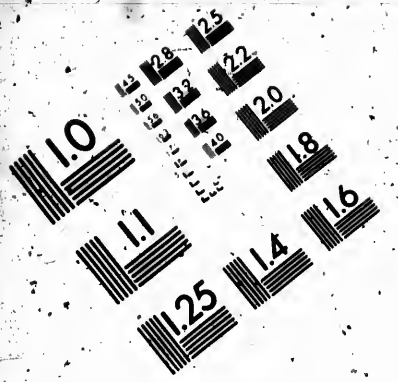

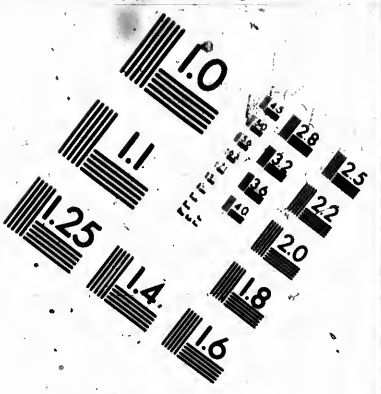

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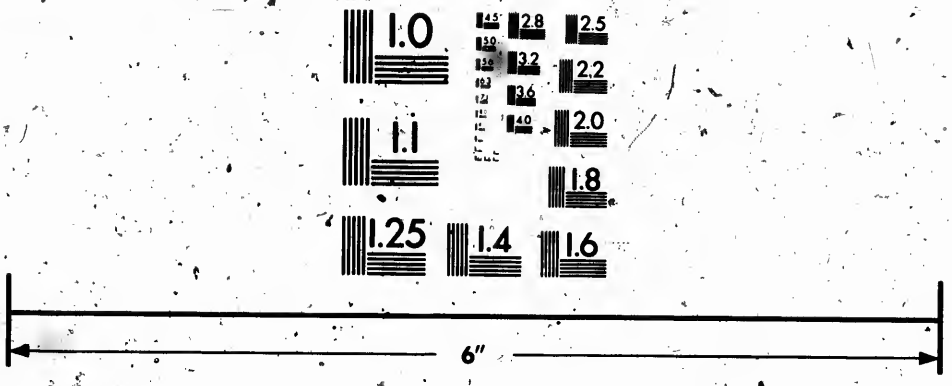

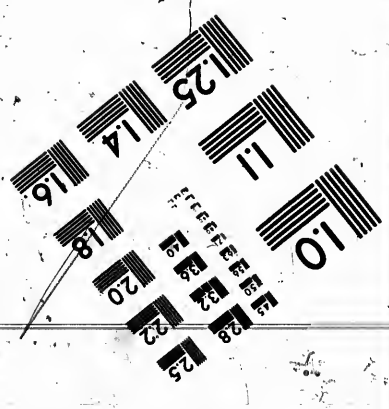

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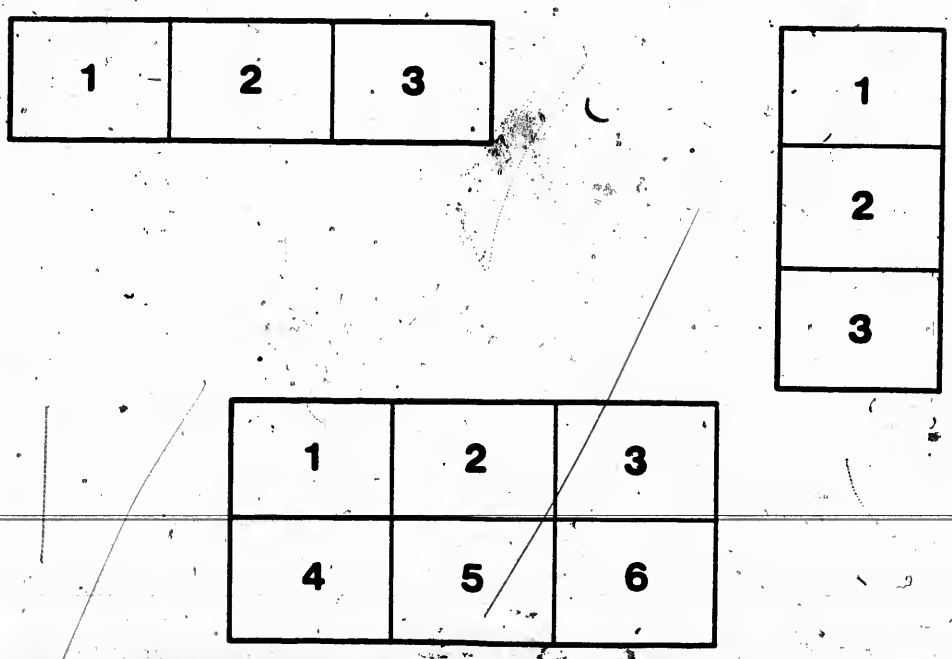

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DU

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THE

LOWER CANADA JURIST.

COURT OF QUEEN'S BENCH, 1880.

MONTREAL, 21st DECEMBER, 1880.

Coram MONK, J., RAMSAY, J., BABY, A. J., DOHERTY, J., *ad hoc*, JETTÉ, J., *ad hoc*.

No. 58 and No. 59.

DAME JULIA MORRISON,

(Plaintiff in the Court below),

APPELLANT;

AND

THE MAYOR ET AL., OF THE CITY OF MONTREAL,

(Defendants in the Court below),

RESPONDENTS.

The Corporation of the City of Montreal lowered the roadway of Little St. James street in the said city, so that the access to the property of the plaintiff and others, who owned real estate on the line of the street, was interrupted.

HELD:—1. That an action lay against the Corporation by the persons aggrieved, for the recovery of the damages occasioned by the interference with their property.

2. The statute (Que.) 27 and 28 Vict. c. 60, does not exclude such action of indemnity, but merely provides a mode of procedure. If the Corporation desires to have the compensation estimated by commissioners, it must move the Court to name them. If the Corporation does not by preliminary plea object to the adoption of the ordinary form of action by the plaintiff, it will be held to have acquiesced, and cannot raise the objection afterwards.

3. In the present case no damages were proved beyond what had been compounded for by the plaintiff.

These were two appeals (Nos. 58 and 59) under the same title, and arising from the same matter. The action in each case was instituted for the recovery of damages for loss of rent, alleged to have been suffered by the appellant, Lady Lafontaine, in consequence of the alteration by the Corporation of the level of Little St. James street. The first action was brought 16th June, 1871, and the second action on the 3rd December, 1873; the damages claimed by the second action being for the two years which elapsed after the bringing of the first action. The actions were dismissed in the Court below by Mr. Justice Mackay, on the following grounds:

Dame Julia Morrison, and The Mayor et al.

"Considering that plaintiff has not proved her allegations material, and that she has not proved and shown right to have any damages from defendants for any of the causes mentioned in her declaration;

"Considering that all that defendants did in the matter of Little St. James street, altering of level of roadway, was within the scope of defendants' authority, and not wrongously or negligently done, and that no compensation was or is due to plaintiff as claimed by her from defendants;

"Considering further the exceptions of defendants well founded and proved;

"Considering that even if plaintiff could have claimed any compensation for the altering of the level of the street or roadway of Little St. James street, it had to be sought by other process than this action, to wit, by resort to the tribunal provided by the 27-28 Victoria, chapter 60."

RAMSAY, J. This is an action of damages for lowering the roadway of Little St. James street, by which the access to appellant's property was interrupted, and by which, she alleges, she suffered material damage, and particularly by loss of rent of her property situated on that street, also for an injunction to compel the respondents to restore the street to its former level. With the latter part of this action we have nothing to do, for by a deed of the 6th November, 1873, a compromise was effected, by which the Corporation paid to the parties aggrieved, and among others to the appellant, Dame Julie Morrison, Lady Lafontaine, certain sums of money for damages, and agreed to lower the footpath or "sidewalk" within a reasonable time, on the condition that they would discontinue their actions. There was, however, a reservation that Lady Lafontaine should have the right to continue her action for damages for "loss of rent." The conclusions of this action are, therefore, reduced to a claim for damages "for loss of rent," and for no other cause.

The respondent contends that the ordinary Courts have no jurisdiction over the matter in litigation. The Court below held, if there be any compensation for the altering of the level of the street, "it had to be sought by other process than this action, to wit, by resort to the tribunal provided by the 27 & 28 Viet., chap. 60."

If this reason be founded, it is needless to carry our investigation further, for we have no authority to decide the issues. It is well, however, to bear in mind that what respondent has to establish is an absolute absence of jurisdiction over the matter. Nothing less will do, because the defendant did not decline the jurisdiction by preliminary plea—*exception déclinatoire*,—within four days from the return of the writ, as required by law. (Arts. 107 and 114, C. C. P.) "Le déclinatoire *ratione personae* ne peut être, pour la première fois, proposé en course d'appel." Carré, 2, 142, note; 143, note 1st. "Le déclinatoire *ratione materiae* peut être proposé en tout état de cause, même en appel." Vol. 2, 147, art. 170, note 3rd, and No. 128. See also *Gray & Dubuc*, 2 L. R., Q., p. 234. The omission to raise the question of jurisdiction by the usual exception was probably due to the fact that it was not generally considered, at the time this action was begun, that a suit for damages, such as this is, fell within the provisions of the 27 & 28 Vic., chap. 60. But in May, 1876, the Judicial Committee held, in the case of *Drummond & The Mayor, &c., of Montreal*,

Dame Julia Morrison, and The Mayor et al.

that a claim for damages for closing a street so as specially to injure the plaintiff's property, could only be urged before Commissioners appointed under the provisions of the 27 & 28 Vic. The opinion of the Judicial Committee is thus expressed :—"It seems to them (their Lordships) that if he (respondent) has any claim, it is one to be prosecuted under the provisions of the Act relating to expropriations by this Corporation (27 & 28 Vic., c. 60) which will be hereafter considered." And further on they say :—"Their Lordships, however, do not think it necessary to decide in this appeal the question thus raised (question of right of indemnity), since in whatever manner it may be determined, and whatever may have been the case before the 18th section of the 27 & 28 Vic., c. 60, was passed, they think that this enactment, by requiring that the compensation payable to any party, 'by reason of any act of the Council for which they are bound to make compensation,' shall be ascertained in the manner prescribed by the Statute, excludes by necessary implication actions of indemnity for damage in respect of such acts. It is enough therefore, to say that, in their view, the Corporation, having acted within their powers, the plaintiff's claim (if sustainable at all) is of a kind which would fall to be determined by the Commissioners under the special Act." (22 L. C. J., p. 9.)

Formal as this opinion appears to be, appellants contend that it cannot be considered conclusive authority, because it is contrary to the jurisprudence of our Courts, and because the point was never urged before the Courts here or before the Committee.

It may perhaps be said there was no jurisprudence on the point because it never was raised, so far as I know. But there have been many actions such as this, and common acceptation is perhaps as conclusive in a matter of this kind as if it had been formally decided.

Be this as it may, it is very certain that what has never been contradictorily argued cannot be considered definitively settled. I am, therefore, of opinion that we are not precluded from deciding differently from that judgment, and that it is our duty now to examine the question, and to express our opinion upon it. The enquiry seems to me to divide itself into two questions :—

1st. To what cases does the 27 & 28 Vic. apply?

2nd. Does the Act create a tribunal or only a *mode de procédure?*

With regard to the first question, the portion of the Act 27 & 28 Vic., Chap. 60, which refers to the special "tribunal," is under the rubric "Expropriation and special assessment." After repealing the former legislation, so far as inconsistent with this Act (sec. 10), the Statute goes on to enact that "the Council of the said city of Montreal shall have power to order, by resolution, the opening or widening of streets, public highways, places or squares, or the construction of public buildings, and to order at the same time that such improvement shall be made out of the city's funds, or that the cost thereof shall be assessed,' &c. (sec. 11). Then if the Council of the said city determines, by resolution, to undertake or carry out "any of the *said* works," and if the person who is seized or possessed as proprietor of any lot of ground or real property necessary to be acquired for the purpose of such work will not come to an amicable settlement, the "price or compensation shall be fixed and determined in the fol-

Dame Julia Morrison and The Mayor et al.

lowing manner," (sec. 13), that is to say, Commissioners shall be appointed by the Superior Court. The Statute then goes on to enact (sec. 18) as follows:— "All the provisions contained in the thirteenth section of the present Act, with regard to the appointment of Commissioners and the mode of ascertaining the value of the pieces or parcels of land or real estate taken by the Corporation of the said city, shall be and are hereby extended to all cases in which it shall become necessary to ascertain the amount of compensation to be paid by the said Corporation to any proprietor of real estate, or his representatives, for any damage he or they may have sustained by reason of any alteration, made by order of the said Council, in the level of any footpath or sidewalk, or by reason of the removal of any establishment subject to be removed under any by law of the said corporation, or to any party by reason of any other act of the said Council for which they are bound to make compensation, and with regard to the amount of compensation for which damage the party sustaining the same and the said corporation shall not agree; and the amount of such compensation shall be paid at once by the said Corporation to the party having a right to the same, without further formality." Now, it is contended by the Corporation that by this section compensation for damages done and not acknowledged is placed on precisely the same footing as compensation for lands to be expropriated. I think this is a misinterpretation of the section, for it would follow that no action of damage would lie against the Corporation for any act attributable to the Council;— the words are: "or to any party by reason of *any other act* of the said Council *for which they are bound to make compensation*." Not only there would be no direct action, but there would be no mode by which the party aggrieved could set the law in motion. It is the Council and its officers that give the notices, and move the court or Judge for the order. If they don't acknowledge that there is any ground of indebtedness, of course they don't move. I think, therefore, that where the Corporation does not take any action, the common law remedy remains to the party aggrieved. Further to illustrate my meaning let me suggest another case, which does not entirely turn upon Article 18. Suppose the Council of the city resolved to expropriate from lands for the purpose of widening a street, without any amicable settlement, and without any nomination of Commissioners, will it be seriously contended that the party expropriated would not have a common law action, as well for the loss of his land, if he be content not to revendicate it, as for the damage specially arising from the dispossession without due notice? I have heard no attempt to answer this but by saying the party aggrieved could proceed by *mandamus*. Now, let us examine the depth of this suggestion.

I do not propose to enter minutely into a consideration of the limits of the jurisdiction of the writ of *mandamus*, about which there has often been some difficulty in England, a difficulty perhaps complicated in a self-governing possession of the Crown by the question of the effect of recent legislation. Suffice it to say, that it appears very questionable indeed whether the writ would lie to compel the Corporation of Montreal to affect to come to the conclusion that they "are bound to make compensation," in order to give the party complaining an opportunity of testing his case. The words of the Statute only oblige

the Corporation to proceed in this way where they "are bound to make compensation, and with regard to the *amount* of compensation for which damage the party sustaining the loss and the said Corporation cannot agree." The first step, then, the Court, on application for *mandamus*, would have to perform would be to determine that at all events there was a *prima facie* case of damages made out. That is to decide an important part of the issue. If the Court can determine this, owing to the reticence of the Corporation, why should it not decide the whole? Again, what would be the object of the *mandamus*? It would be to get an order from the Superior Court to compel the Corporation to make an application to the Superior Court, after a useless notice to the public. No case of a *mandamus* being granted under such circumstances has been brought under our notice. Generally the writ will not be granted to compel the exercise of a discretionary power; nevertheless, even where a power is discretionary, if it be used with manifest injustice, the Court will grant the writ to prevent a failure of justice. It is, therefore, argued by the respondents that as the appellant has, in an extreme case, the right to a *mandamus*, therefore she is not deprived of all remedy by interpreting the Statute so as to exclude the operation of the common law. I think this is an inversion of the ordinary argument. We argue that the *mandamus* should be granted, because there is no other convenient remedy; but it does not seem to be deducible from this that there is no ordinary remedy, because, where there is none, there is the remedy by *mandamus*. I, therefore, think that the sections referred to in the 27 & 28 Vict. contain a direction to the Corporation to proceed in a particular way, in certain cases. I do not think the Corporation can be compelled so to proceed where the question is simply as to compensation for damages which they do not admit to be due.

But let us take for granted that this conclusion is wrong, and that there is a modo open to appellant to set the law in motion to enable her thereby to recover compensation unjustly denied, it does not appear to me, as the record before us stands, that we should be justified in dismissing the action for want of jurisdiction. Respondent contends that the 27 & 28 Vict. has established a tribunal for cases like this, and that, having done so, there is no remedy at common law. It is also the contention of the Judicial Committee. In the case of *Drummond & The Corporation*, they say "it establishes a tribunal consisting of Commissioners for determining the value of property expropriated, and a system of procedure for such cases." To be perfectly correct, their Lordships should have said "*to be* expropriated" (a correction of some importance, for it avoids the necessity of a tedious digression). Now, I question much whether the proposition is precisely correct, either in English law or by the law of France. In Mr. Dillon's work on "Municipal Corporations," Vol. II., p. 902, he says: "If, in such cases, *the Statute provides a specific remedy*, or a remedy other than an ordinary civil action, that remedy alone can be pursued." And in a note to the second edition we find: "This remedy (one by a recent Statute) excludes a civil action for all damages *necessarily* occasioned." Without having the letter of the law before one, it is not easy to say absolutely that the cases cited have no bearing on the proposition of the author; but, so far as I can see, only one requires any mention. In *Flagg & The City of Worcester*, Merrick, J., after say-

Dame Julia Morrison, and The Mayor et al.

ing that there was no common law remedy, *i. e.*, action or right of action, for damages suffered in *repairing* highways, under the common law obligation to repair, said the party suffering could only proceed according to a special remedy allowed by law, and this remedy was complete in itself. "But under this restriction no damage can be done. To avail themselves of the remedy provided by the Statute, ample opportunity is afforded to parties deeming themselves to be aggrieved. Their damages are, *in the first instance*, to be determined *upon their own application* to the Selectmen of the town or Mayor and Aldermen of the city," &c. Elsewhere the judge says: "If their adjudication upon the question is not satisfactory, upon proper proceedings being had, they may be ascertained by a jury, as in the case of taking lands upon the location of highways." From the statement of the law by Merrick, J., Mr. Dillon was not justified in stating his proposition in the unqualified manner he has done. The general principle seems to be that "an existing jurisdiction cannot be taken away except by precise and distinct words." *Galsworth* v. *Durant*, 8 W. R. 594—R. Fisher's Dig. 5077. And the concurrent jurisdiction of courts of equity is not excluded by the adoption of equitable principles by courts of law. *Hawkshaw* v. *Perkins*, 2 Swans. 546. It has been the tendency of our jurisprudence here to treat remedies as cumulative where the new enactment is not unequivocal, particularly where the common law remedy is to be set aside. As an instance of this, I may mention that we have invariably held that the special remedy, by information of the Attorney-General, had in no way destroyed the old common law action. *In re The Adventurer*, decided by Judge Black, in the Vice-Admiralty Court at Quebec, he held that although the Legislature had vested in the Trinity Board the right of fixing the remuneration of pilots for extra services, still this did not take away from the Vice-Admiralty Court its jurisdiction over the matter, and the promoter was awarded extra allowance. 1 S. V. A. C. p. 105. Our legislation, too, indicates the same thing. In defining the jurisdiction of the Superior and Circuit Courts, express words are used to limit the jurisdiction of each Court. Arts. 1053 and 1054 C. C. P. And by Art. 28 C. C. P., the exclusive jurisdiction of the Circuit Court and of the Admiralty are expressly preserved.

It would not be difficult to find numerous other illustrations to establish the principle relied on. Thus, for instance, by Sec. 125 of the Insolvent Act of 1875 (38 Vict. c. 16):—"All remedies sought or demanded for enforcing any claim for a debt, privilege, mortgage, hypothec, lien or right of property upon, in, or to, any effects or property in the hands, possession or custody of an assignee, may be obtained by summary order," and then the Statute adds the words, taking away the jurisdiction of the Courts, "and not by any suit or other proceeding of any kind whatever." Under this section, since this case was argued, we reversed a judgment maintaining a *saisie gagerie* in the hands of the assignee.

In France it seems always to have been held that the civil court could take cognizance of commercial cases raised before it voluntarily, although there was a *tribunal de commerce* established in the town. 2 Carré, p. 148. But the tribunal of commerce could not take cognizance of the civil matter by any consent. *Ib.* For instance, Le Code de Commerce Français, Art. 51, is in these words:—

"Toute contestation entre associés, et pour raison de la société, *sera jugée* par des arbitres." Notwithstanding the precision of these words it has been decided that: "L'incompétence des tribunaux de commerce pour connaître des contestations entre associés, doit être proposée *in limine litis*, avant toute défense au fond. Les juges ne sont pas tenus de renvoyer d'office devant des arbitres, si les parties ne le demandent pas." Sirey, Codes annotés. The reason of this doctrine is succinctly explained by Henryon de Pansey in his treatise "*de l'autorité judiciaire*," ch. 33. After showing the fundamental distinction between *incompétence, l'abus du pouvoir*, et *l'excès du pouvoir*, he goes on to say: "*Nous voyons cependant que de bons esprits ont pensé que l'on devait distinguer les tribunaux ordinaires des tribunaux extraordinaires*, que *les premiers*, investis de la plénitude de l'autorité judiciaire, pouvaient, *sans excès de pouvoir, connaître de toutes les affaires portées devant eux, quelque fut le domicile des parties et la nature de l'objet contentieux; mais qu'il n'était pas de même des tribunaux extraordinaires, par exemple, que si un tribunal de commerce statuait sur une affaire civile, son jugement pouvait être attaqué non-seulement comme incompétent, mais comme renfermant un excès de pouvoir.*"

There is yet another reason why the judgment in the case of *Drummond & The Mayor* should not be followed. The Statute 27 & 28 Vic. does not organize a new tribunal; it merely directs a new form of procedure to avoid inconvenience. The jurisdiction is still left to the Superior Court. The Court or Judge, on application and after notice, appoints the Commissioners, who are nothing more than *experts* carrying on their proceedings under the authority of the Court on an order the terms of which are fixed by Statute. Sec. 13, S.S. 5. It is to the Court the Commissioners report, and by the Court the judgment is rendered, for it is always the judicial decree that binds, however it may be described. Sec. 13, S.S. 12. If, then, it is only a *mode of procedure*, surely it can be waived by the consent or acquiescence of both parties. Dig. L. XVII., 2, 156, § 4. Where it is only a question of damages, there is no assessment to be determined, and therefore there is no possible public interest, as the Corporation and the party complaining can fix the compensation privately, and it is evident they can become bound by the judicial decree without the interference of any other party. Only one word more to close this point. The Corporation and the party had the right to agree to a compensation, could they not have fixed the compensation by reference to arbitration; if so, on what principle can it be said they may not refer it to the arbitrament of the Court?

A case of *Blais & Larochelle* (13 L.C.J. 277) has been mentioned, I can hardly say insisted upon. What was, in effect, decided there was that, under the particular statute referred to (C. S. L. C., cap. 51), a survey was a condition precedent to all further proceedings. The action was brought without that formality, there was no acquiescence, and the action was dismissed. But I understand it has been decided since that time on the same statute, that where the party would not make the survey, the direct action lay. I am therefore of opinion that under a fair interpretation of Sect. 18, 27 & 28 Vic., cap. 60, a party claiming damages from the Corporation, for any act of the Council, has a right to proceed by action; that if the Corporation desires to have the compensation estimated by

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commissioners, it must move the Court to appoint them, and that if it fails to do so, it acquiesces in the ordinary procedure, and is foreclosed from complaining later.

The learned counsel for the respondent has again put forward an argument similar to that advanced by the Corporation in the cases of *Drummond* and of *Grenier*. It does not appear to me to be necessary to reiterate the opinion of the Court on the point raised in these cases. I adhere to the doctrine laid down by the Court in the former case, which, so far as I know, has not been over-ruled, and to the opinion I then expressed. I also concur in the opinion expressed by Mr. Justice Taschereau. It is therefore only necessary for me to say in general terms, that it is fully admitted now that the question must be decided by the ancient law of France; consequently, under no circumstances, should I feel it incumbent on me to enter into a lengthy dissertation to show that the English cases do not really maintain Lord Kenyon's *dictum* in *Gov. of Cast Plate Co. & Meredith*, that the *dictum* itself was *obiter* and supported by a manifestly untenable argument, that Buller, J., made a distinction between the civil law and the common law, and that the decision of Grove, J., was governed by "the clause in the Act which empowers commissioners to award satisfaction," which was "decisive against this action." To which, I may add, it is also decisive against its being any authority on the abstract question. The holdings in *Beckett* vs. *Midland Ry. Co.*, in *Metropolitan Board of Works* vs. *McCarthy*, and in *Lyon* vs. *Fishmongers Co.*, do not appear to me to be fairly susceptible of the species of minimisation they have been subjected to in *Bell* vs. *The Corporation of Quebec*; and taking them in connection with Lord St. Leonard's decision in Ogilvy's case, I am led to entertain the hope that the common law of England does not refuse an action, because doing so would give rise to an infinity of actions. As I read the law of England by the cases cited, I am led to the conclusion that the general principle is the same as that of our law, and that the damage must be direct, or, one of the judges said, it must affect the *corpus* of the property. There may be a difference between the two systems of law as to what constitutes a damage to the *corpus*, if that is to be the formulary used. Most of the authorities cited by the Corporation take ground which harmonizes perfectly with that taken by this Court in *Drummond's* case. For instance, Dufour admits that indemnity is due by l'Administration if they "*exercent une action directe sur la chose d'autrui*," and that l'Etat is not liable for the "*dommage indirectement causé*." These citations are both submitted by the respondent. To them I may add the following words from the same author in the same No.: "*Il n'y a, en ce sens de réparation due que là où il y a eu un acte préjudiciable et injuste.*" As instances of these cases, we have been referred to Steffani's case, which seems, so far as I understand it, to be a violation of the principles just laid down by Dufour, and he notes it as being a very extreme case. To the quotations of Larombière by respondent, I might suggest the addition of the following Number, No. 11, in order to get the full meaning of the author, which does not appear to differ from the view of this Court. But the author who has really treated the question most fully is Demolombe, whose authority has been marvellously misunderstood. Instead of reading No. 699 of that author in connection with 699 A and 699 B,

the Corporation, following the Privy Council, seeks to make out an authority from the example contained in 699 B, separating it from the rule it is placed to elucidate. This is not a fair way of dealing with the author's opinion. Shortly stated, Demolombe's theory is this: that by the opening of streets the neighboring proprietors acquire rights of property which cannot be interfered with without indemnity, which is implied in every act regulating the public right. He says it is the doctrine of the Roman Law, of the old French Law (still in force here), and that it is based on public faith and equity, and therefore it is the law of France now. Hence, if you affect the approaches to his house permanently, or the flow of water from his roof, or his lights, then there is a claim for indemnity. I fancy other examples might be suggested, as for instance his drainage into a public sewer. To quote Demolombe, in support of the pretensions of the Corporation, is a wonderful effort. He is as energetic and eloquent an adversary of the half-hearted doctrine of the "respectfuls" of the *Conseil d'état* as one can desire to meet with.

In the case of *Drummond*, I drew attention to the fact that the idea of indemnity on both sides runs through the whole of the Corporation Acts, and that particularly with regard to streets the proprietor might be actually made to pay for the convenience or advantage accruing to his property by opening a street. The supposition that he might be obliged to pay for the opening to-day and be deprived of it to-morrow, without indemnity, is too monstrous to require comment.

To these remarks I have only to add that I think the Corporation has the power by the statute to alter the level of the street. I also think the Corporation had the right to do so without the special authority of the Act. From the moment it was vested with the charge of the streets, it inherited the privileges as well as the liability of the State with regard to them. But neither the State nor the Corporation has a right so to alter them as to make the footpath inaccessible from the road. Such an alteration is *faute* to all intents and purposes, and if it gives rise to special damage to any one, that damage gives right of action. For all practical purposes, it may be laid down as the rule of our law that where there is special damage to the property of an individual, there is either *faute* or interference with a right of property, consequently there is right to indemnity. So that whether the question be envisaged from the side of fault or from that of interference with a material right of property, the result is the same, and the plain equity of the law triumphs.

This was fully admitted by the Corporation in this very case, and they paid certain damages to the proprietors near the place of this alteration, and bought off their demand in demolition by undertaking to make the footpath a suitable height above the roadway.

The only question, then, that remains is whether Lady Lafontaine has suffered from loss of rent alone. If we turn to the facts, the right of action seems undeniable. Prior to 1868 it was thought desirable to convert Little St. James street from a narrow into a wide street. For this purpose Commissioners were appointed, and proceeded to value the losses of those expropriated, and to assess those who were supposed to profit by the alteration. There was no indemnity to appellant, for the enlargement of the street took place on the north side while her proper-

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ty was situated on the south side; but her two houses were assessed one to an amount of $774, and the other to the amount of $981, equal to $1,755, or more than the rental for a year and a half of the whole property. It then became apparent that by widening the north side of the street the approach by St. Lambert's Hill was rendered more abrupt, and a by-law was passed to lower the level of the roadway of St. James street. Appellant's counsel say that this was so done in order to avoid the law, which specially reserves indemnity for lowering a footpath. Be this as it may, the lowering the level of the roadway had the effect of leaving the footpath on the south side from 2 feet 6 inches to 4 feet above the level of the road. It was evidently impossible to leave a precipice of this kind, and the Corporation engineers devised the brilliant scheme of making a slope stretching three feet into the street, and diminishing by so much the breadth of the roadway for which appellant had just been mulcted in the whole of her revenues for over a year and a half. The street was thus cut down, the new part between the 7th August and the 9th October, 1868, and the old portion was cut down between the 17th June and the 12th July, 1869. In June, 1871, the action was brought. On the 5th November, 1873, the Corporation came in and agreed to pay the appellant $2,728.41 damages to her property, save and except any damages she might have incurred for loss of rent, which last the Corporation refused to acknowledge. The effect of this transaction was to give appellant an indemnity of $973.47 over and above all she had to pay for widening the street. Thus reduced, Lady Lafontaine's action appears to me to be a very narrow one, requiring very special proof, and that I find totally wanting. We have, it is true, evidence that the property is diminished in value from 25 to 30 per cent. by reason of this state of the footpath, but it seems to me that this is covered by the general indemnity. She had not shown that one tenant left her houses on that account, or that she lost any rent on that account. One witness, who described himself as a hotel-keeper, leased two rooms of one of the houses for a restaurant, at the rate of $400 a year. The premises were totally unfit for the object for which he took them; they were in "very poor condition." He undertook to make all the repairs. He conducted his restaurant on temperance principles. His capital was $50, and perhaps $100 of furniture. After a year's occupancy, he collapsed, and could only pay $250. He says it was all owing to the pavement. Perhaps it would not be difficult to suggest other reasons for Mr. Jordan's failure.

Mr. Larocque says he knows the appellant leased her property lower since the widening of the street than before. This is not conclusive, as an old rule teaches.

Mr. Lamothe tells us of the leases he passed in 1870 and 1871, but he says nothing for the time before that, and no other witness has told us any more about it. All we know is derived from the appellant's own statements in answers to interrogatories, and that is not evidence for her. It is therefore hardly necessary to examine it; but it may be said that, even if it were evidence, it would not make out her case. It comes to this, that up to 1870, that is till after the change referred to, she had had the "best class of tenants," the Grand Trunk Railway Company and the Government, and that from them she received higher rents than she received after they gave up the premises, leaving them in very bad con-

dition, as Mr. Jordan tells us. But between May, 1870, and the relaying of the pavement the rent of the property evidently increased, for in 1872 the large house was leased at $500 a year till May, 1873, and $600 for the following year. Dame Julie Morrison, and The Mayor et al.

I therefore think the appellant has failed to make out any damage from loss of rent owing to the change of level of the footpath, and that her action was properly dismissed, and I would dismiss this appeal with costs. The judgment will be based on motives different from those given in the judgment appealed from. The appeal No. 58 must be dismissed for a similar reason, but we do not decide that Lady Lafontaine's action was barred by the arrangement with the Corporation, if her right had existed in fact.

The judgment was unanimous, but Baby and Jetté, JJ., while not dissenting, were of opinion that the evidence would have justified the allowance of some damages.

Judgment confirmed in both cases

Barnard & Monk, for appellant.
R. Roy, Q. C., for respondents.
(J.K.)

COURT OF REVIEW, 1879.

MONTREAL, 29TH NOVEMBER, 1879.

Coram JOHNSON, J., RAINVILLE, J., PAPINEAU, J.

No. 1908.

Brosseau vs. *Crevier*.

HELD:—That in the case of a *capias ad respondendum*, wherein bail has been given under Art. 825 of the Code of C. P., and wherein the condemnation is for a sum less than $80, the Court will grant a peremptory order to the defendant to surrender himself into the hands of the Sheriff, within one month from the service upon him or his sureties of such order, on a simple motion to that effect by plaintiff made after the final judgment declaring the *capias* good and valid.

This was a hearing in Review of a judgment rendered by the Superior Court at Montreal (Mackay, J.) on the 20th day of June, 1879, as follows:—

"The Court having heard the parties by their counsel upon the plaintiff's motion filed on the 9th of June instant, that inasmuch as, under a writ of *capias ad respondendum* issued out of this Court in this cause against the defendant, the said defendant was arrested and taken into custody, and afterwards, while in custody of the Sheriff of this district, Edouard Dorion, post office clerk, and Alfred Boisseau, gentleman, both of the city of Montreal, did on the 16th of May, 1878, severally enter into a bond towards the said Sheriff to the effect that he, the said defendant, would surrender himself into the hands of the said Sheriff whenever required to do so by any order of the said Court, or any Judge thereof, within one month from the service of such order upon the said defendant, or upon his sureties, and that in default thereof they would pay the amount of the judgment in principal, interest and costs; that a judgment was afterwards rendered in the said cause on the 19th of March, 1879, declaring

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the said writ of *capias* good and valid, and the judgment rendered in the Circuit Court of this District in favor of plaintiff against defendant on the 14th of April, 1877, to be binding, and declaring further the sum of $69.65, to wit, $49.25 amount of the said judgment, and $20.40 for costs taxed thereon, to be still due to said plaintiff, with interest on $49.25 from the 6th November, 1876, and condemning the defendant to pay the costs;—which judgment is in full force; and that inasmuch as the said defendant wholly failed to surrender himself as required by law, and in fact hath absconded from and left the Province of Quebec and Dominion of Canada, he be ordered to surrender himself; having examined the proceedings, and deliberated,

"Doth grant the said motion, in consequence, doth order the said Louis C. Crevier, the said defendant, to surrender himself into the hands of the Sheriff of this District within one month from the service upon him or on his sureties of the present judgment and order, and in default whereof, proceedings shall be taken according to law to enforce the same."

JOHNSON, J. The question presented in this case is one of procedure; but it is also one of extreme importance as affecting the rights of persons arrested under writs of *capias*; and I am not aware that any case exactly in point has ever come up. The defendant arrested under a *capias ad respondendum* gave bail to the Sheriff on the 27th April, 1878, under Article 828 of the Code of Procedure; and thereupon got his provisional discharge. On the 16th of May, after the return of the action, he gave bail under Article 825. Judgment for the plaintiff supervened, and the *capias* was maintained. On the 9th of June, the plaintiff moved for an order upon the defendant to surrender himself to the Sheriff within one month of the service upon him or upon his sureties of the order to surrender. The plaintiff in his motion made a mistake which the Court below adopted in giving its order as asked for. He said that the bail given on the 16th of May was a bond *towards the Sheriff*; whereas it was no such thing; it was bail to the action under Article 825, and the bond to the Sheriff was only provisional bail under Article 828; but that is unimportant. The plaintiff in his motion asked for an order of surrender, and the Court granted it; and though both of them mis-stated the effect of the bond of the 16th of May, the bond itself is here to speak for itself, and it is under the bond of that date that the order was asked and got. The terms of Art. 828, under which provisional bail was given to the Sheriff, are as follows: "A defendant arrested upon a *capias* may obtain his provisional discharge by giving good and sufficient sureties to the Sheriff to the satisfaction of the latter, before the return day of the writ, that he will pay the amount of the judgment that may be rendered upon the demand, in principal, interest and costs, if he fails to give bail pursuant to Article 824, or to Article 825." Under this bond to the Sheriff, therefore, the defendant's obligation was to do either the one or the other of two things, either of which the law allowed him to do, at his own option; that is to say, he might have given bail within eight days after the return of the writ (or afterwards, with the leave of the Court), in conformity with Article 824, which would have been bail equivalent to the old special bail, under the law as it stood before the passing of 12 Vic. c. 42, the condition of which would have

been that if he left the Province without paying debt, interest and costs, his sureties should become liable; or, in the second case, he had the right to give bail under Art. 825, which is the new bail to the action originally provided, in somewhat different terms, and with a further condition by section 3 of the 12 Vic., c. 42. This last bond (under Art. 825), was the one he gave; and if there has been any difficulty in dealing with the point now before us, it is because the Statute which is reproduced in cap. 87 of C. S. L. C. is not completely or exactly rendered by the Article 825 of the Code of Procedure. The language of the 3rd section of the 12 Vic., c. 42, and the language of the 10th section of cap. 87 of the Consolidated Statutes, are identical. They both of them contemplate a surrender to be made in either of two cases: either a surrender with reference to the provisions of the law respecting the *cessio bonorum*, or a surrender within one month after the service of an order upon the debtor, or upon his sureties. The Article of the Code (825), on the other hand, merely makes the condition of the bond that the debtor will surrender when required, by an order of the Judge, within one month after service of such order upon him or upon his sureties. Therefore, there is this difference between the Statutes and the Code in this particular, viz., that the former provide for the surrender in both cases, that is, the surrender required in the proceedings upon a *cessio bonorum*, and the surrender required to fix the bail; and the article 825 only provides for the surrender required in order to fix the bail.

The 12th Vic. was a Statute which, as many members of the profession can still remember, entirely altered the old procedure under the *capias*. It was drawn by the late Chief Justice, then Mr. Lafontaine. It was entitled an Act to abolish imprisonment for debt; and, in substance, it did away with the *capias ad satisfaciendum*, and substituted an obligation on the part of the defendant to make a statement and abandonment of his property for the benefit of his creditors; and it gave the right to the plaintiff to proceed against his debtor, and to punish him if he failed to make this abandonment, or if he made it fraudulently. The statutes did not say that the defendant might give bail, as the Article 825 says he may give bail. The statutes said he might give bail to "surrender himself into the custody of the Sheriff whenever required so to do by an order of such Court, or of any Judge thereof, *made as hereinafter is provided*, or within one month after the service of such order on him or on his sureties." The Article 825 says nothing of the surrender with reference to the *cessio bonorum*. It only provides for the surrender within one month after service of an order on a debtor, or on his sureties. The *cessio bonorum* is only compulsory in a case above $80 (which the present case is not). There is provision for the making of it in any case, if the defendant so chooses; but in cases under $80 it is granted as a privilege, and not imposed as a duty. Therefore it appears to me there would be no way of reaching the sureties unless the order granted in this case were held to be a legal order. It was said that the object of the law would be frustrated, and imprisonment for debt restored, if this order were upheld. That is not at all the case. The defendant can surrender, and can then liberate himself by making his *bilan*; but unless he does so, it appears to me quite clear that the sureties will be effectually reached if the order is served upon them.

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if it were otherwise, in a case below $80, a defendant might give bail, under Art. 825, to surrender, and then leave the country and snap his fingers at us under the law, as I hold it, he cannot do so, for whether he remains here to be served with the order or not is quite immaterial, if it is served on the sureties, and if he cannot be compelled to make his abandonment, the sureties themselves are interested in having this order granted, so that he may be induced to give up his property, and liberate himself and them also. I may observe, the provisions of the statutes are not repealed by the Code, but, on the contrary, are expressly preserved by Articles 2274 and 2275 C. C.

Judgment of Superior Court confirmed.

Wurtele & Sexton, for plaintiff.

Doutre & Co., for defendant.

(a.s.)

COURT OF REVIEW, 1880.

MONTREAL, 31st MAY, 1880.

Coram SICOTTE, J., TORRANCE, J., PAPINEAU, J.

No. 2529.

Bannatyne vs. *The Canada Paper Company.*

HELD:—1. That in an action of damages for wrongful and malicious arrest under a writ of *capias ad respondendum*, the Court will award exemplary or vindictive damages, if the charge be sustained by evidence, and assess the damages as a jury might, in the absence of any proof of special damage.

2. That the amount assessed in the present instance ($500) was not excessive.

This was an inscription in Review of a judgment rendered by the Superior Court at Montreal (Rainville, J.) on the 29th of December, 1879, in favor of the plaintiff.

The plaintiff's action was brought to recover $10,000 as damages for the reasons assigned in the declaration, which were to the following effect:

The plaintiff has been a resident since 1874 of a place called "The Locusts," near Eatontown, New Jersey, U. S.

In March, 1877, the Company, defendant, sued the plaintiff in the Superior Court here for $3,467.33, and served the action (with his consent) on duly constituted attorney here; the plaintiff, although described in the writ of summons as a resident of Montreal, being, to the knowledge of the Company, a resident of New Jersey.

The plaintiff contested the action, denying all indebtedness to the Company, and while he was in Montreal on business, in May, 1878, and attending to the cross-examination of one of the Company's witnesses, the Company arrested him under a writ of *capias respondendum* issued in the suit thus pending, on the affidavit of the Company's manager, and kept the plaintiff in custody during several hours, when he obtained temporary relief by putting in bail.

The charge in said affidavit was that the plaintiff was immediately about to leave the Dominion of Canada and the Province of Quebec, to go to the United

States, with the intent to defraud the Company, although the Company well knew that the plaintiff was at the time a resident of the United States and had been so for some years, and that, in leaving this city for the United States, he would merely do so for the purpose of returning to his home.

The only reason assigned in the affidavit in support of the charge of leaving with intent to defraud was that the deponent had been informed that the plaintiff had stated "he had come to Montreal to attend the meeting of the [illegible] Company, and that he was about to go to New York." The reason thus assigned was held to be insufficient in law, and the *capias* was quashed on motion.

The plaintiff claimed, under the circumstances, that his arrest was made maliciously, wrongfully and without reasonable or probable cause, and for the mere purpose of injuring the plaintiff and compelling him, if possible, to settle or compromise the Company's said suit, which the plaintiff was at the time defending himself against, as he had a perfectly legal right to do.

The following was the judgment rendered by Mr. Justice Bainville:

"La Cour * * * considérant que la défenderesse n'était aucunement justifiable de faire émaner contre le demandeur le bref de *capias ad respondendum* en date du quinze mai mil huit cent soixante et dix-huit, et de le faire appréhender et détenir en vertu d'icelui;

"Considérant qu'il est prouvé que le demandeur, lors de sa dite arrestation, demeurait dans le New-Jersey, l'une des Etats Unis d'Amerique, depuis plusieurs années, à la connaissance du public et de la défenderesse et de ses officiers;

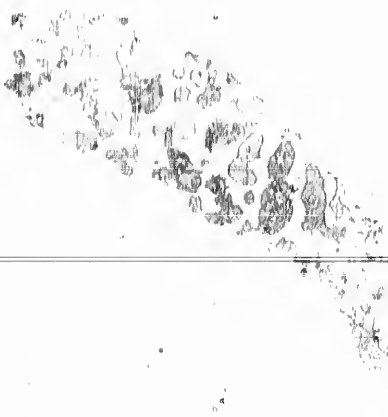
"Considérant que lors de sa dite arrestation le démandeur était venu à Montréal par affaires et ce à la connaissance de la défenderesse, et que son arrestation était illégale, et d'après les circonstances était faite par malice et dans le but de harasser le demandeur;

"Considérant que le demandeur paraissait alors jouir d'une fortune assez considérable et suffisante pour satisfaire à la réclamation de la défenderesse si telle réclamation existait, et qu'en conséquence le demandeur a souffert des dommages dans sa sensibilité et ses biens que la cour estime à la somme de cinq cents piastres;

"Condamne la défenderesse à payer au demandeur la somme de cinq cents piastres cours actuel, avec intérêt sur icelle à compter de ce jour, et les dépens de l'action telle qu'intentée."

Ritchie, Q. C., (for defendants):—In evidence the plaintiff contented himself by proving the issuing of the *capias*, his arrest thereunder and detention, for a very short period of time, in the sheriff's office, the quashing of the *capias*, and the dismissal of the Company's action. He did not attempt to prove any damage whatever.

The defendants established in evidence that the *capias* was not issued by them maliciously, but that the proceeding was taken after they had received the advice of counsel upon the matter. The taxed costs incurred by Mr. Bannatyne upon the proceeding were paid to his attorneys. The Company also proved that the debt sued for in the action was actually due by Mr. Bannatyne. Particular attention is drawn to Mr. Bannatyne's own deposition as a witness in this case, as affording abundant evidence of his bad faith.



Bannatyne vs. The Canada Paper Company

The defendants submit the following propositions:—

1. Under all the circumstances proved in evidence, Mr. Bannatyne's action for damages ought to have been dismissed. As before stated, he established no damage whatever, and his conduct, as shown by the evidence, was such as not to entitle him to any consideration in a demand for damages. In order to entitle him to recover he would have to prove some amount of damage.

1 Hilliard on Torts, p. 480, No. 4; 5 Taunton 187, Bayne vs. Moore; Bigelow, Torts, p. 181; Selwyn's N. P., 1026; Bigelow p. 204, and cases cited.

2. The *capias* was not issued maliciously, but in good faith, after the defendants had taken the advice of counsel, and, consequently, the present action ought to have been dismissed.

1 Hilliard on Torts, p. 503, No. 22; Cooley on Torts, p. 183; Bigelow, p. 200, and cases cited.

3. In the view of the case unfavorable to the defendants, nothing more than purely nominal damages ought to have been awarded. Field on Damages, § 860; Mayne on Damages, p. 4.

The defendants respectfully submit that the judgment rendered against them ought to be reversed, and the action of the plaintiff dismissed with costs.

Bethune, Q. C. (for plaintiff):—All the facts alleged in the declaration were literally proved, and during the pendency of the present action the Company's suit against Mr. Bannatyne was heard on the merits and dismissed with costs, and a copy of the judgment fyled in this case.

The result of the Company's suit proved beyond doubt that the real object of the *capias* was, not to prevent the fraudulent flight of a debtor, but to force an alleged debtor to settle or compromise an unfounded demand. The malicious intent, therefore, which prompted the plaintiff's arrest is most apparent.

Not only was the want of probable cause for the issue of the *capias* and the malicious design with which it was issued thus made apparent, but the malicious conduct of the Company towards the plaintiff was aggravated and intensified by the allegations of their plea to this action.

To prevent mistake, the *ipsissima verba* of a paragraph in that plea (page 4) are given as follows:—"That at the time of the institution of the said action, to wit, on the seventh day of March, eighteen hundred and seventy-seven, the said plaintiff was largely indebted to other persons, and in fact was insolvent, *en déconfiture*, and that thereafter he transferred the larger portion, if not the whole, of his property and assets to his other creditors either by way of payment or as security for the debt so due by him to them as aforesaid, and that at the time of the issue of the *capias* in this cause the said plaintiff had no available property or assets within the Province of Quebec, and had left his domicile therein and taken up his residence in the United States of America, beyond the jurisdiction of this Honorable Court."

Of these slanderous charges, which were introduced in the plea as a justification of the high-handed attempt of the Company to force the plaintiff to pay in full or compromise their demand, which the Court has declared to be unfounded, no kind of evidence was adduced by the Company.

Under all these circumstances, it is quite clear that the plaintiff was entitled

to recover exemplary or vindictive damages, and this, notwithstanding the opinion and advice of counsel. Sedgwick on the Measure of Damages, pp. 38 and 98, and chap. 18, and specially at pp. 458 and 459 (marginal paging). Addison on Torts, pp. 595, 992, 993. Mayne on Damages, p. 37. Brossoit, appellant, and Turcotte, respondent, 20 L. C. J., p. 141. Stephens' Digest, Vo. Damages, p. 378, Numbers 55, 56 and 57. Smith on the Law of Reparation, p. 472. Warwick vs. Foulkes, 12th Meeson & Welsby, p. 507.

These damages the Court has estimated at $500, and it is submitted that not only is the amount assessed a moderate one, but that a Court of Review or appeal ought not, under the circumstances, to disturb the finding of the Court of first instance.

Addison, p. 585; 1 Sourdat, No. 464 *bis*; Mayne, p. 513 to p. 517.

The plaintiff respectfully claims the confirmation of the judgment complained of with costs.

SICOTTE, J. Plaintiff has been a resident of the State of New Jersey, U. S., since 1874. In May, 1878, he was arrested, on the affidavit of the Company's manager, under a *capias*, while he was attending to the examination of a witness in a suit instituted by the defendants against him. The ground assigned in support of the charge of leaving with intent to defraud is that the defendant had been informed that the plaintiff had stated "he had come to Montreal to attend the meeting of the Graphic Company, and that he was about to go to New York." The allegations of the affidavit were declared insufficient in law, and the *capias* was dismissed. Plaintiff instituted an action against the defendants, complaining that there was no ground for the arrest, that it was done by malice and for wrong motives. Defendants, after relating the causes of contestation as to the settlement of the affairs of a partnership which had existed between defendants and plaintiff, before 1873, pleaded that the *capias* was not issued maliciously; that it was issued after advice taken from their counsel, and that no damage was caused. By the judgment under review, the defendants were condemned to pay $500 damages. The facts of the case are not at all favorable to defendants. The plaintiff had refused to go into the new concern created on the limited liability principle, and to acknowledge a claim of $3,467 for losses said to have arisen out of the non-recovery of some debts due to the former partnership. A suit was going on between the parties. While Bannatyne was attending the enquête he was arrested for the grounds already stated. There was no cause for such an insult, and for this outrage against the person of the plaintiff; there was malice in the arrest so made. It was evidently an attempt to coerce by vexation and humiliation a settlement of a disputable and disputed claim. The advice of counsel cannot avail under such circumstances. It is not because a false accusation has not caused damage to a man known for his honorable character and for his integrity, that his traducers must escape penalty for their wrong doings. As Sourdat has it: "Quand un préjudice est causé en dehors de toute convention, le fait, dommageable en lui-même, est ordinairement entaché d'un caractère de perversité beaucoup plus grave que lorsqu'il s'agit d'une infraction aux contrats." This character of perversity is the criterion to determine the amount of the penalty. In appreciating the damages, the Judge

Bannatyne vs. The Canada Paper Company

acted as the jury. He assessed the damages at $500. We are of opinion that, under the circumstances of the case, there is no reason to disturb the verdict.

Judgment of S. C. confirmed.

Bethune & Bethune, for plaintiff.
Ritchie & Ritchie, for defendants.
(S. B.)

COUR SUPERIEURE, 1880.

MONTREAL, 30 NOVEMBRE, 1880.

Coram JOHNSON, J.

No. 1050.

E. Lef. De Bellefeuille et al., Demandeurs, vs. *La Municipalité du Village de St. Louis du Mile End, Défenderesse.*

JUGE:—Que les corporations municipales peuvent être obligés par *quasi*-contrats comme les personnes ordinaires.

Les faits de la cause apparaissent suffisamment aux observations faites par l'Hon. Juge en rendant jugement:

The defendants are a corporate body created by 40 Vic., c. 29. Some of the inhabitants of the old municipality, as it appears, wanted to have it divided into two, and petitioned Parliament for that purpose, and got the present statute passed, employing the plaintiffs professionally to get it done; and it is for these services, rendered before the Act of Incorporation, that the action is brought against the new corporation. There is no doubt that the services were well and effectively rendered; but the corporation answers the action by pleading, 1st, by a *défense en droit*, and, 2nd, by a peremptory exception, that it had no existence as a corporation at the time the services were rendered; and that the plaintiffs were really employed by the gentlemen individually who got this Act passed, and have no recourse except against them personally; and they, the defendants, having at that time no existence, could neither themselves employ nor authorize others to employ the plaintiffs.

It was contended for the plaintiffs that there had been a *quasi*-contract; but it was answered no, because there was nobody capable of *quasi*-contracting; there was no person at all either capable or incapable of contracting. This corporation (which, if it had existed at the time, would have been a person in law), had not then been created, and it was not merely the case of capacity or incapacity of an existing person, but the very existence of any party, person or corporation whatever, whether capable or incapable of contracting. The plaintiffs cited articles 1041 and 1042 of the C. C. They are founded on the authority of Pothier and of Marcadé. The next of the articles is as follows. Article 1041 says: "A person capable of contracting may, by his lawful and voluntary act, oblige himself toward another, and sometimes oblige another toward him, without the intervention of any contract between them."

Art. 1042 reads: "A person incapable of contracting may, by the *quasi*-contract of another, be obliged towards him."

It could be plausibly argued that both these articles seem to contemplate merely the capacity or incapacity, if not to contract, at all events, to be bound. This is the first and obvious meaning, no doubt. Pothier's language in the example he gives is this:

"Il est clair que les fous, les insensés, les enfants, ne sont pas capables de contracter les obligations qui naissent des délits ou des quasi-délits, ni de contracter par eux-mêmes *celles qui naissent des contrats*, puisqu'ils ne sont pas capables de consentement, sans lequel, il ne peut y avoir ni convention, ni délit ou quasi-délit: *mais ils sont capables de contracter toutes les obligations qui se contractent sans le fait de la personne qui les contracte.* Par exemple, si quelqu'un a géré sciemment les affaires d'un fou, d'un insensé, d'un enfant, cet enfant, cet insensé, ce fou contracte l'obligation de rembourser cette personne de ce qui lui en a profité pour cette gestion."

Pothier's language is here admittedly inaccurate. The idiot cannot strictly contract an *obligation*, because consent is necessary. He can come under a liability—an *engagement*, as some commentators call it, because the reason given in Pothier is that the *quasi*-contract results from a fact, and not from a consent, and so the infant or the idiot could be bound though they had given no consent. But it is said, they must have had an existence of some sort—incomplete, if you will (undeveloped, perhaps, is the scientific word). Here it is contended that the undeveloped corporation, which used the plaintiffs to obtain a state of full development for them, were without power to consent, and not only without power to give any kind of consent, but without any form or kind of existence, inchoate or otherwise. Now, though the law, in its terms, and Pothier, in his examples, says the incapacity of the idiot will not exclude obligation under a *quasi*-contract, is that the whole extent of their meaning? The law makes the *quasi*-contract to spring not from capacity or completeness of power, but from a fact,—a benefit; therefore, if the defendant has power to be benefited it would seem it ought to be bound.

There is a special allegation in the declaration, and it is also repeated in the special answer to the exception, and I think it has great force, that the defendant has availed itself of the Act of Parliament got by the plaintiffs' professional exertions: so that this would change the aspect of the question; and it would no longer be whether a *quasi*-contract can oblige an incapacitated person, or even an incompletely existing or organized body of persons; but whether the assumption, adoption and use by an existing person or body of persons of what was got for them by the services of another renders him or them liable for the price or value of those services. Here there was, indeed, no body of persons having a complete corporate existence at the time the services were rendered, and possibly there may have been no *quasi*-contract to bind the non-incorporated party at that time; though there may be now to bind an existing party who could not then consent, but has since received the benefit. But, call it what you please, it is a liability which may be assumed at all events; and which may result as well from that assumption as from an original contract or *quasi*-contract.

In England, in equity, a corporation is held liable for the acts of those who procured its incorporation, even to the extent of agreements which such persons may have made with third parties. Surely, then, a corporation is bound in some

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form towards those to whom it owes its very existence, if not by the legal fiction of the *quasi*-contract, at least by the fact of its own assumption and acceptance and use of the powers got for them by the labors of the plaintiffs.

I am by no means clear that there was not here a *quasi*-contract, under the authority of Pothier's examples. The liability attaches in those cases because the parties could not create it for themselves. What reasoning separates those instances from the present one, for even a vacant succession can be bound by a *quasi*-contract.

In the 1st vol. of the English Railway and Canal Cases, p. 129, there is one reported of Edwards et al. *vs.* The Grand Junction Railway Co. The point was the liability of the company, after incorporation, for what had been agreed to on their behalf before incorporation. I think this is a much stronger case for the plaintiffs than that one was; but even there the language of the Vice-Chancellor (and his judgment was confirmed in appeal) was very plain. He said: "I think that where parties are going before Parliament for the purpose of being incorporated, a door would be open to great frauds if bargains made by persons acting as their agents, when they are in a scattered and individual state, were not binding on the company when incorporated."

That, as I have said, was not the point that comes up here; but it was a stronger point for the corporation; yet they were held to bargains made while they were in "a scattered and individual state," and I see no reason why the present defendants should not also be so held. As to the existence, then, of a *quasi*-contract in this case, though there may possibly be some doubt, I incline to say there was one. I see that some authors in discussing this question prefer the term "engagement," in some cases where the will of the parties is no element, and where the obligation arises from a mere fact (see Laurent, vol. 20, art. 305 to 309). In one place this writer asks: "Pourquoi la loi fait-elle naître des obligations d'un fait? nous avons déjà indiqué le motif général: c'est ou l'utilité des parties intéressées, ce qui est aussi un intérêt général, ou une considération d'équité."

Apart, however, from the question of *quasi*-contract, the obligation of the defendants is supported by the principle I have before adverted to, that they have taken and used what was got by the plaintiffs' services, and they cannot make profit at their expense. Judgment for plaintiffs.

*** Autorités citées par les demandeurs: Pothier, Obl., No. 115, 127 et 128.—Laurent, Droit Civil, t. XX. p. 366, No. 339.—Edwards *vs.* Grand Junction Ry. Co., t. I., *English R. & C. cases*, pp. 129, 139, 146.—Vauxhall Bridge Co. *vs.* Spencer, do, p. 147.—Great Western Ry. Co. *vs.* Birmingham & Oxford Ry. Co., *Law Journal*, 1848, N. S., t. 17, Equity, p. 246.—*Law Journal*, 1837, N. S., t. 6, Equity, p. 50.—The Bedford and Cambridge Ry. Co. *vs.* Stanley, *Law Journal*, 1863, N. S., t. 32, Chancery, p. 62.— Eastern Counties Ry. Co. *vs.* Hawkes, *Law Journal*, 1855, N. S., t. 24, Chancery, p. 601.—Hodges, *Law of Railways*, ch. 4, s. 1, p. 140.—Shelford, *Railways*, t. II, p. 114, notes.—Do, pp. 119, 126.—Thompson, *Liability of Stockholders*, p. 117, § 117, ch. VII.

Autorités citées par la défenderesse: — Code Municipal B.-C., articles 3, 4, 78, 79, 80.—17 L. C. J., 193.

La défenderesse avait soulevé la question du droit d'action des demandeurs par une défense en droit qui fut plaidée devant l'Hon. Juge Papineau.

Ce dernier n rejetant cette défense fit les observations suivantes

" Les demandeurs allèguent qu'ils ont été chargés par un certain nombre de personnes, agissant pour 90 électeurs de la " Municipalité du village de la Côte St-Louis," d'obtenir la séparation de cette dernière municipalité afin de former, d'une partie de cette municipalité, une nouvelle corporation sous le nom que porte maintenant la défenderesse, et de faire les démarches et procédés nécessaires pour obtenir du Parlement de Québec l'acte qu'ils ont de fait préparé et obtenu, et qui est le chapitre 29 de la 41 Vict., passé en 1878.

" Ils ajoutent que la défenderesse bénéficie de l'avantage de son incorporation et qu'il est juste qu'elle porte les charges de telle incorporation, et qu'elle est tenue en conséquence de payer les ouvrages faits, les services rendus et les déboursés encourus par les demandeurs en travaillant à lui donner l'existence.

" La demande est rencontrée par une défense en droit qui peut se résumer ainsi : " Il résulte des allégués de la demande que les services des demandeurs " ont été requis par un certain nombre d'électeurs d'une municipalité autre que " la défenderesse en leur nom personnel et avant que celle-ci fût en existence.

" La défenderesse ne pouvait pas s'obliger avant d'exister et on n'a pas pu " l'obliger lorsqu'elle n'était pas encore."

" Il n'appert pas que les services des demandeurs aient jamais été requis par la défenderesse qui ne peut s'obliger que de la manière prévue par le Code Municipal.

" Il est clair qu'il n'y a pas d'obligation ou lien de droit entre les parties en cette cause en vertu d'une convention ou contrat.

" Aussi les demandeurs ne se fondent-ils que sur un quasi-contrat.

" Ils s'appuient sur les articles 1041 et suivants du Code Civil.

" Une corporation municipale qui est une personne fictive peut-elle être liée sans son consentement par le fait d'une autre personne, malgré qu'elle ne puisse faire de convention ou contrat que par le consentement de son conseil qui la représente ?

" Les municipalités ne peuvent s'obliger que par des actes de leurs conseils faits suivants les règles prescrites par le Code Municipal, lorsqu'il s'agit de contrats consensuels. Mais ici, il s'agit d'un quasi-contrat qui se forme sans le consentement de la personne liée, sans même qu'elle en ait connaissance et par le seul effet de la loi.

" Le quasi-contrat ne résultant pas d'une volonté exprimée, mais d'un fait, il s'ensuit qu'il peut produire un lien de droit même contre une personne incapable de volonté, même contre une personne fictive. Ainsi une succession vacante peut être liée par un quasi-contrat.

" Les demandeurs ont allégué que le fait même de l'incorporation de la défenderesse est, pour cette dernière, un avantage, un bienfait, dont elle est redevable au travail, aux efforts et aux déboursés que les demandeurs ont fait pour lui procurer cette incorporation.

" Cette allégation est suffisante pour faire voir qu'il est juste qu'elle leur rembourse les deniers qu'ils ont déboursés pour lui procurer l'existence.

" La défense en droit est renvoyée avec dépens."

DeBellefeuille & Bonin, avocats des demandeurs.

Alphonse Ouimet, avocat de la défenderesse.

(E.LEF. DE B.)

SUPERIOR COURT, 1881.

MONTREAL, 31st JANUARY, 1881.

Coram JOHNSON, J.

No. 502.

The Grand Trunk Railway Co. vs. *Currie*, and in another case at suit of *same Company* vs. *Hall*.

HELD:—That in a suit by a vendor of real property, for the recovery of the interest merely, on the purchase money, it is not competent to the defendant to claim the right to retain such interest, until security be given that he will not be disturbed in his possession of the property, by reason of certain undischarged hypotheca registered against the property, exceeding in amount the whole capital of the purchase money.

PER CURIAM :—The question raised in these two cases is whether the purchaser of real estate is bound to pay interest on his purchase money, when the property is mortgaged for a larger sum than the price due. Art. 1535 C. C. says:—"If the buyer be disturbed in his possession, or have just cause to fear that he will be disturbed by any action hypothecary or in revendication, he may delay the payment of the price until the seller causes such disturbance to cease, or gives security; unless there is a stipulation to the contrary." Here there is no stipulation to the contrary, therefore the purchaser is entitled to delay payment of the price until the plaintiff causes the mortgages to be erased. But the plaintiffs do not claim the purchase money. They claim payment of the interest thereon; and the question is, whether a purchaser may delay payment of the interest, as well as of the price itself.

This is no new question. In France, whence we borrowed our article 1535, it seems to suffer no difficulty. Here there have been various decisions of more or less authority in various cases, but still the main principle seems never to have been shaken except in the case of Dorion & Hyde, and though I myself sat in that case, I must say that in the light of subsequent decisions I think it was wrong. That case occurred fourteen years ago, and the Judges who sat were the late Judge Caron, Judge Duval, Judge Drummond, and myself as Judge *ad hoc*. Certainly the reasoning of Judge Caron was very convincing then, but, as Judge Dorion said in Hogan vs. Bernier, the reasoning is not supported by authority, and is opposed to authority. It was said that the case of Dorion & Hyde had never been overruled. That is a mistake; not to speak of Hogan vs. Bernier, in which it was overruled admittedly, and, to my mind, with commanding ability, and decisive reason and authority, by one of the ablest judicial minds that ever adorned this Bench; a judgment, too, which was subsequently confirmed unanimously in review;—(Hogan vs. Bernier, 21 L. C. J., p. 101), besides that case, I say, Dorion & Hyde was overruled in a case that was not mentioned at the Bar, the case of Parker & Felton (21 L. C. J., p. 253), where, though the action was different from this, it was clearly held that the balance of the purchase money itself is the only amount for which the purchaser can claim security. In the case of the G. T. R. Co. vs. Martin, decided by Judge Rainville in the C. C. on the 18th of March, 1879, the rule now contended for by the plaintiff was maintained. In four other cases of the same plaintiffs vs.

McGuire, Walker, Slater and Jones, on the 13th September, 1880, Mr. Justice McKay held the same thing.

As to the reasoning on the subject, it is, as I have said, exhausted in the case of Hogan vs. Bernier. The whole thing is comprised in two or three plain principles. In the first place the law gives the purchaser no right to get back again any part of the price he may have already paid, on account of apprehended trouble. It simply gives him the faculty of delaying payment of the price. If he choose to pay, trusting to the seller's solvency, there is an end of the question. He has not chosen to use a faculty given to him for his protection; and there is no authority to extend it to other cases. We must remember that by the old French law, the purchaser could not refuse to pay on account of mortgages in such a case as the present. Of course, if there was a warranty of *franc et quitte*, and the property turned out to be mortgaged, the purchaser could complain that he had been deceived, and he could break the sale; but it was different where the seller only covenanted to hold harmless. As long as the purchaser was not troubled, he could not refuse to pay, even if he was sure that, sooner or later, he would have to pay the mortgages. He had to wait till the trouble came, and then he could call upon his vendor to make it cease, or indemnify him. The obligation of the seller was simply that he would maintain the purchaser in quiet possession. (Pothier, Vente, No. 1, Talbot *vs.* Beliveau, 4 Quebec L. Rep., p. 104.) In the present case, and in the present state of the law, and the decisions on this subject, I am not justified in treating it otherwise than settled by authority in favor of the plaintiff's contention. I do not refer, *in extenso*, to all the cases; but there was the case of McDonnell vs. Goundry, which is a very important one. It was different in the main object of the action from this, and depended on an express stipulation, and other facts not presented here; but in giving judgment the Chief Justice said (22 L. C. J., p. 222): "The appellant is entitled to retain the principal; but not the interest, which represents the rents, issues and profits," and his Honor cited Sirey, Dalloz, Duranton and Troplong, which have been cited in the present case. There is an earlier case also; Dinning vs. Douglas, 9 L. C. Rep., p. 310. In that case it was held by Chief Justice Lafontaine, Aylwin, Duval and Meredith, J J., that "a purchaser enjoying the property purchased, and withholding the purchase money until his vendor shall have complied with a judgment ordering to remove certain oppositions, is bound to pay his vendor the interest as it becomes due, even though the latter may have failed to remove the opposition in compliance with the judgments against him."

The interest then in both these cases is due, and it only remains to see how much it is. In the case of Currie receipts lost at fire at Point St. Charles reduce the amount to $67.50, in the other case judgment goes for amount demanded.

Judgment for plaintiff.

Duhamel & Co., for plaintiff.
Bethune & Bethune, for Currie.
Davidson & Cushing, for Hall.
(S. B.)

COUR DE CIRCUIT, 1878.

MONTREAL, 31 OCTOBRE 1878.

Coram PAPINEAU, J.

No. 4193.

La Compagnie d'Assurance des Cultivateurs vs. *Virginie Beaulieu.*

JUGE:—Que dans les causes au-dessous de $60, tout plaidoyer au mérite produit à la suite d'une exception préliminaire, doit être reçu gratuitement par le greffier, lorsque l'honoraire établi par le tarif pour la contestation des actions de la classe en question, a été payé sur l'exception préliminaire.

L'action en cette cause fut instituée pour la somme de $17.

En réponse à cette action, la défenderesse produisit une *exception dilatoire* sur laquelle avait été payé au greffier, conformément au tarif, un honoraire de 30 centins.

La Cour disposa de cette exception, après quoi la défenderesse produisit un *plaidoyer au mérite*, que le greffier reçut et parapha sans exiger un nouvel honoraire.

La demanderesse prétendant que ce plaidoyer avait été produit illégalement, en demanda le rejet par la motion suivante :

" Motion de la demanderesse pour que le plaidoyer au mérite de la défende-
" resse soit déclaré nul, de nul effet et comme non avenu, parce qu'il a été
" produit illégalement, n'a jamais été et n'est pas revêtu des timbres requis par
" la loi et le tarif, et qu'icelui soit en conséquence rejeté du dossier avec dé-
" pens."

J. G. D'Amour, de la part de la défenderesse, lors de l'audition sur cette motion, prétendit qu'en pareil cas aucun honoraire nouveau *n'était imposé par le tarif*, et que l'usage avait toujours été de ne payer qu'un seul et même honoraire sur la contestation de ces actions; qu'il importait peu que cette contestation fût faite au moyen d'exceptions préliminaires ou de plaidoyers au mérite ou même des deux à la fois: rien n'empêchant que dans ces petites causes, et à raison de leur minime importance, tous ces moyens de contestation ne fussent produits en même temps, pour un seul et même honoraire. Et au soutien de ces assertions, il cita l'article 1097 du C.P.C., ainsi que le tarif relatif au greffier de la Cour de Circuit, No. 84, et la cause de Thibeault vs. Coderre, rapportée au 15 L.C.J. 330. Il invoqua aussi la pratique constamment suivie à Québec, de n'exiger qu'un seul honoraire en pareil cas.

Et après mûr examen, la Cour se prononça en faveur de la défenderesse, et exprima le désir de voir régner à l'avenir une uniformité parfaite dans les questions de ce genre; et adoptant les vues exprimées par le tribunal dans la cause de Thibault vs. Coderre, elle rejeta la motion de la demanderesse, avec dépens.

Motion rejetée.

N. Durand, pour la demanderesse.
J. G. D'Amour, pour la défenderesse.
(J.G.D.)

COURT OF QUEEN'S BENCH, 1879.

MONTREAL, 22ND DECEMBER, 1879.

Coram SIR A. A. DORION, C.J., MONK, J., RAMSAY, J., TESSIER, J., CROSS, J.

No. 229.

J. B. ADAM,

(*Plaintiff in the Court below,*)

APPELLANT;

AND

HARRIET FLANDERS,

(*Defendant in the Court below,*)

RESPONDENT.

HELD:—That since the Civil Code came into force, though a person may have acquired an immoveable in good faith, and be in open possession thereof as proprietor, yet, if the *acte* by which he acquired, though registered within thirty days, has not been registered until after the registration of a judicial or other *hypothèque* against the vendor, the latter claim attaches and has the preference.

The registration of a deed of alienation within thirty days from its date protects only the rights of the vendor or donor, and has no retroactive effect in favor of the person who acquires the property.

The appeal was from a judgment of the Circuit Court, District of St. Francis, dismissing a hypothecary action. The judgment was in these terms:—"Defendant, being the owner in good faith of the property in question in this cause, under deed of sale, before the judgment under which plaintiff claims hypothec in this cause was rendered, whether actual delivery was made or not, this action is dismissed with costs."

The sale was registered within thirty days, but appellant submitted that the delay allowed by article 2083 C. C. is for the exclusive benefit of the vendor.

MONK, J. (*diss.*), found it impossible to concur in the judgment about to be rendered. His Honor was of opinion that the registration of a judgment will attach only against property in the possession of the judgment debtor, and that registration against a property which has been sold by the debtor previously, and has passed out of his possession, and is openly possessed by another, is without effect. He considered that this was the correct interpretation of Art. 2026, "Legal hypothec affects such immoveables only as *belong* to the *debtor*," &c. He was, therefore, of opinion that the judgment should be confirmed.

SIR A. A. DORION, C.J.—Le 20 novembre 1877, l'intimée a acheté par acte sous seing privé, une terre d'un nommé J. B. Payet.

Le 13 décembre suivant, l'appelant a obtenu jugement contre Payet pour $35. Ce jugement a été enregistré le 17 décembre 1877, avec l'avis requis par l'article 2121, C. C.

Le 20 décembre, l'intimée a fait enregistrer son titre d'acquisition.

L'appelant a depuis porté contre l'intimée une action en déclaration d'hypothèque pour le montant de son jugement en capital, intérêts et dépens.

L'intimée a répondu qu'elle avait acheté de bonne foi; qu'elle était en possession de l'immeuble lorsque l'appelant avait obtenu son jugement, en sorte qu'il

Adam and Flanders.

n'avait pas pu acquérir d'hypothèque en le faisant enregistrer ; que d'après l'article 2121, C. C., les hypothèques judiciaires n'affectent que les immeubles qui appartiennent au débiteur lors de l'enregistrement, et que de plus l'intimée ayant fait enregistrer son acte d'acquisition dans les trente jours de sa date, l'enregistrement avait eu l'effet en vertu de l'article 2100, C. C., de lui conserver son droit de propriété.

Cette défense a été maintenue par le jugement rendu par la Cour de Circuit, à Sherbrooke.

L'appelant se plaint de ce jugement, et la question est d'un grand intérêt et présente des difficultés sérieuses.

Avant le Code " l'enregistrement d'un droit réel ne pouvait nuire à l'ac- " quéreur d'un héritage qui alors (et avant la mise en force du Code) en était " en possession ouverte et publique à titre de propriétaire, lors même que son " titre n'aurait été enregistré que subséquemment."

Ce sont là les termes de l'art. 2088 du C. C., et ils indiquent que la même règle n'a pas lieu pour les acquisitions faites depuis le Code.

Ces mots, " et avant la mise en force de ce Code," n'étaient pas dans le projet des commissaires. Ils ont été ajoutés lors de la discussion qui a eu lieu dans l'assemblée législative pour donner effet à la suggestion des commissaires, adoptée dans l'article 2130, de faire dépendre le rang des hypothèques et autres droits réels de la date de l'enregistrement des actes dont ils résultent, excepté dans les cas spécialement exceptés, et sans égard à l'antériorité de la possession d'aucune des parties intéressées.

Cet article 2130 déclare entr'autres choses, que les droits ont rang suivant la date de leur enregistrement, hors les cas mentionnés dans les deux premiers paragraphes et celui des articles 2088 et 2094. Les parties en cette cause ne se trouvent pas dans les exceptions indiquées.

L'article 2130 § 5, veut encore que, " lorsque un titre d'acquisition et un " titre créant hypothèque relativement au même immeuble sont entrés en même " temps, la priorité du titre établit le droit de préférence."

Cela confirme la règle que s'ils ne sont pas entrés ou enregistrés le même jour, celui des deux qui aura été enregistré le premier devra avoir la préférence.

L'article 2098 veut aussi, que le titre d'acquisition, qui n'a pas été enregistré ne puisse être opposé à un tiers qui a acquis le même immeuble, du même vendeur, pour valeur, et dont le titre a été enregistré ; et que jusqu'à ce que l'acquéreur ait fait enregistrer son titre, l'enregistrement de toute cession, transport, hypothèque, ou droit réel par lui consenti et affectant l'immeuble est sans effet, ce qui équivaut à dire que l'acquéreur ne peut conférer aucun droit réel sur les immeubles qu'il a acquis tant qu'il n'a pas fait enregistrer son titre ou droit de propriété. S'il ne peut conférer aucun droit réel tant qu'il n'a pas fait enregistrer son titre, c'est que de fait, il n'a acquis aucun droit de propriété qu'il puisse opposer à ceux qui ont acquis à l'encontre de son vendeur quelque droit sur l'immeuble et qui ont fait enregistrer leurs titres.

L'article 2036 énonce la même règle en disant que " l'hypothèque judi- " ciaire acquise depuis le trente et-unième jour de décembre 1841, jusqu'au

" premier septembre 1860, n'a d'effet que sur les biens que possédait le débiteur " au temps où le jugement a été rendu ou l'acte judiciaire exécuté."

Ici l'hypothèque judiciaire est postérieure au premier de septembre 1860. Elle n'est donc pas affectée par la restriction contenue dans cet article, et elle peut affecter des immeubles qui ne sont plus en la possession du débiteur, mais dont l'aliénation n'a pas été complétée par l'enregistrement, et qui d'après les régistres du bureau d'enregistrement sont encore censés lui appartenir.

Toutes ces dispositions ont eu pour objet de perfectionner le système hypothécaire de manière à donner la plus de garantie possible à ceux qui sur la foi des inscriptions aux bureaux d'enregistrement acquièrent des droits réels de ceux qui y sont portés comme propriétaires d'immeubles, sans égard à ceux dont les droits n'y sont pas constatés par l'enregistrement de leurs titres.

Cette règle peut être rigoureuse et donner lieu dans certains cas à des injustices, mais elle est nécessaire pour la sûreté des transactions hypothécaires, et ne cause de préjudice qu'à ceux qui ont négligé de se conformer aux exigeances des lois d'enregistrement.

Quand à la prétention que l'intimée ayant fait enregistrer son acte d'acquisition dans les trente jours de la vente, l'enregistrement doit d'après l'article 2100 avoir le même effet que s'il avait eu lieu le jour même de la vente, elle est mal fondée.

L'enregistrement d'un acte d'aliénation dans les trente jours de sa date ne protège que les droits du vendeur, donateur ou échangiste, et cet enregistrement n'a pas d'effet rétroactif en faveur de l'acquéreur. (Art. 2100 C. C.)

Il faut donc dire que l'appelant ayant fait enregistrer son hypothèque avant que l'intimée ait fait enregistrer son titre d'acquisition, c'est l'appelant qui doit avoir la préférence et que son action hypothécaire est bien fondée.

Le jugement de la Cour Inférieure est infirmé.

RAMSAY, J. The appellant obtained judgment against one Payet for $35 and costs on the 13th December, 1877. On the 17th December, 1877, the said judgment was enregistered against the property mentioned in the declaration "as appearing to be the property and in the possession of the said Payet," as it is contended within the terms of Art. 2121 C. C. "The judgments and judicial acts of the Civil Courts confer hypothecs when they are registered, from the date only of the registration of a notice specifying and describing *the immovables of the debtor* upon which the creditor intends to exercise his hypothec." On the night which followed the rendering of the judgment, that is the night of the 13th to the 14th of December, 1877, Payet left his home with all his movables, and has not since been heard of. Subsequently appellant found respondent in possession of the premises, and as she would not pay his claim he sued her hypothecarily as *tiers détenteur*. To this action respondent pleaded that she had purchased the land in good faith and paid for it on the 20th November, 1877, and that she had registered her title on the 20th December of the same year, and that, consequently, when the judgment against Payet was rendered on the 13th December, he was not owner of the land in question. In support of her pretension she produced a deed *sous seing privé*, which was supported by parol testimony. It is now contended that this parol testimony was not admis-

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sible, and that therefore the judgment of the Court below should be reversed. I don't think we can look at any question of evidence on this appeal. From the way in which it has come up, we can only look at the law. We could not safely say that evidence which we do not see is irregularly taken. But in any case it seems the *sans seing privé* deed for the sale of lands in the Townships makes proof if supported by parol testimony, and if so it must be sufficient to fix its date by oral evidence.

The case is argued in appellant's *factum* as a question of fraud. There appears to be no suggestion of fraud so far as I can see, but one simply of law, that is to say, whether the unregistered title of the purchaser is to be defeated by the registration of a judicial hypothec subsequent to the sale.

I may at once say that I do not think the first portion of Art. 2100 C. C. affects the case. The thirty days given for registration is in favor of the vendor. It may perhaps be asked why it or some other delay was not also given in favor of the purchaser, but the answer is the law has so willed it, and has made rules applicable to registration where a delay is specially allowed and where it is not. It was primarily the duty of the purchaser to register. That would have given effect to her title and ensured its priority (2082). But if no penalty is attached to her failure to register, then her title being perfect must prevail (1025). In default of such registration her title of conveyance could not be invoked against any subsequent purchaser who had registered his title (2098), provided the two purchasers had a common *auteur* (2089). There is no article which declares, in so many words, that the hypothec acquired and registered subsequently to the sale shall take precedence of the unregistered conveyance; but in Art. 2130 we find that "if a deed of purchase and a *deed* creating a hypothec, both affecting the same immoveable, be entered at the same time, the more ancient deed takes precedence." This seems to imply that if they were entered at different times the first registered would take precedence. Otherwise the rule would be of no use. In the absence, however, of a special article, it is not without doubt whether a Court should extend its discretion to interpret legislative enactments so as to introduce a totally new rule of law. I am inclined, however, to think that in a case where there is a rule of an analogous character, containing precisely the principle invoked, and a further disposition seeming to imply that it was the intention of the Legislature to include the case not specially provided for, it is competent to the Courts to interpret the law so as to include it.

But this does not decide the case. The point on which it turned in the Court below was, that as this was a judicial hypothec it could only attach to property possessed at the time when the judgment was rendered. This was not a difficulty before the Code, but now, it appears, that this distinction only applies to judgments before 1st September, 1860 (2036). We therefore have one article (2034) expressing the law as to the hypothec of judgments generally; then we have a provision as to their effect before the 31st December, 1841 (2035), and again another as to their effect between this date and the 1st September 1860, but none as to those since. How do they attach? This is provided for by the article already cited (2121). But here another difficulty arises; they only

attach on a notice "specifying *the immovables of the debtor.*" Was the immovable in question an immovable of the debtor on the 17th December, 1877, when the registration took place? If not, are we to extend the interpretation we have given to the law, on the strength of 2130 to judicial hypotheca? The English version uses the word "deed," which would seem to exclude a judgment supplemented by a notice specifying and describing the immovables. A deed is an instrument in writing comprehending an agreement or contract. It is somewhat more circumscribed than an "*acte*" in French. But this difficulty is avoided by the French version of the Code, which uses the generic word *titre*, and curiously enough in the English version the word title is used in an exactly analogous case immediately preceding the one quoted in the same article. I am therefore disposed to think now that the alteration of the law in the Code, which was not mentioned at the bar, and probably not brought before the learned judge in the Court below, is in favour of appellant, and that the judgment should be reversed.

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The judgment is as follows:—

"Considering that the judgment which the appellant obtained on the 13th day of December, 1877, against Jean Baptiste Payet, was duly registered on the 17th of December, 1877, with a notice describing the property thereby affected as required by Art. 2026;

"And considering that the deed of sale *sous seing privé* by the said Jean Baptiste Payet to the respondent of the 20th day of November, 1877, although anterior in date to the said judgment, was only registered after the said judgment had been registered, to wit, on the 20th of December, 1877;

"And considering that, according to Article 2130, real rights which are subject to registration, other than those therein excepted, take their rank according to the date of their registration, and that neither the judgment obtained by the appellant against the said Jean Baptiste Payet, nor the deed of sale by the said Jean Baptiste Payet to the respondent, fall within any of the exceptions mentioned in said article;

"And considering that from the dispositions contained in Articles 2036, 2080, 2098, 2120 and 2130, the said appellant has acquired a judicial *hypothèque* on the property described in the declaration in this cause, from the date of the registration of the said judgment and notice describing the said property;

"And considering that by virtue of Articles 1027 and 1472 of the Civil Code, the respondent, in the absence of registration of her deed of purchase, acquired no title to the said property as against the said appellant who had registered his judgment prior to the registration of her said deed of purchase;

"And considering that there is error in the judgment rendered by the Circuit Court, sitting at Sherbrooke, on the 14th day of October, 1878;

"This Court doth reverse the said judgment of the 14th day of October, 1878, and doth condemn the respondent to pay to the appellant the costs on the present appeal, and rendering the judgment which the said Circuit Court ought to have rendered, doth declare the piece or parcel of land described in the declaration as follows, to wit [the description follows], to have become and to be bound, affected and hypothecated for and to the payment of the sum of $35 and interest

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from the 8th day of October, 1877, and costs incurred in the said Circuit Court, and the said respondent is hereby condemned to quit, deliver up and abandon the said immovable within 15 days of the service upon her of the present judgment, in order that the same be sold, according to law, upon the curator to be appointed to the *délaissement*, the proceeds of the sale thereof to be applied to the payment of the said sum of $35, with interest on said sum of $35 from 8th October, 1877, and costs of suit, unless the said respondent prefers to, and do pay to the said appellant the said sum of $35, interest as aforesaid, and costs of suit, and in default of the said respondent to quit and abandon the said immovable and to pay the said sum, interest as aforesaid, and costs, within the delay aforesaid, doth condemn the said respondent to pay and satisfy to the said plaintiff the said sum of $35, with interest on the said sum of $35 from the 8th October, 1877, and costs incurred in the said Circuit Court. (The Hon. Mr. Justice Monk dissenting.)"

L. C. Bélanger, for appellant.

Hall, White & Panneton, for respondent.

(J. K.)

COURT OF QUEEN'S BENCH, 1878.

MONTREAL, 19TH DECEMBER, 1878.

Coram SIR A. A. DORION, C.J., MONK, J., RAMSAY, J., TESSIER, J., CROSS, J.

No. 229.

ADAM, APPELLANT;

AND

FLANDERS, RESPONDENT.

HELD:—That an appeal lies to the Court of Queen's Bench, *on points of law*, from a judgment of the Circuit Court, when the sum or value of the thing demanded amounts to or exceeds $100, although the evidence has not been taken down in writing.—C.C.P. 1142, par. 1.

Sir A. A. DORION, C.J.—This is a motion to reject the appeal from a judgment rendered by the Circuit Court, on the ground that, as the evidence was not taken in writing, there can be no appeal. The case of the Corporation of St. Philippe vs. Lussier, 13 L. C. R. 497, was cited in support of the motion.

This last case was decided in 1863, that is, before the Code of Civil Procedure, which provides, by article 1142, that "cases in which the evidence has not been "taken down in writing can only be appealed on points of law."

This article expressly recognises the right of appeal in such cases as this, but limits the jurisdiction of the Court to the adjudication of the questions of law which are raised.

We have so decided in June, 1874, in the case of The Municipality of St. Guillaume & The Corporation of the County of Drummond.

The motion to dismiss the appeal is therefore rejected.

L. C. Bélanger, for appellant.

Hall, White & Panneton, for respondent.

(J.K.)

COURT OF QUEEN'S BENCH, 1880.

MONTREAL, 24TH DECEMBER, 1880.

Coram SIR A. A. DORION, C. J., MONK, J., CROSS, J., BABY, A. J.

No. 56.

DAVID DARLING ET AL.,
(*Defendants in the Court below*),

AND — APPELLANTS;

JOSEPH BARSALOU ET AL.,
(*Plaintiffs in the Court below*),

RESPONDENTS.

An imitation of a trade mark is colorable when a careful inspection is necessary to distinguish its marks and appearance from those of the manufacture imitated, but not when ordinary attention may enable purchasers to discriminate.

The plaintiffs, Barsalou & Co., who had been in business as manufacturers of soap for upwards of seven years, were registered owners of a trade mark used to distinguish an article of laundry soap, largely manufactured and sold by them. The trade mark consisted of a horse's head placed in the centre of the front of the cake of soap, with the words impressed over it, "The Imperial Trade Mark;" and under it the words, "Laundry Bar," with the address of the firm, "J. Barsalou & Co., Montreal," on the obverse side. The defendants were also extensive manufacturers of soap, in the same city, for upwards of thirty years. At the request of one Bonin, a grocer, they manufactured for him a soap somewhat similar in appearance to Barsalou & Co.'s soap, but without any proved intention of imitating the latter. Bonin's soap bore the impress of a unicorn's head similarly placed, with the words, "A. Bonin, 115 St. Dominique Street, Very Best Laundry," on the face of the cake, and there were no words on the obverse side.

HELD:—That there was not sufficient resemblance or similarity between the marks and inscriptions to deceive persons of ordinary intelligence and observation, and the defendants could not be restrained from continuing the manufacture of their soap.

Appeal from a judgment of the Superior Court, Montreal, RAINVILLE, J., maintaining the action of the respondents.

The judgment of the Superior Court was in these terms:—

"La cour, etc.

"Considérant que les demandeurs ont prouvé les allégations de leur déclaration;

"Considérant que la marque par les défendeurs sur le savon par eux manufacturé et vendu est une imitation frauduleuse de la marque de commerce des demandeurs, et de nature à tromper les acheteurs en général;

"Considérant que l'impreinte de la licorne est faite de manière à représenter la tête d'un cheval plutôt que celle d'une licorne;

"Considérant qu'il est prouvé que des acheteurs ont été trompés sur la ressemblance des dites deux marques;

"Déboute les défendeurs de leur défense, et les condamne à payer aux demandeurs la somme de $100 de dommages, avec intérêt," &c.

The facts are fully set out in the observations of the Court of Appeal.

CROSS, J. Barsalou & Co. sue Brady & Darling for $2000 damages for infringing a trade mark which they, Barsalou & Co., own and have registered and use to distinguish a special article of laundry soap which they manufacture, and which they allege to be in great repute. Barsalou & Co. also demand an injunction

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to restrain Brady & Darling from the future use of this trade-mark upon soap manufactured by them.

Brady & Darling plead that the soap respecting which the complaint is made was manufactured by them in small quantity to order for A. Bonin, grocer, No. 115 St. Dominique street, Montreal, without any intention whatever of imitating the soap or trade mark of Barsalou & Co; that it in fact contained no imitation whatever; the device and inscription on their soap being different from that on Barsalou & Co.'s soap, with no probability nor even possibility, with the exercise of ordinary intelligence, of the one article being taken for the other.

A great number of witnesses were examined on both sides, and specimens of the articles in question produced, as well as of a variety of other soaps of the manufacture of Brady & Darling.

The Superior Court, by its judgment rendered on the 30th April, 1879, held that Barsalou & Co. had made out their case for damages, and condemned Brady & Darling to pay $100, as such, but did not pronounce on the conclusions for injunction.

The reasons given for the judgment were that the mark on the soap manufactured by Brady & Darling was a fraudulent imitation of Barsalou & Co.'s trade-mark, and that purchasers had been deceived by the resemblance of the marks on the two articles.

Darling & Brady appealed from this judgment.

Any difficulty in the case arises more from the appreciation and applicability of the evidence to the particular case than doubt as to the principles of law which should govern it.

Barsalou & Co. have had a well-established business as soap manufacturers for upwards of seven years prior to the institution of this action.

They are registered owners of a trade mark which they use to distinguish an article of laundry soap largely manufactured and extensively sold by them, made in the shape of square cakes or bricks, with their trade mark inscribed thereon.

This trade mark consists of a horse's head placed in the centre of the front or one side of the square, with the words inscribed, or rather impressed with the die, over it "The Imperial Trade Mark," and under it the words "Laundry Bar," with the address of the firm, J. Barsalou & Co., Montreal, on the obverse side.

Brady & Darling are also extensive manufacturers of soap, with a well-established business and reputation, extending back for upwards of thirty years prior to the institution of this action. They have been in the habit of manufacturing a variety of soaps in cakes similar in shape and general appearance to the cakes of soap bearing the trade mark of Barsalou & Co., and with various devices impressed thereon, and amongst others with a unicorn's head.

Alfred Bonin, grocer, of No. 115 St. Dominique street, applied to them to manufacture for him a superior article of soap, in cakes of a convenient size, that he could sell at a particular price named, with his address thereon, so as to be used by him as a means of advertising his business.

Bonin suggested as a device a female face, but Darling, Jr., a clerk in the

manufacturing establishment, persuaded him that the head of an animal would be more appropriate, and among other sketches made that of a unicorn, which he recommended. It was agreed to be adopted as being different from any other device then known to be in use. The inscription was then also agreed to, A. Bonin, 115 St. Dominique St., Very Best Laundry, to be disposed of in four lines, surrounding the device, with no inscription whatever on the opposite face.

None of the sketches drawn by Darling, Jr., were given to Ford, who manufactured the die to make the impressions on Bonin's soap; he was simply told to make a unicorn's head, to place it in a fitting posture, and dispose of Bonin's address with the words Very Best Laundry in a certain number of lines, which he did. The inscription has no kind of resemblance to that on Barsalou & Co.'s soap, there being but the one word Laundry used in common, all the others being different, and the only feature having any kind of resemblance in the two being the horse's head in the one and the unicorn's head in the other; they are similarly placed, alike in size and in the general appearance of the head, with the exception of the horn in the forehead of the unicorn; they differ besides in this that the head of the horse is cut clear and deeply indented, with a well-defined mane, while the unicorn has no mane, and is traced by slight lines on the surface of the cake of soap.

If all other marks but the two heads were defaced on the respective soaps, the distinction between them could still evidently be made with tolerable ease. Apart from the minor distinctions, one is clearly enough the head of a renowned but now esteemed fabulous animal, a unicorn; the other that of a well-known and familiar animal, a horse. The unicorn is usually depicted as having, and is reputed to have had, the head of a horse with, however, the very distinct and remarkable feature of a horn in the forehead, which is represented in the one in question figured on Bonin's soap, and ought to be considered a notable distinction. Add to these distinctions the difference in the inscription on the two soaps, especially the distinct address of each several manufacturing firm, and the dissimilarity is about as striking as any two articles of a like kind proceeding from different manufacturers.

It is made abundantly evident that no imitation was intended by Brady & Darling, and there was no fraud in their action in the matter.

The proof does not establish that Bonin's soap so manufactured by Brady & Darling was ever actually sold as soap of Barsalou & Co.'s manufacture. Nor do we find any proof of any actual damage whatever having been sustained by Barsalou & Co. from the acts or conduct of Brady & Darling respecting the manufacture in question, or resulting therefrom in any way whatever.

It was urged that the similarity of the unicorn's to the horse's head made Bonin's soap liable to be taken for Barsalou & Co.'s. On this point there is some controversy in the evidence, which, after all, simply reduces itself to matter of opinion.

Mr. Taché, Deputy Minister of Agriculture, who has charge of the Patent Department for the Government at Ottawa, is examined; his evidence is valuable as that of an experienced expert. He does not pretend to say that, notwithstanding the registration of their trade mark of a horse's head by Barsalou & Co.,

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Brady & Darling might not, by description, have procured the registration of the head of a unicorn as part of a trade mark, but the matter might then still be subject to the jurisdiction of the Courts, and he considers in this case that the close resemblance of the unicorn's head to the horse's head, together with a general resemblance of the placing of the inscription on Bonin's soap, makes it an imitation of Barsalou & Co.'s. This evidence, however valuable as from an expert, is still mere opinion, and it is to be borne in mind that Mr. Taché's functions are somewhat different from those of a Court of Justice. He would naturally seek to prevent controversy by refusing to register subsequent marks having even the faintest semblance to those already registered, while the responsibility is thrown on the Courts of determining whether the unregistered mark constitutes a fraudulent imitation of the one registered. Besides, the evidence of persons practically engaged in trade and in discriminating between such manufactures is entirely opposed to Mr. Taché's views; they find no difficulty whatever in discriminating between the two articles; and consider the chances of their confusion extremely improbable and unlikely to happen, if ordinary discrimination or observation is exercised. But it is urged that children and illiterate persons constituting a large proportion of the purchasers of such soap might be deceived. In the first place, to children and illiterate persons incapable of much discrimination trade marks would be of little account, and, on becoming sufficiently intelligent to notice them, they could scarcely fail to observe the marked distinction existing in the present case, and that even if perfectly illiterate.

It is not to be forgotten that the general appearance of the article might be much more likely to deceive than the trade mark. There are resemblances which are permissible from the necessity of the case, particularly in the article of soap; these are the form, size and color, which must all be permissible because such soap is usually made in shapes that resemble each other, especially square cakes. The size must, of course, be at the pleasure of the manufacturer, and the ordinary color of such soap, where dye is not used, is commonly much alike in all such soap, although it does appear that Bonin's soap was smaller in the blocks and of a slightly different color to that of Barsalou & Co.

Suppose a trade mark to be put upon ordinary building bricks of an individual manufacturer, it is obvious that, without reference to the mark, there would be little chance of an ordinary observer or purchaser distinguishing of whose manufacture were any particular pile of bricks. To resort to the trade mark would require some intelligence, and the exercise of such intelligence would be expected before it could be said that a purchaser was deceived.

I think that Barsalou & Co. have not succeeded in making out this point, as to the liability of Bonin's soap being taken for theirs, and this conclusion seems the more satisfactory inasmuch as, notwithstanding Bonin's soap continued to be sold for some time, it is not shown that, in a single instance, a purchaser was actually deceived so as to purchase it for Barsalou & Co.'s soap.

Although, in the language used by the judges in some of the cases cited by the appellants, one man is not to be allowed to sell his goods as those of another, yet there must be such a resemblance as to deceive a purchaser using ordinary caution, and when there is a reasonable ground for doubt the mark

has failed to accomplish its purpose; the resemblance must be such that ordinary purchasers, proceeding with ordinary caution, are likely to be misled. The case of Denis & Mounier vs. Vignier, Dodart & Co., cited by the appellants from Browne on Trade Marks, p. 174, sec. 253, I think particularly applicable. In that case the mark of the plaintiff consisted of a simple leaf of a grape vine, in which was inscribed the nature of the product and the name of the commercial house; the mark of the defendants consisted also of a leaf of a grape vine which, if not a complete copy of plaintiff's, at least had a strong resemblance to it, yet there were differences of detail, with different names inscribed on it, and the plaintiff there, in consequence, failed in his action; and in the language of Lord Cranworth, also cited: Although a Court will hold any imitation colorable which requires a careful inspection to distinguish its marks and appearance from those of the manufacture imitated, it is certainly not bound to interfere when ordinary attention may enable a purchaser to discriminate. This Court adopted the same view in the case of Kerry vs. Les Sœurs de L'Asile de la Providence de Montréal, and we see no reason for making a distinction in this case. We apprehend to interfere in this case to sustain Barsalou & Co.'s views would operate an unwarranted restraint on the freedom of trade. The judgment of the Court below will, therefore, be reversed, and Barsalou & Co.'s action dismissed.

We do not find it proved that there was any intention to imitate, or that there was any fraud, or that Barsalou & Co. have suffered any damage. The slight feature of resemblance between the brand used by Brady & Darling and the trade mark of Barsalou & Co. is not material, and not calculated to mislead ordinary purchasers, exercising ordinary caution. A question of some doubt might have fairly presented itself to the Court, if Barsalou & Co. had simply asked an injunction to restrain Brady & Darling from the use of the unicorn's head, as being too close a resemblance to that of a horse, but if, in such a doubtful matter, the Court had seen fit to interfere, I think it should have been without any award of damage, and perhaps without costs: but this case does not present itself here, the Superior Court having failed to adjudicate on the question of injunction, and there being no appeal by Barsalou & Co.

MONK, J. After the very full exposition of this case by Mr. Justice Cross I do not feel it necessary to advert at length to the pleadings and the evidence adduced. I would say, however, with regard to the alleged damage, that it is not proved that Barsalou & Co. sustained any loss or damage in consequence of the partial imitation of this soap. We should not feel justified, therefore, in any view we might take as to the resemblance of the manufacture, in awarding them actual damages.

The question of nominal damages will not come up either, because we are unanimously of opinion that the plaintiffs have not established their right even to nominal damages. The two soaps present marked differences, apparent even to those who do not make a minute examination of them. The difference between a horse and a unicorn may not be very certain. The one is an animal actually existing, while the other is a creature of fable, and is represented with a horn issuing from the head. But the two heads on the soap are not alike. The one is

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the head of a race horse, and is placed exactly on the surface. When we look at the other soap we find the head of an apparently clumsy animal, deeply indented. And, in addition to these variances, one has a horn attached. The color of the soap is somewhat different, and the size also varies. Any one with ordinary intelligence could perceive the difference. After giving the evidence considerable attention we cannot come to any other conclusion than that there was no infringement of the plaintiffs' rights, and we are unanimously of that opinion. The judgment will, therefore, be reversed.

The judgment is as follows:—

"Considering that it is in evidence that the print used by appellants on their soap is not the same as the one used by respondents in conformity to their trade mark, and there is no such resemblance or similarity between the two that the difference cannot easily be noticed by any person with ordinary care and intelligence;

"And considering that there is error in the judgment rendered by the Superior Court, at Montreal, on the 30th day of April, 1879:—

"This Court doth reverse the said judgment of the 30th of April, 1879;

"And proceeding to render the judgment which the said Superior Court should have rendered, doth dismiss the action of the respondents, and doth condemn them to pay to the appellants the costs incurred as well in the Court below as on the present appeal."

Judgment reversed.

Cruickshank & Cruickshank, for appellants.
Béique, Choquet & McGoun, for respondents.
(J.K.)

COURT OF REVIEW, 1880.

MONTREAL, 31st JANUARY, 1880.

Coram TORRANCE, J., RAINVILLE, J., JETTE, J.

No. 978.

Perkins es qual. vs. *Martin.*

HELD:—1. That an isolated act of pledging will not constitute the exercise of the trade of a pawnbroker, within the meaning of the Quebec Stat., 34th Vic., ch. 2, s. 69.

2. That payment of a penalty under said Act, in a *qui tam* action brought for its recovery, by depositing the amount with the Clerk of the Court in which the judgment was rendered, will, in the absence of proof of collusion, be an absolute bar in a subsequent action by the Revenue Officer for the recovery of the same penalty.

3. That, in the absence of proof that the affidavit required by the 27th and 28th Vic., ch. 43 sec. 1, had not been filed, such affidavit will be presumed to have been filed, when the writ has actually issued and judgment has been rendered thereon.

This was a *qui tam* action, for the recovery of the $200 penalty imposed by sec. 69 of the 34th Vic., ch. 2 (The Quebec License Act), on every person who "shall exercise the trade of a pawnbroker in this Province without a license."

The allegation of the declaration is that, on or about the 28th day of October, 1876, the defendant, illegally exercising the trade of a pawnbroker, did receive and take by way of pawn, pledge and exchange, from one Edmund P. Bowman, a gold watch of the value of $60, for the repayment of a loan by the defendant

to Bowman of a sum of $32, and that the defendant thereby exercised the trade of a pawnbroker; the said watch having been taken in pawn, pledge and exchange, otherwise than in the ordinary business of banking and the usual course of commercial dealings between merchants or traders.

By his first plea the defendant expressly denied that he ever exercised the trade of a pawnbroker, and alleged that the transaction between him and Bowman was a pledge or pawning recognized by the law of this Province (articles 1966 and following of the Civil Code), and that, in accepting such pledge, the defendant did not exercise the trade of pawnbroker, and did not require a license therefor.

By his second plea, the defendant alleged a prior suit for the same penalty, at the instance of one Galway L. Kemp, in which judgment was rendered in favor of the plaintiff, on the 29th day of January, 1877, and the payment by him of the penalty and costs to the Clerk of the Court, in which said judgment was rendered, in pursuance of the Statute 37th Vic., ch. 3, sec. 11, and claimed exemption, consequently, from liability to be condemned a second time (as in this suit) for the same penalty.

The plaintiff demurred to the second plea, on the ground that such a condemnation and payment were no bar to an action by the Revenue Officer, as in the present instance.

The plaintiff also replied specially to the second plea, to the effect that the suit by Kemp was instituted by collusion with the defendant, and that the writ of summons therein was issued improvidently and illegally; no affidavit having been previously fyled, as required by the Statute 27th and 28th Vic., ch. 43, sec. 1.

The hearing on the demurrer was reserved by order of the Court until the final hearing on the merits.

At the final hearing the Court dismissed the action for want of proof, and particularly because the plaintiff "failed to prove that the defendant hath illegally exercised the trade of a pawnbroker, as by his declaration he complains."

Racicot, for plaintiff:—Presumably "*the material averment of the declaration*," which, according to the judgment appealed from, "*the plaintiff hath wholly failed to establish in evidence*," *is the exercise of the trade of a pawnbroker by the defendant;* there can be no other averment. It is difficult, however, to understand the force of that reason. The 70th section of the above cited 34th Vict., chap. 2, *which was the law in force at the time of the institution of the action*, defines what a pawnbroker is; and the 69th sect. declares that every pawnbroker contravening this section shall incur a penalty of $200 *for every pledge he takes without license.* In this case it is abundantly proved that the pledge was taken by defendant from Bowman. It was not possible to prove all the cases in which defendant had taken pledges; he had no sign over his door nor any advertisement in newspapers indicating that he carried on the business of a pawnbroker; in fact his *ostensible* business has been that of a cheese maker, and he did not choose to advertise his private business as a pawnbroker, probably because he was aware of the penalty: in fact, he told the witness, Francis Bernard, *that he did not take things in pawn, but bought them,* that is, he would buy a thing with the understanding that when the money was

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reimbursed to him, he would *sell that thing back to the borrower;* is not that pawning? why did he try to hide these little financial operations under the false names of buying and selling? But, in addition to the evidence of the witnesses *Bowman, Bernard* and *Benoit*, the plaintiff has *the defendant's own admission that he was exercising the trade of a pawnbroker.* The defendant files copy of judgment *on his own confession* in the case of Kemp against him, and also copy of the declaration served on him in that case, and whereby the defendant was charged with the offence of having exercised the trade of a pawnbroker without license, almost word for word as in the declaration in this cause, and which charge the defendant admitted in its entirety by his confession of judgment. So that, if the defendant must succeed in this case it surely cannot be under his *first* plea, which the Court below virtually maintained by its *considérants.*

In support of his answer in law to the *second* plea, the plaintiff relies on 37th Vict. (Quebec) chap. 3, last paragraph of section 11, amending a former statute, in the following words: "Mais nulle action ou poursuite intentée par ".....une partie privée et nul jugement ou décision prononcée dans icelle ne pré- " vaudra contre ni sera plaidée dans toute poursuite intentée par l'officier du " revenu, à moins que le montant de la pénalité ou de la forfeiture imposée par " cet acte.....n'ait été recouvré au moyen de telle poursuite par une partie privée, " et n'ait été PAYE *à l'officier du revenu du district,* ou au magistrat qui a " rendu le jugement ou le greffier du magistrat de district, suivant le cas, ou à " moins que le défendeur n'ait subi le terme d'emprisonnement exigé par la loi, à " défaut de paiement de telle pénalité." This salutary clause was doubtless introduced into the License Law to prevent *collusive* prosecutions on the part of private individuals. In this case it is not alleged that the defendant paid the amount of the judgment in the Kemp case to anybody, but merely that he *deposited* it in the hands of the Clerk of the Circuit Court, *who is not authorized by law to receive payment of such monies,* probably with the intention of getting it back afterwards, with Kemp's assistance, from the Clerk; and in fact we find that a few days after he was sued in this case, he protested the Clerk of the Court to keep the said deposit $226.80 in his hands *till this case was decided.* Can any thing show more conclusively the necessity of the law above cited?

With reference to that *second* plea the plaintiff begs also to refer to Statutes of Canada 27-28 Vict., chap. 43, Preamble and section 1, which requires an affidavit from the prosecutor declaring that he is not acting *in collusion with defendant,* etc., but that he institutes such prosecution in good faith, etc., and which enacts *that no process of summons should issue without such affidavit.* In the case of Kemp referred to in said plea, *there was no such affidavit, probably because Kemp could not conscientiously make it;* the summons was, therefore, improvidently and illegally issued and was a nullity. In corroboration of the presumption of collusion between Kemp and defendant, which arises from the absence of the affidavit, plaintiff refers to the evidence of Hiram Seeley (Paper 21 of Record) and also to the uncalled-for *precaution* with which the defendant in that plea takes the trouble to allege that this action of Kemp *was instituted in good faith and that he was not acting in collusion with Kemp.* Who was *then* accusing him of bad faith or collusion? *qui s'excuse s'accuse.*

The plaintiff therefore respectfully submits that the defendant cannot succeed under either of his two pleas, and, as plaintiff has clearly proved the pawning of the watch, the judgment of the Court below ought to be reversed and the defendant condemned, in accordance with the conclusions of plaintiff's declaration, with costs.

Bethune, Q. C., for defendant:—At the *enquête* the plaintiff attempted to prove that the defendant had loaned money on pawn or pledge of moveable property on two or three other occasions, but failed to do so. The instance alleged in the declaration was, therefore, (as the declaration in reality itself admits) an isolated one. The Court, consequently, very properly held that such an act did not constitute the exercise of the trade of a pawnbroker. And the Superior Court here also held the same thing in Laviolette vs. Duverger, 3 Rev. Légale, 444 and 522. The 41st Vic., ch. 3, sec. 1, sub-sec. T, U, V, also supports the same view.

Although under the circumstances it is unnecessary to invoke the second plea, the defendant nevertheless claims all the benefit he is entitled to thereunder, the allegations whereof were all fully proved by the documentary and oral testimony submitted in the case.

The plaintiff wholly failed to prove any collusion between defendant and Kemp, as pleaded by the special answer; and, on the contrary, the defendant proved that he was moved to confess judgment, and deposit with the Clerk of the Court the amount of the penalty, in consequence of the opinion expressed by Mr. Racicot (the Attorney of Record of the plaintiff in this case), that he, the defendant, was really liable to pay the penalty.

The plaintiff also wholly failed to prove that the writ of summons issued in the Kemp case without the necessary preliminary affidavit. And, as the writ did really issue, and judgment was afterwards entered up thereon, the affidavit must be presumed, under the circumstances, to have been really fyled, as otherwise no writ could issue, or, in other words, the writ must be presumed to have legally issued, in the absence of any evidence to the contrary, "*omnia præsumuntur rite et solenniter esse acta.*"

The defendant respectfully submits that the judgment complained of was in all respects correct, and ought to be confirmed.

TORRANCE, J. The plaintiff sued for a penalty alleged to be incurred by defendant, for illegally exercising the trade of a pawnbroker on 28th October, 1876, by receiving and taking by way of pawn, pledge and exchange from one Edward T. Bowman a gold watch. By a first plea, the defendant denied that he had exercised such trade, that the transaction between him and Bowman was recognized by C. C. 1966, and that, in taking said watch, he did not exercise the trade of a pawnbroker. He also pleaded a second suit by one Kemp for the same penalty, in which he had been condemned. The Court in Bedford District held that the plaintiff had failed to prove the exercise by defendant of the trade of pawnbroker. I am of opinion that defendant did not exercise the trade of pawnbroker by the pledge in question on the 28th October, 1876. The Quebec Act 41 Vic., c. 3., sec. 1, ss. T, U, V, and Laviolette v. Duverger, 3 Rev. Leg. 444 and 552, are cited in support by the defendant. I would further remark

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that, if we adopted the pretension of the plaintiff as to the exercise of the calling of pawnbroker by defendant, plaintiff has failed to prove that the suit by Kemp was by collusion with defendant for want of the affidavit, for he has not proved the want of the affidavit.

Judgment of the S. C. confirmed.

Ernest Racicot, for plaintiff.
Bethune & Bethune, for defendant.
(S.B.)

COURT OF QUEEN'S BENCH, 1880.

MONTREAL, 12th NOVEMBER, 1880.

Coram SIR A.A. DORION, C.J., MONK, J., RAMSAY, J., CROSS, J., BADY, A.J.

No. 25.

WILLIAM J. SHAW,

(*Plaintiff in the Court below,*)

APPELLANT;

AND

KENNETH MACKENZIE ET AL.,

(*Defendants in the Court below,*)

RESPONDENTS.

The respondents, merchants, of Montreal, being informed that the appellant, a member of a Toronto firm indebted to them, was passing through Montreal on his way to Europe, applied to him for a settlement of their claim. The appellant refused payment, and the respondents then caused him to be arrested under a writ of capias; but the appellant having thereupon paid the debt was released, and proceeded on his voyage. The writ of capias was not returned.

The evidence was to the effect that appellant's firm were doing a considerable business in Toronto; that appellant was in the habit of going to Europe almost every year on business; and that when arrested under the capias he was about to make a visit to the Paris Exhibition, the business of the firm being carried on during his absence by his partner. There was some evidence that other parties had had unsatisfactory transactions with appellant, and that he had prevaricated with reference to the debt due to respondents. It also appeared that an action for the debt for which appellant was arrested was pending in an Ontario Court, and was contested by appellant on the ground that the suit had been instituted prematurely.

HELD:—1. An action of damages for false imprisonment will not lie, unless there be want of probable cause and malice combined. Malice may be presumed from want of probable cause, but where there is probable cause malice alone will not render the party who instituted the proceedings liable to damages.

2. The settlement of the debt by the appellant, in order that he might be released from custody, was not a waiver of any claim he might have for damages.

3. (By the majority of the Court) The circumstances of this case, establishing misrepresentation and false excuses by appellant, and precarious credit, accompanied by departure, amounted to probable cause, and the appellant's action of damages for wrongful arrest and false imprisonment was properly dismissed.

This was an appeal from a judgment of the Superior Court (JOHNSON, J.) rendered on the 30th of December, 1878, dismissing appellant's action with costs. (See 23 L. C. Jurist, p. 52, for report of the judgment of the Court below).

The recorded judgment of the Superior Court was as follows:—

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"The Court, having heard the parties by their respective counsel on the merits of this cause, examined the proceedings, proof of record and evidence, and deliberated;

"Considering, that the plaintiff has not proved that the defendants, in causing his arrest under a writ of *capias ad respondendum*, acted without reasonable or probable cause, doth dismiss his action, with costs *distraits*," &c.

J. J. Maclaren, for appellant:—

The action was brought by William J. Shaw, of the firm of W. J. Shaw & Co., Toronto, wholesale merchants, against Mackenzie & Powis, of Montreal, for damages for unjustifiably issuing a *capias*, and the wrongful arrest and imprisonment of the appellant thereunder, at Montreal, on the 19th July last, in cause No. 153 of the said Court: Mackenzie & al., plaintiffs, vs. Shaw & al., defendants, as appears by a copy of the affidavit and writ, No. 3 and No. 4 of Record.

The whole question is whether the respondents had proper cause for resorting to the extreme measures which they did—in other words: Were they justified in making the affidavit filed, and arresting the appellant thereunder, as they did, as a fraudulent debtor, who was about to abscond?

To the appellant, the question involved appears to be nothing less than this: Whether it be really the law that no Canadian merchant—or member of a firm, or, in fact, any other person, no matter what his property, reputation or standing may be—can dare attempt to sail to Europe by way of Montreal or the St. Lawrence, on business or the usual summer trip, or indeed leave Lower Canada, without being subject to be pounced upon and publicly arrested and imprisoned as an absconding debtor, provided only he or his firm owe over $40 or some one claims they do, even though it may be disputed, and a contested suit in a competent Court be pending relative thereto, as was the case in this instance. In other words, the judgment can only be supported on the ground that the mere fact of a merchant going out of the country, or an Ontario merchant passing through Lower Canada, is, *prima facie*, a case of fraudulent absconding.

Appellant claims that the judgment appealed from maintains the affirmative of this question, and can be supported on no other ground.

He also claims that such is not the law of this Province.

The appellant would now direct the attention of the Court to some of the salient points and facts in the case, which, he claims, show the issuing of the *capias* and arrest thereunder to have been wholly unjustifiable and without probable cause, and indeed wilfully malicious.

The first point to be noted is the affidavit for the *capias* sworn to by the respondent, Mackenzie, with the approval of his partner, on the 19th July last, No. 3 of Record.

In this affidavit, respondent, Mackenzie, swears, *inter alia*: "That deponent "has reason to believe and verily believes that the said William J. Shaw, one of "the defendants, who is presently in the said City of Montreal, is about to "leave immediately the Province of Canada and Dominion of Canada, with in- "tent to defraud his creditors in general and the plaintiffs in particular, and that "such departure will deprive plaintiffs of their recourse against the said Wil- "liam J. Shaw; that the reasons of the said deponent for stating his belief as

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"above are: that Mr. Powis, the deponent's partner, was informed last night in "Toronto, by one Howard, broker, that the said W. J. Shaw was leaving "immediately the Dominion of Canada, to cross over the sea for Europe or parts "unknown, and deponent was himself informed this day by James Reid, broker, "of the said W. J. Shaw's departure for Europe and other places; and fur- "ther deponent saith not."

Now appellant claims that respondents had no reason to believe and could not believe that appellant was about immediately to leave the country with intent to defraud his creditors generally and the respondents in particular, and that they had no information which justified them in swearing to such an allegation of fraud against appellant.

In the first place—respondents' claim was one, not against W. J. Shaw alone, but a partnership claim against the firm of W. J. Shaw & Co. of Toronto, who, to the knowledge of respondents, were continuing their business as usual, at the time, at Toronto: therefore, the departure of W. J. Shaw was not the departure of the only debtor whom respondents held for their debt, and the respondents do not pretend that he was taking partnership or other assets away with him; neither is it pretended that any change of the business or assets of W. J. Shaw & Co. took place preparatory or previous to his leaving the country. The respondents' own testimony is conclusive on this point.

The attention of the Court is called to the disingenuous answers of respondents, when asked if they did not know appellant had a partner, and that the business of his firm was being continued at Toronto.

At page 22, line 9, App. Ev., Mackenzie is asked—if he was aware whether appellant was in business alone or in partnership; he answers: "I under- "stood that he latterly had a partner." And at page 27, line 24, he is asked, "Were you not aware that his wholesale grocery business was being carried "on as usual at Toronto, at the time you issued the *capias*?"

Answer. "As a direct fact I was not; I was not in Toronto, I was living in "Montreal."

Question. "Did you not ask your partner, who had just returned from Toron- to, whether that was not the case?"

Answer. "I did not."

Now this deponent, who would wish to give the impression, as far as possible, that he knew nothing positive about appellant having a partner, is the same person who, on the 19th July last, in the affidavit referred to, swore "That "William J. Shaw and James Hutchinson, both of the City of Toronto, mer- "chants, and there doing business in partnership under the name of W. J. Shaw & "Co., are personally indebted," &c. This certainly shows that, on the 19th day of July, respondent's knowledge as to appellant's having a partner, and doing business in co-partnership at Toronto was not at all hazy, but quite positive; indeed, respondent Mackenzie, in his deposition at bottom of page 27, App. Ev., in effect admits that appellants' firm business was being carried on as usual at Toronto at the time the *capias* was issued, and that plaintiff also had a family living there, as appears by the following (line 41):

Question. "Did you not believe that his business was going on *as usual?*"
Answer. "I could not say."
Question. "Did you not believe it?"
Answer. "I presumed it was."
Question. "Did you know if he had a family in Toronto, apart from this "boy (boy accompanying plaintiff)?"
Answer. "Not for a fact, I did not."
Question. "Did you not believe that he had?"
Answer. "Yes, sir."

The fact is, in view of respondents' whole testimony and the positiveness of the affidavit as to the partnership of appellant and his firm carrying on business at Toronto on the 19th of July, and that the respondent Powis had only arrived from Toronto that morning, it is only hollow pretension on the part of respondents to pretend that they had any doubt on these points.

The next point to notice is what was the reputation and business standing and property of appellant, to the knowledge and belief of respondents.

At page 22, line 22, App. Ev., Mackenzie admits that appellant was reported to be worth $40,000 to $60,000, as stated in the books of the Commercial Agency, and that he believed that he was a large proprietor of real estate in Toronto.

The fact is, so high and so well known to respondents was the financial standing of the appellant, that in their first transaction with him (the one mentioned in this cause) they gave his firm four months' credit for $2400, without any other security, and without any special inquiries as to appellant's financial standing.

The high financial standing of Shaw, at the time, is shown in the evidence for the appellant of the witnesses Howard and Shields of Toronto, both business men, and in the evidence of Mr. Hague, manager of the Merchants Bank, Montreal.

Mr. Hague states that he has known appellant for ten or twelve years as a successful business man, and to his knowledge he had never failed; that he was greatly surprised when he found Mr. Shaw under arrest, and that, as soon as he was aware that the $2400 odd, for which he was capiased, was wanted to prevent Mr. Shaw from being detained on his departure to Europe, he at once had no hesitation in accepting Mr. Shaw's cheque for the amount.

It is impossible, from the facts of record, to believe that Mr. Shaw did not (not only in the esteem of the public but of the respondents themselves) occupy such a financial position as to preclude the possibility of respondents really believing that his departure could be fraudulent, or would deprive them or entail upon them loss of their debt.

It would be hard to find many business men whose financial standing at the time and past career would less justify swearing out a *capias*.

In view of the fact that the claim for which the *capias* issued was a partnership one; that the respondent knew that the partnership business was going on as usual; that appellant was then reputed to be worth $40,000 to $60,000, and was a large real estate proprietor in Toronto, and had a family there and business premises, and had been known to respondents by reputation for ten or

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twelve years as a business man, and so favorably that they gave his firm large credit without hesitation, and that his reputation and business standing was such as is disclosed by appellant's witnesses Howard, Shields, and Hague; surely it was incumbent upon defendants, before swearing that such a man was about to abscond with intent to defraud his creditors generally and the plaintiffs in particular, and publicly arresting him as a criminal, to have some *good and definite information of such fraudulent intent*, and to be able to show that he had been making some preparations or doing something that looked like preparations for such a fraudulent course; but respondents utterly failed to show any of these things, and there is no evidence of record to show that respondents knew of any special facts pointing to fraud or intent to defraud on the part of appellant.

Appellant having made such evidence as he has, it was absolutely necessary for respondents to show some tangible and reasonable grounds for the high-handed action they took, and the serious charge they made against appellant as a merchant and business man.

It is upon the information which they have shown in the record that they had on the 19th of July, 1878, that they must be judged.

It is what they knew at that time, and not what somebody else might pretend to have known, that is important.

It was very easy for respondents to discover a few persons—since they committed the act on the 19th July, 1878—who may have had some business troubles with the appellant, and it might be safely asserted that there is scarcely a business man in Montreal against whom it is not possible to produce as witnesses some persons with whom he has had business disputes, and who would be ready to give him a far worse character (no matter what his standing and reputation) than anything that has been attempted to be put on record against appellant in this cause.

The appellant also claims that respondents having elected to sue him in Ontario for the debt for which he was *capiased*, they had no right to resort to our Courts to *capias* appellant while the suit was pending before an Ontario Court, as admitted by respondents, App. Ev., p. 25, line 26, especially as they knew, while in Toronto, that he was going to Europe. They were limited to the remedies afforded them by the Court they had selected, and by that they had no right of *capias*.

The appellant submits that to hold that he was justifiably arrested as a fraudulent absconding debtor, is to expose almost every Canadian who visits the mother country on business or pleasure to be treated in like manner, and is to practically stamp as fraudulent absconders all who so travel, if they or their firm only happen to owe some one over forty dollars, or some one so claims. That such is the law he cannot believe, and he confidently asks the reversal of the judgment appealed from, with costs. He also respectfully submits that, under the circumstances and proof of record, he is entitled to substantial damages.

Doutre, Q. C., for respondents:—

The action of the appellant was for $50,000 damages, for false imprisonment in the common jail of this District.

By their plea, the respondents alleged :

That the appellant had not caused the return of the *capias* to be made, and had never contested the truthfulness of said affidavit on the proceedings for said *capias* ;

That the appellant, under such circumstances, has no action in damages against the respondents, resulting from the affidavit and writ of *capias*, and that his acquiescence was an estoppel to the said action ;

That the appellant cannot by this action oblige the respondents to prove, outside their own action on the *capias*, the truth of the allegations of the affidavit ;

That the appellant cannot now review or revise the proceedings on said writ of *capias*, having fully and voluntarily acquiesced therein, by paying the amount claimed ;

That the said respondent Mackenzie made such affidavit in good faith, and that he made the same with the sole intent of securing his debt ;

That it is false that the said respondents acted in the said instance with malice and without any cause or reason, and it is also false that they have advertised in the public papers that such writ of *capias* was issued, such publication having taken place without the knowledge of the said respondents ;

That the appellant cannot obtain any damages from the respondent resulting from said *capias*.

The writ of *capias* was returnable on the 2nd of September, 1878.

The action in damages was issued on the 31st of July, 1878, and made returnable on the 16th September, 1878.

The appellant had a delay of one month to cause the return of the *capias* and to contest the writ.

He took his action in damages twelve days after he had satisfied the *capias* without any reservation or protestation, and before the return of the said *capias*.

The respondents had no object in returning the said writ, having been paid their debt, interest and costs.

The appellant was entitled to have the writ returned the day after it was served on him, or any day before the return, so as to have had the opportunity of contesting the allegations of the affidavit, such affidavit then forming part of a record of the Court below, subject to a special contestation as per Art. 819 C. C. P. If the allegations were not true or not sufficient the *capias* could then have been quashed and dismissed.

If such proceedings had been taken, and with such a result, the present action might have had some foundation. The appellant contents himself with bringing an action in damages, for a trifling infringement of his liberty occasioned by the officer who made a constructive arrest, under a writ which, until set aside, fully protects the officer who issued it, the one who executed it, and the attorney and parties who laid the foundation upon which it was issued.

Prentice v. Harrison (7 Jurist, part 1, p. 580) and Huard v. Dunn are cited to show that the appellant must prove that the writ was set aside upon which he was arrested, before respondents can be held liable to an action for false imprisonment—and that he must besides show that it was set aside for the untruthfulness of the affidavit.

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Huard v. Dunn (3 R. L. 28), S. C.

Stuart, J.—Jugé qu'il n'y a pas d'action pour faux emprisonnement en vertu d'une conviction valide à sa face, tant que telle conviction est en pleine vigueur, et n'a pas été annulée ou cassée.

But even after the appellant has got rid of the writ of the Court which justifies the arrest—he must still show want of probable cause therefor on the part of the officer and the respondents, if the respondents actually were an instrument therein.

The appellant could have avoided paying by giving bail; the respondents were willing to accept certain persons, as stated by the bailiff charged with the writ. Although the boat was on the point of leaving Montreal for Quebec, he could have gone by rail four or five hours afterwards, which would have given him ample time to provide bail. Since he found the cashier of a bank disposed to accept his cheque, even though he had no funds in that bank, this cashier along with another person would assuredly have consented to become surety for a man like the appellant, enjoying, in their opinion, so high a credit.

In paying the amount he virtually assented and acquiesced in the rigorous proceeding of the respondents to secure payment of their debt. In giving security he would have reserved the right of, at any time, contesting the *capias*, whilst he renounced the right by the payment without reserve. The respondents invoke in support of this pretension the decision rendered by this Court in the case of Lapierre & Gagnon (8 Revue Légale, 726). The Court below, although rendering judgment in favour of the respondents, found no analogy between the two cases. It held that the payment made by the appellant was compulsory, and, moreover, that it was the only means by which he could escape imprisonment. The payment made by the appellant without reserve is therefore similar to the arrangement between Lapierre and Gagnon: both were voluntarily made, and, therefore, signified an acquiescence.

The appellant has completely failed to show the absence of probable cause for the issue of the *capias*. The respondents proved that the credit of the appellant was at that time very much shaken; that he was obliged to buy for cash, and that but a few days before the issue of the *capias* an assignee had been instructed to collect an account from him contracted in Montreal.

His sudden departure for Europe under pretext of benefiting his health, together with his statement to the respondents that "they might get their money in the best way they could," were surely quite sufficient to justify the respondents in taking the proceedings which resulted in detaining the person of the appellant for a few minutes. What guarantee had the respondents of the early or even remote return of the appellant? He was taking his son with him, his wife could have followed him at any time—what more was needed to justify the issue of the *capias*?

Sir A. A. Dorion, C. J., (*diss.*):—This is an action by which the appellant claims damages from the respondents for malicious arrest.

The appellant, a wholesale merchant, residing at Toronto, while on his way to Europe, to visit the Paris exhibition, was arrested at Montreal, on the 19th of July, 1878, on a *capias ad respondendum*, issued at the instance of the respondents and on the affidavit of Kenneth Mackenzie, one of them.

After the arrest, the appellant paid the debt, amounting to $2,440.15, and shortly after, he instituted the present action.

The respondents contend by their pleas that the appellant having paid the debt without contesting the *capias*, has acquiesced in the proceedings that they adopted against him, and that he is thereby estopped from claiming any damages; that the affidavit on which the capias issued was made in good faith; that the respondents have not acted with malice and without probable cause, and that the appellant is not entitled to any damages.

In his affidavit, Mackenzie, after alleging the indebtedness of the appellant, adds, "that deponent has reason to believe, and verily believes, that the said "William J. Shaw, one of the defendants, who is presently in the said City "of Montreal, is about to leave immediately the Province of Canada and Do- "minion of Canada, with intent to defraud his creditors in general and the "plaintiffs in particular, and that such departure will deprive plaintiffs of their "recourse against the said William J. Shaw; that the reasons of the said de- "ponent for stating his belief as above are: that Mr. Powis, the deponent's "partner, was informed last night in Toronto, by one Howard, broker, that the "said W. J. Shaw was leaving immediately the Dominion of Canada, to cross "over the sea for [illegible] or parts unknown, and deponent was himself informed "this day by James Reid, broker, of the said W. J. Shaw's departure for "Europe and other places; and further deponent saith not."

The affidavit required to obtain a writ of *capias ad respondendum* must show, in the terms of article 798 of the Civil Code of Procedure, "*that the de- "ponent has reason to believe, and verily believes, for reasons specially stated "in the affidavit, that the defendant is about to leave immediately the Province "of Canada, with intent to defraud his creditors in general or the plaintiff in "particular, etc.*

In the affidavit on which the *capias* issued there are no reasons stated for the deponent's belief that the appellant was about to leave the Province *with intent to defraud his creditors.*

The information which was the ground of deponent's belief that the appellant was about to leave the late Province of Canada, is given, but that is not sufficient to meet the requirements of the Code. Leaving the Province is not of itself evidence of an intent to defraud. This has been so repeatedly held that it is only necessary to refer to a few of the most recent decisions on this point. The cases of Hurtubise & Bourret, 23 L. C. Jurist 130; Henderson & Duggan, 5 Quebec Law Rep. 364; Ambrois & Malleval, 2 Legal News 159; and Paulet & Antaya, 3 Legal News 153; have settled this question beyond controversy.

As regards the evidence, the record shows that Howard and Reid, the two persons named in the affidavit, as being the source of the deponent's information, were both examined as appellant's witnesses. Howard says that he does not recollect having given any information to Powis, one of the respondents, that the appellant was about to leave for Europe, and he is quite positive that if he mentioned the subject at all it was the mere fact that the appellant was going to Europe for a trip. He knew the appellant was going to England, and understood he was going for a trip, more for his health than anything else—just to make a trip over and back.

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Reid says he mentioned to Mackenzie that he had heard that the appellant was on his way to Europe, and was passing through the city, as he was informed by a letter from Toronto:—He never said that the appellant was going for good, nor anything to that effect. He understood the appellant was going to Europe on business or pleasure. He said nothing which would lead the respondents to believe, or give them reason to believe, that the appellant was leaving for good, or from which any reasonable man could infer that he was leaving for good.

It is proved that the appellant was at the time of the arrest carrying on a large wholesale grocery business, at Toronto, in partnership with one James Hutchinson, under the name of W. J. Shaw & Co., that the appellant had several properties in Toronto, and that he was considered to be worth at least from $40,000 to $50,000, and that he, personally, as well as his firm, enjoyed an almost unlimited credit.

The appellant was going to Europe, where he went almost every year. He was taking one of his children with him, leaving his wife and another child at Toronto. His partner was also at Toronto, carrying on the business of the firm as usual.

The debt for which the arrest was made arose out of a transaction made through a broker. There had been some difficulty as to the terms of settlement, and the respondents had instituted legal proceedings in Ontario to recover their debt. The action was contested, and the proceedings were still pending when the capias issued.

The appellant had been the whole day at Montreal, and he was arrested at his hotel, as he was about to leave by boat, for Quebec, to take there the ocean steamship leaving the next morning.

On being arrested the appellant went to the boat with the bailiff who had arrested him, and meeting there Mr. Hague, the general manager of the Merchants' Bank, who accepted his check, he paid the debt, and was released.

Payment under such circumstances cannot be construed into an acquiescence in the proceedings of the respondents, nor as a waiver of any recourse the appellant might have against them. The payment was made under compulsion, to avoid imprisonment, and preserve appellant's credit.

The respondents have attempted to prove that the appellant had had some unsatisfactory transactions with other parties; but nothing amounting to fraud has been proved. These transactions were not of a recent date, and, even if fraudulent, they could not have justified the proceedings of the respondents unless they were in some measure connected with the departure of the appellant from the Province with intent to defraud.

Powis, one of the respondents, was at Toronto on the day previous to the arrest. He came to Montreal sooner than he had intended, and apparently for the purpose of taking proceedings against the appellant. While at Toronto he might, without the slightest difficulty, have obtained information as to the standing and position of the appellant. He might also have ascertained the object of his crossing the Atlantic, which was as much a matter of public notoriety as his intended departure was, yet Powis says that he made no inquiries whatsoever about these matters. It is not explained why Powis, who had first heard of the

appellant's movements, did not himself make the required affidavit, but allowed his partner to make it and draw unjustifiable inferences from the scanty information he had received.

The affidavit is insufficient in point of law, in not disclosing the grounds of belief of the deponent of the appellant's intent to defraud, and it is unfounded in fact, since the two principal witnesses have denied having given the information upon which it is predicated.

There is no evidence that the respondents had any reasonable cause to arrest the appellant, and the whole circumstances seem to indicate a malicious intention on the part of the respondents to punish him for having, rightly or wrongly, contested their claim before a Court of justice.

The proceedings of the respondents appear to me to have been characterised by malice and want of probable cause, and I would therefore reverse the judgment of the Court below, and condemn the respondents to such damages as could be considered a sufficient atonement for their unjustifiable conduct. My appreciation of these damages would, however, be far below the figure at which some of the witnesses have been disposed to assess them.

CROSS, J. (*diss.*) In this action W. J. Shaw, the now appellant, a merchant of Toronto, was plaintiff, and the firm of Mackenzie, Powis & Co., merchants of Montreal, were defendants. Fifty thousand dollars damages were claimed, the cause assigned being that the defendants at Montreal, on the 19th July, 1878, had wrongfully, unjustly, and maliciously caused the plaintiff to be arrested under a writ of *capias ad respondendum*, issued in virtue of an affidavit, made by Kenneth Mackenzie, one of them, the same being to the effect that the said William J. Shaw was then immediately about to leave the Province and Dominion of Canada with intent to defraud his creditors in general and the said firm of Mackenzie, Powis & Co. in particular, and that such departure would deprive them of their recourse for a debt of $2,440.15, they, the said Mackenzie, Powis & Co., at the time, knowing perfectly well that Shaw was then doing a large and profitable business in co-partnership with one James Hutchison, in Toronto, under the firm of W. J. Shaw & Co., and was not then leaving Canada with intent to defraud, but only for a trip to England on business and pleasure; that the business at Toronto was continued as usual, his family and partner remained there, and his purpose was to return in a short space of time, all which facts were well known to defendants. His arrest had been effected under most aggravating circumstances, when about to embark on the Quebec steamer on his way to England, and was made more grievous by the fact being publicly announced in the newspapers; he was thus coerced to pay, and did pay the demand for which he was arrested, although it was at the time in dispute in the Courts in Ontario, the proceedings on the *capias* being then ended; he had sustained heavy damages, for which he brought his suit.

The defendants, Mackenzie, Powis & Co., pleaded that their *capias* suit had not been returned into Court, that the plaintiff, W. J. Shaw, had never disputed the averments of the affidavit of Mackenzie, on which the *capias* issued, but, on the contrary, acquiesced therein, paid the debt, and were then estopped from disputing their truth or sufficiency; that the affidavit was made in good faith,

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without malice, and solely to secure their debt; the proceedings were not published by them.

Both parties adduced evidence, and on the 30th December, 1878, the Superior Court dismissed the action, holding that Shaw had not proved that Mackenzie, Powis & Co., in causing his arrest, had acted without reasonable or probable cause.

Shaw has appealed.

The proof makes it abundantly evident that Shaw was only leaving on a temporary visit to England with one of his boys, for health, pleasure and business,—a trip he was in the habit of making almost every year, and that this fact was well and publicly known in Toronto.

That his firm of W. J. Shaw & Co., composed of James Hutchison and himself, were doing a very large business in Toronto, which they had carried on for some ten or twelve years previously, and were in excellent credit, making large transactions, and that the defendants had themselves previously trusted the firm, and had given them credit to a considerable amount.

That Shaw had considerable real estate at Toronto, his family lived in a house owned by himself, and he was reputed to be worth from $40,000 to $60,000.

That his business was being carried on as usual by his partner in his absence, and his wife and family remained at Toronto.

That the debt for which he was arrested, a purchase of tea, made on the 25th of February, through James Reid, broker, Montreal, a four months' credit transaction, was then in dispute in the Court at Hamilton, Ontario, the question being whether Mackenzie, Powis & Co.'s claim had not been prematurely made.

All the facts with regard to Shaw's leaving must have been known to Mackenzie, Powis & Co., and, had any doubt existed on any point connected with his voyage, it could have been easily set at rest by a very simple enquiry, which Mr. Powis may be presumed to have made, having been in Toronto the day before the arrest, and having come to Montreal on the same train with Shaw, although he did not make his presence known to Shaw.

The credit of the firm of W. J. Shaw & Co. was seriously damaged by the arrest and the publication of the fact in the newspapers; they could only afterwards buy for cash, which greatly diminished their business.

Shaw was arrested at the door of the St. Lawrence Hall after he had come out from dinner, settled his bill, and was on the point of leaving to take the steamer for Quebec, on his way to England. Mackenzie was present, and insisted on a cash settlement. Shaw was, at his request, taken to the steamboat wharf, where he fortunately met Mr. Hague, manager of the Merchants' Bank, to whom he disclosed his embarrassing position and his anxiety not to miss his passage. Mr. Hague accepted his check on the Merchants' Bank for the amount demanded, which Shaw paid over to the bailiff, he was released and proceeded on his voyage.

In answer to plaintiff's proof, the defendants succeeded in getting several persons to say that they had had transactions with W. J. Shaw & Co.; some were satisfactory and some were not; according to one witness they were said

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to be apt to raise difficulties in regard to transactions, and a firm at Montreal had refused to have transactions with them. A person had also been sent from Montreal to collect a note from them, which he only succeeded in doing with some difficulty. William Macgregor, of New York, much relied on for respondents, said he knew of Shaw making large purchases of tea in New York, which it was supposed would result in a loss, and that a note of his, the amount he did not know, was overdue twelve or thirteen days before it was paid.

Such proof would not surprise in regard to any merchant who has had large transactions, he is not likely to have fully satisfied everybody with whom he may have had dealings, and it really has but little bearing on the case.

The salient facts all go to show that there was no purpose of fraud or fraudulent design, or any appearance of such, in Shaw's visit to England. No such inference can be gathered, even from the evidence given by the respondents themselves, and what they say cannot, by our law, make proof in their favor. The credit and standing of the firm, and of Shaw himself, afforded reasonable assurance that the debt would be paid when the pending legal dispute respecting it should be settled, and it did not appear that Shaw's departure would diminish the security.

While a *capias* was used as a means of compelling a debtor to answer in his person to civil process, and imprisonment for debt was of course, other rules would apply; but now that imprisonment for debt, as such, is abolished, and only exists for fraud, in the cases, and on the conditions prescribed by the Legislature, unless Shaw's be one of those cases of fraud, in which the law authorises a debtor to be arrested, respondents' proceedings against him cannot be justified; and in order to determine as regards their liability for damages, we should enquire whether, on the 19th July, 1878, Mackenzie, Powis & Co. had reasonable or probable cause for believing that Shaw was liable to arrest for their debt under the circumstances then existing.

The art. 798 of the C. C. P. requires, among other things, that deponent should state in the affidavit that he has reason to believe, and verily believes, for reasons specially stated in the affidavit, that the defendant is about to leave immediately the Province of Canada with intent to defraud his creditors in general or the plaintiff in particular. The leaving is, of itself, of little consequence, save as connected with the fraud: the reasons most material to be shewn are the reasons for belief in the intent to defraud, and, on reference to Mackenzie's affidavit, it will be found that these are wholly wanting, and the reasons there stated only go to show that the defendant intended to leave, thereby allowing the assertion of intent to defraud wholly unsupported by special reasons.

As I view the matter, the affidavit is insufficient in a material requirement; the deponent has not assumed the responsibility of swearing to particular reasons of intent to defraud, and on this point tenders no issue to be rebutted. Having failed to show sufficient reasons for the arrest, Shaw had no proof to make, and the burden was thrown upon Mackenzie, Powis & Co. to show a case for arrest, if this could be done outside of the affidavit, which affidavit had failed to do it. Had the affidavit contained these reasons, it would still have

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been the right of Shaw to have disproved them in this action, and it seems to me that he has proved an affirmative case sufficient to establish his good faith, even at the disadvantage of not being informed of the particulars he had to answer.

It is to be observed that Mackenzie in his affidavit refers to his partner Powis as one source of his information, Powis having told him that he had heard of Shaw's leaving, through Howard, broker of Toronto, and as another source of information, the broker James Reid of Montreal.

Powis, in his evidence, does say that he told his partner that he, Powis, was informed in Toronto by Howard that Mr. Shaw was coming down on the train to take Saturday's boat for Europe. Howard cannot remember that he even mentioned Shaw's name to Powis, he believes that he did not, but if he did, it was a mere mention of the fact of Shaw going to England, he being aware that he was going.

Reid states that he thinks he did mention to Mackenzie that he had heard that Shaw was going to Europe, but nothing to the effect that he was leaving for good, and only that he was going on business or pleasure. He thinks that, in a jocular way, he asked Mackenzie if he would *capias* Shaw.

There is nothing in these statements affecting the case, further than Mackenzie being informed in this manner that Shaw was going, a fact avowed, and not at any time disputed. Nor is there anything in the proof made by the defendants to alter the general features of the affair. It comes back to the question as to whether the fact of a person owing a debt going beyond the jurisdiction of the Courts of Canada is, from that circumstance alone, liable to arrest. As the law now stands I am decidedly of opinion that he is not, and so it has been already held, notably in the case of *Hurtubise & Bourret*, 23 L. C. Jurist, p. 130.

The contrary would entail the necessity of a merchant having business in England or the United States, before he crosses the border or attempts to embark for his passage, requiring to settle with every one who might possibly have a money demand against him, in fact, to adjust every controversy that might result in a liability. I think Shaw's arrest was without legal justification and it is made apparent as well through the inherent weakness of the defendant's case, as on the evidence adduced by the plaintiff, that Mackenzie, Powis & Co. had no reasonable or probable cause for arresting him. He is consequently entitled to damages. I would not award him much, for although from the absence of just cause malice would be implied, yet he owed the debt for which he was arrested, he did not suffer any great personal inconvenience, and the damage to his business is necessarily of an uncertain character. I would award him $500 damages and costs. I do not think there is anything in the defence of acquiescence and estoppel, he was under constraint by the arrest, an urgent necessity existed for his proceeding on his journey, he paid under coercion to be relieved from the arrest, and lost no time in asserting his right by the present action, which was instituted on the 31st July, 1878.

RAMSAY, J. To obviate all misapprehension let me say at once that the Court is not about to lay down any doctrine at variance with the jurisprudence

which reached its highest development in the case of *Hurtubise & Bourret* (23 L. C. J. 130). Only one member of the Court, so far as I know, doubts the soundness of that jurisprudence, and though my doubts have not disappeared, I do not contend against a jurisprudence which I consider settled. Although I do not assent, I have ceased to dissent, to the doctrine laid down in that well-known case. But the case of *Hurtubise & Bourret* and this case have no resemblance whatever. In the former the question was as to the sufficiency of an affidavit for a capias; and we held that it was not sufficient to swear to the fact of the intention to depart, and the grounds for believing this intention to exist, together with the fact of the overdue debt, but that the affidavit must set forth the reasons for believing the intent to defraud besides, or, as Chief Justice Meredith, in a more recent case, has precisely expressed it, the fact that the debt is overdue is not evidence that the departure from the jurisdiction is with intent to defraud. What we are invited to decide in the present case is, that because the affidavit on which defendants took out the capias against the plaintiff is insufficient, therefore the defendants are liable in damages. I take it this is not the doctrine of the law. *Milot & Chagnon*, 3 R. L. 454. To give it a little substance we have an argument put forth, which, to say the least of it, is novel in form. It is contended that when a suspicious fact is established, the deponent must enquire as to whether the suspicion can be removed. Now, let us leave all subtleties and see what the law does require to protect the party suing out extraordinary process from an action of damages. It requires "probable cause" and absence of malice. If there be not want of probable cause and malice combined no action of damages for false imprisonment will lie. I use the words of the English law because they have been commonly used here; and I fancy they have gained currency because they express in a striking manner the elements of the doctrine of the civil law. The governing doctrine I take to be, that there is no action of damages when the arresting party is in good faith, understanding good faith to exclude *faute grossière*. At any rate the English formulary has been distinctly recognized by the Legislature, art. 796 C. C. P., and by this Court as expressing correctly the law, in the case of *Brown* v. *Gugy*. The second jury trial was on issues formulated by the judgment of this Court ordering a new trial; they were as to the existence of probable cause, malice, and amount of damages. We held the same doctrine in the case of a magistrate who had signed a warrant of arrest in Quebec in 1875, *Marois* vs. *Bolduc*, in the case of *Beauchemin* vs. *Valois*, and in *Ryan* vs. *Laviolette*. Malice may be presumed, it is true, from want of probable cause (*Dennis & Glass*, Q.B., 17 L. C. R., p. 473), but where there is cause, even express malice will not render the party liable. *David* vs. *Thomas*, Q.B., 1 L. C. J., p. 69.

Under these principles let us examine the evidence. It is now totally unimportant whether Howard or Reid told Mackenzie that Shaw was going to leave the country, for the fact is admitted to be true, however Mackenzie knew it. The next fact is that there was an overdue liability. This is fully proved by Reid, the broker who negotiated the transaction. He swears that the debt was due on the 25th of June, nearly a month before the arrest. This is confirmed

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by Turner, who also proves that the debt was not paid. The answer to this is that the account was disputed, and that an action was pending at Toronto in which Shaw denied that the debt was due. It is the first time I ever heard that it was an evidence of integrity to dispute the payment of an account that was due. It is frequently done by people otherwise respectable, but it is a fraud, nevertheless. But the non-payment of a commercial debt 23 days after it is due, and after demand of payment, is no complete measure of Mr. Shaw's delinquency in this matter. Mr. Greening was especially charged to wait upon Mr. Shaw in Toronto in order to obtain a settlement. This was in March or April. Mr. Shaw's answer, if not a lie, was at all events a prevarication. To set Greening off the track, he told him that he had sent a settlement. This settlement he sent was the 4 months' note mentioned by Turner, a departure from the contract proved. In *Mills & Meier et al.*, 5 Q. L. R., p. 274, prevarication and unsatisfactory excuses were held to be some ground for an attachment. We have therefore fully proved—shuffling and prevarication as to the settlement, a fraudulent defence to the action at Toronto, and departure. And yet we are coolly told that there is absence of probable cause, for it would have been easy for Mr. Powis, who was in Toronto, to find out that these were merely the eccentricities of a great land owner, of an opulent merchant of first-class standing, who could buy on credit as easily as other people could with cash. It seems to have been quite possible to get witnesses to swear to all this; but apart from the antecedent improbability of the story, it happens all to be contradicted. Mr. Reid, one of the appellant's own witnesses, proves that Mr. Shaw was so "troublesome about giving settlements according to contract, altering the contract some way or other," that MM. Damase Masson & Co. would not deal with him. From the mouths of defendant's witnesses we have the thing more explicitly. Mr. Osborne tells us that all plaintiff's transactions with him were unsatisfactory. Previous to the 19th July, 1878, Osborne would not have trusted him. In Osborne's absence he did get credit, and paid by note, which was protested. Osborne sent Fulton to get a settlement of the note in Toronto. Fulton saw Shaw, "who received him very cavalierly." This must have been about the 18th, for Fulton could not again see Shaw, who had started for England. Fulton did not get paid till the 20th or 21st. Now, how did he stand at New York? Mr. MacGregor tells us his credit was not good, that he was supposed to be involved "very heavily" in tea transactions that would entail an "enormous loss," he could not readily buy on credit, and some of his paper was overdue. In Boston, we might also infer that his business standing was pretty much as MacGregor has described it was in New York; but the words are open to another interpretation, and therefore they should be passed over. In Montreal, Mr. Lightbound declined to give him either a good or bad character, but said that with him his credit was as good afterwards as before the issue of the writ. Mr. Thompson, of Montreal, had two transactions with Shaw, one of which was unsatisfactory. Not only there is no contradiction to this testimony, but Shaw scarcely ventures to cross-examine those who complain of his dealings with them. If the unsatisfactory nature of the transactions with Osborne and Thompson was due to them and not to him, he might have extracted from them

something to show that the dispute differed in kind from that raised by the plea in the Toronto action brought by defendants. The audacity of Mr. Shaw in suing the creditors he had thus wronged by keeping them out of their money, of what they could have used as money, for nearly five months, for $50,000 damages, is confirmatory of the testimony of those who have spoken as to his claims to high standing.

I have only to add that we agree with the Court below in distinguishing this case from that of *Lapierre & Gagnon*. In that case the settlement of the debt implied a waiver of any claim for damages. No such waiver can be inferred from a payment made in order to allow the party to go at large.

MONK and BABY, JJ., concurred in the remarks of Mr. Justice Ramsay.

* Judgment confirmed, Sir A. A. Dorion, C. J., and Cross, J., dissenting.

Trenholme & Maclaren, for appellant.

Doutre, Branchaud & McCord, for respondents.

(J. K.)

COURT OF QUEEN'S BENCH, 1880.

MONTREAL, 3RD FEBRUARY, 1880.

Coram HON. SIR A. A. DORION, CH. J., MONK, J., RAMSAY, J., TESSIER, J., CROSS, J.

No. 156.

LEDUC, APPELLANT;

AND

THE WESTERN ASSURANCE CO., RESPONDENT.

HELD:—That where the freight of a schooner was insured for a voyage "from Mingan, on the North Shore, to Recollect, *via* Cow Bay, Cape Breton," and from Recollect to Montreal, and she struck a rock at Bersimis, prior to reaching Mingan, and after leaving Cow Bay proved to be so leaky that she had to be repaired twice at Sydney, and where in the captain's protest (adopted by the assured) the condition of the vessel was declared to be attributable to the injury received by striking on the rock at Bersimis, the vessel was unseaworthy at Mingan and when she sailed thence, and, consequently, the insurance never attached.

RAMSAY, J. (*dis.*) This action arises on an insurance of the freight of the schooner *Providence*. The appellant by his action sought to recover $1000.

It is objected now that there was no proof made to the defendants of plaintiff's interest and title to recover before the institution of the action. There is no special plea to this effect, and plaintiff's interest is clearly established by the record. But defendants say that a special plea was not necessary, because the plaintiff alleged in his declaration that the formality of preliminary proof had been observed. I do not think that the general issue negatives sufficiently the want of preliminary proof. It is a "*fin de non recevoir*," to which attention should be at once directed, and if this is not done it is a waiver of the ground. "*Le défaut d'in-*

* An appeal was taken to the Supreme Court of Canada, and by the judgment of that Court, rendered 3rd March, 1881, the judgment reported above was reversed, and $600 damages were awarded to Shaw.

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térêt et de qualité est un moyen que l'on doit aussi proposer dès l'entrée de cause, etc." "*L'exception que l'on tire du défaut d'intérêt et de qualité, s'appelle* FIN DE NON RECEVOIR, *parce qu'elle a pour* FIN, *d'empêcher que l'on ne reçoive celui qui a formé la demande, à discuter si elle est bien fondée, etc.*" 1 Pigeau, p. 163. Perhaps the place and form of this pleading is still more positively indicated by art. 136, C. C. P. "The defendant may plead by peremptory exception," that is, not by preliminary plea within four days, "the non-completion of the time, or the non-fulfilment of the condition upon which the right of action depends." I think therefore that this matter is not fairly in issue in this case.

On the merits the defendants pleaded very specially that the vessel was rotten and unseaworthy, that there was an attempt made to repair her which was totally insufficient, and that she went to pieces from absolute rottenness. It is also pleaded that she was improperly loaded, and in violation of a positive warranty. At the argument, it was further urged that in any case there could only be a condemnation for $500, as the insurance was double, that is, that there were two voyages contemplated, one from "Mingan" to "Port Recollect," and the other from the latter place to Montreal.

The first point therefore we have to examine is whether the vessel was seaworthy or not at the time she left Mingan. This is purely a question of evidence. There is some controversy as to whether it is for the defendants or the insured to make proof as to seaworthiness. But, if it be held to fall on the plaintiff, the responsibility is very easily removed to the insurer by presumptions arising from general facts, and consequently the question is not generally of any practical importance. The defendants have therefore very properly pleaded specially the facts on which they rely, and particularly that the vessel became a wreck shortly after she left the Port of Sydney where she had been repaired. On the other hand the plaintiff insists on stress of weather to rebut any presumption arising from these facts. There is a point in the evidence which has to some extent affected the judgment in the Court below, and which was urged upon our attention at the argument, that should be disposed of at once. It is that in making the repairs at Sydney, the centre-board was made fast, and that this was an alteration of the risk. The evidence upon this point is very slight, but even were it stronger, it would not avail defendants, for it is not pleaded. The fastening down of the centre-board can then only affect the case in so far as it constitutes unseaworthiness which is fully pleaded, and if it be considered that unseaworthiness, arising after the commencement of the voyage, and not caused by gross negligence or fault of the assured, can affect the recourse against the insurer.

All positive evidence as to the state of the vessel on leaving Mingan is wanting; but it is proved that the vessel was repaired in Montreal, and appeared sound on examination; that she made out her voyage to Mingan, and delivered her Montreal cargo in good condition, so far as we know, to the satisfaction of the shippers. From that she proceeded to Cow Bay, where she had a right to go to load, and took in her cargo there. It was only after that there were any signs of leakage. Now, can we presume that because the schooner became leaky

the day after she sailed from Cow Bay with a cargo, that she was unseaworthy when she left Mingan? If not, there is no evidence of any kind to establish unseaworthiness at Mingan. Now upon this point really the whole case turns, and it may therefore be as well to examine how far the leaky condition of a vessel shortly after its departure from the place where the insurance begins serves as evidence to establish unseaworthiness. It is clearly only presumption, and one very uncertain in its application. In this particular case any such presumption is repelled by other facts proved and already referred to,—namely, that she had just delivered a cargo of provisions in perfect condition, and that she had made one stage of her voyage—from Mingan to Cow Bay—without difficulty. We are not even told by those who now [illegible] this sort of presumption, what the length of time was between the v[illegible] leaving Mingan and becoming leaky. It does not supplement this deficiency [illegible] that [illegible] became leaky shortly after leaving Cow Bay. Perhaps if it had [illegible] that the running on a rock at Bersimis, or Bellesemis, took place before [illegible] departure from Mingan, and that this accident was of a serious character, there might have been something to ground the presumption that at Mingan the schooner was not in a fit state to carry freight. But we know nothing of the position of Bersimis, and very specially we know nothing of the nature of the accident, except the confused statement of the extension of protest, which can only be considered as evidence against plaintiff for the purposes for which it was made. I was not prepared for any difficulty on this point when I wrote the notes from which I am now reading, and therefore I must refer to a few authorities I have collected at rather short notice. Phillips, after mentioning an American case which decided that the protest was evidence against the assured, gives Lord Kenyon's ruling in *Christian* v. *Coomlee* (2 Esp. 489), deciding it was not evidence; and Phillips adds, that this is the general doctrine, (2 Phillips, 2095). I would also refer to *Senat & Porter* (2 Durnf. & E., p. 158), where the same doctrine is elaborately decided by the whole Court. I understand the argume[illegible] be that the master is agent of the assured. We must take care not to be influenced with these slim sayings of general practice. He is his agent as far as may be necessary to make a protest, but he is not his agent to give his *impressions de voyage*. Now the object of the protest is clear and has never varied. It is made for the purposes of notice. In the "Guidon de la Mer" we find its object succinctly expressed. "Perte avenant au navire ou marchandise assurée, le marchand chargeur fera faire son *Délais* par le Greffier, notaire ou Sergent Royal, à ses assureurs avec déclaration qu'il espère estre payé des sommes que chacun aura assuré du dit jour en deux mois." p. 206.

It is next argued the captain was dead, and that this admitted the evidence. The death of a witness does not make evidence that which was not evidence before.

Again, we have another pretension as a make-weight. The owner adopted the captain's story in a subsequent protest. I don't think this is a fair argument. Of course, if the assured deliberately adopted the captain's version as his own so as to amount to confession, he would be bound by it; but a parrot-

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like repetition of the captain's narrative has not the characteristics of an *aveu*, and no one reading this protest can suppose the assured has any personal knowledge of what he is speaking of. His protest amounts to this, the captain says so, and no more. The captain does say it, but it does not follow it was true. In addition to this the Bersimis occurrence is an after-thought. The plea, special as to the kind of unseaworthiness complained of, is silent as to this accident. The defendants say "your vessel was rotten." It is now suggested that she was damaged by running on a rock. It is, moreover, a clumsily made argument. We heard nothing of all this at the bar. If, then, the schooner were seaworthy on leaving Mingan, the risk began, and to escape from liability for the loss the defendants must show either gross negligence or direct fault on the part of the assured, to relieve the insurer. In England it has been a question whether, when unseaworthiness supervenes, the owners are bound to repair, if it be possible; and the opinion of the judges seems to have been that, in order to free the insurer, the conduct of the owners must amount to gross negligence, so as to constitute fraud or fault. Now, can it be said that there was such negligence on the part of Leduc? It is proved that the vessel was twice overhauled, and the last time so repaired as to be pronounced perfectly seaworthy, at a cost of $1,000. It is true, within a day and a half, the vessel again sprung a leak, and was abandoned by the crew and lost. If the voyage had begun at Cow Bay, and if there had been no evidence of tempestuous weather, we might have presumed fairly enough that she was unseaworthy at the commencement of the voyage. But the positive proof of the storm that prevailed for days rebuts even this presumption.

We have, therefore, no proof of unseaworthiness at the commencement of the voyage, no evidence of negligence when the unseaworthiness supervened, and the presumption that she was unseaworthy on leaving Sydney is fully rebutted, even if it were ground, in absence of fault on the part of the insured, to relieve the insurer.

Again, I think there is no evidence to show that the schooner was improperly loaded. There remains, then, only the question of the amount of loss, and first, were there two insurances or one? Secondly, is the loss of freight proved? With regard to the first question, I think that there was not a double insurance, but an insurance on one voyage, with a mere partition as to the risk. Therefore, as the voyage had begun, the risk attached, if there was anything to insure; but it does not appear there was any positive contract, or any specific cargo, on which the insurer could properly rely for the second portion of the voyage. This point could have been made perfectly clear by the appellant, if the fact he now contends for were true. I think, therefore, that he should only recover for the freight from Cow Bay to Recollet, that is for $500 and costs.

TESSIER, J., also dissented, without assigning any special reasons.

CROSS, J.:—This action is brought by the owner of the schooner "Providence" on a policy of insurance effected 22nd June, 1868, on freight on a voyage of that vessel from Mingan to Recollet on the Labrador coast *via* Cow Bay, Cape Breton, and from Recollet to Montreal or intermediate ports. Part of the

freight, viz., $500, being on the outward, and the remainder on the homeward, voyage.

The principal defence is unseaworthiness of the vessel. The plea contains, besides, allegations to the effect that, after the policy was effected, the vessel was materially changed, that is, from having a movable keel or centreboard to one that was fixed, and also that the vessel was overloaded.

This plea was afterwards, by permission of the Court, amended by adding that, by the policy on the hull of the vessel, the company, insurers, were not to be responsible for inherent defects, and that, in fact, the vessel was rotten and incapable of performing a voyage. Moreover, the company were not to be responsible for inobservance of precautions and unfitness for navigation; that, by the fixing of the keel, the vessel was rendered unfit for navigation; that she was not to be loaded with mineral ores beyond her tonnage, and that she was, in fact, overloaded.

The parties adduced their proof, and, the case being heard, the Superior Court at Montreal, on the 4th May, 1878, dismissed the action on the ground that preliminary proof had not been furnished of plaintiff's interest in the freight, nor that the assured had ever renounced their right to such proof; that the plaintiff had caused considerable repairs and alterations to be made to the schooner at Sydney, N.S., without first holding a survey, or adopting the usual proceedings to justify the same, and, among other changes, caused the centre board or movable keel of said schooner to be fixed, whereby they augmented the risk and discharged the company.

From this judgment the appeal has been brought which is now under consideration.

It was contended on the one hand that the pleas did not take objection to the preliminary proof; and, on the other, that this was unnecessary, because the plaintiff had alleged the conditions in his declaration, and declared that they had been complied with. In regard to the plea of unseaworthiness, the plaintiff contended that the condition had been alleged as contained in the policy on the hull of the vessel, which had not even been produced in support of the amended plea, which contained the allegation in question. To this the defence answers that unseaworthiness is an implied warranty; that plaintiff had alleged seaworthiness, which defendants had denied, thereby sufficiently putting the matter in issue, and that there were, besides, allegations of unseaworthiness.

According to the conditions of the policy in this case, the preliminary proof would appear to operate merely as a delay to the remedy, not to defeat it. Such a defence is not in any case very favorable, and the Court are disposed to hold that, if available at all in this case, it ought to have been specially pleaded. As regards unseaworthiness, the majority of the Court think it is sufficiently alleged in defendant's pleas.

As to the nature of the demand it may be remarked that, according to the principles laid down by the French authorities (Pothier, Assurance, cap. 7, sec. 2, § 2, No. 36, p. 14), freight under the circumstances would seem not susceptible of being made the subject of an insurance, but by a liberal interpretation of the articles on the subject in our own Civil Code,—see art. 2493,—it

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would seem that our Legislators intended to adopt the English rule on this subject, which admits of insuring freight bargained for by the vessel.

The facts of the case, as disclosed in the evidence, would appear to be as follows:

The schooner underwent repairs in Cantin's Dock, Montreal, in the Spring of 1868; she was inspected by Ritchie, then Marine Inspector, for the defendants, and although he made no survey of her, and had doubts of the soundness of her bottom, yet he considered her fit for a sea voyage, such as the one in question, for which she was afterwards chartered. This is corroborated by further, even stronger, evidence going to shew that at Montreal, before she set out on her voyage, she was to all appearance seaworthy and fit for the voyage undertaken by her.

On the 22nd May, 1868, she was chartered by the Hudson's Bay Company to take a cargo of supplies to their port at Mingan, in the Gulf of St. Lawrence, thence to proceed to Cow Bay, Cape Breton, take in a cargo of coal, and proceed with it to Recollet on the Labrador coast, returning by way of Mingan.

About the end of May she left on her voyage and appears to have successfully landed her cargo at Mingan.

On the 22nd June, 1868, the insurance in question was effected.

On landing her cargo at Mingan, the schooner proceeded to Cow Bay, Cape Breton, where she took in a cargo of coal, and started on her voyage to Recollet. Next day, being the 4th of August, perceiving that she leaked and made much water, they ran into the Port of Sydney for repairs, where the vessel was put into dock, repaired, and launched, but, being found still to make much water, the plaintiff was telegraphed for, arrived in a few days, and ordered the vessel to be again docked. It was found that she leaked by the opening for the centre board, or moveable keel, which was consequently blocked, and the centre board fixed projecting below the vessel about three feet. She again proceeded to sea, but next day, encountering stormy weather, and the vessel leaking badly, the master and crew considered themselves in great danger, and ran the vessel ashore at Fox Bay, Island of Anticosti, where she became a wreck. The storm seems to have been violent, so that the immediate cause of the loss may be fairly inferred to have been from perils of the sea, but this does not alter the question, being the main issue raised, as to whether the vessel was seaworthy when she started on her voyage, the subject of the insurance now in question.

Captain Joseph Boucher entered a protest before J. B. F. Painchaud, notary, at Magdalen Islands, on the 10th September, 1868, which he afterwards extended before Jobin, notary, at Montreal, on the first October following, being thereto assisted by Edward Tonnier, 2nd officer, and Eusèbe Boucher, 3rd officer of the schooner, who, with him, affirmed the same on oath.

Captain Boucher appears also to have made a protest at Sydney, Cape Breton, on the 1st August, 1868, which was extended by *acte* before Jobin, notary, at Montreal, on the 2nd October, 1868. The plaintiff produced the extensions of both protests as exhibits, and they are both proved or mentioned in his deposition by Tonnier, the 2nd officer, the captain having died before the enquête.

In the last document it is among other things declared, in regard to the de par ture from Cow Bay: "On Friday, 3rd August, left at 12, Monday, under

"good wind, south-west; at 4 o'clock same day, strong breeze, the schooner mak-
"ing much water, the crew refusing to go on without repairs to said schooner,
upon which it was decided to go back to Sydney, where said schooner arrived
"the next day at 4 o'clock a.m., to get said schooner repaired, the pumps being
"insufficient to free her; remained until the 6th August, until 4 p.m.,
"when the schooner was on the dry dock, when it was found that the schooner
"was much damaged by running against a *rock at Bertsiamis*." The plaintiff, on the 15th October, served the defendants with a formal notarial notice of abandonment, and demand of payment or claim, stating what had occurred in the course of the voyage leading to the loss of the vessel, and declaring on his own behalf the same fact so recited in the extension of protest of the 2nd Oct., to which he solemnly offered to make oath, he produced a copy with return of his action.

In making these declarations the captain and officers of the vessel have treated the voyage as commencing from Cow Bay, whereas the voyage insured commenced from Mingan, thus avoiding, although probably not intentionally, stating the condition of the vessel between Mingan and Cow Bay, the only past event included in the declaration being the important fact that the vessel was much damaged by running on a rock at Bertsiamis. The defendants, too, seem to this extent to have mistaken their defence, for in great part in their pleas, and for the most part in their evidence, they strive merely to shew that the schooner was unseaworthy when she left Cow Bay; they nevertheless, in adducing scientific evidence, base their enquiries to some extent on the fact of the vessel having been damaged by running on the rock at Bertsiamis. That scientific evidence goes to shew that, on the facts disclosed by plaintiff's case, the schooner was unseaworthy; that she should have been surveyed and thoroughly overhauled and repaired before proceeding from Cow Bay; that she could not be properly repaired without the cargo being taken out; that her condition was altered for the worse, and she was rendered unnavigable by having her centre board fixed; that she was dangerously overloaded. These propositions are controverted by plaintiff's proof in rebuttal, and, although of great importance, the Court would be disposed, on all the points but the first, to consider the balance of probability to weigh in favor of the plaintiff. On the first point, that of seaworthiness, a majority of the judges are of opinion that the defence is sufficiently made out.

In our opinion the vessel was, undoubtedly, unseaworthy when she first left Cow Bay; she leaked violently after being a few hours out, without anything having occurred of sufficient consequence to cause her serious injury. The only question is, how far this condition of things can be carried backwards? The officers of the vessel have, unfortunately, failed to declare her condition at Mingan, and the defendants failed to enquire of them, although two of them were examined, and they might have enquired especially about the running on the rock; but the voyage across the Gulf from Mingan to Cow Bay in the ordinary course, should not, I presume, take more than two or three days, and, if unseaworthy at Cow Bay, that condition should extend back at least for a time so limited, unless a disaster intervened to cause it. Now there is no evidence of such a disaster within the limit of this crossing, but there is in the extension of protest, and in

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plaintiff's notarial notice of abandonment and claim, one beyond it, viz., the striking on the rock at Bertsiamis before she arrived at Mingan, thereby accounting for her unseaworthiness from that point, and making her unseaworthy at Mingan where the voyage commenced. It would not be necessary to invoke this latter part of the proof to make out the defence, because the fact being established that, within so short a time, the vessel, without sufficient cause, leaked seriously, would form a presumption of unseaworthiness at the time of sailing, that would stand until rebutted by the party pretending the contrary. I now quote from 1 Arnould, p. 689, § 255. Where a ship becomes so leaky or disabled as to be unable to proceed on her voyage, soon after sailing on it, and this cannot be ascribed to any violent storm or extraordinary peril of the seas, the fair and natural presumption is that it was from causes existing before her setting out on her voyage, and, consequently, that she was not seaworthy when she sailed.

In such cases, therefore, it is incumbent on the assured to shew that at the time of her departure she was in fact seaworthy, and that her inability has arisen from causes subsequent to the commencement of the voyage. He cites Watson vs. Clarke, 1 Dowling 344; Munro vs. Vandam, 8th Ed. Park, p. 469; Arnould, p. 678, § 251. And if the ship, in a short period after sailing on the voyage, becomes leaky and founder, or is obliged to put back or run for port in distress without encountering any extraordinary peril, or other visible cause, to produce such effect, this is a clear presumptive evidence that she was not seaworthy when she sailed.

Thus we have evidence produced by the plaintiff himself, which, if produced by the defendant, would have been abundantly sufficient to shift the burden of proof of seaworthiness on the defendant, and we have, in addition, the important fact, disclosed in the extension of protest and notice of abandonment, that the schooner had been much damaged by running against a rock at Bertsiamis, before she arrived at Mingan. If much damaged there, and leaking badly afterwards, it is a most natural inference, amounting to a conviction, that she was unseaworthy when leaving Mingan. But it is said that the protest is in itself no proof. True, as Arnould says, 2nd vol., p. 1337, § 474: the protest of the captain, so long as he is living, is in no case evidence on the one side or the other, and, further on, he proceeds: nor will the broker having shewn it to the underwriter with other papers relating to the loss on demand of payment make it evidence as against the assured; and in support of this last assertion he cites the leading case on the subject of Senest vs. Porter, 7 T. R., p. 158. On turning to this case we find that Lord Kenyon, after stating the general proposition, that the protest is not per se admissible as evidence, then what facts were proved to make it evidence in this case? answers by saying that it was in the hands of Vaux, the broker, and that he shewed it to the defendant, the insurer, on an application for payment, which he considers insufficient to make it evidence for the assured, but adds: If the plaintiff had availed himself of any part of this paper to prove his case, the defendant would have been entitled to read the whole of it. In the case we have now under consideration, not only did the plaintiff produce the protest as part of his case, but precaution was taken to prove that the captain was dead, thereby strengthening the grounds on which it was admis-

sible as evidence, but its admissibility in the present case does not rest upon these grounds alone, sufficient as they are proved to be. The protest is actually proved by the second officer, Tonnier, examined as a witness, and thus there is removed the only ground of inadmissibility, that the declaration of the master by his protest cannot be admitted without producing the master to prove it. It is true he merely mentions the fact of the protests being made, to one of which he himself made oath, but he was cognisant of the facts, and was subject to a fuller examination and cross-examination on the subject, and the thing, to my mind, is put beyond all doubt by the plaintiff declaring the same fact on his own account, and offering to swear to it.

Again, it is argued that it is not shewn where this Bertsiamis is located, nor that it is before arriving at Mingan. This is an error of fact. It is proved that Bertsiamis is before you come to the Gulf of St. Lawrence, and it is also proved that Mingan is in that Gulf, also that Cow Bay is in Cape Breton, Nova Scotia; besides, it is a geographical fact in itself notorious, of which the Court is bound to take notice; as well might it be contended that the Thames should not be known to be in England, or the Seine in France, as not to know of the Bertsiamis in Canada, a stream which discharges more water than either of these two rivers. It might have been better for the assured to have been more communicative with the assurers about the nature of the repairs at Sydney, and a preliminary survey would have been advisable, although not obligatory. Attempting to repair a loaded vessel was considerable risk, and the fixing of the centre board a matter of some importance, but a considerable discretion must be allowed in such cases, and we have no doubt the owner thought it was the best that could be done, and, as a Court, we would not be disposed to criticise that discretion, but the majority think the unseaworthiness is made out, and we confirm the judgment on this ground of unseaworthiness, not on the grounds given in the Court below.

I may mention further, with regard to the protest, Abbott on Shipping, p. 3[illegible] says:

The protest is a declaration or narrative by the master of the particulars of the voyage, of the storms or bad weather which the vessel has encountered, the accidents that have occurred, and compelled him, if at an intermediate port, to resort to it, and the conduct which, in cases of emergency, he had thought proper to pursue. With whatever formalities drawn up, it cannot be received in our Courts as evidence for the master or owners, but it may be as evidence against him and them, and he should take care to supply from the Log Book, his own recollection, and that of the mate as trustworthy mariners, true and faithful instructions for its preparation.

Flanders on Shipping, § 285, is to the same effect, as also 2 Parsons on Marine Insurance, p. 528. 3 Phillips, American Edition of 1849, p. 56.

If the protest has been adopted by the plaintiff as his own statement it will of course be evidence against him on the footing of an admission, or it may be admitted to contradict the evidence of the captain, and so discredit his testimony. Case of Betsy Caines, 2 Hag. Ad. Rep., p. 28.

Sir A. A. Dorion, Ch. J.—The majority of the Court are of opinion that the vessel was not seaworthy when she left Mingan. This was the point of

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departure for the voyage, the freight of which was insured by the policy. If she had been seaworthy then, it would not matter at what point she had become unseaworthy, the guarantee of seaworthiness applying to the place where the voyage commenced. (Art. 2505 C. C.) It is a rule that a vessel, starting on a round voyage, ought to be in such a state of seaworthiness as to require no important repairs, unless such repairs be necessitated by storms or inevitable accidents. If the vessel be in such state as to require repairs soon after commencing the voyage, it will raise a presumption of unseaworthiness at the commencement of the voyage, and may, according to circumstances, oblige the owner to show that the repairs were required owing to a cause which occurred since the commencement of the voyage, or to prove affirmatively that the vessel was seaworthy when she left. (Mylius vs. Montreal Insurance Company, 20 L. C. J. 293. Reed & Phillips, 2 Hannay 172.)

The voyage in question commenced at Mingan; there is no proof that she met with any storm between Mingan and Cow Bay, and yet, as soon as she was loaded at Cow Bay she began to sink, and required important repairs.

It is proved that when she left Montreal for Mingan she had been thoroughly repaired, and was classed A 1 by the inspector of the Company. This, however, is not sufficient, for the risk under the policy did not attach at Montreal, but at Mingan, and we have the statement of the captain, now deceased, in the protest he made when he reached the Magdalen Islands immediately after the loss of the vessel, that when the vessel was examined at Cow Bay it was found that she had suffered injury by striking on the rocks at Bersimis. This statement is repeated, and the *fact* assumed to be correct by the appellant himself in the protest which he subsequently served on the Company here, at Montreal. We have therefore the appellant's own admission that the vessel had struck on a rock at Bersimis, and that this was the cause of the injury which required the repairs made at Cow Bay and at Sydney, and as Bersimis is between Montreal and Mingan, it is clear that the vessel was not seaworthy when she left Mingan.

The proof made that the vessel was repaired at Sydney, and was seaworthy when she left that port, does not alter the case. If the vessel was not seaworthy when she began her voyage, the risk did not attach under the policy, and could not attach after the repairs were made, unless the consent of the Company had been obtained, which does not appear.

We therefore consider that the action was properly dismissed, but not for the grounds stated in the judgment of the Court below, viz.; that the preliminary proofs required by the conditions of the policy were not furnished, and that the vessel had become unseaworthy in consequence of the changes improperly made at Sydney, that is by fastening the centre-board, which was before the repairs were made. We see no proof that the change increased the risk, and there is strong evidence that the vessel was lost after leaving Mingan owing to the violence of the storm, and *not* on account of any change in the centre-board.

We therefore base our judgment on the ground that the vessel was unseaworthy when she left Mingan, and that therefore the risk did not attach.

The following was the written judgment of the Court:—

"The Court, etc.

"Considering that the schooner "Providence," mentioned in the policy of insurance on which this action is brought, was not seaworthy when she left Mingan, the place of departure for the voyage, the freight of which was insured by the said policy;

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"And considering that, owing to the unseaworthiness of the said schooner at the time she left the said port of Mingan, the respondents have incurred no liability on the said policy for the loss of freight claimed by the said appellant;

"And considering that, for the above reasons, there is no error in the judgment rendered by the Superior Court, sitting at Montreal, on the 4th of May, 1878;

"This Court doth confirm the said judgment," &c. (Ramsay and Tessier, JJ. dissenting).

Judgment of S. C. confirmed.

Béique & Choquet, for appellant.
Strachan Bethune, Q.C., counsel.
E. Carter, Q.C., for respondent.
(S.B.)

COURT OF QUEEN'S BENCH, 1880.

MONTREAL, 22ND JUNE, 1880.

Coram HON. SIR A. A. DORION, CH. J., MONK, J., RAMSAY, J., TESSIER, J., CROSS, J.

No. 199.

ALEXANDER MOLSON, APPELLANT;

AND

J. T. CARTER, RESPONDENT.

HELD:—1. That under a petition to be discharged from arrest under a *capias ad respondendum* (Art. 819 Code of C. P.) it is incumbent on the defendant to establish that the allegations of the affidavit are false or insufficient.

2. That in the present instance the defendant failed to make such proof, and that the evidence in the case corroborated the essential allegations of the affidavit.

This was an appeal from a judgment of the Superior Court at Montreal, (PAPINEAU, J.), rendered on the 11th of November, 1878, as follows:—

"Ayant entendu les parties par leurs avocats, respectivement, sur la requête du défendeur produite le 19 juin, 1877, pour casser le *capias ad respondendum* émané en cette cause contre lui, dit défendeur, et ce pour les causes et raisons mentionnées en icelle requête; ayant examiné la procédure, les pièces au dossier, et la preuve, et sur le tout délibéré. Considérant et adjugeant que le requérant n'a pas établi les allégués essentiels de sa dite requête, et que la preuve faite sur sa requête, corrobore les allégués essentiels de l'affidavit sur lequel le capias en cette cause a été obtenu.

Molson and Carter.

"Nous, soussigné, l'un des Juges de la Cour Supérieure du District de Montréal, déboutons la dite requête avec dépens contre le défendeur distraits à Messrs. Bethune & Bethune, avocats du demandeur."

The learned Judge, in rendering judgment, remarked as follows:—

The defendant, arrested in virtue of a *capias*, contests it by summary petition.

The allegations of the affidavit are: personal debt of $32,073.71 capital and interest on a hypothecary obligation, dated 9th February, 1875, and judgment for this amount of 17th April, 1877. The general allegation of the case, giving reasons for the *capias*, is in the following terms:—"The defendant has secreted and made away with his property and effects with intent to defraud his creditors generally and the plaintiff in particular." The deponent, the Hon. J. J. C. Abbott, agent of the claimant, gives several reasons for his deposition, which reasons may be condensed as follows:—

Shortly before the date of this obligation the defendant, stating he was urgently in want of money, went to the deponent to obtain some on guarantee of lot No. 185 of the cadastre of the western division of this city, which property he represented as belonging to him, and which the deponent knew belonged to him individually and absolutely in virtue of the defendant having purchased it from the *fidei-commissaires* (trustees) named in the will of his father, the late Hon. John Molson.

That the defendant then held in the Mechanics' Bank, of which he was vice-president, shares of the nominal value of $84,000, apparently paid up, but on which about $14,000 had been paid, the surplus, $70,000, appearing to have been paid with the proceeds of notes of a certain Robinson, which the defendant caused to be discounted through his official position, and which he had caused to be renewed from time to time, although he knew Robinson was insolvent.

That this bank was then in an embarrassed position, as much by the defalcation of a clerk as by the maladministration of the defendant, and that, nevertheless, while representing that he urgently required this money, the defendant left this whole amount on deposit at a low rate of interest in this bank during several months, to the 7th September 1875, under the following heading of account: "Alexander Molson, special, St. James street."

That the precarious state of the bank's affairs was known to the officials the 5th September, although not known to the public until a few days later, when the defendant, apprehending serious consequences to himself, and with intent to defraud and to conceal his goods and effects, used his influence on the officers of the bank to cause them to alter the title of his deposit, "Alexander Molson, special St. James street," by adding to it "mortgage in trust for Eliza A. Molson," thus placing the deposit in his wife's name, and then withdrawing it as trustee of his wife and making away with it under the pretext that it was her property. To the reproaches made to him by certain officers of the bank, and notably by C. J. Brydges, he replied: "He did not desire to be left in the street, and that he had got it and put it away."

The deponent alleges that he had no knowledge of this avowal of the defendant and of the withdrawal of said deposit, except during the thirty days

preceding the date of his deposition, nor of the other facts until after the failure of the bank.

The deponent knew of the embarrassed state of the finances of the defendant since the year 1875, when the defendant gave him to understand that the amount of the deposit had been legitimately expended.

In 1875, Mr. Barnard, Q.C., the legal adviser of defendant, had furnished a statement prepared under the eyes of the latter, in which these $30,000 did not appear among the assets of the defendant, and it appeared to the deponent that there remained to the defendant only shares valueless or nearly so, in financial companies, and immoveables over-mortgaged.

That the defendant, instead of continuing to pay the interest due claimant by means of the rents from the property mortgaged to claimant, rented it to a man named Freeman the 24th February, 1877, in his capacity of legatee of his father, for five years, with right to renew it five years longer, so as fraudulently to cause the rent to come under a clause of his father's will, which declared the revenues of the defendant in his share of the succession unseizable and inalienable, although the defendant knew he had acquired this property in virtue of powers to alienate conferred on the fiduciaries of his father.

That the defendant, in collusion with his wife, caused the latter to interfere in the proceeding of the claimant against the defendant after he had obtained judgment, enabling defendant to enjoy the revenue of said property.

On the other hand, the defendant denies the truth of the allegations, and particularly the allegation of fraudulent secreting. He says the particular object was to procure for the bank the use of $30,000, that in withdrawing this deposit the defendant had employed it principally in releasing important values, which otherwise would have been lost to his patrimony, and in payment of legitimate debts, and that this was done before the closing of the bank, to the knowledge of deponent and Mr. Brydges.

That in the statement submitted to Mr. Abbott in 1875, the sum of $9,000 in notes of the Mechanics Bank was mentioned as assets, and that Mr. Abbott was then informed this was the balance of $30,000 (less $3,000).

That neither his wife nor he ever secreted any portion of the $30,000, nor of the values released as aforesaid, but that they were given to his creditors in the ordinary course of business.

That as to the settlement of defendant's affairs with the bank, the pretended alterations of the books, the avowals stated to have been made to Brydges, they are not pertinent to the case. They have been colored by the deponent, and may be naturally explained. The 14th January, 1876, four months after the pretended avowals to Brydges, the difficulties with the bank had been amicably settled by notarial deed, [illegible] Mr. Abbott and Mr. Brydges took an active part in promoting this settlement, which was approved at a meeting of shareholders.

The defendant denies having himself or wife fraudulently interfered to prevent the execution of the judgment for claimant, either on its basis or on the proceeds of property mortgaged to claimant, and on which defendant is advised that the claimant has no legal right, and Mr. Abbott is not far from sharing this opinion.

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That the intervention of the wife of the defendant could not hinder the claimant from making good his rights on the property and revenues derived from it, and that she could intervene, [illegible] will of the defendant, to demand her rights and those of her [illegible]

That Mr. Abbott, after having been the intimate friend of the defendant, has become his enemy, and it was in order to postpone the decision on the validity of said mortgage that he made use of the means of a *capias* against the defendant.

That Mr. Abbott, after having been the legal adviser of the late John Molson, was that of his testamentary executors, and that the shares of the defendant and of his brother John in the succession were, according to the advice of Mr. Abbott, ceded as they have been; that Mr. Abbott himself drew up the deed of this effect, to permit the defendant and his brother to possess their shares as absolute property, that he himself offered the loan in question on the security offered, ridiculing the opinion of the advisers of the Masson succession who pretended that the defendant could not give security on this property, but that the defendant never had the intention to submit either directly or indirectly to the last wishes of his brother.

It was only since the failure of the Bank that the defendant, in making arrangements with the succession of Masson, had occasion to see that there were serious reasons to doubt that he had a right to mortgage the property in question.

That he had endeavoured to make an amicable arrangement with his creditors, but could not succeed, owing to Mr. Abbott's opposition.

That the lease openly given to Freeman was but to retain for the wife and children of the defendant what belonged to them under the aforesaid will when defendant had no longer means to provide for their subsistence.

The reply to this petition is a general denial. The defendant, before coming to facts, invokes four legal means against the validity of the *capias*. 1st. He pretends there is no ground for the *capias* because the debt of the claimant is assured by mortgage, and cites S. R. B. C., chapter 87, section 2, and 3 L. C. R., page 110.

This means, even if it were founded in law, that you cannot set aside the *capias*, because there is no proof that the actual value of the property is enough to cover the debt and interest and the expenses of the sale under authority. The spirit of the law does not exact that, to give occasion for a writ of *capias*, the claimant be exposed to lose his entire claim, but only that he be exposed to suffer damage.

2nd. The defendant maintains that his difficulties with the Mechanics' Bank, which have been amicably settled with knowledge of opponent, cannot be given as reason for obtaining a *capias*. The Court is with him on this point, in this sense, that, if he succeeded in making an arrangement with the Bank for a sum less considerable than the amount due it, the claimant and the other creditors of the defendant have no reason to complain. I can say the same concerning the series of Robinson's notes.

3rd. The defendant stated further, if he had used those $30,000 in the manner charged, it would not be an act of concealment, but only an undue preference in favor of the *substitués*, who were undoubtedly creditors.

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The Court does not altogether agree with him on that point, at least as respects the claimants, to whom he represented himself as absolute proprietor, and not as *grevé de substitution*. It was not for defendant to say to claimant when he wanted money:—I am free of all charge; and when there was question of payment to say: I am *grevé de substitution*, to which I have passed this money true, without your knowledge, but it cannot be called making away with it. Recourse to *capias* is allowed, when the debtor withdraws or hides his effects with intention to defraud his creditors, and what better means could a debtor employ in this view than to put his goods in the hands of one against whom it is difficult, if not impossible to act? The defendant cannot pretend the *substitués* have incontestable rights in his regard, when he himself was the first to deny them when he required a loan from the claimant.

4th. The defendant said further, that, even were the lease to Freeman and the intervention of his wife effected with a view to place obstacles in the way of the claimant in recovering his debt, these proceedings could not be called a withdrawal or concealment; they were made in good faith and on legal advice. Put in this way, this point would, probably, be decided in favor of defendant; but it is not so put in the affidavit of the claimant, who accuses the defendant of having made use of the lease to Freeman as one of the means of fraudulently making away with his property.

The intervention of Madame Molson cannot be invoked by claimant to his advantage. Madame Molson had pretentions to establish; she took legal means, and was supposed to act independently of defendant.

We must, therefore, come to the proof of the allegations in defendant's petition, to see if he has disproved the essential allegations of the affidavit.

The principal accusation is expressed in two ways: The deponent said that the defendant secreted and made away with his property and effects, and also the sum of $30,000, which constituted all his disposable assets. The claimant alleges that the heading of the account was changed when the bank was in an embarrassed state, and fixes the date of alteration as 5th of September. It is established that the alteration was made in July, when the officers of the bank did not know its affairs were bad, and that the withdrawal of the money was done the commencement of September. The proof established also that the intention of defendant in making the loan was to aid the bank.

The defendant pretends to have disposed of the deposit as follows:—

1875.		
Oct. 7. Paid	$2,666	67
Interest on his note for $8,000, at Molsons Bank	97	18
Sept. 3. Paid on his account which he had overdrawn	6,000	00
" 14. Paid E. Ford	5,000	00
" 15. Do. Do.	1,941	47
Do. on capital account	130	00
Do. as per statement "C."	9,000	00
	$30,835	32
The total of capital and interest of the deposit withdrawn in September, besides $875.30 interest withdrawn in July, was	30,410	19
	$ 416	13

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Thus, he claims to have expended in a legitimate way $416.13 over and above the amount of the deposit he had withdrawn from the bank.

The plaintiff maintains that the defendant has not shown that the sums thus paid formed part of the deposit itself. The identification, it is true, is not perfect; still it must be recollected that the depositor has sworn that at the time this sum was withdrawn it formed the only funds at the disposal of the defendant. The payments were all made within a short space of time after the withdrawal. The plaintiff also insists upon the fact that thirty shares of Molsons Bank, amounting to $1,500, were not included in the statement "C." The witness (Varey) who prepared this statement, says the omission is to be attributed to an error on his part. The deposition of this witness is such as to create a rather serious doubt as to his veracity; still he has not been contradicted by other witnesses, nor was any attempt made to prove that he is unworthy of belief, and such an omission as he speaks of is not an impossibility. The defendant would have been entitled to the benefit of the doubt on this point, if this point had been one on which the plaintiff had really prosecuted his case; but the plaintiff complains, not of the use to which the wife of the defendant put the money diverted by her husband, but of the fact itself that this money had been diverted; and he accuses the defendant of having cancelled and withdrawn the amount of the deposit (which had been loaned to the defendant), by transferring it fraudulently to his wife's name by means of an alteration in the book of the bank while the employees were under his control. This fact has not been contradicted, but it has been corroborated by the evidence; and the intention in which this alteration in the bank book was made is proved by the admission made to the witness Brydges, who said: "And he added that he took the money, foreseeing that the bank would likely be in trouble before very long, and he did not wish to be left with his family on the street. He said he had taken it and put it away." In this admission the words used in the Code, "make away with," are not employed; yet the circumstance, as it occurred, adds to the defendant's words all the force of the language employed in the Code, since the defendant from this moment no longer treated this sum of money as belonging to himself, but as the property of his wife, and he signs the cheques to withdraw it as trustee for his wife, "In trust for E. A. Molson." The money had, therefore, been withdrawn from his account and passed to the account of his wife, who was not a creditor for the sum, at least there is no proof that she was a creditor. And this was done in such a way that the plaintiff had no right of direct action against the defendant's wife, as she had not taken any active part in the transaction made to her profit, but possibly without her knowledge.

The defendant is also accused of having obtained money from the plaintiff upon the security of a property which he represented as his own, and of having afterwards, with the object of placing this property, or rather the rent of this property, out of the reach of plaintiff's action, leased it to one Freeman while representing himself no longer as absolute proprietor, but as legatee under his father's will, which made the property untransferable and not distrainable. This allegation in the affidavit has not been contradicted. On the contrary, it has been corroborated by the evidence of the witnesses called for the defence. The defendant

said this lease was not made for the purpose of unjustly or fraudulently withdrawing his property in the case, but merely to restore to the entail created by his father what belonged to it in reality. It was certainly not to facilitate the payment to the plaintiff that this lease was made; and, without resorting to an unreasonable interpretation of the facts, it may be assumed that the defendant in doing this was only carrying out his intention of not being "left with his family on the street." The defendant falls back on his legal advisers, and says: "In doing this I could not have intention, since I was following their advice by restoring to the entail the property which I had separated from it, under the reasonable belief that I had cause to do so." The Court did not desire to be too severe upon this point, and would only remark that the defendant took upon himself to decide in favor of his family, or of the entail, and to the apparent prejudice of his own creditors, a rather important and complicated question, and one that the Court will not now undertake to decide, since it has been raised only incidentally in this cause, and as pretention to justify the purity of the defendant's intention. Many other facts have been skilfully grouped on both sides to show the claims of the respective parties; these have their value, but it would be too long to discuss them one by one. The defendant has not disproved the essential allegations contained in the affidavit produced by the plaintiff, and the Court rejects the defendant's petition with costs.

Cross, J., (*dissentiens*): —On the 1st June, 1877, the respondent, John Thorold Carter, on the affidavit of the Hon. Mr. Abbott, sued out a writ of capias against Alex. Molson, the appellant, on which he was arrested for a debt of $32,073.71, for which judgment had already been obtained.

The affidavit asserted that the defendant Molson had secreted and made away with his property and effects, with intent to defraud his creditors generally, and the plaintiff in particular. The reasons for belief were stated to be:

That Molson had applied to deponent and obtained from him, as agent for Carter, a loan on the security of a property in St. James street, standing in his own name, on which he gave an obligation and hypotheo dated 9th Feb., 1875, under misrepresentation as to the ownership or availability of said property as security, and representing that he urgently needed the money;

That Molson was at the time Vice-President and Managing Director of the Mechanics Bank, in which he had a large amount of stock nominally paid up, but on which only a small amount had really been paid;

That the Bank was not then in good credit, and it was afterwards discovered that a teller had largely misappropriated its funds;

That, notwithstanding Molson's representation of his being in urgent need of said money, he deposited it at small interest in said Bank till 7th Sept., 1875;

That on the 5th Sept., 1875, the teller's defalcation was discovered, and Molson became aware that the Bank must fail, and he himself be involved in the disaster, whereupon he caused the title and heading of the deposit account in the books of the Bank to be altered, by adding the words, "mortgage in trust for Eliza A. Molson," meaning his wife, in whose name he afterwards drew out the $30,000, with accrued interest, and secreted it; and, on being called to account by one of the Directors for doing so while he was a debtor to the Bank in a large

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sum, declared that he had taken the said money because he did not desire to be left in the street, and that he had got it and put it away;

That deponent had not become aware of these equivocal facts until within the next previous 30 days, save as to Molson's insolvency, which had come to his knowledge shortly after the failure of the Bank. Deponent had assisted in negotiating a settlement between Molson and the Bank, whereby the large amount of stock held by Molson was cancelled;

That Molson had informed deponent that he, Molson, was not paying, and could not pay, any one; that the $30,000 had been expended in various ways. The deponent, in the autumn of 1875, had exhibited to him by Mr. Barnard a statement of Molson's affairs, in which the $30,000 was not inserted. Molson had frequently afterwards applied to deponent for further loans. Molson failed to pay the interest due 1st January, 1877, and told deponent that the property mortgaged to Carter came from his father's estate, and belonged to his children, and he set about placing obstacles in the way of the property being available, by (in his capacity of legatee of his father) leasing it to one Freeman for five years on and from the 24th February, 1877, and, afterwards, conniving with his wife, caused an intervention to be put into the cause for his wife and children, to embarrass plaintiff's recourse;

That he had secreted said sum of $30,000, which he had still in his possession, and had no other means for the payment of his debts.

Molson petitioned to quash the capias, alleging that he had not secreted the $30,000, and never had done anything with a fraudulent intent; that he had borrowed the money to give the use of it to the Mechanics Bank, which he had done; that he had drawn the money to redeem securities which came back to his creditors; that the statement in 1875 contained $9,000 Mechanics Bank bills, afterwards expended on debts; that a satisfactory settlement was made with the Bank, 14th January, 1876, by deed;

That Mr. Abbott, as legal adviser of himself as well as Mr. Carter, approved of the security given by him, and had advised the transfer of the property from his father's estate and the manner of doing it. Only after the failure of the Bank had petitioner become aware that his own title was doubtful, and his wife and children might have rights; that he, Molson, failed to arrange with his creditors from being overpressed by Carter's claim; the lease to Freeman was in good faith, and the rents are collected as *alimens* for his wife and children;

That the intervention was a perfectly justifiable proceeding on the part of his wife, who had rights under his father's will;

The parties went to proof, and on the 11th November, 1878, Mr. Justice Papineau rendered his judgment, dismissing Molson's petition, on the ground that he had not sufficiently disproved the allegations of the affidavit, and laying particular stress on the alteration of the deposit account in the books of the Bank, which appears to have occurred.

It is to me rather a startling proposition to justify a capias issued in June, 1877, against a debtor for alleged falsity in a statement made in 1876.

There is much in the affidavit wholly outside the issue. The circumstances under which the loan was granted are alien to the question, save [illegible] may show

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that security was at the time given which was satisfactory to the creditor, and threw upon him the *onus* of showing that it is bad: otherwise he would have no right to capias for an amply secured debt. This he does not pretend to do. It seems to me, besides, that Molson has reasonably accounted for the assets he is shown to have been possessed of. I think he would have rendered himself liable to the imputation of fraud by the alteration of the account in the Mechanics Bank if the alteration had been made on the eve of or immediately before the insolvency, and had been made the subject of complaint within reasonable time; but it had been done months before, and indicated securities as being held by him in trust for his wife. Had the capias issued on his drawing out the $30,000 in the name of his wife, I think it might have been maintained. But these securities, forming part of those he had previously pledged, and which were redeemed out of the $30,000, went, with Mr. Abbott's assistance, to settle his liabilities to the Mechanics Bank. It is true that there was one amount of 160 shares said to have been put back to the substitution in his father's will, having originally come from that source. Although this might as against creditors have been held a fraudulent preference, it could not, in my opinion, be a good ground for capias. Indeed, it seems to me that the proper remedy in this case would have been an attachment in insolvency, when all suggested frauds could have been inquired into. If the $30,000 was improperly borrowed, perhaps Molson ought to have been prosecuted as a cheat; but no question was made of this until long after the money was received.

The remedy of capias for secreting was only introduced by the statute 12th Vic., chap. 42, enacted to abolish imprisonment for debt and to punish fraudulent debtors. Before the date of that Act the remedy for secreting was by attachment before judgment, of the personal property of the debtor. This was regulated by the 27 Geo. III., ch. 4, sec. 10, prohibiting attachments before judgment, save in certain cases; and one of the exceptions, in fact almost the only exception, was secreting estate, debts and effects, with intent to defraud. A further explanation is found from the statute 9 Geo. II., ch. 27, enacted to prevent fraudulent debtors evading their creditors. It authorised commissioners in the country parts to issue temporary attachments in case absconding debtors were carrying off or concealing their effects, the secreting referred to being the bodily abstraction or concealment of their personal effects by run-away debtors.

In conferring the recourse by capias for secreting, as was done by the 12 Vic., ch. 42, sec. 2, there is nothing to indicate that the remedy was intended to apply to cases of secreting that had not been contemplated by the previous statutes, or to give greater latitude to the meaning of the term secreting than was previously understood to be comprehended by it.

A capias is now taken, in effect requiring a debtor to account for the transactions of two years of his life, and if any thing is left unexplained it is assumed he is to be liable to this rigorous remedy. I cannot concur in this view, and I therefore dissent from the judgment about to be pronounced.

MONK, J. (*dissentiens*):—I agree generally with the remarks of my colleague, the Hon. Mr. Justice Cross. I hold that a creditor who swears that his claim

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is amply secured by a valid mortgage is not entitled to a *capias*, and, further, that in the present case there has been no secretion.

It is needless for me to go into a minute narration of the facts. If Molson had altered the heading of the account, on the eve of, or immediately before, the insolvency of the Bank, for the purpose of making it falsely appear that the $30,000 deposited in the Bank belonged to his wife and children, when they really belonged to himself, and if this had been done with the view of making the withdrawal of the same from the Bank possible, or, at all events, more easy of accomplishment, and with the further view, after such withdrawal, of making away with the amount to the detriment of his creditors in general, and the plaintiff in particular, I think the *capias* might have been maintained, for this would not be a case of so-called constructive secretion, which it is not clear the law recognizes, but a case of actual secretion: the alteration of the heading of the account being the first step in the process. But here the alteration of the heading of the account was made months before the insolvency of the Bank; in the second place, it was an addition rather than an alteration, for the purpose of making it clearer that the amount was the proceeds of the mortgage on the St. James St. property—a very reasonable purpose—considering that the mortgage, if a good one, had the effect practically of cutting off the family who were, in equity at least, the real owners of the property, which made it all the more necessary that the proceeds should be secured to them. In the third place, the withdrawal of the money was not facilitated or affected at all by the alteration of the heading of the account, and the money, after being withdrawn, was not concealed but fully accounted for.

It was quite natural, when Mr. Brydges spoke to him about the withdrawal of the money from the Mechanics' Bank, for Molson, against whom the Bank had a large claim which Molson did not acknowledge, as to the larger portion of it, to say: "I don't wish you to have the control of this money when we are set-"tling accounts; this money belongs to my family, and I don't wish it to be "on the street."

But this clearly is not secretion as against Molson's creditors in general, and plaintiff in particular, for their interest was that the money should not fall into the hands of the Bank.

As to the Bank, they have been since settled with, and do not complain; and, moreover, it would not have been secretion, even as against them, unless Molson made away with the money, to defraud all his creditors, including themselves; which he did not, for he has accounted for the amount.

It is said that part of the $30,000 has gone to redeem securities which belonged to himself, which he has placed in the name of his family, *i.e.*, the substitution; but that he had done so does not appear to have been concealed. On the contrary, there cannot be a doubt that the statement "C" was honestly intended to give all his creditors every possible information as to his property, showing what was in his name, and what was in the name of the substitution, and how the $30,000 had been expended. The only difficulty was to determine the legal rights of the parties under the circumstances, for the purpose of determining to whom the various securities and properties mentioned in the statement really belonged.

The Mechanics Bank was willing to admit the rights of the substitution, and Molson was ready to give up every thing mentioned in the statement "C" on that understanding.

Another mode, however, of settlement with the Bank was adopted. What is clear is that there was no concealment, and everything was understood.

If the mortgage turned out to be bad, the plaintiff could have no difficulty in showing where his $30,000 had gone to, and he might redeem the securities purchased therewith, if really he has a privilege over these securities, which Molson's creditors are bound to respect.

But there seems to have been no more fraud on the part of Molson, at the close than at the outset of the transaction when the money was borrowed upon a bill which the plaintiff's agent knew all about.

At most can it be said that he has preferred the substitution to his other creditors, which I have often had occasion to say is clearly not secretion.

As to Mr. Barnard's evidence, we are all agreed that its exclusion was illegal, but it is thought that Mr. Barnard's evidence would not have thrown any further light on the facts, which are supposed to be thoroughly understood.

But how are we to know the nature of Mr. Barnard's evidence or judge of its effect, without having it before us? Mr. Barnard would probably have removed all doubt as to the remark of Mr. Brydges, the preparation of statement "C" and the discussion of the same with Mr. Abbott, during which Mr. Barnard was clearly acting as a negotiator.

RAMSAY, J.:—The appellant was arrested on a *capias*. Respondent's agent made a very long deposition, setting up many matters which do not appear to have any direct bearing on the case. Leaving them aside, he deposes that the appellant was indebted to the respondent in the sum of $32,073.71, that appellant had secreted and made away with his property with intent to defraud, and that the reasons for so saying are:—

1st. That appellant borrowed the money, that is $30,000, for a special purpose; that, instead of so applying it, he paid it into the Mechanics Bank in his own name; that later he altered the deposit to the name of his wife, and ultimately, that he withdrew the money from the Bank and concealed it, as he had admitted to Mr. Brydges and others.

2nd. That appellant became insolvent, and made a statement of his affairs, in which he made no mention of the sum of money:

3rd. That appellant had borrowed the money on the security of property which he, appellant, now pretends was not his, but came to him from the estate of his father, and that it is substituted, and is by his father's will declared not to be subject to seizure; and that the appellant has joined in a deed of lease of said property, declaring it to be so substituted to the conditions of the said will. Appellant meets this by saying that the change of heading had no relation whatever to the insolvency either of the appellant or the Mechanics Bank, that the change of heading did not facilitate the withdrawal of the money from the Bank, and that the appellant, a borrower in good faith, could not secrete the money borrowed from the lender; that the withdrawal of the money was to prevent its falling into the possession of the Bank, and that the Bank had justified the course he had taken.

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He also says that the statement really accounts for the whole of this money; and, lastly, he says that leasing the property by a deed in which he takes a quality different from that he took in the deed of hypothecation is no concealment and no obstruction, even if obstruction could be a ground for *capias* under the Code.

The evidence produced by the appellant in support of his petition to be discharged is of enormous bulk; 147 pages of testimony are thought necessary to prove that he has expended this money, for this is the only issue of fact about which there is any contestation. It is not denied that appellant borrowed the money on the security of a title which he now contends is bad; that he leased the premises, taking a quality which defeats appellant's right if well founded, and at all events obstructs him; that the money he borrowed for a special purpose, he paid into the Bank first in his own name, that he changed it to his wife's name, that he withdrew it, and that he had the conversation referred to with Mr. Brydges. This waste of our time, this confusion of the relevant and the irrelevant, is manifestly attributable to the stenographic process, by which clatter goes down as evidence, to the enormous advantage of the stenographer, and to the disadvantage of every body else. While we are winnowing the wheat from the chaff of all this so-called testimony, we are not only employed in useless labor, but we are really rendering ourselves unfit for the higher duties of the judicial office. As might be expected, this voluminous evidence is for the most part irrelevant. Beyond a few simple details, which might have been made the subject of admissions, the whole evidence about the affairs of the Mechanics Bank appears to me to be outside of the case. It is important to know when the Bank was in difficulties and when it became insolvent, also when Mr. Molson paid the proceeds of the loan into the Bank, and when he changed the heading, and that, by the failure of the Bank, he became insolvent; but however generally edifying the information may be that numerous persons held what they were pleased to call trust stock, and that Mr. Abbott and Mr. Molson had been on friendly terms, it really throws no light on the case. It would seem that the petitioner's object was to direct attention from his own acts to those of others. With these last we have nothing to do, nor are we called upon, I think, to express any opinion on the validity of the mortgage on the St. James street property. The facts we have to pass upon are, it seems to me, as follows:

In January, 1875, Mr. Molson sought to obtain a loan of $30,000 on the security of property standing in his own name in Great St. James street. On application to the Masson estate, this loan was refused, the opinion of counsel being that the title of the applicant was defective. Mr. Molson then had recourse to the agent of the respondent, to whom it does not appear he communicated the difficulty that had been raised as to his title. But perhaps this fact is less significant than it would otherwise appear, inasmuch as it was the respondent's agent, under whose advice the appellant had purchased the property in question from his father's estate. Nevertheless the fact is there, that appellant, knowing there was a question as to his title, hypothecated the property as his own. This was on the 9th February, 1875, and the money received from the respondent he at once paid into his own account "in trust" in the Mechanics Bank. This

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money remained so deposited for some time, and then the heading was changed so that the money should appear to be the property of Mrs. Molson. The petitioner has explained by one of his witnesses that the object of this change was to put the money in the name of the parties to whom it belonged, and that it was pretended that, by old Mr. Molson's will, it belonged to Mrs. Molson. It has not been very clearly established when this change took place, but it was before the 9th of July, 1875 (p. 21). Very early in September, 1875, the whole of this money was chequed out by a single cheque (p. 3). The Bank, which had been in serious difficulties in February, 1875, was much pressed in the month of June, and finally closed its doors on the 20th September, 1875 (p. 37). It was just before this suspension that Mr. Molson drew out the money (p. 19), probably between the 3rd September and the suspension (p. 1). About the time of the suspension of the Bank, at all events in September (pp. 19 and 23), Mr. George Varey, the confidential clerk of Mr. Molson, tells us he made the statement of his affairs C "for the purpose of aiding in the settlement between him (Molson) and the Mechanics Bank." Some days later he is re-examined by petitioner in order to establish that it was after the 25th of November. After the money had been chequed out by Mr. Molson, and before the stoppage of the Bank, the President, Mr. Brydges, questioned Mr. Molson as to this transaction, and it was then Mr. Molson, in explanation, told Mr. Brydges that "he had taken it (the money) out and had put it away, and intended to keep it for his own purposes to keep him off the street." (p. 41.) It is evidently necessary for the petitioner to show how this considerable sum of money, transferred from the Bank to his own pocket, has been made available for his creditors, if he would escape from the imputation of secreting. He has attempted to do this by the statement C, the date of the making of which has been so unsatisfactorily proved, if it be of any importance whether it was made in the end of September or in the end of November, 1875. But, after giving this statement the closest attention, I have been unable to see that it establishes anything. At the argument I asked for some explanation of the principle on which it was framed, but I could obtain no satisfactory answer. Mr. George Varey, who made it, says it isn't a balance sheet, but merely a statement of assets and liabilities (p. 20), and on his third examination he is totally unable to say on what it was founded. He tells us that "we did not keep books like merchants keep their books"; "that it was made from Mr. Molson's books, and memoranda which we kept"; but how much was from books, if there were any, and how much from memoranda, he is totally unable to say.

We, therefore, find ourselves in face of the fact that this particular sum of money had been transferred on a transparently absurd pretext from the petitioner's credit to that of his wife, that he then drew it, avowedly to put it aside for his own purposes, and no coherent explanation of what these purposes were. I must say that this appears to me to be the crudest form of secreting.

I have already said we have nothing to do with the merits of the title to the St. James street property; but the petitioner's mode of dealing with that security may serve as an indication of the intent to defraud. In the first place, he borrowed the money knowing the objection to his title, and when he

Molson and Carter.

changed the heading, on the 9th July, 1875, he must have known of his own impending insolvency, and then it is clear he had made up his mind to take advantage of the pretended defect in his title. Notwithstanding this, he withdrawe the money, and, according to his own statement now, he spent all of it but $6,000 in releasing stocks and paying other debts. Not satisfied with this he leased the property, taking a quality which on the face of it defeats the plaintiff's recourse for rent. It is said that there is no harm in this; that plaintiff may test whether, in deciding that the title set up in his loan is bad, the petitioner is right or not, and that obstructing a creditor is not, under the Code, a ground of fraud. It seems to me that the putting one's estate by legal forms out of the reach of one's creditors, if the design be manifest to defraud, is obstruction, and it seems to me that the most obvious form of secreting, that is placing in concealment, is only an obstruction. If an insolvent, to defraud his creditors, dig a hole in the ground, and hide his money and valuables in it, would it be ground for his release from capias to say, "if you had looked in the right place you would have found them?" I think, therefore, that the judgment rejecting the petition should be maintained, taking all petitioner's pretensions to be true.

SIR A. A. DORION, CH. J.:—The majority of the Court is for confirming the judgment of the Court below.

The capias was issued on the allegation that the appellant was secreting his property, with intent to defraud his creditors. The circumstances on which the respondent relies, in support of the allegation, are stated at length in the affidavit.

The appellant, by his petition, under Art. 819 of the Code of Civil Procedure, seeks to have the capias quashed. In order to succeed it was incumbent on the appellant to disprove the allegations of the affidavit, and we are of opinion that he has not done so.

The evidence shows that, in the spring of 1875, the appellant borrowed from the respondent a sum of $30,000 on property of which he and the respondent's legal advisers considered he had the absolute control and disposal. The respondent deposited this sum in the Mechanics Bank, of which he was the manager, in his own name, "in trust Great St. James street property," being the property on which the loan was effected.

A short time after, and about the end of June, 1875, the appellant caused the heading of the account to be altered by adding to it, "*for E. A. M.*," these initials standing for "Eliza Ann Molson," his wife.

On the second of September following the appellant withdrew this sum of $30,000 from the Bank, and paid with it his own debts, for a large portion of which he had pledged Bank stock and other securities coming from his father's estate, and which were comprised in a legacy made subject to a substitution and à titre d'aliments, with a clause of *insaisissabilité*. He also paid other debts for which he had not given any security, or at least no property coming from his father's estate. There is, however, a sum of $6,000 out of the $30,000 which is not satisfactorily accounted for.

Subsequently the appellant leased the St. James street property on which he

had borrowed the money from the respondent, and he made the lease not in his own name, as he had been in the habit of doing, but in the name of his wife and children, or as Trustee for them. Mrs. Molson has since laid claim to all this property under the will of the appellant's father, the late Honorable John Molson.

When all these transactions took place the appellant owed large sums of money to the Mechanics Bank and others, and he was unable to meet his liabilities.

The question is, do these facts establish a fraudulent secreting on the part of the appellant?

I do not attach much importance to the manner in which the appellant obtained the loan of the $30,000 from the respondent. Although he knew there were difficulties about his title to the property on which he borrowed the money, since he had applied elsewhere, and had been refused on the ground that his title was defective; yet it does not appear that he concealed that fact, or anything about his titles, which were well known to the respondent's legal advisers. There is therefore no fraud proved in that part of the transactions. But the appellant having obtained the money, apparently in good faith, and deposited it to his own credit, soon thought it more prudent to place it in trust for his wife, and subsequently to apply it to the release of Bank stock and other securities which his creditors could not attach, by paying debts for which they were pledged. By this means the appellant secured to his wife and family the whole benefit of the money which he so applied.

It has been urged that as these securities came from the estate of his late father, and as he could not dispose of them, he had a right to redeem them in order to place them back in the estate. But, if the appellant had committed a fraud against his own family in disposing of property without any right to do so, this could be no excuse for committing another fraud upon his creditors in order to bring back into his father's estate property which he had improperly taken out of it.

It is secreting in the eyes of the law when a debtor, unable to meet his liabilities, fraudulently puts his property or any appreciable portion of it, beyond the reach of his creditors.

The appellant obtained $30,000 from the respondent, and while he was insolvent he disposed of the greatest portion of it, so as to enure to the sole benefit of his wife and family, keeping $6,000, for which he has not given any satisfactory account.

That the appellant has placed a large sum of money beyond the reach of his creditors, there can be no doubt. Did he do so with intent to defraud?

The intent of the appellant must be gathered from all the circumstances of the case. If the appellant did not intend to defraud his creditors and the respondent in particular, when he knew he was totally insolvent, why did he place the money he had borrowed from the respondent to the credit of his own wife? Why did he, with part of it, release property which he knew his creditors could not attach? Why did he change the form of the lease of the St. James property, by representing it as belonging to his wife and childen, while he had

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represented it to the respondent as his own property? All this clearly indicates an intention to defraud. There is, moreover, the positive declaration made by the appellant to Mr. Brydges, "that he did not want to be thrown with his family on the street," when Mr. Brydges remonstrated with him for having withdrawn from the Bank the $30,000 he had deposited there.

On the whole, I think there is abundant evidence of a fraudulent secreting on the part of the appellant, and that the judgment ought to be confirmed.

Judgment of S. C. confirmed.

Barnard & Monk, for appellant.
Bethune & Bethune, for respondent.
(S. B.)

COURT OF QUEEN'S BENCH, 1880.

MONTREAL, 19TH JUNE, 1880.

Coram HON. SIR A. A. DORION, CH. J., MONK, J., RAMSAY, J., TESSIER, J., CROSS, J.

No. 16.

ERICHSEN ET AL.,

APPELLANTS;

AND

CUVILLIER ET AL.,

RESPONDENTS.

HELD:—1. That the claim to customary dower is a real right, and is governed by the law of the place where the real property of the husband is situate, and not by the law of his domicile at the time of his marriage, or of the place where the marriage was celebrated.

2. That the widow cannot claim dower in the present case, because, in conformity with the requirements of a deed of donation to her husband and herself and children, by a Miss Symes, she renounced to all right to dower upon all or any of the immoveable property formerly belonging to her husband's father, from whom her husband inherited the property in question in this case.

This was an appeal from the following judgment of the Superior Court at Montreal (RAINVILLE, J.), rendered on the 7th of December, 1878, and which dismissed an action for customary dower brought by the appellants against the respondents:—

"La Cour * * *

"Considérant que la demanderesse, Dame Charlotte Erichsen, a, le quatre "août, 1849, épousé Austin Cuvillier, et que de ce mariage est née l'autre "demanderesse, Charlotte Agnès Claire Cuvillier, mariée à Arthur Abraham "Fraser;

"Considérant que le 31 octobre, 1857, a été rendu un jugement en séparation de biens entre ladite Dame Charlotte Erichsen et le dit Austin Cuvillier, "que le 12 août, 1858, la dite Dame C. Erichsen, par acte reçu devant "maître Doucet, Notaire, a renoncé à la communauté qui avait existé entre "elle et le dit Austin Cuvillier, son mari; que les seuls droits qu'elle avait "alors étaient son douaire coutumier sur les immeubles qui pouvaient y être "sujets; et que jugement a été rendu homologuant le dit rapport de prati-

" cien, et réservant à la dite Dame C. Erichsen son droit à tel douaire que " de droit ;

" Considérant que le dit Austin Cuvillier est décédé le 11 février 1869 ;

" Considérant qu'avant le mariage de la dite Charlotte Erichsen avec le dit " Austin Cuvillier, le père de ce dernier l'Honorable Austin Cuvillier, était " décédé le 11 juillet, 1849, *ab intestat*, laissant cinq héritiers, au nombre " desquels était le dit Austin Cuvillier ;

" Considérant que le 4 décembre 1849, Dame Marie Claire Perrault, veuve " du dit feu Honorable Austin Cuvillier, donna à ses cinq enfants, au nombre " desquels était le dit Austin Cuvillier, tous ses biens meubles et immeubles lui " appartenant comme ayant été en communauté de biens avec le père du dit " Austin Cuvillier. Que parmi les biens dont le dit Austin Cuvillier a ainsi " hérité, tant par la succession *ab intestat* de son père que par le dit acte de " donation de sa mère, se trouvait un certain lopin de terre situé sur la rue " Sherbrooke ;

" Considérant que par acte de partage entre les dits héritiers, passé le 4 jan- " vier, 1854, devant Doucet, notaire, le dit lot de terre, décrit au dit acte de " partage comme lot No. 4, échu au dit Austin Cuvillier ;

" Considérant que par acte de vente passé le 13 juillet, 1855, le dit Austin, " Cuvillier vendit le dit lopin de terre à la défenderesse, qui en prit possession, " et le possède encore ;

" Considérant que le douaire coutumier est soumis à la règle des statuts réels, " et que les biens situés dans la Province de Québec sont sujets au dit douaire " en faveur de la femme et de ses enfants, indépendamment du domicile des " parties lors de leur mariage, et qu'en conséquence, aux termes de l'Article " 1434 du Code Civil du Bas-Canada, le dit lot de terre est devenu, par suite du " mariage de la dite Dame Charlotte Erichsen avec le dit feu Austin Cuvillier, " sujet au dit douaire ;

" Mais considérant que le 29 mai 1866, Dame Marie Anne Claire Symes, " nièce de la défenderesse, et propriétaire d'une part indivise dans les biens " laissés par le dit feu Honorable Austin Cuvillier et son épouse, Dame Marie " Claire Perrault, fit un certain acte de donation au dit Austin Cuvillier et à Dame " Charlotte Erichsen, à la condition que cette dernière renoncerait, tant pour " elle que ses enfants, à sa prétention au dit douaire ; et que la dite Charlotte " Erichsen a ensuite fait telle renonciation, par acte passé le 28 janvier 1867, " devant Théo. Doucet, notaire ;

" Que la dite Dame C. Erichsen a fait cette renonciation, y étant autorisée " par son époux, et agissant par M. Cuvillier son procureur, nommé par un note " de procuration conçu dans les termes suivants : ' We, after having taken com- " munication of a certain deed of donation (l'acte ci-dessus mentionné) do " approve, ratify and confirm and accept the said donation, to all intents and " purposes ; and whereas by the said deed of donation it is stipulated that it " will be inoperative as to us the said Austin Cuvillier and Charlotte " Cuvillier (Erichsen) and to the children of the said Austin Cuvillier, " unless I, the said Charlotte Cuvillier, do renounce [illegible] and the " children born or to be born of my marriage with the said Austin Cuvillier, to

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"all dower and other matrimonial rights which I, or they, can in any wise demand "or pretend to, to or upon all or any of the immoveable property heretofore belong- "ing to the said Austin Cuvillier, in the City of Montreal, or elsewhere, as the "whole is therein more fully explained. And whereas I am desirous to secure "unto myself and my said husband and his children all the pecuniary advantages "therein granted, I, the said Charlotte Cuvillier, do hereby appoint M. Cuvillier "my lawful attorney, to renounce for me, as well as for my children, born or to "be born of my marriage with the said A. Cuvillier, to all dower and right of "dower, and all other matrimonial advantages which I myself and my said chil- "dren can or could in any way have, demand or pretend to have in, to or upon "all the real and immoveable property hereinafter described, that is to say, &c., "&c., &c;

"Considérant que le dit procureur, M. Cuvillier, a fait une renonciation dans "les termes de cette procuration;

"Considérant que parmi les lots décrits dans la susdite procuration, le lot "possédé par la défenderesse ne se trouve pas, mais que néanmoins la dite pro- "curation, et l'acte de renonciation fait par M. Cuvillier rendent évidente l'in- "tention de la demanderesse, et qu'elle a virtuellement renoncé à son douaire "sur ce lot, quoiqu'il ne se trouve pas décrit, puisqu'elle accepte la dite donation, "la confirme et ratifie, que c'est une simple omission dans la désignation des "immeubles sur lesquels la demanderesse a réellement entendu renoncer à son "douaire,

"Considérant [illegible] prouvé que le dit feu Austin Cuvillier et les demande- "resses ont [illegible] dite donation, laquelle a eu tout son effet en leur faveur, "par suite de leur acceptation d'icelle et de la dite renonciation de la dite dame "Erichsen;

"Considérant que les dispositions de l'article 1029 du Code Civil, par lesquelles "il est dit qu'on peut stipuler au profit d'un tiers, lorsque telle est la condition "d'un contrat que l'on fait pour soi-même, ou d'une donation que l'on fait à un "autre, rendent inadmissible la prétention de la demande que la condition im- "posée à la demanderesse de renoncer à son douaire ne pouvait pas profiter à la "défenderesse;

"Considérant que cette disposition au profit de la défenderesse peut être "acceptée tant qu'elle n'est pas révoquée, et que son acceptation est une accepta- "tion suffisante, maintient l'exception en premier lieu plaidée par la défenderesse, "et renvoie l'action de la demanderesse avec dépens distraits à Mr. Ed. Barnard, "avocat des défendeurs."

The discussion on the appeal was limited principally to the effect of the renunciation, in terms of the deed of donation.

Bethune, Q. C., for appellants, however, submitted the following authorities, on the subject of the right to dower being governed by the law of the situation of the property:—

Art. 248, *Cout. de Paris*; 3 G. C. de Paris, p. 679, No. VI. Pothier (Qrto.), Douaire, No. 303. Merlin, Rep., Vo. Douaire, Sec. 1, § 3, p. 265 (5th Ed.) § 2, p. 217 (4th Ed.). 2 Boullenois, Traité des Stat. réels et personnels. 2nd pp. of Tit. 2, Ch. 4, Obs. 37, pp. 219, 220, 221, 222, 223, 244, 245. N. Den.

Vo. Douaire, § 3, No. 3, p. 183. 1 Baequet, p. 126, No. 50. 2nd Chabot (Ques. Trans.), p. 1. 2nd Duplessis, pp. 186, 187, 188. Story, Conflict of Laws (Redfield's Ed.), Sec. 448, 449, 450, 451. 1 Burge (Col. and Foreign Law), pp. 611, 618, 635. Fisher vs. Jamieson (C. P. U. C.), 7 L. C. Jur., p. 154. Art. 1442 of our own Civil Code.

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Turning then to the ground assigned in the judg[illegible] the dismissal of plaintiff's action, he remarked:—

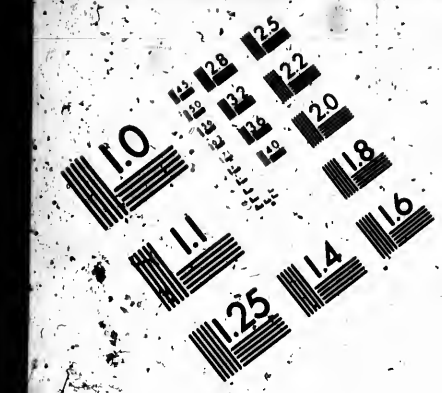
As the property in question in this cause was not inc[illegible] per-ties described in the deed of renunciation, nor in the [illegible] under which it was executed and attached to the deed (paper 3[illegible]d), the judgment nevertheless declares that it was the evident intention [illegible] parties to include the defendants' property, and that its non-appearance in the deed and power of attorney was "*une simple omission*," and that Mrs. Cuvillier *a virtuellement renoncé à son douaire.*

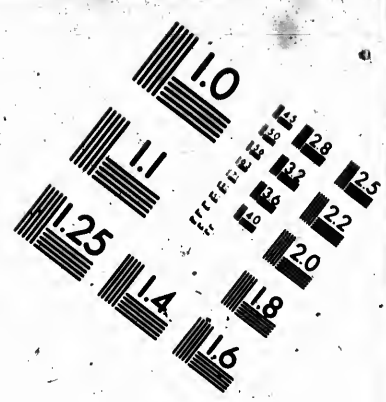
As the intention of the parties can only be discovered by a perusal of the deed of renunciation and power of attorney themselves, it is difficult to understand (in the absence of any allusion whatever therein to the particular property in question in this cause, or to the defendants as being in any way interested in the renunciation) how the donor (Miss Symes) can be presumed to have had any intention to protect interests other than her own, or that Mrs. Cuvillier intended to renounce her rights on any other properties than those specially described. It is true that in the deed of donation referred to in the judgment, Miss Symes stipulated in a general way that Mrs. Cuvillier should renounce to her own and her children's dower on all properties in Canada formerly belonging to her husband, and that in the power of attorney this stipulation is referred to; yet, it is quite clear, from the enacting words in the power of attorney, that Mrs. Cuvillier only had in view the particular properties specifically described, for instead of giving authority to her attorney, Maurice Cuvillier, to renounce to her dower upon *all* the immoveable property formerly owned by her husband in Canada, *including* these specific properties, she simply authorizes her attorney to grant such renunciation *on the specific properties described in the deed.*

Turning then to the renunciation itself, we find that the attorney simply renounced to the dower on the properties therein specially described, no allusion whatever being made therein to any other properties.

As the renunciation, in this form, was accepted by Miss Symes, as a complete compliance with the stipulations she had made in the deed of donation, the conclusion is inevitable, that the real intention of all the parties was to release from the dower the specific properties described in the deed of renunciation and power of attorney, and none others, and that in all that Mrs. Cuvillier did, she cannot be held to have *virtually* renounced to the dower on the property in question in this cause.

It is further submitted, as a legal proposition, that the dower (specially that of the child, Mrs. Fraser) could not be renounced *virtually*, or by implication. The renunciation, to produce any legal effect, must be *express*, and must specially refer to and describe the immoveable property alienated or hypothecated by the husband. Arts. 1443, 1444 of our Civil Code.





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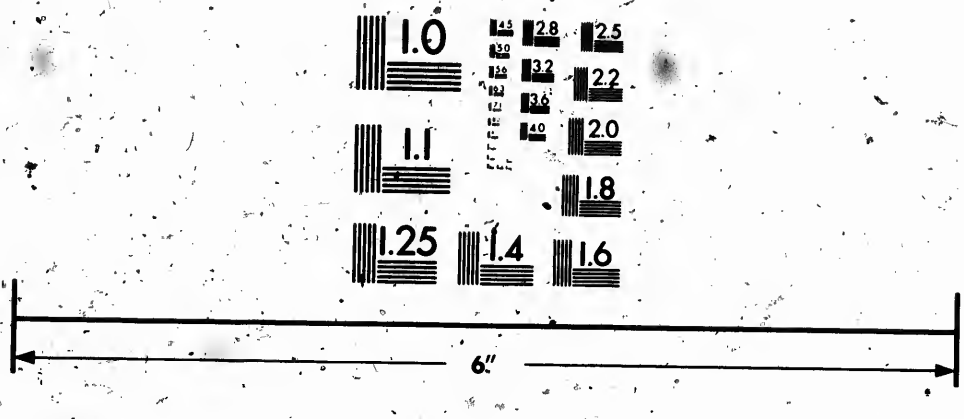

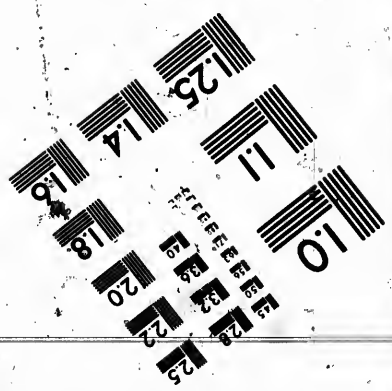

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Erichsen et al. and Cuvillier et al.

Barnard, Q. C., (for respondents). Le second moyen de défense des défendeurs a paru suffisant à la Cour pour renvoyer l'action ; le premier a été rejeté et le dernier n'a pas été mentionné dans le jugement.

L'acte de donation auquel il est référé dans le plaidoyer des défendeurs ne laisse aucun doute sur l'intention de la donatrice ; ce qu'elle a voulu des donataires, et en particulier des demanderesses-appelantes, c'était une renonciation pleine et entière au douaire coutumier que Dame Charlotte Erichsen pouvait prétendre sur tous les immeubles appartenant à Austin Cuvillier, comme les termes de l'acte l'établissent.

Cette renonciation, la dite Dame Erichsen, autorisée par son mari, l'a faite, par son agent, Maurice Cuvillier, et les termes de la procuration récitée dans le jugement de la Cour Inférieure, font voir que Madame Erichsen, après avoir accepté l'acte de donation, a voulu s'y conformer en tous points, et a en conséquence renoncé à son douaire sur tous les biens de Austin Cuvillier. Mais accidentellement, le lot possédé par la défenderesse ne se trouva pas dans les lots décrits dans la dite renonciation, de là l'opinion des demanderesses que leur droit de douaire sur le lot en question continuait d'exister. Cette interprétation de l'acte de renonciation n'est pas admissible. L'intention de la donatrice aussi bien que celle des donataires est trop évidente pour qu'elle puisse dépendre d'une simple erreur cléricale. Madame Erichsen, pour se conformer aux conditions de la donation a renoncé à son douaire sur tous les biens de Austin Cuvillier ; pourquoi alors le lot des défendeurs en serait-il exclu ? Et l'eût-elle fait intentionnellement qu'elle ne l'aurait pû, les termes de la donation qu'elle a acceptée, qui a eu tout son effet et dont elle a profité, ne lui laisse à ce sujet aucune discrétion.

Et relativement à Madame Fraser, les intimés soumettent que dans tous les cas ci-dessus référés, elle était liée par les actes de sa mère, Madame Erichsen, et doit d'après la loi, se conformer au choix de cette dernière, même en supposant qu'en loi Madame Fraser puisse avoir une action pour douaire du vivant de sa mère.

Quant à la première question soulevée par la défense, savoir, que les époux, lors du mariage, ayant été domiciliés en Angleterre dont la loi dans le cas actuel n'accorderait pas de douaire, tel qu'il est établi en preuve, il semble qu'au besoin elle devrait être décidée en faveur des intimés. D'après l'opinion qui tend de plus en plus à prévaloir en fait de droit international privé, la stipulation des époux dans quelque pays qu'ils aient leur domicile lors du mariage, doit être exécutée dans tous les autres pays, tant que cette stipulation n'est pas réprouvée par la loi de la situation des biens. Et en l'absence de contrat les parties sont censées se soumettre à la loi de leur domicile qui tient lieu d'une stipulation expresse. L'article de notre Code qui fait du douaire un statut réel, n'est pas défavorable aux intimés, parce que cet article n'a d'application que quand la loi du pays étranger—la loi de l'Angleterre dans le cas actuel—serait en conflit direct avec la nôtre, sur un point donné. Mais comme la loi du Bas-Canada permet expressément aux parties de faire toute stipulation que bon leur semble touchant le douaire, la loi anglaise ne viole pas notre droit. L'autorité de Pothier est invoquée contre les intimés sur ce point. Mais il est clair que-

les distinctions faites par les auteurs sur lesquels les intimés s'appuient ne paraissent pas avoir été faites par Pothier, qui, de fait, n'a pas décidé la question qui s'élève.

Mr. Barnard cited Art. 1029 of the Civil Code of L. C. Pothier, *Comm. de biens.* Westlake, Private and Int. Law, Nos. 369, 370. 1 Felix, No. 90 et seq. Guthrie's Savigny, 242.

Sir A. A. Dorion, Ch. J. This is an action for *douaire coutumier.*

On the 29th of May, 1866, Dame M. A. C. Symes made a donation to Austin Cuvillier and his wife Charlotte Erichsen, on condition that she should renounce, as well for herself as for her children, to any dower, which she might have on all property which had come to her husband from the estates of the late Honorable Austin Cuvillier and Marie Claire Perrault, his deceased father and mother. Charlotte Erichsen, who is one of the appellants, accepted this donation, and being in England at the time, she, in execution of the condition of the donation, authorised Maurice Cuvillier by a special power of attorney to renounce, as well for herself as for her children, to her dower on the several lots of land specifically described in the power of attorney. Maurice Cuvillier renounced for her, to her dower, in the very terms of his power of attorney.

Austin Cuvillier, the younger, died leaving one child, now Mrs. Fraser, one of the plaintiffs in the Court below and one of the appellants in this Court.

It appears that a lot of land now belonging to the female respondent, and which had come to Austin Cuvillier, junior, from the estates of his late father and mother, has not been included in the power of attorney given to Maurice Cuvillier, nor in the renunciation which he made on behalf of Mrs. Cuvillier to her dower, and that, therefore, there has never been any formal renunciation of her dower on this property.

It is under these circumstances that Mrs. Cuvillier (Charlotte Erichsen) and her daughter, Mrs. Fraser, have brought this action to recover the *douaire coutumier* which they allege they are entitled to claim on the property so held by the female respondent, and to which the renunciation does not apply.

The respondent has pleaded that Austin Cuvillier was married in England while domiciled there; that he made no contract of marriage, and that the appellants were not entitled to claim any dower on the property of the respondent; that Mrs. Cuvillier had renounced to her dower upon all the property coming from the estate of Mr. Cuvillier, the elder, and of Marie Claire Perrault his wife; that the donation made to Austin Cuvillier, junior, and to his wife, one of the appellants, consisted of an annual rent payable to the donees and to their children on condition that Mrs. Cuvillier and her children should renounce to their dower, and that both appellants had received, since the date of the donation, the share of the rent to which they were respectively entitled.

The Superior Court dismissed the action, on the ground that Mrs. Cuvillier had by her renunciation released her dower on the respondent's property, as well for herself as for her children.

The evidence shows that although Austin Cuvillier, junior, was married in England, he had then his domicile in Canada, and as he was married without a written contract of marriage, his wife was entitled to claim a *douaire coutumier,*

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according to the laws of Canada, on all property here subject to such a dower which she had not released.

By article 1444 C. C. a wife is authorised to renounce to her dower on property sold by her husband, and this renunciation may be made by the deed of sale or by a subsequent deed. The effect of such renunciation is, according to Article 1445 C. C., to discharge the property from all dower which she or her children might claim on such property. The renunciation to be binding must be express and made according to the provisions of the Code, at least to bar the dower of the children. I cannot therefore say that there was here such a renunciation as is required by law, and that the children would be barred by the renunciation made by Mrs. Cuvillier from claiming their dower, on the respondent's property which was not expressly mentioned in the renunciation. The renunciation, however, was not a gratuitous act: Mrs. Cuvillier agreed to renounce for a consideration, that is, for the annual rent which was promised to her, and which she has since received. There was an express acceptation of the donation, and the omission of the respondent's property in the description of the lots, on which she authorised Maurice Cuvillier to renounce for her, was evidently a casual omission, and not intentional. By accepting the donation and the rent paid under it, Mrs. Cuvillier did so on the conditions on which the donation was made, and she agreed to give a valid release of her dower, in the form required by law. She can now be compelled to do it, at least as far as her own rights are concerned. She is therefore estopped from claiming her dower by her obligation to renounce to it which she has voluntarily entered into, for valuable consideration.

Whether this obligation on her part can bind her daughter, Mrs. Fraser, is another question which it is not necessary to decide here, for Mrs. Fraser can only claim her dower at the death of her mother (art. 1439 C. C.), and although Mrs. Cuvillier is not entitled to claim the usufruct of her dower on account of her renunciation or her promise to renounce, yet her renunciation or promise to renounce, having been made for a valuable consideration, does not enure to the benefit of her daughter, but to the respondent for whose benefit the renunciation or promise to renounce was made (art. 1465 C. C., Pothier, Douaire No. 250-1). It appears, moreover, by Mrs. Fraser's own admissions, that, since she has become of age, she has received her share of the rent to which she was entitled under the donation which Miss Symes made to her father and mother, and this would likely preclude her from claiming her dower, as she could only have received that rent on the condition stipulated in the donation, that her dower should be released.

It has been contended on the part of the appellants that the stipulations of the deed of donation were in favor of Miss Symes, who alone could claim their accomplishment. It appears, however, by the evidence that Miss Symes, as representing her late mother, was a co-heir in the estate and property of the late Austin Cuvillier, senior, and of Marie Claire Perrault, his wife; that, as such, she had an interest in getting a release of the dower on all the property which had come from their estates, first, to protect the share which by the *partage* had been allotted to her late mother, and to avoid the guarantee to

which she was liable as respects the shares allotted to her co-heirs. She had, therefore, a direct interest in the stipulation that Mrs. Cuvillier should renounce to her dower, as well for herself as for her children. According to art. 1029 of the Civil Code a stipulation may be made for the benefit of third persons, when such is the condition of a contract, which the party stipulating makes for himself, or of a gift which he makes to another. Both these conditions are to be found in this donation: it was a contract which Miss Symes made to relieve herself from certain responsibilities, and it was partly an advantage she wanted to confer on the members of her family, the other heirs of the late Austin Cuvillier the elder, and of his wife, by releasing their share of the property from the dower to which it was affected.

I am therefore of opinion that the appellants cannot succeed,—Mrs. Cuvillier, because she has renounced or agreed to renounce to her dower, and is bound by her agreement, and Mrs. Fraser for the reason that, whatever right she may hereafter have to claim her dower, she has none while her mother is still living.

The judgment of the Court below must therefore be confirmed.

RAMSAY, J.:—The appellants are the widow and daughter of the late Austin Cuvillier, who was brother of the respondent, Madame Delisle. It appears that Austin Cuvillier and his brothers and sisters became proprietors of the property described in the declaration in this cause, as heirs-at-law of their father, who died on the 11th July, 1849, and by a deed of the 4th of December of the same year, by which their mother made over to her said children all rights of property, movable and immovable, belonging to her as having been *commune en biens* with her late husband.

On the 4th of August, 1849, that is, between the death of the father and the cession by the mother, Austin Cuvillier married in England the appellant Charlotte Erichsen. The other appellant is the only issue of this marriage. It further appears that, on the 4th of January, 1855, the heirs Cuvillier, that is, Austin Cuvillier, his sisters and brother, made a *partage* of the land in question, by which *partage* lot 4 became the property of Austin Cuvillier. On the 30th July of the same year he sold his share to his sister, Madame Delisle, now respondent.

On the 31st October, 1857, Mrs. Austin Cuvillier obtained judgment *en séparation de biens* from her said husband, which was duly executed, and by the *rapport de praticien* it was established that the said Mrs. Cuvillier renounced to the *communauté de biens* theretofore existing between her and her said husband, and that she held to her right to dower over the share of her husband in the said property. On the 28th September, 1858, this report was homologated by judgment. Austin Cuvillier died in England on the 11th February, 1869, and his widow and daughter brought their action against Madame Delisle and her husband, to recover back one-half of the share of the said Austin Cuvillier in the lot of land described.

The respondents met this action by the general issue, and by several special pleas, by which last they contended:

1st. That as Austin Cuvillier and the appellant Dame Erichsen were married in England, the English law governs the case, and that by that law dower did not accrue.

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2nd. That the niece of the said Austin Cuvillier had made a donation to the said Dame Erichson, in order to induce her to renounce to her right to dower in that case, and that she had accepted the said donation.

And, 3rd. That the said appellants had done acts of heirship, and accepted the legacies under the will of the late Austin Cuvillier, and that the subsequent renunciation to the succession of the said Austin Cuvillier is null.

I think it can hardly be said that the evidence establishes that Austin Cuvillier had at the time of his marriage renounced the domicile of his birth. But the question of domicile is of no importance in this case. Dower is a real right which is regulated by the laws of the place where the immovable is situate, 1442 C. C. Whatever, then, was the domicile of Austin Cuvillier at the time of his marriage, the right of his wife and child to dower arose.

There can be no doubt that the wife can renounce to her dower over the property her husband sells, alienates or hypothecates, either by the deed by which he so alienates or by any other subsequent deed (1444), and such renunciation absolutely bars the dower not only of the wife but of the children, and this so effectually that neither can claim any compensation out of the other property of the husband or of his succession (1445). Directly, and in so many words, Mrs. Austin Cuvillier did not renounce to her dower over the share of her late husband in the property in question sold to Mrs. Delisle. But during her husband's life, her husband's niece, Miss Symes, made a donation to her uncle, Austin Cuvillier, and to his wife, subject to the express condition that the said donation "n'aura "d'effet qu'en autant et après que Dame Charlotte Erichsen, son épouse actuelle, "aura renoncé tant pour elle-même que pour ses enfants nés et à naître de son "mariage avec le dit Austin Cuvillier, à tous douaire et autres avantages matri- "moniaux quelconques qu'elle ou qu'ils pourraient en aucune manière, avoir, "demander ou prétendre en ou sur toutes et chacune les propriétés immeubles ci- "devant appartenant au dit Austin Cuvillier en la cité de Montréal ou ailleurs, et "dont la plus grande partie a été acquise chez le Shérif dans l'intérêt de la dite "Demoiselle Symes, comme représentant sa mère décédée, et par Dame Marie "Angélique Cuvillier, épouse d'Alexandre Maurice Delisle, écuyer, et Demoi- "selle Luce Cuvillier, ses tantes, la dite donation n'admettant pas toutefois que la "dite Dame Austin Cuvillier ou ses enfants aient ou puissent avoir aucun tel "douaire ou autres avantages matrimoniaux sur les dites propriétés."

On the 8th January, 1867, Mrs. Cuvillier, authorized by her husband, along with her said husband made a deed, under seal, at London, in England, in and by which she formally recognized the said donation and the condition of renunciation therein expressed, and upon the fulfilment of which the said donation depended, and accepted the said donation subject to the said condition. She then goes on to say that whereas she, the said Charlotte Cuvillier, was desirous to secure unto herself and to her said husband and his children all the pecuniary advantages granted unto them by the said deed of donation, she, with the authority of her said husband, named and appointed Maurice Cuvillier to be her attorney, for her and in her name, to renounce for her as well as for her children, "to all dower and right of dower, and all other matrimonial advantages which she herself and her said children can or could in any way have, demand or pretend to have, in, to or upon all the real and immoveable property *hereinafter described*."

Then follows an enumeration of properties which does not include the property in question.

Maurice Cuvillier, under this authority, renounced on the part of Mrs. Austin Cuvillier to all the properties mentioned in the said last-mentioned deed, and to no more, on the 28th January, 1867.

It is evident that the act of Maurice Cuvillier cannot affect the question, and that unless Mrs. Austin Cuvillier's declaration of her intention to take advantage of the donation was in itself a renunciation, none exists. There cannot be an implied renunciation. In other words, the law empowers the wife to renounce by deed, and she cannot be held to have done so in any other way. It can scarcely be seriously doubted that the acceptance of the donation from Miss Symes binds the appellant, Mme. Cuvillier, as much as if the donation had been directly from Mme. Delisle, that is to say, Mme. Delisle has as much right to invoke the donation as if she had been herself the donor, so that the question really reduces itself to this: was the deed passed in London on the 28th January, 1867, for a valuable consideration, equivalent to a renunciation? On this point the law previous to the Code seems to be clear. The wife could always purge the dower so far as she was concerned, 4 Pothier, Douaire, No. 85. The difficulty arises from the terms of Art. 1443, which puts on the same footing the alienation of the immoveable subject to dower "either with or without the consent of the wife." The Article says: "Such alienation and charges are equally without effect, as regards both the wife and the children." The Registration Ordinance did not go so far (sect. 35); but Sec. 36 provides that the wife cannot bind herself for the debt of her husband otherwise than as *commune en biens*, and this provision is supposed to prohibit the wife freeing her dower, even as regards herself. This consideration is the motive for the limitation in Article 1443 C. C. The Commissioners say in their Fifth Report, p. 240: "The first part of this Article amounts to a declaration that the husband cannot sell, alienate nor hypothecate the immoveable subject to dower. Such is the ancient law; but the Article goes further and declares that the mere consent of the wife does not, in any way, affect her right nor that of the children, unless she have made the express renunciation sanctioned by the following Article. Formerly, if the wife made an alienation together with her husband, she did not bind the children, but she obligated herself; so much so that, being the warrantor of the purchaser, she could not disturb him in his enjoyment; by this means she lost the usufruct, but upon her death the children entered into possession of the property, notwithstanding the alienation by their mother, unless they became her heirs. In this respect, the ancient jurisprudence has been changed; the obligation of warranty, contracted by the wife who alienates jointly with her husband, is void and ineffectual, since our Legislature has declared (by ch. 37, C. S. L. C. sec. 52) that the wife cannot obligate herself for her husband otherwise than in the quality of common as to property. The warranty which she contracts in the case presented is therefore null, and for this reason the Article declares that the alienation of an immoveable subject to dower, which is effected either with or without the consent of the wife, even with the authorization of her husband, is without effect, not only as regards the child-

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ren, but also as regards the wife herself; saving the exception contained in the following Article."

We have, then, not only the text of the law but its meaning most authoritatively defined. The wife can no longer bind herself to give up her dower so as to advantage her husband by allowing him to sell or charge his immoveable subject to dower, but that excludes the idea that she cannot abandon her dower for a consideration. It would be to carry the fear of the wife allowing her property to be sacrificed for her husband to an extreme to say that the wife should be declared to be incompetent to better her position by abandoning her right to dower over a particular property for a consideration, as in the present case. Again, it would be to give the wife right to dower twice to say that where the wife alienated for a *bona fide* consideration the deed was to have no effect. The Code does not say it, and we should be contravening the sense of the Article if we were to give it such an interpretation, and moreover we should be violating the most evident of the rules of justice, that no one shall enrich himself at the expense of another. Of course Mrs. Cuvillier could not affect her daughter's rights by any renunciation but that made in accordance with Article 1444, but Mrs. Fraser has no claim to the property till her mother's death. I think, therefore, that the judgment of the Court below should be confirmed with costs, altering the *motivé* slightly, so as to express that the deed in London was not an absolute renunciation to dower permitted by the law since the Registration Ordinance, and I would dismiss this appeal with costs.

Judgment of Superior Court confirmed.

Bethune & Bethune, for appellant.

Barnard & Co., for respondents.

(S.B.)

COURT OF QUEEN'S BENCH, 1872.

MONTREAL, 20TH JUNE, 1872.

Coram CARON, J., DRUMMOND, J., BADGLEY, J., MONK, J.

CONLAN, APPELLANT;

AND

CLARKE, RESPONDENT.

HELD:—That when a husband withdraws himself from the matrimonial domicile, and, notwithstanding the willingness of the wife to continue to reside there with him, refuses to provide her with a fit and proper residence, and with support and maintenance according to his means, the wife may sue the husband for maintenance simply, without suing en *séparation de corps et d'habitation*.

This was an appeal from the judgment of the Superior Court at Montreal, tting in Review, reported in the 15th L. C. J., p. 263.

The following was the judgment of the Court:

"The Court * * *

"Considering that the protection which a husband owes to his wife and the

obedience which a wife owes to her husband are correlative duties, producing the reciprocal legal obligation between them of the wife living with her husband where he thinks proper to reside, and of the husband providing her with a residence and with the necessaries of life according to his means and condition;

"Considering that the said respondent, the said husband, withdrew himself from his joint residence with his said wife, the appellant, and, notwithstanding her willingness to continue to reside with him according to his means and condition, refused to provide her with a fit and proper residence, and with support and maintenance according to his proved means and condition, and hath therefore failed and neglected to perform the marital obligations and duties imposed and binding upon him according to law;

"Considering that the said appellant is therefore entitled to receive from him, the said respondent, her husband, such support and alimentary provision as his means and condition justify, and that she is not, under the circumstances proved in this case, compelled by law, for the obtaining of such support and provision, to proceed against the said respondent, her husband, *en séparation de biens*, although the said circumstances might justify her adoption of such proceedings;

"Considering that the appellant hath established her right to the said maintenance and alimentary support and allowance claimed by her in her said *demande* from the said respondent, and that there is no error in the judgment rendered on the 28th day of February, 1871, by the Circuit Court sitting at Montreal, and that there is error in the said judgment rendered at Montreal aforesaid on the 30th day of June, 1871, by the Court sitting in Review in this cause, doth reverse and set aside the said judgment in Revision, and doth confirm the said judgment *en première instance*, the whole with costs against the said respondent, as well of the said Court of Revision as of this Court, for which costs distraction is granted to Mr. Doherty, appellant's attorney."

(The Hon. Mr. Justice Caron *dissenting*.) The Hon. Chief Justice Duval who heard the case, prevented by sickness from being present in Court at the rendering of the judgment, has, in testimony of his concurrence therein, addressed to the Clerk of the Court a letter containing his decision and signed by him.

Judgment of Court of Review reversed.

[*Vide* cases in S. C. since, 1 L. N. 581, and 3 L. N. 220.]

Mr. Doherty, for appellant.

Mr. Lacoste, for respondent.

(S.B.)

SUPERIOR COURT, 1880.

MONTREAL, 17TH APRIL, 1880.

Coram TORRANCE, J.

Rickaby vs. *Bell*, and *Bell*, Petitioner.

HELD:—When no time is fixed by the statute itself, an Act takes effect from its date; and the date includes the whole day of the date. Accordingly, a writ of attachment issued under the Insolvent Act on the day that the Act to repeal the Insolvent Act was assented to, was held to be invalid, though the writ was, in fact, issued before the repealing Act received the assent of the Crown.

A writ of attachment under the Insolvent Act was taken out against the defendant, and delivered to the assignee to whom it was addressed on 1st April

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instant, before 3 p. m. At a quarter past three the Act was assented to, which repealed the Insolvent Act, and provided that all proceedings in any case where the estate of an insolvent has been vested in an official assignee before the passing of this Act may be continued and completed thereunder. The writ was not served upon the defendant till between 5 and 6 p. m.

PER CURIAM. The question to decide is whether the defendant was made an insolvent by the proceeding taken, or whether the passing of the repealing Act took him out of the operation of the Insolvent Act. The old rule of the operation of an Act was that, if no period was fixed by the statute itself, it took effect by relation from the first day of the session in which the Act was passed, which might be weeks or months before it received the royal sanction. This was remedied by 33 Geo. III. c. 13, which provided that Acts should only have effect from the day of the sanction. Our Civil Code, article 2, says, "the Acts of the Provincial Parliament are deemed to be promulgated: 1st. If they be assented to by the governor, from the date of such assent." 31 Vic. c. 1, s. 4 (Canada), enacts that the date of such assent shall be the date of the commencement of the Act. Here arises the question whether the whole day is included, namely, the whole of first April. As a general rule there are no fractions of days in the computation of time, but there are many exceptions. Dwarris, p. 779, says, "and 'from the date,' and from 'the day "of the date,' are of one sense, since in judgment of law the date includes "the whole day of the date." 1 Kent, Commentaries, p. 455, says: "A "statute, when duly made, takes effect from its date, when no time is fixed, "and this is now the settled rule." And in a footnote: "It goes into operation "the day on which it is approved, and has relation to the first moment of that "day." In re Welman, 20 Vermont R. 653. There may be some inconveniences in giving the law a retroactive effect to the first moment of the first April, but it is impossible to hold that the law only came into force on the night of the first, and it would be hard to apply one rule to an insolvency in the morning, and another rule in the evening. The statute having come into force on the first, it is proper to say that its operation began in the morning, and covers all acts done during that day. Taking this view of the case, my conclusion is that the writ should be quashed, but I give no costs.

Writ of attachment quashed.

Keller & Co., for petitioner.
Geoffrion & Co, for plaintiff.
(J. K.)

COURT OF QUEEN'S BENCH, 1881.

MONTREAL, 15TH FEBRUARY, 1881.

Coram SIR A. A. DORION, C.J., MONK, J., RAMSAY, J., CROSS, J., BABY, A. J.

No. 121.

MARY E. FULLER ET AL.,

(*Plaintiffs contesting in the Court below*),

AND APPELLANTS;

CHARLES H. FLETCHER,

(*Opposant in the Court below*),

RESPONDENT.

HELD:—The provisions contained in Art. 642 C.C.P. are applicable only to cases wherein the second or subsequent writ of execution against the lands of a debtor is placed in the sheriff's hands while he is still in possession of the writ on which the said lands have been seized, and while he is still in a position to proceed to the sale of such lands on the day fixed for the sale.

Accordingly, where an opposition has been filed to a seizure of lands, and the seizure has been suspended, and the sheriff has returned the writ and *procès-verbal* of seizure into the prothonotary's office, a second seizure of the same lands may validly be made for another debt; and the sheriff is not required to note such subsequent writ of execution as an opposition for payment upon the first writ.

The sheriff for the district of St. Francis seized, on the 29th day of March, 1878, the lands of Stephen E. Smith, at the suit of the respondent.

On the 21st day of July following, Smith made an opposition to annul the seizure. The sale of the lands seized was suspended by this opposition, which was returned into the prothonotary's office by the sheriff on the 13th of August, 1878, together with the writ under which the seizure had been made.

On the 29th March, 1879, the sheriff seized, under a writ of execution issued by the appellants, the same lands previously seized at the instance of the respondent.

On this second seizure, the respondent made an opposition to annul the sale, on the ground that the first seizure was still pending, and that a second seizure of the same lands could not take place until the first was disposed of.

The appeal was from the judgment maintaining this opposition and declaring the second seizure void.

Brooks & Co., for appellants:—

Sections 642 and 643 of the Code of Civil Procedure are new law, undoubtedly introduced to avoid multiplying costs of seizure of immovables by the sheriff while a writ is in his hands, and compelling him, in case of several writs being delivered to him, to go on, *without interruption*, towards a sale, for the benefit of common creditors. The codifiers in their project and report, evidently held this view.

How could the sheriff note this execution as an opposition upon the first writ, when the first writ had, by order of the same Court which orders him to

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proceed on the second, been for nearly a year returned into Court? Was the sheriff to know of all previous writs which had been addressed to him, and which had been returned by him? Was he bound to examine the records of the Court to learn the position of his writs? If that writ had been issued from the district of Montreal or Aylmer, would he be bound to search the records of the Courts in those districts?

How could he note the second writ as an opposition for payment upon the first writ, which had passed out of his hands many months previously?

Does this Act mean that a defendant may oppose the first execution on the ground of informalities (as in this case) and the contestation extend over an indefinite period of time, and all this time the creditors stopped from taking proceedings to enforce the collection of their debts?

When the sheriff has returned his execution, he is divested of all control, nor has he any right to control the action of subsequent seizing creditors. The change in the law was made in the interest of the debtor, that costs might not be multiplied, but it never could have been contemplated that by this means facilities should be given for debtors to prevent indefinitely their creditors from proceeding to enforce the collection of their debts. This is evident from the whole tenor of the section 642, which declares that first seizure cannot be abandoned or suspended except in consequence of opposition; applicable as well to the seizing creditor as to those whose writs of execution *have been noted*. Evidently not this case, as the first seizure *had been suspended*.

The learned Judge who rendered the judgment declares therein that appellants might—*the occasion arising*—be subrogated in respondent's rights to prosecute the same. Unfortunately our law makes no such provision, and provides no machinery for obtaining such subrogation, nor is there any reason why it should do so. It merely provides for the case of several seizures being in the sheriff's hands *at the same time*, but if the decision now appealed from be correct, any debtor, by collusion with a friend, may set his creditors at defiance *for years*, so far as relates to attempts to collect claims upon real estate.

In rendering the judgment it was declared that any subsequent *saisissant* might, on summary petition, obtain in the name of the first seizing party a *venditioni exponas*, ordering the sheriff to sell the realty. If this be law, appellants have failed to find it, and it certainly is new doctrine not known or practiced in any of the Courts of this Province. There is no analogy between our procedure and that of the *saisie réelle* in France, where they had the *commissaire aux saisies réelles* and *bail judiciaire*. There the *premier saisissant* had a prior right. It is the interest of respondent to have property sold with as little delay as possible, and he has no right to interrupt the sheriff.

Again, it was not the interest of respondent to oppose the sale, and he has shewn no interest in doing so; on the contrary it was, according to the allegations contained in his opposition, his interest to have the sale proceed. The attachment made by him had been suspended by defendant's opposition, and a long contestation was being carried on. Why delay what he himself had been seeking—the sale of the property of defendant—that the proceeds might be paid over *à qui de droit*.

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In the district of Montreal, the universal practice, never questioned to appellants' knowledge, has been, for the sheriff to seize when he has no other writ in his hands.

Appellants have been informed that a similar case has been decided in the Superior Court at Sorel, in a sense directly contrary to the decision appealed from.

If this judgment is sustained, the intention of the law, which evidently is to facilitate instead of retarding sales by the sheriff, would be violated and great delays may be caused, as in this case, to the manifest injury and prejudice of parties holding claims in this country upon real estate.

Under the law, as it has been universally understood and practiced, and as appellants contend it to be, respondent had no right or interest in putting in the opposition sustained by the Court below, and from which judgment the present appeal is brought, and appellants confidently rely upon the reversal of said judgment.

Ives & Co., for respondent:—We do not suppose that the appellants dispute the law now in force in this Province as regards immovables, viz., that *saisie sur saisie ne vaut*, but they hinge their case, apparently, wholly on the fact that, at the moment when the second seizure was made, the first writ of execution was out of the Sheriff's hands. This is true, and it is admitted that the first writ had been returned by the Sheriff with the opposition, and was in reality in the Prothonotary's office pending the disposal of this opposition. But did the seizure cease to subsist when the Sheriff returned the writ with the opposition thereto? Not at all; the Sheriff was bound to go on with the advertisements, and the seizure would not cease to subsist, even at the expiration of the return day. And not only did the seizure not cease to subsist when the Sheriff returned the writ into Court, but it is manifest that the law does not contemplate that this returning of the writ should entirely deprive the Sheriff of the possession of it, because if the opposition is disposed of before the day fixed for the sale, the Sheriff may proceed with the sale *under that writ*. Arts. 653, 655, 662, C. C. P.

The appellants, however, refer to Article 642, C. C. P., which requires the Sheriff "to note any subsequent writ of execution as an opposition for payment "upon the first writ;" and they say how can he note this second writ as an opposition *upon* the first writ, when the first writ has left his hands. This objection, upon the slightest reflection, is frivolous and unfounded. Even if the article in question intended that this noting should be made on the first writ, that is, endorsed on it, it would not be very difficult for the Sheriff to go into the Prothonotary's office and make—or cause to be made—an entry on the first writ, then lying there, of the issuing of the second writ. But it is manifest that the appellants are playing upon words.

The law does not require that there should be a noting or endorsing *on* the first writ, but merely that the *second* and *subsequent* writs should be noted or endorsed as oppositions "upon" the first writ, or more correctly, and as it is given in the French version, "to" the first writ: "il est tenu de noter tout bref "d'exécution subséquent comme opposition afin de conserver *au* premier bref."

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The appellants' whole argument is one *ab inconveniente*, and in support of which they do not pretend to produce any authority. We purpose in a brief space to show that the inconveniences which, as appellants would have us believe, arise from following the plain enactments of the law are phantoms, having no existence but in appellants' imagination.

The principal inconvenience or injustice which the appellants claim would flow from following the law, is that in case of collusion between the defendant and the first seizing creditor, the opposition to the first writ might be kept before the several Courts for an almost interminable period, and the creditors having subsequent writs be indefinitely delayed in the collection of their judgments. If this were the consequence of following the law, the creditors would certainly suffer injustice. But can such a state of things exist? Manifestly not.

When an immovable is once seized, it is seized for all the creditors; and so soon as a second writ of execution is handed to the Sheriff, the plaintiff in the second writ becomes a party to the first, which cannot then be suspended except in consequence of opposition applicable to both writs, or by consent, or by the order of the Judge. Art. 642, C. C. P.

All we ask the appellants to do, is to use the machinery we have already put in motion, not to make double costs of seizing and advertising.

Now, in France where this rule of *saisie sur saisie ne vaut* goes further, even to movables, and where even in the case of two seizures of *different* property these seizures are united and continued as one (Art. 719, Code de Procédure Civile), no difficulty is suffered in the carrying out of the law. If there is collusion between the defendant and the first seizing creditor, the recourse of the second seizing creditor is plainly laid down, and is followed every day. Arts. 721, 722, and notes, Codes Annotés. Sirey, et Gilbert, vol. 2. This course, viz., by subrogation, is plainly referred to in the judgment appealed from.

The appellants have the undoubted right to be subrogated, if they think there is collusion between defendant and respondent. Pothier, Traité de la Procédure Civile, Articles 595, 596, 597, 598.

This procedure is not new in this country. In the case of Wilson vs. Leblanc, *es qualité*, and Doutre et al., opposants saisissants, vs. Chas. Leblanc, *es qualité*, appellants, and Cyr Leblanc, opposant, respondent, 16 L. C. J., p. 209, this plan of subrogation was adopted and sanctioned.

In this case the creditor holding the second writ applied to the Court to be subrogated for the plaintiff in the other suit, and to issue a writ of *venditioni exponas* therein. This was granted, and was held in appeal to be correct.

Thus we think that this cry of inconvenience and injustice is easily disposed of: whereas, if we should adopt the plan proposed by appellants, and allow a new seizure and new advertisements to be made every time a writ of execution is stayed by opposition, then a dishonest defendant by successive oppositions may defeat his creditors and cause the whole property to be consumed in sheriff's fees.

The question whether opposant has the right and interest to make this opposition, is not raised by the contestation at all, but at the argument below, Mr. Justice Doherty alluded to this and desired to have a hearing upon it.

It requires, however, but little comment, as the interest is self-apparent. The respondent as the seizing and hypothecary creditor, who has incurred a heavy bill of costs, in seizing the land, advertising it for sale, and also in contesting the opposition, has special interest in keeping down the costs and in retaining the ranking of, and privilege for his costs made to bring the property to sale. Although appellants have instanced the case of collusion between defendant and the first seizing creditor as liable to prejudice the interest of other creditors, there is no pretension of such collusion here.

Respondent and defendant are keen litigants, and if there is collusion, it is between appellants and defendant, who are friendly to each other. This is apparent from the fact of appellants being allowed to take their *ex parte* judgment and issue the writ *de terris* without any attempt to discuss movable property. Indeed there is little doubt that defendant and appellants aimed at depriving respondent of his costs.

Art. 657, C. C. P. says: "The party whose immovables or rents are seized may oppose the seizure or the sale thereof, whether his opposition be founded on matter of *form* or on matters of *substance*. *Third parties* may likewise file *similar* oppositions when they have an actual interest therein." Pigeau, Procédure Civile de Chatelet, vol. I, p. 725.

"Tous ceux à qui importe la regularité de la saisie réelle, tels que le saisi, ses "créanciers et tous ceux qui ont quelqu'intérêt à la poursuite, peuvent pro- "poser les nullités qui s'y trouvent," &c.

Sir A. A. Dorion, C. J.—The article 642 of the Code of Civil Procedure, on which the judgment appealed from is based, is in the following terms:

Art. 642.—"When the sheriff has seized an immoveable upon a defendant, he "cannot seize it again at the suit of another creditor, or of the same creditor "for another debt, as long as the first seizure subsists; but he is bound to note any "subsequent writ of execution as an opposition for payment upon the first writ; "and in such case the first seizure cannot be abandoned nor suspended, except "in consequence of oppositions applicable as well to the seizing creditor as to "those whose writs of execution have been noted as oppositions, or with their "consent, or by an order of a judge."

This article is given as new law, and revives the old maxim that *saisie sur saisie ne vaut*, and a practice which had fallen into disuse in this country from want of the necessary machinery to carry it out.

The object of the law is to avoid the expenses of proceeding on several seizures of the same lands, and the delays in the sale of such lands, when the seizure is suspended by opposition or otherwise, or abandoned by the seizing creditor. (Art. 643.)

The Code has not, however, restored the *commissaires aux saisies*, nor the formalities which were followed under the French system.

From the terms of Article 642, it is obvious that the existence of a first seizure can prevent a second seizure only when the writ on which the first seizure has been made, is still in the hands of the sheriff who is ordered to note as an opposition for payment on the first writ, any subsequent writ which he may receive. This is not possible after the sheriff has dispossessed himself of the writ and *procès verbal* of seizure and has returned them into Court according to law.

Fuller et al. and Fletcher.

Again, Article 642 provides that the first seizure cannot be *abandoned nor suspended*, as to those whose writs are noted as oppositions, except in consequence of oppositions applicable to the first as well as to the subsequent writs, or by consent, or by an order of a Judge; and by Art. 643 it is enacted that in the event of the seizing creditor abandoning the seizure, or receiving payment of his claim, the sheriff is bound to continue the proceedings in the name of the seizing creditor, and at the cost of the judgment creditors whose writs have been noted.

All this supposes that subsequent writs of execution are placed in the hands of the sheriff before the proceedings on the first seizure have been abandoned or suspended, and while the sheriff is still in time to proceed to the sale on the advertisements made on the first seizure, and on the day fixed for the sale. This cannot be done after the sale has been suspended, nor after the delay for effecting the sale and returning the writ has expired.

In the present case, as the second writ was placed in the hands of the sheriff long after the day fixed for the sale was passed and the whole proceedings suspended by the return of the first writ, the appellants had no means of compelling the sheriff to advertise the sale of the lands of the defendant on the first seizure, nor to fix a day for the sale, except in accordance with the precept of the second writ, which directed him to seize and proceed to the sale after the usual advertisements.

We are therefore of opinion that articles 642 and 643 are not applicable to this case, and that the judgment of the Superior Court must be reversed.

Cross, J.—I entirely concur in the remarks made and the reasons given by the Chief Justice for the reversal of the judgment of the Superior Court in this case, and would simply venture to add that the article in question was not intended to establish as an unvarying uniform maxim of faith, that one seizure could not be made while another subsisted, but was only intended to make a rule to direct the sheriff as regards his duty and the practice in his office while he had concurrent writs in his hands. Hence the expression, "when the *sheriff* has seized," and the personal restriction of his authority, "*he* cannot seize it again;" also the expression "as long as the first seizure subsists," meaning subsists in his hands. The article must be construed as directory of the sheriff and in view of a reasonable exercise of the duties required of him,—not a possible literal construction of the words, which would impose a duty in its nature unreasonable, if not altogether impracticable.

The judgment is as follows:—

"Considering that the writ of *fieri facias* issued at the instance of the appellants against the lands of the defendant S. E. Smith, was so issued several months after the return day of the writ of *fieri facias* on which the lands of the said defendant had been seized at the instance of the respondent, and after the day fixed for the sale of said lands had expired and the writ returned into the prothonotary's office, with an opposition to the sale of said lands;

"And considering that, when the said writ of *fieri facias*, issued at the instance of the appellants, was placed in the hands of the sheriff, the latter had no means of noting the said writ as an opposition to a writ of which he was dis-

possessed, nor of proceeding on the former writ to the sale of the lands seized at the instance of the respondent, the advertisements having lapsed by the expiry of the date on which the sale was to have taken place;

"And considering that the provisions contained in Art. 642 of the Code of Civil Procedure are only applicable to cases wherein a second writ of execution against the lands of a debtor is placed in the hands of the sheriff while he is still in possession of the writ on which the lands of such debtor have been seized, and when he is still in a position to proceed to the sale of such lands on the day fixed for such sale, and that the said provisions are not applicable to the present case;

"And considering that there is error in the judgment rendered by the Superior Court at Sherbrooke, on the 10th day of November, 1879;

"This Court doth reverse the said judgment of the 10th day of November, 1879; and, proceeding to render the judgment which the said Superior Court should have rendered, doth dismiss the opposition *afin d'annuler* made by the respondent, and doth order that a *venditioni exponas*, at the instance of the appellants, do issue, or such other proceeding be had as to law and justice may appertain.

"And this Court doth condemn the respondent to pay to the appellants the costs incurred on his opposition, both in the Court below and on the present appeal."

Judgment reversed.

Brooks, Camirand & Hurd, for appellants.
Ives, Brown & Merry, for respondent.
(J.K.)

IN THE PRIVY COUNCIL, 1880.

COUNCIL CHAMBER, WHITEHALL, 27TH NOVEMBER, 1880.

Present:—The Right Honorable Sir JAMES COLVILE, the Right Honorable Sir BARNES PEACOCK, the Right Honorable Sir MONTAGUE SMITH, the Right Honorable Sir ROBERT COLLIER.

MOLSON,

AND

APPELLANT;

CARTER,

RESPONDENT.

HELD:—That on application to the Privy Council for special leave to appeal from a judgment in Canada, from which an appeal does not lie as of right, it will not be granted, in the absence of some miscarriage in point of law or gross miscarriage in the Courts below on the matters of fact, and that, in the present instance, no such miscarriage was apparent.

SIR JAMES COLVILE:—This is an application for special leave to appeal against an order of the Court of Queen's Bench for the Province of Quebec, of the 22nd June, 1880, which confirmed an order of the Superior Court of the 16th November, 1878, granting a *capias* against the petitioner under the provisions of the 796th and subsequent sections of the Canadian Code of Pro-

Molson and Carter.

cedure. It is obvious that their lordships would not, according to their usual practice, nor could they with propriety, grant special leave to appeal upon a question of this kind, unless they saw clearly that there had been some miscarriage in point of law, or very gross miscarriage in the two Courts, whose concurrent judgments are under appeal, on the matters of fact.

Now, without going into the complicated proceedings that have been commented upon in this case, it is sufficient to state that the judgments of the Court below may be taken to have proceeded almost exclusively upon the act of the petitioner, in altering the deposit account of a certain sum of money in the Mechanics Bank, and the facts which led to that were simply these: The defendant borrowed from the plaintiff a sum which may be stated in round numbers at $32,000, ostensibly upon the security of certain property. He paid that sum of money into this Bank in his own name with a sort of special mark. As found, in July, 1874, he altered the heading of that deposit account so as to make it appear that the money was his wife's. The Bank became insolvent a month or two later, but just when it was on the eve of insolvency he drew out the $32,000 upon a receipt signed by him for and as the agent of his wife; and it is upon that transaction that the Courts below have principally proceeded.

Now it is to be remarked that one of the learned Judges, Mr. Justice Monk, whose final judgment was in favor of the defendant, says this: "If Molson had altered the heading of the account on the eve, or immediately before the insolvency of the Bank, for the purpose of making it falsely appear that the $30,000 deposited in the Bank belonged to his wife and children when they really belonged to himself, and if this had been done with a view of making the withdrawal of the sum from the Bank possible, or at all events more easy of accomplishment, and with the further view, after such withdrawal, of making away with the amount to the detriment of his creditors in general and the plaintiff in particular, I think the *capias* might have been maintained; for this would not be a case of so-called constructive secretion, which it is not clear the law recognizes, but a case of actual secretion; the altering of the heading of the account being the first step in the process." But afterwards, and in some degree because this alteration of the account was not immediately before the insolvency of the Bank, but a month or two earlier, the learned Judge comes to the conclusion at which he ultimately arrived in favor of the defendant. It appears, however, to their lordships that there was abundant evidence from which Mr. Justice Papineau, sitting in the Superior Court, and the majority of the Judges of the Appellate Court, might come to the conclusion that the transaction was really one of the nature described by Mr. Justice Monk, and that it was a case of actual secretion or making away of property of the debtor within the meaning of the Code of Procedure. It is not necessary for them, they think, to go further, and to express a fuller opinion of their own on the facts of the case which they have not heard fully, and of course having had no opportunity of going in detail through the evidence in the case. Their lordships, however, think that the Judges had before them ample evidence of the fraudulent intent which was imputed to the petitioner.

The case was put finally by Mr. Digby in this way, that the money was either the money of the wife, or that it was not; that if it was her money, it was

Molson and Carter.

right to give it to her; that if it was not her money, then that it could be shewn to be properly applied. But their lordships think there is no pretence whatever on the facts for saying that this money was the money of the wife. It was set up, after the transaction of borrowing took place, that the property pledged was property which the defendant had no right to pledge, but that it was property which his wife and children, under his father's will, had by some substitution of interest which prevented his disposing of it. The money was borrowed by him on his own credit. The only inference to be drawn from the title of the wife, supposing it to be a good title, would be that it was a fraudulent transaction, in so far as it purported to pledge property that was not his. She could not have both the property and the money, and it is quite clear from some of the evidence which has been brought before their lordships, that the petitioner has been treating this property as her's, that a lease has been granted of it, and he himself admits he is receiving rent payable by the lessee as *aliment* for his wife and children. Then if it were not her money the fraudulent act, if it were fraudulent, was complete when it was transferred into her name and afterwards withdrawn in her name, and withdrawn, too, as he then avowed, in order that he should not himself come upon the street, a statement which could only mean that he either wished to make a provision for his wife to keep him off the street, or that he had withdrawn it for his own purposes. The subsequent application of it to other creditors would not, if established, have been material, and that, therefore, is an answer to the argument that the case should be sent for a new trial, or otherwise put into a way for further investigation in order that Mr. Barnard, the petitioner's solicitor, should be examined.

On the whole, their lordships think that they cannot advise Her Majesty to grant special leave to appeal, and that this petition must be dismissed with costs.

(S. B.)

Petition rejected.

COUR SUPERIEURE, 1880.

MONTRÉAL, 25 SEPTEMBRE, 1880.

Coram JETTE, J.

No: 2009.

La Compagnie de Prêt et de Crédit Foncier vs. *Garand ès qual., & Heney et al., opposants, et Phillips, contestant.*

JUGE: 1. Qu'avant la promulgation du Code, le vendeur avait, sans stipulation à cet effet, le droit d'exercer l'action en résolution de vente faute de paiement soit partiel, soit total du prix, et même faute de prestation de la rente constituée représentant le prix.

2. Que ce droit de résolution peut être exercé par le vendeur qui n'a pas fait renouveler l'enregistrement de son titre, à l'encontre des créanciers hypothécaires dont les droits sont régulièrement enregistrés.

3. Que le vendeur non payé, qui n'a pas exercé son droit de résolution avant le décret de l'immeuble, peut convertir sa demande en réclamation sur les deniers et être préféré aux créanciers enregistrés.

JETTE, J.—Le 7 octobre 1856, le Dr. Turcotte, agissant pour dame Léocadie Charlotte Heney, sa femme, a vendu à François Roussel, un emplacement situé à Montréal, et ce pour une somme de £40 pour laquelle, l'acheteur a constitué

La Compagnie de Prêt et de Crédit Foncier, vs. Garand ès qual.

en faveur de la dite dame Heney, ses héritiers et ayans cause, une rente annuelle et perpétuelle de £2 8s. 0d. Il a été de plus stipulé qu'en cas d'aliénation de cet emplacement par l'acquéreur, le capital de la dite rente constituée deviendrait exigible, à moins d'obligation formelle des acquéreurs subséquents de payer la rente. Enfin, il a été convenu qu'en cas d'inexécution des conditions de la dite vente Madame Turcotte, ses hoirs et ayans cause auraient le droit "de reprendre "le susdit lot de terre et de rentrer dans la possession et jouissance d'icelui et "dans toutes ses circonstances et dépendances"; ce terrain restant affecté par privilége de bailleur de fonds à l'accomplissement des dites conditions.

Le 15 août 1859. Roussel a vendu à Mainville aux mêmes conditions, mais le capital de la rente est mentionné dans ce second titre (sans explications) comme étant de £50 0s. 0d. au lieu de £40 0s. 0d., et la rente comme étant de £3 au lieu de £2 8s. 0d.

Le 20 septembre 1860, Mainville a vendu à *Pearson* aux mêmes charges et conditions qu'il avait acceptées lui-même. Pearson ayant failli et obtenu un concordat de ses créanciers, ses biens furent rétrocédés de son consentement à M. Garand, le défendeur, constitué fidéi-commissaire pour le bénéfice de tous les créanciers du failli. C'est ainsi que la demanderesse a fait vendre sur le défendeur ès-qualité l'immeuble orlginairement concédé par Mad. Turcotte à Roussel, et transmis ensuite à Pearson aux conditions susdites. Le prix de cette immeuble étant maintenant entre les mains du shérif, un projet d'ordre de distribution a été préparé, par lequel les opposants, héritiers et ayans cause de Madame Turcotte, ont été colloqués pour le capital de la dite rente constituée et deux années de rente—en tout $224.00.

Phillips, créancier porteur d'un titre dûment enregistré sur l'immeuble vendu, et qui a fait renouveler son inscription après la confection du Cadastre, conteste cette collocation et soutient que les opposants n'y ont aucun droit, attendu qu'ils n'ont pas fait renouveler en temps utile l'enregistrement du titre d'où découle leur privilége, et que cette omission est fatale à l'exercice du droit qu'ils réclament.

Les opposants répondent que comme vendeurs non payés de l'immeuble dont le prix est à distribuer, ils avaient le droit de demander la résolution de la vente consentie par leur auteur, et de rentrer ainsi en possession du dit immeuble dans lequel ils avaient un droit réel; mais que n'ayant pas exercé ce recours en temps opportun, ils sont bien fondés à réclamer par privilége, sur le produit de cet immeuble, conformément à l'article 729 du Code de Procédure Civil.

Il est bon de remarquer d'abord que le titre en vertu duquel les opposants réclament est *antérieur* au code.

Or notre jurisprudence établit les propositions suivantes:

1o. Que la résolution pouvait, avant le Code, être demandée pour non paiement d'une rente représentant le prix aussi bien que pour non paiement du prix même; St. Cyr v. Milette, 3 Q. L. R., p. 369.

2o. Que le droit de résolution stipulé en faveur du vendeur, était conservé au détriment des créanciers hypothécaires mêmes sans enregistrement du titre;—Shaw v. Lefurgy, 1 L. C. R., p. 5; Bouchard v. Blais, 4 L. C. R., p. 371; Thomas & Aylen, 16 Jurist, p. 309; Gauthier v. Valois, 18 Jurist, p. 26.

3o. Que le vendeur non payé qui n'a pas exercé son droit de résolution avant la vente, peut convertir sa demande en réclamation sur le prix qui représente l'immeuble vendu, et être préféré aux créanciers enregistrés. La Compagnie de Prêt et de Crédit Foncier vs. Garand et qual.

Arrêts ci-dessus cités.

Ces décisions règlent la question soulevée ici. Le titre des opposants est antérieur au Code et par suite leur droit de demander la résolution de la vente a été conservé même sans enregistrement. Or si l'enregistrement n'était pas nécessaire, le renouvellement ne l'était pas non plus.

Les opposants ne s'étant pas pourvus par action en résolution de la vente avant le décret du shérif, l'art. 720 du Code leur donnait incontestablement le droit de réclamer sur le prix la somme qui leur est due, et d'être colloqués par préférence aux créanciers hypothécaires de leur débiteur.

La collocation des opposants doit donc être maintenue, mais pour la somme de $160, seulement en capital, et deux années de rente $19.20, en tout $179.20, qui est la seule somme que justifie le titre consécutif de la rente due. Mais comme le créancier Phillips n'a pas fait cette distinction et a contesté toute la collocation, il devra supporter les frais, dont distraction est accordée à MM. DeBellefeuille et Bonin, avocats des opposants et créanciers colloqués.

DeBellefeuille & Bonin, avocats des opposants.

Monk & Butler, avocats du contestant.

(J. A. B.)

SUPERIOR COURT, 1880.

MONTREAL, 30TH APRIL, 1880.

Coram PAPINEAU, J.

No. 1309.

McRobie vs. *Shuter et al.*

HELD: That a proprietor of real estate in Montreal is responsible for an accident arising from the neglect to cover and put a railing round an excavation in the public street connected with the making of a drain from his property to the public drain, and to put up a light at the spot, when the permit to make such excavation has been granted to him by the Corporation on condition of his making such covering and railing and putting up such light, notwithstanding that such excavation was made by a contractor over whom the proprietor had no control.

This was an action to recover damages, in consequence of an accident caused to the plaintiff, by the neglect to cover and surround with a railing an excavation made in the public street opposite the defendant's property, and to put up a light at the spot.

The excavation was made, in connection with the making of a drain from the property to the public drain in the street.

The defendants pleaded and proved that the work was done under contract, and that the defendants had no control over the contractor. And the plaintiff proved that the permit from the Corporation to make the excavation was granted to the defendants, and on condition of their protecting the public against accident by covering the excavation and railing it round, and placing a light also.

The following was the written judgment of the Court :—

McRobie, vs. Shuter et al.

" La Cour * * * considérant que le demandeur a prouvé les allégués de sa demande suffisamment pour obtenir contre les défendeurs la présente condamnation ;

" Considérant de plus que l'accident dont le demandeur a souffert n'est pas a conséquence de l'impéritie ou de l'inhabilité du contracteur ou de l'entrepreneur des travaux des défendeurs dans l'exercice de devoirs particuliers à son métier de plombier et dont les défendeurs pourraient n'être pas responsables, mais que le dit accident est le résultat de la négligence des défendeurs à voir à ce que dans l'exécution des ouvrages faits à leur propriété des lois de police urbaine pour la sûreté des passants dans les rues fussent observées ;

" Considérant qu'il est prouvé que les défendeurs par leur propre agent, avaient demandé et obtenu de la corporation de la cité de Montréal permission d'ouvrir la rue à l'endroit où l'accident est arrivé, à la condition qu'ils se conformeraient aux dits règlements, et qu'ils ont entièrement failli à mettre ou faire mettre des lumières, clôture et gardien pour avertir le public de l'état dangereux où se trouvait la rue ;

" Considérant que par suite de cette faute les défendeurs ont causé au demandeur une souffrance et infirmité d'un caractère permanent, et tant pour cette souffrance et infirmité que pour détérioration de ses hardes et secours du médecin, un dommage d'au moins $90, dont les défendeurs sont solidairement responsables ;

" Considérant que les défenses des défendeurs sont mal fondées en droit et en fait ;

" La Cour renvoie les dites défenses et condamne les dits défendeurs conjointement et solidairement pour toutes les causes énoncées ci-dessus et dans la déclaration du demandeur, à payer à ce dernier la dite somme de $90 cours actuel avec intérêt de ce jour, et tous les frais de la demande, telle qu'instituée."

Judgment for plaintiff.

Duhamel & Co., for plaintiff.
Bethune & Bethune, for defendant.
(S.B.)

COUR SUPERIEURE, 1881.

DISTRICT DE TERREBONNE, 24 JANVIER, 1881.

Coram BELANGER, J.

No. 385.

E. M. A. L. de Bellefeuille et al., demandeurs, *vs. Wm. Pollock*, défendeur, *et Wm. Pollock*, opposant, *et les dits demandeurs*, contestants.

JUGE: 1o.—Que le défaut de *fiat* pour l'émanation d'un bref d'exécution n'est pas une cause de nullité du bref lui-même quant aux parties demanderesse et défenderesse.

2o.—Que le fait qu'un bref d'exécution contre les meubles a été émané sur un *fiat* ne contenant pas le jour du rapport, et que le régistre des exécutions tenu par le protonotaire mentionnait un jour de retour différant de celui entré dans l'exécution, constitue tout au plus une nullité sans griefs que le défendeur n'a pas intérêt à invoquer.

A une saisie-exécution contre ses meubles faite par les demandeurs, le défendeur fit opposition, alléguant à l'appui que le bref d'exécution avait été émané sur

un *fiat* dans lequel le jour du retour de l'exécution avait été laissé en blanc ; et que le régistre des exécutions ne contenait pas non plus le jour du retour de l'exécution. Quant au bref lui-même il était complet. De Bellefeuille vs. Pominville

Les demandeurs répondirent que si ces défauts étaient des nullités, c'étaient des nullités sans griefs pour l'opposant.

A l'argument M. *Filion*, pour l'opposant, cita les Règles de Pratique, 77 et 78.

M. *de Bellefeuille*, pour les demandeurs, cita Lévesque vs. Beaupré, et Beaupré, opposant, 10 L. C. J., p. 257 ; Leslie vs. Fraser, 15 L. C. R., p. 43 ; Biret, Traité des Nullités, t. I, p. 45 ; Perrin, Nullités de Droit, p. 118 ; Solon, Théorie sur la Nullité, p. 275.

J. H. Filion, avocat de l'opposant. Opposition renvoyée.

De Bellefeuille & Bonin, avocats des demandeurs contestants.

(E. LEF. DE B.)

COUR SUPERIEURE, 1880.

MONTREAL, 30 JUIN 1880.

Coram PAPINEAU, J.

No. 538.

Dame Sophie Desjardins et vir vs. *Philippe Gravel* et ux., et *Thomas Langevin dit Lacroix*, opposant ; et *la Demanderesse*, contestante.

JUGE:—1. Qu'un bail authentique enregistré ne donne pas droit au locataire de faire une opposition afin de charge.

2o. Que le décret affranchit l'adjudicataire de toute obligation d'entretenir le bail fait par le saisi.

La demanderesse avait obtenu jugement pour une somme de $1180 en vertu d'un acte authentique comportant hypothèque sur certains immeubles. En vertu de ce jugement les immeubles en question furent saisis et annoncés pour être vendus par le shérif, suivant le cours ordinaire.

L'opposant produisit une opposition alléguant un bail antérieur à la saisie, (mais postérieur à l'enregistrement de l'hypothèque de la demanderesse,) lequel fut enregistré. La demanderesse contesta l'opposition par une défense en droit alléguant que le bail ne conférait aucun droit de propriété, et ne constituait pas une charge de nature à assujétir la propriété et obligeant le créancier saisissant à l'entretien de tel bail ; que d'après notre droit un décret à la poursuite d'un créancier désaisissait le débiteur de tout droit de propriété dans l'immeuble saisi, et transférait la propriété à l'adjudicataire libre de toutes autres charges que les charges réelles ou servitudes attachées au fond et les autres mentionnées au Code reconnues comme subsistant après le décret.

Le jugement est motivé comme suit :

La Cour après avoir entendu l'opposant Thomas Langevin dit Lacroix et la demanderesse contestante par leurs avocats respectifs sur la contestation en droit par la dite demanderesse, de l'opposition afin de charge faite et produite par le

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dit Langevin dit Lacroix à l'encontre du bref *de fieri facias de bonis et terris* émis contre les défendeurs en la présente cause, le 17 de janvier dernier, avoir examiné la procédure, les pièces au dossier et délibéré ;

Considérant que la demanderesse, créancière des défendeurs, n'est pas tenue en loi d'entretenir le bail fait par ses débiteurs et auquel elle n'a pas été partie ;

Considérant que ce bail ne peut pas empêcher la demanderesse de faire saisir et vendre l'immeuble pendant ce bail dont la durée n'excède pas un an ;

Considérant que si la vente par décret ne dépouille pas le débiteur saisi de sa jouissance de l'immeuble saisi jusqu'à l'adjudication, elle l'en dépouille certainement du moment de l'adjudication et met fin au bail, en mettant fin à la jouissance du bailleur, qui, de son côté, ne peut plus faire jouir son preneur ;

Considérant que si d'un côté le bail en cette cause est de fait antérieur à la saisie réelle des immeubles des défendeurs, de l'autre côté ce bail n'a conféré aucun droit de propriété à l'opposant dans, ni aucune charge réelle sur les immeubles loués, et qu'il ne possédait même ceux-ci que pour les défendeurs et au nom de ces derniers, et dans le seul but et pour la seule fin d'en avoir la jouissance accordée par le bail en question ;

Considérant que l'opposant ne dérivant sa jouissance que des défendeurs, il ne peut l'exercer plus longtemps que la loi ne permet à ceux-ci de la conserver eux-mêmes, c'est-à-dire après l'adjudication, ou décret ;

Considérant que l'opposant en demandant de conserver sa jouissance au-delà du temps de la vente par décret jusqu'à la fin de la durée naturelle de son bail, a demandé ce qu'il n'a pas droit d'obtenir ;

Considérant, d'ailleurs, que si toutefois il était possible à l'opposant de faire cette demande, il ne pourrait être reçu à la faire qu'en offrant pour le profit du créancier saisissant une partie du loyer proportionnée au temps que le bail aurait à courir après l'adjudication, et qu'il ne l'a pas offerte ;

Considérant, que le droit de l'opposant se résout par la vente ou décret des immeubles à lui loués en une créance privilégiée sur le produit de ces immeubles pour la plus-value donnée par ses travaux aux dits immeubles, conformément à l'article 2010 du Code Civil, que sa dite opposition afin de charge est mal fondée, et que la contestation ou défense en droit faite par la demanderesse à l'encontre de la dite opposition est bien fondée ;

La Cour maintient la dite défense en droit et renvoie la dite opposition afin de charge avec dépens distraits à MM. R. et L. Laflamme, procureurs de la demanderesse contestante.

Loranger, Loranger et Baudin, pour l'opposante.

R. et L. Laflamme, pour la demanderesse contestante.

(R.L.)

SUPERIOR COURT, 1881.

MONTREAL, 31st JANUARY, 1881.

Coram PAPINEAU, J.

No. 1453.

McLaren et al. vs. *Kirkwood*, Executor, &c., and *George Brooke, adjudicataire*, petitioner for writ of possession against lessee, *William Blackman*.

HELD:—1. That the provisions of Art, 1663 of our Civil Code do not apply to sales of immoveables by the Sheriff, and, consequently, that a lessee of immoveable property sold at sheriff's sale is liable to expulsion by the *adjudicataire* before the expiration of his lease.
2. That such expulsion may be effected by summary petition for a writ of possession.

This was a petition for a writ of possession by a purchaser of an immoveable at sheriff's sale, to eject an alleged tenant of the defendant.

Kerr, Q. C. (showing cause for the tenant):—

A house in possession of a tenant under a lease from the defendant expiring on the 1st May, 1881, was sold by sheriff's sale under *fi. fa.* on the 2nd November, 1880.

Can the *adjudicatare* dispossess the tenant previous to the 1st May, 1881? Under the old law he could, but the question must be considered as one coming under the operation of Art. 1663 of the Code Civil.

That Article provides: "The tenant cannot, by reason of the alienation of the thing leased, be expelled before the expiration of the lease, by a person who becomes the owner of the thing leased under a title derived from the lessor; unless the lease contains a special stipulation to that effect, and be registered. In such case notice, etc., unless it is otherwise specially agreed."

Art. 2128 must be read with Art. 1663, and is in the following words: "The lease of an immoveable for a period exceeding one year cannot be invoked against a subsequent purchaser unless it has been registered."

This change in the law of the Province is based upon and borrowed from Art. 1743 of the Code Napoléon, which is in the following words: "Si le bailleur vend la chose louée l'acquéreur ne peut pas expulser le fermier ou le locataire qui a un bail authentique, ou dont la date est certaine, à moins qu'il ne se soit réservé ce droit par le contrat de bail."

If anything, Art. 1663 C. C. L.-C. is stronger in favor of the tenant than Art. 1743 of the Code Napoléon. The latter article seems only to provide for the case where the lessor sells the premises, the words "Si le bailleur vend la chose louée" dominate over the whole Article, and apparently constitute the only case wherein the person acquiring is deprived of the right of expelling the tenant. Yet in France the prohibition to expel is extended to all cases of mutation of property by exchange and even by a judicial sale.

6 Marcadé, Art. 1743, No. p. 488.
1 Pont, Priv. & Hyp. No. 385, 368.
Gilbert, Code de Proc., Art. 1743, Nos. 4 and 5; Art. 1709, Nos. 33, 33 bis.
Gilbert, Code de Proc., Art. 684, No. 7.
Rolland de Vil. Dict. de Dr. Vbo. Exp. Forcée, Nos. 87, 88, 103.

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In France then it is clear that an "*Expropriation forcée*" does not give to the *adjudicataire* the right to expel the tenant holding under the leases mentioned in Art. 1743.

The question then presents itself, how can the *adjudicataire* be linked to the "bailleur"?

The only solution practicable is that the *adjudicataire* in such case is the representative of the *bailleur*, holding under a title derived from him.

It is hardly necessary to urge that a sale made by the heir of the *bailleur* would entitle the purchaser to evict the tenant; the heir or universal legatee in such case could possess no greater rights than his *auteur*, and would be bound by the *bailleur's* obligation to maintain the tenant in possession. The law *Emptorem* did not apply to such case, *secus* the particular legatee, *donataire*; Troplong, Louage, No. 474.

If the *adjudicataire* be not a representative of the *bailleur*, if he do not hold the property under a title derived from the *bailleur*, then he is not bound by provisions of Art. 1743 of the Code Napoléon. If, on the contrary, he be such representative, and does hold the property under title so derived, he is bound by the last mentioned Article.

For the purposes of this discussion I shall take it for granted that the *Expropriation forcée* in France is similar in its main effects to our sheriff's sale, and I shall discuss the nature and effects.

1st. Of a seizure by a sheriff under a writ *de terris* of the immoveable of a defendant in his, the defendant's, possession.

2nd. Of a sale by the sheriff of the immoveable seized, and the granting of a sheriff's title to the *adjudicataire*.

By the seizure all and every the rights of the defendant upon the immoveable are seized. If he be sole proprietor and in possession, and there be no charges (real) on property, the right of property is attached, and is held as it may be called in trust by the sheriff to await the course of events, the immoveable remaining in the possession of the judgment debtor, who, if the seizure be not declared null, loses his power of alienation.

C. C. P. Art. 645.

2nd. On the day of sale the sheriff offers for sale the property seized, that is to say, amongst other things all the rights of the judgment debtor upon the immoveable.

In order to make such offer it is essential that the sheriff should hold those rights in such a manner as to be able to convey them to the *adjudicataire*; that he does so hold them is shown by the fact that in his deed he is required expressly to convey to the *adjudicataire* "all the rights of the judgment debtor upon the immoveable."

C. C. P. Art. 689, sec. 8.

But it is impossible to convey what one does not possess, so that the sheriff must hold at the time of his making the conveyance the said rights.

What then is the sheriff's [illegible]? Is it not a contract effected by operation of law between the judgment debtor and the *adjudicataire*, the sheriff acting for such debtor as his attorney, and conveying to the *adjudicataire* such

debtor's rights upon the immoveable? It is a forced transfer of the defendant's rights (*jura in rem*) upon the immoveable from him to the *adjudicataire*.

From whom does the *adjudicataire* in such a case derive his title? It may be answered, from the sheriff; but the sheriff does not pretend to convey his own personal right of property in the immoveable, he merely conveys the defendant's rights. If the defendant had no rights of property and no possession, the sheriff's sale and title would not convey the right of property in the immoveable to the *adjudicataire*, or give him any right as against the rightful owner save as a title whereon to prescribe.

C. C. P. Art. 632.

This right of property, moreover, so transferred is limited as it was limited in the possession of the judgment debtor. True, if real rights exist on which oppositions *afin de charge* could have been fyled, the omission to fyle such oppositions and the subsequent sheriff's sale purge the land of such charges, but this is a punishment inflicted upon the holder of such charges for his negligence; he loses his real right, but comes upon the proceeds of sale for compensation.

C. C. P. Art. 652.

The right to oppose *afin de charge* must be a real right, a mere *jus ad rem* gives no such right to oppose; but this right of the lessee under a lease for not more than one year is not a real right, but is merely a moveable one.

1 Pont, Nos. 385 & n (1), 387.

But such *droit mobilier* could not form the object of an opposition *afin de charge*, and as no mention is made in Art. 709, 710 C. C. P. of this right being discharged, and as Art. 711 merely declares all other real rights to be discharged by a sheriff's sale, this, not being a real right, remains.

How, then, do the French writers account for the fact that the *acquéreur* is obliged to maintain the lease made by his *auteurs*? They all say that the effect of Art. 1743 is that the clause imposing on the *acquéreur* the obligation of maintaining the lease of the immoveable is understood (*sous entendue*) in every act of alienation of the immoveable.

1 Pont, Priv. & Hyp. No. 385.

But they make no distinction between the *adjudicataire* at an *expropriation forcée* and an ordinary purchaser—the rights and obligations of both are the same.

There can be no doubt that our articles 1663 and 2128 are both borrowed from the Code Napoleon and the law of 23rd March, 1855, with this advantage that our law more clearly covers the case under consideration than the French law. The introduction of the words, "under a title derived from the lessor" and "cannot by reason of the alienation of the thing," set at rest any difficulty which may have been experienced in France as to the obligation of the *adjudicataire* to maintain the lease.

Art. 2128 shews clearly that where the lease is but for one year, it can be invoked against a subsequent purchaser, just as a lease of more than one year, when registered, can be invoked against such purchaser.

No difficulty can be experienced in coming to the conclusion that such lease for a term of six years for instance, could be opposed, if unregistered, against an ordinary purchaser.

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Why should there be any difference between the *adjudicataire* and such ordinary purchaser?

The obvious intention of the Legislature was to abolish the gross injustice practicable under the law *Emptorem*, to give to the tenant peace and security in his tenancy, to prevent him, for instance, when he had taken a farm and expended capital which he expected to regain with interest by its produce to be disturbed in his possession.

1 Pont, 385; Troplong, Louage, No. 484, 490, 491.

The rights of his creditors to deal with his property are measured by his rights; the right to enjoy the property leased he has given to another for a fixed rent. His judgment creditor cannot by merely seizing such property revest in the judgment debtor the right which he has parted with to another, and deprive that other of that right. So long as the law *Emptorem* and the jurisprudence under it were in force the Sheriff's sale had the force of a sale by the judgment debtor of the property so leased, but, when the law *Emptorem* was destroyed by Art. 1662, the basis upon which rested the effect of the Sheriff's sale in breaking the lease disappeared, and the effect ceased to exist.

[Reporter's Note.—After the argument the counsel of the tenant was allowed to submit the following authority. Merlin, Questions de Droit, vo. *Resolution de Bail*, sec. 1.]

Bethune, Q.C., for petitioner:

The true character of a *décret* of an immoveable property is thus described by Pothier (Proc. Civ. p. 226): "L'adjudication contient une véritable vente que la justice, pour le saisi et malgré lui, fait à l'adjudicataire de l'héritage saivi." And its effect is described by the same author (Proc. Civ. p. 227) as follows:—"L'héritage, adjugé par décret est transféré à l'adjudicataire avec les seules charges exprimées par l'affiche; le décret purge toutes les autres, et éteint tous les droits de propriété et autres droits que les tiers auraient pu avoir dans cet héritage."

De Héricourt, in discussing whether the church and minors should be subjected to the legal effects of a décret says: (Traité des Immeubles p. 148, Lib. Ed.) "Il est de l'intérêt public que les adjudicataires qui acquièrent de la justice ne soient troublés dans leur acquisitions."

These authorities go to establish that any right which the defendant has in the property at the time of the adjudication is forcibly transferred by justice to the purchaser at the sheriff's sale. And, as the possession of a yearly tenant is admittedly the possession merely of the lessor, the owner of the property, it follows that, in the absence of any special reserve of the tenant's rights of occupation in the conditions of sale, the *adjudicataire* becomes absolutely vested with the right of possession incident to the right of ownership thus forcibly transferred to him by justice.

There never was any doubt in France, under the law of that country made applicable to Canada, that the effect of a *décret* was to resiliate the lease, *quoad* the *adjudicataire*, unless the conditions of sale specially bound him to allow the tenant to occupy until the expiration of his lease. (An. Pigeau, 1 vol. p. 774.)

The learned counsel on the other side also admits that such was really the effect of the *décret* prior to the coming into force of our Civil Code; his whole argument being made to turn on the wording of the English version of Art. 1663 of the Code, which declares that a tenant cannot be expelled by a person who becomes owner of the property leased "under a title *derived* from the lessor." His contention being that a title by sheriff's sale, which conveys all the rights of property or possession of the *saisi*, is, in effect, *derived* from the *saisi*, although made forcibly and against his will.

It is submitted that, even adopting the English version of this Article as the true one, the title, in the case of a *décret*, is not *derived* from the *saisi*, but from *justice*. The property is that of the *saisi*, but the title thereto is in no sense derived from him. As Pothier says, (*loc. cit.*) "L'adjudication contient une véritable vente que *la justice* pour le saisi, *et malgré lui, fait* à l'adjudicataire."

But, on turning to the French version of this article, all doubt on the subject is removed; the title of the new proprietor being referred to as one "*consenti pa le locateur.*"

It is quite evident that, in framing this article, the codifiers and Legislature had only in contemplation the case of alienation by private sale, by the lessor himself, and not a forced sale by authority of justice.

It is readily admitted that the authorities in France, since the coming into force of Art. 1743 of the Code Napoléon, bear out the pretensions of the learned counsel on the other side, that a lease like the one in question in this case is not resiliated in France by the mere forcible adjudication of the property *en justice*. But it must be observed that, under the Code of Civil Procedure in France, Art. 684 (old) 691 (new), the *adjudicataire* is bound to execute the lease made by the *saisi* if it be a valid one and do not exceed nine years. Nouveau Pigeau, 2d vol. pp. 224, 225 (Ed. of 1808) and 256, 258 (Ed. of 1836). And, under Art. 684-5-4, mention is required to be made in the tableau to be posted by the *greffier du tribunal*, of the names of the farmers, tenants, etc. Whereas, by our Code of C. P. (Arts. 706 to 711) every description of right (except that of dower and substitution not open) is purged by the *décret*. It is also to be noted that in the Nouveau Pigeau and all other practice books under the present codes in France, the word "*décret*" is not even mentioned; the word "*adjudication*" being substituted therefor, and that in the French Code of C.P. no such title as that of "*des effets du décret*" which appears in our Code, is to be found.

Although the point now raised has not directly been adjudicated upon, since the coming into force of our Code, it has been so indirectly in the recent case in this Court, reported on pp. 39 and 40 of the 4th vol. of the Legal News, and in the case in appeal reported on p. 25 of the 24th vol. of the L. C. J., where the learned Judge who delivered the judgment of the last mentioned Court remarked: "L'adjudication livre la propriété sans les charges, mais ne détruit pas les prestations dues à l'ancien propriétaire, à raison de ses droits sur la propriété. Ses droits pour ces prestations passent à l'adjudicataire, qui les mientiendra s'il le veut."

PAPINEAU, J.—Le requérant s'est porté adjudicataire, à une vente par décret d'un immeuble situé dans le quartier St. Antoine, de cette ville.

N'ayant pu se faire livrer l'immeuble par le défendeur, le requérant en a

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fait la demande au shérif. Celui-ci a fait rapport du refus du défendeur et du refus du locataire du défendeur, un nommé William Blackman, de livrer l'immeuble vendu.

Sur ce rapport et s'autorisant de l'article 712 C. P.C., le requérant s'adresse au tribunal et demande un ordre enjoignant au shérif d'expulser le défendeur et son locataire et de mettre le requérant en possession. Avis de cette requête ayant été donné au défendeur et au dit William Blackman, le premier fait défaut, le second comparaît et la conteste, alléguant :

1o. Qu'il a loué du défendeur, le 19 avril 1879, par acte authentique dont copie est produite, la propriété en question, pour le terme d'un an à compter du 30 du même mois d'avril ; qu'il a pris et gardé possession, depuis le commencement de son bail, et que celui-ci s'est continué, par tacite reconduction, pour une autre année qui ne doit finir que le 30 d'avril prochain.

2o. Que la vente judiciaire n'a pas mis fin à son dit bail par tacite reconduction, et qu'il a droit de rester en possession jusqu'au 1er de mai prochain.

3o. Que l'adjudicataire et requérant ne peut pas le déposséder avant le premier de mai ; qu'il est même tenu d'entretenir le bail jusqu'à son expiration.

Les parties ont considéré tous les faits comme prouvés afin d'avoir une décision sur la question de droit pure et simple.

Blackman fonde sa prétention sur ces mots de l'article 1663 du Code Civil : " Le locataire ne peut, à raison de l'aliénation de la chose louée, être expulsé " avant l'expiration du bail, par une personne qui devient propriétaire de la " chose louée en vertu d'un titre consenti par le locateur, à moins que le bail ne " contienne une stipulation spéciale à cet effet et n'ait été enregistré." Il cite la version anglaise de cet article dans laquelle les mots " *en vertu d'un titre consenti par le locateur,*" sont rendus par ceux-ci " UNDER A TITLE DERIVED FROM THE LESSOR," qui lui semblent plus favorables à sa prétention, et, pour donner plus de consistance à celle-ci, il soutient que cet article doit être interprété à l'aide de l'article 2128 qui se lit comme suit : " Le bail d'immeubles, pour un " terme excédant un an, ne peut être invoqué à l'encontre d'un tiers acquéreur " s'il n'a été enregistré."

Ces deux articles, dit-il, sont de droit nouveau. Le premier est conçu en termes plus énergiques et plus compréhensifs que ceux de l'article 1743 du code Napoléon sur lequel il est calqué. Or, en France, on a fait l'application de l'article 1743 aussi bien aux adjudicataires de biens saisis sur locateurs qu'aux acheteurs des mêmes locateurs à vente privées, et même aux acquéreurs à titre particulier en vertu de testaments, de donations ou d'échanges, quoiqu'il ne soit question que de mutation par vente dans l'article 1743 Code Nap. : (3 Mourlon, Code Nap. No. 768 bis.)

Le contestant s'autorise encore des articles 644 et 645 C. P.C. pour établir que le débiteur saisi reste propriétaire en jouissance et possession de la propriété saisie jusqu'à l'adjudication, et de l'article 689, No. 8, pour faire voir que l'adjudication accompagnée de paiement du prix opère une cession de tous les droits du saisi sur l'immeuble, et il se hâte d'ajouter que le défendeur, lors de la saisie en cette cause, ne possédait *plus les droits qu'il avait cédés au contestant par son bail*, et que ces droits n'avaient pu être saisis ni vendus ;

Que la saisie et adjudication ne sont autre chose, en fait, qu'un transport forcé des droits du saisi à l'adjudicataire; que celui-ci ne peut pas prétendre acquérir plus de droits, dans ou sur l'immeuble saisi et vendu que le saisi lui-même n'en possédait;

Que l'adjudicataire succède au saisi et qu'il est tenu de remplir les obligations contractées par celui-ci, dans le bail, de faire jouir le locataire.

Que le locateur, lors de la saisie, n'avait pas le droit d'expulser son locataire, et que l'adjudicataire n'a pas plus de droit que lui.

Le contestant tire encore un argument des articles 652, 710 et 711 de notre Code de procédure et dit: Le droit du locataire est purement mobilier et personnel; ce n'est pas un droit réel; ce n'est pas non plus une charge sur l'immeuble qui puisse justifier une opposition à l'effet de faire continuer cette charge qui autrement serait purgée par le décret.

Il n'y a donc rien autre chose à faire, poursuit-il, que de maintenir le droit du locataire à son bail jusqu'à l'expiration de celui-ci. Et c'est pour cela que le législateur, qui savait bien que ce droit n'était pas réel, a voulu le protéger par une disposition particulière de la loi, en disant qu'il ne pourrait pas être expulsé par l'acquéreur de son locateur.

Pour bien connaître le sens et la portée des articles 1663 et 2128 du Code Civil, il faut nous reporter dans le passé et nous rappeler quel était le droit sur cette matière, avant le code.

Le bail était alors universellement reconnu comme ne donnant au locataire contre le locateur qu'un droit purement mobilier et personnel. La vente forcée mettait fin au bail. Dans le Bas-Canada, cela était d'occurrence journalière, dans la pratique. La vente privée même y mettait fin et le locataire pouvait être expulsé par l'acquéreur. Avant l'abrogation de la loi *Ædè*, peu de temps avant notre code, le locateur pouvait lui-même l'expulser pour occuper en personne les lieux loués. Le locataire n'avait qu'un recours personnel en dommages contre son locateur, s'il n'était pas maintenu en jouissance (Pothier, louage No. 62, 101, 288, 289; I Pigeau Procédure Civile, No. 778.)

Si le Code n'a pas clairement abrogé le droit ancien, il subsiste encore.

En lisant l'article 1601 de notre Code où le louage est défini "un contrat par "lequel le locateur *accorde au locataire la jouissance* d'une chose pendant un certain temps moyennant un loyer, etc., on est tenté d'y voir une innovation radicale et l'intention, chez le législateur, de créer un droit réel. En effet, d'après les anciens jurisconsultes, et particulièrement Pothier dont la définition du louage est reproduite dans l'article 1709 du code Napoléon, le locateur ne s'*obligeait qu'à faire jouir le locataire* d'une chose pendant un certain temps moyennant un certain prix. Un louage de cette nature ne constituait évidemment qu'une obligation personnelle de faire jouir et si le locateur y manquait, il devenait simplement passible de dommages intérêts.

Dans notre article 1601, ce n'est plus une simple promesse de faire jouir que fait le locateur, c'est la *jouissance même qu'il accorde* et pour tout le temps du bail, de telle sorte que le locataire ne puisse pas en être expulsé à raison d'une aliénation consentie par lui locateur, art. 1663.

Malgré cette énergie dans les termes de l'article 1601, il existe encore une

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différence immense entre le droit de l'usufruitier, qui est un droit réel bien reconnu, et celui du locataire.

En effet, le premier est tellement détaché de la propriété et indépendant de la volonté du nu propriétaire, que celui-ci est obligé de laisser jouir l'usufruitier et n'est obligé qu'à le laisser jouir de la chose usufruitée, telle qu'elle est, pendant que le locateur, non seulement est obligé de livrer la possession de la chose louée au locataire, mais il est obligé de le maintenir en jouissance paisible et d'entretenir la chose en état de servir à l'usage pour lequel il l'a louée, art. 1612. C'est au locateur à protéger le locataire contre tous les troubles causés par suite d'une action contre la propriété ou tout autre droit *dans ou sur la chose louée*, et si le locateur ne réussit pas à écarter le trouble, il est obligé de souffrir une réduction du loyer proportionnée à la diminution dans la jouissance de la chose, et même de payer des dommages, pourvu que la cause du trouble lui ait été dénoncée, art. 1618. Or toutes ces obligations d'entretien et de protection sont des obligations purement personnelles, et les actions qui en résultent en faveur du locataire sont des actions purement mobilières. Il en est autrement pour le droit réel, le *jus in re* qui donne naissance à l'action immobilière. Si donc le locateur cesse de maintenir son locataire en jouissance paisible de la chose louée ou de partie de cette chose, son obligation se résout en dommages intérêts, suivant cet article 1618, pour la bonne raison que le locataire n'ayant pas acquis un droit dans la chose, *jus in re*, ne peut la garder de son propre chef contre les actions de ceux qui la réclament en vertu du droit de propriété ou d'un autre dans ou sur cette chose. Il est forcé d'attendre secours de la part du locateur, tenu de veiller et d'agir jusqu'au dernier instant de la durée du bail au maintien en bon état de la chose louée pour permettre au locataire d'en jouir.

Les commissaires chargés de préparer le Code et après eux les législateurs qui l'ont adopté, préoccupés de la pensée, de ne pas laisser les locataires exposés aux dérangements résultant et des ventes et des aliénations, en général, consenties par le locateur, ont fait l'article 1663 (Rapport des codific : Tome 2, p. 29.)

Ils ont vu, dans cet article, la naissance d'un droit nouveau qu'ils ont désigné sous le nom de charge. Ils ont cru devoir soumettre cette charge à la formalité de l'enregistrement pour lui donner la publicité requise et, dans ce but, ils ont suggéré ce qui est maintenant l'article 2128 du code. "Le bail d'immeuble "pour un terme excédant un an ne peut être invoqué à l'encontre d'un tiers "acquéreur s'il n'a été enregistré (Rapport, Tome 3, p. 65 et 193). Puis, à fin de prévenir les fraudes qui pourraient se commettre par des paiements anticipés, ils ont suggéré l'article 2129 C.C.

Le législateur n'ayant exprimé la défense d'expulsion que par ceux qui ont un titre *consenti* par le locateur, nous ne devons pas étendre cette disposition à d'autres cas.

Si l'on croit que la version anglaise soit en conflit avec la version française et qu'il résulte de là un doute sur l'étendue de la modification, apportée par le législateur, au droit préexistant, celui-ci doit continuer de subsister, puisqu'il ne serait pas clairement abrogé. Si le législateur avait voulu conserver le droit du locataire, même dans le cas d'aliénation forcée, pourquoi ne l'aurait-il pas exprimé ? Mais, dit le requérant, la vente forcée est toujours une vente consentie par

le débiteur, sur qui elle est faite en ce sens qu'il y a donné son consentement, en contractant sa dette. En faisant une dette, il savait qu'il donnait pouvoir au créancier de saisir tous ses biens, pour la payer, si, plus tard, il ne payait pas volontairement.

Soit; il y a consenti, dans ce sens; mais en règle générale on ne dit pas qu'une vente forcée soit une vente consentie par le débiteur.

Et il existe plusieurs différences notables entre la vente réellement consentie et la vente forcée. Dans la première, c'est le vendeur qui fait ses conditions, dans la seconde, la loi les impose: dans la première il y a garantie, dans la seconde la garantie n'existe pas. Il y a bien d'autres différences, qu'il serait trop long d'énumérer ici.

On dit qu'en France l'adjudicataire, à vente par autorité de justice, ne peut pas expulser le locataire; c'est vrai et, de ce que notre article 1663 est plus compréhensif que l'article 1743 du Code Français on en conclut qu'il doit en être ainsi chez nous. Ce raisonnement serait bon, si c'était par la seule vertu de l'article 1743, que cette jurisprudence se serait établie en France. Il n'en est pas ainsi. Le Code de Procédure Civile Français, article 682 (ancien texte) No. 4, porte que dans le tableau des biens, placé dans l'auditoire, pour faire connaître les immeubles saisis, outre l'indication sommaire des biens ruraux, "chaque article contiendra....les noms des fermiers ou colons, s'il y en a, et, par un argument *à contrario*, on fait dire à l'article 684 (nouveau texte): "lorsque l'immeuble loué "ou affermé est saisi sur le bailleur, le bail, pourvu qu'il ait acquis date certaine "antérieurement au commandement qui a précédé la saisie, est opposable aux "créanciers saisissants et à l'adjudicataire." 3, Mourlon Code Napoléon p. 299, à la fin du No. 768*ter*. Nous n'avons rien d'analogue à cela.

Passons aux autres raisons du contestant. Il prétend que l'adjudicataire ne peut pas avoir plus de droit dans ou sur la chose saisie que n'en avait le débiteur saisi. C'est admis, mais il a tous ceux qu'avait le saisi, et parmi ceux-ci se trouve le droit de propriété (article 706) *à compter de sa date*. Or le droit de propriété donne le droit à l'action en revendication, un droit dans la chose même, et si l'adjudicataire exerce ce droit contre la chose louée, durant le bail, ce n'est pas le locataire, qui n'a pas de droit réel dans la chose, qui peut y résister mais son locateur en vertu de l'article 1618 C. C., et si celui-ci ne le maintient pas en jouissance, il doit les dommages à son locataire en vertu du même article.

Le contestant dit que l'adjudicataire succède au saisi et qu'il est tenu aux obligations de celui-ci, et notamment à l'obligation contractée dans le bail de faire jouir le locataire.

Il n'est pas exact de dire que l'adjudicataire succède au saisi. Il lui succède bien en ce sens qu'il vient après lui et prend sa place, comme propriétaire de la chose saisie. Il n'est pas son successeur dans le sens d'avoir à remplir ses obligations, excepté celles qui découlent du droit de propriété même ou des droits réels dans l'immeuble ou bien qui sont imposées par la loi. Or le droit du locataire, comme on l'a vu, n'est pas un *jus in re*, et nulle part la loi n'impose à l'adjudicataire l'obligation d'entretenir le bail fait par le saisi, même antérieurement à la saisie.

Mais, dit le contestant, le saisi avait, par le bail, cédé la jouissance au locataire pour un an et avant l'expiration de l'année, le demandeur a fait

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pratiquer une saisie, la jouissance n'a pas pu être saisie ni par conséquent être transférée à l'adjudicataire, donc celui-ci ne peut l'obtenir avant l'expiration du bail.

La jouissance, comme on l'a vu, n'est pas un droit réel, un *jus in re*, ce n'est pas un démembrement du droit de propriété, comme l'est l'usufruit, il ne subsiste pas comme celui-ci séparément de la nue propriété, il ne subsiste donc pas, dans la personne du locataire, séparément du droit de propriété. Or celui-ci finit au moment de l'adjudication ; la jouissance du saisi finit aussi avec sa possession par l'adjudication (Art: 645, C. P. C.). Les intérêts cessent de courir contre l'immeuble vendu, le jour de l'adjudication, Art. 734 C. P. C.

Le locataire ne possède pas l'immeuble loué en vertu d'un autre droit que celui de son locateur, son droit de posséder résulte d'un droit personnel qu'il a contre le locateur de se faire maintenir en possession. Or la possession doit finir en même temps que celle du saisi, au nom de qui et pour qui il possède.

Prenons maintenant le point de vue adopté par les commissaires codificateurs, que le bail constitue une charge sur la propriété. Est-ce qu'à ce point de vue le contestant serait bien fondé à retenir la propriété ?

L'article 648 C. P. C. prescrit que les avis de vente donnés par le shérif doivent contenir, outre la désignation de l'immeuble, les charges mentionnées dans le procès-verbal de saisie et celles dont le saisissant requiert d'ailleurs par écrit l'insertion ; l'article 640 dit : "*La partie saisie*, de même que la " partie saisissante peut faire insérer au procès-verbal les *charges foncières*..... " dont sont grevés les immeubles saisis ; " l'article 659 donne l'opposition à fin de charge au tiers, lorsque l'immeuble saisi est annoncé pour être vendu, sans la mention de quelque charge particulière, dont l'immeuble est grevé, et qui peut être purgée par le décret ; parmi les charges que la loi mentionne comme n'étant pas purgées par le décret, ne se trouve pas nommée ni directement ni indirectement la charge du bail à loyer. Dans la présente cause le procès-verbal de saisie et les avis de vente ne font mention d'aucune charge qui aurait été créée sur l'immeuble par un bail fait au contestant. Une telle charge n'a donc pas pu être conservée en sa faveur.

Enfin le contestant dit que son droit est un droit purement mobilier. Si c'est un droit purement mobilier, il est nécessairement personnel. Alors son recours doit être, comme son droit, personnel ; et ce droit, comme il le tient de son locateur, qui le lui fait perdre ou qui le laisse perdre, c'est contre son locateur qu'il doit l'exercer, (25 Laurent, louage Nos. 9, 10, 11, 12, 13 ; 4 Aubry et Rau, p. 471 § 365 Note 7 ; et 25 Laurent Nos. 14 à 35.

Mais dit le contestant, si mon locateur est devenu insolvable, comme c'est presque toujours le cas dans les ventes par décret, je devrai perdre mes dépenses d'installation et même mon loyer, si je l'ai payé d'avance. C'est possible, et c'est un inconvénient grave. Il ne s'ensuit pas qu'on doive mettre de côté une loi, toutes les fois que, dans la pratique, il peut en résulter des inconvénients si, en général, son effet est bon.

Supposons que le contestant aurait voulu revenir sur sa déclaration et soutenir que le bail lui donne un droit réel dans la propriété, sa position n'en serait pas

meilleure, car ce droit se trouverait purgé, aux termes de l'article 711 du C. P. C. "Le décret purge tous autres droits réels non compris dans les conditions de la vente."

Petition for writ of possession granted.

Bethune & Bethune, for petitioner.

Kerr, Carter & McGibbon, for lessee, William Blackman.

(S. B.)

COURT OF QUEEN'S BENCH, 1880.

MONTREAL, 8TH NOVEMBER, 1880.

Coram SIR A. A. DORION, C. J., MONK, J., RAMSAY, J., CROSS, J., BABY, A. J.

No. 140.

FREDERICK E. DIXON ET AL.,
(Petitioners in the Court below,)
APPELLANTS;

AND

ARTHUR M. PERKINS,
(Assignee in the Court below,)
RESPONDENT.

The assignee of an insolvent estate sold the assets *en bloc* for the sum of $34,000. The purchasers paid the whole amount before it was due, on an express agreement in writing by the assignee that he would pay them for any deficiency that might be found to exist in the assets sold, in the proportion of an estimate made in pencil upon the inventory annexed to the deed of sale. It appeared that one asset consisted of 150 shares of Railway and Newspaper Advertising Co. stock, of the par value of $15,000, on which $9,357.24 were still unpaid, and a transfer of this stock could be made to the purchasers only subject to the liability of paying such calls as might be made, which liability was unknown to the purchasers when they purchased the estate, and they declined to assume the responsibility.

HELD:—That although there was no warranty stipulated at the time of the sale, the assignee, being unable to deliver the stock sold, was bound to refund a part of the price in the proportion that the value of the stock bore to the value of the whole assets;—and, in the absence of evidence to the contrary, the separate valuation of the stock marked upon the inventory (which valuation had been concurred in by both parties) might be taken to be the true value of the asset not delivered.

The appellants petitioned in the Court below that the respondent, as assignee of the insolvent estate of L. J. Campbell & Co. (which estate they had purchased *en bloc*), be ordered to pay back the sum of $2,000, being the estimated value per inventory of a certain asset of the estate. This asset consisted of 150 shares of the Railway and Newspaper Advertising Company, and it appeared that these shares were not fully paid up, only $5,642.76 being paid thereon, and they could not be transferred without the purchasers becoming liable for the unpaid balance, $9,357.24.

The judgment of the Superior Court sitting in insolvency (TORRANCE, J.) was in these terms:—

"Considering that the petitioners have not proved that they are entitled to the conclusions of their petition;

"Considering that their remedy, if any they have, is under the Civil Code to obtain a reduction of price, doth reject such petition with costs, *distraits*, etc."

Abbott, Q. C., for appellants:—

The judgment in the Court below rejected a petition of the appellants, in which

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they claimed a return of part of the price of the assets of the insolvents purchased by them.

The purchase was made upon an inventory furnished by the assignee, respondent, opposite each item of which the value at which the appellants and the inspectors of the estate agreed in estimating it, was noted in pencil. The price was paid, pending verification of the assets as represented in the inventory, on the written promise of the assignee to return the estimated value of any item of the assets that should be deficient.

On verification it was found that certain shares of stock in the Railway and Newspaper Advertising Company, appearing in the inventory as amounting to $5,642.76, really consisted of shares of stock amounting to $15,000, on which about $5,000 had been paid; the balance unpaid being more than the shares were worth.

The appellants, therefore, refused to accept the unpaid shares; and the respondent was unable to deliver paid shares, according to the inventory; and they claimed the estimated value of this item, viz., $2,000.

The Court rejected the petition, on the grounds that the petitioners had not proved that they were entitled to their conclusions, and that their remedy was under the Civil Code.

The questions, therefore, for the Court are:

1. Whether the appellants were obliged to accept the proposed delivery by the assignee of $15,000 of shares of stock, on which $5,000 only had been paid, instead of the stock described in the inventory; and

2. If not, whether they are entitled to recover back the amount at which the stock represented as being for sale was estimated in the purchase made.

For the more full examination of these questions, the appellants proceed to state in detail the circumstances of the case, and the pleadings of record.

On the 30th August, 1876, the assignee, respondent, advertised for tenders for the purchase *en bloc* of the assets of the insolvents, describing the assets to be sold under separate heads, in an inventory referred to in the advertisement, as will appear by the advertisement itself filed of record as No. 15 of the *dossier*.

The assets to be sold were divided generally into two lots:—

1. The stock, plant, machinery, office furniture, &c., and

2. The bills receivable, book-debts, stocks, &c.

In the inventory of these latter items, the stocks are described as follows:—

Railway and Newspaper Advertising Company's stock.....$5642.76

Dominion Building Society, 60 shares; paid on..... 582.00

The appellants made a tender for the estate *en bloc;* but their tender was not accepted. Further negotiations followed, of an informal character; and finally on the 25th September, 1876, they agreed through George Barry, one of them, to pay $34,000 for the estate, in cash, within ten days from that date. This agreement appears as No. 20 of the *dossier*. On the 30th September, five days before the price became due, the assignee applied for payment of it, which the appellants declined to make as they had not yet verified the assets and compared them with the inventory furnished. But the assignee, respondent, being desirous of obtaining the money, and having already received at the time of the purchase

$500 on account, proposed to the appellants to return them the value of anything which might be found to be deficient, on the basis of the estimate made by the appellants in preparation for their tender.

To this the appellants assented, and thereupon the assignee wrote and delivered to them the following letter (No. 16 of the *dossier*):

MONTREAL, September 30th, 1876.

DEAR SIRS,

In consideration of the receipt from the Molsons Bank of thirty-three thousand five hundred dollars, I agree that, upon the goods and assets of L. J. Campbell & Co. sold to you being checked, I will pay you for any deficiency that may be found to exist, in the proportion in which your estimate was made, namely at the rates marked in pencil upon the inventory annexed to the deed of transfer from me to the Bank.

Very truly yours,

(Signed,) ARTHUR M. PERKINS,
Assignee.
L. J. CAMPBELL & CO.

Messrs. Dixon, Smith & Co.,
&c., &c., &c.

Upon receipt of this letter, and in consideration of the engagement it contained, the entire price of the assets was immediately paid by the appellants, and the deed of transfer from the assignee to the appellants was executed. A copy of it is produced as No. 4 of the *dossier*.

Afterwards, upon checking the assets of the estate, the appellants found that there was no such item of shares of Railway and Newspaper Advertising Company's stock among them, the only shares in that Company being $15,000 of subscribed stock, of which only 35 per cent. had been paid up, leaving about 65 per cent., or about $10,000, still due upon it, for which, if the appellants had accepted the stock, they would have become responsible.

On reference to the inventory it will appear by the pencil valuation marked upon it, that the Railway Advertising Company's stock was valued for the purpose of the purchase at $2,000, the whole valuation so put upon the assets purchased amounting to $36,421.

Upon taking steps to obtain a transfer of the supposed paid-up stock, it was found to stand in the position already described, about $500 of a call on the stock previously made being then in default, and no transfer of it being permissible under the constitution of the Company until that amount should be paid. Thereupon repeated demands were made upon Mr. Perkins for the return of the estimated value of the stock on his undertaking already cited, but without effect; and finally a petition was presented on behalf of the appellants, setting forth the facts, and demanding the return of the said sum of $2,000 as the value of the item not delivered.

The respondent answered this petition by alleging that it was true that, after public notice demanding tenders for the sale *en bloc* of the assets of the insolvents, he had sold the same to the petitioners as being the highest bidders; but that it

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was false that the assignee had, in writing, or by report, or in any other way, led the petitioners into error as to any part of the assets of the insolvents, and particularly as to the Railway and Newspaper Advertising Company's stock.

That the respondent had sold the effects without any guarantee whatever, as the petitioners knew or ought to have known.

That the petitioners, before making their tender, ought to have made, and did make, all the enquiries and verifications necessary to enable them to fix the amount of their tender.

That the respondent had no power to guarantee any part of the assets of the estate; and that he did not deceive or mislead the petitioners either on any part of it, or on the whole amount of the assets.

That if the appellants had made their tender without having verified or examined the nature of the assets of the estate, they had only to blame their own negligence and imprudence; and they could not complain that the respondent had not furnished them with all the information they ought to have procured themselves, nor demand that the amount of their tender should be reduced in proportion.

That the appellants perfectly well knew the nature of the different assets composing the assets of the estate; that they made their tender, and had no reason to complain of the shares in question not having been entirely paid up.

That the respondent had always been ready and willing to transfer the shares; and that the Company had never objected to receive the transfer.

That, even supposing that the allegations of the petition were true, and that the appellants had been deceived as to the nature of the shares of the Company; they had no right to demand that the reduction of $2000 should be made upon the amount of their tender; but at most would have the right to demand that a reduction proportionate to the apparent amount of the assets *en bloc*, should be made.

For these reasons the respondent claimed the dismissal of the petition.

The appellants answered generally.

The documentary evidence has already been referred to, and proves in all respects the allegations of the petition.

The proportion of the shares remaining unpaid was also established in the manner required by law.

The parol evidence in the case substantially established the facts material to the issue.

The circumstances attending the payment of the price, are established by Mr. Francis Wolfer-tan Thomas, the cashier of the Molsons Bank. He explained that, at the time of the execution of the deed of sale, the assets of the insolvents had not been checked by the purchasers, viz., the appellants. That they made objections to close the transfer until they had checked over the assets, and that, in consequence of these objections, the assignee respondent sent them the letter already referred to, without which the petitioners refused to pay the money, or execute the deeds.

He states the fact that, according to the terms of the advertisement, the stock of the Railway and Newspaper Advertising Company was regarded by them and

the bank advancing them the money as being paid-up stock. He proves that the estimate put upon it by Mr. Barry on behalf of the appellant and by himself acting for the Bank was the sum of $2000, and he identifies the figures $2000 in pencil written on the inventory as being the estimate so made; and as being the valuation referred to in the letter of the assignee.

The assignee, respondent, was examined, and he proved that the tenders which were submitted in conformity with the advertisement were not accepted; but that negociations were continued with the appellants, whose tender was considered the best; and finally the proposal under date of September 25th was sent in by the appellants; and accepted by the inspectors. The assignee admits the signing and delivering of the letter as a condition precedent to the payment of the money, and he identifies the inventory, No. 17 of the *dossier*, as being the inventory and estimate referred to in his letter; though he says he did not intend that letter to apply to anything but the stock-in-trade and book debts. He further declared that the pencil estimate of the assets pencilled upon the inventory, was made in his office in the presence of, and really by, the five inspectors. He also proves that, upon endeavoring to get the stock transferred upon the books of the Company, Mr. Barry discovered that the stock was not paid-up stock, and immediately demanded the return of the amount that had been put upon the stock as an estimate of its value, and requested that a meeting of inspectors might be called to authorize such return. He states that he called the inspectors together for the purpose, but could not get a quorum. He also proves the fact that the amount mentioned in the tender really represented only the amount purporting to be paid up on the $15,000 of subscribed stock, a balance being due upon it of $9,357.42.

The respondent examined as a witness Mr. F. E. Gilman, who speaks of conversations he had with Mr. Barry about the stock. He says he was a Director of the Railway & Newspaper Advertising Company. He describes an interview he had with Mr. Barry, in which Mr Barry asked him all about the stock, mainly how much was paid on it, and how it stood; and he says he gave him all that information, except that he did not tell him that $500 of calls already made still remained unpaid. He declares that he does not know whether this interview took place before or after the appellants bought the stock; but it is plain from the circumstances he relates that the conversation took place at the time the appellants called upon the respondent to transfer the stock to them; and then, for the first time, discovered that the stock was not paid-up stock, but that a very large amount of it remained unpaid.

It is, therefore, quite plain from the evidence, both documentary and verbal, that the facts, as stated in the petition of the appellants, were made out. They proved that they had bought from the respondent a quantity of assets, each separately described and well defined, and each valued, not only by the appellants, but by the inspectors of the estate, at a definite and fixed sum. And that they had paid over the whole of the purchase money without verification, and before delivery of the effects purchased, upon the faith of the formal inventory exhibited by the assignee, sanctioned, checked, and valued by the five inspectors; and upon the written undertaking of the assignee to return the estimated price of any portion

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of the estate which should not be delivered, or should not be of the character represented.

It is also clearly established, that the stock, which appeared on the face of the papers to be paid-up stock, was in reality only an instalment paid upon a very large amount of subscribed stock; upon which a balance remained unpaid of about $10,000. And it is not pretended for a moment that the appellants intended or agreed to assume the liability for this balance; although that would be the necessary consequence of their accepting the transfer. It is shewn that they were willing to take the transfer of paid-up stock corresponding to the amount named in the inventory; but that, as soon as they discovered the true nature of the security, they refused to take it, and demanded the return of its estimated value.

There is, therefore, no question of fact at issue between the parties; and so far as can be learnt from the remarks of the Honorable Judge in the Court below, he did not doubt that the facts had been proved as they have been stated. His decision seems to rest on two grounds.

1st. That the assignee had not power to make the arrangement that any specified amount should be returned, in the case of non-delivery; and,

2nd. That the appellants should have sought their remedy under some article of the Code.

With regard to the first question, as to the authority of the assignee; it may certainly be questioned how far an assignee would be authorized by virtue of his office to agree to abandon the right of the estate to any part of the price of a thing sold, and, if the claim of the appellants rested entirely upon such an abandonment, the opinion of the judge would probably have been well founded. But it must be observed that there is no abandonment contemplated by the arrangement made by the assignee, of any part of the price of the assets sold and delivered. There was no sale of the stock, because there was error as to the thing about which the bargain was made. And the assignee did not abandon any part of the price due; he merely agreed, upon receiving in advance the entire price stipulated for, that he would return any part of that price to which he might prove not to be entitled. It was his duty to make and carry out the sale, and to collect the price. But if he was unable to deliver the whole of the property sold, he would have been also unable to enforce payment of the price of that portion. And although difficulty might have been incurred in ascertaining the price of the undelivered stock if there had been no separate valuation of it, there was in reality none whatever under the actual circumstances of the case. The appellants therefore maintain that the assignee was acting strictly within his powers, and according to his duty, in agreeing to return the price of any part of the estate which he should be unable to deliver. And that the appellants, having paid the whole nominal price to the assignee before delivery, on the assurance that they would be replaced in the same position they then held, if it should prove to be impossible to make delivery, are now entitled to have that condition enforced by the repayment of the proper proportion of their money. The estate is benefited by the payment it has received, and distributed the money in question; and yet it has never delivered, and is in fact unable legally to deliver, the

stock in question to the appellants. Nor are they in any manner bound to receive it. There is therefore no consideration whatever for the payment to the assignee of the price of the stock. The appellants have paid $2000 for nothing, without a shadow of value received for it. And the amount which should consequently be returned is in no doubt, since it is established in the manner previously agreed upon between them and the assignee, by the estimate made by the inspectors of the estate of the portion so remaining undelivered.

But assuming for a moment that there was no obligation on the part of the estate to fulfill the undertaking on which the assignee obtained payment of the sum of money in question, the position of the appellants would not be greatly changed if they were obliged to conform to the law as contained in the Civil Code, by which the Judge in the Court below considered their demands should be regulated: stating that their remedy, if any they had, was to obtain a reduction of price, under the Code.

It is not clear what section of the Code was referred to by his Honor; but it is stated that the present case is sought to be assimilated to the case provided for by Article 1528.

This seems scarcely possible, as the question of the knowledge of the assignee as vendor, of the nature of the stock, has never arisen. And he must be presumed to have known it, as he had the books of account of the insolvents, and doubtless made the inventory from those books. Article 1526 is more analogous to the question, and it permits the purchaser either to give up the whole of the thing sold and get back the whole price, or to retain the thing and get a diminution of the price according to a valuation. Article 1525 has also an important bearing on the question—as it allows the purchaser to give up his purchase of a number of things, and recover back the whole of the price, if one essential thing be wanting. That is a wide privilege: and would imply that the purchaser could in any case get back the price of the thing deficient; which is precisely the present case. But whichever Article was referred to by his Honor, he indicated the precise remedy which the appellants are seeking: namely, a reduction of the price. They ask a reduction of the price by $2000. But as they paid the price in advance, they are also obliged to ask that the amount by which the price is reduced be returned to them.

But the general principles of law suffice for the determination of this question. Under them, it is not permitted to a person to enrich himself unjustly at the expense of another. And for that reason, the assignee must return the sum of $2000 which he obtained from the appellants upon a false representation, and by means of a subsequent promise which he now seeks to repudiate. The thing he pretended to sell is not what he had to sell, nor what the appellants intended to buy. He has never conveyed, delivered, or transferred it to them; and they have received nothing from him as representing it. But he retains the $2000 which they gave him in expectation of getting it: and that is the value which they, he, and the duly appointed inspectors of the estate agreed upon as the value.

If the respondent had pleaded negligence by delay in applying for repayment, that pretension could easily have been rebutted. But he has not urged any

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defence of that kind. If he had pleaded and proved that the money had been divided among the creditors, another difficulty would have been interposed. But he does not pretend to have divided a farthing of that money. He seems to have tried to get the inspectors to authorise him to repay it. But they did not think proper to attend a meeting, and he could not get a quorum of them together to decide the question.

The appellants therefore contend that the assignee, respondent, was justified in agreeing to return the value of the stock at the rate estimated. And that the demand by the appellants of the sum of $2000 as being that estimate, was perfectly reasonable; was in accordance with the valuation made by the inspectors themselves; was sanctioned by the acceptance of the money paid on that condition, and should be enforced by this Honorable Court.

The appellants therefore contend that the judgment of the Court below was erroneous:

1. Because it is established in evidence that the item of stock in the Railway and Newspaper Advertising Company was so described in the inventory and notice of sale, as to lead the appellants into material error, and that they did not acquire, nor were they bound to take, the $15,000 of partially paid-up stock which constituted the actual asset of the estate.

2. That under the condition upon which they paid the price, before receiving delivery, the assignee became bound to return the value of the stock not delivered, according to the estimate of it made by them and by the inspectors upon the inventory.

3. That according to the least favorable interpretation of the law, the appellants would be entitled to a diminution of price bearing the same proportion to the value of the thing not delivered, as the purchase money bore to the value of the whole of the assets sold; which diminution would at that rate amount to $1,867.00.

Geoffrion, for respondent:—

Les requérants attachent beaucoup d'importance au fait que l'item subséquent à celui se rapportant aux actions de la *Railway & Newspaper Advertising Company.*, est rédigé différemment; Cet autre item a rapport à des actions dans la société de Construction de la Puissance, et l'on prétend que les mots "*Paid on*" faisait comprendre clairement que dans cet item les actions n'étaient pas entièrement payées, qu'il était naturel que pour l'item précédent, les mêmes expressions ne s'y trouvant pas, il fallait conclure que les actions étaient entièrement payées.

Les appelants, lorsqu'ils ont fait, sinon leur première soumission, du moins leur soumission amendée et celle qui fut acceptée par les inspecteurs, avaient sous les yeux non-seulement l'avis publié dans les journaux, mais aussi un certain tableau montrant l'actif et le passif de la faillite de L. J. Campbell & Co., et produit par les appelants comme leur exhibit B. A ce tableau l'on voit que l'item se rapportant aux actions de la *Railway and Newspaper Advertising Company* se lit comme suit:

"Railway Advertising stock valued at..... .....$5,642.76."

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Les appelants ont dû nécessairement comprendre par ces mots *valued at*, que ces actions requéraient vérification, attendu qu'à aucun autre item du tableau en question, l'on trouve une évaluation autre que celle de leur valeur apparente.

Un autre point sur lequel il est important d'attirer l'attention de cette Honorable Cour, est que les appelants, dans leur requête, n'allèguent nulle part que les dites actions n'avaient pas une valeur égale au pair, et que nulle part au dossier, il appert, soit à la preuve écrite, soit à la preuve testimoniale, que les dites actions valaient moins que le pair ; qu'importe alors qu'elles soient payées en entier ou seulement qu'un certain percentage ait été versé, si elles valent le pair, ainsi que la présomption légale doit l'établir ; les appelants ne souffrent aucune perte de leur prétendue erreur et ne peuvent, en conséquence, obtenir une réduction de leur prix d'acquisition ; dans tous les cas, en supposant que les dites actions ne valaient pas le pair à l'époque de la vente en question, il incombait aux appelants d'établir quelle était leur valeur, afin de permettre à la Cour de fixer la réduction du prix que les appelants auraient pu demander, si toutefois il y avait lieu de l'accorder.

L'intimé fait observer de plus que, dans tous les cas, l'action en réduction de prix doit être exercée dans un délai raisonnable. La requête dont il s'agit en cette cause n'est rien autre chose que la demande d'un droit équivalant à l'action *quanto minoris*.

Les appelants prirent possession de la totalité de l'actif de la Faillite immédiatement après l'acte du 30 Septembre 1876, réalisèrent toutes les marchandises et après avoir disposé de la totalité du fonds de commerce ainsi acquis par eux, viennent au-delà d'un an après cette acquisition, demander la réduction de leur prix d'acquisition. Il est bien vrai que par une lettre en date du 15 Février 1877, soit 4½ mois après l'acquisition du fonds de commerce, ils notifièrent l'Intimé de leur prétendue erreur, mais dans l'intervalle ils ne continuèrent pas moins à disposer des marchandises et du fonds de commerce qu'ils avaient achetés.

Il n'y a pas de doute que si les actions de la Compagnie en question fussent montées au-dessus du pair, les appelants se seraient bien gardés de se plaindre ; le syndic, de son côté, n'aurait certainement pas fait réclamer les dites actions si elles avaient doublé ou triplé en valeur.—Serait-il juste, sous de semblables circonstances, de permettre aux appelants de venir remettre les dites actions et de réclamer une réduction de prix, après une période de temps aussi longue ?

Un autre moyen invoqué par les appelants est que l'Intimé n'a jamais signé le transfert des dites actions en faveur des appelants, sur les livres de la Compagnie, et l'on prétend qu'en supposant que l'Intimé aurait voulu le faire il en aurait été empêché par le fait qu'il y avait des versements non payés. Il est en preuve au dossier que la Compagnie n'a jamais fait objection au transfert en question à cause de ces arrérages ; au contraire, elle était anxieuse d'accepter comme nouveaux actionnaires les appelants en cette cause, même au sacrifice des arrérages des versements en question, si la chose eût été nécessaire.

L'Intimé a toujours été prêt à signer ce transfert, et conséquemment ce dernier grief n'est qu'imaginaire et ne peut pas être invoqué à l'appui de la requête.

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Sur le tout l'Intimé soumet donc humblement :

1o. Que la vente en bloc, faite par lui, des biens de la faillite de L. J. Campbell & Co., a eu lieu sans garantie, ainsi que le veut l'acte de faillite de 1875.

2o. Que les appelants savaient ou auraient dû savoir que les actions en question n'étaient que partiellement payées.

3o. Que rien ne fait voir au dossier que les dites actions valaient moins que le pair lorsqu'elles ont été vendues avec le reste des biens des faillis aux appelants, et qu'en conséquence rien ne démontre que les appelants ont perdu ou souffert aucun dommage à cause de leur prétendu erreur et qu'en conséquence, il n'y a pas lieu de demander réduction du prix d'acquisition.

4o. Que, dans tous les cas, les appelants ayant pris sur eux-mêmes de disposer de tous les autres biens acquis en bloc dans la vente en question, et pour un prix unique, sans auparavant vérifier l'exactitude des détail contenus dans l'annonce de la dite vente, et ayant, de plus, attendu au delà d'une année avant de se plaindre et de demander la dite réduction, sont déchus du droit de le faire, si toutefois, ils ont jamais eu semblable droit.

CROSS, J. (*diss*). On the 25th September, 1876, Dixon, Smith & Co. made a purchase from A. M. Perkins, assignee, of the effects and assets of the insolvent estate of L. J. Campbell & Co., as per an inventory produced, the price agreed upon being $34,000. Being called upon to pay, and fearing that there might be a deficiency in the delivery of the assets, or wishing to guard themselves against such a contingency, they, on the 30th September, through the Molsons Bank, paid $33,500, and got from the assignee a receipt signed by him and by L. J. Campbell & Co. for that amount, in which the assignee declared :

" I agree that upon the goods and assets of L. J. Campbell & Co. being " checked, I will pay you for *any deficiency* that may be found to exist, in the " proportion in which your estimate was made, viz., at the rates marked in " pencil upon the inventory annexed to the deed of transfer from me to the " Bank."

This writing did not embody any conditions made by the parties at the time of the sale, but rather resulted from the circumstances, and was a precaution taken by the purchasers to get all they bargained for, or not to pay for it.

They discovered that one item in the inventory was not in a position so advantageous as they might have expected, and claimed that it was a deficiency within the meaning of the reserve to that effect, in the receipt in question. They, therefore, petitioned the Court to order the assignee to allow them $2,000 for the asset in question, being, as alleged, the amount at which the purchasers had estimated it, as shown by the pencil mark put by them upon the inventory.

Among the general enumeration of assets described in the advertisement of sale, the asset in question was entered as " Railway and Newspaper Advertising Co. stock $5,642.76." Next under it was " Dominion Building Society, 60 shares, paid on $582."

The letter agreeing to purchase was signed by George Barry, one of the partners of Dixon, Smith & Co. ; it bore date the 26th September, 1876, and was addressed to the assignee in the terms following :—

"A. M. PERKINS, ESQ.,

"Assignee Estate, L. J. CAMPBELL & Co.,

"Montreal.

"DEAR SIR,—I hereby agree to pay $34,000 cash within ten days from date, for that portion estate L. J. Campbell & Co. as advertised for sale by tender the 30th of August, 1876, amounting to $166,888.75, not including special account amounting to $90,698.69. I herewith hand you $500 to apply on account of above purchase.

(Signed,) GEORGE BARRY."

It is conceded by both parties that this was an agreement to purchase *en bloc* the principal part of the estate, as it had been advertised. It appears that Barry purchased for the firm of Dixon, Smith & Co., and at their request the assignee, on the 30th September, 1876, by notarial deed, assigned the stock in trade and assets, as per inventory by which they had been advertised, to the Molsons Bank, from whom he declared he had received the purchase money, $34,000.

As the purchase had been so paid for in advance before completing the transaction, it appears that Dixon, Smith & Co. exacted and obtained from the assignee a letter in the terms following:—

"Montreal, 30th September, 1876.

"DEAR SIRS,—In consideration of the receipt from the Molsons Bank of $33,500, I agree that upon the goods and assets of L. J. Campbell & Co., sold to you, being checked, I will pay you for any deficiency that may be found to exist, in the proportion in which your estimate was made, namely, at the rates marked in pencil upon the inventory annexed to the deed of transfer from me to the Bank.

"Very truly yours,

"(Signed) ARTHUR M. PERKINS,

"Assignee, L. J. CAMPBELL & Co."

The pencil marks here alluded to do not appear on the inventory annexed to the deed, but on another substantially the same in the hands of the assignee, while the negotiations were in progress: it differed only in leaving out the words "valued at" added after the descriptive words "Railway Advertising Stock."

By another deed of the same date, the Molsons Bank transferred to Dixon, Smith & Co., as bailees, the stock in trade and assets as received by them,—Dixon, Smith & Co. acknowledging their receipt with the exception of the Railway Advertising stock and Dominion Building Society stock, which the Bank retained as security for their advances.

A claim seems first to have been made by Dixon, Smith & Co. on the assignee 15th February, 1877, as appears by Mr. Abbott's letter of that date demanding a transfer of paid-up stock, or the return of the amount at which they had estimated it.

On the 16th February, 1878, Dixon, Smith & Co. presented their petition to the Superior Court sitting in Insolvency, claiming from the assignee the return

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of $2,000, their estimate of the asset of the Newspaper Advertising Company stock, and on the ground that it should have been paid up stock, and that in fact only some 40 per cent. had been paid on it. It was contested by the assignee, and after evidence and hearing the Court, on the 23rd December, 1879, dismissed the petition, on the ground that it had not been proved they were entitled to their conclusions, and their remedy, if any, was for a diminution of price. From this judgment, Dixon, Smith & Co. have appealed.

The effect of the assignee's letter of the 30th September was to afford a measure of reduction in price, in case of any deficiency of the stock in trade and assets, as per the inventory by which they had been sold.

The sole question between the parties is, whether the bargain was, as respects the item in question, a bargain for paid-up stock, or for the interest then vested in the assignee in the stock acquired by L. J. Campbell & Co. as it then stood. Mr. Thomas, an inspector of the estate, but more especially interested as the banker and advancer of the purchasers, and in some measure acting with and for them, avers that he had reason to believe that Dixon, Smith & Co. regarded it as paid-up stock, and that he himself also considered it to be paid-up stock; but it is not what Mr. Barry or Mr. Thomas thought or considered was the case, but what was actually offered by the advertisement and agreed to be purchased by their letter.

In the first place, an assignee, as an official liquidator, is very much in the position of the bailiff who has seized and is selling the goods of a debtor: he is not supposed to have the same intimate knowledge of the property as the original owner and acquirer would have. More than that, he is authorized to sell and does sell *en bloc*, by a general description. The buyer cannot expect extreme precision as regards every item. What one may lack of his expectations may be more than made up by another turning out to exceed them. It is always the insolvent's interest that is intended to be sold and no more, and provided the general description fairly covers the mass, and no actual misrepresentation be made, the purchaser should reasonably expect to get all the interest of the insolvent in respect of the assets enumerated, and no more, unless more has been specially vouched for. There is a difference between the entire absence of the thing sold, and the condition in which it may be sold, provided that it has an existence. In case of absence there is nothing sold and nothing to be paid for. As to the condition of the article, if nothing has been promised, nothing can be exacted. What was sold in this case? Primarily, it was the mass of the estate. The agreement as regards this has been carried out, and is not now in question; but it is claimed that the item in the mass, consisting of the Advertising Co. stock, was guaranteed to be paid-up stock, and not being so, need not be paid for. How is this established? The manner in which it is mentioned in the advertisement and schedules annexed to the deeds has already been alluded to. On a close inspection of the statement on which Barry placed the pencil marks, it would appear to me that the stocks were mentioned at first in the most general manner, viz.: "Railway Advertising stock, $5,642.76, Dominion Building Society, $582;" and that afterwards, but at what time is uncertain, there was added to the first the words "valued at," and to the

second "60 shares paid on." Had the writer known at the time the number of shares of which the first was composed, he would most probably have inserted it, but in any case there was nothing to imply that either stock was paid up.

In framing the advertisement for the sale, the words "valued at," as applied to the first, were left out, indicating that the assignee was even unwilling to suggest a value, and perhaps from having doubts of the stock being worth what had been paid on it; but whether on the advertisement, which gave no number of shares and gave the extension of, not a round amount, but the uneven figure of $5,642.76, repelling the presumption of paid-up shares, or on the statement containing the pencil marks, there is no undertaking or representation that there was any number of paid-up shares, nor is it a matter on which there should have been any obscurity on the part of a prudent purchaser. The books of these companies are open to all having an interest in them; it was easy for Mr. Barry to obtain information as to the condition of the stock; it was a recorded fact in the books of the Company, to which he could have had ready access. There could not in this case have arisen a doubt as to the class of the stock, all the stock being only partially paid; there was only one class of stock, so that the description could lead to no confusion. As shares are usually sold in a Company where they are only partially paid up, it is not always in practice customary to state the amount paid on them, and a pretension that the shares in such case should be paid up, I apprehend, would be treated with ridicule. The intention was to state the interest of the insolvent estate on what stock they held in the Company, and the sum which had been paid on it. It is not proved that the stock was of less value than the $2000, nor less than par, and it may be worth more than par *i. e.* $5,642.76. If the number of shares had been stated as in the next item, it might then have been expected that the amount extended would have been qualified as "paid on."

I admit that if the petition had claimed payment of the call of $500 accrued before their purchase, it would have been a question of more difficulty, and if this claim could be allowed on the present petition, I would be disposed to concede it. But I think the Court below was well founded in refusing the allowance of $2,000, because the Advertising stock was not paid up. I think, besides, that allowing such inquiry into the condition of each item of the inventory of an insolvent's estate would in itself be subject to great inconvenience. I would, therefore, confirm the judgment of the Court below.

RAMSAY, J. The sale was of the effects of a bankrupt estate *en bloc*. A statement furnished by the assignee purported to set forth in detail what it consisted of. One of the items was: "Railway and Newspaper Advertising Company stock, $5,462.76." The appellants understood this to mean that this was the value of paid-up stock, as set forth in the inventory. What the assignee had to give was 150 shares of $100, equal to $15,000, on which $5,462.76 had been paid up, a liability instead of an asset. I think it will scarcely be seriously contended that this is the regular way of describing unpaid stock. It is certainly not the mode in which the assignee set forth a similar transaction, for we find that the next item is: "Dominion Building Society, 60 shares, paid on, $582." But it is said that the purchaser could not have been deceived, because the unequal

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amount could not represent any certain number of shares. But it is not necessary it should. The figure might very well be taken to be a valuation of the asset, to which the purchaser may have attached little or no importance. But now it turns out to be a liability to pay nearly $10,000.

But it is said appellant took the whole estate *en bloc*, and if he was in error as to part he ought not to have accepted it, and that at all events he cannot keep a part and refuse a part. This may have some truth in ordinary cases, but there is a peculiarity in the case before us. Appellants refused to accept and pay for the assets till they had verified the existence of the items contained in the statement, and they only waived their right to make this verification upon the express undertaking of the assignee in writing, that if appellants would pay the whole price he would pay back any deficiency according to a certain rate. The assignee, therefore, waived this right. Under the arrangement with him it became impossible to hand back the estate, and it was agreed that the settlement should be for the deficiency. There is, therefore, no inconvenience in carrying out the sale for part, as that is specially provided for. It is said the assignee had no authority to write this letter or to enter into this arrangement. This seems to me to be very questionable ground. The assignee was acting for the trustees in the whole transaction, and through him the money was collected. Could he be presumed to be their agent for a bit of the transaction and not for the whole?

We are, therefore, to reverse, and grant the prayer of the petition to the extent of the value at which it seems to have been taken by the appellants. It is contended that this is not evidence of value, and that it is only a private memorandum of the appellants. I think this is hardly a fair appreciation of the matter. The valuation was made in presence, or at all events with the knowledge, of the inspectors, and expressly concurred in by one of them. This would be a complete admission, if Mr. Thomas had not had any other capacity than that of an inspector, and even though he had another interest there, I cannot think his positive concurrence in the value is not evidence of the value. It only exposed his admission to an easier repudiation by the creditors. This they have not attempted. Again, we have the assignee's letter. If it was not by the pencil memorandum, how was the subsequent adjustment promised by him to be arrived at? I have already expressed the opinion that the action of the assignee was adopted by the creditors, and therefore his undertakings for the creditors in taking the step by which they profited bind them. This, however, does not affect the principle, but only the extent of our judgment, for if we had not taken the pencil memorandum as evidence we should have ordered an *expertise*.

One other point remains. At the last argument it was urged that the action was too late, because appellants had only five days to object. There seems to me to be no force in that argument. The term of ten days was departed from and a general undertaking to adjust deficiencies was substituted, which could only be met by an answer at common law. There was no such acquiescence or waiver of the right to claim adjustment.

Sir A. A. DORION, C. J. The grounds of the decision rendered by the majority of this Court are fully set out in the judgment, which is as follows:—

"Considering that on the 25th day of September, 1876, the respondent, in his capacity of assignee to the insolvent estate of L. J. Campbell & Co., sold to the appellants for the sum of $34,000, payable within ten days, the assets of the said estate, including an item described as 'Railway and Newspaper Advertising Company stock, $5,642.76';

"And considering that on the 30th of September, 1876, the appellants through the Molsons Bank paid to the respondent the sum of $33,500, being the balance of the price of the said assets, which payment was made before it became due, on the express condition contained in the letter of the same date by the respondent to the appellants, that he, the respondent, would pay them for any deficiency that might be found to exist in the goods and assets sold, in the proportion of the estimate made in pencil by the appellants on the inventory annexed to the deed of sale;

"And considering that the stock belonging to the insolvent estate of L. J. Campbell & Co., in the R. & N. Advertising Company at the time of the sale consisted of 150 shares of stock of $100 each, making a total of $15,000, of which $9,357.24 were still unpaid, and that no transfer could be effected of said shares or of any portion thereof, except subject to the liability of paying the calls made or to be made on the capital of the said stock, which liability was never known to the appellants, and formed no part of the consideration which they agreed to pay for the said Railway & Newspaper Advertising Co. stock;

"And considering that although there was no warranty stipulated at the time of the sale, yet the respondent, being unable to deliver to the appellants the stock sold, is by law bound to return to them a portion of the price of sale which he has received, in the proportion that the value of said R. & N. A. Co. stock bears to the value of the whole assets sold;

"And considering that the respondent has neither alleged nor proved that the estimate made by the appellants at the sum of $2,000 on the list or inventory mentioned in the letter of the respondent of the 31st December, 1876, and which was concurred in by the said respondent, is not a fair and just estimate of the proportionate value of such an amount of paid-up stock as was represented in the said list as consisting of $5,642.76; and that under such circumstances the appointment of experts to establish the proportionate value of the said stock would lead to unnecessary expense to the parties;

"And considering that the Superior Court sitting at Montreal in matters of insolvency had, under the provisions of Sect. 125 of the Insolvent Act of 1875, jurisdiction to adjudicate on the claim of the appellants arising out of the acts of the respondent when acting in his said capacity of assignee, and having reference to the disposal of the assets of the said insolvent estate;

"And considering that there is error in the judgment rendered by the said Superior Court sitting in matters of insolvency on the 23rd of December, 1879;

"This Court doth reverse the said judgment and proceeding to render the judgment which the Superior Court should have rendered, doth declare the sale of the stock in the said R. & N. A. Co. null and inoperative, and doth condemn the said respondent in his said capacity to pay to the appellants out of the funds

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of the estate the said sum of $2,000, with interest from this date, and costs of both Courts (Cross, J., dissenting)."

Judgment oversed.

Abbott, Tait, Wotherspoon & Abbott, for appellants.
Geoffrion, Rinfret & Dorion, for respondent.
(J.K.)

COUR DU BANC DE LA REINE, 1880.

MONTREAL, 24 NOVEMBRE, 1880.

Coram SIR A. A. DORION, J. C., MONK, J., RAMSAY, J., CROSS, J., DOHERTY, J., suppléant.

No. 32.

MICHEL PATRICE GUY ET AL.,
(*Demandeurs en Cour inférieure*),
APPELANTS;

ET

LA CITÉ DE MONTRÉAL,
(*Défenderesse en Cour inférieure*),
INTIMÉE.

JUGE :—La destination du propriétaire jointe à la possession du public est un titre suffisant pour maintenir le public dans la possession d'un chemin ou d'une rue.

Il n'est pas nécessaire que la destination soit faite par écrit, elle peut s'inférer des circonstances sous lesquelles le public a joui du terrain en litige. La destination du propriétaire a été suffisamment établie dans cette cause par des actes anciens dans lesquels la rue a été reconnue, par la possession continue du public pendant vingt cinq ans au moins, par l'entrée du terrain aux régistres de la corporation comme formant une rue publique, et par les travaux ordinaires d'entretien et de réparation qui y ont été faits par la corporation sans objection depuis plus de dix ans avant que l'action ait été intentée. (Voir Myrand & Légaré 6 Rap. Jud. de Québec, 120.)

L'action des appelants en Cour Inférieure reposait sur les allégations suivantes :—

Depuis le 2 Mars 1853, les appelants auraient possédé à titre de propriétaires, comme grevés de substitution, et par indivis, un terrain décrit comme suit :—

"Un morceau de terre situé au Faubourg St. Joseph, complanté d'arbres "fruitiers, de la contenance d'environ 200 pieds de front sur le chemin de "Lachine, environ 360 pieds de largeur à l'arrière, sur environ 414 pieds de "profondeur, dans une ligne, et 434 pieds de profondeur dans l'autre ligne, avec "une maison, une grange, et une écurie, le tout en bois et en bon état, dessus "construites, le tout joignant en front le chemin qui conduit à Lachine, en pro"fondeur le domaine de St. Gabriel, d'un côté, le Sieur David Ross, et d'autre "côté, le Sieur Henri Blache et le dit Sieur Lusignan."

Le 1er de Février 1871, l'Intimée, sans droit ni raison, illégalement, et forcément et contre le gré et volonté des appelants, se serait emparée d'une partie de l'immeuble ci-dessus décrit pour la convertir en voie de communication ou rue publique de cette ville.

Les conclusions étaient à l'effet que les appelants fussent déclarés propriétaires du terrain en litige, à ce que l'Intimée fût condamnée à déguerpir du dit ter-

rain et à en mettre les appelants en possession sous quinze jours du jugement à intervenir, et de plus à payer à ces derniers la somme de $1000, comme valeur des fruits et revenu du dit terrain.

En réponse à cette action l'Intimée a plaidé que le terrain réclamé par les demandeurs était depuis plus de trente ans, savoir, des avant 1846, une voie de communication ou rue publique de cette ville, et formait et était publiquement reconnu comme étant la continuation de la rue Guy, à partir de son intersection avec la rue St. Joseph, jusqu'à et au-delà de la profondeur du dit terrain; que pendant cette période de temps la Cité avait toujours été en possession paisible, publique, continue et non interrompue, du dit terrain qui avait toujours été livré à la circulation; que le terrain en litige ayant été destiné par l'auteur des demandeurs, feu Etienne Guy, à une voie publique, et n'avait jamais été transmis avec la succession d'icelui à ses légataires et héritiers; que pendant dix ans et plus avant l'institution de l'action, le dit terrain ayant été ouvert et livré au public comme rue et voie de communication et dûment enregistré comme rue publique dans le Régistre tenu à cet effet et dans les archives et documents publics de l'Intimée, comme corporation au vû et su des dits appelants, ce terrain était tombé dans le domaine public et constituait une rue publique à toutes fins que de droit.

Le 10 Septembre 1877, L'Honorable Juge Dorion débouta l'action des demandeurs en ces termes:—

"Considérant que la défenderesse a prouvé les allégations de ses exceptions, et nommément que le terrain réclamé par les dits demandeurs est une rue publique, en la possession de la défenderesse depuis au-delà de dix ans, et enregistrée comme telle dans les registres tenus par la dite défenderesse à cet effet, conformément à la loi, déboute, etc."

Sir A. A. DORION, J. C. Les appelants ont porté cette action pour recouvrer un terrain formant la continuation de la rue Guy, depuis la rue St. Joseph jusqu'auprès du Canal de Lachine, dans la Cité de Montréal.

L'intimée a répondu à cette demande que, pendant plus de trente ans, elle avait été en possession publique du terrain réclamé, qui pendant toute cette période avait servi de rue publique; que ce terrain avait été destiné par feu Etienne Guy, pour en faire une rue publique, et que cette rue avait été reconnue par les appelants et leur co-héritier feu Etienne Guy, fils, héritiers et légataires de Etienne Guy, père. L'intimée a de plus invoqué la possession de dix ans avec enregistrement dans les livres de la Corporation comme rue publique, conformément aux dispositions de l'acte 23 Viet. c. 72, s. 36, et de la 37 Viet. c. 51, s. 195.

Michel P. Guy, l'un des appelants, admet dans sa déposition, que son père, qui était propriétaire de la terre dont le terrain en litige faisait autrefois partie, et qui est mort en 1821, avait fait un plan sur lequel il avait indiqué par des points la continuation de la rue Guy, et que les clôtures de chaque côté de la rue ont été plus tard placées à l'endroit indiqué par ces points. Ces clôtures existaient en 1853, mais il ne peut dire depuis combien de temps.

Dans un partage entre les héritiers Guy, fait en 1831, l'immeuble situé au sud de la rue St. Joseph est désigné comme *borné d'un côté par la continuation de*

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la rue Guy. Ce terrain est partagé entre les héritiers avec les autres biens de la succession, mais le terrain désigné comme étant la continuation de la rue Guy n'est pas partagé, ce qui indique que dès lors les intéressés le considéraient comme voie publique ou du moins comme destiné à une voie publique.

L'intimée a aussi produit des baux consentis par Etienne Guy, fils, l'un des représentants de Etienne Guy, père, dans lesquels cette rue est reconnue.

Ostell dit que dès 1841, lorsqu'il était inspecteur de la cité, la continuation de la rue Guy était ouverte au public. Joseph Chalifoux et Augustin Daoust établissent que la rue était ouverte au public dès 1847 ou 1848, et leur témoignage est corroboré par un bon nombre de personnes qui établissent qu'à leur connaissance, la rue a constamment été ouverte au public depuis et même avant 1850. Il est aussi prouvé que vers l'année 1860, la corporation a fait faire un trottoir d'un côté de la rue, et que ce trottoir a été réparé depuis. Enfin, il appert dans un des régistres de la Corporation, que cette rue y a été désigné comme étant rue publique, sans que l'on sache cependant quand cette entrée, qui n'est pas récente, y a été faite.

Les appelants ont établi, que le terrain qu'ils réclament faisait autrefois partie de la propriété avoisinante qu'ils ont eue de leur père. Ils ont cherché à prouver que la rue n'avait pas toujours été ouverte au public et qu'elle avait été fermée par des clôtures ou barrières ; mais sur ce point ils n'ont pas pu ébranler la preuve contraire faite par l'intimée. Il a aussi été prouvé qu'il y a quelques années, l'un des employés de la Corporation avait donné à Michel Patrice Guy, l'un des appelants, l'alignement de la rue St. Joseph à l'entrée de la continuation de la rue Guy, et les appelants ont invoqué ce fait comme une reconnaissance de la part de la Corporation que ce terrain leur appartenait. Il faudrait un acte bien plus formel qu'un simple alignement de la rue, par un officier subalterne, pour établir un abandon de la part de la Corporation, d'un droit qu'elle aurait eu à une rue publique qui, comme partie du domaine municipal, ne pourrait être aliénée ou détournée, de sa destination première, qu'en observant les formalités requises par la charte de la Corporation.

Cette prétention des appelants étant écartée, il résulte de la preuve que, quoique l'intimée n'a jamais acquis le terrain en litige, ce terrain a été depuis dès avant 1821, destiné par le propriétaire d'alors, auteur des appelants, pour y continuer la rue Guy ; que cette destination a été reconnue par les appelants eux-mêmes dans le partage qu'ils ont fait en 1831 du reste de la propriété, et dans les baux qui ont été produits par l'intimée ; qu'enfin cette rue a été ouverte pour l'usage du public de 1841 à 1847 ou 1848, et qu'elle a toujours été ouverte au public depuis et considérée comme appartenant à la Corporation, qui l'a inscrite dans ses régistres comme une rue publique et y a fait, depuis plus de dix ans avant que cette action a été portée, les travaux ordinaires d'entretien et de réparation.

L'intimé a cité Dillon on Municipal Corporations, pour établir que la destination du propriétaire jointe à la possession du public était un titre suffisant pour maintenir le public dans la possession d'un chemin ou d'une rue.

C'est ce que cette cour a décidé à Québec, dans une cause de *Myrand & Légaré*, en s'appuyant sur des principes du droit français qui, sur ce point, ne diffé-

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rent guère des règles indiquées par Dillon. Nous avons même déclaré dans cette cause, qui est rapportée au 6e vol. des rapports judiciaires de Québec, p. 120, où toutes les autorités sont citées, qu'il n'était pas nécessaire que la destination du propriétaire fut établie par écrit, mais qu'elle pouvait s'inférer des circonstances sous lesquelles le public avait joui du terrain en litige.

Ici, nous avons la destination de la rue clairement démontrée par divers titres, puis nous avons la possession continue du public, pendant vingt-cinq ans au moins, et enfin l'entrée aux régistres de la Corporation de ce terrain comme formant une rue publique, ce qui, joint à une possession paisible pendant dix années, suffit aux termes des autorités citées plus haut, pour établir le titre de la Corporation à cette rue pour l'usage du public.

Le jugement de la Cour Supérieure, qui a renvoyé l'action des appelants, est en conséquence confirmé.

RAMSAY, J. The pretension of the appellants in law is first, that the Corporation can only acquire a street by possession of ten years and enregistration by the Council; secondly, that in that case they owe indemnity. As a matter of fact they contend that there was no sufficient proof of possession of ten years, apart from the production of a certain register, and that this is not the register required by the Statute, as it is not based upon, and it does not purport to be based upon, any resolution or decree of the Council, as it does not appear by whom it was written, and as the entry bears no date.

The Corporation, respondent, contends that there is full proof of the possession of ten years, and that the register is sufficient.

The case is rendered somewhat involved from the extraordinary form of the legislation, to which our attention has been particularly directed. It is very difficult to put any reasonable interpretation on the 23rd Vict. It would seem that "*les rues, ruelles, allées, chemins, et places publiques*" shall only become *chemins et terreins publics une fois enregistrés.* It seems, however, from the last two lines of the section that the object in view was to enact that, "when the Council shall declare that any unregistered street, etc., is a public street, etc., or that any street, etc., has been used by the public as such for a period of ten years or upwards, such declaration shall be registered in a book to be kept by the City Inspector, and the entry in such book shall be *prima facie* evidence that such street, etc., is a public street, etc." If this be the true meaning of the Statute, it is clear that it is not the registration which alone gives the character to the place, nor even the declaration or constatation of the Council; the character depends on the antecedent fact that it was a public street, or that it had been in public use for ten years or upwards. But here a distinction has to be considered: the two categories are not similar. The declaration that a public street is a public street has no effect except to permit the registration, so as to make a record of an already existing fact. But if there be no prescription of ten years for highways, or if there be no dedication to be presumed by ten years' use, then the registration or the declaration gives an effect to the antecedent fact which it had not independently. It is the declaration of the will of the Corporation, by its mouth-piece the Council, that it takes advantage of the decennial enjoyment of ten years. It would then be an expropriation, as Mr.

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Loranger has argued, and would give the party the right, on general principles, to indemnity. Perhaps under the action as drawn the question of indemnity might not come up, but the decree of the Council and the sufficiency of the registration would be important.

It seems to me, therefore, to be all-important to decide whether there be a prescription of ten years by law, and what amounts to a destination or dedication of the property to public use by the owner. I may at once say that I do not think the City charter gives a peremptory answer to the action, and that we must look further.

By the 18th Victoria, cap. 100, sec. 41, ss. 9, a special statutory prescription of ten years was given to all roads left open and used by the public for ten years. That is to say, a right of way or servitude was established in favor of the public by ten years' enjoyment. But in the Act of 1860, which was an Act to consolidate the Act of the 18th Vic. and its amendments, the section giving this prescription was omitted, and it does not appear in any subsequent Act. There was, however, no clause repealing the section referred to. It may be a question whether the 18th Vic. was not impliedly repealed by the consolidating Act. But this does not appear to be applicable to roads in towns, and, therefore, we must hold that the only prescription that can accrue to the public in towns is that of 30 years. It may be a fair enough inference from the judgment in *Myrand & Legaré* (6 Q. L. R., p. 120) that we had decided that the 18 Vic. was still in force. I am not prepared to say that I feel bound by that dictum. There was a sixty years' possession, the road being perfectly cut off from the rest of the property; and I see by my notes, which are not printed in the report, that this was the view I expressed. It can hardly be seriously contended that there is evidence in the case before us of a prescription of 30 years. We have, therefore, only to enquire whether, as matter of fact, there was an abandonment of the continuation of the street by Mr. Guy, the father, and subsequently by the children, to the public. It must be at once admitted that neither the plan made by old Mr. Guy, nor the *partage* made by the children could, by itself, or both together, give any right to the Corporation or to the public. They might at most characterize subsequent acts. Again, the acts from which a dedication to the public can be inferred must be of a totally unequivocal character—occasional, or even very frequent, use will not suffice. There must be something more than toleration, there must be acts from which the extent of the tacit donation can be gathered. The law of England and that of France appear to agree, although Mr. Dillon calls the doctrine anomalous, p. 597, and the Supreme Court of the United States has likewise adopted it. This indicates, I think, that some great principle justifies the existence of the doctrine, and I don't think it is difficult to discover it. When the law requires that a donation shall be in writing, it is a rule of positive law that it declares, and not what is essential to the contract. A donation might quite well exist without a writing, and certain donations without writings are maintained.

One only requires a writing absolutely where a writing can be of use. But what use would a writing be to the public? It is to be observed, it is to the public and not to the Corporation the dedication is made, and what the Corpor-

ation pleads is its enjoyment through the public right. Therefore it is that all legislations are agreed that the deed, of which there could be no formal acceptance, is not requisite to give validity to a donation for public uses.

We have, therefore, to enquire whether there be evidence of any such unequivocal acts of the appellants or of their predecessors.

In estimating the evidence it should be remarked that paper fifteen of the record, respondents' exhibit 3, does not establish such a registration as is required by sec. 10, ss. 6, 23 Viet. cap. 72. The burthen of proof, therefore, falls entirely on the Corporation. They must establish the facts which amount to a dedication. There can be no doubt that the ground in litigation was extensively used. It is also beyond controversy that it was fenced off as a street for a great number of years. One of the appellants admits this. It is also proved that the Corporation treated it as a street so far as to make a foot-path in wood on one side. On the other hand it may be said that any presumption arising from the arpentage in 1817, the partage in 1831, and the leases, is rebutted by the fact of the donation in 1826–7. The donor had exercised his liberality, and in projecting a continuation of the street he was calculating on the return he might expect from his prudent generosity. It may also be said that the use does not signify much as evidence of the intention to alienate, and the fencing off of the street seems easily explained without attributing an intention to make a further donation. There is also some evidence, and about as much as one could expect in support of a fact of the kind, to show that the appellants had used the vacant space between the line fences for purposes incompatible with a street, and it is also proved by the witnesses of the respondents as well as those of the appellants, that the road was totally insufficient for the purposes of a street; that it was neither macadamized, nor lighted, nor drained. So far, then, it would seem the respondents had not maintained their pretension. But there are two facts proved, and not explained in any way, which seem to me to alter the complexion of the case. It is proved that the *marais*, or principal difficulty in the use of this passage, was filled by the Corporation. The time of this is not, it is true, very well established. But in addition to this filling of the *marais* we have the fact proved that, fourteen or fifteen years before 1873, Hagerty laid a *new* foot-path for the Corporation on the north-east side of the ground in dispute (p. 24, Respondents' factum). Peter Nicholson says it was in 1860. And this foot-path was put in the place of another. This work was done without opposition, and it was not removed. It seems to me that this is a fact of a very conclusive character, being totally unexplained. It is not intermittent, like use by persons on foot and in vehicles; it is a continuous and very visible act of possession. Now if we take altogether the idea that the appellants and their *auteurs* contemplated a road passing there, that this was so evidently necessary for the development of their property that they did not think it worth their while to let it enter into the *partage*,—if we consider their negligence of its enclosure at the two ends notwithstanding all the progressive movement going on in its neighborhood, and the suffering the Corporation to repair, if not originally to make, a foot-path, then it seems to me impossible to believe that they did not purposely abandon the ground in dispute for the use for which they

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evidently thought it fit. Nor does it require one to attribute to the appellants a species of generosity the law does not readily presume to arrive at this conclusion. We know very well that opening a street through an extensive block of land is good policy, and if people were to be permitted to affect to do it for a long period of time, and till others had shaped their course in consequence, and then to withdraw their seeming gift, very great injustice would be done.

There is only one other point in the case to which it is necessary to allude. By appellants' factum it would appear the conclusions of the declaration were double. It was pointed out by appellants' counsel that this was an error of the factum. It is evidently not an error of the declaration. The pretension being that the registration did not exist, it would have been out of place to give an option to pay the value. The action is purely petitory, coupled with the usual demand for rents, issues and profits. The defence is the title is in the public, and it appears to me this is proved. I am, therefore, disposed to confirm.

Jugement confirmé.

Loranger, Loranger, Pelletier et Beaudin, avocats des appelants.
Hon. T. J. J. Loranger, conseil.
R. Roy, C.R., avocat de l'intimée.

COURT OF QUEEN'S BENCH, 1880.

MONTREAL, 3RD FEBRUARY, 1880.

Coram SIR A. A. DORION, C.J., MONK, J., RAMSAY, J., CROSS, J.

No. 28.

AMÉDÉE W. GRENIER ET AL.,

(*Plaintiffs in the Court below,*)

APPELLANTS;

AND

THE CITY OF MONTREAL,

(*Defendant in the Court below,*)

RESPONDENT.

The City of Montreal raised the level of a street within the city, so as to damage the property of the plaintiff. Although prescription was not pleaded, the action was dismissed by the Court below on the ground that it was prescribed under C.C. 2261. On appeal,

HELD:—That the damage complained of being continuous in its nature, and there being no special plea or evidence to show when such damage occurred or ceased, the two years' prescription was not applicable.

The appeal was from a judgment rendered by the Superior Court, Montreal, JOHNSON, J., (reported in 21 L.C. Jurist, p. 215), dismissing an action of damages brought by the appellants against the city, on the ground of prescription of two years.

A. W. Grenier, for appellants:—

Le jugement de la Cour Inférieure, sans doute appuyé sur les articles 2188, 2261 et 2267 du Code, donne lieu d'examiner: si l'action doit réellement son

origine à un quasi-délit ; si même considéré comme telle, elle doit être soumise à la prescription de deux ans lorsque les dommages sont *continus et actuels*.

Les appelants soumettent que l'action n'allègue pas des faits constituant un quasi-délit dans le sens voulu par l'article 2261, le quasi-délit dont il y est question étant un acte illégal et illicite ; ici les travaux d'exhaussement en Juin 1871, source principale des dommages réclamés, ont été accomplis par l'intimée dans l'exercice ordinaire de ses attributions, sans législation spéciale, surtout quant à la prescription des dommages qu'ils pourraient causer ; de fait l'exhaussement de la rue était un acte parfaitement légal et licite de la part de l'intimée, qui, dans les limites de ses pouvoirs n'usait que de ses droits sur sa propriété, mais si dans l'exercice de tels droits, elle a porté atteinte aux droits des propriétaires voisins, a-t-elle commis par là un quasi-délit ? nous ne le croyons pas ; du moment que cet exhaussement a été une cause et une source de dommages pour la propriété des appelants, il en est résulté une obligation d'en réparer les suites nuisibles dûes à l'imprudence de l'intimée. Le fait qui a produit le dommage était licite en lui-même, mais en portant atteinte à la propriété des appelants ces derniers avaient droit d'être indemnisés dès lors et plus tard s'ils venaient à souffrir dans la jouissance paisible de leur propriété. (Arts. 406, 407, Code C. B. C.) La prescription de deux ans pourrait avoir lieu pour torts personnels et directs à la propriété, mais ne peut être invoquée à l'encontre de la présente réclamation qui est plutôt guidée par le droit commun et l'art. 407 du Code, et ne peut être soumise, suivant l'art. 2242, qu'à la prescription trentenaire. On remarquera aussi que la prescription sanctionnée par l'art. 2261 est de droit nouveau et pour dommages résultant de quasi-délits, *à défaut d'autres dispositions applicables*. En résumé, la prétention des appelants est qu'un fait légal ne peut être considéré comme un *quasi-délit*, au contraire l'acte de l'intimée est un *quasi-contrat* et nous en trouvons la définition en l'art. 1041 du Code Civil : " une personne capable de contracter peut par son acte volontaire et *licite* s'obliger envers une autre et quelquefois obliger une autre envers elle, sans qu'il intervienne entre elles aucun contrat."

L'action des appelants n'a pas d'autre but que de réclamer une diminution de valeur causée par l'acte originairement licite mais ensuite dommageable de l'intimée, et aussi d'y remédier pour l'avenir, comme le dit Larombière, Vol. 5, Oblig. No. 51, page 730.

Voir aussi Rolland de Villargues, Dict. *vo.* Quasi Contrat, Nos. 1 & 14.

Quant aux faits *illicites* ce sont les délits et *quasi-délits*.

Le Code ne parle de prescription que pour les quasi-délits, ce droit strict peut-il s'étendre aux quasi-contrats ? nous ne le croyons pas.

Mais en supposant même que l'action résulterait d'un quasi-délit prescriptible par deux ans, serait-elle soumise à cette prescription lorsque les dommages sont continus et actuels ? Les appelants allèguent que les travaux d'exhaussement accomplis par l'intimée, sans nécessité mais avec imprudence et sans précautions d'irrigation et autres, les ont fait souffrir, qu'ils en souffrent encore lors de l'institution de l'action, et concluent tant à des dommages passés, présents et futurs qu'à une somme additionnelle à défaut par l'intimée de faire cesser ces troubles et les causes de ces dommages.

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La prescription étant une peine infligée à celui qui néglige de faire valoir ses droits dans un certain laps de temps, peut-on ici soumettre les appelants à la prescription de deux ans ou à toute prescription; si dans certains cas le délai de la prescription peut courir du jour où le fait dommageable s'est accompli, ici de quand fera-t-on courir cette prescription quand les appelants allèguent et établissent par la preuve qu'ils souffrent encore actuellement, même durant l'instance, par les faits dommageables de l'intimée.

L'exhaussement de la rue, la cause première dommageable n'a pas produit instantanément son effet, le dommage devait se manifester avant de pouvoir le réclamer, et de fait il ne s'est réalisé et n'est devenu apparent que longtemps après et par l'accumulation des effets successifs et insensibles de cette cause première; ce dommage existe et continue de se produire encore lors de l'institution de l'action et même après; si à cela on ajoute que l'action a pour objet de faire disparaître une cause dommageable, une nuisance permanente et causant des dommages continus, le Tribunal d'appel peut-il confirmer un jugement qui déclare une telle action éteinte par une prescription de deux ans que le Juge est tenu de suppléer d'office sans que ce moyen soit opposé par l'intimée? Non, les appelants ont toute confiance que le jugement de la Cour Inférieure sera renversé par cette Honorable Cour, appelée dès lors à adjuger en leur faveur.

Roy, Q. C., for respondent:—

L'article 2261 déclare prescriptibles par deux ans les dommages résultant de délits ou quasi-délits. Dans l'espèce, la cause du dommage est fixée par l'appelant au mois de Juin 1871, et il n'intente son action que le 5 Janvier 1875, près de quatre ans après.

1 Sourdat. Resp. p. 477, Nos. 636 à 639.

7 Marcadé. Prescription, p. 237, 238, a 2 et 3.

Harrison. Mun. Man. Edn. 1874, p. 410, note r.

7 Jurist, N. S. pt. 1, p. 809, Bonomi & Backhouse et autorités citées.

RAMSAY, J. This is an action of damages for injury to appellants' property by reason of the alteration in the level of the neighbouring street. The action was dismissed on the ground of prescription of two years, which was not pleaded. Is the action for damages subject to such a prescription, and, if so, can it be supplied by the Judge? The difficulty arises entirely from the wording of the Code. Under the old law it is evident that no such prescription would apply. But it is argued that "actions" "for damages resulting from offences or *quasi*-offences, whenever other provisions do not apply," "are prescribed by two years" (2261 [2]). And that no such action "can be maintained after the delay for prescription has expired" (2267); that no one can be liable for damages except by his fault, and that consequently the right of action for damages must necessarily arise out of a *délit* or *quasi délit*, which include "positive act, imprudence, neglect, or want of skill." (1053.) These words of the Code are very precise, and if we are to give full effect to them, we should perhaps have to declare that even the action of damages for a breach of contract was liable to the prescription of two years. But we do not think it necessary to decide the point in the present case, at the same time we do not wish it to be supposed that we shall feel bound by the decision of the Superior Court, should a case arise

presenting the question of prescription in another form. We think that the case before us presents a question of continuous damage, and in the absence of a special plea it is impossible to determine when the damage arose so as to be within the rule of prescription of two years. For instance, in the present case the earth to raise the level of the street was deposited more than two years before the institution of the action, but it does not follow that any actual damage arose then. It may have been months and weeks before the full effect of the alteration was manifest, and it is not sufficient to say that there was a protest two years and six months before, for such a protest may be for impending damage, to prevent any presumption of acquiescence.

On the part of the city no evidence has been produced. On the part of the appellants it is established beyond doubt that the roadway has been raised considerably above its level at the time the houses in question were built. It is not, however, proved that the appellants specially procured any level from the officers of the corporation before building, but this is of no consequence, as it is in evidence that these houses were built after Dubord street was opened and used as a public thoroughfare. I think it is also established that the appellants have suffered damage, if not of very great amount, of a very appreciable kind, by the elevation of the level of the street, at least as regards one of the houses. The respondent's pretension is that however great the damage may be, and however directly it may result from their act, such act was legal, [illegible] under the Statutes concerning the Corporation of Montreal, the general clauses granting powers to do certain things, or rather certain classes of things, are to be construed as being rights accorded to the Corporation to do these things, even to the positive injury of individuals, without indemnity, when such indemnity is not specially reserved by the Statute. In support of this proposition the case of *The Corporation of Montreal & Drummond* has been quoted.*

It would not be difficult, I think, to distinguish this case from the one referred to, and to show that the element of negligence is really the one now to be considered, and takes the case entirely out of the category in which the respondents desire to place it. The right to raise the level of a street does not seem to imply the right to inundate the neighbouring property. Making a street is a well-defined operation. In its ordinary acceptation it implies drainage and water courses, and some sort of adaptability to the contiguous properties, and I cannot conceive that the Corporation by upsetting a quantity of earth into a street, by which a hollow is converted into an embankment, can escape from the liability of their act, on the pretext that they were raising the level of a street.

But apart from this distinction, and were it conceded that this case presented a question identical with that of *Drummond & The Corporation of Montreal*, I do not think we would be absolutely bound by a single decision in that sense. There is doubtless some inconvenience in inferior courts refusing to accept as conclusive in all other analogous cases the decision of a higher tribunal. At the same time I am inclined to believe that the authority of precedent has never been considered as in itself perfectly conclusive, and the mass of over-ruled cases supports this view. The occasion which seems to

* 22 L. C. J. 1.

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justify over-ruling is when the precedent is plainly *contra rationem juris*. Now, with all due deference for the opinion of the Judicial Committee, I am bound to say that the decision in the case of *Drummond & The Corporation of Montreal* appears to me to be open to this objection. I cannot believe that their Lordships have perfectly seized the reasons of our judgment, probably from the imperfect manner in which they were presented, nor do I think they have thoroughly appreciated the doctrine expressed by the French writers.

I am the more strongly induced to arrive at this conclusion from the reference made by their Lordships to the case of *Drummond & The Corporation of Montreal*, in a case recently before them of *Bell & The Corporation of Quebec*.[1] In the latter case they admit in an unqualified manner that such cases must be decided by the French and not by the English law; and the counsel for the appellant are reminded that English and American decisions "cannot be treated as governing authorities." This is an important step gained towards settling the jurisprudence on the point before us. It dispenses us from the necessity of examining the cases of the English law, and endeavouring to evolve from them a general principle—a work which appears to me to be more arduous than to reconcile the two paragraphs of Dalloz, which have given their Lordships some embarrassment.

Before proceeding to examine the rule laid down by the Judicial Committee as a principle of French law, it may be well to call to mind what was the pretension urged by the learned Counsel for the Corporation at our bar. I quote from his *factum*, page 3: "Les appelants soumettent que comme corporation municipale la législature leur a délégué une partie de sa souveraineté, et leur a donné certains pouvoirs législatifs qu'ils peuvent exercer à leur discrétion dans l'intérêt public, et sans encourir aucune responsabilité envers les individus; que tant qu'ils ne touchent à la propriété même des citoyens, c'est-à-dire, tant qu'il n'y a point *expropriation*, totale ou particlle, ils ne sont, à l'exception des éventualités prévues par la charte, tenus à aucune indemnité envers eux, pour dommages ou inconvénients qui peuvent résulter de travaux faits dans les rues, pourvu toutefois que ces travaux se fassent avec une diligence ordinaire, et que les inconvénients ne soient pas le résultat de leur négligence; la charte définit et précise les cas où le corps municipal sera responsable en indemnité envers les citoyens, et hors ces cas, nous répétons qu'il ne l'est pas quand il opère dans les limites de ses attributions."

I quote the passage at length so that there may be no doubt as to what are appellants' pretensions in this class of cases, and I do this the more readily because I think the point is placed before us with great clearness. I shall next proceed to quote what the Privy Council in Drummond's case declared to be the law of England. They said: "Upon the English legislation on these subjects it is clearly established that a statute which authorizes works makes their execution lawful, and takes away the rights of action which would have arisen if they had been executed without this authority." (Jud. Op. pp. 11 and 12.) Their Lordships did not, however, go so far as to say that this was French law. They made a distinction. They said that if the works affected any of the

[1] 7 Q. L. R. 103.

natural servitudes of the property, in such case the owner would be entitled to indemnity in some form or other, even when not reserved by the Statute authorizing the works. That there may be again no misunderstanding, I quote the words of their Lordships' opinion, p. 7: "It cannot be denied that the law of France allows to the owners of houses adjoining streets rights over them, which, if not servitudes, are in the nature of servitudes. Demolombe enumerates as undoubted the rights "*d'accès ou de sortie, des vues, et d'égouts*" (vol. 12, sec. 699). and the same rights are spoken of by Proudhon (vol. 1, art. 369.) The right of access to a house is, of course, essential to its enjoyment, and if by reason of alterations in the street the owner cannot get into or out of it, or is obstructed in so doing, there seems to be no doubt that, by the law of France, he is entitled to recover, in some form, indemnity for the damage he sustains. But the stopping of a street at one of its ends does not produce these consequences."

Recurring to the dictum in the Drummond case, in the case of Bell, their Lordships (who all sat in the Drummond case) said: "There appears to be a clear distinction in the French law between rights of immediate access from a man's property to a highway, *and the power to complain of a mere obstruction on it.*" It may be remarked that, in the former case, "obstruction to access" was put on the same footing as absolute impossibility of ingress and egress, while in the latter case they are contrasted. This is perhaps a very slight discrepancy, hardly affecting the question in the way I look at it, but which may have some significance as showing that the result of the rule laid down was not perfectly clear to the writer at the moment he wrote. We have, therefore, an entire abandonment of the doctrine that the damage which is done under a Statute is *damnum absque injuria*, and in its place we have a distinction between one sort of damage and another, one for which indemnity is due although not reserved by the Statute, while for the other no right of indemnity exists. Now I state without the least hesitation that this pretension is a novelty. It is almost impossible to conceive that if there was a "*droit d'accès et de sortie*," such as their Lordships seem to suppose there is—a *droit* which exceptionally controls the reading of a Statute—we should not have some treatise *ex professo* on the subject. I am not aware of the existence of any such work, or indeed of any legal authority who treats of such a right. The pretension has never been urged at our bar, and, without affecting to possess the gift of prophecy, I venture to say it never will be. The quotation from Demolombe, which appears to have induced their Lordships to arrive at the conclusion that there existed a special "*droit d'accès et de sortie*," differing in character from all other forms of direct damage, is solely an illustration of what might be no damage, and nothing more. But, if the blockade was so near as to darken one's windows, or if the narrowing of the street was so great an alteration as to convert a carriage-way into a lane where a wheelbarrow could not pass, neither Demolombe nor any writer on French law has ever pretended that damages would not be due. A glance at the quotation from Dalloz, on p. 9, of their Lordships' opinion, shews that this is the true interpretation. It is the equivalent of the old English distinction between remote and proximate damages to which Dalloz refers.

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There is another point raised by their Lordships in the Drummond case, which may have some bearing on this case. They say that the indemnity should have been sought before the special tribunal of Commissioners, and not before the ordinary Courts. This, again, is a *dictum* which, first suggested in the case of *Jones & Stanstead Railway Company*, has, like a delicate exotic, failed to take root in our uncongenial soil. No one has made it the subject of a declinatory plea, or suggested that we had not jurisdiction. The truth is that the discussion in France which has attracted their Lordships' attention, as to whether the claim is properly for damages or for the price of an expropriation, is purely theoretical, so far as our forms of procedure are concerned. In practice we ask for damages for any sort of expropriation or *quasi*-expropriation or injury of the kind in question, just as we ask for land damages from a railway company. In dealing with this question I have referred to the two cases of Drummond and of Bell, because by them this new doctrine is sought to be engrafted on our law as a settled jurisprudence. In the case of Drummond, in reality a much simpler question arose. The plaintiff there was absolutely deprived of the enjoyment of a thing for which he had specially paid. The Corporation compelled Drummond to pay one day for the opening of a street, which another day it closed, and kept his money. There is nothing indefinite about the character of that particular transaction. It gave rise to no question of servitude quasi or real; the direct nature of the damages cannot be questioned, and, if article 407 of our Civil Code does "undoubtedly embody a fundamental principle of the old French law," as their Lordships say it does, (it appears to me to embody a fundamental principle of justice), it is difficult to conceive why it was not applied in that case.

The doctrine, then, of our law seems to be unquestionable.

With the doctrine of the English law on the point, we have nothing to do. It does not apply, and therefore we are not presumed to know anything about it; still we may be permitted to say, as a matter of general jurisprudence, that the English law and the French law start from the same well-known principle, "*Nemo damnum fecit, nisi qui id fecit, quod facere jus non habet.* (de Reg. Jur. L. 151.) Any difference there may be in giving effect to the principle must be due to some rule of detail as to the interpretation of the legislative act. Here we consider that powers to do certain works do not absolve the party empowered from the common law obligations which previously existed between the party empowered and his neighbour. This presumption applies with still greater force when the power granted is not to do a specific thing, but forms part of the general attributes of a Corporation. It is the mere statutory specification of the powers accorded to this fictitious person, analogous to those belonging to a real person, and which, it might be supposed, except for such specification, it did not possess. To conclude that because this power is given without any expression of reserve, it is not given subject to the common law is a doctrine very difficult for us to realize. The rule as to the interpretation of contracts, which, in so far, is identical with the interpretation of Statutes, is: "The customary clauses must be supplied in contracts, although they be not expressed." Art. 1017, C. C.

The rule, therefore, of our law being clear, it only remains for us to enquire what is the amount of damages to be awarded. We cannot adopt the estimation of appellants' witnesses. It is evidently not a damage of an irreparable kind, and it can hardly be said to affect in any great measure anything but the lot next Dubord street. Damages $200.

Sir A. A. Dorion, C. J.—En 1871, la corporation de la Cité de Montréal a fait élever la rue Dubord de deux pieds à deux pieds six pouces de hauteur, tout le long du pignon de la maison et du mur de clôture de la cour des appelants. Aucun égoût ou cours d'eau ayant été fait dans la rue, l'eau s'est répandue le long du mur de la propriété des appelants et s'est déversée sur leur terrain. La gelée et le poids des terres rapportées ont détérioré le mur et l'ont fait pencher en dedans vers leur propriété.

Les appelants ont été obligés de couper leur porte de cour qui se trouvait trop basse pour le niveau donné à la rue, et d'élever leur mur de clôture au moyen d'une addition de planches pour lui donner une hauteur suffisante.

En 1874 les appelants ont porté cette action par laquelle ils réclament $4,872.25 pour les dommages que la corporation leur a causé, et de plus $10,000 dans le cas où la corporation ne ferait pas d'égoût dans la rue.

L'intimée à répondu à cette demande qu'elle avait réparé les trottoirs et la rue pour convenir au public; que l'auteur des appelants avait construit au hasard sans demander le niveau de la rue; que les travaux faits dans la rue étaient convenables à l'intérêt public, et qu'ils avaient été autorisés par le Conseil; enfin, que si les appelants avaient éprouvé des dommages par l'écoulement des eaux, il fallait les attribuer à la pente naturelle du sol à partir des rues Sanguinet et Ste. Catherine vers la rue Dubord, d'où résultait une servitude dont était grevée la propriété des appelants envers le fonds supérieur.

Cette exception était suivie d'une défense au fond en fait.

Il a été prouvé qu'en 1871 la rue Dubord avait été élevé tel qu'allégué par les appelants, et ce avec l'autorisation et sous la direction des officiers de la corporation qui en avaient eux-mêmes fixé le niveau; que l'élévation donnée à la rue avait eu l'effet de renvoyer les eaux le long du mur et sur le terrain des appelants; qu'ils avaient été obligés d'élever leur mur de clôture par une addition en bois et de couper leur porte de cour; qu'il en était résulté pour eux de dommages diversement estimés par les témoins de $300 à $4,000 et à $5,000.

La Cour Supérieure a renvoyé l'action des appelants parce qu'elle était éteinte par la prescription de deux ans, et que la Cour était tenue d'appliquer cette prescription *ex-officio* et sans qu'elle fut invoquée.

Pour rendre ce jugement la Cour Supérieure a considéré cette action comme étant une demande en réparation d'un délit ou d'un quasi-délit, et s'est fondée sur les articles 2261 et 2267 C.C. dont les termes sont:

2261. "L'action se prescrit par deux ans dans les cas suivants:

"2o. Pour dommages résultant de délits et de quasi-délits, à défaut d'autres "dispositions applicables."

"2267. Dans tous les cas mentionnés aux articles 2250, 2260, 2261 et "2262, la créance est absolument éteinte, et nulle action ne peut être reçue après "l'expiration du temps fixé pour la prescription."

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Dans l'ancien droit la prescription était une fin de non recevoir qu'il fallait invoquer et que les Juges ne pouvaient suppléer. Pothier, Obligations, No. 677. L'article 2223 du code Napoléon dit également: "Les Juges ne peuvent pas suppléer d'office le moyen résultant de la prescription."

Les commissaires dans l'art. 5 de leur projet de code avaient suggéré l'adoption de l'article même du code Napoléon, comme contenant la règle alors en force.

Les trois branches du corps législatif ont adopté cet article sans modification puisqu'il n'en est fait aucune mention dans l'acte 29 Vict. ch. 41 qui contient tous les changements faits au rapport des commissaires. Cependant l'on trouve dans la version authentique du Code, Art. 2188, que les mots "sauf dans les cas où la loi dénie l'action" ont été ajoutés à l'article 5 du projet des commissaires, que les mots "*et en certains cas exclus*" ont été ajoutés au milieu du paragraphe 3 de l'art. 1 du projet des commissaires Art. 2183 C. C., que l'article 2267 a été ajouté en entier après l'adoption du projet de Code par le corps législatif. Ces additions, qui ont renversé toutes les notions reçues jusqu'alors sur le caractère et l'effet des prescriptions, ont été faites, nonobstant la clause 4 de l'acte concernant le Code Civil, 29 Vict. C. 41, qui permettait aux commissaires de corriger toutes fautes d'impression, erreurs par commission ou omission, contradiction ou ambiguité dans l'original, "*mais sans en changer l'effet.*"

Il est inutile de rechercher ici quand et comment des changements aussi importants ont pu être faits; ce qui est certain c'est qu'ils n'ont pas pu être faits par inadvertence.

L'on a converti en déchéance ce qui n'était que prescription, tout en conservant le nom de prescription. Cette confusion dans les termes n'est que le prélude des difficultés que cette règle nouvelle fera naître dans la pratique.

Mais comme nous ne pouvons déclarer que cette disposition ne fait pas partie du Code, surtout depuis que par un acte de la Province de Québec (31 Vict. ch. 7 s. 7) il a été décrété que le Code Civil et le Code de Procédure, tel qu'imprimés par l'Imprimeur de la Reine de la ci-devant Province du Canada, serait la loi en force en cette province, il faut examiner si cette prescription s'applique à l'action des appelants.

L'art. 2261 établit une prescription de deux ans pour les dommages résultant de délits et quasi-délits, à défaut d'autres dispositions applicables.

Mais la Corporation en élevant le niveau de la rue pour la commodité publique n'a commis ni un délit, ni un quasi-délit. Elle a usé d'un droit que lui conférait sa charte; mais si en exerçant ce droit elle fait des travaux qui sont préjudiciables aux propriétaires elle est tenue de les indemniser des dommages qu'elle leur cause. Toullier, T. 3 No. 327, s'exprime ainsi sur cette question:

"L'administration n'est pas au-dessus de la loi, et elle ne peut dans l'exécu-
"tion des travaux publics se soustraire à l'application de ces principes.....
"Ils [illegible] peut faire des travaux qui ne sont préjudiciables, parce
"qu'ils [illegible] également reconnus utiles et nécessaires pour tous; mais
"comme je ne puis souffrir seul pour l'avantage de tous, que, dans la société,
"les charges doivent également peser sur tous les membres, je devrais être
"dédommagé du préjudice que je souffre—*ainsi, l'élévation ou l'abaissement de*
"*de la voie publique m'enlève mes jours, mes accès*; l'Etat en exerçant ce droit

" ne le fait qu'au détriment du mien, il me cause un préjudice matériel et réel, " dont il me doit la réparation."

Sourdat, T. 1, No. 429, dit aussi : " Une question qui a été souvent agitée, est " celle de savoir, si l'abaissement du sol d'une route, ou d'une rue, qui dimi- " nue notablement les facilités d'accès d'une maison située au bord de cette voie " publique peut donner lieu à une action en indemnité contre l'Etat, ou la com- " pagnie qui lui est substituée. Cependant un grand nombre de décisions ont " alloué en pareil cas des indemnités aux propriétaires lésés."

Au No. 432, le même auteur ajoute : " La jurisprudence se montre assez large dans l'appréciation de l'étendue des dommages directs." Ainsi, quand il s'agit d'indemnité à raison de l'exhaussement d'une rue, on comprend dans le chiffre des dommages et intérêts, non-seulement ce qui serait absolument nécessaire pour rétablir les communications et les jours, et empêcher les effets de l'humidité, mais encore une somme représentative de la dépréciation générale de la propriété."

C'est ainsi qu'il a été jugé par un arrêt rapporté par Sirey 1864–2,–279 que l'abaissement du sol de la voie publique au devant d'une maison, lorsqu'il a pour effet de diminuer les facilités d'accès à cette maison, constitue un dommage direct et matériel donnant droit à indemnité.

Le Conseil d'Etat a rendu une décision semblable le 21 février 1867, qui est rapportée dans Sirey 1867–2–365.

La Corporation qui est autorisée par sa charte à élever et à abaisser le niveau des rues n'a commis ni délit, ni quasi délit en élevant ou en permettant qu'on élevât le niveau de la rue Dubord. Elle a exercé un droit qu'elle avait, mais en exerçant ce droit, elle a déprécié la propriété des appelants et elle leur doit une indemnité proportionnée aux dommages qu'elle a causés.

Mais en supposant qu'il y aurait eu délit ou quasi-délit, il n'est pas certain que l'article 2261 C. C. s'appliquerait à un délit causant un dommage réel à la propriété. Les commissaires dans leur troisième rapport, p. 434, paraissent avoir été d'opinion que les courtes prescriptions n'étaient pas applicables aux dommages causés à la propriété. Il n'est pas nécessaire de résoudre cette difficulté dans cette cause, puisque comme nous l'avons indiqué, la Corporation n'a commis ni délit, ni quasi-délit.

D'ailleurs ici les dommages sont continus, en ce sens qu'ils ne se sont pas manifestés du moment que l'exhaussement de la rue a été fait, mais successivement à mesure que l'eau s'est répandue sur la propriété des appelants, qu'elle y a séjourné et détérioré leur propriété. Dans un cas semblable ce n'est pas de l'époque à laquelle les travaux ont été faits que la prescription commence à courir, mais de l'époque ou chaque fait dommageable s'est manifesté. (Sirey 1856, 2–248. Sourdat, No. 638.)

Pour ces raisons nous croyons que le jugement de la Cour Supérieure doit être infirmé, et que les appelants ont établi qu'ils ont droit à des dommages que la Cour porte à la somme de $200.00.

The judgment is as follows :—

" Considérant que les appelants ont prouvé les principaux allégués de leur déclaration, et, notamment que l'intimé a, dans le cours de l'été 1871, fait élever

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ou permis que l'on élevât le niveau de la rue Dubord, qui longe le côté nord-ouest de la propriété des appelants entre deux et trois pieds de hauteur;

"Et considérant que cette élévation du niveau de la rue aurait fait refluer les eaux de la rue sur la propriété des appelants, et aurait fait pencher le mur de la propriété des appelants, et détérioré la porte de cour que les appelants avaient dans le dit mur de clôture, et causé d'autres dommages à leur propriété, à un montant d'au moins $200;

"Et considérant que la prescription de deux ans ne s'applique pas à ces dommages qui sont continus, et qu'il y a erreur dans le jugement rendu par la Cour Supérieure siégeant à Montréal le 31me jour d'octobre 1876;

"Cette Cour casse et annule le dit jugement du 31 Oct. 1876, et procédant à rendre le jugement qu'aurait dû rendre la dite Cour Supérieure, condamne l'intimé à payer aux appelants la somme de $200 de dommages avec intérêt à compter de ce jour, et les dépens," etc.

Judgment reversed.

A. W. Grenier, for appellants.

R. Roy, Q.C., for respondents.

(J. K.)

SUPERIOR COURT, 1880.

MONTREAL, 31st MAY, 1880.

Coram JETTÉ, J.

No. 861.

Bennett vs. *Haeusgen* et al.

HELD:—1. That *péremption d'instance* cannot be acquired in favor of a party who is dead, and cannot be asked for in the name of such party.

2. That the death of one of the defendants does not prevent the other defendant from moving for and obtaining *péremption d'instance* in his own favor.*

PER CURIAM:—"La Cour * * Considérant qu'il appert par les écritures des parties et les pièces produites que le défendeur Haeusgen est décédé depuis l'institution de l'action, et que son décès a été régulièrement dénoncé dans l'instance le 26 Octobre 1874;

"Considérant qu'aux termes de l'article 437 du Code de Procédure Civile, ce décès a suspendu l'instance quant à la partie décédée et à ses ayants cause et que par suite, la péremption n'a pu s'acquérir en faveur de la dite partie tant que la cause est restée en cet état;

"Considérant que la demande en péremption ne peut être au nom d'une partie décédée;

"Renvoie la motion des défendeurs quant au dit Haeusgen décédé;

"Mais, considérant que la dite demande est bien fondée quant au défendeur survivant Gnaedinger, l'accorde et déclare en conséquence, l'action du demandeur périmée quant à lui, avec dépens distraits à Messieurs A. & W. Robertson, avocats du dit défendeur Gnaedinger."

Motion for *péremption* granted in part.

Monk & Butler, for plaintiff.

A. & W. Robertson, for defendant.

(S. B.)

*Vide 9 L. C. J. pp. 21, 22; 12 L. C. J. p. 269; and 1 Q. B. Rep. (Dorion), p.125.—(Reporter's Note.)

COURT OF QUEEN'S BENCH, 1880.

MONTREAL, 15TH JUNE, 1880.

Coram HON. SIR A. A. DORION, CH. J., MONK, J., RAMSAY, J., TESSIER, J., CROSS, J.

No. 194.

THE CITY OF MONTREAL,

APPELLANT;

AND

DUGDALE,

RESPONDENT.

AND

No. 17.

DUGDALE,

APPELLANT;

AND

THE CITY OF MONTREAL,

RESPONDENT.

HELD:—1. That when a medical man has been employed by the City as a Health Officer, at a fixed annual salary, and attendance at the Civic Small-pox Hospital has been added to his ordinary duties, without stipulation by him for additional salary, he cannot legally recover from the City the value of such additional services, besides his ordinary salary, but he may recover from the City any amount which the Council may have voted by way of remuneration for such extra services.

2. That the City could not dismiss a salaried employee, whose term of office had been renewed for another year by tacit reconduction, without paying him his salary to the end of the current term so renewed. And that in the present instance the term of office of Dr. Dugdale had been renewed by tacit reconduction for another year, when the City dispensed with his further services.

CROSS, J.:—On the 5th September, 1877, Dr. Dugdale sued the City of Montreal, the following being the particulars of his demand:

For professional services, attendance at Civic Hospital for 14 months, from 1st November, 1874, to 1st January, 1876, at $150 per month . $2100 00

18 visits to Civic Hospital from 10th January, 1876, to 21st February, 1877, as Consulting Physician..... 90 00

Salary as City Health Officer from 1st May to 1st September, 1877, 4 months, at $800 per annum..... 266 67

$2456 67

The City pleaded that Dr. Dugdale was appointed Health Officer at an annual salary fixed and voted to him from time to time by the City Council; that all the several duties and attendances for which he claimed compensation were assigned to and performed by him in his capacity of Health Officer, and not otherwise. No other or separate allowance was made or agreed to be given to him for any supposed extra services, and he was entitled to none: he had been paid for all his allowances and services when he was Health Officer, viz., up to 1st May, 1877, and never in the interim pretended to claim for extra services.

By the judgment of the Superior Court rendered on the 14th May, 1878, the first item of the account, being for extra services, was allowed, and the other two, one being for extra services and the last for salary, were disallowed.

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Both parties have appealed from this judgment, and the whole case now comes up for adjudication by this Court.

Dr. Dugdale's pretensions are that the Small-pox Hospital having been established after his appointment as Health Officer, and while he was acting as such, he had from the Corporation a separate appointment as Attendant Physician to that institution, and as no particular salary was assigned to the latter office, where his duties were different and more arduous than under his first appointment, he was entitled to a *quantum meruit* compensation for the performance of the extra duties.

I think the true principle to govern such cases is to be found in Dillon's work on Municipal Corporations, Vol. 1, Nos. 169, 170 and 172. According to the opinion there given, there could be no implied assumpsit on the part of the Corporation with respect to the services of its officers for a *quantum meruit* compensation in a case like the present.

I would be disposed to say that the naked appointment to an office under a Municipal Corporation would not of itself necessarily carry with it a legal claim to emolument; that it is only by a salary or allowance being voted, or in some authorised manner becoming attached to an office, that an incumbent becomes entitled to recover it, unless the relations of the parties to each other go to establish an actual contract for or promise of pecuniary compensation by the Corporation.

The acceptance of an office and the performance of its duties does not establish, as a necessary consequence, the right to be compensated for the services so rendered.

The Court, however, does not find it necessary to go the length I have thus enunciated for the determination of this case, nor does it rest its judgment on the grounds which I have mentioned as being in accord with my own views, which so far need not be authoritatively pronounced upon.

In our construction of the evidence we do not find that Dr. Dugdale has established any new or second appointment separate from that of Health Officer, or that any contract, express or implied, existed between him and the City Corporation to entitle him to compensation for extra services.

It appears that, in 1868, Dr. Dugdale was appointed one of the City Health Officers, and that at first, and up to 1869, no fees or emolument were attached to the office, the duties whereof were fulfilled gratuitously, but that in the year 1868–9 a gratuity of $50 was voted and was received by Dr. Dugdale, as well as certain fees, not considerable, for vaccination. In 1870 a regular fixed sum of $500 per annum was voted, and the salary was continued at the same rate up to the years 1873 and 1874, for which two several years the amount voted was enhanced to $800 for each year.

In November, 1874, the Board of Health established the Small-pox Hospital, and the attendance which Drs. Dugdale and Larocque had previously given to small-pox patients elsewhere, was afterwards given at the Small-pox Hospital, where they each, by understanding between themselves, attended during alternate periods up to January, 1876.

The duties of Health Officers seem never to have been specifically defined, but

it would appear that the creation of the Board of Health, and the appointment of Health Officers, was specially in view of preventing the spread of the contagion of small-pox, with which the city was threatened at the time. A reasonable presumption would necessarily result from the circumstances that all acts performed by the Health Officers of a nature to promote the objects for which the Board was established would, in the absence of distinct evidence to the contrary be presumed to be performed as part of the duties of such Health Officers, and notwithstanding the evidence given by several medical gentlemen to the effect that in their opinion the duty of attending the Small-pox Hospital was new and distinct from the ordinary duties of Health Officers, it cannot be disputed that the prevention of the spread of small-pox and its cure were of a character necessarily falling within a Health Department, and that efforts bestowed to that end by a Health Officer would be reasonably presumed to be [illegible]ed in his quality of Health Officer, more particularly in the absence of [illegible] limits being fixed for the exercise of his functions or to regulate [illegible] more especially as they were very similar to duties previously perfor[illegible] in the same office. If they had seemed to him too onerous or not sufficiently compensated he should have apprised his employers of the fact, and (if justified in so doing) refused to continue their performance until new relations were established as to his line of duties and their compensation; but if he chose to allow matters to proceed on the same footing, he has no right to complain if reclamations made by him afterwards are not favorably entertained, nor does he make out his case by shewing, as he has attempted to do, that his time and professional skill commanded a higher rate of remuneration in his general practice. Various motives induce professional men to accept offices to which but small emolument is attached, among these motives is that of obtaining a field for the exercise of their talents and making a name. What might have satisfied Dr. Dugdale when he first accepted the office might have been wholly inadequate at the time he relinquished it, but this remark, although applicable in many instances, may not in any manner be so in his case.

There is some further evidence on this point. Alderman Kennedy, at one time Chairman of the Health Committee, says it was a separate duty and separate appointment. It was a separate appointment from the Board. They were appointed City Health Officers by the Council, and they were appointed attending Physicians to the Small-pox Hospital by the Board of Health. The Board of Health could have appointed any other two Doctors as well as them. This is Alderman Kennedy's opinion of an appointment because he considered the duty was separate and distinct, but no appointment, or resolution is produced, nor in fact did any take place, and had there been any attempt to do so by the subordinate authority, the Council who control and dispense the funds would have required to be consulted if emolument was to be attached to the office. The simple fact, as explained by Mayor Hingston in his evidence, is, it was a duty tacked on to their duty of Health Officers; that is, being Health Officers they were requested to attend to the wants of the Small-pox Hospital as regards medical attendance; they had previously been giving that attendance to small-pox patients elsewhere, and continued it at the Hospital specially created for these patients. If an additional duty, no additional

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emolument was ever voted for it by the Council, or asked at the time by the officers themselves.

Aldorman McCord, Chairman of the Board of Health, examined for Dr. Dugdale. To the following question: Are you aware at what time Dr. Dugdale ceased attending the Small-pox Hospital regularly? he answers: I think it was in January, 1876, when Dr. Dugdale ceased to attend the Hospital. About the 1st of January, 1876, I permitted Dr. Dugdale to cease visiting the Hospital as he had done previously. I permitted Dr. Dugdale to cease visiting the Hospital under the arrangement that had been going on previously, that is under the arrangement made with him, but with the understanding that he should go whenever he was sent for. And to the following question put to him in cross-examination.

Question.—Was there an arrangement between the Corporation and them to perform the duties of Medical Health Officers at a certain salary, was there not?

Answer.—I know that the Medical Health Officers received a salary from the Corporation of I think $800 each. It was then my duty to see that they performed their duties as Medical Health Officers for the best advantage of the department, and accordingly I directed them to do as I thought most advantageous for the department. Since my appointment as Chairman in March, 1875, the Health Officers have been gradually developing their duties. A sanitary inspector was recently appointed who now does some of the duty heretofore done by the Medical Health Officers.

There is here no indication of a separate appointment, separate duties or a right to extra compensation, but rather the existence of an obligation to perform services by the direction and at the discretion of the employer.

For the reasons thus explained the Court have come to the conclusion to reverse the judgment of the Superior Court as regards the claim of Dr. Dugdale for compensation for extra services, with the exception, however, of a sum of $400, which the evidence shows the City Council voted Dr. Dugdale as a gratuity in recognition of the services they admitted he had performed, but without any acknowledgment of their legal liability, and which remained in their books to his credit when the action was instituted. This disposes of the appeal taken at the instance of the Corporation.

The Court are also of opinion that the appeal taken by Dr. Dugdale for a proportion of his fixed salary claimed by him and not allowed by the judgment of the Superior Court must be successful. The annual hiring did not terminate on the first of May as contended for by the Corporation, but for want of sufficient notice had been continued for another year, whereby he became entitled to the arrears of salary claimed by him in the present action. On this point the Court follows the precedent laid down in the case of Devlin vs. the City of Montreal. Dr. Dugdale will therefore recover in this action the sum of $666.67 besides the costs of his appeal, and he will be condemned to pay the costs of the appeal by the City.

The judgment of this Court is as follows:

Considering that the said two appeals have been respectively instituted from

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the same judgment, to wit, the judgment rendered in this cause in the Superior Court at Montreal on the 17th day of June, 1878, condemning the said City of Montreal to pay to the said John J. Dugdale the sum of $2,100.00 for the value of his services as Physician of the Civic Small-pox Hospital for the period beginning 10th November, 1876, and dismissing his demand for the surplus;

Considering that the only capacity in which the said City of Montreal ever appointed or employed the said John J. Dugdale was that of Health Officer, and that his attendance at the Civic Small-pox Hospital was not under or in virtue of any separate appointment or employment, but was merely the assigning to him additional duties to be by him performed as Health Officer, for which the said City of Montreal did not undertake or agree to allow him any separate or additional emolument save the sum of $400 voted and allowed to him by a Resolution of the Council of the said City of Montreal, bearing date the 16th April, 1877, and placed to his credit in the books of the said City Council;

And considering that the said John J. Dugdale has proved that he was appointed and employed as Health Officer by the said City of Montreal at an annual salary, and that such appointment and employment was renewed from time to time, the date of the last appointment being on the 5th June, 1874, and being for the then current year, and at the salary of $800 per annum, the same rate per annum as he had been in the habit of receiving for the previous years, and that the said appointment and employment was continued up to the 21st March, 1877, when the said John J. Dugdale was by the said City of Montreal discharged from said employment, but was paid for his services as such Health Officer up to the first of May, 1877;

And considering that when so discharged he had entered on the performance of his duties of such Health Officer for the then current year by tacit renewal, without the necessary previous legal notice having been given him to terminate his engagement, and that when he instituted his action on the 5th of September, 1877, there had accrued and was due to him for four months of his salary as such Health Officer, at the rate of $800 per annum, the sum of $266.07, which he was entitled to recover from the said City of Montreal;

Considering therefore that there is error in the said judgment of the said Superior Court on the 17th day of June, 1878, the Court of Our Lady the Queen now here doth reverse, cancel, annul and set aside the said judgment, and proceeding to render the judgment which the said Superior Court ought to have rendered, doth adjudge and condemn the said City of Montreal to pay and satisfy to the said John J. Dugdale the sum of $666.67, with interest thereon from the seventh day of September, 1877, the date of service of process in this cause, with costs of the Superior Court and also the costs of the said John J. Dugdale on his Appeal to this Court, and the Court doth further adjudge and condemn the said John J. Dugdale to pay to the said City of Montreal the costs of the said City of Montreal, on their appeal to this Court.

(The Honorable Justices Monk and Tessier *dissenting*.)

RAMSAY, J. Dr. Dugdale sued the Corporation of the City of Montreal for professional services rendered by him as Health Officer, and as Physician attending the Small-pox Hospital established by the City. In the year 1868 Dr. Dug-

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dale and Dr. Larocque were appointed Health Officers for the City. The employment was gratuitous, but at the end of the year the Corporation voted these gentlemen each a small fee, and engaged them for the year 1870 at the rate of $500. This was continued yearly till 1873, when the salary was raised to $800. In March, 1877, the Corporation resolved to employ only one Health Officer, and Dr. Dugdale's services were dispensed with from and after 1st May, 1877.

In 1874 the Board of Health determined to establish a Small-pox Hospital, which went into operation in Nov., 1874, and Dr. Dugdale and Dr. Larocque attended there together till the 1st January, 1876, when Dr. Dugdale resigned his functions there. He now claims a salary of $2100 for his services there.

A third item is for visits at the Small-pox Hospital during January and February, 1876—$90.

The judgment of the Court below allowed him $2100 for his services at the Small-pox Hospital from Nov., 1874, to 1st January, 1876, and dismissed his action for the balance of his year's salary as Health Officer in 1877, also for the fees for visits in 1876 to the Small-pox Hospital.

From this judgment the Corporation appealed, and so did Dr. Dugdale.

The general principle involved in a claim for extra remuneration seems to me to be very clear. If a person employed in a particular capacity by another is charged to perform some duty not theretofore performed by him, he may decline to do it, and then the question will arise nakedly whether the new employment is of a similar kind to that which he was employed to perform. If it is, he is bound to perform the duty to the best of his ability. But if the person employed performs the new duty without remonstrance, the presumption is that the new work falls within the general scope of that which he was employed to perform, and he has no legal claim to additional remuneration. This is evidently the rule of reason and of ordinary experience. In the case before us, however, the position of the parties is not so clearly defined, and it seems to me that the general rule is therefore not perfectly applicable. The plaintiff was appointed as a Health Officer, and he had medical duties to perform. During this time an epidemic broke out which required the establishment of an extra hospital, entailing far more work than was at first contemplated. Dr. Dugdale did not refuse to do the work, neither did he continue to perform it in silence. He spoke to the members of the Committee as to extra remuneration, and it seems that one of them informed these gentlemen that their claims would be considered. Under these circumstances I think the governing principle in such a case is this: the plaintiff agreed to trust to the generosity of his employer, and therefore he has no claim beyond that which the Corporation chose to allow, and he ought to have taken the $400 offered. I think the Corporation have admitted this was equitably his due, and it ought to have been offered by the action. I would therefore reverse the judgment of the Court below in so far as regards the allowance of $2100, and give instead to Dr. Dugdale $400 with costs in favour of Dr. Dugdale in the Court below, and costs of appeal in favour of the Corporation.

As to the balance of his services for the year, I think Dr. Dugdale is entitled

to that. This point was decided in the case of Mr. Devlin. The Statute cited by the Corporation (37 Vict. c. 64) does not authorize the Corporation to dismiss its servants unfairly, without notice and in violation of their contract. If they have such a privilege, they have what no other person, public or private, has. The Queen can only dismiss her servants without notice when it is expressed in the commission. Of course if the Queen dismissed a servant without notice, in violation of a contract, there would be no action, but that is because no action lies against the Crown and not because there was no right of action. I don't think Dr. Dugdale is entitled to any fees for his attendance at the Hospital after 1st January, 1876. Mr. McCord distinctly tells us that he was to go to the Hospital when required.

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There appears to me to be another difficulty in Dr. Dugdale's way, even if a different view was taken of his position. It is as to the form of the evidence. He has brought medical men to establish that attending a Small-pox Hospital is worth $200 a month. It seems to me that they might as well have said $2000. Unless they could give us some idea of what Dr. Dugdale was gaining elsewhere, which is not attempted, it is merely a fancy appreciation. This is a difficulty attending the proof of the value of all intellectual services. I would, therefore, reverse the judgment as regards balance of salary, giving Dr. Dugdale what he asks on that point and costs of both Courts.

With regard to Dr. Dugdale's claim to be paid for the whole term of one year, a question has been raised whether his re-engagement by *tacite reconduction* gives him a right to salary for his services for the period of a year, the original engagement being for that period. I think the authority of Despeisses quoted in support of our Code, is satisfactory on this point, and it is in accordance with principle. If it be a *reconduction* the parties must be put in the same position in which they were before, else the law would presume a different bargain. This would be an illogical operation. It will be observed that Pothier does not contradict the doctrine of Despeisses in the least, he seems to support the same general conclusion, mentioning the particular cases in which the question of the period of engagement could arise.

MONK, J. (*dissentiens*), remarked that he could not concur in the judgments just rendered, and that he was of opinion the judgment appealed from should be confirmed.

TESSIER, J., also expressed his dissent by written memorandum to that effect.

Judgment of S. C. reversed.

Rouer Roy, Q.C., for the City.
Trenholme & Maclaren, for Dr. Dugdale.
(S. B.)

COUR DE RÉVISION, 1880.

MONTREAL, 30 NOVEMBRE, 1880.

Coram SICOTTE, J., TORRANCE, J., JETTÉ, J.

No. 806.

In re David, failli, *Beausoleil*, syndic, et *Trust & Loan Co. of Canada*, requérante.

JUGE:—Que le syndic est en droit d'exiger sa commission sur le montant de l'hypothèque à la charge de laquelle l'immeuble du failli est vendu, aussi bien que sur la somme additionelle offert à l'enchère pour parfaire le prix. La commission est également exigible sur la totalité du prix de vente lorsque l'adjudicataire est le créancier hypothécaire.

Le jugement en première instance a été rendu par la Cour Supérieure à Montréal (Mackay, J.) le 30 novembre, 1880.

SICOTTE, J. (*dis.*) La compagnie s'est rendue adjudicataire des droits du failli dans certains immeubles, pour la somme de $5.00, et s'est obligée en outre de payer aux créanciers personnellement les prestations et les rentes foncières dues aux vendeurs, et les hypothèques dues à la Compagnie. Ces conditions avaient été réglées et ordonnées par jugement du 15 janvier 1880, sur la demande des créanciers, après contestation par le syndic.

Les adjudicataires ont réclamé par requête, l'exécution de leurs titres; mais le syndic demande préalablement le paiement d'une commission de 2½ par cent, pour lui, et de 1½ pour le Gouvernement, à être prise non-seulement sur le prix réalisé, mais aussi sur la somme représentant les créances dues au vendeur et à la Compagnie. Le syndic réclame de plus les taxes municipales accrues avant la vente.

Cette requête de la Compagnie a été rejetée, et l'on demande que le jugement soit infirmé.

Par l'acte de faillite, les ventes par le syndic ont le même effet que celles faites par le shérif. Mais par la clause 76, la vente peut être faite, dans la Province de Québec, à la charge par l'acquéreur de payer aux créanciers hypothécaires, leurs créances, s'ils y donnent leur consentement; et dans ces cas, le syndic devra leur réserver une hypothèque spéciale dans l'acte de vente, comme garantie du paiement de la partie du prix d'acquisition non-payée.

Par cette disposition, comme par plusieurs autres, les créanciers hypothécaires peuvent rester étrangers à la faillite et à ses conséquences. Ces dispositions ne sont que l'application de la loi commune sur les priviléges et les hypothèques.

La distribution doit se faire comme dans le cas de vente par le shérif, " de la même manière quant à tous les points essentiels que la collocation des deniers provenant d'une vente d'immeubles se fait dans la Cour qu'il appartient dans les cas ordinaires." Aussi le syndic est assimilé au shérif. Tout ce qui est dû au shérif est dû au syndic, mais pas plus, ni autrement.

La sec. 9 chap. 85, S. R. " Autorise le shérif d'exiger 2½ par cent, qu'il déduira sur les deniers qu'il prélevera." Evidemment, il ne peut faire déduction que sur les deniers qu'il a entre ses mains, provenant du prix, comme il n'y a de collocation et de distribution que des deniers prélevés.

Le syndic n'a pas à noter et à distribuer les deniers qu'il n'a pas et n'aura jamais en mains, ou sous son contrôle, puisque ces deniers, par ordre du juge et

du consentement des créanciers, restent entre les mains de l'acquéreur, qui les paiera quand dus, aux créanciers indiqués par l'ordonnance même.

Cela est d'accord avec tout notre régime hypothécaire et notre procédure d'expropriation, on ne doit pas accorder d'émoluments aux officiers judiciaires que d'après entente positif et non d'après des indications éloignées : car ces impositions sont de droit étroit.

Dans les ventes judiciaires, le créancier qui consent à ce que la vente se fasse à la charge de son hypothèque, conserve son droit sur la chose vendue, tel qu'il était. Par conséquent, il n'y a pas vente, expropriation de son droit, de sa propriété. Le shérif, ou le syndic, n'a pas prélevé le prix et la valeur de ce droit. Car le créancier a suivi la foi de l'acquéreur et conservé son droit contre lui et contre la propriété.

Dans l'espèce une opposition afin de charge sous la forme d'une requête au juge, pour contraindre le syndic, a été faite et accordée, et ce dernier a fait la vente conformément à cette opposition et au jugement.

Sans cette opposition, l'hypothèque eut été purgée par le décret. Alors il y aurait eu expropriation du droit des créanciers, et prélèvement du prix payé pour tel droit.

La commission n'est exigible que sur les deniers prélevés. C'est la règle en Angleterre comme en Canada. "If the sheriff levy, he is entitled to poundage." C'est d'après cette règle que M. le juge Johnson décidait, dans Chauveau vs. Evans, que le syndic ayant prélevé le premier paiement d'une vente en bloc, faite avec délai, aurait du déduire sur les deniers distribués par son dividende, la somme représentant le droit imposé pour le fonds de construction et des jurés. Cela découlait de la clause 145, qui enjoint au syndic, de retenir entre ses mains sur les deniers prélevés un pour cent pour le fonds en question.

Il n'y avait pas d'exécution pour prélever la dette de la Compagnie; mais, au contraire, il y avait ordre de ne pas vendre pour ces droits, et partant de ne pas prélever. Les fonctions du syndic cessent quant à ces biens et à ces droits, quand l'adjudicataire aura versé le prix de l'adjudication payable entre ses mains pour être distribué, tel que réglé par la clause 77 de l'acte des faillites, et sur lequel il déduira sa commission.

Le syndic comprenait bien la chose, telle qu'elle vient d'être exposée. Aussi s'est-il opposé au jugement ordonnant la vente à la charge des créances hypothécaires de la Compagnie et du vendeur. Dans son *factum*, pour en obtenir la révision, il accuse la charité peu chrétienne qui a présidé à la redaction des actes constitutifs de la créance de la Compagnie; il se plaint amèrement de l'oubli par le juge, des conséquences désastreuses de son ordonnance, de son ignorance des droits relatifs du débiteur et du créancier.

Nonobstant ces doléances, l'ordonnance fut confirmée. Le syndic cherche maintenant à en éluder les effets pour réparer, dit-il, les injustices de ces ordonnances judiciaires.

Voici comme il rend compte de ses faits et intentions dans sa défense contre la requête qui se plaint de son refus de donner titre à l'adjudicataire. "Dans le cas actuel, dit-il, la Corporation de Montréal et la Municipalité de Ste. Cunégonde, ont des réclamations considérables pour taxes qui priment l'hypothèque de

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la Compagnie : que si le syndic n'avait pas pourvu à leur paiement, ces corporations auraient été frauduées de leurs droits, &c., &c. Il se glorifie d'avoir pourvu au paiement de la taxe gouvernementale, d'être le protecteur de la masse des créanciers chirographaires, que les juges avaient oubliés et négligés."

Il est impossible de voir, ailleurs que chez un syndic, un zèle aussi grand pour les intérêts de la masse, des municipalités, et du Gouvernement.

Les syndics sont amplement retribués pour leurs fonctions, et se font un salaire plus considérable que les shérifs.

Le syndic n'a aucune autorité pour collecter des adjudicataires, les taxes municipales dues par les immeubles qu'il vend. La loi accorde à ces municipalités, non-seulement un privilége contre tous, mais un moyen sommaire de faire valoir leurs réclamations sur le prix prélevé. Elles ont un privilége sur le prix réalisé, mais elles n'acquièrent un droit personnel contre l'adjudicataire pour les arrérages accrues avant son acquisition.

L'acquiescement invoqué par le syndic est une chose qui prouve contre lui, c'est preuve qu'on voulait, à défaut d'une offre découlant de la loi, se faire une protection d'un engagement personnel. Dans l'espèce, cet engagement est d'une personne qui n'avait aucune autorité pour lier la Compagnie ; et même, s'il eut été consenti par cette dernière, il eut été sans valeur.

La requête de la Compagnie, n'est que pour contraindre le syndic à exécuter le jugement du 15 janvier, 1880 ; et suivant moi elle aurait du être accordée.

JETTÉ, J. En mai dernier le syndic à la faillite de *Louis David* a annoncé que le 2 août suivant, il vendrait quatorze immeubles dépendant de la succession du failli, que " Toutes ces propriétés seraient vendues sujettes aux " hypothèques (avec intérêt jusqu'au jour de la vente) en faveur de la Trust " & Loan Co. et des héritiers Coursol."

Avant de procéder à l'adjudication le syndic a annoncé que les conditions de la vente, telles que déterminées par les inspecteurs, étaient les suivantes :

" L'acquéreur s'oblige :

" 1o. De payer suivant les conditions des obligations, les hypothèques de la " *Trust & Loan Co.* qui existent sur la totalité des dits lots et aussi celles dues " aux héritiers Quesnel sur les lots de la rue Coursol, avec les intérêts jusqu'au " jour de la vente.

" 2o. Payer au syndic sa commission de 2½ par cent sur le montant de l'ad- " judication, y compris celui des hypothèques.

" 3o. De payer au syndic un pour cent pour le fonds des bâtisses et des jurés.

" 4o. De payer au syndic un pour-cent sur le même montant pour couvrir les " frais d'encan.

" 5o. De payer le montant des taxes qui peuvent être dues aux corporations.

" 6o. De payer le coût des contrats et de leur enregistrement et d'une copie " enregistrée pour le syndic."

La vente a été faite ensuite et tous les lots—sauf le dernier—ont été adjugés à M. Trihey, représentant de la Compagnie *Trust & Loan*, dans les termes suivants :

" Lot No. 1. Thomas Trihey, *cinq piastres* en outre des obligations men- " tionnées, aux conditions qui viennent d'être lues.

" Vendu à Thomas Trihey suivant les conditions.

" Montréal, 9 août 1880. [Signé] T. TRIHEY,
For Trust & Loan Co."

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" Les autres lots sont adjugés dans les mêmes termes.

" Depuis cette vente, la Cie. du Trust & Loan, sa commission de 2½ par cent sur le *prix de vente*, c'est-à-dire sur le montant des hypothèques grevant chaque lot en outre des $5 offertes lors de l'adjudication, la Cie. a refusé de payer la commission sur autre chose que ces $5, et elle demande maintenantque le syndic soit forcé de lui donner son titre sur paiement de telle commission.

La question soulevée dans l'espèce est donc de savoir si le syndic a droit à sa commission comme le shérif, simplement sur *la somme d'argent*, actuellement payée ou sur la totalité de ce qui constitue le *prix de vente*.

La Cour de première instance a jugé que le syndic avait droit à sa commission *sur le prix de vente*, et la majorité de la Cour est d'avis de confirmer ce jugement.

La loi de faillite réglant la vente des immeubles du failli, dit à l'art. 77:

" Dans la province de Québec cette vente pourra être faite sujette à toute " charges et hypothèques que la loi de cette province permet de laisser subsister " sur les immeubles lorsqu'ils sont vendus par le shérif—*et sujette aussi* à toutes " autres charges et hypothèques dont le paiement n'est pas échu à la date de la " vente, l'époque de leur paiement n'étant pas cependant prorogée par les con- " ditions de la vente, et sujette aussi à toutes autres charges et hypothèques " qui pourront être consenties par écrit par les détenteurs ou créanciers hypo- " thécaires.....,et les dispositions du Code de Procédure Civile relatives à la " collocation des créanciers hypothécaires et privilégiés, à la nécessité et au " dépôt des oppositions afin de conserver et aux frais sur ces procédures, s'y " appliqueront en vertu du présent acte, *autant que la nature du cas pourra le* " *permettre; et la collocation et la distribution des deniers provenant de cette* " *vente* d'immeubles seront faites dans le bordereau des dividendes entre les cré- " anciers ayant des créances privilégiées ou hypothécaires sur les immeubles, " *après collocation des frais et déboursés, y compris la commission du syndic* " *sur le* PRIX DE VENTE, qui ont été nécessités par cette vente ou qui en découu- " lent, de la même manière quant à toutes les parties essentielles, que la collo- " cation et la distribution des deniers provenant d'une vente d'immeubles sont " faites dans la Cour qu'il appartient, dans les cas ordinaires, *excepté autant* " *qu'elles pourraient être incompatibles avec les dispositions du présent acte;* " mais nulle partie des frais généraux encourus dans la liquidation des biens du " failli ne sera imputée sur ces deniers ou n'en sera distraite, sauf sur la balance " qui pourra rester après paiement de toutes les créances privilégiées et hypo- " thécaires. *La commission du syndic sur pareille vente sera la même que celle à* " *laquelle a droit le shérif sur les ventes faites par lui*.....

Ainsi, d'après cette loi, les ventes du syndic sont faites: 1o. sujettes aux charges et hypothèques que la loi permet de laisser subsister sur les immeubles lorsqu'ils sont vendus par le shérif; 2o. *de plus* sujettes à toutes autres charges hypothèques *non échues* à la date de la vente, et de celles que les créanciers consentent à y laisser.

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Il y a donc là une différence importante entre *la vente par le shérif* et la *vente par le syndic.*

Dans le premier cas, les seules charges qui restent sur la propriété sont :

1o. Les charges foncières et les rentes, s'il en est fait exception au procès-verbal de saisie ; (C. P. C. art. 640)

2o. Les servitudes dont l'immeuble est chargé (C.P.C. art. 709.)

3o. Les rentes seigneuriales, l'emphytéose, les substitutions non ouvertes, et le douaire coutumier non ouvert (art. 710.)

La vente du shérif purge *tous autres droits réels.*

(C. P. C. art. 711.)

Dans le second cas, c'est-à-dire celui d'une vente par le syndic—la vente peut se faire *sujette à toutes ces mêmes charges*, et *de plus sujette à toutes les hypothèques non échues et à toutes celles que les créanciers hypothécaires veulent bien laisser sur l'immeuble.*

Il est facile de comprendre, d'après cette disposition, que la vente du syndic, lorsqu'elle est faite sujette à ces charges additionnelles que la loi permet de laisser sur l'immeuble vendu, ne peut produire, *en deniers comptants*, le même résultat que si la vente était faite aux conditions fixées pour les ventes du shérif. Dans bien des cas, en effet, les immeubles vendus seront hypothéqués pour leur pleine valeur, et telle vente qui rapporterait beaucoup *en deniers comptants*, si elle était faite par le shérif, ne rapportera rien, ou presque rien, si elle est faite par le syndic, à la charge des hypothèques.

Cependant le législateur a accordé au syndic sur la vente par lui faite, une commission égale à celle que le shérif a le droit de percevoir. Est-ce un droit illusoire que la loi a ainsi voulu donner au syndic? Il n'est pas possible de le croire, surtout si l'on considère que cette commission n'est pas accordée, comme on l'a prétendu—à raison de la responsabilité qu'encourt le shérif—ou le syndic—comme dépositaire du prix de vente, mais bien comme rémunération, comme émoluments d'office.

Autrefois le shérif ne recevait pas un salaire fixe comme aujourd'hui ; il était payé au moyen d'honoraires d'office, sur les procédures par lui faites. Voici comment s'exprime la 25e George III, ch. 2. (1785) quant aux ventes faites par ce fonctionnaire :

" Sec : 35. Emoluments alloués aux shérif. Il sera alloué, sur chaque exécution, " aux shérifs, tous leurs déboursés, et *ils seront autorisés à charger en outre et* " *au-dessus, deux et demi pour cent qui seront déduits sur le total de* L'ARGENT " PRÉLEVÉ.

La version anglaise dit : " to be deducted out of the *money he levies.*"

Ce n'est qu'en 1850 (13 et 14 Vict.) que cet état de choses fut changé et que l'on décida de payer un salaire au shérif : les honoraires qu'il était autorisé auparavant à percevoir, devant continuer à être prélevés pour former un fonds général placé sous le contrôle du Receveur de la province.

Le législateur en promulguant la loi de faillite a procédé de la même manière, et instituant, pour la liquidation des biens des faillis, un officier auquel il donnait, dans certains cas, les mêmes pouvoirs qu'au shérif, il lui a accordé, comme rémunération des honoraires d'office pour les procédés par lui faits et

notamment la même commission de deux et demi par cent sur les ventes d'immeubles.

Mais comme il autorisait, pour les ventes par le syndic, un mode tout différent de celui suivi pour les ventes par le shérif—c'est-à-dire celui de la *vente à la charge des hypothèques*, mode qui devait nécessairement produire un résultat tout autre que celui de la vente pour argent comptant, le législateur a compris qu'il ne pouvait faire porter la commission du syndic, comme celle de shérif,—*sur l'argent prélevé*,—on the monies levied—et il en autorise le prélèvement *sur le prix de vente*,—on the price of the sale—(sec. 77).

Or, quel est le prix de vente? C'est évidemment la somme au moyen de laquelle l'adjudicataire obtient la propriété de l'immeuble vendu. Si l'immeuble est vendu à la charge des hypothèques, le prix de vente consiste dans le chiffre des hypothèques que l'acquéreur entreprend de payer et dans la somme additionnelle qui complète son enchère.

Ceci est évident lorsque l'adjudicataire est un étranger, un tiers; pourquoi en serait-il autrement lorsque l'adjudicataire est le créancier hypothécaire? Le créancier hypothécaire n'en paye pas l'immeuble moins cher, parcequ'il a déjà avancé la somme; et de quelque côté que l'on considère l'opération, le montant de son hypothèque fera toujours partie de son prix d'achat.

Donc, aux termes de la loi, le syndic est en droit d'exiger sa commission sur le chiffre de l'hypothèque à la charge de laquelle l'immeuble est vendu, aussi bien que sur la somme additionnelle offerte à l'enchère pour parfaire le prix.

Dans l'espèce, le syndic a refusé à l'adjudicataire de lui passer titre à moins d'être payé de sa commission sur le *prix de vente*. L'adjudicataire s'est plaint de ce refus et a demandé, par une Requête à cette fin, qu'il fut enjoint au syndic de lui donner son titre, sur paiement des deux et demi par cent sur la somme qu'il est convenu de payer à part de l'hypothèque.

La majorité de la Cour croit que le jugement qui a renvoyé cette requête est bien fondé et elle le confirme.

La loi a été interprété dans le même sens dans une cause de *Chauveau* vs. *Evans*, par M. le juge Johnson, et rapportée au 3e vol. du *Legal News*, p. 78.

TORRANCE, J., concurred.

Jugement confirmé.

Judah & Branchaud, avocats de la requérante.
Geoffrion & Cie., avocats du syndic contestant.
(J. K.)

SUPERIOR COURT, 1880.

MONTREAL, 17TH SEPTEMBER, 1880.

Coram TORRANCE, J.

No. 1969.

Barthe vs. [illegible]

HELD:—That where *contrainte par corps* has not been demanded by the conclusions of an action of damages for personal wrongs, it may be asked for by motion, after judgment rendered in favor of plaintiff.

The plaintiff had obtained judgment against defendant in damages for $200,

Barthe vs. Dagg.

for having caused his arrest without probable cause. The merits of a rule were now before the Court, under which it was sought to imprison the defendant for non-payment of the judgment.

The defendant resisted the demand for imprisonment on the ground that the plaintiff had not asked for imprisonment by his declaration, and the judgment condemning him to pay the money had not ordered imprisonment.

Lebourveau, for defendant, cited:—C. C. P. (Foran), p. 22, No. 3; p. 248, Nos. 3 and 4; Dictionnaire de Leg. & Jurisp. (Dalloz), vol. 1, p. 663, Nos. 22 and 25; Dictionnaire de Droit Civil (M. Rolland de Villargues), vol. 6, p. 142, Nos. 10 and 11; Code Civil (Boileux), vol. 7, p. 76 last part; p. 77 last part, p. 38 first part; Code Civil (Marcadé), vol. 9, Nos. 871 and 872.

PER CURIAM:—The Civil Code, Art. 2272, enumerates among the persons liable to imprisonment "any person indebted in damages awarded by the judgment of a Court for personal wrongs, for which imprisonment may by law be awarded. In the present case the defendant is indebted in $200 for damages for personal wrongs. Here is an application for imprisonment following the judgment of indebtedness. I see nothing in the demand which is not in conformity with our Code. The old law in the Ordonnance of 1667, Tit. 34, Art. 10 and 11, would appear to contemplate two judgments. The authorities from the modern French law would appear to support the pretension of the defendant, but they are misleading when our law has its own rule on the subject. It is true that the plaintiff did not ask for imprisonment by his declaration, but I do not consider that the omission was an abandonment of his rights under C. C. 2272.

Rule made absolute.

F. Keller, for plaintiff.
Lebourveau, for defendant.
(J.K.)

SUPERIOR COURT, 1880.

MONTREAL, 12TH OCTOBER, 1880.

[IN CHAMBERS.]

Coram TORRANCE, J.

No. 61.

Cramp vs. *Cocquereau et al.*

HELD:—That a judicial surety is not entitled to an alimentary allowance under C. C. P. 790.

The defendant was in jail under a judgment ordering *contrainte par corps*. The debt arose out of a judicial suretyship, to wit, a bond for costs in appeal.

J. C. Lacoste, for defendant, applied for an alimentary allowance under C. C. P. 790.

G. B. Cramp, e contra, cited C. S. L. Can., Cap. 87, s. 6 and s. 24:—*Vermette* vs. *Fontaine*, 6 Q. L. R. 159.

TORRANCE, J., rejected the application on the ground that the judicial surety was not entitled to the alimentary allowance—it was given to a debtor arrested by a *capias*.

G. B. Cramp, for plaintiff.
J. C. Lacoste, for defendant.

Petition rejected.

(J. K.)

COURT OF QUEEN'S BENCH, 1880.

MONTREAL, 17TH SEPTEMBER, 1880.

Coram SIR A. A. DORION, C.J., MONK, J., RAMSAY, J., CROSS, J.

No. 191.

THE CITIZENS INSURANCE COMPANY,

(*Defendants in the Court below*),

APPELLANTS;

AND

THE GRAND TRUNK RAILWAY COMPANY OF CANADA,

(*Plaintiffs in the Court below*),

RESPONDENTS.

The defendants, by a guarantee policy, guaranteed an employee of the plaintiffs in the terms following:—"The said employee shall honestly, diligently and faithfully discharge and transact the duties devolving upon him....and shall faithfully account for and pay over to the said Railway Company all such moneys as he, the said employee, shall receive for or from the said Company....and, in default thereof, that the said Company (defendants) shall indemnify the said Railway company (plaintiffs) against all loss and damage, costs and expenses, which the said Railway Company shall sustain or incur by reason of any act, matter or thing whatsoever, done or committed, or omitted to be done by the said employee, in or arising out of his said employment, and for which the said employee shall be liable by law to indemnify the said Railway Company." The employee left a large sum of money in open bags in his office while he went to lunch. On his return the money had disappeared. He had at his disposal a desk with lock drawer and a strong box, as well as a vault, none of which he availed himself on this occasion for the safe-keeping of the money.

HELD:—That although there was no suspicion or imputation of dishonesty against the employee, there was negligence sufficient to constitute a breach of the warranty of diligence and fidelity, and the Guarantee Company was liable on the policy.

The appeal was from a judgment of the Superior Court, Montreal, RAINVILLE, J., 30th September, 1878, maintaining an action on a guarantee policy of insurance. See 22 L. C. Jurist, pp. 235–239, for report of the judgment of the Superior Court.

The unanimous judgment of the Court of Appeal was rendered as follows:—

RAMSAY, J. This is an action by the Grand Trunk Railway Company of Canada on a guarantee policy of insurance. The condition of the policy is that one Faulkner should honestly, diligently and faithfully discharge and transact the duties devolving upon him in his employment by the said Company, plaintiffs; "and that he, the said David Faulkner, should faithfully account for and pay over to the said Railway Company all such money," &c., "he should receive for or from the said Company." The breach is that Faulkner had received $22,489.65 of the money of the Company, and that he had not faithfully accounted for or paid over any portion of said sum except $412.65. The facts are that Faulkner drew the money from the Bank of Montreal on the 22nd June, 1877, a little before 12 o'clock; that he carried the money in two bags to his office in Jacques Cartier Square, in a building used by plaintiffs, respondents, and, having occasion to go out to his lunch, he placed the two bags under his desk, locked the door of his room, and went out. When he returned in twenty minutes or half an hour after he found the door unlocked; that the bag with the notes in it

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had been opened, and all the money, except a $10 bill which had fallen on the floor, had been carried off. The bag with the silver was untouched.

The Insurance Company, appellants, contend that Faulkner has faithfully accounted for the whole money, which was stolen in his absence, and that, if there was any negligence, it was on the part of the Railway Company, which did not provide him with the proper means of preserving the money entrusted to his care, and, consequently, that the Company, appellants, is not liable.

It may at once be said that the Company respondent has never alleged, and does not contend, that Faulkner is guilty of dishonesty in the matter. His antecedents and his conduct at the time of the transaction repel any suspicion of the sort. But the policy warrants his diligence and fidelity. Did he use all the care a man dealing with so large a sum of money ought to have used? Could he have taken greater precautions under the circumstances? It seems to us he did not exercise common prudence in leaving this large sum of money under the table, in what may almost be called an open room, for it was a badly fastened door on a common stair, without any guardian, and leaving the building. Again, we find nothing to show that the Grand Trunk Railway Company, by its arrangements, either ordered or sanctioned such a proceeding. It evidently was not necessary. He could have placed the money in the vault down stairs if he had liked,—he could easily have placed it in the galvanized iron box,—he need not have drawn it from the Bank till after his lunch, and, above all, he might have sent out for his lunch, or done without it. He was, therefore, guilty of negligence, and we think the judgment should be confirmed.

Judgment confirmed.

Abbott, Tait, Wotherspoon & Abbott, for appellants.
G. Macrae, Q. C., for respondents.
S. Bethune, Q. C., counsel for respondents.
(J. K.)

COUR DE CIRCUIT, 1881.

MONTREAL, 21 MARS 1881.

Coram JETTÉ, J.

No. 6978.

Patenaude et al. vs. *McCulloch.*

JUGE:—1o. Que dans les causes de $60 et au-dessous, tout plaidoyer au *mérite* produit à la suite d'une exception à la forme doit être reçu *gratuitement* par le greffier, lorsque l'honoraire établi par le tarif pour la contestation des actions de cette classe, a été payé sur l'exception à la forme.

2o. Que dans les causes en question, le tarif n'impose aucun honoraire particulier sur les exceptions préliminaires ou les plaidoyers au mérite, mais comporte simplement qu'un honoraire sera payé au greffier sur la contestation de ces actions.

3o. Que dans l'espèce actuelle, le seul honoraire pourvu par le tarif ayant été payé sur l'exception à la forme, le greffier était tenu de recevoir le plaidoyer au mérite du défendeur, sans exiger un nouvel honoraire.

L'action en cette cause était pour moins de $25.

Le défendeur y répondit d'abord par une *exception à la forme*, sur laquelle fut apposé un timbre de 30 centins.

Il fut ensuite disposé de cette exception du consentement des parties, après quoi le défendeur offrit un plaidoyer au mérite qui fut refusé par le greffier, pour la raison qu'il n'était pas, comme l'exception à la forme, revêtu d'un timbre de 30 centins. Patenaude et al. vs. McCulloch.

Le défendeur prétendant qu'en ce cas, aucun honoraire nouveau n'est imposé par le tarif, fit, contre le greffier, la motion suivante, pour qu'il lui fût enjoint par le tribunal, de recevoir son plaidoyer :—

" Motion du défendeur, qu'attendu que le greffier de cette Cour a, sans " aucun droit, cause ni raison, injustement, arbitrairement, contrairement aux " exigences du tarif et aux décisions de cette Honorable Cour, refusé de rece- " voir son plaidoyer au mérite, intitulé *Défense au fond en fait*, et que par " suite de ce refus, le dit défendeur est exposé à être condamné par défaut : " qu'il émane de cette Honorable Cour, un ordre enjoignant au dit greffier de " recevoir le dit plaidoyer et d'en faire l'entrée au plumitif conformément à " l'usage ; et faute par le dit greffier d'obéir à l'ordre du tribunal, qu'il soit " déclaré en mépris de cette Cour et traité en conséquence, *nisi causâ*, le 11 " mars courant : le tout avec dépens."

Lors de l'audition, le défendeur cita au soutien de ses prétentions, la cause de Thibault vs. Coderre, rapportée au 15 L. C. J. 330 et celle de la Compagnie d'Assurance des Cultivateurs vs. Beaulieu, rapportée à la page 24 du présent volume. Il invoqua aussi le tarif officiel et la pratique suivie à Québec, de n'exiger qu'un seul honoraire en pareil cas.

J. L. Archambault, de la part du greffier, prétendit qu'un honoraire devait être payé sur chaque plaidoyer, que ce fût un plaidoyer préliminaire ou un plaidoyer au mérite ; et que le fait d'avoir payé 30 centins sur l'exception à la forme, ne pouvait dispenser le défendeur d'un semblable honoraire pour le plaidoyer au mérite. D'ailleurs, continue M. Archambault, les exceptions à la forme n'étaient le plus souvent que des procédés purement vexatoires, tendant à retarder injustement les demandeurs dans le recouvrement de leurs créances ; ces exceptions avaient toujours été en discrédit auprès des tribunaux et si l'on obligeait les défendeurs à payer séparément et les plaidoyers au mérite et les exceptions à la forme, ce serait peut-être le moyen le plus efficace de diminuer le nombre de ces dernières exceptions, qu'il considérait comme une calamité, et il invoqua enfin, à l'appui de sa thèse, les articles XXIV et XXV des Règles de Pratique de la Cour de Circuit, comme moyen très-efficace de résoudre la question et de mettre fin au débat.

La Cour prit la question *en délibéré* et, après le plus scrupuleux examen, déclara bien fondées les prétentions du défendeur, et lui accorda sa motion avec dépens.

Motion accordée.

J. G. D'Amour, faisant motion.
J. L. Archambault, représentant le greffier.
(J. G. D.)

SUPERIOR COURT, 1881.

SWEETSBURGH, 23RD MAY, 1881.

Coram BUCHANAN, J.

No. 2691.

Joyal vs. *Safford.*

HELD :—1st. That the four days given to a defendant in which to file preliminary exceptions is a right given to him which cannot be restricted when the fourth day falls upon a Sunday or non-juridical day.

2nd. That suits under the Dominion Election Act of 1874 to recover penalties for bribery, are civil suits for the recovery of debt controlled by the procedure governing actions in the Province in which they are instituted, and, in consequence, in this Province seven distinct and separate penalties for contravention of the Dominion Election Act may be cumulated as to amount in one and the same action.

BUCHANAN, J. This action is brought for the recovery from the defendant of the sum of $1400, being for the penalties alleged to have been incurred by defendant for having, on or about the 18th of October, 1880, at the election of a member to serve in the House of Commons for the Electoral District of Brome, in the place of Mr. Chandler deceased, illegally and corruptly offered and promised to give and pay divers sums of money to seven different persons, voters in said Electoral District, to bribe them to vote for Mr. Manson, then a candidate for election. The declaration sets forth seven distinct offences against the bribery clause No. 92 of the Dominion Election Act, 37 Vic. cap. 9, by the defendant, whereby he was subject to seven distinct and separate penalties of $200 each, and which are here cumulated as to amount, and by one and the same action the gross amount of such penalties, $1400, is sought to be recovered from the defendant.

The defendant has met the suit by an *exception dilatoire*, calling upon plaintiff to make his option as to which one of said offences he intends to proceed upon, and as grounds thereof he says that plaintiff has illegally cumulated seven different offences in the same action, and seeks for one condemnation for seven separate offences; that the statute in question imposes only one penalty upon offenders against this section, and that plaintiff cannot demand more than one penalty of $200, and defendant cannot be condemned in the same suit to pay more than one penalty.

The plaintiff answers: 1o, in law (which would more correctly be done by motion), that the exception was not filed within the legal delay of four days from the return of the action—it having been returned on the 9th of March, and the exception filed on the 14th March; and, 2o, putting in issue the merits of the exception.

The case is now heard on the issues raised by that exception. By Art. 107 C. C. P. four days are given from the return day of the writ for the filing of preliminary exceptions. This is a right given to a defendant. In this cause the fourth day was a Sunday, and if plaintiff's pretention was correct the defendant would be restricted of his rights, and he would only have had three days wherein to file his preliminary exception. This pretention cannot be supported, and all doubt on the point is removed by the 3rd Art. C. C. P., which says that, if day on which anything ought to be done, is a non-juridical day, such thing

may be done with like effect on the next following juridical day. Now, the 13th March (the 4th day) was a Sunday, and the next day being the one on which the exception was actually filed was effective for that purpose, and the delay to file this exception did not expire until the 14th March. The cases cited from 2 Legal News, Boulerisse v. Hébert, p. 196, and Darby v. Bombardier, p. 202, do not touch the point raised here. In those cases the question was as to an intermediate day, whether in such case Sunday would count—a case not met, as here, by the 3rd Art. before alluded to. The case of Brock et al. v. Theberge, 9 L. C. R. p. 231, was decided before the enactment of our Code, and is of no force now on the point in question. Consequently, the demurrer or answer in law must be dismissed.

I come, then, to the main point of the case under its present issue. By sec. 109 of the Dominion Election Act of 1874 it is enacted that all penalties and forfeitures imposed by that Act shall be recoverable with full costs of suit by any person who will sue for the same by action of debt or information. By sec. 111 his recourse is called a civil suit. By giving this nomenclature to the action or proceeding for the recovery of penalties, as well as for other reasons, the Legislature clearly intended that such proceeding should be regulated by the laws of procedure governing actions in the Province in which they were instituted. Being merely an action of debt or civil suit, the procedure therein, in this Province, must be controlled by the provisions of our own Code of Procedure. By Art. 120 of that Code, sub-sec. 5, it is said that the defendant may stay the suit when the plaintiff has joined in his action several claims which are incompatible or susceptible of different modes of trial, and the point to be considered is, whether in the present action there is anything incompatible, as alleged by defendant, in the joinder in the same suit of several distinct offences and the cumulating the amount of the penalties accruing therefrom.

These offences are all of one class, bribery, under the same section—alleged to have been committed at the same time and place and in regard to the same election. The word incompatible means inconsistent, disagreeing, but I do not find here any inconsistency between the different counts of the declaration—all the offences charged being of the same nature, viz., in money. Under the law of England such joinder could be made, and in looking at Archbold, Nisi Prius, Vol. 1, p. 418, in treating of actions of debt on penal statutes, there is a form of declaration given, and after the first count setting forth the liability for one penalty there follows a note from the pleader saying: "if you wish to add a second count for another offence you may do it thus——." As regards the French law, Pigeau, Vol. 1, p. 37, says: "Dans la règle générale, on ne peut cumuler, "c'est-à-dire, exercer par le même acte deux ou plusieurs actions qu'on a contre "une personne, et qui procèdent de causes différentes: ainsi supposé que Pierre "en ait une contre Paul, pour l'obliger à se désister de la possession d'une mai- "son que lui Pierre prétend lui appartenir, et qu'il en ait en même temps une "autre pour demander à Paul de l'argent qu'il lui a prêté; ces deux actions ne "tendant pas d'un principe, doivent être intentées séparément: la raison est "que les joignant, cela ferait une confusion dans l'instruction: les raisons à oppo- "ser contre ces deux actions et les voies que le Juge doit prendre pour s'éclaircir si

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"elles sont fondées, n'etant pas les mêmes, cette complication ferait que les deux "actions s'embarrasseraient et se nuiraient respectivement dans leur marche." This is the rule adopted by the code, and the illustration given by Pigeau makes a practical application of that rule, but none of the causes there given entitling a defendant to the exception in question apply to this case. The grounds of this suit do not proceed from different causes in the sense given to that rule by Pigeau, nor can there be here any "confusion dans l'instruction." Here apparently all that is involved is a question of proof as to how far all or any of the offences are established by the evidence, the consequences thereof being provided for by a penalty by the Statute. The defendant must necessarily admit that he is liable to seven distinct separate actions, and the policy of our courts has always been so far as is possible, and where it works no injustice, to avoid circuity and multiplication of actions.

It will be found in looking over the reports that there are several cases where the same action has included several penalties under the Dominion Election Act, and I might refer to the case of Terriault vs. Ducharme, 3 Legal News, p. 354, where 30 penalties were sued for, and this case was taken through the Court of Review. It does not appear that a similar issue was raised therein, as in the present case, and of course so far is not a precedent, but we may infer from the silence of the defendant on this point in that case and in other like cases that it was not considered that an exception would lie, or it would have been taken. The *exception dilatoire* here pleaded must be dismissed with costs.

Jno. P. Noyes, for plaintiff.
E. Racicot, for defendant.

Exception dismissed.

(J. P. N.)

SUPERIOR COURT, 1881.

SWEETSBURG, 23RD MAY, 1881.

Coram BUCHANAN, J.

No. 2583.

Bertrand vs. *Hinerth.*

HELD:—1. That an admission of indebtedness in a plea, with an offer of confession of judgment, not accompanied by such confession but accepted by plaintiff in his answer, is sufficient whereon to base a judgment for the amount of such admitted indebtedness.

2. That upon such admission, in default of any absolute provision for such a case in the tariff, the costs will be taxed at the discretion of the Court.

BUCHANAN, J. The plaintiff by his declaration claims from the defendant the sum of $306.35, interest and costs—the action being accompanied by process of *saisie gagerie*. The *demande* for this sum is based upon two titles styled leases: one from Dr. Gatien to plaintiff of a property in Granby for a term of ten years from 1st May, 1876, at an annual rent of $70; the other being from plaintiff to defendant sub-letting same premises for unexpired term of plaintiff's lease, and including all the machinery, &c., of plaintiff in and about the buildings leased. The sub-lease was made, 1st, for said annual rent of $70 and other conditions of no importance here; and, 2nd, for the sum of $1300 on account thereof.

$200 was then paid, and as to the balance, $1100, defendant bound himself to pay the same to plaintiff by stated instalments, and on his default the machinery, &c., alluded to should belong to plaintiff. The declaration, after setting forth these facts, alleges that there was a balance due plaintiff under those two titles of the amount sued for.

The defendant by his plea says that all the rent of the premises leased from Dr. Gatien has been paid; that as to the stipulation in regard to the machinery, &c., it was not a lease but an actual sale, accompanied with possession, and the amount sued for, apart from the rent going to Dr. Gatien, represents a *prix de vente*, and is not a debt by nature of which plaintiff had a right to *saisie gagerie*; that, at the time of the institution of the present action, the *defendant was only owing the plaintiff* the sum of $200, being the instalment coming due and which became due to plaintiff on the 1st January, 1880, and interest thereon from the 18th day of March until the institution of the present action and its service, to wit: a sum of 16 cents, forming a total sum of $200.16 "for which said defendant hereby offers to confess judgment with costs of an action of that class,"—and concluding to the effect that *acte* be granted him of his offer to confess judgment for said last sum and interest from the service of this present action, with costs of an action of that class. And in case the plaintiff should not accept that offer that his action for any amount above and in excess of that sum be dismissed with costs from the fyling of the plea, and that in any case the *saisie gagerie* be quashed. The whole with costs against the plaintiff. This pleading is followed by a *défense au fond en fait*.

Issue was joined by plaintiff by an answer containing the following allegation: "That nevertheless, for the purpose of expediting proceedings in this cause, the "said plaintiff is ready and willing to accept and hereby accepts the plaintiff's "confession of judgment for $200.16.

"Wherefore, plaintiff praying *acte* of his acceptance of defendant's said confes- "sion of judgment for the sum of $200.16 under reserve, &c., prays the dismissal "of said plea as regards all other points therein raised, persists in his *saisie* "*gagerie* and declaration in this cause, and prays as he therein and thereby "hath already prayed, to the extent of said sum of $200.16 with costs."

As it appears from the argument of this case that it now presents itself merely as regards the amount of costs in which defendant must be condemned, besides the amount of admitted indebtedness as contained in his plea and accepted by plaintiff, I have for that reason stated with some particularity the pleadings in this case, so that we may ascertain its exact position. No evidence has been adduced on either side, further than the production of the leases by plaintiff, and of his receipts by defendant, so that it is established that the amount of defendant's indebtedness was only the said sum of $200.16 and interest at the time suit was brought. It is evident from the nature of the claim to this amount that plaintiff was not entitled therefor to attachment by *saisie-gagerie*; the amount due was not for the leasing of real property, and even if it was a lease of the machinery merely and was not a promise of sale, no privilege of attachment belonged thereto, and the attachment as made must be quashed.

As regards the costs of suit there was a good deal of contention by plaintiff that

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he was entitled to full costs of suit because the plea was a mere offer of a confession of judgment, and no such confession was actually made or filed; that he could not inscribe for judgment on an offer, and that the defendant in order to avail himself of the right he claimed to a diminished amount of costs should have fyled a confession. This argument was supported by the authority of Latham *v.* Martin, 18 Jurist, p. 257. In that case, although there was no acceptance of the offer, as here, the judgment of the Court of Review was, in effect, agreeable to the pretensions of the plaintiff here. The principle of that judgment, however, has been modified, if not in effect reversed by a judgment rendered subsequent to that of Latham *v.* Martin, in a case in the Court of Appeal, Poulin et al. and Prevost, decided the 21st Dec., 1875. In that case the appellants, being sued, offered to confess judgment for all but a sum of $18, which they said they did not owe. The respondent (plaintiff) contested this, but did not succeed in proving any larger amount to be due than that for which the appellant offered to confess judgment. The judgment of the Superior Court was for the amount offered and full costs, inasmuch as no confession had been fyled. Hence the appeal. By the judgment of the Court of Queen's Bench that judgment was reversed, one of the reasons, the main one, being as follows: "Considérant qu'il n'est ici question que des admissions faites dans les plaidoiries écrites et non d'une confession de jugement, et que l'article 94 du Code de Procédure n'est pas applicable à cette cause"—and thereupon the Court condemned the respondents to pay the difference of costs between an action settled after plea fyled and a contested action up to judgment. That case although unreported in any of our books of reports so far as I can ascertain, is contained in a newspaper of which I have obtained a copy for perusal, and I give it here in extenso, as being a matter of interest generally to the profession.

"RAMSAY, J. (*diss.*) This was an action on a note for a certain sum of "money, and the defendant came in by his plea and admitted all but a small "portion of the claim. The plaintiff went on, and tried to prove the whole "debt, but failed. In effect the judgment went for the sum which defendant "admitted to owe, and the defendant was condemned to pay the costs "of the suit. As the case came up it looked as though the defendant's "admission was a confession of judgment under the Code of Procedure, but "he did not think it was a regular confession of judgment, and held that costs "were due. On examining the plea he (Ramsay, J.) found that it was not "a confession of judgment at all, but only an admission of indebtedness. The "question was, whether the judgment might have awarded the defendant costs "after plea fyled. The Court below might, in the exercise of its discretion, have "given some special order as to costs. There appeared to be no tariff to meet "the case, but the Judge might have made a special order. Was this Court to "interfere with the judgment because he had not done so? It had always been "held that questions of costs were discretionary with the Court below, and if the "Court of Appeals undertook to over-rule the judgment in the present case it "would be exercising a control over the lower Court as to costs which would "prove very troublesome. It was, perhaps, a small point, but his Honor regard-

"ed it as of sufficient importance to warrant him in dissenting from the judgment "about to be rendered."

"Dorion, C.J., had no difficulty in deciding that the judgment below was "unjustifiable. The only difficulty he had was as to interfering with a judg- "ment on a question of costs. It had been a very considerable difficulty with "him, but the Court here found that the judgment was not only wrong but set "out a principle which could not be allowed to pass. The Court was, therefore, "obliged to deal with it. The action was for $205, amount of a promissory note. "The defendant pleaded distinctly that he owed $184.52, claiming that from "$202 there ought to be deducted two items of about $18. The plaintiff con- "tested that plea in its entirety. He went into a long enquête, and the judg- "ment was for the amount which the defendant offered, but it also condemned "him to the whole costs of the action, including the enquête, upon which the "defendant succeeded, for there was no other enquête in the case except as to "the $18. The judgment sustained the defendant's pretensions, but said that, "inasmuch as the defendant should not only have offered to confess judgment, "but should have done so, he must be condemned to pay costs. The only "question was whether the plaintiff could have inscribed his case and obtained "judgment for the $184 on the admissions in the plea. He considered that plain- "tiff could certainly have done so, and referred to Art. 144 of the Code of Pro- "cedure, which says that every fact the existence or truth of which is not "expressly denied is held to be admitted; and to Art. 214, which says if a fact "denied in an answer to an articulation of facts is afterwards proved, the party "who denied it must pay the costs incurred by such proof, whatever may be the "issue of the suit. The object was to oblige parties to plead in good faith. It "was more than a mere question of costs—it was a question of principle. "Although reluctant to disturb a judgment on these points he thought it must "be reversed."

"SANBORN, J., had no reluctance whatever in maintaining the appeal. It was "one of those appeals that ought to be maintained. It settled an important "question of right. There were conflicting decisions on the point. His Honor "referred to Routh vs. Dougall, 2 Jurist, p. 286; in which Mr. Justice Day "held that where a substantial confession was proved the plaintiff should pay "costs of contestation.

"MONK, J., said the only question was whether the defendant had gone far "enough in his plea to enable the plaintiff to obtain judgment on the admission. "His Honor thought defendant did make his offer clearly enough. He had "no hesitation therefore in saying that the judgment was wrong.

"Judgment reversed."

Applying the law and principle laid down by the *Court of Queen's Bench*, which I understand have been followed since at *Montreal*, I must take the admissions of the defendant here as to his amount of indebtedness to plaintiff to have been sufficient for the plaintiff whereon to have inscribed in judgment, and under that rule he will be entitled to costs as determined by the judgment. The point that a plea of general issue was fyled has not been omitted from consideration, but I do not perceive that it can affect the question at issue materially.

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It may have been necessary that such a pleading should have been fyled. In Poulin et al. vs. Prévost, it is true, there was no general issue, but in that case the affirmative offer met the whole case,—here, it did not. There were two issues presented, the offer of judgment of a certain sum and as to the real payment, and I cannot undertake to settle here a point which it is not necessary I should adjudicate upon, viz., as to the effect of an affirmative and a negative plea being both pleaded together. It is a point on which there is some controversy, and on which a great deal of legal learning has been expended, as may be gathered from the somewhat numerous cases in our reports on the subject. The admissions of indebtedness although contained in the pleading, stand in the record, and are as effectual to bind the parties, particularly when specially accepted, as in this case, as if set forth in a separate and distinct document, and the *défense au fond en fait* did not affect nor impair the strength and force of those admissions.

The case here, as to costs, does not come precisely within any items of our Tariff, yet as far as I can ascertain, but in the exercise of that discretion which the Court may adopt, I have brought the case under item No. 8 of the Tariff of Advocates Fees in the S. C., with the addition of disbursements necessary for the inscription for obtaining judgment, which I think meets the justice of the case and covers the fees of all the proceedings which the plaintiff was entitled to take. No costs can be given on the quashing of the attachment, for none are provided for where the issue upon it has been, as here, only raised by the plea to the merits. If it had been done by a separate and distinct proceeding costs would have accrued.

J. F. Leonard, for plaintiff.
E. Racicot, counsel.
Lynch & Co., for defendant.
(J.P.N.)

COURT OF QUEEN'S BENCH, 1881.

MONTREAL, 9TH FEBRUARY, 1881.

Coram SIR A. A. DORION, C. J., MONK, J., RAMSAY, J., BABY, J., and CARON, J., *ad hoc*.

No. 183.

DAVID LAW,
(*Defendant in the Court below,*)
APPELLANT;

—AND—

FREDERICK FROTHINGHAM,
(*Plaintiff in the Court below,*)
RESPONDENT.

A property was sold "free and clear of all incumbrances whatsoever, save and except a vendor's privilege for $5,250 in favor of the heirs McKenzie," which the vendors by the deed of sale undertook to pay, and have a discharge thereof duly registered.

HELD:—1. That the above clause being equivalent to a stipulation of *franc et quitte*, satisfaction thereof was a condition precedent to the institution of an action for the purchase money or any portion thereof, or for arrears of interest.

2. That the purchaser, sued for an instalment of the purchase money, properly pleaded the vendor's default to fulfil the condition, by an *exception temporaire*.

3. That the purchaser, in order to be in a position to claim damages for non-satisfaction of the clause of *franc et quitte*, should put the vendor *en demeure* to remove the incumbrance, and allow a reasonable delay for doing so.

The appeal was from a judgment of the Superior Court, Montreal, Sicotte, J., July 8, 1878, by which the respondent's action was maintained.

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The action was brought to recover the sum of $3,582.87, amount of instalment and accrued interest, due Feb. 15, 1876, under a deed of sale of real estate from G. H. Frothingham and co-heirs (now represented by the respondent), to the appellant. The price was 60 cents per foot, at which rate the purchase money amounted to $20,185.20, payable in instalments. The appellant had paid two of the instalments, but objected to pay the third.

The defence was that by the deed of sale referred to, the vendors had sold the property in question "free and clear of all incumbrances whatsoever, save and except a vendor's privilege for $5,250 in favor of the heirs McKenzie," which the vendors undertook to pay, and have a discharge duly registered; that the purchase money was only payable subject to the fulfilment by the vendors of their covenant to remove the incumbrance, and that they had failed to do so. By another plea the appellant alleged that he had suffered damage to the extent of over $4,000, by not being able to carry out a sale which he had made to John Lewis at an advance of 35 cents per foot, and that the instalment sued for was compensated by the larger amount of damage.

The Court below sustained the action, for the reasons which follow:—

"Considérant que les vendeurs ont, par l'acte même, dénoncé à l'acheteur les hypothèques et charges qui grévaient le terrain vendu au défendeur, et se sont chargés de les acquitter;

"Considérant qu'il est constant que le défendeur doit, outre et en sus du paiement réclamé par l'action, une somme excédant $10,000, productive d'intérêt à sept pour cent, et que l'hypothèque qu'il dénonce n'est que de $5,250;

"Considérant que cette hypothèque est une substitution au profit des héritiers McKenzie, dénoncée par la vente, et que l'acheteur connaissait le caractère et la nature de cette dette, qu'il n'est pas dans la puissance des vendeurs de payer et acquitter à volonté;

"Considérant que le défendeur est mal fondé à demander à garder son prix entre ses mains, tant que les vendeurs n'auront pas acquitté cette dette et purgé cette substitution;

"Considérant que le défendeur est aussi mal fondé dans sa réclamation pour dommages résultant du profit qu'il aurait fait en revendant partie du terrain acheté, et qu'il n'a pu réaliser faute de pouvoir obtenir le consentement de l'acheteur qu'il indique, tant que cette hypothèque et substitution ne serait pas purgée;

"Considérant que le défendeur ne peut que demander à différer le paiement du prix à raison du péril d'éviction, et qu'attendu la dénonciation de la dette et hypothèque par le contrat de vente, il a suivi la foi et et la solvabilité des vendeurs;

"Considérant que le défendeur doit encore sur le prix au-delà de $10,000, payables annuellement avec intérêt de sept par cent, et qu'il a entre ses mains une somme plus que suffisante pour le garantir contre les périls d'éviction;

"Considérant d'ailleurs que le défendeur ne demande pas la caution contre les périls d'éviction, mais purement le débouté de l'action, et que sa dette soit compensée par les dommages sus-mentionnés, déclare le défendeur mal fondé dans ses défenses;

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"Condamne le défendeur à payer au demandeur la dite somme de $3,582.87, avec intérêt," etc.

The appellants submitted their case in their factum as follows:—

Three witnesses were examined on behalf of the plaintiff, viz., John H. R. Molson, the brother-in-law and attorney of the plaintiff, Joseph Doutre, Esq., Q.C., and H. A. McKenzie.

From Mr. Molson's evidence it appears that in 1875 the plaintiff was a resident of the United States, and was at that time travelling in Europe, and that Mr. Molson was the only person authorized to represent him in this country.

From the letter marked "C" produced by Mr. Molson, it appears that that gentleman was informed, on the 27th Feb., 1875, of the sale by defendant to Mr. Lewis. Within a day or two, afterwards it was agreed that the piece of land sold to Mr. Lewis should be discharged from the mortgage held by the heirs Frothingham on payment of the proportion ($2933.64) of the purchase money represented by that portion of the property. In a memorandum dated 2nd March, 1875, after referring to this proposed discharge, the defendant writes: "The Mackenzie mortgage is an obstacle which I will be glad if you will remove." Mr. Molson fully admits that he was informed of the sale to Mr. Lewis, and that the McKenzie mortgage stood in the way. He says: "To the "best of my knowledge and belief, this McKenzie mortgage was the only obsta- "cle to the completion of the sale to Mr. Lewis." From his evidence it would appear as if every effort that was humanly possible was at once made, and that he and the legal advisers of Mr. Frothingham kept on making efforts all the time to have the mortgage removed. "We did all we could to get the said "mortgage discharged, and I told the defendant repeatedly that we were doing "all we could to that end." But when the facts and dates are examined a little more closely, it will not appear that the efforts made by Mr. Molson and his legal coadjutors were quite so extraordinary or continuous as he would have it believed. He informs us, indeed, that on receiving the defendant's memorandum of 2nd March, 1875, already referred to, he took steps through the plaintiff's attorneys, Messrs. Abbott, Tait, Wotherspoon & Abbott, and to the best of his recollection he also spoke to Mr. G. Frothingham on the subject, and "we then instructed the plaintiff's legal advisers to do everything which could "be done to have the mortgage removed. I believe they communicated with "Mr. Doutre, Q.C., who was acting as legal adviser for Mr. McKenzie." But unfortunately Mr. Molson felt a desire at this time to follow the example of his brother-in-law and to travel in Europe. He left almost immediately after receiving the memorandum of 2nd March, and did not return till the following July, and then, finding that Mr. Geo. Frothingham was spending the summer at Cacouna, he took no further steps till his return to Montreal in September. During Mr. Molson's absence there was no one here to represent the plaintiff, and the legal advisers referred to evidently did not feel themselves obliged by their instructions to exert themselves in any particular manner, for they did simply nothing.

On the 1st September the defendant again applied by letter to Mr. Molson

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to have the mortgage removed. Mr. Molson replied in a leisurely manner on the 17th. It appears from this letter that up to this time he had really given himself no trouble whatever, and had only begun to make inquiries as to what the mortgage was, for he says he delayed replying to defendant's letter until Mr. Frothingham's return from Rivière du Loup, to ascertain what the mortgage covered, and he has found out that "it is $5250 in favor of a Mrs. "McKenzie and her heirs, and covers a large piece of land, and I understand it "can be paid off only at her death, unless with the consent of the heirs," and he goes on in the coolest manner to propose that the defendant should pay the expense of removing it! "Mr. Abbott says it would cost $200 to have this "done now. *Do you wish to go to that expense? if you do, I will see Mr.* "*Frothingham and Mr. Abbott and endeavor to have it removed.*" The defendant was naturally astonished at this proposition, and reminded Mr. Molson of Mr. Frothingham's undertaking to have the mortgage removed, to which Mr. Molson rejoined that he knew nothing of any such promise, and advised the defendant to apply to Mr. Frothingham himself!

It is perfectly evident from these letters and from the evidence of Mr. Doutre and Mr. H. McKenzie that, notwithstanding Mr. Molson's statement that he and all concerned were doing all they could ever since the 2nd March, 1875, to have the mortgage removed, the matter was in fact treated with absolute neglect and indifference, and nothing whatever was done for a whole year till February, 1876, when the appellant caused a notarial notification, protest and tender to be served on Mr. Frothingham, whereupon some communications took place for the first time between Mr. Frothingham's solicitors and Mr. Doutre, the legal adviser of the McKenzie family, the result of which was that Mr. Doutre, after looking at the deed of donation, and having one or two interviews with Mr. H. McKenzie, reported to Mr. Abbott that the mortgage could not be paid off, and thereupon all further attempts in the matter on the part of Mr. Frothingham and Mr. Molson at once ceased.

Mr. Molson, on being served with the notarial protest and notification (on the 15th February 1876, made the extraordinary statement that "the estate "*had never before been asked to remove the said vendors' claim*, but will now "use diligence in endeavouring to do so"!

The fact of the agreement between the defendant and Mr. Lewis for the sale of a portion of the property at 95 cents a foot—which is not at all denied by Mr. Molson—and the fact that this sale was broken off by Mr. Lewis, solely because of the non-removal of the mortgage in question—which Mr. Molson also admits—are abundantly proved, if they needed any further proof, by the evidence of Mr. Philips, the notary; of Mr. H. L. Snowdon, who acted as legal adviser of the purchaser; and of Mr. Lewis himself.

The decline which has taken place in the value of the property since that time, and the loss and damage sustained by the defendant in consequence of the sale not being carried out, are established by the evidence of Mr. Snowdon and Mr. Munro. There can be no doubt that the sum of $4244 has been lost by the defendant, as much as if that amount of money had been taken out of his pocket in hard cash by Mr. Frothingham.

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The appellant submits that he has a right to be indemnified for this loss. The respondent, on the other hand, defends himself against this claim, and excuses his long-continued neglect and inaction on the ground that he and his co-vendors were only bound to remove the mortgage in case it was found practicable to do so, and that, in point of fact, it was impracticable, on account of the substitution created by the deed of donation from Madlle. Beaubien to Alex. McKenzie and wife, and that in any event the respondent was never put *en demeure* until the service of a notarial protest and notification upon him on the 15th February, 1876.

In answer to this, the appellant begs to observe that the covenant contained in the deed of sale from the heirs Frothingham to himself is absolute in its terms: "which the said vendors undertake to pay and have a discharge duly registered." There is nothing in the deed to indicate an intention to make the performance of this covenant dependent on a condition or contingency. The appellant wanted to have this mortgage removed, which would be an obstacle in the way of his selling or mortgaging the property, and the vendors undertook absolutely and without conditions to have it removed and to have a discharge duly registered. No delay was stipulated for by them and therefore they were bound to perform their obligation at once. They were placed *en demeure* by the deed itself.

But let us suppose, for the sake of argument, that the respondent was not bound to perform his obligation in case of its being found impossible to perform it—has he shewn that this impossibility existed? Has he shewn that he has made any serious effort to cause the mortgage to be removed?

The respondent relies on the deed of donation as establishing the impossibility invoked by his special answers to the appellant's pleas. But what is the real effect and meaning of this deed? A substitution is undoubtedly established in favor of the children of Alex. McKenzie and his wife. But "en dérogation à ce que "dessus mentionné, et voulant la dite Demoiselle donatrice gratifier la dite "Dame donataire personnellement, il est convenu et consenti par la dite "Demoiselle donatrice qu'il sera loisible à la dite Dame donataire de vendre telle "part ou portion des terrains ci-dessus donnés à qui bon lui semblera, et à tel "prix, charges, clauses et conditions qu'elle avisera, mais pourvu que ce soit à titre "de constitution de rente, et que ce faisant, elle dite Dame donataire pourra et "aura droit de s'approprier en pur don le quart du montant de telle rente, et de telle "quart en disposer comme bon lui semblera, mais quant aux trois autres quarts, "n'en aura la dite Dame donataire ainsi que le dit sieur Alexandre McKenzie "que l'usufruit et jouissance leur vie durant ainsi que ci-dessus dit." Complete power is given by this clause to the donee to sell, and the only restriction imposed is that the sale shall be made *à titre de constitution de rente*. What is the nature of a contract of sale *à rente constituée*? It is that the purchase money can never be called up by the vendor, but that the *rente* shall be at all times redeemable at the will of the purchaser. This right of redemption is inherent in the very nature of the contract (C. C. art. 389, 1789), "La faculté pour le débiteur "de racheter à toujours la rente est de l'essence du contrat." *Rolland de Vil*

larques, Dict. du D. C. Vo. Rente, No. 162. *Poth. Bail à rente No.* 78: *Const. Rente, No.* 51. Some modification of the old law in regard to ground rents and constituted rents seems to have been introduced by the statute of 1859 (22 Vict. c. 49) the provisions of which are embodied in the Civil Code—the object of the Legislature being to extend the right of redemption further than it existed before, while at the same time parties are allowed to stipulate in a deed of sale that a rent shall not be redeemable for a given term not exceeding 30 years. It is unnecessary, however, to discuss the provisions of this statute, in the first place because they have no bearing on the present case, and, in the second, because the deeds, under which the right now in question was created, were executed long before the statute, which is not declared to be retroactive, was passed.

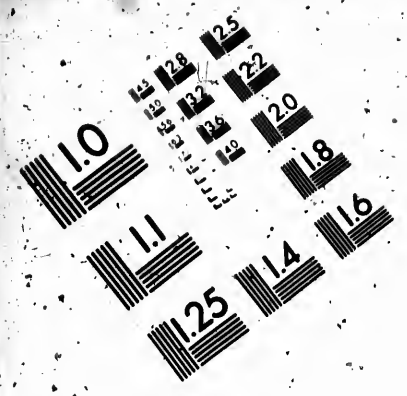
The question between the parties appellant and respondent must therefore be discussed and determined entirely with reference to the effect of the deed of donation of 11th March, 1836, for the deed of sale to the late John Frothingham of 4th May, 1844, refers back to this deed of donation, the purchaser undertaking to pay the said capital or constituted sum and the yearly interest thereon, "according to the terms of the aforesaid act of donation," that is to say, as explained in the preceding part of the clause, he undertakes to pay the constituted rent yearly to the said Alex. McKenzie and wife, and after their death to their children, "until reimbursement of the capital." There is nothing in the deed of sale to indicate an intention to alter in any way the conditions prescribed by the deed of donation; on the contrary, everything tends to shew that Alex. McKenzie and his wife desired simply to observe and carry out those conditions. Mr. Doutre bases his opinion entirely on the deed of donation, and the plaintiff relies upon it exclusively in his special answers to defendant's pleas.

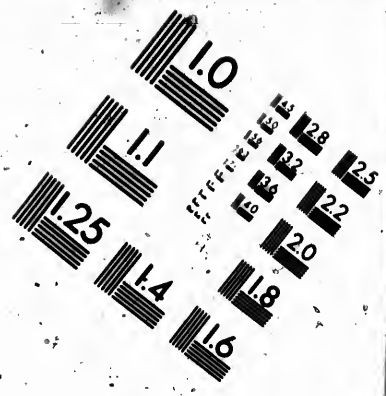
The material clause of this deed has been cited already. Its language is plain and speaks for itself. Permission is given to the donees to sell, with the single proviso that the sale shall be made "*à rente constituée.*" As the right of redemption formed an essential element of the contract of *constitution de rente*, it must be presumed that it was present to the mind of the donor at the time the donation was made, and that she fully understood and intended that this right should belong to any one who might purchase the property under such a contract.

There is nothing in this inconsistent with the nature of a substitution. A *rente constituée*, like any other kind of property, may be made the subject of a substitution. This does not alter in any way the nature of the contract. The debtor of the *rente* has the same right of redemption which the debtor of any other *rente constituée* has. This is evident from the fact that the law gives the power to the institute to receive the capital of rents redeemed. (C. C. art. 947.) He is bound to re-invest this capital, and in case of default, provision is made for compelling him to do so. (Ibid, art. 948.)

With all respect to Mr. Doutre, this point seems to the undersigned so clear as to need no argument, and they cannot help thinking that gentleman must have arrived at his conclusion without sufficient consideration.

As to the question of placing *en demeure*, the appellant submits that the respondent and his co-vendors were placed *en demeure* by the deed of sale itself.





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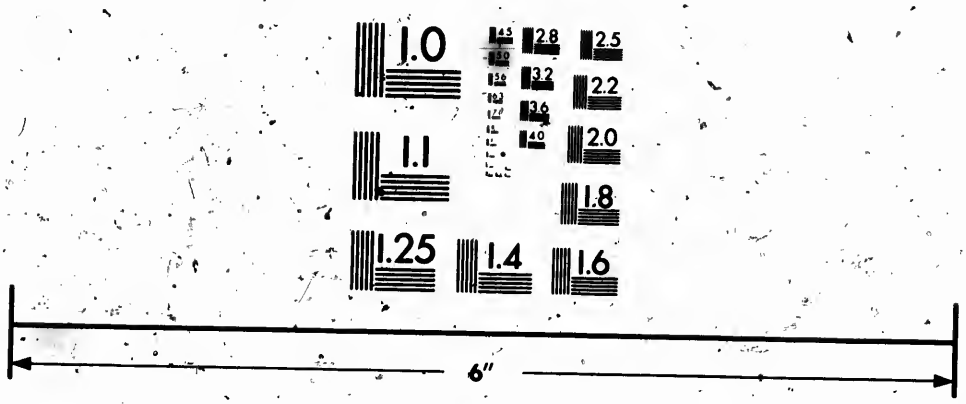

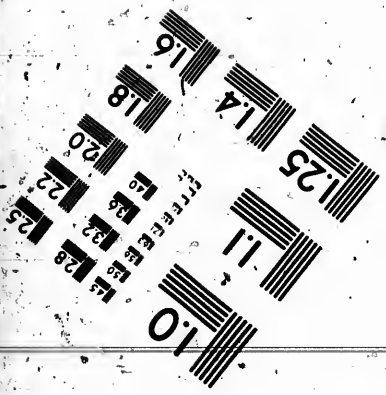

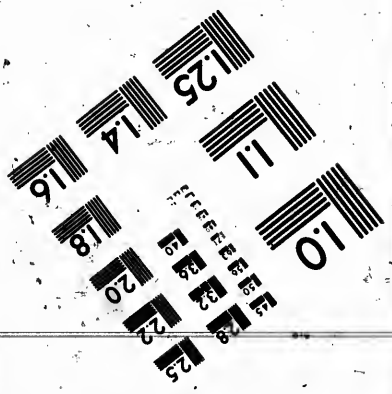

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Law and Frothingham.

They undertook to remove the mortgage from the property sold and to have a discharge duly registered. No delay was fixed for this, and therefore the undertaking of the vendors was to have it done at once. If, however, a notice was considered necessary, the letter or memorandum from the appellant to Mr. Molson of 2nd March, 1875, was a sufficient notification. Mr. Molson accepted it as such, for he says that he immediately gave instructions to Mr. Frothingham's legal advisers "to do everything which could be done to have the "mortgage removed." He was again notified on the 1st September following, and again by notary on the 15th February, 1876.

The appellant submits in conclusion—that he is entitled to be indemnified for the loss sustained by him in this matter, the amount of which is fully proved, and which, in fact, is hardly disputed, for no attempt has been made on behalf of the respondent to contradict the evidence of appellant's witnesses.

That even if the Court should be of opinion that no indemnity can be awarded to appellant for the damages sustained, the appellant has at all events a right to ask that respondent's action be dismissed under the first plea, on the ground that one party to a contract cannot be compelled to fulfil his obligation, while the other party is in default to fulfil his own.

The respondent submitted that the main questions to be considered in the case, were:

1. Is the appellant entitled to ask, as he does by his plea, that the payment of the amount sued for, be delayed and declared not exigible until respondent shall have procured the removal of the vendor's privilege declared by the deed; and that for the present respondent's action be dismissed with costs? and

2. Has the appellant any claim for damages against the respondent by reason of the refusal of Mr. Lewis to purchase the property owing to the existence of the vendor's privilege upon it?

The respondent contends that both of these questions should be answered in the negative, and in support of his contention that the first should be so answered he urges *inter alia* the following reasons:—

1. That the delay for payment of the price of sale allowed the purchaser by Art. 1535 C.C. does not apply to a case like the present, where the purchaser has contracted with a knowledge of the existence, nature and amount of the incumbrance, the same having been openly declared in the deed of sale.

2. That no time was fixed within which the vendors were to have the incumbrance removed, and that they were never placed in default till after the instalment sued for became due.

3. That it was understood between the parties, and was and is the true intent and meaning of the deed that the vendors should only be bound to have the incumbrance removed when practicable and possible.

4. That the fact that the respondent contracted upon this understanding is shown by his correspondence with Mr. Molson, and more particularly by his statement in his letter, dated the 20th September, 1875 (paper 31 dossier), which is as follows:—

"I beg for your information to state, that Mr. Frothingham promised me that "*if the mortgage* (meaning the McKenzie mortgage) *could be removed he* "*would have it removed.*"

5. That the evidence clearly establishes that it was not practicable or possible to have said mortgage removed.

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6. That, even if Art. 1535 applies to this case, appellant has no cause to fear trouble within the meaning of that Article, inasmuch as, after paying the instalment of purchase money and interest sued for, he will still have in his hands a balance remaining unpaid exceeding ten thousand dollars, which is more than ample security against the mortgage in question.

7. That delay under this article should be demanded by *exception dilatoire*, and appellant is not entitled to the dismissal of respondent's action under any circumstances.

And in support of his contention that the second question should be similarly answered, the respondent urges *inter alia* :

1. That the appellant having contracted with a full knowledge of the existence, nature and amount of the incumbrance, and upon the understanding, as shown by his letter above referred to, that the respondent was only bound to discharge the same when it was practicable and possible to do so, and which letter was written *long after the negotiations with Mr. Lewis fell through*, he cannot claim damages from respondent arising out of his failure to discharge said mortgage, after having made due diligence to have it removed, such failure being beyond respondent's control.

2. That Mr. Lewis, having as he declares determined then and there (meaning March, 1875) when he ascertained the existence of this mortgage, that he would have nothing further to do with the property, the respondent could in no way be held responsible for this determination, not having been put in default to remove the incumbrance.

3. That as appears by the correspondence and evidence in order to carry out the proposed sale to Lewis, respondent was to discharge the portion sold from his mortgage on receiving $2,933.64, and there is no evidence that this amount was ever tendered respondent.

4. That the damages claimed are too remote and consequential, and are entirely unfounded.

CARON, J., *dissentiens* : L'intimé par son action à la Cour Supérieure, réclamait $3,582.87, dont $2,525.15, pour le troisième paiement partiel sur $20,185.20, prix de vente d'un immeuble, et $1,059.72 pour les intérêts alors échus.

Le tribunal inférieur a condamné l'appelant à payer le montant réclamé.

Toute la difficulté dans la présente cause, résulte de la clause suivante, contenue dans l'acte de vente de cet immeuble :

" The said vendors declare and convenant that the said property is free and " clear of all incumbrances whatsoever, *save and except a vendor's privilege for* " $5,250.00 in favor of the heirs MacKenzie, which only affects a part of the " said property, but at the same time covers other and much larger property, and " which the said vendors undertake to pay and to have a discharge duly regis- " tered."

L'appelant réclame par ses défenses des dommages qu'il allègue avoir soufferts, en conséquence de ce que l'intimé n'a pas encore payé ces $5,250.00,

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mais nous sommes tous d'opinion, qu'il n'existe pas de preuve suffisante au dossier à cet égard, et que l'appelant n'a droit à aucun dommage.

Evidemment, l'intimé est tenu de payer cette hypothèque, en vertu de la clause plus haut cité, mais quand ? Les parties à l'acte de vente n'ont rien déterminé sur ce point et aucune époque n'y est mentionnée.

Ainsi en retardant le paiement de cette somme de $5,250.00, l'intimé n'a donc pas réellement manqué aux obligations contractées par cet acte.

L'appelant ne peut pas prétendre qu'il est trompé par son vendeur, puisque ce dernier lui a déclaré l'existence de cette hypothèque par l'acte de vente même et s'est chargé de la payer, l'appelant de son côté s'en rapportant entièrement à lui quant à ce paiement.

Lorsque l'appelant s'est aperçu que l'intimé ne payait pas cette hypothèque, ainsi qu'il y était obligé, pourquoi ne s'est-il pas adressé aux tribunaux pour l'y contraindre ? Il a préféré, comme on le voit, par les défenses produites au dossier, attendre la présente action, afin de plaider compensation pour les dommages qu'il allègue avoir soufferts par le défaut de l'intimé de payer cette somme.

Il avait ce droit, mais il a complètement failli à en faire la preuve.

Mais l'appelant peut-il invoquer l'article 1535 de notre Code Civil pour obtenir la suspension du paiement ? Je ne le crois pas, parceque le vendeur lui a dénoncé l'hypothèque en question par l'acte de vente même, et que malgré la connaissance qu'il avait de son existence il s'est néanmoins obligé à payer le prix de vente et les intérêts aux époques fixées par cet acte.

" La faculté de retenir le prix, disent Aubry et Rau, Vol. 4, p. 397, cesse " lorsque l'acheteur s'est engagé à payer, nonobstant tout trouble, ou *lorsque* " *connaissant le danger d'éviction, il a cependant promis de payer son prix* " *dans un délai déterminé.*"

Cette doctrine a été consacrée par la jurisprudence en France d[illegible]e Code Napoléon dont l'article 1653 se trouve reproduit par notre article [illegible].

Laurent, en commentant l'article 1653, vol. 24, No. 324, s'exprime comme suit : " N'en faut-il pas conclure que l'acheteur ne peut pas suspendre le paie- " ment du prix lorsqu'il connaissait lors de la vente, le danger de l'éviction ? " La Cour de Paris a jugé que l'acheteur, était tenu de payer, dans une espèce " où il s'était engagé à payer le prix dans les dix mois de l'acquisition ; l'ache- " teur, dit l'arrêt, a renoncé par là, à exciper du danger de l'éviction connue " de lui, pour se refuser au paiement. *Cela nous paraît incontestable.*"

Un des considérants de cet arrêt est en ces termes : " Considérant, que " Debionne s'est engagé par une des clauses du contrat à payer son prix dans " les six mois de son acquisition ; d'où il suit qu'il a renoncé à exciper du dan- " ger de l'éviction connue de lui, pour se refuser au paiement de son prix".

" Il n'est point, dit Dalloz, No. 1218, Vo. Vente, vol. 43, absolument " nécessaire, qu'il ait été dit positivement dans l'acte de vente, que nonobstant " le trouble l'acheteur paiera. Cette clause peut-être remplacée par des équi- " pollants. Ainsi, par exemple, si la possibilité d'éviction aurait été indiquée " dans l'acte, et si en même temps l'acheteur s'était engagé à payer dans un " certain délai, le terme arrivé, *il devait remplir son engagement* et il ne pour- " rait exiger qu'une caution lui fût donnée."

Marcadé et Pont, (vol. 6 p. 286) ajoutent: "qu'il faut assimiler au cas de "stipulation que l'acheteur paiera nonobstant tout trouble, celui d'un acheteur "qui au moment *où il s'obligeait de payer à telle époque, connaissait le dan-"ger de l'éviction*; car il y a là consentement tacite de payer nonobstant "le trouble." Zachariæ exprime aussi la même opinion (Vol. 4, p. 311), à peu près dans les mêmes termes.

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Il me semble que ces autorités s'appliquent parfaitement au cas actuel.

L'appelant doit exécuter ses engagements tels qu'il les a contractés. Son vendeur lui a déclaré qu'il existait une hypothèque sur le terrain vendu et qu'il se chargeait de la payer; l'appelant n'a pas fixé de délai pour ce paiement; mais il s'est engagé à payer le prix de vente, à certaines époques déterminées par l'acte de vente, sans stipuler comme condition préalable le paiement de cette hypothèque; il est tenu de remplir cette obligation qu'il a contractée et doit être forcé à payer le prix de vente aux termes qu'il a lui-même fixés.

"Le Stellionat, étant, suivant Dalloz (vol. 40, p. 848), le dol commis par "celui qui présente comme libres, des biens hypothéqués" etc., il ne saurait en être question dans l'espèce actuelle, puisque l'hypothèque a été dénoncée à l'acheteur. De quel droit donc l'appelant pourrait-il refuser de payer le prix de vente au terme convenu?.....Il ne peut pas le retenir comme garantie du recours qui pourrait être exercé contre lui pour ces $5,250.00, parceque, le montant réclamé étant payé, il resterait encore en sa possession une valeur d'au-de-là de $10,000, sur le prix de vente.

Serait-ce parceque l'intimé n'a pas payé cette hypothèque, que l'appelant pourrait être autorisé par ce tribunal à garder non-seulement la balance du prix de vente, c'est-à-dire au-de-là de $12,000.00 avec les intérêts échus et à échoir, mais encore la jouissance de la propriété?

Cette prétention n'est certainement pas soutenable, car le vendeur, que représente l'intimé, n'a pas vendu l'immeuble en question, *franc et libre* de toutes hypothèques, mais au contraire, *il a déclaré qu'il était affecté à un "vendor's privilege for* $5,250.00 *in favor of the heirs Mackenzie.*"

L'appelant ne peut évidemment, dans le cas actuel, exercer d'autre recours contre l'intimé, que ceux que donnent nos lois contre les personnes qui refusent de remplir leurs obligations, et c'est à lui de faire les procédures nécessaires pour le contraindre à faire ce paiement, s'il est possible toutefois de payer cette somme aux appelés à une substitution qui n'est pas encore ouverte.

J'avoue, pour ma part, que les difficultés qui se présentent à la radiation de cette hypothèque, en faveur de personnes qui ne sont pas encore nées, me paraissent insurmontables.

Mais s'il pouvait y avoir quelque doute sur le droit de l'intimé d'exiger la partie du prix de vente, qu'il réclame, (quoiqu'il n'en existe pas à mon avis); il me semble qu'il ne peut y avoir qu'une opinion quant à la condamnation qu'il devrait obtenir pour les $1,059.72 qu'il demande pour les intérêts échus, durant la possession de l'appelant, ce dernier ayant perçu les revenus de l'immeuble pendant ce temps. Sur ce point tous les commentateurs du code Napoléon sont unanimes:

"Les auteurs, dit Laurent, Vol. 24, No. 327, enseignent et la jurisprudence

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"admet que l'acheteur qui suspend le paiement du prix du capital, doit néanmoins "payer les intérêts."

Aubry & Rau, vol. 4, p. 397, disent que: "L'acheteur, quoique autorisé, à "raison d'une juste crainte de trouble, à suspendre le paiement du prix, ne peut "se refuser par ce motif au paiement des intérêts."

C'est aussi l'opinion de Troplong, 2 vol. No. 611, "mais en se dispensant, "dit-il, de payer le prix, l'acquéreur n'est pas moins obligé de servir les intérêts, "il continue à jouir de la chose, il profite de la vente, il ne peut donc pas priver "le vendeur des intérêts auxquels il a droit."

Duvergier, vol. 1, No. 422, dit aussi, que; "lorsqu'à raison d'un danger "d'éviction l'acheteur est autorisé à suspendre le paiement du prix, la perception "des fruits qui continue fait aussi continuer le cours des intérêts."

Il cite de plus un arrêt de la cour de Riom, du 2 Janvier 1830, dans le même sens.

L'on retrouve la même doctrine dans Sirey, Dalloz, Vo. Vente, Rolland de Villargues, Vo. Ventes, No. 209, doctrine qui a été, du reste consacrée, par plusieurs décisions de la Cour d'Appel et de la Cour Supérieure dans cette province.

Le seul jugement, je crois, rendu par la Cour d'Appel en contradiction avec ce principe, est celui prononcé dans la cause de Dorion vs. Hyde (12 Jurist p. 80). Mais c'est une décision isolée, le contraire ayant été, à mainte reprises maintenu depuis, notamment dans les causes de Hogan vs. Bernier, 21 Jurist p. 101, Parker vs. Felton, même volume p. 253; mais surtout par la Cour d'Appel dans la cause de McDonald vs. Goundry, 22 Jurist, p. 222.

La Cour était unanime dans cette cause, quant à l'obligation de l'acheteur de payer les intérêts, quoique deux juges fussent d'opinion qu'il avait le droit de suspendre le paiement du prix de vente.

M. le Juge Johnson dans une cause récente, (31 Janvier, 1881, 4 Legal News, p. 45) a rendu dans le même sens un jugement savamment élaboré, et conforme à celui prononcé en Cour d'Appel par Messieurs les Juges Lafontaine, Aylwin, Duval et Meredith dans la cause de Dinning vs. Douglas, vol. 9 D. T. B. C.

Je crois pour ces raisons que le présent appel devrait être débouté et l'action de l'intimé maintenue.

Sir A. A. Dorion, C.J.—On the 12th February, 1874, the heirs Frothingham sold to the appellant a lot of land in the City of Montreal for $20,000, payable by instalments. The action is for one instalment of $2,523.15 due on the 15th February, 1876, and $1,059.72 for interest, in all $3,582.87.

The appellant pleaded, first, that the vendors had by the deed of sale declared that the property sold was free and clear of all incumbrances whatsoever except a vendor's privilege for $5,250, in favor of the heirs McKenzie, which the vendors undertook to pay and have a discharge duly registered; that the vendors, though requested, have not removed this incumbrance which consisted in a *rente constituée*, and he prayed that the action be dismissed *quant a présent*.

By a second plea the appellant alleges that, owing to this incumbrance, he lost the sale of a portion of the property, at an advance of 35 cts. per superficial foot, and that he has thereby suffered damages to the extent of $4,254.10, which he opposes in compensation, to the amount claimed by the action.

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The respondents answered that as no time was fixed for removing the incumbrance, and no demand made, they were never *en demeure* to remove it; that it was agreed this incumbrance should be removed as soon as it would be practicable to do so; that when appellant purchased, he was aware that this incumbrance was held on the property as security for the price of the property substituted to the children of Alexander McKenzie; that the substitution is not yet open, and the incumbrance cannot now be removed; that the appellant has still in his hands a sum exceeding $10,000, which is more than sufficient security for any claim which may be made against him by the heirs McKenzie. A similar answer was made to the second plea.

The Court below held that as the incumbrance had been disclosed to the appellant, and as there was still due by him upwards of $10,000, he had ample security for any claim which might be made against him for this *bailleur de fonds* claim, and condemned him to pay the amount demanded.

This is not a case within Art. 1535 C. C., which provides that "if the buyer be disturbed in his possession, or have just cause to fear that he will be disturbed by any action hypothecary or in revendication, he may delay the payment of the price until the seller causes such disturbance to cease or gives security, unless there is a stipulation to the contrary."

This article applies to cases of ordinary warranty or *garantie de droit*. But in the present case the vendors have added, as it was competent for them to do, (C. C. 1507), to their obligations resulting from the legal guarantee, by declaring that the property was free and clear of all incumbrances, except of one, which they undertook to remove. It is in effect the old clause of *franc et quitte* (Rolland de Villargues, vo. Franc et Quitte, No. 1) so well explained by the learned Chief Justice of the Superior Court in the case of *Talbot & Béliveau* (1).

The appellant's plea is founded upon a formal agreement that the vendors should remove the incumbrance. When this agreement was entered into the appellant had ample security in his hands, far exceeding the amount of the incumbrance; yet he was not satisfied with the guarantee which Art. 1535 afforded him: he stipulated for something more, that is, that, notwithstanding the security afforded by the large balance remaining in his hands, and which was greatly in excess of the amount of the incumbrance affecting the property, the vendors should remove that incumbrance. It is not a question of security, but one concerning a solemn undertaking on the part of the vendors, and which they are bound to fulfil in the terms of their agreement. As Rousseau de Lacombe, vo. Stellionat, says: "Quand, par le contrat, etc..., le débiteur a déclaré l'héritage qu'il oblige franc et quitte de toutes hypothèques, etc., il peut être contraint comme stellionataire à racheter; bien que *pignus sit sufficiens omnibus*, ...et que la créance non déclarée soit très modique."

Ancien Denizart, vo. Stellionat, No. 2: "Le Stellionat se commet encore par ceux qui, dans les engagements qu'ils contractent, déclarent leurs biens *libres et francs*, lorsqu'ils sont hypothéqués; et cela, quand même la créance non déclarée serait très modique, et qu'il y aurait toute sûreté dans les autres biens non hypothéqués."

(1) 4 Quebec Law Rep. 104.

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Arrêts cités par Brodeau sur Louet, Lettre S. No. 18 :—

"Le stellionataire ne peut s'exonérer de la contrainte en offrant des sûretés additionnelles." (Dalloz, vo. Stellionat, t. 12, p. 149, note 5; Siégaut et Leroy, note 6; Pelletier et Allais.) "La peine des stellionataires est la prison; ils sont obligés de la garder jusqu'à ce qu'ils aient entièrement éteint l'engagement pour lequel le stellionat a été commis." (Ancien Denizart, vo. stellionat, No. 4.)

There is no *stellionat* in this case, since the vendors have declared the incumbrance affecting the property sold, but they have undertaken to make the property *franc et quitte*, by removing such incumbrance, and although the *contrainte par corps* exists no more in a case like the present one, yet the remedy to force a vendor to fulfil his obligation remains in full force. The purchaser is entitled to insist on the removal of the hypothec as a condition precedent to the payment of the price or of any portion of it. It can easily be conceived that a person purchasing a large block of land, on speculation, in an improving locality, has great interest in having all the incumbrances removed to enable him to dispose of the property. No amount of security would induce an intending purchaser to acquire any portion of a property likely to improve, if it remained subject to incumbrances affecting the whole.

The appellant has nothing to do with the obstacles, which, on account of the substitution to the heirs McKenzie, may prevent or render more difficult the removal of the incumbrance. We do not think these obstacles are insuperable; but, if they were, it would be an additional reason for the appellant to refuse to pay the price of a purchase, which he probably would not have made, if, instead of a promise that the incumbrance would be removed, he had been told that it could not be done.

The same reasons apply to the withholding of the interest. This is not a question of security; if it were, we would have to say that the appellant, by retaining in his hands a portion of the price equal to the amount of the mortgage of the heirs McKenzie, would have ample security, and that he must pay the balance as well as the interest; but it is a question whether the respondents have fulfilled a condition of the sale. We are, therefore, of opinion that the first plea of the appellant is well founded.

As to the second plea, the appellant has not proved the damages which he claims. There was no delay fixed for removing the incumbrance, and the respondents were not regularly put *en demeure* to remove it before the negotiations to sell a portion of the property to John Lewis were broken off. Such a *mise en demeure* was required, and a reasonable delay to enable the vendors to remove the incumbrance should have been allowed before the appellant could claim any damages.

A question of procedure has been raised, as to the form of the pleadings. By C. C. P. 120, § 2, it is provided that "the defendant *may* stay the suit by dilatory exception; if he has a right to demand security from the plaintiff, or the execution of some precedent obligation." In a few cases it has been held that, according to this article, a defendant, entitled to security under C. C. 1535, or pleading that the plaintiff had not fulfilled a precedent obligation, should do it by *exception dilatoire*. (Grammont & Lemire, 5 R. L. 67; Wainwright & The

Mayor of Sorel, 5 R. L. 668, Routhier, J. (1); Bouchard & Thivierge, 4 Q. L. R. 152.)

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In other similar cases, pleas in the nature of *exceptions péremptoires* or *péremptoires temporaires* have been maintained (Bunker & Carter, 5 L. C. R. 291; O'Sullivan & Murphy, 7 L. C. R. 424; Wainwright & The Mayor of Sorel, 5 R. L. 668; Mathieu & Vigneau, 6 R. L. 514; Dorion & Hyde, 12 L. C. J. 80; Parker & Felton, 21 L. C. J. 253; McDonnell & Goundry, 22 L. C. J. 221; Noel & Gagnon, 5 Q. L. R. 218).

If the words "precedent obligations" in art. 120 have the same meaning as "condition precedent" they will lead to some confusion, for a condition precedent suspends the right of action and ought to be pleaded by an *exception péremptoire*, and not by an *exception dilatoire* which merely asks for the suspension of proceedings in an action rightly instituted. (Noel & Gagnon, 5 Q. L. R. 218) In the present case the appellant is as much entitled to a removal of the incumbrance before he is called upon to pay the price of his purchase, as he would be to resist the action for want of delivery. The vendor has no action for the price until he has delivered the property sold, nor, in this case, until he has delivered it *franc et quitte* as he has agreed to do. The *exception temporaire* was therefore the correct mode of pleading to the respondent's action, and it was the one generally followed before the Code.

The word "may" is used in Art. 120, and by interpreting it as merely permissive of other remedies, the decisions above referred to may easily be reconciled. I see no reason why a defendant who has the right to ask for the dismissal of an action *quant à présent*, might not use a milder course and ask by a dilatory plea that the proceedings be suspended. This is, perhaps, what is meant by the second paragraph of art. 120.

There is in all these cases a great latitude given for the exercise of the equitable jurisdiction of the Courts, and if in this case we had thought that our giving a short delay would have led to some practical result, we would have done as we did in the case of Parker & Felton, and we would have allowed a delay to remove the incumbrance. However, after full consideration of the circumstances, we have thought that, as the appellant is in any case entitled to the costs as well in the Court of first instance as in appeal, it was better to give at once a final judgment, so that the parties may settle their difficulties out of Court or carry the case further, and the result is that the action is dismissed with costs.

RAMSAY, J. This case appeared to me at first to be one of extreme simplicity, but now with elaborate reasoning, questions of practice, precedents of this Court said to be contradictory of the decision rendered in this case, and citations from codes, it assumes another aspect.

The action was brought to recover one instalment of purchase money due on a deed of sale by respondent to appellant, with interest. The defence to the action was that the deed of sale contained the clause of *franc et quitte* save one

(1) It has been stated that this last judgment was confirmed in appeal (Taschereau, C. de P., p. 41) This case was argued in appeal on the merits, and after the plaintiffs had given security for the incumbrances. There was then no occasion to decide the question of pleading, which was never considered by the Court.

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incumbrance, which respondent bound and obliged himself to remove and to have the discharge enregistered. This has not been done. Respondent says that this clause meant "that the vendors should pay off the said mortgage as soon as it was practicable or possible so to do;" and that it was not practicable so to do because by a deed which appellant knew the existence of, the incumbrance—a constituted rent—was substituted, and that the substitution was not yet open.

Of course every deed that stipulates a condition means that the condition must be possible, that is, not physically impossible, or contrary to law and good morals. But the undertaking to pay off a *bailleur de fonds* claim is not impossible. By itself it is perfectly possible, although the person undertaking may be unable from some act of his own to perform the obligation. Frothingham *s'est fait fort* to pay off the claim and he was bound to do it. If, however, it were otherwise, I think the repayment of the *rente constituée* is not rendered impossible even for Mr. Frothingham—that is, there is not even a relative impossibility. The authority of Pothier is clear and precise. See Const. de rente, No. 51, cited at the bar, and No. 91, where the doctrine is repeated. It is true the object of the law, to prevent the loan of money at interest, was the cause of this strict doctrine, and the usury laws being done away with, it may perhaps be said that the cause of the law having disappeared, the law also has ceased. But I don't think the *brocard* can be so applied, as to create an embarrassment of this kind. It might perhaps have been argued that the deed from McKenzie to Frothingham constituted a *rente viagère*, but both parties seem to agree that it created the substitution of a *rente constituée*, and they are probably right. For my part I don't think it would affect the case as it comes before the Court.

There was another point made at the argument, and as it seems to have been the one on which the judgment of the Court below turned, it is right to notice it. It was said that appellant had plenty of security in his hands even after he paid this instalment. It is not a question of security but of contract. Respondent promised to remove the encumbrance, he cannot now tell appellant that he wanted something else, with which he ought to be satisfied. I therefore think the judgment must be reversed in so far as it maintains the action for the instalment.

By the second plea there is a claim by appellant for damages for failure on the part of respondent to fulfil his bargain, which, it is prayed, may be set off against the balance of purchase money due. That is rather a contradictory conclusion. Defendant says he won't pay the instalment, because it is not due, owing to the omission of plaintiff, in one plea, and in another he says he will pay it, provided he may do so by offering damages to be paid as a set off. There is another objection, I don't think the liability is proved. Respondent had a certain thing to do, he was only pressed to do it when Lewis refused to take the deed, and then the damage was done. I would, therefore, reject the demand of damages by the plea.

It has been said by the learned Judge who dissents, that the first plea of the appellant should have been pleaded as a preliminary plea, and he quotes article 120, 2ndly, C. C. P. That article only says that such a plea *may* be pleaded as a dilatory exception,—a disposition we are not likely to interpret by turning "may" into "must."

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Allusion has been made to two cases of *Goundry & MacDonnell*, and it is contended that we there held that where there was the clause of *franc et quitte* the vendor could recover the price of the purchase money. That is not what was held. I remember the case very well. The first instalments were sued for in the District of Beauharnois. The cases came before me, and I dismissed one of the actions because there was no certificate of the Registrar filed according to the terms of the deed, and I maintained the other, as it did not appear there was any incumbrance. It is not easy to give a more complete effect to the stipulation of a deed than this. Two other cases then came before us, which had been managed with more care, and the sole question was as to whether there was an incumbrance within the meaning of the clause of the deed. Two of the Judges were of opinion that there was. The majority of the Court held that there was only a right of way, which could be localised, and that only gave right to an action *quanto minoris* and a reduction of the price, and that plenty of money remained to satisfy such reduction. The whole Court, therefore, affirmed the same principle that we are applying now, namely, that satisfaction of the clause of *franc et quitte* was a condition precedent to bringing an action for the purchase money.

[It has been suggested to me since delivering the above opinion, that we had perhaps omitted to allude to a point in the case, namely, interest. I cannot plead guilty to having made any omission. At the argument there was no question of interest urged on our attention, other than interest after demand in justice for money due. As we declared the money was not due, we had no question of interest before us. Had there been such an argument, it would not probably have modified the judgment. By our law, interest is only due by stipulation or from the time of a judicial demand, with a few exceptions, none of which covers the *failure to do* of the creditor.

In this case there was no stipulation that interest should run on the purchase money while respondent delayed to fulfil his obligation, and certainly interest could not be deemed to run from the demand of money which is not due. Arts. 449 and 1077. I do not mean to say that the purchaser does not owe anything to the vendor on a special action, but certainly he does not specially owe interest. Interest on the purchase money may, in some cases, be a fair equivalent for the use of the property; but it would be to make a practical blunder to assume that it was so in a case like the present, where it appears that the property was purchased at a large price for speculative purposes, for which it could not be used owing to this encumbrance. This is the true meaning of Art. 1534. 2ndly, when interest runs, but it has no application whatever to sales with the clause of *franc et quitte*, or where there is a condition of a similar character. The appellant only failed to recover damages for the delay, because he had not put the respondent *en demeure* before the Lewis transaction arose, and he showed no other damage. Note by Mr. Justice Ramsay.]

The judgment in appeal is recorded as follows:—

"Considering that by the deed of sale of the 20th of February, 1874, the respondent and his co-heirs declared that the immoveable property sold by them to the respondent, and described in the said deed, 'was free and clear of all incum-

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'brances whatsoever, save and except a vendor's privilege for $5,250 in favor of 'the heirs McKenzie,' which the vendors undertook to pay and have a discharge thereof duly registered;

"And considering that long before the institution of the present action, the respondent and his co-heirs have been requested to remove the said incumbrance in favor of the heirs McKenzie, but have failed to do so;

"And considering that under the stipulation contained in the said deed of sale, the respondent as representing the vendors cannot recover from the appellant any portion of the price of sale until he shall have removed the said incumbrance according to the terms of the said sale;

"And considering that there is error in the judgment rendered by the Superior Court at Montreal, on the 8th of July, 1878;

"But, considering that the appellant has not proved that he had suffered any damages by the non-removal of the said incumbrance;

"This Court doth reverse the judgment of the said Superior Court of the 8th of July, 1878, and proceeding to render the judgment which the said Superior Court should have rendered, doth dismiss the action of the respondent *quant à présent*, and doth condemn the said respondent to pay to the appellant the costs incurred as well as in the Court below as on the present appeal. (Hon Mr. Justice Caron dissenting.)"

Judgment reversed.

Lunn & Cramp, for the appellant.

S. Bethune, Q.C., counsel. *Abbott, Tait, Wotherspoon & Abbott*, for the respondent.

(J. K.)

COURT OF QUEEN'S BENCH, 1880.

MONTREAL, 22ND MARCH, 1880.

Coram SIR A. A. DORION, C.J., MONK, RAMSAY, TESSIER, CROSS, JJ.

Ex parte Henry McCaffrey, petitioner for *Habeas Corpus*.

HELD:—1. It is not necessary, in a rule for *contrainte par corps*, to give the guardian the option of paying the value of the goods.

2. The guardian is not discharged by the lapse of a year after proceedings taken against him to make him produce the goods.

3. The fact that the commitment orders the imprisonment of the guardian until payment of an amount apparently in excess of what is due, cannot be urged under a *Habeas Corpus*, the *Habeas Corpus* not applying to persons imprisoned under a process in a civil matter, unless there be manifest absence or excess of jurisdiction.

SIR A. A. DORION, C.J.—Le petitionnaire a été nommé gardien à une saisie de meubles, et ne les ayant pas produits lorsqu'il en a été requis, il a été condamné à être emprisonné jusqu'à ce qu'il ait payé la dette et les frais du créancier saisissant.

La contrainte a été exécutée et il demande par sa requête que le *committimus* en vertu duquel il a été emprisonné soit annulé:

1o. Parce qu'on ne lui a pas donné l'option de payer la valeur des effets saisis, suivant l'article 597 du Code de Procédure.

2. Parceque depuis qu'il a été nommé gardien il s'est écoulé plus d'une année avant que l'on ait adopté des procédés pour lui faire représenter les effets saisis, et qu'il a par là été de plein droit déchargé de la garde de ces effets. Ex parte McCaffrey.

3. Parceque le *committimus* ordonne que le pétitionnaire soit emprisonné jusqu'à ce qu'il ait payé la dette et les frais dûs par le défendeur au créancier saisissant, et de plus $71 pour frais encourus sur une opposition faite par un tiers, et qui ne pouvaient être recouvrés sur les meubles dont le pétitionnaire avait la garde.

Il a déjà été jugé dans les causes de Brooks vs. Whitney (Décisions Jud. B. C. t. 10. p. 244,) et de Leverson vs. Boston, (2 L. C. Jurist, 297,) que le demandeur n'était pas obligé, dans une règle pour contrainte par corps contre un gardien, de lui donner l'alternative de payer la dette ou de payer la valeur des effets saisis, et que c'était au gardien à alléguer que la valeur des effets saisis était inférieure à la dette, et à demander qu'ils fussent estimés afin de n'être condamné qu'à en payer la valeur. Voir aussi Higgins et al. vs. Robillard, (Dec. Jud. B. C. t. 12 p. 3.)

Telle était la règle avant le Code et cette règle a été maintenue par l'article 697 du Code de Procédure, qui dit que, "le gardien ou dépositaire peut être "condamné même par corps à représenter les effets dont il s'est chargé, ou à "payer le montant dû au saisissant." Il est vrai que l'article ajoute; "Il "peut, néanmoins, en établissant la valeur des effets non représentés, se libérer "par le paiement de cette valeur."

Le droit du créancier, c'est de demander que le gardien qui ne représente pas les effets saisis soit emprisonné jusqu'à ce qu'il ait payé la dette, avec faculté au gardien d'établir que les meubles ne valent pas le montant de la dette, et dans ce cas de n'en payer que la valeur. C'est donc au gardien à alléguer que les meubles mis sous sa garde ne valent pas le montant de la dette et des frais, et à en faire la preuve. Le pétitionnaire n'ayant pas demandé à exercer cette faculté, ne peut sur *Habeas Corpus* se prévaloir de l'objection qu'il a été condamné à payer la dette sans alternative.

La seconde objection invoquée par le pétitionnaire n'est pas non plus fondée. D'après l'ordonnance de 1667, Tit. 19 art. 20 et 22, les gardiens étaient déchargés de plein droit et sans obtenir de jugement à cet effet, deux mois après que les oppositions à la saisie avaient été jugées et un an après la date de leur commission, si les différents n'étaient pas alors terminés. Cependant Pigeau T. 1, p. 640, enseigne qu'au Chatelet, la décharge de plein droit n'avait pas lieu, et qu'il faillait que le gardien obtienne un jugement. En France, en vertu du Code de Procédure, art. 605 et 665, le gardien peut demander à être déchargé, si la vente n'a pas lieu au jour indiqué ou si les oppositions n'ont pas été vidées dans les deux mois après la saisie, mais il n'est pas déchargé de plein droit.

Ici l'on cite une décision de la Prévosté de Québec, (Duburn c. Chaumeron) qui a déchargé un gardien de la contrainte par corps, parce que le demandeur n'avait pas procédé à la vente des meubles suivant l'article 172 de la Coutume de Paris, dans les deux mois de la saisie.

La même chose a été jugée dans la cause de Scholefield vs. Rodden et al. (3 L. C. J. p. 332). Dans celle de Hallé vs. Hallé (5 Q. L. R. 390), le gardien a été

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déchargé de la contrainte par corps parcequ'il s'était écoulé plus d'une année depuis sa nomination.

Nonobstant ces deux jugements rendus tous deux par la Cour de Circuit, il est au moins douteux, que l'on ait depuis la cession du Pays suivi les dispositions de l'ordonnance de 1667, et considéré que le gardien était déchargé de plein droit et sans jugement.

En France les oppositions et autres incidents sur les saisies exécutions étaient des matières sommaires. Il suffisait de huit jours, ou d'un mois tout au plus, pour les faire juger, et le Code de Procédure Civile Français suppose qu'ils doivent tous être vidés dans les deux mois de la saisie puisque c'est le terme qu'il fixe à la durée de la charge de gardien. Ici il faut plus souvent deux ans que deux mois pour faire vider les incidents d'une saisie-exécution, et si le gardien devait après un an être déchargé de plein droit de la garde des effets saisis, il en résulterait que dans la plupart des cas, il n'y aurait plus de gardien, lorsque l'huissier se présenterait pour faire la vente des effets saisis. Du reste notre Code de Procédure ne contient qu'une disposition relative à la décharge du gardien. Elle se trouve dans l'article 596, qui dit que le gardien à droit à une décharge ou quittance des effets qu'il représente. Ainsi, tant qu'il ne représente pas les effets, il est gardien et sujet à la contrainte par corps.

Le pétitionnaire ne peut prendre avantage de sa troisième objection sur un bref d'*Habeas Corpus*. La Cour Supérieure pouvait condamner le gardien à payer la dette du demandeur à défaut de représenter les effets saisis, et à être emprisonné jusqu'à ce qu'il l'eut purgée. Si elle l'a condamné à payer $71 de plus qu'il ne devait, il y a là mal jugé, mais non défaut de jurisdiction. Ces observations s'appliquent également aux deux premières objections. L'appelant a probablement un recours par voie d'appel, mais non par un bref d'*Habeas Corpus*, et sa demande est rejetée.

Ramsay, J. This is an application for a writ of *habeas corpus*. The petitioner is held under *contrainte par corps* for failure to produce certain goods of which he had been established guardian. He contended that the *contrainte* was illegal, (1) Because he was not given the alternative to pay the value of the goods; (2) Because he was held for certain costs not ordered by the judgment.

In support of the petition it was said that by section 20, C. S. L. C., cap. 95, it was enacted that "when any person is confined or restrained of his liberty otherwise than for some criminal or supposed criminal matter," &c., he shall have a right to a writ of *habeas corpus;* and it was urged that this legislation gave a right to the writ when any one was restrained of his liberty in a civil suit, independently of the enactments of the Statute of Charles. The answer to this pretention is to be found in Sect. 25 of this Act, which declares that this shall not apply to any one "charged in debt or other action, or with process in any civil suit." Our Act is copied from 56 Geo. III, cap. 100. It would have been a strange innovation to have employed the writ of habeas corpus as a means of verifying the procedure of the civil courts. The question has been frequently decided by the courts here, as the error in the rubric "Habeas Corpus ad subjiciendum in civil matters" has served to mislead. See

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Ex parte Whitfield, 2 Rev. de Leg., p. 337. The principle of this rule is fully explained in a case decided by this Court, *Exp. Donaghue*, 9 L. C. R. p. 285, and in another case, in the Superior Court, of *Barber et al.* v. *O'Hara*, 8 L. C. R. p. 216. And even where there is excess of jurisdiction, the writ will not be granted unless it be a commitment of an inferior court, else we should have a judge in chambers deciding as to the extent of the jurisdiction of the Superior Courts of law. See *Leboeuf & Viaux*, S. C., 18 L. C. J. 214. On the other side we have a case *Exp. Crebassa*, 15 L. C. J., p. 331, where it is said that a judge in chambers discharged a prisoner confined on *contrainte* for *rebellion à justice;* and there is also a case of *Exp. Lemay* mentioned in a note, in which it is said a party was discharged by a judge in chambers because the amount of certain costs was not stated. If these cases are not misreported, they can hardly be received as authority against the cases on the other side, and the express terms of the statute, which are reproduced in arts. 1040 and 1052 C. C. P. I do not mean to say that there may not be cases in which the judgment pretended to justify the imprisonment, may not really support it, and in such a case a party may be discharged on *habeas*.

Nor can it be contended that the writ of *habeas corpus* can be used in any case to relieve one of imprisonment under the law. So even a person condemned by a Court of law to an illegal imprisonment cannot be discharged on *habeas*—*Exp. Plante*, 6 L. C. R. p. 20. And we refused the writ when it appeared that a man had been sentenced to five years' imprisonment with solitary confinement. See also the case of O'Kane in 1875, where we intimated that there was probably excess of jurisdiction by a Court of record. The remedy in these cases is by writ of error.

The writ must be refused.

R. & L. Laflamme, for petitioner.

C. P. Davidson, Q.C., for the Crown.

(J.K.)

COURT OF QUEEN'S BENCH, 1880.

MONTREAL, 22ND JUNE, 1880.

Coram SIR A. A. DORION, C. J., MONK, RAMSAY, CROSS, JJ.

McCAFFREY,

No. 185.

(*Mis en cause in the Court below,*)

APPELLANT;

AND

CLAXTON ET AL.,

(*Plaintiffs in the Court below,*)

RESPONDENTS.

HELD:—The guardian may be condemned to produce the goods placed in his charge, or to pay the debt and costs. It is not necessary that the judgment should give him the alternative of paying the value, as the privilege is reserved to him by law of being discharged on establishing and paying the value of the goods. He cannot be condemned to pay more than is due by the defendant to the seizing creditor.

SIR A. A. DORION, C. J.:—(*diss.*) En décembre 1876, l'appelant a été nommé gardien des meubles et effets saisis sur John B. Mahedy, es-qualité et autres, à

* Three cases were cited at the bar, *Exp. Cutler*, in which the writ was refused by the Chief Justice and Mr. Justice Cross. In the case of *Martin* there was no judgment ordering the imprisonment. 22 L. C. J. pp. 85 and 86. And in *Exp. Thompson*, Mr. Justice Cross refused the writ in chambers; ib. p. 89. See also *Exp. Healey*, decided by me in chambers; ib. 138.

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la poursuite des intimés. La vente fut retardée par des oppositions, dont une faite par Mahedy, en son nom personnel, fut contestée et renvoyée pour partie avec dépens en faveur des intimés. Le sept de décembre 1878, un bref de *Venditioni Exponas* ayant été émané, l'appelant fut requis de représenter les effets mis sous sa garde, et à défaut par lui de le faire, les appelants obtinrent le 18 janvier 1879 une règle pour contrainte par corps. Par cette règle les intimés demandaient à ce que l'appelant ayant négligé de représenter les effets mis sous sa garde, il lui fut ordonné de les produire et livrer au shérif du District de Bedford, et qu'à défaut par lui de le faire, il fut contraint par corps et incarcéré dans la prison commune du District, *jusqu'à ce qu'il les eut produit ou qu'il en eut payé la valeur*, savoir, la somme de $539.42 étant le montant de leur dette et des frais, avec intérêt sur $262.62 compter du 2 janvier 1875, sur $3.17 du 19 avril 1875, et sur $108.05 du 20 juin 1876, le tout avec dépens.

Cette règle fut rapportée le 15 avril 1879, et l'appelant ayant fait défaut, la Cour rendit le lendemain, 16 avril, un jugement ordonnant que l'appelant fut contraint par corps et incarcéré dans la prison commune du District de Bedford *jusqu'à ce qu'il ait payé aux intimées la somme de* $539.42 *montant de leur dette et frais, avec intérêt sur* $262.62 *du* 2 *janvier* 1875, *sur* $317 *du* 19 *avril* 1875, *et sur* 108.05 *du* 20 *juin* 1876, *et condamna en outre l'appelant à payer les dépens de la règle.*

L'appelant se plaint de ce jugement parce qu'il l'a condamné à payer le montant entier du jugement, intérêts et frais, sans lui donner l'option de payer la valeur des effets saisis, et en second lieu parcequ'il l'a condamné à payer une somme de $71.30 pour frais dûs par John Mahedy personnellement et non par les défendeurs, comme représentant feu Patrick Mahedy.

Sur la première objection soulevée par l'appelant, cette Cour a déjà eu l'occasion d'exprimer son opinion, sur la demande faite par l'appelant pour être libéré sur *Habeas Corpus*, que d'après la jurisprudence et les termes de l'article 597 du Code de Procédure Civile, un gardien peut être condamné à représenter les effets dont il s'est chargé ou à payer le montant dû au saisissant, sans que ce dernier soit obligé de lui donner l'option de payer la valeur des effets saisis, et que c'est au gardien à demander à exercer cette option s'il le désire.

Il n'y aurait aucune difficulté sur ce point si la règle pour contrainte par corps et le jugement, qui a accordé cette contrainte, étaient dans les termes du code; mais la règle demande à ce qu'il soit ordonné à l'appelant de produire les effets saisis, et qu'à défaut de le faire, il soit contraint par corps et emprisonné jusqu'à ce qu'il ait produit les effets saisis ou qu'il en ait payé *la valeur*, savoir, le montant de la dette des intimés, il n'y a eu aucune preuve de cette valeur et le jugement, au lieu de suivre les termes de la demande et de condamner l'appelant à être incarcéré *jusqu'à ce qu'il ait produit les effets saisis ou qu'il en ait payé la valeur*, le condamne purement et simplement à être incarcéré *jusqu'à ce qu'il ait payé la dette, intérêts et frais.*

Les tribunaux ne peuvent ajouter aux demandes des parties et prononcer des condamnations plus onéreuses que celles qu'elles requièrent par leurs conclusions. (Art. 17, C. de Procédure Civile). C'est cependant ce que la Cour

Inférieure a fait dans cette cause. Les intimés demandaient que l'appelant fut incarcéré jusqu'à ce qu'il eut produit les effets, ou qu'il en eut payé la valeur, il était du devoir de la Cour d'ordonner comme dans la cause de Higgins & Robillard, (Dec. Jud. B. C. T. 12, p. 3) la preuve de la valeur des effets saisis, et ensuite de condamner l'appelant à être incarcéré jusqu'à ce qu'il les eut produits ou qu'il eut payé le montant de leur évaluation ; au lieu de cela la Cour a condamné l'appelant à être emprisonné jusqu'à ce qu'il eut payé le montant de la dette, ce qui n'était pas demandé par les intimés.

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Cette irrégularité me parait tellement grave, surtout dans un procédé où il s'agit de contrainte par corps, que je ne puis concourir dans le jugement qui va être prononcé par la majorité de la Cour. J'aurais infirmé le jugement et annulé la contrainte par corps avec dépens contre les intimés, et j'aurais renvoyé le dossier à la Cour Inférieure pour y être procédé à l'évaluation des meubles saisis, et être ensuite adjugé sur les conclusions prises par les intimés.

Sur le second point, il n'y a aucune difficulté, et nous sommes tous d'accord à dire que la somme de $71.30 pour frais sur la contestation de l'opposition de Mahedy n'aurait pas dû être comprise dans celle de $539.42 que l'appelant a été condamné à payer aux intimés.

Il s'est glissé une autre erreur dans le jugement, en ce que l'appelant a été condamné à payer les intérêts sur une somme de $317, au lieu de l'être à payer les intérêts sur $3.17 tel que demandés par la règle. Ces deux erreurs corrigées, la majorité de la Cour est d'opinion de maintenir le jugement quant au surplus et la contrainte par corps prononcée contre l'appelant, mais de lui accorder les frais sur son appel.

RAMSAY, J.—The majority of the Court are agreed to reverse the judgment and to give the appellant the costs of the appeal. The difference between the opinion of the majority and that of the Chief Justice is on a matter of detail.

The appellant, a guardian, is imprisoned for failing to produce the effects committed to his keeping. He complains:

"That the judgment, ordering the said imprisonment, is illegal, null and void, inasmuch as it orders the imprisonment of the appellant, the guardian, until he has paid the full amount of the judgment, interest and costs, or produces the effects seized and placed under his guardianship, without giving any alternative to pay the value thereof. That the said judgment is, moreover, illegal and null, inasmuch as the appellant, the guardian, is condemned to pay the amount of costs incurred by a third party claiming the right of property in a portion of the goods seized, the judgment for which execution issued, and under which the goods were seized, condemning the defendants, in their respective capacities of executor and universal legatee, and the additional costs incurred, payable by John Mahedy personally."

There is nothing in the objection that the rule did not offer the appellant the alternative to pay the value of the goods. This was decided by the Court of Appeal in the case of *Leverson & Cunningham & Boston, mis en cause*,* and I

* 2 L. C. J. 297.

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am not aware of any case that has reversed or in any way put in question that decision. It was before the Code, but article 597 C.C.P. seems to have been carefully drawn so as to preserve the old law. The guardian is condemned on pain of coercive imprisonment to produce the property or to pay the amount due to the seizing creditor. The article then goes on to say: "He may, however, upon establishing the value of the effects which he fails to produce be *discharged* upon payment of such value." This, then, is an exception in his favour, and, I take it, open to him at all times, since he can be "discharged" upon payment of such value. He, then, has no need of a reservation in the judgment of a right which he has by law, and of which the judgment could not have deprived him.

The other objection is that he has been condemned to pay costs incurred by a third party claiming the right of property in part of the goods seized. What the law says is that the guardian shall pay the "amount due to the seizing creditor." The rule in this case is somewhat confused in its form. After setting up the failure to produce in accordance with the summons, the rule goes on: "That the said guardian, McCaffrey, is ('be' is probably intended) ordered to produce and hand over to the said sheriff the said moveables, goods and effects seized in this cause, and placed in his care and keeping, and described in the said schedule hereunto annexed, and that in default of his so doing he be *contraint par corps*, and incarcerated in the common gaol of this district, until he has produced the said moveables, goods and effects, mentioned and described in the *procès-verbal* of the seizure thereof, by the said sheriff, and also in the said schedule annexed to the said writ of *venditioni exponas*, and also in the schedule hereunto annexed, or pay the value thereof, to wit, $539.42 currency, being the amount of the debt and all the costs in this cause, with interest on $262.62 currency, from the 2nd of January, 1875, on $3.17 currency, from the 19th day of April, 1875, and on $108.05 currency from the 20th day of June, 1876, at the rate of six per cent. per annum, unless cause to the contrary be shown on the 15th day of April next (1879), at ten of the clock in the forenoon or as soon as counsel can be heard, at the Court House, in the village of Sweetsburgh, in the District of Bedford, sitting the said Court, the whole with costs."

He has, therefore, a tender to pay the value, if that had been necessary, and the value is fixed at $539.42, which is, according to the calculation of the party moving, and which is in no wise contradicted, "the amount of the debt and all the costs in this cause." As the *mis en cause* has not contested the value, I do not see how we can interfere and say that the goods were of less value. But the amount of the debt and costs, on its face appears to be more than he has to pay, in order to get rid of his imprisonment, by all the amount of the costs on Mahedy's opposition, and this must be deducted. The rule goes on to ask more than this, and more than plaintiffs contend is the value of the goods, and as the judgment following the rule orders the *mis en cause* to be imprisoned not only until he shall have paid $539.42, but also interest over and above their value, I think the judgment must be revised in this respect also. The appeal will therefore be maintained with costs, and the judgment will be modified by deducting

the amount of these costs $71 and some cents, and by striking out the subsequent interest.

The judgment is as follows:—

"Seeing that the judgment of the 16th day of April, 1879, declaring the rule issued in this cause absolute, orders that the said Henry McCaffrey, *mis en cause* in the Court below, now appellant, be *contraint par corps* and incarcerated in the common gaol of the District of Bedford until he shall have paid to the Respondents (plaintiffs below) the sum of $539.42, being the amount of the debt and all the costs in this cause, and with interest on $262.62 from the 2nd day of January, 1875, on $317 from the 19th day of April, 1875, and $108.05 from the 20th day of June, 1876, at the rate of six per cent., and condemns the said appellant, *mis en cause* in the Court below, to pay the costs of the said rule, to be regularly taxed at $28.10, currency;

"Seeing that by law the said appellant could not be condemned to pay more than the amount due by the defendant to the seizing creditors;

"Seeing that in addition to the amount due the seizing creditors, the said judgment condemns the said appellant to pay a sum of $71.30 for costs to which a third party claiming the right of property in a portion of the goods seized, was condemned, and which did not form part of the said amount due by the defendant to the seizing creditors, and also the interest on the sum of $317 from the 19th day of April, 1875, instead of on the sum of $3.17;

"Seeing that in the said judgment of the 16th of April, 1879, rendered by the Superior Court for the District of Bedford, there is error;

"Doth reverse, annul and set aside the said judgment, and proceeding to render the judgment the Court below ought to have rendered, doth order that the said Henry McCaffrey be detained in the common gaol of the District of Bedford until he shall have paid to the respondents (plaintiffs below) the sum of $373.84, amount of the condemnation in this cause, with interest upon $262.62 from the 2nd January, 1875, on $3.17 from the 19th April, 1875, and on $108.05 from the 28th June, 1876, and the further sums of $40.05, costs incurred to have the original judgment declared executory against the defendant as representing the late Patrick Mahedy, the original defendant, of $17.50 for costs on writ of *fieri facias*, of $3.20 for costs of *venditioni exponas*, and $30.35 for other costs incurred on said writ of *venditioni exponas*, together with the costs incurred on the rule for *contrainte par corps*, said costs hereby taxed at the sum of $28.10. (Hon. Sir A. A. Dorion, C. J., dissenting.)"

R. & L. Laflamme, for appellant.

Lacoste, Globensky & Bisaillon, for respondents.

(J.K.)

COURT OF QUEEN'S BENCH, 1881.

MONTREAL, 25TH APRIL, 1881.

Coram HON. SIR A. A. DORION, CH. J., MONK, J., RAMSAY, J., CROSS, J., BABY, J.

No. 110.

MILLER,

APPELLANT;

AND

COLEMAN ET VIR,

RESPONDENTS.

HELD:—1. That executors are only responsible for what they actually receive, and are not jointly and severally responsible for each other's administration.

2. That where a person, besides being executor, acts as if he were the tutor (though not really so) of a minor, to whom the estate he administers belongs, he cannot charge interest on monies expended by him in excess of his receipts.

3. That an executor under the circumstances above mentioned has, however, a right to claim interest on all interest-bearing debts paid by him in the interest of the minor to prevent the sacrifice of her real estate.

4. That on the contestation of the appellant's account and its final adjustment by the Court, the female respondent owes the appellant the sum of $590.07.

This was an appeal from a judgment of the Superior Court, at Montreal, (Sicotte, J.), rendered on the 17th October, 1879, by which the appellant was condemned to pay to the female respondent, as a *reliquat de compte*, the sum of $41,278 cy., besides interest and costs.

Sir A. A. DORION, C. J. This is an action of account, and by the final judgment rendered on the 17th of October, 1879, the appellant was condemned to pay to the female respondent the sum of $41,278, and interest from the 6th of December, 1875, and to *contrainte par corps*.

The appeal is from this judgment, and the facts which have given rise to the action are as follows:

Robert F. Coleman and Maria Mansfield Connolly were married, at Belleville in Ontario, on the 4th of November, 1841.

The issue of this marriage were two children, Susanna Louisa Coleman and Anna Maria Coleman, the female respondent, who was born in 1846.

Robert F. Coleman made his will, at Belleville, on the 10th of February, 1842, giving his wife the enjoyment of his property during her life, or until she remarried, and the property to his children. He appointed his wife, Lewis Walbridge and William Hope, his executors, and died in 1852. Walbridge and Hope both renounced the executorship.

On the 11th of June, 1853, Mrs. Coleman made her will, at Montreal, whereby she bequeathed all her property to her two children, and appointed the appellant and Francis Mullins as her executors, authorizing them to continue the execution of the will of her late husband. She also appointed them tutors to her children, to take care of them until their marriage, or their age of majority.

The appellant was then married to a sister of Mrs. Coleman, and was therefore the maternal uncle of the female respondent and of her sister.

Mrs. Coleman died on the 25th of June, 1853. Her property consisted of one quarter of lot No. 1, in the first range of the parish of Chateauguay. The children had, besides, the property left to them by their late father, which consisted of a lot of land, with mill, and two houses, at Belleville, against which there were several mortgages registered, amounting to about $5,000.

On the 12th of June, 1854, Catherine Connolly, a sister of Mrs. Coleman, died intestate, and her property, consisting in one undivided half of certain lots of land in Drummond street, Montreal, went to her brother, Patrick Connolly, and to her sisters Rosanna, Susan and Sarah Connolly, and to her two nieces, the female respondent and her sister, as representing their late mother, who thereby became possessed of one-fifth in the undivided half of said two lots of land in Drummond street.

On the 2nd of May, 1856, Susanna Connolly, the wife of the appellant, made her will and bequeathed to him the undivided half of the lots of land in Drummond street for the use and benefit of her two nieces, the female respondent and her sister. Mrs. Miller (Susanna Connolly) died shortly after.

In 1861, Susanna Louisa Coleman died a minor, leaving the female respondent as her sole heir.

Patrick Connolly died about 1862, intestate, and the female respondent, his niece, inherited one-fourth of his estate, which consisted of his share of the Chateauguay farm and of one-fifth in one undivided half of the Drummond street lots.

On the 3rd of August, 1864, Sarah Connolly gave to the female respondent her share in the Drummond street property, which apparently consisted in one-fifth and one-fourth in another fifth of one undivided half of said lots. The appellant accepted this donation for the female respondent, and assumed in the deed the quality of tutor.

In July, 1867, the female respondent became of age, and on the 21st of April, 1868, she married Louis Edmond Amédée Globensky. They are separated as to property. A few days before her marriage, that is, on the 9th of April, 1868, the female respondent gave a full discharge to the appellant, as having been executor to her mother's last will; she acknowledging by this discharge that he had rendered to her a true and faithful account of his administration.

On the 2nd of November, 1868, the female respondent being authorized by her husband, sold to the appellant all the rights and shares she had in an undivided half of the Drummond street property, for $5,000, which sum she acknowledged to have previously received. It is admitted, however, by the appellant that he then only paid to her a sum of $360, leaving the sum of $4,640 to be accounted for.

The property sold by this deed was not the undivided half bequeathed by Mrs. Miller to the appellant for the use of her nieces, but the shares which came to the female respondent by the death of Catherine and Patrick Connolly, by the donation from Sarah Connolly and by the decease of her own sister. These shares consisted in one-half, or about one-half, of the undivided half of the lots on Drummond street, or one-fourth of the whole. This appears from the terms

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of the deed, from the fact that the appellant claimed the other half as having been bequeathed to him by his wife, and also by his answer.

The female respondent alleging in her declaration that the appellant had had the management of all her property since the death of her mother (25th of June, 1853), that the discharge of the ninth of April, 1868, was null, having been obtained by fraud and without a previous account by the appellant of his administration of her estate and property, and that the sale of the 2nd of November, 1868, of the Drummond street property was also null as having been made to the appellant before he had rendered an account of his administration, and further that the appellant had in his hand property belonging to her to the amount of $60,000, prayed that the discharge of the 9th of April, 1868, and the sale of the 2nd of November, 1868, be set aside, and that the appellant be condemned to account to her for his administration of her property, or to pay to her $60,000, and that he be held to be *contrainable par corps*.

To this action the appellant pleaded:

1st. Cumulation of action, inasmuch as the respondent asked by the same action an account of appellant's administration and the rescission of the deed of sale of the 2nd of November, 1868.

2nd. That the respondent sold her share of the Chateauguay property on the 9th of June, 1875, and that he never had the administration of it, nor received any rent from said property.

3rd. That Susanna Connolly, his wife, had bequeathed the one undivided half of the Drummond street property to him, and that she had authorized him to dispose of it for the interest of the respondent and of her sister, and that under that bequest he was entitled to the enjoyment of that property during his life.

4th. That the Belleville property was sold by the sheriff on the 15th of February, 1865, to John Bell for $300, and a deed given of it on the 6th of October, 1865, and that he, the appellant, had purchased the property from Bell in 1868.

5th. That the respondent had given him a full discharge on the 9th of April, 1868, and he further denied all the allegations of the declaration.

On the first plea the Superior Court held that there was cumulation of action, and ordered the respondent to make her option between her action *en reddition de compte* and her demand to annul the sale of the 2nd of November, 1868.

I cannot understand on what principle such a judgment, which appears to me to be at variance with the most elementary rules of French procedure, could have been rendered. If the discharge is null, the appellant is bound to account to the female respondent for all the property he has belonging to her, and if the sale is also null, the property sold forms part of the property for which he has to account, as well as regards the property as for the issues and profits he may have derived from it. Yet as the respondent has not appealed from this interlocutory, but has made her option to proceed with her action *en reddition de compte*, we have now nothing to do with that part of the action which has been abandoned.

On the 29th December, 1871, the discharge given by the respondent was held to be valid, and her action was dismissed.

This judgment was reversed by the Court of Review, whose judgment was confirmed by this Court, and the appellant was condemned to render an account of his administration. By some oversight, the Court of Review did not formally declare the discharge null and void, and as its judgment was confirmed as rendered, there was no express adjudication setting aside the discharge, although it was virtually annulled by the order given to the appellant to account, on the ground that he had not previously properly accounted for his administration of the respondent's property.

On the 6th of October, 1875, the appellant, in pursuance of this judgment, rendered an account, by which he credited the respondent with an amount of $12,224.05, including $4,640, being the balance of the sale of the Drummond street property, and he charged her with a sum of $33,116.82 for disbursements and interest, leaving a balance in his favor of $20,892.77, which he claimed by an incidental demand.

In this incidental demand the appellant has raised the objection that the action should have been in Ontario, where the property administered by the appellant was situated. If there was anything in this objection, it should have been urged as a plea to the jurisdiction of the Court, and not by an incidental demand, but in neither form is it a valid objection. The action to account is a personal action which can be brought either at the domicile of the party accountable, or at the place where he was appointed to the office which makes him liable to account. The domicile of the appellant is at Montreal, and it is here that by the will of Mrs. Coleman he was appointed executor to her last will and tutor to her children. Although the capacity of tutor was never regularly conferred upon him as required by law (Art. 249 and 922 C. C.), yet he in that capacity accepted the donation made to the respondent by her aunt, Sarah Connolly, on the 3rd of August, 1864. Whatever may be the interpretation to be given to Art. 922 C. C., the action was well brought at Montreal, where the appellant had his domicile, and where he was appointed executor to Mrs. Coleman's will.

As regards the property and revenue to be accounted for, it is admitted the appellant never meddled with the Chateauguay property, which was sold by the respondent after she had become of age, and that the appellant never received any rent or profit therefrom.

The Drummond street property has not yielded a revenue sufficient to pay for the taxes and fences, and the appellant claims that he has paid several sums of money for this property, which was managed by Dr. Leprohon, and that there is still due him a balance of $180.

The only remaining property is the Belleville lots, with mill and two houses, from which the appellant admits he has received $4,658.07 of rents, issues and profits.

The mill was leased in 1847 by Mr. Coleman to one Easton, for 10 years, at the rate of $400 a year; this included the wooden house attached to the mill. The stone house was leased for $100 a year to one Blacklock. The appellant says that Francis Mullins, the other executor, alone managed this property and received the rents from the death of Mrs. Coleman in 1853 to the 10th of September,

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1855, when he received $89 from Blacklock. The appellant further states that the mill was always leased for $400, except in 1859, when it was leased to Wallace for $800, and in 1864 and 1865, when it was leased for $300. This included the wooden house, and the stone house was always leased for $100 except in 1856, when it was rented for $140, and in 1857 for $120. The appellant acknowledges having received altogether for rents, issues and profits from the mill and houses the above-named sum, $4,658.07.

The Court below charged him with $18,600, that is $13,941.93 more than he has admitted.

The rent for 1852, which is charged to the appellant by the judgment of the Superior Court, is not claimed by the action, and it appears by the evidence that from the death of Mrs. Coleman, June, 1853, to 1855, Francis Mullins alone administered the Belleville property and received the rents.

As the executors are only responsible for what they actually receive or ought to receive, and are not jointly and severally responsible for each other's administration (Art. 913 C. C., Darling et al. vs. Brown et al., 2 Supreme Court Rep. 26), the appellant is not accountable for the rents so received by Mullins.

On the 30th of September, 1865, the Belleville property was sold by the sheriff to John Bell. The appellant acknowledges that from 1855 to 1865, when the property was sold, it was leased for $5,640, but that he has only been able to collect $4,658.07, and that he has received nothing since. There is some doubt about a cheque for $100 sent by Wallace to Miller in February, 1861, and for which the latter has not given credit. Miller says that either the cheque was not paid, or that it is the same sum credited in May, when he returned from Florida. This $100 is not included in the above amount. In 1868 Bell reconveyed the property, but the appellant contends that he then purchased it for himself. It, however, appears, by the evidence, that on the 29th of September, 1865, the day previous to the sale of the mill by the sheriff, Bell drew on the appellant for $545.38, being the amount of his claim, and that it was understood that Bell would, after purchasing the property, reconvey it to the appellant for the respondent. The appellant's letters leave no doubt on this point. The appellant accepted and paid Bell's draft, and afterwards insisted on a reconveyance of the property, which was only effected in 1868. This reconveyance must be considered for the benefit of the respondent.

The rent for 1865 was $300. The appellant says the property was then in the hands of the sheriff, and he has received no rent.

I think, however, that as the appellant had repaid Bell's claim about the time the sheriff's sale took place, Bell must have held the property for him from 1865 to 1868, and must have accounted for the rents as he was bound to do; and if he did not do so, it must have been owing to the negligence of the respondent, who, in either case, is responsible for such rent. The mill was then in a bad state of repair, and could not yield more than it did in 1864 and 1865, that is $300 per annum. This would give $1,200 for the four years of 1865, 1866, 1867 and 1868, and four hundred dollars for the rent of the stone house during the same period, in all $1,600.

There is, moreover, the rent for 1869 and 1870, which, at the same rate,

would give $800, the property having been sold to Diamond on the 11th of September, 1870.

These sums of $4,658.07, $1,600 and $800 would make altogether a sum of $7,058.07, for which the appellant is accountable.

In 1870 the appellant sold the Belleville property for $6,250 to Diamond. From the evidence this would appear to have been a fair price. There is no evidence of fraud. There were debts to be paid, and in the absence of fraud the appellant is only bound to account for the price he received, $6,250.

On the 2nd of Nov., 1868, the respondent sold to the appellant her rights and shares in one undivided half of the Drummond street property for $5,000, and received in cash $360, leaving a balance to be accounted for of $4,640.

The debit side of appellant's account consists:—

1. Of the sums received for issues and profits	$7,058 07
2. Of the price of the Belleville property	6,250 00
3. Of the balance of the price of Drummond street property	4,640 00
	$17,948 07

The credit side consists of the sums paid by appellant as follows:—

1. Amount admitted by the *debats de compte*	$ 6,045 00
2. Louisa's board for 1853, 1854, 1855	400 00
3. Do. at the Providence, 1856-7	97 70
4. Do. at the Providence, 1859, 1860	133 60
5. Do. at St. Vincent de Paul, 1859	85 50
6. Do. at St. Vincent de Paul, 1855-6	24 00
7. Do. of Mrs. Coleman and Louisa, 1853	180 00
8. Paid Atheneum Insurance Company	84 00
9. Paid Mrs. Leprohon	18 50
10. Paid Birks & Co	1 40
11. Paid Miss Burroughs	30 75
12. Paid Beacon Fire Insurance Company	91 50
13. Paid Dr. McCulloch	247 25
14. Paid McDonald & Co	7 40
15. Paid Mathewson's account	16 00
16. Paid J. & T. Bell	7 50
17. Paid Wm. Benjamin's account	49 65
18. 1858, trip to Murray Bay	23 25
19. 1860, trip to Murray Bay	12 00
20. 1862, trip to Murray Bay	30 00
21. Paid Dr. Fremont	50 00
22. Paid Mrs. Tassé	19 42
23. Paid Smith & Co	6 80
24. Paid Hodson	5 00
25. Paid for books	10 00
26. Paid Jourdain's bill	4 25
27. Paid H. Morgan & Co	39 93

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28.	Paid J. B. Homle	5 00
29.	Paid Mrs. Tassé	20 00
30.	Paid Dawson & Co.	3 00
31.	Sewing Machine	65 00
32.	Paid Leblanc & Cassidy	32 00
33.	Paid respondent	500 00
34.	Paid Ryland	7 25
35.	Paid A. & W. Robertson	78 50
36.	Paid Mde. Tassé	20 00
37.	Paid Farrell	3 00
38.	Balance paid for taxes and fences of Drummond street property	180 00
39.	Paid John Bell	545 38
40.	Paid appellant's judgment against Mrs. Coleman	2,014 14
41.	Paid O'Hara's judgment	420 00
42.	Paid Trust & Loan Co. Mortgage	1,600 00
43.	Paid interest for 1856 and 1857 paid Trust and Loan Co.	256 00
44.	Paid Equitable Fire Insurance Co.	40 00
45.	Amount of interest to which appellant is entitled as per statement	5,028 47
		$18,538 14

All the above items with the exception of items 40, 41, 42, 43, 44, and 45 have been admitted by the respondent, some by the *debats de compte* and admissions, and the others at the hearing of the case.

The current expenses always exceeded the receipts, and the appellant has charged a large amount of interest on his disbursements. The appellant having incurred those expenditures without legal authority, since he was not duly appointed tutor to the respondent, and was not authorized to borrow or spend any money on her account except in connection with his administration as executor, he cannot be treated more favorably than a duly appointed tutor. (Aubry & Rau, vol. 1, p. 368.) He is not, therefore, entitled to any interest on the balances which were from time to time due to him. (Art. 313 C. C.) He has, however, the right to claim interest on the debts which bore interest which he paid in the interest of the minor to prevent the sale of her real estate [illegible] upon the amount of the judgment he held against the estate. (A[illegible] vol. 1, p. 472, note 6; Larombière on Art. 1251 C. N., No. 59; Mourlon, Révue du droit Français et étranger, vol. 1, p. 808; Demolombe, vol. 27, p. 285, No. 332; Art. 1724 C. C.)

The appellant is therefore entitled to interest on the following items:

STATEMENT.

1st.	Amount of John Bell, $545.38, from 10th November, 1865, to 11th September, 1870, 4 years and 300 days	$131 96
2nd.	On amount of appellant's judgment for $2,014.14, from 21st	

	May, 1853, to 11th September, 1870, 17 years and 131 days.	2,090 91	Miller, and Coleman et vir.
3rd.	On amount of O'Hara's judgment of $420, from 26th August, 1852, to 11th September, 1870, 18 years and 16 days.....	454 70	
4th.	On amount of Trust & Loan Co. mortgage of $1,600, from 28th May, 1857, to 11th September, 1870, 13 years and 115 days.....	1,251 06	
5th.	On $250 paid to Trust & Loan Co. for interest in 1856 and 1857, 14 years.....	215 00	
		$4,143 63	
	This sum of $4,143.67 deducted from the $6,250 received by the appellant on the 11th of September, 1870, leaves a balance of $2,106.33 to be deducted from the sum of $5,015.14, leaves a balance of $2,908.81, bearing interest from 11th September, 1870, to 6th October, 1875, date of producing the account, 5 years 25 days.....	884 80	
	Amount which appellant is entitled to charge for interest.....	5,028 47	
	The amount to the credit of the appellant as above is.....	18,538 14	
	The amount to his debit is.....	17,948 07	
	Leaving a balance of.....	$590 07	

which the appellant is entitled to claim with interest since 6th of October, 1875.

The only contested items admitted in favor of the appellant in the above statement are:

1. Appellant's judgment against Mrs. Coleman.....	$2,014 14
2. O'Hara's judgment.....	420 00
3. Trust & Loan Company's mortgage.....	1,600 00
4. Interest paid to Trust & Loan Company, 1855, '56 and '57.....	250 00
5. Balance of disbursements on Drummond street property.....	180 00
6. For insurance.....	40 00
	$4,510 14

These sums were clearly due, and there is no reason to reject them from the credit side of the account, and, as the three first items bore interest, the appellant is also entitled to interest on those items.

The claim of the respondent for higher rent than what appellant has admitted is rejected, because it is proved that Mullins received the rents from 1833 to 1855, and it is not proved that appellant has received from 1855 to 1864 more than what he has admitted.

There is no proof of any negligence on his part. From his letters it would seem that he was very pressing, and if he could have collected more, no doubt he would have done so. His administration was difficult. It was gratuitous, and he has lost a large amount for interest on his advances. These are considerations which ought to induce the Court to make a fair allowance in his favor.

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On the other hand I have not allowed to appellant the note for $1,192, given by Mrs. Coleman to Mullins, and by him endorsed to the appellant, nor the £400, equal to $1,000, mentioned in Mrs. Coleman's memorandum book.

Mullins administered the Belleville property from 1852 to 1855. He received the rents without accounting for them, and the note must have been paid or compensated by what he received. The note has been long ago prescribed. Moreover, the appellant, who was assuming the duties of a tutor, could not purchase this note, and claim it against the respondent.

As to the £400, the entry in the book is very imperfect, and subsequent to it the appellant sued and obtained a judgment for £500 only, leaving out the £400. I consider this was an abandonment of the remainder of his claim if he had any.

On the whole the judgment of the Superior Court should be reversed, and the appellant condemned to deliver over to the respondent the one undivided half of the Drummond street property coming from Mr. Miller, as well as any right and interest he may have in those small lots of land situate at Belleville, which have been transferred to him and Mullins by one Easton, and all the papers and documents which he has belonging to the estate.

The respondent should be condemned to pay to the appellant the sum of $590.07, with interest from the 6th of October, 1875, each party paying his own costs of the Court below, and the respondent paying the costs on the appeal.

RAMSAY, J.—The first question that presents itself on this appeal is as to the extent of the appellant's responsibility. Without a clear idea as to this all attempts to arrive at any satisfactory conclusion must fail. Fortunately we have to examine the question independently of the dispositions of the Civil Code, which has introduced a new rule (Art. 1064), the effect of which has not yet been defined, and which, from the exceptions to Arts. 1045 and 1710, it is evident the codifiers did not perfectly realise.

The appellant's responsibility has to be considered in two ways: first, as to the nature of his duty, and, second, as to the penalty for failing to perform it. With regard to the first, it is immaterial to examine whether appellant was a pro-tutor, or whether he is a *negotiorum gestor*. Practically he is bound to the same care in either case. If he be considered as bound like a tutor, he is bound to use the care of a prudent administrator—he is liable for bad management (290 C. C.); if he be a *negotiorum gestor*, he will be protected by the circumstances under which in this particular case he assumed the responsibility. Poth., Mandat, 211. As to the discharge and the penalty for failing to pay the *reliquat de compte*, it is very material to the appellant whether he be held bound as a tutor, or whether he be considered as an ordinary *negotiorum gestor*. I refer especially to Arts. 311 and 2227.

It has been argued that there was no such quality known to the law as a pro-tutor, and that the rule of Art. 311 C. C. cannot be extended beyond the person having the quality; that Miller could not be a pro-tutor, even if such a quality did exist, inasmuch as he had not the charge of the person of the minor; that as regards the Upper Canada property, he acted as the executor of Mrs. Coleman's will; that as regards the Drummond street property, he acted as the fidei-commissary legatee under his wife's will, and, consequently, that he is not

accountable to the respondent, as regards these properties, in any other capacity.

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The interlocutory judgment of this Court, confirming purely and simply the judgment of the Court of Review, gave no special quality to Miller. It ruled that the account rendered by him without vouchers and the discharge by appellants was null. In effect it applied the principle of Art. 311 C. C. And here two questions arise: (1) Can we alter that judgment if it be wrong? (2) Is it wrong? The difficulty as to the liability of one acting as a tutor, who is really not a tutor, is not a new one. D. 1. 1, *de eo qui tutore*. It seems, however, to me to be a pure subtilty, the falsity of which is in some measure concealed to us by the word pro-tutor. There is really no such capacity. The Roman law speaks of a quasi-tutor, never of a pro-tutor. Ulpian thus sets forth the difficulty, such as it is—"*Quia plerumque incertum est, utrum quis tutor, an vero* QUASI TUTOR *pro tutore administraverit tutelam.*" (Ib.) He was a tutor *de facto*, whether he acted believing himself to be a tutor, or that he knew himself not to be a tutor, "*sive se putet tutorem, sive scit non esse.*" (Ib., § 1.) And he who is not a tutor, but who has acted as such, could be proceeded against before the pupil had attained the age of puberty, "*quia tutor non est.*" (Ib., § 3.)

Here then we find the direct action to account as a tutor given against one acting as a tutor, when it could not have been open against the tutor, avowedly because the former was not a tutor. Of course we cannot find any authority in the Roman law directly bearing on the rule of Art. 311, because under the Roman system no such case could happen. On arriving at puberty, when the tutorship determined, the curator protected to some extent the minor, and when the curatorship determined the minor become major was not subject to the personal control of the curator. But by the authority of the Roman law, I think the true principle is established so as to leave no difficulty as to its application. (Paul Sent i. iv, 8.) On this text Hvshke says that calling the action that of pro-tutorship is an error. Again, as to Miller's quality, there might be some question, for there is a certain ambiguity as to the control he had over the minors. But this ambiguity disappears when we find that the appellant actually took the quality of tutor in a deed. He says this was done inadvertently; but that excuse is scarcely admissible, when the declaration is taken in connection with the other facts.

We next come to the distinction appellant seeks to establish as to the Upper Canada property. He has certainly something to say, but it does not appear to me that his pretension, as explained at the argument, can be sustained. Having the quality of executor under the Upper Canada law, Miller's administration there will be governed by that law and not by the law of Lower Canada, if they be different. But when the tutor into whose hands the result of that administration has passed comes to render his personal account of his tutorship, he does it under our law. It is impossible that he can turn round to the minor and say, "I have confused two capacities in which I was acting, and I shall therefore give you an imperfect account." It seems the same may be said of his administration of the Drummond street property. But really these questions are of little practical utility in the present case, for Miller has tendered an account of his administration both in Upper Canada and in Drummond street. Taking this view of

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the liability of Miller, it is unnecessary to enter upon the question as to whether this Court could reform its previous judgment, and discharge Miller from the obligation to account anew, notwithstanding the discharge.

One other question remains, and it is whether a quasi-tutor like Miller is liable *par corps* for the *reliquat de compte*. If he is a tutor *de facto*, I cannot see how he can escape from the operation of Art. 2272 C. C. If he is not a tutor *de facto*, then he cannot come within the operation of Art. 311. It does not seem to me that any logical distinction can be made.

Having defined Mr. Miller's legal position, we next pass to the consideration of his liability under the evidence of his administration. It strikes one as something remarkable that between 1852 and 1875 an estate, absolutely unprofitable, should have maintained first three, then two, and finally one person generously, as it is admitted, and have grown up to $41,278, and this without any very notable accession of fortune. The three sources of this wealth were, the Upper Canada property, the Drummond street property, and the wardrobe of the late Mrs. Coleman. There is absolutely nothing beyond this, for it is expressly admitted that the Chateauguay property produced nothing till it was sold by respondent, who got the whole price. As for the Drummond street property, it produced nothing. If no part of that property had been sold, the judgment ought to have gone to the effect that Miller should deliver over to respondent her share of the property. But there is a curious incident of the suit. Respondent asked to have a deed of sale to Miller of part of this property set aside. Miller objected to the conclusions of the declaration, and moved that respondent be obliged to select whether she would have an account or the deed set aside. Strange to say he was successful in this motion, and respondent did select and abandoned so much of her action as tends to set aside the deed of the part of the Drummond street property.

Respondent now contends that this judgment does not really affect the question; that Miller having to account, he was obliged to account for the loss on the bad and fraudulent sale to himself, and therefore that the deed might stand as a transfer of the property and still Miller remain bound for the mal-administration.

This is very ingenious, but it seems to me that the position is not a sound one, and that it wars against the fundamental principle that you cannot seek the same thing twice. Respondent cannot hold to the sale, and ask appellant to pay a different price from that stipulated in the deed. It would also sin against another disposition of the positive law; it would be to prove *outre le contenu de l'acte*. The case of Halcro and Deslesderniers (2 L. C. R., p. 325) has been cited. That case, so far as it has any bearing on the matter before us, goes no further than to say that a deed, to which the defendant is a party, may be set aside by exception and without an incidental demand, provided the conclusions of the exception are sufficient. Here the conclusions were sufficient if they had been let alone; but by an interlocutory judgment, acquiesced in by respondent, they were struck out. This is to be regretted, for the Court is now in rather an awkward position. The action stands as an action to account, and therefore it seems we must deal with the price of sale, and in doing so we cut respondent out of the action to set

aside the deed, for she had one of two actions, she has not both. Again, if we reserved her right to set the deed aside, we might be reserving a remedy which is no longer available. I think, therefore, that the issue as regards the property sold is narrowed down to the price stipulated in the deed. But here another difficulty presents itself. The part sold does not end the questions as to the Drummond street property. It does not clearly appear what Miller bought from Mrs. Globensky. The deed purports to convey "all the rights, share, claim, title and interest which she, the said Anna Maria Connolly Coleman, has or can have, or pretend in or to any part or parts of the one undivided half of two lots," &c. At the time this deed was made, Mrs. Globensky had a claim to one undivided half under her aunt Mrs. Miller's will, and she had also by succession, donation and will from her uncle and other aunts 8–30ths of the property. There is some room for doubt, but I think we must interpret the deed to be a conveyance of the shares of Mrs. Globensky in the undivided half coming to her from other sources than Mrs. Miller's will. In the first place, there could be no question of shares as to the undivided half coming from Mrs. Miller, whereas the shares coming to her from other sources are a little difficult to calculate, and there may have been doubt as to their extent. Again, the parties declare in the deed that Mrs. Globensky is then seized by good and valid titles of the property she sells; strictly speaking she had no title in that sense to Mrs. Miller's half. Miller was seized of it until he gave a title, and although this distinction has hardly any result under our system, the position of the half share not being theoretically in accordance with the deed it helps us to interpret the deed. Miller has, therefore, to account for the half coming to Mrs. G. from Mrs. Miller, and we think he should be condemned to pay that half to her. Substantially, then, we have to examine as against Miller the revenues or negligence as to the Upper Canada property. No negligence is proved. I fully concur with the learned Chief Justice on the principles he has explained, being those which ought to guide us in deciding the details of the case. I may specially say that the entry of £400 in Mrs. Coleman's handwriting in a roughly kept book does not appear to me to be a title. It will be observed that this is not an entry depending on Miller's administration, and consequently his oath cannot help him. What he had to prove was a title to this debt, which he has not got. It is not unlikely Miller's story is true from the relations existing between the parties at the time; but we cannot be guided in a matter of this sort by impressions. Again, if the loan was made to Mrs. Coleman, Miller seems to have abandoned it by bringing an action for a similar debt and omitting this claim. Such an abandonment is readily presumed. With regard to the other debt due by Mrs. Coleman, I think Miller should have credit for it. It has been said that as he made no inventory he cannot charge it. That is not what the law says. If a tutor makes an inventory and does not mention a debt due to him, and of which he has knowledge, he cannot charge it later, because the inventory stands as an admission, either that he has abandoned the debt or that the debt does not exist. Again, if he makes a payment for the minor out of his own money he gets no interest on the advance, except when he pays a debt bearing interest, and then he gets interest at the rate of six per cent. This is a very rigid rule, and from its very rigidity might be injurious

Miller, and Coleman et vir.

to the minor, nevertheless it is probably the safe rule, and it is certainly the rule of law. Among the old writers we find it laid down that if the minor's income is insufficient for his support, his own services must be employed to eke out his income. Our social ideas would have been not a little outraged if Mr. Miller had taken this young lady from school in order that she might do something for her own support. Mr. Miller's position was, therefore, a difficult one; but he had a remedy. He could have obtained an authorization to borrow money or to advance it. This he did not do, and now the estate cannot be charged with interest. We refuse Miller interest on all his advances. The learned Chief Justice has entered very minutely into the details of the receipts and expenditure, and I concur with him in the result at which he has arrived. I find, too, that the conclusion to which the Court has come is substantially supported by the evidence of Mr. McDonald, the accountant. As has been remarked, his calculations cannot always be used because in dealing with the figures he admits what we cannot legally allow, and therefore much of his labor is lost; nevertheless his evidence helps us to a conclusion, or rather his calculations fortify us in those conclusions at which we have arrived. If we are to have many such cases it will become necessary for us to adopt some more stringent rules as to practice than those usually followed in actions to account in our Courts. The account here is not in the form required by law.

BABY, J. (dissenting), agreed in substance with the judgment of the Court below.

Judgment of S. C. reversed.

A. & W. Robertson, for appellant.
Strachan Bethune, Q.C., & Joseph Doutre, Q.C., Counsel.
Lacoste & Co., for respondents.
(S. B.)

COURT OF QUEEN'S BENCH, 1880.

MONTREAL, 22ND MARCH, 1880.

Coram Hon. Sir A. A. DORION, Ch. J., MONK, J., RAMSAY, J., TESSIER, J., CROSS, J.

ANGERS, Attorney General,

APPELLANT;

AND

MURRAY,

RESPONDENT.

HELD:—That no appeal lies from a judgment dismissing an action by the Attorney General to annul letters patent, after the expiration of forty days from the rendering of the judgment.

SIR A. A. DORION, C.J. This is an appeal from a judgment dismissing the proceedings taken by the Attorney General for the cancellation of letters patent issued by the Crown

The respondent has moved that the appeal be dismissed, because it was not instituted within forty days from the date of the judgment appealed from, as required by art. 1037 of the Code of Civil Procedure.

The appellant contends: 1st, that the delay of forty days mentioned in art. 1037 only applies to proceedings by *scire facias* on an information, and that in the present case he has proceeded by an action in the ordinary form, as authorised by art. 1035 of the Code of Civil Procedure.

2nd, that the delay of forty days does not apply to proceedings taken, as in this case, by the Attorney General on behalf of the Crown.

We have already decided in the case of Pacaud & Rickaby (1 Quebec Law Rep. 245) that, since the repeal of arts. 1038 and 1039 of the Code of Civil Procedure, by the 32 Vict., ch. 11, s. 33, the Crown alone could, by the Attorney General or the Solicitor General, or other duly authorized officer demand the cancellation of letters patent, and as the Crown in civil matters always proceeds by information, the art. 1037 applies to all proceedings taken by the Crown under art. 1035, whether such proceedings are initiated with an ordinary writ of summons or with a writ of *scire facias*, for in both cases the proceedings must be upon the information of the Attorney General, Solicitor General or other authorized officer representing the Crown. As we have indicated it in the case of Pacaud & Rickaby, there is a difference in the punctuation of the French and English texts of art. 1035, and the French text taken by itself might be taken as meaning that the *suits in the ordinary form* referred to in the first part of the article were something different from the informations mentioned in the second part of the article. We think, however, that the English version makes it clear that the word information applies to both forms of proceeding, that is, to an ordinary suit and to a proceeding by *scire facias*, the words "*suits in the ordinary form*" being used in contradiction to proceedings on *scire facias*, and not as being different from an information on behalf of the Crown.

This disposes of both pretentions of the appellant, for if the Crown alone can proceed to have letters patent cancelled, and if this must be done by information, the art. 1037 applies in express terms to such information taken on behalf of the Crown, whether that information be accompanied by a writ of summons in the ordinary form or by a writ of *scire facias;* it cannot, in fact, apply to any other proceeding, for there are no other proceedings by which, since the repeal of articles 1038 and 1039, letters patent can be cancelled.

The reasoning of Lord Campbell in the case of Moore and Smith (5 Jurist N. S. 892) as to statutes affecting the rights of the Crown, without any express declaration to that effect, when their provisions must necessarily bear that construction, is most applicable to the present case.

We are therefore of opinion that the appeal should have been instituted within the forty days from the rendering of the judgment, and as this was not done the appeal must be dismissed.

Motion to reject appeal granted.

Abbott & Co., for appellant.

A. & W. Robertson, for respondent.

(S.B.)

COURT OF QUEEN'S BENCH, 1880.

MONTREAL, 22ND MARCH, 1880,

Coram Hon. Sir A. A. DORION, Ch. J., MONK, J., RAMSAY, J., TESSIER, J., CROSS, J.

BREWSTER,

APPELLANT;

AND

LAMB,

RESPONDENT.

HELD:—That where an application to appeal to the Privy Council has been made in Chambers five days after the rendering of the judgment, and security has been allowed to be given *de bene esse*, and the respondent moves in the next term that the Record should be remitted to the Court below, the motion will be rejected.

An application was made in Chambers (Dec. 29th, 1879) on behalf of the appellant Brewster, for leave to appeal to the Privy Council.

The petitioner set out that on the 22nd December, 1879, being the last day of the term, a judgment was rendered in the Court of Queen's Bench, Appeal side, reforming the judgment of the Court below, but condemning the petitioner, appellant, to pay respondent Lamb a sum of $2,985.83, with interest and costs of suit in the Court below. This judgment was susceptible of appeal to Her Majesty in Her Privy Council, and petitioner was desirous of prosecuting such appeal. But in consequence of the detention of Mr. L. H. Davidson (the counsel specially charged with the case on behalf of appellant) at Caughnawaga by a snowstorm, he was not present at the rendering of the judgment, and no motion for leave to appeal to the Privy Council was presented before the Court adjourned.

The petitioner offered forthwith to enter security for an appeal to the Privy Council, and concluded as follows:

"Wherefore your petitioner prays that your Honor will be pleased to permit him to enter his security in appeal to Her Majesty in Privy Council, and further order that this petition do stand as a rule for the first day of the next term of said Court of Queen's Bench, and that all further proceedings in this cause be stayed until after the hearing and determination of the rule."

The foregoing petition was supported by the affidavit of Mr. Cushing, partner of Mr. Davidson.

The petitioner submitted that nothing in the Code of Procedure or Rules of Practice requires a motion for leave to appeal to be made to the Court, and that where such motion has not been made, the party is not deprived of the right to put in security, and that the acceptance of such security should have the same effect as the granting of leave to appeal by the Court.

The CHIEF JUSTICE made the following order: "Petition allowed as to the offer of security; remainder rejected, with reserve of all rights to respondent."

In March Term, 1880, the respondent moved that the Record be remitted to the Court below.

The Court rejected this motion, and held that security put in as in the present instance was as effectual as if put in under a rule to show cause. Brewster, and Lamb.

Motion to remit Record rejected.

Davidson & Cushing, for appellant.
Girouard & Co., for respondent.
(S.B.)

COURT OF QUEEN'S BENCH, 1881.

MONTREAL, 15TH FEBRUARY, 1881.

Coram SIR A. A. DORION, C. J., MONK, RAMSAY, CROSS, BABY, JJ.

No. 61.

THE NORTHERN ASSURANCE COMPANY,

(*Defendants in the Court below,*)
APPELLANTS;

AND

GILBERT PROVOST, ALIAS PREVOST,

(*Plaintiff in the Court below,*)
RESPONDENT.

HELD:—1. That a clause in a fire policy, that the house insured was "*à être lambrissée en brique*," did not constitute a warranty of a promissory nature that the house was to be immediately covered with brick, but merely expressed the intention of the insured to brick the building when circumstances would permit. Moreover, the insurance company having, after the expiration of a year, accepted a renewal premium while the house was still, to their knowledge, in the same state, could not take advantage of the words cited.
2. Where the value of the property is not easily arrived at, and the evidence is conflicting, a claim will not usually be held to contain a fraudulent over-valuation, unless the amount demanded be about double the actual value. An apparent over-valuation of 20 per cent. was, in the present case, held not fraudulent.

The judgment appealed from, rendered by the Superior Court, Montreal, Mr. Justice Sicotte, on the 13th May, 1879, condemned the appellants to pay to respondent the sum of $800 for loss under a fire policy, and is as follows:

"Considérant que le demandeur a constaté le contrat d'assurance intervenu entre lui et la défenderesse relativement à la maison indiquée dans la police et dans les écritures respectives;

"Considérant qu'il est constant que cette maison a été détruite par incendie dans la nuit du 22 août 1878;

"Considérant que le demandeur a droit aux termes de la police de réclamer de la défenderesse la valeur de la chose assurée, et détruite par le sinistre;

"Considérant que la demanderesse est tenue de payer au demandeur la valeur de la chose assurée et qu'il est prouvé que cette valeur est de $800;

"Considérant que la défenderesse n'a pas justifié ses défenses et qu'il n'y a pas lieu de reprocher aucune fraude au demandeur:

"Condamne la défenderesse à payer au demandeur la somme de $800 qui lui est due pour la valeur de la chose assurée, avec intérêt du 26 novembre, 1878, jour de l'assignation, et aux dépens distraits aux avocats du demandeur."

The action was brought to recover $1000 on a policy of insurance which, in consideration of a premium of $12, insured respondent in the sum of $1,200, for

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one year from 17th March, 1877, to 17th March, 1878, "sur la bâtisse seule-"ment d'une maison à 3 étages bâtie en bois à être lambrissée en brique (fon-"dation en pierre), et couverte en ferblanc et gravois, à être occupée par 4 familles "comme logements. Située côté ouest de la rue Désiré, coin de la rue Ontario, Hochelaga, isolée."

On the 17th March, 1878, a second premium of $12 was paid, as per receipts to renew or continue the insurance for another year, viz.: to the 17th March, 1879.

On the night of the 22nd August, 1878, the house insured was completely destroyed by fire, except the stone foundation.

On the 23rd August, 1878, the respondent gave notice of loss, requesting payment of the entire insurance, $1,200.

The defendants having refused payment, considering the policy void and the amount demanded fraudulently exaggerated and fraudulent, the respondent, on the 25th November, 1878, took action for $1000, deducting $200 from the amount of the policy as the value of the salvage, and the Superior Court maintained his claim to the extent of $800.

The appellants submitted:—

Two questions present themselves in the defence of the appellants, one of law and one of fact. The appellants maintain, in the first place, that, by the very terms of the insurance, embodied in the policy, respondent was under a warranty to have the house encased in brick within a reasonable delay, and that, having utterly failed to so encase the house within such reasonable delay, and in fact at any time before the fire, the policy became and is void for breach of warranty.

It is pretended, and the judgment appealed from evidently assumes, that appellants' acceptance of the renewed premium was a waiver of this condition to encase with brick, but appellants claim no such waiver can be inferred from that fact or from the circumstances of this case. The failure to encase within the requisite time rendered the policy, *ipso facto*, absolutely void. When appellants accepted the second premium they had a right to assume that the respondent had carried out the warranty he had undertaken, and if he had not done so it was for him to notify them thereof, and their accepting the premium in ignorance of the fact that he had failed in his warranty and that the policy was void, could not constitute a waiver or create a new and valid contract in favor of respondent. Even if it be held, which appellants claim it cannot be, that the renewal created a new and valid insurance for another year in favor of respondent, it certainly could not do so on any more favorable conditions than those contained in the original policy, and the policy would even then be void for failure to encase within a reasonable time, which the evidence shows would not exceed two months. Thus appellants claim that, in whatever point of view the matter be looked at, the utter failure of respondent to encase the house within a reasonable time rendered the policy void, and that no liability exists thereon on the part of appellants for any sum whatever. The house was left by respondent in an abandoned condition during all the time after he insured it, and he never manifested the least intention to complete it, but the contrary,

and his conduct in insuring it by representing he was going to complete it was a fraud on appellants.

Appellants consider their case so strong on the foregoing grounds that it is scarcely necessary to go into the question of fact to show that the claim of the respondent was fraudulently exaggerated and fraudulent. He claimed by his notice of loss $1,200, and the judgment has given him $800, or two-thirds only of what he claimed; but appellants hold that the judgment itself is excessive. There is, no doubt, as usual, a great conflict of opinion as to value, in the evidence, but a few facts appear which seem decisive against respondent having incurred $800 loss. In the first place the house was simply a rough half-finished, abandoned wooden shell. Respondent clearly had offered it and 4,400 feet of land for $1,100 or $1,200. The house with that quantity of land was valued by the sworn valuators of the municipality at only $300 in 1876 when the house was in course of construction, at $600 in 1877, and $500 in 1878, in both which years the house was in the same condition as when burnt, and this in a municipality where it is proved the valuation of property was placed so high generally as to lead to contestations.

J. B. Depatie, the man who built the house, states that he could replace the house for $650. He gives the size as 28 x 41 feet, which shews that the estimates of respondent's witness are based on much too large measurements of the house.

The respondent submitted:—

La défense repose sur deux points. Le premier, la propriété ne valait pas la somme pour laquelle elle était assurée et les pertes subies ont été exagérées; le second, l'intimé ne s'est pas conformé aux conditions de la police en ne faisant pas lambrisser en brique la maison assurée.

Quant au premier point soulevé par l'appelante, l'intimé a tout lieu de croire que la preuve faite par lui met hors de doute la validité de sa demande sous ce rapport. La preuve de l'intimé est complète et parfaite, et si la Cour Inférieure a diminuée de $200 la réclamation de l'intimé cela est plutôt dû aux circonstances, à la dépréciation générale de la propriété et à la difficulté de transiger toute espèce d'affaires, qu'à l'exagération réelle de la valeur donnée à sa propriété par l'intimé. D'un autre côté la prétention de l'appelante que la propriété de l'intimé ne valait pas plus que $200, est tellement exagérée que l'intimé ne croit pas devoir insister davantage sur ce point.

Reste la question de savoir si d'après les termes du contrat le demandeur-intimé était tenu de faire lambrisser en briques la maison assurée. De ce que la propriété assurée est une maison à être lambris-ée en briques s'en suit-il que l'intimé est obligé de le faire, et s'il ne le fait s'en suit-il que son assurance est nulle? L'appelante en répondant affirmativement donne à ces mots des conséquences non prévues et auxquelles l'intimé n'a jamais eu l'intention de se soumettre.

En examinant avec soin le contexte de la phrase il est impossible d'y trouver autre chose que ceci: l'intimé a fait assurer une maison *en bois* qui par son mode de construction était destinée à être lambrissée en briques. Ceci est vrai et prouvé au dossier. La maison assurée était par la manière dont elle était cons-

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truite destinée à être lambrissée en briques, mais que l'intimé ait promis de le faire d'après les termes de la police, il le nie formellement. La seconde partie de la phrase donne l'explication de la première. La phraséologie est la même. " A être occupée par 4 familles comme logements." Quelle est la signification de ces mots? L'appelante peut-elle prétendre que l'intimé a contracté l'obligation de faire occuper sa propriété par 4 familles? Evidemment non. Les parties contractantes ont simplement voulu énoncer le fait que cette maison bâtie en bois était destinée par sa construction à être lambrissée en briques, comme par ses divisions elle était destinée à être habitée par 4 familles. Ces mots se trouvent là comme purement descriptifs, ce que cette maison était et ce qu'elle devait être par la nature de sa construction.

Il est d'ailleurs impossible de déduire des mots qui viennent d'être cités l'idée absolue que l'intimé était obligé de faire lambrisser sa maison en briques. L'intimé ne s'est jamais cru obligé à une pareille chose, et il est bien persuadé que l'appelante elle-même ne l'a jamais cru avant l'incendie qui a détruit la propriété assurée. C'est à la clarté sinistre de cet incendie qu'une pareille idée a dû venir à l'appelante, car en examinant ses actes antérieurs la Cour sera convaincue qu'elle, l'appelante, a assuré une maison en bois, qu'elle a renouvelé cette assurance sur une maison en bois, et qu'elle a chargé deux fois à l'intimé une prime sur une maison inachevée. Elle assumait donc le risque d'une maison non complète, et l'intimé a payé en conséquence une prime sur une maison non-achevée. Nous trouvons dans les rapports de la Louisiane de 1876 pages 21 et 22, une décision qui offre beaucoup d'analogie avec la cause actuelle. Dans cette cause la Cour aurait émis le principe éminemment juste qui suit: " If it was valid (contract) to earn premiums it remained valid to bind the insurer for losses occurring in the meantime."

Il eut été facile pour l'appelante de déclarer clairement l'obligation de l'assuré de lambrisser en briques, en ajoutant quelques mots sur le sens desquels l'intimé n'aurait pas pu se tromper.

Cette Honorable Cour voudra bien remarquer que dans l'interprétation de termes douteux et ambigus, ce doute et cette ambiguité doivent toujours être interprétés contre la Compagnie d'Assurance. Ce principe universellement admis est clairement exposé dans Clarke, page 17, Law of Insurance.

Il est prouvé que l'appelante a assumé le risque sur une maison inachevée, et qu'elle a renouvelée la dite assurance connaissant le fait que la maison n'avait été terminée. Car par le reçu qui a été donné par l'appelante et qui est produit en cette cause, l'intimé s'était engagé dans le cas qu'il ferait finir la dite maison à donner avis à l'appelante quand les travaux seraient commencés. Cet avis n'ayant jamais été donné par l'intimé à l'appelante, celle-ci devait savoir que la maison n'avait pas été finie et en renouvelant l'assurance elle a eu soin de charger le taux d'une maison non achevée. En exigeant cette prime l'appelante a confessé par le fait même qu'elle savait que la maison était inachevée. L'appelante a essayé d'établir par un de ses agents subalternes, le nommé Swann, que l'intimé s'était engagé à faire finir sa maison dans le cours de l'été suivant. L'intimé s'est objecté à cette preuve, prétendant que le contrat écrit qui existait entre les parties ne pouvait pas être changé ni modifié par une preuve orale.

Cette objection a été réservée par le Juge présidant à l'enquête, et j'ai lieu de croire que cette Honorable Cour s'en tenant aux vrais principes mettra de côté cette preuve et maintiendra l'objection de l'intimé. S'il était permis aux Compagnies d'Assurance de changer ou modifier leurs contrats avec les assurés par le témoignage de quelques uns de leurs agents, je crois que les assurés seraient fort souvent en danger de perdre leur plus justes réclamations. La Cour n'aura qu'à examiner les deux dépositions du témoin Swann pour s'en convaincre. Appelé comme témoin par l'intimé il déclare qu'aucun délai n'aurait été déterminé pour achever la maison. Mais lorsqu'il vient rendre témoignage en faveur de l'appelante ce n'est plus la même chose, il déclare que l'intimé devait finir la maison dans le cours de l'été. Evidemment Swann se trompe dans l'une ou l'autre de ces deux dépositions, et cela démontre le danger qu'il y aurait pour une Cour de Justice de mettre de côté un contrat écrit pour s'en tenir à une preuve orale plus ou moins sure.

Enfin l'intimé soutient qu'il a exécuté son contrat de bonne foi et au meilleur de sa connaissance. L'appelante ne peut pas prétendre que la police qu'elle a émise en faveur de l'intimé soit parfaitement claire dans le sens qu'elle veut bien lui donner. Car il faut un effort considérable d'imagination pour tirer de ces mots " à être lambrissée en briques " la conséquence absolue que l'intimé était tenue de faire ces travaux, d'y voir un lien de droit par lequel il se serait trouvé, sans s'en douter, enchainé à une obligation que pour sa part il ne soupçonnait même pas. L'intimé qui ne sait ni lire ni écrire, a pu fort bien comprendre par la lecture qu'on lui a faite de la police, que par les mots " à être lambrissée en briques " l'appelante voulait dire que cette maison était destinée à être lambrissée en briques, sans que pour cela il fût obligé de faire ces travaux pour assurer la validité de son contrat. La bonne foi de l'intimé ressort de tous ses actes. Lorsqu'il a renouvelé l'assurance a-t-il caché à l'appelante que sa maison n'était pas achevée, a-t-il essayé d'une manière quelconque de tromper l'appelante et de l'induire en erreur ? Au contraire, on lui avait chargé le taux d'une maison non achevée lors du premier contrat, et en renouvelant il ne demande pas de diminution sur ce taux, parce qu'il n'y a pas droit et qu'il doit encore payer la même somme qu'il avait d'abord payée. L'appelante peut-elle prétendre à la même bonne foi, comment reconcilier le fait qu'elle exige le taux d'une maison non achevée avec la prétention que l'intimé avait du finir cette maison depuis longtemps ? Evidemment elle jouait un jeu double. D'un côté elle retire une prime d'une maison non achevée ce qui est à son avantage, et de l'autre elle ne se tenait pas responsable envers l'intimé en cas d'accident, vu qu'il n'avait pas achevé sa maison. Cette prétention répugne à la bonne foi qui est si essentielle dans les contrats d'assurance. L'intimé prétend de plus que l'appelante connaissant par l'avis qu'il devait lui donner lorsqu'il ferait finir sa maison, que les travaux n'avaient pas été faits, et recevant postérieurement le montant de la prime en renouvellement, a, par cela même, renoncé au droit qu'elle aurait pu avoir de faire valoir ce moyen contre l'intimé. (Clarke page 133, Law of Insurance.) Voici comment s'exprime cet auteur : " So the receipt by the Company of the renewal premium, after violation of the condition, will be a waiver of the right to insist on the forfeiture." Plus haut à la

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même page le même auteur s'exprime comme suit: "The breach of the conditions of a policy does not, *ipso facto*, avoid it, but only if the Assurance Company so elect, and the right of avoiding the policy may be waived, either by express agreement or by the acts of the parties."

D'ailleurs pourquoi l'appelante qui est si pressée de faire peser sur l'intimé cette obligation de faire lambrisser sa maison en briques aussitôt après le sinistre, ne l'était-elle pas autant avant cet événement, pourquoi s'empresse-t-elle de recevoir une prime sur une maison non achevée? Pourquoi dans cette occasion ne proteste-t-elle pas contre la conduite de l'intimé et ne l'avertit-elle pas qu'elle n'entend plus être responsable du risque s'il ne remplit pas ce qu'elle considère, elle l'appelante, comme une des conditions du contrat? Elle ne fait rien de cela, elle aime mieux se donner la satisfaction de retirer une prime considérable, tout en se disant qu'elle n'entend pas être responsable des pertes que l'intimé pourrait subir. C'est là la mesure de la bonne foi de l'appelante envers l'intimé. L'appelante a eu même l'audace dans sa défense de dire que l'incendie en question était l'œuvre de l'intimé, et qu'en faisant assurer sa maison il avait eu en vue une spéculation. Ces allégations que l'appelante n'a pas eu le courage d'essayer même de prouver, sont tellement outrageantes que l'intimé tout en se réservant un recours ultérieur croit devoir attirer l'attention de cette Honorable Cour sur cette manière d'agir de l'appelante envers les personnes qui la patronnent et encouragent, et cela après les instances les plus réitérées.

L'intimé cite encore les autorités suivantes à l'appui de ses prétentions.

Dans la cause de l'Aurora Fire Insurance Co. vs. Eddy, Illinois Reports, Vol. 49, page 107 et 108, le Juge en Chef Breese dit: "We have always understood that the rules by which a policy of insurance is to be governed do not differ from other mercantile contracts. But if the underwriters have left their design or object doubtful by the use of obscure language, the construction ought to be and will be most unfavorable to them; Angell, page 50. The sense and meaning of the policy is to be ascertained from its terms, taken in their plain and ordinary signification; Code Napoléon, article 1162; L. C. J., Pacaud and Queen Ins. Co., vol. 21, page 111; L. C. Law Journal, vol. 1, page 116; Stuart's Reports, page 147; Code Civil du B. C., art. 2570, 1234; Angell, page 59 et 60, 52 et 53; Sansum, Digest of Law of Insurance, page 298; Flanders, Fire Insurance, page 267.

CROSS, J. In this action the respondent Prevost sued the Northern Assurance Company for $1000, out of $1200, amount insured by policy bearing date 17th March, 1877, renewed by payment of a second premium 17th March, 1878, on a three-storey house built of wood, to be filled in with brick, stone foundation, covered with tar and gravel, to be occupied by four families as lodgings, situated corner of Désiré and Ontario streets, Hochelaga, isolated, destroyed by fire 22nd August, 1878, causing a loss of $1000, allowing $200 for salvage of the foundation, &c.

The Insurance Company pleaded that Prevost was guilty of fraud and false representations as to the value of his building, when he insured, and as to his loss when he claimed, the whole not being worth over $200. That, by the policy, Prevost had undertaken to have the house lined with brick, and to have it put in

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condition to be inhabited by four families, but failed to do so. That the fire occurred by the fault and culpable negligence of Prevost, the insured.

It was not disputed that the premises were destroyed by fire. Proof was adduced as to the value of the building, which was of a somewhat conflicting nature, also as to the other points in the case. By the judgment rendered on the 13th May, 1879, it was held that Prevost had proved his case, and was entitled to recover to the extent of $800.

The Northern Assurance Company appeal from this judgment, and rest their case chiefly on two points:—1, that there has been a fraudulent valuation of the subject insured, which renders the policy void; and, 2, that the words in the policy "*à être lambrissée en brique*," constituted a warranty of a promissory nature on the part of the insured, the non-compliance with which avoided the policy.

As to the first point, there is certainly considerable diversity of opinion as to the value of the building; but, considering what it must have cost to construct, we do not think that there is anything extravagant in the estimate put upon it. The insured was not bound to put the lowest estimate on it, nor to be guided by what he himself had paid for it. The assessment roll, it is true, would make it less than what it is claimed to be worth, but an assessment roll is not a very sure guide.

To be held a fraudulent over-valuation in a claim, I believe it has usually been considered that the amount demanded should be something like double the actual value. Values in such matters vary greatly, and we see nothing in the case to stamp the plaintiff with bad faith or exaggeration.

The second point depends on the interpretation to be given to the words "*à être lambrissée en brique*."

Whether this implied a promise, or was merely an expectation, is no doubt a question of some nicety, but we think it is not in the nature of a promise or undertaking, but a description of the then existing condition of the premises, an expectation expressing an intention to cover in the building with bricks when his means and circumstances permitted him to do so. A person insures to have his property covered from accident, he does not necessarily contract with the insurer as regarded the carrying out of his future purposes, and unless it was apparent that he did so we would not hold him to it.

Besides, the receipt for the premium contained the condition that, if the insured proceeded with the work to be done on the house, the company was to have previous notice. They never had that notice, and after waiting for a year, they collected a new premium, allowing the condition to remain in the policy as at first inserted, manifestly showing that they did not interpret this clause to be promissory or to mean that the covering with brick was to be done within any fixed or definite time.

RAMSAY, J. This is an action on a fire insurance policy for $1,200. By the action $1,000 was claimed, and by the judgment $800 was allowed to plaintiff.

Defendant resisted the action on two grounds: First, it was contended that the house, which was of wood, was to be covered with brick, and that it had

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not been so covered before the fire, although there had been sufficient time to cover it; that this was a warranty, and, consequently, that there was no insurance. There can be no sort of objection to calling this a warranty; but it was not a warranty of an existing thing, or a thing on which the insurance depended, and, consequently, by whatever name it may be called, the failure to execute it could not vitiate the policy. That this is now put forth as an excuse for not paying for the loss is evident from the fact that the insurance was effected on the 17th March, 1877, and renewed on the 17th March, 1878, on the house still "*à être lambrissée en brique.*" If, as Mr. Taylor says, it ought to have been completed in May, 1877, why did he renew the policy in May, 1878?

In the second place, it is contended that the house was over-estimated. The evidence principally relied on is the valuation of the municipality. The three valuators are brought up by plaintiff, and they all swear positively that their valuation is relative and not a real valuation of the property. There is then an attempt to prove that the plaintiff would have sold for $1,100. The witness says he hoped he could get the property at this rate; but he was disappointed in this expectation. This is not the sort of evidence to support an accusation of fraudulent over-valuation. Something more precise is required.

There is also an attempt to prove that the house was set fire to—I presume by the insured. This is not alleged, and evidence as to this ought not to have been admitted. It is, however, quite harmless, for nothing of the sort is proved.

Judgment confirmed.

Trenholme & Maclaren, for appellants.

I. A. Jodoin, for respondent.

A. Lacoste, Q.C., counsel for respondent.

(J.K.)

COURT OF QUEEN'S BENCH, 1880.

MONTREAL, 19TH JUNE, 1880.

Coram HON. SIR A. A. DORION, CH. J., MONK, J., RAMSAY, J., TESSIER, J., CROSS, J.

No. 3.

MOAT ET AL., APPELLANTS;

AND

MOISAN, RESPONDENT.

HELD:—1st. That where an immoveable sold by the sheriff is described as being bounded on a projected street, which is proved to be the only means of communication from the property to the public highway, and such street is found subsequently to have no legal existence, and that it is clear the *adjudicataire* would not have purchased had he known that no such street really existed, the sale will be set aside on the petition to that effect by the *adjudicataire*.

2nd. That the *adjudicataire* has a right, under the circumstances, to recover from the parties collocated in the judgment of distribution of the proceeds of said sale, the amounts of their respective collocations with interest.

This was an appeal from a judgment rendered by the Superior Court, at Montreal, on a petition by the respondent to vacate a sale made by the sheriff of a

lot of land seized and sold at the suit of the appellants against the Montreal Patent Guano Company.

On the 14th of April, 1875, the respondent purchased, at a sale made by the sheriff, for $3,350, a lot of land described in the minutes of seizure and in the advertisements, as follows:

"Second.—Another lot of land adjoining the one heretofore firstly described, "being part of lot number 17 on the official plan and in the book of reference "of the village of Hochelaga, said lot of land containing subdivision lots num- "bers 146 to 174 of said lot number 17, both inclusive, said lot of land contain- "ing 725 feet, English measure, in front by 148 feet in depth, bounded in "front by the above mentioned projected street (to wit, the street mentioned "in the description of the first lot seized, as being in front of the said first lot), "in rear by the heirs Mathew, on one side by the first above described lot of "land, and on the other side by subdivision lot number 175 of said lot number "17, with a wooden house thereon erected."

The respondent having paid the price of sale, obtained from the sheriff on 28th of May, 1875, a regular deed of sale. The price of sale was distributed in the regular course and paid over in the proportion of $1,200 to Robert and John Moat and of $2,150 to Joel C. Baker, represented in this cause by John Fair, his assignee, the said Robert and John Moat and John Fair being three of the appellants.

At the time of the sale lot number 17 had been subdivided into building lots, and the subdivision plan had been deposited in the registry office. This plan showed the subdivision lots composing lot number 17 as being bounded on the south-west side to a projected street of fifty feet wide extending the whole distance from the public highway to the depth of said lot 17. Although the street was not yet opened to the public, it was used by the respondent and other owners of the adjoining lots up to 1877, when Marie Brien dit Desrochers, wife of Henri Girard, to whom the appellants, Robert Moat, Ivan Wotherspoon, and Francis Cornwallis Maude, had sold on the 23rd of July, 1874, the first ten acres, from the public highway, of the lot number 17, with the option of opening a street twenty feet wide either on the south-west or on the north-east side of the property, closed the passage on the south-west side, after having opened one on the north-east side according to the option given to her by her vendors.

By his petition presented in January, 1878, the respondent complains that by the closing of this street on the south-west side of Mrs. Girard's portion of lot number 17, he is entirely cut off from any means of communication to the highway; that he cannot even use the road or street opened by Mrs. Girard on the north-east side of her property, because Corbeil and Rieutord, who have purchased the lot firstly described in the sheriff's advertisement, consisting of subdivision lots from 78 to 145 of said lot number 17, both inclusive, have not opened the said road across their lots; that the property sold to him should, according to the official subdivision plan, have a depth of 148 with a street of fifty feet wide in front of it, while it was described as having a street of only twenty feet wide; that the description of the property sold differs so much from

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that given in the minutes of seizure and in the advertisements, that he would not have purchased had he known the difference; and he claims that the sale be declared void, and that the appellants, Robert Moat and John Moat, be condemned to pay and reimburse to him the sum of $1,200, which they have received of the purchase money, together with interest from the 20th August, 1875, and that John Fair, in his capacity of assignee to Joel C. Baker, be condemned to pay to the respondent the sum of $2,150, which the said Baker also received out of the purchase money, with interest from the 20th day of August, 1875, and that the said appellants be condemned jointly and severally to pay to him any portion of the above sums which the said respondent may not be able to recover from either of the said John Fair in his said capacity, or of the said Robert and John Moat, and also the interest on the sum of $3,350 from the 14th of April to the 20th of August, 1875.

The appellants have answered to this petition, that although a strip of land of fifty feet in width appeared on the subdivision plan as number 364, extending from the highway to the upper end of lot number 17, still this strip was never conveyed to the municipality, and no street was ever opened through the said strip as a highway or public street; that this strip of land belongs partly to Mrs. Girard and partly to the Montreal Guano Company, and that no servitude or right of way was promised or guaranteed by the sheriff's advertisements to the purchaser of the lot sold to the respondent over the said strip of land from the upper end of the said lot number 17 to the highway; that, on the contrary, the said lot of land sold to the respondent and the one adjoining it, were advertised and described in the sheriff's advertisements as bounded not by a street or road, but by "*a projected street*," showing that no street existed over which the purchaser could have a right of servitude; that the respondent acquired by the sheriff's sale no right to the use of a street or right of way over that part of the said strip of land which is the property of Mrs. Girard, but that he acquired, without any express mention being required, all servitudes over the front of said lot number 17, which had been established in favor of the rest of the said lot number 17 lying beyond her land; that a servitude or right of way over the land of Mrs. Girard exists under her title, which consists of a roadway of twenty feet in width, to be left either on the south-west or north-east side at her option; that Mrs. Girard has exercised her option and has left a roadway of twenty feet in width on the north-east side of her property, which is all the respondent can claim by virtue of the adjudication and sale made to him; that the respondent is not entitled to demand the annulling of the sheriff's sale made to him, and therefore the appellants ask that the respondent's petition be dismissed with costs.

There is also a general denegation of the allegations of the petition.

Upon this contestation the Court below held that the respondent, by the option granted to Mrs. Girard by the appellants and their auteurs, had been deprived of his roadway and means of communication from the lots by him purchased to the public highway; that the description of the property sold to the respondent did not agree with the plan deposited in the registry office, and that the variances were so material as to entitle the respondent to demand that the sale

made to him by the sheriff be vacated, and did annul and set aside the said sale and condemn the appellants to pay to the respondent the sum of $3,350 with interest, the whole according to the conclusions of his petition.

CROSS, J., expressed his dissent from the judgment about to be rendered, and was of opinion to reverse the judgment appealed from.

DORION, CH. J. Notwithstanding the various transactions which gave rise to this contestation, the facts in themselves are very simple, and the principles of law applicable to those facts are clear.

The respondent has purchased at sheriff's sale a lot of land consisting of lots from lot 146 to lot 174, both inclusive, of the subdivision lots of lot number 17 in the village of Hochelaga, bounded in front on the south-west side to a projected street twenty feet wide, and in rear to the heirs Mathew. The description given in the advertisements corresponds with the subdivision plan of lot number 17 deposited in the Registry office, and acknowledged by the appellants in the sale they made to Mrs. Girard of another portion of said lot number 17, except that in the plan the projected street bounding in front the lots purchased by the respondent is indicated as being of fifty feet wide, while in the sheriff's advertisements it is mentioned as being only twenty feet wide.

What the respondent purchased is a number of lots bounded in front by a projected street, forming part of lot number 17 as subdivided according to law by a plan deposited in the registry office. The street indicated in the plan is a street extending from the highway along the whole front of the subdivision lots composing lot number 17, and without which the lots purchased by the respondent would have no communication to the public highway, which is at a distance of from fifteen to twenty acres from these lots. By the closing of this street the respondent is deprived of any communication with the highway.

When he complains of this, he is told that there was no street existing when he purchased, and that as it was described as a projected street, he accepted the risk that it might never be open, and further that he is not entitled to a street of fifty feet wide as indicated in the subdivision plan of lot number 17, but only to a passage twenty feet wide as mentioned in the advertisements and sale made by the sheriff, which passage he may have on the north-east side, that is in rear of his property, as reserved in the sale made to Mrs. Girard, instead of on the south-west side or in front of it. As a matter of fact, the respondent could not even get to the public highway from the rear of his property without purchasing a right of way across the subdivision lots from lot 78 to 145, both inclusive, which are between his lots and that part of lot number 17 sold to Mrs. Girard.

The question is not, however, whether the respondent can reach the public highway by any other means than by the projected street mentioned in his deed, but whether he is entitled to have a street in front of his lots as mentioned in his deed and on the subdivision plan of lot number 17.

The sale on a projected street is a sale on a street which the vendor intends to have opened, and which he guarantees shall be opened for use of the lots sold whenever required. If there is no existing street, or no right to have one opened according to the promise made, then the property sold is not according to the

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description given of it—and if the property sold differ so much from the description given of it in the minutes of seizure, that it is to be presumed that the purchaser would not have bought it had he been aware of the difference, he is entitled, according to Article 714 of the Code of Procedure, to have the sale set aside, and to recover back the price which he has paid.

In this case the evidence is conclusive that the difference between the immoveable sold and the description given of it is such, that the respondent would not have bought if he had known there was no street or passage leading to the lots which he purchased. It is also clear that the respondent was not aware of this difference when he purchased, since at the time of his purchase, and for upwards of fifteen months thereafter, although the street was not open to the public, he and the several proprietors of the lots composing the subdivision lots of lot No. 17 used, without hindrance, a passage in front of their lots to communicate to the highway.

The Court considers that the Superior Court has rightly appreciated the facts of this cause, and made a just application of the law, and the judgment is therefore confirmed.

The case of Desjardins and La Banque du Peuple (10 L. C. R. 325) is in point as to the recourse which an *adjudicataire* may exercise against the seizing creditors and those who have received the price of sale in case of deficiency in a judicial sale.

The appellants have no reason to complain of this judgment, since they and their authors have by their own deeds been the cause of the removal of the right of way from one side of the property to the other, and that as seizing creditors they gave rise to the misdescription which took place in the advertisements and sale by the sheriff.

Judgment of S. C. confirmed.

Girouard & Co., for appellants.
Duhamel & Co., for respondent.
(S.B.)

COURT OF REVIEW, 1880.

MONTREAL, 30TH DECEMBER, 1880.

Coram JOHNSON, J., TORRANCE, J., RAINVILLE, J.

No. 433.

Comfort vs. *Roy*, & *Roy*, Oppt.

HELD:—That in the absence of any official number attaching to an immoveable, mention must be made in the *procès verbal* of such immoveable of the coterminous lands, and that the omission so to mention such coterminous lands renders the seizure of the immoveable null and void.

The facts and circumstances connected with the question at issue in this case appear by the judgment of the Court of Review, which was worded as follows:—

"La Cour Supérieure siégeant présentement à Montréal comme Cour de Révision, après avoir entendu les parties par leurs avocats respectivement sur le

jugement prononcé le treize de novembre dernier (1880), par la Cour Supérieure du district d'Ottawa, renvoyant l'opposition du défendeur avec dépens, examiné la procédure et le dossier et délibéré :— Comfort vs. Roy.

" Attendu que l'opposant se plaint de la saisie de son immeuble et allègue que le procès-verbal de saisie ne décrit pas les lots composant le dit immeuble de manière à en établir clairement l'identité, qu'il n'en donne pas les tenants et aboutissants, et que les numéros par lesquels il les désigne ne sont pas reconnus officiellement et légalement;

" Considérant qu'aux termes de l'article 638 du Code de Procédure Civile du Bas-Canada, le procès-verbal de saisie doit contenir la description des immeubles saisis, en indiquant, entre autres choses, le numéro de l'immeuble, s'il existe au plan officiel de la localité, sinon les tenants et aboutissants ;

" Considérant qu'il est prouvé qu'il n'existe pas de plan officiel pour la localité où est situé l'immeuble saisi en cette cause, que le plan mentionné au procès-verbal de saisie n'est pas un plan officiel et prévu par la loi ;

" Considérant que le dit procès-verbal de saisie n'indique pas les tenants et aboutissants du dit immeuble et que la dite saisie est irrégulière et illégale, et qu'en conséquence il y a erreur dans le dit jugement du treize de novembre dernier ;

" Annule et renverse le dit jugement, et procédant à rendre celui qui aurait du être rendu par la dite Cour de première instance ;

" Déboute le demandeur de sa contestation et maintient la dite opposition, et en conséquence annule, à toutes fins que de droit, la saisie faite en cette cause du dit immeuble, et en donne main levée au dit défendeur opposant, avec dépens contre le demandeur tant en Cour Supérieure qu'en Cour de Révision."

Judgment of Superior Court reversed.

R. & L. Laflamme, for plaintiff.

J. B. Couillard, for defendant and opposant.

(S. B.)

COURT OF REVIEW, 1881.

MONTREAL, 31st JANUARY, 1881.

Coram SICOTTE, J., TORRANCE, J., PAPINEAU, J.

No. 1439.

Ouimet et al. vs. *Choquet et al.*

HELD :—That the mere acceptance of a delegation of payment does not create a novation of the original debt.

PAPINEAU, J. :—Le demandeur allègue poursuite, devant la Cour Supérieure, par F. X. Gareau contre Charles Gareau et al., en nullité d'un acte de vente ; le débouté de cette demande, avec dépens distraits aux demandeurs, avocats de Charles Gareau, dépens taxés à $55.40 ; appel de ce jugement au Banc de la Reine et sa confirmation avec depens, distraits et depuis taxés, en faveur des

Ouimet et al., demandeurs, agissant sous le nom de l'un d'eux seulement ; ces dépens taxés à
vs.
Choquet et al. $145.64 ; cautionnement des défendeurs que F. X. Gareau poursuivrait l'appel du jugement de la Cour Supérieure, devant la Cour du Banc de la Reine et paierait les frais et dommages, au cas où il ne réussirait pas devant le Banc de la Reine et que, à défaut par lui de payer, les cautions les paieraient ; appel subséquent à la Cour Suprême ; puis arrangement fait en justice, dans une autre cause où Joël Leduc était demandeur contre F. X. Gareau, Chs. Gareau et J. A. N. Mackay, défendeurs, par lequel arrangement l'appel devant la Cour Suprême était discontinué, et il était réglé que les frais à payer aux avocats de Chs. Gareau, pour la procédure devant la Cour Supérieure, seraient de $150. Ces avocats étaient Ouimet, Ouimet et Nantel, mais ce dernier avait subrogé les demandeurs dans ses droits. Renvoi, par la Cour Suprême, de l'appel porté devant elle, à la suite et en conséquence de cet arrangement ; second cautionnement des défendeurs pour cet appel.

Les défendeurs sont poursuivis pour les frais faits devant les trois Cours.

Les deux premières sommes demandées ont seules été accordées par le jugement soumis à révision.

Les défendeurs plaident, que par l'arrangement en question, les demandeurs, qui s'y trouvaient parties et qui l'ont signé, ont accepté Charles Gareau comme leur seul débiteur des frais qu'ils réclament, qu'il s'est fait une novation, et qu'en déchargeant F. X. Gareau, les demandeurs ont déchargé les cautions de celui-ci qui sont les défendeurs.

Il n'y a pas eu de novation parce que les demandeurs n'ont pas, de fait, déchargé F. X. Gareau, par l'arrangement en question. Ils se sont bornés à l'acceptation de l'indication de paiement faite en leur faveur. Soit qu'il s'agisse d'indication de paiement ou de délégation, il ne peut y avoir de novation que si le créancier fait connaître évidemment son consentement à la décharge du débiteur principal. Le consentement des demandeurs à la décharge du débiteur originaire ou principal, n'est pas du tout évident, dans la présente cause.

Voir 28 Demolombe p. 218 et suiv : Nos. 309 et 313 ; 18 Laurent p. 341, § 317 et suivantes ; Code Civil B. C. Art. 1173.

Les défendeurs ont aussi fait un plaidoyer de paiement, mais ne l'ont aucunement prouvé.

Il n'y a donc pas erreur dans le jugement et il est confirmé unanimement.

Judgment of Superior Court confirmed.

Ouimet & Co., for plaintiffs.

Béique & McGoun, for defendants.

(S. B.)

COURT OF REVIEW, 1879.

MONTREAL, 29TH NOVEMBER, 1879.

Coram RAINVILLE, J., JETTE, J., LAFRAMBOISE, J.

No. 2296.

Archambault vs. *The City of Montreal.*

HELD:—That the City of Montreal is liable for damages caused to a horse and vehicle, by the wheel having sunk into the earth upon a public street, where an excavation for a tunnel had been recently filled in, notwithstanding the fact that there was a flaw in the wheel of the vehicle unknown to its owner, it having been proved that the wheel was sufficient for ordinary use but not strong enough to withstand the strain put upon it by sinking into the earth.

The plaintiff alleged that on the 3rd of November, 1878, while driving in a carriage over Craig street in Montreal, the right wheel suddenly sank into the earth to a depth of 15 to 18 inches, producing such a violent shock as to break the carriage and throw the plaintiff into the street.

That the horse ran away, and was so much injured that it died.

That the fault lay with the City in not keeping their street in good order, and the plaintiff claimed $262 for damages to horse and carriage.

The defendants pleaded that they had never been notified that there was any defect in the said street, and that the plaintiff's carriage was defective and had already been repaired.

The facts alleged by the plaintiff were proved, and the defendants proved a defect or flaw in the axle of plaintiff's carriage, consisting in a defective welding of the iron which was unknown to plaintiff and not readily discoverable.

The judgment of the Superior Court (JOHNSON, J.) was as follows:

"The Court, having heard the parties by their counsel upon the merits of this cause, examined the proceedings, heard the witnesses of the said parties *viva voce* in open court and deliberated;

"Considering that on or about the 3rd of November, 1878, the plaintiff was driving a horse to him belonging, and harnessed to a vehicle, along the course of Craig street in the City of Montreal, to wit, a public street under the defendants' control and management;

"Considering that in the said street there had been then recently made by lawful authority a tunnel under ground and of large dimensions, and that the excavation therefor had not been sufficiently or properly filled in, so as to ensure the safe passage of vehicles;

"Considering that at the particular spot alleged in the declaration as that at which the accident complained of occurred, owing to such insufficient filling up and defective ramming of the earth into the excavation made for the said tunnel, a part of the surface earth had caved in;

"Considering that while the plaintiff was driving, as aforesaid, the front wheel of his carriage suddenly sunk and fell into a cavity caused by the fault and negligence of the defendants and their servants in so insufficiently filling in the said excavation, and the axle of his carriage was thereby broken, and the horse ran away and was so badly injured that it had to be destroyed; and the plaintiff suffered damage not only to the extent of the value of the horse, which alone is proved to be one hundred and fifty dollars, but also by breaking his carriage, the necessary repairs of which cost him twenty dollars;

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"Considering that the defendants have, among other things, pleaded that they had no notice of any cavity or dangerous place in the said street, but that the evidence shows the bad state thereof to have endured so long that they must be reasonably held to have known of it;

"Considering that there was a flaw in the axle of the plaintiff's carriage, but unknown to him, and for which he cannot be held responsible, the said flaw consisting in a defective welding of the iron, not readily discoverable while it was in use, and which, in fact, was only discovered after it had been broken;

"Considering that the said axle was sufficient and safe for ordinary use, but not able to withstand a great shock, or strain, such as was caused by the said cavity;

"Considering that the liquid state of the mud in the said street pervaded and concealed the said cavity, so that the plaintiff could not see it, and that, therefore, without his fault, but wholly by the fault of the defendants, the said damage was caused to plaintiff as aforesaid:—Doth adjudge and condemn the said defendants to pay and satisfy to said plaintiff the sum of one hundred and seventy dollars as and for said damages, with interest from to-day and costs *distraits* to Messrs. Archambault and David, attorneys for plaintiff."

This judgment was unanimously confirmed in Review.

Judgment confirmed.

Archambault & David, for plaintiff.
Rouer Roy, Q.C., for defendants.
(J.L.M.)

COURT OF QUEEN'S BENCH, 1880.

MONTREAL, 21st DECEMBER, 1880.

Coram HON. SIR A. A. DORION, C. J., MONK, J., RAMSAY, J., CROSS, J., BABY, A. J.

No. 262.

Lionais et al., appellants, and *The Molsons Bank*, respondents.

HELD:—1. That in the case of an appeal, by opposants claiming an immoveable seized, from a judgment dismissing their opposition with costs, the appellants are not bound to give security for the amount of the plaintiff's judgment.

2. That a deposit of $300 in money in the hands of the Prothonotary is a sufficient security under the circumstances.

This was an application to reject the appeal, on the ground that the security given was insufficient. The appellants were opposants in the Court below, and claimed the immoveable property seized, and their opposition was dismissed with costs.

The respondent contended that they should have given security for the amount of the respondent's judgment, and that the deposit of $300 in money in the hands of the Prothonotary was, under any circumstances, an insufficient security.

The Court rejected the application.

Application rejected.

Doutre & Joseph, for appellants.
Barnard & Beauchamp, for respondents.
(S. B.)

COURT OF QUEEN'S BENCH, 1880.

MONTREAL, 19TH NOVEMBER, 1880.

Coram HON. SIR A. A. DORION, CH. J., MONK, J., RAMSAY, J., CROSS, J., BABY, A. J.

No. 273.

Hotte, appellant, and *Andegrave dit Champagne*, respondent.

HELD:—That where a petition has been filed praying the dismissal of an appeal on the ground of *acquiescement*, and affidavits are filed in support and against the application of a contradictory character, leave will be granted to cross-examine the deponents.

THE CHIEF JUSTICE:—A petition was filed asking for the dismissal of the appeal on the ground of *acquiescement*. The petition was supported by affidavits, which were met by counter affidavits on the part of the appellant. Application is now made to be allowed to cross-examine the parties who have made these affidavits. In view of the contradictory character of the affidavits this application to cross-examine is allowed, and the deponents are ordered to appear for that purpose on the 11th of December next.

Application allowed.

Prefontaine & Major, for appellant.
Ouimet & Ouimet, for respondent.
(S.B.)

COURT OF QUEEN'S BENCH, 1880.

MONTREAL, 24TH NOVEMBER, 1880.

Coram HON. SIR A. A. DORION, CH. J., MONK, J., RAMSAY, J., CROSS, J., BABY, A. J.

No. 266.

The Canada Investment and Agency Co. (limited), appellant, and *Hudon*, respondent.

HELD:—That an appeal will not be dismissed, merely because the security was put in one day sooner than that stated in the notice served on the respondent, if no objection be made to the securities themselves.

THE CHIEF JUSTICE:—This is an application to reject an appeal, on the ground that the security was put in one day prior to that stated in the notice served on the respondent. No objection is made to the securities named in the bond. It appears that the original notice and the copy served do not agree,—hence the difficulty as to the date at which the security was given. In the absence of any objection to the securities themselves, the Court does not feel justified in rejecting either the appeal or the bond on that ground. The application is, therefore, rejected, and leave is given to the respondent until next term to object to the securities, if he desires to object to them.

Application rejected.

Abbott & Co., for appellant.
Perras & Morin, for respondent.
(S.B.)

COURT OF REVIEW, 1880.

MONTREAL, 30TH NOVEMBER, 1880.

Coram SICOTTE, J., RAINVILLE, J., JETTÉ, J.

No 1829.

Duchesnay et al. vs. *La Rocque, Fils.*

HELD:—In the case of a notarial obligation executed at Montreal, that the right of action for the recovery of the debt due thereunder originated at Montreal, and not at the place where demand of payment thereof had to be made.

This was an inscription in Review of a judgment rendered by the Superior Court at Montreal (Torrance, J.) on the 13th of October, 1880, maintaining an *exception déclinatoire* filed by defendant, and dismissing the plaintiffs' action.

The action was brought to recover the amount of a notarial obligation executed by the defendant at Montreal, where he then resided.

No place was stipulated in the obligation for the payment thereof, and when it fell due the defendant resided in the district of St. Francis, where he still resided at the time the action was instituted.

The defendant, by his *exception déclinatoire*, contended, that the debt was payable under the circumstances at his domicile in the district of St. Francis, and that, consequently, the cause of action arose there and not at Montreal, and as he was not served personally with the action within the district of Montreal, the plaintiffs' action should be dismissed.

The following was the judgment in Review:—

"La Cour * * * considérant que la cause ou le droit d'action prend naissance à l'endroit où l'obligation est contractée dans le cas d'obligation résultant d'un contrat;

"Considérant qu'il appert par la déclaration et l'exception déclinatoire produite, que l'obligation a été contractée dans les limites du district de Montréal;

"Considérant qu'aux termes de l'article 34 du Code de Procédure Civile, le défendeur peut être assigné devant le tribunal du lieu où le droit d'action a pris naissance;

"Infirme et annule le dit jugement, et procédant à rendre celui qu'aurait dû rendre la dite cour en cette instance;

"Déboute le défendeur de son exception déclinatoire avec dépens dans la dite Cour Supérieure contre le dit défendeur en faveur des dits demandeurs, et avec les dépens de cette Cour de Révision contre le dit défendeur en faveur des dits demandeurs."

Judgment of Superior Court reversed.

Geoffrion & Co., for plaintiffs.
Ouimet & Ouimet, for defendant.
(S. B.)

SUPERIOR COURT, 1881.

MONTREAL, 31ST JANUARY, 1881.

Coram RAINVILLE, J.

No. 951.

Howard et al. vs. *Yule.*

HELD:—That an executor and trustee under a will made before the passing of the Civil Code may be removed from office, for any of the causes stated in Art. 917 of the said Code, and a sequestrator appointed to administer the estate of the testator until another executor and trustee be appointed.

The facts and circumstances of the case are fully disclosed in the judgment of the Court, which was worded as follows:—

"La Cour * * * attendu que les demandeurs allèguent que feu William Yule, par son testament exécuté devant témoins, le 14 mai 1842, et son codicile en date du 7 septembre, 1843, a institué son fils, le défendeur, et ses six filles ses légataires universels, et ses légataires particuliers pour certaine portion de sa succession;

"Attendu que par les dits testament et codicile, le défendeur a été institué exécuteur conjointement avec d'autres personnes aujourd'hui décédées;

"Attendu que par les dispositions du dit testament les dits enfants ont droit aux intérêts des sommes qui leur sont respectivement léguées, et qu'après le paiement des dits intérêts le surplus du capital, s'il y en a, leur revient à chacun d'eux en pleine propriété;

"Attendu que par le même testament il est stipulé que si l'un des dits légataires meurt sans enfants, alors sa part accroit aux autres;

"Attendu qu'il est en outre stipulé par le dit testament que chacun des dits co-héritiers aura droit de disposer de la portion à lui léguée par testament seulement, en faveur de l'un ou de plusieurs de ses enfants, selon qu'il le jugera à propos;

"Attendu que par le dit codicile il est stipulé que chacune des dites filles du dit testateur aura droit de disposer, par testament seulement, en faveur de son mari pour sa vie durante de telle partie de la portion à elle léguée qu'elle jugera à propos, mais qui ne devra pas excéder la moitié du revenu annuel qu'elle pourra retirer de la dite succession;

"Attendu que le demandeur James William Howard est intéressé dans la présente cause en vertu du testament de sa femme feue Margaret Catherine Yule, l'une des dites légataires, exécuté le 21 d'août 1858, devant trois témoins, par lequel acte la dite Dame Margaret Catherine Yule a légué au dit James William Howard, son mari, tous les biens qui lui seraient dus et échus à la date de son décès, sur sa part de la dite succession, et aussi, la vie durante de son dit mari, la moitié du revenu annuel qui pourrait lui revenir de la dite succession;

"Attendu que les autres demandeurs sont les héritiers du dit feu William Yule;

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" Attendu que les demandeurs allèguent que le dit défendeur n'a pas rempli ses devoirs comme tel exécuteur, savoir, 1o. qu'il n'a pas fait inventaire des biens de la dite succession ; 2o. qu'il a prêté des sommes d'argent considérables, savoir au montant de $22,422.25 sans aucune garantie quelconque, à des personnes qui étaient alors ou sont devenues depuis incapables de payer, sur lesquelles sommes aucun intérêt n'a été payé depuis plusieurs années, excepté sur la somme de $5,400, et que le dit défendeur a aussi lui-même emprunté de la dite succession la somme de $26,203.84. Que ces faits constituent une délapidation et dissipation des biens de la dite succession, et, indiquent, de la part du défendeur, une incapacité complète de remplir ses devoirs d'exécuteur ;

" Attendu que les demandeurs demandent en conséquence que le dit défendeur soit destitué de ses dites fonctions, et qu'un séquestre soit nommé pour prendre soin des dits biens;

" Attendu que le défendeur plaide: 1o. Quant au défaut d'inventaire qu'il a pris possession des dits biens depuis plus de 40 ans, à la suite d'un inventaire fait par son dit père, quelque temps avant sa mort, et qui constatait que les biens de sa succession valaient quarante quatre mille louis, et que les héritiers ne se sont jamais plaint de tel défaut, et sur le second point, que les sommes qu'il a prêtées l'ont été à des héritiers futurs, et que les droits des demandeurs n'en sont nullement lésés ;

" Considérant qu'il est prouvé qu'en effet le dit feu William Yule, quelque temps avant sa mort, avait fait un état des biens de sa succession, lequel état est produit et on constate les forces ;

" Considérant que les co-héritiers du défendeur ne se sont jamais plaint du défaut d'inventaire, et que le dit état doit valoir entre les parties et tenir lieu d'inventaire ;

" Considérant qu'il est prouvé que le dit défendeur a prêté ou avancé à deux de ses fils, à d'autres descendants des héritiers du dit feu William Yule, différentes sommes de deniers se montant à plus de $17,000, sur lesquelles des intérêts se sont accrus au montant de plus de $9,000 ;

" Considérant que les dits prêts ont été faits sans aucune garantie, et qu'il est admis par le défendeur lui-même qui l'un des dits emprunteurs est mort sans laisser aucuns biens, et que les autres sont sans moyens pécuniaires ;

" Considérant qu'aux termes du dit testament, si les dits emprunteurs venaient à mourir avant leurs auteurs, et si ces derniers venaient aussi à décéder sans descendants, les dits emprunteurs n'auraient jamais eu aucun droit à aucune partie des biens de la dite succession ;

" Considérant en outre que les dits emprunteurs peuvent être deshérités par leurs auteurs, aux termes du même testament ; que dans ce cas les sommes à eux prêtées se trouveraient complètement perdues ;

" Considérant que le défendeur a négligé de fournir régulièrement les intérêts sur les sommes par lui prêtées, savoir, sur la somme de $26,203 ;

" Considérant que dans le bilan fourni par le dit défendeur, une somme de $939.29, au paiement de laquelle il avait été condamné envers Margaret C. Yule et autres, par jugement de cette Cour, représentant leur part dans les intérêts accrus sur les dites sommes prêtées par le défendeur, apparaît à

l'actif comme due par feue Margaret Catherine Yule, tandis que la dite Margaret C. Yule n'a reçu que ce qui lui était dû ;

" Considérant qu'il résulte de ces faits que le défendeur a mal administré les biens de la dite succession, et qu'il est démontré qu'il est incapable de les administrer ;

" La Cour destitue le dit défendeur de ses dites fonctions d'exécuteur testamentaire et fidéi-commissaire de la succession de feu William Yule, et ordonne qu'il soit nommé un séquestre pour prendre soin des biens de la dite succession, jusqu'à ce qu'un autre administrateur fidéi-commissaire soit nommé à la place du dit défendeur, et enjoint aux dites parties de comparaître devant cette Cour, ou devant un juge d'icelle, le quatorze d'avril courant, pour procéder à la nomination de tel séquestre : et à défaut par les dites parties de s'entendre sur le choix du dit séquestre, il en sera nommé un d'office ;

" Et la Cour condamne le défendeur aux dépens."

Judgment removing defendant from office.

Bethune & Bethune, for plaintiffs.

Ritchie & Ritchie, for defendant.

(S. B.)

COURT OF QUEEN'S BENCH, 1880.

MONTREAL, 21ST DECEMBER, 1880.

Coram The Hon. Sir A. A. DORION, Ch. J., MONK, J., RAMSAY, J., CROSS, J., BABY, A. J.

No. 197.

The Canadian Rubber Co., Appellant, and *The City of Montreal*, Respondent.

HELD :—That the judgment or order of the Superior Court naming commissioners in a matter of expropriation is only an interlocutory order, and cannot be appealed from *de plano*.

THE CHIEF JUSTICE :—This was an application to reject an appeal, on the ground that the judgment appealed from was only an interlocutory one and could not be so appealed without the permission of the Court ; the appeal having been taken *de plano* and without such permission. The judgment complained of was one appointing commissioners, on a petition in expropriation presented to the Superior Court. The Court holds this is not a final judgment, and the appeal must, therefore, be dismissed.

Application granted.

Barnard & Beauchamp, for appellant.

Rouer Roy, Q.C., for respondent.

(S. B.)

COURT OF QUEEN'S BENCH, 1880.

MONTREAL, 17TH SEPTEMBER, 1880.

Coram HON. SIR A. A. DORION, CH. J., MONK, J., RAMSAY, J., CROSS, J.

No. 134.

VEZINA,

APPELLANT;

AND

THE NEW YORK LIFE INSURANCE COMPANY,

RESPONDENTS.

HELD:—That until the premium is paid on an application for life insurance the insurance does not attach, and, therefore, where the ostensible applicant is unable to pay the premium, and another party, as a matter of speculation and without having any interest in the life of the applicant, pays the premium and takes a transfer of the policy prepared by anticipation in the name of the applicant, the policy in the hands of such person is void.

This was an appeal from a judgment rendered by the Superior Court at Montreal (Dorion, J.) on the 30th of April, 1878, dismissing the appellant's action.

The action was brought to recover the amount of a life policy, granted by the respondent on the 5th of November, 1873, for $2,000 on the life of one Hector Gendron, who died on the 16th of September, 1875.

The appellant sued as the assignee of one Langlois, under a deed of transfer executed (after Gendron's death) on the 3rd of November, 1875, and Langlois was alleged in the declaration to have obtained an assignment of the policy from Gendron on the 26th of December, 1873.

The respondent pleaded that the policy was executed in New York, and was based on the faith of the statements and representations made by Gendron in his written application attached to the policy, which he warranted to be true.

That it was made an express condition of the policy, that the proof of interest of any assignee of the policy must be produced with the proof of the death of the assured. And that the laws of New York required such proof of interest also.

That no proof of such interest, in the life of Gendron, was ever made by the appellant, and that neither Langlois nor the appellant ever had any insurable interest in the life of Gendron.

That Gendron's statement in said written application, that the policy was taken out for himself and his own benefit, was untrue, and that said policy was really taken out by Langlois, who paid the premium, and as a mere speculation on his part.

That Gendron never had any legal interest whatever in the policy, and did not pay any portion of the premium, and merely lent his name for the benefit of Langlois.

That, moreover, Gendron had mis-stated his age in said written application; having represented therein that he was born on the 5th of December, 1812, whereas he was born on the 5th of December, 1811.

That Gendron had also declared himself to be a man of sober habits, whereas he was addicted to the habitual use of intoxicating drinks, and was really a man of intemperate habits.

And that Gendron had lastly represented that no proposal to insure his life had ever been declined by any Company, whereas in two instances cited, although he had secured insurance on his life, the policies were very soon after cancelled on the ground of falsehood and fraud.

The appellant replied, to the effect, that there was no fraud in the transactions connected with the issuing of the policy, and that the insurance was effected at the solicitation of the respondent, and under full knowledge of all the circumstances under which Langlois became possessed of the policy.

The following was the judgment rendered by the Superior Court:—

"The Court, after having heard the parties by their Counsel upon the merits of this cause, examined the proceedings, the proof made, and on the whole deliberated.

Considering that the policy of insurance upon which the present action is founded has been obtained by one Gendron, not in his interest, but in the interest of a third party who was neither the creditor nor related in any degree to the party insured;

Considering that the said Gendron never had any interest in the said policy, not having even paid the first premium;

Considering moreover that the said policy was obtained under false representations with regard to the age of the insured party, and to the fact that he had not been refused by other Insurance Companies;

Considering that Langlois, to whom the said policy was transferred, had not and has not proved that he had any interest in the life of the said Gendron; Dismisses the said plaintiff's action with costs, distraction whereof is granted to Messrs. Bethune and Bethune, the defendant's Attorneys."

Cross, J. (*dissentiens*). This suit was brought by Vézina, as assignee of one Langlois, against the New York Life Insurance Company, claiming $2000, amount of a policy issued by that Company on the life of Hector Gendron, bearing date the 5th November, 1873, transferred to Langlois with the approval of the Company, 26th December, 1873. Gendron died 16th September, 1875.

The Company pleaded that the contract was made in the city of New York, the Company having no power to contract out of the State of New York. The policy was issued in consideration of the statements and representations in the further application for the same sent to the office at New York, and made a part of the contract, and on the conditions therein enumerated; among others an assignment to be valid must be in duplicate, and must be sent to the Company for acknowledgment, and the proof of interest must be produced with the proof of death.

That by the law of the State of New York the assignee of a life policy cannot recover without making proof of his interest in the life of the assured, and producing the same with the proof of the death of assured.

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That neither Vézina nor Langlois ever had any insurable interest in the life of Gendron.

That the statement made in the application and in the declaration thereto subjoined that the policy was taken out by Gendron for himself was untrue, that it was in reality taken out by Langlois as a mere speculation.

That Gendron merely lent his name without ever having any interest in the policy or paying any premium. That Langlois, knowing that it would be illegal to take it in his own name, procured Gendron to apply for the policy, from whom he got an assignment, the whole to defraud the Company.

That in the application Gendron falsely declared that he was born on the 5th December, 1812, but in fact, as the Company had recently discovered, he was born on the 5th December, 1811.

He falsely declared he was a man of sober habits, but the Company had recently discovered he was a man of intemperate habits.

He further falsely declared that no proposal to insure his life had ever been declined by any company, whereas the Company had recently discovered that his life had been insured with the Ætna Insurance Company of Hartford, in June, 1872, by two policies in favor of Venner and Vallière respectively, which had been cancelled on the ground of falsehood and fraud, and the absence of an insurable interest.

Vézina replied that Gendron had effected the policy for himself without falsehood or fraud, and at Quebec, on the pressing solicitations of the Company and their agents there. That the case was investigated by the agents of the Company, and the risk deliberately accepted and fully approved of by them.

Vézina established all the facts necessary to make out his case. The case turns upon the sufficiency of the proof made by the Company to destroy the *prima facie* case of Vézina.

The Superior Court, by its judgment rendered on the 30th April, 1878, found that the Company had established three points in their favor:

1st. That Gendron never had any interest in the policy.

2nd. That the policy had been obtained under false representations as to the age of the assured and the fact that he had not been refused by other companies.

3rd. That Langlois had not proved that he had any interest in the life of Gendron.

On these grounds the Court dismissed Vézina's action, and he has appealed to this Court.

The objection, that an assignment of the policy must be made in duplicate, cannot hold.

It is equivalent to saying the Company cannot bind themselves by a contract unless there exist proof of it by writings double what the law requires to prove it.

It is conceded that the Company did not prove any misrepresentation by Gendron with regard to his habits or that he was of intemperate habits.

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The objection as regards the age is also obviously unfounded, as is shewn by the proof. The application shows that the age was at first correctly stated, it was made out by Michaud, the Company's Agent, who probably altered the age from 62 to 61, supposing he had made a wrong computation from date of birth; at all events, it seems to have been altered after the document had been correctly made out, and in a different ink. It is to be presumed that the age was correctly stated when Gendron signed it, more especially as the Company's own Agent filled the blank and correctly stated the age in his own handwriting.

As regards proposals by Gendron to be insured in another Company being refused, the plea itself shews the fallacy of this pretension, because it recites, not a refusal, but an acceptance in two other instances and the cancellation of existing policies after they had been some time in force; these policies were issued directly to Venner and Vallière; they alone, and not Gendron, were responsible for the representations made in proving them. Besides the witness Beach, who swears to the reasons for cancelling them, is clearly mistaken as to Gendron's age, making him out to be 65 or 66 in the winter in 1872-3. But the only fact of importance regarding them as affecting this case is, that they were *effected*, not refused, and that they were effected, not by Gendron, but by Venner or Vallière.

These points being [illegible] up, there remains only the question of Gendron's interest in his own li[illegible] the transferee Langlois' interest.

I accept it as an elementary principle of Life Insurance that every individual, man or woman, has an insurable interest in his or her own life, C.C. Art. 2590 (Bunyon, Life Insurance, p. 19, No. 14, edition of 1874.) Every man is presumed to possess an insurable interest in his own life, since by insuring it he can protect his estate from that loss of his fortune, gains, or savings, which might be the result of his premature death, and as that cannot be limited, neither can the amount for which he may insure. The insured must have an insurable interest in the life upon which the insurance is effected. He has an insurable interest on the life of himself, &c., &c. The extent of his interest is measured by the contract,—within reason,—that is, at a large or a small sum, as may be agreed upon between the parties interested.

Gendron was possessed of this interest, and having once insured his life it was his own property to dispose of to whomsoever he pleased, and for what consideration he pleased, even by gift, and in doing so he defrauded no one, especially not the Company, who had agreed with him as to the terms on which his life should be insured.

It is a mere question of evidence as to whether the contract was made by himself, or whether it was effected by the Company between him and Langlois, and in the latter case by and for Langlois, also, in the name of Gendron. Now, Michaud, the Agent of the Company at Quebec, says, of the contract and of Gendron: "J'ai connu Hector Gendron dont il est question en "cette cause, et j'ai fait sa connaissance à mon bureau, lorsqu'il y est venu pour "faire assurer sa vie par la défenderesse; c'est lui-même qui a demandé à être "assuré, et c'est lui-même qui a donné les informations contenues dans l'appli-

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"cation, transmise à l'Agent-Général, à Montréal. Sur cette application la police "d'assurance sur laquelle la présente action est basée a été amenée;" and it appears that seven or eight months after it was effected and transferred to Langlois, Burke, the General Agent of the Company, knowing the facts, approved of this and other Policies, saying: "Laissez-les payer leur argent." If anybody urged in particular the effecting and continuing of the policy, it was Michaud, the Agent of the Company. Langlois did not appear on the scene until a month after the policy had been effected, when Michaud, the Agent of the Company, offered it to him as a good speculation, using persuasions and offering him inducements to take it. Gendron and Langlois had never before then had any transactions together. Langlois accepted the transfer already prepared and signed on the policy, and paid the premium to Michaud, who is presumed to have had authority from Gendron to dispose of the policy. There is no bad faith shewn on the part of Gendron, but the fact proved shews that he was then willing to take the price that the policy was to cost him. This does not necessarily make the contract illegal or null, the consent of the parties to it had been given, the payment of the premium was all that was wanting to its complete execution. That payment could be validly made either by Gendron himself or by any one he would procure to make it. If he found he had made a valueless bargain for himself, it was competent for him to part with it at cost or even under cost—there could be no conspiracy with him to procure a policy; he had no co-conspirator, no one acting with him when he made the agreement, and a conspiracy afterwards to part with what belonged to himself cannot be admitted; a conspiracy in any case under the circumstances is difficult to be imagined, and to my mind a conspiracy could scarcely take place in such a case unless such fraud were used by the insured himself as would avoid the policy if he had acted alone. Conspirators could aid little in the matter; but in this case Gendron had no confederates. The policy, as made out and agreed to, could only be delivered as the policy of Gendron, and Langlois who then took it by assignment, acknowledged this title, and the Company by accepting the premium from Langlois and delivering the policy acknowledged both the policy and its assignment. True, the judgment treats it as being the policy of Langlois, requiring him to have an interest in the life of Gendron. Although such a pretension was set up in the case of Wainright vs. Bland, Moody & Robinson, vol. 1, p. 481, and countenance given to it by the Judge at *nisi prius*, yet when the final judgment was rendered *in banco*, the Judges took particular pains not to rest it on this ground.

It was a case of very gross fraud. There was also then in force in England, where the case occurred, the Statute 14 Geo. 3, cap. 48, providing that it should "not be lawful to take any policy on the life or lives of any person or persons, "or other event or events, without inserting in such policy or policies the person "or persons' name or names interested therein, or for whose use, benefit or on "whose account such policy is so made or underwrote." It was contended and made a question whether the plaintiff Wainright who from the first appeared to have made Miss Abercrombie, a young female relation without any means

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whatever, an instrument to secure policies for short periods on her life to the large extent of £16,000 sig., with strong suspicions that she had been poisoned by him. The case turned upon the question of misrepresentations and not upon the point made by the defence that the policy was the policy of Wainright himself, whose name should have been inserted as the party interested within the Statute.

SIR A. A. DORION, CH. J.:—

This action is to recover the amount of a life insurance policy granted by the respondent on the life of one Hector Gendron, for $2,000.

The policy was executed on the 5th of November, 1873, on an application dated the 27th of October, 1873.

Gendron died on the 16th of September, 1875, and the appellant, under a deed of transfer executed on the 3rd of November, 1875, claims to be the assignee of one Langlois, to whom he alleges Gendron assigned the policy on the 26th December, 1873.

It appears however, in evidence that, although the policy is dated the 5th November, 1873, it was not issued by the Company, but remained in possession of its Agent until the 26th of December, 1873,—when the premium was paid by Langlois, who obtained a transfer of the policy at the time he made the payment.

Up to this last date, 26th of December, 1873, Gendron's life was not insured, since he had paid no premium of insurance and from his circumstances could not pay any premium.

The respondent had issued no policy, nor entered into any agreement by virtue of which any insurance could have been claimed had Gendron's death occurred before that date.

Gendron had therefore no interest in the policy, and his life was not insured until the 26th of December, 1873, when the premium was paid. But the premium was not paid by him nor to secure to him any interest in the policy, since he immediately transferred it to Langlois who paid the premium, and this according to a previous agreement entered into between them.

According to art. 2590 of the Civil Code, *the insured must have an interest in the life upon which the insurance is effected.*

Langlois had no interest in the life of Gendron, and therefore could not take an insurance upon his life. True it is, that the insurance here appears to be by Gendron himself, but it was for the benefit of Langlois who paid the premium, on the condition that the policy would be transferred to him and for his benefit.

Now, under the above rule of law, any policy taken out by Langlois on the life of Gendron would have been void on grounds of public policy. Was it possible for Langlois to avert this result by taking a policy for his own benefit in the name of Gendron, or by an agreement that Gendron should insure his life, the premiums to be paid by Langlois and the insurance to enure to his benefit? I think not, for it would in effect be insuring the life of Gendron in which he had no interest.

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It is true that, according to art. 2591, a policy of insurance of life may be transferred to any person, whether he has an insurable interest or not in the life of the person insured; but this can only apply to a *bonâ fide* transfer, and cannot be construed to destroy the salutary rule contained in the preceding article to prevent wager policies.

It has been contended that the respondent by its agents consented to the transfer made to Langlois, but no consent of an agent, nor even of the Company itself, could validate a contract in violation of a law founded on public policy.

I therefore consider that Gendron never had any interest in the policy on which the action is brought; that this policy, although in the name of Gendron, was issued for the sole benefit of Langlois who paid the premiums accruing upon it, from first to last, that it was not a *bonâ fide* transfer of a previously existing and valid insurance—and that the judgment of the Court should be confirmed.

I do not think it necessary to enquire into the validity of the other grounds on which the judgment of the Court below was based.

RAMSAY, J.—In this case a question of the conflict of laws has been raised; we have not, however, to decide it, as the law of this Province appears to be similar to that of the State of New York on the point in question. The respondents resist appellant's claim on the ground that there never was an insurance on the life of Hector Gendron; that the policy was taken out in his name by one having no interest in his life at all. The majority of the Court is of opinion that no one can insure the life of another without having an interest in his life. Of course, if this proposition be true, it is perfectly evident that a contract by which it should appear that the deceased had insured his own life, while in reality he was only a *prête-nom*, would be simulated, and as null as if the insurance had been ostensibly between the insurance company and the third party. The consent of the deceased has never been considered as an essential. Of course, the question of fact will always be a delicate one, for it is difficult to know when the deceased has been used as a *prête-nom* or not, for, as has been said, a man may insure his life and give away the policy, or sell it, or give it as security. But after all it is only a question of evidence, and the majority of the Court is of opinion that in this case it is fully established that Gendron never had any right of property in the policy, but that it was taken out in his name by Langlois, the *cédant*. We therefore think the judgment must be confirmed with costs.*

Judgment of Superior Court confirmed.

Doutre & Co., for appellant.
Bethune & Bethune, for respondent.
(S.B.)

* The above judgment has been since reversed by the Supreme Court of Canada.

COURT OF QUEEN'S BENCH, 1880.

MONTREAL, 17TH SEPTEMBER, 1880.

Coram Hon. Sir A. A. DORION, CH. J., MONK, J., RAMSAY, J., CROSS, J.

No. 38.

THE TRUST AND LOAN COMPANY OF CANADA, APPELLANT;

AND

DUPRAS, RESPONDENT.

HELD:—1o. That the registrar of each Registration Division is bound to enter in the certificate furnished by him to the sheriff, under articles 699 and 700 of the Code of Civil Procedure, all hypotheca registered against the parties who have been owners of the property sold during the ten years preceding the sale, and he cannot limit his certificate to the entries of mortgages registered within such ten years, and that the registrar is liable to pay the amount of such mortgages as would have been collocated on the proceeds of the sale had he made a proper certificate, and which have not been so collocated owing to his not having furnished such a certificate as the law called for.

2o. That an indication of payment, in favor of a creditor of a vendor of an immoveable, in a deed of sale duly registered, enures to the benefit of such creditor, who thereby becomes entitled to be collocated for the amount so indicated to be paid, on the proceeds arising from a judicial sale of such immoveable.

SIR A. A. DORION, CH. J.:—This action was brought by the appellants to recover from the respondent, who is the registrar of the County of Two Mountains, a sum of $1000 and interest, which they allege they have lost through his neglect and omission to mention their hypothec on the registrar's certificate which he delivered to the sheriff when the property hypothecated was sold by that officer.

The facts proved are as follows:

On the 4th of August, 1863, one Henri Paul Lebrun dit Laforet gave to the appellant an hypothec on his property for $1000 and interest at eight per cent.

Laforet sold the property hypothecated to Joseph Charbonneau on the 2nd of December, 1864, Charbonneau binding himself to pay the appellant's hypothec.

The obligation of Laforet of the 4th of August, 1863, was registered on the 7th of August, 1863, and the deed of sale to Charbonneau on the 31st of December, 1864.

The property was sold at sheriff's sale on Charbonneau, at the suit of Laurena Davis and others, in 1876, for $3,500, which sum was returned into Court and distributed among Charbonneau's creditors, according to a registrar's certificate furnished by the respondent in his official capacity. (Arts. 699 and 700 of the Code of Civil Procedure.)

The certificate did not mention the appellant's hypothec, and, in consequence of this omission, the appellants were not collocated on the proceeds of the sale.

In answer to the action the respondent, in addition to the general issue, has pleaded that he had conformed himself to the requirements of the law, and that he is not responsible for the claim of the appellants.

The pretension of the respondent is, that he was only bound to mention in his certificate the hypothecs affecting the property sold, which had been registered within the ten years preceding the date of the sale by the sheriff, and

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that the hypothec of the appellants had been registered more than ten years previous to the sale.

This pretension is unfounded.

What the law requires is that the registrar should furnish a certificate of all hypothecs registered against *the parties, who, during the ten years preceding* the sale, were the owners of the immoveable sold. (Art. 700 C. of C. P.)

The sale by Laforet to Charbonneau, who was the proprietor at the time of the sale, created an hypothec, which by the *délégation* therein contained, became available to the appellants, and for which they would have been collocated if it had been mentioned in the respondent's certificate. The Court below seems to have taken this view of the case, it nevertheless dismissed the action of the appellants on the ground that they could only claim to be indemnified by the respondent for a loss actually sustained, and that they had not proved that they had lost their recourse against Charbonneau and Laforet, nor established that they were insolvent.

This point was not raised by the respondent, who neither alleged that Laforet or Charbonneau were solvent nor demanded that their property should be discussed, and had this been pleaded it would have been no answer to the action.

The registrar is a public officer, bound to perform certain duties, and he is responsible for the loss occasioned by the errors and omissions committed by him in the discharge of those duties. (Arts. 2177 and 2178 C. C.)

The distribution of the proceeds of an immovable property sold by the sheriff is made among the hypothecary creditors according to their rank, as shown by the certificate which the registrar is bound to furnish to the sheriff—and as the property has, by the payment of the purchase money by the purchaser, been freed from the hypothecs with which it was charged, the recourse of the creditors was transferred on the price in the hands of the sheriff which represented the property. If, by the negligent omission of the registrar, a creditor loses his right of collocation on the monies he is thereby deprived of an advantage, for the loss of which he may at once urge his recourse against the registrar. The appellants have lost their hypothec and their right to be paid out of the proceeds of the sale, and this through an omission of the respondent to perform his duty. They are therefore entitled to call upon him to place them in the same position in which they would have been if the omission had not taken place. The reasons for which the appellants could claim, from their debtor, the payment of their claim, on the ground of diminished security, even before the term of payment had expired, are equally applicable to the respondent in the present case, Art. 1092. C. C. 1188 and 2131 C. N.; Pothier, Obligations, Nos. 234, 5,6. The appellants have established that, having the first mortgage, they would have been paid the full amount of their hypothec, with the interest thereon from the 4th of August, 1863, to the 1st of May, 1876, at the rate of eight per cent. We hold that they are entitled to their judgment against the respondent for the same amount, and that they are not bound to discuss the other property of either Laforet or Charbonneau, supposing they had any, before exercising their recourse against the respondent. The latter is,

however, on payment of the appellants' claim, entitled to be subrogated to their rights against Laforet and Charbonneau. Trust and Loan Co. of Canada and Dupras.

The judgment of the Court below will therefore be reversed, and the respondent condemned to pay to the appellants the sum of $1037.94, with interest at 6 per cent. from the 23rd of January, 1877, being the date when the appellants would have received their money but for the omission of the respondent. The appellants are also entitled to the costs by them incurred in both Courts.

The following was the written judgment of the Court :—

" La Cour * * * considérant que le 4 août, 1863, un nommé Henri Paul Lebrun dit Laforet, a consenti une obligation pour $1000 à la demanderesse, appelante, pour prêt d'autant, avec obligation de la rembourser le premier Mai, 1868, avec intérêt de huit par cent, par an, payable semi-annuellement et d'avance le premier Mai, et le premier Novembre de chaque année, pour sûreté duquel remboursement, il hypothèqua une terre située à St. Augustin, dans le Comté des Deux-Montagnes; laquelle obligation fut enrégistrée le 7 août, 1863, au Bureau d'Enregistrement, du Comté des Deux-Montagnes ;

" Considérant que le deux décembre, 1864, Lebrun dit Laforet a vendu cette terre à un nommé Joseph Charbonneau, pour $3,286.66, en déduction de laquelle somme, ce dernier s'est obligé à payer à la demanderesse, appelante, la dite somme $1000, avec intérêt à huit par cent, en conformité à un certain acte d'obligation reçu devant Mtre. Doucet et confrère, Notaires, le jour et an y mentionnés, et pour sûreté du paiement du dit prix de vente, la dite terre devait demeurer hypothéquée par privilège de bailleur de fonds, lequel acte de vente fut registré au même Bureau d'Enregistrement, le 31 décembre, 1864 ;

" Considérant que par l'effet de la dite vente ainsi que de l'indication de paiement y exprimée en faveur de la demanderesse, et de l'enregistrement du dit acte, la dite demanderesse, appelante, est demeurée aux droits du dit Lebrun dit Laforet, et partant créancière personnelle du dit Joseph Charbonneau, en la dite somme de mille piastres et intérêts, avec hypothèque de bailleur de fonds sur la dite somme, à compter de la date du dit acte ;

" Considérant qu'en juin, 1876, cette terre a été saisie sur Charbonneau à la poursuite de Dame Lurena Davis *et al.*, dans une cause devant cette Cour, sous No. 326, dans laquelle la dite Dame Lurena Davis *et al.*, étaient demandeurs contre le dit Charbonneau, et fut vendue suivant la loi, par le shérif de ce district, le vingt-un octobre, 1876, à un nommé F. X. Charbonneau, pour $3,500, qui furent rapportées en Cour par le shérif, ensemble avec le certificat des hypothèques enregistrées contre la dite terre, lequel certificat fourni par le défendeur intimé, en sa dite qualité de régistrateur du comté des Deux-Montagnes, suivant la loi, à la demande du dit shérif, ou de son député, et portant la date du treize décembre, 1876, ne faisait aucune mention, contrairement à la loi, de l'hypothèque de mille piastres créée sur la dite terre en vertu du dit acte de vente ;

" Considérant que le 23 décembre, 1876, le Protonotaire prépara son rapport de collocation et distribution, colloquant les autres créanciers hypothécaires sur la dite terre mentionnée au dit certificat, suivant leur rang, le dit rapport homologué le 8 janvier, 1877.

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" Et considérant que si le dit défendeur intimé en cette cause eut mentionné dans son certificat des hypothèques qui grevaient le dit immeuble, celle de la dite appelante ainsi que par la loi, il était tenu de le faire, la dite appelante aurait été colloquée pour la somme de $1000 courant, montant en capital de son obligation du 4 août, 1863, avec les intérêts sur icelle à 8 per cent, du 1 mai 1876, ainsi que demandé au 21 octobre, 1876, jour du décrêt en justice, et que c'est par la faute du dit intimé que la dite appelante n'a pas été payée de sa dite créance ;

" Et considérant qu'aux termes de l'article 1053 l'intimé est responsable du préjudice causé à l'appelante par sa négligence, et qu'il est tenu de la remettre dans la même position qu'elle aurait été si sa créance eut été mentionnée au dit certificat, et qu'ainsi il est tenu de lui payer les sommes qu'elle aurait touchées sur le dit prix de vente ;

" Et considérant que la dit appelante n'était pas tenue de discuter les autres biens de son débiteur ou autres obligés à sa créance, les dommages qu'elle réclame étant constatés par le fait qu'elle aurait touché le montant de sa créance, et qu'elle n'a pu le faire, par la faute et la négligence de l'intimé.

" Et considérant qu'il y a erreur dans le jugement rendu par la Cour Supérieure, siégeant dans le district de Terrebonne, le 24 jour de mars, 1879 ;

" Cette Cour casse et annule le dit jugement du 24 mars, 1879, et procédant à rendre le jugement qu'aurait dû rendre la dite Cour Supérieure, condamne le dit intimé à payer à l'appelante la somme de $1037.94, savoir celle de $1000 pour le capital de la dite obligation, et celle de $37.94 pour intérêt au taux de 8 par cent, du 1er mai, 1876, ainsi que demandé par les conclusions de la déclaration au 21 octobre, 1876, jour du décrêt en Justice, avec intérêt sur la dite somme de $1037.94 au taux de 6 par cent. à compter du 23 janvier, 1877, date à laquelle la dite appelante aurait touché les dits deniers, si sa créance n'eût pas été omise dans le dit certificat en par la dite appelante subrogeant le dit intimé à son droit de recouvrer la dite somme de $1037.94 avec intérêt comme susdit de Henri Paul Lebrun et Joseph Charbonneau ou leurs répresentans ;

" Et la Cour condamne l'intimé aux dépens tant en Cour de première instance que sur le présent appel."

Judgment of Superior Court reversed.

Judah & Branchaud, for appellant.

Lacoste & Co., for respondent.

(S. B.)

COURT OF REVIEW, 1880.

MONTREAL, 15TH DECEMBER, 1880.

Coram SICOTTE, J., RAINVILLE, J., JETTÉ, J.

No. 901.

Le Crédit Foncier du Bas Canada vs. *Thornton.*

HELD:—That an acceptance of a delegation in a deed of sale, whereby a sum of money is made payable to the party accepting, on condition of such party granting a discharge of the character specified in the deed, compels the party so accepting to execute the discharge in question, before suing to recover the money.

The facts and circumstances of the case are fully detailed in the judgment in Review, which was worded as follows:—

"La Cour Supérieure siégeant présentement à Montréal, comme Cour de Révision, après avoir entendu les parties par leurs avocats sur le jugement prononcé en cette cause, le sept de juin dernier (1880) par la Cour Supérieure du district de St. François, examiné la procédure et le dossier et délibéré;

"Considérant que par l'acte du vingt-huit de mai 1877, relaté dans les écritures, le nommé Baldwin débiteur des demandeurs, a délégué à ces derniers le défendeur pour la somme de $400, à être imputée sur plus forte somme qu'il devait à la dite compagnie demanderesse et hypothéquée sur les terrains indiquées dans l'acte susdit;

"Considérant que la délégation fut faite et acceptée par le défendeur sous la condition que la dite compagnie déchargerait le terrain vendu au nommé Garceau, par le délégant Baldwin, de l'hypothèque qu'elle avait sur ce terrain et en donnerait radiation;

"Considérant que la compagnie demanderesse a fait acceptation de la délégation, institué son action sans offrir au débiteur, délégué, ni produire en justice, telle décharge et radiation de son hypothèque;

"Considérant qu'aux termes de la délégation, comme par la loi la délégation a pour but et résultat de décharger l'ancien débiteur et de substituer un nouveau débiteur à sa place, le créancier par l'acceptation de la délégation n'avait plus de dette contre Baldwin, le délégataire, et n'avait aucun recours contre le délégué, qu'en exécutant et accomplissant préalablement la condition suspensive pour rendre la délégation parfaite à l'égard du délégué;

"Considérant que la décharge et la radiation dont il s'agit étaient la mesure de l'intérêt du défendeur pour se rendre débiteur à la place de Baldwin, et que faute de telle décharge et radiation à temps utile le terrain du nommé Garceau a été vendu par autorité judiciaire, et la compagnie demanderesse a été colloquée pour la somme provenant de la vente;

"Considérant que le défendeur était bien fondé à repousser comme il l'a fait l'action de la compagnie demanderesse, et que cette dernière n'a pas prouvé sa demande et son droit d'action contre le défendeur;

"Déclare qu'il y a erreur dans le dit jugement du sept de juin, et le renverse, et procédant à rendre celui qu'aurait dû être rendu par la dite Cour de pre-

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mière instance, déboute la compagnie demanderesse de son action, avec dépens tant en Cour de première instance, que dans cette Cour de révision, contre la compagnie demanderesse."

Judgment of Superior Court reversed.

Hall & Co., for plaintiff.
G. O. Doak, for defendant.
(S. B.)

COURT OF REVIEW, 1879.

MONTREAL, 29TH NOVEMBER, 1879.

Coram JOHNSON, J., RAINVILLE, J., LAFRAMBOISE, J.

No. 2386.

Dalbec vs. *Dugas* et al.

HELD:—When a defendant has appeared in a cause and has been foreclosed from pleading, it is not necessary for the plaintiff to give notice to the defendant of an inscription for judgment, out of term under Art. 89 of the Code of Civil Procedure.

The plaintiff instituted this action upon a protested promissory note on the 5th of December, 1878. Upon the 21st of the same month the defendants appeared in the cause, and after a demand of plea had been served upon them they were duly foreclosed from pleading, and the plaintiff inscribed the case for judgment *ex parte* out of term, without notice to defendants' attorney, and judgment was rendered by the prothonotary on the 10th of January, 1879.

Against this judgment the defendants filed an opposition, the sole *moyen* of which was that they had received no notice of the inscription, and they claimed, in consequence, that the judgment was irregular and illegal.

The judgment of the Superior Court, which was unanimously confirmed in Review, was as follows:

"La Cour, considérant, etc., que la procédure faite pour la prononciation du jugement *ex parte*, par le protonotaire, est celle réglée par la loi, et qu'il n'y avait lieu de donner aux défendeurs dans l'espèce avis de la demande pour jugement;

"Considérant que par le droit accordé dans ces cas aux défendeurs de s'opposer au jugement ainsi rendu, et de faire valoir les moyens de défense comme ils auraient pu le faire par un plaidoyer, déclare que les opposants sont mal-fondés dans leur présente opposition, déboute la dite opposition avec dépens."

Opposition dismissed, and judgment confirmed.

A. Dalbec, for plaintiff.
L. O. David, for defendants.
(J.L.M.)

COURT OF QUEEN'S BENCH, 1880.

MONTREAL, 22ND JUNE, 1880.

Coram Hon. SIR A. A. DORION, Ch. J., MONK, J., RAMSAY, J., CROSS, J.

No. 14.

BRUNEAU ET VIR,

APPELLANTS;

AND

BARNES ET VIR,

RESPONDENTS.

HELD:—That the endorsement *pour aval* of a wife *séparée quant aux biens* from her husband, on a promissory note signed by the husband for goods sold and delivered to him and charged to him alone in the vendor's books, and given in renewal of a note of the husband not bearing her endorsement, is null and void, notwithstanding [illegible] goods so sold and delivered may have contributed to the support of the wife.

SIR A. A. DORION, Ch. J.:—Cette action a été portée par l'intimée assistée de son mari, pour recouvrer des appelants F[illegible]er N. Berthiaume et son épouse $403.19, dont $384.97 étaient pour le montant d'un billet signé par le défendeur Berthiaume, payable à quatre mois de sa date, à l'ordre de E. Mathieu et frères, et endossé pour aval par l'appelante Adélaïde E. Bruneau, femme Berthiaume, et remis à E. Mathieu & frère, qui l'ont endossé et remis à l'intimée, et $18.22 pour intérêts accrus sur ce billet depuis son échéance jusqu'à la date de l'action.

L'Intimée allégnait dans sa déclaration que ce billet avait été donné pour des fournitures et effets nécessaires à la subsistance de l'appelante et de sa famille, avancées par E. Mathieu et frère sur le crédit de l'appelante, dont le mari était alors insolvable.

L'appelante a seule plaidé à l'action et elle a en substance allégué, que les articles mentionnés dans le compte produit avaient été avancés à son mari, qui par son contrat de mariage était tenu de payer toutes les dépenses du ménage, que la moitié des items du compte de E. Mathieu & Frère, était pour de la boisson et non pour effets nécessaires à la famille, qu'elle avait été induite en [illegible] lorsqu'elle avait endossé ce billet, qui n'avait été transporté à l'intimée que depuis son échéance, et que son endossement n'était qu'un cautionnement pour une dette de son mari qu'elle n'était pas tenue de payer.

Il est prouvé dans la cause, que E. Mathieu & frère, qui sont des marchands épiciers, ont depuis plusieurs années avancé des effets de leur magasin à Berthiaume, le mari de l'appelante. C'est lui qui achetait et c'est à lui que les effets étaient chargés dans leurs livres. Berthiaume a payé diverses sommes dont on lui a donné crédit. Il est de plus prouvé que le billet sur lequel la poursuite est faite, comprend le montant d'un autre billet que Berthiaume avait donné à E. Mathieu & frère, et une balance de compte, pour effets vendus et livrés à leur magasin, et chargés à Berthiaume seul, et il est de plus admis que l'intimée n'a reçu le billet dont elle réclame le montant que depuis son échéance.

La Cour Supérieure s'appuyant sur les articles 165 et 173 du Code Civil qui déclarent que les époux contractent par leur mariage l'obligation de se secourir et assister mutuellement et de nourir, entretenir et élever leurs enfants, et sur

Bruneau et vir, and Barnes et vir.

l'art. 1317, de même Code, qui veut que la femme séparée de biens supporte entièrement les frais du ménage, s'il ne reste rien au mari, a condamné les appelants conjointement et solidairement à payer la somme demandée.

Nous avons déjà eu occasion d'examiner dans la cause de Hudon et ux., et Marçeau (23 L. C. J. 45), quelle était la responsabilité des époux vis-à-vis des tiers relativement aux dettes contractées pour les besoins de la famille et les choses nécessaires à leur subsistance, et nous avons jugé dans cette cause, comme nous l'avons fait depuis, dans celle de Paquette et Guertin et ux., (jugée le 14 juin 1879), en confirmant le jugement de la Cour Supérieure, que la femme séparée de biens n'est pas responsable des avances faites, même pour choses nécessaires à la famille, lorsque ces avances ont été faites au mari et sur sa seule responsabilité, et que pour savoir qui du mari ou de la femme est responsable, il faut s'enquérir à qui les avances ont été faites et à qui le fournisseur a fait crédit.

Ici il n'y a pas de doute que c'est au mari que E. Mathieu & frère ont fait les avances. C'est en son nom qu'ils ont porté dans leurs livres les effets vendus, c'est de lui qu'ils reconnaissent avoir reçu des paiements à compte, mais il y a plus, c'est qu'ils ont accepté du mari un premier billet en paiement de ce qu'il leur devait et que ce billet dont le montant est compris dans celui sur lequel l'action est portée, n'était ni signé ni endossé par l'appelante.

Il est vrai que l'un des MM. Mathieu a déclaré dans son témoignage, qu'ils avaient toujours compté sur ce que l'appelante avait de la fortune et que c'était sur son crédit qu'ils avaient fait les avances, parce qu'ils savaient que son mari n'avait rien et qu'il était insolvable.

Il est possible que les MM. Mathieu aient compté lorsqu'ils ont fait les avances à Berthiaume qu'il les paierait avec les revenus de l'appelante, mais les avances n'en ont pas moins été faites à Berthiaume lui-même. Pourquoi, si c'était à la femme qu'ils entendaient faire des avances, en ont-ils chargé le mari, et pourquoi ont-ils pris son billet sans la signature ou l'endossement de la femme?

Le billet sur lequel l'action est portée a été préparé chez les MM. Mathieu et il est fait à leur ordre comme le premier ; rien n'indique que lorsqu'il a été préparé ils eussent l'intention de le faire signer ou endosser par l'appelante, car on l'aurait fait dans une autre forme.

Nous ne voyons donc rien dans les circonstances de cette cause qui doive la soustraire à la règle établie dans les causes de Hudon *et ux.* et Marçeau et de Paquet et Guertin *et ux.* La seule différence qu'il y a entre cette cause et les deux autres c'est que dans celle-ci l'appelante a endossé le billet de son mari, et qu'elle s'est par là obligée pour une dette de son mari, mais une telle obligation est nulle et de nul effet (art. 1301 C. C.)

Quant aux articles 165, 173 et 1317 du Code Civil, ils n'ont rien à faire à la question qui nous occupe.

Ces articles ont été placés dans les chapitres du Code qui traitent du mariage et des conventions matrimoniales pour régler les droits des conjoints entr'eux, et non pour déterminer les droits que les tiers pourraient avoir contre eux.

Les époux se doivent mutuellement secours et assistance, mais les tiers n'ont pas d'action pour obliger un époux à secourir l'autre, de même qu'ils n'ont pas

d'action pour forcer la femme à supporter seule tous les dépenses de la famille lors même que le mari n'aurait rien.

Entre les époux et les enfants, il y a des obligations légales réciproques déterminées par les articles du Code, mais entre les époux et les tiers il n'y a que celles qui résultent des conventions d'après les règles exposées au traité des obligations.

Le jugement de la Cour de première instance est en conséquence infirmé et l'action renvoyée avec dépens.

MONK, J. dissented, on the ground that in this case the wife had all along admitted her liability for the goods which were from time to time supplied to the family. It was notorious, moreover, that the husband was a pauper, and that the goods would not have been supplied, unless the sellers had looked to the wife for payment.

The following was the written judgment of the Court:—

"La Cour * * * considérant que le billet du 23 avril, 1877, sur lequel est portée cette action a été signé par François-Xavier N. Berthiaume, le mari de l'appelante, pour et en considération de la somme de $270.50 montant d'un billet antérieur donné par le dit Berthiaume pour effets à lui vendus par la maison Mathieu & frère et pour une autre somme de $114.47 aussi pour effets à lui vendus et livrés par les dits Mathieu & frère;

"Et considérant que lors même que ces effets auraient été nécessaires à la vie de l'appelante et de sa famille, ces effets ayant été avancés au dit Berthiaume seul, la dite appelante femme séparée de biens d'avec son mari, n'était point responsable d'iceux, et qu'en endossant le dit billet du 23 avril, 1877, elle s'est rendue caution d'une dette dont son mari était seul responsable, et que l'obligation qu'elle a par là contractée est aux termes de l'art. 1301 du C.C. nulle et de nul effet;

"Et considérant qu'il y a erreur dans le jugement rendu par la Cour Supérieure siégeant à Montréal, le 30me jour de novembre, 1878, en autant que la dite appelante y a été condamnée à payer conjointement et solidairement avec son mari le montant du dit billet avec intérêt et dépens;

"Cette Cour casse et annule le dit jugement du 30 novembre, 1878, en autant que ce jugement affecte la dite appelante et renvoie l'action des Intimés contre l'appelante avec dépens, tant en Cour Inférieure que sur le présent appel."

(*Dissentiente*, Honorable M. le Juge Monk.)

Judgment of S. C. reversed.

Prévost & Préfontaine, for appellants.
D. E. Bowie, for respondents.
(S.B.)

SUPERIOR COURT, 1880.

MONTREAL, 30TH NOVEMBER, 1880.

Coram JOHNSON, J.

No. 1847.

Bell vs. *The Dominion Telegraph Company.*

HELD:—The person to whom a message is directed to be sent has an action against the Telegraph Company for damages resulting from the negligence of the company in failing to deliver the message. The condition requiring messages to be repeated in order to hold the Company in damages will not free the Company from responsibility for their own negligence, and especially where compliance with such condition would not have prevented the damage complained of.

JOHNSON, J.—The plaintiff telegraphed from Montreal to a Mr. Machar at Kingston, Ontario, on the 13th May, 1875, and Mr. Machar immediately sent back his answer: both the message and the answer being sent by the defendants' line. The answer, however, was never delivered, and the consequence was that some expense was incurred by the plaintiff in sending some men by railway to work in a mine, known as the Frontenac mine, and whom he would not have sent forward if he had got Machar's answer.

The defendants admit their undertaking with Machar at Kingston; but plead an alleged condition printed on the message to the effect that the sender was obliged to repeat it. If the contract of the Telegraph Company was with Machar alone, it would seem strange that they should hold the plaintiff bound by a condition to which he was no party. These particular contracts are of very modern date; but there are many decisions, nevertheless, particularly in the United States, directly in point, and some in Canada that have a very important bearing on the points raised here. In the first place there is a series of cases quoted by Field in his Treatise on Damages, page 361, holding that the party to whom the message is sent can maintain an action? The point in most of these cases was the form of action to be taken: whether it should be on the contract, or as for a tort. Field, No. 430, has this: "*can the party to whom the message is sent maintain* "*an action?* Some controversy has existed in reference to the question, "whether the party to whom the message is sent can maintain an action on the "contract, expressed or implied, made between the sender and the company; but "there can be no doubt that the action can be maintained by such party for "the negligence resulting in loss, as for a tort; and in New York, as well as in "some other States, he may sue on the contract." The same thing in point of principle (though there it was a letter instead of a telegram) was held in the well known case of Delaporte et al. *v.* Madden, where all the English authorities are cited, 17 L. C. Jurist, p. 29. Here, where no distinctions of form are known, the right of action by the plaintiff would, therefore, appear clear. Then, as to the condition, it appears to me equally clear that such a condition could not shield the Company from the consequences of their own neglect. I can understand such a thing applying to a misdirection of the message, not the fault of the Company; but when it comes to not delivering the message at all, rightly or wrongly, as occurred here, the impossibility of the Company pleading it as a dispensation from any obligation on their part is a principle that runs through all these

reported cases, and in Cooley on Torts, page 687—under the head "Restrictions of Liability by Telegraph Companies." I find a case cited in the note where it was held that the force of the condition seems to be restricted to errors arising from causes beyond the Company's control; and another where it was denied that telegraph companies can contract not to be responsible for their own negligence. The text of our own law in relation to common carriers is explicit: Art. 1676 C. C. says: "Notice by carriers of special conditions limiting their liability is "binding only upon persons to whom it is made known; and notwithstanding "such notice, and the knowledge thereof, carriers are liable wherever it is proved "that the damage is caused by their fault, or the fault of those for whom they "are responsible." Now, applying these principles to the case in hand, it is very evident that the fault of the Company defendant here consisted in not delivering the message to any Mr. Bell at all, or to any one else, a fault that would not have been remedied if it had been written over again any number of times. It is proved by the production of the directory that only one Robert Bell resided in the city. I, therefore, maintain the plaintiff's action. The amount of damage is very inconsiderable: he had to pay some forty dollars as passage money for these men, and there is the breach of contract that gives rise to nominal damages also. I shall give judgment for $50 and costs as of the lowest class in this Court.

Trenholme & Taylor, for plaintiff.

Lacoste, Globensky & Bisaillon, for defendants.

(J. K.)

SUPERIOR COURT, 1881.

MONTREAL, 31st JANUARY, 1881.

Coram JETTE, J.

No. 113.

Devine et al. vs. *Griffin.*

HELD:—That the Court will not remove an executor from office, under Art. 917 of the Civil Code, for an isolated act of mal-administration, when it is proved that the executor acted in good faith, and that no loss is likely to accrue to the estate from what he did, and that the administration of the executor was in all other respects most satisfactory.

The facts and circumstances of the case are sufficiently disclosed in the judgment of the Court, of which the following is a translation:—

"Seeing that the plaintiffs, three of the testamentary heirs of the late Lydia Hoyle, ask for the removal of the defendant from the office of executor of the will of the late Lydia Hoyle, on the ground of incapacity and unfaithfulness in the fulfilment of the duties of his office, and especially invoke in support of their demand a loan by defendant of a sum of $12,938 to James C. Ritchie, his son-in-law, without any security for the repayment of that sum at the time the loan was made, and for which he only received, long after, hypothecary security, for the most part insufficient and illusory, which he had nevertheless released, contrary to the interest of the succession; alleging further that the defendant neglected for several years to collect the interest on the loan, and that in acting thus he was guilty of fraud and showed himself to be grossly incapable;

Devine et al. vs. Griffin.

"Seeing that defendant contested this demand, saying, 1st. That his administration, far from being disadvantageous to the succession, had been extremely profitable, having in particular realized a profit of $5,000 by the well-timed sale of Bank of Montreal stock—a profit which the heirs would have lost if the sale had not then been made. 2nd. That the plaintiffs had already instituted an action *en reddition de compte* against him, which was still pending; that defendant had rendered the account asked for on the 17th January, 1878, and that since that time the plaintiffs had continually delayed the case, and that the present action could not be brought while the other was pending. 3rd. That at the time of the loan to Ritchie, the latter was reputed to be rich, and was in good business, and the investment was under the circumstances considered satisfactory; that, moreover, it was made in good faith, that the security was then perfectly satisfactory; and that the subsequent discharges were given to facilitate the sale of the hypothecated properties, and secure payment of the claim. 4th. That as to the two plaintiffs of age, Mrs. Ireland and Mr. Devine, they had no interest in bringing the present action on the ground alleged, because by deeds of July, 1878, and of 12th May, 1879, they had settled with defendant for the sum coming to them from the loan to Ritchie, and as to the minor, Annie Emily Devine, her share in the succession was fully secured by the personal guarantee of defendant and other securities taken for the payment of the Ritchie debt; and finally, that defendant had always been ready to pay to said minor her share, and had tendered the same, and offered security for it;

"Seeing that by an additional plea defendant alleged, in answer to the action, that since the demand he had given the minor a hypothec for $10,600 on a property worth more than that;

"Considering, in fact, that though it results from the evidence that the loan to Ritchie could not be considered a satisfactory operation, and that whatever confidence defendant could reasonably have in Ritchie's solvency, the loan was not made according to the conditions required in such cases, nevertheless the defendant did not seem to have acted in bad faith, but had only been guilty of negligence and imprudence;

"That this loan was the only act complained of, and his administration was not attacked otherwise, though it was proved that a total amount of about $50,000 from the succession had passed through his hands, and that this loan seems to be all that remains to be adjusted;

"That defendant had not only always acknowledged his responsibility for the amount of the loan, but that he had satisfied the two plaintiffs who are of age as to their share of the amount, and that he offers all requisite hypothecary and other security for the minor's share in the succession, and has done what he could to secure the minor's interest, which offer had not been accepted by the tutor;

"That the personal solvency of the defendant had not been questioned, and the sufficiency of the guarantees offered was established;

"Considering in law the plaintiffs who are of age, having received their share in the loan, cannot invoke it in support of the present action;

"That the offers made by defendant as to the minor's part are sufficient

security, if they had been accepted by the tutor, and the majors' absence of interest renders their demand untenable, and even invests it with the character of a vexatious proceeding;

Devine et al. vs. Griffin.

"Considering further that the action to account gives the plaintiffs full and ample protection, and that under the circumstances the removal of the defendant from office cannot be ordered."

Action dismissed.

Keller & McCorkill, for plaintiffs.
Bethune & Bethune, for defendant.
(S.B.)

COURT OF REVIEW, 1880.

MONTREAL, 15TH DECEMBER, 1880.

Coram SICOTTE J., RAINVILLE, J., JETTÉ, J.

No. 967.

Auprix vs. *Lafleur*.

HELD:—That where an *employé* is bitten by a ferocious dog of his master (which is allowed by him to go at large), without any provocation by the *employé*, the master is liable in damages, notwithstanding that such *employé* has been warned of the disposition of the dog to bite, and that he should try and avoid him.

The plaintiff was employed by the defendant in his bakery, and after his duties were over proceeded with the other workmen to leave the defendant's premises, and in doing so, had to traverse the defendant's yard, in which was a dog of the defendant at large which was known to be ferocious and disposed to bite. The other workmen, before leaving the bakery, warned the plaintiff of the character of the dog, and that he had better not leave till he was chained up. The plaintiff, however, left the bakery and whilst traversing the yard was bitten by the dog.

The plaintiff sued in the Superior Court at Montreal to recover damages, and by the judgment of that Court (Mackay, J.) rendered on the 24th of September, 1880, his action was dismissed, on the ground that the plaintiff had been guilty of negligence in traversing the yard as he did, after being warned as before mentioned.

The Court of Review held that, under articles 1053, 1054 and 1055 of the Civil Code, the plaintiff had a right to recover, and rendered the following judgment:—

"La Cour * * * Considérant qu'il est constant que le 19 mars dernier, le demandeur a été attaqué et mordu par le chien du défendeur, comme il est relaté dans l'action;

"Considérant que le demandeur était dans cette occasion dans l'accomplissement des fonctions et du travail commandé par le maître;

"Considérant qu'il n'y a eu aucune provocation de la part du demandeur;

"Considérant qu'il est constant que le maître connaissait les habitudes féroces de son chien, étant dans l'habitude d'enchaîner le chien dès le jour venu, mais que dans la circonstance il avait oublié et négligé de l'attacher;

Auprix vs. Ladeur.

"Considérant qu'il est constant que le demandeur, à raison de cette morsure, a été empêché d'exercer son industrie, et d'employer son travail, et qu'il a été dans la nécessité de recevoir les soins du médecin ;

"Considérant que le demandeur a souffert des dommages au montant de la somme de soixante-et-quinze piastres au moins, et que le défendeur est responsable de l'accident dont se plaint le demandeur ;

"Considérant qu'il y a erreur dans le susdit jugement du six septembre 1880, qui a débouté l'action du demandeur avec dépens ;

"Cette Cour renverse le dit jugement et procédant à rendre celui qu'eût dû rendre la dite Cour Supérieure, condamne le dit défendeur à payer au dit demandeur la dite somme de $75 pour les dommages ainsi soufferts, avec dépens d'une action au dessus de cent piastres dans la Cour de Circuit et les dépens de la Cour de Révision."

Judgment of Superior Court reversed.

Lonergan & Co., for plaintiff.

Quinn, for defendant.

(S. M.)

COURT OF REVIEW, 1880.

MONTREAL, 13TH JANUARY, 1880.

Coram TORRANCE, J., RAINVILLE, J., PAPINEAU, J.

No. 1343.

Alexander vs. *Taylor.*

HELD:—Where an agent of a Life Assurance Company obtains for an individual a policy of insurance upon his life in consideration of his giving his promissory note to the agent individually for the first year's premium, less the agent's commission; there is privity of contract between the agent and the maker of the note, and the note being given for good and valid consideration, the agent can maintain an action upon the same.

The plaintiff brought his action on a promissory note for $225, given by defendant to plaintiff for value received.

Defendant pleaded: 1st. No consideration. 2nd. That the plaintiff had represented to defendant that he was an agent of the Ætna Life Assurance Company of Hartford in the State of Connecticut, and as such induced defendant to take out a policy of insurance on his life for $5,000 in consideration of the annual payment to said Company of $225, for which sum said promissory note was made.

That it was understood that said note was not given to defendant personally but to said Company, and when the policy issued it was upon the condition of defendant's paying the said Company an annual premium of $315.

That defendant refused to accept said policy when the same was offered to him, and returned it to the Company who accepted, and still hold[s] said policy.

That no privity of contract respecting the said note ever exi[sted] between the plaintiff and defendant.

The plaintiff answered that the promissory note was given in consideration of his procuring for defendant the policy of insurance referred to in defendant's plea, and the amount thereof was to be applied in part payment of the first annual premium to become due and to be paid in advance, the balance of said premium to be made up chiefly by plaintiff's commission thereon, which he agreed to apply in favor of defendant on said first premium only.

That plaintiff procured said policy on the life of defendant, which policy was issued on the 8th of July, 1878.

The judgment of the Superior Court, Jetté, J., of date the 30th Sept., 1879, was *motivé* as follows:

"Considérant, &c., &c., " qu'il est établi en preuve que la considération pour laquelle le défendeur a donné au demandeur le billet dont le paiement est réclamé, était l'obtention de la Compagnie d'Assurance Etna d'une police d'assurance sur la vie du défendeur moyennant une prime de $225, montant du dit billet, lequel est daté à Montréal, le 29 juin 1878, et payable à trente jours de cette date, et que le demandeur a offert et offre de nouveau au défendeur la dite police sur paiement du dit billet de $225, et que c'est là une considération légale.

" Considérant que le défendeur n'a pas prouvé qu'il avait été trompé par le demandeur quant au chiffre de la prime à payer sur la dite police d'assurance, pour les années à courir après la première du dit contrat, mais que le reçu produit ne peut s'appliquer qu'à la prime de la première année, et que ce reçu a eu son plein et entier effet par l'offre de la police promise sur paiement de la somme stipulée au dit billet: Renvoie les exceptions et défenses du défendeur, et le condamne à payer au demandeur la dite somme de $225 avec intérêt sur icelle " &c., &c.

This judgment was unanimously confirmed in Review.

Judgment of Superior Court confirmed.

Cruickshank & Cruickshank, for plaintiff.

Carter, Church & Chapleau, for defendant.

(J.L.M.)

SUPERIOR COURT, 1880.

MONTREAL, 30TH DECEMBER, 1880.

Coram JETTE, J.

No. 1202.

Cross vs. *Gareau*, and *Coutlée, mis en cause.*

HELD:—That the sheriff cannot be compelled to exact interest from a purchaser of an immovable, who is a hypothecary creditor in respect of such immovable, and who has given a Bond in terms of Art. 695 of the Code of Civil Procedure.

The facts and circumstances involved are sufficiently detailed in the judgment of the Court, which was worded as follows:—

"La Cour, après avoir entendu le demandeur et le mis en cause par leurs avocats sur la motion produite le 13 octobre dernier par le demandeur pour forcer le dit mis en cause, Louis M. Coutlée, shérif du district d'Ottawa, à rapporter pour distribution entre les créanciers du défendeur, l'intérêt sur

Cross vs. Gareau.

$1,805.00 montant du prix d'acquisition des lots de terre vendus en vertu de l'exécution émise en cette cause, et dont le nommé François Samuel Mackey, agissant pour les héritiers testamentaires de feu l'Honorable Louis Joseph Papineau s'est rendu adjudicataire, la dite motion alléguant que le dit shérif n'a pas fait le cautionnement donné par le dit adjudicataire payable avec intérêt, avoir examiné la procédure et les pièces au dossier, et délibéré ;

"Considérant qu'aux termes de l'article 687 du Code de Procédure Civile l'adjudicataire d'un immeuble décrété n'est tenu de payer l'intérêt de son prix d'achat que dans le cas où il néglige de solder ce prix pendant plus de trois jours après l'adjudication et pour le temps de son défaut seulement ;

"Considérant qu'aux termes de l'article 688 du même Code, l'adjudicataire qui est en même temps créancier hypothécaire n'est pas tenu de payer la somme que représente sa propre créance en argent, mais peut offrir à la place un cautionnement garantissant que telle somme sera consignée si elle ne lui est pas attribuée par le jugement de distribution, et que le shérif est tenu de recevoir ce cautionnement et d'en faire rapport en mentionnant qu'il a été ainsi satisfait ;

"Considérant qu'en accordant ce privilége au créancier adjudicataire, la loi a assimilé ce cautionnement au paiement réel ; que la distribution de la somme ainsi garantie se fait exactement de la même manière que si les deniers étaient réellement devant la Cour, et que par suite le créancier adjudicataire qui a donné tel cautionnement, dans le délai fixé pour paiement, est comme celui qui a payé libéré des intérêts ;

"Considérant que le demandeur ne fait pas voir par sa motion que l'adjudicataire en cette cause n'ait pas donné son cautionnement dans le délai fixé pour le paiement, et que par suite il n'établit contre lui aucune responsabilité à cet égard, non plus que contre le shérif pour n'avoir pas exigé ce qu'il ne démontre pas avoir été dû ;

"Considérant enfin que si depuis que le shérif a reçu et accepté le cautionnement de l'adjudicataire en cette cause, tel cautionnement avait pu produire des intérêts, les créanciers du défendeur n'y auraient aucun droit, et que, aux termes de la loi concernant les dépôts judiciaires, ces intérêts auraient été la propriété de l'état ou du shérif suivant le cas, et que par conséquent le demandeur est sans grief.

"Renvoie la motion du dit demandeur avec dépens."*

Motion rejected.

Davidson, Monk & Cross, for plaintiff.

R. & L. Laflamme, for Coutlée.

(S.B.)

* [Reporter's note. The Court referred to the case of Genereux, ins., & Gordon et al., clmts., & La Soc. de Constrn. Met., contestant, 23 L. C. J., p. 221.]

COURT OF QUEEN'S BENCH, 1880.

MONTREAL, 22ND MARCH, 1880.

Coram Hon. Sir A. A. DORION, C.J., MONK, J., RAMSAY, J., TESSIER, J., CROSS, J.

No. 192.

MATTINSON, APPELLANT;

AND

CADIEUX, RESPONDENT.

HELD:—That when a *tiers-saisi* whose declaration is contested fails to answer the contestation, the allegations of such contestation are not held to be admitted, but proof must be adduced in support of such contestation.

This was an appeal from a judgment of the Superior Court, at Montreal, (Johnson, J.) rendered on the 27th of September, 1878, condemning a *tiers-saisi* to pay plaintiff the amount claimed by his contestation of the declaration of the *tiers-saisi*, without the adduction of any proof in support of such contestation; the Court holding such proof to be unnecessary as the *tiers-saisi* had not answered the contestation.

The following was the judgment so rendered:—

"La Cour, après avoir entendu le demandeur contestant par ses avocats, sur son inscription pour jugement sur la contestation par lui faite, de la déclaration de James Mattinson, junior, pour et au nom de James Mattinson, senior, James Mattinson, junior et Andrew Young, faisant affaires en société sous le nom et raison de Mattinson, Young et Compagnie, *tiers-saisis* en cette cause, en date du 4 février, 1878, en obéissance au bref de saisie-arrêt après jugement émané en la dite cause le 10 novembre 1877, la défenderesse ayant déclaré qu'elle n'a pas de plaidoyer à produire et qu'elle consent au jugement; ayant examiné la dite déclaration, les pièces au dossier et la procédure généralement, et attendu que les dits Mattinson, Young et Compagnie, n'ont pas produit de réponse à la dite contestation, dans le délai requis par la loi, la Cour maintient la dite contestation, et adjuge et déclare que lors de la signification à eux faites du susdit bref de saisie-arrêt, ils étaient et sont encore endettés envers la défenderesse en une somme de $40.19, cours actuel, pour les causes et raisons énoncées dans la dite contestation, et que par suite la déclaration qu'ils ont faite est illégale, fausse et erronnée, et condamne en conséquence les dits Mattinson, Young et Compagnie comme tel débiteurs de la défenderesse à payer au demandeur, sous quinze jours de la signification des présentes, la dite somme de $40.19 pour icelle ainsi payée être imputée en déduction de celle de $711, savoir: $600 montant principal du jugement obtenu de cette Cour en cette cause par le dit demandeur contre la dite défenderesse, le 20 mars 1877, avec intérêt sur icelle somme de $600 à compter du 30 mars 1876, et celle de $111 frais taxés sur le dit jugement, et dont distraction a été accordée à Messieurs Longpré & Dugas, avocats du demandeur, avec dépens de la dite contestation contre les dits tiers-saisis Mattinson, Young & Compagnie, distraits aux dits Messieurs Longpré & Dugas, et au paiement de la dite somme de $40.19, seront les dits James Mattinson, Senior, James Mattinson, junior, et Andrew Young, contraints par toutes voies que de droit, et en ce faisant valablement déchargés."

Mattinson and Cadieux.

The following was the written judgment of the Court of Appeal:—

"La Cour * * * considérant qu'en vertu des arts. 1115 et 1116 du Code de Procédure Civile il y a appel de tout jugement rendu par la Cour Supérieure quelque soit le montant de la demande ou de la somme en litige, et que le jugement rendu en cette cause est [illegible] en vertu des articles ci-dessus;

"Et considérant que l'intimé [illegible] aucune preuve des allégués contenus dans sa contestation de la déclaration des appelants comme tiers-saisis;

"Et considérant qu'il y a erreur dans le jugement rendu par la Cour Supérieure, à Montréal, le 27e jour de septembre, 1878;

"Cette Cour casse et annule le dit jugement du 27 septembre 1878, et renvoie la contestation de l'intimé de la déclaration des appelants comme tiers-saisis, et condamne l'intimé aux frais encourus tant en Cour Supérieure que sur le présent appel.

Judgment of Superior Court reversed.

Archibald & McCormick, for appellant.

Longpré & David, for respondent.

(S.B.)

COURT OF QUEEN'S BENCH, 1879.

MONTREAL, 20TH SEPTEMBER, 1879.

Coram HON. SIR A. A. DORION, Ch. J., MONK, J., TESSIER, J., CROSS, J.

No. 2379.

THE MECHANICS BANK,

(*Plaintiff below,*)
APPELLANT;

AND

BRAMLEY AND THE SINCENNES-McNAUGHTON LINE,

(*Defendants below,*)
RESPONDENTS;

AND

THE SINCENNES-McNAUGHTON LINE,

(*Defendants en garantie below,*)
APPELLANTS;

AND

BRAMLEY,

(*Plaintiff en garantie below,*)
RESPONDENT.

HELD:—1. That a promissory note made payable to the order of an incorporated Company endorsed by said Company per its Vice-President, and by the Vice-President transferred to one of his own private creditors in payment of his own private debt, will not bind the maker towards such transferee, who must have known from the form of the note itself that it was given for the affairs of the Company.

2. That in such a case an *action en garantie* by the maker of the note against the Company, endorser thereof, is well founded to protect him from the third holder to whom such note had been illegally transferred by the Vice-President of the Company in payment of his own private debt.

3. That where the by-laws of an incorporated Company provide that notes when signed by the President or Vice-President and countersigned by the Treasurer shall be binding upon the Company, a note payable to the order of the Company and endorsed by the Company only by a President or Vice-President will not be binding as upon the Company.

The plaintiffs brought their action upon two protested promissory notes as follows:

$4,250. MONTREAL, 22nd February, 1875.

Three months after date, I promise to pay to the order of the Sincennes-

McNaughton Line, at the Mechanics Bank, here, forty-two hundred and fifty dollars, for value received. The Mechanics Bank and The Sincennes-McNaughton Line.

(Signed), G. H. BRAMLEY.

(Endorsed), The SINCENNES-McNAUGHTON LINE,
Per W. McNAUGHTON.

Without recourse,
W. McNAUGHTON.

$4,250.

MONTREAL, 25th May, 1875.

Three months after date, I promise to pay to the Sincennes-McNaughton Line or order, at the office of the Mechanics Bank, here, forty-two hundred and fifty dollars, for value received.

(Signed), G. H. BRAMLEY.

(Endorsed), THE SINCENNES-McNAUGHTON LINE,
W. McNAUGHTON.

The defendant Bramley pleaded in effect that these notes were not signed for value received, and that the Sincennes-McNaughton Line never received any consideration for the same.

That the note was signed in blank and left in the office of the Sincennes-McNaughton Line upon the condition that it would only be used for its affairs, of all which William McNaughton was well aware.

That McNaughton illegally transferred it to the plaintiff for his own debts, and the plaintiffs were aware that it was only to be used for the business of "the Sincennes-McNaughton Line."

That the second note of the 25th May, 1875, was given by McNaughton to plaintiff as a renewal of the first note.

That both of the notes were false and made without the consent of Bramley, and were not legally transferred to the plaintiff by the Sincennes-McNaughton Line, which never endorsed the same.

This plea was supported by the defendant Bramley's affidavit.

By an incidental demand *en garantie* Bramley called the Sincennes-McNaughton Line into the cause to guarantee him against the said notes, reciting his pleas, and alleging that he had received no value for the notes.

The Sincennes-McNaughton Line made default, and the allegations of the pleas and incidental demand having been proved, the judgment of the Superior Court was rendered in terms following:

The Court, &c.

Adjudging first on the said principal demand:—Considering that it is proved that the plaintiffs received the notes sought to be recovered by this action from William McNaughton as security for the payment of a debt due by McNaughton to them, and the said notes were duly endorsed to them by the defendants, the Sincennes-McNaughton Line; Doth maintain the pleas of the said defendants and dismiss plaintiff's action with costs, &c.

And seeing that the defendant Bramley is well founded in the allegations of his incidental demand or *demande en garantie* against the defendants *en garantie*, the Sincennes-McNaughton Company, who have made default on said *demande en garantie*, doth maintain the said incidental demand with costs against the said the Sincennes-McNaughton Line, &c., &c.

The Mechanics Bank and The Sincennes-McNaughton Line.

On the 20th of September, 1879, this judgment was unanimously confirmed in appeal. Judgment confirmed.

Monk & Butler, for Mechanics Bank.
Coursol, Girouard, Wurtele & Sexton, for Sincennes-McNaughton Line.
Mathieu & Cagnon, for Bramley.
(J. L. M.)

COUR SUPERIEURE, 1881.

MONTREAL, 30 SEPTEMBRE, 1881.

Coram PAPINEAU, J.

No. 419.

Chs. H. Binks vs. The Rector & Church Wardens of the Parish of Trinity and The Trust and Loan Company of Canada, Opposant.

JUGE :—Qu'un orgue placé dans une église employée pour l'exercice du culte divin devient immeuble par destination comme y étant placé à perpétuelle demeure, et ce aux termes des articles Nos. 375 et 379 du Code Civil.

PER CURIAM. L'opposante fait opposition à fin d'annuler la saisie de l'Orgue de l'Eglise de la Trinité alléguant que cet orgue est placé pour perpétuelle demeure, qu'il est immeuble par destination et qu'avant d'avoir été saisi en la présente cause à la poursuite du demandeur, il avait été saisi avec l'Eglise dont il fait partie à la poursuite de l'opposante, le 20 de février, 1879, en vertu d'un jugement dans une cause où l'opposante était demanderesse contre le Lord Evêque de Montréal, sous le No. 738 des dossiers de cette Cour, et que cet orgue ne peut être détaché de la dite Eglise.

L'opposante produit copie du procès-verbal de la saisie en date du 20 de février, 1879, dans lequel procès-verbal l'orgue est mentionné comme saisi avec l'Eglise.

Le demandeur conteste cette opposition et dit que si l'orgue a été saisi par la Compagnie Opposante il l'a été illégalement, et sa saisie ne lui donnerait aucun droit de faire opposition dans cette cause parceque l'orgue n'a pas été mis dans l'Eglise de la Trinité pour perpétuelle demeure vu qu'il n'y tient pas à fer et à clous, qu'il n'y est pas scellé à chaux ou à ciment, et qu'il en peut être enlevé sans être fracturé et sans briser ni détériorer la dite Eglise.

La réponse est générale.

Le demandeur admet en réponse à l'articulation de faits que l'orgue saisi en la présente cause est le même que celui saisi avec l'Eglise.

D'après notre Code, art. 375, il y a quatre classes d'immeubles ; 1o. les immeubles par nature comme les fonds de terre, les édifices : 2o. les immeubles par destination ; 3o. les immeubles qui sont tels par l'objet auquel ils s'attachent ; 4o. ceux qui le sont par la détermination de la loi. Les trois dernières classes d'immeubles ne l'étant pas par leur nature, il faut bien dire que ceux de la seconde classe n'ont rien qui puisse les faire distinguer des autres meubles, rien qui puisse les faire considérer comme immeubles que leur destination. Les immeubles de la 3ème. classe se reconnaissent parcequ'ils *s'attachent* à un autre objet. Ceux de la 4e. classe l'étant par détermination de la loi, il n'y a qu'une disposition expresse de celle-ci qui puisse nous les faire déclarer immeubles quoiqu'ils soient meubles par nature.

L'art. 379 donne au propriétaire d'un fonds deux moyens distincts de convertir en immeuble par destination des objets mobiliers : le premier est de les y placer

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à *perpétuelle demeure*, le second de les incorporer. Dans l'un et l'autre cas ces objets mobiliers sont immeubles par destination tant qu'ils restent sur son fonds. Inutile de dire que le mot fonds dans cet article comprend les édifices aussi bien que les fonds de terre ; les exemples cités tels que les forges, les papeteries, les usines le font voir bien clairement.

Il est donc important de constater si c'est pour perpétuelle demeure que l'orgue en question a été placé dans l'Eglise de la Trinité, parceque de ce point là, et de celui là seulement, dépend le maintien ou le renvoi de l'opposition en cette instance.

Le demandeur, dans sa contestation et dans son argumentation a tenté de faire voir, et il a fait sa preuve avec l'intention évidente d'établir, qu'il n'y a d'objets censés placés par le propriétaire à perpétuelle demeure aux yeux de la loi que ceux " qui tiennent à fer et à clous, qui sont scellés en plâtre, à chaux " ou à ciment ou qui ne peuvent être enlevés sans être fracturés ou sans briser " ou détériorer la partie du fonds à laquelle ils sont attachés, " et telle est l'interprétation qu'il voudrait faire donner à l'article 380.

Ce n'est pourtant pas ce que signifient les exemples cités dans cet article 380 ni ceux énumérés dans l'article 379, puisque les glaces, les tableaux sont censés unis à perpétuelle demeure par le fait seul que la partie de l'appartement qu'ils couvrent demeurerait incomplète ou imparfaite sans eux ; or pour cela il n'est pas nécessaire qu'ils tiennent à fer et à clous, ni qu'ils soient scellés en plâtre, etc.

De même les pailles et autres substances destinées à faire le fumier et plusieurs autres objets mentionnés dans l'art. 379 comme immeubles par destination ne sont pas scellés à chaux, ni à ciment ; ils ne tiennent pas non plus à fer et à clous.

Le placement à perpétuelle demeure ne se reconnait donc pas toujours par ces moyens d'attachement corporel des objets mobiliers au fonds ; c'est plutôt un effet de la volonté puisqu'ils deviennent immeubles par la seule destination.

La Cour d'Appel *in-re* La Compagnie du Grand Tronc et La Banque des Townships de l'Est (16 L. C. Reports p. 173 and 10 L. C. Jurist p. 11) a décidé que la locomotive, saisie à la poursuite de la Banque, était immeuble par destination, parcequ'elle étant nécessaire à l'exploitation du chemin de fer sur lequel elle était et où elle avait été placée.

Cette décision a été donnée ainsi, non parceque cette locomotive là en particulier était nécessaire à l'exploitation du chemin de fer du Grand Tronc, ni parce qu'elle y était attachée physiquement, mais parce qu'une locomotive abstractivement parlant, étant nécessaire à cette exploitation, celle saisie dans la cause avait été destinée spécialement par la Compagnie, à cette fin, tant qu'elle resterait sur son chemin. Et c'est par cette *destination* qu'elle était devenue immeuble.

Cette locomotive n'était cependant pas corporellement attachée ni fixée au chemin par clous, plâtre, ciment, etc. Elle pouvait en être enlevée sans fracture, et le chemin de fer aurait été aussi complet, aussi parfait après qu'avant l'enlèvement de la locomotive. Le chemin n'aurait été nullement brisé, ni détérioré par cet enlèvement, puisqu'une autre locomotive aurait pu servir aussi bien à l'exploitation du chemin.

Une Eglise est un édifice construit d'une manière particulière, pour un but spécial : celui du culte Divin. Sa construction a ceci de particulier que l'Eglise ne peut être employée à autre chose, sans des détériorations importantes. Ses

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dimensions sont calculées d'après la fin pour laquelle on l'édifie. L'orgue dans une église, n'est pas une chose absolument nécessaire, indispensable ; on conçoit et l'on voit souvent une église sans orgue. Le culte se fait bien sans orgue quoiqu'on le trouve singulièrement relevé par cet instrument ; mais de ce qu'une église peut être complète sans orgue et le service divin peut se faire sans orgue, il ne s'en suit pas que l'orgue placé dans l'Eglise, n'est pas comme celle-ci, destinée au culte divin ; au contraire l'orgue est, tout autant que l'église dans laquelle il est placé, spécialement affecté au culte divin. Et comme l'objet de cette affectation est perinanent, on doit en conclure que l'affectation ou destination est permanente comme son objet.

La loi n'exige pas, et le bon sens non plus qu'un objet mobilier soit un objet nécessaire à une exploitation quelconque pour devenir immeuble par destination. Il suffit que le propriétaire l'ait placée pour perpétuelle demeure.

Un objet simplement utile et dont le propriétaire entend avoir l'utilit à perpétuité, dans son édifice, peut, tout aussi qu'un objet nécessaire, y être placé par lui à perpétuelle demeure.

Comme l'Eglise, l'Orgue qu'on y place doit avoir des dimensions et qualités particulières appropriées à cette église, de manière à s'harmoniser avec elle.

L'orgue en question, c'est le témoin du contestant qui nous le dit, a été fait pour cette église ; on a fait une plateforme tout exprès pour l'y placer ; il ne peut être sorti de cette église sans être mis par pièces, *without being taken to pieces*. Cet orgue n'a pas été employé, depuis sa construction, ni destinée à être employé, dans d'autres églises, ni dans des maisons d'habitation ; on l'a mis là pour la même fin pour laquelle l'église elle-même a été bâtie : la célébration des mystères religieux. Cette fin seule indique que le placement de cet orgue n'est pas un placement d'un caractère purement temporaire, comme le placement d'un meuble d'ornement. C'est un placement d'un caractère permanent, d'une destination perinanente, autant que celle de l'église dans laquelle il a été construit. De fait, c'est la même destination.

La preuve n'a fait connaître aucun autre objet, au placement de cet orgue, dans l'église, que le culte divin. C'est un objet qui devait être perpétuel dans la pensée de ceux qui ont placé l'orgue dans l'église. On doit en conclure que le placement de l'orgue est à perpétuelle demeure, que celui-ci est conséquemment immeuble par destination, aux termes des articles 375 et 379 du Code Civil, que l'opposition est bien fondée, et la contestation de l'opposition mal fondée. L'opposition est maintenue avec dépens contre le contestant.

Les autorités cités par l'opposante sont : Code Civil du Bas-Canada, art. 379, 7 Pothier (Bugnet) Communauté Nos. 60 et 61.

7 Démolombe des Biens, Nos. 216–217 218–201 256–260 268 et 274, et aussi No. 223.

Le contestant a cité :

3 Quebec Law Reports, page 273, Budden & Knight.

6 Do page 213, Wyatt vs. Levis et Kennebec R. R. Co.

23 L. C. Jurist, page 32, Filion vs. Bisson.

2 Dupare Poulin page 67, No. 13.

Judah & Branchaud, proc : de l'opposant.

L. H. Davidson, proc : du contestant.

(A.B.)

COUR SUPERIEURE, 1881.

MONTREAL, 24 DECEMBRE, 1881.

Coram JETTÉ, J.

No. 448.

Laramée et al. vs. *Evans.*

JUGE: 1o. Que le seul fonctionnaire compétent à célébrer le mariage de deux catholiques est le propre curé des parties; que la licence accordée par le représentant du Gouvernement Civil n'est d'aucune valeur pour dispenser des publications de bans requises pour les catholiques, et qu'en conséquence le mariage célébré dans l'espèce, par un ministre protestant, et en vertu d'une simple licence, est un mariage nul et abusivement contracté.

2o. Qu'avant de prononcer sur la validité de tel mariage, la Cour Supérieure doit référer la cause à l'ordinaire du Diocèse, pour qu'il prononce préalablement la nullité du mariage et sa dissolution s'il y a lieu, sauf à adjuger ensuite par la Cour Supérieure quant aux effets civils du mariage.

Voir 24 L. C. Jurist, p. 235, pour le rapport du jugement sur la défense en droit.

JETTÉ, J.—La présente demande est en nullité de mariage et des questions d'une importance considérable y sont soulevées; j'ai donc cru utile de les traiter avec quelque développement.

Les faits du litige peuvent se résumer comme suit:

Le 20 mai 1879, *Marie Joseph Laramée* et *Margaret Evans*, tous deux majeurs, ont été mariés par le Révérend M. Beaudry, pasteur de la première église méthodiste française de Montréal. Ce mariage a été célébré sans publication préalable de bans, mais sur présentation d'une *licence* accordée en vertu des dispositions du statut 35 Victoria, ch. 3 (1871) intitulé: "*Acte concernant les licences de mariage.*"

La famille du mari, toute catholique, n'avait pas été consultée et le mariage, célébré hors sa connaissance, lui fut tenu caché pendant plusieurs jours, l'époux continuant à vivre, comme auparavant, sous le toit paternel et y revenant régulièrement tous les soirs comme par le passé. Cependant la vérité finit par se faire jour, et des procédés furent aussitôt commencés pour attaquer ce mariage et en demander l'annulation.

Le 23 juin, l'interdiction de l'époux est prononcée, sur avis du conseil de famille, pour cause de grande faiblesse d'esprit, et son frère M. le Dr. Laramée est nommé son curateur.

Le 25 août, sur nouvel avis du conseil de famille, ce curateur est autorisé à porter la présente demande contre l'épouse pour faire déclarer ce mariage nul.

Cette action est intentée: 1o. par M. Laramée, père, qui, outre son intérêt de parenté, allègue un intérêt pécuniaire, l'épouse Margaret Evans, ayant intenté contre lui une action pour pension alimentaire de $300 par an; et 2o. par M. le Dr. Laramée, en sa qualité de curateur à l'époux interdit.

Les Demandeurs allèguent:

1o. Que les époux étaient tous deux catholiques; que le mari était de la paroisse St. Jacques et la femme de celle de Notre-Dame, et qu'ils n'ont obtenu aucune dispense valable de publications de bans; que leur mariage a été célébré secrètement, hors la connaissance et à l'insu des parents et amis du mari et par un

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fonctionnaire incompétent ; qu'en conséquence ce mariage est nul à raison du vice et empêchement de clandestinité.

2o. Que la faiblesse d'esprit qui a motivé l'interdiction du dit Marie Joseph Laramée, existait lors de son mariage ; qu'il était faible, craintif, sans volonté et sans énergie ; cédant à toutes les influences et incapable de gouverner sa personne, et que c'est en profitant de ces circonstances, que la défenderesse, par l'empire qu'elle avait pris sur lui, par ses manœuvres, ses artifices et même ses menaces, et aussi à l'aide des menaces et de la crainte qu'un des parents de la défenderesse inspirait au dit Marié Joseph Laramée, que ce dernier fut amené à se laisser conduire à ce mariage, auquel il n'a pu donner et n'a pas de fait donné un consentement valable.

Les demandeurs allèguent de plus que ce mariage a été contracté au mépris de toutes convenances sociales, l'époux appartenant à une famille honorable et respectée, tandis que la défenderesse est une fille naturelle, dont la mère est réputée mener une vie de débauche.

Les demandeurs concluent en conséquence à ce que ce mariage soit déclaré nul et *quant au* LIEN et *quant aux* EFFETS CIVILS et qu'à cette fin, sur preuve des faits allégués, la présente demande soit référée à l'Ordinaire c'est-à-dire à l'Evêque Catholique Romain du Diocèse, pour qu'il prononce sur la validité du lien, la Cour n'étant appelée à prononcer qu'ultérieurement sur la valeur du dit mariage quant aux effets civils.

La défenderesse a d'abord opposé à cette demande deux défenses en droit, mais toutes deux ont été renvoyées par jugement de cette Cour le 31 mars 1880. (Papineau J.)

Elle plaide maintenant par une Exception disant :

Qu'elle a épousé le dit Marie Joseph Laramée ouvertement et en présence de témoins, devant Louis N. Beaudry Ministre de l'Eglise Méthodiste du Canada, qui comme tel est autorisé à célébrer les mariages et à tenir les régistres de l'Etat Civil et que ce mariage a été célébré légalement, en vertu d'une licence régulière, et conformément à la coutume et aux usages de la dite Eglise et des autres Eglises protestantes du Canada depuis la cession du pays à l'Angleterre et notamment depuis plus de 50 ans.

Que depuis quelque temps, avant l'époque de son dit mariage, elle fréquentait la dite Eglise Méthodiste et se trouvait dans les limites du Circuit ou de la paroisse du dit Louis N. Beaudry.

Que l'autorité ecclésiastique catholique romaine du Diocèse de Montréal n'a aucun pouvoir, ni juridiction, pour prononcer sur son dit mariage.

Enfin que l'interdiction de son mari n'a été demandée que pour faciliter la présente action, qu'il a librement et volontairement consenti à son mariage et qu'il était compétent et capable de donner tel consentement, et que cette union n'a eu lieu qu'après une longue fréquentation à la connaissance des parents des deux parties.

Elle demande en conséquence le renvoi de la demande.

Plusieurs questions tant de droit que de fait s'imposent à ce tribunal pour la décision de cette cause.

1o. Marie Joseph Laramée, était-il, à l'époque de son mariage, privé de l'intelligence et de la volonté nécessaires pour donner un consentement valable ?

2o. Les deux parties sont-elles catholiques ; et par suite soumises à l'observation des prescriptions spéciales que la loi reconnaît relativement au mariage des catholiques ? Laramée et al. vs. Evans.

3o. Le mariage de deux catholiques peut-il être valablement célébré par un ministre protestant ?

4o. L'autorité ecclésiastique catholique a-t-elle juridiction pour prononcer sur la validité d'un tel mariage ?

Nous allons examiner successivement ces diverses questions :

I.

1o. Marie Joseph Laramée était-il, à l'époque de son mariage privé de l'intelligence et de la volonté nécessaires pour donner un consentement valable ?

La valeur des actes faits par une personne sujette à interdiction est déterminée par des règles différentes suivant que ces actes sont antérieurs ou postérieurs à la sentence d'interdiction.

Si l'acte est *postérieur* à l'interdiction, il est nul de plein droit. (C.C. art. 334).

Si au contraire, l'acte est *antérieur* à l'interdiction—comme dans l'espèce actuelle—non-seulement la loi ne le déclare pas nul, mais elle en reconnaît au contraire la validité en principe, parce que l'interdit n'est alors frappé d'aucune incapacité légale. Seulement comme le remède de l'interdiction subséquente pourrait devenir illusoire, lorsque la cause de l'interdiction existait au moment de l'acte attaqué, le législateur—sous la seule condition de la *notoriété* de la démence ou de l'imbécilité au moment de l'acte,—en a soumis la validité à l'appréciation des tribunaux et déclaré qu'en ce cas l'acte *pourrait* être annulé. Ainsi l'art : 335 dit: "Les actes antérieurs à l'interdiction prononcée pour imbécillité, démence ou fureur, *peuvent* cependant être annulés, si "la cause de l'interdiction existait notoirement à l'époque où ces actes ont été "faits."

Le Code exige donc que le juge apprécie et détermine la validité de l'acte dont on demande l'annulation, car même si la cause de l'interdiction était notoire au moment de l'acte, il dit simplement que le juge *pourra* le déclarer nul. Et il a été jugé, que les faits prouvés sur la demande en interdiction ne peuvent lier ou affecter les tiers qui n'ont pas été appelés à les contredire. (Sirey 1820 2. 82). Or, il est établi, dans l'espèce, que la défenderesse n'a pas été appelée à la demande en interdiction. Le tribunal, se guidant sur ces principes, doit donc rechercher d'abord si la faiblesse d'esprit de Laramée était notoire, et en second lieu si elle était suffisante pour faire prononcer la nullité du consentement qu'il a donné à son mariage.

Sur le premier point—la *notoriété*, la preuve me paraît suffisante : les parents, les amis, les compagnons d'école, les professeurs de l'interdit viennent établir qu'il était parfaitement connu qu'il manquait d'intelligence, ce qui le rendait le jouet et la victime de ses jeunes compagnons d'étude et de jeu.

Mais quant au dégré de faiblesse d'esprit dont il était atteint, la preuve faite par la demande me paraît contrebalancée, sinon détruite par la preuve contraire faite par la défenderesse, et je suis forcé de conclure que Marie Joseph Laramée

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n'était pas, lors de son mariage, atteint d'une faiblesse d'esprit telle qu'il fut incapable de donner un consentement valable.

Il n'est pas non plus prouvé qu'aucun artifice, manœuvre, pression ou menace aient été employés pour lui arracher ce consentement.

Ce premier moyen doit donc être entièrement écarté.

II.

2o. La seconde question à décider est de savoir, si les deux parties à ce mariage sont catholiques et par suite soumises à l'observation des prescriptions spéciales que la loi reconnait relativement au mariage des catholiques?

Quant au mari, aucun doute ne s'élève.

Quant à la femme, elle se réclame, par sa défense, sinon comme appartenant à l'Eglise Méthodiste, du moins comme l'ayant fréquentée habituellement depuis quelque temps avant son mariage, et comme résidant dans le circuit ou la paroisse attribuée au pasteur de cette Eglise, M. Beaudry.

A l'appui de cette allégation, la défenderesse a produit plusieurs témoins, dont quelques-uns ont déposé avec plus de zèle que de circonspection, puisque dans leur désir de faire passer la défenderesse pour protestante ils sont allés jusqu'à affirmer qu'elle n'avait certainement jamais été baptisée, et qu'ainsi elle devait nécessairement être protestante puisqu'elle n'était pas même chrétienne! Quoiqu'il en soit cette preuve se réduit à peu de chose: ainsi le témoin Décary, son oncle, après avoir dit beaucoup plus, est forcé de convenir qu'il ne l'a vue qu'une ou deux fois aller à l'Eglise protestante; le témoin McLaren l'a vue une seule fois, avant son mariage, à l'Eglise de M. Beaudry, et celui-ci croit aussi l'avoir vue cette fois là, mais n'en est pas certain.

Aglaé Brunet, au contraire, affirme être allée avec la défenderesse, aux églises protestantes au moins cinq ou six fois, et quant à Pampelus Evans, sa plus jeune sœur, elle affirme l'y avoir vu aller au moins cent fois!

Ces deux derniers témoins seuls, pourraient donc avoir quelqu'importance, mais leur crédibilité me parait loin d'être au-dessus de tout soupçon.

A l'encontre de ces témoignages la preuve des demandeurs établit un ensemble de faits qui ne permettent pas de douter que la défenderesse a toujours été et est restée catholique.

Ainsi il est établi par un extrait des Régistres de l'Etat Civil, tenus pour la paroisse de Notre-Dame, que le 7 mars, 1857, une enfant, né le 21 février de la même année, de parents inconnus, a été baptisée sous le nom de *Margaret*, la marraine de l'enfant étant Dame Scholastique Cardinal, veuve de Louis Décarie. Or, il se trouve que la défenderesse en cette cause est [illegible] naturelle d'un Monsieur Evans et de Julie Décarie, que Dame Scholastique Cardinal, est sa grand'mère, et malgré les dénégations de celle-ci, il résulte évidemment des faits et des circonstances qui se sont produits lors de la naissance de cet enfant, que la grand'mère a dû la faire baptiser, hors la connaissance d'une tante trop zélée qui croyait sincèrement que le moyen le plus sûr d'en faire une protestante était de la priver du baptême.

Ce premier jalon posé, nous trouvons ensuite cette même enfant placée chez les Sœurs par sa grand'mère Scholastique Cardinal, pour y faire sa première com-

munion. Ce fait loin d'être contesté est admis par les parties et par tous les témoins.

Il ne pouvait d'ailleurs être mis en question et l'identité de l'enfant se trouve constatée par le Régistre de Confirmation qui mentionne pour l'année 1867, c'est-à-dire juste à l'âge auquel les enfants sont admis à la première Communion et à la Confirmation, le nom de la défenderesse Margaret Evans.

Voilà donc deux faits dont le rapprochement établit sans contestation possible que la défenderesse a été baptisée et élevée comme catholique. Que trouvons nous ensuite dans la preuve à partir de cette date de la première Communion et de la Confirmation de la défenderesse en 1867? En réponse aux affirmations de certains témoins que les propensions de la défenderesse ont toujours été pour la religion protestante et qu'elle allait aussi souvent que possible aux églises protestantes, nous trouvons des actes de profession et de foi catholique indiscutables. Ainsi, il est prouvé par les témoins St. Louis, Bertrand et Lyons qu'on a vu la défenderesse communier plusieurs fois, soit à l'Eglise de Notre-Dame des Anges, soit à l'Eglise de l'Hôtel-Dieu et même suivre les exercices d'une retraite dans cette dernière Eglise. Et cette retraite et l'une de ces communions sont du mois de mars, 1879, c'est-à-dire deux mois seulement avant son mariage! Il est évident qu'il était impossible de fournir une preuve plus complète du fait à établir, c'est-à-dire que depuis sa naissance jusqu'à son mariage, la défenderesse a toujours été catholique.

En présence de ces faits, les affirmations de certains témoins, au sujet de la préférence supposée de la défenderesse pour le culte protestant, n'ont aucun poids, car la règle consacrée par la jurisprudence de notre pays est qu'il faut des faits précis et certains pour établir un changement de religion.

5 Jurist p. 27, Gravel et Bruneau.

6 Jurist p. 226, Syndics de Lachine & Laflamme.

10 Jurist p. 114, Proulx & Dupuy.

Je conclus donc sur ce second point de la cause, que les deux parties à ce mariage étaient catholiques et que par suite elles ne pouvaient le contracter que conformément aux prescriptions de la loi pour le mariage des catholiques; prescriptions que nous allons maintenant établir en examinant la troisième question soulevée dans ce litige.

III.

3o. Le mariage de deux catholiques peut-il être valablement célébré par un ministre protestant?

En d'autres termes, un ministre protestant est-il un *fonctionnaire compétent*, reconnu par la loi, pour la célébration du mariage de deux catholiques?

Notre Code Civil a déterminée dans le Chap. 2, au Titre du Mariage, les formalités relatives à la célébration du mariage, et dans le premier article de ce chapitre il déclare:

"*Art.* 128. Le mariage doit être *célébré publiquement* devant un *fonctionnaire compétent* reconnu par la loi."

Cet article exige donc deux choses: 1o. que le mariage soit *célébré publiquement*; 2o. qu'il le soit devant un *fonctionnaire compétent*, reconnu par la loi,

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La *publicité* exigée par la première partie de cet article est imposée dans le but d'empêcher la *clandestinité* des mariages, condamnée formellement par l'ancien droit français et par le nouveau, condamnée formellement par le droit anglais en force lors de la cession du pays à l'Angleterre, condamnée par la législation de tous les pays européens, condamnée par les décrêts du Concile de Trente. Et la raison de cet accord si remarquable de la loi civile de tous les pays civilisés avec la loi de l'Eglise Catholique est facile à saisir : c'est que le mariage n'intéresse pas seulement les parties elles-mêmes ; il est la source de la famille, la condition de la légitimité des enfants, il modifie la capacité de la femme, il affecte souvent le crédit du mari, &c.; à tous ces points de vue il intéresse la société elle-même, qui, dès lors, a le droit de le connaître. C'est pourquoi la loi exige la *publicité* de la célébration des mariages.

Mais quelles sont maintenant les conditions de cette publicité, qu'est ce qui la constitue ?

Si nous cherchons à nous pénétrer de l'intention du législateur, nous trouvons, dans le rapport des Commissaires chargés de la rédaction de notre Code Civil, (1er vol. p. 180), que l'adoption de cette disposition a été l'objet de discussions entre M. le Commissaire Day et les deux autres Commissaires. M. le Commissaire Day craignait que le mot *publiquement* employé dans l'article 128 ne fut interprété comme exigeant que la célébration du mariage eût lieu *dans l'Eglise* (in Church) comme cela se fesait en France, ce qui, dit-il, dans un rapport spécial, (1 vol. Rap. Cod. p. 238) établirait une règle contraire à l'usage constant et reconnu de toutes les dénominations protestantes, à l'exception de l'Eglise d'Angleterre. Mais les deux autres Commissaires répondant à cette observation disaient : " Le mot *publiquement* a une certaine élasticité qui l'a " fait préférer à tout autre ; étant susceptible d'une extension plus ou moins " grande, il a été employé afin qu'il pût se prêter à l'interprétation différente que " les diverses églises et congrégations religieuses, dans la province, ont besoin de " lui donner, d'après leurs coutumes et usages, et les règles qui leur sont parti- " culières auxquelles l'on ne désire aucunement innover. Tout ce que l'on a " voulu, c'est d'empêcher les mariages clandestins.

" Ainsi seront réputés faits *publiquement* ceux qui l'auront été d'une manière " ouverte dans le lieu où ils se célèbrent ordinairement, *d'après les usages de* " *l'église à laquelle les parties appartiennent.*"

La législature appelée à prononcer entre ces deux opinions a maintenu le mot *publiquement* avec l'interprétation que lui donnaient les Commissaires Caron et Morin.

Ainsi donc le mariage est censé célébré *publiquement*, lorsqu'il l'est soit dans l'Eglise, soit dans la maison du ministre, soit même ailleurs, pourvu qu'il soit célébré ouvertement *d'après les usages de l'Eglise à laquelle les parties appartiennent !*

Telle est la première condition qu'impose cet article 128.

La seconde partie de l'article exige que le mariage soit célébré devant un *fonctionnaire compétent*, reconnu par la loi.

Or, c'est dans l'article suivant que le Code nous dit quel est le *fonctionnaire compétent* à célébrer le mariage :

" *Art.* 129. *Sont compétents à célébrer les mariages*, tous prêtres, curés, " ministres et autres fonctionnaires *autorisés par la loi à tenir et garder régis-* " *tres de l'Etat Civil.*

" Cependant aucun des fonctionnaires ainsi autorisés ne peut être contraint à " célébrer un mariage contre lequel il existe quelqu'empêchement, d'après les " doctrines et croyances de sa religion et la discipline de l'Eglise à laquelle il " appartient."

Cet article est rédigé en termes tellement vagues et généraux qu'il devient nécessaire d'en rechercher ailleurs le véritable sens et la portée exacte. Car un des modes les plus sûrs pour arriver à l'intelligence d'une loi, c'est de remonter à ses sources, d'examiner les circonstances qui l'ont fait naître, et de se rendre compte de celles qui ont pu la modifier, enfin, d'avoir recours à l'histoire. Cette méthode a sans doute le désavantage d'exposer à des longueurs, mais je trouve ma justification pour l'adopter dans le cas présent, dans l'importance considérable de la question à résoudre et dans ces paroles de Troplong dont la justesse ne saurait être contestée : " S'il m'est arrivé quelquefois, dit cet illustre juris- " consulte, de parvenir à la saine intelligence de certaines parties de notre droit, " c'est toujours l'histoire qui a été ma principale lumière et mon plus utile " secours." Preface à la contrainte par corps.

Remontons donc aux sources de notre législation sur cette matière :

Si l'on consulte les anciens monuments de l'Eglise, on voit que même dans les premiers temps, les Chrétiens ne célébraient leurs mariages que dans l'assemblée des fidèles et sous les auspices du prêtre qui leur donnait la bénédiction nuptiale. Cependant cette bénédiction, bien que pratiquée dans l'Eglise, n'était pas nécessaire pour la validité du mariage, et nombre de personnes en profitaient pour se soustraire à cet usage. Les rois de France frappés des abus qui en résultaient exigèrent, à peine de nullité, dès les premiers temps de la monarchie, que les mariages fussent célébrés en face de l'Eglise et que les époux reçussent la bénédiction nuptiale. On trouve à cet égard la disposition suivante, dans l'art. 130 du 6e. livre des Capitulaires de Charlemagne et de ses successeurs : " *Que ceux qui auparavant n'était pas mariés, ne soient pas assez hardis de se* " *marier sans la bénédiction du prêtre.*" Mais ces lois finirent par tomber en désuétude et les abus résultant de la clandestinité des mariages se multiplièrent à tel point qu'il devint nécessaire d'y remédier. Ce fut le Concile de Trente qui opéra cette réforme, en défendant formellement les mariages clandestins, et en exigeant pour en assurer la publicité, la proclamation préalable des bans et la célébration devant *le propre curé des parties*, à peine de nullité.

Mais cette réforme du Concile ne fut pas d'abord acceptée en France. Les jurisconsultes français soutinrent que le Concile avait excédé ses pouvoirs en introduisant une règle de discipline sur un point de droit public du ressort de la puissance séculière seule, et refusèrent par suite de reconnaître l'autorité de ses décrêts. Ce refus est encore invoqué aujourd'hui par la défenderesse qui, s'appuyant sur la décision de la Cour Supérieure dans la cause de *Connolly* et *Woolrich* (11 Jurist p. 220), soutient que ces décrets du Concile de Trente, n'ayant jamais été reçus en France, n'ont aucune autorité en ce pays. La défenderesse s'appuie même pour étayer cette prétention sur l'opinion des Lords

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du Conseil Privé, dans l'affaire Guibord (11 Jurist p. 247), mais cette autorité loin de venir à son secours, peut au contraire être invoquée contre elle. En effet voici ce qui est dit à l'endroit cité : "It is a matter almost of common "knowledge, certainly of historical and legal fact, that the decrees of this "Council, both those that relate to discipline and to faith, were never admitted "in France to have effect *proprio vigore*, though a great portion of them has "been incorporated into French *Ordonnances*."

Ainsi le Conseil Privé constate bien, il est vrai, que comme règle générale les décrets du Concile de Trente ne furent pas reçus en France, mais il admet ce qui d'ailleurs est incontestable, qu'une grande partie de ces décrets fut ensuite insérée dans les Ordonnances des rois de France et devint ainsi la loi du royaume.

Or il se trouve que ceux des décrets du Concile qui réglaient les formalités exigées pour empêcher les mariages clandestins, savoir la publication des bans et la célébration devant le propre curé des parties, ont précisément été adoptés par l'autorité civile et promulgués dans diverses Ordonnances que nous allons maintenant examiner.

Les décrêts de ce Concile, d'ailleurs, étaient si sages et répondaient si bien aux besoins du temps qu'il ne fallut pas attendre longtemps, malgré les passions et les préjugés soulevés contre eux, pour les voir acceptés et promulgués sous forme de loi. Ainsi en 1579, quinze ans seulement après le Concile de Trente, Henri III par son Ordonnance rendue aux Etats de Blois, déclare qu'aucun de ses sujets ne pourra *valablement* contracter mariage, "sans procla- "mations précédentes de bans faites par trois divers jours de fêtes." (Ord. de Blois art. 40.) En 1606, Henri IV par son Edit du mois de décembre confirme ces dispositions de l'ordonnance de Blois, et déclare de plus dans l'art. 12 : "Nous voulons que les causes concernant les mariages, soient et appartiennent "à la connaissance et juridiction des juges d'Eglise, à la charge qu'ils seront "tenus de garder les Ordonnances, même celle de Blois, en l'article 40 ; et "suivant icelle, déclarer les mariages qui n'auront été faits et célébrés en l'Eglise, "et avec la forme et solennité requise par le dit article, *nuls* et *non valablement* "*contractés* comme estant cette peine indicte par les Conciles."

Louis XIII par sa déclaration du 26 novembre, 1639, intitulé : "Déclaration portant règlement sur l'ordre qui doit être observé en la célébration des mariages," dit :

"Art. 1er. Nous voulons que l'article 40 de l'Ordonnance de Blois touchant "les mariages clandestins, soit exactement gardé ; et *interprétant icelui*, ordon- "nons que la proclamation des bans sera faite *par le curé de chacune des parties* "*contractantes*, avec le consentement des pères, mères, tuteurs ou curateurs, "s'ils sont enfants de famille, ou en la puissance d'autrui ; et que à la célébra- "tion du mariage assisteront quatre témoins dignes de foi, outre le Curé, qui "recevra le consentement des parties, et les conjoindra en mariage, suivant la "forme pratiquée en l'Eglise. *Faisons très expresses défenses à tous Prêtres*, "tant séculiers que réguliers, *de célébrer aucun mariage qu'entre leurs vrais et* "*ordinaires paroissiens*, sans la permission par écrit des curés des parties ou de "l'Evêque diocésain, nonobstant les Coutumes immémoriales et priviléges que

"l'on pourrait alléguer au contraire. Et ordonnons qu'il sera fait un bon et
"fidèle registre tant des mariages, que de la publication des bans, ou des dis-
"penses, ou des permissions qui auront été accordées."

Enfin Louis XIV, par son Edit du mois de mars 1697, décrète : "Que les "dispositions des Saints Canons et les Ordonnances des Rois nos prédécesseurs, "concernant la célébration des mariages, et *notamment celles qui regardent* "*la présence du propre curé de ceux qui contractent*, soient exactement obser- "vées ; et en exécution d'iceux défendons à tous curés et prêtres, tant séculiers "que réguliers de conjoindre en mariage *autres personnes que ceux qui sont* "*leurs vrais et ordinaires paroissiens*, demeurant actuellement et publiquement "dans leurs paroisses, *au moins depuis six mois*, etc." (1 Champeaux, p. 239).

Ainsi voilà les décrets du Concile de Trente, au sujet des formalités requises pour la célébration des mariages, formellement acceptés par l'autorité séculière et promulgués par elle sous la forme de loi du royaume. Et de nombreux monuments de la jurisprudence française nous fournissent ensuite maints exemples de l'application de ces dispositions, dont l'autorité indiscutable est d'ailleurs attestée par tous les auteurs. Et c'est cette loi, droit commun de la France, qui est devenue aussi la loi de notre pays, soumis alors à l'autorité du Roi Très-Chrétien.

Ajoutons que cette législation s'appliquait en France à tous les citoyens indistinctement, non-seulement aux Catholiques mais encore aux Protestants, et que ceux-ci, qui par l'Edit de Nantes avaient obtenu en 1598, la liberté religieuse à peu-près complète, avaient été ramenés par la révocation de cet Edit en 1685, au régime antérieur à l'Edit, c'est-à-dire à un ordre de choses où leur état civil n'était reconnu et constaté qu'en autant qu'ils se soumettaient aux règles établies pour les Catholiques, soit pour la constatation de la naissance de leurs enfants, soit pour la célébration de leurs mariages, soit pour la sépulture de leurs morts. Et à l'époque de la cession du Canada à l'Angleterre, il n'y avait dans cette Colonie, aucuns Régistres de l'Etat Civil, pour la constatation des naissances, mariages et décès des protestants.

Tel était l'état de choses que le Roi d'Angleterre trouvait établi en Canada, en 1763.

Voyons maintenant si ce système, qui était le nôtre alors, a subi ensuite quelque modification, d'abord par l'effet du changement de domination, et subséquemment par l'effet de la législation nouvelle du pays.

Quant à l'effet du changement de souveraineté constatons d'abord que c'est une règle du droit international que les lois du pays cédé ou conquis sont censées approuvées et maintenues par le nouveau souverain et qu'elles gardent par suite leur force et leur autorité, sauf cependant celles qui seraient contraires aux principes fondamentaux du gouvernement de l'Etat conquérant, car alors ces lois se trouvent contraires à la volonté *déjà exprimée* du nouveau souverain.

(*Halleck*—International Law, p. 633).

Mais cette règle peut être modifiée par les conditions spéciales du traité de cession intervenu entre deux Etats.

Pour bien apprécier donc, l'effet de la cession du pays à l'Angleterre, sur la législation que nous avons constatée ci-dessus, au sujet de la célébration des

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mariages, il devient nécessaire de nous rendre compte d'abord de l'état de la législation anglaise sur le même sujet à cette époque, et d'examiner ensuite la condition faite aux habitants du pays, à cet égard, par les stipulations du traité de cession en 1763.

Et d'abord quant à la loi anglaise au moment de la cession.

Lorsque les décrêts du Concile de Trente furent promulgués, il y avait près de trente ans, qu'Henri VIII et l'Angleterre s'étaient séparés de l'Eglise Romaine. Ces décrêts ne furent donc pas reçus en Angleterre, et bien que les abus résultant des mariages clandestins y fussent aussi nombreux et aussi fréquents que dans les autres pays d'Europe, ce ne fut que près de deux siècles plus tard, en 1753, que l'on songea sérieusement et que l'on réussit enfin à mettre un terme à un état de choses qui avait produit des scandales restés historiques sous le nom de mariages de *Fleet Prison* et de *May Fair*.

En 1753, donc fut passé le Statut 26 George II., ch. 33, connu sous le nom de *Lord Hardwicke's Act*. Ce statut rendit obligatoire la célébration des mariages dans une église paroissiale ou dans une chapelle publique, la publication de bans, la présence de deux témoins, à part l'officiant, et enfin l'entrée du mariage dans un Régistre que devait être signé, par les parties, le ministre et les témoins.

"The effect of this Statute, (dit *Macqueen*, on Husband and Wife, p. "9,) was to do away entirely with clandestine marriages in England; and, so far, "its operation here was very much as that of the *Trent Decrees* upon the con- "tinent."

En effet les prescri[illegible]ce statut étaient à peu près les mêmes que celles du Concile et celles [illegible] trouvons dans les Ordonnances des Rois de France. Néanmoins il importe d'[illegible]signaler de suite ici une particularité importante, car elle nous fera mieux comprendre, dans l'instant le but de la législation subséquente de notre pays au sujet de la célébration des mariages des protestants. D'après ce statut de Lord Harkwicke, le pouvoir de célébrer *légalement* les mariages n'était accordé qu'à l'église d'Angleterre seule. Tous les sujets du royaume, qu'ils fussent catholiques, dissidents, ou membres de l'Eglise d'Angleterre, étaient soumis à la même règle et leur mariage ne pouvait être célébré *légalement* qu'en face de cette Eglise, à qui ce privilège exorbitant fut conservé jusqu'en 1837.

Ainsi donc en 1763, l'Angleterre était soumise à ce statut qui d'un côté exigeait pour la célébration légale d'un mariage, l'accomplissement des mêmes formalités, ou à peu-près, que celles requises par le Concile de Trente et la loi française, mais d'un autre côté, avec cette attribution de juridiction exclusive à l'Eglise d'Angleterre.

La législation des deux pays, savoir celle de l'Etat dominant et celle de la province cédée, était donc, sur cette matière de la célébration des mariages, parfaitement concordante sur un point, savoir: quant aux formalités principales et essentielles exigées dans les deux pays pour la validité du mariage; et absolument antipathique, sur un autre point, savoir: quant à la juridiction et à la compétence en matière de mariage.

Sur le premier point, la législation française ne contenant en réalité que des

dispositions identiques à celles de la législation anglaise, il est évident qu'elle n'avait aucune modification à subir pour obtenir l'assentiment du nouveau souverain. Laramée et al. vs. Evans.

Mais sur les cond point les deux législations étaient, comme je viens de le dire, profondément antipathiques, puisqu'en France et ici la juridiction exclusive en matière de mariage, était reconnue à l'Eglise catholique, [illegible] Angleterre la même juridiction exclusive était attribué à l'[illegible]

Sur ce second point donc, conflit irrépressible si ric[illegible] aspérités de cette situation et modifier l'application de la [illegible] national que nous avons déjà constatée et reconnue.

Mais les articles de capitulation de Québec et de Montr[illegible] le libre exercice de la religion catholique serait conservé aux [illegible] de la colonie et les généraux anglais, au nom de leur souverain, av[illegible] cédé à cette condition. Aussi cette stipulation fut-elle formellement renouvelée par le traité définitif de paix, signé le 10 février, 1763.

Il serait inutile de recommencer ici les dissertations sans nombre faites sur la portée de cette stipulation. L'histoire constate, il est vrai, qu'à certaines époques difficiles, des esprits étroits et préjugés ont voulu faire subir à cette concession si précieuse que l'état souverain avait fait aux catholiques de ce pays, des restrictions qui en auraient stérilisé les résultats, mais le bon sens, la loyauté et la largeur de vues des hommes d'Etat anglais ont depuis longtemps fait justice de ces mesquines prétentions.

Le traité de cession a donc garanti aux catholiques du Canada le libre exercice de leur religion, c'est-à-dire la liberté religieuse la plus complète, la plus large et la plus féconde !

Or quelle a été la conséquence nécessaire de cette concession faite par l'Angleterre protestante, intolérante même à cette époque, aux habitants catholiques de la colonie, au point de vue de l'exécution des dispositions de la loi relative aux mariages? Il serait sans doute illogique d'en faire résulter l'octroi à l'Eglise catholique, par le souverain protestant, du droit exclusif de célébrer les mariages tant des protestants que des catholiques; mais il ne serait pas moins déraisonnable, de soutenir que malgré cette condition du Traité, l'Eglise d'Angleterre est restée (quant à la colonie) en possession de son pouvoir exclusif de célébrer les mariages tant des catholiques que des protestants. Et si les circonstances qui ont donné naissance à une stipulation sont toujours utiles pour en faire connaître l'esprit et en déterminer la portée exacte, il résulte avec évidence de celles que nous venons d'exposer que cette concession faite aux catholiques du pays, par le souverain protestant de la Grande Bretagne, le chef de l'Eglise d'Angleterre, constituait, quant au mariage, d'un côté une restriction formelle du privilège que possédait alors l'Eglise Etablie, une limitation de son pouvoir, jusque là sans bornes, et, d'autre côté la reconnaissance et la consécration d'un pouvoir rival, celui de l'Eglise Catholique! On enlevait à l'Eglise d'Angleterre une portion de son domaine, une parcelle de sa suprématie, et l'on admettait à sa place une autre autorité, une autre juridiction. Et la limite de chacune de ces deux juridictions, antipathiques et exclusives se trouvait fixée par la logique même des choses et restreinte dans chaque cas aux personnes professant la religion de l'une ou de l'autre de ces Eglises.

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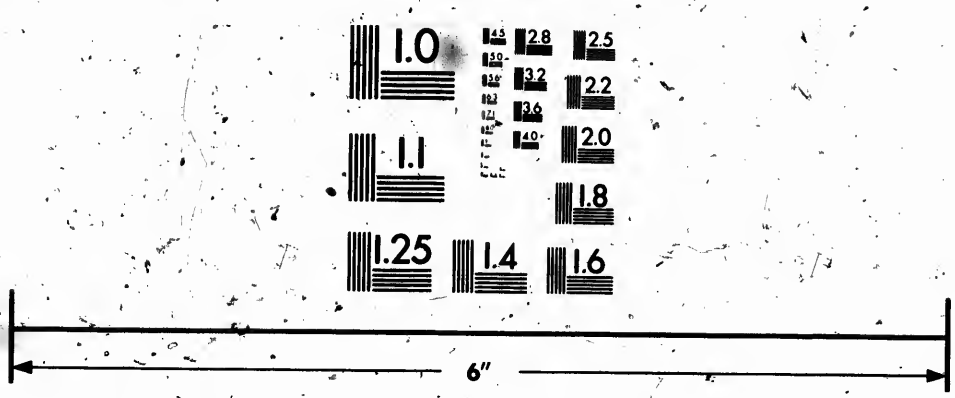

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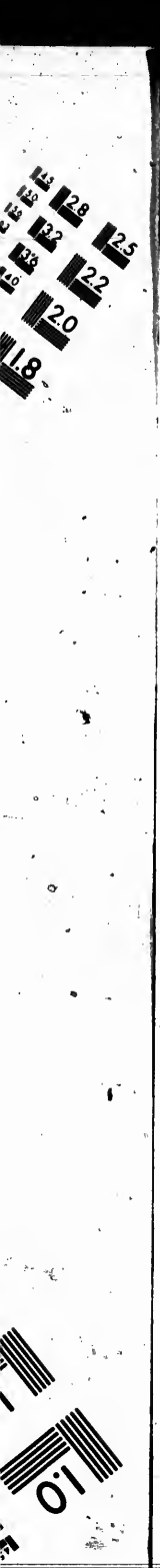

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Telle est la conséquence irrésistible de cette stipulation du Traité, et le temps n'est plus où l'on pouvait encore mettre en question des droits aussi solennellement garantis.

Nous arrivons maintenant à l'étude de la législation particulière de notre pays, depuis sa cession à l'Angleterre, et nous devons examiner si cette législation a modifié la loi française telle que nous l'avons constatée.

Pendant les trois premières périodes de la domination Anglaise, savoir: celle de la loi martiale de 1760 à 1763 ; celle du gouvernement militaire de 1763 à 1774 et celle du gouvernement civil absolu, de 1774 à 1791, on ne trouve aucune loi ou ordonnance sur cette matière. Ce n'est qu'à partir de 1791 que nous trouvons divers statuts auxquels nous devons maintenant donner notre attention.

Constatons cependant avant d'entrer dans cet examen, que pendant ces premiers temps de la domination anglaise, aucun conflit de juridiction ne s'était élevé entre l'Eglise Catholique et l'Eglise d'Angleterre au sujet de la célébration des mariages. La limite que nous avons indiquée comme déterminant exactement l'étendue légale de la juridiction de chacune était si bien comprise et acceptée, qu'aucun exemple ne pourrait être cité d'un empiètement quelconque de part ou d'autre. Et nous allons voir maintenant que les luttes subséquentes n'ont pas été dirigées contre l'Eglise Catholique et pour arriver à une modification de cet état de choses si bien établi et accepté entre elle et l'Eglise d'Angleterre, mais au contraire contre celle-ci seule et simplement pour arriver à la dépouiller de son privilège de juridiction exclusive sur tous les protestants, et pour faire reconnaître aux diverses autres dénominations protestantes des droits égaux aux siens.

En effet les diverses dénominations protestantes qui n'appartenaient pas à l'Eglise d'Angleterre ne se soumettaient que forcément au privilège que celle-ci réclamait en vertu de l'acte de Lord Hardwicke, de célébrer les mariages de tous les protestants, et ces autres dénominations tentaient ouvertement d'amener l'abrogation de ce privilège par l'établissement d'une coutume contraire. Aussi voyons nous constamment à l'origine du premier régime constitutionnel du pays, les ministres des autres dénominations protestantes célébrer ouvertement les mariages, en dépit des réclamations de l'Eglise d'Angleterre. Et que l'on remarque cependant, que nul d'entre eux n'élevait, à cette époque, la prétention de célébrer valablement le mariage des catholiques, et que tous se bornaient à réclamer un droit égal à celui de l'Eglise Etablie, quant au mariage des protestants seulement.

Cependant des doutes ne tardèrent pas à s'élever sur la légalité des mariages ainsi célébrés par ces ministres protestants n'appartenant pas à l'Eglise d'Angleterre, et en 1804, un premier statut fut passé pour les valider, (44 Geo. III. Ch. 11.) Cette loi déclare que tous les mariages qui ont été solemnisés en cette province *depuis le* 13 *septembre*, 1759, par quelque *ministre de l'Eglise d'Ecosse*, ou par quelque personne réputée être ministre de l'Eglise d'Ecosse ou par quelque *ministre dissident protestant* ou par quelque personne réputée tel, ou par quelque Juge de Paix, seront considérés comme valables et légaux. Néanmoins la législature respectant les droits de l'Eglise Etablie, restreint la portée de sa disposition

en déclarant que ce statut ne devra pas s'étendre à la confirmation d'aucun mariage célébré *après* la passation de cette loi. Cette restriction constitue, comme on le voit, une réserve expresse du privilège de l'Eglise d'Angleterre.

Cependant la même pratique se continue et en 1821, il devient nécessaire de passer une nouvelle loi pour valider les mariages célébrés dans le District Inférieur de Gaspé. (1 Geo : 4. ch. 19) ; mais toujours avec la restriction que nous venons de signaler. Enfin en 1825, même déclaration de la Législature pour les mariages célébrés dans le district de St. François (5 Geo. 4, ch. 25).

Comme on le voit ces statuts, en apportant un remède pour le passé, laissaient subsister entière la prétention de l'Eglise d'Angleterre, d'avoir seule juridiction pour célébrer valablement le mariage de tous les protestants et plaçaient les autres dénominations protestantes dans une condition d'infériorité vis-à-vis d'elle.

En 1795, une loi avait été passée (35 Geo. III. ch. 4,) pour régler la forme des Régistres de l'Etat Civil et apporter certaines modifications aux dispositions de l'Ordonnance de 1667, à cet égard. Il avait été déclaré par ce statut, qu'afin d'établir *un système uniforme* et authentique d'enrégistrement des baptêmes, mariages et sépultures, il serait tenu dans chaque église paroissiale catholique et dans chaque église et congrégation protestante, deux Régistres sur lesquels le Recteur ou Curé etc., desservant telle paroisse ou église, seraient tenus d'enregistrer les baptêmes, mariages et sépultures *par eux faits*, mais sans dire quelles congrégations protestantes avaient droit de tenir tels Régistres. L'interprétation donnée à ce statut fut, que comme les ministres de l'Eglise d'Angleterre seuls avaient autorité pour célébrer légalement les mariages des protestants, eux seuls étaient autorisés par cette loi, à tenir les Régistres de l'Etat Civil. L'intervention de la Législature en 1804, 1821 et 1825, comme nous venons de le rapporter, pour valider les mariages célébrés par des ministres autres que ceux de l'Eglise d'Angleterre, vint en quelque sorte ajouter la consécration législative à cette interprétation et fixer le sens et la portée de ce statut de 1795.

Mais les autres dénominations protestantes étaient déterminées à conquérir leur affranchissement de cette sujétion à l'Eglise d'Angleterre. Aussi en 1827 une loi fut passée pour *lever les doutes concernant l'interprétation* d'une certaine partie de l'acte 35 Geo. III ch. 4.; et par cette loi nouvelle (7 Geo : 4. ch. 2,) l'Eglise d'Ecosse, la première, obtint enfin le droit depuis si longtemps réclamé. Il fut en conséquence déclaré par ce statut : " que tous mariages qui ont été ci-" devant ou qui seront *ci-après* célébrés par des ministres ou des Ecclesiasti-" ques en communion avec l'Eglise d'Ecosse, ont été et *seront* considérés comme " légaux et valides à toutes fins et intentions quelconques, nonobstant aucune " chose dans le dit acte *ou dans tous autres actes* à ce contraire."

L'obstacle ainsi levé une première fois nous allons voir maintenant, presque chaque année, ensuite, les autres congrégations protestantes venir demander successivement le privilège tant convoité.

Les *Méthodistes Wesléyens* furent les premiers à profiter de la victoire remportée par l'Eglise d'Ecosse et obtinrent en 1829 (9 Geo. 4, ch. 76,) le privilège de tenir des Régistres de l'Etat Civil.

La même année, la Législature accorde ce pouvoir aux juifs. (9 Geo : 4, ch. 75).

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Ce privilège est ensuite accordé:

En 1831, aux *Presbytériens* de Montréal, quoiqu'ils ne fussent pas régulièrement de l'Eglise établie d'Ecosse;

(1er Guillaume 4, ch. 56.)

En 1833, aux ministres du Synode uni et associé de *l'Eglise dissidente d'Ecosse;*

(3 Guillaume 4, ch. 27).

La même année, aux ministres *Presbytériens de Hull;* et à la Congrégation des *Baptistes* de Montréal;

(3 Guillaume 4, ch. 28 et 29.)

En 1834, aux *membres des Sociétés Congrégationnelles;* aux *Baptistes volontaires de Stanstead;* et aux *Universalistes* d'Ascot;

(4 Guillaume 4, ch. 19, 20, 21.)

En 1836, aux *Baptistes Calvinistes*, aux *Baptistes volontaires;* aux *Universalistes*, et aux *Méthodistes* du township de Dunham;

(6 Guillaume 4, ch. 49 et 50.)

En 1839, aux ministres de la *Nouvelle Connexion Méthodiste* du township de Hemmingford;

(2 Victoria, ch. 17.)

En 1845, aux *Unitaires;*

(8 Vic., ch. 35.)

En 1846, aux ministres du *Synode de l'Association Presbytérienne* de l'Amérique du Nord;

(9 Victoria, ch. 54.)

En 1850, aux ministres de *l'Eglise Wesléyenne* méthodiste du Canada;

(13 et 14 Victoria, ch. 47.)

En 1853, aux *Adventistes;*

(16 Victoria, ch. 217.)

En 1854, aux ministres de *l'Eglise Luthérienne Evangélique* et à *l'Eglise Evangélique Allemande;*

(18 Victoria, ch. 58 et 59.)

En 1857, à *l'Eglise de l'ordre de la Comtesse d'Huntingdon* et à *l'Eglise Méthodiste Episcopale;*

(20 Victoria, ch. 194 et 214.)

Enfin en 1860, aux *Quakres.*

(23 Victoria, ch. 11.)

Telles sont les seules lois sur cette matière qui ont précédé le Code Civil.

Il serait sans doute intéressant de faire une appréciation séparée de chacun de ces statuts, mais ceci nous entrainerait à de trop longs détails. Il n'est peut-être pas hors de propos d'observer cependant, que par leurs requêtes à la Législature plusieurs de ces congrégations religieuses avaient demandé non seulement le pouvoir de tenir des Registres de l'Etat Civil, mais encore celui de célébrer les mariages, et qu'à part un ou deux cas, qui paraissent pouvoir être attribués à l'inadvertance, la législature n'a jamais accordé que le pouvoir de tenir des Registres; de plus que dans le cas de l'Eglise Luthérienne Evangélique, en 1854, sous l'Union, le pouvoir demandé était, quant au Bas-Canada, celui de

tenir les Registres seulement, et quant au Haut-Canada, celui de célébrer les mariages conformément au statut de cette province 11 Geo. 4, ch. 31 ; enfin que la législature, dans la plupart des cas cités, a pris soin de n'accorder le privilège de tenir les Registres que sous la condition que les *ministres* fussent régulièrement *ordonnés* tels, chacun *suivant les rites de son Eglise.*

Il me parait évident que chacune de ces conditions et restrictions découlaient logiquement des dispositions fondamentales de notre législation sur cette matière et des circonstances toutes spéciales dans lesquelles cette législation se trouvait à prévaloir.

Ajoutons enfin que malgré ces nombreuses concessions particulières, que nous venons d'énumérer, aucune loi générale n'a jamais été passée dans notre province pour autoriser indistinctement tous les ministres des diverses congrégations protestantes à tenir les Régistres de l'Etat Civil, et que ce pouvoir se trouve ainsi nécessairement restreint à ceux qui l'ont obtenu spécialement.

Résumons. Quel est maintenant le résultat de ces divers statuts que nous venons d'énumérer? Peut-on dire qu'ils ont changé en quoi que ce soit la loi française et modifié les conditions de son application? Evidemment non. La division de juridiction s'est faite lors de la cession du pays à l'Angleterre entre l'Eglise Anglicane et l'Eglise Catholique. Depuis lors les droits et privilèges de celle-ci, en cette matière n'ont pas été mis en question, et ce n'est pas même contre elle que la lutte s'est faite. C'est la juridiction de l'Eglise Etablie qui a été l'objet de toutes les entreprises et c'est cette juridiction que les diverses dénominations protestantes ont enfin réussi à conquérir pour elles toutes, laissant en dehors de leurs luttes et de leurs convoitises, celle de l'Eglise Catholique, intacte et incontestée!

C'est dans ces conditions que le Parlement du Canada Uni, ordonna la codification des lois du Bas-Canada, et nous sommes ainsi ramenés aux articles du Code Civil sur la matière qui nous occupe.

Or, c'est un fait parfaitement connu que les commissaires chargés de cette codification n'avaient pas mission de changer la loi du pays, mais au contraire de la reproduire aussi exactement que les exigences d'un semblable travail pouvaient le permettre, en suivant toutefois le plan adopté pour la rédaction du Code Napoléon. C'est aussi ce qu'ils ont fait, s'éloignant néanmoins forcément du Code Napoléon lorsque notre loi était différente, comme ils le constatent eux-mêmes dans les remarques suivantes que je trouve sur le titre du mariage, à la page 174 du 1er vol. de leurs rapports. Après avoir établi qu'ils ont supprimé, pour notre Code Civil, le 8e chapitre du Titre du mariage au Code Napoléon, qui traite du mariage de la femme avant dix mois de veuvage, prohibition qui n'existe pas en Canada, les Commissaires ajoutent: "Outre "cette différence entre le Code Napoléon et notre projet, il en est d'autres qui "sont le résultat de nos circonstances et de notre état social, *empêchant l'adop-* "*tion* sur le sujet du mariage, *de règles uniformes et particularisées, applicables* "*à tous les habitants de la province,* où se rencontre un nombre si varié "d'usages, de religions et d'associations religieuses, *ayant des coutumes et pra-* "*tiques différentes, et possédant des ministres autorisés à célébrer les mariages* "*et à en rédiger les actes.*

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" La rédaction de ces actes est, à la vérité, soumise à des lois générales (titre " 2 des actes de l'Etat Civil), *mais les formalités de la célébration même n'étant " pas déterminées d'une manière spécifique et détaillée, chaque religion suit celles " qui lui sont particulières;* ce qui crée, sur un sujet de cette importance, une " *variété* qui ne devrait pas exister dans une société plus homogène, *mais qui est " inévitable dans la notre.*"

" En France, avant la révolution, l'uniformité était praticable, vu qu'il n'y " avait alors de légalement reconnue *qu'une seule religion dont les ministres " étaient exclusivement chargés de ces devoirs.* Depuis que toutes les religions " y sont reconnues et également protégées, il a fallu pour conserver cette unifor- " mité dans le système, *civiliser* le mariage et en confier la célébration, ainsi " que la tenue des registres, à des officiers d'un caractère purement civil, sans " aucune intervention obligée de l'autorité religieuse."

" *Un changement de cette nature ne paraissant aucunement désirable en ce " pays,* il a fallu renoncer à l'idée d'établir ici, sur les formalités du mariage, " des règles uniformes et détaillées, et de suivre le Code Napoléon dans le " système qu'il a adopté.

" *Dans la vue de conserver à chacun la jouissance de ses usages et pratiques,* suivant lesquels la célébration du mariage est confiée *aux ministres du " culte* AUQUEL IL APPARTIENT; sont insérées dans ce titre plusieurs disposi- " tions qui, quoique nouvelles quant à la forme, ont cependant leur source et " leur raison d'être dans l'esprit, sinon dans la lettre de notre législation."

C'est donc à la lumière de ces observations, et en nous pénétrant de l'esprit de notre législation antérieure au Code, qu'il nous faut maintenant examiner les articles qui se rapportent à cette matière.

Et d'abord comme les rédacteurs du Code le constatent, il n'a pas été question d'établir ici le *mariage civil,* et suivant l'expression de mon savant collègue M. le juge Papineau : " notre loi se contente de donner des effets civils et sa sanction, " au *mariage religieux.*" C'est en effet ce qui résulte, on ne peut plus clairement, de chacune des lois que nous avons examinées. Car quelles sont les personnes et les seules personnes à qui la loi a toujours reconnu le pouvoir de célébrer les mariages? Les prêtres, les curés, les ministres ; c'est-à-dire ceux là seulement qui sont revêtus d'un caractère religieux.

Notre Code Civil n'a donc pas établi de système nouveau, mais il s'est contenté de reproduire l'ancienne législation, en la renfermant dans des règles assez larges et assez élastiques pour " conserver à chaque croyance la jouissance de ses usages et de ses pratiques."

Or nous avons vu quelles étaient les règles de l'ancien droit au sujet du mariage des catholiques ; nous avons vu que Louis XIII dans sa Déclaration du 26 novembre, 1639, ordonne que les publications des bans soient faites par *le curé de chacune des parties contractantes,* et que quant à la célébration du mariage, il fait *défense expresse* à tous prêtres tant séculiers que réguliers *de célébrer aucun mariage* qu'entre *leurs vrais* et *ordinaires paroissiens,* sans la permission écrite du curé des parties ou de l'Evêque ; nous avons vû de plus que cette loi, loin d'être incompatible avec l'ensemble de la législation anglaise lors de la cession du pays, était au contraire, en complet accord avec ce qui prévalait en

Angleterre à cette époque; nous avons vû enfin que cette loi n'avait pas été affectée par la législation subséquente. Et maintenant lorsque nous examinons les dispositions du Code Civil, nous trouvons que les rédacteurs du Code n'ont pas voulu apporter de changement à cette loi, mais que tout ce qu'ils ont voulu faire ça été de nous donner une règle assez large pour ne pas en gêner l'application.

Il serait donc impossible d'interpréter sainement cet article 129 du Code Civil qui dit, que tous prêtres, curés, ministres et autres fonctionnaires autorisés à tenir et garder les régistres de l'Etat Civil, sont compétents à célébrer les mariagés, sans recourir à cette législation antérieure que les commissaires ont voulu reproduire sans modification. Or, d'après cette législation antérieure, le fonctionnaire compétent à célébrer le mariage des catholiques, c'est le prêtre, le curé; et celui compétent à célébrer le mariage des protestants, c'est le ministre, et celui compétent à célébrer le mariage des juifs, c'est le rabbin, etc. Mais il est impossible de dire que tous ces fonctionnaires ont une juridiction semblable et que le rabbin juif, par exemple, serait compétent à célébrer le mariage de deux catholiques!

Mais il y a plus, le Code lui-même nous donne dans l'article 130, la règle d'interprétation à suivre pour l'application de l'art. 129. En effet la loi défend, dans l'art. 57, à tout fonctionnaire autorisé, de célébrer aucun mariage, sans se faire représenter un certificat de publications de bans, à moins que ce fonctionnaire n'ait fait ces publications lui-même ou qu'on ne lui en produise la dispense. Et l'art. 130 ajoute, que ces publications sont faites par le prêtre, ministre ou autre fonctionnaire, *dans l'église à laquelle appartiennent les parties!* Et si les parties appartiennent à différentes églises, ces publications ont lieu *dans l'église de chacune des parties.* Or n'est-il pas évident que celà veut dire, que ces publications doivent être faites par le prêtre ayant juridiction spirituelle sur les parties? Et si ces publications doivent être ainsi faites par le fonctionnaire ayant juridiction spirituelle, dans l'église des parties, à plus forte raison doit-on dire que le mariage doit être célébré *dans cette église des parties et par le fonctionnaire y ayant juridiction.*

Or, dans l'espèce soumise, je trouve deux catholiques, dont l'un paroissien de St. Jacques et l'autre de Notre-Dame, se présentant, sans publications préalables et sans dispense, chez un ministre protestant n'ayant sur eux aucune juridiction spirituelle. Ce ministre est-il pour ces deux parties le fonctionnaire compétent reconnu par la loi? Assurément non.

Il n'avait aucune autorité, pour célébrer le mariage en question et son acte ne peut être considéré que comme abusif et fait en violation de la loi.

Mais on soutient que les parties ayant fourni à ce ministre une *licence* de mariage, octroyée par un des officiers auxquels le Gouvernement confie cette charge, cette *licence* l'autorisait à célébrer valablement ce mariage, sans s'inquiéter de la religion des parties. Cette prétention n'est pas soutenable. La *licence* n'est pas autre chose que l'équivalent pour les protestants de la dispense pour les catholiques, c'est-à-dire une permission de l'autorité qui a droit de dispenser de cette formalité de la publication des bans. Or cette autorité pour les catholiques c'est l'Evêque diocésain, ou son grand vicaire, et pour les protestants c'est le Gouverneur Civil de la Province (C. C. art. 134). La licence

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du Lieutenant Gouverneur donnée à deux catholiques, n'a donc aucune autorité et ne peut produire aucun effet; et la loi de 1871, n'ajoute rien ni à la loi antérieure, ni au Code Civil, mais déclare simplement par quel département du pouvoir exécutif ces licences seront accordées.

Concluons donc, sur cette troisième question que le seul fonctionnaire compétent à célébrer le mariage de deux catholiques est le propre curé des parties, que la *licence* accordée par le représentant du Gouvernement Civil, n'est d'aucune valeur pour dispenser des publications de bans requises pour les catholiques et qu'en conséquence le mariage célébré dans l'espèce, par un ministre protestant, et en vertu d'une simple licence, est, aux yeux de la loi civile, un mariage nul et abusivement contracté.

IV.

4o. La quatrième et dernière question en cette cause est de savoir :

Si l'autorité ecclésiastique catholique a juridiction pour prononcer sur la validité d'un tel mariage ?

Le mariage, chez tous les peuples, a toujours été distingué des contrats ordinaires et a toujours été regardé comme quelque chose de *divin*. Aussi la célébration du mariage a-t-elle partout et toujours été accompagnée de quelque bénédiction ou cérémonie religieuse.

Par la loi nouvelle le mariage est devenu plus encore; il a été élevé à la dignité de *sacrement*.

Pour les catholiques donc, le mariage est non seulement un contrat, mais un sacrement.

Or, contrat de droit divin et sacrement, le mariage est évidemment du ressort exclusif de l'autorité ecclésiastique.

Mais comme le mariage touche aussi aux plus graves intérêts de la société, il est pareillement évident que l'Etat y est intéressé et qu'il lui appartient d'en régler les effets civils. Considéré donc dans ses rapports avec la société le mariage est, à ce point de vue, soumis à l'autorité civile: "*Matrimonium in quantum "ordinatur ad bonum politicum, subjacet ordinationi legis civilis,*" dit St. Thomas.

La demande faite à ce tribunal, dans l'espèce soumise, n'a donc attribué, avec raison, au juge civil, que la connaissance des effets civils de ce mariage. La juridiction de cette Cour est en effet parfaitement déterminée et exclusivement limitée aux matières civiles, et tout le monde admet aujourd'hui que grâce à la liberté religieuse dont jouit notre pays, les matières ecclésiastiques ne sont plus réclamées comme étant de la compétence des tribunaux civils.

C'est pourquoi quant à la validité même du mariage, quant au lien, les demandeurs requièrent le renvoi de la cause à l'autorité ecclésiastique, savoir à l'Evêque du Diocèse, afin qu'il prononce d'abord sur ce qui est de son ressort, sauf au tribunal civil à donner ensuite à sa sentence la sanction et l'autorité du pouvoir civil.

S'il n'y avait aucun précédent pour guider ce tribunal en pareille matière, les principes que nous venons d'exposer suffiraient seuls pour nous indiquer

clairement la route à suivre, mais la jurisprudence des divers tribunaux qui composent notre hiérarchie judiciaire, vient encore faciliter notre tâche.

Ainsi en 1848, dans la cause de *Lussier & Archambault*, (11 Jurist p. 53) la Cour du Banc de la Reine, présidée par les Juges Rolland, Day et Smith, a reconnu que la nullité du mariage de deux catholiques ne pouvait être prononcée avant qu'un décrêt de l'autorité ecclésiastique eût préalablement adjugé sur le sacrement.

En 1866, dans la cause de *Vaillancourt et Lafontaine* (11 Jurist p. 305) la Cour Supérieure siégeant à Trois Rivières, (Polette, J.) a pareillement déclaré que la nullité du mariage de deux catholiques ne peut être prononcée qu'après que le lien religieux ou sacramentel a été déclaré nul par l'autorité ecclésiastique.

En 1872, dans la cause de *Bergevin et Barrette* (4 Revue Légale, p. 160) la Cour Supérieure à Montréal (Berthelot, J.) a décidé dans le même sens.

Enfin en 1874, dans l'affaire *Guibord*, rapportée au 20e Jurist p. 228, sous le titre de *Brown et la Fabrique de Montréal*, les Lords du Conseil privé ont reconnu qu'en matière ecclésiastique l'Evêque a toujours autorité pour prononcer judiciairement, et qu'il peut être du devoir des tribunaux civils en tel cas de respecter ces sentences et même de leur donner effet. Cette opinion est d'un si grand poids qu'il importe de citer ici en entier le passage qui la contient. Le Conseil Privé appréciant les motifs invoqués pour justifier le refus de la sépulture ecclésiastique à *Guibord*, d'après les règles du Rituel, s'exprime comme suit : (page 243 du Jurist).

" To bring him (Guibord) within the 3rd Rule, it would be necessary to " show that he was excommunicated by name. *That such a sentence of " excommunication might be passed against a Roman Catholic in Canada, " and that it might be the duty of the Civil Courts to respect and give effect " to it*, their Lordships *do not deny*. It is no doubt true, as has already been " observed, that there are now in Canada no regular Ecclesiastical Courts such " as existed and were recognized by the state when the province formed part of " the dominions of France. *It must however be remembered that a bishop is " always a* judex ordinarius, *according to the canon law ;* and according to " the general canon law, may hold a Court and deliver judgment, if he has " not appointed an official to act for him. And it must further be remembered " that, unless such sentences were recognized, there would exist no means of " determining amongst the Roman Catholics of Canada the many questions " touching faith and discipline which, upon the admitted canons of their Church, " may arise among them."

Il me semble clair que cette déclaration couvre entièrement le cas actuel et reconnait d'une manière complète la juridiction de l'évêque dans l'espèce soumise.

En présence de ces décisions de nos tribunaux, que je viens de citer, et de cette opinion du tribunal le plus élevé de notre hiérarchie judiciaire, je ne saurais hésiter à suivre la jurisprudence que je trouve ainsi établie, contrairement à la décision isolée de la Cour Supérieure dans la cause de *Burn et*

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Fontaine (4 Revue Légale p. 163), qui d'ailleurs ne va pas aussi loin que le *jugé* l'indique.

En conséquence avant de prononcer sur la validité de ce mariage je réfère la présente cause à l'ordinaire du Diocèse pour qu'il prononce préalablement la nullité de ce mariage et sa dissolution s'il y a lieu, sauf à adjuger ensuite par cette cour, quant aux effets civils de ce mariage.

Dépens réservés.

Bonin & Archambault, pour les demandeurs.

Maclaren & Leet, pour la défenderesse.

(J. K.)

COURT OF QUEEN'S BENCH, 1881.

MONTREAL, 26TH JANUARY, 1881.

Coram Hon. Sir A. A. DORION, Ch. J., MONK, J., RAMSAY, J., CROSS, J., BABY, J.

No. 155.

LEDUC,

APPELLANT;

AND

THE WESTERN ASSURANCE COMPANY,

RESPONDENT.

HELD:—1. That when a vessel is seaworthy at the port of departure named in a marine policy, and becomes unseaworthy afterwards by striking on a rock during the voyage, the insurance risk attached from the time she left port.

2. Under the sue and labor clause in the policy, the assured had a right to recover the proportion of the cost of repairs caused by striking on said rock which the value of the vessel bore to the sum insured, in addition to the sum insured; the vessel having been totally wrecked subsequently to the making of said repairs.

This appeal involved the insurance of the vessel, the freight of the cargo of which was insured under the policy referred to in the appeal decided on the 3rd of February, 1880, of which a report is to be found in 25th L. C. J., p. 55.

CROSS, J.:—This action was brought the 16th April, 1869, by Joel Leduc, owner of the Schooner "Providence," for $3,130.37, being for a total loss of that vessel, and a proportion of cost of repairs made to her, anterior to the disaster which caused the total loss of the vessel.

The declaration alleges a policy of insurance issued by the Western Assurance Company in favor of Leduc on the 2nd July, 1868, whereby Leduc effected an insurance on the hull, rigging, apparel and appurtenances of the Schooner "Providence," to the amount of $2,800, from noon on the 2nd June, 1868, to noon on the 15th November of the same year, with liberty to navigate the interior waters, and also the Gulf to the Lower Provinces.

The value of the vessel was fixed by the policy at $4,400.

The policy contained the clause providing, in case of loss, that the assured would sue labor and travel for the recovery and safety of the vessel, to which the assurers would contribute in the proportion that the sum insured bore to the value of the vessel.

That when the insurance was effected the vessel was at Montreal, about to

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leave on a voyage to Mingan, north of the Gulf of St. Lawrence, thence to Rigolet, coast of Labrador, passing by Cow Bay, Cape Breton, and return to Montreal. She left Montreal, reached Mingan and set sail thence to Cow Bay, which she reached in safety, and left thence for Rigolet the 31st July with a cargo of coal, but, when near the Port of Sydney, next day, under stress of weather, she made so much water that she was obliged to put into the Port of Sydney for repairs, where Captain Boucher of the "Providence," the Schooner in question, made his protest in due form, whereof notice of the facts was then given the Western Assurance Company, who acquiesced in the necessity of repairs being made. She was examined by competent parties, repairs considered necessary, and made to the extent of $619.63½, and then being judged to be seaworthy she sailed again, 28th August; but, after experiencing tempestuous weather, the violence of the storm proved so great that the crew, to save themselves, were obliged, on the 31st August, to run the vessel ashore on the east end of the Island of Anticosti, where she became a total wreck. That the rigging was saved at the cost of $80 for the hire of a schooner to carry it to the nearest port, Amherst Harbor, Magdelen Islands, and $36 for the hire of the crew, where the rigging being sold, produced $223.26; deducting expenses ($146.40), left a net salvage of $76.86.

Captain Boucher made his protest at Amherst Harbor the 10th September, 1868, which was extended at Montreal the 15th October following, and the vessel abandoned to the said Western Assurance Company, whereof due notice was then given to them.

That the Company's share of the expenses at Sydney was $321.73 and $36 for wages of crew, and, deducting salvage, $76.86, made the sum demanded $3130.37.

The Western Assurance Company pleaded that the vessel was unseaworthy, which became apparent by her leaking as soon as she left Cow Bay with her cargo of coal; that she was insufficiently repaired, without a prior survey as required by the policy, and without the discharge of the cargo which ought to have been done to enable effective repairs to be made, and she started after the repairs in an unseaworthy condition.

That by the policy the Western Assurance Company were not responsible for losses occasioned by the want of ordinary care and skill in navigating the vessel; that in repairing her the centre board, previously moveable, was fixed, rendering her navigation more dangerous, especially with an over cargo of coals on board, from which causes, and the want of care and skill in navigating her, the vessel was wrecked. The Company also pleaded the general issue.

The protests alleged in the declaration are produced, whereby it appears that the vessel sustained serious damage on her downward voyage by running on a rock at a place called Bertsiamis, which was probably the reason why she was leaky after taking in her cargo of coal. This would of itself have sustained a claim for a partial loss for the repairs found necessary at Sydney Harbor, but the vessel afterwards proving a total loss this partial loss, if recoverable, would only be so under the clause in the policy which authorised the Captain and crew to sue labor and travel for the safety of the vessel, in the event of disaster.

Evidence was adduced, as well of the partial loss by stress of weather after leaving Cow Bay with cargo of coals as of the putting into Sydney Harbor and

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the repairs made there, as also of the final disaster and total loss, salvage of the rigging, &c., its transport to Amherst Harbor, Magdalen Islands, expenses of the crew, sale of the effects saved, and proportion of the salvage to which the Company was entitled, as well as their proportion of the previous repairs at Sydney Harbor.

Proof was also produced in support of the defendant's pleas as regards seaworthiness of the vessel, the impropriety of her being repaired without discharging the cargo, the insufficiency of the repairs, and the mistake committed by causing the centre board or moveable keel to be fixed and lowered, rendering the navigation of the vessel more difficult and dangerous.

This proof was answered by counterproof. It was also shown that the agent at Montreal had been notified of the condition of the vessel at Sydney Harbor, and, as was pretended, acquiesced in the repairs. A declaration by notarial act, made by Leduc, 15th October, 1868, is put in, which reiterated the principal facts of the protests of the captain, notified an abandonment, and claimed as for a total loss.

The judgment of the Superior Court, dated the 4th May, 1878, dismissed the action, and Leduc has appealed.

The grounds on which the plaintiff Leduc lost his case in the Superior Court were:

1st. His failure to make preliminary proof.

2nd. His failure to make proof of his interest in the schooner.

3rd. His failure to make a survey before the schooner was repaired at Sydney, N.S.

Lastly. Having caused the centre board to be lowered and fixed, when the repairs were made, in place of allowing it to remain moveable as before, thereby augmenting the risk.

With regard to the first point, there is no special plea alleging the absence of preliminary proof.

For a total loss on a valued policy, such proof as regards the amount would be wholly useless, and as regards interest in the vessel, if it is be presumed by the execution of the valued policy.

There was in addition, Leduc's notification of the facts and circumstances, dated the 15th October, 1868, in which he declared himself the proprietor of the schooner, and offered his oath in support thereof, to which the Western Assurance Company merely said, they had no answer to make at present. These and the protests, with declarations on oath of the captain and crew, would perhaps make a sufficient preliminary proof to satisfy the condition of the policy, if the Company had specially objected on this ground; but they have not.

This preliminary proof is not by the condition exacted under any forfeiture, but merely under a provision that the loss was not to be payable until sixty days after proof of the loss and amount of damage, nor does it appear that any penalty attached to the want of any preliminary proof of interest, not even the delay of recourse, which proof has been supplied in the action.

The failure to make a survey would not prevent recovery for the amount insured. As regards the total loss a survey was useless, and the condition did not apply. As regards the repairs, it would seem that the Company had notice

of the condition of the vessel. Leduc assumed that they gave their consent. Mr. Bethune merely admits that he was notified.

As regards the centre board being lowered and fixed by the repairs, and the increase of the risk thereby occasioned, there is contradictory proof on the subject, and in a matter of repairing at a distant port where a discretion has to be exercised, persons cannot be blamed for using a reasonable discretion; whether the centre board should have been fixed or not, was a matter of opinion. As to the necessity of discharging the cargo, it is also a matter of opinion.

The suggestion of the unseaworthiness of the vessel is also unfounded; not only is unseaworthiness not proved, but on the contrary it is established that the vessel underwent a thorough repair at Montreal before starting on her voyage, she was visited by the surveyor of the Western Assurance Company, and was without doubt seaworthy, nor does it appear to the Court that any carelessness or mismanagement in the navigation or repair of the vessel can be attributed to the master or crew, or to Leduc.

As to the abandonment being conditional, we do not find it to have been so, Leduc demanded payment which was a right.

Taking the document as a whole, we do not find anything illegal in it, nor anything to stand in the way of Leduc claiming his insurance.

A question of some interest might have admitted of difficulty, had the objection been insisted on, but it has really not been urged, viz:—whether Leduc, in virtue of the clause in the policy which authorizes the Captain and crew, in case of disaster, to sue, labor and travel for the safety of the vessel, or otherwise, in virtue of the insurance, is entitled to recover for expenses and repairs made at Sydney Harbor in excess and beyond the total amount of the policy; not the entire of such expenses, but a proportion of them, divided between the insurer and the insured, in proportion to the risk borne by each. Leduc has claimed this proportion, and no special objection has been taken to the claim.

According to the French law and practice, it is very doubtful whether he could recover it, unless under a clause of the policy which would clearly give him the right, beyond the amount of total loss. The English authorities and practice, on the contrary, are clearly in his favor, even irrespective of the policy; here the policy contains a clause providing for it. I believe it has been allowed in other cases, and we are disposed to say that Leduc is entitled to it.

We are of opinion that he has proved his case; that there has been no fault or neglect on his part, or on that of his agents, to interfere with his remedy; that he is entitled to recover what he claims; that the judgment of the Superior Court must be reversed, and judgment go in his favor for the amount claimed, subject, however, to a verification of the detail of the average, to see if a proper adjustment has been claimed, which will be attended to in entering the judgment.

The judgment will therefore be reversed.

The following was the judgment of the Court:

"The Court * * * * Considering that the appellant has proved the material allegations of his declaration, and particularly that, by the policy of insurance mentioned in the plaintiff's declaration, dated at Montreal, on the

pu être un *inducement* pour les électeurs de cette localité de voter pour lui ; mais c'est un *inducement* parfaitement légitime ; parcequ'il l'a fait sans condition et sans promesse d'aucune espèce, ni de sa part ni de celle de Chambers, ni même de la part des voteurs, qui ne paraissent pas même avoir été consultés sur ce qu'ils feraient dans l'élection et pour qui ils voteraient dans le cas où le changement serait obtenu.

Je suis d'opinion en conséquence que cette charge est mal fondée et comme charge personnelle contre le répondant, et même comme charge contre Chambers, comme agent du répondant.

Je passe maintenant aux charges contre les agents du répondant. Je les prends dans l'ordre qu'ils ont été présentés à la Cour lors de la plaidoierie verbale.

Voici l'accusation telle que portée dans les articulations de faits ; " That a general and organized system of illegal and corrupt inducement to the voters at said election was also carried on by respondent at such election and by his agents, with his knowledge and approval, particularly with reference to letting of the work yet to be done on said Grenville canal by public tender ; that the said respondent and his agents gave and represented, and promised and held out the corrupt inducement to the electors of said electoral district, and especially to the electors voting at the polls in Chatham, Grenville, St. Andrews and

between the 27th day of August and the 1st day of September, 1868, at the east point of Anticosti Island, in the Gulf of St. Lawrence, the said schooner was stranded, wrecked and became a total loss, and was afterwards, to wit, on the 15th day of October, 1868, abandoned by the appellant to the respondents, and due notice of said abandonment then and there made and given by the appellant to the respondents ;

" Considering that by said stranding and wreck of said schooner, and the total loss thereof, the appellant has suffered loss and damage to the full amount of the insurance so effected thereon, to wit, to the amount of the said sum of $2,800, subject, however, to a deduction of $48.86, being the net amount of the salvage after allowance made for the wages of the crew while engaged in making the salvage, reducing the amount recoverable for total loss to $2759.14 ;

" Considering that the respondents have failed to prove the material allegations of their pleas, or that they are entitled to any part of the conclusions by them therein taken ;

" Considering that the proportion of said expenditure for said repairs at Sydney, to be borne and paid by the respondents, amounts to the sum of $315.45, which, together with the aforesaid sum, balance of, makes an entire sum

La question telle que réduite est de savoir si George O. S. Conway, était, durant l'élection de février 1880, un des agents du répondant et si comme tel il a, durant cette élection, influencé ou essayé d'influencer indûment grand nombre d'électeurs et nommément, James Byrne, Wm. Bennett, et David Moncriefe, en les incitant à voter pour le répondant et leur disant ou promettant, que si le répondant était élu, ce dernier ferait donner les ouvrages du dit canal par contrat, et que par ce moyen ils pourraient avoir de l'ouvrage pour eux et pour leurs chevaux dans ces travaux.

La question de savoir si Conway était un des agents du répondant ne souffre pas de difficulté, il le prouve lui-même clairement, et les avocats du répondant l'ont même admis lors de la plaidoirie.

Sur l'autre question il y a plus de difficulté : Pour établir leur prétention à ce sujet, les requérants ont fait entendre comme témoins, Conway lui-même, Burne, Bennett et Moncriefe. Ils ont aussi fait entendre un nommé Kerr, mais ayant admis à l'argument que ce témoin ne prouvait rien, je n'ai pas dû m'en occuper. Le répondant de son coté a fait entendre de nouveau Conway en contrepreuve et Henry Bradford. Puis les requérants ont ensuite fait entendre en contrepreuve le même Burne et la femme de Moncrieff.

J'ai lu et relu avec le plus grand soin la déposition de Conway, qui peut se résumer comme ceci. Je me suis occupé activement de l'élection du répondant ; j'ai vu un grand nombre d'électeurs à ce sujet, surtout dans les parties du comté plus rapprochées du canal ; je leur ai parlé de protection, mais surtout de la

vault or monument as he pleased, and that he was bound to erect the same within a reasonable delay ; specially so, as the respondents were bound to keep the bodies of appellant's family taken from the old cemetery in their vault until the appellant should have erected his vault or monument for the reception of said bodies.

2o. That said amount, however, could not be exacted until after the appellant had been put in mora to erect said vault or monument.

Sir A. A. Dorion, Ch. J. :—En 1869 l'appelant a échangé avec les intimés un terrain qu'il avait dans l'ancien cimetière pour un autre terrain dans le cimetière de la Côte des Neiges.

Il fut convenu que l'appelant prendrait immédiatement possession du terrain qui lui était cédé.

L'acte d'échange contient en outre les clauses suivantes :

" Le présent échange est ainsi fait pour et moyennant la soulte et retour de " soixante-et-quinze piastres, en argent dur, au pair, trente sols pour trente sols, " en faveur de la dite Œuvre et Fabrique, laquelle dite somme, le dit François " Xavier Beaudry promet et s'oblige de payer à la dite Œuvre et Fabrique, ou " ayant droit, lorsqu'il fera construire son charnier ou monument sur le terrain " ci-dessus en premier lieu échangé."

" Il est de plus convenu et entendu, entre les dites parties, que la dite Œuvre

leur donnerait la chance d'y avoir de l'ouvrage. Il n'y a pas là de promesse que le répondant ferait donner l'ouvrage par contrat ni même qu'il travaillerait pour l'obtenir, mais seulement une forte croyance de la part de Conway que le répondant s'y prêterait volontiers, et que vû son influence auprès du Gouvernement il pourrait facilement l'obtenir, et que ça leur donnerait une grande chance d'avoir de l'ouvrage ; c'est représenter des faits sous leurs plus beaux jours et en tirer les conclusions, voilà tout. Je ne vois pas de menée ou promesse corruptrice en celà. L'intention du législateur n'a pas été d'empêcher pendant l'élection de scruter et mettre au jour toutes les aptitudes et les moyens qu'un candidat peut avoir plus qu'un autre pour obtenir ou faire faire des changements ou des ouvrages publics ou obtenir des avantages pour le comté qu'un autre ne pourrait peut-être obtenir. C'est néanmoins ce que paraît avoir fait Conway dans le cas actuel. C'a eu de l'influence sur les électeurs, il le dit lui-même, mais suivant moi ce n'est pas cette influence corruptrice que la loi a en vu de punir. Il n'a promis qu'une chose, c'est qu'il travaillerait de toutes ses forces et emploierait toute son influence pour obtenir le changement, c'est-à-dire que les travaux du canal fussent donnés par soumission si le répondant était élu.

Mais si ce langage avait été employé par le candidat lui-même, je dirais avec le Juge en chef de la Cour Suprême dans la cause de Jacques Cartier que cela serait insuffisant pour être considéré comme propre à exercer une influence corruptrice auprès des électeurs. A plus forte raison si ce n'est qu'un simple

Ce jugement a été infirmé par la Cour de Révision qui a autorisé les intimés à inhumer les corps des parents de l'appelant dans son terrain et l'a condamné à payer la soulte de $75 et les intérêts, tels que demandés par l'action.

Il s'agit ici de l'interprétation de l'acte d'échange que les parties ont fait entr'elles.

Nous ne pouvons adopter l'interprétation que la Cour de première instance a donnée à cet acte. Il est évident que les parties en stipulant que la soulte ne serait payée que lorsque l'appelant aurait construit un charnier sur son terrain et que jusque-là les intimés déposeraient les restes de ses parents exhumés de l'ancien cimetière, n'entendaient pas qu'il serait au pouvoir de l'appelant de ne jamais payer de soulte, et de ne jamais faire inhumer les corps de ses parents dans son terrain, s'il lui plaisait de ne jamais construire de charnier sur son terrain. L'acte a été rédigé avec très-peu de soin, mais il faut lui donner une interprétation raisonnable, et nous sommes d'opinion qu'il renferme une obligation absolue de la part de l'appelant de construire un charnier sur son terrain et non pas seulement une obligation facultative ; mais comme il n'a pas été fixé de délai dans lequel l'appelant serait tenu de remplir son obligation, il est tenu de le faire

pour les induire à voter pour le Répondant, il y aurait peut être assez dans leurs dépositions pour établir des promesses corruptrices à eux faites par Conway surtout à Bennett et Moncrieff, s'ils n'étaient contredits chacun par Conway et Bradford.

J'ai lu ces témoignages avec soin et je suis d'opinion que les dépositions des trois témoins Burne, Bennett et Moncrieff sont suffisamment contredites par Conway et Bradford pour m'obliger de ne pas y attacher l'importance qu'elles pouraient avoir sans cela.

Je crois en conséquence ce moyen non fondé.

Le cas des Goodwin.

On s'y plaint des menées corruptrices et intimidation générale contre les employés du canal en les obligeant de se rendre à leur ouvrage le matin de la votation, pour être conduits de là au poll, dans les voitures des dits Goodwin, sous les yeux et le contrôle de ces derniers et de leurs agents, avec promesse de ne rien déduire pour le temps perdu pour aller voter, et en controlant ainsi leur vote par le moyen de l'intimidation exercée sur eux par la présence des dits Goodwin et de leurs agents.

Voici quant à la question de faits. James Goodwin avait l'entreprise de travaux sur le canal, où il employait une centaine d'hommes; Plusieurs *foremen* conduisaient ces hommes; George Goodwin dirigeait les travaux comme *General Manager*. George Goodwin, dit dans sa déposition qu'il s'est occupé de l'élection de février 1880, qu'il a rencontré plusieurs fois l'agent d'élection du Ré-

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ou monument déterminerait le terme auquel la dite soulte serait exigible, et que les intimés cesseraient de garder dans leur charnier les corps des membres de la famille de l'appelant et que par le dit acte d'échange, l'appelant a contracté l'obligation absolue de payer la dite soulte et non l'obligation facultative ou conditionnelle de ne la payer que s'il jugeait à propos de construire un charnier ou un monument sur son terrain.

" Mais considérant que le délai dans lequel le dit appelant devait construire ce charnier et payer la dite soulte, n'a pas été fixé par leur convention et qu'aux termes des articles 1067 et 1134 l'appelant ne pouvait être contraint de payer la soulte stipulée au dit acte d'échange qu'après avoir été mis en demeure, soit par une interpellation judiciaire ou au moins par une demande par écrit de construire son charnier dans un délai raisonnable et déterminé par l'interpellation même, et de payer la dite soulte après l'expiration de tel délai;

" Et considérant que l'appelant n'a pas été régulièrement mis en demeure avant l'institution de cette action de construire son charnier, et que partant il n'était pas en défaut de payer la dite soulte de $75 lorsque cette action a été portée;

" Et considérant que les intimés n'ont pas même par leurs conclusions de-

suivant en cela ce qu'ils avaient fait dans les élections précédentes. Et comme on le voit par ses réponses rapportées plus haut, que les hommes ont dû comprendre que ceux qui seraient conduits au poll par les voitures de Goodwin et reviendraient aussitôt dans les mêmes voitures ne perdraient pas leurs temps, où autrement qu'il n'y aurait pas de déduction faite sur leur temps.

James F. Sutton était employé par Goodwin pour tenir le temps des hommes. Il s'est occupé de l'élection de 1880; il a cabalé auprès des hommes; Il a assisté à diverses assemblées ou réunions d'amis du répondant où il a agi plusieurs fois comme secrétaire, et où assistaient plusieurs des principaux partisans du répondant, tel que Harry Abbott, l'agent d'élection du répondant, Mr. Pridham, David Williamson, James Barron, George Goodwin avec qui il était continuellement en rapport, et quelques autres; Il leur a fait rapport de son travail auprès des employés du canal, leur indiquant à peu près le nombre qui dans son estimation voteraient pour le répondant et qu'il estimait à au moins 90 sur 100. Celà est plus que suffisant d'après tous les auteurs, et la jurisprudence bien établi, pour m'obliger de le considérer comme agent du répondant et pour rendre le répondant responsable des actes du dit Sutton durant l'élection.

Voici ce que disait le Juge Grove en rendant le jugement dans la cause de Boaton au sujet des agents durant l'élection et de la responsabilité qui en résulte pour le candidat.

Après avoir exposé jusqu'à quel point le mandant est responsable des actes de son mandataire, en droit commun, le savant juge ajoute:

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l'appelant la soulte stipulée au dit acte d'échange du 10 septembre 1869.

TESSIER, J. (*dissentiens*):—Je suis d'opinion de réformer ce jugement en raison d'erreur pour les intérêts, et de condamner l'appelant à payer aux intimés le principal avec intérêt du jour de l'assignation, et dépens de la Cour en 1ère instance, mais avec dépens de révision et d'appel contre les intimés.

Judgment of S. C. reversed.

A. Dalbec, for appellant.
Beique & Choquet, for respondents.
(S. B.)

aucun doute que Sutton était un agent du Répondant dans le sens de la loi électorale.

Voici ce qu'il dit en rapport avec l'intimidation que les Requérants prétendent avoir été exercée contre les employés du canal.

Q.—Do you swear no other man went to vote that day after his time was taken except Wm. Robertson?

A.—To the best of my knowledge there was not any man that went to vote but was taken and brought back again, just the same for both sides. I think I should know, for I was the one that took them all and sent horses with them and *saw that all went.*

Q.—How many teams had you at work bringing up voters?

A.—Six, I think.

Q.—Was it done with Mr. Goodwin's consent?

A.—Certainly.

Q.—Did you deduct any thing for the time lost by men who went to vote?

A.—Not for men who were taken to the poll and brought back again, they allow them in any election both municipal and other elections, as long as they go and come straight back again.

Puis il dit qu'il y avait 103 électeurs parmi les hommes de Goodwin.

Q.—Of those that came on the works, how many came out to vote?

A.—I could not say. All I did was to tell them they could go if they wanted. The horses were there, whether they were for Christie or Abbott.

HELD:—That a candidate cannot be precluded from performing during an election any duty incidental to his position, in the interest of any part of his constituency, provided he does not attempt by such means unduly to influence votes; and that the circumstances did not constitute a corrupt act by the respondent.

4. One Conway, an agent of the respondent, represented to large numbers of persons that it would be better for the country and for them if the work on the Grenville Canal were let by tender, according to law, and not given to the existing contractor without tenders. That in that case they would have a better chance for obtaining work for themselves and their teams, and that the respondent would have more influence to cause the work to be done by tender than Dr. Christie, and would undoubtedly do so. And Conway declared that this argument exercised a considerable influence over a number of voters in respect of their votes.

HELD:—That these statements of Conway's did not constitute an illegal inducement to vote for respondent.

5. One Goodwin, contractor, and George Goodwin, and Sutton his manager, employed about 100 men on the canal; and George Goodwin and Sutton were active supporters of the respondent. These two canvassed the men, and found that a large majority of them intended to vote for the respondent. On the evening before the polling day, with the approbation of Goodwin the contractor, they told the foreman to tell the men to come to their work as usual and they would all be taken to the polls by the teams without distinction, whether they voted for the petitioner or the respondent, and be brought straight back again. And the men were given to understand that if they went and came straight back, nothing would be deducted from their pay, without distinction as to the mode in which they might vote. This had been the custom in all former elections as well municipal as parliamentary.

HELD:—That abstaining from charging the men for their lost time was, under the circumstances, an act of corruption sufficient to avoid the election.

6. Various charges were made, alleging the intimidation of persons employed upon the Government works, and the exercise of undue influence upon them by threats of dismissal to induce them to vote for the respondent.

Q.—Is it not to your belief that ninety out of one hundred did vote for him?

A.—It is.

Q.—This man that you took to the poll, did you take any thing from his time, I mean Louis Desjardins?

A.—No. There was nothing taken off any that went and came straight. No man that went out to vote, no matter on which side, was stopped any thing for his time.

Q.—You mean as long as he went in Goodwin's sleighs?

A.—No matter whether he did or not, if he went and came straight back again.

Q.—The condition was that he was to go to the poll and be brought back again?

A.—There was no condition. None of them lost their time at that or any other election as long as they were driven out and brought straight back again, no matter whom they were for.

Q.—Do you know that that was the custom?

A.—Yes, because I was there the election before—the municipal election.

Q.—Do you believe that had been the custom?

A.—That was the order given to me.

Q.—Do you believe the men know that?

A.—I do, certainly.

Q.—You think they all understood that?

by the law.

10. A person had been furnished with a list of voters resident in Montreal, which he had given to one Boswell with instructions to see them. The respondent telegraphed him two names to be added to the list, and asked him to procure certain canvassers at Montreal and to send them to the county. This person sent Boswell to obtain the canvassers, and gave him nine railway tickets without specifying distinctly to whom they were to be given, but, as he stated in evidence, intended to be furnished to them. Boswell seeing two persons on the platform whom he knew to be voters going up to vote, gave to each of them one of the tickets. He returned two, but it was not proved what he did with the remainder.

HELD:—That under the circumstances Boswell was an agent of the respondent, and that the delivery of the tickets to the voters was a corrupt act sufficient to avoid the election.

11. The petitioners examined a large number of witnesses, from many of whom nothing was elicited in support of their charges. They also examined many of such witnesses at very great length, thereby causing great expense.

HELD:—That the respondent pay the costs of the proceedings, but that the petitioners pay one half the costs of the enquête.

PER CURIAM:—J'ai à décider aujourd'hui le mérite de la contestation faite par les requérants de l'élection du répondant, l'Honorable John J. C. Abbott, comme membre des communes du Canada pour le district électoral d'Argenteuil; cette élection ayant eu lieu le douze février 1880.

Les requérants ont, par leur pétition d'élection, invoqué à peu près tous les moyens que le Statut indique comme pouvant servir de base à toute semblable contestation d'élection. Le répondant s'est contenté de nier les allégations des

and after they came back again.

Q.—That day did you deduct the time for any of these men that were carried up by Mr. Goodwin's teams?

A.—Not that I know of.

Q.—You have a positive knowledge of this, that you kept the time?

A.—Certainly.

Q.—Did you deduct the time of those who were carried up by Goodwin's teams?

A.—I did not; many of them did not come in the morning, and if not at work, they did not get their time.

Q.—But did you deduct for the time they went away to vote?

A.—Not if they were taken off the works and brought straight back again.

Analysant maintenant ces réponses de Sutton et les confrontant avec celles de George Goodwin, nous avons un ordre donné par George Goodwin, un des agents du répondant, aux employés sous son contrôle, sur le canal, d'être à leur poste sur le lieu des travaux, le jour de la votation, comme à l'ordinaire, et que les sleighs du chantier seraient là pour les conduire au poll et les ramener tout droit à leur ouvrage, et qu'il ne serait rien déduit sur leurs gages pour le temps perdu; personne n'avait droit de bénéficier du temps perdu pour aller voter, que ceux qui se rendraient à leur ouvrage le matin de la votation, et qui seraient transportés au poll avec les voitures du chantier, ou au moins qui ne laisseraient le chantier qu'avec la permission de quelqu'un de leurs supérieurs,

de faire déquantifier le répondant, en autant qu'il s'y agit de corruption exercée par le répondant lui-même.

Le 1er acte dont on se plaint, est que le requérant a, avant et pendant cette dernière élection, dans la vue de promouvoir son élection par des menées corruptrices, promis illégalement de payer de prétendus comptes contractés par ses agents durant l'élection de septembre 1878, et prescrits et éteints depuis longtemps; et d'avoir payé ces comptes après l'élection, malgré qu'ils fussent prescrits et que tel payment fût en conséquence illégitime. Ces comptes sont, celui de Mme. Wilson, hotellière de St. Philippe, pour dépenses d'hotel par les agents du répondant pendant l'élection de 1878; et quelques comptes de charretiers pour quelques piastres, pour avoir transporté certains agents du répondant dans différentes parties du comté, durant la même élection. Il a été prouvé que ces comptes étaient dûs légitimement (sauf toutefois l'effet de la prescription).

Durant le temps que l'on s'occupait activement de la dernière élection, des partisans et promoteurs de l'élection du répondant, lui ont fait observer tant par lettres et télégrammes, que de vive voix, et ce à différentes reprises, que s'il ne payait pas ces comptes, cela ferait du tort à son élection; à cela il a invariablement répondu, qu'il ne pouvait et qu'on ne devait pas s'occuper de ces comptes pendant l'élection, quelque tort qu'il dût lui en résulter pour son

deux trop intelligents pour ne pas voir qu'ils auraient en cela travaillé contre leur candidat, et je les crois, d'un autre côté trop bons partisans de leur candidat pour supposer, qu'ils auraient, dans ce cas, adopté un moyen propre à mettre son élection en danger. Mais, dit-on, nous n'avons fait en cela, que ce que nous avions l'habitude de faire dans les élections précédentes; c'est possible; mais si vous l'avez pratiqué dans d'autres élections, c'est, sans doute, parceque vous n'aviez pareillement qu'à y gagner, comme dans le cas actuel; Et si cette pratique est illégale, comme je n'en ai pas de doute, les cours, non seulement ne doivent pas la reconnaître, mais elles sont obligées de la stigmatiser et de la réprimer, quand la plainte en est faite régulièrement; si elle n'a pas été condamnée plutôt par les Cours, comme corruptrice, c'est sans doute parceque l'occasion ne s'en est pas présentée. Ainsi je suis d'opinion que la conduite de George Goodwin et Sutton en agissant comme ils l'ont fait, vis-à-vis de leurs employés, accompagnée de la promesse de ne pas retenir les gages des employés pour le temps perdu pour aller voter, constitue dans le sens de la loi un acte de corruption de la part de George Goodwin et James F. Sutton, deux des agents du répondant, qui devra en porter la responsabilité.

On se plaint aussi sous le même chef, que divers agents du répondant, ont par divers autres moyens corrupteurs cherché à détourner les mêmes employés de voter pour le candidat Christie, et en auraient même forcé un grand nombre de voter pour le répondant, en les induisant ou forçant de voter de vive voix en leur présence, et en les menaçant de les chasser de leur emploi sur le canal, s'ils ne votaient pour le répondant.

Fish qu'il recommandait par lettre, de prévenir Beauchamp de ne rien dire au sujet de ces comptes, à Muddy Branch. Il paraît avoir dit à peu près la même chose à Beauchamp. Je ne vois rien dans tout cela de compromettant pour le répondant. Il n'a fait en cela, que promettre de payer ce qui serait constaté être légitimement dû. Il n'y a pas de mal à cela, malgré que ce fût durant l'élection. Il en serait autrement, et mon opinion serait toute contraire s'il était constaté qu'il n'a effectivement retardé le paiement ou la promesse de payer ces comptes, que pour avoir l'occasion de s'en faire un moyen de corruption auprès de ceux à qui ces comptes étaient dûs; mais je crois qu'il y a assez dans la preuve pour faire voir qu'il a fait tout ce qu'il devait raisonnablement faire pour régler ces comptes bien longtemps même avant qu'il fût question d'élection et de sa candidature, et que s'il n'a pas payé ces comptes, même avant le retour fait des dépenses d'élection de 1878, par son agent d'élection, c'est dû exclusivement au fait que les personnes à qui ils étaient dûs n'ont pas présenté leurs comptes auparavant, et au fait de l'absence de son agent d'élection, et aussi à son absence pendant plusieurs mois en Europe. Quand le répondant a dit qu'il paierait, après l'élection, tous les comptes légitimes, il ne l'a dit qu'à Fish, à Beauchamp et à quelqu'autre, et seulement parceque ces derniers lui suggéraient qu'il était important pour lui de les payer; il ne paraît pas avoir cherché l'occa-

son départ, un nommé James Weldon, un des partisans du Dr. Christie, est venu trouver James Wade, un des *foremen* sur les mêmes ouvrages, et sous le contrôle duquel se trouvait Robertson, et lui demanda si ce dernier pouvait aller voter avec lui. Sur la réponse affirmative de Wade, Robertson est parti avec Weldon, dans la voiture de ce dernier, et est allé voter *ouvertement* pour le Dr. Christie. En se rendant au poll ils ont rencontré Goodwin qui en revenait. Jusqu'ici les faits sont clairs et non contredits. Le fait de la décharge est aussi bien établie ; mais ce qui n'est pas aussi claire, c'est de savoir, pour quelle cause Robertson a été déchargé, si c'est à cause de son vote, ou parcequ'il est allé voter (ce qui aurait le même effet,) ou si c'est plutôt pour des motifs légitimes. Si nous n'avions que les faits ci-dessus et le fait de la décharge, joint à la connaissance qu'avait alors Goodwin que Robertson devait voter pour le Dr. Christie, la présomption légale résultant de cette décharge, sous de telles circonstances, serait apparente ; il est claire qu'une telle décharge devrait être considérée de plein droit dans le sens du Statut, comme une présomption d'intimidation exercée contre Robertson pour avoir voté ou pour avoir voté contre le répondant. James Goodwin nous dit qu'en voyant Robertson avec Weldon, il a de suite compris qu'il s'en allait voter pour le Dr. Christie ; il a alors exprimé aux personnes qui l'accompagnaient son mécontentement contre Robertson pour l'avoir trompé en disant qu'il préférait rester à son ouvrage et ne pas voter. Il dit avoir alors donné ordre à Sutton de le décharger (il n'est pas sûr que Sutton fût avec lui et qu'il ait en conséquence donné cet ordre à Sutton) ; qu'à tout événement il a

de ses amis qui l'interrogent sur ce qu'il entend faire au sujet de ces comptes ; que ces comptes lui paraissent légitimement dûs ; qu'il ne veut pas s'en occuper et qu'on s'en occupe pendant l'élection ; et qu'il verra à payer les comptes légitimes après l'élection. On voit encore par la déposition de Beauchamp, quelle position le répondant entendait prendre au sujet de ces comptes vis-à-vis de ces petits créanciers : " To tell the truth, Mr. Abbott was afraid that I would meet these people and compromise myself." Il y a certainement toute la différence entre la position prise par le répondant en cette cause, et celle prise par le répondant dans la cause de Halton. Ce que le répondant a dit au sujet de ces comptes, il l'a dit à quelques amis promoteurs de son élection, seulement, tout en leur recommandant de n'en pas faire mention, devant les électeurs. Je ne vois dans la conduite du répondant, et dans ses conversations ou ses correspondances avec ses agents ou qui que ce soit, rien qui puisse faire présumer qu'il a promis indûment de payer ces comptes, ni qu'il a autorisé qui que ce soit à dire qu'il les paierait.

Conséquemment, en supposant que des agents l'aient compromis à ce sujet, en promettant ce qu'ils n'étaient pas autorisés à faire, et en agissant en dehors de la connaissance du répondant, ces actes ne peuvent être imputés au répondant personnellement, et il ne peut en être personnellement responsable.

Robertson lui a menti en allant voter après lui avoir refusé d'y aller avec lui. Mais il faut bien remarquer que Robertson a dit à Goodwin, non pas qu'il ne voulait pas aller voter, mais que plutôt que d'aller voter pour le répondant il préférait rester à son ouvrage; c'est ce qui ressort de ces paroles " qu'il était pauvre, qu'il avait des amis de l'autre côté qui pourraient se trouver offensés ; " c'est aussi à peu près de cette manière que Goodwin a rapporté à Forman, sa conversation avec Forman, lorsqu'il a dit à ce dernier de dire à Sutton de décharger Robertson. Goodwin dit c'est parcequ'il m'a trompé que je l'ai déchargé, mais vraiment je ne puis voir en quoi Robertson l'a trompé, en allant voter ; s'il lui avait tout simplement dit qu'il ne voulait pas aller voter, il y aurait peut-être quelque chose de plausible dans l'explication de Goodwin ; mais ce n'est pas celà que Robertson a dit, et il ne me parait pas raisonnable de croire que Goodwin l'a compris ainsi, quand lui-même a rapporté à Forman que Robertson lui avait dit qu'il préférait ne pas aller voter, parce qu'il avait des amis de l'autre côté qui pourraient être mécontents ; Goodwin n'a pas dû comprendre autre chose de celà, si ce n'est qu'il préférait rester à son ouvrage plutôt que d'aller avec lui pour voter. En donnant cette interprétation à la conversation de Robertson avec Goodwin, la seule raisonnable dans les circonstances, comment accepter la prétention de Goodwin qu'il a donné ordre de décharger Robertson, parcequ'il l'a trompé ? Il a trompé son attente ou ses espérances, mais c'est tout ; Goodwin s'attendait tout naturellement que Robertson n'oserait pas aller voter avec un autre quand ce dernier avait refusé d'aller avec lui ; et quand Goodwin a donné ordre de décharger Robertson, il l'a fait, non pas parce

dépenses à même ces $150.00. Maintenant l'on dit : Williamson n'a pas rendu un compte des dépenses qui ont été payées avec cette somme, il est à présumer qu'il l'a employée pour des fins corruptrices, et jusqu'à ce que le contraire soit établi. Le répondant, il est vrai, paraît avoir répudié ce paiement de $150.00 à Williamson, mais évidemment il ne l'a pas fait sérieusement et de bonne foi, puisque depuis ce temps il ne s'est pas occupé de faire rendre compte à ce dernier de ce qu'il a fait de cet argent, et qu'il a continué à le reconnaître comme un de ses amis : et que ce qui fait voir d'avantage qu'il n'était pas sérieux, quand il chargeait son fils de ces $150.00, c'est que quelques mois après, vers février 1879, il se débitait envers son fils, dans les livres de sa société, pour une semblable somme de $150.00, et de tout celà l'on conclut qu'il est responsable personnellement des actes de corruption commis par Williamson, son agent.

Pour pouvoir déclarer le répondant responsable personnellement des actes de son agent, il faut, dans mon opinion, (et ça me semble être l'opinion de tous les auteurs, et être conforme à la jurisprudence,) qu'il ait autorisé directement ou indirectement l'acte de son agent. Il ne peut être question ici d'une autorisa-

ou n'a rien remarqué ou retenu de la conversation entre son père et Thomas Owens, qu'une chose; ce sont les mots suivants; " Mr. Thomas Owens said if my father would go and vote for Mr. Abbott, his day would be made good," quoiqu'il ait été dit bien d'autres choses. Et elle admet que son père lui a souvent rappelé ces paroles. Je crois qu'il serait dangereux de faire reposer le sort d'une élection sur un témoignage du genre de celui de cette jeune fille. Ce témoignage mis de côté, nous restons avec le témoin Robertson d'un côté et le témoignage de Thomas Owens de l'autre. Robertson dit que Owens lui a dit que s'il votait pour le répondant, sa journée lui serait payée, *his day would be made good*, donnant à entendre que s'il votait pour le Répondant, lui Owens, lui payerait sa journée ou verrait à la lui faire payer; Owens admet qu'il lui a dit qu'il ne perdrait pas sa journée s'il allait voter, mais il ajoute qu'il lui a dit qu'il ne devrait pas perdre sa journée parceque les Goodwin pour qui il travaillait, avaient l'habitude de ne pas retenir à leurs hommes le temps employé par eux pour aller voter, d'un côté ou de l'autre, pourvû qu'ils ne s'absentent que le temps nécessaire pour aller voter et revenir à leur ouvrage. D'après lui, il n'aurait rien promis, mais seulement exposé la coutume suivie par les Goodwin de payer leurs hommes, sans rien retrancher pour le temps employé pour aller voter. Ces deux témoignages se contredisent, et conséquemment se nullifient; ce qui fait que les requérants se trouvent sans preuve pour appuyer leur allégué.

Je considère en conséquence ce moyen non prouvé.

Je passe au cas que l'on a désigné à l'argument sous le titre de *open voting*. Voici, à ce sujet, les allégations des requérants, dans leur articulation de faits: "That such of said voters so voting (at polls Nos. 5, 6, 9, 10 and 11) as could

connu, ou autorisé la corruption, que l'on prétend avoir été exercée par le nommée Williamson au moyen des $150.00, mais bien le contraire; car il n'y a pas de preuve qu'il y ait eu de dépenses extraordinaires faites dans cette élection par les agents du répondant; il n'est pas même prouvé qu'aucune partie de ces $150.00 ait été employée en dépenses illégitimes. J'ai toujours compris qu'une présomption disparait quand il y a preuve de faits et de circonstances qui amènent à conclusion contraire, ou même quand il y a absence des faits et des circonstances qui peuvent la créer contre un candidat. Il suffit qu'il ait ignoré ces actes de corruption dans le temps où il pouvait encore les empêcher, s'il ne fait rien ensuite pour les approuver ou faire présumer qu'il les a approuvés volontairement et avec connaissance de cause. Je ne vois dans la conduite du répondant rien qui puisse être pris comme approbation des actes de Williamson, au contraire il a toujours dit qu'il ne voulait pas reconnaitre ce payment; et quand Williamson est allé pour lui parler de cette affaire, il a refusé de l'entendre et a déclaré encore qu'il ne voulait avoir rien à faire avec celà.

Pour ma part il me paraît impossible de trouver rien dans tout celà, pour me justifier de rendre le répondant responsable personnellement des actes de Williamson son agent, dans la dite élection de 1878, concernant l'usage que ce dernier a fait du chèque en question.

the means of better intimidating voters was afforded, which were fully availed of by respondent's said agents, who in fact counselled and co-operated with said Douglass in said illegal and corrupt acts; that owing to said Douglass refusing to administer the oath of incompetency, to mark ballots to voters, and to his keeping no record or entry of voters whose papers he marked, petitioners are deprived of the means of fully knowing who were all the voters induced or compelled to vote publicly or who did vote publicly as stated, but among those who could have marked their own ballots, but were corruptly induced or compelled to permit them to be marked for them, were Alexander Cadieux of Chatham, &c., (on en nomme un certain nombre); that the said William Owens moreover, actively interfered in the poll with the freedom of franchise of said electors, and told each of them as they came into the poll to vote that it was not necessary for them to mark their own ballots, and instructed them to ask the said Douglass to mark their ballots for them, which he invariably did as aforesaid in the presence of said Wm. Owens and other unauthorised to be present."

La preuve établit qu'un certain nombre de voteurs qui ont voté au poll No. 6 ont eu leurs bulletins marqués par le Député Officier Rapporteur sans qu'on ait fait prêter à ces voteurs le serment qu'ils ne pouvaient marquer leurs bulletins eux-mêmes, tel que requis par la sec. 48 de l'acte des élections de 1874 telle qu'amendée par la section 8 de la 41 V. ch. 6, et cela malgré les protestations et objections faites par les représentants du candidat Christie. Quelques-uns ont même voté ouvertement en faisant marquer leurs bulletins dans la salle où se tenaient, en outre du Député Officier Rapporteur et les représentants assermentés des deux candidats, et plusieurs autres, en déclarant même quelques fois à haute

[illegible] et on y trouve le passage suivant, tel que rapporté à la page 3 de sa déposition: "I am happy to say that I have arranged your Post Office matter, and as soon as the details can be completed, you will have your three mails a week at Shrewsbury, and the mail will be carried directly from Shrewsbury to Lachute." En conformité à cette demande du département des postes M[illegible] à Chambers, le 7 janvier, lui demandant quel serait son prix pour [illegible] malle 3 fois par semaine, entre Shrewsbury à Lachute.

Le 19 janvier, Chambers répond à M. King qu'il chargera $115 par année, lui disant en même temps, qu'il est important que ce changement soit fait, à cause des retards éprouvés sous le système alors existant.

Le [illegible] janvier, M. King fait son rapport au Maître Général des Postes, recommandant [illegible] changement et l'engagement de Chambers.

Le 22 [illegible] Chambers écrit ce qui suit au répondant: "When in Montreal, on [illegible] and before going to the Post Office Inspector's Office, we put down [illegible] settled question that there would be no more done until after the election, for the reason that it might be hurtful to us. I have much pleasure in saying that such is not the case, we will not lose one vote; But

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"Et le sous-officier rapporteur exigera du votant qui lui fera cette demande, avant qu'il ne vote, de faire serment de son incapacité à voter sans cette aide, selon la formule suivante ;

"Je jure solennellement que je ne sais pas lire et que je ne puis comprendre le bulletin de vote de manière à le marquer, (ou) que je suis incapable, pour cause d'infirmité physique (selon le cas) de voter sans l'aide du sous-officier rapporteur."

"Et le sous-officier rapporteur inscrira en regard des noms des votants dont les bulletins auront été ainsi marqués, en sus de ce qui est requis par la quarante neuvième section du présent acte, la raison par laquelle chaque bulletin a été marqué par lui."

La loi ayant ainsi déterminé le mode de voter, il est clair que toute autre manière de le faire non autorisée spécialement par le Statut est illégale ; et les votes donnés et reçus autrement que la loi le requiert ne sont pas des votes, dans le sens de la loi. Dans le cas actuel un bon nombre de votes ont été donnés et reçus au poll No. 6 de la manière que j'ai mentionnée ; et de plus le sous-officier rapporteur n'a pas inscrit en regard des noms de ces votants dont il a marqué les bulletins, la raison pour laquelle chaque bulletin a été marqué par lui ; ce qui est une autre illégalité. Maintenant ces illégalités devront-elles avoir pour effet de faire déclarer l'élection nulle ? La section 80 du Statut dit que "nulle élection ne sera annullée à raison de l'inaccomplissement des formalités prescrites par le présent acte pour les opérations de la votation.....s'il appert au tribunal chargé de s'enquérir de la question, que les opérations électorales

pour que le vote de Chambers offrit quelque doute au répondant. Mais comment supposer celà, quand il est démontré hors de tout doute que Chambers était un vieux partisan du répondant et un de ceux sur le support duquel il pouvait compter sûrement. Et parceque cet ami politique dévoué l'a prié de s'occuper de cette affaire, comme il le dit, dans son intérêt et dans l'intérêt de toute cette localité, et que le répondant y a prêté son ministère, il faudra dire nécessairement qu'il l'a fait pour corrompre et influencer Chambers ? Je ne puis me rendre à cette prétention.

Si encore on avait prouvé quelque promesse de la part du répondant, pour le gagner à son parti et l'induire à voter ou même à travailler pour lui dans son élection, il pourrait y avoir lieu de crier à la corruption. Mais ici il n'y a rien de tout celà ; au contraire, comme je l'ai dit, le répondant a prêté son ministère apparemment sans condition et sur la demande d'un ami politique, qu'il n'avait pas de raison de craindre de voir se tourner contre lui, pour aucun prétexte. C'est bien le cas de dire avec le Juge en chef de la Cour Suprême, dans la cause de Jacques-Cartier, 2 v. des Rapp. de la Cour Suprême, p. 268, "It has never yet been seriously contended, that a member of Parliament, who

Hickson et al. and Abbott.

wishes to aid a warm political and personal friend in the procurement of an office for himself or a friend, must, in doing so, necessarily be considered as guilty of a corrupt act. In fact if he refuses to aid a political friend, when the request that was made to him to do so was reasonable, his refusal would suggest the idea that he was becoming false to his friend and his party, and it might be charged against him that he was then acting from corrupt motives.

Et plus loin, à la page 272, il ajoute:

"When Mr. Laflamme first made the promise unobjectionable, as a promise made to a political friend to oblige him, and was harmless and not improper."

Mais ajoute-t-on, l'acte du répondant, en obtenant le changement en question, a eu l'effet d'influencer en sa faveur les électeurs de Shrewsbury, et conséquemment il doit être considéré comme un acte de corruption de la part du Répondant.

Avec ce raisonnement un candidat se trouverait singulièrement restreint dans tout le temps que se ferait le travail de l'élection. Ca nous mènerait jusqu'à dire qu'il ne pourra rien faire pendant ce temps qui ait la moindre tendance à favoriser son comté. Il serait défendu à tout candidat pendant ce temps de s'occuper du bien être ou de toute chose qui tendrait à l'avantage du comté ou de toute partie du comté, sous peine d'être réputé avoir voulu corrompre les voteurs. Ce n'est certainement pas ce que veut la loi. Ce qu'elle veut, c'est que l'on ne fasse pas dépendre son acte, ou l'avantage que l'on procure à un comté ou à une partie du comté, du vote d'un ou des électeurs; elle veut autrement que les électeurs soient laissé libres de voter comme ils l'entendront et pour qui ils voudront. Dans le cas actuel y a-t-il quelque chose qui aurait pu entraver le vote des électeurs de Shrewsbury, ou les contraindre à changer leurs votes; l'acte du répondant en favorisant ce changement dans le transport des malles, a pu être un *inducement* pour les électeurs de cette localité de voter pour lui; mais c'est un *inducement* parfaitement légitime; parcequ'il l'a fait sans condition et sans promesse d'aucune espèce, ni de sa part ni de celle de Chambers, ni même de la part des voteurs, qui ne paraissent pas même avoir été consultés sur ce qu'ils feraient dans l'élection et pour qui ils voteraient dans le cas où le changement serait obtenu.

Je suis d'opinion en conséquence que cette charge est mal fondée et comme charge personnelle contre le répondant, et même comme charge contre Chambers, comme agent du répondant.

Je passe maintenant aux charges contre les agents du répondant. Je les prends dans l'ordre qu'ils ont été présentés à la Cour lors de la plaidoierie verbale.

Voici l'accusation telle que portée dans les articulations de faits; "That a general and organized system of illegal and corrupt inducement to the voters at said election was also carried on by respondent at such election and by his agents, with his knowledge and approval, particularly with reference to letting of the work yet to be done on said Grenville canal by public tender; that the said respondent and his agents gave and represented, and promised and held out the corrupt inducement to the electors of said electoral district, and especially to the electors voting at the polls in Chatham, Grenville, St. Andrews and

Lachute, at said election that if he the respondant were elected he would endeavor to cause said work to be let by public tender and prevent the same from being monopolized or done by said Goodwins without such letting by tender, so that the electors of said county, and especially of said last above named places, would derive great benefit and advantage from such letting by tender of said work and obtain employment for themselves and their teams on said work, all which the said respondent and his agents before and during said election promised to do and have done or cause or endeavor to be done, or have done corruptly to influence voters of said electoral district generally and especially those of Chatham, Grenville, and St. Andrews, and to corruptly promote respondent's election, which it effectually did, Respondent having secured corruptly thereby more than his whole majority of votes;

That among the electors who were corruptly influenced at said election by said corrupt representations, promises and inducements of respondent and of his agents to corruptly vote and support respondent and work for him at said election, and to become election agents of respondent thereat, and who made and used such corrupt promises and inducements to influence each other and other voters to vote for and work for the respondent, were the said George O. S. Conway,".....Et un grand nombre d'autres electeurs nommés à la suite, en outre de plus de cent qui ne sont pas nommés.

Il n'est maintenant question que du nommé Conway comme ayant cherché à exercer la corruption dont on se plaint dans ce paragraphe, les Pétitionnaires ayant abandonné toute prétention sur ce point contre le répondant personnellement et contre les autres personnes mentionnées dans ce paragraphe.

La question telle que réduite est de savoir si George O. S. Conway, était, durant l'élection de février 1880, un des agents du répondant et si comme tel il a, durant cette élection, influencé ou essayé d'influencer indûment grand nombre d'électeurs et nommément, James Byrne, Wm. Bennett, et David Moncriefe, en les incitant à voter pour le répondant et leur disant ou promettant, que si le répondant était élu, ce dernier ferait donner les ouvrages du dit canal par contrat, et que par ce moyen ils pourraient avoir de l'ouvrage pour eux et pour leurs chevaux dans ces travaux.

La question de savoir si Conway était un des agents du répondant ne souffre pas de difficulté, il le prouve lui-même clairement, et les avocats du répondant l'ont même admis lors de la plaidoirie.

Sur l'autre question il y a plus de difficulté: Pour établir leur prétention à ce sujet, les requérants ont fait entendre comme témoins, Conway lui-même, Burne, Bennett et Moncriefe. Ils ont aussi fait entendre un nommé Kerr, mais ayant admis à l'argument que ce témoin ne prouvait rien, je n'ai pas dû m'en occuper. Le répondant de son coté a fait entendre de nouveau Conway en contrepreuve et Henry Bradford. Puis les requérants ont ensuite fait entendre en contrepreuve le même Burne et la femme de Moncrieff.

J'ai lu et relu avec le plus grand soin la déposition de Conway, qui peut se résumer comme ceci. Je me suis occupé activement de l'élection du répondant; j'ai vu un grand nombre d'électeurs à ce sujet, surtout dans les parties du comté plus rapprochées du canal; je leur ai parlé de protection, mais surtout de la

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question du canal ; tous paraissaient désireux que les ouvrages du canal fussent donnés par contrat au moyen de soumissions, afin que si le contrat tombait entre d'autres mains que celles de Goodwin ils pussent avoir une chance d'y avoir de l'ouvrage, c'était leur opinion que si les ouvrages étaient donnés par contrat, ils y auraient de l'emploi pour eux et leurs chevaux. Ils comprenaient et je leur disais qu'il était dans leur intérêt d'élire quelqu'un qui pourrait obtenir que ces travaux fussent donnés par contrat ; pour les induire à voter pour le répondant, je leur disais que s'il était élu je croyais qu'il avait assez d'influence auprès du Gouvernement pour obtenir ce changement, plutôt que le Dr. Christie. Cette question a exercé beaucoup d'influence dans cette partie du comté. J'ai tenu ce langage aux Moncrieffs, aux Carpenters, Dolan et autres ; c'est là je crois un résumé aussi correcte que possible de toute cette déposition ; laissant toutefois de côté tout ce que je crois n'avoir aucune influence sur la question.

Je ne vois rien dans tout cela qui puisse être considéré comme constituant, de la part de Conway, la corruption que la loi a en vue, en matière d'élection.

Il n'y a pas de doute que le langage de Conway a pu influencer un certain nombre d'électeurs et les induire à voter pour le répondant ; mais il ne suffit pas qu'il y ait eu influence exercée, mais il faut que cette influence soit exercée par des moyens réprouvés par la loi, c'est-à-dire par la corruption, *corrupt inducements*.

Tout ce qu'on peut reprocher à Conway, c'est d'avoir dit, qu'il croyait bien que si le répondant était élu, il aurait assez d'influence auprès du Gouvernement pour obtenir que l'ouvrage du canal soit donné par contrat, suivant la loi, et que lui Conway userait de toute son influence et ferait tout ce qu'il pourrait pour obtenir ce changement ; ajoutant que celà était dans leur intérêt, vû que ça leur donnerait la chance d'y avoir de l'ouvrage. Il n'y a pas là de promesse que le répondant ferait donner l'ouvrage par contrat ni même qu'il travaillerait pour l'obtenir, mais seulement une forte croyance de la part de Conway que le répondant s'y prêterait volontiers, et que vû son influence auprès du Gouvernement il pourrait facilement l'obtenir, et que ça leur donnerait une grande chance d'avoir de l'ouvrage ; c'est représenter des faits sous leurs plus beaux jours et en tirer les conclusions, voilà tout. Je ne vois pas de menée ou promesse corruptrice en celà. L'intention du législateur n'a pas été d'empêcher pendant l'élection de scruter et mettre au jour toutes les aptitudes et les moyens qu'un candidat peut avoir plus qu'un autre pour obtenir ou faire faire des changements ou des ouvrages publics ou obtenir des avantages pour le comté qu'un autre ne pourrait peut-être obtenir. C'est néanmoins ce que parait avoir fait Conway dans le cas actuel. C'a en de l'influence sur les électeurs, il le dit lui-même, mais suivant moi ce n'est pas cette influence corruptrice que la loi a en vu de punir. Il n'a promis qu'une chose, c'est qu'il travaillerait de toutes ses forces et emploierait toute son influence pour obtenir le changement, c'est-à-dire que les travaux du canal fussent donnés par soumission si le répondant était élu.

Mais si ce langage avait été employé par le candidat lui-même, je dirais avec le Juge en chef de la Cour Suprême dans la cause de Jacques Cartier que cela serait insuffisant pour être considéré comme propre à exercer une influence corruptrice auprès des électeurs. A plus forte raison si ce n'est qu'un simple

caballeur qui leur tient ce langage; il doit avoir droit de leur indiquer où est leur intérêt. Voici les paroles du savant juge en chef, p. 249 du 2e vol. des Rapports de la Cour Suprême: Elles s'appliquent parfaitement au présent cas; "I do not know that the candidate would be going much beyond the proper line, if he were to say that if occasion offered he would exercise his influence in favor of his constituents, whether in the bestowal of offices or in other matters in which they were interested. If in his speech he would limit his favors to those only who would support him, it might then be said he left the proper path and held out direct inducement to each to vote for him, and in that way was endeavoring to corrupt the constituency; and yet, promising to do what he could for his constituents in general terms, would, to most minds, imply quite as much as the more direct offer to give offices to those who helped him." Ici comme dans le cas supposé par le savant juge, il n'y a pas de promesse faite à personne en particulier, ni à ceux qui voteraient pour lui; ce n'est au contraire qu'une idée générale émise par Conway que si le Répondant était élu, tous auraient la chance d'avoir de l'ouvrage; sans toutefois rien promettre si ce n'est que lui-même ferait tous ses efforts pour obtenir le changement désiré par les électeurs.

Je suis d'opinion qu'il n'y a pas dans la déposition de Conway, preuve de promesse ou menées corruptrices de sa part suffisante pour justifier les Requérants dans leurs prétentions.

Maintenant quant aux cas particuliers (en rapport avec cette même accusation) de Byrne, Bennett et Monorieff, à qui les Requérants prétendent que Conway a fait des promesses spéciales et corruptrices, au sujet du même canal, pour les induire à voter pour le Répondant, il y aurait peut être assez dans leurs dépositions pour établir des promesses corruptrices à eux faites par Conway surtout à Bennett et Monorieff, s'ils n'étaient contredits chacun par Conway et Bradford.

J'ai lu ces témoignages avec soin et je suis d'opinion que les dépositions des trois témoins Burne, Bennett et Monorieff sont suffisamment contredites par Conway et Bradford pour m'obliger de ne pas y attacher l'importance qu'elles pouraient avoir sans cela.

Je crois en conséquence ce moyen non fondé.

Le cas des Goodwin.

On s'y plaint des menées corruptrices et intimidation générale contre les employés du canal en les obligeant de se rendre à leur ouvrage le matin de la votation, pour être conduits de là au poll, dans les voitures des dits Goodwin, sous les yeux et le contrôle de ces derniers et de leurs agents, avec promesse de ne rien déduire pour le temps perdu pour aller voter, et en controlant ainsi leur vote par le moyen de l'intimidation exercée sur eux par la présence des dits Goodwin et de leurs agents.

Voici quant à la question de faits. James Goodwin avait l'entreprise de travaux sur le canal, où il employait une centaine d'hommes; Plusieurs *foremen* conduisaient ces hommes; George Goodwin dirigeait les travaux comme *General Manager*. George Goodwin, dit dans sa déposition qu'il s'est occupé de l'élection de février 1880, qu'il a rencontré plusieurs fois l'agent d'élection du Ré-

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pondant assisté à plusieurs assemblées de comité ou réunion privée de partisans du Répondant, qu'il a caballé auprès des employés du canal; Enfin il était évidemment et doit être considéré comme ayant été un des agents du Répondant dans cette élection.

On trouvera aussi dans sa déposition qu'avant le jour de la votation, il a dit aux *Foremen* surveillants ou au moins à quelques-uns d'entre eux de dire aux hommes que les voitures seraient là pour les conduire au poll et les ramener aussitôt. Voici comment il s'exprime: "I told them that the teams would come along, and that the teams would bring them right back again." Plus loin: "I cannot remember any more than telling the *foremen* to tell the men that the teams would be along and take them to the polls and bring them straight back again."

Plus loin encore, sur la demande qui lui est faite de répéter ce qu'il a dit aux *foremen*, il dit encore, "I told them to tell the men to come on the morning of the polling day as on any other working day, and the teams would be along and take them to the poll and bring them right back again; that is all I said; I do not think I said any thing in the way of promising their pay: The men understood it, I told the *foremen* in presence of the men." La question suivante lui est ensuite faite;

Q.—But you knew that it would be understood that nothing would be deducted from their pay?"

R.—"I suppose so; I suppose the *foremen* said it to them in that way." Il constate aussi que le jour de la votation ces voitures ont transportés au poll tous les hommes qui ont voulu aller voter, sans distinction, comme il l'avai annoncé, et que leur temps a couru comme s'ils eussent continué de travailler, suivant en cela ce qu'ils avaient fait dans les élections précédentes. Et comme on le voit par ses réponses rapportées plus haut, que les hommes ont dû comprendre que ceux qui seraient conduits au poll par les voitures de Goodwin et reviendraient aussitôt dans les mêmes voitures ne perdraient pas leurs temps, où autrement qu'il n'y aurait pas de déduction faite sur leur temps.

James F. Sutton était employé par Goodwin pour tenir le temps des hommes. Il s'est occupé de l'élection de 1880; il a cabalé auprès des hommes; Il a assisté à diverses assemblées ou réunions d'amis du répondant où il a agi plusieurs fois comme secrétaire, et où assistaient plusieurs des principaux partisans du répondant, tel que Harry Abbott, l'agent d'élection du répondant, Mr. Pridham, David Williamson, James Barron, George Goodwin avec qui il était continuellement en rapport, et quelques autres; Il leur a fait rapport de son travail auprès des employés du canal, leur indiquant à peu près le nombre qui dans son estimation voteraient pour le répondant et qu'il estimait à au moins 90 sur 100. Celà est plus que suffisant d'après tous les auteurs, et la jurisprudence bien établi, pour m'obliger de le considérer comme agent du répondant et pour rendre le répondant responsable des actes du dit Sutton durant l'élection.

Voici ce que disait le Juge Grove en rendant le jugement dans la cause de Boston au sujet des agents durant l'élection et de la responsabilité qui en résulte pour le candidat.

Après avoir exposé jusqu'à quel point le mandant est responsable des actes de son mandataire, en droit commun, le savant juge ajoute:

" Mais quant à ce qui a trait à la loi concernant les élections, il y a plus, parcequ'on emploie, pour les fins de l'élection, un certain nombre de personnes qui, non seulement ne sont pas autorisées à commettre des actes de corruption, mais auxquels même on a strictement défendu d'en commettre ; néanmoins la loi dit que si un candidat consent à ce qu'un certain nombre de personnes sollicitent des votes en sa faveur, posent des affiches, s'organisent en comité pour les fins de son élection et fassent autre choses de cette sorte, tel candidat devra, pour me servir d'une expression familière, récolter le bien et le mal. Il ne lui est pas permis de tirer parti des démarches de ces personnes qui travailleut ainsi au succès de son élection et de les laisser faire de la corruption sans plus s'en préoccuper. Voilà pourquoi la loi fait porter aux membres du Parlement la responsabilité des actes commis par leurs agents, qui, de leur consentement, travaillent au succès de leur élection, et cela dans une mesure beaucoup plus grande que ne le fait la loi commune."

Dans la cause Berthier (Massé et al. et Robillard), le Juge Johnson, après avoir rapporté les paroles du Juge Grove, dans la cause de Boston, ajoutait : " Mais il n'est pas besoin de recourir aux autorités dans le cas actuel ; toute personne qui, de bonne foi, prend part à une élection et travaille à en assurer le succès, au profit de l'un des candidats, devient *ipso facto* l'agent de tel candidat. Ainsi a été jugé par l'Honorable Juge Taschereau, à la Cour Suprême, dans la cause de Brassard et Langevin, et la sagesse de ce jugement ne saurait être discutée. Nous acceptons donc cette définition sans la plus légère hesitation et l'appliquerons à la présente cause."

J'accepte aussi cette définition, et l'appliquant au cas actuel, je dis, et n'ai aucun doute que Sutton était un agent du Répondant dans le sens de la loi électorale.

Voici ce qu'il dit en rapport avec l'intimidation que les Requérants prétendent avoir été exercée contre les employés du canal.

Q.—Do you swear no other man went to vote that day after his time was taken except Wm. Robertson?

A.—To the best of my knowledge there was not any man that went to vote but was taken and brought back again, just the same for both sides. I think I should know, for I was the one that took them all and sent horses with them and *saw that all went.*

Q.—How many teams had you at work bringing up voters?

A.—Six, I think.

Q.—Was it done with Mr. Goodwin's consent?

A.—Certainly.

Q.—Did you deduct any thing for the time lost by men who went to vote?

A.—Not for men who were taken to the poll and brought back again, they allow them in any election both municipal and other elections, as long as they go and come straight back again.

Puis il dit qu'il y avait 103 électeurs parmi les hommes de Goodwin.

Q.—Of those that came on the works, how many came out to vote?

A.—I could not say. All I did was to tell them they could go if they wanted. The horses were there, whether they were for Christie or Abbott.

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Q.—But nearly every man that came on the works went out to vote?

A.—I tried to get them all out.

Q.—You put forth your best efforts to bring them all out?

A.—Yes.

Q.—And do you not think you succeeded?

A.—There were a great many absent that I had no way of looking after.

Q.—Is it not the case that before the election it was pretty well known how these men would vote.

A.—Not by me.

Q.—Were the men not canvassed?

A.—I asked the men, any of them that I supposed to, if they would give their vote to Mr. Abbott.

Q.—You canvassed the men, did you not?

A.—I just asked if they would give Mr. Abbott a vote.

Q.—Did you not make a report to Mr. Abbott's friends in Grenville and give an estimate of the number of men likely to vote for him?

A.—I gave an estimate of men.

Q.—Was it not that nearly all the men were going to vote for Mr. Abbott?

A.—I think I said the best part of them.

Q.—Is it not to your knowledge that over ninety out of a hundred were going to vote for Mr. Abbott?

A.—I cannot swear for certain.

Q.—Will you not swear to the best of your belief?

A.—I believe that myself.

Q.—Is it not to your belief that ninety out of one hundred did vote for him?

A.—It is.

Q.—This man that you took to the poll, did you take any thing from his time, I mean Louis Desjardins?

A.—No. There was nothing taken off any that went and came straight. No man that went out to vote, no matter on which side, was stopped any thing for his time.

Q.—You mean as long as he went in Goodwin's sleighs?

A.—No matter whether he did or not, if he went and came straight back again.

Q.—The condition was that he was to go to the poll and be brought back again?

A.—There was no condition. None of them lost their time at that or any other election as long as they were driven out and brought straight back again, no matter whom they were for.

Q.—Do you know that that was the custom?

A.—Yes, because I was there the election before—the municipal election.

Q.—Do you believe that had been the custom?

A.—That was the order given to me.

Q.—Do you believe the men know that?

A.—I do, certainly.

Q.—You think they all understood that?

A.—I would not say all, but those who had been there some time must have.

Q.—Do you think the majority of those one hundred and three understood that?

A.—I cannot say any thing of that; I know those at Grenville, who were there at the municipal election would.

Q.—Is it your belief that the voters at the canal understood that?

A.—Yes, it is.

Q.—That if they were taken to the poll and brought straight back, they would lose no time?

A.—Certainly.

Q.—They perfectly understood this rule, that if taken to the poll they would lose no time?

A.—Certainly.

Q.—Do you believe any man who left and went of his own accord to vote was it understood he would lose his time?

A.—Certainly.

Q.—But if driving in Goodwin's teams, his time would be allowed him?

A.—Yes, if the team took him and brought him back straight he would have no time deducted.

Q.—What I want to get from you, as you have stated, that when they were carried to the poll and brought back again right away they did not lose their time, but if they went on their own account and went and voted, what then?

A.—What I meant was if they went and said nothing about it, and went on their own account, that is what I meant, I took their time before they went and after they came back again.

Q.—That day did you deduct the time for any of these men that were carried up by Mr. Goodwin's teams?

A.—Not that I know of.

Q.—You have a positive knowledge of this, that you kept the time?

A.—Certainly.

Q.—Did you deduct the time of those who were carried up by Goodwin's teams?

A.—I did not; many of them did not come in the morning, and if not at work, they did not get their time.

Q.—But did you deduct for the time they went away to vote?

A.—Not if they were taken off the works and brought straight back again.

Analysant maintenant ces réponses de Sutton et les confrontant avec celles de George Goodwin, nous avons un ordre donné par George Goodwin, un des agents du répondant, aux employés sous son contrôle, sur le canal, d'être à leur poste sur le lieu des travaux, le jour de la votation, comme à l'ordinaire, et que les sleighs du chantier seraient là pour les conduire au poll et les ramener tout droit à leur ouvrage, et qu'il ne serait rien déduit sur leurs gages pour le temps perdu; personne n'avait droit de bénéficier du temps perdu pour aller voter, que ceux qui se rendraient à leur ouvrage le matin de la votation, et qui seraient transportés au poll avec les voitures du chantier, ou au moins qui ne laisseraient le chantier qu'avec la permission de quelqu'un de leurs supérieurs,

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pour se faire conduire au poll et ramener aussitôt au chantier. Cette faveur était accordée à tous ceux qui iraient voter sous ces conditions, tant d'un côté que de l'autre.

Voyons maintenant quel devait être l'effet d'un tel ordre et de cette promesse faite sous de telles conditions, et si ce procédé de la part de George Goodwin, assisté en tout par Sutton, un autre agent du répondant, n'était pas d'induire un grand nombre de ses employés à voter ou à en détourner un certain nombre d'autres de voter du tout. Il est constaté que Sutton connaissait, et que George Goodwin devait connaitre aussi, que, sur cent et quelques employés ayant droit de vote, au delà de quatre-vingt-dix devaient voter pour le répondant. On voit de suite l'intérêt que Goodwin et Sutton, qui favorisaient l'élection du répondant avec un grand zèle, avaient d'engager ces employés, par tous les moyens possibles à aller voter, et pour celà on leur a dit, non-seulement nous vous conduirons au poll en voiture, mais encore, votre temps vous sera payé sans déduction pour le temps perdu. Le répondant avait évidemment tout à gagner ; il ne risquait même rien puisque ses agents G. Goodwin et Sutton avaient eu soin de s'assurer d'avance du nombre approximatif qui devait voter tant d'un côté que de l'autre ; il valait mieux en payer dix qui voteraient contre lui, plutôt que de s'exposer à en voir, peut-être cinquante, peut-être quatre-vingt-dix préférer ne pas aller voter pour ne pas perdre leur temps. Si Goodwin et Sutton eussent été convaincus que le plus grand nombre devaient voter pour le candidat qu'ils combattaient, serait-il naturel de supposer qu'ils auraient fait une semblable promesse ? Non, certainement, car ils sont tous deux trop intelligents pour ne pas voir qu'ils auraient en celà travaillé contre leur candidat, et je les crois, d'un autre côté trop bons partisans de leur candidat pour supposer, qu'ils auraient, dans ce cas, adopté un moyen propre à mettre son élection en danger. Mais, dit-on, nous n'avons fait en celà, que ce que nous avions l'habitude de faire dans les élections précédentes ; c'est possible ; mais si vous l'avez pratiqué dans d'autres élections, c'est, sans doute, parceque vous n'aviez pareillement qu'à y gagner, comme dans le cas actuel ; Et si cette pratique est illégale, comme je n'en ai pas de doute, les cours, non seulement ne doivent pas la reconnaître, mais elles sont obligées de la stigmatiser et de la réprimer, quand la plainte en est faite régulièrement ; si elle n'a pas été condamnée plutôt par les Cours, comme corruptrice, c'est sans doute parceque l'occasion ne s'en est pas présentée. Ainsi je suis d'opinion que la conduite de George Goodwin et Sutton en agissant comme ils l'ont fait, vis-à-vis de leurs employés, accompagnée de la promesse de ne pas retenir les gages des employés pour le temps perdu pour aller voter, constitue dans le sens de la loi un acte de corruption de la part de George Goodwin et James F. Sutton, deux des agents du répondant, qui devra en porter la responsabilité.

On se plaint aussi sous le même chef, que divers agents du répondant, ont par divers autres moyens corrupteurs cherché à détourner les mêmes employés de voter pour le candidat Christie, et en auraient même forcé un grand nombre de voter pour le répondant, en les induisant ou forçant de voter de vive voix en leur présence, et en les menaçant de les chasser de leur emploi sur le canal, s'ils ne votaient pour le répondant.

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J'ai du examiner la preuve à l'appui de cette charge, comme toutes les autres ; je ne repasserai pas ici toute cette preuve, qui est très longue, et je me contenterai de dire que je la trouve tout-à-fait insuffisante. J'en viendrai plus loin à *l'open voting* en lui même et dégagé de toute contrainte.

Je prends maintenant le cas spécial de M. Robertson. On se plaint que James et Geo. Goodwin, deux des agents du répondant, ont employé la violence, les menaces et l'intimidation contre Robertson leur employé, pour l'induire à voter pour le répondant, et l'ont ensuite comme continuation des mêmes moyens d'intimidation, savoir, le jour même de la votation, déchargé le dit Robertson de leur emploi, à son grand préjudice, dommage et perte, pour être allé voter ouvertement pour le Dr. Christie malgré leur défense.

Voici quels sont les faits :

Dans l'après midi du jour de la votation, James Goodwin, le contracteur des ouvrages du Canal de Grenville, se rendit, dans sa voiture, au poll de Chatham avec quelques électeurs ; en passant à l'endroit où travaillait Robertson, un de ses employés, aveugle, un nommé Williamson, qui se trouvait là, lui cria que Robertson avait droit de vote et lui demanda s'il devait dire à Robertson que lui Goodwin le demandait. Sur la réponse affirmative de ce dernier, Robertson s'est rendu auprès de Goodwin, qui lui aurait alors dit de monter dans sa voiture pour aller voter avec lui. Robertson s'est excusé en disant qu'il préférait ne pas y aller, disant qu'il était un pauvre homme, et qu'il avait des amis de l'autre côté, c'est-à-dire, du côté du Dr. Christie, qui pourraient être mécontents de lui. Sur ce Goodwin lui aurait dit, qu'il n'avait pas d'objection, et de s'en aller à son ouvrage. Goodwin s'est alors rendu au poll. Quelque temps après son départ, un nommé James Weldon, un des partisans du Dr. Christie, est venu trouver James Wade, un des *foremen* sur les mêmes ouvrages, et sous le contrôle duquel se trouvait Robertson, et lui demanda si ce dernier pouvait aller voter avec lui. Sur la réponse affirmative de Wade, Robertson est parti avec Weldon, dans la voiture de ce dernier, et est allé voter *ouvertement* pour le Dr. Christie. En se rendant au poll ils ont rencontré Goodwin qui en revenait. Jusqu'ici les faits sont clairs et non contredits. Le fait de la décharge est aussi bien établie ; mais ce qui n'est pas aussi claire, c'est de savoir, pour quelle cause Robertson a été déchargé, si c'est à cause de son vote, ou parcequ'il est allé voter (ce qui aurait le même effet,) ou si c'est plutôt pour des motifs légitimes. Si nous n'avions que les faits ci-dessus et le fait de la décharge, joint à la connaissance qu'avait alors Goodwin que Robertson devait voter pour le Dr. Christie, la présomption légale résultant de cette décharge, sous de telles circonstances, serait apparente ; il est claire qu'une telle décharge devrait être considérée de plein droit dans le sens du Statut, comme une présomption d'intimidation exercée contre Robertson pour avoir voté ou pour avoir voté contre le répondant. James Goodwin nous dit qu'en voyant Robertson avec Weldon, il a de suite compris qu'il s'en allait voter pour le Dr. Christie ; il a alors exprimé aux personnes qui l'accompagnaient son mécontentement contre Robertson pour l'avoir trompé en disant qu'il préférait rester à son ouvrage et ne pas voter. Il dit avoir alors donné ordre à Sutton de le décharger (il n'est pas sûr que Sutton fût avec lui et qu'il ait en conséquence donné cet ordre à Sutton) ; qu'à tout événement il a

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donné cet ordre à quelqu'un qui était avec lui; mais qu'aussitôt après, il eût pitié de lui et dit de ne pas le décharger. Sutton de son côté dit qu'il n'était pas avec Goodwin dans cette occasion et qu'il n'a reçu aucun ordre de lui de décharger Robertson; qu'il a déchargé ce dernier, mais de lui-même et seulement parcequ'il s'était absenté sans permission; Sutton dit qu'il ne connaissait pas ce qui s'était passé entre Goodwin et Robertson, ni aucun autre pour décharger ce dernier; mais qu'il avait appris l'absence de Robertson en revenant lui-même du poll, et qu'il avait donné ordre à Dawson, un des *foremen* ou *walking foremen* de le décharger, parce qu'il s'était absenté sans permission *après les temps pris*; ajoutant que dans toutes autres circonstances il l'aurait pareillement déchargé.

Cependant John D. Foreman, l'Inspecteur des travaux, dit que c'est à lui que Goodwin a donné l'ordre en question; il contredit James Goodwin et Sutton sur le fait de l'ordre de décharge; ce témoin dit avoir rencontré Goodwin, qui lui aurait dit qu'il était mécontent de Robertson, non parcequ'il avait voté, mais parcequ'il lui avait compté un mensonge en lui disant qu'il préférait ne pas aller voter et rester à son ouvrage, et en allant ensuite voter avec un autre. Ce témoin ajoute que Goodwin lui a dit que Robertson devait être déchargé et l'a chargé de dire à Sutton de voir à cela. Puis il dit l'avoir mentionné à Sutton. Dawson de son côté dit lui, que Sutton lui a dit qu'il avait eu ordre de Goodwin de décharger Robertson, ce qui me parait confirmer la déposition de Forman. Tout cela m'amène à croire que c'est plutôt sur l'ordre de Goodwin que lui a communiqué Forman, que Sutton a déchargé Robertson.

Quel a été le motif de Goodwin pour en agir ainsi? C'est, dit-il, parce que Robertson lui a menti en allant voter après lui avoir refusé d'y aller avec lui. Mais il faut bien remarquer que Robertson a dit à Goodwin, non pas qu'il ne voulait pas aller voter, mais que plutôt que d'aller voter pour le répondant il préferait rester à son ouvrage; c'est ce qui ressort de ces paroles "qu'il était pauvre, qu'il avait des amis de l'autre côté qui pourraient se trouver offensés;" c'est aussi à peu près de cette manière que Goodwin a rapporté à Forman, sa conversation avec Forman, lorsqu'il a dit à ce dernier de dire à Sutton de décharger Robertson. Goodwin dit c'est parcequ'il m'a trompé que je l'ai déchargé, mais vraiment je ne puis voir en quoi Robertson l'a trompé, en allant voter; s'il lui avait tout simplement dit qu'il ne voulait pas aller voter, il y aurait peut-être quelque chose de plausible dans l'explication de Goodwin; mais ce n'est pas cela que Robertson a dit, et il ne me parait pas raisonnable de croire que Goodwin l'a compris ainsi, quand lui-même a rapporté à Forman que Robertson lui avait dit qu'il préférait ne pas aller voter, parce qu'il avait des amis de l'autre côté qui pourraient être mécontents; Goodwin n'a pas dû comprendre autre chose de cela, si ce n'est qu'il préférait rester à son ouvrage plutôt que d'aller avec lui pour voter. En donnant cette interprétation à la conversation de Robertson avec Goodwin, la seule raisonnable dans les circonstances, comment accepter la prétention de Goodwin qu'il a donné ordre de décharger Robertson, parcequ'il l'a trompé? Il a trompé son attente ou ses espérances, mais c'est tout; Goodwin s'attendait tout naturellement que Robertson n'oserait pas aller voter avec un autre quand ce dernier avait refusé d'aller avec lui; et quand Goodwin a donné ordre de décharger Robertson, il l'a fait, non pas parce

que ce dernier l'a trompé, car il n'a pu comprendre cela, mais parce que Robertson s'est permis d'aller voter avec un autre et surtout avec un des amis du Dr. Christie après avoir refusé d'y aller sous son contrôle ; ce qui, suivant moi, n'est pas un motif légitime. Je suis d'opinion que le renvoi de Robertson de son emploi, dans les circonstances que j'ai rapportées, constitue de la part de Goodwin une influence indue et un acte d'intimidation dans le sens du Statut. Je suis d'opinion aussi que James Goodwin était un des agents du répondant, et que conséquemment le répondant est responsable de l'acte d'intimidation commis par Goodwin envers Robertson.

Avant de passer à d'autres cas, je vais en finir de suite avec Robertson, à qui prétend-on, Thomas Owens, un des agents du répondant, a offert de payer sa journée, s'il voulait voter pour le répondant.

Voici comment est formulée cette accusation, dans l'articulation de faits des requérants :

" That before polling day at said election (l'élection de février 1880) the said Thomas Owens corruptly offered to pay William Robinson, of Chatham, farmer, an elector at said election, for his day on polling day if he would vote for respondent, to corruptly influence said Robinson to vote for respondent."

Pour prouver cet allégué on a fait entendre Robinson et sa fille de 14 ans. Mais je ne crois pas devoir attacher aucune importance au témoignage de la jeune fille. Elle me paraît plutôt avoir récité une leçon apprise par cœur, que donné un témoignage impartial de ce qu'elle a entendu et vu. Elle ne se rappelle ou n'a rien remarqué ou retenu de la conversation entre son père et Thomas Owens, qu'une chose ; ce sont les mots suivants ; " Mr. Thomas Owens said if my father would go and vote for Mr. Abbott, his day would be made good," quoiqu'il ait été dit bien d'autres choses. Et elle admet que son père lui a souvent rappelé ces paroles. Je crois qu'il serait dangereux de faire reposer le sort d'une élection sur un témoignage du genre de celui de cette jeune fille. Ce témoignage mis de côté, nous restons avec le témoin Robertson d'un côté et le témoignage de Thomas Owens de l'autre. Robertson dit que Owens lui a dit que s'il votait pour le répondant, sa journée lui serait payée, *his day would be made good*, donnant à entendre que s'il votait pour le Répondant, lui Owens, lui payerait sa journée ou verrait à la lui faire payer ; Owens admet qu'il lui a dit qu'il ne perdrait pas sa journée s'il allait voter, mais il ajoute qu'il lui a dit qu'il ne devrait pas perdre sa journée parceque les Goodwin pour qui il travaillait, avaient l'habitude de ne pas retenir à leurs hommes le temps employé par eux pour aller voter, d'un côté ou de l'autre, pourvû qu'ils ne s'absentent que le temps nécessaire pour aller voter et revenir à leur ouvrage. D'après lui, il n'aurait rien promis, mais seulement exposé la coutume suivie par les Goodwin de payer leurs hommes, sans rien retrancher pour le temps employé pour aller voter. Ces deux témoignages se contredisent, et conséquemment se nullifient ; ce qui fait que les requérants se trouvent sans preuve pour appuyer leur allégué.

Je considère en conséquence ce moyen non prouvé.

Je passe au cas que l'on a désigné à l'argument sous le titre de *open voting*. Voici, à ce sujet, les allégations des requérants, dans leur articulation de faits : " That such of said voters so voting (au polls Nos. 5, 6, 9, 10 and 11) as could

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not mark their own ballots, were illegally and corruptly denied by respondent's said agents, and at their instance, of the freedom of franchise, as they were compelled to vote openly in the presence of unauthorized persons present in the poll; that at poll No. 6 at such election, where the voters employed on such public works largely voted, John Douglass, of Chatham, who was both an elector and an agent of respondent, during said election, was deputy returning officer; That the said Douglass was appointed to said poll after application therefor by him to respondent; That the said Douglass permitted unauthorized persons in large numbers, all partisans of respondent, to be present in the poll, that large numbers of voters voted at said poll by having their ballots marked for them by said Douglass, who instead of marking them in presence of sworn agents, and after oath of incompetency of the voter to mark his ballot, in all cases marked such ballot publicly and openly in the presence of persons who had no right to be present, and who were not sworn to secrecy, and who were in a position to make their presence an intimidation to voters. That in no case did the said Douglass administer the oath to the voters, that the voter was unable to mark his own ballot as required by law, although such oath was pointed out to him by the agent at the poll of said Christie, and he was requested to administer the same, which he wilfully refused to do. That the said Douglass moreover kept no record or entry of the voters for whom he so marked their ballots; that large numbers of voters who were quite competent to mark their own ballots, were by said illegal conduct of said Douglass intimidated and unduly influenced, and the means of better intimidating voters was afforded, which were fully availed of by respondent's said agents, who in fact counselled and co-operated with said Douglass in said illegal and corrupt acts; that owing to said Douglass refusing to administer the oath of incompetency, to mark ballots to voters, and to his keeping no record or entry of voters whose papers he marked, petitioners are deprived of the means of fully knowing who were all the voters induced or compelled to vote publicly or who did vote publicly as stated, but among those who could have marked their own ballots, but were corruptly induced or compelled to permit them to be marked for them, were Alexander Cadieux of Chatham, &c., (on en nomme un certain nombre); that the said William Owens moreover, actively interfered in the poll with the freedom of franchise of said electors, and told each of them as they came into the poll to vote that it was not necessary for them to mark their own ballots, and instructed them to ask the said Douglass to mark their ballots for them, which he invariably did as aforesaid in the presence of said Wm. Owens and other unauthorised to be present."

La preuve établit qu'un certain nombre de voteurs qui ont voté au poll No. 6 ont eu leurs bulletins marqués par le Député Officier Rapporteur sans qu'on ait fait prêter à ces voteurs le serment qu'ils ne pouvaient marquer leurs bulletins eux-mêmes, tel que requis par la sec. 48 de l'acte des élections de 1874 telle qu'amendée par la section 8 de la 41 V. ch. 6, et cela malgré les protestations et objections faites par les représentants du candidat Christie. Quelques-uns ont même voté ouvertement en faisant marquer leurs bulletins dans la salle où se tenaient, en outre du Député Officier Rapporteur et les représentants assermentés des deux candidats, et plusieurs autres, en déclarant même quelques fois à haute

voix pour qui ils votaient. Mais tout cela paraît avoir été fait de bonne foi, et sans que ces voteurs aient été amenés à agir ainsi par aucunes menées frauduleuses et corruptrices de la part des agents du répondant, ni de la part du Député Officier Rapporteur ; ces voteurs paraissent en avoir agi ainsi de leur propre mouvement et sans avoir été poussés par personne à en agir ainsi. Le Député Officier Rapporteur paraît avoir agi de bonne foi. Mais il a commis une illégalité en marquant les bulletins de ces voteurs sans s'assurer au préalable par leur serment exigé par la loi, s'ils étaient ou non en état de marquer eux-mêmes leurs bulletins, et encore en le faisant ouvertement en présence d'autres personnes que les représentants assermentés des candidats.

Toute la question se résume à savoir quel peut être l'effet de ces votes ainsi donnés ou pris illégalement sur l'élection, ou autrement, jusqu'à quel point l'élection peut-être affectée par ces votes illégaux et donnés et reçus autrement que la loi l'exige. La section 48 de l'acte des élections de 1874 telle qu'amendée par la sec. 8 du ch. 6 de la 41 V. (1878), indique comme suit les personnes qui pourront faire marquer leurs bulletins par le sous-officier rapporteur.

" Le sous-officier rapporteur, à la demande de tout électeur illettré ou incapable pour cause de cécité ou autre infirmité physique, de voter de la manière prescrite par le présent acte, aidera cet électeur en lui marquant son bulletin de la manière que lui prescrira l'électeur, en la présence des agents assermentés des candidats, ou des électeurs assermentés qui les représenteront dans le bureau de votation, *mais d'aucune autre personne*, et en déposant ce bulletin dans la boite du scrutin."

" Et le sous-officier rapporteur exigera du votant qui lui fera cette demande, avant qu'il ne vote, de faire serment de son incapacité à voter sans cette aide, selon la formule suivante ;

" Je jure solennellement que je ne sais pas lire et que je ne puis comprendre le bulletin de vote de manière à le marquer, (ou) que je suis incapable, pour cause d'infirmité physique (selon le cas) de voter sans l'aide du sous-officier rapporteur."

" Et le sous-officier rapporteur inscrira en regard des noms des votants dont les bulletins auront été ainsi marqués, en sus de ce qui est requis par la quarante neuvième section du présent acte, la raison par laquelle chaque bulletin a été marqué par lui."

La loi ayant ainsi déterminé le mode de voter, il est clair que toute autre manière de le faire non autorisée spécialement par le Statut est illégale ; et les votes donnés et reçus autrement que la loi le requiert ne sont pas des votes, dans le sens de la loi. Dans le cas actuel un bon nombre de votes ont été donnés et reçus au poll No. 6 de la manière que j'ai mentionnée ; et de plus le sous-officier rapporteur n'a pas inscrit en regard des noms de ces votants dont il a marqué les bulletins, la raison pour laquelle chaque bulletin a été marqué par lui ; ce qui est une autre illégalité. Maintenant ces illégalités devront-elles avoir pour effet de faire déclarer l'élection nulle ? La section 80 du Statut dit que " nulle élection ne sera annullée à raison de l'inaccomplissement des formalités prescrites par le présent acte pour les opérations de la votation.....s'il appert au tribunal chargé de s'enquérir de la question, que les opérations électorales

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ont été conduites conformément aux principes établis par le présent acte, et que cet inaccomplissement ou erreur n'a pas changé le résultat de l'élection." D'après cette clause l'annulation de la présente élection, pour le motif d'inaccomplissement des formalités, pour la réception des votes dont il s'agit, devra donc dépendre du nombre de votes ainsi donnés comparés avec la majorité totale obtenue par le répondant, cette majorité étant de 65. Or le nombre de votes ainsi donnés, quoiqu'il ne soit pas constaté d'une manière certaine, est certainement beaucoup moindre que cette majorité. Le témoin Cushing, qui prétend avoir tenu une liste des votes ainsi donnés, les porte en tout à 44; mais ce nombre doit être diminué considérablement, car un beau nombre des personnes qu'il dit avoir voté en faisant marquer leur bulletin par le sous-officier rapporteur, ont juré qu'elles ont elles-mêmes marqué leurs bulletins. Alguire les porte à une trentaine et Ostrom, le greffier du poll, qui en a tenu une liste, (sauf de quelques uns en commençant), les porte à vingt et quelques uns, sa liste en mentionne vingt; D'après celà le nombre des votes ainsi donnés ne peut s'élever à plus de vingt-cinq ou trente, en donnant le bénéfice du plus grand nombre. Maintenant si je retranche ce nombre de la majorité totale du répondant, ce dernier reste encore avec une majorité sur l'autre candidat; conséquemment l'inaccomplissement des formalités de la votation quant à ces votes, n'a pas changé le résultat de l'élection. La conclusion est que je ne puis annuller l'élection pour ce motif.

La décision dépend néanmoins d'une autre question soulevée dans cette contestation, savoir, de la question de la validité de la liste électorale de St. André. Car si cette liste électorale, qui comprend quelques centaines de noms, était déclarée nulle, il est évident que la majorité du répondant pourrait être tournée en minorité et le résultat de l'élection changé. J'ai du donc examiner cette question avant de me prononcer sur celle de *l'open voting*. La question se résume à ceci: Le 11 janvier 1879 un rôle d'évaluation pour la paroisse St. André a été produit au bureau du secrétaire-trésorier du conseil, qui l'a revisé et amendé dans les trente jours de l'avis donné pour son homologation, en augmentant l'évaluation d'un grand nombre de propriétés, ou leur valeur annuelle, et en en diminuant d'autres de valeur. Un appel a été interjetté de la décision du conseil à la Cour de Circuit du comté, qui, le 5 juin 1879, à rejetté tous les amendements par le conseil, à ce rôle d'évaluation. Pendant l'appel, c'est-à-dire entre le premier et le quinze de mars 1879, le secrétaire-trésorier a préparé la liste des électeurs parlementaires, en y insérant tous ceux qui, d'après le rôle d'évaluation, paraissaient qualifiés à voter. Sur plainte produite au Bureau du Conseil, avis a été donné pour examen et révision de la liste, et dans les trente jours de cet avis, la liste a été homologuée; tout celà pendant l'appel sur l'homologation du rôle d'évaluation. Maintenant on se plaint que ce rôle d'évaluation a été ainsi corrigé et amendé par le conseil en prévision d'une nouvelle élection et, dans le seul but de favoriser l'élection du répondant, en y ajoutant des noms qu'il n'avait pas droit d'y placer; la majorité du conseil étant composé de partisans avoués du dit répondant.

On a soulevé plusieurs questions se rattachant à ce cas que l'on a appelé le *St. Andrews case;* mais je ne crois pas nécessaire d'entrer dans le mérite de

toutes ces questions; Il me suffit de dire que je n'ai aucune compétence pour juger de la validité de la liste en question, et qu'on devait s'adresser au tribunal chargé du redressement des décisions des conseils. En effet la loi donnait un moyen de faire reviser la décision du conseil concernant cette liste;" le chap. 7 de la 38e Vict. de Québec, tel qu'amendé par la 39 Vict. ch.: 13 statue ce qui suit: "Quiconque pourra appeler de toute décision du conseil corrigeant ou amendant la liste, au juge de la Cour Supérieure pour le district, dans les quinze jours qui suivent cette décision, au moyen d'une requête dans laquelle sont brièvement exposés ses motifs d'appel." On devait se servir de cet appel. Cette Cour n'est pas une Cour d'appel; ses pouvoirs sont limités et ne peuvent s'étendre jusqu'à la revision des actes des conseils municipaux agissant dans les limites de leurs attributions. Si encore il s'agissait de décider d'une nullité absolue, il en serait autrement; mais il s'agit d'un acte purement annullable et dont la connaissance est référée par la loi à un tout autre tribunal; ce n'est pas parceque le conseil a jugé à propos d'examiner et homologuer la liste électorale, dans un temps où peut-être il ne devait pas le faire, que cette révision par le conseil devra être considérée comme nulle de plein droit. Il suffit que le conseil ait agi dans les limites de ses attributions, pour que sa décision soit considérée comme valable jusqu'à ce qu'elle soit mise de côté par un tribunal compétent; c'est-à-dire le tribunal indiqué par la loi pour cet objet. D'ailleurs si l'on veut entrer dans le mérite même de la question de savoir si le secrétaire avait droit de préparer la liste électorale et de la soumettre au conseil pour révision ou examen, pendant l'appel sur le rôle d'évaluation, je n'y vois aucune difficulté, et je crois même qu'il était du devoir du secrétaire de faire cette liste et du conseil de la reviser, sur la plainte logée à cet effet.

Car la loi, sec. 12 de la 38 V. ch: 7 enjoint au secrétaire-trésorier de préparer cette liste dans un temps fixé, savoir, entre le premier et le 15 mars, et le conseil par la section 27 est obligé de reviser la liste dans les trente jours de l'avis donné par le secrétaire du dépôt de la liste, si une plainte est faite contre la liste ou partie de la liste. Le secrétaire et le conseil se sont conformés à ces dispositions; puis la sec. 36 dit que, "toute liste des électeurs ainsi mise en force, sera, pendant tout le temps qu'elle restera en vigueur, reputée la seule liste des électeurs parlementaires pour la division électorale à laquelle elle se rapporte, lors même que le rôle d'évaluation qui aura servi de base à cette liste serait défectueux, ou *serait cassé* ou *annullé*; sauf néanmoins toute correction faite en vertu de la section 44." C'est-à-dire par le juge sur l'appel contre la décision du conseil revisant la liste.

Pour ces raisons je ne crois pas devoir toucher à la liste électorale de St. André, ni rechercher les motifs qui ont porté le conseil à l'homologuer. Je dois la prendre telle qu'elle est et la supposer légale, pour les fins de la dite élection.

Je passe maintenant au *Ticket case.*

L'allégué des requérants, à ce sujet, porte que H. J. Boswell, un des agents du répondant, aurait offert et promis payer et aurait de fait payé ou fait payer les dépenses de voyage de John McMartin, un des électeurs à la dite élection, de Montréal à St. André, où il avait droit de vote, et celles pour son retour de St. André à Montréal, et ce dans la vue de le corrompre et l'induire indûment à voter à la dite élection.

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D'après la prouve il ne me parait pas douteux que Boswell a fourni à McMartin, le 12 février, le matin de la votation, un billet de passage ou *ticket* spécial, pour le conduire par voie du chemin de fer Québec, Montréal, Ottawa et Occidental, de Montréal à Lachute ou plutôt du Mile-End à Lachute et le ramener ensuite à Montréal. Que Boswell lui à fourni ce billet pour l'engager à aller voter pour le répondant ; que McMartin s'est servi de ce billet pour se rendre à St. André où il devait voter, et où il a en effet voté, et revenir à Montréal, sans avoir rien à payer pour son passage sur les chars, ni en allant ni en revenant ; que ce billet de passage, avec huit autres semblables, avait été fourni à Boswell, la veille de la votation par Richard White, un des éditeurs de la Gazette de Montréal, qui, lui, avait obtenu ces billets de Samuel Shackel, l'auditeur du chemin de fer Québec, Montréal, Ottawa et Occidental, en son bureau, à Montréal, le même jour 11 février, veille de la votation, dans l'avant-midi. Je n'ai pas de doute que les huit tickets qui ont été produits formaient partie des neuf tickets achetés par M. Richard White au bureau de l'auditeur du chemin de fer, et pour chacun desquels il avait payé une somme de cinquante cents. L'identification de ces billets me parait complète. Ce sont les seuls billets d'une nature spéciale qui aient été vendus et délivrés et dont il ait été fait usage ce jour là pour le trajet entre Montréal et Lachute ; c'est Boswell qui a été chargé d'en faire usage pour les fins de l'élection, et je n'ai pas de doute qu'il s'est servi d'un de ces billets pour faire transporter McMartin à Lachute et l'en ramener, le jour de la votation, et ce dans le but de s'assurer son vote ; ce qui constitue de la part de Boswell un acte de corruption dans le sens du Statut des Elections. Le répondant doit-il être tenu responsable de cet acte de corruption de la part de Boswell ? Oui, sans doute, si ce dernier était alors un des agents du répondant aux termes de la loi électorale ; c'est-ce qu'il s'agit maintenant de rechercher. Je pose d'abord comme parfaitement établi que Richard White, qui a procuré les billets de passage à Boswell, était un des agents du répondant ; n'y eût-il pour l'établir que le télégramme à lui adressé par le répondant, le onze février, la veille de l'élection, et celui adressé aussi de Lachute, par le répondant à M. Tait, son associé, le même jour, que ce serait déjà bien suffisant ; ces télégrammes prouvent hors de tout doute l'agence de M. White et le fait que le répondant en était parfaitement informé et qu'il l'approuvait. Voici ces télégrammes :

Lachute, 11 (2).

RICHARD WHITE,
Gazette Office, Montreal.

Add William Cleary, working for James McShane, and Robert McKnight, Forfar street. Please send here to-night one or two first rate vigorous French canvassers, not afraid of work, and a French speaker. Big efforts against us among French.

J. J. C. ABBOTT.
Lachute, 11 Feb.

M. M. TAIT,
Montreal.

Want urgently one or two rough working French canvassers and one French speaker for to-night. See Richard White immediately.

J. J. C. ABBOTT.

Ces télégrammes ne laissent aucun doute sur l'agence de Richard White, reconnue et approuvée par le répondant. M. White explique ce qu'était cette liste à laquelle le répondant le priait d'ajouter deux noms. Il dit qu'il avait reçu cette liste du bureau de M. John Taylor, un autre agent actif du répondant, avec prière de voir les personnes y mentionnées et de les envoyer voter ; cette liste comprenait environ une demi douzaine de noms de personnes résidant à Montréal, et ayant droit de vote dans le comté d'Argenteuil ; c'est à cette liste que le répondant le prie, par son télégramme, d'ajouter deux noms Tout celà prouve l'agence de White jusqu'à l'évidence. Maintenant quant à l'agence de Boswell, M. White déclare dans sa déposition, qu'au lieu de cabaler lui-même auprès de ces électeurs de Montréal, il en aurait chargé Boswell, qu'il connaissait comme très actif et dévoué au partie depuis nombre d'années ; qu'il lui aurait remis cette liste, à cet effet, un jour ou deux avant de recevoir le télégramme du répondant ; qu'aussitot après avoir reçu ce télégramme, il est allé au Burcau de la Minerve à propos des cabaleurs qui lui étaient demandés, puis au bureau de l'auditeur du chemin de fer, où il a acheté les 9 billets de passage que j'ai mentionnés ; et puis qu'il est allé à la recherche de Boswell, et lui a communiqué la demande qui lui était faite d'une couple de cabaleurs français et d'un orateur français ; lui a en même temps remis les 9 billets de passage, sans lui mentionner l'usage qu'il devait en faire ; et qu'en même temps il lui a donné $5.00. Nous avons vu ce qu'il a fait d'un de ces billets. Maintenant le répondant est-il responsable de l'acte de Boswell comme son sous-agent ? Je le crois. C'est vrai que Richard White, en lui confiant les billets de passage, ne lui a pas dit d'en faire usage pour faire de la corruption auprès des électeurs qu'il l'avait chargé de voir, mais il ne le lui a pas défendu non plus ; et le lui eût-il défendu que je croirais encore le répondant responsable de l'acte de Boswell, car, comme l'établissent les auteurs et nombre de décisions, en matière d'élection, le candidat est responsable non seulement des actes de son agent, lorsque ce dernier a même outre passé ses instructions, mais aussi des actes des sous-agents, qui, par le fait qu'ils sont suffisamment reconnus par un agent principal, deviennent en quelque sorte l'agent du candidat et l'obligent de a même manière que s'il était agent principal. Cox & Grady, en parlant de la responsabilité du candidat, à raison des actes d'un agent, ou d'un sous-agent disent, à la page 321 : " It may be accepted as a general proposition that where a sitting member or his agent employs a person to bring up a voter, and that person does corruptly what they intended should be done incorruptly, they must take the consequences." Cette autorité me parait exactement applicable au cas actuel ; Boswell était chargé par Richard White, agent reconnu du répondant, de voir à envoyer (bring up) les électeurs de Montréal ; au lieu de le faire légalement et sans corruption, comme il est présumable qu'on voulait qu'il le fit, a payé leur passage en leur fournissant des billets de passage ; qui avaient été payés à prix d'argent évidemment, et personne ne peut sérieusement le mettre en doute, il a commis un acte de corruption ; et suivant Cox & Grady le répondant doit être tenu responsable de cet acte de Boswell.

Le juge Grove, dans la cause de Taunton, rapportée au 2e Vol. de O'Mally et Hardcastle, dit ceci, au même sujet, à la page 74 : " I am of opinion that to establish agency for which the candidate would be responsible, he must be

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proved by himself or by his authorised agent to have employed the persons whose conduct is impugned to act on his behalf, or to have to some extent put himself in their hands, or to have made common cause with them for the purpose of promoting his election. To what extent such relation must be sufficient to fix the candidate must, it seems to me, be a question of degree and of evidence to be judged of by the election petition Tribunal." Ici, il me parait que le répondant, par son agent Richard White, s'est mis entre les mains de Boswell pour engager les électeurs de Montréal à aller voter pour lui ; et je crois que c'est un des cas où il doit porter les conséquences des actes de ce sous agent. Je pourrais citer beaucoup d'autres autorités sur cette question, mais je crois que celles-ci suffisent pour faire voir que le cas actuel est un de ceux où le candidat doit être déclaré responsable des actes d'un sous-agent, même s'il a dépassé les limites des instructions à lui données par l'agent principal.

On a prétendu que Boswell n'avait agi, dans le cas actuel, que comme le simple messager de White, l'agent du répondant. Cette prétention n'est pas soutenable en face de la preuve. Les pouvoirs d'un simple messager chargé d'une simple commission, ne peuvent s'étendre jusqu'au pouvoir de cabaler des électeurs d'une manière générale et sans restrictions, et encore moins à faire usage des billets de passage comme bon lui semblerait, comme dans le cas actuel.

Pour ces raisons je suis d'opinion que le répondant est responsable de l'acte de Boswell, et que c'est un autre motif pour lequel son élection doit être déclarée nulle.

Il reste plusieurs autres charges particulières dirigées contre des agents du répondant ; je n'ai pas cru utile de les examiner, vû que les charges que j'ai déjà examinées et sur lesquelles je me suis prononcé contre le répondant, sont plus que suffisantes pour faire annuller son élection.

Je déclare l'élection du répondant nulle et la mets de côté à toutes fins que de droit ; quant aux frais, le répondant devra les payer, sauf moitié des frais d'Enquête. Les requérants ont cru devoir aller à la recherche de la preuve des faits allégués, en faisant venir un grand nombre de témoins, dont en définitive ils n'ont rien tiré et par lesquels ils n'ont rien prouvé ; c'était leur affaire et c'était leur droit ; mais il n'est pas juste que les frais en doivent retomber sur le répondant ; ils l'ont fait à leur risque et péril et je crois qu'il n'est que juste et conforme aux désirs exprimés dans la section 60 de l'acte des élections contestées, 1874, qu'ils en payent la façon. Ils ont aussi questionné d'autres témoins très longuement, sur presque toute la cause, sans pouvoir rien obtenir d'utile à la cause, si ce n'est sur un point ou deux de la cause. Il n'est pas juste encore que le répondant ait à supporter tous les frais de ces dépositions non plus. Je crois qu'au moins la moitié de l'enquête est inutile et adverse aux requérants, et je crois en conséquence qu'il n'est que juste de diviser les frais d'Enquête et de les faire supporter moitié par les requérants et moitié par le répondant.

Ainsi le répondant est condamné aux frais, sauf les frais d'Enquête qui seront payés moitié par le répondant et l'autre moitié par les requérants.

N. W. Trenholme, for Petitioners. Election declared void.

C. A. Geoffrion, Counsel.
M. M. Tait, for Respondent.
A. Lacoste, Q. C., Counsel.

(S. B.)

SUPERIOR COURT, 1881.

MONTREAL, 30TH DECEMBER, 1881.

Coram JETTÉ, J.

No. 487.

Cossit et al. vs. *Lemieux*, and *Rattray*, *Petitioner*.

HELD :—1. Before the coming in force of the Civil Code the obligation of improving the property was not an essential obligation in an emphyteutic lease.
2. The principal and distinguishing characteristic of an emphyteusis before the Code was the alienation of the property.
3. A lease, passed in 1846, in the terms recited below, constitutes an emphyteusis.
4. If an immoveable charged with an unexpired term of 15 years of such lease be sold by the sheriff without mention of such charge in the minutes of seizure, and if such charge diminishes the value of the property by about one half, the purchaser who is prevented by notification and protest on the part of the lessee from obtaining possession during such unexpired term may obtain the vacation of the sheriff's sale under Art. 714 C. C. P.

On the 3rd of November, 1846, the defendant, Claude Lemieux, leased a portion of the Windsor Cove property at Point Levis, on the River St. Lawrence, to James Tibbitts and James McKenzie by a lease in the following terms: —"The said Claude Lemieux did declare to have leased, demised, granted and "to farm let, and by these presents doth lease, demise, grant and to farm let, "for the space and term of fifty consecutive years, which have commenced run- "ning on the twenty-first day of the month of September last, and which will "expire on the twentieth day of the month of September, 1896, unto the said "James Tibbitts and James McKenzie, junior, accepting hereof, lessees, for "themselves, their heirs and assigns, that is to say:—

"All the beach, &c. (*sequitur descriptio*)—

"To have and to use, enjoy and possess the said portion of beach with all "the appurtenances and dependencies thereof, now leased or intended so to be, "unto the said James Tibbitts and James McKenzie, junior, their heirs or "assigns, for the space and term of fifty consecutive years, subject, however, to "the following reserves, exceptions, clauses and conditions, that is to say:

"1stly. That the emplacement or building lots actually leased by the said "lessor to divers parties are not comprised in the present lease, and shall con- "tinue to be used and employed by the lessor as heretofore.

"2ndly. That a piece of ground (*sequitur descriptio*) is by him hereby "reserved, and shall be by him used to put firewood thereon, but for no other "purpose whatever.

"3rdly. It is hereby expressly agreed by the parties that, over and above the "price of the present lease hereinafter stipulated, the lessor shall be entitled to "have and receive from the cribs or refuse-wood in the said cove a sufficient "quantity for heating one stove throughout every winter during the present "lease.

"4thly. It is hereby expressly agreed by and between the said parties that the "lessees shall have the right to put an end to this lease on the expiration of the "first twenty-five years of its duration, upon giving notice in writing to the lessor, "or his heirs or assigns, at the domicile hereinafter elected, three months before

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"the expiration of the twenty-fifth year of the term of this lease; upon the "giving of which notice the present lease shall terminate on the twentieth day "of the month of September, 1871, in the same manner as if it had been origin- "ally made for twenty-five years only.

"5thly. The said parties do hereby annul the lease of said beach made by "Antoine Lemieux conjointly with Joseph Lemieux, the *auteur* of the said "Claude Lemieux, to the late Leonard Windsor, by deed, etc., * * * * "and the said James Tibbitts and James McKenzie, junior, do hereby promise "and engage to save, keep harmless and forever defend the said Claude "Lemieux from all claims and demands which might be made against him by "any person or persons whomsoever in relation to the said lease.

"And, lastly, the present lease is thus made for and in consideration of the "price or sum of twenty-five pounds current money of this Province *per annum*, "and for each year of its duration.

"The lessor hereby acknowledging to have received in advance, in the presence "of us the said notaries from the said lessees, the sum of twenty-five pounds, "being for the first year's rent, of which the said lessees are hereby fully exoner- "ated, released and discharged.

"And the said lessees do hereby promise and engage to continue paying "the said rent in advance yearly on the twenty-first day of the month of "September next year, and the other on the like day in each successive year, "and which rent shall be payable at the domicile hereinafter elected by the "parties.

"And it is hereby specially agreed by and between the said parties that if "the said lessees should neglect or refuse to pay the said rent each year in "advance, they will thereby lose all right to continue occupying the said beach "hereby leased to them, and the present lease will thereby become null and "void.

"And for securing the payment of the said yearly rent of twenty-five "pounds, the said lessees do hereby specially bind, pledge, mortgage and hypo- "thecate the beach hereby leased to them and herein above designated.

"And for the due execution hereof," &c., &c.

The above named lessees, Tibbitts & McKenzie, having become insolvent before the expiration of this lease, the unexpired term was sold, and passed into divers hands, the last purchaser of the lessees' rights being A. F. A. Knight, who bought them on May 20th, 1872. On November 4th, 1880, a writ of execution was issued out of the Superior Court at Montreal against the lands of the defendant, at the instance of the plaintiffs, under which the property above leased was seized and advertised to be sold by the Sheriff of Quebec on January 22nd, 1881, on which date it was put up for sale and adjudged to David Rattray, the petitioner, for $3,800. Shortly after this adjudication, Knight, who still occupied the property as lessee, served a notification and protest on Rattray, intimating that he (Knight) intended to retain possession of the property until the 3rd of November, 1896, when the term of the above lease would expire, and that he would resist any efforts which Rattray might make to obtain possession. Thereupon Rattray presented a petition to vacate the

sheriff's sale under arts. 710 and 714 C. C. P., alleging that the property was charged with a right of emphyteusis which was not purged by the adjudication, and which diminished the value of the property by about one-half, and that he would not have bought had he been aware of the difference.

The plaintiffs contested this petition on various grounds, but their principal contention was that the lease in question did not constitute an emphyteusis, and was consequently purged by the sheriff's sale.

J. A. Bonin, for plaintiffs contesting, argued that the lease in question was not an emphyteusis, but a mere "*bail à ferme*" as the terms "to farm let" sufficiently indicated. The word "emphyteusis" did not once occur in the deed, and there were none of the distinguishing marks of such a contract. The clause containing an hypothecation of the property to secure the rent was meaningless and superfluous in view of the previous one providing that the lease should become null and void upon the failure of the lessees to pay the rent in advance; and hence no inference could be made as to the intention of the lessor to alienate the property. Above all, the lease did not contain any stipulation that the *preneurs* should improve the property, and this was an essential obligation in an emphyteusis as the following authorities showed:—

C. C. L. C. 567, and Report of Commissioners on do. (3rd Report, p. 408); *Proudhon*, Usufruit, No. 97, pp. 102 *et seq.*; *Nouveau Denizart*, Vol. VII., Vo. Emphytéose, p. 538, Nos. 1 et 2; *Proudhon*, Domaine de Propriété, Vol. II., Nos. 709 et 710; *Guyot*, Rép., Vol. VI., Vo. Emph., pp. 680 sqq.; *Domat*, Liv. I., Tit. 4, sec. 10, Nos. 1 et 9; *Argou*, Vol. II., pp. 246 et 249; *Nouv. Den.* Vol. XIII., Vo. Emph. p. 280; *Sebire & Carteret*, Vo. Bail Emph., 2, pp. 453 sqq., § 11 et 15; p. 456, § 27; *Ferrière*, Dict. Vol. I., Vo. Emph. p. 570; *Dunod*, Prescription, p. 339; *Duvergier*, Louage, Vol. III., No. 144, et note 1, p. 136; *Laurent*, VIII., No. 346; *Troplong*, Louage, p. 31; *Dumoulin* sur Paris, § 73, No. 22; *Dalloz*, 1853-1-145, 1857-1-326, 1861-1-444.

E. Lafleur, for petitioner, contended that the lease was emphyteutic. The principal characteristic of an emphyteusis was the alienation of the *fonds*. The hypothecation of the *fonds* by the lessee, however superfluous it might be for the security of the rent, necessarily implied the alienation of the property, and could not have been effected by an ordinary lessee, but only by an emphyteutic holder. *Pothier*, Traité de l'Hypothèque, sec. II., § 2; *Guyot*, Rép. Vo. Emphytéose, p. 681, col. 2; *Nouveau Denizart*, Vo. Emphytéose, § 1, No. 6; *Ferrière*, Dict. de Droit, Vo. Emph. p. 706; *Dalloz*, Jurisp. du Royaume, Vol. 9, p. 944.

Then, as to the obligation of improving, art. 567 C. C. L. C. did not apply, as the lease was passed before the Code came in force, and before the Code this obligation was not essential to the contract, as was established by the following authorities:—*Ancien Denizart*, Vo. Emphytéose; *Guyot*, Rép., Vo. Emph. *sub init.*; *id. ibid.* p. 682, col. 1; *Serres*, Inst. du Dt. Français, Liv. III., Tit. 25, § 3, p. 502; *Ferrière*, Dict. de Droit, Vo. Emphytéose, III.; *Vinnius*, Ad. Inst., Lib. III., Tit. 25, 3; *Boutaric*, Traité des Droits Seigneuriaux, ch. XIII., p. 424; *id.* Ad Inst. Lib. III., Tit. 25, § 3, p. 486; *Layseau*, Déguer-

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plissement, Liv. IV., ch. 5, No. 6; *Henrys* (Ed. Bretonnier), Vol. I., p. 722, col. 2; *Le Grand*, Coutume du Baillage de Troyes, Tit. IV., art. 67, glose 1, No. 1 (p. 200, col. 2); *Bosquet* Dict. Raisonné des Domaines, Vo. Baux Emph., Vol. I., p. 290, col. 2; *Nouv. Denizart*, Vo. Emph. No. 3; *Domat*, Liv. I., Tit. IV., sec. 10, Nos. 1, 2, 3, &c.; *Duvergier*, Vol. III., pp. 340–1; *Rolland de Villargues*, Dict. du Droit Civil, Vol. IV., p. 227, Vo. Emph.; *Sebire & Carteret*, Vo. Bail Emph. § 1er; *Laurent*, VIII., p. 421; *Troplong*, Louage, ch. I., pp. 174–5; *De Villeneuve & Gilbert* (1791–1850), Vo. Emph. § 2, No. 18, p. 369; *id. ibid.*, § 1, No. 1; *Dalloz & Vergé*, app. au Tit. VIII., No. V. Louage Emph. § 1, No. 21; *id. ibid.*, § 3, No. 49; *Ledru Rollin*, Vo. Emph., Nos. 29, 51, 112; *Pepin le Halleur*, Hist. de l'Emph. pp. 75–7.

JETTE, J.—A une vente faite par le shérif de Québec, le 31 janvier 1881, Rattray s'est porté adjudicataire, au prix de $3,800, d'un immeuble saisi sur le défendeur Lemieux.

Rattray demande maintenant l'annulation de cette vente, disant:

Que le 3 novembre, 1846, Lemieux a donné cet immeuble à *bail emphytéotique* pour le terme de 50 ans, que ce bail est encore en pleine force et vigeur et que néanmoins il n'en a été fait aucune mention lors de la vente.

Que l'existence de ce bail, qui a encore 15 ans à courir et que le décrêt ne purge pas, (C. P. C., art. 710) change du tout au tout la position de l'adjudicataire, qui ne peut prendre possession de la propriété par lui achetée, et par suite souffre *eviction* temporaire; et de plus que l'existence de ce bail constitue une différence tellement considérable et importante entre la description du bien vendu et celle de celui acheté, que l'adjudicataire est bien fondé à demander la nullité de ce décrêt, attendu que la valeur de l'immeuble, qui sans ce bail vaudrait le prix d'adjudication, $3,800, se trouve réduite avec le bail, à moins de moitié, savoir $1,800, (C. P. C. 714).

Les demandeurs contestent cette demande, et y opposent deux plaidoyers.

1o. Par le premier, ils disent: Que le bail de 1846, n'est pas un bail emphytéotique, mais un simple bail à longues années, ne contenant aucune obligation *d'améliorer* la propriété baillée, et que par suite le premier, ou son ayant cause, n'avait aucun *droit de propriété* dans l'immeuble en question, mais un simple droit de jouissance qui a été purgé par le décrêt.

2o. Qu'en supposant que ce bail serait un *bail emphytéotique*, le requérant ne saurait s'en prévaloir pour faire annuler la vente, attendu qu'ayant été l'employé et le teneur de livres du preneur, ou de son ayant cause, pendant plusieurs années, il connaissait parfaitement l'existence de ce bail et ses conditions.

Qu'en outre, en admettant que ce bail fut emphytéotique, les demandeurs avaient droit de faire vendre sur Lemieux, le bailleur, *le domaine direct* du dit immeuble, et que le requérant ayant acheté, avec pleine connaissance de ce bail, se trouve avoir acquis ce *domaine direct*, et recevra pendant le reste du terme du bail, l'équivalent de son prix d'achat par le canon emphytéotique qui lui est maintenant payable.

Enfin les demandeurs disent: Que le requérant n'agit dans cet instance que de concert avec l'ayant cause du preneur à bail de ce terrain, avec qui il s'est

entendu pour acheter cet immeuble pour le [illegible]preneur, vû que ce dernier, qui a toujours considéré son bail comme un bail ordinaire, avait négligé de faire son opposition à temps pour préserver son droit. Cosett et al. vs. Lemieux.

Qu'en conséquence le requérant n'a pas été trompé sur la valeur de l'immeuble et ne peut demander la nullité du décrêt.

Le requérant a répondu en droit à ce second plaidoyer, disant en substance, que la connaissance que le requérant aurait pu avoir du bail en question ne peut l'empêcher de demander la nullité du décrêt.

La cause a été inscrite tant sur la réponse en droit que sur le mérite.

La preuve n'établit aucunement le concert allégué entre le requérant et l'ayant cause du preneur à bail, le nommé Knight.

D'un autre côté il est prouvé que l'immeuble en question, sans la charge du bail, vaut le prix d'adjudication, $3,800, mais si le bail doit être maintenu, la valeur se trouve réduite d'au moins $2,000 c'est-à-dire plus de moitié.

La contestation se trouve donc restreinte à l'appréciation du bail de 1846. Est-ce un bail emphytéotique ou un simple bail à longues années?

Si c'est un simple bail à long terme, bien qu'il ait été enrégistré, il a été purgé par le décrêt et l'adjudicataire a acquis tout ce qu'il voulait avoir.

Si, au contraire, c'est un *bail emphytéotique*, le décrêt ne l'ayant pas purgé (C. P. C. art. 710) le requérant est bien fondé à prétendre qu'il n'a pas eu ce qu'on prétendait lui vendre et à demander l'annulation de la vente.

Notre code civil, nous donne la définition suivante du bail emphytéotique:

Art. 567. "L'emphytéose ou bail emphytéotique est un contrat par lequel "le propriétaire d'un immeuble, *le cède* pour un temps à un autre, *à la charge "par le preneur d'y faire des améliorations*, de payer au bailleur une redevance "annuelle et moyennant les autres charges dont on peut convenir."

Ainsi après cette définition, c'est une *cession de l'immeuble lui-même*, et non pas seulement de la *jouissance*; et ce pour un temps déterminé. Dans l'ancien droit Français, il était admis par presque tous les auteurs que l'emphytéose constituait un démembrement du droit de propriété, le preneur acquérant le *domaine utile* de l'immeuble tandis que le bailleur n'en retenait que le *domaine direct*.

Cette distinction entre le domaine utile et le domaine direct, admise par la plupart des anciens auteurs, était cependant contestée par quelques uns, c'est-à-dire par ceux qui avaient pénétré plus avant dans les profondeurs du droit romain. Ainsi Cujas (sur la loi 74 D., De rei vindic:) n'accorde à l'emphytéote que le *quasi-domaine*, et lui refuse le domaine utile, parce qu'en droit romain, le domaine utile était inconnu, qu'aucun texte n'en parle (Troplong, Louage No. 32.) Les jurisconsultes modernes ont adopté le sentiment de Cujas et n'admettent pas cette distinction entre le domaine direct et le domaine utile. *Pepin le Halleur*, dans son Histoire de l'Emphytéose, définit le droit de l'emphytéose: *jus in re aliena*, et *Laurent* de son côté ne lui accorde rien de plus.

Quoiqu'il en soit la division en domaine direct et domaine utile était presque généralement admise sous l'ancien droit, surtout sur l'autorité de Dumoulin, et nos codificateurs semblent l'avoir acceptée sans restrictions. Ainsi l'article 571 du code déclare que: "L'immeuble baillé à emphytéose peut être *saisi réelle-*

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"*ment* par les créanciers du preneur, auxquels il est loisible d'en poursuivre la "vente en suivant les formalités ordinaire du décrêt."

Le bail emphytéotique confère donc un droit dans l'immeuble même, et si l'acte par lequel le défendeur a cédé en 1856 l'immeuble en question a bien les caractères de l'emphytéose, nul doute que la demande de l'adjudicataire ne soit bien fondée et que le décrêt ne doive être annulé.

Il faut donc rechercher quels sont les caractères *essentiels* du bail emphytéotique.

D'après l'article 567 de notre code, il semblerait que le bail doit présenter trois caractères principaux :

1o. La translation d'une espèce de propriété ;

2o. La stipulation d'une redevance annuelle ;

3o. L'obligation par le preneur *d'améliorer* l'immeuble.

Et les rédacteurs du code, disent dans leur rapport (vol. I p. 408) : "L'on "trouve souvent dans les définitions données de l'emphytéose que la redevance "doit être *modique ; ce n'est pas nécessaire*, mais elle doit être annuelle, sans "quoi ce ne serait plus ce contrat. *L'obligation d'améliorer est aussi de "rigueur ;* mais avec ces qualités *essentielles*, le bail est susceptible de toutes les "autres conditions, qu'il plait aux parties d'y insérer.

Si le bail dont il s'agit en cette cause avait été fait depuis le code, il est évident que cet art. 567, et le commentaire que nous en trouvons dans le rapport des rédacteurs du code, devraient avoir une influence considérable sur l'appréciation que le tribunal est appelé à faire de l'acte dont il est ici question. Mais cet acte est antérieur au code et le requérant soutient que, quoiqu'en ait dit les commissaires-rédacteurs, la condition *d'améliorer* n'était pas de rigueur dans l'ancien droit.

Cette prétention me parait justifiée par les autorités citées. Ainsi, *Guyot*, Rep. : vol. emphytéose, p. 682, 1ere col. dit : "On stipule ordinairement quand "on donne une place à titre d'emphytéose que le preneur *sera tenu d'y bâtir*, "cette clause *n'est pourtant pas de l'essence du contrat ;* mais si elle y est apposée "on peut contraindre le preneur à l'exécuter."

Ferrière, Dict : vo. Emphytéose, iii : On donne quelquefois un héritage à "bail emphytéotique *à la charge que le preneur y fera construire, etc.* Mais il "se passe beaucoup de baux emphytéotiques sans que le preneur se charge de "bâtir, *cette clause n'étant pas de la substance du contrat.*"

Loyseau—Déguerpissement : Livre IV, chap. 5, No. 6.

"..... le preneur à emphytéose *n'est point chargé d'améliorer* les héritages "s'il ne s'y est soumis expressément."

Ancien Denizart, vo. Emphytéose.

Serres—Inst. du Dr. Français, p. 502. *Boutaric*—Droits Seigneuriaux, p. 424. *Louet.*—Lettre E., ch. 10-1, p. 682.

1 *Henrys*, p. 722, col. 2. *Nouveau Denizart*, vo. Emphytéose No. 3. *Domat*, livre 1er titre 4, sec. 10, No. 1, 2, 3, 9.

2 *Duvergier*, pp. 140, 141.

4 *Rolland de Villargues*, p. 227.

Sebire et Carteret, Encyc. du Droit Vo. Bail Emphyt.

Troplong, Louage, art. 1709.

Pepin le Halleur, Hist. de l'Emphytéose, pp. 75, 77.

Cossit et al. vs. Lemieux.

Et cette doctrine semble en effet très-logique, lorsque l'on se rend compte de la transformation qu'a subit l'emphytéose qui, à l'origine, ne s'appliquait qu'aux propriétés *stériles* et *incultes* que le bailleur ne donnait qu'à la condition de les faire améliorer, c'est-à-dire cultiver, mettre en rapport ; mais qui plus tard s'est appliquée même aux propriétés bâties et que le preneur n'était tenu comme dit Boutaric *que de ne pas détériorer*.

Je suis donc d'opinion, qu'avant le code, l'obligation d'améliorer n'était pas nécessaire, n'étant pas essentielle pour donner au bail le caractère de l'emphytéose, mais que ce caractère résultait surtout de la nature du droit transmis et que si l'acte comportait la translation d'une espèce de propriété, moyennant une redevance annuelle le bail était non pas un louage ordinaire, mais un bail emphytéotique.

Si j'apprécie maintenant le bail invoqué en cette cause, en y appliquant la règle que je viens de poser, je crois pouvoir conclure que ce bail n'est pas un simple bail à longues années mais un véritable bail emphytéotique, et que l'intention des parties a été de lui donner ce caractère.

Lemieux cède sa propriété pour 50 ans, et les termes dont il se sert me semblent plus énergiques, plus compréhensifs que ceux que l'on rencontre ordinairement dans les baux. Ainsi il est dit : *doth lease, demise, grant and to farm let :* le mot *demise* signifie, il est vrai, dans certains cas : *affermer ;* mais sa signification régulière et primaire est : *faire une translation, léguer*. Cette expression semble donc indiquer déjà que les parties entendaient de céder et acquérir plus qu'un simple droit de jouissance.

En second lieu le bail est fait au preneur, ses hoirs et ayant cause, et le preneur accorde une *hypothèque* au bailleur pour la sureté du paiement de la redevance annuelle. Sans doute que cette stipulation n'a aucune valeur légale, quant à l'affectation du fonds en faveur du bailleur, mais elle me semble indiquer évidemment que l'intention des parties n'était pas de faire un simple bail et que le droit qui a été cédé, transmis par cet acte est bien une espèce de propriété, puisque le bailleur croyait pouvoir y trouver une garantie pour son payment.

Ces circonstances réunies à la longueur du terme du bail, me paraissent suffire pour faire de ce bail plus qu'une location ordinaire ou même à longues années, mais un véritable bail emphytéotique.

Et l'existence de ce bail affectant considérablement la valeur de la propriété vendue, je crois que l'adjudicataire est bien fondé à demander la nullité de l'adjudication qui lui en a été faite.

Requête accordée avec dépens.

Lafleur & Sharp, for petitioner.
De Bellefeuille & Bonin, for plaintiffs contesting.
Pelletier & Jodoin, for defendant.
(E. L.)

SUPERIOR COURT, 1881.

MONTREAL, 19TH NOVEMBER, 1881.

Coram PAPINEAU, J.

No. 1899.

The Molsons Bank vs. *The St. Lawrence and Chicago Forwarding Company.*

HELD:—(1) That goods having been carried by schooner from a port in the United States to Kingston, Ontario, under a bill of lading requiring their delivery there to the defendants, subject to the order of the shippers, and having been accepted from the schooner, and a receipt therefor given on a duplicate of the bill of lading, and forwarded by the defendants to Montreal, and there delivered, without the order of the shippers, and without the surrender or presentation even of the bill of lading, the defendants were liable to the plaintiff, the holder of the bill of lading bearing the endorsement of the shippers, for the value of the portion of the goods mentioned in the bill of lading which were assigned to the plaintiff.

(2) That the assignment of a portion of the goods mentioned in a bill of lading is valid, and specially so when the assignee holds the bill of lading endorsed by the shippers, and offers to surrender it.

The pleadings and facts of the case are fully detailed in the remarks of the Court.

On demurrer filed by the defendants it was held by RAINVILLE, J. (11th April, 1881) that a partial transfer of the contents of a bill of lading, accompanied by delivery of the bill of lading itself endorsed by the shippers, was valid.

At the hearing on the demurrer, *Girouard, Q.C.* (for defendants), compared the case to a partial transfer of a promissory note, and cited Art. 1573 C. C., 2nd par.; Bigelow on Notes and Bills (Ed. 1880), p. 138; Chitty on Bills, p. 235; Byles on Bills, p. 174.

At the final hearing *Tait*, for plaintiff, cited Arts. 2428 and 2429 of the C. C. And *Bethune, Q.C.* (also for plaintiff), cited Angell on Carriers (4th Ed.), § 466, p. 388, and 6th Howard's Rep., p. 344, 380 and 381, on the question as to the privity of contract existing between the shippers and their assignees and the defendants, and Art. 1121 C. C.; Gougier & Mergier, vo. Endossement, § 2, No. 23, p. 724; 1 Nouguier, No. 413, and Têtu & Garneau, 1 Q. L. R., p. 355, on the question of the effect of a partial transfer of the contents of a bill of lading. And to the necessity of delivering to the persons named in the bill of lading, or their assigns, De Villeneuve & Massé, Dict. du Cout. (new Ed.), *vo.* connaissement, No. 77 and seq.; Gougier & Mergier, *vo.* connaissement, § 4, No. 45, and 1 Boulay Paty, p. 230, 2nd Col. And *Girouard, Q.C.*, cited Art. 2340 C. C., Butters vs. Oxen (judged by V. P. W. DORION, J.).

PER CURIAM:—La demanderesse allègue que le 8 août 1880, Reynolds Brothers, ont mis à bord du Schooner "Falmouth" de Kingston, une cargaison de 16,500 boisseaux de blé à transporter à Portsmouth près Kingston, pour y être livrée au soin de la Compagnie défenderesse et être de là par elle transportée à Montréal, et livrée à l'ordre de Reynolds Brothers, avec instruction de donner avis de cet envoi à Crane et Baird de Montréal et de son arrivée à cette dernière place.

Que, moyennant le prix du fret, L. D. Becker, maître du Schooner, entreprit de

transporter ce blé à Portsmouth et de le faire livrer là au soin de la défenderesse, et fit et signa un connaissement original et copie, se chargeant de transporter et livrer le blé, suivant l'adresse en marge du connaissement, savoir à l'ordre de Reynolds Brothers, comme suit :

" Order Reynolds Bros notify Crane & Baird, Montreal P.Q., Care St. Law-
" rence and Chicago Forwarding Company at Portsmouth harbor near Kingston,
" Lake Ontario."

La demanderesse prétend que cette adresse signifiait que la cargaison devait être livrée à Portsmouth au soin de la défenderesse pour être par celle-ci transportée et livrée à Montréal à l'ordre de Reynolds Brothers, en notifiant toutefois Crane et Baird de son arrivée à Montréal.

Que Becker a donné l'original du connaissement à Reynolds Brothers et gardé le double ou la copie pardevers lui.

Que Reynolds Brothers ont endossé et livré l'original du connaissement à Crane et Baird, et, par le fait de cet endossement, ont donné ordre à la défenderesse, en la personne de son agent, D. McPhee, de livrer à Beddall & Co., de Montréal, 15,500 boisseaux de ce blé ; l'ordre est comme suit : " D. McPhee,
" deliver to Messrs. Beddall & Co., or order, 15,500 bushels of within cargo, we
" paying all freight charges," Crane et Baird.

Que Crane et Baird après avoir endossé l'original du connaissement l'ont livré à Beddall & Co., qui sont ainsi devenus légitimes propriétaires des 15,500 boisseaux de blé.

Que d'après la coutume du commerce existant de temps immémorial, lorsque le grain est ainsi consigné, en vertu d'un connaissement fait de la même manière, il est d'usage que les compagnies au soin desquelles il est adressé, le transportent et le livrent à Montréal suivant le connaissement ou les instructions du maître du Schooner qui en a d'abord pris la charge.

Que vers le 15 de Sept. 1880, Beddall & Co., étant porteurs du connaissement et propriétaires des 15,500 boisseaux de blé, ont obtenu de la demanderesse sur la garantie de ce connaissement une avance de $16,275, et ont remis le connaissement à la demanderesse après l'avoir endossé en faveur de la demanderesse autorisant celle-ci à vendre ce blé pour se payer dans le cas où Beddall & Co. manqueraient de rembourser la banque, devenue ainsi propriétaire des 15,500 boisseaux de blé et du connaissement qui les représentait.

Que le " Falmouth " est arrivé à Portsmouth le 8 Sept. et a livré sa cargaison à la défenderesse qui l'a reçu à bord de la barge " Mohawk," promettant et s'engageant à le livrer à Montréal au désir du dit connaissement.

Qu'en livrant le blé à la défenderesse, Becker a communiqué la copie du connaissement à la défenderesse qui, par son agent McFarlane, l'a reçu et s'est obligé de le rendre à Montréal, en signant sur le travers de la copie du connaissement un reçu de ce blé, et de le livrer conformément à ce document et, suivant la coutume du commerce, à l'ordre de Reynolds Brothers et sur production de l'original ou de la copie du connaissement.

Que lors de l'arrivée du grain, à Montréal, vers le 11 Sept. 1880, la défenderesse l'a livré à des personnes inconnues à la demanderesse et au préjudice de son droit sans avoir exigé la production du connaissement original appartenant à

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la demanderesse et sans la production de la copie ou double resté entre les mains de Becker.

Que la demanderesse a demandé à la défenderesse de lui livrer les 15,500 boisseaux de blé en offrant de livrer l'original du connaissement et de payer le fret et autres charges légitimes, et qu'elle a renouvelé cette demande et ses offres par acte de maître J. S. Hunter, notaire, mais que la défenderesse a refusé de livrer le grain disant qu'elle l'avait déjà livré. Que les 15,500 boisseaux de blé valaient au moins $20,000.

Que la demanderesse a droit de se faire livrer les 15,500 boisseaux de blé dans le délai qu'il plaira à la Cour de fixer, ou la valeur de ce blé $20,000.

Elle conclut à ce que la Cour la déclare propriétaire des 15,500 boisseaux de blé, et condamne la défenderesse à le lui livrer sous un délai déterminé, et sur paiement du fret et autres charges légitimes dont le montant est inconnu à la demanderesse et à défaut de ce faire, elle conclut à une condamnation pécuniaire de $20,000 avec intérêt de l'assignation et dépens.

La défenderesse a fait une défense en droit qui a été renvoyée.

Ensuite elle fait une exception alléguant que le contrat auquel elle est devenue partie n'était pas une portion du contrat contenue dans le connaissement, mais une convention distincte de celle-là et non négociable faite avec les propriétaires de la cargaison Crane et Baird à Montréal.

Que le " Falmouth " est arrivé à Portsmouth le 6 de Sept. 1880, et sa cargaison a été mise à bord du " Mohawk " sans retard ;

Qu'une autre cargaison, également consignée à Crane et Baird, celle du " Willie-Keeler " de 16,400 boisseaux de blé de même qualité, est arrivée en même temps que celle du " Falmouth," et 4,000 boisseaux en ont été mis à bord du " Mokawk " et le surplus transporté à Montréal par " l'Alfred."

Que le 11 de Sept. 1880, à l'arrivée de ces vaisseaux à Montréal leurs cargaisons ont été transportées, pour le compte et sur l'ordre de Crane et Baird, savoir 15,500 boisseaux à bord du " Canadian " et 1,000 boisseaux sur le " Dalton," en partance pour l'Europe, faisant un montant équivalent à la cargaison du " Falmouth " mise à bord du " Mohawk."

Que le 14 Sept. 1880, Crane et Baird ont endossé le connaissement en faveur de Beddall & Co., pour 15,500 boisseaux.

Que cet endossement, n'étant pas à l'adresse de la défenderesse et n'étant que pour une partie de la quantité contenue dans le connaissement, était invalide, et ne donnait aucun droit à Beddall & Co. sur la cargaison.

Que ce n'est que le 14 de Sept. seulement et après la livraison de toute la cargaison du " Falmouth," aux propriétaire de celle-ci, à Montréal que Crane & Baird et Beddall & Co., ont endossé illégalement et livré le connaissement à la demanderesse, qui connaissait le fait de la livraison antérieure de la cargaison et n'a pas avancé la somme de $16,275.

Que la défenderesse n'a jamais eu avis ni connaissance du transport du connaissement que par le protêt notarié qui leur a été signifié plus d'un mois après la livraison du grain.

Et que la demanderesse ayant été coupable de négligence grossière en n'aver-

tissant pas la défenderesse, après connaissance de l'arrivée du blé à Montréal, doit seule souffrir de cette négligence.

Que le 14 septembre, Crane & Baird avaient donné à Beddall & Co. pour les mêmes 15,500 boisseaux de blé, un ordre daté du 11 de septembre, adressé à la défenderesse, de les livrer à Beddall & Co., et que de fait il y en eut 15,486 boisseaux livrés à bord du "Peppina" et du "Sarah."

Que ces livraisons ont eu lieu sans remise du connaissement original du "Falmouth" ni d'aucun autre, celui du "Willie-Keeler" n'ayant été remis à la défenderesse que plus tard par Crane & Baird.

Que de fait la demanderesse connaissait la livraison du grain à Beddall & Co., et qu'elle avait autorisé ceux-ci à l'expédier en Europe par le "Peppina" et le "Sarah," et que Beddall & Co. avaient substitué les connaissements du "Peppina" et du "Willie-Keeler," que la demanderesse les avait acceptés ainsi que des lettres de change tirées sur la maison de R. H. Hall, de Cork, pour la valeur du blé et qui ont été payées à leur échéance sans que la demanderesse eût faite de nouvelles avances sur la garantie du blé, et que la demanderesse n'a souffert aucun dommage.

La demanderesse répond spécialement à l'exception de la défenderesse, qu'elle n'a pas eu connaissance de la livraison du blé le 11 Sept., et que le 26 de Sept., sur demande spéciale faite à Beddall & Co., il lui a été répondu que le blé n'était pas encore arrivé.

Que la demanderesse a acheté d'un nommé Meeker diverses lettres de change tirées par Beddall & Co. sur la maison R. H. Hall, et que pour sureté de l'acceptation de ces lettres de change Meeker lui a transporté diverses connaissements relatifs à diverses quantités de blés expediées en Europe par le "Peppina" et le "Sarah," mais que cela n'avait rien à faire avec le connaissement du "Falmouth."

Il y a certainement dans la transaction qui nous occupe une irrégularité considérable et un sansouciance de la loi, qui n'est guères pardonnable à des hommes d'affaires comme ceux qui ont été appelés à y prendre part. Les usages du commerce et les facilités qu'il doit avoir sont prévues par la loi et sont réglées aussi dans l'intérêt même de sa sureté.

Le connaissement est un acte commercial, son but, ses effets, ses garanties intéressent les commerçants, et ils sont obligés de connaître et de suivre les lois du commerce qui ont été faites sur leurs usages et pour leur commodité et leur sureté, tout comme les autres membres de la société sont tenus de suivre la loi.

Ici nous avons un connaissement fait pour une cargaison de blé par Reynolds Brothers qui sont désignés comme chargeurs et expéditeurs pour le compte et aux risques de qui il appartiendra, livrable au port de destination, qui est Kingston, suivant l'adresse en marge ou à son nom, ou ses cessionnaires ou consignataires sur paiement du fret et autres charges.

Et nous trouvons en marge: "Order Reynolds Bros., notify Crane & Baird, Montreal, P.Q."

"Care St. Lawrence and Chicago Forwarding Company at Portsmouth "Harbor near Kingston, Lake Ontario."

D'après ce connaissement la cargaison doit être livrée à Portsmouth à l'ordre

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de Reynolds Brothers et au soin de la Cie. défenderesse, et avis doit être donné à Crane & Baird à Montréal.

Il n'y a rien là qui nous dise que le port de destination est réellement Montréal, ni que Crane & Baird soient les consignataires ou propriétaires, puisque la livraison doit se faire à l'ordre de Reynolds Bros.

Le connaissement doit énoncer le lieu où la cargaison doit être délivrée, avec le taux et le mode de paiement du fret ; le taux ou fret est de 6c par boisseau, à Kingston.

Régulièrement l'effet légal de ce connaissement se terminerait à Kingston. Il n'est pas question de fret pour aucun autre lieu ni que la cargaison doive aller plus loin. Le maître du "Falmouth" se trouve donc avoir rempli son contrat en notifiant Crane & Baird à Montréal et en livrant la cargaison au soin de la Compagnie défenderesse à Portsmouth près Kingston ; or il est prouvé qu'il a fait tout cela.

La Compagnie défenderesse reconnait, dans son plaidoyer avoir reçu la cargaison à Portsmouth et en avoir donné un reçu au maître du "Falmouth," sur le double du connaissement entre les mains de celui-ci.

La route couverte par ce connaissement étant parcourue par la cargaison, on aurait du faire un autre connaissement, si l'on voulait faire transporter la marchandise jusqu'à Montréal. On ne l'a pas fait. La marchandise s'est rendue à Montréal et elle a été livrée à Beddall & Co., sur l'ordre de Crane & Baird, sans la production ni de l'original, ni du double du connaissement, ni à Kingston ou Portsmouth, ni à Montréal.

Que s'est-il donc passé à Portsmouth ou Kingston, est-ce un nouveau contrat distinct et indépendant ou la continuation du premier ?

La demanderesse prétend que le premier a été continué. La défenderesse au contraire prétend dans son plaidoyer qu'il s'en est fait un autre indépendant du 1er avec Crane & Baird à Montréal, écrit sur l'exemplaire du connaissement, entre les mains du maître du Schooner "Falmouth."

La preuve porte très peu sur ce qui s'est passé à Kingston ou Portsmouth.

La défenderesse dit, dans son plaidoyer, qu'en arrivant à Portsmouth, le 6 de Septembre, 1880, la cargaison a été transbordée, sans délai, à bord du "Mohawk," avec une autre cargaison, aussi consignée à Crane & Baird, arrivée au même lieu en même temps.

La défenderesse, en réponse au 7e interrogatoire, admet que Becker le maître du Schooner, à exhibé le connaissement en sa possession, à l'agent de la défenderesse qui a signé un reçu pour la défenderesse. Cet agent Macfarlane, dans son témoignage dit n'avoir eu aucun autre autorisation ou instruction, que ce connaissement, pour transmettre la cargaison à Montréal et, tout en disant que son reçu mettait fin à la transaction, il dit avoir, le jour même, 6 septembre 1880, notifié Crane & Baird (suivant le connaissement puisqu'il n'avait pas d'autre autorisation), et il leur a envoyé le compte du fret qu'il avait acquitté et il a tiré sur eux, le même jour, pour le montant du prix du fret jusqu'à Kingston.

Nous voyons aussi dans la déposition de Dugald Macphie, le gérant de la Compagnie défenderesse, à Montréal, que la défenderesse a pris une copie du

connaissement en question, mais pour son propre usage et non pour le remettre à des tiers. Il dit encore que les autres actionnaires de la Compagnie défenderesse paraissent vouloir le tenir responsable de ce qu'il a livré la cargaison à Montréal sans qu'on lui ait remis le connaissement. N'est-ce pas là une indication suffisante que la Compagnie défenderesse comprenait, comme la demanderesse, qu'elle agissait, non pas en vertu d'un contrat séparé et distinct, mais en vertu d'un contrat tacite ou verbal qui n'était que la continuation du contrat apparaissant au connaissement? Une autre indice, que ce n'est que la continuation du même contrat, c'est que la Compagnie n'a pas prouvé son allégation, qu'un autre contrat distinct a été fait avec Crane & Baird, dans Montréal.

De fait, le gérant de la défenderesse reconnait avoir été deçu, par un ordre de Crane & Baird, présenté par Beddall & Co., et sur lequel il a livré la cargaison sans avoir le connaissement, et par conséquent dans l'ignorance d'un autre ordre de Crane & Baird écrit sur le connaissement.

L'endossement de Crane & Baird n'est pas adressé à la défenderesse, nommément, mais à D. Macphie, sans mention que celui-ci soit l'agent ou gérant de la défenderesse.

L'endossement [illegible] Reynolds, celui de Crane & Baird et celui de Beddall & Co. sont sans [illegible]

La banque de son côté a été longtemps sans se présenter au bureau de la défenderesse pour avoir livraison de la cargaison.

On voit que les deux parties, et leurs agents, ont fait l'affaire avec un relâchement vraiment propre à conduire au procès, et chacun de ceux qui ont mis la main à cette transaction a bien contribué, pour sa part, à ce litige.

La demanderesse doit donc avoir jugement pour $16,275, valeur admise du blé, avec intérêt du jour d'assignation avec dépens, excepté ceux d'enquête, chaque partie payant ses frais d'enquête, et sur paiement des charges suivant le connaissement.

Quant à la question de l'endossement pour une partie seulement de la cargaison, elle ne me parait pas souffrir difficulté du moment que la demanderesse offrait comme elle l'a fait dans la présente instance de remettre le connaissement sur livraison de la partie de la cargaison qui lui était transportée.

Judgment for plaintiff.

Abbott & Co., for plaintiff.
Strachan Bethune, Q.C., counsel.
Girouard & Wurtele, for defendant.
(S. B.)

COURT OF QUEEN'S BENCH, 1879.

MONTREAL, 22ND DECEMBER, 1879.

Coram HON. SIR A. A. DORION, C. J., MONK, RAMSAY, TESSIER, and CROSS, JJ.

Ex parte *Narbonne*, Petitioner for writ of *habeas corpus*, and for writ of *certiorari*.

Where a prisoner has been committed by a magistrate for trial, the Court of Queen's Bench sitting in appeal will not order a writ of *certiorari* to issue, to bring up the preliminary examination, in order to see whether the committing magistrate had sufficient evidence before him to commit, even where it is alleged that the magistrate had no jurisdiction, the depositions taken before him showing that the offence was committed in a foreign country.

A petition was presented on behalf of the prisoner "pour qu'il émane un bref d'*Habeas Corpus*, pour amener devant cette Cour la personne du dit requérant, en même temps qu'un bref de *certiorari* comme auxiliaire au dit bref d'*Habeas Corpus*, adressé le dit bref de certiorari à Calixte Aimé Dugas, Ecr., magistrat de police, lui enjoignant d'apporter et produire devant cette Cour tous les papiers et documents de cette dite cause formant le dossier d'icelle, établissant la prétendue offense contre le dit requérant, la dite production devant être faite devant cette Cour en même temps que le retour du dit bref d'*Habeas Corpus*, et que, sur le tout, le dit mandat d'emprisonnement ou *Committitur* soit déclaré irrégulier, illégal, nul et de nul effet, et mis en néant, et que le requérant soit libéré et remis en liberté."

MONK, J. (*diss.*) An application has been made on behalf of one Narbonne, committed for trial at the next term of the Criminal Court. He was charged with inciting certain individuals, residing in New York, to the commission of a felony, viz., the forgery of a quantity of Canadian postage stamps. Being committed on this charge, he applies to the Court here for a writ of *habeas corpus*, with a view to obtain his liberation, and he also makes application for a writ of *certiorari*, to bring up the depositions taken before the magistrate. He represents in his petition that the proof shows that the offence was committed in the United States, and therefore he is not subject to the jurisdiction of the Court here. The ground, therefore, of this application on the part of Narbonne to be liberated is that the offence alleged to have been committed was not committed in Lower Canada or in the District of Montreal, but as a matter of fact was committed in New York. The petitioner goes further, and says that the depositions taken before the magistrate establish this fact, and for the purpose of bringing up these depositions, to show that he has been committed for trial for an offence committed in a foreign State, he applies for a certiorari. The only question to be considered now is whether this Court has a right to issue a certiorari with that view. It has been contended on the part of the Crown that this Court has no such right; that once a man has been committed for trial by a magistrate, this Court has no right to issue a certiorari to bring up depositions, with a writ of *habeas corpus*, to determine whether the commitment is well founded. The majority of the Court are of opinion that in the particular case before it a writ of certiorari cannot be granted. I am of an entirely different opinion. There is something doubtful

in the terms of the commitment, and I consider it not only the right but the duty of the Court to order a certiorari, to see whether the prisoner has been committed for an offence committed in a foreign country. It is a matter of considerable importance that a man should not be detained five or six months in jail for an offence committed in a foreign State. The practice sanctions the proceeding. Mr. Justice Aylwin ordered the papers to be brought up in a case, for the purpose of ascertaining whether it was an offence under the Mutiny Act. Hurd, on Habeas Corpus, lays down the general principle, and the same doctrine is to be found in Chitty. It is said it could only be done in extradition cases, but I consider that the same permission should be granted here, and that the proceeding is one which results from the necessity of the case.

RAMSAY, J. We are asked to grant a writ of *habeas corpus* for the purpose of setting the prisoner at liberty, he being now detained in gaol on a sufficient warrant. We are asked also to issue a writ of *certiorari* to bring up the preliminary examination, in order that we may look at the depositions, for the purpose of assuring ourselves that the committing magistrate had sufficient evidence before him to commit. It is perfectly evident that if we were to accede to such a request, we should be not only introducing a novel practice, but we should be establishing a precedent of a most inconvenient character. We should be converting this court into a court of appeals from the decisions of justices, under the Act respecting the duties of justices out of session, in relation to persons charged with indictable offences. We have put it to the learned counsel for the petitioner to produce any authority in support of his application, and he appears to have utterly failed to find anything of the sort. The whole proceedings are so familiar that it seems somewhat strange that we should have had to entertain the proposition. They will be found described in 1 Chitty, p. 128. The only cases where I have ever heard of the judges looking, on *habeas corpus*, at the evidence, for the purpose of enlarging a prisoner, are these of extradition. But that is a very special jurisdiction; the commitment is not for trial, but for removal out of the jurisdiction of the Court and out of the protection of the laws of England. There is, therefore, room for a distinction, although personally I am of opinion that it was a very unwise one to make. However, the law has now made a kind of provision for this sort of examination, and the result has been—as might have been expected—we have had the most incongruous proceedings. We have had one judge of this court reviewing, on *habeas corpus*, the commitment of another, to see whether the latter had jurisdiction, and a judge of the Superior Court performing a similar operation. Perhaps this is not the necessary result of the law as it stands, but it is a good illustration of the danger of courts allowing themselves to be wheedled into novel practices by abstract arguments.

What the law wills is this, that if a justice is convinced that an offence within the limits of his jurisdiction has been committed, he may, by a lawful warrant, hold the accused, either by bail or imprisonment, to stand his trial.

Petition rejected.

Mousseau, Q.C., for the Crown.

F. X. Archambault, for the prisoner.

(J.K.)

SUPERIOR COURT, 1881.

MONTREAL, 31ST DECEMBER, 1881.

Coram RAINVILLE, J.

No. 2584.

Low vs. *The Montreal Telegraph Company* et al., and *Renfrew* et al., Intervening Parties.

HELD:—That the agreement executed between the defendants had the effect of transferring during 97 years all the property, business, rights and franchises of the Montreal Telegraph Company to the great North Western Telegraph Company, and was, consequently, *ultra vires*, null and void.

PER CURIAM:—Le demandeur se plaint de la Compagnie de Télégraphe de Montréal et de la Compagnie The Great North Western Telegraph Company of Canada.

Et par sa déclaration il allègue l'acte d'incorporation de la Compagnie de Télégraphe de Montréal (10 et 11 Vict. ch. 84); que par la clause 6 de cet acte les affaires de la Compagnie devraient être administrées par un bureau de direction composé de cinq membres: que les directeurs devaient fixer les taux de transmission des messages, déclarer les dividendes, faire des règlements, nommer les officiers et employés, &c.

Que par un Statut subséquent (18 Vict. ch. 207) les droits de la dite Compagnie ont été augmentés et son capital porté à deux millions. Que le 17 août dernier (1881) la dite Compagnie faisait des affaires très profitables et avait un actif valant trois millions:

Que la dite Compagnie n'a pas le droit de transporter ses propriétés et ses revenus de manière à se priver du droit et de l'obligation d'exercer les privilèges qui lui ont été conférés par la loi; que nonobstant cela, la dite Compagnie par un acte d'arrangement passé le 17 août 1881, a illégalement transporté pour l'espace de 97 ans à l'autre défendeur (The Great North Western Co.) toutes les lignes télégraphiques, bureaux, instruments, appareils, etc., pour à l'avenir la dite Compagnie North Western faire fonctionner les dites lignes, le dit abandon et cession étant faits pour le prix de $165,000.

Et que la dite Compagnie Great North Western est maintenant en possession de toute lignes, etc., de la Compagnie de Montréal; que le dit acte est *ultra vires* et un abandon des franchises, accordées à la dite Compagnie de Télégraphe de Montréal, et met en péril l'existence de sa charte.

Le demandeur allègue qu'il est propriétaire de 51 parts dans le fonds social de la dite Compagnie de Télégraphe de Montréal, et qu'il l'est depuis le 10 juin dernier (1881), et il conclut à ce que le dit acte soit déclaré *ultra vires* et cassé et annulé; qu'ordre soit donné à la dite Compagnie de Télégraphe de Montréal de reprendre possession de ses lignes et de les faire fonctionner.

Qu'ordre soit donné à la Compagnie "The Great North Western" de cesser de faire fonctionner ces lignes et d'en livrer la possession à l'autre défendeur. Et enfin qu'elle soit condamnée à rendre compte des deniers et revenus qu'elle a perçus des dites lignes.

A cette action la défenderesse, la Compagnie de Télégraphe de Montréal a plaidé :

1o. Par une défense en droit.

2o. Par deux exceptions.

Par sa défense en droit la défenderesse prétendait que l'action devait être renvoyée 1o. parceque tous les actionnaires n'étaient pas en cause et, 2o. parceque l'action ne pouvait être intentée qu'au nom du Procureur-Général.

J'ai eu à adjuger sur cette défense en droit, je l'ai renvoyée et je n'ai rien vu ni entendu depuis qui a pu me faire changer d'opinion. Aux autorités que j'ai citées en rendant jugement, j'ajouterai les suivantes.

"A Court of Equity has jurisdiction at the instance of stockholders in a cor-"poration, to restrain the corporation and those who have control and manage-"ment thereof from acts tending to the destruction of its franchises, from viola-"tion of its charter, from misuse of the corporate powers or property."

2 Abbott's Dig. Vo. Stockholders No. 39.

"A stockholder in a corporation has a remedy in chancery against the direc-"tors to prevent them from doing acts which would amount to a violation of the "charter."

1 Abbott's Dig. Vo. Stockholders No. 86, p. 777.

Et M. le juge Ramsay dans la cause de Molson contre la Cité de Montréal disait : "Art. 997 of the C. C. P. only lays down a rule of duty for the Attor-"ney-General, but in no way affects the common law right of each individual to "protect himself by action against the wrong doing of a corporation."

Par sa première exception la défenderesse plaide les moyens invoqués dans sa défense en droit, savoir que le demandeur ne représente pas les autres actionnaires et n'a pas qualité pour porter l'action.

Après la décision rendue sur la défense en droit, ces moyens tombent d'eux-mêmes.

Par sa seconde exception la défenderesse allègue : qu'au nombre des pouvoirs à elle accordée par sa charte et ses amendements sont les suivants : qu'elle aura le droit, en loi, d'acheter avoir et posséder tous biens immobiliers, mobiliers ou mixtes, pour son usage, et de les louer, transporter ou autrement en disposer pour l'avantage et pour le compte de la dite Compagnie, de temps à autre, ainsi qu'elle le jugera nécessaire ou convenable ; Qu'en vertu des pouvoirs à elle ainsi conférés, la dite défenderesse a construit et acquis une grande étendue de lignes télégraphiques, et qu'à la date de l'arrangement en question elle faisait fonctionner ses lignes et avait au-delà de 1000 employés. Que durant les dix dernières années la Compagnie Dominion a établi une ligne rivale et qu'il était devenu impossible pour la défenderesse de faire fonctionner ses lignes avec un profit raisonnable ; Qu'en vue de cet état de choses les directeurs de la Compagnie défenderesse ont avisé aux moyens de réduire les dépenses et ont proposé de louer leurs lignes à l'autre défenderesse moyennant un loyer fixe, que cet arrangement a été ratifié par les actionnaires de la Compagnie Montreal Telegraph Co. réunis en assemblée spéciale tenue le 17 août 1881, par un vote de 23204 contre 1831. Qu'en exécution de la résolution passée à la dite assemblée, le dit arrangement a été exécuté. Que cependant, le fonctionnement des dites lignes

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télégraphiques a été continué par la dite Compagnie Montreal Telegraph et ses directeurs par et au moyen de l'autre Compagnie défenderesse sous le contrôle et surintendance de la Compagnie Montreal Telegraph et de son bureau de direction, et que dans l'exercise des pouvoirs à eux conférés par la dite charte le bureau de direction de la Compagnie Montreal Telegraph a élevé, depuis le dit arrangement le tarif pour la transmission des dépêches, que le dit arrangement a eu l'effet de faire cesser l'opposition de la Compagnie Dominion comme la défenderesse le prévoyait, qu'en un mot elle n'a pas agi *ultra vires*.

L'autre défenderesse "The Great North Western Telegraph Co." a plaidé les mêmes moyens *mutatis mutandis*.

Dans le cours de l'instruction Messrs. Renfrew, Gilmour & Crawford intervinrent et allèguent que le demandeur n'est pas propriétaire *bona fide* des parts ou actions mentionnées dans son action, qu'il n'est qu'un prête nom.

Le même jour la défenderesse la Compagnie du Télégraphe de Montréal après permission obtenue, a produit un plaidoyer amendé dans lequel elle invoque les moyens additionnels invoqués dans l'intervention.

Le demandeur a contesté l'intervention notifiant les intervenants, du fait que la défenderesse avait invoqués ces moyens, en sorte que la contestation sur l'intervention n'est plus qu'une question de frais, en autant que le mérite de ces moyens est jugé sur la contestation principale.

La preuve établit que le 17 août 1881 le demandeur était propriétaire d'une action dans le fonds social de la Compagnie Montreal Telegraph, et ce depuis le 10 juin précédent, et que le dit jour 17 août il a acquis 50 autres actions; qu'il a agit dans la cause de concert avec d'autres actionnaires qui ont avancé des deniers pour les frais; qu'il agira plus ou moins suivant leurs désirs, et il admet même que si ceux avec lesquels il agit lui intimaient leur désir qu'il discontinue l'action, il le ferait.

Pour décider cette cause il faut examiner quels sont les droits et les pouvoirs de la défenderesse Montreal Telegraph Co. et quelles sont ses obligations.

Le grand principe qui régit cette cause est bien connu, il est laconiquement mais lucidement consigné dans l'article 358 de notre Code Civil: "Les droits qu'une "corporation peut exercer sont, outre ceux qui lui sont spécialement conférés "par son titre ou par les lois générales applicables à l'espèce, tous ceux qui lui "sont nécessaires pour atteindre le but de sa destination."

Quels sont les droits et les pouvoirs de la Compagnie de Télégraphe de Montréal? Elle a le droit par sa charte et ses amendements de construire des lignes télégraphiques, de placer des poteaux, etc., selon l'accroissement des affaires.

"Et la dite Compagnie sera habile en loi à acheter, avoir et posséder tous "biens immobiliers, mobiliers ou mixtes pour son usage, et de les *louer*, trans-"porter, ou autrement en disposer pour son avantage et pour son compte."

La section 1 de l'acte d'amendement (18 Vict. ch. 207) s'exprime dans les termes suivants: "il sera loisible à la dite Compagnie et elle aura le pouvoir "d'acheter, recevoir, tenir et posséder en cette province pour elle et ses succes-"seurs, pour l'usage de la Compagnie les immeubles seulement, qui à part ceux "qu'elle possède déjà, seront nécessaires pour la transaction des affaires de la Com-"pagnie, pour la construction des bâtisses pour le service de ses stations, actuelle-

" ment ou ci-après érigées, et pour l'établissement de lignes ou embranchements " d'icelles et la meilleure administration de la dite Compagnie, et de *les donner, " à bail*, transporter ou aliéner pour le profit et avantage de la Compagnie " quand et selon qu'elle le jugera à propos."

Le principe général que nous avons posé quant aux pouvoirs des corporations est clairement établi par tous les auteurs et les règles en sont tracées dans Brice, Ultra Vires, p. 66 et 67, et dans la règle 5e il dit : " Corporations have no capacities or powers other than those indicated in the four previous propositions, and they cannot legally or validly engage in other transactions.

Il pose ensuite comme règle 10e : " *Franchises and special privileges or powers* " in the nature of *franchises* cannot be delegated." Et en note il ajoute : This " is established beyond dispute. Every capacity of a corporation which can be " styled 'special' or a privilege is given to it for itself, for its own purposes " and to be used by itself directly. Any transfer, direct or indirect, to others " is altogether void."

Et il pose comme règle 13e que : " Any one corporator may call upon the " Courts to restrain the corporation from engaging in any ultra vires transac- " tion." Et en note il ajoute : " This is quite clear whether the transaction " be executed or executory."

En quoi consiste les *franchises*, les privilèges d'une corporation ? Dans les droits exclusifs qui lui sont accordés ; son existence même est une franchise, mais ses droits exclusifs qui lui sont accordés sont aussi des *franchises*.

Et il est de principe que les corporations ne peuvent pas déléguer et transporter à d'autres leurs pouvoirs particuliers et leurs privilèges.

Such a transfer, dit Brice, whether permanently and absolutely, or only for a definite period, is, it has been repeatedly decided, in the absence of statutable powers, illegal.

Brice, p. 521.

Il n'y a guère de difficulté sur le principe : il n'y en a que sur l'application de ce principe aux diverses transactions qu'il plait aux parties de faire.

Examinons donc l'acte passé entre les deux Compagnies.

Par cet acte la Compagnie " The Great North Western " appelée " Contractors," s'engage pour l'espace de 97 ans : " to work, manage and operate the system of telegraph, owned and heretofore operated by the Montreal Telegraph Co. appelée " The Company," et de maintenir les lignes en bon état.

Les contracteurs auront le droit d'user et d'occuper tous les bureaux, stations, bâtisses et propriétés de la Compagnie, à l'exception de la chambre des directeurs, et de la chambre adjacente du secrétaire et d'une partie des voutes : et les contracteurs auront le droit de sous-louer telles parties des bâtisses de la Compagnie qui ne seront pas nécessaires au fonctionnement de ses affaires. Mais la Compagnie aura le droit de vendre ou autrement disposer des bâtisses situées à Montréal et à Ottawa qui ne servent pas aux affaires de la Compagnie. Les dits contracteurs doivent collecter les montants perçus pour messages et autres revenus au nom de la Compagnie.

Il est de plus convenu par cet arrangement que les contracteurs pourront faire fixer le taux des messages suivants, cependant certaines restrictions. Les contrac-

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teurs s'obligent de payer, à même les revenus, à la Compagnie la somme de $165,000.00 payable par quartier. Les contracteurs s'obligent de payer tous les frais d'exploitation, taxes, etc. Les contracteurs s'obligent de remplir tous les contrats auxquels la Compagnie était tenue.

A défaut de payement dans un certain délai, l'arrangement prend fin *ipso facto*; et la Compagnie reprend possession de ses lignes, etc., avec toutes les additions et améliorations, ce qui a lieu aussi lorsque l'arrangement prendra fin.

La Compagnie Western Union est intervenue comme caution.

Quelle est donc la nature de cet arrangement? Est-ce bail à loyer? Est-ce un bail d'ouvrage ou ce qu'on appelle dans les ouvrages Anglais et Américains, "Working or traffic arrangement?"

Y a-t-il abandon ou cession de privilèges de franchises?

Remarquons d'abord que les contracteurs doivent payer $165,000.00 à tout événement quand même ils ne recevraient pas un seul sou. C'est pour le moins un singulier louage d'ouvrages! Ce sont les contracteurs, les engagés qui payent, et c'est le maître qui reçoit. C'est un singulier working arrangement où l'une des parties peut prendre la part du lion!

Et l'on a dit à l'argument que les contracteurs n'étaient que les mandataires, les agents de la Compagnie! Mais il est de principe que le mandant peut en tout temps revoquer les pouvoirs de son mandataire, il s'exposera à une action en dommages si l'on veut, mais là n'est pas la question. C'est son droit strict.

C. C. B. C. Art. 1756. "Le mandant, dit cet article, peut en tout temps "revoquer son mandat." Sa volonté seule peut mettre fin au mandat.

Mais ici la Compagnie peut-elle mettre fin à son arrangement avant le temps fixé, même en payant des dommages?

Evidemment non, et la Compagnie l'a si bien compris qu'elle a stipulé la résolution *ipso facto* de l'arrangement dans le cas où les contracteurs failliraient de payer dans un certain délai. Et si la compagnie s'avisait, de sa propre autorité hors le cas prévu, de s'emparer des lignes, etc., qu'elle a cédées à la Great North Western, celle-ci trouverait facilement les moyens de l'en empêcher.

Un grand nombre d'autorités, et un nombre aussi grand de décisions, ont été citées de part et d'autre sur la question de l'interprétation à donner aux arrangements de la nature de celui en question en cette cause. J'ai lu avec autant d'attention que possible la plupart des décisions qui ont été citées, et dans toutes les causes, tout se reduit à savoir, si une corporation a cédé ses pouvoirs, a abandonné quelques-unes de ses franchises. Par l'arrangement fait entre les parties en cette cause la Compagnie Montreal Telegraph a abandonné toutes ses lignes, toutes ses stations, toutes ses propriétés, employées pour la transaction de ses affaires et l'opération de ses lignes, ne s'est réservée aucun contrôle sur l'autre Compagnie cessionnaire; laquelle a droit de construire des lignes nouvelles, de réparer les anciennes, de collecter charges, pour transmission des messages, d'en faire fixer le montant, et ce, durant l'espace de 97 ans; la Compagnie du Télégraphe de Montréal n'a plus même le droit par l'entremise de ses directeurs aux désirs de sa charte, de fixer d'une manière absolue et sans restriction les charges ou droits à être perçus pour la transmission des messages, ils ne peuvent plus aux désirs de la même charte, déclarer des dividendes sur la propor-

tion des profits, et ils ne peuvent pas non plus faire un état détaillé des affaires, profits et pertes, de la dite Compagnie, et pour me servir des expressions du Vice Chancelier Turner, dans la cause de Great Northern Railway contre Eastern Counties Railway, rapportée au 21 Law J. Chancery, page 837 je dirai "It is impossible to read the agreement between the plaintiffs and the "East Anglican Railway Company (in the present case between the Montreal "Telegraph Co. and the Great North Western), without being satisfied that it "amounts to an entire delegation to the plaintiffs (defendant) of all the powers "conferred by the charter;" et appréciant des conventions de même nature, le juge Wells, dans une cause rapportée au 115e vol. Mass. Rep. page 351, dit: "They are not merely contracts by which another party is employed to operate "the road in behalf and under the direction and control of the corporation "owning the franchise, receiving a share of the profits as compensation. The entire "control of the road with all its franchises is transferred, the corporation owning "it receiving in return only a fixed rent payable in the form of a dividend to "its stockholders." Et le juge Miller dans la cause de Thomas contre Railroad Company, rapportée au vol. 101 U. S. Rep. page 82 et 83, après avoir rapporté les opinions des juges anglais, et les différentes décisions rendues par les Cours en Angleterre, ajoute: "The true principle is that where a corporation, like a "railroad company, has granted to it by charter a franchise intended in large "measure to be exercised for the public good, the due performance of those "functions being the consideration of the public grant, any contract which disables "the corporation from performing those functions, which undertakes, without "the consent of the State to transfer to others the rights and powers conferred "by the charter, and to relieve the grantees of the burden which it imposes, is a "violation of the contract with the State, and is void as against public policy. "This doctrine is asserted with remarkable clearness in the opinion of this "Court, by Mr. Justice Campbell, in the Maryland Line Railway & Winans, "17 How., p. 30."

Pour présumer mon opinion sur ce point, je crois qu'en principe, une corporation a le droit de faire tout arrangement, soit pour diviser des profits, soit pour le fonctionnement de ses affaires, mais de manière à ne jamais perdre le contrôle de ses droits et privilèges, ni à céder ou renoncer à aucune de ses franchises.

On a invoqué la clause de la charte de la Compagnie du Télégraphe de Montréal tant dans l'acte originaire 10 et 11 Vict., ch. 82, que dans l'acte 18 Vict., ch. 207. Cette clause semblerait donner à la dite Compagnie, le droit de faire un bail et de louer, transporter ou autrement disposer de tous ses biens immobiliers, mobiliers ou mixtes, mais évidemment cette clause n'a pas été faite et ne peut pas avoir pour effet de donner droit à la dite Compagnie de déléguer ses privilèges et ses franchises; car en effet elle ne peut louer ou aliéner ses biens que pour son profit et avantage, mais cela s'entend, des biens dont elle n'aurait plus besoin pour le fonctionnement de ses affaires et non pas un louage ou aliénation faite de manière à lui enlever pour ainsi dire son existence comme corporation; car à l'état où s'est réduite la corporation, elle a presque cessé d'avoir une existence morale, elle n'est plus pour ainsi dire qu'une ombre.

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Et comme dit le chancelier Zabriskie, dont l'opinion est rapportée dans la cause de Copeland vs. The Citizens Gas Co., 61 Barber's Rep., p. 76 : "It "may be considered as settled that a corporation cannot lease or alien any "franchise or any property necessary to perform its obligations and duties to "the State, without legislative authority. The franchises granted by the "State are often parts of the sovereign power delegated to a subject, and always "privileges to which other citizens are not entitled. In these grants, the State "is supposed to regard the character of the grantee. In this case the franchise "of maintaining a canal and railroads across public highways and navigable "rivers, *of taking tolls and rates of fare fixed by themselves, without control*, "are, with others, a material part of the property leased; these cannot be "leased or aliened without the consent of the State."

Et la Cour décida que le bail était nul et l'action régulièrement intentée par un actionnaire. Et dit Brice p. 128. "The corporation have the right to alien-"ate, but the alienation *must be in the ordinary course* and for the purposes of "the corporate operations." Et il pose comme principe que "a corporation of a "public nature may not so deal with its property as to incapacitate itself from "performing its public duties."

"And the rule applies to strictly private corporations in this sense that the "agreement is *ultra vires* if some of the corporators object."

Brice p. 130.

Je suis donc d'opinion que l'acte d'arrangement intervenu entre les parties est *ultra vires*, et doit en conséquence être annulé. Car ce n'est pas le nom que l'on donne à un acte qui doit en déterminer la nature, et plus on a pris de précautions pour en déguiser les effets, plus les tribunaux doivent scrupuleusement en chercher l'objet et en déterminer les conséquences. Et ceux qui ont redigé l'arrangement passé entre les parties en cette cause devaient avoir probablement sous les yeux l'arrangement mis en question dans la cause de Hinch *vs.* The Birkenhead, &c. Railway Co., 13 Eng. Law. & Eq. Rep. p. 506. On a eu soin d'éviter quelques clauses qui semblaient les plus sujettes à objection (on a laissé à la Great North Western le droit de collecter les charges au nom de la Compagnie du Télégraphe de Montréal).

Mais l'effet et les conséquences de l'arrangement sont les mêmes et le jugement doit être le même.

On a dit que c'était l'intérêt évident des actionnaires de la Compagnie que l'arrangement soit exécuté : c'est possible. Mais outre l'intérêt des actionnaires il y a celui du public. Et si le parlement avait voulu donner un monopole à cette compagnie, enrichir ses actionnaires aux dépens du public, il n'aurait pas accordé de charte à la Compagnie "Dominion" dont la concurrence a amené l'arrangement en question. D'ailleurs la Compagnie n'a pas tant à se plaindre, ses actionnaires ont eu comme bonus le ½ de leurs actions soit un demi million et de bons dividendes sur ce capital ainsi augmenté. Si le parlement a jugé à propos d'accorder une charte à une seconde Compagnie de Télégraphe, c'est donc qu'il croyait que la concurrence tournerait à l'avantage du public. Ce serait une étrange chose de croire que l'état aurait créé une seconde corporation pour leur permettre de se fondre dans une troisième.

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Aussi lors de la dernière session, la Compagnie a-t-elle tenté d'obtenir les pouvoirs qu'elle croyait nécessaire pour faire l'arrangement en question, et alors projeté probablement : elle croyait donc ne pas avoir ces pouvoirs. Le parlement les lui a refusés dont il croyait qu'elle ne les avait pas et que pour faire cet arrangement, c'est-à-dire louer ses lignes, etc., il les lui fallait.

Je ne puis pas donner de meilleur interprétation à la loi que celle que la Compagnie elle-même a donnée.

Il ne reste qu'une objection faite par la défense, c'est que le demandeur n'est qu'un prête-nom, un instrument entre les mains d'autres personnes, et qu'il est sans intérêt. D'abord il est prouvé que le demandeur est propriétaire d'une part ou action depuis le 10 juin 1881, et qu'il en a acquis 50 autres le 17 août, jour de l'arrangement.

Il est bien vrai que le demandeur a dit qu'il a agi de concert avec d'autres personnes (qui sont prouvées être des actionnaires de la Compagnie), mais seraient-elles étrangères que le demandeur en resterait pas moins actionnaire, et qu'il le soit d'une part ou de mille, quelle serait la différence ?

Est-ce qu'on mesure l'intérêt d'un actionnaire sur le montant de ses actions ? Son intérêt pécuniaire peut être moins considérable mais son intérêt légale est le même.

Il peut se faire que l'arrangement en question soit plus profitable, pécuniairement parlant, aux actionnaires, que la continuation de l'exploitation des lignes par la Compagnie, il peut se faire que les actions tombent sur le marché si l'arrangement est annulé. C'est l'opinion de Mr. Crawford qui est un fort actionnaire et qui a été entendu comme témoin. Mais il peut se faire aussi que ce soit le contraire. Il y a bien des boîtes à surprise dans toutes ces affaires. Mais qu'est-ce que tout cela peut avoir à faire avec l'intérêt légal du demandeur ? Il a un droit et il l'exerce. Quant à son intérêt pécuniaire il est juge de ses actions et personne n'a le droit d'y voir.

Si l'acte est illégal la majorité ne peut pas lier la minorité. C'est ce que j'ai décidé dans une cause contre la Banque Ville-Marie. Et si la minorité peut se plaindre pourquoi pas un seul actionnaire ? C'est ce que Lord Cranworth a décidé dans la cause Beman *vs.* Rufford, L. J. Equity vol. 20, p. 544. "Therefore it "is, that in this, as in many other cases, one shareholder may file a bill on behalf "of himself and others, although at a meeting of the Company a great many of "the shareholders, even the majority, may say that they have sanctioned a dif-"ferent course."

Lord Cranworth, V. C.

Judgment for plaintiff

McLaren & Leet, for plaintiff.
Strachan Bethune, Q.C., Counsel.
Abbott & Co., for defendants.
D. Girouard, Q.C., Counsel.
Doutre & Joseph, for intervening parties.
(S.B.)

COUR DU BANC DE LA REINE, 1881.

MONTREAL, 22 NOVEMBRE, 1881.

Coram Honorable Sir A. A. DORION, J. C., RAMSAY J., CROSS, J., BABY, J.

No. 139.

ANDREW F. GAULT et al., APPELANTS;

ET

LOUIS A. BERTRAND, INTIME.

Certains effets et marchandises dont le prix est réclamé en cette cause par les appelants, marchands à Montréal, furent vendus à l'intimé sur échantillons, à l'Ile-Verte, dans le district de Kamouraska, par le commis-voyageur des appelants; il fut prouvé que cette vente était sujette à l'approbation des appelants, mais qu'elle fut effectivement approuvée et ratifiée par eux et les effets et marchandises expédiés à l'intimé, à l'Ile-Verte.

Jugé, à l'unanimité du tribunal, en confirmation du jugement de la Cour de première instance (Papineau, J.), rapporté au 24 L. C. J. p. 9 et suivantes:

Que dans l'espèce, le droit d'action des appelants a pris naissance à l'Ile-Verte, dans le district de Kamouraska, et non pas à Montréal.

L. H. Davidson, pour les appelants:

Appellants, merchants doing business at Montreal, brought suit in the Superior Court there for the recovery of $197.88, as the price and value of goods sold and delivered to respondent, a trader domiciled at Ile-Verte, in the district of Kamouraska.

The sale was made in the manner now so common amongst business men, *i.e.*, through a commercial traveller, who visited defendant at Ile-Verte, and there took an order for the goods in question, which was forwarded by him to his principals, at Montreal, who accepting it thus, filled the order and shipped the goods to respondent, by the carriers chosen by him and according to his orders.

The respondent filed a declinatory exception, on the ground that he was illegally impleaded in the district of Montreal, and that the Court was without jurisdiction.

The case is important, not so much by reason of the *amount* as of the *principle* involved; the constantly recurring transactions of the same kind, and the uncertainty which has prevailed in legal circles, owing to contradictory decisions, as to the district within which suit could be brought in such cases.

The facts of the case lie in a small compass; the evidence is short, and by no means conflicting, except in one particular, viz., that of the place of delivery according to the contract. Appellants, by their answer to the exception, allege that their responsibility as to delivery ceased when they delivered the goods to the carrier named by respondent and addressed as he directed. Respondent has brought one witness who, in positive terms, asserts that it was agreed that the delivery should be made at Ile-Verte, and that the goods were to be "sent by the cars to Ile-Verte." But unfortunately for the veracity of this witness, the order given at the time is produced and the person taking it is examined; and from both it appears that the goods were not to be addressed to Ile-Verte or sent by cars, but were ordered to be sent by Richelieu Company to Quebec, care of G. Tanguay, and were so sent.

It is evident this point had been regarded as most important by respondent, and his witness was determined to carry it at all hazards.

It is, however, indisputably proved: 1st. That the order was taken by the traveller Deschamps, at Ile-Verte, in respondents' store; 2nd. That the terms of the order were written by Deschamps at the time and forwarded to appellants; 3rd. That the order required acceptance by the appellants at Montreal, before being complete; 4th. That no agreement to pay freight was made by Deschamps for appellants, and that the respondent, without doubt, paid it.

And appellants contend that under such circumstances they had a right to institute suit in the district of Montreal and require respondent to appear and answer there, although not served with the writ within that district.

The learned judge in the Court below seems to place his decision upon two considerations: 1st. That Deschamps was to be regarded as the authorized agent of appellants; and that, though the order might be subject to acceptance by appellants, yet their acceptance and ratification of it had a retroactive effect, and rendered the sale complete from the moment of the order being given at Ile-Verte; that respondent could have compelled appellants to make delivery or pay damages, and that therefore the *lien de droit* existed before delivery; 2nd. That, supposing appellants' consent to be only effectively given at Montreal, respondent's was given at Ile-Verte; and as the entire right of action arose in neither one nor other district, resort should be had to the domicile of the debtor, "*actor sequitur forum rei.*"

It is submitted that this argument is fallacious, and does not meet the provisions of Art. 34 C. C. P., which governs this case.

The agency of Deschamps was, as is well known in the commercial world, in the case of travellers, a most limited one; his powers simply were the taking of orders upon samples furnished him, for fulfillment at the business place of the firm; the acceptance or rejection of such orders lay with the *house.* This is *sworn* to by Deschamps and is, as is well known, the custom of trade. The limited nature of the agency exercised by such travellers must therefore be taken as within the knowledge of the person dealing with him; and the order given by the trader under such a custom and knowledge cannot be regarded in any sense as absolute or one which would entitle him to compel delivery; it only received its validity and effectiveness *when the house accepted* it, and agreed to the terms named in it, from that moment alone was there any contract. There could be no retroactivity, as manifestly neither party contemplated the completeness of the contract at the moment of ordering or prior to the acceptance; and the act of acceptance can hardly be characterized as a ratification; within the ordinary meaning of the term, it would imply an *unauthorized* act on the part of the agent. Here there was no *unauthorized* act; the agent did all he was entitled to do, as the trader well knew, and no more; he took his order and reported it to his principals, with whom *acceptance* or *rejection* lay. Prior to the action of the principal, there was in reality nothing but a *proposed contract;* the trader had in effect, through a representative of the principals *who himself had no power of completing* the sale, proposed to them a purchase of certain goods, on certain terms, and until acceptance of his proposal it was binding on neither one nor the other. There was *no right of action* on either side; this originated, when and at the place where the principals accepted the proposal

Gault et al. et Bertrand.

made them through their traveller. Then and then only did the trader obtain right of action to compel delivery, and become liable to the fulfillment of the implied promise to pay contained in the purchase or ordering of goods. And although a *lien de droit* for delivery of the goods or for damages might exist in favor of the purchaser, *after* acceptance of his order, the delivery or tender of delivery by shipment, in accordance with the order given, would be necessary to fix the *lien* on the part of the sellers, *and it is the right of action on the part of the seller* which is at issue in this cause.

Consent alone is necessary to the perfection of a sale (Art. 1472, C.C.), and this consensus, in cases such as that under consideration, can only exist and be legally given *on the acceptance*, by word or act, of the principal, and in this instance that happened in the district of Montreal.

But the second element of a sale, viz., the thing to be given, existed also in Montreal: the traveller did not carry with him the goods sold; they had to be shipped from Montreal, and this the debtor well knew and assented to. There can, too, be little doubt that payment of the price was also understood to be made at Montreal.

Whether, therefore, the present reading of our Code of Procedure, "right of action" be synonymous with the old form "cause of action" or not, or whether it must be held to mean as "cause of action" was interpreted to mean "the whole" right of action or not, is immaterial in this case: since it is submitted, there was no right of action on either hand *prior* to the acceptance of the order by appellants at Montreal.

Au soutien de leurs prétentions les appelants ont cité dans leur *factum* les causes suivantes:

Lapierre vs. Gauvreau, 17 L.C.J. 241.

Thompson et al. vs. Dessaint, 14 L.C.J. 185.

Joseph et vir vs. Paquet, 14 L.C.J. 186.

Prévost vs. Jackson, 3 Legal News, 136.

Gnaedinger vs. Vaillancourt, No. 1879, Cour de Révision, Montréal, non rapportée.

Clark vs. Ritchey, 9 L.C.J. 234.

J. G. D'Amour, pour l'intimé:

La seule question agitée en cette cause, découle de l'Art. 34 du C.P.C., c'est celle de savoir en quel lieu le droit d'action des appelants a pris naissance et par conséquent en quel district ils devaient assigner l'intimé.

Cet article comporte qu'en matières purement personnelles, sauf quelques exceptions qui y sont spécialement indiquées, le défendeur peut être assigné: 1o. devant le tribunal de son domicile; 2o. devant le tribunal du lieu où la demande lui est signifiée personnellement; 3o. devant le tribunal du lieu où le droit d'action a pris naissance.

Or, les appelants invoquent maintenant la troisième des conditions de l'article 34, et soutiennent que leur droit d'action en cette cause a pris naissance à Montréal; ils fondent cette prétention sur le fait qu'un "ordre" pour marchandises, reçu de l'intimé, à l'Ile-Verte, par leur commis-voyageur, a été

rempli à Montréal, où les marchandises en question ont été livrées à des voituriers publics, pour de là être transportées chez l'intimé, à l'Ile-Verte.

Ils allèguent aussi que lors de la vente en question, les marchandises dont il s'agit étaient à Montréal et non pas à l'Ile-Verte, et que le prix de vente devait être payé à Montréal et non pas à l'Ile-Verte.

Or, aucun de ces moyens ne vaut et ne saurait constituer le droit d'action prévu par l'article 34; car aucune de ces conditions, n'est de l'essence du contrat intervenu à l'Ile-Verte, dans le district de Kamouraska, entre l'intimé et le commis-voyageur des appelants, et toutes ces conditions ne sont en réalité que ces accessoires de ce contrat.

Et en effet, quelles sont donc les choses qui constituent la substance du contrat de vente?

Trois choses seulement sont de l'essence de la vente: la chose qui en fait l'objet, le prix convenu et le consentement des contractants. Or, dans le cas actuel il est établi au delà de tout doute que c'est à l'Ile-Verte, dans le district de Kamouraska et non à Montréal, qu'a eu lieu le concours de ces trois conditions qui constituent la vente. D'ailleurs cette vente était même parfaite par le seul consentement des parties, ainsi que l'enseigne l'Art. 1472 du C. C., bien que les marchandises en question ne fussent pas encore livrées.

Il est bien vrai que les appelants prétendent aussi que la vente dont il s'agit ne devait être complétée que par leur acceptation définitive, à Montréal, et par l'envoi des marchandises. Mais quoiqu'il en soit de cette prétention, ils ont de fait approuvé et ratifié cette vente, puisqu'ils ont expédié les marchandises et en réclament aujourd'hui le prix en justice; et l'intimé soutient que cette ratification de leur part a eu un effet rétroactif remontant à l'instant même de la vente, et il fonde cette prétention sur les autorités suivantes:

Rolland de Villargues, t. 7, Vo. Ratification, parag. 4, col. 2, Nos. 82 et 83.
Guyot, Rép. t. 14, Vo. Ratification, col. 2, p. 455.
Toullier, t. 8, Nos. 491 et 514, p. 716 C. Nap. art. 1338.
Demolombe, t. 29, pp. 626, 669 et 670.
Larombière, t. 4, commentaire sur l'art. 1338 du Code Nap. p. 591 et seq.
Ferrière, Dictionnaire de Droit, Vo. Ratification, col. 2, 2e al., p. 499.

Il est donc évident d'après ces autorités, que même en admettant que la vente dont il s'agit fût sujette à ratification, elle aurait encore eu, par le seul effet rétroactif de cette ratification son entière perfection à l'Ile-Verte, dans le district de Kamouraska: c'est donc dans ce dernier district et non à Montréal que le droit d'action des appelants a pris naissance et devait être exercé.

Mais en supposant pour les seules fins de l'argumentation, que la ratification en question n'aurait pas eu d'effet rétroactif, les appelants pouvaient-ils, même dans cette supposition toute gratuite, instituer la présente action à Montréal?

L'intimé soutient encore que non, parce que même dans ce cas, leur droit d'action n'ayant pas pris naissance entièrement dans le district de Montreal, la Cour Supérieure de ce district n'avait aucune juridiction sur l'intimé, qui, en conséquence, devait être assigné devant le tribunal de son domicile.

Or, il est bien constant, que dans le cas actuel, l'intimé n'a pas donné son consentement à la vente en question ailleurs qu'à l'Ile-Verte, dans le district de

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Kamouraska, ni promis ailleurs que dans ce dernier district, de payer le prix des marchandises dont il s'agit ; et dans la supposition même que les appelan's n'auraient accepté son "ordre" qu'à Montréal, leur droit d'action n'aurait pas pour cela pris naissance à Montréal : ils devaient donc assigner l'intimé devant le tribunal de son domicile, dans le district de Kamouraska.

Il est donc incontestable que lorsqu'une poursuite est faite dans un district judiciaire où le défendeur ne réside pas et où il n'a pas été assigné *personnellement*, il faut au moins pour qu'une telle assignation soit valable, que le droit d'action ait pris naissance dans ce district. Or, c'est tout le contraire qui a eu lieu dans le cas actuel et par conséquent l'intimé devait être assigné devant le tribunal de son domicile.

Et si l'on en juge par les décisions rendues dans les causes de Sénécal et Chenevert et The National Insurance Company et Paige, la jurisprudence de cette Honorable Cour ne paraît laisser aucun doute sur cette question.

J'appellerai aussi d'attention spéciale de la Cour sur la cause de Tourigny et The Ottawa Agricultural Insurance Company, rapportée au 3 Legal News, p. 196, laquelle a beaucoup d'analogie avec la présente cause.

J'ajouterai un dernier mot : c'est que le jugement soumis au tribunal, consacre une fois de plus les principes immuables sur lesquels reposent les décisions que je viens de citer ; et je suis bien aise de constater que le décret à intervenir, établira d'une manière définitive la jurisprudence sur cette importante question de juridiction depuis si longtemps controversée dans nos cours de première instance.

RAMSAY, J.—In this case, there is a preliminary plea to the jurisdiction. I don't think that any difficult question which may arise on article 34 C. C. P. comes up here, whatever interpretation we may give to the words "right of action" in that article.

The whole transaction, purchase and sale took place at Ile-Verte, out of the district of Montreal and at the domicile of the defendant, where he was served with process.

To bring the case within the exception of article 34, Mr. Davidson contended that the bargain of the agent did not bind as it was not complete without the consent of appellants, and that this consent was only given at Montreal, and that therefore the contract of sale took place at Montreal.

It appears to be of no importance whether Deschamps, a commercial traveller, had a *mandat* from appellants to sell or not. In fact, he did sell subject to ratification, and appellants ratified. The effect of that ratification was to make the sale at Ile-Verte complete, as though it had been completed at the time and place where the order was taken. This is of course a fiction of law, but it is recognized by our law, article 1085 C. C. I would therefore confirm this judgment.

Jugement confirmé.

L. H. Davidson, pour les appelants.
J. G. D'Amour, pour l'intimé.
(J. G. D.)

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OF THE

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COMPILED BY

STRACHAN BETHUNE, Q.C.

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" " :—Certain accounts having remained unpaid from a previous election, notwithstanding that efforts were made to have them settled, friends of the respondent informed him during the canvass that their non-payment would injure him, and that they ought to be paid. The respondent replied that he would do nothing about the accounts during the election, and requested his friends not to say anything about them of any kind; but he stated to his friends his intention to have all legitimate accounts paid after the election. Held:—That this was not an act of corruption within the meaning of the Act. (Hickson et al., petitioners, and Abbott, respondent, S. C.)..... 289

" " " :—During the respondent's absence in England, in September, 1878, and a few days before the nomination in that year, respondent's son gave a cheque for $150 to one Williamson, a prominent supporter of the respondent in the county, for the expenses of the election, Williamson promising to use it in a strictly legal manner. The respondent did not discover the expenditure till two months after the election was over, when he disapproved of it, and ordered the amount to be charged to his son. Williamson rendered a rough account to the son, by which it appeared that the disbursements made were legitimate; but he afterwards destroyed the rough draft, and never rendered any formal account. In the course of the next year, upon a settlement of accounts between the respondent and his son, he remitted the charge against his son. Held:—That these circumstances created no presumption that the disbursements of Williamson were illegal, and that they did not constitute an act of corruption by the respondent. (Do.)..... 289

" " " :—For some time before and during the canvass, the respondent advocated a change in the mail service between Lachute and Shrewsbury, in which the Postmaster at Shrewsbury was active, and correspondence took place between them, showing that he had done so. In consequence, the mail service between Lachute and Shrewsbury was improved, and the Postmaster at Shrewsbury got the contract from the Government for carrying the mails; but nothing occurred in the correspondence or discussions on the subject tending to show that the movement was intended to influence the election, and the Postmaster was an old and firm supporter of the respondent. Held:—That a candidate cannot be precluded from performing during an election any duty incidental to his position, in the interest of any part of his constituency, provided he does not attempt by such means unduly to influence votes; and that the circumstances did not constitute a corrupt act by the respondent. (Do.)..... 289

" " " :—One Conway, an agent of the respondent, represented to a large number of persons that it would be better for the country and for them, if the

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work on the Grenville Canal were let by tender, according to law, and not given to the existing contractors without tenders. That in that case they would have a better chance for obtaining work for themselves and their teams, and that the respondent would have more influence to cause the work to be done by tender than Dr. Christie, and would undoubtedly do so. And Conway declared that this argument exercised a considerable influence over a number of voters in respect of their votes. Held:—That these statements of Conway did not constitute an illegal inducement to vote for respondent. (Do.)..... 289

DOMINION ELECTION ACT OF 1874.—One Goodwin, contractor, and George Goodwin, and Sutton his manager, employed about 100 men on the canal; and George Goodwin and Sutton were active supporters of the respondent. These two canvassed the men, and found that a large majority of them intended to vote for the respondent. On the evening before the polling day, with the approbation of Goodwin, the contractor, they told the foreman to tell the men to come to their work as usual, and they would all be taken to the polls by the teams without distinction, whether they voted for the petitioner or the respondent, and be brought straight back again. And the men were given to understand that if they went and came straight back, nothing would be deducted from their pay, without distinction as to the mode in which they might vote. This had been the custom in all former elections as well municipal as parliamentary. Held:—That abstaining from charging the men for their time was, under the circumstances, an act of corruption sufficient to avoid the election. (Do.)..... 289

" " " :—Various charges were made, alleging the intimidation of persons employed upon the Government works, and the exercise of undue influence upon them, by threats of dismissal to induce them to vote for the respondent. Held:—That the evidence in support of these charges was wholly insufficient.....

" " " :—One Robinson, a voter, who worked under Goodwin, was asked by Goodwin if he would go up with him to vote, to which he replied that he would prefer not to do so, as he was a poor man and had friends on the other side who would be offended by his doing so, and he would therefore stay at work. Goodwin assented, and left him at work. After his time had been taken for the afternoon, one of Dr. Christie's agents coming up, Robinson accompanied him to the poll, and voted, stating that he voted for Dr. Christie. Goodwin, meeting him on his return with the petitioner's canvasser, ordered him to be dismissed, and he was accordingly dismissed from the works. But the evidence was conflicting whether he was dismissed because he voted for the petitioner or because he had deceived his employer. Held:—That the weight of evidence went to show that he was dismissed because he voted against the respondent, and that his dismissal was therefore an act of intimidation avoiding the election. (Do.)..... 290

:—At one of the polls in Chatham, a certain number of persons had their ballots marked by the deputy returning officer, without having been made to take the oath that they could not themselves mark their ballots; some of them voting openly by causing their ballots to be marked in the room where several persons were besides the returning officer and clerk, and the representatives of the two candidates. But all these took place in good faith, and without the voters having been induced to act in that way by any violent or corrupt practice, on the part of the respondent's agents, or of the deputy returning officer. The voters appeared to act in this way of their own will, and without having been asked or urged to do so by any one, and the returning officer also appeared to have acted in good faith. Held (1):—The votes so taken were irregular and illegal.

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(2):—That inasmuch as the number of illegal votes thus taken was not great enough to change the result of the election, even if they had all voted for the respondent, the illegality thus committed was not sufficient to annul the [illegible] 200

" " " :—It was charged that the voters' list of the parish of St. Andrews was rendered illegal by the following facts: the valuation roll from which it was made had a number of names added to it by the Council upon the revision of it, and on an appeal to the Circuit Court these names so added were all struck off for some irregularity in the mode in which they had been so added; but, pending the discussion of the matter in the Court, the time fixed by the law for the [illegible] voters' list arrived, and the secretary-treasurer made his list from the valuation roll as amended, the judgment striking off the added names not having been rendered. Some of the voters appealed to the Court against the voters' list, but their appeal was rejected as being too late. Held, (1):—That the Judge sitting for the trial of an election case cannot determine the validity or invalidity of a voters' list, inasmuch as the law furnishes a mode of contesting a voters' list, and, if such mode be not followed, the judge holding an election trial cannot interfere with the list. (2):—That in making the list, pending the appeal, the secretary-treasurer acted properly, and if any one objected to the list he should have appealed against it in the manner provided by the law. (Do.) 200

" " " :—A person had been furnished with a list of voters resident in Montreal, which he had given to one Boswell, with instructions to see them. The respondent telegraphed him two names to be added to the list, and asked him to procure certain canvassers at Montreal, and to send them to the county. This person sent Boswell to obtain the canvassers, and gave him nine railway tickets without specifying distinctly to whom they were to be given, but, as he stated in evidence, intended to be furnished to them. Boswell seeing two persons on the platform whom he knew to be voters going up to vote, gave to each of them one of the tickets. He returned two, but it was not proved what he did with the remainder. Held:—That under the circumstances Boswell was an agent of the respondent, and that the delivery of the tickets to the voters was a corrupt act sufficient to avoid the election. (Do.) 290

" " " :—The petitioners examined a large number of witnesses, from many of whom nothing was elicited in support of their charges. They also examined many of such witnesses at very great length, thereby causing great expense. Held:—That the respondent pay the costs of the proceedings, but that the petitioners pay one-half the costs of the *enquête*. (Do.) 290

DOWER:—The claim to customary, is a real right, and is governed by the law of the place where the real property of the husband is situate, and not by the law of his domicile at the time of his marriage or of the place where the marriage was celebrated.—In the present instance, however, the dower was held to have been renounced. (Erichsen et al., appellants, and Cuvillier et al., respondents, Q. B.) 80

EMPHYTEUTIC LEASE:—Before the coming into force of the Civil Code the obligation of improving the property was not an essential obligation to an emphyteutic lease. (Cossit et al. vs. Lemieux, and Rattray, petitioner, S. C.) 317

" " " :—The principal and distinguishing characteristic of an *emphyteusis* before the Code was the alienation of the property. (Do.) 317

EXCEPTION DECLINATOIRE:—*Vide* CAUSE OF ACTION.

" " :—When goods are sold by the traveller of a Montreal merchant, by sample, at Isle Verte, Kamouraska, subject to ratification by the principal, and the sale is ratified by him, the cause of action arose at Isle Verte. (Gault et al., appellants, and Bertrand, respondent, Q. B.) 340

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EXECUTION :—*Vide* PRACTICE.

EXECUTORS :—Are only responsible for what they actually receive or ought to receive, and are not jointly and severally responsible for each other's administration. (Miller, appellant, and Coleman *et vir*, respondents, Q.B.) 196

" :—Where a person, besides being an executor, acts as if he were the tutor (though not really so) of a minor to whom the estate he administers belongs, he cannot charge interest on monies expended by him in excess of his receipts. (Do.) 196

" :—An executor under the circumstances above mentioned has, however, a right to claim interest on all interest-bearing debts paid by him in the interest of the minor to prevent the sacrifice of her real estate. (Do.) .. 196

" :—An executor and trustee under a will made before the passing of the Civil Code may be removed from office for any of the causes stated in Art. 917 of the said Code, and a sequestrator appointed to administer the estate of the testator until another executor and trustee be appointed. (Howard et al. vs. Yule, S. C.) 229

" :—The Court will not remove an executor from office, under Art. 917 of the Civil Code, for an isolated act of maladministration, when it is proved that the executor acted in good faith, and that no loss is likely to accrue to the estate from what he did, and that the administration of the executor was in all other respects most satisfactory. (Devine et al. vs. Griffin, S. C.) 249

GUARANTEE POLICY :—Where the employee guaranteed loses a large sum of money belonging to his employer, through negligence, the guarantor, who has undertaken to make good any loss which by law the employee would be bound to make good, is liable to pay the amount thus lost. (The Citizens Ins. Co., appellant, and The Grand Trunk R. W. Co., respondent, Q. B.).. 163

GUARDIAN :—In a rule against a, for *contrainte par corps*, it is not necessary to give the guardian the option of paying the value of the goods. (*Exp.* McCaffrey, for *Habeas Corpus*, Q. B.) 188

" :—A, is not discharged by the lapse of a year before proceedings are taken against him to make him produce the goods. (Do.) 188

" :—A, may be condemned to produce the goods placed in his charge or to pay the debt and costs. It is not necessary that the judgment should give him the alternative of paying the value, as the privilege is reserved to him by law of being discharged on establishing and paying the value of the goods. He cannot be condemned to pay more than is due by the defendant to the seizing creditor. (McCaffrey, appellant, and Claxton et al., respondents, Q. B.) 191

HABEAS CORPUS :—The fact that a commitment orders the imprisonment of a guardian until payment of an amount apparently in excess of what is due, cannot be urged under a *Habeas Corpus*, a *Habeas Corpus* not applying to persons imprisoned under a process in a civil matter, unless there be manifest absence or excess of jurisdiction. (*Exparte* McCaffrey, for *Habeas Corpus*, Q. B.) 188

" " :—Where a prisoner has been committed by a magistrate for trial, the Court of Queen's Bench sitting in appeal will not order a writ of *certiorari* to issue, to bring up the preliminary examination, in order to see whether the committing magistrate had sufficient evidence before him to commit, even where it is alleged that the magistrate had no jurisdiction, the depositions before him showing that the offence was committed in a foreign country. (*Exp.* Narbonne, Q. B.) 330

IMMOVEABLE *by destination* :—An organ placed in a church to be used in the public worship therein is an immoveable by destination. (Binka vs. The Rector, &c., of Trinity Church, and The Trust and Loan Co. of Canada, opposant, S. C.) 258

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INDICATION OF PAYMENT:—An, in favor of the creditor of a vendor of an immoveable, in a deed of sale duly registered, enures to the benefit of such creditor, who thereby becomes entitled to be collocated for the amount so indicated to be paid, on the proceeds arising from a judicial sale of such immoveable. (The Trust and Loan Co. of Canada, appellant, and Dupras, respondent, Q. B.)..... 239

INSOLVENT ACT OF 1875:—An assignee under the, who sells real estate subject to a mortgage, has a right to his commission on the amount of his mortgage as well as on the portion of the purchase money paid in cash. (*In Re* David, Ins., and Beaudoleil, assignee, and The Trust and Loan Co. of Canada, petitioner, C. of R.)..... 156

INSURANCE:—Where the freight of a schooner was insured for a voyage "from Mingan, on the North Shore, to Recollect, *via* Cow Bay, Cape Breton," and from Recollect to Montreal, and she struck a rock at Bersimis, prior to reaching Mingan, and after leaving Cow Bay, proved to be so leaky that she had to be repaired twice at Sydney, and where in the Captain's protest (adopted by the assured) the condition of the vessel was declared to be attributable to the injury received by striking on the rock at Bersimis, the vessel will be held to have been unseaworthy at Mingan, and when she sailed thence, and, consequently, that the insurance never attached. (Leduc, appellant, and the Western Assurance Co., respondent, Q. B.)... 55

" :—A clause in a fire policy, that the house was "*à être lambrissée en brique*," does not constitute a warranty of a promissory nature that the house will be immediately covered with brick, but merely expresses the intention of the insured to brick the building when circumstances would permit. Moreover, if the Insurance Company, after the expiration of a year, accepts a renewal premium while the house is still, to their knowledge, in the same state, the company cannot take advantage of the words cited. (The Northern Assurance Company, appellant, and Provost, respondent, Q. B.)..... 211

" :—Where the value of the property is not easily arrived at, and the evidence is conflicting, a claim will not usually be held to contain over-valuation, unless the amount demanded be about double the actual value. An apparent over-valuation of about 20 per cent. was in the present case held not fraudulent. (Do.)..... 211

" :—Until the premium is paid on an application for life insurance, the insurance does not attach, and, therefore, where the ostensible applicant is unable to pay the premium, and another party, as a matter of speculation and without having any interest in the life of the applicant, pays the premium and takes a transfer of the policy prepared by anticipation in the name of the applicant, the policy in the hands of such person is void. (Vézina, appellant, and the New York Life Insurance Company, respondent, Q. B.)..... 232

" :—When a vessel is seaworthy at the port of departure named in a marine policy, and becomes unseaworthy afterwards by striking on a rock during the voyage, the insurance risk attached at the time she left port. (Leduc, appellant, and the Western Assurance Company, respondent, Q. B.)..... 280

" :—Under the sue and labor clause in the policy, the assured had a right to recover the proportion of the cost of repairs caused by striking on said rock, which the value of the vessel bore to the sum insured, in addition to the sum insured; the vessel having been totally wrecked subsequently to the making of said repairs. (Do.)..... 280

LEASE:—An authentic, duly registered, does not entitle the lessee to fyle an opposition *a fin de charge* to a seizure of the property leased. Desjardins *et vir* vs. Gravel *et ux.*, and Langevin dit Lacroix, opposant, S. C.)..... 105

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LEASE:—A purchaser at Sheriff's sale is not bound to continue a lease such as above mentioned. (Do.)..... 105

" :—The provisions of Art. 1663 of the C. C. do not apply to sales of immoveables by the Sheriff, and consequently, a lessee of immoveable property sold at Sheriff's sale is liable to expulsion by the *adjudicataire* before the expiration of the lease. (McLaren *et al.* vs. Kirkwood, and Brooke, *adjudicataire*, S. C.)..... 107

" :—The expulsion, in a case like the above, may be effected by summary petition for a writ of possession. (Do.)..... 107

LIFE INSURANCE:—Where an agent of a Life Assurance Co. obtains for an individual a policy of insurance upon his life, in consideration of his giving his promissory note to the agent individually for the first year's premium, less the agent's commission, there is privity of contract between the agent and the maker of the note, and the note being given for good and valid consideration, the agent can maintain an action upon the same. (Alexander vs. Taylor, C. of R.)..... 252

MARRIAGE:—The only functionary competent to celebrate a marriage between two Roman Catholics is the proper *curé* of the parties, and a license issued by authority of the Lieutenant Governor cannot legally dispense with the publication of bans required in the case of such marriage, and, consequently, a marriage of two Roman Catholics by a Protestant minister, by special license, is null. (Laramée *et al.* vs. Evans, S. C.)..... 261

" :—Before pronouncing on the validity of a marriage between two Roman Catholics, the Superior Court should refer the case to the Bishop of the Diocese, asking him to pronounce as to the nullity of the marriage and its dissolution, if there be cause for such; leaving to the Court to adjudge thereafter as to the civil effects of the marriage. (Do.)..... 261

MUNICIPAL CORPORATIONS:—*Vide Quasi* CONTRACT.

NEGLIGENCE:—A proprietor of real estate in Montreal is responsible for an accident arising from the neglect to cover and put a railing round an excavation in the public street, connected with the making of a drain from his property to the public drain, and to put a light at the spot, when the permit to make such excavation has been granted to him by the Corporation on condition of his making such covering and railing and putting up such light, notwithstanding that such excavation was made by a contractor over whom the proprietor had no control. (McRobie vs. Shuter *et al.*, S. C.)..... 103

" :—*Vide* TELEGRAPH MESSAGE.

" :— " DAMAGES.

NOVATION:— " DELEGATION OF PAYMENT.

NULLITE DE DECRET:—Where an immoveable sold by the Sheriff is described as being bounded on a projected street, which is proved to be the only means of communication from the property to the public highway, and such street is found subsequently to have no legal existence, and that it is clear the *adjudicataire* would not have purchased had he known that no such street really existed, the sale will be set aside on petition to that effect by the *adjudicataire*. (Moat *et al.*, appellants, and Moisan, respondent, Q. B.)... 218

" :—The *adjudicataire* has a right, under the circumstances above mentioned, to recover from the parties collocated in the judgment of distribution of the proceeds of said sale, the amounts of their respective collocations with interest. (Do.)..... 218

PAWNBROKER:—An isolated act of pledging will not constitute the exercise of the trade of a pawnbroker, within the meaning of the Quebec Statute, 34th Vic., ch. 2, sec. 69. (Perkins vs. Martin, C. of R.)..... 56

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PEREMPTION D'INSTANCE:—It cannot be acquired in favor of a party who is dead, and cannot be asked for in the name of such party. (Bennett vs. Hacsegon et al., S. C.) 148

" :—The death of one of the defendants does not prevent the other defendant from moving for and obtaining *péremption d'instance* in his own favor. (Do.) 148

PRACTICE:—*Vide* APPEAL.

" :— " QUI TAM ACTION.

" :—The provisions contained in Art. 642, Code of C. P., are applicable only to cases where the second or subsequent writ of execution against the lands of a debtor is placed in the Sheriff's hands, while he is still in possession of the writ on which the said lands have been seized, and while he is still in a position to proceed to the sale of such lands on the day fixed for the sale. Accordingly, where an opposition has been fyled to a seizure of lands, and the seizure has been suspended, and the Sheriff has returned the writ and *procès-verbal* of seizure into the Prothonotary's office, a second seizure of the same lands may validly be made for another debt, and consequently the Sheriff cannot treat such subsequent writ as coming within the provisions of said Art. 642 C. C. P. (Fuller et al., appellants, and Fletcher, respondent, Q. B.) 93

" :—*Vide* PRIVY COUNCIL.

" :—A defendant cannot claim as a cause of nullity the failure to state the return day in a *fiat* for execution and in the register of executions. (De Bellefeuille et al. vs. Pollock, and Pollock, opposant, S. C.) 104

" :—*Vide* LEASE.

" :— " PÉREMPTION D'INSTANCE.

" :— " CONTRAINTE PAR CORPS.

" :—A judicial surety is not entitled to an alimentary allowance under Art. 790 of the Code of C. P. (Cramp vs. Cocquereau et al., S. C.) 162

" :—*Vide* PRELIMINARY PLEA.

" :— " DOMINION ELECTION ACT OF 1874.

" :— " ADMISSION IN PLEA.

" :— " GUARDIAN.

" :— " HABEAS CORPUS.

" :— " CAUSE OF ACTION.

" :— " REGISTRAR'S CERTIFICATE.

" :—When a defendant has appeared in a cause and has been foreclosed from pleading, it is not necessary for the plaintiff to give notice to the defendant of an inscription for judgment out of term under Art. 89 of the Code of C. P. (Dalbec vs. Dugas et al., C. of R.) 244

" :—*Vide* SHERIFF'S SALE.

" :—Where a *Tiers Saisi*, whose declaration is contested, fails to answer the contestation, the allegations of such contestation are not held to be admitted, but proof must be adduced in support of such contestation. (Mattinson, appellant, and Cadieux, respondent, Q. B.) 255

PRELIMINARY PLEA:—When the fourth day from the return of the action falls on a Sunday, the defendant can fyle his preliminary plea on the following day. (Joyal vs. Safford, S. C.) 166

PRESCRIPTION:—*Vide* CITY OF MONTREAL.

PRIVILEGE:—*Vide* VENDOR.

PRIVY COUNCIL:—On application to the P. C. for special leave to appeal from a judgment in Canada, from which an appeal does not lie as of right, it will not be granted, in the absence of some miscarriage in point of law, or gross miscarriage in the Courts below on the matters of fact, and that in the present instance no such miscarriage was apparent. (Molson, appellant, and Carter, respondent, P. C.) 99

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PRIVY COUNCIL:—Where an application to appeal to the P. C. has been made in chambers five days after the rendering of the judgment, and security has been allowed to be given *de bene esse*, and the respondent moves in the next term that the record should be remitted to the Court below, the motion will be rejected. (Brewster, appellant, and Lamb, respondent, Q. B.)..... 210

PROMISSORY NOTE:—The endorsement *pour aval* of a wife *separée de biens* from her husband, on a promissory note signed by the husband, for goods sold and delivered to him and charged to him alone in the vendor's books, and given in renewal of a note of the husband not bearing her endorsement, is null and void, notwithstanding that the goods so sold and delivered may have contributed to the support of the wife. (Bruneau *et vir*, appellants, and Barnes *et vir*, respondents, Q. B.)..... 245

" :—*Vide* LIFE INSURANCE.

" :— " CORPORATION.

PRO TUTOR:— " EXECUTOR.

QUASI CONTRACT:—Municipal corporations may be rendered liable by, as ordinary individuals may be. (DeBellefeuille vs. The Municipality of the Village of St. Louis du Mile End, S. C.)..... 18

QUI TAM ACTION:—The payment of the penalty under the Quebec Statute 34th Vic., ch. 2, sec. 69, in a *qui tam* action brought for its recovery, by depositing the amount with the clerk of the Court in which the judgment was rendered, will, in the absence of proof of collusion, be an absolute bar in a subsequent action by the Revenue officer for the recovery of the same penalty. (Perkins vs. Martin, C. of R.)..... 36

" " :—In the absence of proof that the affidavit required by the 27th and 28th Vic. ch. 43, sec. 1, had not been fyled, such affidavit will be presumed to have been fyled, when the writ has actually issued, and judgment has been rendered thereon. (Do.)..... 36

REGISTRAR'S CERTIFICATE:—The registrar of each registration division is bound to enter in the certificate furnished by him to the Sheriff, under articles 699 and 700 of the Code of C. P., all hypothecs registered against the parties who have been owners of the property sold during the ten years preceding the sale, and he cannot limit his certificate to the entries of mortgages registered within such ten years, and the registrar is liable to pay the amount of such mortgages as would have been collocated, owing to his not having furnished such a certificate as the law called for. (The Trust and Loan Co. of Canada, appellant, and Dupras, respondent, Q. B.)..... 239

REGISTRATION:—When a person acquires an immoveable in good faith, and is in open possession thereof as proprietor, but neglects to register his title immediately, and a judicial or other hypothec against the vendor is registered before the title deed, the latter claim attaches and has the preference. (Adam, appellant, and Flanders, respondent, Q. B.)..... 25

SALE:—In a suit by a vendor of real property, for the recovery of the interest merely, it is not competent to the defendant to claim the right to retain such interest, until security be given that he will not be disturbed in his possession of the property by reason of certain undischarged hypothecs registered against the property, exceeding in amount the whole capital of the purchase money. (The Grand Trunk R. W. Co. vs. Currie and Hall, S. C.)..... 22

" :—*Vide* REGISTRATION.

" :—When an assignee under the Insolvent Act sells an estate *en bloc* for a fixed sum paid to him, and agrees in writing to pay back any deficiency that may be found to exist, on checking over, at the rates of estimate on which the sale was based, and it turns out that certain stock estimated at $2,000 could not be delivered, the purchaser is entitled on petition to an order condemning the assignee to refund the $2,000. (Dixon et al., appellants, and Perkins, respondent, Q. B.)..... 117

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SALE:—When a person sells a property, free and clear of all incumbrances except one which he undertakes to pay, and have a discharge thereof duly registered, although not within any agreed delay, he cannot sue for any part of the purchase money, either principal, or interest, without first paying off the incumbrance. (Law, appellant, and Frothingham, respondent, Q. B.)..... 172

" :—In a case like the above, to entitle the purchaser to damages he must put the vendor *en demeure* to pay off the incumbrance, and allow a reasonable delay for doing so. (Do.)..... 172

SEPARATION DE CORPS:—When a husband withdraws himself from the matrimonial domicile, and notwithstanding the willingness of the wife to continue to reside there with him, refuses to provide her with a fit and proper residence, and with support and maintenance according to his means, the wife may sue the husband for maintenance simply, without suing *en séparation de corps et d'habitation*. (Conlan, appellant, and Clarke, respondent, Q. B.) 90

SEQUESTRATION:—*Vide* EXECUTION.

SHERIFF'S SALE:—*Vide* LEASE.

" " :—*Vide* NULLITE DE DECRET.

" " :—In the absence of any official number attaching to an immoveable, mention must be made in the *procès-verbal* of such immoveable of the contermineous lands, and the omission so to mention such contermineous lands renders the seizure of the immoveable null and void. (Comfort vs. Roy, and Roy, opposant, C. of R.)..... 222

" " :—In the case of a, of an immoveable, the Sheriff cannot exact interest from the purchaser, who is a hypothecary creditor, in respect of such immoveable, and who has given a bond in terms of Art. 668 of the Code of C. P. (Cross vs. Garcau, and Coutlée, *mis en cause*, S. C.)..... 253

" " :—If an immoveable charged with an unexpired term of 15 years of an emphytentic lease be sold by the Sheriff, without mention of such charge in the minutes of seizure, and if such charge diminishes the value of the property by about one half, the purchaser who is prevented by notification and protest on the part of the lessee from obtaining possession during such unexpired term, may obtain the vacation of the Sheriff's sale under Art. 714 of the Code of C. P. (Cossit et al. vs. Lemieux, and Rattray, petitioner, S. C.)..... 317

STATUTE:—A, goes into operation the day on which it is approved, and has relation to the first moment of that day. (Rickaby vs. Bell, and Bell, petitioner, S. C.). 91

STREETS:—*Vide* CITY OF MONTREAL.

SURETY:—*Vide* PRACTICE.

TACIT RECONDUCTION:—*Vide* WAGES.

TELEGRAPH MESSAGE:—The person to whom a message is directed to be sent has an action against the Telegraph Company for damages resulting from the negligence of the Company in failing to deliver the message. The condition requiring the message to be repeated in order to hold the Company in damages will not free the Company from responsibility for their own negligence, and especially where compliance with such condition would not have prevented the damage complained of. (Bell vs. The Dominion Telegraph Co., S. C.)..... 248

TRADE MARK:—A, consisting of a horse's head stamped in the centre of a cake of soap, with the words "The Imperial Trade Mark" above, and the words "Laundry Bar" below, and the address "J. Barsalou & Co." on the obverse side of the cake, will not be held to be imitated by stamping on a somewhat similar cake of soap a unicorn's head similarly placed, with the words "A. Boniu, 115 St. Domibique Street, Very Best Laundry" on the face of the cake, without any words on the obverse side. (Darling et al., appellants, and Barsalou et al., respondents, Q. B.)..... 31

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VENDOR:—The privilege of the, of real property, sold before the coming into force of the Civil Code, may be exercised in respect of the proceeds of the sale of the property by the Sheriff, without registration or renewal of registration against the cadastral number, to the prejudice of hypothecary creditors, whose claims have been duly registered. (La Compagnie de Prêt et de Crédit Foncier vs. Garand es qual., and Heney et al., opposants, and Phillips, contestant, S. C.)..... 101

WAGES:—A salaried employee, whose term of office has been renewed for another year by tacit reconduction, cannot be dismissed without being paid his salary to the end of the current term so renewed. (The City of Montreal, appellant, and Dugdale, respondent, and E. Contra, Q. B.)..... 149

" :—*Vide* CITY OF MONTREAL.

WARRANTY:—*Vide* INSURANCE.

WIFE *Séparée de biens*:—*Vide* PROMISSORY NOTE.

WRIT OF POSSESSION:—*Vide* LEASE.