so, that the statement of such Defendant to the Bailiff that he could not open the door, amounted to a refusal to do so.

Kemp vs. Kemp.

Mondelet, (C.) J.—This is an inscription *en faux* fyled by the Defendant to the Sheriff's return to a writ of Execution, on the ground that the Defendant did not refuse to open the door of his dwelling house, in order that the Sheriff might seize, as stated in such return. It would appear by the evidence, that when the Sheriff's bailiff went to seize, he found the door of the Defendant's dwelling locked, and the Defendant who was outside, pretended he could not open the door although his wife and family were within, and were not only visible from the outside, but were called on by the Bailiff to open the door and neglected to do it. This in my humble opinion is equivalent to a refusal by the Defendant to open his door and I therefore dismiss the proceedings *en faux*.

Inscription *en faux* dismissed.

M. Morison, for Plaintiff.

S. W. Dorman, for Defendant.

(S. B.)

MONTREAL, 30TH APRIL, 1858.

Coram Mondelet, (C.) J.

No. 1536.

Kemp, vs. *Kemp*.

Held, that a Sheriff's Return to a writ of execution, setting forth that the Defendant has refused to open the door of his dwelling house, in order that the Sheriff might seize, is only *primâ facie* evidence of the fact, and is not sufficient of itself to justify a condemnation for *contrainte*.

Mondelet, (C.) J.—This is a rule for *contrainte par corps* against the Defendant, for refusing to open the door of his dwelling house, in order that the Sheriff might seize, and is based on the Sheriff's return to the writ of Execution. This is not enough, under the requirements of the ordinance of 1667, and I can only regard the Sheriff's return as *primâ facie* evidence of the fact. I am aware that there has been an impression at the Bar, for many years, that the Sheriff's return was sufficient of itself to justify a judgment of *contrainte*, and I shall therefore merely discharge the *délibéré* and order proof on the Rule.

Délibéré discharged, and proof ordered accordingly.

M. Morison, for Plaintiff.

S. W. Dorman, for Defendant.

(S. B.)

MONTREAL, 28TH JUNE, 1858.

Coram Badgley, J.

No. 1536.

Kemp, vs. *Kemp*.

Held, in the case of a *Saisie Exécution*, where a Defendant who was outside his dwelling house, neglected to open the door which was locked, that such neglect did not amount to a *rebellion de justice*.

This was a Rule for *contrainte par corps*, based on the facts disclosed in the two preceding reports.

Badgley, J.—I am not satisfied from the proof adduced in support of the Rule that the Defendant was in a position to open the door of his house. He certainly was not bound to break open the door, and his mere neglect to open it cannot, I think, under the circumstances, be construed into a refusal to open it. I must therefore discharge the Rule.

Rule discharged.

M. Morison, for Plaintiff.

S. W. Dorman, for Defendant.

(S. B.)

SUPERIOR COURT.

MONTREAL, 27TH FEBRUARY, 1858.

Coram SMITH, J.,

No. 2458.

Nordheimer, et al., vs. Hogan, et al.

Held:—That a hotel-keeper has no lien on a piano brought into the hotel by a permanent boarder, as against the owner of the piano, for the board of the boarder.

This was an action *en saisie revendication*, by which the Plaintiffs sought to recover a piano-forte of the value of £80 currency, which they alleged to be their property, illegally detained by the Defendants.*

The Defendants pleaded that the piano in question was the property of one James H. Phillips, of the City of Montreal, gentleman, who had boarded with the defendants, as hotel-keepers, from the 19th of December, 1856, till the 11th of May, 1857. That Phillips introduced the said piano as part and portion of his personal property and effects into the hotel of the Defendants, where it had remained ever since, having been left there by Phillips, who was indebted to the Defendants, for board, in the sum of £57 17s. 6d., which he refused and wss unable to pay, and that the Defendants had no other security for the payment of this sum, except the said piano; and that they had a *lien* and privilege upon the piano, as security for the payment of said sum. The conclusions were for the dismissal of Plaintiffs' action, or, in the event of the seizure being maintained, that it be adjudged that the Defendants had a *lien* and privilege upon the piano for the amount of their said claim for board.

By a special answer, the Plaintiffs denied that the piano in question was ever the property of Phillips, and alleged that on the 15th of December, 1856, the said piano was leased to Phillips for the sum of £1 10s. a month, for five months, payable in advance, of which the Defendants were then notified, and that Plaintiffs then delivered the piano to Phillips at the Defendants' hotel, where he continued to use it under his lease till about the 1st June, 1856, when the Defendants illegally obtained and kept possession of it.

At the *enquête* it was established on the part of the Plaintiffs that they were the proprietors of the piano, and that Phillips possessed it under a written lease or hire receipt, which was filed and proved, also that the Defendants were notified of such lease, two or three days after the piano went to their hotel. On behalf of Defendants it was proved that Phillips brought the piano to the hotel, and left it there when he went way, and that he was indebted to the Defendants for board.

Dorman, for Plaintiffs, submitted:—1st. That hotel-keepers have a privilege upon the effects of travellers (*des passans et pèlerins*) only, and that they have no *lien* or privilege upon property and effects of resident and permanent boarders. 2nd. That, in the present case, the Defendants were aware and had notice before Phillips became their debtor for board, that the piano did not belong to

*AUTHORITIES.—Coutume de Paris, art. 175. 1. Troplong Privilèges, p. 312; Nos. 201 to 205. 2. Bourjon Droit com. p. 682; Ferriere Grand Coutumier, on the Art. 175.

Nordheimer vs. Hogan et al.

Phillips, but was the property of the Plaintiffs, which was alone sufficient to deprive them of the privilege claimed, even had it otherwise existed.

Smith, J.—(After stating the case.) The Defendants invoke the 175th Article of the Custom. I do not think it applies to the present case which is that of a permanent boarder, but only to "pélerins" or transient travellers. The commentators explain the expression "pélerins" by the expressions "voyageurs" and "passants." It is further to be considered that the Defendants had notice that the piano did not belong to the person for whose debt they pretend to hold it. To my mind, the question is a simple one, and I give Judgment for the Plaintiffs both as to the proprietorship of the piano, and the damages for detention.

The Judgment was recorded as follows :—

"The Court, &c., considering that the Plaintiffs have established the material allegations of their declaration, and that the "Piano" seized in this cause was not the property of James H. Phillips mentioned in the pleadings in this cause, but was their property, and by them leased to the said James H. Phillips mentioned in the pleadings in this cause, then a boarder in the hotel of the said Defendants, and considering that the said Defendants had no lien by law upon the said "Piano" for any amount which may have been due to them by the said James H. Phillips—Doth declare the attachment, *Saisie Revendication* made in this cause of the said "Piano" described as follows, to wit, "A certain Six Octave *Pianoforte*, with rosewood case, maker's name Chickering, the maker's number upon the said Piano being 16215," good and valid, and it is further adjudged and the said Defendants are hereby jointly and severally ordered to deliver up the said "Piano" above described to the said Plaintiffs as the lawful proprietors thereof, within three days after service upon them of the present Judgment, and in default of their so doing, it is considered and adjudged that the Defendants do, and they are hereby condemned, jointly and severally to pay to the Plaintiffs the sum of eighty pounds current money of this Province of Canada, as and for the value of the said "Piano" with interest thereon, from the 31st day of August, one thousand eight hundred and fifty-seven, the date of the service of process in this cause, and it is further considered and adjudged that the Plaintiffs do recover from the said Defendants, jointly and severally, the sum of nine pounds, said current money, as and for damages suffered by the said Plaintiffs from the act of the said Defendants in refusing to deliver to them the said Piano. The whole with costs against the said Defendants *distraits* in favor of S. W. Dorman, Esquire, the Attorney of the said Plaintiffs."

Judgment for Plaintiffs.

S. W. Dorman, for Plaintiffs.
Rose & Monk, for Defendants.
(F. W. T. & S. W. D.)

MONTREAL, 28TH JUNE, 1858.

Coram DAY, J.

No. 1341.

Bélanger vs. *Durocher.*

Held,—That a *délaissement* fyled after the expiration of 15 days from the service of the judgment will not be rejected on motion to that end.

DAY, J.—This is a motion by the plaintiff, to reject a *délaissement* fyled after the fifteen days. I doubt whether the *délaissement* is bad even for that reason, but the motion to reject it, is premature and not the right course to raise the point. The plaintiff must go on with his execution and test the matter in that way.

Piché & Prevost, for Plaintiff. Motion rejected.

Ouimet, Morin & Marchand for Defendant.

(S. B.)

MONTREAL, 28TH JUNE, 1858.

Coram DAY, J.

No. 486.

Abbott, et al. vs. *Meikleham, et al.*

Held,—1. That an action for damages, by two professional men against three merchants, for breach of contract to buy a Railroad, is not susceptible of trial by Jury.

2. That so much of the conclusions of the Defendants' pleas in such action as pray for such trial by Jury will be rejected on motion.

This was a motion by the Plaintiffs, to reject the words "and of this they put themselves upon the country," where they occur at the conclusion of the respective pleas fyled by the Defendants, inasmuch as the cause was not susceptible of trial by Jury.

DAY, J.—This is plainly not a commercial case, the liability of the Defendants being based on an agreement to purchase real estate, and in no way connected with commercial matters. The motion of the Plaintiffs must therefore be granted.

Henry Stuart, for Plaintiffs. Motion granted.

Rose & Monk, for Defendants.

(S. B.)

MONTREAL, 28TH JUNE, 1858.

Coram BADGLEY, J.

No. 1982.

Cockburn vs. *Beaudry.*

Held,—1. That the verbal testimony of the Secretary of a Railway Company, chartered under the provisions of "The Railway Clauses Consolidation Act," to the effect that it appeared by the books of the Company that the shares originally standing in the name of the defendant had been transferred before the institution of plaintiff's action, who sues as a creditor of the Company to recover the amount unpaid on such shares, is insufficient to establish the fact of such transfer.

2. That even if such transfer were duly proved, the fact that plaintiff's debt accrued and was due whilst such shares stood in defendant's name, will entitle plaintiff to recover.

This was an action similar in character to that of Cockburn vs. Starnes reported at page 114 of the second volume of the Jurist.

Cockburn vs. Beaudry.

A demurrer, raising the same question as in the case vs. Starnes, was fyled and dismissed on the 26th of November, 1857.

In addition to the demurrer the defendant pleaded that the plaintiff served him with a writ of attachment in his case against the Company; that he (the defendant) had made his declaration as *tiers saisi* in due course, and that it was not competent for the plaintiff now to sue him. He also pleaded the general issue.

At the argument *Bethune* for plaintiff contended, that the evidence of Mr. Hopper, the Secretary of the Montreal and Bytown Railway Company, to the effect that it appeared by the Company's books that the defendant had transferred his stock before the institution of the present action, could not avail the defendant under the plea of general issue, and if it could, that such testimony was insufficient to establish the fact of the transfer having been really executed, as far as plaintiff was concerned, he being a third party and in no way bound by a mere entry in the Company's books that such transfer was registered. It was incumbent on the defendant to produce one or other of the duplicate transfers and prove their absolute execution. And further, that even if the transfer had been duly proved, the defendant was still liable to pay, the plaintiff's debt having accrued and judgment being rendered thereon against the Company during the period that the defendant admittedly held the shares.

As to the *saisie arrêt*, there was of course nothing in the pretension that the fact of such being served on the defendant prohibited the plaintiff from suing him; the effect of the *saisie arrêt* could only be to attach calls due to the Company, which defendant contends never were made, whereas the action is brought to recover that which, under the circumstances, could not be recovered under the attachment.

BADGLEY, J.—I do not think I can reject Mr. Hopper's evidence. It is legal evidence as far as it goes, but I consider it insufficient. It might do as between the Company and the defendant, but the transfer of stock cannot be proved in this way as between the plaintiff, who is a stranger to the Company and its books, and the defendant. However, even were the proof of the transfer deemed sufficient, the defendant is still liable to pay the plaintiff's debt, as he held the stock during the time the debt accrued and when the judgment for such debt was rendered against the Company. On the whole I have no doubt of the plaintiff's right to recover.

Judgment for plaintiff.

Bethune & Dunkin, for Plaintiff.
Leblanc & Cassidy, for Defendant.

(S. B.)

MONTREAL, 30TH JUNE, 1858.

Coram SMITH, J.

No. 2112.

Foster et al. vs. *Chamberlain et al.*

Held,—That it is not competent for the plaintiffs to compel the defendants to go on with their *enquête* in the absence of certain of plaintiffs' exhibits attached to a *commission rogatoire*, issued by them and not returned. And that defendants are under any circumstances entitled to adduce evidence after the return of the commission.

This was a motion by the Defendants to have the *enquête* re-opened, on the ground that when their *enquête* was closed it was done under compulsion and in the absence of certain of Plaintiffs' exhibits, which were attached to a *commission rogâtoire* issued by plaintiffs and not then returned; such exhibits being material to the issue in the cause, and that the return of the commission was new evidence which they had a right to rebut.

SMITH, J.—At the hearing the plaintiffs contended that when they closed their *enquête* they specially reserved their right to fyle the return of the commission; but I do not think that a sufficient reason to prevent the defendants from adducing evidence after the return of the commission. The fyling of the return is a getting in of new evidence which the defendants are entitled to rebut. And moreover, in the absence of material exhibits they could not legally be foreclosed.

Motion granted.

Cross & Bancroft, for Plaintiffs.

Bethune & Dunkin, for Defendants.

(s. n.)

MONTREAL, 30TH JUNE, 1858.

Coram SMITH, J.

No. 2013.

Cockburn vs. *Tuttle.*

Held,—In an action by a creditor of a Railway Company against a stockholder, under the provisions of "The Railway Clauses Consolidation Act" that an irregularity in the *first* election of Directors cannot be pleaded in bar of the plaintiff's right to recover.

This was an action similar in character to that of Cockburn vs. Starnes, reported at page 114 of the 2nd vol. of the Jurist.

The defendant pleaded amongst other things, that the Act of Incorporation of the Montreal and Bytown Railway Company required a certain amount of *bonâ fide* stock to be subscribed before the first election of directors. That this provision of the charter was not complied with and that all the acts of the directors, including their agreement with the Plaintiff, were null, as regarded all parties in the position of the Defendant.

SMITH, J.—(After stating facts)—It surely cannot be pretended here that the Company had no legal existence as a Corporation. The charter created a Corporation absolutely, and whatever irregularity may have existed in the first election of directors it is impossible to try that question in this case. It was the business of the Defendant to have tested the validity of such election at the time by *mandamus*, but he remains silent and inactive, and not only so, but recognises the power of these directors to act as such by paying the first call made by

Cockburn vs. Tuttle.

them on his stock. Moreover the Plaintiff has recovered a judgment against the Company, which is conclusive, in my opinion, against the Corporation. On the whole I can see no reason why the Plaintiff should not recover.

Judgment for plaintiff.

Bethune & Dunkin, for Plaintiff.
S. W. Dorman, for Defendant.
Andrew Robertson, Counsel.
(S. B.)

* Similar judgments were rendered by the same Judge, on the same day, in the following cases, No 2017, Cockburn v. Taylor, and No. 2550, Cockburn v. Masson.

MONTREAL, 27TH SEPTEMBER, 1858.

Coram DAY, J.

No. 96.

Routh vs. *Dougall.*

Held,—In an action where judgment is rendered for a larger amount than admitted and tendered by plea, but where the defence is in the main sustained, that Plaintiff must pay the costs of contestation.

This was an action on a check for £32 9s. 6d. cy, drawn by Defendant and duly protested for non-payment, and interest from date of protest.

The defendant pleaded that he only owed £7 16s. cy., which he tendered with his plea, but without either interest or costs.

The Court gave judgment for £8 6s. cy., but without interest, condemning the defendant to pay costs to the fyling of the plea, and condemning the plaintiff to pay the costs of contestation.

On judgment being so pronounced, the plaintiff's Counsel contended that, according to law and the practice of the Court he was entitled, under the circumstances, to costs to judgment and that he ought not to be condemned to pay any costs; but the Court, after consultation with Justices Smith and Badgley, declared that the practice had been invariably the other way, and that the plaintiff must pay the costs of contestation as stated in the judgment*

Judgment accordingly.

Bethune & Dunkin, for Plaintiff.
Rose & Monk, for Defendant.
(S. B.

* REPORTER'S NOTE.—*Sed vide* case No. 2418, *MacFarlane* v. *Rodden* et al., decided in the Superior Court at Montreal, on the 28th June, 1854, by Justices Day, Smith and Mondelet. In this case defendant pleaded that he only owed £379 12s. 5d., instead of £528 3s. 10d. demanded, for which he tendered a confession of judgment with interest and costs, and prayed that in case plaintiff contested he should be condemned to pay the costs of contestation. By the final judgment plaintiff was awarded less than the amount so confessed, namely £375 6s. 3d. cy., but, on the ground that such amount had not been tendered with interest and costs, the defendant was condemned to pay full costs to judgment.

RULE OF PRACTICE APPOINTING SPECIAL DAYS FOR THE ADDUCTION OF EVIDENCE AND FINAL HEARING ON THE MERITS.

DISTRICT OF MONTREAL.

Tuesday, the 28th day of September, One Thousand Eight Hundred and Fifty-eight.

The Honorable Mr. Justice Badgley promulgated the following rule of practice :—

It is ordered that the 24th, 25th and 26th days of the month in every term of the Superior Court, and the sixth, seventh and eighth days of every month, in which *enquete* days have been appointed, shall be special days for the adduction of evidence and final hearing on the merits at the same time.

(Signed,) CHAS. D. DAY, J. S. C.
J. SMITH, J. S. C.
CHARLES MONDELET, J. S. C.
W. BADGLEY, J. S. C.

MONTREAL, 28TH OCTOBER, 1858.

Coram MONDELET, (C.) J.

No. 2067.

Benning v. *The Montreal Rubber Company*, and *Young*, Opposant, and *Corning et. al*, contesting collocation of Young.

Held,—That an opposant *afin de conserver* residing but of the Province, who contests the collocation by privilege of another opposant *afin de conserver*, is bound to give security for costs.

MONDELET, J.—A question of considerable importance to the bar arises in this case. It is whether an opposant, resident out of the Province, who contests the collocation of another opposant, is bound to give security for costs? The goods and chattels of the defendants have been sold under an execution against them by the plaintiffs. Messrs. Corning, Bento & Co., creditors residing in New York, have made their opposition, and Mr. Young, who is also an opposant, has been collocated on his opposition. This collocation is contested by Corning, Bento & Co., and Mr. Young's counsel now move that they should give security for costs. It has been argued with much plausibility that the opposants, Corning, et al., are in the position of defendants, and as such not bound to give security for costs. By the Roman Law the defendant was held to give security for costs; this was never received in France, and there the defendant was not bound to give security; but Corning and Company must make out that they are defendants in order to exempt them from giving such security; now, after mature deliberation I cannot come to the conclusion that they are defendants. The ordinance 41, Geo. III. c. 7, sec. 2, provides in terms that opposants are bound to give security for costs; and considering that opposants are not defendants, I hold that they fall within its provisions. It was argued that Young having claimed an exclusive privilege and got collocated for it, to the prejudice of the other opposants, they were as regards him defendants only, and only plaintiffs as regards the actual defendants, named such in the cause, against whom the oppositions were directed as suits, and that the said defendants alone, viz: the Rubber Company had an interest in demanding security. This is very ingenious reasoning, but not satisfactory to my mind. I must consider that

Benning vs. The Montreal Rubber Co.

Benning and others are the plaintiffs and the Rubber Company the defendants, and that Corning & Co. are opposants, and, as such, bound to give security. Another objection was made, that security should have been demanded within a reasonable time after the opposition was made; I hold that Young was only bound to move when his claim came to be prejudiced by the contestation. I therefore grant the motion with costs.

A. & W. Robertson, for Young.

Cross & Bancroft, for Corning et al.

(A. C.)

MONTREAL, 30TH OCTOBER, 1858.

Coram SMITH, J.

No. 2609.

Greenshields et al., v. *Gauthier.*

REPLICATION.

Held,—That the necessity of a replication to the plaintiff's general answer, is waived by consent of defendant to subsequent proceedings.

The action was for the price of goods sold and delivered.

The defendant pleaded exceptions and a *defense en fait*, to which the plaintiffs replied by general answers to the exceptions, and a replication to the *defense en fait.*

The case was then inscribed by the plaintiffs for *enquête* on the part of the plaintiffs by consent of parties, and subsequently for *enquête* on the part of the defendant by consent also.

The plaintiffs finally inscribed for hearing on the merits on the 17th October, instant, and on the same day the defendant moved the Court to set aside all proceedings in the cause subsequent to the fyling of the answers and replication by the plaintiffs, on the ground among others that the ordinance 25 Geo. III. cap. 2, sec. 13 required a replication to the answers to complete the issue.

SMITH, J.—There is no doubt that a replication is required by the ordinance, but in this case the defect has been covered by several consents, and by the case having thereafter gone to evidence in the usual form. Judgment must go for the plaintiffs, and the motion of the defendant is rejected.

Motion rejected.

Torrance & Morris, for Plaintiffs.

Olivier & Roy, for Defendant.

(A. M.)

*REPORTER'S NOTE.—This decision will tend to settling the practice of our Courts as to the matter treated of in it. Where the defendant takes care not to acquiesce, the Court will set aside all steps in the cause subsequent to the omission to fyle the replication, as has been held in Superior Court Montreal, A.D. 1854, Boudreau v. Gascon, No. 405, and in Tidmarsh v. Stephens et al., No. 2627. But where the defendant proceeds, after the omission, in ordinary course, the Court will hold as in the present case, and in Tidmarsh v. Stephens on a second motion, and in Gugy v. Ferres, no. 2146, S. C., A.D. 1851, that the irregularity is thereby waived.

MONTREAL, 28TH JUNE, 1858.

Coram DAY J.

No. 1668.

Bernier v. *Beauchemin.*

Held,—1. In an action for infringement of a patent right, that if it be proved that the article patented was in public use or on sale in the Province with the consent of the Patentee, at the time of the application for the patent, the Plaintiff cannot recover.

2. That a verdict of a Jury in favor of the Plaintiff under such circumstances will be set aside, and a new trial ordered.

This was a motion by the Defendant for a new trial.

The action was brought for an alleged infringement of a patent right for manufacturing a new and improved double stove secured by Provincial letters patent.

The Defendant pleaded in effect that the Plaintiff was not the inventor of the peculiar kind of stove in question, the same having been previously in use both in this Province and in the United States, and that the patent had been obtained by misrepresentation and fraud.

The case was tried by a special jury, and resulted in a verdict for the Plaintiff for £5.

There were several reasons assigned in support of the motion, but the one mainly relied on was that it had been proved on the trial that the Plaintiff had himself sold and put in use some hundred of the same kind of stoves as the one patented, before the date of his application for the patent.

DAY, J.—(After stating the facts.) At the trial, the case was made to turn on the 8th section of the 14th and 15th Victoria, ch. 79. It will be observed that the essential provision of this clause is that the invention should be proved to have been in use before its discovery by the patentee. Now the evidence in no way establishes that fact, but it is proved that the Plaintiff sold himself some two hundred of the same kind of stoves as the one patented long before the patent was taken out. Moreover, the pleas do not cover the case contemplated by this clause. There is no allegation of manufacture and use before the discovery of the invention; the allegations of the pleas being confined to the manufacture and use before the issuing of the patent. This statute however is not the original law, but only auxiliary to the 12th Victoria, ch. 24, which is the law under which the patent issued. By the 1st section of this latter statute it is required that the invention shall not have been known or used in this Province before its discovery by the party seeking for the patent. Now here there has been plainly a misrepresentation. The Plaintiff had sold some 200 of this very kind of stove, and six months afterwards he makes a statement contradictory of this fact. This view is borne out by the statute of James the First and the ruling in England. If I buy a stove, and at the same time no prohibition to its manufacture and use exists by patent, my right of property enables me to use this stove, pull it to pieces and find out how it is made, and manufacture a stove of the same kind and sell it. This right is based, independently of statute on the broad rules of common sense, and cannot be taken away by any letters patent granted subsequently to my acquiring it. In the present case the Jury

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have found that there was no misrepresentation, but their finding is plainly against evidence, and the motion for a new trial must accordingly be granted.

Motion granted.

Leblanc & Cassidy, for Plaintiff.
Lafrenaye & Papin, for Defendant.
(S. B.)

MONTREAL, 30TH JUNE, 1858.

Coram SMITH, J.

No. 88.

Soupras, vs. *Boudreau & Boudreau*, opposant.

Held, that it is not competent for Defendant, whose lands are under seizure after a return of *nulla bona*, to oppose the sale of such lands, on the ground that he was possessed of sufficient moveable property to satisfy Plaintiff's Judgment.

SMITH, J.—This is an opposition by the Defendant to the seizure and sale of his lands, on the ground that he is possessed of sufficient moveable property to satisfy the judgment. There was a return of *nulla bona* in due form, before the issuing of the writ against lands, and moreover, the Defendant does not tender or even indicate the moveables he wishes to have seized. It is impossible to allow such an opposition.

Opposition dismissed.

Ouimet Marchand & Morin, for Plaintiff.
A. & G. Robertson, for Defendant and Opposant.
(S. B.)

MONTREAL, 18TH SEPTEMBER, 1858.

Coram BADGLEY, J.

No. 437.

McGill v. *Wells*.

Held,—In a case where a preliminary plea has been fyled and the Plaintiff has demanded a plea to the merits, under the 72d section of the 20th Vic. ch. 44, that the Plaintiff may foreclose the Defendant after the eighth day from such demand, without serving the demand of plea required by the 25th section of the 12th Victoria, chapter 38.

This was a motion by the Defendant to take off the foreclosure recorded against him, and to be permitted to plead to the merits, on the ground that such foreclosure was premature, no demand of Plea having been served on him, as required by the 12th Victoria, ch. 38, sec. 25.

Laflamme (*R.*), for Defendant, contended that the foreclosure contemplated by the 72d section of the Act of 1857 required to be made "in the manner prescribed by the 25th section of the Act of 1849," and consequently that after the expiration of the eight days succeeding the demand of a plea to the merits, a formal demand of such plea should have been made in writing, and the Defendant only foreclosed after the expiration of the third juridical day after such demand. The Legislature never intended by the 72d section of the Act of 1857 to do anything more than place the parties in the same position as

they would have been in had the preliminary plea been disposed of in ordinary course, or in other words to say, that instead of waiting till judgment could be rendered on the preliminary plea, that the Plaintiff, by merely declaring on receipt of such plea that he wished for the plea to the merits, should have his case progressed to the same extent (but not more) that it would have been advanced had such judgment been actually rendered on such preliminary plea.

Badgley, J.—I am against the Defendant on this motion. I think that the Act of 1857, in referring to the manner of foreclosing under the Statute of 1849, has not included the necessity of another formal demand of plea.

F. Griffin, Q. C., for Plaintiff. Motion rejected.

Laflamme, Laflamme, & Barnard, for Defendant.

(S. B.)

MONTREAL, 28TH JUNE, 1858.

Coram Day, J.

No. 2513.

Webster vs. *the Grand Trunk Railway Company of Canada.*

Held, 1.—That a shareholder who has transferred his shares as collateral security, cannot 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 required by 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 insufficient to meet the requirements of the Company's Charter.

This was a hearing on law on the demurrer, fyled by the defendant, to the Plaintiff's declaration.

The Plaintiff's action was brought to recover £3000 cy., for damages alleged to have been caused by the Company, Defendant, by reason of their refusal to register two transfers of stock, made by the Plaintiff to two of his creditors, as collateral security.

The following are the material allegations of the declaration which were demurred to :—

"That at all and every the times and periods hereinafter mentioned the said Defendant was a body, Politic and Corporate, duly incorporated as such by virtue of Public Acts of this Province.

"That on the first day of October 1853, the said Plaintiff was and for many months previously had been possessed of 268 shares of £25 Sterling each, in the capital stock of the said Company Defendant, as the owner and proprietor thereof.

"That on the said first day of October 1853, the said Plaintiff being indebted, to a certain copartnership firm then carrying on business in the said City of Montreal, under the name or style of Lemesurier, Routh & Co., in the sum of £1403 15s. 7d. Cy., for so much money loaned to him by the said firm, and having engaged to transfer to such firm 58 of the 268 shares, as collateral security for the due payment of such indebtedness, and in order that the said firm might realise the amount so due to them by the Plaintiff out of the sale of the

Webster vs. Grand Trunk RR. Co.

said 58 shares, he the said Plaintiff did, in due form of law, by an instrument in writing executed in duplicate on the said first day of October, 1853, transfer and sell to the said Lemesurier, Routh & Co., the aforesaid 58 shares in the capital Stock of the said Company Defendant; the whole on the understanding, that the surplus of the proceeds of the sale by the said firm of the said 58 shares, after deduction of the Plaintiff's said debt should be paid by them to the said Plaintiff. That thereupon the said Lemesurier, Routh & Co., duly demanded of the said Company Defendant to transfer the said 58 shares of Stock on the Books of the said Company Defendant to them the said Lemesurier, Routh & Co., and then and there also presented to the said Company Defendant the said transfer, and offered to surrender the same, on the due execution of such transfer aforesaid on the Books of the said Company but the said Company Defendant wholly neglected and refused to execute such transfer on the Books of the said Company, whereupon afterwards, to wit, on the 24th day of December, 1853, (the said firm having in the meantime made similar verbal applications, on several occasions but without effect) through the ministry of J. J. Gibb and his colleague Notaries Public, the said Lemesurier, Routh & Co., did formally reiterate their said demand to have their said 58 shares transferred as aforesaid on the Books of the said Company Defendant, and did also then and there re-exhibit and re-offer to surrender the said transfer as aforesaid, but the said Company Defendant still persisted in refusing to transfer the said 58 shares on the Books of the said Company, and thereupon the said firm duly protested against the said Company for all costs, losses, damages, injuries and hurts had, suffered and sustained or which might thereafter be had, suffered and sustained in consequence of the premises. As the whole will more fully appear by reference to an authentic copy of such Notarial demand, and Protest herewith produced and fyled, and to which the said Plaintiff particularly refers as forming part of these presents." Then follow similar allegations as regards the transfer which was made to the Savings Bank. "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 [illegible] shares were worth, in the Montreal Market, and were readily saleable [illegible] 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 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 wereso respectively made, on the Books of the said Company aforesaid was £4853 4s. 2d. Currency, instead of £6684 7s. 4d. Currency, 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. Currency, 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."

The Defendant fyled a *défense au fonds en droit*, and the following were the reasons assigned in support thereof:

"1st. Because from the allegations of the Plaintiff's said declaration it appears, that the right to recover damages, by reason of the alleged refusal of the Defendant to transfer the shares in the said Declaration referred to, (if any such right exist) is vested in the parties therein named as Transferees of the shares to wit, in the firm of Lemesurier, Routh & Co., and in the City and District Savings Bank, and not in the now said Plaintiff, and because no demand by Plaintiff on the Defendant to transfer said stock is alleged in said declaration, or any legal cause or reason by which the Plaintiff can demand damages, or recover the alleged loss referred to by reason of a refusal to comply with the alleged demands made by the said Transferees.

2nd. Because by the law regulating the transfers of shares in the said Railway Company, the Defendant, a form of transfer is provided, and it is thereby also provided that a duplicate of the transfer in the form so provided, should be delivered to the Directors of the said Company, to be fyled and kept for the use of the said Company, and that an entry thereof should be kept in a book to be kept for that purpose, and because it is not in Plaintiff's declaration alleged, that the transfer of the said shares was made in the form provided for, and embodied in said law, or that a Duplicate thereof was delivered to the said Directors. And because the alleged offer to surrender the duplicate by the said Transferees is not a sufficient compliance with said law, nor could such offer, made by the said Transferees, avail or be pleaded by the said Plaintiff.

3rd. Because the pretended right of the Plaintiff to recover from the Defendant the sums of money in Plaintiff's declaration referred to, appears from the said declaration to rest upon alleged contracts with the said Transferees, and upon debts alleged to be due them by the Plaintiff, and on alleged Transfers to them of said shares as collateral security for said debts and upon alleged demands and protests in respect of said shares, and refusals by the Defendant to comply with their said demands, whereas by law no such right is or can be, by reason of said allegations, vested in the Plaintiff against the Defendant, by reason of alleged contracts, debts and transactions between Plaintiff and the said Transferees to which the Defendant is not alleged to have been privy, and because the refusal to comply with the said demands of the said Transferees in transferring said stock, would confer on the said Transferees a right to a similar action against Defendant on their part for their benefit, but not upon the now Plaintiff.

4th. Because the alleged fall or depreciation in the price or value of said shares, and the alleged incidental loss and damage in the Plaintiff's declaration referred to, does not impose upon Defendant any responsibility in law to pay Plaintiff for such alleged diminution in value, damage or loss, inasmuch as the Plaintiff appears to have transferred, and was by law obliged to transfer the said shares absolutely to the Transferees, for value paid, and irrespective of the alleged understandings in Plaintiff's declaration mentioned; and because such pretended fall in the price or value of said stock is not nor can the same be taken or held as recoverable by Plaintiff from Defendant, without allegations showing actual damage suffered by him by reason of his undertakings as Vendor or Transferor to the said Vendees or Transferees, and in the quality of Vendor or Transferor solely, and not from any indirect interest in any surplus remaining over after the application of the said shares as collateral security in payment of said alleged debts, whereas no such allegations are in said declaration made or anything set forth to show that the Plaintiff was or is so held to said Vendees or Transferees, or hath suffered and sustained any damage legally recoverable from Defendant.

5th. Because from the allegations of the Plaintiff's declaration the Plaintiff seeks to impose liability on the Defendant grounded on an alleged interest in the shares in his declaration referred to, not as absolute proprietor thereof or as an actual shareholder in the Defendant Company, but on the contrary arising from the peculiar nature of the understanding and alleged debts and transfer as collateral security for the said debts, and on alleged demands by said Transferees, whereas no such qualified and possible interest in any surplus from the proceeds of said shares can impose such liability on the Defendant, or vest in the said Plaintiff as possessing such interest, any right in law to the said sums of money claimed in this action, and because the said Plaintiff by his declaration seeks to recover the money demanded on the ground of such partial interest in the said shares, or the proceeds thereof, and by reason of the peculiar contracts aforesaid to which Defendant could not and are not obliged to have been parties.

6th. Because from the Plaintiff's declaration it appears, that the alleged transfers of the said shares were made to the Transferees and the present action

brought by the Plaintiff founded upon and with reference to contracts, and with understandings peculiar to the relation of alleged debtors and creditors, and to the discretionary power in the said Transferees as to the form and mode of realizing said shares, or even of holding them indefinitely, and with power to the Plaintiff on payment of his debts to resume said stock, and that the said Transfers originated in and were carried out in consequence of undertakings between the said parties, that such transfers should be so made and the said Plaintiff seeks to render the said Defendant so liable as proprietor of the shares, and as if the refusal to transfer had been made on his demand as such proprietor, and also as if the said Plaintiff was liable over and had actually paid the damages which, as such Vendor or Transferor, he might have been liable to the Transferees or Vendees from not vesting the said shares fully and absolutely in said Vendees or Transferees by a registration in their name in the Defendant's Books as owners of the said shares.

7th. Because the Plaintiff hath not in and by his said declaration set forth any loss or damage which he the said Plaintiff can legally claim, or which he can recover from the Defendant, by reason of the alleged refusals to transfer the shares in Plaintiff's declaration referred to, the Transferees in said declaration named, and hath not alleged any loss or damage legally suffered by Plaintiff, from or by reason of or directly and proximately arising out of any default or neglect of the Defendant in respect of or towards said Plaintiff."

Day, J.—(after stating facts.) The points raised by the demurrer are substantially two in number:—

1st.—That the Plaintiff had parted with his Stock and was not therefore in a position to bring the action. 2nd.—That the directions of the Statute, which prescribes the mode of transferring stock, were not complied with.

On the first point I am clearly against the Plaintiff. The only party whom the Grand Trunk Company could recognize was the proprietor of its capital stock.—The ownership was indivisible, and the stock could not by private agreement be divided in such a way as to be available in part to one person and in part to another. The Transferees, from the time they became so, were the proper parties to make any claim arising out of the stock they held, and in case of the Company's refusal to comply with a just demand, they had the power by *mandamus* or otherwise of compelling performance. They however did not here take any such step, but waited, received the registration of the stock and made no demand for damages. There could be no qualified transfer as regarded the Company. The legal right and equitable interest in the stock might, by private agreement, reside in different persons, but only by private arrangement; as regarded third parties the transfer must be absolute. It was to be remarked that the Plaintiff now suing did not apply to the Company but the Transferees, not avowedly representing him, made the application and demand. If the Plaintiff took judgment there would be nothing to prevent the Defendant from being liable to an action for the same causes from the Transferees who would sue as the direct owners of the stock.

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On the second point I would observe, that it did not appear by the declaration that the Defendant were called upon to do an act which they were in law bound to do. The General Railway statute, 14 and 15 Vic. c. 51, sec. 17, prescribed a particular method for effecting transfers of stock, viz., by executing an instrument in writing of a given form, in duplicate, one part to be delivered to the Directors, to be fyled and kept for the use of the Company, and an entry thereof to be made in a book, to be kept for that purpose. The declaration did not show the required formalities to have been observed. It alleged that the Transferees had demanded of the Company to transfer the shares on their Books, and that duplicates of the deeds of transfer were at the same time offered to the Defendant. But where special forms were furnished by statute, it behoved parties to allege and prove a strict compliance with them, and this compliance was not sufficiently alleged by the Plaintiff's declaration. The precise wording of the statute should have been followed, since that offered the only legal means of making a valid transfer.

As a matter of verbal criticism therefore I think the declaration defective on this second ground, and, on the whole, have no hesitation in maintaining the demurrer and dismissing the Plaintiff's action.

The following are the *motifs* of the judgment:—"considering that by virtue of the Transfer and assignment by the Plaintiff of the shares in the capital stock in the declaration in this cause set forth to the said "Lemesurier, Routh & Co.," and to the said "City and District Savings Bank of Montreal," and by law, he the Plaintiff ceased to hold any legal title to or in the said shares of capital stock as owner thereof, and the Defendant cannot by reason of the alleged depreciation in the value of said capital stock, after the date of the said transfer and assignment, or of any other of the causes and matters in his said declaration set forth be liable to him, the said Plaintiff for any damages or sum of money in manner and form, as he the Plaintiff in and by his said declaration hath prayed, maintaining the said *Défense au fonds en droit* firstly pleaded, doth dismiss the said action, with costs."

Action dismissed.

Bethune & Dunkin for Plaintiff.
Cartier & Berthelot for Defendant.
(s. n.)

COURT OF QUEEN'S BENCH.

IN APPEAL FROM THE DISTRICT OF MONTREAL.

MONTREAL, 3RD SEPTEMBER, 1858.

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

No. 6.

LEVERSON ET AL.,

(Plaintiffs in the Court below),

Appellants

AND

BOSTON, Sheriff,

(*mis en cause* in the Court below),

Respondent.

Held.—1o. That the Sheriff is the guardian of goods seized, when the defendant offers none.

2o. That in a Rule for *contrainte par corps* against a guardian it is not necessary to offer any alternative, in default of producing the moveables seized.

3o. That when the guardian, by way of answer to such Rule, pleads that the property is only worth a particular amount, it becomes the duty of the Court, *avant faire droit*, to order proof of the fact.

4o. That the *onus probandi* falls on the guardian.

5o. That the Sheriff although over 70 years of age is liable *par corps*.

This was an Appeal from a judgment of the Superior Court at Montreal, reported at page 86 of the 1st volume of the L. C. Jurist.

LAFONTAINE, C. J.,—Le 3 août 1854, les appelants font émaner contre le nommé James Cunningham un bref de *capias ad respondendum*, accompagné d'un bref de *saisie-arrêt avant jugement*, sur lequel bref de saisie-arrêt le député shérif fait rapport le premier septembre 1854, qu'il a saisi suivant procès verbal annexé, ajoutant : " which said goods, chattels and effects I have put into the guardianship of David Garrick, to abide the order of this honorable Court." Dans son procès verbal de saisie, l'huissier Bates dit qu'il a nommé Garrick " gardien d'office," et Garrick signe comme tel. Le *capias ad respondendum* fut mis de côté, mais la saisie-arrêt fut déclaré bonne et valable par un jugement du 18 février 1855 qui condamne le défendeur Cunningham à payer aux demandeurs, appelants, une somme de £666. Il est à remarquer que cette cause portait le numéro 363.

Une autre saisie-arrêt avait aussi été émanée de la part des mêmes demandeurs contre le même défendeur *en main-tierce*, c'est à dire entre les mains de Canfield Dorwin et autres tiers-saisis, portant le numéro 375. Les demandeurs furent déboutés de cette dernière saisie-arrêt, par un jugement du 29 septembre 1854. Dès le lendemain, sur la présentation qui lui est faite de ce jugement, le shérif, l'intimé en cette instance, signe et fait remettre à Bates l'ordre suivant :

" No. 375.

George B. C. Leverson, et al., Plaintiffs. vs. James Cunningham, Defendant, and Canfield Dorwin, et al., Tiers-Saisis.	To John Bates one of my Bailiffs.

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"Whereas by the judgment of the Court rendered in the above cause on the 29th September instant, the attachment made of the effects of the said Defendant was set aside and quashed.

"These are therefore to command you forthwith to deliver up to the said Defendant the several articles and effects which were attached and which remain in your custody, receiving a proper receipt in writing for the same.

"Given at my office in Montreal this 30th September 1854.

"Jno. Boston, Sheriff."

Au bas de cet ordre est le reçu suivant :

"Received, Montreal 30th September 1854, from the bailiff or sheriff's officer who made the attachment or seizure in the above cause, to wit from John Bates, all and every the articles enumerated in his *procès verbal* of such attachment so made by him Thomas Bates.

"Thomas Bates. "James Cunningham.
"W. A. Bates."

Lorsque les demandeurs eurent obtenu sur la première saisie-arrêt No. 363, le susdit jugement du 28 février 1855, ils firent émaner une exécution, puis (après le rejet d'une opposition de la part du défendeur) un bref de *venditioni exponas* pour faire vendre les effets saisis par l'huissier Bates ; à ce bref daté du 11 Mai 1855, l'Intimé fit le rapport suivant :

"I hereby certify and return, that I have been unable to proceed to the sale of the goods and chattels already seized in this cause, and mentioned and described in the schedule hereunto annexed marked A, as within commanded, by reason of the said goods and chattels not being produced and represented on the day fixed for the sale thereof, by David Garrick, the guardian named in the original *procès-verbal* of seizure thereof; but in justice to the said guardian, I annex to this return various documents and affidavits, respectively numbered 1, 2, 3, 4, 5, 6, and 7, which have been filed with me as explanatory of the cause of the non-production of the goods so seized.

(Signed,) "Jno. Boston, Sheriff."

"Montreal, 1st August, 1855."

Ces documents et ces affidavits ont pour but principal de rendre compte de l'erreur qui a donné lieu à la remise au Défendeur des effets saisis. En un mot, le Shérif en recevant le jugement du 29 Sept. 1854, ne fit pas attention que ce jugement était rendu dans une autre cause que celle dans laquelle les effets en question avait été saisis et dans laquelle il n'y avait pas encore eu de jugement; de là l'erreur qu'il commit par son ordre du 30th Sept. 1854 de délivrer des effets qui n'avaient été saisis que dans cette dernière cause (No. 363) et qui étaient alors encore sous saisie.

Les appelants disent dans leur factum, qu'à la suite du rapport du shérif du 1er Août 1855, ils firent une motion dans laquelle ils demandèrent purement et simplement qu'il fût enjoint au shérif de produire les effets saisis afin qu'ils fûssent vendus, et ce sous peine d'emprisonnement jusqu'à la production des dits effets, mais que cette demande ne leur fût pas accordée.

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Les Appelants firent ensuite une nouvelle motion sur laquelle intervint l'interlocutoire suivant :

"The Court, inasmuch, &c. &c., doth order the said John Boston, as such Sheriff to produce the said goods and chattels so seized as aforesaid before this Court, within such time as this Court shall direct, in order that the said goods and chattels may be sold according to law, and in default of the said John Boston so producing the said goods and chattels, he, the said Sheriff, shall be imprisoned and held *contraint par corps* until he do produce the said goods and chattels, or *until he pay to the said Plaintiffs the balance of four hundred and forty-eight pounds sixteen shillings and two pence currency*, with interest on the said sum from the 17th day of October, 1855, *still due on the said judgment*, unless cause to the contrary be shown on Friday the 26th day of December instant (1856), at half past ten of the clock in the forenoon sitting the Court."

Le 26 Décembre, le Shérif comparait, et, sur sa demande, il lui est permis de répondre par ecrit. Voici cette réponse :

"The said John Boston, as such Sheriff, for answer to the Rule for *contrainte par corps*, returned into this Court on the 26th instant, saith, that the goods and chattels mentioned and referred to in the said Rule, were, according to law and the practice of this Honorable Court, duly placed on the seizure thereof, in the care and safe-keeping of one David Garrick, of the city and district of Montreal, gentleman, as guardian, *gardien;* that the appointment of the said David Garrick as such guardian was acquiesced in by the said Plaintiffs, and, at the instance of the said Plaintiffs, was in effect duly and solemnly confirmed by the judgment in this cause rendered on the 28th day of February, 1855; and that he, the said Sheriff, in all things by him done in regard to the said seizure, and the placing of the said goods and chattels in the care and safe-keeping of a guardian as aforesaid, acted in good faith, and in strict conformity with the requirements of the law and the practice of this Honorable Court.

"That the said goods and chattels never were, at any time since the seizure thereof, in the custody, care, and safe-keeping of the said Sheriff, and that it is out of the power of the said Sheriff for that reason, and for and by reason of the several circumstances, matters, and things set forth and contained in the various schedules annexed to the said Sheriff's Return to the *alias* writ of *venditioni exponas* in this cause, of which writ and schedules authentic copies are annexed to and fyled with the said rule in support thereof, to produce such goods and chattels, as demanded in and by said Rule.

"That moreover the said goods and chattels were not and are not of any greater value than fifty pounds currency, and that he, the said Sheriff, is of the age of seventy-one years fully accomplished and ended.

"And the said Sheriff lastly saith, that all and every the allegations, matters and things in the said Rule set forth and contained are false, untrue, and, unfounded in fact (except in so far as the same are hereinbefore expressly admitted to be true), and excepting, as aforesaid, the said Sheriff hereby expressly denies the same and each and every thereof.

"Wherefore the said Sheriff prays, that the said Rule may be hence dismissed with costs."

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Le 14 Février 1857, les Appelants inscrivent la cause au rôle de droit "for hearing on the merits of the rule taken against the said *mis en cause* (the Sheriff) on the 20th day of February instant."

A l'appel de la cause, le 20 Février, la Cour ayant décidé d'entendre les parties, les avocats de l'Intimé firent par écrit la protestation suivante:

"On behalf of the said Sheriff we most respectfully except to the order of this Court just rendered, to the effect that the parties should now be heard on the rule for *contrainte par corps* sued out against the said Sheriff, inasmuch as the said Plaintiffs have wholly failed to join issue on the Sheriff's answer to such rule."

Puis, le 25 Février, est intervenu le jugement dont est appel, lequel jugement est en ces termes:

"This Court having heard the said Plaintiffs and the said Sheriff, by their counsel, upon the Rule obtained by the said Plaintiffs on the 22d day of December, 1856, upon the Sheriff to produce certain goods and chattels; and that, in default of producing the same, he be imprisoned and held *contrainte par corps* until he produce the same or pay to the said Plaintiffs the balance of their debt and interest; having examined the proceedings and deliberated, considering that the said Plaintiffs have failed to establish, by reason of any of the allegations in the Rule by them taken on the said Sheriff, any legal right to have and maintain the conclusions of the said Rule, namely, that the said Sheriff do produce the said goods and chattels by him seized at the suit of the said Plaintiffs, or, in default thereof, that he do pay the said Plaintiffs the amount of the judgment obtained by the said Plaintiffs against the said Defendants,—doth discharge the said Rule, with costs."

Pour ce qui regarde la responsabilité du Shérif, à défaut de représentation des effets saisis, et la *contrainte par corps* qui en pareil cas peut être prononcée contre lui, c'est un point qu'il n'y a plus à discuter. Je renvoie à ce que j'ai dit sur la même question dans la cause de Irwin, Appelant, et Boston, Intimé, jugée le 1er Octobre, 1857.

L'un des moyens invoqués par l'Intimé pour se soustraire à la *contrainte par corps*, est qu'il a atteint l'âge vénérable de 70 ans bien et dûement accomplis. Malheureusement le statut qui exempte les septuagénaires de l'emprisonnement, la 7 G. 4, ch. 19, fait une exception expresse du Shérif; cet officier continue, quelque soit son âge, d'être soumis à la *contrainte par corps*, disposition qui est de nouveau confirmée par le Statut de 1849, ch. 42, s. 15.

D'après l'Ordonnance de 1667 (1), dans sa disposition relative au sujet, confirmée par les deux statuts en dernier lieu cités, auquel on peut encore joindre la 9e section du Statut de 1836, ch. 15, il y a donc lieu à la contrainte par corps contre le Shérif; c'est là un droit dont la partie qui a fait saisir les effets non représentés peut réclamer l'exercice. Le nouveau Code Civil Français, art. 2060, a reproduit la disposition de l'Ordonnance de 1667, dans les termes suivants: "La contrainte par corps a lieu . . . . . 4o. pour la représentation des choses déposées aux séquestres, commissaires et autres gardiens." Mais dans

(1) Tit. 34, Art. 4.

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l'un et l'autre droits, le Juge ne peut prononcer la contrainte par corps que lorsqu'elle lui est demandée. Rodier disait sur l'art 4 du titre 34 de l'Ordonnance de 1667 : "La contrainte par corps ne doit être prononcée avec la condamnation, qu'autant qu'elle sera demandée; parceque quand même le défendeur serait dans le cas de la contrainte par corps, il dépend du demandeur de ne pas l'exiger." Voir aussi Pigeau, ed. de 1779, T. I. p. 411; et Troplong sur le Nouveau Code, dans son traité de la Contrainte par Corps, No. 234, dit: "C'est une règle générale que le juge ne peut prononcer la contrainte par corps que lorsqu'elle lui est demandée. Dans les matières qui tiennent à l'utilité privée, le juge ne doit prêter son office que lorsqu'il en est requis." Mais toujours quand la contrainte est ainsi demandée à défaut de représentation d'effets saisis, doit-elle être accordée. Troplong, dans l'ouvrage déjà cité, No. 142, dit que dans le cas de l'article 2060 du Code, "la contrainte par corps a lieu impérativement, et non d'une manière facultative pour le Juge, elle est prononcée, non seulement pour la restitution de la chose, mais encore pour la représentation de cette même chose." Il me semble qu'il en devait être de même sous l'empire de l'Ordonnance de 1667. Je ne vois pas de différence entre l'art. 4 du Titre 34, de cette Ordonnance, et l'article 2060 du Code Napoléon. L'Ordonnance en permettant au créancier de demander l'application de cette voie rigoureuse n'a pas exigé que cette demande fut subordonnée à l'offre d'une alternative au gardien pour se libérer, c'est un droit dont elle autorise le créancier à réclamer l'exercice purement et simplement. Si celui contre lequel la contrainte par corps peut être ainsi demandée, a, soit par la loi, soit par la jurisprudence des arrêts, quelque alternative ou faculté à faire valoir, pour repousser cette contrainte, ou pour en faire modifier l'application, c'est à lui à l'invoquer formellement, et alors le juge doit apprécier les circonstances. Mais quant au créancier, lorsqu'il se borne à demander purement et simplement la contrainte par corps, il me semble qu'il fait ce que la loi lui permet et que sa demande est valablement faite, bien qu'elle ne contienne pas l'offre d'une alternative, par exemple, un *si mieux n'aime* de payer soit la dette soit seulement la valeur des effets non représentés: d'un autre côté il me semble déraisonnable de prétendre que l'offre d'une telle alternative soit incompatible avec la demande de la contrainte et doive la faire repousser. Le créancier qui aurait pu présenter sa demande sous la forme la plus rigoureuse, ne doit pas être puni pour l'avoir présentée sous une forme plus favorable au Shérif. Je pense donc que non seulement la seconde motion du demandeur pour contrainte, faite avec le *si mieux n'aime* payer sa créance, procédait valablement mais que même leur première motion qui n'offrait pas cette alternative et qui a été rejetée par le jugement du 30 Mai 1856, était valablement faite, sauf au Shérif, d'un côté, à demander la modification des conclusions. et, de l'autre, à la cour à accorder cette modification, même d'elle même, si la jurisprudence qui s'est formée sous l'Ordonnance de 1667 l'autorise à le faire. Mais ni dans l'un ni dans l'autre cas, le tribunal de première instance ne devait rejeter en entier la demande pour contrainte par corps. Car la loi donnait aux demandeurs le droit de présenter cette demande.

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Il peut arriver que la valeur des effets non représentés soit bien au-dessous du montant de la créance pour laquelle ils ont été saisis. Dans ce cas le dommage qu'éprouve le créancier ne peut excéder cette valeur. Si le Shérif lui fournit cette valeur en deniers, et qu'il fasse voir que la non représentation des effets ne peut être attribuée à aucune fraude de sa part, le créancier doit être satisfait, car il obtient pleine réparation. Il est juste qu'il soit alors libéré de la contrainte. On peut donc suivant les circonstances lui donner l'alternative de payer la valeur des effets.

Telle était dans les derniers temps la jurisprudence en France sous l'ancien droit ainsi que le certifient les auteurs du *Nouveau Denisart*, au mot "Gardien," § 4, No. 6. Le jugement que nous avons rendu dans la cause de Irwin et Boston, consacre cette jurisprudence. Les appelants ayant demandé la contrainte par corps, le tribunal aurait dû la leur accorder, sauf à y ajouter l'alternative d'un si mieux n'aime payer la valeur des effets, une fois cette valeur bien et duement établie.

The judgment of the Court below was reversed, without costs (the Chief Justice dissenting on the question of costs), and the Court below directed, *avant faire droit*, to order proof as to the value of the effects.

The following is the judgment of the Court of Appeals:

"La Cour, après avoir entendu les parties, par leurs avocats, sur le mérite, examiné tant le dossier de la procédure en Cour de première instance, que les griefs d'appel produits par l'appelant et les réponses à iceux et sur le tout mûrement délibéré :—1o. Considérant que, dans l'état de la cause, les appelants étaient bien fondés à demander, en cour de première instance, la contrainte par corps contre le Shérif, l'Intimé en cette cause; que cette demande n'aurait pas dû être rejetée comme elle l'a été par la dite Cour; 2o. Considérant que le dit Shérif, a, dans ses réponses par écrit à la demande de la dite contrainte, allégué que les effets saisis et non représentés par lui, n'excédaient pas en valeur la somme de cinquante livres courant, et est censé par là avoir demandé que, si la contrainte était prononcée contre lui, il lui fût donné l'alternative de s'en libérer en payant aux appelants la valeur des dits effets; que, dans ce cas, la Cour de première instance, après audition des parties, aurait dû ordonner avant faire droit que preuve fût faite sans délai à la satisfaction de la dite Cour de la valeur des dits effets saisis et non représentés, pour ensuite être la dite contrainte par corps prononcée contre lui avec l'alternative de s'en libérer en payant aux dits demandeurs la dite valeur ainsi prouvée; 3o. Considérant que tous les moyens invoqués par le dit Shérif dans ses réponses par écrit sont mal fondés, à l'exception de celui qui est relatif à la valeur des dits effets; 4o. Considérant, par conséquent, que dans le jugement, dont est appel, il y a mal jugé; Infirme le susdit jugement, savoir le jugement rendu le 28 de Février 1857 par la Cour Supérieure siégeant à Montréal; et cette Cour, procédant à rendre le jugement que la dite Cour Supérieure aurait dû rendre, et déclarant que la demande de la dite contrainte par corps procédait valablement contre le dit Shérif, intimé, rejette tous les moyens invoqués par lui dans ses dites réponses par écrit, à l'exception de celui qui est relatif à la valeur des dits effets, et ad-

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juge qu'avant faire droit en la dite Cour Supérieure, sur la dite demande d'une contrainte par corps, il soit ordonné par elle que preuve soit faite de la valeur des dits effets saisis et non représentés par le dit Shérif, pour ensuite être la dite contrainte par corps prononcée contre lui par la dite Cour Supérieure, avec l'alternative de s'en libérer en payant aux dits demandeurs la dite valeur ainsi prouvée ; chaque partie payant ses frais sur le présent appel. (l'Honorable Juge en chef différant quant à l'adjudication des frais)."

Judgment of the Court below reversed.

David & Ramsay, for Appellants.

Bethune & Dunkin, for Respondent.

(S. B.)

EN APPEL.

DU DISTRICT DE MONTREAL.

MONTREAL, 8 SEPTEMBRE, 1858.

Coram Sir L. H. Lafontaine, Bart., C. J. Aylwin, J., Duval, J., Caron, J

MÉTRISSÉ dit SANS FAÇON et al.,

Défendeurs en Cour Inférieure,
Appelants ;

et

BRAULT,

Demandeur en Cour Inférieure,
Intimé.

CAUTIONNEMENT.

Jugé :—1. Qu'un jugement rendu dans une demande en déclaration d'hypothèque condamnant le Défendeur à délaisser et dont il a interjeté appel, n'est pas passé en force de chose jugée ;
2. Que le délaissement fait en Cour de première instance par suite de ce jugement, sous certaines conditions n'est point légal ; que le délaissement pourra être valablement fait après jugement confirmatif en appel ;
3. Que le cautionnement sur l'appel, qui n'est donné que pour "dépens et dommages," et non pas pour satisfaire à la condamnation est nul et doit être rejeté.

Sir L. H. Lafontaine, Bart., *Juge en Chef ;*

Il s'agit d'une demande en déclaration d'hypothèque, dans laquelle un jugement du 18 novembre 1857 a condamné les Appelants ou ceux qu'ils représentent, à payer à l'Intimé la somme de £1047 10s. ou à délaisser sous quinze jours l'emplacement y désigné.

Le 6 mars 1858, les Appelants présentent une requête adressée "Aux Honorables Juges de la Cour Supérieure, siégeant à Montréal, et au protonotaire de la dite Cour," exposant :

1. La nature du jugement :
2. Que l'immeuble est bien inférieur en valeur à la condamnation ;
3. Suppliant en conséquence "Vos Honneurs et le dit protonotaire de les autoriser en leurs qualités respectives à délaisser le dit immeuble conditionnellement en justice, pour avoir tel délaissement sa pleine force et effet définitif dans le cas où le jugement susmentionné serait confirmé en appel, aussi bien que dans le cas où le dit appel ne serait pas efficacement poursuivi, mais pour être tel délaissement nul et non avenu, dans le cas où le dit jugement serait infirmé en appel, et qu'à l'effet de telle autorisation, l'avis des parents et amis tant des dits absents que de la dite substitution, assemblés devant vous, soit reçu sur le contenu des présentes."

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Au bas de cette requête est écrit ce qui suit :

" Qu'il soit fait ainsi que requis, Montréal ce 6 Mars 1858.

MONK, COFFIN ET PAPINEAU,
P. C. S.

Puis l'on voit que le même jour les requérants font un acte de délaissement, dans lequel on lit :.... " lesquels, pour éviter casuellement les conséquences du jugement en déclaration d'hypothèque prononcé contre eux ès dites qualités respectives, le 18 novembre dernier, à la poursuite du dit demandeur par reprise d'instance, C. A. Brault, et en conséquence de l'option à eux déférée par la coutume et le dit jugement, et en vue de l'appel que les dits comparants entendent interjeter du dit jugement, déclarent qu'aux risques, périls et fortune de qui il appartiendra, ils délaissent conditionnellement en justice l'immeuble mentionné et désigné au dit jugement comme suit :.... pour tel délaissement avoir sa pleine force et effet dans le cas où les dits comparants ne poursuivraient pas efficacement l'appel du dit jugement, et dans le cas où le dit jugement serait confirmé en Cour d'Appel, mais pour être tel délaissement nul et non-avenu dans le cas où le dit jugement serait infirmé en appel, et le présent délaissement ne devant pas par conséquent être considéré comme un acquiescement au dit jugement, dont et de tout ce que dessus les dits comparants ont requis acte, à eux accordé.

" Reconnu devant nous le 6e jour de mars 1858.

MONK, COFFIN ET PAPINEAU.

Le cautionnement sur l'appel est du 9 mars 1858, et n'est donné que pour " dépens et dommages," (*costs and damages*) ; ce qui a porté l'Intimé à demander, par motion du 1er juin dernier, le renvoi de l'appel, " inasmuch," est-il dit, " as the security by Appelants and their sureties given and entered into upon said Appeal, is insufficient, informal, and illegal, as appears from the face of it and from the record, particularly inasmuch as no good and sufficient security for payment of the debt awarded by the judgment of the court below to the respondent, or for satisfaction of the said judgment if it were to be confirmed by judgment of this Court of Queen's Bench, has been entered into and furnished as ought to have been by law."

La question qui nous a été soumise, est donc celle de la validité du cautionnement.

La loi (1) exige que celui qui interjette appel, donne caution " qu'il poursuivra effectivement le dit appel et satisfera à la condamnation, et aussi " paiera tels dépens et dommages qui seront adjugés, en cas que le jugement " ou la sentence de la Cour du Banc du Roi soit confirmé, ou que l'Appelant " convienne et déclare par écrit au Gref de la Cour dont est appel, qu'il ne " s'oppose point que le jugement rendu contre lui ait son effet, suivant la loi " à cette condition il donnera seulement caution des dépens d'appel, en cas " qu'il y succombe, etc., etc."

L'article 1er du titre 27 de l'ordonnance de 1667, porte que "ceux qui auront été condamnés par arrêt ou jugement, *passé en force de chose jugée*, à délaisser la possession d'un héritage, seront tenus de ce faire quinzaine après la signification

(1) Acte de judicature de 1793, ch. 6, S. 27.

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de l'arrêt ou jugement faite à personne ou domicile, à peine, etc.; et l'article 5, que " les sentences et jugements qui doivent *passer en force de chose jugée*, sont ceux rendus en dernier ressort, *et dont il n'y a appel, etc.*"

L'appel suspendant l'effet du jugement, celui que les Défendeurs ont interjeté a arrêté l'exécution du jugement qu'ils attaquent. L'un des effets de cet appel est donc que ce jugement n'est pas encore passé en force de chose jugée. Il ne pourra l'être que par une sentence confirmative de cette cour dans laquelle le litige est, par suite de l'appel, porté et continué. De toute nécessité, le délai pour délaisser l'héritage se trouve prorogé, ou plutôt il ne devra courir que du jour de la sentence confirmative. Les Défendeurs sont dans la même situation qu'ils seraient si le jugement attaqué n'avait pas fixé le délai pour faire le délaissement. En effet, il n'est pas essentiel que mention soit faite de ce délai dans le jugement, (1) non plus que de la clause *si mieux n'aime, etc.* (2) Le condamné a de droit, et l'option et la quinzaine pour faire le délaissement du moment que le jugement a passé en force de chose jugée: En Canada les juges ont le pouvoir de proroger ce délai, voir ce qu'on appelle la *rédaction* de l'ordonnance. (3) Si nous venions à rendre un jugement confirmatif, rien n'empêche que nous déclarions que la quinzaine courra du jour qu'il sera rendu, ou que même nous accordions un plus long délai. Ce ne serait qu'un surcroît de précaution.

Dans une demande en déclaration d'hypothèque, c'est le délaissement qui est considéré comme l'objet de l'action et du jugement, le paiement de la dette n'est qu'une faculté accordée au détenteur pour éviter ce délaissement. Il est vrai qu'on est dans l'habitude de conclure que le défendeur soit tenu de payer, si mieux il n'aime délaisser. Mais ces conclusions ne sont pas exactes: " C'est," comme dit Pothier, (4) " mettre la charrue devant les bœufs "

Le cautionnement que les Appelants avaient à donner, était purement et simplement, quant à la question qui nous occupe, qu'ils *satisferaient à la condamnation*, ce qui devait consister, au cas d'un jugement confirmatif en appel, à faire le délaissement dans le délai voulu, ou, sinon, à payer la dette.

Le jugement en appel est motivé comme suit :—

" The Court having heard the parties by their counsel respectively, on the rule obtained by the said Respondent on the first day of June last, and mature deliberation thereupon being had, seeing that although the liability of the Appellants as the party condemned in the Court below, is only conditional, and notwithstanding that the same judgment is in the alternative, yet that pursuant to the Statute of the 34 Geo. III., Chap. 6, Sect. 27, he was held to give security to answer the condemnation, and that the bond given by him is irregular and defective in omitting an undertaking to that effect; but seeing that the insufficiency of the bond furnished by the Appellant under like circumstances, may, under

(1) *Rodier*, sur l'ord. de 1667, tit. 27, art. 1. Ed. de 1770, p. 552.
(2) Pothier, traité de l'hypothèque, p. 444, Ed. in 4o de 1777.
(3) " En ce qui concerne les délais, qu'ils seront prorogés par les juges en leurs consciences et comme ils le jugeront à propos à cause de la difficulté qui se rencontre à voyager en ce pays."
(4) Pothier, déjà cité p. 445.

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the powers vested in this Court by the ordinance of the 25 Geo. III., Cap. 2, Sec. 6, be supplied; it is ordered that the said Appellants be admitted to prosecute their said appeal on giving good and sufficient security within one month, to prosecute the appeal, to answer the condemnation, and to pay all such costs and damages as shall be adjudged in case the judgment of the Superior Court be affirmed, and upon payment of the costs of the rule obtained by the Respondent on the first day of June last, failing which, it is ordered that the said rule be, and the same is hereby made absolute, and the appeal dismissed with costs."

Doutre & Daoust for Appellants.

Mackay & Austin for Respondent.

(P. R. L. & F. W. T.)

COUR SUPERIEURE.

MONTREAL, 17TH OCTOBRE, 1856.

Coram SMITH, J.; (C.) MONDELET, J.; CHABOT, J.

No. 1003.

Comstock et al vs. *Lesieur.*

Jugé,—Que le Défendeur qui a été assigné et qui a comparu en vacance; est en droit de demander le cautionnement *judicatum solvi* le premier jour juridique du terme ensuivant, quoique, l'avis n'ait pas été donné dans les 4 jours après sa comparution. (1).

Le Défendeur avait comparu en cette cause le 30 Septembre 1856, jour du rapport du Bref de Sommation.

Ce ne fut que le 15 Octobre 1856, que le Défendeur donna avis aux procureurs des Demandeurs qu' il feroit motion "qu'en autant que les Demandeurs "ne resident point dans le Bas-Canada, et notamment qu'ils sont résidant dans "les États-Unis d'Amerique, ils soient tenus de donner le cautionnement, *Judi-* "*catum Solvi*, avant que le dit Défendeur soit tenu de répondre à la forme ou "au mérite de la présente demande, le tout avec depens."

Une demande de défense avait été faite aux procureurs du Défendeur le neuf Octobre 1856.

Cette motion fut faite le 17 Octobre 1857, et après audition elle fut accordée.

Ouimet, Morin & Marchand, pour les Demandeurs.

Loranger, Pominville & Loranger, pour le Défendeur.

(P. R. L.)

(1) Règles de Pratique, page 19, Règle 62.

EDITORS' NOTE.

IN the Report of the cases of Sinclair vs. Ferguson, Robertson vs. Ferguson, and Mills vs. Ferguson, published in page 101 of the present volume of the "Jurist," it is stated, that the privilege thereby invoked had been recognized by our Courts anterior to the introduction of the late Bankrupt Law. This, it would appear from the statement of Mr. Popham of counsel for the Plaintiffs, is not the case. As far as can be ascertained, all the previous actions founded on the 177 Art. of the Custom demanded a privilege upon *the price* only; while these reported cases were the first to demand the *restoration* (*revendication*) of the goods.

LISTE

DES JUGEMENS RENDUS EN COUR D'APPEL A COMPTER DU 1ER SEPTEMBRE 1858, JUSQU'AU 9 DÉCEMBRE 1858, INCLUSIVEMENT.

MONTREAL.

APPELANTS.	INTIMÉS.	DATE.	JUGES.	JUGEMENS.
Chalmers,	Mutual Insurance Co.,	3 Septembre,	Juge en Chef, Duval, Caron, Aylwin dissent,	Infirmé.
Leverson,	Boston,	"	Juge en Chef, Aylwin, Duval, Caron,	"
Foley,	Elliott,	"	"	"
Platt,	Charpentier,	"	Juge en Chef, Duval, Caron, Aylwin dissent,	"
Chapman,	Clarke,	"	Juge en Chef, Aylwin, Duval, Caron,	Confirmé.
Gore,	Gugy,	"	"	"
Cuvillier,	Prowse,	"	"	"
Burroughs,	Molson,	"	"	"
Hutchinson,	Gillespie et al.,	"	"	Appel accordé.
Métrissé,	Brault,	"	"	Règle absolue conditionnellement.

QUEBEC.

APPELANTS.	INTIMÉS.	DATE.	JUGES.	JUGEMENS.
McCarthy,	Hart,	13 Septembre,	Juge en Chef, Aylwin, Duval, Caron,	Confirmé.
Douglas,	Dinning,	"	"	"
Renaud,	Gugy,	"	"	Infirmé.
Downey,	Lepper,	"	Juges Aylwin, Duval, Caron, Juge en Chef dissent,	"
Martin,	Lee,	"	Juge en Chef, Aylwin, Caron, Duval dissent,	Confirmé.
Daly,	Gugy,	"	Juges Aylwin, Duval, Caron, Juge en Chef dissent,	Infirmé.

U.W.O. LAW

MONTREAL.

APPELANTS.	INTIMES.	DATE.	JUGES.	JUGEMENS.
Russell,	Fisher,	1 Décembre,	Juge en Chef, Duval, Caron, Aylwin dissent,	Confirmé.
Shaw,	Meikleham,	"	"	"
Gould,	Corporation of Montreal,	"	"	"
Ross,	Palsgrave,	"	Juge en Chef, Aylwin, Duval, Caron dissent,	"
Ouimet,	Sénécal,	"	Juge en Chef, Aylwin, Duval, Caron,	Infirmé.
McPherson,	Boston,	"	"	Réformé.
Charlebois,	Gauthier,	2 "	"	Appel débouté.
Charlebois,	Nichols,	"	"	"
Marcoux,	Cummings,	"	"	"
Gravel,	Adams,	"	"	"
Vannier,	Larche,	3 "	"	"
Vondenvelden,	Richard,	9 "	"	"
De la Ronde,	Mongenais,	9 "	"	"
Larocque,	Russel,	6 "	"	Confirmé.

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OF THE

LOWER CANADA JURIST.

COMPILED BY

STRACHAN BETHUNE, *Advocate.*

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" :—*Vide* HYPOTHEQUE.

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" need not be insinuated or registered. (Lafleur, appellant, and Girard, respondent, S. C.) 90

DOUAIRE COUTUMIER, as regulated by the *Coutûme de Paris*, was at all times claimable on lands in Lower Canada held under the tenure of free and common soccage before the passing of the Imperial Statute 6 Geo. 4, ch. 59, commonly called "The Canada Tenures Act." (Wilcox et *ux.*, appellants, and Wilcox, respondent, Q. B.) 1

DOWER:—English law of, as well as English law of descent and alienation, as respects lands held in free and common soccage, was introduced into Lower Canada for the first time, by the Imperial Statute 6 Geo. 4, ch. 59, commonly called "The Canada Tenures Act." (Wilcox et *ux.*, appellants, and Wilcox, respondent, Q. B.) 1

ELECTION PETITIONS ACT:—Fees allowed to commissioner under, are assignable, and may be recovered from party contesting and sitting member, jointly and severally, when they both join in applying for the appointment of the Commissioner. (McCord vs. Bellingham et al., S. C.) .. 42

ENQUÊTE:—It is not competent for the plaintiffs to compel the defendants to go on with their *enquête* in the absence of certain of plaintiffs' exhibits attached to a *commission rogatoire*, issued by them and not returned.

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And defendants are under any circumstances entitled to adduce evidence after the return of the commission. (Foster et al. vs. Chamberlain et al., S. C.) 285
EVIDENCE:—In an action by an endorsee of a promissory note against the maker, the payee and endorser, who has received the amount of the note from the maker before its maturity, and undertakes to pay it, is not a competent witness for the defendant to prove that fact. (Fraser vs. Bradford, S. C.) 110
" :—*Vide* BOND.
" :—*Vide* DEFENDANT.
" :—Defendants, sued as copartners carrying on trade under the name of "The Montreal Railroad Car Company," may prove, under the general issue, that the company was incorporated and that the debt sued on was a debt of the corporation. (Edmonstone et al. vs. Childs et al., S. C.) 192
" :—*Vide* PARTNERSHIP.
" :—*Vide* INSURANCE.
" :—When a *gardien*, in answer to a rule for *contrainte par corps*, pleads that the property is only worth a particular amount, the *onus probandi* falls on him. (Leverson et al., appellants, and Boston, respondent, Q. B.) 297
EXCEPTION *à la forme*, by which it is alleged that defendant is described as of "the township of Orford," whereas he in fact lived in the town of Sherbrooke, will not be maintained, when it is proved that the part of Sherbrooke within which defendant resides is included within the limits of the township. (Morse, appellant, and Brooks et al., respondents, Q. B.) 39
" , by which it is alleged that defendant is described as of "St. Jean Baptiste," when in fact he resided in St. Jean Baptiste *de Rouville*," will not be maintained. (Gigou vs. Hotte, S. C.) 193
" DÉCLINATOIRE:—Where such has been fyled requiring proof to support it, and plaintiff, instead of inscribing for *enquête*, inscribes for hearing on the merits of the exception, the exception will be dismissed for want of proof. (Elliott vs. Bastien et al., S. C.) 202
EXECUTOR:—*Vide* HYPOTHEQUE.
EXPERTISE:—Costs of, are in the discretion of the Court, and in the exercise of such discretion the Court will at least divide them between the parties, where the report has the effect of materially reducing the plaintiff's demand. (Gardner vs. McDonald, S. C.) 208
FAITS ET ARTICLES:—Where party interrogated on, answers evasively, to the effect that he does not remember, when the matters enquired of must be presumedly within his knowledge, the interrogatories will be taken *pro confessis*. (Nye, appellant, and Malo, respondent, Q. B.) 43
" :—*Vide* ADMISSIONS.
FOLLE-ENCHÈRE:—Rule for, against *adjudicataires* who, on the face of the proceedings, are non-residents in Lower Canada but have paid the capital of their purchase, founded on a claim for interest on such capital, and served on "the agent and attorney at law" of the *adjudicataires*, will not be maintained. (Hall vs. Douglas, and McDougall et al., *adjudicataires*, S. C.) 276
FREE AND COMMON SOCCAGE LANDS, in Lower Canada:—*Vide* DOUAIRE COUTUMIER and DOWER.
" :—*Vide* SÉPARATION DE CORPS ET DE BIENS.

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GARANTIE:—Clause of, in a deed of exchange, confers no *hypothèque*, unless a specific sum of money be stipulated as the amount of such *garantie*. (Exparte Casavant, and Lemieux, opposant, S. C.) 139

GARDIEN:—*Vide* SHERIFF.

" :—In a rule for *contrainte par corps* against, it is not necessary to offer any alternative, in default of producing the moveables seized. (Leverson et al., appellants, and Boston, respondent, Q. B.) 297

GENERAL ISSUE:—*vide* EVIDENCE.

GOODS, sold *à terme*:—*vide* VENDOR.

HOTEL-KEEPERS have no privilege on a piano brought into a hotel by a permanent boarder, as against the owner thereof, for the board of such boarder. (Nordheimer et al. vs. Hogan et al., S. C.) 281

HYPOTHÈQUE GÉNÉRALE, dating as far back as 1815, and claimed in respect of land situate in the County of Sherbrooke, and duly registered in accordance with the provisions of the Registry Ordinance 4 Vict., chap. 30, cannot be affected by want of registration during the period that the 10th and 11th Geo. 4 ch. 8 was in force, without averment and proof that the debtor held the land whilst that statute was in force. (The Queen, appellant, and Comte et al., respondents, Q. B.) 88

" duly created during the lifetime of the debtor may be preserved by registration after his death. (The Queen, appellant, and Comte et al., respondents, Q. B.) 86

" LÉGALE is *not* exempt from registration under the 4th section of the Registration Ordinance 4 Vict. ch. 30. (The Queen, appellant, and Comte et al., respondents, Q. B.) 86

" :—*Vide* GARANTIE.

" :—*Vide* INSURANCE.

" given during insolvency confers no privilege as against contemporaneous chirographary creditors. (Duncan vs. Wilson, and Wilson, opposant, and Wood, opposant, S. C.) 253

" does not attach to the property of an executor, by reason of the registration of the will under which he is appointed. (Lamothe vs. Ross, and Ross et al., opposants, and the Trust and Loan Company of Upper Canada, S. C.) 278

INSCRIPTION EN FAUX cannot be had in regard to an instrument which bears none of the characteristics of authenticity. (Molson vs. Burroughs, S. C.) .. 72

" :—In case of, the *procès verbal* of the exhibit attacked may be made immediately after its deposit. (Moreau et *vir.* vs. Léonard, S. C.) 136

INSOLVENCY:—*Vide* DÉCONFITURE.

INSTANCE:—*Vide* COPARTNERS.

INSURANCE:—The condition usually endorsed on policies of insurance respecting double insurance is binding in law, and its performance will not be held to be waived by the company, if their agent, on being notified of such double insurance *after the fire*, make no specific objection to the claim of the assured on that ground. (The Western Assurance Company, appellant, and Atwell, respondent, Q. B.) 181

" :—A contract of, may exist without the execution or issue of any Policy or of any interim receipt, even with a company whose charter and by-laws manifestly contemplate the execution of a policy in all cases, and such contract may be proved by parol evidence. (The Montreal Assurance Company, appellant, and McGillivray, respondent, Q. B.). 221

" :—Premium of, taken by the manager of an insurance company in the shape of a promissory note of a third party, payable to the order of

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and endorsed by the manager to the company, though dishonoured, is a sufficient consideration to support the contract of insurance. (Do.) 221

INSURANCE:—In case such as above the evidence of the mortgagor, who undertook to effect the insurance for the mortgagee, is admissible to prove that he did so; and the evidence of the declarations of the manager that the insurance had been effected, etc., and of his promises of a policy made about the date of the contract, is admissible. (Do.).......... 221

" The sale by the proprietor and mortgagor of the real estate assured, during the pendency of the contract of insurance in favor of the mortgagee, does not affect such insurance, though part of the consideration of such sale be a promise by the purchaser to pay the mortgagee her debt, and though she be a party to it. (Do.)..................... 221

" :—Interest on loss may be awarded from the date of the fire. (Do.)..... 221

INTERVENTION:—*Vide* ASSIGNEE.

JUDGMENT:—Draft of, may be amended, even after the judgment has been pronounced, provided it has not been registered. (Palsgrave vs. Ross, and Ross, opposant and plaintiff *en faux*, and Palsgrave, defendant *en faux*, S. C.).. 95

[Confirmed in Appeal, 1st December, 1858.]

" on confession cannot be attacked (after entry thereof in the plumitif) by motion, on the ground of alleged irregularities in the procedure apparent on the face of the record, and the fact that one of the plaintiffs' attorneys appeared for the defendant and countersigned the confession, is not such an irregularity as would justify the setting aside of the judgment after entry thereof in the plumitif. (Molson et al. vs. Burroughs, S. C.).. 107

[Confirmed in Appeal 3rd September, 1858.]

" , dismissing a pleading, cannot be desisted from by the parties and re-adjudicated by the Court. (Clarke et al. vs. Clarke et *ux.*, S. C.).... 209

JURY TRIAL cannot be had in an action for damages, by two professional men against three merchants, for breach of contract to buy a railroad; and so much of the conclusions of the defendants' pleas in such action as pray for such trial by jury will be rejected on motion. (Abbott et al. vs. Meikleham et al., S. C.).................................... 283

LEASE:—Assignment of, by a bankrupt to a creditor, to whom he sells all his moveables, is a sufficient delivery in law of such moveables, as against creditors of other third parties, and precludes the necessity of a *déplacement* or other species of *tradition réelle*. (Cumming et al. vs. Mann, andSmith et al., opposants, S. C.)...................... 195

LEGACY from father to daughter, conditional on her not doing certain things, is forfeited by her doing such things, and it is a fatal variance in a declaration to claim such legacy as an absolute one. (Freligh vs. Seymour, S. C.).. 91

LEGITIME was virtually abolished by the Imperial Statute 14 Geo. 3, c. 83 (Quebec Act), and the Provincial Statute 41 Geo. 3, chap. 4. (Quintin dit Dubois et al., appellants, and Girard et al., respondents, Q. B.)..... 141

MAGISTRATE:—*Vide* DAMAGES.

MARRIAGE, of minor without consent of parents:—In case of, parents may recover damages, without being first obliged to take proceedings to set aside the marriage. (Larocque et *vir.*, appellants, and Michon, respondent, Q. B.).. 267

MARRIED WOMAN:—*Vide* SALE of real estate.

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MASTER AND SERVANT :—A servant refusing to obey a lawful order of his master and discharged in consequence can only recover wages to date of discharge, notwithstanding proof of previous uniform good conduct. (Hastie vs. Morland, S. C.).. 277

MEASUREMENT, in case of delivery of a cargo of wheat, commenced in presence of both carrier and consignee, or their representatives, may be continued in the absence of either party. (Syme et al. vs. Janes et al., S. C.).. 169

MINOR cannot be impleaded by a writ issued during his minority, although he was of age when writ was served on him. (Chalifoux vs. Thonin, S. C.). 187

MOTION :—*Vide* ATTACHMENT.

MUNICIPAL COUNCILLORS :—When a vacancy occurs, and the municipality fails to fill it at the first meeting of councillors after the expiration of 3 months from the occurrence of the vacancy and the Governor General in consequence nominates a councillor to the vacancy, such appointment will be set aside if the municipality has elected a councillor in the interim. (Brosseau, petitioner, and Bissonette, defendant, S. C.) ... 94

" COUNCILS cannot, under the Act of 1855, close a street and form therewith a public pound, by by-law, but must do so by *procès verbal*. (Corporation of the Parish of Verchères vs. Boutillet, S. C.)............. 115

" CORPORATION :—*Vide* BY-ROAD.

NEW CONCLUSIONS, reserved by declaration in respect of rent accruing, may be taken in a default case without service thereof on the defendant. (Dubois vs. Gauthier, S. C.).. 94

NEWSPAPER subscriptions *can* be recovered, on mere proof of delivery of the paper, without any order for the same, and notwithstanding a verbal refusal to receive the paper and notification to the carrier to discontinue the delivery of it. (Bristow vs. Johnston, C. C.)..................... 275

" subscriptions *cannot* be recovered, without due proof that the paper was ordered by the party sued. (Parsons et al. vs. Kelly, C. C.)....... 275

NOTICE subsequently given of security in appeal is a waiver and revocation of a notice of such security already given for a previous day. (Sullivan, appellant, and Smith, respondent, Q. B.)................................ 160

" OF ACTION—*Vide* SHERIFF.

OPPOSANT *à fin de conserver* residing out of the Province, who contests the collocation of another opposant, is bound to give security for costs. (Benning vs. The Montreal Rubber Company, and Young, opposant, and Corning et al., opposants, S. C.)....................................... 287

OPPOSITION *à fin de distraire* :—A rule by an opposant, calling on a plaintiff to contest his opposition, and ordering in default that *main levée* be granted, is irregular, and will be dismissed. (McGrath vs. Lloyd, and Keith et al., opposants, S. C.)..................................... 279

" *à fin d'annuller* cannot be maintained against a seizure of lands, on the ground that the defendant was possessed of sufficient moveable property to satisfy plaintiff's judgment, when such seizure has been preceded by a regular return of *nulla bona*. (Soupras vs. Boudreau, and Boudreau, opposant, S. C.).. 290

PARTNERS :—*Vide* ADMISSIONS.

PARTNERSHIP cannot be proved, as against a person sued as a secret partner, by the testimony of one of the ostensible partners. (Chapman vs. Masson, S. C.).. 216

PATENT :—In an action for infringement of, it is not necessary to set out at length in the declaration the preliminary formalities to be observed in order to obtain the patent. (Bernier vs. Beauchemin, S. C.)............. 193

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PATENT:—In an action for infringement of, if it be proved that the article patented was in public use or on sale in the Province with the consent of the patentee, at the time of the application for the patent, the plaintiff cannot recover; and a verdict of a jury under such circumstances will be set aside and a new trial ordered. (Bernier vs. Beauchemin, S. C.) 289

PEREMPTION D'INSTANCE will not be allowed, in the absence of the original record. (Turner vs. Boyd, S. C.) 96

" :—Motion for, praying that action be dismissed for want of proceedings during three years, and not asking that case be declared *périmé*, is irregular and will be rejected. (Peck et al. vs. Murphy et al., and The Mayor, Aldermen and Citizens of the City of Montreal, T. S., S. C.) 221

PETITORY ACTION:—Where the plaintiff's title depends on the validity of a power of attorney executed *sous seing privé* in Upper Canada and duly attested by a notary public of Upper Canada, under his seal of office, with a certificate of the administrator of the Government of this Province annexed, that the mere production of such power of attorney, with the certificates aforesaid annexed, is not sufficient proof of its execution. (Nye vs. McDonald, S. C.) 109

PLEA:—A hypothetical plea will be rejected on demurrer. (The Montreal Assurance Company, appellant, and McGillivray, respondent, Q. B.) 221

PLEADING:—A clerical error in a, can be amended at the final hearing. (Hastie vs. Morland, S. C.) 277

" :—The necessity of a replication to the plaintiff's general answer is waived by consent of defendant to subsequent proceedings. (Greenshields et al. vs. Gauthier, S. C.) 288

" :—Where a preliminary plea has been fyled and the plaintiff has demanded a plea to the merits, under the 72nd section of the 20th Vict., ch. 44, the plaintiff may foreclose the defendant after the eighth day from such demand, without serving the demand of plea required by the 25th section of the 12th Vict., ch. 38. (McGill vs. Wells, S. C.).... 290

In an action by a shareholder in the Grand Trunk Railway Company, against the company for refusing to register a transfer of his shares, the allegations that the transferrees had offered to surrender such transfer to the company and had demanded that the company should transfer the shares on their books, are insufficient to meet the requirements of the company's charter. (Webster vs. The Grand Trunk Railway Company of Canada, S. C.) 291

" :—When a *gardien*, by way of answer to a rule for *contrainte par corps*, pleads that the property is only worth a particular amount, it becomes the duty of the Court, *avant faire droit*, to order proof of the fact. (Leverson et al., appellants, and Boston, respondent, Q. B.)........ 297

POWER OF ATTORNEY:—Proof of, *vide* PETITORY ACTION.

PRESCRIPTION:—*Vide* DAMAGES.

" :—In an hypothecary action, instituted in the *District of Montreal* in respect of property situated there, by a party who has always resided in the *District of Quebec*, the prescription of ten years will be available to the defendant; the plaintiff under such circumstances being considered *présent* within the meaning of the 116th Article of the Custom of Paris. (Stuart, appellant, and Blair, respondent, Q. B.) . 123

" of six years under 10 and 11 Vict., ch. 11, is applicable to the action of a

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purser of a steamboat for wages, and such plea is not waived by pleas of payment and compensation. (Strother vs. Torrance, S. C.)...... 163

PRESCRIPTION of one year, under 127th Art. of the Custom of Paris, only applies to wages or salary claimed by a servant who has ceased to be in the employ of the master during one year. (Glouteney vs. Lussier et al., S. C.)............ 185

" of five years, under the 12th Victoria, ch. 22, applies to a note due before the passing of that statute, and on which no action is brought within five years after it came into force. (Côté et al. vs. Morrison, S. C.).. 206

" :—*Vide* ACTION EN RESCISION.

PRESENT :—*Vide* PRESCRIPTION.

PRIVILEGE :—*Vide* HOTEL-KEEPER.

PROMISSORY NOTE, having two years to run, will become exigible in case of *déconfiture*. (Lovell vs. Meikle, S. C.)............ 69

" :—In an action on, instituted before the coming into force of the 20th Vic. ch. 44, but in which the plea was fyled after the Act was in force, the 87th section as regards denial and proof of signature applies. (Jameson vs. Larose, S. C.)............ 73

" :—*Vide* EVIDENCE.

" :—*Vide* PRESCRIPTION.

PUBLIC POUND :—*Vide* MUNICIPAL COUNCILS.

RAILWAY COMPANY :—*Vide* VERBAL ACCEPTANCE.

REBELLION DE JUSTICE :—In the case of a *saisie execution*, where a defendant is outside his dwelling house, the door of which is locked, and within which are his wife and family, who are visible from the outside, and who neglect to open the door on being called on by the bailiff to do so, the statement of such defendant to the bailiff that he cannot open the door, amounts to a refusal to do so. (Kemp vs. Kemp, S. C.)... 279

" :—The neglect of a defendant to open the door of his dwelling house, under the circumstances above stated, does not amount to a *rebellion de justice*. (Kemp vs. Kemp, S. C.)............ 280

REGISTRATION :—*Vide* HYPOTHÈQUE GÉNÉRALE.

" :—*Vide* BAILLEUR DU FONDS.

" of a mortgage is not necessary as against chirographary claims. (Duncan vs. Wilson, and Wilson, opposant, and Wood, opposant, S. C.)...... 253

RELIGIOUS CONGREGATION :—One member of, cannot by action at law compel the trustees of the church property to adopt the formalities necessary to secure the appointment of a new trustee to fill a vacancy, the remedy being by prerogative writ and not by action. (Smith vs. Fisher et al., S. C.)............ 74

REVOCATION of a *donation onéreuse* does not affect the *hypothèques* created by the donee during the existence of the donation. (Lafleur, appellant, and Girard, respondent, S. C.)............ 90

RULE OF PRACTICE, S. C.,............ 287

SAISIE ARRET after judgment need not be served on defendant who is an absentee and has been duly summoned as such by advertisement in the original procedure. (Jones vs. Saumur dit Mars, and Leroux, T. S., S. C.).. 60

" , before judgment :—*Vide* DAMAGES.

" :—*Vide* VERBAL ACCEPTANCE.

" MOBILIÈRE :—Where the bailiff in his *procès verbal* declares that he elects his domicile in a particular parish, without specifying in what part of it, the *saisie* will be declared null, and a notice of sale, at the foot

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of the *procès verbal*, for a specified day of the month, without mention of the year, is null, although such *procès verbal* be fully and correctly dated. (Beaupré vs. Martel, and Martel, opposant, S. C.).......... 276

SAISIE MOBILIERE :—*Vide* REBELLION DE JUSTICE.

SALARY or wages, accrued subsequent to dismissal and prior to termination of agreement, cannot be recovered by a merchant's clerk dismissed for absence without leave. (Charbonneau vs. Benjamin, S. C.)........ 103

SALE of real estate :—Question as to validity of, will be determined by the law of the local domicile of the parties, and therefore a sale of real estate in Lower Canada, made in the United States, by a married woman whose matrimonial was Lower Canada, without the express authorization of her husband, is valid. (Laviolette vs. Martin, S. C.).............. 61

" , *omnium bonorum*, made by a trader whilst notoriously insolvent, and after meetings of his creditors which failed to result in any unanimous arrangement, to two of his creditors who (as the sole consideration for such sale) became responsible for the payment of the dividend he was desirous of paying, by giving their notes for an amount sufficient to cover the dividend, all of which notes actually paid were so paid out of the proceeds of the sales of a portion of the goods assigned, is not either a simulated sale or a sale in *fraudem creditorum*. (Cumming et al. vs. Mann, and Smith et al., opposants, S. C.)........... 105

SECURITY FOR COSTS :—Plaintiff having failed to put in, within delay fixed by the Court, his action will be dismissed with costs, on defendant's motion to that end. (Adam vs. Sutherland, S. C.) 109

" :—*Vide* OPPOSANT.

" in appeal given merely for costs and damages, in a hypothecary action, is insufficient and will be rejected. (Métrissé dit Sans Façon et al., appellants, and Brault, respondent, Q. B.)......................... 303

" :—Defendant summoned to appear in vacation can demand security for costs on the first day of the nearest term, without giving notice within the four days from the return of the writ. (Comstock et al. vs. Lesieur, S. C.)... 306

SEIGNIORIAL COMMISSIONERS cannot be sued by a Seignior to pay him the interest on his *lods et ventes* income, out of moneys placed to their credit in a bank, by the Receiver General of the Province. (Ramsay vs. Judah et al., S. C.)... 251

SEIZURE of land :—*Vide* SHERIFF.

SEPARATION DE CORPS ET DE BIENS :—In an action of, where both parties are domiciliated in a township, the real estate acquired during the marriage, by purchase, and held in free and common soccage, will, in the liquidation of the matrimonial rights, be considered as forming part of the community. (Magreen vs. Aubert, S. C.)........................ 70

SHAREHOLDERS of railway companies, incorporated after the passing of "The Railway Clauses Consolidation Act," are liable to the creditors to an amount equal to the amount unpaid on their stock, and in an action to recover the same it is not necessary to allege that the directors called in all such stock. (Cockburn vs. Starnes, S. C.) 114

" of railway companies :—The liability of, under "The Railway Clauses Consolidation Act," cannot be affected by any irregularities in the nomination or appointment of the original directors. (Ryland vs. Ostell, S. C.)... 274

Also Cockburn vs. Tuttle, S. C. 285

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Shareholders of railway companies, incorporated as above mentioned, are liable, notwithstanding they may have transferred their stock, if the plaintiff's debt accrued and was due whilst the shares stood in defendant's name. (Cockburn vs. Beaudry, S. C.) 283

" :—*Vide* **Damages**.

Sherbrooke, County of :—*Vide* **Hypothèques généraux**.

Sheriff is not liable for costs of bringing in a prisoner to gaol under warrant of a country justice who has committed such prisoner on a criminal charge. (Champagne vs. Boston, C. C.) 79

" :—Advertisement by, of the seizure of land, of which land the contents are not stated, is defective, and gives ground for an opposition *à fin d'annuler*. (Berthelet vs. The Montreal and Bytown Railway Company, and Guy et al., opposants, S. C.) 164

[Reversed in Appeal. *Vide* page 166.]

" :—Advertisement by, of the seizure of land, of which land the contents are not stated in said advertisement, does not give ground for an opposition *à fin d'annuler*. (Berthelet, appellant, and Guy et al., respondents, Q. B.) 166

" is responsible for goods seized by him, in the same way as the *gardien*, except where a solvent *gardien* has been appointed by the *saisi*, and the sheriff proves that such *gardien* was solvent, or reputed so to be, to the extent of the property seized, at the time of his appointment. (Irwin, appellant, and Boston et al., respondents, Q. B.) 171

Also Leverson et al., appellants, and Boston, respondent, Q. B.) 297

" is not entitled to the notice of action prescribed by the Provincial Statute 14 and 15 Vict., ch. 54, in an action *en revendication* against him, for certain effects seized by him and ordered to be delivered up to the *saisi*. (Irwin, appellant, and Boston et al., respondents, Q. B.) 171

" , though over 70 years of age, is liable *par corps*. (Leverson et al., appellants, and Boston, respondent, Q. B.) 297

Street, closing of :—*Vide* **Municipal Councils**.

Surveyor's report, referring to a plan not of record in the cause, is bad and will be set aside on motion. (Adams vs. Gravel, S. C.) 203

Tiers saisi :—Declaration of, cannot be contested after the expiration of eight days from the making thereof. (Warner vs. Blanchard, and the Mayor, Aldermen, and Citizens of the City of Montreal, T. S., S. C.) 73

" , referring in his declaration to certain documentary evidence, will be held to produce the same at his own cost, on motion by plaintiff to that effect. (Forsyth vs. The Canada Baptist Missionary Society, and Leeming et al., T. S., S. C.) 167

Toll-bridge :—*Vide* **By-road**.

Transfers of shares in railway companies cannot be proved by verbal testimony. (Cockburn vs. Beaudry, S. C.) 283

Tutor :—*Vide* **Account**.

Usury :—Money actually paid, in excess of six per cent. interest, in the discounting of various notes renewed from time to time, and of which those sued on form part, can be recovered back by having the same deducted from the notes so sued on. (Nye, appellant, and Malo, respondent, Q. B.) 43

Vender of real estate can oppose the exception of *quanto minoris* to the *cessionnaire* of his vendor, even when he has accepted signification of the transfer and promised to pay the purchase money. (Masson et al. vs. Corbeille, S. C.) 140

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VENDOR has a privilege on goods sold *à terme* and delivered to the vendee and still in his possession (he having become insolvent), and such goods may be attached by conservatory process to prevent their disappearing. (Torrance et al. vs. Thomas, S. C.) 99
Also, Sinclair vs. Ferguson, Robertson et al. vs. Ferguson, and Mills et al. vs. Ferguson, S. C. 101

VERBAL ACCEPTANCE, by the secretary in one case and the accountant in another, of a draft on a chartered railway company, is sufficient to prevent the attachment by *saisie arrêt après jugement* of the money covered by such drafts. (Ryan et al. vs. Robinson, and The Montreal and Champlain Railroad Company, T. S., S. C.) 203

WAGES :—*Vide* SALARY.
" .—*Vide* PRESCRIPTION.
" :—*Vide* MASTER AND SERVANT.

WARRANTY :—If the recital, in a deed of, indicate the purpose for which the deed is executed, its effect will be restricted to that purpose, though the dispositive portion of the deed is couched in general terms. (The Bank of British North America vs. Cuvillier et al., S. C. 154

WILL :—*Vide* LEGACY.
" :—*Vide* HYPOTHÈQUE.

WIFE *séparée de biens*, who is sued on two notarial obligations in which she acknowledges herself personally indebted to the plaintiff, can plead and prove by verbal testimony that the statement of personal indebtedness contained in the obligations is false, and that on the contrary it was the husband who was really indebted and that she was merely his security, on the ground that such contracts are in fraud of the law of the land. (Mercille vs. Fournier et *vir*, S. C.) 205

WITNESS may be examined twice by the same party. (St. Denis vs. Grenier et *vir*, S. C.) 93

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U.W.O. LAW

THE

LOWER CANADA JURIST.

(*EXTRA.*)

ELECTION REPORTS.

DISTRICT OF MONTREAL.

In the matter of the Controverted Elections for the City of Montreal.

MONTREAL, 19TH FEBRUARY, 1858.

JOHN ROSE, Esq., *Solicitor General*,
A. A. DORION, Esq.,
THOMAS D'ARCY McGEE, Esq.,
} Sitting Members;

AND

WILLIAM BRISTOW, ET AL.,

Petitioners against the return of John Rose, Esquire.

JEAN LOUIS BEAUDRY, ET AL.,

Petitioners against the return of A. A. Dorion, Esquire, and Thomas D'Arcy McGee, Esquire.

Coram BADGLEY, J.

1st. Upon an application being made to a Judge for the taking of evidence, he has the right to hear and determine all questions respecting the validity of the application. Amongst these are comprised—
1. The sufficiency of the recognizance.
2. The sufficiency of the sureties, and of their affidavits, etc.
3. The regularity of the services.
4. The sufficiency of the allegations of the parties to warrant the taking of evidence upon them.
5. The general conformity of the proceedings, in substance and form, to the requirements of the Statute.

And in settling such questions the Judge acts judicially.

2d. A recognizance which does not state in the body of it the place where it was executed, is insufficient.

3d. And this defect is not cured by the insertion, in the Magistrate's certificate, of the words "at the place above mentioned," the place so mentioned being the indication of the Magistrate's residence in his descriptive addition.

4th. In the attestation to a recognizance, the Statute requires the Magistrate signing it to state for what place he holds his office; and an attestation signed by a person calling himself "J. P." without saying for what place, is insufficient.

5th. So also with regard to the *jurat* to an affidavit of sufficiency appended to a recognizance.

6th. On an application by a sitting member for the taking of evidence, he must produce with his recognizance his own affidavit as to the sufficiency of the sureties, and the absence of such affidavit is fatal.

7th. The copy of notice of contestation delivered to the Judge must be sworn to; and though the form and manner of such swearing is immaterial; the appending to the copy, a copy of the affidavit of service of the original, is entirely insufficient.

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8th. The Elections Act of 1849, in so far as it establishes disqualifications against a candidate by reason of certain acts committed by him, is a penal act; and if such acts be charged against him, they must be so alleged as to come within the very words of it.

9th. The evidence to be taken before the Judge will be confined to the facts and circumstances specially detailed in the notice of contestation, and in the answer thereto; and testimony will not be taken upon general averments.

10th. The provisions of the Controverted Elections Act of 1857 are insufficient to enable a Judge, becoming a Commissioner, to appoint a deputy to act as judge in his place. The Judges in Montreal are unanimous upon this point.

On behalf of Mr. Rose, *Carter, E.*, contended—

1. That there is no evidence of service of notice on Mr. Rose—a *copy* of affidavit of service only being produced, and the other affidavit not stating the manner of service.

See Sections 3 and 4, 20 Vict., ch. 23.

2. That it is not alleged in the notice that the petitioners had voted, or had a right to vote, at the elections. Alleging simply, in the description they give of themselves, that they were *Electors*, does not amount in law to a specific averment that they *had a right to vote* at the time of the election.

Nottingham case. Woodsworth's Election Reports, 69.
Rogers on Elections. 2d vol., p. 9.
(Petitioner alleged to be a "*freeholder*," held insufficient.)
Rogers on Elections. 2d vol., pp. 9, 10, 11, 12; and see Nottingham case, at p. 13.
Wordsworth, Law of Elections. p. 297.
See Petition against election of the Hon. George Moffatt and Mr. DeBleury, rejected by the House in 1844, upon the objection that the petitioners were only called *Electors*.
Dwarris on Statutes. p. 290, 1st vol., and p. 291—294.
May on Parliament. p. 442.

3. That the notice does not allege as a fact that Luther H. Holton had been duly nominated.

This omission is fatal to all those grounds which refer in any way to acts alleged to have been done to Mr. Holton's prejudice, or such as allege him to have had a majority of votes. Before any evidence could be received of the number of votes recorded in his favor, it would be necessary to prove that he had been nominated, and hence the allegation was an essential one.

4. That the copy of intended Petition to the Legislature differs materially from the Notice in several respects, and particularly in this: it is alleged in it that Petitioners voted and had a right to vote—an essential allegation of title necessary to be proved; and which therefore should have been formally averred in the Notice.

20 Vict., ch. 23, sec. 1. "No Election Petition alleging other facts or circumstances than those stated in such Notice, shall be received by the Legislature."

Sect. 4. "Contesting party shall produce and fyle with such Judge a copy of his intended Petition against such election."

Sect. 6. "Powers shall be limited to the questions of fact set forth in the notice of the contesting party."

5. That general allegations in a notice under our present law, which requires that the party shall "specify particularly the facts and circumstances," is wholly insufficient.

Rogers on Elections, 2nd vol., p. 8; Title, "Form of Petition."

"It is nevertheless requisite to state, *with certainty*, such facts as are intended to be relied on in evidence, in order that the party or parties, whose interest it is to disprove such facts, may have sufficient notice of the charges made against him."

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Dwarris on Statutes, p. 295.

6. That admitting, for argument's sake, that charges made in the *terms of the statute*, in a general form, would suffice; still in England the party was limited in his proof to the statement of counsel, in opening, and he was required to mention every fact on which he meant to rely.

Wordsworth on Elections, p. 301.
Rogers on " " p. 121, 2nd vol.

7. That the Election Act of 1849 is a penal statute, and must be construed strictly; and every charge made must be in the terms of the Act.

Shepherd on Elections, p. 174.
As to interpretation—Lord Huntingtower vs. Ireland, 2 D. and R., 450.
Same " vs. Gardner, 1 B. and C., 297.

8. That although the wording of the Act may be general, it should be alleged *what act* in particular was done by the party offending, to enable him to meet the charge.

Macnamara's Paley, pp. 175, 176, 177, and see 179.

9. That "bribery" must be alleged with the intent mentioned in statute, viz., *to vote* for a particular candidate, or to abstain from voting for another—the "intent" being the very essence of the charge.

Sec. 54, 12 Vict., c. 27.
Rogers on Elections, 1st vol., pp. 249, 250.

10. That an allegation, "that they were paid for their votes," is insufficient.

See Form of Oath appended to the Act, which applies to any reward "anterior" to voting.
See also Lord Huntingtower vs. Ireland, 2 D. and R., 450.
Same vs. Gardner, 1 B. & C., 297.

11. That an allegation of the opening of public houses must contain the assertion, that they were opened "with intent to procure the election of the candidate;" and should specify what public houses in particular were so opened, and that electors at the said election were in fact *accommodated;* so as to comply with 1st section of 20 Vict., ch. 23, which requires that the notice shall specify particularly the facts and circumstances.

12. Applying the foregoing rules, the grounds assigned in the notice are too vague and general. Bribery and corruption are alleged, in general terms, to have been committed "by him, his agents, *friends and others*," &c. It is not stated what acts were done by him, or what acts by his agents; or who the agents were. The agents are not stated to have been authorized for that purpose. The law does not make the candidate answerable "for his friends and others," although the bribed voters might be disqualified; and such allegations are of too general a character, as not tending to any definite result. For instance, whether the election should be avoided, or merely the names of the bribed voters struck from the poll, under 56th section of 12 Vict., ch. 27.

See Frontenac Election, Patrick's Cases, 49, 50 and 51; the Hon. Chas. D. Day and A. N. Morin of the Committee.

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13. That the allegations in the notice, as to disqualified voters, is likewise too general. The names of the voters, and the grounds of disqualification of each, should have been stated, so as to comply with the requirements of the Election Petitions Act, sec. 70, which absolutely requires that the names of objected voters should be given, with the several heads of objection, distinguishing the same against the names of the voters objected to; and for this reason, that by sect. 82, the evidence is to be limited *to the voters objected to*, and *to the ground of objection stated*.

See also section 110 (of the Election Petitions Act).
" section 6 of 20th Vic., ch. 23, limiting the evidence to facts alleged in notice.

14. In England this rule was invariably adhered to strictly.

See Rogers on Elections, 2nd vol., pp. 114, 118.
Wordsworth, p. 304.
Dwarris on Statutes, p. 295.

15. That the Recognizance should have been subscribed before a person signing himself "Justice of the Peace for the District of Montreal." 1. Because the form requires it. 2. That his style and title affixed to his signature should establish that the place where it was executed was within his jurisdiction. This is a rule applicable to all magisterial acts, and more particularly in cases where their powers do not exist under common law, or in virtue of their commission, but under a special statute which should strictly be pursued.

Baron Parke in Gosset vs. Howard, 10 Q. B., pp. 452 and 453.
1 Deacon, p. 306.
Re Peerless, 1 Ad. and Ellis, p. 153.
R. vs. Stockton, 72 B., 527.
See 13 East, R. vs. Hare, p. 169.
Howard v. Brown, 4 Bing. 393.
Frost v. Hayward, 2 Dowl. P. C., p. 567.

16. The omission to state in the Recognizance the place where it was executed is fatal. 1st. The form given by the Act requires it. 2nd. Without it, the jurisdiction of the Justice is not shewn. 3rd. The attestation, which refers to a place not mentioned, is invalid and incomplete. 4th. The affidavit, which refers in the *jurat* to the *place* of the sureties entering into the Recognizance, without any place being therein mentioned, is valueless. This is a rule which has never been departed from in Magisterial proceedings.

1 Deacon, p. 306.
Reg. vs. St. George Bloomsbury, 28 Law and Equity Rep., p. 303.
Oke's Synopsis, 24 and 25.
Paley on Con., 157.
R. v. Hayzel, 13 East 141.
Kite & Lane's case, 1 B. & C. 115.
Reg. v. Toke, 8 Ad. & El., 233.

17. An affidavit must shew where it was made; otherwise the authority of the Justice to administer the oath would not be made apparent.

1 Petersd., p. 258, and 2 Archb., pr. 320.
1 Deacon, p. 306, No. 4 of part 2.
R. v. Cockshaw, 2 N. & M., pp. 378, 379.

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R. v. Tus. Yorkshire, 3 M. & S., 493, 494.
Cass v. Cass, 1 Dowl. & Louri., p. 678.
Boyd v. Straker, 7 Price, p. 662.
Reg. v. Crowen, 3 New Sers. Ca., p. 664.
Reg. v. Morin, 1 New Sers. Ca., 590, 593, and 594.

18. Although the Election Law states that the Recognizance may be entered into before "any Justice of the Peace," this must be understood to mean "a Justice having jurisdiction in the locality."

"The Act for the Trial of Controverted Elections, 4 and 5 Vict., ch. 58, required recognizances to be entered into before the examiner thereof or one of Her Majesty's Justices of the Peace, and the said examiner *and every Justice of the Peace* was empowered to take the same. The Statute 11 and 12 Vict., c. 98, sec. 11, is to the like effect. In the *Carnarvon case*, the recognizance under the former act had been taken in *Westminster* before *a Justice for Cardigan;* it was objected that it should have been taken before a Justice *having jurisdiction in Westminster*. The examiner, after argument, was of this opinion; and the House of Commons, acting upon it, refused to allow the parties to correct the mistake."

Bar. and Aust. Election cases, 532.
Hansard's Parl. Deb. 3 Series, Vol. 59, p. 1130.
Noted at page 19 of Macnamara's Paley, note K.

On behalf of Petitioners contesting election of Antoine Aimé Dorion, *Carter, E.* urged the following objections to the recognizance produced with the Petition of Mr. Dorion to adduce evidence in support of his election:

1. That the attestation of the Justice to the recognizance and affidavit, was not in full, he not having subscribed the same as "Justice of the Peace for the District of Montreal."

2. That the recognizance was not accompanied by an affidavit of sufficiency, as required by the 17th section of the Election Petition Act of 1851, from the sitting member.

On behalf of Petitioners contesting election of Thomas D'Arcy McGee, Esquire, *Carter, E.* urged the following objections to the recognizances produced with Mr. McGee's Petition to adduce evidence on his own behalf:

1. That the affidavit of sufficiency required from the sitting member by the 17th section of the Election Petitions Act, had not been produced.

2. That the place where the recognizance was entered into and made, had been omitted in the recognizance.

3. That the jurat to the affidavit of sufficiency omitted to show where the affidavit was sworn, referring only to a place of entering into the recognizance, whereas no such place was therein stated.

4. That the attestation of the recognizance and affidavit were defective, the Justice not having subscribed the same in full as "Justice of the Peace for the District of Montreal."

The Judgment was as follows:—

Badgley, J.—In the matter of the contestations of the Elections of John Rose, Esq., her Majesty's Solicitor-General for Lower Canada, Antoine Aimé Dorion, Esq., and Thomas D'Arcy McGee, Esq., applications were made to me in the following order:—1st. By John Rose, Esq., on the notice of contestation of his

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election by William Bristow and others, Esquires. 2nd. By Jean Louis Beaudry and others, Esquires, on their notice of contestation of the election of Antoine Aimé Dorion, Esq. 3rd. By William Bristow and others, Esquires, on their notice of contestation of the election of John Rose, Esq. 4th. By Antoine Aimé Dorion, Esq., on his answer to the notice of said J. L. Beaudry *et al.* And 5th. By Thomas D'Arcy McGee, Esquire, on his answer to the notice of contestation by J. L. Beaudry *et al.*, Esquires.

The three first were fyled on the 28th day of January last, the two last on the 30th day of the same month; and the several parties were heard on the 9th of February, upon the validity of their respective applications.

The recent Statute, 20 Vic. ch. 23, has cast directly upon the Judges of the Superior Court some very irksome duties in connection with these Election contests before they shall be deemed Commissioners to take evidence, and it is therefore important to separate their functions and to divide their duties. This will be best performed by tracing briefly the Statutory legal course of an Election petition previous to this Statute, and by applying the recent enactments to the former proceedings, as they shall present themselves for comment.

The recent Act was passed, more speedily to obtain evidence on controverted Elections, and *was to be construed as part of the "Election Petitions Act of* 1851," *which shall be construed as if the provisions of this Act were contained therein.* There are no express words of repeal of the Act of 1851 by this subsequent Act, but this latter Act is made to form part of the former by special inclusion; and the contrariety and repugnance in the provisions of the Act of 1857 to those of the Act of 1851 plainly indicate the intention of the Legislature virtually to repeal the latter, in the particulars contradictory of, and contrary to, the former.

"It is held in law, that a positive enactment is not to be restrained by inference, but at the same time that Judges must act on the maxim, *leges posteriores priores contrarias abrogant*"—2 B. Rep. 84. So, also, if two inconsistent Acts be passed at different times, the last is to be obeyed; and if obedience cannot be observed without derogating from the first, it is the first which must give way.—5 Beav. 582. And so also, affirmative words in an Act of Parliament do not repeal the provisions of a former Act, unless there be some obvious inconsistency between the enactments—9 M. and W. 777. So where the later Statute has affirmative words inconsistent with those of a former Act, the former Act must be held to be repealed—1 M. and W. 135. And Dwarris repeats the ruling, that every affirmative statute is a repeal by implication of a preceding affirmative statute, so far as it is contrary thereto; for *leges posteriores*, &c.

Now, by the Election Petitions Act of 1851, an Election Petition must be presented to the House within the first fifteen days of the opening of the Session; but shall not be received, unless when presented, it is endorsed with the Speaker's certificate of the reception of the Recognizance and affidavits of sufficiency. With that requisite it is referred to the General Committee.

The recognizance, in the meantime, is open to objections from its invalidity, its undue reception, the insufficiency of sureties, &c., all which are finally decided by the Speaker; whose decision concludes the parties, as well as the House

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itself. If it be unfavourable, *the reference is discharged, and no further proceedings shall be had.* If otherwise, the Petition and certificates are transmitted by the General to the Special Committee.

The contestant's proceedings rest upon the recognizance. His petition shall not be presented nor received by the House without the recognizance, and falls altogether without further proceedings, if the Speaker's proceedings declare it objectionable: all this manifestly makes the validity of the recognizance a condition precedent to the trial of the petition; and its insufficiency a suspension *in limine* of all ulterior proceedings.

Now, by the new act, the contestant makes direct application in writing to the Judge who is to act as Commissioner, and with that application must fyle with him, among other required documents, the recognizance and affidavit of sufficiency required by the Election Petitions Act of 1851. The Judge must necessarily pass upon all these, to establish the validity of the application; the enquiry as to that, necessarily covering the conformity of all, in form and substance to the requirements of the statute; including the regularity of the services, and the questions concerning the validity of the recognizances. Thus a prompt action in that respect is obtained, making their validity a condition precedent to the ulterior proceedings of the Commissioner, as it was by the Act of 1851, to the proceedings by the House. If the sitting member shall desire to have evidence taken by a Commissioner, he also is required to cause a recognizance to be entered into with affidavits of sufficiency, *before he shall be permitted to make his application* to the Select Committee; *and it shall not be entertained* by that Committee, *unless copies, certified by the Speaker, of the recognizance and of the affidavits of sufficiency are produced*, nor unless *these are accompanied with his own affidavit of his knowledge of the sureties, and of his belief of their sufficiency.* This recognizance is, moreover, patent to objections also, the decision whereof rests with the Committee; but it is expressly provided *that no sitting member shall obtain the benefit of the evidence in his own behalf until the required security has been perfected.* By the new law, the application of the sitting member for evidence shall be made to the Judge, and shall be accompanied with copies of the notice of contestation and of his answer, and with a recognizance and affidavits of sufficiency, as required by the Act of 1851. The validity of this application must be passed upon by the Judge under the new law, in the same manner as that of the contestant, it may be, long before the existence of any House of Assembly or of its Committee.

From the foregoing, it would seem evident that the Judge passes upon these recognizances, in the one case that of the contestant, as the Speaker, and in the other that of the sitting member, as the Select Committee; and that in neither case can evidence be taken for either party without a valid and perfect recognizance in the manner and as required by the Act of 1851. The repugnance between the two Acts in these respects is patent. But assuming that the regularity and sufficiency of these preliminary proceedings are evident, and that the appointment of a Commissioner to take evidence, as provided by the terms of the Act of 1851, is made by the Committee, what evidence is to be taken?

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1. *Lists of the voters excepted to shall be handed to the Chairman of the Committee, with the several heads of objection, and distinguishing the same against the names of the voters excepted to;* and upon these lists the evidence *is restricted to the voters objected to, and to the heads of objection against each, as stated in the lists.* Then *copies of these lists and disputed votes and statements of the parties, with a copy of the Election Petition, together with a copy of the order of the Committee, specially assigning and limiting the facts, or allegations, matters and things, respecting which the Commissioner is required* and directed to examine evidence, and report the same, must be transmitted to the Commissioner, who is *directed to proceed with the examination, and in scrutinizing the rights of the voters,* and in all matters and things *referred to him in the same course and manner, and according to the same rules as select Committees.* Now, the new law requires the intending contestant, " upon any other grounds than those appearing on the face of the return, or of the poll-books or other documents, of which the original or certified copies are by law to be transmitted to the Clerk of the Crown in Chancery, or kept by the Returning Officer," *to give notice in writing to the returned member of his intended contestation, specifying particularly the facts and circumstances upon which he intends to contest.* So, in like manner, *the sitting member may, as his answer, set forth any other circumstances* not appearing upon the return, &c., as aforesaid, *upon which he rests the validity of his election;* otherwise, *he shall not be permitted to prove any facts or circumstances on his behalf other than by way of rebutting the case made against his election.*

The manifest intention of both Acts is the exclusion of general charges and allegations, and the restriction of evidence to specific facts. The Select Committee, by the Act of 1851, makes this preparatory specific issue for the Commissioner, whilst, by the new Act, the Commissioner acts at once without any intervention by the Committee, and settles the *alleged facts and circumstances particularly specified in the terms of the Act,* upon which he is required to take evidence, long before the appointment of a Special Commitee, or any possible action by such a body. The inconsistency of the two ennactments in this last matter is evident; by the new Act the Judge Commissioner must necessarily settle the specific issue, so to speak, and not the Select Committee, all whose functions in this respect become dead and repealed.

Again, by the Act of 1851, the Commissioner is appointed by the warrant of the Special Committee, which appoints the time of proceeding in the District of the controverted election, and empowers him to act as such Commissioner. But the new Act casts directly upon the Judge the duty of acting as such Commissioner without any warrant of any kind, and simply upon the application of the contestant or sitting member. The inconsistency between the two laws in this last respect is also apparent.

In all these particulars, therefore, relating to the entry and reception of the Recognizances in the first instance, namely, by the contestant at the time of his application and not at the presentment of his petition to the House; the establishment of its validity by the Judge Commissioner and not the Speaker;

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the mode of establishing the facts and circumstances to be supported by evidence; and the appointment of the Commissioner; the provisions of the new Act are inconsistent with and repugnant to the Act of 1851, and must therefore prevail over the provisions of that prior Act; unless it can be presumed that the Commission is to be perfected without any available security whatever for the payment of the expenses thereon, that the particular specification of facts and circumstances is to be settled by the parties themselves, and that the Commissioner must proceed with all sorts of facts and circumstances, general and special, upon all sorts of general charges, until he shall be stopped by the statement of specific facts transmitted by the Special Committee. The new law contemplates the completion of the evidence by the time of the first action of the Special Committee; and in what manner can that object be attained, if it does not rest with the Commissioner to act judicially in the cases above referred to?

Considering therefore the new law in those particulars contradictory to, as well as inconsistent with, the former law, I am constrained to abide by the new law, which has been examined with care and circumspection. Under its provisions the action of the Judge is simply judicial, until the validity of the documents, proceedings and application shall be determined upon by him, whilst it is evident that the means at hand for attaining that object can only be found in the observance by the contestant and sitting member, of the Statutory provisions and requirements which the Acts have declared to be necessary for sustaining proceedings upon the matter in contest; more especially those legislative requirements in which *the intention of the Legislature* as declared by the 155th sect. of the Act of 1851, *has been expressed by negative as well as affirmative terms,* and which that Act has so carefully guarded from interference, even by the House of Assembly itself. Amidst these are to be found the prominent *defects and omissions* which appear upon the face of some of the documents fyled with several of the applications, and which must necessarily subject those documents to the *peine de nullité.*

It is my duty to add that the Act of 1851 directs the General Committee to bracket together *all the Election Petitions* concerning the same election or return, which the law declares shall afterwards be dealt with as one Petition In the matter before me I have five different applications proceeding out of the same election and return, and I am informed that a sixth is in other judicial hands. My impression is, that they must be dealt with in the terms of the Act of 1851, as one. The contrary has been strongly urged upon my consideration, but I entertain no doubt about the correctness of my conviction, of all these applications forming one case only. No difficulty can occur, because, of course, the evidence will be proceeded with, upon those requiring evidence, with a view to the despatch of business and the convenience of the procedure.

It only remains for me to proceed with the examination of the applications, and of the objections which have been urged against them, either by separate propositions, or in the answers of the parties. The objections which affect the validity of the documents and proceedings, as most material, will be first disposed of, commencing with the recognizances and affidavits.

The 10th Section of the Act requires, that the recognizance shall be entered into and shall be in the form or to the like effect as in the schedule A (1), with such alterations as may be necessary to adapt such form to the circumstances of the case. These alterations manifestly have reference to mere formalities, but not to substantial requisites. The recognizances with the application of Mr. McGee and others, contain no mention of the place of their execution, which indication is required by the statutory form given, and by the general run of authorities in this respect. Now, the recital in the recognizance is as follows,—" On, &c., before me, J. A. Labadie, of the City of Montreal, Esquire, Notary Public, and one of Her Majesty's Justices of the Peace for the said District of Montreal, came, &c."; and in Jurat,—" Sworn by deponent at the time and place of his entering into the said recognizance before me." Signed, " J. A. Labadie, J. P." But the recital in the document of the Justice being such for the District of Montreal is no attestation of the execution of the instrument at any place within the district, and it is not inconsistent to suppose that it was made out of the jurisdiction of the Justice. The mere allegation in the body of the instrument of a person being a Justice does not qualify him as such; a Justice of the Peace is one having jurisdiction according to rules of common law, or by statute. To deny that this must appear on the face of the proceedings, is to call in question one of the most important rules of law. To use the language of an eminent Judge:—It appears to me, on general principles, it has been found necessary to introduce that form, for the purpose of shewing that the order or act was in a proper place. The attestation, which refers to a place of execution not mentioned at all in the body of the instrument, is not according to the requirements of the statute or of law. Moreover, the style and title of the Justice recited in the attestation do not for or in themselves constitute an indication of the place at which the instrument was executed; nor is his signature accompanied with the form of the statute—" N. M., Justice of the Peace for, &c."; it is simply "——, Justice of the Peace," or " J. P." The omission of these substantial requirements is fatal to the recognizances, and renders them invalid, because it is in violation of a rule necessarily attaching to all magisterial acts, for the purpose of clearly shewing the exercise of their jurisdiction on parties within their own limits, and more particularly in cases where these forms in the particular in question do not exist under the common law, or in virtue of their commissions, but under a special statute, which must be strictly pursued. The law upon this point is as follows:—" For in the case of special authorities given by Statute to Justices and others, not arising out of this ordinary course of the common law, the instruments by which they act ought, according to the decisions, to shew their authority on the face of them by direct averment or reasonable intendment." 10 Q. B. pp. 452'3. The place also where the information is stated to be sworn is necessary to be mentioned in order to shew that the Magistrate at the time was acting within his jurisdiction. Authorities might be multiplied upon this head. It is sufficient to say " that we are to understand by the word *Justice*, a Justice having jurisdiction according to the rules of common law, or by Statute"—and upon this it is held that the jurisdiction must be shewn on the face of the instrument. Justice Coleridge observes:—" I think

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the rule is a good rule, and that it is right that the jurisdiction of a Judge with limited power should be shown on the face of the particular instrument; and if this is not done, it would not be known that the matter was not *coram non judice*, and it is not fitting that jurisdiction should be established one way or the other by parol evidence." 28 English Law and Eq. Rep.

The affidavit of sufficiency is equally defective, inasmuch as it purports to have been sworn at the place where the recognizance was entered into, no such place having been shown; and being moreover not in conformity with the form of attestation given in the Statute, by omitting to declare the Justice to have been a Justice *for the District of Montreal.* "It is a general rule that the place where the depositions are taken should be specified in the Jurat, as it affords a medium through which the Court may, by referring to their records, ascertain the authority of the person before whom it purports to have been sworn. The objection cannot be got over." Petersdorff, vo. affidavit; so also 2 Deacon, &c., &c. The Act of 1851 allows the recognizance to be entered into before "any Justice of the Peace," but this must be understood and can only mean a Justice having jurisdiction in the locality; so held by the House of Commons in the Carnarvon case. Note K., Paley on convictions, p. 19.

The recognizance of Messrs. Bristow and others, applicants, and of Mr. McGee, applicant, are therefore invalid, and must be set aside.

In the case of the application of Mr. Dorion, the recognizance and affidavit of sufficiency are both in form as to substance, and the place of execution is stated, but they are both bad in form as to the attestation, under the statute. It has been objected moreover in this case, that the Act of 1851 declares that *no application* by the sitting member for taking evidence *shall be entertained*, unless the recognizance and affidavit be accompanied with his own affidavit *that he knows the sureties and believes their sufficiency* as stated. This has not been done, and the defect is fatal to the entertaining of his application.

I have omitted to state that the copy of the notice served by Messrs. Bristow and others upon Mr. Rose, and produced with their application, is defective, inasmuch as it is not sufficiently sworn to: a copy only of the affidavit of service is appended to it,—the original of which is not produced,—and *that* copy of affidavit is without legal verification. This is a fatal omission, because the Act of 1857 requires the copy to be sworn to: and though it prescribes no mode or form for such swearing, the Judge cannot dispense altogether with the requirement of an oath, as the proof of its correctness as a copy of the original served. The copy, therefore, is insufficient.

All the applications, in more or less degree, neglect the requirements of the law in the particular specifications of facts and circumstances, which should be set out, to bring them within the terms of the statute. The more general terms of the Act of Parliament of 1849 have been embodied in the notices and answers; but both the Acts of 1851 and 1857, as well as the cases of Parliamentary decisions, require, the statement with certainty and precision of the persons charged, as guilty of the facts with which they are chargeable. Dwarris says: "At the same time, the facts intended to be relied on in evidence should be distinctly alleged, that the party who is to be affected by

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them may be sufficiently apprised of the charges he is called upon to disprove. It is not competent to enter into evidence of other charges not alleged; or to impeach other votes, not particularized"; and Rogers says the reasons is, "in order that the party whose intent it is to disprove such facts, may have sufficient notice of the charges made against him." Wordsworth says that the precise facts are required to be stated, "that the other party may not be surprised by the proof of matters of which no previous intimation had been given." The authorities, from English practice, are in strict conformity with the the terms of the Provincial Act; and although the wording of the statute may be given, yet the act in particular done by the party offending, must be alleged, to enable him to meet the charges. Macnamara's Paley sums up the whole: "when an Act describing the offence, makes use of general terms which embrace a variety of circumstances, it is not enough to follow the words of the statute, but to state what particular fact prohibited has been committed." This must be evident when it is considered that the Election Law of 1849, is, in these respects, a penal law, and as such must be construed strictly; every charge made, must therefore, be in terms of the Act, and effect must not be given to a penal statute unless the offence charged comes within the very words of it. Under these circumstances a large portion of the averments and grounds of complaint stated in all the several applications will be rejected, and the evidence confined to the facts and circumstances specially particularized according to the statutes. This will apply to the charges of corruption and others which are essential.

The evidence will therefore be confined to the particular facts and circumstances that are not obnoxious to rejection upon the application of John Rose, Esq., and J. L. Beaudry and *al.*, Esquires.

It has been stated in some newspapers that the Judges had concurred in the action adopted by Mr. Justice Mondelet in taking the application made to him into *delibéré*. The Judges had unanimously agreed in opinion that under the Act they could not appoint deputies to act while they were performing Commissoners' duties; but in all other respects the Judges individually acted upon their own convictions. Mr. Justice Mondelet acted upon his, without influence or suggestion from his colleagues, and I acted upon my own, alone. I refer to these newspaper matters, because the statements contained in them as regarded myself are not true. I am answerable for my own opinions, but am unwilling to submit to newspaper imputations or criticisms for the opinions or actions of others.

Carter, E., for John Rose, Esquire, and for Beaudry et al.

Dorion, A. A., in person.

Devlin, for T. D'Arcy McGee, Esquire.

DISTRICT OF MONTREAL.

In the matter of the Controverted Election for the County of Argenteuil.

SYDNEY BELLINGHAM, Esq.,

Sitting Member,

AND

JOHN J. C. ABBOTT,

Petitioner.

MONTREAL, 19TH FEB., 1858.

Coram Badgley, J.

1. The French and English versions of the Provincial Statutes have equal force. When they directly contradict, they destroy each other; but if one be ambiguous only, the other may be resorted to for explanation of the intent and meaning of the law.

2. The words "Superior or Circuit Judge" used in the Controverted Elections Act of 1857, mean a Judge of the Superior Court, or of the Circuit Court.

3. An Affidavit appended to the copy of notice fyled with the Judge; containing the name and description of the deponent, and all necessary and material averments; purporting by the jurat and by the signature thereto, to have been sworn before a Justice of the Peace and an officer of the Court, and stating in the conclusion of it that the deponent has signed it; forms a sufficient compliance with the requirement of the Statute of 1857, that such copy shall be "sworn to;" although the signature of the deponent was inadvertently omitted.

4. The contestant is not bound to produce with his application a copy of a second answer served on him by the sitting member, after the delay allowed by the statute for such service had expired. And such answer, if produced by the sitting member, will be rejected from the record.

5. The Judge Commissioner has the power of limiting the evidence to be taken, to such averments as have been legally made by the parties in accordance with the statute; and upon an answer by the sitting member purporting to be a protest against answering, and containing no sufficient substantive averment of any facts upon which he could rest the validity of his election, he will be restricted to evidence in rebuttal of that of the contestant.

6. The Judge Commissioner acts judicially, in the examination of, and decision upon, the validity of the application to him to take evidence, and upon the matters and things incident to such application.

This was an application made by the Petitioner, on the 28th of January last, for an order to take evidence in this matter; and with it the Petitioner produced the documents required by law. On the 8th of February the parties were heard upon the validity of the application, pursuant to an order made by the Hon. Judge, on the 29th of January. But before proceeding to the argument, the Judge remarked, that a paper in the nature of a recusation against his acting had been presented to him; the grounds of which were that he had been a partner, and still was a co-speculator, with the contestant. If true, these were not sufficient grounds of recusation; but, in reality, the facts were that four years ago he had ceased practising as in partnership with the contestant; and that at present the only matter he knew of in which they had a joint interest, was that they were joint proprietors of a piece of ground, of the value of four or five hundred pounds. This formed no reason for recusation, and he should therefore proceed with the case.

The objections of the sitting member to the granting of the application are so fully detailed in the remarks of his Honor in rendering judgment, that they will not be further adverted to here. In support of them it was contended for the sitting member, by

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Burroughs. That the Judge receiving the application had no jurisdiction in the premises; as he was not a Judge residing or having jurisdiction in the electoral division or district in which the election was held. That there was at present no Judge who possessed the requisite qualifications to act as Commissioner in this case.

That the applicant had not produced with his application the copy of the sitting member's answer, served upon him on the 1st of February; and that, therefore, his application could not be granted.

That the applicant had not produced with his application a copy of his intended election petition. (*Badgley, J.* There was a copy of petition produced —it must be among the papers.) The document purporting to be such copy has no authenticity except the last sheet of it; as that alone is signed and certified to be a true copy by the Petitioner, and the others are not attached to it. (The counsel here opened the folded paper purporting to be a copy of petition, and shewed the Court that the leaves were not attached together.) (*Badgley, J.* My impression is that the leaves were attached when I received it; but in any case, I have read it through; it is a connected narrative with catchwords at the bottom of each page which are repeated in the next; and it is a copy of an election petition which the Petitioner produces, and asserts in his written application, to be a copy of that which he intends to present to Parliament. Whether it is really a true copy or not is for Parliament to decide, and can only be ascertained when the original is presented. You need not argue this objection any further.)

There is no affidavit to the copy of notice produced, that it is a true copy of the original notice. The writing at the foot of the copy produced, is not signed by the party making it, and therefore can have no force, validity or effect, as an affidavit. And even if that omission were to be considered only as an irregularity, and not fatal to the document as an affidavit, the assertion by the deponent with which it concludes, "and I have signed," is false, for he did not sign. If, therefore, a portion of the statement contained in the affidavit is palpably false, no dependence can be placed on the remainder. But, in reality, there is nothing to identify the person who swore to the affidavit in any way. The signature is the only means of identifying him, and that is wanting. (*Badgley, J.* The deponent is described as Adolphe Germain, of the city and district of Montreal, gentleman. Does not that identify him? If the affidavit had omitted the name and description of the party sworn, merely saying, "I the undersigned being duly sworn," and there were no signature, there would then be no means of identification.) Even if that distinction existed, which was denied, there was nothing to shew that the deponent was a "literate person." The signature was the only evidence that he was such a person, and in its absence the Court could not presume him to be so. (*Badgley, J.* He swears that he himself compared the copy served, and also this copy, with the original. Does not that afford evidence of his being a literate person?)

The sitting member had objections to urge to the notice of contestation and other documents produced by the Petitioner; but as those now urged were only preliminary, the others would be reserved till these were disposed of. He, how-

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ever, did not consider that the Judge had any right to act in the matter in a judicial capacity, being merely a Commissioner, and in no respect invested with judicial functions. (*Badgley, J.* It will, perhaps, be better for you to urge all your objections, for there cannot be several hearings in the matter; but in that respect you will of course act as advised. You must consider, however, that I have some judicial functions, or I could not even adjudicate upon your objections; and would be obliged to grant the application without scrutiny.)

Carter, for the Petitioner, contended, that the objections urged were insufficient and frivolous. Upon the first he would not dwell, as if any doubt existed as to the Judge who had jurisdiction given him by the statute in its English version, the French one removed it, by saying, *un des Juges de la Cour Superieure;* and the Judges of the Superior Court resident in Montreal had jurisdiction over the district in which the County of Argenteuil was situate.

As to the second objection, which asserted the non-production of the sitting member's answer of the 1st February with the contestant's application, it was true enough in fact; but the pretension that the Petitioner was in any respect bound to produce that answer, or in any way to notice it, was utterly groundless. The Statute of 1857, both in positive and negative terms, rigorously restricts the service of answer by the sitting member, to a period within fourteen days from the service upon him of the Petitioner's notice of contestation; and it does not contemplate the service of two answers. Now, the notice of contestation was served on the 16th of January. On the 27th of the same month, the sitting member served upon the contestant an answer which he himself characterizes as his "answer to J. J. C. Abbott's notification;" and the contestant on the the 28th of January produced and fyled with his application, the copy of answer so served upon him. The fourteen days limited by the Statute expired on the 30th of January; on the second day after which, namely, on the 1st of February, *sixteen* days after the notice was served, the sitting member thought proper to serve on the Petitioner another answer; and it is this last that he complains the contestant did not produce. Not only was the contestant free from all obligation to produce it, but it cannot be permitted in any way to form a part of the record of this contest.

The third objection is simply not true in fact, and requires no notice.

The last objection urged, appears to be based upon the erroneous supposition, that the Statute requires a formal affidavit to be appended to the copy of notice fyled with the Judge, and that the omission of a signature to the affidavit is an irregularity entirely fatal to its validity. Both of these propositions are groundless. The Statute requires the Judge to be possessed of a copy of the notice of contestation, to guide him in his investigations of the matter before him; and this copy, it is provided, shall be sworn to by the person who served the original. The service of the notice must be proved, the Statute says, by *an affidavit sworn to* before certain particular officials, and containing certain averments, which it specifies. The reason of such special requirements with regard to proof of service is obvious. The affidavit of service within a particular time, at a particular place, or upon a particular person, is the basis of the whole contestation. It is therefore of the utmost importance that it should be invested

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with every character of solemnity. On the other hand, the Statute, when describing the mode of establishing the correctness of the copy, only prescribes that it shall be "sworn to by the person who served the notice." No affidavit, or form, or description of swearing is prescribed; nor any official indicated before whom the oath is to be taken; and the reason of this also is plain. The oath is only required to satisfy the Judge, *primâ facie*, that the copy given him is correct; and if it be not, the fact is subject to instant and easy verification by the production by the sitting member of his copy of the same document. In reality, no written oath or affidavit whatever, is required to establish the correctness of the copy. If the party who served the notice had appeared in person before the Judge, and sworn *vivâ voce*, to its correctness, the requirements of the Statute would have been amply satisfied. But the affidavit, considered as a formal affidavit, though irregular for want of the signature, is not fatally so, and is valid. The true test of its validity is the liability of the swearer to be indicted upon it for perjury if false, which liability undoubtedly exists. The person who takes the oath, the facts he swears to, and the official who receives the oath, are all shewn on the face of this affidavit; and these are all the circumstances necessary to constitute a valid oath, the breaking of which would be perjury. If he had signed, his signature need not be proved on a trial for perjury, but only the signature of the official receiving the oath; and that official in this case is an officer of this Court, whose authority and jurisdiction its Judges will recognize. But even if the omission had been the absence of a signature to the jurat, which is of infinitely greater importance than the signature to the affidavit; a Court of Justice would at any time permit the correction of such an inadvertent omission, by allowing the signature to be appended; if it were satisfied that the oath was actually taken. That was done by the Superior Court at Montreal in regard to a deposition (which is of a more solemn and formal character than an affidavit) the jurat to which the Prothonotary had omitted to sign. (No. 2617. Berthelot *vs.* Chisholm & Laberge, 25th May, 1855.) An Election Committee would do the same; or would receive evidence to prove that the oath was actually taken as it purported to be, and that in a much more important matter than this affidavit. (County of Halton election, Patrick, p. 60.) To avoid the possibility of difficulty on this point, the Petitioner has fyled the affidavits of Mr. Belle, the Commissioner of this Court, who received the oath in question, and of Mr. Germain, who took it; to shew that it was actually taken as it purports to have been.

It only remains to notice the character of the answer of the sitting member, which is such as to render totally unnecessary, and even absurd, the taking of any evidence upon its allegations; and in fact would not in any respect warrant the adduction of any testimony whatever.

The Statute allows the sitting member to set up his answer, "any facts or "circumstances not appearing upon the face of the return, or of the Poll Books, "upon which he rests the validity of his election," but leaves it wholly optional with him to do so; giving him, in the absence of such answer, the privilege of going into evidence in rebuttal of that of the contestant. In lieu of availing himself of the right of answering thus accorded to him, the sitting member, by hi

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answer, has taken the unnecessary course of protesting that the Petitioner has no right to demand or require from him an answer (a right which the contestant does not claim nor pretend to); and then, as grounds for such protest, sets up a number of allegations which compose the remainder of the answer. By its purport he protests that it is impossible to answer the contestant's notice, except by an exception to its sufficiency, and continues, and lastly, "Protesting that you "have no right to demand or require an answer to your said pretended notice "of contestation for the following among other reasons :—

"1. Because, &c.," and so on, stating several reasons.

The answer does not in any respect pretend to set up any fact or circumstance whatever, upon which the sitting member could rest, or upon which he therein professes to rest, the validity of his election. Every substantive assertion contained in it, is made, only as affording a reason why the contestant should not demand or require an answer to his notice.

If the answer could be strained to a construction in favor of the sitting member, and thereby held to be intended to assert certain substantive facts, as grounds for disqualifying the Petitioner from contesting; they are insufficient for that purpose, upon the broad ground that the contestant petitions as well in his quality of elector as in that of candidate, and in the former capacity no misconduct would disqualify him from contesting. But if they should be held to be intended to be asserted as grounds for disqualifying him from taking his seat, in place of the sitting member, they are also insufficient for that purpose. It may be questioned indeed whether any such disqualification exists under the Statute, as it is too grave a penalty to be created by implication, and none is directly enacted; but apart from that question, no offence or breach of the election laws is stated in such a manner, as to bring it within the meaning of any of the prohibitory clauses. There is enough to shew that these clauses are aimed at, and that is all; for the acts alleged can scarcely be said to be identical in any single respect, with those forbidden by the Statute.

The remarks made by His Honor in rendering judgment, on the 19th February, were as follows :—

Badgley, J.—This is the first in order, of the election applications which have been presented to me, and it was made by John J. C. Abbott, Esq., of the City of Montreal, as an elector and as a Candidate at the late election for the County of Argenteuil. The application was accompanied by copies of the documents required by, law together with the recognizance, and affidavits of sufficiency of the sureties.

The contestant and returned member appeared before me on the 8th February instant, and were heard upon the validity of the application and proceedings, in obedience to my order of the 29th of January, for that purpose; and the returned member then took exceptions in writing to the application, and thereby prayed for its nullity and total avoidance, upon the following formal and technical grounds, which, as most convenient, will be stated and disposed of separately in the order of their statement.

The first objection sets out that the contestant's application under the 20th Victoria, c. 23, sec. 4,—"is not addressed to the Superior or Circuit Judge in "Lower Canada residing or having jurisdiction in the electoral division, or in

[illegible]verted [illegible]lections. [illegible]nty of Argenteuil.

" the District in which such controverted election was held," &c., and is, therefore, informal and void.

The objection rests upon a verbal inaccuracy in the English text of the 4th section, which directs the application to be [illegible] "[illegible] *the Super[illegible] or Circuit* " *Judge [illegible] Lower Canada residing,*" &c, [illegible] text has " *un Juge de la* " *Cour S[illegible]perieure ou de Circuit dans l[illegible] Ba[illegible] Canada, resid[illegible]* &c. Both these texts have received the approval and [illegible] of the thre[illegible] of the Legislature and have been declared to be l[illegible] they are [illegible] authority, and where [illegible] absolute contradiction between them exists. the verbal inaccuracy or omission of the one, [illegible] be supplied by the correctness of the other. In this matter the English [illegible] is supplemental to the French text, "*un des Juges de la Cour Superieure,*" &c., and the [illegible] of the applica[illegible]on to "*any one of the Honorable the Ju[illegible] Her Majesty's Superi[illegible] Court for Lower Can[illegible], resident [illegible] the district of Mo[illegible],*" [illegible] conformity with the [illegible]tatute.

A[illegible] the time of this application the office of Circuit Judge had been abolished [illegible] legislation; no such judicial functionary existed in the district of Mon[illegible] [illegible] the Judges of the Superior Court had therefore jurisdiction over the [illegible] which this controverted election was held. It would be idle to waste time up[illegible]n this objection, which is obviously futile and needs no further remark.

The second exception objects—" that the contestant had not produced and " filed the answer of the sitting member served upon him, the contestant, on the " first of February instant."

The Statute requires the contestant to serve upon the returned member, within fourteen days from the declaration of the election by the Returning Officer, a copy of his notice of contestation, which shall " specify particularly therein the " facts and circumstances upon which the election is intended to be contested. " Within 14 days after such service of the notice, the sitting member shall serve " his answer thereto, admitting or denying the facts and circumstances alleged " therein respectively, &c.;" six days from the service of the answer—or from the time in which it should be served, the contestant's application must be made, to become effectual: the statute prohibiting in the 4th section the reception of the application at all, unless made within that specially limited period of time, and unless also it be accompanied with the answer; for in a proviso to that enactment it is declared, "that the application shall be held void, if the contes- " tant shall *wilfully* omit to file the notice in answer, if any, of the returned " member."

The dates of the proceedings, as noted, are as follows: the result of the election was declared on the 4th of January; [illegible] service of notice of contestation was made on the 16th of the same mont[illegible] answer of the returned member, indorsed "*Answer to J. J. C. Abbott's n[illegible]on, copy for J. J. C. Abbott in th[illegible] matter of the Argenteuil El[illegible]*," [illegible]d on the 26th, and the service th[illegible] was made on the conte[illegible] the 27th of the same month. On [illegible]lowing day, the contestant's [illegible]on was formally made to the judge, accompanied by a copy of the noti[illegible] the answer aforesaid, together with the recognizance and affidavits pres[illegible] the statute. On the 29th January

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a judicial order was made for the hearing on the 8th of February, and was served on the returned member on the 30th of the same month.

This reference to dates is all essential to fix the proper proceedings within the statutory periods of limitation, inasmuch as on the one hand any lapse or oversight by the contestant would be fatal to his application, whilst on the other, such laspse would, by the terms of the statute, deprive the returned member of certain privileges in the adduction of evidence.

Now, the Contestant did, in fact, on the 28th of January and within the limited period provided therefor by the 4th section, make his application; and did produce and file therewith the required copy of his notice, and the answer thereto of the returned member, thereby exhausting absolutely the statutory requirements enjoined upon him. His application in this respect, therefore, was in strict conformity with the statute, and cannot be invalidated, because the returned member thought proper to frame and serve a second answer on the 1st of February, after the time limited by law for that purpose. The law declares the service of the 1st of February made out of time, and relieves the contestant's application from being held void, for any *wilful omission* on his part to produce and file with his application on the 28th of January, a document which had no existence, and of which he could have no knowledge, until the 1st of February. Under these circumstances of law and fact, this second ground of objection is equally futile and untenable as the first.

The third ground objects "that the Contestant did not, at the time of his application to the Judges of the Superior Court, who, he declares, had no power "or authority in the matter, produce, and file with any Judge, a copy of his intended Election Petition, and a copy of his notice, sworn to by the person who "served the same.

The omission to file the copy of the Election Petition would, if true, invalidate the Contestant's application; but as matter of fact, that copy accompanied the application made on the 28th of January, and was noted as produced and filed on that day. The allegation in that respect is therefore not true in fact.

The remaining portion of this exception, viz., the non-production and filing with the application *of the copy of the notice sworn to by the person who served the same*, would also, if founded, be fatal to the application, and entail its refusal.

It must be observed that the statute merely requires the copy of the notice, fyled with the Judge, to be sworn to; but indicates no form or manner of observing that formality, except that it requires to be *sworn to by the person who served the same*. The statute has, however, ordered in express terms in what manner the service of either notice or answer shall be made; "that the service "of the notice or answer shall be made by delivering a copy of the said notice "or answer to the party to be served in person," &c.; "that the service must be "made by a literate person;" and as to the proof of such service, it enacts, "that "it shall be proved by affidavit, sworn to before some Justice of the Peace, &c., "in which shall be stated the time, place and manner of such service."

These statutory requirements apply solely to the service, for the information and guidance, and in the interest of the parties themselves and also for the public interest: and they are thus particular, because without the service there could be

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no contestation on matters not appearing on the return or on the Poll Books. The service of notice is the foundation of the whole of the proceedings. On the other hand, the requirement that the copy of the notice should be "sworn to," and by the person who should serve the same, is manifestly within the attributes and cognizance *of the Judge* for his guidance and action in the reception of the application; for his adjudication of its validity; and for his information in the taking of evidence afterwards. Here the service is not objected to, and must therefore be held to be considered unobjectionable by the returned member, no irregularity or omission in that respect having been alleged.

It appears not to be denied that a copy of the notice was produced and fyled with the application on the 28th January last, and was then judicially noted with the other documents produced. At the foot of that copy is written an affidavit sworn to before a Justice of the Peace and Commissioner of this Court for taking affidavits, which purports, and is averred to have been made by the deponent; stating therein his name, residence, and quality, and the time, place, and manner of the service, and at the same time averring, *that the deponent compared the copy so left*, (that is, the copy served upon the said Sydney Bellingham,) *and also the foregoing copy*, (that is, the copy produced to the Judge,) with the said notice, (that is, with the original notice), *and that each of the said copies was, and is, a true copy of the said notice.* All these averments are declared in the Jurat subscribed on the affidavit by the Officer, to have been sworn to before him on the 28th January last.

The terms of the exception and the argument before me appear to indicate an informality in this affidavit, as the sole point in difficulty as to this copy being a sufficient sworn copy within the Statute, the signature of the deponent to that affidavit being wanting; and this is taken as the ground upon which the exception denies that the copy was sworn to. As a merely formal or technical point of law, the true test of this objection lies in this: can perjury be assigned upon the averment above referred to, contained in the affidavit in question. ? The law declares *that the gist of the crime is the taking of the false oath in the particular complained of.* And it was held in Morris' case by Lord Mansfield, and Justices Dennison and Wilmot, "That, as to the actual swearing, it is "in the nature and course of business quite necessary to take the *jurat* attested "by the proper person before whom the oath ought to be taken, as sufficient "proof of its being actually sworn by the person, so far at least as to put him "to show, or to raise a presumption, that he was personated." So "in ordinary cases, whether the perjury is assigned upon an answer in Chancery, or an affidavit, the proof of the handwriting of the person who administered the oath is sufficient proof that the affidavit or answer was sworn; and if the place at which it was sworn is mentioned in the *jurat*, that also is sufficient evidence that it was sworn at that place." Rex. v. Spencer, 1 C. p. 260. *So, when an affidavit is made of any material matter, the party making it is indictable for perjury, although the affidavit was not used, and even was not receiveable in the Court, because of some formal regulation not being complied with, for the perjury is complete at the time of swearing.* White's case; Hailey's case. These authorities are conclusive upon the point, and sustain the opinion I have formed on

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the subject. The perjury is not in the subscription of the signature by the deponent to the affidavit, but in the false averment; it is true, the signature is required by a practice rule of the Court of Chancery and of other English Courts, only for the convenience of the more perfect identification of the person chargeable with the perjury, for which purpose the averments of the affidavit are sufficient. This copy of notice is for the information of the Judge, and the *jurat* is signed by Mr. Belle, who, besides being a Justice of the Peace, is a Commissioner of this Court for taking affidavits, is and as such must be judicially known and recognized by me. In this respect the question of the sufficiency of this swearing differs essentially from that in the Montreal cases, upon the sufficiency of the affidavits to recognizances, in which latter the greatest strictness is required; the form of the jurat and of the signature to them being regulated by the Statute, and the authority thereby given being exceptional both by Statute and Common Law. Full credence in this case therefore, must be given to the jurat of the officer; the copy produced must be held to be the copy "sworn to," which the Statute requires, and this third ground of objection must be also declared insufficient. My opinion in this respect is concurred in, as matter of law, by my colleagues of the Superior Court for this district.

The returned member having declined to take any further objection, it only remains to adjudicate upon the application, which is declared to be valid; and to fix the time and place for proceeding with the evidence.—Previous to this declaration however the Contestant's objections to the answer produced and filed with the application, must be briefly noticed. In itself the answer is in form and substance, a protest against answering at all, and sets out specific grounds and reasons why the returned member should not answer. It has been prepared in utter ignorance of the requirements of the statute, and at best can only be treated as a mere general denegation of the facts and circumstances contained in the notice. If the grounds or reasons given for declining to answer could possibly justify their reception as indicating in themselves facts and circumstances which the returned member should have particularly specified in support of his election, they are valueless for that purpose, and do not meet the requirement of the statute in that respect. This first answer, therefore, will be considered only as a general denegation; the second, or supplementary answer produced on the 9th of Feb., was served two days beyond the time limited by the statute; it is, therefore, not admissible upon the well-known principle of law stated by Dwarris,—*wherever a statute imposes terms, and prescribes a thing to be done within a certain time, the lapse of even a day is fatal, even in a penal case; because no terms can be admitted but such as directly and precisely satisfy the Law.* This latter document cannot give the member returned any of the privileges which belong to an answer properly constructed and timely served, setting out in the language of the 2nd section,—"Any other facts and circumstances upon which he rests the validity of his election." In such a state of the proceedings the statute itself expressly decides "that the returned member shall not be permitted to prove any facts and circumstances in his behalf, other than by way of rebutting the case made against his election." The final order for evidence will be formally entered and recorded, however, on Monday next. I have now only stated opinions which offer themselves at the present time.

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Before concluding these remarks, I may be permitted to observe, that the inconveniencies and obstructions caused to suitors and the public in general, by the operation of this Law in Lower Canada, cannot be compensated by the electoral [illegible] expected to be obtained from the principle embodied in the Act [illegible] have been carelessly and imprudently formed in respect to [illegible] the Province. Intelligent legislation and political wisdom have hitherto united in elevating the Judicial Office above the angry turmoil of political strife; and by rendering it independent of public and private influences, have secured its integrity and retained it in public respect. This new Act reduces the Judge to the position of an Election Commissioner; brings him into direct and personal collision [illegible] and hustings partisans and parties, still warm from the excitement and heat of a recent election contest; on the one hand with the bitterness of the returned member fearful of the loss of his seat notwithstanding all his toil and expense, and on the other with the eagerness of the contestant desirous to occupy his place; and finally compels the Judge himself to examine the witnesses produced without any assistance from Counsel.—All these necessarily expose the Judge to turbulence, it may be ruffianism, in his scrutiny of the acts and votes of parties, partisans and voters, not unwilling, if excited or required to oppose authority.

Not only judicial independence is jeopardised by such a Statute, but the most conscientious discharge of his duty will not relieve the Judge from silent suspicion or avowed charge of partisanship. The judiciary should not be exposed to such molestations. By this act, moreover, the Judge has no voice in his selection as commissionner, cannot relieve himself from the application to himself, but must act under the annoyances above detailed, and under the direction of the Select Committee, who may compel him in his own person to submit to their irresponsible opinions and determination, upon his actions in his office of Judicial Commissioner.

His best efforts to carry the law through, and to return to the performance of his paramount duties may be thwarted by obstructions and evasions of the sitting member or by intemperate threats and denunciations of the action of a Select Committee, as attempted in this case, for the purpose of intimidating him from the performance of his duty and from obedience to the law, in proceeding with the matter of contestation and with the evidence to be taken.

Under all these circumstances, this Act cannot but be pernicious in its effects upon the Judiciary, injurious to the Administration of Justice, and productive of delays and interruptions to the business of the Superior Courts. In practice, little advance in time can be gained so far as the first Session is concerned, at least under the circumstances of time at which the last election took place. The Statute allows 34 full days to elapse after the election, before the application of the contestants need be made; nay, many similar applications may be made to the same Judge, who must receive them, nor can he thereafter transfer them to any of his colleagues. The applications therefore can only progress in the order in which the applications themselves are produced, and the Statute compels the Judge to continue the case in hand without interruption until its close. What that period may be, it is manifestly impossible to foresee; and as mani-

festly impossible will it be, to appoint an early time for proceeding with a second contestation until the termination of the first.

The application of the Statute works differently in the two sections of the province; in Upper Canada, the Counties have each a Judge who could have but one petition; in Lower Canada the Judicial Districts embrace several Counties, and one Judge may have several applications with all the inconveniences consequent thereon.

Viewing the marks of haste and inconsiderateness, not to say ignorance, with which the Statute abounds as regards Lower Canada, it does not appear to me to possess the means for practically working out advantageously the principle which it professes to enforce and encourage; but at the same time whatever doubts I may have in my own breast, with respect either to the expediency or policy of the law, yet as long as it continues in force I am bound to see it executed according to its meaning; and I have therefore within as short a period as the interests of the parties appeared to justify, proceeded in this contestation.

Wednesday, the 3rd of March, was named as the day for taking evidence at St. Andrews.

Burroughs, for the sitting Member.

Carter, for the Petitioner.

MONTREAL, TUESDAY, THE 23rd DAY OF FEBRUARY, 1858.

Coram Badgley, J.

Badgley, J., observed: Before proceeding to record and register his judgments definitively upon the validity of the contestant's application, and of the exception taken thereto by the sitting Member, heard a short time since, he was compelled to notice a document signed by Mr. Bellingham, and put into his hands at Chambers a few days ago by Mr. W. E. Holmes, advocate of this city, acting for Mr. Bellingham, after the parties had been heard upon the Judge's order to that effect, and whilst the matter was under judicial consideration. He had issued a rule ordering the sitting member and Mr. Holmes to appear before him to answer respecting the document on this day.

His Honor then handed down the paper to Mr. Holmes, Mr. Bellingham not being present, and wished to know from him if Mr. Bellingham desired that it should be formally received by the Judge. Mr. Holmes having declared that he presumed that to be Mr. Bellingham's intention, the paper was returned to the Judge sitting in Court, and was by him directed to be read publicly and openly in the Court by the Prothonotary, which was done. The document contained charges of personal corruption against the Judge imputing to him partiality to the contestant by reason of his former professional connections with him,—because the transactions of their late co-partnership had not been finally closed,—that several of these transactions had not been profitable in their result,—that the contestant desired to enter Parliament for a special purpose in connexion with the Grenville Railroad, in his success in which purpose the Judge was interested;—that his conduct as a Judge had on two previous occasions fur-

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nished matter for impeachment,—that he had a personal interest in the result of this election; with other personal aspersions upon the integrity of the Judge,—finally charging him at his peril to proceed with the matter in hand until the House of Assembly could be informed of these imputations, and prevent him from farther action.

It was admitted by Mr. Holmes that the document was original, and bore the signature of the sitting member; that he had advised the writer against adopting such a course, but thought it better that he should be the bearer than that it should be served by a bailiff, and that he accordingly had handed it to the Judge.

His Honor then commented upon the conduct of the parties, principal and agent; declared the imputations cast upon him, and the charges themselves, to be equally unfounded and unjustifiable, and that he had no interest of any kind in Mr. Abbott's transactions; that the document had been thrust upon him for the sole purpose of intimidation, and to delay and obstruct the execution of the duties which the statute imposed upon him, and from which he could only escape by evading those duties altogether. He observed that no justification could be made for personal abuse offered to any Judge, and it became doubly criminal when the assertions were calumnious and unfounded, as these were. It was surely privilege enough for the member that, under the protection of Parliamentary practice, he might criminate and calumniate any public officer, and there show all the courage of a cowardly assailant without apprehension of unpleasant results. Mr. Bellingham's discretion should have warned him against a personal collision with the Judge, and have restricted his abuse to the floor of Parliament or of the Committee Room; but, calumnious and false as the charges were, he must have anticipated the consequences of his proceeding. His Honor remarked, that a long apprenticeship to public life had rendered him indifferent to abuse or misconception; but however far his own indifference under such inflictions upon himself personally, might extend, he could not let pass an insult affecting his judicial position; for the authority of the Courts could not be maintained if such were allowed, and the exposure of the Judges to insult from those, whose partiality or interest for their own affairs induce from them to think themselves injured, would render it impossible to cause the laws to be executed with vigour and success. His Honor then cited, from Wilmot's Cases and Opinions, the case of The King *versus* Almon, in which the Chief Justice remarks: "The passage "from Lord Coke, when duly considered, relates only to rules, orders, awards and "judgments, made at chambers, exparté, &c. And there is nothing in the constitu-"tion of this Court which forbids the business of it being done by one Judge: for "one Judge sitting in Court has the authority of the whole Court, and a libel upon "him would be a libel upon the Court in the strictest sense of the word, and certain-"ly a libel upon a single Judge, for an opinion given in Court—consented to by "the other three Judges—although it could never be called a libel upon the Court, "yet, would be a contempt of Court, and be liable to an attachment; and, there-"fore, the question resolves itself at last into this single point,—whether a Judge, "making an order at his house or chambers, is not acting in his judicial capacity "as a Judge of this Court, and both his person and his character under the same

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"protection as if he was sitting by himself in Court? It is conceded that a[illegible] "of violence upon his person, when he was making such an order, would be a "contempt punishable by attachment. Upon what principle?—for striking a "Judge walking along the streets would not be a contempt of Court. The reason, "therefore, must be, that he is in the exercise of his office and discharging the "functions of a Judge of this Court: and if his person is under this protection, "why should not his character be under the same protection? It is not for the "sake of the individual, but for the sake of the public, that his person is under "such protection: and in respect of the public, the imputing corruption and the "perversion of justice to him, in an order made by him at his chambers, is attended "with much more serious consequence than a blow; and, therefore, the reason of "proceeding in this summary manner applies with equal, if not superior, force to "one case as well as the other. There is no greater obstruction to the execution "of justice from the striking a Judge than from the abusing him, because his order "lies open to be enforced or discharged whether the Judge is struck or abused for "making it." Speaking of proceedings at Chambers, the Chief Justice proceeds: —"Still they are emanations of Judicial power, and, whether they have more "or less weight, they are acts done by the Judge, in the capacity and character "in which he sits here; and whether he is swearing an affidavit out of Court, or "pronouncing a solemn opinion in Court, the reason of resenting the indignity "is the same."

Nothing could be added to those remarks without in some degree detracting from their weight and authority. It will be sufficient to observe, that the Judges of the Superior Court, each by himself in this Province, acts as a court independant of his colleagues, and his judicial acts are the acts of one, who in his own person is declared by the law, to be a court in the performance of court duties. The said Sydney Bellingham is therefore declared to be in contempt of the said Judge whilst in the performance of his judicial functions in this Court, repeated *in facie curiæ*, and is therefor condemned to pay a fine of £10 currency to the Queen, and to stand committed until the fine be paid.

His Honor added that the motives which had led to Mr. Holmes' action in this affair, induced the Judge to act leniently by him; but at the same time he could not be relieved entirely, without censure for such action and without at least being reprimanded for his conduct in this particular. As a professional man in practice in the Superior Court, he ought to have aided in maintaining the judicial position from indignity; and could not plead ignorance in this matter. He was reprimanded accordingly.

The judgment upon the application of the contestant, and for the taking of evidence by the Commissioners were then formally recorded.

DISTRICT OF QUEBEC,

In the matter of the Controverted Election for the County of Lotbinière.

JOHN O'FARRELL, Esq.,

Sitting Member;

AND

NOEL DE TILLY, ET AL.,

Petitioners.

QUEBEC, 10th FEBRUARY, 1858.

Coram MEREDITH, J.

1. An application to take the evidence will be rejected, if the affidavits of the sureties be insufficient.
2. An application to take evidence, which the judge commissioner has refused to receive for insufficiency in the affidavits of the sureties, may be afterwards received and acted upon, if the defect be corrected and the application renewed, within the time fixed by the statute for the making of such applications.
3. The French and English versions of the Provincial Statutes, have equal force. When they directly contradict, they destroy each other; but if one be ambiguous only, the other may be resorted to for explanation of the intent and meaning of the law.
4. The words "Superior or Circuit Judge" used in the Controverted Elections Act of 1857 mean a judge of the Superior Court, or of the Circuit Court.
5. There are grave doubts whether the powers conferred upon a judge commissioner by the Controverted Elections Act of 1857, are sufficient to enable him validly to appoint a deputy; and in the face of these doubts, the Quebec judges unanimously decided not to do so.

The facts of this case sufficiently appear by the judgment delivered by the Honorable Judge, which was as follows:—

Meredith, J.—By the application now before me, I am required under the provisions of the 20th Vict. chap. 23, to take evidence upon certain matters of fact connected with the Lotbinière Election contest.

Before proceeding to consider the questions of general importance which this case presents, I shall advert to the technical objection urged by the Returned Member, that the recognizance was not, as the statute requires, produced "at the time of the application."

The application was placed in my hands accompanied, as was supposed, by the necessary papers, on the 27th of January; on the 28th the parties were heard, and the case was continued by consent until the 30th, when I "refused to receive the application" in consequence of the affidavits of the sureties being insufficient. On the same day (a new bond and affidavits having been produced, and the delay for making the application not having then expired) the Petitioners renewed the application then in my hands, by making a motion, calling upon me to receive the bond, and to proceed to take evidence in this matter as the statute requires.

The Returned Member has argued, that as the bond and affidavits were not filed until five days after the application had been produced, the whole proceedings are illegal.

After giving the matter due consideration I am unable to adopt this view. By the words "at the time of the application", in the statute, I understand *at the time the application is submitted to the Judge.* The application, now under consideration, was submitted to me twice; and when submitted for the second time, all the papers were in proper form; and as the delay for the application

had not then expired, I deem it my duty to receive it. If the Petitioners had written out their application anew, and submitted it with the recognizance and affidavits on the 30th of January, I do not think there would be even a semblance of reason for the objection; and I cannot understand why the application already in my hands should not have the same force and effect, as any copy or duplicate of it could have.

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The objection that the copy of the petition and some of the other papers were produced five days before the application was renewed, does not seem to me of importance. The law requires the papers to be produced and filed *at the time of the application*; but the statute does not require that all the papers should be filed exactly at the same time, *à peine de nullité*.

For these reasons I think the objection as to the form of the proceedings must be overruled.

I next proceed to consider the objections to my jurisdiction in this matter.

It is contended that I have no jurisdiction, because the statute does not declare that the duties in question shall be performed by a "Judge of the Superior Court", but by "a Superior Judge"; and it is said, that under our law there is no officer known by that name.

As to my power to act as a commissioner I cannot say I entertain any doubt. The 4th section of the Act already referred to is as follows: "IV. "When any of the parties shall be desirous of taking the evidence respecting "the facts and circumstances alleged in such notice or answer, it shall be law-"ful for him to make application in writting to the Judge of the County Court "in Upper Canada, or Superior or Circuit Judge in Lower Canada, residing or "having jurisdiction within the Electoral Division, or in the District, in which "such controverted election was held, requiring him to take the evidence upon "all matters of fact mentioned in the notice of the said contesting party, and in "the answer, if any, made by the party who has been elected; and the said "Judge shall forthwith appoint a time and place for proceeding therein, of which "due notice shall be given, at least six days before proceeding thereon, to the "opposite party."

There cannot be any question as to what would have been the powers or duties, of a Circuit Judge, under this provision of the statute; and by the 13th section of the recent Judicature Act, abolishing the office of Circuit Judge, it is declared that "the Circuit Court shall be held by the Judges of the Su-"perior Court, each of whom shall have *all the powers and duties* vested in, or "assigned to, any Circuit Judge, at the time this section shall take effect."

Thus, all the duties which were assigned to the Circuit Judges, when the provisions of the law just quoted took effect, have devolved upon the Judges of the Superior Court; and as a Circuit Judge would have had power to act as a Commissioner in this matter, I, as one of the persons upon whom the powers and duties of the Circuit Judges have devolved, have the same power; and this irrespective of the question as to whether I am, or am not, "a Superior Judge," within the meaning of the 4th section of the statute. I do not, however, hesitate to say that the objection urged in consequence of the use of the words "Superior Judge", in the 4th section of the law is, in my opinion groundless.

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It seems to me that the Legislature, in speaking of the Judges of the Superior Court, have used the words "Superior Judge" in the same way, that in speaking of the Judges of the Circuit Court, they have used the words "Circuit Judge." And although it must be admitted that the expression used is inaccurate, any doubt as to the meaning of the statute is removed by the use of the words "Juge de la Cour Supérieure" in the French version.

It has however been contended on the part of the Returned Member, that our law has not two texts, and that the translation in French, is not authority as law.

This point is of importance, and it is one in relation to which no doubt should be allowed to exist. I shall therefore advert briefly to the course of our legislation as regards the language of our law.

The Ordinances of the Governor and Council from 1777 to 1792 were, it is true, in the English language only; but all the statutes of the Parliament of Lower Canada, and all the Ordinances of the Special Council, were passed in the two languages. By the 41st section of the Union Act, however, all the written or printed proceedings of the Legislative Council and Legislative Assembly were required to be in the English language only; but this provision of law was repealed by the 11 & 12 Vict. cap. 56; and since that time the Provincial statutes are passed by the Assembly, and Legislative Council; and are assented to by the Representative of Her Majesty, as well in the French as the English language; and consequently the two versions must have equal force. When they exactly agree, they have the same effect as one; when they are contradictory, they destroy each other; and when, as in the present case, an expression in one of the versions, causes a doubt, which is removed by the examination of the other; the latter must be regarded as explaining the former.

Guided by these views in the present case, I hold that the words "Juge de la Cour Supérieure" in the French text, remove any uncertainty that might have existed as to the meaning of the word "Superior Judge" in the English version of the statute; and therefore, that not only as having the powers which could formerly have been exercised by a Circuit Judge, but also as a Judge of the Superior Court, named in the statute, I can take cognizance of the application now before me.

So far the case seems plain; but we now come to the consideration of the 6th section by which it was intended to give to the Judges of the Superior Court, the right of appointing Deputies. It is as follows:—

Sec. VI. "So soon as the said application shall have been *validly* made as "aforesaid, the Judge so applied to, shall be deemed to all intents and purposes, "a Commissioner for inquiring into and examining and taking evidence in all "the matters of fact and circumstances mentioned in the notice of the said con- "testing party, and the answer, if any, of the returned member. * * * "And it shall be the duty of the said judges, respectively, to take upon them "the duties imposed by this Act, and they shall then have all the powers and "rights (including remuneration for their services, and the right of appointing "Deputies to act for them as such judges, while engaged in consequence of such "application,) and shall perform all the duties and be subject to all the liabilities, "assigned by the said Election Petitions Act to persons appointed Commis- "sioners to take evidence, relative to any controverted election."

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The discussion of the point as to whether the provisions contained in the statute is or is not sufficient to enable the Judges of the Superior Court to appoint deputies, might be avoided upon the present occasion; but as the Judges in this city to whom election petitions have been presented, do not intend to exercise that right, and as their determination in this respect must, to some extent, subject the Bar, and the suitors before the Court, to inconvenience, I deem it right to advert to the reasons by which I have been guided in coming to the conclusion already mentioned.

The Judges of the Superior Court, it is to be observed, are not even named in the Election Petitions Act of 1851, and it is not contended that under that Act any duties whatever were imposed upon them. The 6th section of the 20. Vic. cap. 23, already quoted, is the only part of the last-mentioned Act in which any allusion is made to the power of appointing Deputies, and a single persual of that section will suffice to shew that were it not for the parenthesis, contained in it, there would be no ground whatever, for supposing that a Judge of the Superior Court could convey to a Deputy named by him, the powers of a Judge of that Court

Excluding the parenthesis, the provision in question would be as follows, "and "it shall be the duty of the said Judges respectively, to take upon themselves "the duties imposed by this Act, and they shall then have all the powers and "rights, and shall perform all the duties, and be subject to all the liabilities assigned by the said Election Petitions Act to persons appointed Commissioners "to take evidence respecting any controvered election." The Commissioners, here spoken of, were not necessarily Judges, and the Commissioners, when a Judge, was merely a Circuit or County Judge; and therefore could give to his Deputy the power of a Circuit or County Judge only. It therefore follows that if a Judge, acting under the 20 Vic. cap. 23, has the "powers and rights assigned by the said Election Petitions Act to persons appointed Commissioners" he might perhaps give to his Deputy the same powers that a Commissioner could have given to a Deputy named by him, namely those of a Circuit or County Judge, but clearly none other. The framer of the statute seems to have felt this, and therefore, by a part of the parenthesis, gave to the Judges acting under the statute, "the right of appointing deputies to act for them as such, while engaged in consequence of such application."

These words are sufficiently plain; but the framer of the statute has wholly omitted to embody in it, the provisions necessary to enable the Judges to exercise the right intended to be conferred upon them.

As explaining my views in this respect, I shall compare the provisions of the Election Petitions Act of 1851 enabling Circuit and County Judges to appoint Deputies, with the provision of the statute of 1857, intended to enable the Judge of the Superior Court to exercise a like power.

The Election Petitions Act of 1851 Sec. 102, declares explicitly the mode, in which the appointment of a Deputy, *under that Act*, should be made. The instrument of nomination must contain a recital of the commission which shall have rendered the appointment necessary; the instrument is to be in triplicate: one of the triplicate originals is to be registered in the office of the Clerk of the

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Circuit or County Court, another of them is to be delivered to the Deputy, and a third is to be transmitted to the Provincial Secretary for the information of the Governor of the Province. Now in the Act of last session under which alone, a Judge of the Superior Court can act, nothing of this kind is to be found; and as a Judge of the Superior Court sits as frequently in the Circuit Court as in the Superior Court, and may also have to assist in holding the Court of Queen's Bench, it was clearly quite as necessary, in the Act of 1857, as it was in the Act of 1851, to declare the mode in which the appointment of a deputy is to be made, and the manner of giving publicity to such appointments.

The Act of 1851 also provides, that it shall be lawful for such Judge (namely such Circuit or County Judge), notwithstanding any such nomination, while the same shall be in force, and without thereby annulling or superseding the same, to perform himself, if the execution of such commission shall not prevent his doing so, either the whole or any part of the duties of his said office of Circuit or County Judge, as if such nomination had not been made as aforesaid.—

On this important point, also, the Act of 1857 is silent.

Again, the statute of 1851 (sec. 101 and 104) defines, in the most careful and detailed manner, the nature and extent of the powers to be executed by the Deputy of a Circuit or County Judge; whereas, in the Act of last session, there is nothing of the kind.

I shall conclude this comparison of the two statutes, by observing that the duration of the powers of the Deputy, is also placed beyond doubt by the Act of 1851, which provides that the deputy of the Circuit or County Judge may act "during the time that such commission for the examination of witness under "this act shall be in force unreturned, and for *twenty days* after the same shall "have been superseded or returned, &c", whereas the Act of 1857 declares merely that the Deputies may "Act for the Judges naming them while engaged in consequence of such application. Now if a Judge acting as Commissioner were obliged to adjourn his Court for a week or a month, in consequence of the sickness or absence of a witness, or from any such cause; it might well be doubted, whether the Judge during such adjournment, should be deemed "engaged in consequence of such application" so as to enable his Deputy to act.

It is also to be observed that, under the terms of the statute, the validity of the appointment of a Deputy seems to be made to depend not merely upon the powers of the Judge making the appointment, and upon the sufficiency of the forms observed, but also upon "*the validity*" of "*the application made to the Judge*," and upon this point, simple as it may appear, very embarrassing questions may arise, and indeed have already arisen.

Moreover, according to the strict, literal meaning of the parenthesis (which, I repeat, is the only part of the law tending to give the right of appointing Deputies to the Judges of the Superior Court,) the right in question is conferred upon the Judges *collectively*, and is not expressly given *to each of them*; although, under the statute, no two or more of them are required to act together for any other purpose.

It may be thought by some persons, that the Judges attach undue importance to the difficulties connected with the appointment of deputies by them. But

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every lawyer is aware that jurisdiction ought not to be assumed in consequence merely of what may be supposed to have been the intention of the Legislature, and that it is a well established doctrine, that a power, whether it proceed from a public or a private source; from the Legislature, or from a private individual, must be strictly pursued, without any deviation from the manner prescribed for its exercise. And if it be the duty of Judges to act upon this rule in ordinary cases, how careful ought they to be in observing it in a matter such as the present, when they bear in mind that if they name deputies, the persons named would, in the course of a few weeks, have to exercise jurisdiction in several thousand cases; and I need not say how disastrons would be the consequences, if the validity of the appointment of the deputies, or of any of them, could be questioned, with even a hope of success.

Having thus explained my views as to the important question respecting the appointment of Deputies, it remains for me only to observe, that, after giving to the subject the most careful consideration, the Judges of this District to whom election petitions have been presented,—after consulting the Chief Justice, and with his full concurrence,—have come to the conclusion that they ought not, at least for the present, to exercise the right of appointing Deputies, as they feel convinced, that, even if that right exist, they could not exercise it without danger to themselves, their Deputies and the public.

In speaking of the appointment of Deputies by the Judges, I have been been careful to use the word *right*, because the law does not say that the Judges *shall* name Deputies, or that it *shall be their duty* to do so, but merely that they shall have "*the right*" to name Deputies.

I am well aware that, in some cases, words of permission may be deemed obligatory; but in a statute such as that now before us, (which, in so far as the Judges are concerned, is not only opposed to the principles of the Common Law, but tends to defeat important rights to which the Judges are entitled, as well by their commissions, as by express legislative provisions in force when those commissions were granted,) I do not think that words which, according to the ordinary use of language are understood as merely conferring a right, can be regarded as imposing an obligation; more particularly such an obligation as that of administering justice by Deputies; for the want of jurisdiction in whom, or for whose abuse of it, it might, in many cases, be attempted to render the Judges, making the appointments, liable.

The non-appointment of Deputies, however, will not prevent the Judges from acting upon the applications submitted to them. They feel confident that the Legislature will see the necessity of making provision, without delay, for the numerous and grave difficulties connected with this subject; and, in the meantime, they propose to devote as much of the approaching vacation as possible, to the performance of their duties as commissioners. At the same time, I must say, I seriously apprehend that the inconvenience to the public from the attempt on the part of the Judges to perform the duties assigned to them by the statute, in addition to their ordinary duties, will be found to outweigh any advantage that can result from that attempt.

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In the course of the foregoing remarks, I have purposely abstained from dwelling upon the manner in which the judicial office in Lower Canada is affected by the statute in question. That is, doubtless, one of the matters connected with this subject which must soon engage the attention of the Legislature; and I cannot believe it was the deliberate intention of Parliament, to place the Chief Justice and other Judges of the highest Court of original civil jurisdiction in Lower Canada, in the position which they now occupy under the statute.

It must not be inferred form the remark just made, that I do not duly appreciate the importance of the duties assigned to the judges by the recent statute. I admit they are of the highest importance; but I contend that if those duties, —which could be performed as well by other persons, without interrupting and disturbing the administration of justice in the ordinary tribunals,—must be performed by the Judges, those fuctionaries, in discharging them, ought so be allowed to act as judges, instead of being compelled, as they now are, to act as commissioners; the difference between the two positions being too important and to well understood to require comment.

If it be said, this would be contrary to the privileges of Parliament, the answer is plain,—the duties to be imposed upon the Judges are either of a judicial nature, or they are not so. If they are judicial, the Judges ought to perform them as Judges—if, on the contrary, those duties are not of a judicial nature, then they cannot consistently with justice be imposed upon the Judges without their consent.

In the same case, in the course of taking the evidence, the Hon. Judge Commissioner ruled as follows:

1. Delay to produce the original poll-books will not be granted, on the day fixed for proceeding, to the person who made the application for the taking of evidence.
2. Proof of acts of violence, &c. alleged in the notice of contestation may be gone into, without the production of the poll-books.
3. Evidence of particular acts of corruption will not be received, under a general allegation of corruption.
4. A copy of the poll-books will be received as illegal evidence under the 120th section of the Election Petitions Act.
5. A witness summoned may refuse to answer until his necessary expenses are paid.
6. A witness will not be compelled to answer a question tending to criminate him.

On the day appointed for the opening of the court the contesting parties moved for an adjournment of nineteen days to enable them to produce the original poll-book. The application was rejected. His Honor stated that the day had been fixed at their request, against the wishes of the returned member, and that they had not used any diligence to have the poll-book. Montague & Neal on Election Laws, p. 85.

"Application to adjourn to obtain the poll-book refused, as being never allowed after a cause had begun, to a party who had neglected to supply himself with proper evidence, unless the other consent." Newcastle-under-Tyne, 1 Peck, 492, 1833.

"Adjournment to produce poll-book refused. The petitioner being the party who had asked for the enquiry, ought to have been ready with his witnesses." 1 Perry Kn., p. 239.

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As strong a case as either of the above will be found in Corbett & Daniels, p. 92, the Limerick case.

His Honor stated, that he could not adjourn the court for more than twenty-four hours without making an oath that a case of necessity existed for such adjournment. Now, for anything within his personal knowledge, it might have been for the advantage of both of the parties to close the contest at once; and such being the case, he would not swear that it was even for the advantage of either party, much less that it was absolutely necessary for either party, that the case should be continued.

The returned member contended also, that the cases of necessity, accident, and sickness mentioned in the 113th and 114th sections of the Elections Petitions Act of 1851 must be such as affect the Commissioner *personally;* and this view would seem to be justified by that portion of the statute which obliges the Commissioner to verify every such case *by his own oath,* and which requires, in the case of sickness, that the affidavit of the doctor *attending the Commissioner* must also be given : no reference being made to the sickness of any other person than the Commissioner, or to any affidavit being given by any other person. It can hardly be supposed that even the Parliament which passed the Act in question, could intend to compel a judge to swear to matters not within his own personal knowledge.

2. The returned member objected to the adduction of any evidence whatever, as there was no proof of an election. The Hon. Judge Commissioner overruled the objection.

The statute expressly declares, that the facts respecting which the Commissioner is to take evidence are those "not appearing upon the face of the return or poll-book." The proof to be taken before the Commissioner is only part of the whole of the proof to be taken; and that part of the proof which is made by the poll-book is already before the house; and the poll-book in this country is authentic; whereas in England, not only is it necessary to *produce the poll-book,* but it is also necessary to *prove it by legal evidence.*

The Commissioner is required to take evidence as to the facts and circumstances mentioned in the notice and answer, and, if *legal* evidence be offered of any of these facts and circumstances, it cannot legally be refused. Proof of acts of violence, &c. was therefore allowed.

3. The contesting parties offered to prove acts of corruption, but the evidence was refused because the facts were not particularly specified, as required by the law, and as required by the invariable practice in England.

The returned member offered evidence to show that the elector petitioning had bribed a voter, and was therefore disqualified, but the Commissioner refused to receive it for the same reason.

4. The petitioners produced the copy of the poll-book, and it was received as illegal evidence under the 120th sect. of the Election Petitions Act. (1)

(1) It does not appear in what manner the copy was authenticated, or by whom; for certain copies would appear to be good evidence under 13 and 14 Vict. cap. 19, sec. 4. —EDITOR'S NOTE.]

Controverted Elections. County of Lotbinière.

5. A witness summoned, refused to give his evidence until his *necessary expenses* were paid; and in accordance with numerous decisions of Committees in England, it was held that the witness had the right claimed, but that it did not extend to allowance for loss of time, but merely to necessary expenses.

6. A witness refused to answer a question tending to criminate him, and the Commissioner refused to compel him to answer.

THREE RIVERS, FEBRUARY, 1858.

In the matter of the Controverted Election for the City of Three Rivers.

WILLIAM McDONELL DAWSON, Esquire,
Sitting Member;

AND

JOHN McDOUGALL, Esquire,
Contestant.

Coram POWER, J.

1. The Judge applied to for the taking of evidence, has a right to decide upon the sufficiency of the recognizances.

2. He stands in the place of a select committee *quoad* the evidence, and has a right to limit the testimony to such facts and circumstances only as he considers, are validly alleged in the notice and answer.

3. A general allegation of bribery and intimidation is insufficient.

4. A general allegation of keeping open houses, is insufficient.

5. A general allegation that more than 200 illegal votes were given for an opponent, is insufficient.

6. A general allegation that a great number of persons voted twice is insufficient.

7. A general allegation that several persons under the age of majority voted is insufficient.

8. A general allegation that all the sitting member's votes are not qualified, and that the contestant's are, is insufficient.

9. The evidence of the returning officer that the contestant was a candidate, was refused.

10. In the absence of the poll-books, the Judge would grant a delay to produce them.

11. A list of voters objected to, not served with the notice nor referred to in it, nor forming any part of it, tendered to the Commissioner after the day for taking evidence had been fixed, and had arrived, was refused.

12. The Judge Commissioner will not receive and take down, evidence *de bene esse*, upon insufficient allegations, in the manner prescribed by the 120th section of the Election Petition Act to be done in certain cases, for there is no issue created by such allegations.

The following are the facts of this case.

On the 27th January last, John McDougall, Esq., the defeated candidate at the late election for a Member to represent the City of Three Rivers in the Legislative Assembly, made application to the Judge above named; in the manner prescribed by the act of last session of Parliament, cap. 23, to take evidence upon the facts and circumstances contained in a notice of Contestation of the said election, which he had duly served upon the member returned; and also upon the facts and circumstances contained in the written answer to the said notice, given him by the returned Member. The Judge immediately, after having examined the recognizances required by law in such case, unhesitatingly and without requiring any preliminary hearing, appointed the 9th February instant, at the Court House, to receive evidence in support of such of the matters of fact alleged, in the said notice, and answer, as were susceptible of legal proof.

Controverted Elections. City of Three Rivers.

On the 9th Feby., the Judge Commissioner, after some preliminaries, opened his Court, and caused the contesting party's notice and the returned Member's answer, to be publicly read.

The facts and circumstances in the notice, were divided into 12 heads of objections to the election, each head being numbered; of which the following is a summary:

—That the member elect held the office of Superintendent of Woods and Forests at the time of his election, which disqualified him from being elected.

2nd.—That he does not possess the property qualification required by law, namely, £500 sterling.

3d.—A denial of his right to the lots of land upon which he grounded his qualification, and also the value of the said lots.

4th.—A general allegation of bribing his own voters, and threatening and intimidating the voters of the contesting Party.

5th.—A general allegation of keeping open Houses of public entertainment for the electors.

6th.—General allegation of bribery in giving Bills, Bonds, Money, &c. to his electors.

7th.—General allegation that more than 200 illegal votes were given for returned Member.

8th.—General allegation that a great number of persons voted more than once in his favor.

9th.—General allegation that several persons under the age of majority, voted for him.

10th.—That he employed violent men from Quebec to take possession of the polls, and prevented the contesting Party's voters from voting.

11th.—A similar allegation of intimidation, by a band of hired men with fire-arms.

12th.—General allegation that all the returned member's voters are not qualified, and that all the contesting Party's voters are qualified.

The answer of the returned member was very lengthy,—it occupied an hour in the reading,—and was highly recriminatory. It denied all the allegations of the notice, and laid to the charge of the contesting Party, the commission of acts similar to those mentioned in the notice, and a great many others; but, unlike the notice, it detailed them very minutely and circumstantially.

Acte was granted to the contesting Party of having presented to the Judge, on the 27th January last, a list of objected voters, of which the Judge had declined to take judicial notice.

The Judge Commissioner prescribed the order in which he would receive evidence upon the statements in the notice. He said that standing in the place of a select Committee *quoad* the evidence, he had a right to do so; and he notified the Parties, and directed the Clerk to enter upon his minutes, that he would proceed to take evidence upon the heads or numbers 1, 2, 3, 10 and 11 in the notice, in that order consecutively, commencing with number 1, and terminating such legal evidence as the contesting Party may offer, on each of those heads, before entering upon another head; and that respecting the num-

Controverted Elections, City of Three Rivers.

bers 4, 5, 6, 7, 8 and 12, which contain nothing more than general allegations, upon which he saw objections to taking evidence, he invited the parties and their respective agents to shew him any usage or parliamentary law under which he could take or receive evidence upon those numbers. He also directed that when a Witness would be under examination, all the other Witnesses should leave the Room, and ordered that if any Witness should be offered for examination who had been present, and heard the evidence of another Witness, such Witness should not be examined.

He then proceeded to take evidence in the order prescribed, and Mr. Sheriff Ogden being the first Witness called and sworn for the purpose of proving that the Contesting Party was a candidate at the late Election, stated, that the orignal poll-books were not in this possession, as he had transmitted them to the Clerk of the Crown in Chancery; whereupon the Judge ruled, that the Poll-Books being the best evidence of the fact intended to be proved, and being in existence, he would not receive secondary evidence of their contents; and that as in the absence of proof of this fact, the examination of other Witness could not proceed, he would be obliged to adjourn and give delay for the production of the poll-books.

The returned Member then gave in an admission of what was required to be proved on this point, and the Enquête proceeded, and continued nine days, during which period, twenty-six Witnesses were examined for the contesting Party, upon the unobjectionable heads of the notice; after which, on the 19th instant, the contesting Party produced a list of 34 Witnesses, whom he required the Judge to examine on the other heads, and was heard upon his right to have them examined.

Whereupon the Judge Commissioner refused to take evidence, and directed to be placed upon his minutes, the reasons why he did not take judicial notice of the List of objected votes presented to him, and why in his opinion it was not right to take evidence upon the 4th, 5th, 6th, 7th, 8th, 9th and 12th heads of objection in the contesting Party's notice; which reasons are as follow:—

Seeing that under the provisions of the 20 Vict., Cap. 23, Sec. 1, the contesting Party is directed to give notice in writing, in the manner mentioned in this Act, to the person whose election he intends to contest, "of his intention to "contest the same, and in such notice he shall *specify particularly, the facts and* "*circumstances* upon which he intends to contest the election;" and that by the 4th Section, "when any of the Parties shall be desirous of taking the evidence, "respecting the facts and circumstances, alleged in such notice, or answer, it "shall be lawful for him to make application in writing to the Judge;" and by the 6th Sec: "So soon as the said application shall have been validly made, "as aforesaid, the Judge so applied to, shall be deemed, to all intends and pur-"poses, a Commissioner for inquiring into, examining, and taking evidence upon "*all the matters of fact and circumstances* mentioned in the notice of the said "contesting Party, and the answer (if any) of the returned Member; ———, "and the Judges shall perform all the duties, and be subject to all the liabili-"ties, assigned by the said Election Petitions Act (i. e, the act of 1851) to "persons appointed Commissioners to take evidence relative to any controverted

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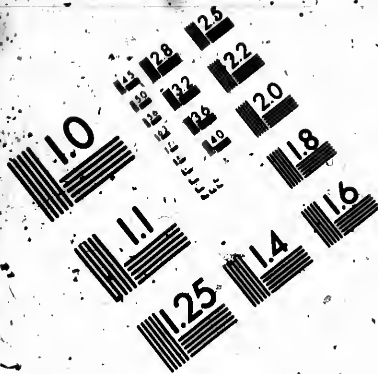
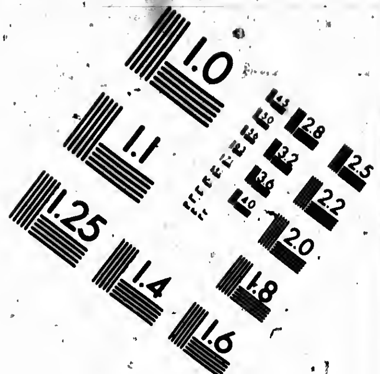
"election, *saving only that their powers shall be limited to the questions of fact, set* "*forth in the notice* of the Contesting Party, and the answer (if any) of the re- "turned Member, and the questions concerning the validity of the recognizance "if it be objected to," and considering that my duty was limited in this instance, to the questions of fact set forth in the notice, and that, the List of objected voters, presented to me, on the 27th day of January last, by the Contesting Party, was neither referred to in, nor served with, nor formed any part of, the said notice, I therefore declined to take any other notice of the said List, than to grant *acte* of its hav[illegible] [illegible]ented to me, and reject it.

Seeing, also th[illegible] [illegible] of the said act enjoins "that this act "shall be construed [illegible] [illegible] Election Petitions Act of 1851, and that the "said act shall be co[illegible] [illegible] Act were included therein," and seeing the very general natu[illegible] [illegible]ons contained in the heads of objection numbers 4, 5, 6, 7, 8, 9 an[illegible] [illegible] the notice of the contesting Party, and con- sidering that the copy of the [illegible] Petition presented to me in this matter, and which I have transmitted to the Clerk of the Honorable the Legislative Assembly, contains no more particulars upon the above-mentioned heads than are set forth in the said notice, and is not, therefore, sufficient in itself to raise an issue of fact upon any of the said heads, but is merely introductory to the individual issues, into which the complaint of the Petitioner, as well as the defence of the returned member, must be necessarily divided; by their respective Lists of objected voters; and referring to the 82nd clause of the said Election Petitions Act of 1851, wherein it is enacted "that no evidence shall be given, before the "select Committee, or before any Commission issued by such Committee, against "the validity of any vote, not included in one of the Lists of voters, delivered "as aforesaid, or upon any head of objection, to any voter included in any such "list, other than one of the heads specified against him in such list," and being in virtue of the 118th clause of the said act, in the same position and invested with the same power, *quoad* the taking of evidence as a select Committee, and not with any greater power, I am unwilling to assume *that* which a select com mittee is forbidden to do, and cannot, in law, take evidence upon the allegations of facts in the notice, under the above numbers; because such facts are not therein specifically stated and particularised.

Seeing also, and having due regard to the Provision contained in the 160th clause of the said Election Petitions Act of 1851, which is likewise made appli- cable to the 20th Vic., Cap. 23, by the 9th clause of this latter Act; and which provision is :—"That if with regard to any Election Petition, any case shall "arise, as to which no express provision is made by this Act, and in which if it "were treated as a case wholly without the purview of this Act, there would be "a manifest failure of justice, without any error, fault, or neglect of any of the "Parties interested, then, such case shall not be held to be omitted, but it shall "be lawful for the House, Speaker, General Election Committee, Chairman's "Panel, Select Committee, or Commissioner, as the case may be, to adopt such "proceedings as they or he shall deem most consonant to the express provi- "sions, spirit and intent of this act," and considering that it was competent to the contesting Party to have served his list of objected voters at one and the

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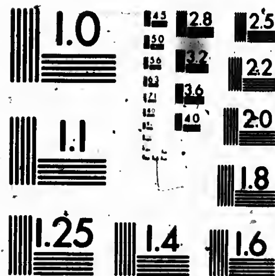

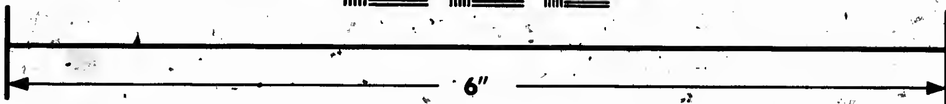

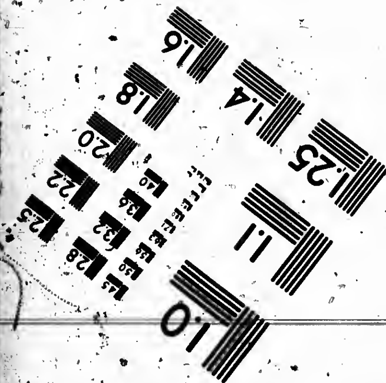
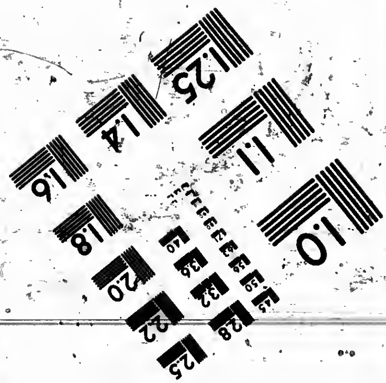

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same time, upon the returned Member; and that he might have referred in the notice to the List, and thereby have made the List a part of the notice, and that he has therefore erred in his proceeding; I cannot apply the above-mentioned provision for his benefit, as insisted upon in the present instance; because such application would have the effect of relieving him from the consequence of his own error or neglect, and would be inconsistent with the existing provisions of law.

The contesting Party again produced a List of the same witnesses, and required the Judge Commissioner to examine and take their evidence, *de bene esse*, conformably to the 120th clause of the Election Petitions Act of 1851, which requires the Commissioner, whenever he is of opinion that a Witness ought not be examined and rejects his evidence, to cause such evidence to be taken down in writing, separately and apart from the minutes, with his reasons for rejecting it.

To this requisition, the Judge Commissioner replied that the reasons already given by him for refusing to place this evidence upon his minutes were of such a nature, as to oblige him also to refuse having it taken down *de bene esse*; because evidence permitted to be taken *de bene esse*, according to the clause referred to, must be "of, or concerning, any matter, or thing whatsoever in issue before the said Commissioner"; and as the general allegations, in the notice, under the numbers 4, 5, 6, 7, 8, 9 and 12, put nothing in issue, he was not obliged to occupy his time in taking down this evidence, *de bene esse*, any more than he would be to take down evidence of matters occurring in India.

The returned Member then produced eight Witnesses, who were examined in rebuttal of the evidence on the part of the Contesting Party. Their examination occupied parts of two days, and then the Judge adjourned *sine die*, and directed his Clerk to make, with all possible haste, a Transcript of the minutes, to be transmitted to the Clerk of the Honorable the Legislative Assembly; and respectfully submitted to such select Committee, as may be appointed to investigate this matter.

DISTRICT OF QUEBEC, 8TH FEBRUARY 1858.

In the matter of the Controverted Election for the City of Quebec.

The Hon. CHARLES ALLEYN,
HYPOLITE DUBORD, Esq.,
GEORGE HONORE SIMARD, Esq. } Sitting members;

AND

MARC AURELE PLAMONDON, Esq., *et al*, *Petitioners.*

Coram MORIN, J.

1. The Judge applied to for the taking of evidence, has no right to hear or decide questions arising upon the sufficiency of the conclusions of the Petition, a copy of which is filed before him.

2. It is not necessary for the Petitioners, prior to obtaining an order for the taking of evidence, to prove that they, having been candidates, had filed their declaration of qualification with the returning officer.

3. Upon an application being made to a Judge for the taking of evidence, he has the right to hear and decide upon objections to the validity of the security.

4. Security to the amount of two hundred pounds currency is sufficient, though the Petition be against the return of three members.

The substance of the objections in this case, and of the opinion of the Judge upon them, are sufficiently exhibited by the judgment upon the application of the Petitioners, which was as follows:

'I, the undersigned Judge, to whom was addressed, on the twenty-ninth day of January last, on the part of the Petitioners, Marc Aurele Plamondon, Esquire, and others, an application to hear evidence in the present Contestation, accompanied by a copy of the Petition to be presented against the said Election, with a copy of the notice given, and sworn to by the person who served it, and copies of the answers respectively offered by the members elect, together with the security and affidavit of sufficiency;—

Having, on the thirteenth day of the same month, previously heard the Petitioners' Counsel, in support of the application, and the Counsel of the Honorable Charles Alleyn, and Hypolite Dubord, Esquire, who opposed it, the other member elect, George Honoré Simard, Esquire, not having appeared;—

Considering as to the objections raised to the jurisdiction, *primo*, to the insufficiency of the Petition, inasmuch as the Petitioners, acting only as candidates, could not conclude as they have done, but ought to have restricted themselves to demand that they might be substituted in lieu of the member elect, and that, consequently, there is no Petition; *secundo*, the insufficiency of the same Petition, and the absence of a Petition in a legal point of view, in consequence of the Petitioners' failing to prove that they produced, before the Returning Officer their declaration *quoad* their qualification, that these questions are not submitted, but remain a subject to be enquired into by the Honorable Legislative Assembly, or by an Election Committee, and that the present application was made, moreover, in the manner directed by law;—

Considering—as to the objections made to the validity of the security, inasmuch as there being three members elected, and three separate contestations, there should have been three bail-bonds, to the amount of two hundred pounds,

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currency each, or a bail-bond for three times that amount,—that the law contains no special provisions for this case, but requires a separate bail-bond of two hundred pounds, currency, on the part of the Petitioners on each Election Petition, a condition complied with in the present case;—

Order, that on Wednesday, the seventeenth day of February instant, at ten in the forenoon, in the Court House in the City of Quebec, I will open my Court, as Commissioner, in order afterwards to proceed in the matter as may be necessary, at which time and place the Petitioners will be bound to proceed to their *enquête.*

Quebec, the eighth day of February, one thousand eight hundred and fifty-eight.

(Signed,) MORIN, J. S. C.

Melville DeChene, Atty. for Petitioners.
A. Stuart, Atty. for C Alleyn.
F. R. Angers, Atty. for H. Dubord.

WILCOX vs. WILCOX. (Appendix.)

No. 1.

Opinion of Chief Justice Hey. (1)

If his majesty should think fit, for the reasons that have been above set forth, to permit the canadians to enjoy their ancient laws and usages, the easiest way of doing this, and that which will give the least disgust to those who may dislike this measure, will be to declare that they have never been legally abolished, nor the laws of England legally introduced into this Province in their stead, which I conceive to be really the case for the following reasons:—

Reason for concluding that the laws of England have not been yet legally introduced into the Province of Quebec.

In the first place I conceive that no authority but that of Parliament of Great Britain could legally do so great a work. This will appear from the following considerations:—

The King and Parliament and not the King alone, is the proper Legislature of this Province.

It is a well known and indisputable maxim of the law of nations, adopted and confirmed by the law of England, that *the laws of a conquered people continue in force, till they are expressly changed by the will of the conquering nation.* This is the first great principle by which we must be guided in enquiring who are legally vested with the power of making laws in the Province of Quebec. The next point to be settled is what part of the conquering nation has a right of declaring the will of the whole with respect to this affair. Now if the conquering nation is governed under the form of a pure and absolute democracy, so that every public affair is decided by a majority of votes in an assembly of all the freeholders, or heads of families contained in it, (such as was the ancient commonwealth of Athens) there will be no difficulty in determining this question, because in this case the will of the conquering people will be actually expressed by themselves. In such a case, therefore, it will be clear that the laws of the conquered nation will continue in force till they are especially changed by an Act passed for that purpose by a majority of votes in a full assembly of the people. But where the conquering nation is not governed in this simple form by assemblies of the whole people, but by some select bodies vested with the authority of the whole (such as assemblies of deputies chosen by the rest, or perpetual senates of rich or elderly men, or a king, or by any mixture of these establishments), some other maxim besides that before mentioned, must be adopted in order to determine in what part of the conquering nation the power of making laws to bind the conquered nation resides. Now the simplest maxim that can be adopted on this occasion seems to be this, *that the same man or body of men that are the Legislators of the conquering nation, become after the conquest the Legislators of the conquered nation.* Thus if the conquering nation is an aristocratical commonwealth in which the legislative authority is vested in a senate only, that senate will have the right of making laws for the conquered nation in the same manner as it has to make laws for the other members of the conquering nation. If the conquering nation is under an absolute Monarchical Government and the Legislative authority is vested in the King alone, the King will have a right to make laws also for the conquered nation: for the will of the conquering nation will in such a Government be expressed by the King alone by virtue of the constitution of the Government, as it would in the foregoing case of the aristocratical Commonwealth by the senate. And in like manner, if the conquering nation is under a mixt form of Government, and the Legislative authority is vested in two or more political bodies, so that their concurrent consent is necessary to establish a law, as, for instance, in a King, a Senate and a House of Representatives, these bodies conjointly and not any one of them singly, will likewise have a right to make laws for the conquered people. This is the case with the Kingdom of Great Britain; its form of Government is that of a limited Monarchy, and

(1) Extracted from "a view, &c." *Vide* L. C. Jurist; vol. 1, pp. 33-48 of 2nd part.

the Legislative authority is vested in the King in conjunction with the two Houses of Parliament. The King therefore in conjunction with the two Houses of Parliament and not without them, must have the legal right of making laws for the conquered inhabitants of the Province of Quebec, and all changes made in the ancient laws of this Province by any other authority must be void and of no effect. This seems to me to be clear and just reasoning, and is confirmed both by the conduct of Edward the First in calling an assembly of his nobles to settle the laws of Wales, upon his conquest of it, as has been above related, and by the rules of the English law laid down concerning Ireland; for Ireland is a conquered country and has always been considered as such, and it is said in the law-books, and of late years has been declared by an Act of Parliament to be subject to the Legislative authority of the Parliament of Great Britain but has not been declared to be subject to that of the King alone.

Settlement of the Laws of Wales upon the conquest of it.

The Parliament of Great Britain has a right of making laws to bind Ireland.

I know that many gentlemen of the law maintain a different opinion concerning the Legislative authority in countries conquered by Great Britain, and assert that though the King makes but a part of the Legislature in Great Britain itself, yet he is the sole legislator of all the conquered countries.—They ground this opinion on that branch of the English constitution which vests in the King alone without the Parliament, the power of making peace and war, and the absolute property of all the captures made in war.—The King, say they, is absolute master of the lives of all prisoners of war who are taken without a capitulation: he is absolute master of all the ships and money, and merchandises, or other plunder, his troops and ships of war get possession of, and may dispose of them in whatever manner he thinks fit; and if he is thus absolute master of all the moveable property he can seize, which is clear beyond a doubt, then also, by parity of reason he must be likewise of all the immoveable property, that is, of all the lands and houses of the countries his armies conquer, so that, if the country surrendered at discretion and without a capitulation, he might by right of conquest, lawfully dispossess every freeholder in the country of his land, and give it away to other persons, or sell it to the highest bidder and apply the money thence arising to whatever uses he thought fit. He is, therefore, say they, absolute monarch of the country, since the lives and fortunes of the inhabitants are at his disposal.—All the premises in this argument I allow to be true, but do not think that the conclusions drawn from them are just, that the King is, therefore, the absolute monarch of such a country, or has alone the right of making law in it. The power over the lives of the conquered people is certainly only a temporary power; if the King does not cause them to be put to death immediately after they are taken, or at least, during the remaining part of the war, he loses his right of doing it; for when a peace is made, and the conquered country is ceded and transferred to the conqueror by the former Sovereign, as is the case with the Province of Quebec, and the old, or conquered inhabitants are suffered to continue in the country and admitted to the rank of subjects and to take the oath of allegiance, it seems clear that they have a right to be protected in their persons and future property acquired after the peace, in the same manner as the other subjects of the conqueror; that is, in other words, after the peace is made the preliminary proposition that the King is absolute master of their lives and fortunes, from which it was concluded that he was the absolute monarch and legislator of the country, is no longer true; and consequently that conclusion will not follow from it. This will be further evident by considering the original foundation of the rights of war. Now these rights of war over the persons and property of a conquered people are evidently only temporary rights founded on necessity, in order to enable conquerors to preserve the advantages they have obtained in the war, and compel the enemy to accept of a reasonable peace; and therefore they can subsist no longer than the war continues. And as the rights of war are founded on necessity, so the

An argument in favor of this opinion that the King without the Parliament has a right to make laws for conquered countries.

Answer to this argument.

power or prerogative of exercising these rights, that is, the perogative of managing the war, is vested by the laws of England in the King alone for much the same reason, that is, on account of the high expediency amounting to a kind of necessity of entrusting this matter to the direction of one man, arising from the extreme difficulty of carrying on the operations of war, and of making the sudden and temporary regulations fit to be observed in conquered countries immediately upon their just submission, by a numerous body of men, such as the Parliament of Great Britain. This I conceive to be the reason why the power of making these regulations is vested in the King alone, immediately upon the conquest of the country and during the remaining part of the war, while the inhabitants of it must be considered as continuing still to be enemies to the conquerors, and disposed to take the first opportunity of throwing off their yoke, and returning to their former masters, and are in truth neither more nor less than prisoners of war permitted to be at large upon their parole of honor. While this violent state of things continues, the King continues to have the sole power of governing the conquered country and its inhabitants, and consequently that of making temporary laws for them, according to his discretion, as being a necessary part of such government. But when the peace is made, and the country ceded to the conquerors by the former sovereign, and the old inhabitants are permitted to continue in it as subjects to the conquering sovereign whether with or without a restoration of their lands to them, there seems to be an end of the exercise of the King's prerogative of making war in such a country, and of all the incidental powers belonging to it. From that moment the laws of peace take place, and the legislative authority, with respect to this new part of the British dominions, as well as to the former parts of them, reverts to its proper channel, in which it runs in time of tranquillity; that is, in the British Constitution, to the King, and to the two Houses of Parliament.

The King becomes sole proprietor of all the land and houses in a conquered country, unless there is an express clause in the articles of capitulation, or treaty of peace to the contrary.

'Tis true indeed that the King remains sole proprietor of all the land and houses in the conquered country after the peace, as well as before, unless there is an express article to the contrary in the treaty of peace; because the property of them, which was vested in him by the conquest, can never be divested out of him without some express act of his own for that purpose. He may therefore do what he pleases with it; he may either give it back to the old possessors, or to new grantees, as he thinks proper (though the latter is a rigorous way of proceeding, seldom practised) or he may keep it in his own hands, as his own demesne land, and cultivate it by his own servants and laborers, for his own profit, or let it for terms of years to farmers, at a rack rent. But it does not therefore follow that he is the sole legislator of the country, any more than he would be in any particular county of England, if all the lands in that county were, by forefeitures for high treason, or by escheats or purchase, or in any other manner to come into the possession of the Crown.

An argument derived from thence in favor of the opinion aforesaid, that the King is the legislator of conquered countries.

The strongest way of stating this latter argument in favor of the King's having the right of making laws in a conquered country seems to be this. Since the King is absolute owner of all the land in such a country, and may grant it away to whomsoever he pleases, he may annex what conditions he thinks fit to those new grants, and, amongst the rest, a condition that the grantees shall be governed by such or such a particular system of laws, as for instance, the laws of England, or the laws of Scotland, or the laws of Hanover, or any other laws that he shall think fit to introduce, and the grantees, by accepting the lands granted to them, must be deemed to have consented to the conditions upon which they were granted, and consequently to the observation of the laws introduced by them. And thus the King, by being absolute owner of these lands, will, in an indirect manner, acquire a legislative authority over the persons who shall thenceforth inhabit them. This, I confess is very plausible, and goes near to prove that the King might, in a case properly circumstanced, become the legislator of a con-

quered country. But I think that it is not quite sufficient for this purpose, and further, that if it was, yet the Province of Quebec, in particular, is not so circumstanced that the foregoing argument can be applied to it. My reasons for these opinions are as follows:—

Answer to this argument.

In the first place, the reason why this argument, drawn from the ownership of the land, is not sufficient to prove that the King has a power of making laws for a conquered country in any case, is because the position upon which it is founded is not true, to wit, that the absolute owner of a piece of land can annex what conditions he thinks proper to a grant. And this restraint upon the power of the grantor extends to the King as well as to every grantor. Thus, if a grant is made, either by the king or a subject, of a parcel of land in England, to a man and his heirs for ever, with a condition that he shall never sell it, or give it away from the right heir, and that, if he shall attempt to make such alienation of it, the grant shall become void, and the land shall revert to the right heir of the grantor, immediately upon his taking the first necessary step towards such an alienation, and before the alienation is complete, such a grant would be void, because it tends to create a perpetuity which the law abhors. In the same manner a grant by the king of a parcel of land in England, with any other condition annexed to it which is contrary to the general laws of the country, as for instance, a condition that the youngest son should inherit the land, instead of the eldest, or the eldest daughter instead of the eldest son, would be a void grant, or void at least with respect to that condition. In the same manner, likewise, if the whole county of Yorkshire was to come into the king's hands by escheat, or purchase, or otherwise, and the king was to grant it out to a set of new grantees, with a condition that they should be governed by the laws of Hanover, those grants, or at least those conditions of them, would be void. Such is the restraint which the law puts upon the power of a grantor, arising from his ownership. It is evident, therefore that the mere circumstance of ownership will not give the owner a power of making laws in the land of which he is owner. And to make this still plainer, in the case of a conquered country, let it be supposed that, after a peace, and the complete cession of a conquered country by the former sovereign to the crown of Great Britain, the king should grant away the whole of such conquered country to one of his subjects, to be holden of himself by fealty only, or by fealty and a paper-corn rent, or should sell it to such subject for a sum of money, in order to reimburse the nation in some degree for the expense of conquering it, and such subject should afterwards grant it away to other grantees, or let it to lessees for a term of years, I would ask whether such subject, when he granted it thus away to new grantees, or let it to lessees, would have a right to insert in his grants or leases a condition that the grantees or lessees should be governed by such or such a particular system of laws, which he had thought proper to mention in his grants or leases. I believe no one can think that such a condition would be binding, and if it could not, it clearly proves that the mere circumstance of being owner of the conquered country will not confer the right of legislation, The restraint upon the power of the grantor does not indeed arise from any right of privilege of the grantee, who naturally ought to be bound by every condition he freely consents to, but it arises collaterally from the interest that the other subjects have that no unreasonable laws or custom should take place in any of the dominions that are subject to the same crown with themselves, and which, by means of the connection between the several parts of one and the same empire, might ultimately be prejudicial to themselves.

But further, if the ownership of land could be supposed to give the owner a right to impose a system of laws upon the persons to whom he grants it, as a condition annexed to the grants yet if he makes free grants of it, that is, such grants as convey to the grantees a fixed and permanent interest in the several parcels of land that are granted to them, not to be defeated at the mere pleasure of the grantor (without which they can hardly be called grants), this right would be only a temporary right of legislation in the grantor, which being once executed by the grantor's inserting in a clause of the

grants the laws by which he would have the grantees to be governed, could never be used a second time, because the changing these laws, when they were once established, would be changing the conditions of the grants, which cannot be done by either the grantor or grantee, without the consent of the other party. Indeed, if a clause was inserted in the grants expressly reserving to the grantor the right of making new laws for the grantees, whenever he thought fit, there might be some pretence for a continuation of this right in the grantor, but such a clause would almost entirely destroy the nature of the grant, and, from a free grant, convert it into a very precarious one, that would be little better than a grant at the will of the grantor. Therefore no such power can ever be presumed, by implication or supposition of law to remain in the grantor without an express reservation of it in the grant, of which, I believe, no example is to be found in any grant made by a King of England since the first foundation of the monarchy. Without such an express reservation, the grants must be taken to convey a permanent and indefeasible property to the grantee, nor subject to the will of the grantor, and consequently, if the original ownership of the land could give the grantor any power at all of making the laws for the grantees, it must be only a temporary power of doing it once for all by a condition inserted for that purpose in the original grant; which is a very different thing from the ordinary legislative authority by which civil societies are regulated, which is constantly in being, and is incapable of any restriction, because it is founded on the power of the whole society who are supposed to have delegated to a particular man, or body of men, the power of making new laws to bind the whole society whenever they shall find it necessary. But in truth the mere circumstance of ownership cannot confer upon the owner of land even this temporary power of making laws for his grantees for the reasons which have been above set forth, which restrain the grantor from annexing illegal conditions to his grants, much less therefore can it confer upon him this complete and permanent and supreme legislative authority.

Hitherto I have considered the strongest case that can be put in favor of the doctrine of the King's being the Supreme Legislator of Countries that have been conquered by the British arms, to wit, that of a Country that should have been surrendered at discretion without any articles of capitulation, and which the King would have immediately seized upon and taken in his own hands, as his own property, by right of conquest, and kept in his own hands, as his own property, and cultivated by his soldiers or other servants or tenants-at-will, till the peace was made, and which should then have been entirely ceded to him by the former Sovereign of it; and I have endeavoured to show that, even in such a case, the King alone without the Parliament would not have a full legislative authority in such a conquered country, and particularly that no such authority could be derived from the circumstances of his being the owner of the Country.

The argument above mentioned derived from ownership cannot be applied to the Province of Quebec.

But the case of the Province of Quebec is very different from this case, in so much that the argument derived from the circumstance of ownership, if it had been a good argument, could not in any degree be applied to it. For this Province was not surrendered at discretion without articles of capitulation; and the King never was for a single moment the owner of all the land in the country, but only of such parts of it as had belonged to the King of France. For by the 7th, the 26th, the 35th and 37th articles of the capitulation upon which the whole country was surrendered to General Amherst in the year 1760, it is expressly provided that all sorts of property, both moveable and immoveable, that does not belong to the King of France, shall continue to belong to the present proprietors, whether private persons or bodies politic, or religious societies, not excepting that of the Jesuits, and this provision is confirmed by the fourth article of the definitive treaty of peace made in 1763, by which it is agreed between the two crowns that those persons who choose to retire and quit the Province may sell their estate and effects to any British subject, and retire to old France or elsewhere with the money arising from such a sale whenever they think proper within the space of eighteen months,

consequently the argument in favor of the king's legislative authority, derived from his ownership of the land cannot be applied to this Province.

If, therefore, this right of making laws for the Province of Quebec can be shewn to belong to the king alone without the concurrence of his Parliament, it must be founded on some other principle than this of ownership, if any other can be found for this purpose. I know of no other principle likely to be alleged on this occasion but that of the king's prerogative of making war and peace; and this has been examined above, and shewn, as I conceive, to be insufficient for the purpose. Add to all this that the king has already exercised a legislative authority with respect to this Province in conjunction with his Parliament in at least three instances, to wit, in passing the famous stamp act, in passing the act of 4 Geo. 3, chap. 19, for importing salt from Europe into this Province, and the Act of 4 Geo. 3, chap. 15, for granting certain duties in the British Colonies and plantations in America, which seems to be a kind of declaration, that his Majesty is not by his own single authority without the assistance of his Parliament, the true legislator of the Province; for, if he was so, it may be presumed that he would not have permitted this Province to be included in those Acts of Parliament, lest they should be made use of as precedents to diminish his just prerogative, but he would have imposed those several taxes and duties and extended the other provisions of those Acts to this Province by orders of his own made in his privy council. His choosing to proceed in these instances by the authority of Parliament is a proof that he considers the Parliament of Great Britain, consisting of himself, his Lords and Commons, as the only true and adequate legislature of this Province.

The Parliament of Great Britain has already exercised a legislative authority in this Province.

If these arguments against the king's being singly, without the Parliament, the legislator of this Province, are just, it will follow of course that all the ordinances hitherto passed in this Province are null and void, as being founded at best (for I shall endeavour to shew that they have not even the foundation) upon the king's single authority, and, if so, then the great ordinance of the 17th of September, 1764, by which the French laws were abolished and the laws of England introduced in their stead will be void amongst the rest, and consequently the French law must by virtue of the first maxim above laid down, be deemed to be still legally in force.

The French laws, therefore, have not been legally abolished, but are still in force.

I am sensible that it is a delicate and disagreeable undertaking in any of his Majesty's subjects, and more especially in an officer of the Crown, to argue against his Majesty's prerogative, but in some cases it may become a duty to do so. On the present occasion I have ventured to do so, not through an indiscreet desire of curiously prying into the exact bounds of the Royal prerogative, nor merely because I thought the truth lay on that side of the question, (for in that case it would have been sufficient to be silent upon the subject;) but in order to suggest to His Majesty's ministers what I conceive to be for the service of his Majesty, namely, an easy, short and popular method of getting rid of the sudden introduction of the English laws into this Province, by the ordinance of the 17th September, 1764, if His Majesty through compassion for His Canadian subjects, should graciously resolve to indulge them with a continuance of their ancient laws and customs. With this view, I shall proceed to mention two or three other grounds, from which we may infer that sudden alteration of the laws to have been void.

In the second place therefore, though it should be admitted that the king alone had a full legislative authority in this Province, yet this sudden and violent act of legislation may justly be contended to have been void for want of a sufficient and authentic declaration of His Majesty's pleasure to this purpose. For if his Majesty, has made such a declaration of his pleasure, it must either be, by his Royal Proclamation of the 7th October, 1763, or by the Provincial ordinance before mentioned of the 17th of September 1764. Now neither of those acts can, as I apprehend, be justly considered as a declaration of His Majesty's pleasure to this purpose.

For in the first place the proclamation does not actually introduce the laws of England into this Province, but only promises his British subjects that are inclined to go and settle in it, that he will introduce those laws, or rather such select parts of them as shall be of benefit to them after they shall have settled themselves in the said Province. The words of the Proclamation are 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 thereof; We have thought fit to publish and declare by this our Royal 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 direction to our governors of our said Colonies respectively, that so soon as the state and circumstances of the 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 and welfare and good government of our said Colonies, and of the people and inhabitants thereof, as near as may be agreable to the laws of England and under such regulations and restrictions as are used in other Colonies; and in the meantime and until such assemblies can be called as aforesaid *all persons inhabiting in, or resorting to our said Colonies may confide in our Royal protection for the enjoyment of the benefit of the laws of our realm of England*, for which purpose we have given power under our great Seal to the governors of our 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 de- "termining all causes, as well criminal as civil, according to law and equity, and "as near as may be, agreable to the laws of England, with the liberty to all persons "who may think themselves aggreived by the sentences of such Courts, in all civil cases, "to appeal under the usual limitations to us in our Privy Council."

The King's Proclamation of 7th October 1763.

These are the words of the King's Proclamation relating to the settlement of the laws of the conquered Provinces. They seem to be a promise to the inhabitants of those Provinces both those which were there settled in them and those that were likely to resort to them that his Majesty will in due time and manner introduce into them the bulk of the laws of England upon a supposition that the introduction of those laws will prove a blessing to the inhabitants, but they do not actually introduce them, for they refer to the powers given to the several governours of those Provinces in their Commissions under the Great Seal as the means by which His Majesty intends to perform this promise and actually introduce them, if therefore they have been actually introduced into this Province, it must be by the governor and Council of the Province in pursuance of the powers contained in the said commission and instructions; and if it shall appear that these powers were not sufficient to warrant and authorize an introduction of these laws, we may safely conclude that they have not yet been legally introduced into this Province and consequently are not legally in force in it. We must therefore now proceed to examine the commission and instructions of the governor of Quebec, in order to see how far the ordinances that have been made by the governor in Council of the Province and particularly the great ordinance of the 17th of September 1764, by which the laws of England have been introduced into this Province, and warranted by the legislative powers communicated by his Majesty to his governour and Council in the commissions and instructions.

The Governour's commissions.

Now the Governour's Commission gives him no power to make laws but in conjunction with an assembly of the freeholders of the Province as will appear by considering those parts of the commission which relate to this subject, and which are as follows.

Towards the beginning of the Commission, there is this paragraph. "And we do hereby "require and command you to do and execute all things in due manner that shall belong "to your said command and the trust we have reposed in you, according to the several "powers and directions granted or appointed you by this present commission and the "*instructions* and authorities herewith given unto you, or by such power, *instructions* "and authorities as shall at any time hereafter be granted or appointed under our signet "and sign manual or by our orders in our Privy Council, and according to such reason-"able laws and statutes as shall hereafter be made and agreed upon by you with the "advice and consent of the Council and assembly of the said Province under your go-"vernment in such manner and form as is hereinafter expressed."

After this paragraph the Commission mentions the oaths to be taken by the governour and members of the Council, and then authorises the governour to keep and use the seal of the Province, and then impowers him with the advice and consent of the Council, and as soon as the situation and circumstances of the said Province will admit thereof, to summon and call general assemblies of the freeholders and planters within the Province and then prescribes the oaths to be taken by the members of such assemblies, and then communicates to the governour in conjunction with the Council and the Majority of such assembly, a certain degree of legislative authority, which is expressed in these words. "And we do hereby declare that the persons so elected and qualified shall be called the assembly, of that our Province of Quebec; and that you the said James Murray, by and with the advice and consent of the said Council and assembly, or the major part of them, shall have full power and authority to make, constitute, and ordain laws, statutes and ordinances, for the public peace, welfare and good government of our said Province, and of the people and inhabitants thereof, and such others as shall resort thereunto, and for the benefit of us, our heirs and successors; which said laws, statutes and ordinances, are not to be repugnant, but as near as may be agreeable to the laws and statutes of our Kingdom of great Britain."

These are the only passages in the governour's Commission by which his Majesty has communicated any part of his legislative authority in this country; and by these passages it is plain that he has communicated this authority to the Governour, Council, and Assembly, and not to the governour and Council only without an assembly, consequently all ordinances made for this Province by the Governor and Council only, without an assembly, which is the case with all the ordinances hitherto made in this Province, must be void and of no effect, unless they are founded on some other ground than the governour's Commission.

The Governour's private instruction.

We must therefore have recourse in the next place to the governour's private instructions for a power in the governor and Council, without an assembly, to make laws for this Province. Now the only instruction that has any relation to this subject, is expressed as follows:—

"You are hereby authorized and empowered, by and with the advice and consent of the council of the said Province (until the situation and circumstances of our said Province will admit of calling general assemblies) to make such rules and regulations as shall appear to be necessary for the peace, order and good government of the said Province; taking care that nothing be passed or done that shall any ways tend to affect the life, limb or liberty of the subject, or to the imposing any duties or taxes."

Now this instruction cannot, as I conceive, convey any authority whatever to the Governor and Council, because it is only a private instruction under his Majesty's signet and sign manual, and not a public commission under his great seal. Such high powers as those of governing a Province, and making the necessary rules and regulations for that purpose, can be communicated only under the great seal of Great Britain; and they ought likewise to be made public, that the people may know that his Majesty has communicated them, and that the Rules and Regulations made in pursuance of them are made with sufficient authority and have a just claim to their obedience. It is upon this principle that the Governor's commission is passed under the great seal and is made

patent, or open, with these words at the end of it, "*In witness whereof we have caused these Our Letters to be made patent;*" and he is ordered in his instructions to cause it to be read before the Council, and it is usual also to cause it to be read aloud before the people. And upon the same principle it is, that a Judge or commissioner of Oyer and Terminer, or of gaol delivery, or of assise, when he goes upon his circuit to execute these commissions, always causes them to be read aloud before the people, before he acts under them, which is called *opening his commission*; and if any additional powers were given him by a private instruction under the King's signet and sign manual, they would be of no force, because not under the great seal and not made public. All delegations of the royal authority must be made in a solemn and formal manner, and must be at least so far made public that the persons who are required to acknowledge them, and pay obedience to the acts done by virtue of them, must be acquainted with them; and for this reason a judge's commission to hear and determine all criminal matters in any particular county must be published in that county to which it relates, and the commission of a Governor of a Province must be published in the Province of which he is made the Governor: and no powers than those that are contained in those public commissions can be of any legal authority. The end and design of giving private instructions to a Governor is not to convey new powers to him in a secret and under-hand manner, but to direct him in the use of those powers which are legally communicated to him by his public commission. It may, therefore, be justly concluded, that since his Majesty has not, either by his commission under the great seal or by any other public and solemn instrument of sufficient legal authority for this purpose, communicated to his Governor any power of making laws for this Province by the advice and consent of the Council of the Province only, without the concurrence of an Assembly, all the ordinances hitherto made in this Province have been made without a sufficient authority, and are consequently of no legal validity. Therefore the English laws have not yet been legally introduced into this Province, and the French laws have not yet been legally abolished, but ought properly to be considered as still in force.

But, if we suppose for a moment that a private instruction is sufficient to convey to the Governor and Council a power of making laws for the Province without the concurrence of an assembly, yet how small a portion of this power is meant to be communicated to them by the instructions above mentioned? They are authorised and empowered to make rules and regulations for the welfare and good government of the Province, provided they do not tend to affect the life, limb, or liberty of the subject, or to the imposing any duties or taxes. Under this restriction, it is evident that none of the criminal laws of England could be legally introduced into this Province, because they all affect either life, or limb, or liberty; nor could they introduce the ordinary process of arresting and imprisoning a man, by a writ of *capias ad respondendum*, which is used in actions of debt and trespass and other civil actions, since it touches so immediately the liberty of the subject. It is evident therefore that the great ordinance of the 17th September, 1764, which introduces at once all the civil and criminal laws of England, could not be passed by virtue of this instruction. It was therefore passed without sufficient authority, and, therefore, is not legally in force. Consequently, the laws of England have not yet been legally introduced into this provinde, nor the French laws legally abolished; but they continue yet in a true legal construction to be the laws of this Province.

The third and last ground from which we may infer that the laws of England have not yet been legally introduced into the Province by the ordinance of the 17 September, 1764, is the want of promulgation, which is a circumstance essentially necessary to the legal validity of every new law. Let the authority of a legislative body be ever so clear and absolute, the laws they make can have no binding force upon their subjects till they have plainly made known to them what they are.

Want of promulgation.

When the King, Lords and Commons make a new law in England itself, though their power is incontestable and without limit, the law is not in force immediately from the

day the King gives the Royal assent to it, but usually from a certain future day appointed by the Act itself, before which the people are supposed to have sufficient time to make themselves acquainted with it; or if no such day is appointed, but the expression in the Act is only that henceforth or henceforward the said new law should take place, it will be binding only from the time of the Acts being sold by the King's Printer, which is the present method of publishing Acts of Parliament to the people. Formerly, before the invention of printing, Acts of Parliament were publicly proclaimed or read aloud to the people, by the Sheriff, in the several counties of England; and, till they were so proclaimed, were not deemed to be legally in force. And when an Act of Parliament is made that extends to the American Colonies, it is never deemed to be legally in force in any colony till it has been transmitted to the Governor of the Colony by the Secretary of State, and received by him, and published by his order to the people.

What ought to be esteemed a sufficient promulgation of a new law.

Further, the publication of a law that is necessary to give it its binding force, is not a publication of its title only, or even an abstract of its contents, but a publication of the law itself in the very words in which it was conceived. Thus, if the King and Parliament of Great Britain should think proper to adopt and introduce into England any part of the laws of France, as, for instance, the laws relating to the police of the city of Paris should from such a future day take place in London and the other cities of Great Britain, nor even to enact that the laws relating to the police of the city of Paris and contained in such or such a book, (mentioning the title of the book, its date, and the place at which it was printed,) or in such an edict of Lewis the Fourteenth, passed on such a day of such a year should be thenceforward in force in London and the said other cities of Great Britain; but it would be necessary to recite those laws word for word in the Act of Parliament that introduced them. In like manner, if the Parliament of Great Britain should resolve to introduce into this Province any part of the law of England, as, for instance, the laws relating to the maintenance of the poor, it would not be sufficient barely to enact that the laws of England relating to the maintenance of the poor, should take place in the Province of Quebec; but it would be necessary to recite all those laws, word for word, in some such manner as this: "That the following laws concerning the maintenance of the poor, being those which are in force in England, upon the same subject, should henceforward be of force in the Province of Quebec; which laws are according to the tenor following;" after which the laws themselves should be recited word for word; for, by this means, the people would be made acquainted with these laws, and would be able to observe and obey them, which otherwise they could not do. But, instead of this, the whole body of the laws of England, both criminal and civil, have been introduced into this Province by only three or four words in the ordinance of the 17th September, 1764, by which it is ordained that the Supreme Court of Judicature shall have power to hear and determine all criminal and civil causes agreeable to the laws of England. Surely this cannot be deemed a sufficient promulgation of them. It may therefore be concluded upon this ground of the want of promulgation, as well as upon the other grounds that have been mentioned above, that the laws of England have not yet been legally introduced into this Province; and, consequently, that the French laws have not yet been legally abolished, but continue to be still in force.

Difference between this Province and the other British Colonies in America, with respect to the necessity of promulgating the laws of England in order to make them legally binding.

I am aware that it may be said that the laws of England have in fact been introduced into the other American Colonies, without an express promulgation; and yet it is not doubted that they are legally established there. And in the same manner it may be supposed they may be legally established in this Province, without a promulgation. But the cases are very different. This is a conquered Province, in which the French laws were fully established at the time of the conquest, and are the only laws the people have any knowledge of; whereas all the other British Colonies in America have either been originally settled by Englishmen, or considered as if they had been so, and treated accor-

dingly, in consequence of the great number of Englishmen who have, after the conquest of them, gone and settled in them among the conquered inhabitants, and have been supposed to constitute the main body of the people. This was the case with Jamaica, which was acquired by conquest from the Spaniards. The greatest part of the Spanish inhabitants of it abandoned it soon after the conquest, to go to the other Spanish dominions in America; and the few that remained are reckoned to be not worth considering in comparison to the number of English who resorted thither; so that the laws and constitution of the Government were established in the same manner and upon the same principles as they would have been if it had been an uninhabited Island originally discovered by English sailors, and settled by English planters.

The Island of Jamaica, though a conquered country, was treated as if it had been a planted one.

A promulgation of the laws of England is not necessary in a planted colony.

Now, in a colony settled by Englishmen, there is no need of any promulgation of the laws of England, because they are supposed to be already known to the inhabitants. They carry with them from England into the country they go to inhabit, the whole body of the laws of England that are in force in England at the time they leave it and begin their settlement of the new Province, excepting such laws as are in their nature entirely local and not applicable to any country but England; and they are further bound by such of the laws that shall be afterwards passed by the British Parliament, as shall by express words be extended to them; and likewise by such by-laws or local laws, of an inferior kind, as shall be made amongst themselves by the Governor, Council and Assembly of their representatives, under the powers communicated by the Royal Charters or Commissions to the Governor under the Great Seal.

I call these latter laws *by-laws*, because they are restrained by an express clause in the charter and commissions to the Governors, (under the authority of which alone they can be made at all,) to be such as are not repugnant to the laws of England, which is the very essence and definition of a *By-law* of a city or town Corporation in England. This is the true idea of the planted Colonies of Great Britain; from which it is plain that there is no need of an express promulgation of the laws of England in such Colony, in order to give them a legal introduction into it; because they are originally introduced there by the first settlers of the Colony, who are supposed to be sufficiently acquainted with them. But this reason can have no weight with respect to a conquered Province, such as the Province of Quebec, where the inhabitants know nothing of the laws of England. And, consequently, they cannot be legally introduced into such a Province without an express promulgation.

The French inhabitants of this Province ought not to be overlooked as inconsiderable in comparison with the British inhabitants of it.

If it be said that the French inhabitants of this Province may well be overlooked as being an inconsiderable part of the people settled in it in comparison of the British subjects that have resorted to it, in the same manner as the Spanish inhabitants that remained in Jamaica after the conquest of it were overlooked in the settlement of the laws of that Island, it need only be observed, in answer to such a proposal, that the French inhabitants of this Province are in fact so far from being inconsiderable, that they are at least a hundred times as many in number as the British subjects settled in it, and that this proportion seems likely to increase every day. Surely it would be an harsh and unreasonable conduct to treat the bulk of the people as inconsiderable in order to accommodate the measures of Government to a small number of new residents that are less than the hundredth part of them.

Because they are more than a hundred times the number.

Recapitulation of the grounds upon which it may be concluded that the laws of England have not yet been legally introduced into this Province.

These are the grounds upon which I conceive it may justly be concluded that the laws of England have not yet been legally introduced into this province and consequently that the French laws and usages have not yet been legally abolished; to wit: first, because this important change of the laws has not been made by the Parliament of Great Britain, which is the only proper legislature of this Province;

secondly, because it has not been made by virtue of any legislative authority legally communicated by the King to his Governor and Council, (for the commission under the Great Seal to the Governor communicates no such authority to the Governor and Council, but to the Governor, Council and Assembly; and the King's private instructions are not a legal method of communicating such an authority; and if they were, it would not warrant the great change that has been made in the laws by virtue of it, because this change has been carried vastly beyond the limited powers contained in it); and thirdly, because it has been made without a promulgation of the new laws. If his Majesty shall be graciously pleased to restore to the Canadians their ancient laws and usages, it will probably be a more gentle and popular method of doing this, and give less disgust to the English inhabitants of the Province, to declare upon all or some of the grounds that have been above set forth, that the great ordinance of the 17th of September, 1764, by which the English laws were introduced into this Province, was originally null and void in itself, and consequently that the French laws have never been legally abolished, than to consider the laws of England as having been once legally established here by that ordinance, and then to repeal that and the other ordinances, and thereby banish those laws from the Province in order to re-establish the laws of the conquered nation. And it is for this reason I have been so full in setting forth the grounds of its nullity. But which of those two methods of getting rid of the English law and restoring the ancient laws and usages that were observed before the conquest is fittest to be adopted, is a prudential rather than a legal enquiry; either method of doing it will be agreeable and equally beneficial to the Canadians.

No. 2.

A.

Opinion of Mr. *Justice Smith* in *Stuart v. Bowman*. Lower Canada Reports, Vol. 2, p.p. 394-8.

The Plaintiffs' title has been alleged by various counts as subsisting under both the English and French systems of law. It is, therefore, first necessary for the Court to decide what the law is, which is in force in the County of Ottawa in respect to lands held in free and common soccage. It is a principle laid down by the best authorities and universally recognized, that where a country is obtained by conquest or treaty, the King possesses an exclusive prerogative power over it, and may modify and alter the laws existing in the country at the time; but, in England, this right is subject to the control and revision of Parliament. It is also well settled that the King, in making these changes, cannot violate any articles of capitulation, which may have been assented to in favor of the conquered, and that these articles are sacred. In applying these incontrovertible rules to the case of Canada, upon reference to the articles of capitulation, it will be found that when the Marquis de Vaudreuil asked the British General to promise the maintainence of the inhabitants in their ancient laws and customs, the reply was, that they became subjects of His Majesty, and must await the expression of the King's pleasure in that respect.

The first intimation of this pleasure was contained in the proclamation of 1763, in which it was declared that His Majesty's subjects in the then Province of Quebec, should be maintained in the enjoyment of the laws of England. This, it has been held, has never been carried out, and was a mere declaration of intention. But on the other hand, this has been contradicted by the establishment of Courts of Justice, which are ordered to administer justice and equity, as nearly as may be, in conformity with the laws of England. After the establishment of these jurisdictions, political difficulties arose; some of the judges administered the English law, others such law as they saw fit. Hence arose a difference concerning the interpretation of the proclamation. But Courts of Justice have nothing to do with these difficulties between political parties. If the Crown had

the right to make such a declaration as that contained in the proclamation, and its intention to introduce the English law, was thereby made distinctly manifest, we have nothing to do but to carry that intention into effect. These matters were maturely weighed and considered, during the debates upon the Quebec Act of 1774. Do we not find in that Act a sufficiently distinct recognition of that intention; and if it was so endorsed by the authority of Parliament, must it not be held to be binding? We find it enacted in the fourth section of that Act, "that whereas the provisions of the said proclamation in respect of the civil government of the said province of Quebec, &c., 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 65,000 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, &c.," it was, therefore, so far as related to the civil government and administration of justice in the Province, &c., revoked, annulled and made void, from and after the 1st May, 1775. Could this Act have formally abrogated that which had never subsisted? Was not the intention of the Crown, and the acquiescence of the Parliament up to this period made manifest by this Act? It did not declare it to have been null, but annulled it from and after a certain date. The mere effect of our becoming subjects of the Sovereign of Great Britain, renders us subject also to the proclamation, issued by his Privy Council, up to the time that Parliament saw fit to interfere, and this Act, by its terms, maintained what had been done by virtue of that proclamation, only annulling it for the future. By the eighth section the right to hold property by Canadian subjects under the old tenure is conceded, "as if the said proclamations, &c., had not been made," &c., further ordering, that for the decision of matters in dispute, relative to property and civil rights recourse shall be had to the laws of Canada. The Imperial Parliament plainly held then, that it required a distinct enactment on their part to re-convey to the Canadians their rights to the administration of the French system of laws, which they must consequently have held to have been formerly taken away by the capitulation and proclamation. Then, on reference to the 9th section, which is framed in the form of a proviso, we find it enacted, that "nothing in this Act contained shall extend, or be construed to extend, to any lands that have been granted by His Majesty, or shall hereafter be granted by his Majesty, his heirs and successors, to be holden in free and common socage." If this proviso, instead of extending to the fourth section, and other portions of the Act, as its terms would imply, only extended as a proviso to limit the enactment contained in the 8th, (the next preceding section,) it nevertheless formally declared by the enactment contained in it, that recourse should be had, in the cases named, to the laws heretofore in force in Canada, and should not apply to lands granted in free and common socage. Can it be maintained, in the face of these declarations and enactments, that the old system of laws was to be applied, as well to the vast extent of territory, both in what is now Upper Canada, and in the Townships of Lower Canada then known as the waste lands of the Crown, as to the old territory already occupied by the French Canadian inhabitants? Clearly not. Some difficulty arose about the extent of the application of this proviso, it being contended, that as no other part of the Act but the next preceding 8th section referred to lands, this section only referred to it, and its force being held by some to be very limited, the differences between the parties gave rise to the passing of the Tenures Act, 6 Geo. IV, cap. 59, by the Imperial Parliament. In all the fierce struggles which ensued between contending political parties in the Province, the abstract right of the Imperial Parliament, to legislate upon this point, has never, to my knowledge, been disputed. This is conclusive proof, that the right was recognized, and it undoubtedly exists. This Act recognises the declarations of the Proclamation, and confirms the provisions of the Quebec Act in this regard, but at the same time limits it. The eighth section of that Act is as follows: "That all lands within the said Province of Lower Canada, which

have heretofore been granted by His Majesty, &c., to be holden in free and common socage, or which shall or may hereafter be so granted, &c., may and shall be &c., held granted, bargained, sold, alienated, conveyed, and disposed of, and may and shall pass by descent, in such manner and form, &c., as are by the laws of England established and in force in reference to grants, &c., descent, &c., or to the dower and rights of married women." Could language be stronger than this? If the power be admitted to have existed in the Imperial Parliament to pass this law, (and it has always been admitted,) this must be conclusive upon the point. But the Provincial Parliament has itself acquiesced in and confirmed this enactment, at the same time that they in some degree modified it by the Act of 1829. Whether this Statute has the force of law or not, it is still a formal recognition of the right of the Imperial Parliament, and this concurrence of the Colonial Legislature should remove every doubt which might previously have existed upon that point. I do not hesitate to declare my opinion, that it was in force as law, although it did not receive the Royal Assent within the two years mentioned in the Quebec Act. The Law Officers of the Crown have held, indeed, that it required a special Act of Parliament to enable the Crown to assent to it, after that period had elapsed—and it has been assented to with the additional rights which such an Act could confer. The case of the withheld consent to a contract, for the limited space of time, is widely different from this. The provision of the two years' limit, within which the Crown may assent, is made in favor of the Crown. The continuance of the Act before the Sovereign for this consent, is a sufficient mark of the continuance of the consent of the Colony, to which the Crown can therefore validly add its consent at any time, so long as the Act is not withdrawn. I am of opinion then, that the English law, with the restrictions contained in the last named Statute, is in force in respect of township lands.

B.

Opinion of Mr. *Justice Vanfelson* in *Stuart v. Bowman*. Lower Canada Reports, Vol. 2, p.p. 401-3.

VANFELSON, Justice:—Giving the judgment of the Court:—I differ from the learned President in the opinion he has expressed, that the English law is in force in the Townships. It is true that the Crown has the right, by virtue of its prerogative, to provide for the Government of, and administration of justice in a conquered or ceded country, but in the silence of the Crown upon the point, the laws of the conquering country are not introduced, but those of the conquered people remain in force. Has then the Sovereign of Great Britain introduced the English law? Upon this point our attention has been first directed to the forty-second article of the capitulation, the answer to which leaves the law in abeyance, subject to the future disposal of the Sovereign. The Treaty of Peace, by which the country was formally ceded, is also silent upon the point. Next in order is the Proclamation of 1763. I thought, at the time of the argument, that the English law had been introduced by that Proclamation, but upon further consideration I now believe that was an erroneous opinion. The terms of the Proclamation are by no means sufficiently distinct and formal to be considered as introducing the body of the English law. But besides the administration of the Government, it was necessary to provide for the disposal of the lands constituting what was called the domain of the Crown, and these were to be ceded under free and common socage, and to be administered by the Governor, as in the other Colonies, referring undoubtedly to the other North American Colonies. There is no inconsistency in introducing several different tenures of land, but there would have been great incongruity in introducing several different and distinct systems of law into the same country, divided, in the extent of their jurisdiction, by the lines which divide the old grants from the new, and requiring them to be administered to the different parties by one and the same tribunal. It is the Act of 1774, which really raised the difficulty respecting the extent to which the English laws were introduced into Canada. At the time when this was passed it

had been found that the species of jurisdictions, which had been established, were inconvenient both to the old settlers and the new. The eighth section of this Act has more special reference to the subject of tenures, and gave to the *seigneurs* and others, the same beneficial rights which they had ever enjoyed previous to the dispute concerning the interpretation of the Proclamation of 1763. The ninth section, which has been cited, can only be held to refer to this subject, for although it is couched in terms as if meant to apply to all the provisions of the Act, yet, it will be found quite impossible to give it that application. It must be held then to be a proviso to the next preceding section only, and simply to mean that seigniorial and feudal rights shall not affect the lands so newly ceded. To say that the whole body of the English law was to have force in respect to them, would be an absurdity. The Court has next to consider the Imperial Act of 1825, (6 Geo. IV. cap. 59.) I believe that the Imperial Parliament had the right to pass that statute as a Declaratory Law only. But, by this Act, as shewn by the eighth clause, the English law is only introduced, in respect of these lands, in three particulars, viz: *conveyance, descent or inheritance and dower;* and I think that the Imperial Parliament has gone very far in this. I believe that the Provincial Act of 1829 has never had force of law, but served as an explanation of the views of the Colonial Legislature in relation to the question. I conceive it to be manifest, then, that the English law has never been introduced into Lower Canada, except in the three points mentioned by the Act of 1825; and by that Act, and not before, has it been introduced to govern Township lands.

C.

Opinion of Mr. *Justice Mondelet* in *Stuart v. Bowman*. Lower Canada Reports, Vol. 2, p.p. 405-437.

MONDELET, Juge: Depuis que le Canada appartient à l'Empire Britannique, les tribunaux de ce pays n'ont jamais été appelés à décider une question d'une aussi haute importance que l'est celle qui se présente ici, je veux dire la grande question de savoir si les lois civiles de l'Angleterre ont, à aucune époque, été introduites en cette Province.

On comprend sans difficulté, qu'aux termes de la sec. 8me de l'Acte Impérial de 1774, communément appelé "Quebec Act," c. 83, la cause qui est soumise à cette cour, étant une action en Revendication ou Pétitoire, doit être jugée d'après les lois françaises, le droit du pays, à moins que les lois anglaises n'aient été introduites en Canada quant aux terres et héritages tenus *en franc et commun socage*.

Cette action étant une action en revendication (ou pétitoire) de divers lots de terre, situés dans le *Township de Buckingham*, on peut réduire aux suivantes les questions qui en surgissent:

1. Les Demandeurs ont-ils un titre?
2. S'ils ont un titre, il résulte d'une prescription acquise par une possession de 30 ans, revêtue des qualités requises par la loi ou de prescription plus courte, avec titre et de la manière que le veut la loi; ou
3. D'un acte ou d'actes translatifs de propriété.
4. Le Défendeur a-t-il un titre?
5. S'il a un titre, de qui le tient-il?
6. S'il a un titre, a-t-il acquis un droit irrévocable à la propriété en question, les Demandeurs, dans la supposition où ils auraient un titre, ne l'ayant enregistré qu'après l'enregistrement effectué par le Défendeur.

Il faut donc, avant tout, savoir d'après quel système de lois les droits respectifs des parties doivent être jugés.

Pour bien saisir cette importante question, il faut se reporter à la cession du pays la couronne d'Angleterre, en 1763.

En 1759, les armes victorieuses de l'Angleterre soumettent leurs vaillants ennemis, les Français.

En 1760, a lieu la capitulation.

En 1763, intervient le traité de cession.

L'article 42 de la capitulation du 8 septembre, 1760, ne peut assurément pas être invoqué comme une reconnaissance de la part de l'Angleterre, que la coutume de Paris fût alors, et devint par la suite, la loi du pays, puisqu'en réponse à la demande de Mr. de Vaudreuil que "les Français et Canadiens continueront d'être gouvernés suivant la coutume de Paris, et les lois et usages pour ce pays," le Général Anglais écrit, "répondu par les articles précédents, et particulièrement par le dernier, c'est-à-dire, ils deviennent sujets du Roi." Ces expressions étaient bien naturelles dans la bouche du Général Anglais, qui, sans doute, craignait d'assumer une responsabilité aussi grande que l'eut été celle de décider seul cette question; il soumettait, par cette réponse, le tout à la décision des autorités impériales. Au reste, du silence ou de la réserve du Général Anglais il ne pouvait résulter autre chose, sinon que tout était indécis quant à l'objet dont il était question, et, en attendant, les lois du pays demeuraient.

Comme on a recours à des principes que l'on prétend être applicables à l'état d'un pays conquis, il est à propos de réclamer ici contre une habitude qu'on pourrait s'être faite de dire que le Canada a été conquis; il faut s'entendre.

Il n'y a pas eu une conquête, dans le sens de la conquête de l'Angleterre, par les Normands. Il n'en est pas du Roi Geo., III, à qui le Roi Français céda le Canada, comme de Guillaume le Conquérant, qui prend et retient ce qu'on ne veut pas lui laisser saisir.

Il n'en est non plus du Roi d'Angleterre comme de *Cortès* qui se rue sur le Mexique, et qui au lieu de l'obtenir par une cession, fait subir à l'infortuné *Montézuma* des humiliations qui le conduisirent à une mort prématurée, c'était le moyen le plus expéditif d'en finir.

La position du Canada, lors de la cession, n'a rien d'analogue avec nombre d'autres exemples qu'on pourrait citer. C'est une cession qui a eu lieu, le traité le dit, et en fait foi.

Ainsi, les doctrines extrêmes et souverainement injustes que des politiques exagérés, dans des temps d'absolutisme et de malheurs pour les peuples et leurs libertés, se sont efforcés d'accréditer vis-à-vis des populations conquises, toujours à l'avantage des conquérants, ne sont aucunement applicables aux circonstances du Canada, de 1760 à 1763.

Mais supposons, pour un instant, que le Canada a été conquis dans le sens exagéré que l'ont prétendu certains individus, j'emprunte au Procureur-Général De Grey, et au Soliciteur-Général York, les passages suivants que je lis dans leur rapport à Sa Majesté, du 14 avril 1766:

"There is not a maxim of the common law more certain than that a conquered people retain their ancient customs till the conqueror shall declare new laws."

Le droit des gens est là, le *jus gentium*, pour revendiquer ce que des prétentions barbares et infectées des notions rétrécies du moyen âge, mettent en question.

Ecoutons le langage d'hommes d'état, et d'hommes de loi, chez qui, l'honneur, le désintéressement national et individuel, la science et le bon sens ont si noblement et si humainement proclamé: c'est le Procureur-Général Thurlow, dans son rapport au Roi Geo. III, du 22 janvier 1773.

"The Canadians seems to have been strictly entitled by the *jus gentium* to their property as they possessed it upon the capitulation and treaty of peace, together with all its qualities and incidents, by tenure or otherwise, and also to their general liberty; for both which, they were to expect your Majesty's gracious protection.

It seems a necessary consequence that all those laws, by which that property was created, defined and secured, must be continued to them. To introduce any other, as Mr. York and Mr. De Grey emphatically expressed it, tends to confound and subvert rights instead of supporting them."

Mr. le Procureur-Général Thurlow, envisageant alors la proclamation des droits du Souverain, et les droits du Souverain sur le pays nouvellement acquis, et fesant voir ce

que la justice et l'honneur exige que l'on fasse à l'égard des habitants de ce pays, aborde une autre question, celle qui autorise le Souverain de faire ce qu'exige la nécessité, et alors il s'exprime comme suit :

" Although the foregoing observations should be thought just, as a general idea, yet circumstances may be supposed, under which, it would admit some exceptions and qualifications. The conqueror succeeded to the *sovereignty* in a title at least as full and strong as the conquered can set up to their private rights and ancient usages. Hence would follow every change in the form of government which the conqueror should think *essentially necessary* to establish his sovereign authority, and assure the obedience of his subjects. This might possibly produce some alteration in the laws, especially those which relate to crimes against the state, religion, revenue and articles of police and the power of magistracy. But it would also follow, that such a change should not be made without some such actual and cogent necessity which real wisdom could not overlook or neglect, not that ideal necessity which ingenious speculation may always create by possible supposition, remote inference and forced argument—not the necessity of assimilating a conquered country in the article of laws and government, to the metropolitan state, or to the older Provinces which other accidents attached to the empire, for the sake of creating a harmony and uniformity in the several parts of the empire, unattainable, and, as I think, useless, if it could be obtained: not the necessity of gratifying the unprincipled and impracticable expectations of those few among your Majesty's subjects, who may accidentally resort thither, and expect to find all the different laws of all the different places from which they come, nor according to my simple judgment, any species of necessity, which I have heard urged for abolishing the laws and government of Canada."

Ces opinions si saines, ces déclarations si honorables et si franchement faites au Roi, par Mr. le Procureur-Général Thurlow, sont appuyées par les rapports de Mr. le Solliciteur-Général Wedderburne du 6 Décembre, 1772, et sont éloquemment et énergiquement consignées le 14 Avril 1766, par Mess. le Procureur-Général De Grey, et le Soliciteur-Général York, dans leur rapport à Sa Majesté, qui avait précédé les autres.

Il n'en faut pas d'avantage pour faire voir que la Couronne ne pouvait, *seule*, changer les lois du pays en force avant 1759 ; l'Angleterre entière *ne le devait pas*, et il n'est que juste de déclarer ici ma ferme conviction que non-seulement le Roi, non plus que le Parlement Impérial ne l'ont fait, mais qu'il ne paraît pas même qu'ils aient jamais eu l'intention de le faire.

Nous voici arrivés à l'émanation de la Proclamation du 7 Octobre, 1763.

Il me paraît fort singulier qu'on attribue à ce document, des propriétés que le Roi même ne paraît pas avoir imaginé qu'elles possédât. Qu'y trouve-t-on ?

" And whereas it will greatly contribute to the speedy settling of 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 thereof ; we have thought fit to publish and declare, by this our Proclamation, that we have, in the Letters Patents under our Great Seal of *Great Britain*, by which the said Governments are constituted, given express power and direction to our Governors of our said colonies, that so soon as the state and circumstances of the said colonies will admit thereof, they shall with the advice and consent of the members of our said 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, agreeably 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 in-

habiting in, or resorting to our said colonies may confide in our royal protection for the enjoyment of the benefit of the Laws of our Realm of *England;* for which purpose, we have given power under our Great Seal to the Governors of our said colonies, respectively, to create 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 all causes, as well criminal as civil, according to Law and Equity, and as near as may be, agreeably to the Laws of England, with liberty to all persons, who may think themselves aggrieved by the sentence of such courts, in all civil cases, to appeal, under the usual limitations and restrictions, to us, in our Privy Council."

Il me parait évident que cette proclamation du Roi, qui lui ne pouvait seul changer les lois du pays, et qui, probablement n'en a jamais eu l'intention, ne renferme pas même l'expression du désir de Sa Majesté, que les lois anglaises, je veux dire dans leur ensemble, fussent introduites en Canada; j'y vois, tout au plus, l'expression du désir du Roi, que les tribunaux du Canada jugeassent suivant la loi et l'équité (*according to law and equity*), et autant que faire se pourrait, suivant les lois anglaises, (*as near as may be agreebly to the laws of England*). Il n'est pas permis, en présence d'une phraséologie aussi générale, aussi peu tranchée que celle-là, de violer toutes les règles de la logique, de la raison, de la justice, et de la loi, et assurer, comme on le fait, que les termes sont une déclaration formelle de la part du Roi, que les lois anglaises devenaient et seraient désormais les lois du Canada. Et certes, si le Roi seul en avait l'autorité, ce que je ne puis admettre, et s'il en avait l'intention, le désir et la volonté, qu'y avait-il de plus facile que de le dire? Depuis quand, les souverains, surtout les conquérants, dans le sens qu'on a si étrangement attribué à la cession du pays, sont-ils si timides, et substituent-ils à l'expression de leur volonté, des termes aussi éloignés de l'opérer, que sont les mots "according to law and equity, and as near as may be agreeably to the laws of England?" *According to law!* Quelle loi? *Equity!* cela signifie tout ce que l'on veut, et aussi peu qu'on le désire—*as near as may be, agreeably to the laws of England!* Si on doit juger autant que faire se pourra, suivant les lois anglaises, comment se fait-il qu'elles ont été introduites? Serait-ce donc pour laisser aux juges la liberté, suivant leurs caprices, de s'y conformer, ou de s'en écarter? Plus on tenterait de prouver en quoi de pareilles prétentions sont tout-à-fait illogiques et insoutenables, plus on s'exposerait à affaiblir sa position, car l'on risque toujours quelque chose, lorsqu'on s'attache trop à prouver ce qui est l'évidence même. Ainsi donc, non-seulement la Proclamation de 1763 ne justifie aucunement d'en inférer l'introduction en Canada des lois anglaises, mais elle n'autorise pas même l'induction logique et raisonnable que Sa Majesté Geo. III. ait eu l'idée de le faire. Et s'il m'était permis d'anticiper, je dirais de suite, que par l'Acte de 1774, (*Quebec Act*) l'on a législaté dans un sens inverse.

D'ailleurs, la Proclamation de 1763, n'était pas bornée à la Province de Québec, qui n'était qu'un des quatre gouvernements qu'elle établissait, je veux dire, les deux Florides et la Grenade, en sorte qu'il serait contre toute raison, d'appliquer d'une manière absolue, à la Province de Québec, ce qui, considérant les circonstances, et l'état de société dans ce pays alors, n'était aucunement en rapport avec les choses aux Florides et à la Grenade. Il y avait mille raisons d'admettre des modifications qui rendraient plus que ridicule les prétentions de métamorphoser en ordonnance absolue, et parfaitement effective, une proclamation qui n'a d'autre but et d'autre portée que d'exprimer un désir du Souverain, qui était, tout au plus, naturel, mais sans conséquence et sans suite.

Au reste, l'histoire du temps nous fait connaître ce que l'on pensait alors de cette Proclamation.

J'emprunte encore au rapport de Mr. le Procureur-Général Thurlow, les passages suivants, ils sont précieux—

..........."Three very different opinions have been entertained. There are those who think that the law of England, in all its branches, is actually established, and in force in Quebec. They argue that your Majesty, upon the conquest, had undoubted authority to establish whatever laws should seem fittest in your royal wisdom; that your

Majesty's Proclamation, dated the seventh day of October, 1763, was a repeal of the existing laws, and an establishment of the English laws in their place, in all parts of the new subjected countries; that the several commissions to hear and determine by the laws of England, were an actual and authoritative execution of those laws; and, that this law, as it prevails in the province of New York and the other colonies, took its commencement in the same way, and now stands on the same authority.

If Your Majesty should be pleased to adopt this opinion, it seems to afford a full answer to the whole reference, by exhibiting not only a general plan, but a perfect system of civil and criminal justice, as perfect as that which prevails in the rest of your Majesty's dominion, or, at least, it leads off to questions widely different, touching the expediency of a general change in the established laws of a colony, and touching the authority by which it ought to be made.

Others are of opinion that the Canadian laws remain unrepealed. They argue that according to the notion of the English law, upon the conquest of a civilized country, the laws remain in force till the conqueror shall have expressly ordained the contrary. They understand the right acquired by conquest to be merely the right of empire, but not to extend beyond that to the liberty and property of individuals, from which they draw this conclusion, that no change ought to be made in the former laws beyond what shall be fairly thought necessary to establish and secure the sovereignty of the conqueror. This idea they think confirmed by the practice of nations and the most approved opinions. *Cum enim omne imperium victis eripitur, relinqui illis possunt, circa res privatas et publicas minores. suæ leges, suique mores, et magistratus hujus indulgentiæ pars est, avitæ religionis usum victis, nisi persuasis non eripere*, Grot 3, 15, 10. And if this general title to such moderation could be doubted, they look upon it to be a necessary consequence of the capitulation and treaty alluded to before, by which a large grant was made them of their property and personal liberty, which seem to draw after them the laws by which they were created, defined and protected, and which contain all the idea they have of either. This moderated right of war, flowing from the law of nations and treaties, they think may have some influence upon the interpretation of the public acts above mentioned.

Though the proclamation of the 7th October, 1763, is conceived in very large terms, generally enough to comprehend the settled countries together with the unsettled, yet the purview of it seems to apply chiefly, if not altogether, to the unsettled, where the laws of England obtain a course till otherwise ordered, for it seems to assume and proceed upon it, as manifest, that the laws of England are already in force, which could not be true of any settled country reduced by conquest. It also recites for its object, that, "it will greatly contribute to the *speedy settling* our said new government;" and, at any rate, they think it too harsh a conclusion to be admitted that such an instrument in the state thereof, not addressed to the Canadians, nor solemnly published among them, nor taking any notice of their laws, much less repealing them, should be holden to abrogate all their former customs and institutions, and establish the English laws in every extent and to every purpose, as it may be thought to do in unsettled countries, which conclusion, however, they know not how to avoid, but by confining it to those countries where no settled form of justice existed before.

If it be true that the laws of England were not introduced into Canada by this Proclamation, they consider the several commissions above mentioned, to hear and determine according to those laws, to be of as little effect, as a Commission to New York to hear and determine according to the laws of Canada.

.... Others again have thought that the effect of the above mentioned Proclamation, and the acts that followed upon it, was to introduce the criminal Laws of England, and to confirm the civil law of Canada, in this number were two persons of great authority and esteem; Mr. Yorke and Mr. De Grey, then Attorney and Solicitor General, as I collect from their report of the 14th April, 1766. One great source they represent, of the disorder supposed to prevail in Canada, [illegible] the claim taken at the

constructions put upon your Majesty's Proclamation of 1763, as if it were your Majesty's intention, by your Majesty's Judges and officers of that country at once to abolish all the usages and customs of Canada, with the rough hands of a conqueror, rather than in the true spirit of a lawful Sovereign, and not so much to extend the protection and benefit of Your Majesty's English laws to your new subjects, by securing their lives, liberties and properties, with more certainty than in former times, as to impose new, unnecessary and arbitrary rules, especially in the titles to land, and in the modes of descent, alienation and settlement, which tend to confound and subvert rights instead of supporting them.

"There is not a maxim of the common law more certain than that a conquered people retain their ancient customs till the conqueror shall declare new laws. To change at once the laws and manners of a settled country, must be attended with hardships and violence. And, therefore, wise conquerors, having provided for the security of their dominions, proceed gently, and indulge their conquered subjects in all local customs which are in their nature indifferent, and which have been received as rules of property or have obtained the force of laws. It is the more material that this policy should be pursued in Canada, because it is a great and ancient colony, long settled and much cultivated by French subjects who now inhabit it, to the number of eighty or one hundred thousand.

In criminal cases, whether they be capital offences or misdemeanors, it is highly fitting so far as may be, that the laws of England should be adopted, in the description and quality of the offences itself, in the manner of proceeding to charge the party, to bail or detain him, to arraign, try, convict or condemn him. This certainty and lenity of the English administration of justice, and the benefits of this constitution, will be more peculiarly and essentially felt by His Majesty's Canadian subjects, in matters of crown law, which touch the life, liberty and property of the subjects, than in the conformity of Your Majesty's Courts to the English rules in matters of tenure, or the succession and alienation of real and personal estate. This certainty and this leniency are the benefits intended by Your Majesty's royal proclamation as far as concerns judicature."

Messrs. York et De Grey parlent énergiquement dans le même sens, comme il est facile de s'en convaincre, en référant à leur rapport du 14 avril 1766, dont je m'abstiendrai de faire des extraits, pour éviter des longueurs et les redites. On le trouve au 1er. Vol. de l'histoire du Canada, par Smith, p. 29, *et seqq.*

Telles sont les vues qu'avaient des hommes distingués par leur position et leur mérite, sur le caractère; le but et la portée de la Proclamation de 1763. Cela est d'autant plus remarquable, qu'à cette époque on devait tout naturellement avoir des idées un peu exagérées vis-à-vis d'un pays qu'on regardait comme conquis.

Sans parler ici de l'énormité de l'injustice qu'il y aurait eu, et de l'acte barbare et de vandalisme dont l'Angleterre se serait souillée, si d'un coup de plume elle eût effacé les lois, les usages, les droits et tout ce qu'il y avait de plus cher à un peuple qui n'avait d'autre tort que celui d'avoir vaillamment combattu pour un gouvernement, le plus immoral, le plus égoïste, et le plus lâche que l'on pût imaginer, et qui sourd à son devoir et à l'honneur français, s'est vu, à sa honte, s'il en était susceptible, enlever un pays magnifique, après en avoir indignement abondonné les braves habitants qu'il aurait du protéger et défendre, s'il eût mis à cet acte de justice, d'honneur et d'humanité, les sommes immenses que leur roi, le sardanapale des temps modernes, dépensait dans les orgies les plus dégradantes, et à gratifier les goûts et alimenter les excès de maîtresses bien dignes de lui, sans parler, dis-je, de l'acte de vandalisme qu'eût ainsi commis l'Angleterre, n'est-il pas contraire à tout principe, de reconnaître dans un monarque, le premier magistrat de l'empire, et rien de plus, le droit de faire, ce que d'après le *droit des gens*, le parlement entier de la Grande-Bretagne n'aurait pas même songé de faire, et n'aurait consommé qu'en foulant aux pieds, l'honneur et l'humanité—Et ce serait vouloir que ce magistrat qui exécute, mais ne fait pas, à lui seul les lois, exerçât vis-à-vis d'un pays établi et un peuple civilisé, ce qu'il a à peine le droit de déclarer au nom

de la nation qu'il gouverne, lorsqu'il s'agit de territoires non habités. Jamais pareille idée ne peut être accueillie dans un pays où nous connaissons nos droits, comme nous reconnaissons et savons respecter ceux des autres.

Il est donc certain qu'en 1763, les lois françaises, c'est-à-dire, les lois du pays, étaient dans leur integralité.

De 1763 à 1774, les choses demeurent dans cet état.

Il faudrait donc, pour justifier la prétention qu'on met en avant, relativement aux *Townships*, trouver quelque part, l'abolition des lois du pays, quant à une section quelconque de ce pays.

On a avancé que l'acte impérial de 1774, c. 83, (le *Quebec Act*) renferme des dispositions qui décident la question ; examinons le :

D'abord la sec. 4e, en parlant des habitants du pays, a les termes qui suivent : " 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."

Comme on le voit, cette section du statut impérial, est loin d'annoncer un doute sur l'existence des lois du pays, à cette époque ; et il s'en faut qu'on y trouve quoique ce soit qui confirme l'étrange interprétation qu'une arrière pensée a porté certains hommes de parti en Canada, d'attribuer à la proclamation de 1763 : ce n'était que du réchauffé.

Quoiqu'il en soit, ou puisse être, toujours est-il vrai, que par cette sec. 4e., la proclamation est de plus mise de côté : n'en parlons plus.

La sec. 8e est aussi emphatique que possible, la voici :

" 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 their civil rights, in as large, ample and beneficial manner, as if the said proclamation, commission, 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 Provinces 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 the said Province by the Governor, Lieutenant-Governor, or Commander in Chief, for the time being, by and with the advice and consent of the Legislative Council of the same, to be appointed in manner hereinafter mentioned."

Cette section a rapport à tous les sujets Canadiens de Sa Majesté, "*All* His Majesty's Canadian subjects *within* the Province of Quebec." Il n'y a d'exception qu'à l'égard des ordres religieux et des communautés, " the religious orders and communities *only* excepted."

D'après quel procédé et quelles règles peut-on faire qu'une section qui parle de *toute* une province et de *tous* ses habitants, dont les ordres religieux et les communautés seuls sont exceptés, n'a rapport et ne s'entendra que d'une section de cette province, et d'une partie de ses habitants ? La chose est insoutenable ; aussi se rejètte-t-on sur le *proviso* qu'on lit en la sec. 9e.

"Nothing in this Act contained shall extend, or be construed to extend, to any lands that have been granted by His Majesty, or shall hereafter be granted by His Majesty, His Heirs and Successors, to be holden in free and common socage."

Cette clause est mal exprimée, la phraséologie en est indéfinie ; elle se rapporte à tout l'acte. " Nothing in this Act contained, &c."

Si l'intention était de faire rapporter le proviso à la section précédente seulement, il eût été facile de le faire.

Dans la supposition où la cour serait justifiable, (ce que je nie) de restreindre à une seule clause, ce qui, en termes exprès, a rapport à l'acte entier, alors la seule portée que l'on puisse raisonablement attribuer aux termes de ce proviso, (Sec.9) c'est que les lois qui ont rapport à la tenure seigneuriale ne s'appliquassent point aux terres concédées, ou à être concédées, *en franc et commun socage.*

Si les cours prenaient sur elles d'étendre la signification des mots, et de déclarer qu'ils signifient au-delà de ce qu'il est raisonable de leur attribuer, et cela dans le but de donner suite à ce proviso, alors, il n'y a pas de choix, et il faut, sans balancer, dire, ou que ce proviso affecte tout l'acte, ou que tout ce qui se trouve dans la clause 9e. est sans application aux sections du pays, où il y a des terres tenues *en franc et commun socage.* Si ce proviso affecte tout l'acte, alors, il le détruit, et entre autres conséquences il résulterait :

1. Qu'une loi qui est faite pour *toute* la province, ne s'appliquerait qu'à une partie de la province

2. Que la section 5e qui garantit le libre exercice de la religion catholique romaine dans la province de Québec, n'aurait aucun effet dans les townships où les terres sont tenues *en franc et commun socage*, et que là, cette religion ne devrait pas être tolérée.

3. Qu'il en serait ainsi de la section 6e, quant à certaines allocations à faire par Sa Majesté, pour le soutien d'un clergé protestant, là où il y aurait des terres tenues *en franc et commun socage :* conséquence absurde, mais irrésistible.

4. Que dans les *townships*, les catholiques ne seraient pas tenus de prêter le serment d'allégeance.

5. Que dans les *townships*, les canadiens n'auraient droit à aucune protection dans leurs droits de citoyens.

6. Que dans les *townships*, l'aliénation par testament, suivant les lois anglaises, serait impossible et non permise, 10e section.

7. Que les lois criminelles garanties par la section 11e, n'auraient point de force dans les *townships.*

8. Que le conseil constitué "pour faire des règlements pour le bonheur et le bon gouvernement de la province de Québec," n'aurait jamais eu le droit de faire ses règlements pour les parties ou sections de la province de Québec où s'étendait la tenure *en franc et commun socage*, en sorte que les lois de la législature d'alors n'auraient eu de force que dans les seigneuries.

9. Que les ordonnances du conseil, dont la sec. 14e exige l'envoi dans l'espace de six mois, par le gouverneur, &c., pour être soumise à Sa Majesté, afin d'obtenir son approbation, seraient lois pour les *townships*, sans cette formalité, laquelle serait de rigueur dans les seigneuries.

10. Que les ordonnances concernant la religion, ou autres, par lesquelles il pourrait être infligé une peine plus forte qu'une amende, ou un emprisonnement de trois mois, seraient lois dans les *townships*, du moment de leur promulgation, mais n'auraient aucune force dans les seigneuries jusqu'à ce qu'elles eussent reçu l'approbation [illegible] comme l'exige la sec. 15e.

11. Que la Sec. 17me au sujet de la réserve faite du droit des nominat[illegible] établissement des cours de justice &c., serait inapplicable dans les *Townships*, et que là, Sa Majesté n'aurait aucun droit d'établir des cours, juges ou officiers quelconques.

Il s'ensuivrait enfin—

12. Que la sec. 18me n'aurait aucune force ou vertu de réserve quant aux *Townships* où les lois du [illegible]lement de la Grande-Bretagne, concernant le commerce &c., seraient sans force.

En voilà, [illegible] assez pour faire toucher du doigt à qui veut réfléchir, la parfaite nullité de la s[illegible] prend telle qu'on la trouve.

Dans la 2e [illegible] posée, il y a [illegible] moins de la raison, puisque l'on refuse d'appliquer à la partie seulement, ce que la section même déclare emphatiquement se rapporter au tout. La seule interprétation permise, et elle n'est raisonable que parcqu'elle

ressort de la nature même de l'objet dont il y est question, c'est que ce qui, du droit Français a rapport à la tenure seigneuriale, ne s'applique pas aux terres concédées ou qui le seront, en franc et commun socage.

Il résulte de ce qui précède que l'acte impérial de 1774, n'a pas introduit les lois Anglaises dans les Townships.

Une observation générale suffira pour le prouver encore plus clairement, s'il est possible. Est il un homme de loi, en Canada, qui soit disposé à se compromettre au point de dire, que le corps *entier* des lois Anglaises a *été* introduit dans les *Townships*. Or, si la sec. 9me de l'acte de 1774 n'a pas eu cet effet, quelle est donc la partie, ou les parties des lois de l'Angleterre, qui a *été*, ou ont *été* introduites dans les *Townships*. La question devient, à ce compte là, encore bien plus compliquée, tellement compliquée, qu'en y réfléchissant tant soit peu, l'on recule devant les conséquences ruineuses qui auraient été [illegible] d'une anomalie aussi impraticable, et de l'état de choses effrayant qui en [illegible] résulté, et contre lequel, les populations des *Townships* se seraient élevées, et [illegible]aient aujourd'hui en masse, pour demander à grands cris qu'on substituât quelque chose de certain et d'intelligible, à un amas de règles incohérentes résultant de statuts multipliés, innombrables, contradictoires, sans application, et que les jurisconsultes du pays euxmêmes ne comprennent pas parfaitement.

Au reste, le jugement que je porte sur l'effet de ces lois, si on les reconnaissait à ce point, ne m'est pas particulier.

" To introduce (disent Messrs. York et De Grey, dans leur rapport au Roi, du 14 Avril 1766) at one stroke, the English law of real estates, with english modes of conveyancing, rules of descent, and construction of deeds, must occasion infinite confusion and injustice. British subjects, who purchase lands there, may, and ought to conform to the fixed local rules of property in Canada, as they do in particular parts of the realm, or in the other dominions of the Crown."

C'était bien ainsi que l'envisageaient le Gouverneur Carleton et son Conseil, comme on peut s'en assurer, par le rapport du 28 Avril 1767, qu'ils firent à Sa Majesté, d'apres l'ordre qu'ils en avaient reçu.

Et lors de la demande que firent les habitants du Canada, à la mère-patrie, d'une forme constitutionnelle de gouvernement, la pétition qu'ils présentèrent, (et comme on le dit, les hommes qui marchaient en tête de ce mouvement étaient d'origine bretonne) renfermait ce qui suit :

4. That the ancient laws and customs of this country respecting lands and estates, marriage settlements, inheritances and dowers be continued, &c."

Be continued, dirent-ils, non pas *restored*, non plus qu'*introduced*, &c., mais *be continued*, par la raison toute simple que ces lois étaient le droit du pays.

Je crois donc pouvoir dire qu'il ne parait pas que l'Angleterre ait jamais songé à émettre les prétentions exagérées qui ont vu le jour en Canada, au sujet des lois anglaises. Plus tard, lorsqu'il fut question de diviser en deux la Province de Québec, Mr. Pitt s'exprima de manière à dissiper, s'il en avait existé, tout doute à ce sujet. Le but du gouvernement anglais était d'assurer la suprématie des lois anglaises dans le Haut Canada, et celle des lois françaises dans le Bas Canada, la raison en devait être, entre autres, celle donnée par York et De Grey, dans leur rapport dont j'ai déjà eu occasion de parler plusieurs fois.

"British subjects who purchase lands there, may and ought to submit to the fixed local rules of property in Canada, as they do in particular parts of the realm, or in the other dominions of the Crown."

En introduisant le bill dans la chambre des communes, voici comment s'exprime Mr. Pitt : " The division of the Province into Upper and Lower Canada, he hoped, would put an end to the competition between the old french inhabitants and the new settlers from Britain and the british colonies : this division, he trusted, would be made in such a manner as to give each a great majority in their own particular part, although it could not be expected to draw a complete line of separation. Any *inconveniences* however, to

be apprehended from ancient Canadians being included in the one, or British settlers in the other, would be averted by a local legislature to be established in each."

Je ne puis mieux faire, et c'est mon dernier mot sur l'Acte de 1774, que de citer ce qu'en dit l'historien Mr. Smith, dont les vues sur une question comme celle-ci ne seront jamais aperçues par les gens instruits, à travers un prisme fait exprès pour les refléter sous un jour trop favorable aux justes prétentions des anciens habitants du pays. Dieu me garde de faire à Mr. Smith, dont je respecte la mémoire, un reproche de ce qu'il avait, sur les affaires du pays et sur certains droits d'une portion considérable de ses habitants, des opinions que nombre d'autres, placés comme il l'était lui-même, avaient sans doute avoués : je fais la part des temps et des circonstances. Et c'est parceque je reconnais chez lui ce que je réclame pour moi-même, et pour tout autre, quel qu'il soit, une liberté, sans controle aucun, de penser et d'exprimer nos opinions sur quelque sujet que ce soit, que je cite avec confiance ce qu'il a écrit, et que j'attribue, sans difficulté, à une conviction parfaite chez lui, qu'il disait la vérité, puisque je dois cet hommage à sa mémoire. D'ailleurs, moi aussi, qui ai le droit et la liberté de penser et de dire ce que je pense, je vois, comme le voyait Mr. Smith, l'acte de 1774.

"The Quebec Act restored, (dit-il à la p. 69, s. 1,) the municipal laws of France as to civil rights in Canada, established also the best of all criminal jurisprudence, the criminal laws of England."

Et à la p. 73, "The main scope of the Quebec Act, was to extend the boundary of the Province..................to establish the French laws; to take away the trial by jury in civil cases; to establish the criminal laws of England; and to secure to the catholic clergy their estates and tithes."

Pas un mot du proviso de la sec. 9e., au sujet des terres concédées, ou à l'être, en franc et commun socage. Et certes, la chose valait bien la peine qu'on en parlât, et Mr. Smith n'aurait pas été en défaut, si l'on eût imaginé alors de donner à ce proviso l'étrange interprétation qu'on lui donne aujourd'hui.

Cette opinion de Mr. Smith, et quelle autre pouvait-il en avoir sur l'effet de l'Acte de Québec, non pas pour les seigneuries seulement, mais dans tout le Canada? *in Canada*, cette opinion, dis-je, me fait voir, qu'à cette époque, la nuance la plus naturellement opposée à ce qu'il en fût ainsi, était, comme je le suis moi-même d'avis, que les lois françaises et non les lois anglaises, étaient alors le droit commun du pays.

Or, comme depuis l'acte impérial de 1774 jusqu'à 1826, il n'y a eu, soit en Canada, soit en Angleterre, aucune législation qui puisse aucunement ébranler l'édifice bien appuyé du système de nos lois civiles, dont l'arbre gigantesque a pris racine à Rome même, dont le tronc s'est étendu sur les Gaules, et dont les branches et le feuillage nous recouvrent, nous arrivons à 1826, époque à laquelle a été passé dans le parlement impérial, l'acte des tenures, 6 Geo. IV, c. 59, que l'on prétend être un acte déclaratoire qui a la vertu de trancher toutes les difficultés.

Je suis tellement convaincu que jamais les lois civiles Anglaises n'ont été introduites en Canada, j'en trouve la preuve si conclusivement faite par ce qui précède, qu'il m'est impossible d'admettre le doute en cette matière. Je ne puis par conséquent reconnaître au Parlement Impérial le droit d'intervenir et entreprendre d'introduire, par l'effet d'une clause intercalée dans un acte législatif en 1826, des lois civiles qui n'ont jamais fait partie de celles qui nous ont régi jusqu'alors.

Le Parlement Impérial eût-il le droit de législater sur de tels objets, ce que je répudie sans difficulté, il est impossible, toutefois, qu'il ait la puissance de faire que ce qui n'a jamais été, ait existé, de même que ce qui n'a jamais eu d'existence, en ait eu. Dieu lui-même ne le peut, et l'on veut que le Parlement Impérial le puisse. Il faut avouer que c'est porter un peu loin la complaisance et la confiance, il faut un degré de foi qui dégénère en abjection.

Ne s'aperçoit-on pas, que si, en présence des traités et des capitulations, et d'une déclaration aussi formelle, aussi emphatique, aussi solennelle que celle que renferme l'acte Impérial de 1774, sec. 8me, "And all causes &c., shall with respect to such pro-

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perty and rights, be determined agreeably to the said laws and customs of Canada, *until* they shall be varied or altered, by any ordinances that shall, from time to time, be passed in the said province, by the Governor &c., &c., &c." Ne s'aperçoit-on pas dis-je, que si l'on admettait, pour un instant, la prétention que le Parlement Impérial a pu constitutionnellement et légalement statuer, comme on dit qu'il l'a fait en 1826, on admettrait par là-même que sous le prétexte qu'on aurait élevé des doutes là où il n'y en avait pas, le Parlement Impérial réglerait, sans appel, et en dernier résort, ce qui est loi, ce qui l'a été, et déciderait, *ex cathedrâ* que les lois garanties après avoir été accordées, ne l'ont pas été, qu'on s'est trompé, que l'erreur a donné lieu à cette croyance, et que désormais les lois qu'on pensait notre règle, ne le sont pas, et que tout doit être regardé comme affranchi, par le passé même, de l'effet de ces lois?

Ne voit-on pas de suite où nous mènerait une complaisance aussi grande que celle-là? Ne touche-t-on pas du doigt qu'une fois la concession faite à l'Angleterre d'intervenir de la sorte dans notre système de lois, il n'y a plus de sureté, plus de garantie, plus de droit? les droits acquis disparaissent pour faire place à une législation d'outremer que la colonie ne peut, ne doit pas admettre, sans tout sacrifier.

Je sais que l'opinion que j'exprime, ne sera pas de nature à édifier nombre de personnes qui se pensent tenues de fléchir le genoux devant les oracles de la Mère-Patrie; mais quant à moi, je ne connais qu'une règle, c'est le devoir, et comme juge, je ne puis m'incliner en présence d'un pouvoir qui, quelque élevé, quelque puissant qu'il soit, ne l'est pas encore assez pour faire disparaître les traités et les actes les plus solemnels, et faire plus que la divinité même ne peut accomplir, faire que ce qui n'a jamais eu d'existence, ait été. Je repousse cette idée, je repousse, de même, cette prétention flétrissante, dégradante, que désavouent également la raison et la justice.

Si j'admettais la légalité de pareille intervention de la part de la législature impériale, ça ne serait, tout au plus, que dans ce qu'elle ferait *prospectivement*, et là même, je ne puis m'incliner en présence d'un corps, qui, tout colossal qu'il soit, ne m'en impose pas encore au point de m'obliger de reconnaître comme légal, ce qui ne serait qu'une assomption de pouvoir, et rien de moins. Les raisons que j'ai données plus haut, pour faire toucher du doigt, l'énorme renversement des droits acquis, qu'amènerait une telle législation d'outre mer, si nous étions assez serviles pour la recevoir, quant au passé, ont une égale application quant au futur; et je répudie, sans hésitation, une prétention aussi exhorbitante que serait celle de l'Angleterre, de porter atteinte sous une autre forme, à des droits acquis en vertu de ce qu'il y a de plus solemnel chez les peuples. Si j'avais à discourir ici, sur la partie morale d'une telle législation, et qu'il fût nécessaire d'emprunter à l'honneur et à l'honnêteté des motifs, en dehors des considérations légales et constitutionelles plus puissantes que celles dont j'ai parlé plus haut, je n'en finirais pas. J'ai préféré et dû me borner au sujet qui n'est, assurément, que trop fertile. Je me contenterai d'ajouter que cette partie de l'acte des tenures (sec. 8 de l'acte Imp. 6 Geo. 4, c. 59) a été glissée, *assez singulièrement*, dans une loi qui avait pour objet, toute autre chose que d'être un acte déclaratoire, et dont le titre est "An Act to provide for the extinction of feudal and seignorial rights and burthens, on lands held *à titre de fief* and *a titre de cens*, in the Province of Lower Canada, and for the gradual conversion of those tenures into the tenure of free and common socage, and for other purposes relating to the said Province." Dans le cas même où je ferais taire mes convictions, et que paralysant ma langue, je me prosternerais en esclave, devant la législature impériale, pour la remercier de nous arracher ce qu'elle nous aurait donné, encore, serais-je pleinement en droit de repousser intérieurement et mentalement cet acte, qu'on a tout le tort possible de vouloir nous faire regarder comme un acte déclaratoire: il n'en est pas un, et le fût-il, en répudiant, comme je le fais, cet acte, et ne lui attribuant aucune des vertus qu'on lui prête, mon dernier mot à ce sujet, le voici: la sec. 8e de l'acte 6 Geo. IV, c. 59, n'a aucunement porté atteinte à nos lois civiles, il est sous ce rapport, sans aucun effet.

J'ajouterai que bien que l'acte des tenures ait été passé par le Parlement Impérial, qu'il soit censé son fait, il faudrait peu connaître ce qui se fait dans les législatures, et ignorer les expédients auxquels ont recours, souvent, des intrigants et des personnes intéressées, pour introduire furtivement, dans les lois qui ont pour objet de législater sur tout autre chose, des clauses qui ont l'effet, ou auxquels ces individus voudraient attribuer une vertu bien grande, celle de consomer des œuvres d'iniquité qu'ils n'ont, souvent, ni la franchise, ni le courage d'avouer ouvertement. Cela se fait ailleurs qu'en Angleterre. Ainsi, donc, l'acte des tenures n'est pas même, quant aux lois anglaises, un acte déclaratoire, au degré qu'on le prétend.

Supposant même que l'acte des tenures ait eu l'effet de régler conclusivement trois ou plusieurs choses, par exemple, *dower*, *conveyance and descent*, et que l'acte provincial de 1829 n'ait pas affecté l'acte des tenures, (ce qui est le cas, vu qu'il n'a pas été sanctionné dans les deux ans) il ne s'ensuit qu'une chose de deux:

Ou de tout temps depuis que le pays appartient à l'Angleterre, les lois anglaises ont, dans les *Townships* réglé le *dower*, *descent and conveyance*, et rien de plus ;

Ou ces lois anglaises ne règlent ces trois objets que depuis la passation de l'acte des tenures, si toutefois l'acte Provincial de 1829, n'a pu l'affecter.

Il s'ensuit :

Que dans un cas, comme dans l'autre, le corps entier des lois anglaises n'a jamais été introduit dans les *Townships*. La forme de *conveyance* serait bien, à la vérité, réglée d'après le droit anglais, mais une fois l'acte fait ses conséquences seraient à déduire, et ses effets à mesurer sur le droit du pays. Il en est de cela comme des testaments faits suivant les formes anglaises, les biens se répartissent suivant le droit français, ou si l'on veut, le droit du pays. Mais je désire qu'on me comprenne bien, je ne puis reconnaître au *tenures act*, l'effet d'avoir même pour les trois objets (*dower*, *conveyance and descent*), indroduit pour le temps passé, les lois anglaises, dans les townships.

Si cela est correct, les actes en vertu desquels les demandeurs réclament des droits, en cette cause, ne peuvent acquérir plus de force, et avoir plus d'effet qu'ils n'en eûssent eu, si cette loi (*tenures act*) n'eût pas été passée par le Parlement Impérial.

Dans la thèse de l'introduction dans les *townships*, soit du corps entier du droit civil anglais, ou de tout ce qui, du droit anglais, a rapport au *dower*, *conveyance and descent*, où en serait-on, même dans les *townships*? Comment pourrait-on jamais administrer tout ce droit? Il serait même ridicule d'entreprendre une chose aussi impraticable.

Il y avait bien de la vérité dans ce que le juge *Kerr* observa, une fois, dans une séance du Conseil Législatif, au juge en chef *Sewell*, sur l'impraticabilité d'une telle chose, et sur ce qu'il n'y avait pas un seul juge en Canada, qui fût en état de déclarer qu'il y avait moyen d'administrer de telles lois.

Et on voudrait calmer les craintes, et faire disparaître les difficultés, en disant que ce que les Juges ne comprendraient pas, et ne seraient pas capables d'appliquer, ni d'administrer, serait le flambeau qui éclairerait les masses, au milieu des ténèbres sur leurs lois, dans les Townships, impossible.

L'Acte Provincial de 1829 n'affecte pas la question, vu qu'il n'a pas été sanctionné dans les deux ans, d'après l'acte constitutionnel de 1791.

Cet acte fut présenté pour la sanction royale, et réservé le............ 14 Mars, 1829.
Il ne fut sanctionné par Sa Majesté, en Conseil, que le................ 11 Mai, 1831.
Il fut annoncé par Proclamation en Canada le...................... 1 Sep. 1831.

Le Parlement impérial, dans sa toute-puisance qui dans l'acception familière n'a de limites que de ne pouvoir faire qu'un homme soit une femme, ne peut pas non-plus au sérieux, faire par le statut 1, Guillaume 4 c. 20, que ce qui a de fait existé, n'ait pas existé, non-plus que ce qui n'a pas existé, ait existé. Or l'acte constitutionnel de 1791 ayant formellement statué qu'une loi provinciale reservée pour la sanction royale, et qui n'aura pas été sanctionnée dans les deux ans de sa présentation au gouverneur, pour la sanction royale, ne sera pas loi, elle devient une nullité. "And that no such Bill which shall be so reserved as aforesaid, shall have any force or authority within either of the

said provinces respectively, unless His Majesty's assent thereto shall have been so signified, as aforesaid, within the space of two years from the day on which such bill shall have been presented for His Majesty's assent, to the Governor, Lieutenant-Governor, or person administering the Government of such Province." Act Imp. 31e Geo. III, c. 31, sec. 32. Le Parlement Impérial pouvait bien dire qu'à l'avenir, malgré la clause de l'acte constitutionnel, Sa Majesté pourrait par sa sanction, même après les deux ans, prolonger la vie, à ce qui, sans cela, cesserait de l'avoir, c'est sans doute, ce qu'il a fait, mais, jamais le parlement impérial, par un acte qui ne réfère pas d'une manière directe à l'acte provincial en question (celui de 1829), y eût-il même référé, n'a pu faire que ce qui était mort fût vivant, que ce qui était nul, fut accompli, devint valide et eut une existence. C'est d'abord, une contradiction *in terminis*, c'est de plus, vouloir que le parlement impérial statue que le Roi fasse une impossibilité.

Il s'ensuit que si le statut impérial veut dire cela, il a dit ce qui n'est pas possible, et que s'il n'a dit ni voulu dire telle chose, le Roi, en donnant sa sanction à un acte qui n'était plus un acte, mais une nullité parfaite, a tenté une impossibilité ; il a fait, de son autorité privée, ce qu'il n'avait aucun droit de faire.

Il résulte de tout cela, que l'acte provincial de 1829 ne pouvant affecter l'acte impérial des tenures, il faudrait, avec les modifications mentionnées plus haut, le limiter, dans tous les cas, aux trois objets dont il a été parlé ci-devant. Bien entendu, dans la supposition que le Parlement Impérial eût eu le droit d'intervenir comme il l'a fait, par l'acte 6 Geo. IV, c. 59, sec. 8, ce que je nie plus fortement que jamais.

Si, par hazard, en l'absence de tout bonne raison, on m'opposait que la Législature du Bas Canada a reconnu ce droit d'intervention, je me contenterais de répondre que cela prouverait, tout au plus, qu'elle a eu tort, et que deux erreurs ne font jamais une vérité.

Et pour faire toucher du doigt le peu de logique qu'il y aurait à tirer des conséquences de prémisses aussi lumineuses, il me suffirait, sans doute, de référer les avocats et le barreau en général, à l'ordonnance du Conseil Spécial, 2 Vict. c. 51, qui révoque une certaine ordonnance, intitulée : "Ordonnance pour déclarer que le second chapitre du Statut, du Parlement d'Angleterre, passé dans la trente-et-unième année du règne du Roi Charles Second, n'est pas, ni n'a jamais été en vigueur en cette Province, et pour d'autres fins."

C'est ainsi que la Législature d'alors déclara sérieusement par une Ordonnance 2 Vict. c. 15, que l'Acte de l'*Habeas Corpus* (31 Chas. II, ch. 2,) n'avait jamais été en vigueur en Canada, et par une autre Ordonnance (2 Vict. c. 51,) le Conseil Spécial, par sa toute-puissance "Attendu qu'il convient, d'après les circonstance, de révoquer une certaine Ordonnance, &c," révoque la première, et permet au pays de repasser sous l'empire de l'Acte Impérial 31, Chas. II, c. 2.

Je pourrais, si le temps me le permettait, citer d'autres Actes de législation aussi logiques que celui-là, pour faire voir qu'il vaut mieux s'en tenir à des principes fixes, avoués par la raison et la loi, que de fonder, je ne dirai pas des raisonnements, mais toute autre chose que des raisonnements, sur des bases aussi fragiles que l'est souvent l'expression d'une opinion ou d'une résolution par un corps quelconque. Ce que j'avance là est une vérité qui est parfaitement philosophique, et hautement proclamée par l'expérience de tous les temps.

Au reste, je ne suis pas plus disposé de me prosterner en présence des Actes du Parlement Provincial, qui reconnaîtraient au Parlement Impérial des droits qu'il ne possède pas, que de m'incliner en silence devant les décrets de la Législature Impériale en une matière qui n'est pas de son ressort, et sur laquelle elle n'avait pas assurément plus de droit, en 1826, de violer ses garanties et les droits acquis, que de fouler aux pieds en 1774 le *jus gentium*, chose qu'elle n'a jamais, alors, eu l'idée même de tenter.

Les raisons puissantes, qui avaient tant de force dans la bouche des hommes d'état à l'époque entre la Proclamation de 1763 et l'Acte Impérial de 1774, et sur lesquelles l'Acte de Québec a été calqué, ont bien plus de force aujourd'hui qu'elles n'en avaient alors, puisqu'à une période si rapprochée de la victoire, l'Angleterre reconnaissait des

principes d'une éternelle justice, qu'une possession de 52 ans (1774 à 1826,) n'a certainement pas pu avoir l'effet d'affaiblir.

Ainsi donc, sous quelque point de vue qu'on se représente la question, qu'on se reporte en 1774, ou en 1826, ou même en 1829, toujours elles nous offre la même solution; les lois civiles Anglaises n'ont jamais fait partie des lois de ce pays, pas même pour les terres tenues *en franc et commun socage*, sauf, que de la nature même des choses, et inévitablement, les lois qui règlent la tenure seigneuriale sont sans application à la tenure *en franc et commun socage*; et que s'il résultait de l'Acte des Tenures aucune modification à nos lois de propriété, même dans les *Townships*, ce que je nie absolument, ces modifications n'auraient j'amais pu affecter les droits acquis, et ne pourraient être regardées que comme règles de droit à appliquer prospectivement seulement, mais jamais rétroactivement.

Au reste, dans la supposition même où l'acte 10 et 11 G. 4 c. 77, (1829) pût produire quelque effet, il suffit de le lire pour se convaincre que son contenu entier a pour objet principal de consolider les lois du pays, même à l'égard des terres tenues *en franc et commun socage*, soit par rapport à la forme des titres tant avant que depuis cet act, (1829), les hypothèques créées dès avant ou depuis, et quant à la répartition de ceux qui en ayant *en franc et commun socage*, seroient décédés sans avoir fait de testament.

Je ne vois pas après tout, que qui que ce soit puisse regreter que le corps des lois civiles de l'Angleterre n'ait pas *été* introduit en Canada. Toute personne instruite sait, que tout excellent, sous nombre de rapports que soit, en Angleterre, le système des lois qui y existe, et qui est en nombre de choses en harmonie parfaite avec le génie du peuple qui y est soumis, et des belles institutions dont il a bien droit de s'énorgueillir, il serait hors de mise de greffer sur l'arbre social, politique et légal du Canada, des rejettons qui loin de communiquer une vie nouvelle, ou même de la force et de la vigueur, le ferait dessécher et dépérir. En Amérique, où le cœur et les bras font disparaître les forêts et surgir les villes comme par magie, l'on comprend facilement combien il importe que chaque homme qui a mis la main à la coignée participe aux avantages résultant de ce travail commun, au lieu de s'en voir ravir, quelque fois la plus belle portion, par un fils ainé, dont tout le droit à se revêtir des dépouilles de ses frères et sœurs, ne lui vient que de devoir au hazard d'être le premier, d'un grand nombre d'enfants, qui a vu le jour.

Les habitants des Townships sont bien heureux qu'il n'en soit pas ainsi sur notre terre d'Amérique; et ils peuvent remercier le Ciel et l'Angleterre de ce que non seulement, ils ne sont pas pressurés par les lois de primogéniture, mais qu'ils sont affranchis de nombres d'autres lois de formalités, de technicalités &c., auxquelles ils comprendraient autant ou aussi peu que nombre d'autres, qu'une étude de toute leur vie ne rend pas même habiles à débrouiller complètement: qu'ils se réjouissent, en commun avec tous ceux qui, libres de préjugés, connaissent et savent apprécier les avantages inestimables dont nous jouissons tous en commun, et dont nous avons, assurément, bien le droit de nous glorifier, je veux dire, l'avantage d'être soumis à l'empire de deux systèmes de lois que nous devons respectivement aux deux premières nations de l'Europe: les sages lois criminelles de l'Angleterre et le mode humain de les administrer, et les lois civiles de la France et la procédure philosophique qui s'y rattache, et qui peuvent, sans crainte du résultat, être mises en juxtà position avec les lois civiles anglaises dont Messrs. Yorke et De Grey nous donnent une idée.

"To introduce, at one stroke, the english law of real estate, with english modes of conveyancing, rules of descent, construction of deeds, must occasion infinite confusion and injustice."

D.

Opinion of Mr. *Justice Rolland* in *Stuart v. Bowman.* Lower Canada Reports, Vol. 3, p.p. 345–355.

Rolland, Juge:—Cette cause a présenté sur l'appel plusieurs questions importantes. Il ne serait peut-être pas nécessaire que la Cour, pour prononcer sur les droits des par-

ties, exprimât son opinion sur toutes ces questions, mais il en est plusieurs sur lesquelles il est à propos de ne pas laisser ignorer les points sur lesquels les juges de cette Cour sont d'accord, et ceux sur lesquels ils diffèrent des opinions émises d'une manière si explicite par les juges de la Cour Supérieure. Il est à regretter que sur la principale de ces questions, savoir, quelles lois doivent affecter les droits des parties, il y ait eu en ce pays autant d'opinions différentes ; les uns disent que par l'effet de la conquête (ou si l'on veut, de la cession du pays à la Grande-Bretagne,) le Droit de la Métropole a été introduit ; d'autres veulent qu'il l'ait été par la proclamation de 1763, quelques-uns soutiennent qu'il l'a été virtuellement, sinon formellement, quant aux terres tenues de la couronne en franc et commun socage, par le Statut Impérial de 1774 (14 Geo. 3) ; d'autres enfin, qu'il n'a eu force de loi pour régler l'aliénation de ces terres, et les successions et le douaire des femmes, que par le Statut Impérial de 1826 (Geo. 4) ; et sur ce Statut il y a eu deux opinions, les uns le considérant comme acte déclaratoire, ou ayant effet rétroactif, et d'autres comme une loi qui ne pourvoit que pour l'avenir. Enfin, il en est qui ont eu recours à l'acte provincial de 1829, pour y trouver le droit qui doit régir cette espèce de propriété, le regardant comme acte déclaratoire sous bien des rapports ; tandis que bien des personnes (avocats comme juges) ont cru qu'il n'y avait pas une telle loi, la sanction royale n'ayant été donnée qu'après que l'acte de législation des chambres (le projet ou *bill* des chambres) eût cessé d'avoir effet, en autant que le temps limité pour l'octroi de la sanction royale, et pendant lequel les *chambres étaient liées*, était expiré ; ils prétendent avec beaucoup de plausibilité qu'on ne peut sanctionner un acte des chambres qui est tombé dans le néant, et cela nonobstant qu'un Statut Impérial ait semblé avoir pour but de légaliser telle sanction tardive, et tout en respectant cette législation du pouvoir souverain, qu'on regarde néanmoins comme ne voulant pas ce qui serait absurde. Quant à cette loi de 1829, (je l'appelle loi parcequ'elle a été regardée comme telle, qu'elle se trouve dans notre *Code Provincial*, c'est-à-dire, imprimée avec nos statuts, et cela par autorité, avec la proclamation qui avait pour but de lui donner la sanction royale.) J'avoue que je suis bien aise que cette question délicate, dans l'état actuel des choses, ne se trouve pas soulevée ou susceptible d'une application immédiate au sujet en discussion ; car nous sommes unanimes à juger la cause sans nous prononcer " par un *obiter dictum*" sur cette question qui ne se présente pas ; aussi, je me dispenserai d'exprimer mon opinion individuelle. Nous ne devrons pourtant pas nous contenter de dire, sur la demande, que les Demandeurs sont propriétaires ou non, et ont droit ou non de revendication, ou, sur la défense, que les exceptions plaidées nous paraissent bien ou mal fondées. Il faudra, après une audition des parties aussi prolongée et une discussion aussi compliquée, passer en revue quelques-uns des principaux raisonnements employés de part et d'autre. Et pour procéder méthodiquement je partirai d'un principe bien connu "que dans la revendication c'est au Demandeur à établir son titre, sans " qu'on doive s'occuper du titre de possession du Défendeur, qui n'a besoin d'aucun titre " si le Demandeur n'établit sa propriété, sauf à faire droit sur les défenses si le Demandeur a établi un titre, mais sujet à être combattu."

Je prends donc la déclaration qui ne contient pas moins de douze chefs, ou causes, ou allégués de titres à la demande. L'on nous a dit que six de ces titres invoqués, l'étaient d'après le droit anglais et autant d'après le droit français. C'était une distinction bonne en plaidant, mais pour nous, juges, elle est à peu près fausse ou du moins inutile. Le Demandeur doit dire que tous ses titres, ou le meilleur (s'il n'en a qu'un de bon) sont d'après la loi du pays, le seul droit que nous connaissions. Quand on parle du droit anglais, l'on veut sans doute dire ce qui se trouve faire partie de notre droit, et cela se comprend. Cette distinction a de suite donné lieu à la *question si importante* et si débattue, savoir, si le titre aux terres en ce pays tenues en franc et commun socage se juge d'après le droit anglais ou non ; et si le droit anglais relatif aux terres tenues à ce titre est en force ici, s'il y a été introduit, quand et comment ?

De suite j'exprime mon opinion qu'il n'a pas été introduit par la cession du pays à la Grande-Bretagne ; qu'il fallait une manifestation authentique et formelle du nouveau sou-

verain, un acte de législation à cet effet, et qu'il n'y a rien eu de tel jusqu'à la passation du Statut de la 14e Geo. III. Je ne m'expliquerai pas plus au long. Puis lisant ce Statut Impérial, je n'y trouve rien de déclaratoire qui puisse avoir un effet rétroactif, tout au contraire. Mais cet acte reconnaissant qu'il y a telle chose au pays qu'une tenure *in free and common socage*, a-t-il par là législaté ou reconnu un droit particulier pour cette espèce de tenure; ou en disant que le droit du pays ne s'y appliquerait pas at-il voulu seulement empêcher l'effet d'un principe fondamental quant à la tenure des terres en Canada, je veux dire l'effet de la maxime, "nulle terre sans seigneur?" Ceci devient une question assez délicate. D'abord le Statut de 1774 déclare que depuis la cession du pays *il n'a été fait aucun règlement pour l'administration du gouvernement civil.* C'était le préambule. Puis vient la 8e clause qui dit, que tous les sujets Canadiens de Sa Majesté "shall hold and enjoy their property and possessions, together with all cus- "toms and usages relative thereto, and all other their civil rights, in as large, ample "and beneficial manner as if the said Proclamation (of 1763), commission, ordinances, "&c., had not been made; and that in all matters of controversy relative to property "and civil rights, resort shall be had to the laws of Canada, &c., and all actions deter- "mined agreeably to the said laws and customs." Peut-il y avoir rien de plus exprès que ce langage de la loi? Mais suit la 9e clause qui fait la difficulté, et à ceux qui prétendent que le droit anglais a été introduit ou conservé pour les terres tenues en franc et commun socage, l'on peut dire qu'on n'introduit pas un système de lois étrangères par un mot, et comme l'a dit, à l'égard de l'office du Shériff, Sir W. Grant, dans une cause célèbre, "par cela que dans une loi l'on a parlé d'un shériff, (mot anglais, office connu "en Angleterre) il ne s'en suit pas que cet office et les obligations de l'officier soient "les mêmes en Canada qu'en Angleterre." De même, peut-on dire, ce semble avec beaucoup de raison: "parcequ'une tenure est établie en Canada semblable à une qui "prévaut en Angleterre, il ne doit pas s'ensuivre que dans la succession et le régime de "ces terres, dans tous les contrats et transactions, et dans l'administration de la justice, "relativement à ces terres, il faudra avoir recours à un droit autre que celui du pays, "avec tous les désavantages qui peuvent en résulter." Quoique les lettres patentes ou concessions royales de ces terres fassent mention de ce nouveau système, le statut n'en dit rien, la 9e clause est muette à cet égard, et conçue dans des termes négatifs. Le statut devant être interprété dans le sens le plus naturel, on ne doit donner à la clause 9e qu'un effet limité, quoique les termes soient généraux, et cela quant à la tenure qui ne doit pas être affectée par cette loi déclaratoire, mais demeurer tenure libre, ce qui n'a rien de contraire au droit du pays, sans qu'on puisse imaginer que l'intention était de reconnaître l'existence du droit anglais dans toute son application aux biens-fonds sous la tenure en franc et commun socage, ce qui, comme on l'a reconnu plus tard, eût créé la plus grande confusion. Aussi n'a-t-on agi que dans ce sens là; des partages de successions et des aliénations nombreuses ont eu lieu d'après le droit du pays, je n'ôse *l'appeler meilleur*, mais je dirai qu'il est assurément *plus avantageux;* et en effet la loi de 1829, ce projet de loi sanctionné après qu'il avait cessé d'exister, fait assez voir que l'introduction d'un nouveau droit au moins pour le passé eût été préjudiciable. *Je suis du nombre des juges qui ne considèrent pas le statut de 1774 comme introduisant aucune partie du droit anglais, et je suis d'avis que la reconnaissance d'une tenure libre, non sujette à la maxime "nulle terre sans seigneur," mais régie par le droit du pays, est tout ce que la loi voulait*, et que tout autre interprétation était inadmissible; car il faudrait dire que tout le droit anglais avait été introduit avant 1774, (chose absolument contredite par le statut même) et que la 9e clause avait l'effet de le conserver pour la régie des terres en question *dans toutes ses parties*, prétention que personne n'a émise et que le Statut de la 6e Geo. IV, qu'on a appelé loi déclaratoire, contredit formellement, puisqu'il ne parle du droit anglais que comme réglant les aliénations, les successions et le douaire, excluant ainsi l'idée d'un droit universel. Or le Statut de 1774 ne dit rien de cela; cette 9e clause n'est donc susceptible d'autre interprétation que de celle que je lui ai donnée et qui n'exclut pas la régie des terres de franc et commun socage par le droit commun

du pays, c'est-à-dire le droit tel qu'il existait lors de la cession du pays, "*The Law of Canada*," expression forte du Statut Impérial. Si l'on prétend que ces lois, ces coutumes et ces usages du Canada, dont parle le statut, ne doivent s'appliquer aucunement aux terres tenues et concédées en franc et commun socage, ils ne pourront pas davantage servir de règle de décision dans les litiges judiciaires à l'égard de ces biens, soit à raison de leur tenure, soit à raison de quelque privilége qui s'y rattache, et ces litiges seront soustraits à l'action des lois du pays, et par rapport à icelles la 8e clause de l'acte de 1774, serait une lettre morte. Ce serait une prétention *bien hardie* et une interprétation de la 9e clause *bien illimitée* que celles-là. Et pourtant si l'on prenait à la lettre ces mots "*nothing in this Act contained, &c.*," voilà où il faudrait en venir. Si la 9e clause a eu l'effet de reconnaître un droit particulier de succession (avec la primogéniture et le reste) elle irait beaucoup plus loin : car elle invaliderait l'acte en entier à l'égard des terres en question en cette cause. En la limitant à la 8e clause, ce qui serait plus plausible, elle irait encore plus loin comme je l'ai déjà observé, et cela sans qu'il y ait un mot dans le Statut qui reconnaisse le droit anglais comme en force au pays, ni en tout ni en partie, ni dans les Townships, ni ailleurs, car le Statut est tout-à-fait dans l'autre sens.

L'on n'introduit pas un système de lois exceptionnel par des termes négatifs, en disant que les lois du pays ne s'appliqueront pas aux matières en question, sans dire par quelles lois elles seront régies et en quoi ? Car dire que rien absolument du droit du pays n'y aurait d'application est une proposition trop étrange, ce me semble, pour qu'elle puisse être adoptée. Je tiens donc qu'en interprétant cette 9e clause, il faut le faire *magis ut valeat, &c.*, et qu'en en restreignant le sens à la tenure de manière à l'exclure de la loi des Fiefs, loi fondamentale de tenure au pays, on remplit le but qu'avait la législature.

Mais, dit-on, il y a les Lettres Patentes qu'on doit considérer, et elles sont formelles *et réfèrent* au droit anglais. D'abord, j'observe qu'il n'est pas d'usage d'interpréter une loi par des titres mais bien les titres par la loi ; et que, quoique le donateur puisse établir des règles pour la régie du bien donné, ce ne peut être qu'en autant qu'il y a intérêt, et c'est là tout. Mais viendra la question de savoir si le souverain en donnant un bien sous une tenure comme dans sa métropole, a voulu, s'il le pouvait, que les lois du pays n'eussent aucun effet à l'égard de ces terres, et qu'elles fussent régies par un droit exceptionnel ? Cela ne me paraît pas exprimé, et il en faudrait une stipulation expresse, et pour que la volonté du souverain fut connue quant à la régie du bien donné, il faudrait qu'il l'eût exprimée. Il n'en a rien dit.

Mais l'acte de la 6e Geo. IV, (Canada Trade Act) s'exprime-t-il d'une manière précise ? Oui, mais seulement quant à trois objets, et pour l'avenir ; c'est ainsi que *je le lis*. D'abord, il ne pouvait être déclaratoire qu'en reconnaissant l'existence d'un droit pris de l'Angleterre, et contraire au nôtre en tout ce qui affecte ces terres. Ce n'est point du tout cela. Il ne reconnaît que le droit des successions, des douaires et des aliénations, quant au reste il ne dit rien. Qu'était-il besoin de spécifier ces trois choses, si, dès avant, le droit anglais avait été introduit et subsistait ; ce qui n'est aucunement reconnu par cela même qu'on en limite l'effet par rapport aux terres en question. C'est nécessairement une législation *prospective* sans effet rétroactif, et cela pour régler la tenure, sauf les changements qu'on avait en contemplation. Cet acte est encore en force si le Statut Provincial de 1829 ne l'est pas. Cependant les droits des parties en cette cause n'en peuvent être affectés, et les biens ont dû passer, *ab hærede*, dans la famille Robertson comme si le Statut Impérial n'eût pas été passé, c'est-à-dire d'après le droit du Canada tel qu'il l'était. Qui empêche qu'une terre libre par sa tenure se transmette par succession comme les autres biens au pays ?

J'entends dire qu'en Angleterre la tenure a des règles toutes spéciales, qu'elle comporte des obligations, et qu'elle a même des priviléges ; mais pourquoi en Canada ne serait-elle pas régie par le droit commun ? Il faudrait au moins en donner la raison. En Canada nous avons le testament suivant les formes anglaises, s'en suit-il que nous avons la loi des legs, *Lex testamentaria* ? Je sais qu'on l'a prétendu, mais cette préten-

tion, comme tant d'autres, *toujours pour introduire partiellement et à chaque occasion le droit anglais*, n'a pas prévalu. Il en a été de même des règles de la preuve dans les affaires de commerce, dont on a voulu déduire bien plus que l'Ordonnance de 1785 ne comporte.

Comme j'ai compris que c'est sur le Statut Impérial de la 6e Geo. IV, que les Demandeurs fondent leur prétention dans le premier chef de leur demande, où l'on dit qu'ils invoquent le droit anglais, *j'y passe de suite ;* mais auparavant il faut dire un mot du Statut de 1790, l'acte constitutionnel, mais dans le fait cet acte n'ajoute rien à celui de 1774. La clause 43e dit que les terres qui seront concédées par la Couronne en franc et commun socage dans le Bas-Canada, le seront ainsi sujettes à telles altérations, en égard à la nature et aux conséquences de telle tenure, qui pourront être établies par un Statut Provincial. C'est subséquemment à cette époque qu'ont été concédées les terres revendiquées en cette cause, (en 1799). C'est une manière générale et bien peu satisfaisante de parler des conséquences de cette tenure étrangère au pays, et je le répète encore, ce n'est pas ainsi, ce me semble, que l'on introduit un droit exceptionnel. Aussi n'y a-t-on guères fait attention, et les terres ont continué à se vendre par actes devant notaires, les partages en succession ont eu lieu d'après le droit commun du pays, et les douaires ont été réglés de même. Les tutelles, les administrations de biens et autres choses ayant rapport à ces terres ont continué de se faire comme par le passé. C'est ce qui est reconnu par les Statuts même.

La clause du Statut de la 6e Geo. IV : " That all lands granted in free and common " soccage may and shall be held, granted, exchanged, sold, alienated, transferred, &c." est donc suivant moi entièrement prospective, et je n'y vois rien de rétroactif, car l'on y eût certainement pourvu aux droits acquis.

L'on nous a référé au Statut de la 3e Geo. IV, mais je n'y vois qu'un idée, celle de changer la tenure des terres du pays en celle de *free and common soccage*, comme en Angleterre.

L'on a aussi prétendu que l'acte provincial de 1829 reconnaît comme loi déclaratoire le Statut Impérial de la 6e Geo. IV ; j'y vois tout le contraire, car ce Statut Provincial parle des effects *injurieux* qui résulteraient d'un effet rétroactif, s'il était donné au Statut Impérial, et surtout quant à l'article des successions, il ordonne expressément " que " la loi du Canada (c'est-à-dire les anciennes lois du pays) sera la règle des successions " quant aux terres ci-devant concédées *in free and common soccage*, excepté dans le cas " d'un partage volontaire."

Si l'on considère le Statut de 1829 comme en force, la succession, quant aux terres en question, se trouve devoir être réglée par l'ancien droit du pays, car il n'y a eu ni partage ni transaction au sujet de la succession de Patrick Robertson, non plus que de ses successeurs.

Je n'ai donc aucune difficulté à donner comme mon opinion que les terres en Canada, tenues de la Couronne en franc et commun socage, passaient par succession suivant le droit du pays, lors de l'acte Impérial de la 6e Geo. IV. Ni les Statuts Impériaux de 1774 et de 1790, passés avant l'émanation de la concession royale à John Robertson, (1799) ni le Statut Impérial de la 6e Geo. IV, auquel je n'accorde aucun effet rétroactif, ni les Lettres Patentes qui en fixent la tenure, n'ont, suivant moi, rien changé au droit commun du pays quant à la succession, d'autant plus qu'il n'en est rien dit dans les Lettres Patentes, et qu'on n'y trouve rien qui manifeste même l'intention du donataire à cet égard. Il n'y est question que de la tenure seule, tenure libre, n'emportant pas avec soi, suivant moi, l'introduction du droit commun des successions d'Angleterre, (le droit anglais qu'on étend au mode d'aliénation sans aucun prétexte quelconque) excepté en autant qu'il peut avoir été introduit par le Statut de la 6e Geo. IV, et qui n'est pas dans mon opinion applicable au cas actuel, pour des aliénations et successions antérieures.

L'on comprendra donc facilement qu'individuellement je n'ai pas dû trouver de difficulté à prononcer d'après notre droit commun sur le titre des Demandeurs. Le jugement est formulé de manière à ne pas repousser l'idée qu'il serait fondé sur un droit ex-

ceptionnel. C'est pourquoi il est prononcé à l'unanimité, quoique les juges ne soient pas tous d'accord sur cette question controversée, chaque juge pouvant avoir son opinion particulière sur ce point.

Je juge donc la cause actuelle comme une action pétitoire, ou en revendication, et d'après notre droit, j'ai examiné si les Demandeurs avaient ou non établi un droit de propriété, j'ai dû considérer de suite les différents titres invoqués par eux. Ils semblent en invoquer douze. Ils ne devraient en avoir qu'un, et ce sera assez s'ils l'ont établi.

E.

Opinion of Mr. *Justice Panet.* Lower Canada Reports, Vol. 3, p.p. 367–371.

Panet, Juge:—Les Appelants se plaignent du jugement qui les a déboutés de leur action pétitoire, par laquelle ils revendiquaient, en 1835, certains lots de terre, dont l'Intimé, suivant eux, s'était injustement mis en possession. Cette action n'appartenant qu'au propriétaire fondé en titre, la première chose à faire est d'examiner le titre des Appelants; car si leur titre était insuffisant, le Défendeur, Intimé, aurait gain de cause sans même de défense de sa part, selon la règle si connue *actore non probante, &c.* J'examine donc en premier lieu sur lesquels s'appuient les Appelants. Ce sont d'abord des lettres patentes du 20 Novembre, 1799, constatant un octroi de deux mille acres de terre en franc et commun socage à John Robertson, qui, le 15 Octobre 1804, vendit par acte devant Notaires à Patrick Robertson, son frère, et à Elizabeth et Catherine Ann, enfants mineurs d'Alexander Robertson, aussi son frère. Patrick Robertson mourut le 16 Mars 1808, laissant Neil Robertson, son frère aîné, qui lui-même mourut le 18 Juin 1813. Catherine Ann mourut ensuite le 16 Août 1823, laissant Elizabeth Robertson, l'Appelante, la seule survivante, et les représentant en fait de succession, soit que l'on considère le droit anglais ou le droit français, ce qui n'a pas empêché que l'on s'en soit fait une question épineuse, dans la cour dont le jugement nous est maintenant soumis. A mon avis, l'on s'est beaucoup plus étendu qu'il n'était nécessaire sur la difficulté. En généralisant la proposition on lui a donné une portée bien grande, et l'on a parlé de l'introduction des lois civiles anglaises en général dans une partie du pays, tandis que réduite à sa plus simple expression, il s'agissait de savoir si la couronne avait ou non droit de concéder sous une tenure en préférence à une autre tenure, en la tenure en franc et commun socage, de préférence à l'ancienne tenure en usage dans le pays avant la conquête. Ainsi posée, la question n'était pas susceptible de grande difficulté, et il ne s'agissait plus que de savoir ce que c'était qu'une concession en franc et commun socage, et quels incidents et conditions découlaient de la nature de cette tenure. De là, comme conséquence de cette tenure, l'on regardait que les règles d'aliénation et de succession du droit anglais se trouvaient nécessairement introduites. Cependant, dans l'usage, les propriétaires des terres tenues en franc et commun socage ne se sont pas conformés à ces règles, et il s'est élevé de grands doutes relativement à leur propriété. Chacun voyait la difficulté selon ses préjugés, ses prédilections politiques, et son intérêt particulier. La Législature Impériale, au moyen d'une clause intercalée dans l'acte 6 Geo. IV, c. 59, s'est prononcée de manière à empirer les choses, et à rendre tout-à-fait incertains les droits acquis des propriétaires de terres ainsi tenues. Cependant, l'acte s'exprimant au temps futur, (shall) son effet est resté douteux quant aux aliénations, successions, etc., qui avaient eu lieu avant l'acte. Enfin, fut passé l'acte provincial 9 Geo. IV, ch. 77, qui fût réservé à la sanction de Sa Majesté et qui a été sanctionné en vertu de l'acte Impérial 1 Guil. IV, ch. 20. Je viens de suite à cet acte pour occuper moins de temps, et parce que, suivant moi, cet acte a l'effet de trancher le nœud gordien. et qu'il suffit pour établir que les règles de notre droit sont applicables à la cause qui nous est soumise.

L'acte constitutionnel 31 Geo. III, ch. 31 s. 32, déclarait "qu'un bill qui sera remis à la signification du plaisir de Sa Majesté sur icelui, n'aura aucune force ni autorité, dans l'une ou l'autre des dites Provinces, respectivement, jusqu'à ce que le Gouverneur, ou le Lieutenant-Gouverneur, ou la personne qui aura l'administration du Gouvernement, sig-

nifie, soit par harangue, ou message au Conseil Législatif et à l'Assemblée de telle Province, ou par proclamation, que tel bill a été mis devant Sa Majesté en conseil, et que Sa Majesté a bien voulu l'approuver, et qu'il sera fait une entrée dans les journaux du dit Conseil Législatif de chaque telle harangue, message ou proclamation, dont un duplicata, duement attesté, sera délivré à l'officier préposé pour être conservé parmi les régistres publics de la Province. Et que tel bill qui sera remis comme ci-dessus, n'aura aucune force ni autorité, dans l'une ou l'autre des dites Provinces respectivement, à moins que l'approbation de Sa Majesté sur icelui ait été signifié, comme ci-dessus, dans l'espace de deux années du jour que tel bill aura été présenté pour l'apppobation de Sa Majesté, au Gouverneur, Lieutenant-Gouverneur ou à la personne qui aura l'admistration du Gouvernement de telle Province." Or, l'acte Provincial 9 Geo. IV, ch. 77, ayant été ainsi remis à la signification du plaisir de Sa Sajesté, n'a été approuvé qu'après l'expiration des deux années ci-dessus mentionnées; ce bill avait été ainsi réservé, et suivant toute probabilité était encore daus les délais, lorsque dans Parlement Imperial fut passé, il semble tout exprès, l'acte de la 1ère Guil. IV, ch. 20, pour autoriser la sanction "d'aucun bill ou d'aucuns bills, qui, a, ou qui ont ci-devant, ou qui pourront ci-après "être passés par la Législature," et il est ajouté les mots suivants: "any repugnancy, "or supposed repugnancy, of any such regulations to the law of England, or in any of "the provisions in the before recited Acts of Parliament, or either of them, contained, to "the contrary in any wise notwithstanding." Or quels étaient les actes *before recited?* l'un d'eux était la 31e Geo. III, ch. 31 dont la 32e clause précitée porte la limitation des deux années qui fait la difficulté. Maintenant que l'on remarque que l'acte qu'il s'agissait de sanctionner, et que la Législature Impériale autorisait, il semble à tout prix, de sanctionner, ne voulant admettre aucune excuse ou prétexte pour s'y refuser, est un acte souverainement avantageux, qui lève tous les doutes et remédie à tous les inconvénients. Dans le préambule on lit: "Whereas it is necessary and expedient to make "provision for quieting the lawful proprietors of such lands, and confirming to them "the legal possession and enjoyment of the same, &c., &c." Puis cet acte confirme les ventes faites, quoique non suivant les lois d'Angleterre, et il statue qu'à l'avenir les ventes pourront se faire selon les lois d'Angleterre ou selon celles de la Province, enfin que lorsqu'un propriétaire de terres, tenues en franc et commun socage dans la Province, sera décédé avant la passation du dit Statût sans les avoir partagés par testament ou autrement, les héritiers de tel propriétaire seront tenus de partager tels biens selon l'ancienne loi du pays, à moins que les dits héritiers soient convenus de les partager différemment. Tel était le bill qu'il s'agissait de sanctionner, mais comme il n'était pas nommément mentionné dans l'acte qui en autorisait la sanction, l'on a objecté que l'on pourrait abuser d'une désignation aussi générale. Pour que cette objection fût de quelque poids il faudrait dire quel autre bill le Gouverneur eut pu sanctionner. Il n'y en a aucun auquel l'indication de l'acte Impérial peut convenir. Les autorités coloniales ne concurent aucun doute sur l'interprétation de ce Statut (1 Guil. IV, ch. 20). Le bill fut sanctionné par une proclamation, dont un duplicata duement attesté est conservé suivant la loi dans les régistres de la Province. D'où je conclus que cet acte provincial 9 Geo. IV, ch. 77, fait partie de nos lois et est obligatoire. Or, nous avons vu que cet acte confirme les ventes faites, quoique non suivant les lois d'Angleterre, des terres tenues en franc et commun socage. Le premier obstacle relatif au système de lois applicable à la présente cause étant ainsi surmonté, je continue d'examiner les titres des Appelants.

F.

Opinion of Mr. *Justice Aylwin*. Lower Canada Reports, Vol. 3, p.p. 377-396.

Aylwin, Justice:—I concur with my brethren in giving judgment for the Plaintiff, but I arrive at the same conclusions by another way. The main question raised by the parties seems to me to be, whether the decision is to be governed by the rules of the law of England or by the Common law of Canada. I am of opinion, that as the title to land held in free and common socage is in issue, that title must rest on the law of England.

The land which forms the subject in controversy was part of the waste lands of the Crown, and was originally granted by His Majesty King George the Third, by Letters Patent, under the Great Seal of the Province of Lower Canada, on the 29th May, 1799, to John Robertson, an Ensign in His Majesty's late 84th Regiment of Foot, (from whom immediately the Appellants derive their title,) which contain a recital "that the "said John Robertson had made and subscribed the declaration by our royal instruc- "tions in that behalf required, whereby he, the said John Robertson, doth promise and "declare that he will maintain and defend to the utmost of his power the authority of "us and of our Parliament as the Supreme Legislature of our said Province." And the "royal grant is made "to be held of us in free and common socage, by fealty only in "lieu of all other and all manner of rents, services, fines, rights, dues, duties, claims "and demands whatsoever, *in like manner as lands are now holden in free and common* "*soccage in that part of Great Britain called England.*"

At the period of the conquest of Canada by the British Arms, the *Coutume de Paris* and the *Droit Commun de la France*, were the law of the land, and administered by tribunals regulated by the *Code Civil* or *Ordonnance* of 1667. It is well settled, that, "when a Country is obtained by *conquest* or *treaty*, the King possesses an exclusive "prerogative power over it, and may entirely change or new model the whole, or part "of its laws and political form of Government, and may govern it by regulations frames "by himself. As however a Country conquered by British Arms becomes a dominion "of the King, in right of his Crown, it is necessarily subject to the Legislature of Great "Britain; and, consequently, His Majesty's Legislative power over it, as conqueror, is "subordinate to his own authority in Parliament, so that His Majesty cannot make any "new change contrary to fundamental principles, or exempt the inhabitants from the "power of Parliament. Nor can the King legally disregard or violate the articles on "which the Country is surrendered or ceded; but such articles are sacred and inviola- "ble according to their true intent and meaning. It is necessary and fit that the con- "quered Country should have some laws, and therefore until the laws of the Country "thus acquired are changed by the Sovereign, they still continue in force." (1) It becomes necessary then to inquire whether the Royal Prerogative in this respect, was restrained by any articles of surrender or cession as to Canada. In referring to the capitulation signed at Montreal, the 8th September, 1760, we find as article 41 proposed by the French Commander, the Marquis de Vaudreuil, "The French Canadians and Acadians "of what state and condition soever, who shall remain in the Colony, shall not be forced "to take arms against His Most Christian Majesty, or his allies, directly or indirectly, "on any occasion whatsoever; the British Government shall only require of them an "exact neutrality." The answer to which by General Amherst is, "They become sub- "jects of the King," The 42d article is directly to the point; it was asked by the French: "The French and Canadians shall continue to be governed according to the Custom "of Paris, and the laws and usages established for this Country; they shall not be "subject to any other imposts than those which were established under the French do- "minion." The answer is: "Answered by the preceding articles and particularly by "the last." The Royal Prerogative is thus clearly reserved in its plenitude, to the King of Great Britain. By the 5th article of the definitive treaty of peace between the Kings of Great Britain and France, dated at Paris, the 10th February, 1763, Canada was ceded to Great Britain "*in the most ample manner and form, without restriction.*" The sole covenant on the part of Great Britain is: "His Britannic Majesty on his side agrees "to grant the liberty of the Catholic religion to the inhabitants of Canada, he will con- "sequently give the most effectual orders that his new Roman Catholic subjects may "profess the worship of their religion according to the rites of the Romish Church," but even this is limited expressly by the words immediately following "*as far as the laws of Great Britain permit.*" Upon the conquest of the Country, General Murray established

(1) Chitty on Prerogative, 29.

military tribunals, which dispensed justice both in civil and criminal matters, according to their own rule of natural equity and right, and the whole system of Courts and administration of Justice, as practised under the French Government, ceased for ever. On the 7th October, 1763, by proclamation given at the Court at St. James, the King published and declared that he had granted his Letters Patent under the Great Seal of Great Britain, for the erection of four distinct and separate Governments, out of the acquisitions secured to him in America by the Treaty of Paris. The first of which was "The Government "of Quebec," comprising all Canada. This Proclamation contains the following important declaration: "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 thereof; we have, in the Letters Patent under our seal of Great Britain, by "which the said Governmants are constituted, given express power and direction to our "Governors of our said Colonies respectively, that so soon as the state and circum- "stances of the 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 Province of America, which are under our immediate Government; and "we have also given power to the said Governors, with the consent of our said Coun- "cils, and the representatives of the People, so to be summoned as aforesaid, to make, "constitute and ordain Laws, and Statutes and Ordinances for the public peace, wel- "fare and good Government of our said Colonies, and of the people and inhabitants "thereof, *as near as may be agreable 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 in, or resorting to our said Colonies may con-* "*fide in Our Royal Protection, for the enjoyment of the benefit of the Laws of our Realm of* "*England, for which purpose, we have given power under our Great Seal to the Governors* "*of our said Colonies respectively, to erect and constitute, with the advice of our said* "*Council: respectively,* Courts of Judicature and public justice within our said Colonies, "*for the hearing and determining all causes, as well criminal as civil,* according to Law "and equity, and, as near as may be, agreable to the Laws of England, *with liberty to all* "*persons, who may think themselves aggrieved by the sentence of such Courts in all civil causes, to appeal, under the usual limitations and restrictions, to us, in our Privy Council.*"

Under this Proclamation and the King's commission and instructions, Civil Government, in lieu of the military tribunals, was established in the Province of Quebec, on the 10th of August, 1764. The Legislative power was wielded by the Governor and Council, and on the 20th September, 1764, an Ordinance was passed by their authority to which it is proper to advert at length, as the very existence of this act of legislation, as well as of many others, by the same authority, is hardly known at this time, no collection of them having ever been made by authority, and the old printed copies being very rare. The Ordinance commences as follows: "Whereas upon the conquest of this Country, "Her Majesty's Commander in Chief of the Forces, in America, did order and direct "justice to be administered to the inhabitants thereof, by Courts established for that "purpose in the several Governments into which this Province was at the time divided, "*of which His Majesty, through one of his Secretaries of State, was pleased to signify His* "*Royal approbation, and to command the same to subsist and continue until Civil Government* "*could with propriety be settled therein.* In order to satisfy any doubt which might arise "with regard to the decisions of the said Courts, and as far as may be to prevent all "vexatious law suits, which might, at present or hereafter, arise therefrom, His Excel- "lency the Governor (General Murray,) by and with the advice, consent and assistance "of His Majesty's Council, and in virtue of the power and authority to him given by His "Majesty's Letters Patent, under the Great Seal of Great Britain, hath thought fit to "order and declare that, from the 8th day of September, in the year 1760, the date of "the capitulation of Montreal, until the 10th day of August last, from which time Civil

" Government took place throughout this Province, all orders, judgments or decrees of " the Military Council of Quebec, and of all other Courts of Justice in the said Govern- " ment, or in those of Montreal and Three-Rivers, do stand approved, ratified and con- " firmed, and shall have their full force and effect, except in such cases where the value " in dispute exceded the sum of £300 sterling, when either party may appeal to Her " Majesty's Governor and Council of the Province, provided such appeal be lodged with " the Clerk or Deputy Clerk of His Majesty's Council of Quebec, within two months " after the publication hereof."

" And it is hereby further ordained and declared, that the Judges, Justices of the " Peace and other Magistrates, or Civil Officers of this Province, whom it doth or may " concern, upon application of the several parties, shall put in execution all such orders, " judgments or decrees of the said Courts, the same being properly attested as not having " been already executed."

The Judges, &c., mentionned here, are those who were appointed under another or " prior Ordinance, of the 17th September 1764: "For regulating and establishing the " Courts of Judicature, Justices of the Peace, Quarter Sessions, Bailiffs and other matters " relative to the distribution of justice in the Province. "This Ordinance commences. " Whereas it is highly expedient and necessary, for the well governing of Her Majesty's " good subjects of the Province of Quebec, and for the speedy and impartial distribution " of justice among the same, that proper Courts of Judicature, with proper powers and " authorities, and under proper regulations, should be established and appointed." " His " Excellency the Governor, by and with the advice, consent and assistance of His Majes- " ty's Council, and by virtue of the powers and authority to him given by His Majesty's " Letters Patent &c.," ordained and enacted " That the Superior Court of Judicature, " or *Court of Queen's Bench*, be established in this Province, to sit and hold terms in the " Town of Quebec, twice in every year, viz, one to begin on the 21st day of January, " called *Hilary Term*, and the other on the 21st day of June, called *Trinity Term*. In " this Court His Majesty's Chief Justice presides, with power and authority to hear and " determine all criminal and civil causes, *agreeable to the Laws of England*, and to the " Ordinances of this Province, and from this Court an appeal lies to the Governor and " Council, when the matter in contest is above the value of £300 sterling, and from the " Governor and Council an appeal lies to the King and Council when the matter in con- " test is of the value of £500, sterling, or upwards...... In all trials in this Conrt, all " His Majesty's subjects in this Colony to be admitted on Juries without distinction, " and His Majesty's Chief Justice, once in every year, to hold a Court of Assize and " General Gaol Delivery soon after Hilary Term, at the the Towns of Montreal and " Three-Rivers, for the more easy and convenient distribution of justice to His Majesty's " subjects in those distant parts of the Province.

" And whereas an inferior Court of Judicature, or Court of Common Pleas, is also " thought necessary and convenient, it is further ordained and declared, by the autho- " rity aforesaid, that an Inferior Court of Judicature, or Court of Common Pleas, is " hereby established, with power and authority to cetermine all questions of property " above the value of ten pounds, with liberty of appeal either to the Superior Court or " Court of King's Bench, when the matter in contest is of the value of £20 and up- " wards. *All trials in this Court to be by Juries, if demanded by either party, and this Court " to sit and hold two terms in every year, &c., The Judges in this Court are to determine " agreable to equity, having regard nevertheless to the Laws of England, as far as circum- " stances, and the present situation of things will admit, until such time as proper Ordin- " ances for the information of the people can be established, by the Governor and Coun- " cil, agreable to the Laws of England. The French Laws and customs to be allowed and " admitted in all causes, in this Court, between the natives of this Province, where the " cause of action arose before the first day of October, 1664. The first process of the Court " to be an attachment against the body. An execution to go against the body, lands or " goods of the Defendant. Canadian Advocates, Proctors, &c., may practise in this Court.*"

All civil causes below the jurisdiction of the Common Pleas were made triable by Justices of the Peace. An Officer called the *Provost-Marshal* was appointed to act as Sheriff in the execution of process, and until the arrival from England of a person to fill this office, provision was made by the appointment of Bailiffs.

The commission appointing William Gregory, Esquire, the first Chief Justice of the Province, is dated the 24th August, 1764, and it directs him "to inquire by the oaths of " honest and lawful men of the Province aforesaid, and by other lawful ways, methods " and means by which you can or may the better know, as well within their liberties as " without, of all civil pleas, actions and suits, as well real and personal, as mixed, bet- " ween us and any of our subjects, or between party and party by whomsoever had, " brought sued or commenced, and of all other articles and circumstances, the premises " or any of them in any wise, and the said pleas, actions and suits, and every of them " to hear and determine, and the same do and fulfil in form aforesaid, doing therein that " which to justice doth belong and appertain, *according to the law and custom of that " part of our Kingdom of Great Britain called England, and the laws, ordinances, rules and " regulations of our said Province of Quebec, hereafter in that behalf to be ordained and " made.*"

The Commission appointing William Hey, Esquire, the second Chief Justice, is dated the 25th September 1766, and is in the same terms.

An Ordinance " for registering grants, conveyances, and other instruments in writing, of or concerning any lands, tenements or hereditaments within this Province" passed the 6th November, 1764, recites the instructions of His Most Sacred Majesty to the Governor, bearing date at St. James the 7th December, 1763. in relation to the registration of grants and deeds, and enacts among other things " that the due execution of every " deed or conveyance, of what nature soever which shall hereafter be made of or con- " cerning any lands, tenements or hereditaments, within this Province, shall be proved " before the said Registrar or Deputy Registrar, or other person qualified for that pur- " pose, either by personal acknowledgment of the grantor, vendor or mortgagor in such " deed or conveyance respectively named, or by the oath of one or more subscribing " witnesses to the same, which acknowledgment, or proof of the due execution of such " deed or conveyance, shall be endorsed on the back thereof, and signed by the Regis- " trar or his Deputy, or other person thereto authorized as aforesaid, which endorse- " ment shall be allowed as evidence of the due execution of any deed or conveyance in " any of His Majesty's Courts of record in this Province, and every deed or conveyance, " of or concerning any lands, tenements or hereditaments, in this Province, shall, with- " in the space of forty days next after the respective dates thereof, be registered in the " said office in words at length, and for want of such registry every such deed or con- " veyance shall be adjudged fraudulent against any subsequent purchaser for a valua- " ble consideration."

Another ordinance was passed the same day, 6th November 1764, by which it was ordained and declared, that until the 10th day of August next ensuing, that is the year of our Lord, 1765, the tenure of the lands in respect of such grants as were *prior to the cession of the Province*, by the definitive Treaty of Peace signed at Paris on the 10th February 1763, and the *rights of inheritance as practised before that period, on such lands, or effects of any nature, whatsoever*, according to the custom of the Country, *should remain* to all intents and purposes the same, unless they should be altered by some declared and positive laws.

The statement made by Baron Maseres, respecting these Ordinances and the Courts established by them, is verified by the judicial records of the Country, in the Court of Appeals before the Governor and Council, as in the other Courts. "These Courts sat and acted for ten years together agreably to the said Ordinances; and all sorts of contracts were made in the Province, upon the supposition that these laws were in force in it and were likely to continue so." (1)

(1) Additional papers concerning the Province of Quebec, London, 1775.

U.W.O. LAW

It is true, doubts have here been entertained, in very high quarters, as to the effect of the Proclamation, of 1763, in introducing the Laws of England into the Colonies ceded by the Treaty of Paris. (1) The legality of the Ordinances referred to has been also questioned, but it has been determined, with respect to Gibraltar, (2) that by the Charter of the 13th year of the Reign of George II, by which a new Court of Judicature was erected, authorized to hold pleas of what nature and kind soever, between the inhabitants, and to award and issue out warrants of execution for putting the complainant into possession of the houses, lands, tenements or other things which should be specially adjudged to them, the Laws of England as far as they were applicable to the situation of Gibraltar, were made the law of that place in all cases of property whether real or personal. The Charter to Gibraltar declares the Royal Will, "That the laws of England be the measure of Justice, to be administered between the parties *as near as may be.*" The Phrase, "*as near as may be*" literally the same which is used in the Proclamation of 1763, and is similar to "as far as circumstances and the present situation of things" as used in our Canadian Ordinance. The authority of the case of Campbell vs. Hall, (3) as to the King's Prerogative power to make laws for a ceded Country, seems now to be fully acquiesced in and to have triumphed over the objections of Maseres, to be found appended to Howell's State Trials Vol. 20, pp. 325-355. The practice and usage in some of the old Colonies, on this Continent, also, are in accordance with this doctrine. The introduction of the Laws of England in Civil cases, into Canada, is a matter of fact that cannot be denied, and it is certain that the old Law of Canada was only restored and reintroduced by the Statute of the 14th Geo. III, cap. 83. This Statute now comes to be construed, for on the true reading of it depends the decision of this case. The preamble sets out with a recital of the Proclamation of 1763. The 4th section declares that its provisions "in respect to the Civil Government of the 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 conequence "thereof, (the Proclamation) 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 65,000 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." It then proceeds to enact "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 Pro- "vince 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 1*st day of May*, 1775." This section in thus revoking the Proclamation, the Governor's Commission, and particularly the Ordinances relative *to the administration of justice, and all commissions to Judges*, prospectively and from a day to arrive, viz: the 1st May 1775, impliedly and necessarily contains a recognition, by the Parliament of Great Britain, of the authority of these Ordinances and Commissions, and gives them a Legislative sanction. And this sanction, if otherwise it were required, must certainly remove all doubts as to the legality of the powers exercised *de facto* in the Colony, previously to the 1st May, 1775. The 8th section enacts "that all His Ma- "jesty's *Canadian subjects*, within the Province of Quebec, the religious orders and "communities only excepted, *may* hold and enjoy their property and possessions, toge- "ther with all customs and usages relative thereto, and all other their civil rights, in

(1) Burge, Colonial Laws, Preliminary Treatise XXXV.

(2) 3 Knapp's Rep. 150 Jephson vs. Riera.

(3) 1 Cowper 209.

"as large, ample and beneficial manner, as if the said *Proclamation, Commissions, Ordi-*
"*nances 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 appoint-
"ed within and for the said Province by His Majesty, shall, will respect to such *proper-*
"*ty and rights,* be determined agreeably to the said laws and customs of Canada,
"until they shall be varied or altered, &c." The terms, *His Majesty's Canadian subjects* when taken with the context, imply the new or French Canadian subjects. in contradistinction to the old subjects to whom the Proclamation of 1763 was more particularly applicable. The section is conceived in the future, it refers to the Courts thereafter *to be appointed,* not to the existing Courts, which, until the 1st May, 1775, were to continue to administer the Law of England, "as near as may be" according to their constitution. Now follows the proviso which is all important. Section 9. "Provided always, that nothing in this Act contained *shall extend or be construed to* extend, to any lands that have been granted by His Majesty, &c., to be holden in free and common socage; "by section 10, containing another proviso as to the power to devise or bequeath by last Will and Testament, "such Will being executed either according to the Laws of Canada or according to the forms prescribed by the Laws of England." The 11th Section after reciting "whereas the certainty and lenity of the Criminal Law of England, and the benefits and advantages resulting from the use of it, have been sensibly felt by the inhabitants *from an experience of more than nine years during which it has been uniformly administered,*" enacts, "*that the same* shall *continue* to be administered and shall be observed as law in the Province of Quebec, *to the exclusion of every other* rule *of Criminal Law,* or mode of proceeding thereon, which did or might prevail in the said Province, *before the year of Our Lord* 1764." The wise policy which dictated the restoration of the old Laws of Canada, in 1774, as better adapted to the wants of the Colony than the system in practice, since the year 1764, equally required that the grants of land in free and common socage made by the Crown under the Proclamation of 1763, to the companions in arms of Wolfe, and to the old colonists of Great Britain, shoud be respected, and that the Law of England should continue unimpaired to be the governing law as to them. While Justice required that the old law of real property should subsist as the general rule, the honor of the Crown and the faith of the State, were pledged to maintain the grants made in "*free and common socage according to the Laws of England;*" the new subjects, the French Canadians, in obtaining such a boon as was conferred by the Quebec Act, never could expect that limits should be put upon the power of the Sovereign to make grants of lands, whatever his *jus coronæ,* and which it was as competent for him to dispose of under an English tenure, as it was to his predecessor to do the same by a French one. None could object to a grant in soccage by the King of Great Britain, with its incidents, more than to a grant in *fief* or in *franc alleu,* whether according to the *Coutume de Paris* or that of *Vexin le Français* or any other, by the King of France, with their incidents. Indeed history has shewn that the people of Canada, content with the provisions of the Quebec Act of 1774, clung to their allegiance to the Crown of Great Britain, at the very time, when, her old colonists repudiated it.

The British Act of 1791, the 31st Geo. III, cap. 31, which divided the Province of Quebec, into Upper and Lower Canada, next deserves to be mentioned. The 43rd section enacts: "that all lands which shall hereafter be granted within the said Province of Upper Canada, shall be granted in free and common soccage, in like manner as lands are now holden in free and common soccage in that part of Great Britain called England, and *that in every case where lands shall be hereafter granted within the said Province of Lower Canada, and where the grantee thereof shall desire the same to be granted in free and common soccage, the same shall be so granted, but subject nevertheless to such alterations*

with respect to the nature and consequences of such tenure of free and common soccage, as may be established by any law or laws, which may be made by His Majesty, his heirs or successors, by and with the advice and consent of the Legislative Council and Assembly of the Province. The desire of the Grantee is hére recognised by Parliament as a rule for making the grant in soccage, and it had already been practically adopted by the Government in Canada; for though several grants by the Crown of Great Britain have been made of lands to be held *en fief*, and under French tenures, such grants are the exception, and the grants in soccage have been the rule since the conquest. The *alterations* mentioned in this section no doubt referred more particularly to the laws of descent; the *nature and consequences of soccage tenure* being the right of primogeniture, which, in Lower Canada, would contrast with the equal distribution, among the children, of land *en roture*, and would suggest the probability of future alterations. The next and last British Statute to be examined on this head is the Canada Tenures Act, 6th Geo. IV, cap. 59, by the 8th section of which it is declared in express terms: *Whereas doubts have arisen, whether Lands granted in the said Province of Lower Canada by His Majesty, or by any of His Royal predecessors, to be holden in free and common socage, shall be held by the owners thereof, or will subsequently pass to other persons according to the rules of alienation and descent in force in England, or according to such rules as were established by the ancient laws of the said Province for the descent and alienation of lands therein; it is therefore enacted,*" that all lands within the Province of Lower Canada, which have heretofore been granted by His Majesty, &c., to be holden in free and common soccage, or which shall or may, hereafter be so granted, &c., may and shall be &c., *held, granted, bargained, sold, alienated, conveyed and disposed of, and may and shall pass by descent, in such manner and form, &c., as are by the Law of England established and in force in reference to the grant, &c., descent, &c., or to the dower or other rights of married women;*" this Act leaves not a shadow of doubt as to the operation of the Law of England, upon the grants in soccage in Canada. I view it as purely declaratory of what the law always was, in which light it has also been here considered by the Legislature of Lower Canada, in the Provincial Statute of the 9th Geo. IV, cap. 77, to the consideration of which I now pass.

The Canadian Legislature recites among other things in the preamble to this Act "Whereas divers inhabitants of this Province, and others, are now vested and possessed of sundry lands, and other immoveable property, in free and common socage, situate within the Province of Lower Canada, and hold the same by and in virtue of *grants, bargains, sales, enfeoffments, &c.*, differing *both in manner and form from such rules as are by the Law of England established in reference to such grants, &c.*, and whereas it is necessary and expedient to make provision for quieting the lawful propriotors of such lands, *and confirming to them the legal possession and enjoyment of the same*, notwithstanding that such grants, &c., or other conveyances, *do or may differ from such rules* and restrictions as are by the Law of England established in reference to the same respectively." The first section enacts "that all such grants, bargains, &c., by or in virtue of which any person or persons whomsoever are or shall be the proprietor or possessor of, or lay claim to be the proprietor and possessor of any lands or other immoveable property, heretofore granted in free and common soccage within the Province of Lower Canada, and which may have been made and executed prior to the passing of this Act, &c., though not made and executed according to the rules and restrictions established by the Law of England in reference to such grants, &c., *shall be and are hereby declared to be as good and valid in law, to all intents and puposes whotsoever, as if they and each and every of them had been made and executed in conformity to such rules and restrictions as aforesaid*, provided always, that such grants, &c., were at the time of making and executing the same, good and sufficient to operate as such grants, &c., *under any law or usage in force in this Province, at the time of making or executing the same*, and that as fully and amply to all intents and purposes *as if the said rules and restrictions of the Law of England had never been in force.*" The force of this Act has been felt by

the Respondent, and an attempt has been made to get rid of it altogether. I confess that I am startled at this attempt to expunge from the Statute Book a law which took its place there, and stood upon it unimpeached as long as the Legislature of Lower Canada itself had an existence, and which has survived that Legislature. This Statute was brought prominently under the notice of the old Court of King's Bench for Quebec, in the case of Hunt and Tait, and afterwards in the Provincial Court of appeals, and neither at the Bar nor from the Bench, in either of these Courts, was its validity ever questioned. Though the Royal Assent to it was not signified within the space of two years, as required by the Constitutional Act, of the 31st Geo. III, cap. 31st sect. 33, it was proclaimed as law in the Province by Royal Authority, under a Special Act of the Imperial Parliament to that effect, equally binding and conclusive id this respect as the Constitutional Act itself. The Proclamation was made in Quebec, on the 1st September, 1831, but before this, viz: on the 17th November, 1830, the decision was pronounced in the case of Paterson *et al.*, and McCallum *et al.*, in the Provincial Court of Appeals, in which the Law of England was distinctly recognized at the rule to govern lands in soccage. It must be observed also, that our Canadian Statute, even though it were assailable as to the time and manner of receiving the Royal Assent, would yet import a deliberate recognition, by our local Legislature, of the existence of this self same English rule, and would be entitled to the greatest weight in the construction of the Quebec Act of 1774. But there is now to be mentioned another Law of Lower Canada, as to which there can be no donbts, and it is the last, viz: the Registry Ordinance of the 4th Victoria, cap. 30. The 34th section of this Act of Legislation declares in express terms, that "*the alienation of the real estates of married women, held in free and common soccage, and those held under other and different tenures in this Province, is governed by different rules.*"

Having thus passed in review the Legislative provisions upon the subject, it may be asked whether apart from them, the soccage tenure has not its incidents or "*nature and consequences*" which are characteristic and distinctive, of which it cannot be stripped and without which it cannot exist at all. It is useless to refer to tha Law of France for an explanation of this Saxon Tenure, for it is unknown to that law either by name or in effect. It is to the Law of England alone that we must look for information, from the very necessity of the case. But in the construction of all feudal grants of land, there is moreover a well recognized doctrine: "*La teneur de l'investiture est la première loi;* à son défaut, c'est la coutume locale; à défaut de celle-ci, la disposition expresse du droit commun des Fiefs; la disposition expresse manquant, c'est l'esprit et le sens des coutumes féodales qui doivent servir de règle, *et ce n'est que subsidiairement à tout cela qu'on a recours au droit écrit.*" (1) This subject is well treated in Laboulaye, (2) He asks: "Qu'est-ce que le Fief?" and answers: "Ce nom de Fief comprend des tenures d'origine et de natures fort diverses, et cette diversité *décida seule du droit de succession.* Le manoir seigneurial, avec tous les droits y attachés s'est nommé Fief. Ce manoir était un ancien alleu, ou un bénéfice devenu héréditaire et indépendant. Pour ces concessions seigneuriales il n'y a plus de règle fixe de succession, c'est le contrat qui fait la loi-c'est la volonté du Seigneur qui décide. *Voluntas donatoris in chartâ doni manifeste expressa servetur* dit le deuxième Statut de Westminster. Au baron de décider s'il y aura succession, et quel sera l'ordre de cette succession. *Encore une fois, c'est la volonté du Seigneur qui fait la coutume de la terre*, et il il y a à cet égard un tel arbitraire, que Beaumanoir ne craignait pas d'avancer, "*Que les Coutumes sont si diverses que l'on ne trouverait pas au royaume de France deux Chastelleries qui de tout cas, us assent d'une même coutume.*"

In the preface to Bishop Gibson's Reliquiæ Spelmannianæ, the Editor, referring to the *great case of defective titles in Ireland*, says: that it led to a more general inquiry,

(1) Merlin, Répertoire, vbo Fief, sect. 2, § 4, No. 3.

(2) Traité de la Condition des Femmes, p. 208, et seq.

"What the reservation of a tenure is to the grant? Whether it be a part of the grant and the *modus concessionis*, or whether it be a distinct thing *et aliud* from the grant." In whatever way this may be answered, Sir Henry Spelman himself, p. 19, gives instances of Charters granted by Saxon Kings of lands, upon different conditions, dependent upon the will of the Sovereign, and shewing that this *voluntas donatoris*, freedom of will, might be communicated to the grantee in the disposal of the land after his death, *post obitum suum cuicunque voluerit hæredi relinquat*, and that he was left to frame his own rule of succession.

In Hale's history of the Common Law, p. 252, the course of descents in England is traced up to the feudal grants of land.

Dalrymple's history of feudal property, cap. 5, p. 196, again traces the rules of descent or succession to the feudal grants, as well as the alienation of property, p. 90. The very definition of socage land as given in Woodson's lectures, Vol. 2, S. 22, is "soccage or as we now term it, freehold land is such *as is pleadable at the Common Law*, that is, *recoverable in the King's Superior Courts*. (1)

The rules as to alienation, descent and devise of soccage lands are inseparable from the tenure, and can only be those of the Law of England. No hardship was imposed by the Crown in *making* these grants originally by the soccage tenure, the acceptance of the land was voluntary, and the condition was made known to each succeeding purchaser from the grantee, and must have been tacitly adopted by him. Just as lands *en fief* are descendible, by one rule, and those *en roture* by another, the free and common soccage tenure carried with it its own rule of descent and alienation.

G.

Opinion of Mr. *Justice Dominique Mondelet in Stuart v. Bowman*. Lower Canada Reports, Vol. 3, p.p. 398–407.

Mondelet, Justice:—In the examination of the cause, I shall confine myself strictly to the judicial aspect of the questions which it presents, avoiding all topics that do not directly lead to a legal conclusion.

A succinct review of some of the various phases of the Legislative history of Canada, precludes in my mind the necessity of inquiring into the effects of a change of domination on our system of laws, as without adverting to any principles of public or international law, it will be found that the rule of decision, in the present case, is written in several acts of positive enactment, as well of the Imperial as of the local Legislatures. A few general principles being settled, this, like every case, must, after all, depend upon its own particular circumstances. It is therefore a pure act of supererogation to acknowledge that the Canadians were fully entitled to the preservation of their property, and that their laws and usages remained intact, until abrogated by competent authority: the ancient state of the law, whatever it was, continued, and of that state, of the changes, if any, it has undergone, the Acts of the Legislature, and of the Government, ought to be authentic and decisive evidence: whilst on the other hand it is plain that inducements were held out to the old subjects, which, being followed by and embodied in Acts of Legislation, were Acts of national faith, binding upon the honor of the British nation. As Acts of national law, it was equally essential that the power of the Supreme Legislature of the Empire should be adequate to their construction and enforcement. We are met at the outset by the Proclamation of 1763, which was the first Act of the British Sovereign that followed the capitulation of Montreal. This, it is obvious, could not have, and has not had, any legal effect for establishing any particular system of laws, in it, the King is made to say: "We have given power, under our Great Seal, to the Governor of our 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 all causes, as well

(1) Termes de la ley. Soccage:—1 Preston on estates, 200, 210.

criminal as civil, according to law and equity, and as near as may be, agreable to th Laws of England," &c., &c. From the period at which Canada became a Brirish Province. up to the Quebec Act, justice would appear to have been administered according to both the English and French Laws indifferently, on the authority of Ordinances enacted by General Murray, and others having the administration of the Government during this interval of time. This is abundantly proved by the judicial records of those times.

The Act of 1774 comes next in order, and in the 4th section it is enacted "that the "said Proclamation, (of 1763) so far as the same related to the said Province of Quebec, "and the commission under the authority whereof the government of the said Province "is at presrnt 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 Govern-* "*ment 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,* 1775." In this we find a recognition of the power under which the Governor and Council of the Province of Quebec, passed Ordinances and established Courts of Justice, clearly evidenced by the terms *revoked, annulled and made void*, and by the limitation of the time at which these Ordinances should cease to have force. It becomes necessary, therefore, to enquire into the nature of these Ordinances, and by a reference to a collection of them published at Quebec in 1767. by Brown and Gibsone, by authority, (it is presumed) we find an Ordinance passed in Council, at Quebec, the 17th September, 1764, signed Jas. Murray, p. 6, constituting Courts of Justice and ordaining among other things, that in the Court of Common Pleas, having jurisdiction in civil matters, "The judges in this Court, are to determine "according to equity, having regard nevertheless to the Laws of England, as far as the "circumstances and present situation of things will admit, until such time as proper "Ordinances for the information of the people, can be established by the Governor and "Council, agreeable to the Laws of England. The French Laws and customs to be "allowed and admitted in all causes in this Court, between the natives of this Province, "when the cause of action arose before the first day of October, 1764."

By the two last foregoing extracts, two points are established; 1st the introduction and administration, in part, of the Laws of England; 2nd the sanction by the British Parliament of the authority under which they were introduced.

Reverting to the Quebec Act, (1774) the 8th section provides that "in all matters of "controversy, relative to property and civil rights, resort shall be had to the Law 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 proper-"ty 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 the said Province, by the Governor, Lieutenant Governor or Commander in Chief "for the time being, by and with the advice of the Legislative Council of the same, to "be appointed in manner hereinafter mentioned." This section is followed by a proviso contained in the 9th section, in the words following: "Provided always that nothing in "this Act contained, shall extend, or be construed to extend, to any lands that have "been granted by His Majesty, or shall hereafter be granted by His Majesty. his heirs "and successors, to be holden in free and common socage," and of this it is sufficient to say that taking this proviso according to a well known rule of construction in reference to *subjectam materiam*, it must be restricted to what immediately precedes in the section which it qualifies.

By the Imperial Act 31 Geo. III, c. 31st, section 43, it is provided "that in every case "where lands shall be hereafter grrnted within the said Province of Lower Canada. and "where the grantee thereof shall desire the same to be granted in free and common "soccage, the same shall be so granted, but subject nevertheless to such alterations,

" with respect to the *nature and consequences* of such tenure of free and common soccage, " as may be established by any law or laws which may be made by His Majesty, his " heirs or successors, by and with the advice and consent of the Legislative Council and " Assembly of the Province." If this provision mean any thing, its plain legal import must be taken to be that not only the tenure of free and common soccage, but also that all its legal consequences are introduced whenever any lands are granted, according to that tenure.

The 6 Geo. 4, cap. 59, contains the following enactment in the 8th section :—

" And whereas doubts have arisen whether lands granted in the said Province of " Lower Canada, by His Majesty, or by any of his Royal predecessors, to be holden in " free and common soccage, shall be held by the owners thereof, or will subsequently " pass to other persons, according to the rules of descent and alienation in force in " England, or according to such rules as were established by the ancient laws of the " said Province, for the descent and alienation of land situate therein : Be it therefore " declared and enacted, that all lands within the said Province of Lower Canada, which " have heretofore been granted by His Majesty, or by any of his Royal predecessors, " to any person or persons, their heirs and assigns, to be holden in free and common " soccage, or which shall or may hereafter be so granted by His Majesty, his heirs and " successors, to any person or persons, their heirs and assigns, to be holden in free and " common soccage, may and shall be by such grantees, their heirs and assigns, held, " granted, bargained, sold, aliened, conveyed and disposed of, and may and shall pass " by descent in such manner and form, and upon and under such rules and restrictions, " as are by the law of England established and in force, in reference to the grant, bar- " gain, sale, alienation, conveyance, disposal and descent of lands holden by the like " tenure, therein situate, or to the dower or other rights of married woman in such " lands, and not otherwise, any law, custom or usage to the contrary in any wise not- " withstanding : Provided nevertheless, that nothing herein contained shall extend to " prevent His Majesty, with the advice and consent of the Legislative Council and " assembly of the Province of Lower Canada, from making and enacting any such laws " and Statutes as may be necessary from the better adapting the before mentioned rules " of the Laws of England, or any of them, to the local circumstances and condition of " of the said Province of Lower Canada, and the inhabitants thereof."

On the character of this Stature, some diversity of opinion exists, whether it be a declaratory law or whether it provide for the future only. Of the fact of doubts having arisen in relation to the mode in which lands in free and common soccage were to be held, it contains authentic and decisive evidence. This assertion by competent authority is no more gainsaid than its power can be denied, of finally settling the law on this matter ; for what it has done, has been effected by virtue of that sovereign power of Parliament, called Omnipotent, which it were futile to question. It presents itself with two unmistakeable characters of a declaratory Statute : the *enunciation* of doubts on the construction of previous laws, and the use of particular words indispensable in the phraseology belonging to that class of Statutes, and to that class only. The reason for including them is obvious, and if the fact of doubts existing be not susceptible of dispute, their use is entirely conclusive.

The next and the last Act of Legislation having relation to this subject, is the Provincial Statute, 9th and 10th Geo. IV, c. 77. In it are recited, as well the 8th section of the above recited Imperial Statute of the 6th Geo. IV, c. 59. as its proviso, the authority of the Provincial Legislature for making the provisions in the present Act contained, and also the clause of the Imperial Act, 31st, Geo. III, above recited, and it then proceeds, among other enactments, as follows : " Whereas should proprietors of land " granted in free and common soccage be deprived of the protection of the Laws of this " Province, and of the advantages resulting from the customs received and established " with regard to real property, they would be exposed to the loss or diminution of the " rights they have acquired, and up to this day have exercised and enjoyed, as attached " to such lands or real properties, or to the possession of such lands, so granted in free

"and common soccage, And whereas divers inhabitants of this Province, and others, "are now seized and possessed of sundry lands, and other immoveable property, in free "and common soccage, situate within the Province of Lower Canada, and hold the "same by and in virtue of grants, bargains, sales, enfeoffments, alienations, gifts, ex- "changes, disposals, descents, devises, inheritance, right of dower, or other conveyan- "ces, differing, both in manner and form, from such rules and restrictions as are by the "Law of England established in reference to such grants, bargains, sales, enfeoffments, "alienations, gifts, exchanges, disposals, descents, devises, inheritance, right of dower "and other conveyances: And whereas it is necessary and expedient to make provisions "for quieting the lawful proprietors of such lands, and confirming to them the lawful "possession and enjoyment of the same, notwithstanding that such grants, bargains, "sales, enfeoffments, alienations, gifts, exchanges, disposals, descents, devises, inheri- "tance, right of dower or other conveyances, do or may differ from such rules and res- "trictions as are by the Law of England, established in reference to the same, respec- "tively: And whereas it is also necessary and expedient to enact and declare in what "manner such lands as are now holden, or shall or may hereafter be held in free and "common socage, within the limits of the Province of Lower Canada, shall and may "hereafter be held, acquired, conveyed or transferred: Be it therefore enacted by the "King's Most Excellent Majesty, &c., and it is hereby enacted, &c., that all such grants, "bargains, sales, enfeoffments, alienations, gifts, exchanges, disposals, descents, devises. "inheritance, right of dower or other alienation or conveyance, whatsoever, by or in vir- "tue of which any person or persons whomsoever, are or shall be the proprietor or pos- "sessor of or lay claim to be the proprietor or possessor of any lands, or other immoveable "property, heretofore granted in free and common soccage within the Province of Lower "Canada, and which may have been made and executed prior to the passing of this Act. "for the transfer, alienation and conveyance of any such lands or other immoveable "property, though not made and executed according to the rules and restrictions esta- "blished by the Law of England, in reference to such grants, bargains, sales, enfeoff- "ments, alienations, gifts, exchanges, disposals, descents, devises, inheritance, right of "dower or other conveyances, shall be, and they are hereby declared to be, as good and "valid in law, to all intents and purposes whatsoever, as if they, and each and every of "them, had been made and executed in conformity to such rules and restrictions as "aforesaid: provided always, that such grants, &c. &c., and each and every of them "respectively, were, at the time of making and executing the same, good and sufficient "to operate as such grants, &c. &c., under any law or usage in force in this Province, at "the time of making and executing the same, and that as fully and amply, to all intents "and purposes, as if the said rules and restrictions of the law of England, had never "been in force, or had *not been so declared* to govern and affect the transfer, alienation "and conveyance of lands or other immoveable property, so held in free and common "soccage, any law, usage or custom to the contrary notwithstanding."

The 3rd, 4th and 5th clauses protect the rights of *bailleurs de fonds*, and privileged and hypothecary creditors.

A proviso is contained in the 6th clause to the following effect:—"Provided always, "and be it further enacted, &c., that when any proprietor of land, granted or held in "free and common soccage in this Province, *shall have died before the passing of this Act* "without having partitioned the same, either by last will and testament, or otherwise, "the heirs of such proprietor shall be held to partition such lands according to the old "laws of this country, unless the said heirs should have agreed among themselves upon "a different partition."

The Provincial Statute presented for the Royal sanction, and reserved 14th March, 1829, was sanctioned by His late Majesty, William the Fourth, in Council, 11th May, 1831. The Royal Assent was signified by the Proclamation of His Excellency, the then Governor in Chief of Lower Canada, 1st September, 1831.

According to the Imperial Act, 31st Geo. III, c. 31, § 32, His Majesty's Assent to the Provincial Statute hereinbefore in part recited, ought to have been signified within the space of two years, from the day on which such bill had been presented for His Majesty's Assent by the Governor, Lieutenant Governor, or person administering the Government of this Province; but it is under a different authority, that the bill in question has been assented to and has now the force of law. The Imperial Act, 1 William IV, c. 20, contains a provision whereby it is declared to be lawful to His Majesty, his heirs and successors, to sanction, or to authorize his or their sanction to be given to any bill or bills, which had heretofore or which might be hereafter, passed by the Legislative Council and Assembly to regulate the descent, grant, bargain, sale, alienation, conveyance or disposal of any lands which are now, or may hereafter be, holden in free and common soccage in the said Province of Lower Canada, or to regulate the dower or other rights of married women, on such lands; notwithstanding any inconsistency, or contradiction, or supposed inconsistency, to or with the Laws of England, or with any of the provisions *in the Acts of Parliament above mentioned, or in any of them contained, to the contrary.*" Under the authority conferred on His late Majesty by the last mentioned Statute, the Royal Assent could have been legally and was in fact given to the Provincial Act, 9th and 10th Geo. IV, c. 77, on the 11th May, 1831, and the Proclamation of the Governor in Chief, of the 1st September, 1831, whereby this assent is signified, expressly recites the Imperial Act of the 1st William IV, c. 20, as the authority in virtue whereof this sanction has been given.

Assuming this as the state of the Law, the Appellants have a good title in the deed of sale of 1804, by John Robertson, to Patrick Robertson and Francis des Rivières; they may also invoke successfully the rules of descent established by the old laws of the Country, and this according to the provisions of the Provincial Statute 9th and 10th Geo. IV, c. 77. This Act is not only important in the provisions which it contains, but also as supplying evidence of the opinion entertained by the Legislature of the undoubted declaratory character of the Act 6th Geo. IV, c. 59.

No. 3.

Opinion of Sir *William Grant*. Stuart's Reports, pp. 75-6, foot note (*b*).

(*b*) The earliest case relating to the liability of Sheriffs, in civil matters in Lower Canada, whereof any trace is to be met with, is that of *McAuley v. Shepherd*, argued and decided upon an appeal from this Province before His Majesty in his Privy Council in the year 1787. The case was argued, on the part of the Sheriff, appellant, by the late Master of the Rolls, Sir WILLIAM GRANT, and the following is an abstract of the grounds of the judgment in the Privy Council as contained in a letter from him to his client the Sheriff, announcing the reversal of the judgment of the Court of Appeals here, and the dismissal of the action against him:—"The Lords at the Board of Privy Council adopted as the grounds of reversal, very nearly the same reasons as are stated in our case. Lord CAMDEN said, that it was of great consequence that men should know, with precision, under what law they are acting. The laws of Canada being by the Quebec Act made the rule of decision in all civil cases, no part of the law of England would operate there, except in so far as it may be clearly and expressly introduced by an ordinance of the Province. To say that the bare mention of the word Sheriff in an ordinance should have the effect of introducing the whole body of English law relative to that office was absurd.—That officer existed before the ordinance passed, and had a duty to execute under the criminal law of England. If the ordinance had been silent he would have had nothing to do with civil process under the law of Canada. It is the ordinance that gives him the execution of civil process, and further than it charges him he cannot be liable. If it was intended to adopt the law of England with regard to escapes it ought to have been done in clear and unambiguous language;—that the officer might have known whether he would accept of the office under such conditions.—Sir LLOYD KENYON

acceded to this, and in addition laid some stress on your not having the appointment of the gaoler. The rule *respondeat superior* supposes the gaoler to be the Sheriff's servant which he was not in this instance.

No. 4.

Opinion of *Mr. Justice Reid*. *Vide* Stuart's Reports, pp. 434-436.

REID, CH. J. The question to be now decided is one upon which various opinions have been entertained. It is whether an *acte authentique*, and general mortgage of all present and future property, can effect lands in free and common soccage. The court are convinced that, under the laws of this country, when properly explained, lands held in free and common soccage, cannot be so affected. The statute of 1774, (the Quebec act,) directs, as a general principle, that "in all matters of controversy relative to property and civil rights, recourse shall be had to the laws of Canada, as the rule for the decision of the same," but by the next section it is provided, "that nothing in this act shall extend, or be construed to extend, to any lands that have been granted, or shall hereafter be granted by His Majesty in free and common soccage." It is true that the parliament of Great Britain did not thereby in terms determine by what rule the civil law should be administered with respect to such lands, but it follows, that this exception being made as to lands held in free and common soccage, that is by the tenure by which lands are almost universally held in England, the legislature could alone mean that the same law as governs lands in free and common soccage in England, should govern lands similarly situated here. Doubts and difficulties have, however, constantly arisen, and for a long time existed, a variety of opinions have been formed thereon, and the laws of Canada, having, notwithstanding, been construed to extend to such lands, considerations of the injurious consequences that would arise to estates and families, if the subject were to remain longer involved in those doubts and difficulties, caused the Act of the imperial parliament of the 6th Geo. IV, to be passed, after which, if any doubts existed, they must be removed, for by that declaratory statute, lands in free and common soccage in Canada, are declared to be subject to the same laws, modes of succession, conveyance and alienation, as lands in free and common soccage in England. Now, how can it be said that a paper drawn up before a notary, not specifying any particular lands, can have any reference to what is understood by a mortgage in the laws of England. A mortgage there, is not what a notarial act is here, a mere acknowledgement of a debt, but is a conveyance of the land. A mortgage is a contract of sale for certain land for a certain sum, with a power to redeem. It is a special pledge or security given to a special creditor, for a special sum of money, and is a conveyance, provisional as to its redemption, which must have all the qualities of an absolute sale, excepting as regards the proviso of redemption. The judgment of the court below is, therefore, reversed with costs, and the parties sent back to obtain a fresh distribution of the proceeds of the sale, the property having been sold at the instance of two or three individuals.

No. 5.

Opinion of *Mr. Justice Pyke* on the validity of the sanction given to the Act of 1829, 9 Geo. 4, chap. 77, and on the effect of the 6th clause of that Act.

20th JANUARY, 1833.

No. 1583.

THOMAS B. ANDERSON, ET UX, *et al.*, *Plaintiffs*,

v.

JOHN BLACKWOOD FORSYTH, *Curator* to
THOMAS RICHARDSON, *an absentee*, *Defendant*.

The declaration sets forth that the late Hon. John Richardson in his life time of Montreal, died intestate, on the 18th May, 1831, and the Defendant Thomas Richardson,

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and the said Plaintiffs, Ann, Helen, Euretta, and Charlotte Richardson, being his only children, were and are his only lawful heirs and heiresses.

That by Royal Letters Patent dated the 7th December, 1815, His late Majesty King George the Third, did give and grant unto their said father John Richardson certain lots of land therein particularly described situated in the Townships of Grantham in this Province, making together 149 lots of 200 acres each, and containing altogether 29,800 acres and the usual allowance for highways, to have and to hold unto him the said late John Richardson, his heirs and assigns, for ever, respectively, in free and common soccage, by fealty only, in *lieu* of all rents, services, &c., in like manner as lands were then holden in free and common soccage in that part of Great Britain called England.

That the said lots of land, according to the laws of the said Province, in force at the decease of the said John Richardson, and also according to the laws thereof by which the descent of lands holden in free and common soccage by persons who died on the 18th May, 1831, was and is regulated and governed, descended to the said Defendant and his sisters Plaintiffs in this cause, and were and are equally partible and divisible among them as the heir and heiresses at law of the said John Richardson.

That the said lots of land are still held in common and undivided, and the said Thos. Richardson, though often required, hath refused and still doth refuse to divide the said lots between him and the said Plaintiffs, his sisters, and therefore concluding that the Defendant in his capacity of Curator to the said Thomas Richardson, be adjudged and condemned to make with the said Plaintiffs a division and partition according to law of the said lots of land, &c., &c.

The Defendant to this action has pleaded 1st. a general demurrer or *défense au fonds en droit*, and 2dly. by a special plea or exception, it is denied that the Plaintiffs' daughters of the said late John Richardson, were or could be jointly with their brother Thomas Richardson, inheritors *ab intestato* in respect to lands held by their late father in free and common soccage, nor that the said lots in Grantham descended to the said Thomas Richardson, and the Plaintiffs his sisters, and were and are at the time of the decease o their said father John Richardson, according to the laws in force in this Province, in relation to lands held in free and common soccage, equally partible and divisible among them, but on the contrary it is averred that the lots of land described in the declaration being held by their deceased father in free and common soccage did according to the laws in force at the time of, as well as since his decease, and particularly according to the statute of the Imperial Parliament 6 Geo. 4, C. 59, descend and were inherited by the said Thomas Richardson solely, to the exclusion of his said sisters, as the only surviving son of the said late John Richardson, and therefore that the Plaintiffs have no legal right to the partition or division of the said lots of land, nor to maintain their said action, concluding that the same be dismissed.

The replication is general.

The cause having been inscribed for a preliminary hearing *en droit* upon the issues so raised, the parties by their counsel were fully heard, and at such hearing two grounds of objection to the Plaintiffs' right of action was urged by the Defendant's Counsel.

First.—That the 6th Clause of the Provincial Statute of the 9th and 10th Geo. 4, C. 77, on which the Plaintiffs rely in support of their action, and which declares "that "when any proprietor of land granted or held in free and common soccage shall have "died before the passing of this act, without having partitioned the same either by his "last will and testament or otherwise, the heirs of such proprietor shall be held to "partition such land according to the laws of the Country, unless the said heirs shall "have agreed among themselves upon a different partition," does not authorize the now claim and pretensions of the Plaintiffs, inasmuch as the late Mr. Richardson, died on the 18th May, 1831, and the statute in question had previously on the 11th of the same month received the Royal assent in England, and it was therefore contended on the part of the Defendant, that as Mr. Richardson died after the passing of the act, that is, after

the assent given thereto on the 11th May, the Plaintiffs could not avail themselves of the said recited clause to obtain the partition sought for;

2dly. That the Provincial Statute 9 and 10 Geo. 4, Cap. 77, was moreover not in force, but a dead letter inasmuch as the Royal assent thereto had not been signified as required by the constitutional act of the 31 Geo. III, c. 31, s. 32, within two years from the day on which it had been presented for his Majesty's assent to the Governor of this Province, and reserved for his Majesty's pleasure.

The case remained *en délibéré* until the 30th June, 1833, when the Court gave the following Judgment.

Upon the first ground of objection which has been urged against the Plaintiffs' right of action, there would be little doubt of its validity if the Royal assent given by his Majesty in Council to the Provincial Statute of the 9 & 10 Geo. 4, c. 77, could legally be considered as the period of the passing thereof, and in that case the Defendent Thomas Richardson, would be entitled to the right he has set up to the lands in question, to the exclusion of his sisters; but the Court is unanimously of opinion that no act of the Legislature can be said to be passed until it has arrived at that ultimate stage when it becomes and has the force and authority of law and binding upon those for whom it was made, and which in ordinary cases, would be upon the Royal assent being openly and publicly given to any Provincial act by his Majesty's representative in this Province in the presence of the Legislative Council and Assembly, but in regard to the act in question to which such assent was not so given, but withheld, and the act reserved and transmitted to England for his Majesty's pleasure, it was requisite under the constitutional act that it should go through a fourth stage—that of a proclamation announcing in this Province the Royal assent to such reserved act, it being specially declared in the 32nd section of the constitutional act, that no reserved Bill shall have any force or authority within this Province until the Governor &c. shall signify, either by speech or message to the Legislative Council and Assembly of the Province, or by Proclamation, that such bill has been laid before his Majesty in Council and that his Majesty has been pleased to assent to the same. The reason of such a provision is as just as it is obvious, for without it, great uncertainty, confusion and injustice would ensue, and those whose rights, property or duty might be affected or regulated thereby being left in ignorance of the law, would be led into error, which might be followed by serious or injurious results. Now the Proclamation announcing his Majesty's assent to the act of the 9 & 10 Geo. 4, c. 77, not having issued until the 1st September, 1831, and the demise of Mr. Richardson having occured on the 18th May, 1831, he died before the passing of the act, that is, before it became a law of the Province and received the last stamp of authority, and consequently this ground of objection on the part of the Defendent must fail and be rejected, and the lands in question, though held in free and common soccage, must under the before recited 6th clause of the last mentioned act be equally divided amongst all Mr. Richardson's children without distinction acording to the conclusions of the Plaintiffs' declaration.

In regard to the several grounds of objection taken by the Defendents counsel, namely: that the statute of the 9 & 10 Geo. 4, c. 77, was not in force in this Province, the royal assent thereto not having been made and signified within the period prescribed by the constitutional act;—it is true that as a general rule it is by the constitutional act declared that no bill which has passed the Assembly and Legislative Council of this Province and been reserved for his Majesty's pleasure, shall have any force or authority unless the Royal assent shall have been signified within the period so contended for, and as stated in this ground of exception, yet it has been held by this Court in the case of

decided in April, 1832, that in regard to the Statute in question the assent though signified after the period so prescribed was valid and authorized under and by virtue of the Statute of the Imperial Parliament of 1 William 4, c. 20, which, after reciting the Statutes of the same Parliament 31 Geo. 3, c. 31, and 6 Geo. 4, c. 59, and

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stating that doubts had arisen how far His Majesty could sanction any Provincial act establishing rules respecting the descent of lands granted in free and common soccage, &c., and therefore to remove such doubts, it was enacted as follows: "that it shall and "may be lawful for His Majesty, his heirs and successors to assent to, or to authorize "his or their assent to be given to any Bill or Bills which hath or *have heretofore been*, "or which may hereafter be passed by the said Legislative Council and Assembly for "regulating the descent, grant, bargain, sale, alienation, conveyance, or disposal of any "any lands which are now, or which may hereafter be holden in free and common "soccage within the said Province of Lower Canada, or for regulating the dower or "other rights of married women in such lands, any repugnancy or supposed repug-"nancy of any such regulations to the law of England, *or to any of the provisions* in "the before recited acts of Parliament, or either of them contained to the contrary in "any wise notwithstanding.

In the case alluded to, the Judgment of the Court, according to a note of that case, was delivered in the following terms:—

It appears in point of fact that the bill in question (9th and 10th George IV.) having passed the Legislative Council and Assembly, was presented to the Governor for His Majesty's assent, on the 14th of March, 1829, and reserved for His Majesty's pleasure, and afterwards assented to by His Majesty in Council, on the 11th May, 1831, and the proclamation subsequently announcing such assent in this Province is dated the 1st September, 1831, making a lapse of two years and five months between the presenting and reserve of the bill and the date of the proclamation. The bill, therefore, under the general rule laid down in the constitutional act, would have no force or authority within this Province, the assent having been signified too late; but in the present instance a majority of the Judges is of opinion that they must look to and be governed by the act of the Imperial Legislature of the I. Wm 4 c. 20, as before recited, which was also passed subsequently to the expiration by *ten* (30th March 1831, the difference is sixteen days not ten) days, and which it appears to us was professedly to provide for and authorize the assent of His Majesty to the provincial act 9 and 10 Geo. IV.; and this statute of Wm. emanating from the same source and authority as the constitutional act, namely, that of the Imperial Parliament, the two acts are co-equal, and as the statute of William is the last, it is entitled to a preference in so far as the two acts might seem to clash or interfere with each other, which upon every principle in the construction of statutes they should be so interpreted, as that both may stand without essentially invalidating each other, and so that both may have their intended operation and effect, and assuredly it never could be urged that there was any thing to prevent the Imperial Parliament in the plenitude of its power, while it could repeal the section relied on in the constitutional act from also creating any particular exception to the general rule therein contained, where from circumstances and delays created by doubts, it might be beneficial to the public that such exception should be made, for although in such a law as the constitutional act, it was right and requisite to fix a period within which the signification of the Royal Assent on reserved bills should be made to prevent uncertainty and confusion, yet it was not in itself very material whether the time so fixed was one, two, or three years. Now what are we to conclude from the terms and whole tenor of the statute of Wm. IV., and from a legal and just interpretation thereof? In the first place we must presume that the Imperial Parliament were aware of their own acts previously passed, and more particularly of the constitutional act 31 Geo. III., c. 31, as it is recited in the preamble of that of the 1 Wm. IV., from the whole tenor whereof it is obvious that the Imperial Parliament were informed of the passing by the Legislative Council and Assembly of this Province, of the act of the 9 and 10 Geo. IV., and that the same had been reserved for His Majesty's pleasure, inasmuch as it is declared that doubts had been entertained (Where? In England assuredly) how far the King was authorised to assent to such a bill, and it therefore empowers His Majesty not only to give his Royal assent to any such bill *heretofore*

passed, but which might thereafter be passed by the Legislative Council and Assembly of this Province, upon the particular subjects therein set forth, in regard to lands held in free and common soccage within such Province, and if this did not embrace the bill now in question, the act of William would be inconsistent and inoperative as to part, namely, as to any bill heretofore passed; but it cannot be supposed that that bill which alone had given rise to the doubts and the necessity of the interference of the Imperial Parliament was not fully known to that Parliament, and that they had not a full knowledge thereof, as also of the limitation of the constitutional act, which last although it might serve as a rule in so far as His Majesty and the Legislature and people of this Province were concerned, in the ordinary course of reserved bills, could not prevent the Imperial Parliament from making any exception to such rule, whenever in its wisdom it might find it expedient to do so, in furthering the just views and wishes of the Legislature and people of this Province, as evinced in the said Provincial statute of the 9 and 10 Geo. IV., and thereby affording to His Majesty additional power as to the giving or withholding his Royal Assent, as circumstances and the public welfare might require. The bill so reserved and sent from this country for His Majesty's pleasure, had been long detained in England, and the statute of William accounts for it by stating that doubts had arisen how far His Majesty could sanction any Provincial act establishing rules respecting the descent of lands granted in free and common soccage, &c., &c., in a manner different from what had been regulated by the statutes of the Imperial Parliament set forth in the preamble of the statute of William, it was therefore to remove these doubts that the statute of William was passed, giving to His Majesty the power to sanction such bills heretofore passed, and which renders such sanction effectual, and gives to the bill the force and authority of law independent of the clause of limitation in the constitutional act; had His Majesty, without the intervention of the Imperial Parliament, withheld his assent, so as the same could not be signified in this Province until after the expiration of the two years, there is no doubt that any subsequent assent in the ordinary course would have been ineffectual, and would not have given to the Provincial bill the force of law, nor is it probable that the Royal assent would under such circumstances have been given,—it therefore appears to us evident that the true intention of the act of William was to give effect and operation to the Provincial act by authorising the Royal assent thereto after the expiration of the two years, for otherwise it was useless to have passed such an act to authorise that assent when it could be of no avail, and would have no other effect than to create a contempt of the Royal authority, which should be thus unavailingly exercised, and at the same time bring in question the wisdom of the Imperial Legislature, and expose it to an interpretation of acting absurdly in having passed an act without any object upon which it could operate, and which could be none other than the Provincial act in question, which then alone existed, and alone could have given rise to the statute of William, and have been in the contemplation of the Imperial Parliament. His Majesty was therefore rightly, as he is always ably, advised to give his assent to the Provincial act, which thereby and by virtue of the statute of Wm. IV., and the proclamation of the 1st September, 1831, has now the force of law in this country, for in authorizing the Royal assent to any bill heretofore made upon the subject therein alluded to, the statute of William has obviously given that effect to the Provincial statute as if it had been passed by the Imperial Parliament itself; it will not, however, operate in the same way in regard to any future bill upon the same subject, if any should hereafter be passed, as these must be wholly governed by the constitutional act, which having limited a time within which the Royal assent is to be signified, would not therefore require any act of the Imperial Parliament, as from circumstances and the delay thereby occasioned was thereby rendered necessary in regard to the Provincial act of the 9 and 10 Geo. IV. The object of the act of William was therefore, as it appears to us, twofold—firstly, to remove the doubts as to the Royal power to assent to such a bill, and, secondly, to remedy the mischief which the delay arising from such doubts had occasioned.

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The opinion expressed by the Court in the case of
is decisive upon the second ground of objection offered by the Defendant's counsel at the argument, and therefore

The défense au fonds en droit and special plea of the Defendant, in the opinion of a majority of the Court, must be dismissed.

No. 6.

Masères' Collection, pp. 288, 9.

In pursuance of the instructions above mentioned in Number XXIV, page 156, given by the commissioners of his Majesty's treasury to Thomas Mills, Esquire, His Majesty's Receiver General of the Province of Quebec, in March, 1766, the merchants of the town of Quebec, who had then lately imported wine and brandy into the Province, were required by the said Receiver General of the revenue to pay the King a duty upon the same according to the rates set forth in the said instructions, to wit, six pence, sterling, for every gallon of Brandy, and ten shillings, sterling, for every hogshead of wine; which were declared to have been the rates established on the importation of the same liquors in the time of the French Government. But the merchants refused to pay them. Upon this George Suckling, Esquire, the then Attorney General of that Province, by the direction of the said Thomas Mills, Esquire, his Majesty's Receiver General, fyled informations in the Supreme Court, or Court of King's Bench, in that Province, against some of the merchants, who had refused to pay these duties, for defrauding the King of the said duties; to which they pleaded the General Plea of *Not Guilty;* and upon this issue was joined. One of these informations which was against Mr. Dupré, a French merchant, of the town of Quebec, who had imported a large quantity of British Brandy, was tried in the month of October, 1766, by a special Jury, *consisting entirely of Englishmen*, (or such as had been his Majesty's subjects before the conquest of that Province) before Mr. Hey the new chief Justice of the Province, who had arrived in the Province in the preceding month of September. The trial lasted several hours; and the evidence as to the facts in the cause was strong and clear in favour of the Crown, it being clearly proved, in the first place, that Mr. Dupré had imported the quantity of British brandy stated in the information; and, secondly, that he had refused to pay any duty upon it; and, thirdly, (which was the main fact to be proved) that a certain duty, though somewhat less than that which was demanded in the information, had been constantly paid for a great many years past in the time of the French Government, and universally considered by the Canadians as legally due to the French King. Consequently, the only doubt that remained upon the subject, was concerning the question of law, whether, or not, by the conquest of the country, by the British arms in 1759 and 1760, and the subsequent entire cession of it to the King of Great Britain by the definitive treaty of peace in February, 1763, the King of Great Britain became lawfully entitled to the same duties upon British brandy, imported into the Province, as had been legally due and paid to the French King upon French brandy, imported into it immediately before the conquest. As this was a point of law of great novelty and difficulty, the chief Justice exhorted the Jury to find a special verdict, if they were satisfied with the evidence by which the facts of the cause had been supported, that he might himself have full time to consider and examine it before he pronounced his judgment upon it, and that he might afterwards undergo the more able discussion of his Majesty's principal judges in England upon a removal of the proceedings by writ of error, or appeal, before his Majesty in Council, but the jury found a verdict for the defendant.

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Idem, p. 294.

In the year 1761, Major General Murray, who was left in Canada in the chief com-

mand of the King's troops there, imposed, by his own authority arising from that military command, the following duties on strong liquors imported into that country.

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

Idem, pp. 296—8.

These duties, though paid by the merchants of Quebec, in obedience to the orders of Gen. Murray, (which during the continuance of the military government in that Province, could not easily be disputed) were thought by many of them to have been illegally imposed, more especially where they exceeded the duties that had been paid on the same commodities in the time of the French Government. And in consequence of this opinion, when General Murray returned to England in the year 1766, five English merchants who had imported French brandy and New England rum into Quebec during the continuance of these duties so imposed by the said General, and had paid the said duties to the General's collector at Quebec, resolved to bring actions against him to recover back these duties, of which they conceived themselves to have been illegally deprived. Accordingly, in the month of January, 1768, they brought four different actions against the said General upon this account in the Court of Common Pleas in England, demanding by their declarations the whole of the sum they had thus paid, as duties upon the said commodities, to the said General's collector, as being money had and received by the said General to their use, and which he had therefore undertaken and promised to pay them, but then refused to do so: to all which actions the said General pleaded the general plea, that he did not undertake to pay them the said sums of money, being in nowise indebted to them.

On the 10th of February, 1768, two days before the end of Hilary term, his Majesty's Attorney and Solicitor General gave their opinion that the French duties might legally have been collected, but that the excess of the duties collected by General Murray above the French duties ought to be refunded, and that the Plaintiffs would not be able to recover more than that surplus or excess, in their actions. This opinion of the Attorney and Solicitor General I have not seen; but I take this account of it from a paper containing an account of these duties, and of the proceedings had in the Court of Common Pleas in England relating to them, which was drawn up by the direction of the said General Murray, and delivered by the Commissioners of his Majesty's Treasury to the Receiver General of the Province of Quebec.

The Plaintiffs in these actions obtained an order for a special jury, and gave notice for the trial of them on the twenty-fourth day of February, 1768; and they came on accordingly to be tried on that day. The gentlemen who were of counsel for the Plaintiffs, insisted that the General, who was military Governor of Canada during the time that these duties were collected, had no authority by his commission to levy any duties upon his Majesty's subjects in that Province; and that it was inconsistent with the laws of England to collect them without the authority of either the British Parliament, or an Assembly of that Province for so doing; and that consequently the whole sums so collected ought to be refunded. On the behalf of the Defendant, [General Murray, it was proved by means of the original French custom-house books (which the General had brought over with him from Quebec upon his late return to England, and which were now produced in Court and the signatures of the French officers thereto proved by witnesses) that the aforesaid French duties had really existed and been paid in the time of the French government according to the rates above stated. Upon seeing this so clearly proved, the Plaintiff in these actions consented to an offer which had before been made them by the Defendant, but then refused, to let the jury give a verdict for the excess of the duty imposed by the Defendant above the duty upon the same commodity in the time of the French Government; meaning, as I understand the account, the augmented duty of one pound sterling per hogshead, or 3¾d. sterling per gallon, which was imposed by the Edict of 1747; for the paper above mentioned makes no mention of any distinction between the said augmented duty and the old duty of 12s. 6d. per hogshead that existed antecedently to that edict; and so these causes ended.

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It is further added in the paper above mentioned, that, as the counsel for the Plaintiffs in these actions were convinced that the said duties had been legally collected, so far as they did not exceed the French duties that were payable at the time of the conquest of Canada by the British arms, and had therefore accepted the offer of the excess of the duty on rum imposed by General Murray above the French duty on it, as the whole of what their clients could legally insist on, it became unnecessary for the Defendant's counsel to argue the legality of levying the French duties before the Judge who tried these causes, who was the very able and learned Sir Eardly Wilmot, at that time Lord Chief Justice of the Court of Common Pleas; but that his Lordship seemed to entertain no doubt upon the question of law, and hinted that the Plaintiff's counsel did wisely to accept the terms that had been offered them. And it is further added that the jury who tried these causes, and who were some of the principal merchants of the city of London, were so fully satisfied of the justice of their verdict, as comprehending the full amount of the Plaintiff's just demands, that, of their own accord, they deducted from the offer made on the behalf of the Defendant, the difference of the exchange between London and Quebec, which was eight or nine per cent, and allowed the same in the damages found by them for the Plaintiffs on account of the excess of the rum-duty.

In consequence of the event of these actions, by which it seemed to be generally admitted by the Judge, and [illegible] and counsel concerned in the trial of them, that the King had a legal right to [illegible] the French duties upon rum and other liquors imported into the Province [illegible] the Lord Commissioners of his Majesty's treasury (of whom the Duke of Grafton was then the first) resolved to demand the payment of them once more of the merchants of Quebec, notwithstanding the ill success of the trial in October, 1766; imagining that the authority of the Chief Justice of the Common Pleas and of the special jury of London merchants who had tried these actions, and of the Plaintiff's counsel in them who had consented to the verdicts above mentioned, might prevail upon them to accede to the same opinions, and acknowledge the King's right to these duties. And in this hope they directed Thomas Mills, Esquire, the Receiver General of the Province of Quebec, who was then and is still in England, to proceed immediately to Quebec and institute a new suit for the recovery of the duties above mentioned, which were claimed by his Majesty as having heretofore belonged to the French King, and gave him some new additional instructions relating to them, which were as follows:—

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

Idem, pp. 300.

These instructions were received at Quebec about the end of October, 1768; and in consequence of them, Mr. Cramahé, the temporary Receiver General of the revenue, gave public notice in the Quebec Gazette in February following, that is, in February, 1769, that these duties on rum, brandy, and wine would be demanded and required of the importers of those liquors upon all the quantities they should import of them in the ensuing spring and summer, according to the rates appointed by the last instructions received from the Commissioners of the treasury. And when these ships arrived with these strong liquors, he accordingly demanded these duties. But none of the importers would consent to pay them. Upon this an information was fyled by the Attorney General of the said Province, by the direction of the said Lieutenant Governor, and the said temporary Receiver General of the revenue, against the two principal importers of rum from the New England Colonies, Mr. Isaac Werdon and Mr. John Mercier, who were partners in trade and had imported sixty-two hogsheads and a half of New England rum. This information was as follows:—

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

Idem, pp. 306—311.

After this address to the jury, the witnesses for the Crown were called and examined; and all the facts in the case were fully and clearly proved; to wit, first, that the said

duties on rum, wine, and brandy had existed and been paid in the time of the French Government, in the manner that has been above stated in the account of the former trial, in October, 1766; and secondly, that the Defendants had lately imported into the Province sixty-two hogsheads and a half of rum from New England, and landed them without paying the duty or giving security to pay it; and thirdly, that they had been required by the temporary Receiver General of the Revenue to pay the said duty, but had refused to pay it; so that the only remaining doubt in the cause was concerning the point of law above mentioned, *whether, or no, in consequence of the conquest of the country, and the transfer of the sovereignty over it from the French King to the King of Great Britain, these duties were become legally due to the King of Great Britain.*

When the evidence was gone through on both sides, the Chief Justice summed it up to the jury with great judgment and perspicuity, and exhorted them (as he had done the former jury, in October, 1766) to bring in a special verdict, that the matter of law, which he considered as very new and difficult, might be fully and maturely examined, both by himself and the other higher tribunals, to which it might, if the parties so thought fit, be removed by writ of error, and that, in consequence thereof, it might be at last rightly decided. But the jury (though they consisted of some of the most respectable inhabitants of Quebec, and of such as were most moderate in their principles and disposition) could not be persuaded either by this exhortation of the Chief Justice of the Province, or by the example of the jury of London merchants who tried the actions against General Murray, in February, 1768, and the concurrent opinion of the Chief Justice of the Common Pleas in England and the counsel for the Plaintiffs in those actions in favor of the King's right to the French duties, to find either a verdict for the Crown or a special verdict; but without much deliberation, they gave a general verdict for the Defendants, that they were not guilty of the charge.

Such was the event of this second trial for these duties; after which, I presume, it may be concluded that they can never be recovered by suing for them in the courts of Quebec, and consequently that no English minister will ever hereafter endeavor to recover them in this way; since every attempt of this kind that is not attended with success, has a pernicious tendency to weaken the authority of Government in the eyes of the Canadians, and to lessen their reverence for the Crown. If the King's ministers persevere in their resolution to have these duties collected, they had better at once get them imposed anew by an Act of the British Parliament.

As by this determined resolution of the inhabitants of Quebec to find verdicts against the Crown, whenever these duties shall be sued for, the question concerning the king's legal right to them is become a matter of mere curiosity and speculation, it can be of no prejudice, either to the Crown, or to the importers of rum and brandy into the Province of Quebec, to inquire a little into the merits of it, and to mention some reasons that have sometimes inclined me to doubt whether this claim of the Crown is justly founded.

I shall readily upon this occasion admit the proposition upon which I conceive this claim to be grounded, to be an undoubted maxim of law; to wit, that every tax that was lawfully due to the King of France, under the French government, in this Province, as well as every seigneurial and territorial right that had belonged to him (such as the right to the Castle of St. Lewis, the Intendant's Palace, the barracks for the soldiers, and all the ungranted lands in the Province, and the quit-rents and mutation-fines arising from those that are granted), becomes, *ipso facto*, by the change of the sovereignty of the country, upon the conquest and subsequent final cession of it by the definitive treaty of peace in February, 1763, the legal due of the King of Great Britain; unless some act of the King of Great Britain himself, or his predecessors, done either before or after the cession of it, shall have abridged his rights in this respect; and consequently that any internal tax (such as a tax on horses, or windows, or houses) that should have existed legally under the French government, at the time of the conquest, would clearly and certainly now belong to the King of Great Britain, unless, as is above mentioned,

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some act of his own, or his predecessors, had destroyed his right to it. This, I admit as a fundamental maxim, by which this question is to be governed, but yet have a doubt whether it can be applied to the duties on the importation of wine, rum and brandy into the Province of Quebec, so as to support the King's claim of them, for the reasons following:

In the first place, the Acts of Parliament relating to trade and the customs to be paid in the American plantations, expressly comprehended, by words put in for that purpose, all his Majesty's territories in America, either then belonging, at the several times of passing these Acts, or that afterwards should belong to the Crown of Great Britain; so that here is a system of laws relating to the customs upon goods imported into, and exported out of, this and all the other Colonies in America, that is ready-made, and exists beforehand with respect to every new acquisition in that country, and therefore must take place and be carried into execution in every such new colony from the moment at which it becomes a part of the dominions of the Crown of Great Britain. Now this system of duties on goods imported and exported, thus imposed or appointed before the acquisition of every new colony, seems to be intended to supercede all the other duties that may be subsisting in it at the time of its becoming a part of the dominions of the Crown of Great Britain; and if so, it will follow that these acts of Parliament which have been passed, or assented to, by the King, or his royal predecessors, ought to be considered as Acts by which they have beforehand renounced, resigned and given up, their future right to any custom on goods imported into, or exported out of, any new territory in America, that shall be found legally subsisting in such territory at the time of their acquisition of it, and which would otherwise have accrued to them by virtue of the above mentioned maxim of law. And this renunciation of the said right is not made *gratis*, or without a valuable consideration, but in exchange, for certain other duties, or customs, imposed by those Plantation Acts of Parliament in their stead.

Secondly, in a Statute made since the conquest and cession of this Province, namely, the Stat. 4 Geo. III. c. 15, certain duties are imposed upon Madeira wine and Spanish wine, and upon foreign molasses and syrups, imported into the American colonies; but no mention is made of a duty upon British spirits. And as to French and other foreign spirits, they are absolutely prohibited in it. Now this Statute seems to be intended to regulate the whole system of the customs to be paid in America. And therefore it seems reasonable to suppose that if his Majesty had intended at the time of passing this Act, to levy the French duties upon strong liquors, he would have inserted in it a declaratory clause for that purpose: as thus: "And it is further enacted, by the authority aforesaid, that in the Province of Quebec, in America, the following duties shall be levied upon wine, rum, and brandy, imported into the said Province; to wit, "a duty of ten shillings, of lawful money of Great Britain, per hogshead upon wine, a "duty of sixpence per gallon upon brandy, and a duty of twenty shillings per hogshead upon rum; being the same duties as were levied upon the same liquors respectively, under the French government, immediately before the conquest of the said "Province by the British arms; and that the said duties shall be paid in the said Province of Quebec, over and above the other duties before imposed on the said Province "in common with the other Colonies in North America." The want of such a clause as this in the aforesaid Act of Parliament, at a time when the Parliament (of which the King is the head) were deliberating upon the duties that were fit to be imposed in America, seems to afford a ground for concluding that his Majesty, at the time of passing this Act, had no intention that these duties should be levied in this Province.

Thirdly, if no such Act as the 4 Geo. III. cap. 15 had ever been passed, and if no general system of custom house laws, relating equally to all the different Provinces of North America, the new ones, as well as the old, had been enacted beforehand, as is above mentioned; yet with respect to British brandy, which General Murray entirely exempted from all duty, it may be alleged that the King's having omitted to demand a duty upon that commodity for several years, to wit, from the conquest of the country

till the year 1766, ought to be construed as a resignation or relinquishment of that duty, for the benefit of his new subjects in Canada, and in order to put them in as good a condition as their neighbors in the adjoining Provinces of New England and New York with respect to their trade with Great Britain for that commodity. The reviving a tax which had been dropt for a considerable time, is not very different from imposing a new tax. But this reason relates only in a small degree to the duty on wine, which General Murray did not remit, but only lessened, and not at all to the duty on rum, which he augmented.

Lastly, with respect to brandy it may be said that the commodity itself, which is the subject of the duty, is no longer the same as in the time of the French Government. For then only French brandy, which is a liquor made from wine, was allowed to be imported into Quebec; now only British brandy, which is a liquor made from wheat or other corn, is imported thither. Now these can hardly be considered as the same liquors, except in name; since they differ from each other as least at much as either of them differs from rum; and consequently the legal existence of a tax upon the former in the time of the French government, cannot be a sufficient ground for demanding, as a legal due, a like tax upon the latter at present.

These are the reasons that have induced me to doubt whether the claim of the Crown to these duties is justly founded; yet, I dare not absolutely conclude that it is not so, out of regard to the opinion of a very learned and able lawyer of my acquaintance, who, notwithstanding the foregoing reasons (which he has seen and considered), and a well-known zeal for the liberties and privileges of his fellow-subjects in all parts of the British dominions, yet thinks that these duties are legally due to the Crown. The person I mean is Mr. Dunning, who is mentioned above, on page 296, as having been appointed his Majesty's Solicitor-General on the 20th of January, 1768, and having given an opinion, in conjunction with the Attorney-General, in favor of the King's claims to these duties, on the 10th of February, in the same year 1768; to whose judgment, upon every subject of law, I am always ready to pay the highest deference. But I will venture to observe, that in a claim of this kind made by the Crown to an ancient duty, good policy requires that the justice and legality of it should not only be discernible to the acutest and most learned lawyers, but should be apparent and manifest to the understandings of common men, so that every body may immediately perceive and acknowledge it, and the Crown take possession of the duty which is the object of the claim, with a general consent and approbation. Where this is not the case, as it evidently is not with respect to the duties above mentioned, it is better to resort to the legislative authority of the nation for a new law, either to revive the duties which are the objects of such disputed claim, or to impose such other duties and taxes, as the people upon whom they are to be levied are easily able to bear, and the exigencies of government make it necessary to levy upon them. And the only authority by which this can be done in the Province of Quebec, where no Assembly of the people has yet been established, seems to be that of the British Parliament. The authority of this supreme Legislature and general representative body of the whole British empire has not yet been disputed in this Province; and from the loyal deportment of his Majesty's new Canadian subjects there is reason to hope that every act of government that shall be founded on that high authority will meet with a ready obedience on their part.

No. 7.

An Act for settling the Law concerning Lands held in Free and Common Soccage, in Lower Canada. 20 *Vic.* c. 45.

(*Assented to 10th June*, 1857.)

Whereas the Act hereinafter mentioned has left certain points unsettled as regards the Law applicable to lands in Lower Canada held in Free and common soccage, and

the Authority of the said Act itself has been called in question on technical and formal grounds, although it has been maintained by the majority of the Judges of the Courts of Superior Civil Jurisdiction, and has been generally acted upon as Law; And whereas it is expedient that all doubts as to the effect of the said tenure should be removed for the future and as regards the past in so far as may be consistent with vested rights, and that the Laws relating to lands of every tenure should be as far as possible uniform, more especially as regards their descent in cases of intestacy, and the rights of married women; And whereas in the ignorance or uncertainty which has very generally prevailed as to the Law in the matters aforesaid, it may have happened in many cases that the widows and heirs of persons who have left lands in Free and Common Soccage with regard to which they have died intestate, have assented to some disposition or partition thereof, which though consistent with their understanding of the Law and with substantial justice in each particular case, may not have been in accordance with the strict legal rights of the parties, and it is just and necessary for the quieting of titles and the avoidance of litigation, to confirm such dispositions and partitions: Therefore, Her Majesty, by and with the advice and consent of the Legislative Council and Assembly of Canada, enacts as follows:

I. The Act passed by the Legislative Council and Assembly of the Province of Lower Canada, in the ninth year of the Reign of His Majesty King George the Fourth, and intituled, *An act for rendering valid conveyances of lands and other immoveable property held in free and common Soccage within the Province of Lower Canada, and for other purposes therein mentioned*, and the Royal assent whereto was signified by Proclamation in the said Province on the First day of September, one thousand eight hundred and thirty-one, is hereby declared to be and to have been since the passing thereof, that is to say, since the day last aforesaid, in force in Lower Canada.

II. And whereas it is provided by the sixth section of the Act above cited, that when the proprietor of lands granted or held in free and common soccage should have died before the passing of the said Act, without having partitioned the same either by last will and testament or otherwise, the heirs of such proprietor should be held to partition the same according to the "Old Laws of the Province," (that is to say, as if such lands had been held by the tenure of *franc aleu roturier* being that known to the said Old Laws which is most analogous to free and common soccage,) unless the said heirs should have agreed among themselves upon a different partition; And whereas the tenor of the said section and of the preamble and other parts of the said Act, shew that the Legislature held the said Old Laws to be those most consistent with the feelings and customs of the people of Lower Canada, and that they ought, with the exception of such portions as relate to Seignorial or feudal rights or dues, to apply thereafter to lands held in free and common soccage, yet by some omission or error this is not formally enacted: Therefore, it is hereby provided, that where the proprietor of any land held in free and common soccage in Lower Canada, shall have died intestate as to such lands between the passing of the Act last above cited and the passing of this Act, the husband, widow and heirs of such proprietor, shall have respectively the same rights in respect of such lands as if they had been held in *franc aleu roturier*,—unless they shall have agreed upon, assented to or confirmed a different disposition or partition thereof, or shall have acquiesced therein during one year and one day from the death of such proprietor, by having allowed the same or any possession or act founded thereon, to remain unquestioned by them in any competent Court during that time. And this section shall apply to and bind minors, absentees and married women, and as well the heirs and legal representatives of or persons claiming through the parties who shall have agreed upon, assented to, confirmed or acquiesced in such disposition or partition, as such parties themselves; Provided always, that whenever any person shall have *bonâ fide* purchased or obtained any hypothec or charge upon any such lands for a valuable consideration from any person who claimed to be and was entitled thereto as heir of the former owner so dying intestate, either under the English Law referred to in the Act

aforesaid, or under the Laws of Lower Canada applicable to lands held in *franc aleu roturier*, and shall have registered the deed creating such charge, or operating such conveyance, before the registration of any sale, conveyance or incumbrance of such lands by any other person claiming to be such heir, and before the passing of this Act, or within six months next after the passing of the same but before registration by such other person, no person being at the date of such deed in adverse possession of the lands as such heir or as claiming through any such heir, or having questioned the title of the vendor or grantor of the charge in any suit pending or decided in favor of the adverse claimant at the date of such deed,—then as regards the conveyance, sale or charge operated or created by such deed, the grantor or vendor therein mentioned shall be held to have been at the date thereof the person entitled to inherit the said lands from the proprietor so dying intestate as regards them; And in like manner any devise of any such lands held in free and common soccage, by last will and testament made according to the forms prescribed by the law of England in force there at the time of making such devise, shall have the same force and effect as if made before two Notaries Public according to the laws and usages of Lower Canada.

III. Provided always, that nothing in the two preceding sections of this Act, shall affect any case pending at the time of its passing, or any case in which there is then any actual and open possession under a title adverse to their provisions or those of the Act therein mentioned, but such cases shall be adjuded upon as if this Act had never been passed; nor shall any thing in the said sections affect any case in which a judgment having authority of *chose jugée* has been given before the passing of this Act.

IV. The Laws which shall hereafter apply to and govern lands held in free and common soccage in Lower Canada, as well with regard to descent, inheritance, incumbrance, alienation, dower, and the rights of husbands and of married women, as with regard to all other incidents and matters whatsoever, shall be the same with those which apply to and govern lands held by the tenure of *franc aleu roturier*, in like matters, except only in so far as such Laws may have been expressly altered as regards lands held in free and common soccage, by the Act above cited or any other Act of the Legislature of Lower Canada or of Canada; and as regards the rights of married women and their representatives, this section shall apply to cases where the husband shall die after the passing of this Act, whatever be the date at which the marriage may have taken place, but nothing herein contained shall prevent the effect of any marriage contract or settlement made either in the English or French form.

V. The Laws which have governed lands held in Free and Common Soccage in Lower Canada in matters other than alienation, descent and rights depending upon marriage, are hereby declared to have always been the same with those which governed lands held in *franc aleu roturier*, except in so far only as it may have been otherwise provided by any Act of the Legislature of Lower Canada, or of this Province; but nothing in this section shall be construed as a declaration that such lands held in Free and Common Soccage, have or have not at any time been governed by any other Law as regards alienation, descent or rights depending on marriage.

VI. The word "Lands" in this Act shall include any immoveable property or hereditament capable of being held in free and common soccage, and any estate or interest therein; the word "Deed," shall include any instrument by which any lands can be conveyed, hypothecated or incumbered by the Laws of Lower Canada; and the word "Hypothec" or "Charge," shall include the privilege of *bailleur de fonds* and all other privileged or hypothecary charges.

U.W.O. LAW

NOTE

TO REPORT OF

Wilcox v. Wilcox.

To those who adopt the opinion that the English laws were in force and that the practice of the English Courts of law obtained in the old Province of Quebec, for some years after the conquest in 1759, it is interesting to observe the records of the Courts of law at that time in the Province.

For example, in the English registers, (for there was a French and an English Register kept,) now in the custody of the Prothonotary of the Superior Court, Montreal, we find the following:

George the Third by the Grace of God, of Great Britain, France and Ireland, King, Defender of the Faith and so forth:

To our trusty and well beloved Peter Livius Doctor of Laws, William Owen and Gabriel Elzeard Tachereaux, of our Province of Quebec in North America, greeting.

We, reposing special trust in your loyalty, integrity, learning and abilities, have thought fit to constitute and appoint, and by these presents do constitute and appoint you, the said Peter Livius, William Owen, and Gabriel Elzeard Tachereaux, to be Judges of a court with civil Jurisdiction within the district of Montreal, in our Province of Quebec, during pleasure only, hereby granting unto you, or any two of you full power and authority to take cognizance of, and proceed in all civil causes and complaints whatsoever, and such civil causes and complaints to hear and determine according to law with power to sit and hold courts for the purposes aforesaid within the District aforesaid as often as occasion shall require, and to correct and punish ill contemptuous persons and contemptuous absenters of themselves, and to promulge and interpose all manner of sentences and decrees, and to put the same in execution, together with all necessary powers Jurisdictions and authorities, to put the same in execution, saving always the right of appealing to our court of appeals in our said Province, hereby committing unto you the said Peter Livius, William Owen, and Gabriel Elzeard Tachereaux our power and authority, in and concerning the premises. And we do further in our name command and firmly and strictly charge all justices, Justices of the Peace, Sheriffs, Marshalls, Keepers of all our Jails and Prisons, Bailiffs, Constables, and all other our Officers and Ministers and faithful and liege subjects in and throughout the said district of Montreal, that in the execution of this our Commission, they be from time to time aiding and assisting, and yield obedience unto you in all things as is fitting under pain of the law and the peril which will fall thereon.

Given at our Castle of Saint Lewis in our city of Quebec, in our province aforesaid, under the Great seal of our said province of Quebec on the twenty-third day of July, in the year of our Lord one thousand seven hundred and seventy six, and of our reign the sixteenth. Witness our trusty and well-beloved Guy Carleton, our Captain-General, and Governor-in-chief, in and over our said province, keeper of our Great Seal of our said province, Vice-Admiral of the same &c. &c. &c., General and Commander-in-chief of our forces in our said province, and the territories thereof, &c. &c. &c.

(Signed) GUY. CARLETON.

By his Excellency's Command,

(Signed) GEO. ALLSOP,

G. S.
G. C.

COURT COMMON PLEAS.

Friday the 1st. *July*, 1777.

Present. { Peter Livius, Gabl. Elzd. Tachereaux, } Esqrs.

This day his Majesty's Commission to Peter Livius, Esquire, Doctor of Laws, William Owen, and Gabriel Elzeard Taschereaux, Esquires, appointing them to be Judges of the Court of Common Pleas for the district of Montreal, was openly read, and is as follows, viz.:—

George the Third, by the Grace of God, of Great Britain, France, and Ireland, King, Defender of the Faith, and so forth,

To all to whom these present letters shall come sendeth greeting:

Know ye that we having taken into our Royal consideration, the loyalty, integrity, learning, and abilities of our trusty and well-beloved Peter Livius, Doctor of Laws, William Owen, and Gabriel Elzeard Taschereux, Esquires, of our city of Montreal, in our province of Quebec, have constituted and appointed, and by these our present letters do constitute and appoint them, the said Peter Livius, William Owen, and Gabriel Elzeard Taschereaux, to be the Judges of our Court of Common Pleas, to be held in and for the district of Montreal, in our said Province, during our pleasure, with all necessary powers, jurisdictions, and authorities whatsoever. In testimony whereof, we have caused these our letters to be made patent, and the Great Seal of our said Province to be hereunto affixed, and to be entered on record in one of the Books of Patents in our Register's Office of Enrollments in our said Province. Witness our trusty and well-beloved Sir Guy Carleton, Knight of the Bath, our Captain General and Governor in Chief in and over our said Province, Keeper of our Great Seal of our said Province, Vice-Admiral of the same, &c., &c., &c., General and Commander in Chief of our Forces, in our said Province and the frontiers thereof, &c., &c., &c., at our Castle of St. Louis, in our city of Quebec, in our Province aforesaid, the sixth day of March, in the year of our Lord One thousand seven hundred and seventy seven, and in the seventeenth year of our reign.

(Signed) GUY CARLETON.

By his Excellency's command,

GEO. ALLSOPP.

Court of Common Pleas opened.

Adjourned to Monday the 7th April next.

Thursday, the 10th April, 1777.

Present, { Peter Livius, Gabriel Elzd. Taschereaux, } Esqrs.

Brook Watson, Trustee of the Creditors of Jean Louis Carrignant,

vs.

Richard Dobie.

Mr. Panet, for Plaintiff, demands that this cause may be ordered to be heard on Thursday next. Conrt orders this cause to be heard on Thursday next.

On motion of Mr. Grant for Defendant,

' It is ordered that the proceedings in this cause depending in the late Court of Civil Jurisdiction for the district of Montreal, may be transmitted into the present Court of Common Pleas for the said District, and they are accordingly now transmitted and received into and by the said Court of Common Pleas.

Monday the 13th April, 1778.

Present, { Hertelle de Rouville, and Edward Southouse, } Esquires.

Watson and Rashliegh vs. Michael Augé.

Mr.   for Plaintiffs, produces the Sheriff's return of having levied part of the debt due to Plaintiffs from the sale of the moveable effects, amounting to the sum of £238 17s. 8½d., and prays without regard to the opposition put in by Mr. Meziere for Mr. Lymburner, of a claim that the said sum may be paid to the Plaintiff in consequence of his execution.

Mr. Meziere for Mr. Lymburner, says the Defendant owes him a debt due by account, and that the Defendant being a bankrupt and insolvent, that he has a right to have his proportion of the said sum.

Mr. Panet denies that the Defendant is by any act of Court declared a Bankrupt, or any assignment of Defendant's estate, and demands that if any there is it may be produced.

Court having considered this matter, and as no act appears whereby the Defendant was admitted by the Court to be a bankrupt,—order that the said sum of £238 17s. 8½d. be paid to Plaintiffs in consequence of their execution in part payment of their debts and costs, and that thereupon the Sheriff be discharged for that sum.

Thursday, the 21st May, 1778.

Present, { Hertelle de Rouville, and Edward Southouse, } Esquires.

Peter McFarland v. Robert Picken.

Mr. Sanguinet, for Plaintiff, prays this cause may be continued further.
Court continued this cause further.

Jacques Le Moyne vs. James Price and William Haywood, absent.

Mr. Sanguinet, for Plaintiff, prays judgment for the sum of Fifty-eight pounds ten shillings, lawful money of the Province, due by account dated 14th February, 1776. Defendants called, dont appear, though duly served with process, dated 27th April, certified by the proper officer on the 29th same month, at their last place of abode, and being defaulted last Court day for not appearing.

Court condemns Defendant to pay Plaintiff the said sum of Fifty-eight pounds ten shillings lawful currency of the Province, with interest from the day of demand, on Plaintiff affirming his account with costs, amounting to
Amount affirmed 25 May, 1770.

Herman Eberts vs. James Patten.

Mr. Walker, for Defendant, prays Defendant may be enlarged from jail and admitted to appear on common bail for the insufficiency of the Plaintiff's affidavit.

Parties agree that on Defendant's paying Four pounds lawful money, and part of the costs, and that Mrs. Patten, defendant's wife, will be accepted as security for the same, and she appearing and offering to become security for the same, she is accepted, and agreed that the Defendant be enlarged.

Court accepts of said settlement.