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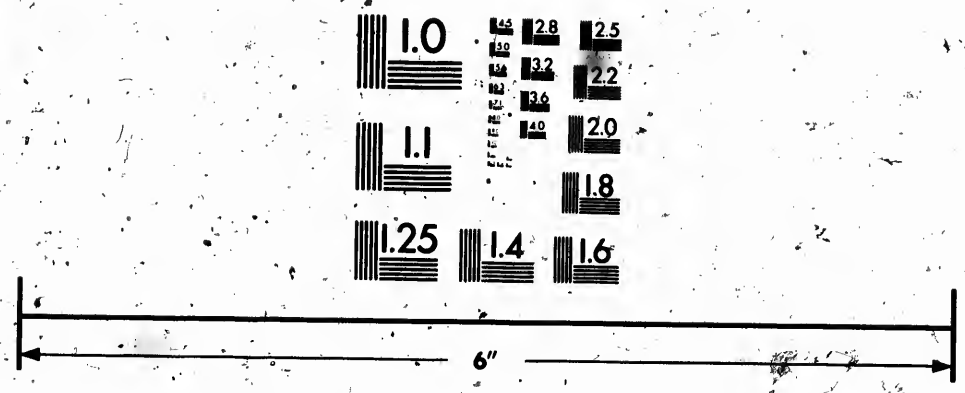

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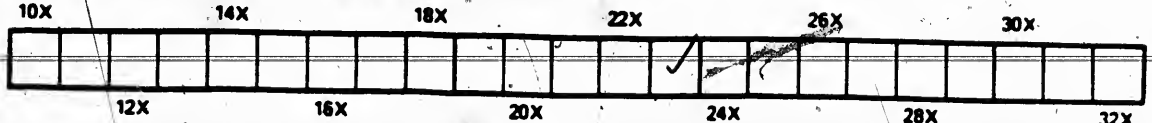

32X

THE

LOWER CANADA Jurist.

COLLECTION DE DECISIONS

DU

BAS-CANADA.

VOL. XVI.

Editorial Committee:

S. BETHUNE, Q.C.; P. B. LAFRENAYE; J. L. MORRIS; JAMES KIRBY.

THE INDICES:

BY S. BETHUNE, Q.C.

Montreal:

PRINTED AND PUBLISHED BY JOHN LOVELL.

1872.

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OF THE

LOWER CANADA JURIST.

COMPILED BY

STRACHAN BETHUNE, Q. C.

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THE

LOWER CANADA Jurist.

COUR SUPERIEURE, 1870.

EN CHAMBRE.

MONTREAL, 17 SEPTEMBRE, 1870.

Coram BERTHELOT, J.

No. 283.

LE MAIRE ET LES ECHEVINS ET CITOYENS DE LA CITE DE MONTREAL,
Requérant l'élargissement de la rue St. Joseph;

ET

WALTER BENNY, et al.,
Requérants;

ET

J. BTE. HOULE,
Requérant;

WRIT DE PROHIBITION.

JUGE:—Que le Juge peut intervenir dans un cas d'expropriation en vertu des dispositions du Statut de 1864, Sec. 89, à raison du montant excessif à être accordé par les commissaires et du mode d'appréciation vicieuse et illégale qu'ils entendaient faire.

2o. Que ceci constituait un abus de pouvoir et une incompétence en procédant à faire l'estimation des dommages que la loi n'autorisait pas.

3o. Que le rapport des Commissaires n'étant pas fini et complété, ils n'ont pas cessé d'être dépendants de l'autorité du Juge et sont soumis à l'autorité judiciaire.

BERTHELOT, J.—Ce qui a donné lieu à la grande contestation soulevée en cette instance remonte au mois de mai 1866, temps auquel l'Hon. Mr. Wilson faisait acquisition d'une propriété au coin des rues Notre Dame et St. Joseph des héritiers St. Omer et Lachapelle pour le prix de £6000—$24000.

Avec la commutation à payer, Frais de contrat et intérêts sur ce prix, sous la déduction des loyers durant deux années, le coût total pourrait lui revenir au mois de mai 1868 à.....£7279 4 8

Ce sont les chiffres donnés par M. Windeyer, l'architecte de M. Wilson, ou à peu de chose près, donnant un peu plus de $6.50 par pied quarré en accordant une superficie de 4350 pieds.

Devenu acquéreur de cette propriété, M. Wilson n'avait pas été longtemps sans supposer que la Corporation élargirait la rue St. Joseph depuis la rue McGill

Le Maire et al. de Montréal, et Walter Benny et al.

au quarré Chaboillez, et adressa dès le 22 avril 1867, une lettre à cet effet au Président du Comité des Chemins dans les termes suivants:

Montreal, 22nd April 1867.

"To the Chairman of the Road Committee,

"*Dear Sir,*

"I have in contemplation next May twelve months to build three large stores, *first class*, corner of St. Joseph and McGill Streets.

"I understand it is the intention of the Corporation to widen St. Joseph Street. I can at once enter into a favorable arrangement with a merchant here, to lease him the whole block for over £1,000 in lieu of the present rent of £225.

"I would like to proceed as soon as possible with plans and specifications, and if my contracts are given out early I might expect to derive some advantage.

"If you consider my application favorably, it will be with this understanding that Mr. McGarvey, my neighbour, will go back at the same time that I will. Mr. Biron, the present tenant, has a lease for two years longer from the first May 1867 to 1869 at the rate of £225 per annum, he will only be deprived of his present lease twelve months, an answer will much oblige

"Your obedient servant,

"(Signé,) CHARLES WILSON.

Il ne paraît pas que cette lettre fut suivie d'une réponse, et M. Wilson, sans laisser écouler un mois depuis sa première lettre, adressait de nouveau le 11 mai 1867, le Président du Comité des Chemins dans les termes suivants:

Montreal, 11th May 1867.

To the Chairman of the Road Committee,

Dear Sir,

As I understand the Corporation means to expropriate a portion of St. Joseph Street, and as I hold some property on that and McGill, I beg leave to submit a statement to the Road Committee regarding the part belonging to me.

It is my intention to erect thereon a first class building for which I have been offered by Messrs. Baillie & Co., four thousand dollars per annum, and I now want to know from the Committee if I may build on the present line. It would be greatly to my advantage to do so, as my stores, (three in number), would be each 29 feet front, and if I am obliged to build back, they will measure only 24 feet, in that case they would be much depreciated in value.

The ground stands me eight dollars per foot; add to that the cost of foundation and only a small partial allowance for the reduced size of stores, I consider that two thousand five hundred pounds would be a very moderate compensation, and the acceptance of the offer would be *obviously more for the public advantage* than mine.

I ask *nothing for the present building nor for its demolition*, but I would require the right to take it down on the first of May next; the Corporation to arrange with Mr. Biron for the lease of 12 months from the first of May.

If this voluntary offer is accepted by your Committee, I shall consider myself bound by it.

If I am prevented to build on the present line and have to wait when the

expropriation takes place in the usual course, it will cost the Corporation *double the amount I ask*.

You will please acquaint me with the decision of the Corporation as early as possible, as Mr. Baillie leaves for England per next steamer, and I must either accept or reject his offer at once.

I remain,

Yours truly,

(Signed,) CHARLES WILSON.

ALDERMAN DAVID,

Chairman Road Committee.

L'on peut croire que M. Wilson avait acquis plus ou moins la connaissance que la Corporation procéderait en effet à l'élargissement de la rue St. Joseph, car dès le 10 octobre 1867, il consentait au bail devant Mtre Bureau, Notaire, à M. Baillie pour dix ans, des magasins qu'il devait construire sur cette propriété, livrables le 31 décembre 1868, suivant plans à être faits par M. Windeyer, à raison de dix par cent sur le coût du terrain fixé à £[illegible], en sus du coût des bâtisses, d'après le prix des contrats. Il y était stipulé que le prix du bail ne serait pas *changé* ni *affecté* par le fait de l'élargissement de la rue St. Joseph; mais en ce cas le montant de l'indemnité accordée à M. Wilson devrait être déduit du prix ci-dessus fixé pour le terrain, savoir £7250, moins toutefois le montant des taxes à payer à la Corporation pour l'élargissement de la rue.

Voici les termes de cette clause du bail:

"It is hereby further agreed by and between the parties that the frontage of "the building on McGill Street shall *depend* upon the widening or not widening "of St. Joseph Street by the Corporation. In case St. Joseph Street is widened "by the Corporation, the money granted to Mr. Wilson to be deducted from the "cost of the building, *minus* the amount of the Corporation taxes for the said "widening.

J'aurai occasion ci-après de revenir sur cette convention d'une très-grande importance pour aider à la solution des questions soulevées.

Le 24 octobre, peu de jours après ce bail, le Comité des chemins de la Corporation faisait le rapport suivant:

"That the Honorable Charles Wilson is about to take down and demolish the "old stone building on the North West corner of McGill and St. Joseph Streets, "and as your Committee have had for some time back in contemplation the widen- "ing of St. Joseph Street, they consider the present a favorable opportunity to "commence an improvement which is much needed and which will when carried "out greatly enhance and add to the value of Real Estate in that neighbour- "hood.

"Wherefore your Committee recommends that it be resolved to widen St. "Joseph Street in front of the said property of the Honorable Charles Wilson "and in accordance with the plan hereunto annexed: and that, in furtherance of "these views they be authorized to acquire by amicable arrangement or by "valuation of Commissioners as provided by law that portion of the said property "of the Hon. Charles Wilson tinted red on the said plan, on the express con- "dition however that the whole cost of so doing shall be assessed upon the pieces

Le Maire et al, de Montréal, et Walter Honey et al.

" or parcels of land belonging to parties interested in or benefited by the said " improvement."

Ce rapport fut adopté par le Comité de Finance le 3 décembre 1867, et dès le 4, la Corporation, par une résolution à cet effet, ordonnait qu'il fut procédé à l'élargissement de la rue St. Joseph.

Le même jour trois décembre 1867, M. Wilson trouvait un acquéreur pour sa propriété en la personne des Messieurs Ewing aux prix de $45,000, c'est-à-dire, à raison de $10 par pied.

Voici les termes de cette promesse de vente:

" Montreal, 3rd December 1867.

" I, Charles Wilson, of the City of Montreal, hereby bind and oblige myself to bargain and sell to Messrs. A. H. & A. S. Ewing, of Montreal, Merchants, my property and premises, situated at the corner of McGill and St. Joseph Streets, of Montreal, for the price and sum of forty five thousand dollars currency and at the conditions already given to the Hon. J. O. Bureau, Notary Public.

" And we, L. H. & A. S. Ewing, hereby bind our elves to purchase and accept such sale from said Hon. Charles Wilson for the amount and conditions.

" Signed in duplicate on this third day of December A. D., one thousand eight hundred and sixty-seven.

(Signed,) CHARLES WILSON,
(Signed,) L. H. & A. S. EWING.

Les acquéreurs, MM. Ewing, étaient obligés en outre de maintenir le bail que M. Wilson avait fait à MM. Baillie & Cie. Cela résulte de la déposition même de M. Samuel H. Ewing. En voici l'extrait:

" *Question.*—Did Mr. Wilson speak to you, when in agreement with you " about his property, of a certain bargain which he had made with Mr. James " Baillie & Company for the leasing of three stores he meant to erect on the " said property; and please relate every thing you know about the matter?

" *Answer.*—Yes, when I was in agreement with Mr. Wilson, for the purchase " of his said property, this gentleman was bound to erect on the said property, " three stores for said *James Baillie & Company.*

" *Question.*—What price were James Baillie & Company bound to pay to " said Wilson as rental for all three buildings to be erected on the whole lot " at the corner of said St. Joseph and McGill streets?

" *Answer.*—James Baillie & Company were to pay ten per cent., on the whole " money laid out on the said property, both for the land and buildings to be " erected, and this after the following conditions, to the best of my recollection: " ten per cent. on twenty-nine thousand dollars, representing the value of the " naked land and equally ten per cent., on the money to be spent for buildings, " which money to be in their minds, from twenty-five thousand dollars to thirty " thousand dollars. Now the conditions of my bargain with the said Hon. Mr. " Wilson were that I should walk into his shoes and fulfill his promises with " James Baillie & Company, and James Baillie & Company were to pay me ten " cent. on twenty-nine thousand dollars for the value of the ground, and ten per " cent. on all the moneys to be laid out for buildings which were to be begun on " the spring of last year (1868) and finished and delivered on the first of " January last (1869.)

" *Question.*—At the time of the aforesaid agreement between the said Wilson " and James Baillie & Company, did they or you expect that the Corporation " were intending to expropriate the said Mr. Charles Wilson of a part of his " said lot?

" *Answer.*—At the said agreement, *I did expect that the said expropriation* " *would take place.*

" *Question.*—Do you not remember that one of the conditions of the contracts " between James Baillie & Company and Mr. Wilson, and James Baillie and " you (in case you were to purchase from Wilson) was to this effect, to wit: " in case St. Joseph Street would be widened by the Corporation, the money to " be given to said Wilson or to you, if you had finally purchased, was to be " deducted from the cost of the land monies upon which said James Baillie & " Company would have to pay interest at said rate of ten per cent?

" *Answer.*—Yes, the very sum to be got from the Corporation was to go *in* " *diminution of the capital, and consequently of the interest or rental of ten* " *per cent to be paid by the aforesaid James Baillie & Company.*

" *Question.*—When the said Charles Wilson, James Baillie & Company and " yourself were entering into the agreements above mentioned, did Mr. Charles " Wilson know that the Corporation intended to take out of his property a strip " of land by thirteen or sixteen feet in front on the whole depth?

" *Answer.—I believe he did know, in fact I had promised to purchase the* " *place on the conditions that have already been stated in my deposition.* " *Besides, the very agreement entered into by Mr. Wilson and James Baillie* " *proved the fact.*"

Plus tard, des difficultés étant survenues sur le titre qui pouvait être donné, les parties se départirent à l'amiable de cette vente le 30 décembre 1867, et firent une autre convention pour y mettre fin.

Le bail de M. Wilson à MM. Baillie et sa vente avec MM. Ewing, à la charge par ces derniers d'entretenir le bail fait à M. Baillie, font voir que tous étaient d'avis que la propriété ne perdait pas de sa valeur par l'élargissement de la rue, et que les magasins ne s'en loueraient pas moins bien sur le pied du revient, qu'ils fussent de 87 pieds ou de 72 pieds seulement.

Il y a de plus la preuve que le prix *extrême* du lot était de $45,000 ou un peu plus de $10 par pied, faisant pour les 750 pieds expropriés à peu près $7500 ou £1875.

Ce sont des faits dont la preuve est acquise par les transactions écrites des parties et qui parlent plus haut et font une preuve plus certaine et plus croyable que ce qu'elles ont pu dire lorsqu'elles ont été interrogées comme témoins devant les Commissaires, ou en cette instance. Et c'est un fait maintenant certain que $10 par pied représentait non seulement la valeur intrinsèque du terrain exproprié, mais les dommages ou la dépréciation de valeur du terrain restant à M. Wilson, puisque le montant des loyers ne souffrait pas de diminution.

C'est dans ces circonstances que le 14 d'avril 1868, la Corporation fit procéder à la nomination de Commissaires pour fixer la valeur de l'expropriation à faire sur M. Wilson de 750 pieds de sa propriété au coin des rues McGill et St. Joseph.

Le Maire et al. de Montréal, et Walter Benny, et al.

MM. Masson, Brown et Springle furent nommés par un des Juges de la Cour Supérieure en la manière ordinaire, en vertu des dispositions de l'acte 27 et 28 Victoria, Chap. 10, relatif à la Corporation de Montréal, section 13.

Aux termes du §5 de cette section, ces Commissaires doivent se faire assermenter par le Protonotaire de cette Cour, et ils sont revêtus des mêmes devoirs que confèrent aux Experts les lois du Bas-Canada, au sujet des experts. Par les § 6 et 7 ils doivent " procéder à estimer et fixer le montant du prix, indemnité ou compensation qu'ils *croiront* juste et raisonnable pour chacun des " terrains ou immeubles, ou partie d'iceux, dont l'expropriation est faite ou pour " les dommages causés par telle expropriation ; et à cette fin ils sont autorisés à " requérir les propriétaires à leur communiquer les titrés, à entendre les parties, " examiner et interroger leurs témoins, le tout *viva voce* et sans rapporter tels " interrogatoires et examen avec leur rapport," c'était certainement vouloir faire de ces Commissaires de vrais Experts qui auraient à s'informer pour faire leur rapport d'après ce que pourraient leur dire ces témoins, de même encore qu'ils pourraient faire leur rapport d'après leur connaissance et expérience supposée des choses sans être positivement liés par le dire des témoins et des intéressés.

Le parag. 8 de la même lecture leur dicte ce qu'ils ont à faire quand l'expropriation ne devra s'opérer que sur une partie du terrain.

" Ils doivent fixer le dommage ou la diminution de valeur du reste du terrain, " par la séparation d'icelui de la partie requise par la dite Corporation, et établir " 1o. La valeur intrinsèque de la partie du terrain à être prise, et 2o. la plus " value, s'il y en a, qui devra résulter de l'amélioration projetée au reste de la " propriété, et la différence entre la valeur intrinsèque et la plus value constituera le prix auquel aura droit l'exproprié, et quand les Commissaires décideront que la plus value est égale à la valeur intrinsèque ou la dépasse, ils n'accorderont aucun prix pour le terrain exproprié."

Dans le présent cas, il est admis qu'il n'y avait pas de plus value pour la partie du terrain non expropriée, et il ne s'agissait que de fixer la valeur intrinsèque du morceau exproprié et les dommages que l'expropriation du terrain faisait subir au restant de la propriété.

Je vais maintenant rapporter textuellement le 89 de la même section qui donne aux Juges de cette Cour droit de jurisdiction et de surveillance sur la conduite et les actes des Commissaires dans l'exécution de leurs devoirs.

" Si l'un ou plusieurs des dits Commissaires, en aucun temps après leur nomination, négligent de remplir avec diligence les devoirs qui leur sont imposés par les " dispositions du présent acte ou ne les remplissent pas fidèlement, diligemment " et impartialement, il sera loisible à la Corporation de la dite Cité, par son Procureur, de s'adresser par requête sommaire à la dite Cour Supérieure ou à un " Juge d'icelle, suivant le cas, pour faire suspendre les procédés des dits Commissaires et destituer et remplacer le commissaire ou les commissaires qui " auront forfait à leurs obligations, et sur telle requête la dite Cour ou le dit " Juge pourra décerner tels ordres qu'elle ou qu'il jugera conformes à la justice." Les termes sont assez clairs et précis pour y voir certainement l'intention de la Législature de ne pas tout laisser au *jugement* et à *l'arbitraire* des Commis-

Le Maire et al. de Montréal, et Walter Benny et al.

saires, mais au contraire de les assujettir dans l'exercice de leurs devoirs à la *surveillance* et à la *direction* de la Cour ou d'un Juge, s'il leur arrivait de s'écarter de ce que la loi attendait d'eux dans le mode d'apprécier et d'établir la valeur de la portion du terrain exproprié et les dommages résultant au surplus du terrain.

Si leur rapport était fini et complété, je verrais quelque difficulté, peut-être, à faire intervenir mon autorité, parce que la leur, comme experts, aurait déjà cessé, et ils auraient cessé par là même d'être dépendants de l'autorité du Juge, mais dans ce cas-ci, ils sont encore soumis à l'autorité judiciaire tant qu'ils n'ont pas fait leur rapport et accompli ce pourquoi ils ont été commissionnés.

En effet, l'on conçoit aisément que la Législature n'a pas pu vouloir laisser entièrement la fortune des citoyens à l'arbitraire de personnes chez lesquelles on ne peut pas toujours espérer de trouver des connaissances légales suffisantes sur les règles de droit à suivre en pareille matière, règles d'autant plus difficiles que l'on n'en trouve nulle part de précises et positives, qui puissent s'appliquer à chaque cas.

Il s'agira donc de voir s'il y a lieu dans le cas actuel à l'intervention de l'autorité judiciaire, d'après ce qui est en preuve, au cas où les Commissaires dont on se plaint n'auraient pas agi *fidèlement, diligemment* et *impartialement*.

Il ne faudrait pas prendre ces trois mots dans leur sens étroit et restreint ; ce ne serait pas agir suivant ce que le législateur a eu en vue.

Ainsi en se servant du mot diligemment, le législateur ne voulait pas dicter aux Commissaires d'agir *promptement*, ce qui est le sens étroit du mot, mais d'agir avec *soin*, avec *exactitude*, avec *attention*. Ce n'était pas un mouvement prompt qu'on leur imposait. Mais on voulait les obliger *d'étudier, examiner et considérer diligemment* ce dont il s'agissait; c'est là le vrai sens du mot. La diligence en ce cas consistait à bien s'informer de ce que la loi avait en vue et des règles de droit qui pouvaient s'appliquer au cas actuel d'expropriation et aux contrats et conventions que venait de faire l'exproprié, de bien les comprendre, d'en saisir l'ensemble, et de voir quelle portée ils avaient en regard de ce dont il s'agissait,—et de ne pas trop s'éloigner dans l'estimation des dommages de la règle que l'exproprié, M. Wilson, avait lui-même fixée et établie plus ou moins formellement dans son contrat de bail à M. Baillie et dans son contrat de vente à MM. Ewing.

Agir autrement pouvait exposer les Commissaires au reproche qu'ils n'agissaient pas avec l'impartialité que la loi attendait d'eux—qualité qui est la plus essentielle à un juge, et à un arbitre ou expert, de même qu'il pouvait les exposer au reproche de partialité qui est définie comme suit par un savant écrivain anglais: "Partiality is properly the understanding judging according to the "inclination of the will and affection, and not according to the exact truth of "things, or the merits of the cause."

Il faut voir maintenant ce dont les requérants se plaignent en leur requête et s'ils peuvent avoir raison de demander l'intervention du Juge pour arrêter les procédés des Commissaires, révoquer la nomination de MM. Brown et Springle, comme ayant méconnu leur devoir et faire procéder à la nomination de deux autres pour agir conjointement avec M. Masson, l'autre Commissaire.

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La Corporation, pour motif ou raison principale de sa requête, allègue que l'un des experts, M. Masson, avait fait un rapport pour $7,862.50, tandis que MM. Brown et Springle avaient fait un rapport pour un montant $19,500. Les autres raisons reposant sur l'amitié supposée exister entre M. Wilson, M. Springle, M. Brown, et sur les services pécuniaires par lui rendus à ces Messieurs, ne me paraissent pas avoir été prouvés, et j'éviterai d'en faire plus de mention non plus que de ce que l'on reproche à ces deux Commissaires, lors de l'assemblée du mois d'Août au Conseil-de-Ville pour entendre les intéressés. La preuve ne constate rien de tel; ce sont des accusations que ne justifie pas la preuve faite devant moi.

D'ailleurs, je trouve dans le témoignage même de M. Masson le désaveu de toute intention de reproches de manque de sincérité de MM. Brown et Springle, dans leur manière de voir et d'estimer les dommages.

Le fait est qu'il est bien malheureux qu'il y ait eu tant d'aigreur de part et d'autre à propos de cette affaire, et que l'on n'ait pas évité d'introduire dans la procédure l'énorme quantité de témoignage écrit, plein d'accusations et de récriminations, et qui n'était pas nécessaire pour l'adjudication du mérite des deux rapports. Je dis le mérite du rapport, car du moment qu'il est connu quel est le mode d'appréciation que les Commissaires ont suivi, ou sur quoi ont porté leur estimation pour arriver à un montant quelconque de la valeur du terrain et des dommages à payer, il devenait alors possible pour le Juge de déclarer s'il y avait lieu pour lui d'intervenir et de remédier à l'erreur des Commissaires, si ces derniers avaient fait entrer dans leur estimation ce qui en devait être exclu.

J'avais voulu éviter toute cette enquête aux parties, dès le mois d'Octobre 1868, en les invitant à faire de part et d'autre des admissions de faits sans préjudice aux questions du droit; mais elles ont refusé d'accéder à la suggestion que je leur faisais pour commencer une longue enquête qui a occasionné de grands frais et une grande perte de temps. J'ai eu à regretter de ne pas me croire autorisé par la loi à leur imposer la suggestion que je leur avais faite.

Pour revenir aux requêtes présentées, je dois dire que celle des intéressés, MM. Walter Benny et autres accentue un peu plus fortement que celle de la Corporation sur les reproches qu'ils font aux Commissaires, et ils allèguent "que MM. " Brown et Springle ont refusé de réduire leur rapport excessif de $19,500, et en " outre que ce montant énorme fait nécessairement présumer la partialité et la " vénalité de MM. Brown et Springle."

Les réponses aux Requêtes ne sont que des dénégations des accusations portées contre les Commissaires, précédées de la narration de leurs procédés depuis leur nomination, affirmant qu'ils avaient tenu plusieurs assemblées en juin, après notices duement données; que M. Wilson avait fait entendre grand nombre de témoins pour prouver la valeur du terrain exproprié et les dommages ou dépréciation qui lui en résulteront pour le restant de son terrain et que la Corporation s'était abstenue de faire une preuve au contraire, ayant même déclaré une première fois qu'elle déclarait son enquête close, et que ce ne fut que sur leurs pressantes réquisitions, que MM. Laurent et Bulmer furent entendus pour contredire ou diminuer l'importance de la preuve faite par M. Wilson.

Ces allégués me paraissent prouvés et m'obligent de dire que ceux qui devaient

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représenter la Corporation et ses intérêts en ces différentes occasions ne me paraissent pas avoir fait ce qu'ils auraient pu et dû faire dès le commencement des opérations des Commissaires.

Ce n'est qu'après que ces derniers eurent donné un avis plus direct aux intéressés en autant qu'ils devraient être taxés pour payer cette expropriation, que la Corporation s'est occupée de venir à l'aide des requérants et autres citoyens de la rue St. Joseph.

Cette négligence et cette apathie de la part de la Corporation, ne justifiaient pas cependant un mode d'appréciation des dommages en dehors de ce que la loi et la justice dictaient aux Commissaires.

Dans ces cas d'expropriation, la Corporation pourrait assister les Commissaires par ses avocats pour les renseigner sur la loi.

Des procureurs et avocats en pareille circonstance, sont censés ne représenter que le public.

Ce qui paraît encore étrange, c'est que les témoins même entendus de la part de la Corporation sont tombés eux-mêmes dans l'erreur et la même fausse appréciation que les pétitionnaires, par leur requête, reprochent aux deux Commissaires Messrs. Brown et Springle; et c'est ici l'occasion de dire qu'il n'était pas généreux ni juste de vouloir faire retomber sur eux seuls le blâme qui doit s'attacher à leur manière de procéder à l'estimation des dommages, parce que ce mode d'appréciation des dommages semble avoir été l'erreur commune des trois Commissaires et même de la Corporation et des témoins entendus à sa réquisition, Messrs. Bulmer et Laureot.

S'ils sont bien blâmables, ce n'est que d'avoir persisté à maintenir leur rapport (fait d'abord pour le montant excessif de $19,500) à celui de $13,600 lorsqu'il paraissait évidemment par la *preuve écrite* faite devant eux, que la valeur extrême du terrain exproprié en y comprenant tous dommages résultant au terrain restant à l'exproprié, ne pouvait s'élever tout au plus qu'à la somme de $7500.

C'était cette somme-là même que M. Masson aurait consenti d'accorder en dernier lieu pour arriver à un entendement avec les deux autres Commissaires.

C'est à présent le moment d'exposer les principes du droit sur la matière. Le droit français, ainsi que le droit anglais et américain nous en donneront des règles sûres,—et indépendamment de ce que les Commissaires auraient pu trouver dans les procédés et les rapports des Commissaires qui ont eu à procéder, lorsqu'il s'est agi de l'expropriation de partie de la rue Notre Dame, en vertu du même statut, en 1864 et 1865. Il faut néanmoins observer que ces autorités s'appliquent généralement au cas d'expropriation d'une maison ou bâtiment pour partie, dont le surplus restait pour être réparé, réédifié ou destiné à d'autres fins, tandis que dans ce cas-ci, les vieilles bâtisses n'entraient pour rien ou très-peu de chose dans l'estimation à faire. M. Wilson, comme nous l'avons vu, devait immédiatement les démolir pour construire à neuf des magasins dont le loyer était le même que l'expropriation eut lieu ou non, c'est-à-dire soit que la largeur des 3 magasins fût de 87 pieds ou de 72 pieds. Du fait que les magasins s'ils n'étaient que de 72 pieds de front sur la rue McGill au lieu de 87, devaient rapporter le même loyer, il résulte nécessairement la preuve évidente que l'élargissement de la rue St.

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Joseph profitait à M. Wilson, puisque n'ayant qu'à bâtir sur 72 pieds de front, il aurait à faire des bâtisses moins coûteuses que sur 87 pieds, tout en retirant le même loyer; d'ailleurs c'est une chose incontestable que l'élargissement de la rue St. Joseph profitait au coin de la rue McGill. Pour démontrer quelles sont les règles d'appréciation que les Commissaires devraient suivre et d'après lesquelles ils devraient établir et fixer les dommages, je citerai *Herson* de l'expropriation, No. 25.

Pour le propriétaire, l'indemnité porte sur plusieurs objets; savoir: 1o. "La perte de la valeur intrinsèque des terrains expropriés." Cette valeur intrinsèque doit être calculée d'après "l'importance du fonds au *moment de l'expropria-*"*tion* et non sur les avantages que le propriétaire peut en retirer en modifiant "de quelque manière que ce soit l'état de sa propriété."

Le même principe est énoncé par *Debray*, "Manuel de l'expropriation" après s'être exprimé ainsi au No. 101. "Il convient avant tout, d'établir ce qu'il faut "entendre par *indemnité;* ce n'est pas seulement le prix vénal du fonds exproprié, c'est aussi la réparation du dommage souffert par suite de la dépossession: "ainsi l'indemnité à allouer, et qui ne peut consister qu'en une somme d'argent, "doit représenter l'immeuble exproprié, et le préjudice souffert."

Ce passage fait justice et dispose de la prétention qui va à dire qu'il faudrait, pour indemniser l'exproprié, lui donner un terrain de même valeur à tous égards. Voici ce que Delalleau enseigne: "En résumé, nous pensons que l'on doit donner à l'exproprié pour l'indemnité principale, la somme nécessaire pour acquérir *s'il le veut*, une autre propriété de la même valeur. C'est le *seul moyen* de le rendre indemne." Et c'est ce que faisait M. Masson en lui faisant payer son terrain $10 du pied. *Solon*, de l'expropriation, P. 93,94,95.

"Quelque soit le pouvoir du Jury (disons des "Commissaires au lieu du Jury "en France), l'indemnité ne doit jamais être basée que sur la valeur de la pro-"priété au *moment* de l'expropriation, et non sur les avantages que le propriétaire aurait pu en retirer en modifiant de quelque manière que ce soit l'état "actuel de la propriété.

"Il ne faudrait pas non plus prendre pour bâse du rapport à faire, les chances "d'un projet de place, de rue, de chemin de fer. Il *faut* que l'indemnité soit "calculée sur l'*état actuel de la propriété* en y faisant entrer les changements "arrêtés qui d'ores et déjà en ont augmenté la valeur."

C'est ce que je trouve que M. Masson a exactement suivi en consentant à accorder, pour amener MM. Brown et Springle à son opinion, la somme de $7600, qui représentait à peu près et proportionnellement pour les 750 pieds expropriés, ce que les MM. Ewing auraient voulu payer pour la totalité du terrain $45,000.

Plus loin Solon dit: "Il faut tenir pour certain qu'il y a nullité de l'expro-"priation qui comprend tout à la fois une somme déterminée et une somme "*éventuelle* pour le cas où l'administration n'effectuerait pas *certains travaux.*"

Ainsi le rapport de MM. Brown et Springle est vicieux et même nul s'ils ont voulu y faire entrer les dommages qui pourraient résulter à M. Wilson de ce que son voisin McGarvey n'était pas exproprié en même temps que lui, et ne le serait peut-être que longtemps après, ainsi que les autres propriétaires plus loin

dans la rue St. Joseph. De tels dommages résultant de ce que la Corporation retarderait l'exécution de ce qui est regardé comme une grande amélioration publique, ne peuvent être mis à la charge de ceux qui doivent être taxés pour l'élargissement de la rue St. Joseph.

Ce serait un recours de tout autre genre que M. Wilson aurait à exercer contre la Corporation même si elle négligeait de poursuivre cette amélioration dans un délai raisonnable.

Ce droit a été reconnu par nos tribunaux, il y a 20 ans, lorsque feu M. Paul Lacroix obtint successivement deux jugements en condamnation de dommages contre la Corporation pour avoir négligé de compléter, dans un temps convenu, le Carré ou Jardin Viger, sur les rues St. Denis et Craig.

Delalleau et Jousselin, No. 307.

" En aucune circonstance, on ne doit accorder d'indemnité pour les avantages " hypothétiques que le propriétaire aurait pu obtenir en modifiant de quelque " manière que ce soit l'état de sa propriété. C'est la valeur au *moment* de l'en- " treprise des travaux, et par suite, l'état des lieux à *cette époque*, qui doivent " seuls être pris en considération."

Dufour, No. 121.

" C'est aussi au moment de l'entreprise des travaux qu'il faut s'attacher pour tout ce qui concerne l'état des lieux.

" Le devoir du Jury est de *repousser* toute demande d'indemnité qui se fon- " derait sur les avantages que l'indemnitaire aurait pu supposer par des change- " ments apportés à son mode de jouissance."

Nulle part, dans ces actions, l'on ne trouve un cas parfaitement semblable à celui-ci. Je suppose que nulle part ailleurs et en France surtout, l'on aurait pu imaginer que des loyers à retirer plus ou moins incertains, et plus ou moins élevés, sur des magasins non encore bâtis, plus ou moins grands, pouvaient faire la base d'un revenu assez fixe et assez certain, de $1000 ou $1200 qu'on pût capitaliser six ou huit pour cent, pour arriver à former un capital de milliers de piastres ou de louis à accorder comme indemnité d'expropriation.

C'est pourtant ce que les trois Commissaires ont entendu faire ; chacun cependant d'après des calculs plus ou moins raisonnables ; et comme je l'ai dit déjà, les témoins mêmes de la Corporation ont adopté ce mode vicieux d'évaluer les dommages de l'expropriation.

Cela ne doit pas être et ne peut pas être. La loi, la justice et la raison repoussent ce mode d'appréciation.

Les dommages à estimer ne peuvent porter et comprendre que quelque chose de réel et d'existant au moment même de l'expertise des Commissaires et ne peuvent aucunement porter sur un capital non encore engagé ou exposé par l'exproprié.

Ils ne peuvent tomber sur rien d'incertain et d'hypothétique. Eh ! quoi de plus incertain que des loyers à retirer de magasins non encore bâtis.

M. Baillie, qui les avait loués 14 mois avant qu'ils lui dussent être livrés, étant *déjà* insolvable à la demie-année.

Combien d'autres exemples, à la douzaine, de marchands qui croient faire de bonnes affaires et qui sont obligés d'appeler leurs créanciers avant la fin de l'année.

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Combien de magnifiques magasins érigés en 1867, 1868, 1869, dans des endroits aussi bien situés que ceux de M. Wilson sont restés sans locataires.

Un de ses propres témoins, M. *Taylor*, son vis-à-vis, qui a bâti la même année que M. Wilson, nous rapporte qu'une partie seulement de son immense bâtisse est louée. Très près du coin de la rue McGill, les deux magasins de M. Guy n'ont jamais été loués depuis 1867 qu'ils ont été bâtis. Au beau milieu de la rue Notre Dame, j'en puis compter plusieurs autres qui ne sont ni loués ni occupés depuis deux ou trois ans.

Et c'est en présence d'un pareil état de chose qu'il faudrait dire qu'il est raisonnable de suivre les Commissaires, MM. Brown et Springle, dans leur exagération de vouloir prendre pour certain ce qui est l'incertitude même, surtout dans un pays où les affaires de commerce sont si incertaines et sujettes à subir toutes les fluctuations des marchés étrangers! Ce n'est ni juste, ni possible, ni conforme aux règles du droit à cet égard. *Foucart*, p. 737, donne la définition suivante :

" L'indemnité consiste dans une somme d'argent mise à la disposition immé-
" diate du propriétaire, dont le montant doit être déterminé en raison composée
" de la valeur des objets expropriés, et du préjudice que le propriétaire exproprié
" peut éprouver, soit par dépréciation de la portion de propriété qui reste dans
" ses mains, soit par la dépense qu'il sera obligé de faire pour co-ordonner cette
" propriété à la disposition ultérieure des lieux ; puis il ajoute :

" La valeur donnée aux biens doit être la valeur vénale qu'ils avaient avant
" l'entreprise d'utilité publique, *sans égard à l'augmentation* résultant de cette
" entreprise." J'ai déjà dit qu'il était bien évident que la valeur de la propriété de M. Wilson provenait *en partie* du fait que l'on savait que l'élargissement de la rue St. Joseph aurait lieu. C'était bien là aussi pourquoi M. Wilson prenait tant de trouble pour s'assurer en 1867 que la rue St. Joseph serait élargi.

Plusieurs témoins entendus ont entretenu la même opinion.

Je dois ajouter ici un passage de Caudevaine sur l'expropriation.

Art. 50.—Lorsqu'un propriétaire " fait *volontairement* démolir sa maison,
" lorsqu'il est forcé de la démolir pour cause de vétusté, il n'a droit à indemnité
" que pour la valeur du terrain délaissé si l'alignement qui lui est donné par les
" autorités compétentes le force à reculer sa construction." *Fait volontairement démolir sa maison*, c'est-à-dire que le propriétaire a voulu lui-même démolir sa maison, la loi, ne voyant plus qu'un terrain vuide là où était son édifice, veut que l'estimation du terrain qu'il doit céder pour satisfaire à l'alignement donné, ne comprenne que le sol nu.

Lorsqu'il est forcé de la démolir pour cause de vétusté : c'est-à-dire que soit qu'il s'agisse d'une démolition purement volontaire, soit qu'il s'agisse d'une démolition forcée par les vices du bâtiment qui menace ruine, la portion du terrain qui est à céder, ne doit toujours être estimée que suivant la valeur " d'un sol vide."

C'est le cas même de Wilson, il démolissait sa vieille maison parce que son terrain exigeait des bâtisses et des magasins en rapport avec les besoins du commerce, et son bail à M. Baillie prouve qu'il était déterminé à les bâtir, que l'élargissement de la rue eut lieu ou non. Il ne devait donc être indemnisé qu'à raison de son sol vide, et il est vrai de dire que le rapport de M. Masson était le seul raisonnable en droit, en justice, et d'après les faits en preuve.

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J'ai déjà dit que je ne voyais pas de doute que le juge put intervenir dans le cas actuel en vertu des dispositions du Statut de 1864, à raison du montant excessif du rapport et du mode d'appréciation vicieuse et illégale que les Commissaires dont on se plaint étaient au moment de faire et de les empêcher d'accomplir ce qu'il eût été plus difficile d'attaquer après sentence rendue.

Le Juge aurait peut-être encore pu le faire d'après le principe du droit anglais. *Where there is a wrong there must be a remedy.*

Et c'était à lui ou à la Cour de trouver ce remède et ce moyen. En France ce pouvoir est exercé par les tribunaux sous une forme ou sous une autre. Il est nécessaire qu'il existe quelque part. *Herson*, de l'expropriation, No. 305.

" L'article 42 de la loi de 1841 en indiquant les seuls cas dans lesquels la " violation de la loi donnerait ouverture à cassation, n'a pas interdit pour cela " les autres moyens tirés du droit commun qui y donnent lieu.

" Aussi l'excès du pouvoir, ou l'incompétence de la part du Jury ou du magis- " trat directeur, rend toujours annulable la décision qui en est entachée, quelque " soit la disposition de la loi d'expropriation à laquelle il se rattache.

Debray de l'expropriation, No. 133.

" Ce ne sont pas là, nous le répétons, les seules causes qui peuvent donner " ouverture à cassation : ce sont celles qui se représenteront le plus souvent."

L'article 42, au surplus, en indiquant " les cas où la voie du recours est accor- " dée aux parties, n'a pas pour cela interdit les moyens tirés du *droit commun*, " par exemple, l'incompétence et *l'abus* de pouvoir de la part du *Jury* ou du *Ma-* " *gistrat directeur.*

" La restriction de l'article 42 ne porte que sur la résolution de la loi spéciale, " laissant entier le pouvoir réformateur de la Cour Suprême à l'égard de toute " décision entachée d'abus de pouvoir ou *d'incompétence.*"

Ici il y avait abus de pouvoir et incompétence en procédant à faire l'estimation des dommages que la loi n'autorisait pas.

Je pense devoir revenir maintenant aux différentes sommes mentionnées comme devant ou pouvant être le montant de la juste indemnité à payer à M. Wilson pour les 750 pieds qui lui étaient enlevés, c'est-à-dire à peu près un sixième, son lot ayant à peu près une superficie de 4350 pieds.

M. Windeyer, l'architecte de M. Wilson, dans un état dont j'ai déjà parlé, avait fait monter le coût du revient de toute la propriété au mois de mai 1868 à la somme de £7278.4.8.

Lorsque M. Wilson produisit le 10 de juin 1868 sa réclamation devant les Commissaires, pour le prix de 750 pieds expropriés, et les dommages en résultant au reste de la propriété, il eut l'étrange prétention de faire une réclamation pour $29562.40, c'est-à-dire $343.40 plus que son architecte n'avait estimé toute sa propriété au mois de mai 1868.

Voici cette réclamation et la lettre qui l'accompagne.

GENTLEMEN,

" With reference to my property on the corner of McGill and Joseph streets, I " claim as indemnity for the damage occasioned to me, by being compelled to " place, on the new line, the building I am now erecting on the above corner, " the sum of twenty nine thousand five hundred and sixty-two dollars, 40

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" cents currency, as shown by statement below which, by the evidence taken " before you, has been fully established.

" The proposed improvement is no benefit to me in any way, because, instead " of St. Joseph street being widened, my stores alone are set back, my property " alone is sacrificed, and, should there be hereafter at any time any benefit from " the widening of the street, that benefit will be realised by the property oppo- " site, which will retain all its present frontage on McGill street, while by this " proposed improvement mine is curtailed.

" This corner both now and prospectively is of great value, and my actual loss " will eventually be greater than now estimated.

" Taking all these facts into consideration, the price of the portion of land, " at the present value of the whole lot, forms but a small part of my just indem- " nity."

(Signed,)

CHARLES WILSON.

Cette modeste lettre était accompagnée de l'état suivant :

" Statement of claims of the Hon. Charles Wilson for property taken for the " widening of St. Joseph street :

" Ground taken 745 ft. sq in super. at $10 per foot.....	$7,452,50
" Demolishing house.....	2,405 00
" Value of part of gable wall	150.00
" Depreciation of value between stores built on new line " and three stores that might have been built on old line " $1,400 capitalized at. 6 per ct.....	23,360.00
	$33,367.50

CREDIT.

" Ground taken 745 ft. in super. at $10 per foot.....	7457	
" Estimated cost of difference between erecting building...	3600	
Material of old house demolished.....	120	
		$11,177.50
Total.....		$22,190.00
" Add on $11,057 50 4 p. c. being the difference between " 6 p. c. and 10 p.c. which is being paid on all money " invested in land and building $442 30 capitalised at " 6 p. c. per an		7372.40
Total.....		$29,562.40

Cela était suffisant pour mettre les Commissaires en garde contre des prétentions aussi [illegible] exagérées, et il est à regretter que ceux qui représentaient la Corporation ou [illegible] représenter devant les Commissaires, ne se soient pas de suite mis à [illegible] pour faire voir *l'exagération* et *l'impossibilité* de pareilles prétentions. [illegible] ce montant excessif ne reposait sur rien de raisonnable et en rejetant [illegible] ce qui pourrait aucunement être accordé par les Commissaires à M. Wilson.

Après avoir entendu les témoins de M. Wilson et les deux témoins de la Cor-

poration, Messrs. Bulmer et Laurent, les Commissaires, Messrs. Brown et Springle proposèrent un rapport le 11 juillet 1868, pour accorder $19,000. M. Masson refusa d'y concourir. Puis la séance fut ajournée au 14 juillet.

Dans une lettre du 16 à M. Masson sur le mérite de ce rapport, M. Brown s'exprime ainsi :

" A high appreciation of your mature judgment in matters of expropriation and " reference to the experience you have long acquired impels me to state to you " fully the grounds on which I differ from you in determining the indemnity to " be accorded, it being to my judgment a question to be determined separate " and distinct from *ordinary expropriation*."

Il est tout à fait regrettable que M. Brown ait cru qu'il s'agissait d'un *cas particulier* ; s'il s'était occupé de l'affaire comme d'une *expropriation ordinaire*, il y aurait vu plus clair et n'aurait pas persisté dans son erreur.

Plus loin, il s'exprime ainsi :

" I *start* with the position that private property is as it has ever been *sacred*, " and can only be taken for public uses and then paid for in the full or amply. " This is not what I should consider enough or satisfactory, but *what the pro-* " *prietor claims and proves*."

Ce n'était pas aux Commissaires à établir et fixer les principes qui règlent l'expropriation pour cause d'utilité publique ; ils auraient dû seulement et simplement, comme des Experts, s'informer de ce qu'ils avaient à estimer, s'en enquérir, s'ils ne le savaient pas, et agir en conséquence.

C'est en quelque sorte s'ingénier à législater sur le droit d'expropriation.

Ce dernier passage nous explique complétement la cause de l'erreur dans laquelle M. Brown est tombé, ainsi que M. Springle. Ils auraient dû lire et relire et bien comprendre les 6 et 7 de la 13me section du statut sus-cité, qui ne les obligent pas à adopter seulement les idées extravagantes des témoins, puisqu'il y est dit; *qu'après voir entendu parties et témoins, et examiné tels titres, ils fixeront l'indemnité qu'ils croiront juste et raisonnable.*

La loi laissait tout à leur jugement et à leur conscience.

Ils se sont donc trompés sur les devoirs de leur charge, ils se sont cru liés, parce que les témoins de M. Wilson étaient venus leur dire, ils ont cru qu'ils ne pouvaient pas en prendre ou en laisser, suivant que leur bon jugement ou leur connaissance des choses, de la valeur des propriétés ou des loyers, pourrait leur suggérer.

Ainsi, bien que M. Brown admette que les idées de ces témoins en matière de loyers, soient exagérées, et que les loyers avaient récemment augmenté deméme, plus qu'il n'était raisonnable, il se croit non moins obligé de suivre les idées extravagantes de ces personnes; je suis persuadé que si M. Brown s'était uniquement guidé d'après sa longue expérience des choses depuis un demi siècle, et aussi de leur incertitude, qu'il ne serait pas tombé dans une erreur aussi palpable.

Il avait raison d'être étonné de ce que les témoins ont dit; il aurait dû en prendre et en laisser, comme un juge et un jury sont souvent obligés de faire. Des jurés encore plus que des juges sont juges des matières de fait, et des Commissaires en matières d'expropriation, sont de vrais jurés. Telle est la loi. Malheureusement, les deux Commissaires étaient obsédés par cette fatale idée, qu'ils

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étaient des juges; et singulièrement, ils s'imaginent que des juges et des jurés ne pouvaient pas y mettre un peu de leur bon jugement et de leurs connaissances des hommes, des choses et de la loi.

C'est tout le contraire cependant, et il n'y a pas très longtemps encore, le montant de l'expropriation en pareil cas était fixé et réglé par des jurés que le Shérif assemblait, en vertu de lois précédentes sur l'expropriation.

Il vaut mieux attribuer à cette fatale et singulière erreur, le refus que Messrs. Brown et Springle ont maintenu de se rendre aux vues de M. Masson, l'autre commissaire, et je ne dois pas supposer qu'ils ont été mus et ont agi ainsi que les Requérants l'ont prétendu par faiblesse, partialité et vénalité.

Le 7 août 1868, 3 jours avant la signification des requêtes et du bref de prohibition, ils ont consenti à réduire leur projet de rapport à $13,600. Mais c'était encore beaucoup trop. Et ainsi que je l'ai dit déjà, le rapport de M. Masson à sept mille et quelques cent piastres, est peut-être même trop élevé.

Ce que je ne puis comprendre dans la conduite et la manière de voir de MM. Brown et Springle, c'est que bien qu'ils aient cru être strictement tenus à juger d'après ce que les témoins de M. Wilson étaient venus leur dire, ils ont fermé les yeux sur la preuve écrite devant eux, résultant du bail fait par M. Wilson à M. Baillie, et de la vente du même à M. Ewing. C'était une preuve *écrite*, procédant de l'*exproprié lui-même* et de deux personnes en rapport d'affaires importantes avec lui, preuve qui était beaucoup plus forte et plus certaine que la preuve testimoniale.

Malheureusement, il y a peu de chose qu'on ne fasse dire à un témoin quand on sait un peu s'y prendre. C'est triste d'avoir à le dire, mais c'est une vérité et c'est pourquoi les tribunaux s'attachent beaucoup plus à la preuve écrite, surtout comme dans le cas présent lorsqu'elle procède même de la partie intéressée.

Que n'ai-je pas vu dans l'enquête qui a été faite sur ces requêtes et la contestation! Beaucoup de témoins sont venus renchérir sur ce qu'ils avaient déjà dit devant les Commissaires, tandis que d'autres sont venus dire le contraire de ce qu'ils avaient dit lorsqu'ils ont été appelés à donner des affidavits en Août 1868, en faveur de la requête de la Corporation et des intéressés, les requérants. Les premiers sont de la classe de ceux qui prouvent trop et on ne les croit guère. Les seconds sont de la classe de ceux que l'on ne croit pas, parce qu'ils n'y a pas moyen de savoir si c'est leur première ou la seconde déposition qui contient la vérité. J'aime mieux me taire que d'en dire davantage sur ce que mon expérience comme homme et comme juge m'autoriserait de dire.

Il y a trois témoins entendus de la part des Requérants, dont les dépositions ont été devant moi d'un grand poids. Ce sont celles de M. le Commandeur Berthelet, de M. Harrison Stephens et de M. Louis Boyer, tous trois grands propriétaires, dans différents quartiers de la ville, devant leur fortune à de longues habitudes d'industrie et d'économie, se livrant peu à la spéculation proprement dite sur les propriétés, et incapables de tomber dans les écarts des témoins qui sont à la recherche d'une bonne occasion pour faire une grosse spéculation sur la revente d'une propriété, comme bon nombre des témoins entendus de la part des Commissaires. Aussi leur témoignage a été donné sobrement et tel que j'ai dû croire à ce qu'ils ont dit de la valeur réelle et raisonnable de la propriété en

question et dans ses environs, s'il m'avait fallu leur témoignage pour arriver à la même conclusion, ce dont je pouvais me dispenser à raison de la preuve écrite dans la cause.

Tous trois s'accordent à dire que la valeur des terrains dans cet endroit-là n'était que d'à peu près 6 à 7 piastres du pied, et que ce n'était qu'à cause des grandes améliorations récemment faites dans le voisinage. Des terrains tous près de celui-là avaient été vendus dans la rue Notre Dame, dont la rue St. Joseph n'était que la continuation, à l'entrée du faubourg, à raison de cinq piastres du pied.

Tous trois s'accordent à dire que les loyers payés alors pour des magasins étaient incontestablement trop élevés et que l'élargissement de la Rue St. Joseph augmentait la valeur de la propriété de M. Wilson.

Enfin M. Berthelet donne une estimation raisonnée sur la valeur de plusieurs propriétés situées dans la Rue St. Jacques, près des Banques, valant plus, pied pour pied, que celle de M. Wilson, quoique plusieurs témoins de ce dernier aient dit qu'il n'y en avait pas de mieux situé ou d'une plus grande valeur dans la cité que celle de M. Wilson.

Le témoignage de ces trois témoins est corroboré par celui de plusieurs autres qu'il serait oiseux de rapporter nominativement, et sur le tout je suis obligé d'y accorder plus de créance, et d'arriver à la conclusion que l'estimation faite par Messrs. Brown et Springle est exagérée, fausse et impossible d'après les règles du droit dont ils auraient dû faire l'application dans l'exercice de leurs fonctions comme Commissaires, et que pour ces raisons et tout ce qui précède, ils devront être destitués.

Il me reste maintenant à considérer la question de la légalité et de la régularité du *writ* de prohibition émané sur la demande de M. J. Bte. Houlé, un des intéressés en autant qu'il était un de ceux qui devaient être taxés pour le montant de l'expropriation. Il ne s'est pas joint aux autres requérants Benny et autres pour demander par requête la destitution des deux Commissaires, et le writ de prohibition est à l'effet d'empêcher les trois Commissaires de la Corporation de procéder ultérieurement sur le rapport que les dits Thomas S. Brown et James H. Springle avaient fait le 20 juillet 1868. La demande en était motivée par les mêmes raisons que celles articulées sur la requête, et surtout parce que le dit rapport était erroné en principes et avait pour objet d'accorder des dommages éloignés et d'une nature toute spéculative.

La contestation des Commissaires sur ce point est qu'il ne pouvait y avoir lieu en ce cas au *writ de prohibition*, parce que les Commissaires étant nommés et pouvant être révoqués par la Cour, et sous son contrôle comme les shérifs et le Protonotaire, n'étaient pas une Cour séparée, mais officiers de cette Cour; parce qu'ils n'avaient pas excédé leur jurisdiction, et parce qu'il y avait un autre recours par voie de pétition.

Je dois dire de suite que c'est une fausse comparaison que de dire que les Commissaires sont les officiers de la Cour comme le Shérif ou le protonotaire. Ces derniers sont les officiers immédiats de la Cour, gardiens de ses records et documents, tandis que les Commissaires exercent une espèce de jurisdiction comme des experts ou des arbitres peuvent le faire et par eux-mêmes. Le moment

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pour la Cour d'intervenir est avant le travail des Commissaires terminé s'ils excèdent leur jurisdiction en adjugeant sur des dommages que leur nomination ne les charge pas d'adjuger: Attendre que le tort fut accompli et leur rapport terminé, serait attendre peut-être trop tard, ou du moins nécessiterait un recours plus long et plus incertain, lequel peut-être ne serait pas reconnu.

Je ne vois pas qu'il puisse réellement y avoir une difficulté sérieuse à soulever à l'encontre du droit de M. Houlé de se pourvoir par *writ de prohibition* dans le cas actuel, et je ne puis mieux faire sur ce point que de citer deux autorités du factum de M. Carter pour prouver que le recours par writ de prohibition peut être exercé, lors même que celui qui l'invoque peut avoir recours à d'autres moyens. Gough vs. Gapper, 5 East p. 345. Lord Ellenborough, C. J., after reviewing all the cases of Prohibition from the earliest times, says:

"The subject matter of all these cases, both as they involved the determina-
" tion of questions of a temporal nature, and the construction of statutes, was
" clearly within the jurisdiction of the several courts prohibited. *There are cases in*
" *which the judgment given below might have been corrected on appeal*; and
" some of them are cases where the common Law Courts have taken upon them-
" selves the construction of acts of Parliament, made respecting subjects pecu-
" liarly relating to the Superior Courts so published, *and have yet even in such*
" *cases granted prohibition* when such Inferior Courts misconstrued those acts of
" Parliament."

Voici une autre autorité toute aussi applicable—dans un cas où il s'agissait d'empêcher une compagnie de chemin de fer de passer à travers la propriété du demandeur.—La compagnie défenderesse prétendait qu'il y avait d'autres moyens et d'autres recours qu'elle pouvait employer et que la Cour n'assumerait pas sans nécessité sa jurisdiction sur la demande.

Cependant le writ fut accordé et le Lord Chancellor s'exprima ainsi:

"I am told there are other modes of proceeding, other remedies which the
" Plaintiff may adopt, and therefore it is submitted to me that the Court ought
" to refuse its jurisdiction. Now I consider that there cannot be a more useful
" exercise of the jurisdiction of the Court, than in intervening to ascertain the
" right between parties in circumstances as in this case. I look at the great
" powers which are necessarily given to these companies; the variety of interests
" with which those powers may interfere, if not strictly exercised according to
" the provisions of the acts; the necessity of immediate interposition; the injury
" to both parties, if there be not a jurisdiction *constantly open*, by which their
" *respective rights* may be ascertained, and then it appears to me that this is of
" all others a situation of things in which this Court ought to exercise that juris-
" diction."

C'est certainement aussi un cas dans lequel je dois faire intervenir mon autorité judiciaire pour protéger les intérêts du Requérant qui pourraient souffrir autrement.

Il avait le droit de choisir celui des recours que la loi lui donnait et ce n'est pas à la Cour ni aux défendeurs à le limiter dans ce choix ou à le lui contester.

Je dois donc renvoyer la défense en droit.

Le jugement de la Cour est comme suit:

La Cour destitue les Commissaires T. S. Brown et J. Springle et les remplace par les personnes de E. Atwater et J. Pratt, et ordonne en outre que les dits E. Atwater et J. Pratt conjointement avec le dit D. Masson procèdent tous trois à déterminer et fixer le montant du prix à être accordé pour le terrain désigné en la Requête du 6 juillet 1866, le tout sans frais sur les diverses contestations et sur chacune d'elles.

Bourassa and Macdonald.

Stuart & Roy, pour la Corporation.
Mousseau & David, pour les Citoyens.
J. J. C. Abbott, pour Brown & Wilson.
Barnard & Pagnuelo, pour Springle.
(P.B.L.)

COURT OF QUEEN'S BENCH, 1871.

MONTREAL, 10th MARCH, 1871.

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

No. 46.

BOURASSA, APPELLANT,

AND

MACDONALD, RESPONDENT.

HELD:—1o. That Art. 2178 of the Civil Code applies, as well to creditors and purchasers *antecedent* to the coming into force of Art. 2178, as to subsequent creditors.

2o. That the seizure of the property does not suspend the necessity of re-registration, required by Art. 2172.

This was an appeal from a judgment rendered by the Superior Court at Montreal, sitting as a Court of Review, on the 31st day of May, 1870.

The contestation between the parties was as to which of them should be preferred in the distribution of moneys arising from the sale, by the Sheriff of Montreal, of certain immoveable property, situate in the County of Huntingdon, which had been seized and sold as belonging to one François Xavier Robidoux, at the instance of the respondent, plaintiff in the Court below.

In accordance with the provisions of Articles 2168 and 2169, of the Civil Code of Lower Canada, the Governor's proclamation was issued on the 28th June, 1867, as respects the registration division of that part of the county of Huntingdon, in which the lands seized in the cause are situate, and was published in the "Canada Gazette."

By the terms of the proclamation, the said Article 2168 was put in force on the 2nd of November, 1867, with respect to such registration division. And it, therefore, became incumbent (according to Article 2172) to renew "the registration of any real right upon any lot of land within such division," within 18 months from the 2nd of November, 1867; viz., on or before the 2nd day of May, 1869.

The property in question in this cause was seized by the Sheriff on the 23rd of January, 1869, and was sold on the 31st of May, 1869.

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The respondent fyled an opposition *à fin de conserver*, based on a claim of *bailleur de fonds*, which was registered on the 29th of March, 1860; but such registration was never renewed.

The appellant appeared in the Registrar's certificate, attached to the Sheriff's return, as a hypothecary creditor, whose claim was that of an ordinary mortgage, registered on the 30th of March, 1867. And the registration of the mortgage had been renewed on the 23rd of April, 1869.

In the report of collocation and distribution of the moneys arising from the sale of the property, the Prothonotary collocated the appellant in preference to the respondent, and the latter consequently contested the report.

The case was argued in the first instance before THE HON. MR. JUSTICE BERTHELOT, who pronounced the following judgment on the 30th day of November, 1869:

"La Cour, après avoir entendu le dit opposant James MacDonald et le dit Hubert Bourassa, par leurs avocats au mérite sur la contestation de la collocation de ce dernier sous No. 5 du jugement de distribution soumis par le Protonotaire de cette Cour.

"Vû la proclamation en la *Gazette du Canada* en date du 28 Juin 1867 en conformité à l'exigence des Articles 2168 et 2169 du Code Civil du Bas-Canada.

"Vû les Articles 2172 et 2173 du même Code et l'absence de renouvellement de l'Inscription hypothécaire invoqué par le dit opposant dans les dix-huit mois qui ont suivi la dite proclamation sur l'immeuble affecté à son hypothèque par la transcription requise en l'article No. 2168 ci-dessus cité du Code civil et en suivant les formalités requises par l'article 2131 du même Code, vu aussi les articles 699 et 971 du code de Procédure.

"Considérant que par suite de ce, et de l'article 2173, l'hypothèque invoqué et acquise antérieurement par le dit opposant est sans effet vis-à-vis du dit Hubert Bourassa, créancier colloqué pour et sur une hypothèque dont le renouvellement a été fait le 23 Avril 1869, en temps utile et selon l'exigence de la proclamation ci-dessus mentionnée du 28 Juin 1867.

"La Cour a renvoyé la contestation du dit opposant, avec dépens contre lui."

The Court of Review, presided over *by the same Judge* who rendered the original judgment, and JUSTICES MACKAY and TORRANCE, *unanimously* reversed the judgment, assigning for so doing the following reasons:

"La Cour * * * considérant qu'il y a erreur dans le dit jugement du trente novembre mil huit cent soixante-neuf, a revisé le dit jugement et l'a renversé, et procédant à rendre le jugement qui aurait dû être rendu en cette cause:

"Considérant que par l'article 2091 du Code Civil, l'enrégistrement effectué après la saisie de l'immeuble, lorsque cette saisie est suivie d'expropriation, est sans effet vis-à-vis des tiers, et qu'il en est de même du renouvellement d'enrégistrement prescrit par les articles 2172 et 2173 du même Code.

"Vû que la saisie judiciaire à la poursuite même du contestant de l'immeuble dont les deniers sont devant cette Cour pour distribution, a eu lieu le vingt-trois Janvier, mil huit cent soixante-neuf et fut suivie de vente par décret le trente-et-un Mai, mil huit cent soixante-neuf, et que par conséquent le renouvellement d'hypothèque fait et opéré par le nommé Hubert Bourassa, le vingt trois Avril, mil

huit cent soixante-neuf, ne pouvait avoir aucun effet à l'encontre d'une créance hypothécaire ou privilégiée inscrit antérieurement au jour de la saisie.

"La Cour, pour ces raisons, adjugeant sur la contestation du dit opposant James MacDonald, de la collocation cinquième du projet de jugement de distribution produit en cette cause le vingt Septembre mil huit cent soixante-neuf, a maintenu la dite contestation et a ordonné et ordonne que le montant de la dite collocation, deux cent cinquante-sept dollars quarante centins soit accordé au dit opposant James MacDonald, de préférence au dit Hubert Bourassa, et comme bailleur de fonds, et qu'il soit en conséquence par le protonotaire de cette Cour, procédé à faire un nouveau rapport de distribution et de collocation, avec les frais de la dite Cour Supérieure contre le dit Hubert Bourassa en faveur du dit James Macdonald, et aussi les frais de cette Cour de Revision."*

Cassidy, Q.C., pour l'appelant:—Il se présente sur cet appel deux questions:

La première est de savoir si l'appelant a pu légalement renouveler son hypothèque pendant que l'immeuble était *sous-saisie*, telle saisie ayant été suivie du décrêt de l'immeuble.

La seconde question s'offre sous l'aspect que voici: admettant que l'appelant fut bien fondé à renouveler son hypothèque pendant que l'immeuble était sous-saisie, vu qu'il se trouvait dans les 18 mois de la Proclamation, ce renouvellement d'hypothèque lui donne-t-il priorité sur l'Intimé, qui n'a pas renouvelé la sienne?

Sur la première question, la Cour de Revision a été d'avis que l'appelant n'avait pu légalement renouveler son hypothèque, quoique ce renouvellement ait été fait en conformité à l'article 2172 du Code Civil, c'est-à-dire, dans les 18 mois après la Proclamation, pour le motif que l'immeuble était sous-saisie lors de ce renouvellement, et que cette saisie a été suivie du décrêt de l'immeuble.

Le principe consacré par ce jugement est donc que l'enrégistrement d'un droit réel fait sur un immeuble qui est sous-saisie, suivie plus tard d'un décret, *est sans effet*, dans tous les cas.

La Cour de Revision a erré, ce nous semble, en affirmant une telle doctrine, et sa décision dans l'espèce actuelle est une violation de la loi.

Nous allons démontrer qu'il y a une exception au principe qu'elle a posé d'une manière aussi absolue, et nous ferons voir que l'appelant se trouve dans cette exception.

L'article 2090 du Code Civil contient la disposition que voici:

L'enrégistrement d'un titre d'acquisition de droits réels dans ou sur les biens immobiliers d'une personne, fait dans les trente jours qui précèdent sa faillite est sans effet: *sauf les cas où le délai accordé par la loi pour effectuer l'enregistrement de tel titre, tel que porté dans le chapitre qui suit, n'est pas encore expiré.*"

Et l'article suivant, 2091, est en ces termes:

"*Il en est de même* de l'enrégistrement effectué après la saisie de l'immeuble, lorsque cette saisie est suivie d'expropriation."

Il nous parait évident que ces deux articles consacrent le même principe et la même exception.

* Vide L. C. J., Vol. 15. pp. 267, 274.

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On ne peut appliquer l'article 2091 par lui-même, comme l'a fait la Cour de Révision; il faut le mettre en rapport avec l'article 2090 pour savoir quels sont les cas où l'on est reçu à prendre inscription sur un immeuble, même lorsqu'il est sous l'effet d'une saisie qui est suivie d'un décret.

L'article 2090, parlant de la Faillite, déclare comme exception, que l'on est bien fondé à prendre inscription d'un droit réel sur un immeuble, même dans les 30 jours de la Faillite, *quand on est dans les délais* accordés par la loi pour faire telle inscription: et l'article suivant déclare que la même règle s'applique en matière de saisie.

L'article 2090 nous réfère à différents articles du Code où une inscription peut être prise sur un immeuble, même lorsqu'il est sous saisie, tels sont par exemple les suivants:

Art. 2100: Le vendeur d'un immeuble a 30 jours pour inscrire son titre. Si l'immeuble ainsi vendu était aussitôt saisi sur l'acquéreur, le vendeur serait-il privé de son droit? évidemment non.

Art. 2104.—Il en est de même des co-partageants qui ont 30 jours pour prendre inscription.

Art. 2105.—Le même délai est accordé aux co-héritiers ou légataires.

Art. 2106.—Les créanciers ou légataires qui demandent séparation de patrimoine ont six mois.

Art. 2107.—Les médecins ont aussi un délai de 6 mois pour inscrire leurs créances pour dernière maladie.

Il faut donc admettre qu'une inscription prise dans les délais accordés par la loi est valide, que l'immeuble soit alors ou non sous l'effet d'une saisie qui est plus tard suivie d'un décret. Or, dans l'espèce actuelle, l'appelant était dans les délais accordés par la loi pour renouveler son inscription; cette inscription est donc légale et elle doit avoir son effet à l'encontre de l'Intimé qui a négligé de renouveler la sienne. D'ailleurs, l'appelant en renouvellant son inscription, n'acquérait pas un nouveau droit d'hypothèque, il ne faisait que protéger un droit existant.

Si la décision de la Cour de Revision est acceptée comme bien fondée, on ne peut se dissimuler qu'elle produira de fâcheuses conséquences dans l'application de notre nouveau régime hypothécaire. Il arrivera fréquemment qu'un créancier postérieur renouvellera son hypothèque avant un créancier antérieur, et fera de suite saisir l'immeuble pour empêcher le renouvellement de créances qui primeraient la sienne, si elles étaient renouvelées.

Seconde Question:—L'Intimé, pour conserver sa priorité d'hypothèque sur la créance de l'Appelant, était-il tenu de renouveller son titre de créance dans les 18 mois en conformité à l'article 2172 du Code Civil? Nous prétendons qu'il y était tenu. Et comme il a négligé cette formalité, son droit d'hypothèque se trouve primé par celui de l'appelant, conformément aux dispositions de l'art. 2173 du Code qui déclare que si le renouvellement des droits réels, mentionné dans l'article 2172, n'est point fait par enrégistrement au long, dans les 18 mois du jour fixé par la proclamation, les droits conservés par le premier enrégistrement n'auront aucun effet à l'égard des autres créanciers ou des acquéreurs subséquents dont les droits sont regulièrement enrégistrés.

Cette seconde question n'a nullement été prise en considération par la Cour Inférieure qui a paru n'y attacher aucune importance.

Sur le tout nous croyons avoir raison de demander la cassation du jugement de la Cour de Revision et la confirmation du jugement de la Cour Supérieure.

Bethune, Q. C., for Respondent:—The legal consequence, resulting from non-renewal of registration within the eighteen months, is stated in Article 2173 of the Civil Code, to be this: "The real rights preserved by the first registration "have no effect against *other creditors and subsequent purchasers*, whose claims "have been regularly *registered*." (*not renewed.*)

This provision of the law has clearly reference only to *subsequent* creditors and purchasers, and *not* to creditors and purchasers *antecedent* to the coming into force of Article 2168 of the Code. The word "*other*" before the word "creditors" is clearly intended to mean the same thing as the word "*subsequent*" before the word "purchasers." The real meaning and intention of the enactment was manifestly to protect subsequent creditors and purchasers whose claims should be duly registered from all old claims, whose registration should not be renewed within the prescribed eighteen months, and not to apply to those who were thus required to renew their registration.

As regards all creditors and purchasers, therefore, *antecedent* to the coming into force of Article 2178, their respective rights, as protected by their original registration, were in no way affected, *as between themselves*, by any failure on their part to *renew* their registration in accordance with said Article 2172.

It was further submitted that, however the Court might be disposed to view the foregoing remarks, it was manifest that whilst the property in question in the case was actually *under seizure*, no registration, whether for purposes of renewal or otherwise, could produce any legal effect whatever. *Vide* Articles 2090 and 2091 of the Civil Code of Lower Canada.

As already shown, the registration effected by Bourassa (in the manner indicated by Article 2131,) as a renewal of his original registration, was only made on the 23rd of April, 1869, namely, within about six weeks of the sale by the Sheriff, and was therefore, in the language of the Code, "*without effect.*" And as MacDonald's claim was a privileged one, and registered long prior to that of Bourassa, MacDonald ought clearly to have been collocated in preference to Bourrassa.

BADGLEY, J., *dissentiens*:—I am of opinion that the judgment should be confirmed. The appellant renewed the registration of his hypothec. The respondent, who had a *bailleur de fonds claim*, did not, because during the eighteen months fixed by the proclamation, he obtained judgment against the defendant, and caused the property to be seized under an execution, and it was while it was in the Sheriff's hands that the appellant renewed the registration of his claim. The eighteen months expired on the second of May, and the property was actually sold by the Sheriff on the thirty-first of May. Bourassa was collocated before the *bailleur de fonds* claim, on the ground that the absence of renewal of the registration of the latter had caused it to lose priority. This judgment has been reversed in review, and I believe the latter judgment to be correct. From

Bourassa, and Macdonald.

the moment the property went into the Sheriff's hands, the creditors were all on the same footing, and no right could be acquired by one over the other.

DUVAL, C. J.—Bourassa registered within the time prescribed by law, and the other mortgagee did not. The fact that the property was under seizure could not deprive Bourassa of the rights which the law gave him. The judgment of the Court would therefore sustain his claim to priority.

CARON, J.—Question d'enrégistrement. Le dit intimé a-t-il enrégistré son titre en temps opportun?

Cet enrégistrement a été fait après la saisie, mais dans le délai de 18 mois à compter de la proclamation émanée par le Gouverneur, en vertu et à l'effet des articles 2166, 2167, 2168, 2169, du Code Civil.

La proclamation est du 28 Juin 1867; le délai accordé par cette proclamation expirait le 2 Mai 1869, Bourassa a enrégistré le 23 Avril 1869 à peu près onze jours avant l'expiration du délai de 18 mois.

La vente judiciaire ou décret est du 31 Mai 1869.

Macdonald a cité l'article 2173 du Code Civil qui me paraît être contre lui.

Le Juge Berthelot en première instance a jugé en faveur de Bourassa, mais en Cour de Revision où il siégeait aussi, il a renversé son propre jugement.

Le dernier jugement paraît mauvais, et c'est le premier qu'il faudrait confirmer.

C'est l'art. 2172 qui a ordonné le renouvellement des enrégistrements antérieurs, il est suivi de l'art. 2173 qui déclare quelle est la conséquence de ne pas faire le renouvellement requis.

La saisie n'empêche pas l'effet de l'enrégistrement pourvu qu'il soit fait dans les 18 mois de la proclamation articles 2090, 2091, du Code Civil.

The following was the judgment of the Court:

"Vû la proclamation en la "Gazette du Canada" en date du 20 Juin 1867, en conformité à l'exigence des articles 2168 et 2169 du Code Civil du Bas-Canada:

Vû les articles 2172 et 2173 du même Code et l'absence de renouvellement de l'inscription hypothécaire invoquée par le dit opposant, dans les 18 mois qui ont suivi la dite proclamation, sur l'immeuble affecté à son hypothèque, par la transcription requise en l'article No. 2168 ci-dessus cité du Code Civil, et en suivant les formalités requises par l'article 2131 du même Code: Vû aussi les articles 699 et 971 du Code de Procédure;

Considérant que par suite de ce et de l'article 2173, l'hypothèque invoquée et acquise antérieurement par le dit opposant, est sans effet vis-à-vis du dit Hubert Bourassa, créancier colloqué pour et par un hypothèque dont le renouvellement a été fait le 23 Avril 1869, en temps utile et selon l'exigence de la proclamation ci-dessus mentionnée du 28 Juin 1867:

Considérant en outre que le renouvellement d'hypothèque tel que voulu par la loi n'est pas une inscription nouvelle, mais une simple formalité prescrite pour la conservation des hypothèques et droits acquis antérieurement au cadastre:

Considérant que le créancier remplit cette formalité sans le consentement et la participation de son débiteur et son insçu; et partant que le renouvellement d'hy-

pothèques n'est pas l'aliénation prohibée par l'article 644 du Code de Procédure Civile non plus que l'enregistrement invalidé par l'article 2091 du Code Civil;

Considérant enfin, que le fait que le renouvellement est postérieur à la saisie de l'immeuble, ne peut militer contre le créancier qui remplit dans les délais de la proclamation une formalité à l'accomplissement de laquelle la loi l'oblige pour la conservation de son hypothèque primitivement acquise.

Considérant par tant que dans le jugement du 31 Mai 1870 rendu dans la Cour Supérieure siégeant comme cour de Revision, il y a erreur, cette Cour infirme, annule et met au néant le dit jugement, et confirme le jugement rendu en cette cause par la Cour Supérieure siégeant en premier instance le 30 Novembre 1869, le tout avec dépens contre l'intimé dans toutes les Cours."

(*Dissentiente*, l'Honorable M. le Juge Badgley)."

Leblanc & Cassidy, for Appellant.
Bethune & Bethune, for Respondent.

Judgment reversed.

(S. B.)

COURT OF REVIEW, 1870.

MONTREAL, 30th DECEMBER, 1870.

Coram MACKAY, J., TORRANCE, J., BEAUDRY, J.

No. 1244.

Pattison vs. *The Mutual Insurance Co. of Stanstead and Sherbrooke.*

HELD:—That a Corporation cannot be legally served with process, at the office of a person who does business for the Corporation in the district in which such person resides.

This was a hearing in Review of a judgment rendered by the Superior Court for the District of Bedford.

The question at issue is thus stated in the *factum* of the defendants, the party reviewing :—

This case comes before the Court of Review on an issue raised by an *Exception Déclinatoire.*

Plaintiff is Assignee of Insolvents who reside and carried on business in Sutton in the District of Bedford, and the action is brought upon a Policy of Insurance effected by Insolvents with the defendant, whose office and place of business is in the Town of Sherbrooke, in the District of St. Francis.

The declaration alleges that the Insolvents effected insurance with an agent of Defendants at Sutton, and that they suffered loss by fire at Sutton, and fyle a Policy of Insurance made, dated and signed at Sherbrooke. Service of process was made on an agent of defendants at Sutton.

Defendants, by an *Exception Déclinatoire*, allege that the Superior Court in the District of Bedford had no jurisdiction, inasmuch as the cause of action arose in the District of St. Francis, where the contract of insurance was made, and that the service upon a mere drummer or canvasser of the insurance Company, although styled an agent, was not such service as could give the Court in the District of Bedford, jurisdiction.

Pattison vs. The Mutual Ins. Co. of Stanstead and Sherbrooke.

The Court below by its judgment held that the service made in this case gave the Court jurisdiction (omitting to decide as to where the cause of action arose), and dismissed defendants' Exception.

From that judgment defendants seek redress before the Court of Review.

Article 34 of the Code of Procedure gives us the law by which this issue is to be tried. In personal actions, the defendant must be summoned either, 1, Before the Court of his domicile, 2, Before the Court of the place where the demand is served upon him personally, or 3, Before the Court of the place where the right of action originated.

It is submitted that neither of these postulates are found in this case.

1. It is not pretended that defendants are impleaded before the Court of their domicile.

2. Defendants, being a Corporation, could not be served *personally*; but even if it were held that *personal* service upon an officer of an Insurance Company is personal service upon the Company, defendants claim that the so called agent upon whom the service was made, was not an officer of the Company authorised in any manner to act for or defend or represent the company in such matter, any more than their messenger or porter.

3. The cause of action did not originate in the District of Bedford, but in the District of St. Francis.

Plaintiff claims that the cause of action originated in the District of Bedford, at Sutton, because the application for the Policy was made there to an agent of the company, whose place of business is in Sherbrooke. He examines one of the Insolvents, Ross, who deposes that he made the application to one Asa Frary, an agent of defendants, and supposed this agent could, and did, contract for the company, and that by the mere making of an application, an insurance was effected at Sutton.

Defendants contend, that this agent was merely a medium of communication between parties desiring insurance and the company, and that no insurance was effected until the application was accepted by the company who might, if they thought fit, reject the application. This pretension of defendants is sustained by the Policy itself fyled by plaintiff, since by that very instrument, made and dated at Sherbrooke, the insurance commences only from its date, and not from the date of the pretended application. Defendants also sustain their pretension by the testimony of the agent Frary, who deposes that he had no power to bind the company nor did he undertake to bind the company, but merely to transmit the application for the acceptance or rejection of the company, and that he was not an agent in the sense of being an officer empowered to *act for* the company, in their place and stead.

As to the question touching the origin of the cause of action, defendants would cite as authorities in point, 6 L. C. Rep. 492, 8 L. C. Rep. 187, 12 L. C. Rep. 416, 11 Jurist, 123.

The Court below seems to have predicated its judgment upon the assumption that the service of process gave jurisdiction.

Upon this point defendants claim that the person upon whom the service was made, although commonly styled an agent, was not such agent as the code con-

templates in article 61 of the Code of Procedure, Asa Frary not being the President, Secretary, nor Agent acting for and in place of the company. Besides, this Article cannot apply to the defendants, as they are not a *joint Stock* company but a *Mutual one*, in the nature of a co-partnership. Moreover, where jurisdiction is concerned, and the service alone is relied on to give jurisdiction, the law, (Article 34 above cited), requires that it must be *personal*, which is not the case, nor could it be in this case. The pretended agent served, deposes that he had no power or authority to answer for, or represent the company in this cause. Defendant calls in support of this part of his case the following authorities: 6 L. C. Rep. 105, 14 Jurist, 91.

Chabotte vs. Charby.

Defendants respectfully pray the reversal of the judgment of the Court below, with costs of both Courts.

MACKAY, J., remarked that Asa Frary, the *quasi* agent of the company, swore positively that the company had no office in Bedford District.

The following was the judgment in review:—

"The Court considering that there is error, in rejecting the exception declinatory of the said defendant, as it was done, doth, revising said judgment, reverse the same, and proceeding to render the judgment that ought to have been rendered in the premises:—

Considering that said defendant has proved the allegations of the said Exception declinatory, and that it, the company defendant, has not been and was not properly summoned in this cause:—

Considering that it is not shown that defendants had any office in the District of Bedford:—

Considering further, that the cause of plaintiff's action did not arise in the District of Bedford, and that Asa Frary was not such an agent of defendant as that the service of process on him, could or can be held a sufficient service upon defendant to give jurisdiction to the Court in Bedford over the said suit:—

Doth maintain said defendant's Exception declinatory, and doth dismiss plaintiff's action * * *"

Judgment of S. C. reversed.

G. C. V. Buchanan, for plaintiff,
Hon. J. J. C. Abbott, Q.C., Counsel.
Jas. O'Halloran, Q.C., for defendant.
(S. B.)

COUR SUPERIEURE, 1871.

EN REVISION.

MONTREAL, 31 OCTOBRE 1871.

Coram MONDELET, J., MACKAY, J., TORRANCE, J.

No. 1298.

Chabotte vs. *Charby*.

Juge—Qu'il suffit pour le vendeur de laisser entre les mains de l'acquéreur une somme égale à l'hypothèque pour laquelle il craint éviction.

Le 26 Janvier 1860, vente par Paul Lussier au défendeur d'une terre, etc.
Le 3 septembre 1869 transport par Lussier au demandeur des paiements.

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Lussier avait acheté cette terre de Joseph Gassaille le 31 juillet 1858, et s'était engagé de fournir à son vendeur et à son épouse le pacage de deux vaches et de payer à la St. Michel chaque année, le tout leur vie durant, une somme de 36 livres, ancien cours, et il fut stipulé dans ces actes de vente que la propriété vendue demeurerait hypothéquée en faveur de Gassaille et son épouse en la somme de $50.

Le demandeur, par son action, réclamait la balance du prix de vente moins les $50, montant de l'hypothèque, laissant cette somme entre les mains du défendeur pour rencontrer cette hypothèque.

Le défendeur contesta cette demande et requit un cautionnement ou la cessation du trouble.

La Cour Supérieure siégeant à St. Hyacinthe, le 27 de février 1871, a condamné le défendeur à payer la dette avec dépens jusqu'après le rapport de l'action et avec sursis à ce jugement jusqu'à ce que le demandeur ait rapporté décharge de l'hypothèque ou ait fourni bonne et suffisante caution, avec les dépens depuis la production de la défense contre le demandeur. Cette cause ayant été inscrite en révision, le défendeur prétendit que le droit de pacage qui constituait sur la propriété une charge, valait 2,000 francs ancien cours.

En Révision, le demandeur prétendit que par l'acte de Gassaille, il n'est pas dit sur quelle propriété le pacage sera fourni, en sorte que c'est une obligation purement personnelle. Il est évident que le défendeur ne peut être troublé par une action personnelle, Gassaille n'a aucun droit de servitude.

L'action hypothécaire ne peut être exercée que pour 300 francs ancien cours et le défendeur en payant cette somme à Gassaille, sera libéré, et si la propriété était vendue par le Shérif, Gassaille ne pourrait être colloqué que pour 300 livres ancien cours. Cette cour a déjà sanctionné le principe qu'il suffit de laisser entre les mains de l'acquéreur une somme égale à l'hypothèque pour laquelle il craint l'éviction. C. S. Montréal, Sicotte et al., vs. Nagle.

Le jugement en Révision est motivé comme suit:

La Cour Supérieure siégeant à Montréal présentement comme Cour de Révision, Considérant que le défendeur n'est point exposé à être troublé comme il le prétend et vû l'offre que lui a faite le demandeur de laisser entre ses mains, trois cents livres ancien cours pour le garantir, laquelle offre est suffisante, lui défendeur, n'a aucune raison, ni aucun droit de refuser de payer au demandeur la somme d'argent que ce dernier réclame par sa présente action.

Considérant qu'il y a erreur dans le jugement dont est appel, savoir; le jugement rendu le 27 Septembre 1871, à St. Hyacinthe renverse, &c.

Jugement pour le Demandeur.

Chagnon & Sicotte, avocats du Demandeur.

Fontaine, Mercier & Decazes, avocats du Défendeur.

(P.R.L.)

COUR DU BANC DE LA REINE.

EN APPEL.

MONTREAL, 9 MARS 1871.

Coram DUVAL, J. C., CARON, J., DRUMMOND, J., BADGLEY, J.

MONK, J.

No. 60.

AUGUSTIN LAROSE, et al.,

Défendeurs en Cour Inférieure,

APPELLANTS;

ET

L'HONORABLE CHARLES WILSON,

Demandeur en Cour Inférieure,

INTIMÉ.

JUGE:—1o. Que les cautions pour la poursuite d'un appel, sont tenues au paiement des frais, sans pouvoir exiger la discussion préalable.

2o. Que la distraction des frais accordée à l'avocat ne peut pas être opposée par les cautions sur une action pour leur recouvrement portée par le demandeur qui a réussi en appel et instituée en son nom par les avocats distrayants.

Les appelants furent poursuivis pour une somme de $261.06 pour frais encourus en Cour Supérieure et en Cour d'Appel, dans une cause mue entre l'Intimé, et Cyrille Leblanc, défendeur, et Charles Leblanc, opposant. Le nommé Charles Leblanc avait fait une opposition à la vente d'un immeuble saisi sur le défendeur; ayant perdu en Cour de première instance, il porta sa cause en appel. Le jugement de la Cour Inférieure fut confirmé par ce dernier tribunal, et ce sont les frais encourus sur ce procès qui firent l'objet du litige. L'intimé les réclamait des appelants, cautions en appel du dit Charles Leblanc.

Les appelants contestèrent cette action, sur le principe, que l'intimé devait discuter leur principal et que l'intimé était mal fondé à réclamer en son nom les frais dont ses avocats avaient obtenu distraction.

Le jugement rendu par la Cour Inférieure à Montréal, Mackay, J., le 30 Novembre 1869, a maintenu les prétentions des appelants et renvoyé l'action, et il est motivé comme suit:

The Court having heard the parties by their respective counsel as well upon the *défense au fond en droit* pleaded separately and severally by the said defendants Augustin Larose and Charles H. Lamontagne to the action and demand of the said plaintiff, as upon the merits of this cause, upon the plea separately pleaded by the said defendants, having examined the proceedings, proof of record, and having deliberated, adjudging firstly upon the demurrers or *défenses au fond en droit* pleaded by the said defendants respectively, doth dismiss the said *défenses au fond en droit* of the said defendants and each of said *défenses* with costs;—and the Court proceeding to adjudicate upon the merits of the separate issues between the said defendants and the plaintiff, considering that the plaintiff's demand is in respect of costs for which distraction has been awarded to and exists in favor of Messieurs Loranger & Loranger, the Attornies who conducted the proceedings upon which said costs accrued: Considering that plaintiff does

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not allege payment by him to said Messieurs Loranger & Loranger of said costs amount, and that claim exists, personal to said Messieurs Loranger & Loranger, against the said Larose and against the said Lamontagne for said costs, from which claim, were the said defendants, or either of them, to pay said costs to plaintiff, they the said Larose and Lamontagne would yet not have freedom; Considering that were the said defendants Larose and Lamontagne to pay plaintiff, they might have, under the circumstances of this case, to pay over again the said costs the amount of which is claimed in this action by plaintiff; Considering that the said defendants have sufficiently proved the allegations made by them upon their separate defences;

The Court maintaining the defences of the said defendants Augustin Larose and Charles H. Lamontagne, doth dismiss the plaintiff's action against the said Augustin Larose and also against the Charles H. Lamontagne with costs to the said Larose and Lamontagne, severally against the said plaintiff;—

Ce jugement, porté devant la Cour Supérieure, siégeant en Révision, a été le 30 avril 1870, cassé et infirmé. Le jugement en révision est comme suit:—

Coram BERTHELOT, J.; TORRANCE, J., BEAUDRY, J.

La Cour Supérieure siégeant à Montréal, présentement en Cour de Révision, ayant entendu les parties intéressées, par leurs avocats respectifs, sur le jugement rendu dans et par la Cour Supérieure, dans le District de Montréal, le trente novembre 1869, ayant examiné le dossier et la procédure dans cette cause et ayant pleinement délibéré;

Considérant que le demandeur a porté la présente action contre les défendeurs pour le recouvrement des frais encourus et adjugés en sa faveur, tant sur une opposition par le nommé Charles Leblanc, prenant la qualité de Curateur à la substitution créée par le testament et codicile de Dame Julie Carrière, en son vivant de la Cité de Montréal, veuve de feu François Leblanc, gentilhomme, la dite opposition produite dans une cause devant la dite Cour Supérieure, à Montréal, sous le No. 2029, dans laquelle le dit Hon. Charles Wilson était demandeur contre Cyrille Leblanc, défendeur, et déboutée par jugement de la dite Cour Supérieure, siégeant en révision le 29 janvier 1869, et aussi pour frais adjugés, sur l'appel du dit jugement porté devant la Cour du Banc de la Reine, l quelle a maintenu le jugement de la Cour Supérieure, siégeant en Révision, avec dépens du dit appel, dont distraction fut accordée à MM. Loranger et Loranger, procureurs du demandeur; et

Considérant que les défendeurs actuels en vertu du cautionnement par eux consenti pour la poursuite du dit appel de la part du dit Charles Leblanc, sont tenus au paiement des dits frais, sans pouvoir exiger la discussion préalable des biens du dit Charles Leblanc, ès qualité; et

Considérant que nonobstant la distraction accordée à MM. Loranger et Loranger des frais sur le dit appel, et le transport judiciaire qui en résulte, les défendeurs étaient mal fondés à opposer cette distraction, en autant qu'elle n'a eu lieu que pour les frais adjugés dans la Cour Supérieure, et que d'ailleurs la présente action et demande est faite au nom du dit demandeur par le ministère des dits MM. Loranger et Loranger, qui par là sont censés et réputés consentir à tout

paiement, qui pourrait être fait au demandeur des frais dont la distraction leur avait été accordée, et ne pourraient troubler à cet égard les dits défendeurs; et

Considérant que sur ce dernier point, il y a erreur dans le jugement rendu en cette cause le trente novembre 1869, qui a maintenu la première exception plaidée respectivement par les dits défendeurs;

Renverse et annule le dit jugement et adjugeant ainsi qu'aurait dû le faire la dite Cour Supérieure, rejette et déboute tant la défense en droit que les exceptions plaidées par les dits défendeurs respectivement, et les condamne conjointement et solidairement à payer au dit demandeur la somme de soixante et cinq livres, cinq chelins et quatre deniers cours actuel, avec intérêt sur icelle à compter du 17 septembre 1869, jusqu'à parfait paiement, et les dépens tant dans la dite Cour Supérieure en première instance qu'en la présente Cour de Révision.

Les appelants dans leur factum en appel, ont exposé leur cause comme suit:

La distraction des dépens est un transport juridique fait à l'avoué de ses dépens.

Le Code de Procédure du Bas-Canada n'a qu'un seul article sur cette question, et il n'est pas propre à nous éclairer.

L'art. 482 dit: Les procureurs *ad lites* peuvent demander et obtenir distraction de leurs honoraires ainsi que des déboursés qu'ils ont réellement faits. Si cette demande n'est pas faite le jour où le jugement est rendu ou avant, elle ne peut être accordée sans que la partie adverse ait été mise en demeure d'y répondre.

L'art. 133 du Code de Procédure français sert de référence à l'art. 482. Cet article dit: "Les avoués pourront demander la distraction des dépens à leur profit, en affirmant, lors de la prononciation du jugement, qu'ils ont fait la plus grande partie des avances. La distraction des dépens ne pourra être prononcée que par le jugement qui en portera la condamnation: dans ce cas la taxe sera poursuivie et l'exécutoire délivré au nom de l'avoué, sans préjudice de l'action contre sa partie.

PIGEAU est aussi cité à l'appui de l'art. 482, C. P. C. Il dit (Edition 1787) T. I. p. 419:....."En sorte que celui qui est condamné aux dépens est obligé de les payer en entier au Procureur de celui qui a obtenu gain de cause, sans pouvoir déduire ce qui lui est dû par celui-ci."

Les autorités suivantes confirmeront ces principes.

POTHIER.—Mandat, No. 135.

CARRE & CHAUVEAU.—T. I., des jugements. Question 569, *bis*.

DALLOZ.—Dictionnaire de jurisprudence. Vo. frais et dépens, No. 159.

BIOCHE—Dictionnaire de Procédure. Vo. dépens, No. 226.

PONCET.—Jugement, T. I., No. 293.

NOUVEAU DENIZART.—Vo. Distraction, T. 6, p. 543.

Ireland *vs.* Stephens, 2 Revue de Législation, p. 62.

Stigny *vs.* Stigny, 2 Revue de Législation, p. 121.

Esson *vs.* Black—Robertson's Digest, p. 114.

Converse *vs.* Clarke, 12 Déc. Des Trib. p. 402.

L'intimé, après avoir fait d'infructueuses recherches pour étayer sa prétention de quelques autorités, n'a trouvé qu'un seul arrêt en sa faveur. L'arrêt *in re*

Larose, et al., et Wilson.

Ladeux rapporté dans SIREY, Recueil Général des Lois et des Arrêts (An XIII—1808, p. 391) est souvent reproduit, et très-mal rapporté presque partout. Ses motifs peuvent de prime abord contredire la prétention des appelants, mais dès que nous lisons les faits de la cause, il est facile de s'apercevoir que le jugement est exact, mais que les motifs seuls sont erronés. Dans cette cause, la partie qui avait eu gain de cause, faisait vendre la propriété du défendeur pour la dette et les frais, qui avaient été distraits à l'avoué de cette partie. Le défendeur vient attaquer cette vente et veut faire annuler le décret, sur le principe que les frais n'appartenant pas au demandeur, il ne pouvait en poursuivre le recouvrement. Le défendeur devait succomber, puisque le produit de la vente devait servir à payer la partie et l'avoué, et que pouvant attaquer la saisie par opposition, il laisse faire la vente, naître des droits en faveur des tiers et s'accumuler contre lui les frais accomplis.

L'intimé exposait en substance, ses prétentions dans son factum, comme suit :

La défense des appelants se réduit à deux moyens :

1o. *Que l'intimé avant de s'adresser à eux était tenu de discuter leur principal, savoir le dit Charles Leblanc.*

2o. *Que l'intimé était sans droit à réclamer en son nom les frais pour lesquels ils s'étaient portés cautions, attendu que ses avocats avaient obtenu distraction pour ces mêmes frais.*

Ces moyens sont formulés dans des Défenses en Droit et une Exception en droit.

La réponse de l'intimé au premier moyen, savoir qu'il était tenu de faire la discussion des biens du principal des appelants avant de s'adresser à eux, fut que ces derniers étant des cautions judiciaires, n'avaient aucun droit au bénéfice de discussion ; Article 1964 du Code Civil. Qu'en supposant qu'ils eûssent ce droit, ils auraient dû le mettre en demeure de faire cette discussion et lui offrir les frais nécessaires à cet effet, ce qu'ils n'avaient point fait : Articles 1942, 1943 et 1944 du Code Civil. L'intimé leur offrit même par ses réponses, de suspendre les procédés sur son action, afin de leur donner l'avantage de cette discussion qu'il leur promit de faire, pourvu qu'ils lui indiquassent les biens à être discutés, et qu'ils fussent les avances nécessaires. Mais les appelants ne jugèrent pas à propos de faire ces avances et la contestation fut engagée.

En supposant que les avocats de l'intimé auraient obtenu distraction de tous les dépens qu'il réclame en son nom, il ne s'en suivrait pas que son action est mal fondée. Nonobstant la distraction obtenue par l'avocat, sa partie a toujours le droit de réclamer en son nom les frais occasionnés par la poursuite.

Chauveau, Dic. de Procédure, p. 106, n. 240 :

Lorsque l'avoué qui a obtenu la distraction de dépens à son profit, n'en poursuit pas le recouvrement, la partie à laquelle les dépens ont été adjugés, peut en poursuivre le paiement en son propre nom.

C'est aussi ce qu'enseigne Merlin, Rép. de Jur. Verbo. Dépens, vol. 3, p. 731, n. 5.

Dalloz. Jur. du Roy., vol. 9, p. 674.

On a considéré, et nous doutons que ce soit avec raison, la distraction comme une cession opérée de plein droit, par la loi elle-même, de la créance des dépens

adjugés. La partie au profit de laquelle ils ont été prononcés, n'est cependant pas tellement dépouillée de tous droits, que si l'avoué ne poursuit pas le recouvrement, elle ne puisse agir contre celui qui a succombé.

Bioche, Dic. de Proc. vol. 3, p. 104, No. 234.

L'avoué peut prendre, tant en son nom *qu'en celui de son client*, inscription hypothécaire sur les immeubles de la partie condamnée, en vertu d'un jugement qui prononce la distraction.

Sirey, dans sa Collection nouvelle, An XIII, p. 391, rapporte un arrêt de la Cour de Cassation dans le même sens. Le demandeur recherchait en son nom le paiement des frais pour lesquels son avoué avait obtenu distraction. Il fut jugé: Que la distraction des dépens prononcé au profit d'un avoué n'empêche pas la partie d'être débitrice de son avoué et créancière de la partie condamnée aux dépens. En conséquence, la partie condamnée ne peut exciper de la distraction pour se soustraire aux poursuites dirigées contre elle par son adversaire, à moins que l'avoué n'arrête les dépens entre ses mains.

Carré, Lois de la Proc. Civ. vol. 1er, p. 594, dit que l'avoué ne reçoit les dépens qu'en sa qualité de mandataire de sa partie, et que la distraction n'est le plus souvent qu'une voie abrégée pour éviter le circuit de paiement.

Boncenne, Proc. Civ. vol. 2, p. 559.

Pigeau, vol. 1er, p. 546, 3e édition 1819. Verbo, distraction de dépens.

La distraction n'est pour l'avoué qu'une sûreté et une facilité de plus pour être payé, mais elle n'empêche pas que sa partie demeure sa débitrice pour les frais pour lesquels il a obtenu distraction.....

Nouv. Den. Tome VI, p. 547.

Les appelants ont invoqué à l'audition un dernier moyen qu'ils n'avaient pas mis en question par leurs exceptions. Ils se sont plaints en dernier lieu que l'action de l'intimé était prématurée parce qu'elle avait été intentée dans les quinze jours qui avaient suivi le jugement rendu sur l'appel de leur principal, le nommé Charles Leblanc. Le jugement en question fut rendu le 9 septembre 1869 et l'action fut intentée le 17 du même mois.

Il est à propos toutefois de remarquer que cette action n'a été intentée qu'après des mises en demeure réitérées faites aux appelants par les soussignés au nom de leur client, et après avoir été avertis par les procureurs des appelants, MM. Doutre, que leurs clients ne payeraient point les frais en question, avant que leur débiteur principal fut discuté. Un des appelants interrogé comme témoin admet avoir aussi averti les procureurs de l'intimé qu'il ne payerait pas avant que les biens de Charles Leblanc fussent vendus. Les appelants ne peuvent donc point se plaindre qu'ils aient souffert un grand préjudice, puisqu'ils étaient décidés à ne point payer même après l'expiration des délais.

L'intimé maintient que cette prétention des appelants soulevée à la dernière heure n'est point fondée en loi et qu'elle aurait dû faire la matière d'une Exception particulière.

Les appelants prétendent que l'intimé devait attendre quinze jours après le jugement rendu en appel pour demander le paiement des frais qu'il réclame, et s'appuient sur l'article 551 du Code de Procédure Civil qui déclare : *Que l'exé-*

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cution d'un Jugement portant condamnation au paiement d'une somme de deniers, ne peut avoir lieu avant l'expiration de quinze à compter de sa date.

Cette prétention n'est point fondée pour deux raisons; 1o parce que le jugement rendu en Appel, n'est pas un nouveau jugement, mais n'est que la confirmation de celui qui avait été rendu en Cour de première instance, et sur lequel les délais étaient expirés depuis plus d'une année; 2o parce que l'action qui a été intentée n'est pas mue entre les parties mentionnées dans le jugement qui a été rendu en Appel.

L'action a été intentée contre des cautions en Appel, et les délais de quinze jours mentionnés dans l'article 551 du Code de Procédure, ne profitent qu'aux parties en litige dans la cause qui a donné lieu à ce jugement. Si au lieu de poursuivre les cautions, l'intimé avait pris une exécution contre le nommé Charles Leblanc, celui-ci dans le cas où un nouveau jugement aurait été rendu, aurait peut-être pu invoquer ce moyen. Mais dans le cas actuel, ce sont des tiers qui sont en cause, et ils n'ont droit à aucun délai. Ils ne peuvent prétendre à ceux qui sont indiqués dans l'article en question, attendu qu'aucun jugement n'avait été rendu contre eux.

Jugement de la Cour de Révision confirmé.

Doutre, Doutre & Doutre, avocats de Larose appelant.

Maillet, avocat de Lamontagne appelant.

Loranger & Loranger, avocats de l'intimé.

(P.R.L.)

COURT OF QUEEN'S BENCH, 1871.

MONTREAL, 9TH MARCH, 1871.

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

No. 64.

Forgie et al., Appellants; and The Royal Insurance Company, Respondents.

HELD:—That the sale of property insured does not convey to the purchaser the Policy of Insurance, without a transfer of the policy and by mere operation of law.

This was an appeal from the judgment rendered in the S. C., at Montreal, on the 31st of December, 1868, and reported in the 13th vol. of the L. C. Jurist, pages 9 and *seq.*

MONK, J., *dissented*, on the ground that the correspondence between the trustees of Egan's estate and the respondent, respecting the sale of the property insured by the trustees to the appellants, established a consent or privity on the part of the respondent, to the sale in question, which embodied an undertaking by the trustees eventually to transfer the policy of insurance.

BADGLEY, J.—On the 18th of August, 1865, the trustees of the Egan estate effected insurance with the Royal Insurance Company upon the Pontiac Mills and their machinery for $10,000 upon each, together $20,000, and the insurance was continued for another year at the end of the first year mentioned in the policy, extending it to August, 1867. On the 19th September, 1866,

the trustees sold the Pontiac Mill property, including the mills and their machinery, a quantity of land and premises and mill sites described in the printed advertisement of sale to the appellants for $15,000, payable one quarter in cash and the balance in one, two, three, four, five years, with interest at seven per cent., to be secured by mortgage and transfer by them to the trustees of the policy of insurance to be maintained by the purchasers for the balance of the purchase money. On the following third of November the purchasers paid to the trustees the cash instalment of the price, $3,750, and the latter, by their acknowledgment of receipt of it, declared that the deeds of sale of the property and the transfers to them of insurance should be completed on the first demand of the trustees, the appellants to repay to them the pro rata of the premium of the insurance of the property effected by the appellants from the date of the receipt.

The payment having been made and the sale accomplished, the trustees considered it expedient to protect their interest in the property by having that interest covered by insurance, and for this purpose addressed the following letter, dated on the same 3rd of November, to the Insurance Company, and which explains itself:

"Please to take notice that the trustees have sold to Messrs. O. F. O'Connor and John Forgie the Pontiac Mills, on which you have issued policies of insurance.

"When the documents are made out it is the intention of the trustees to convey the property to the above-named gentlemen, as *also the Policies of Insurance, and they (O'C. & F.) will reconvey to the trustees the policies to cover the payments due upon the property.*

"Messrs. Forgie and O'Connor will at once enter upon the repairs to the dams and mills, but the mills will not be worked till next spring. Please to inform me in writing if this is in order, and that you will hold the trustees covered."

To which they received from the Company the following reply, dated the 10th of the same November:

"Your favor of the 3rd instant is to hand, and contents duly noted. Regarding the insurance with this office, upon the Pontiac Mills, under Policy No. 480,688 for $20,000, the trustees are held covered until they convey their interest by transfer; meanwhile it is necessary that they pay carpenters' risk ($27.50 per month) during the time the mills are under repair."

From this last date nothing further occurred until the mills and machinery were burned by fire on the 8th of January, 1867, information of which appears to have been received by the trustees as well as by the Insurance Company shortly after the occurrence of the fire.

On the 21st of January the appellants notified the Company of the loss of the insured property, and on the 31st supplemented their notice by affidavits of the value of the loss to the amount of the insurance as by the policy. On the following 16th of March they executed a protest, addressed to both trustees and Company, in which, after setting out their purchase of the mills, and their destruction, together with reference to the correspondence above between the trustees and the Company, they declare that they had not yet obtained from

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the trustees the deeds and transfer above mentioned, yet, nevertheless, they were willing that the trustees should receive out of the insurance, first, the amount remaining due as the balance of the sale, with rebate of interest, &c., and second, the pro rata of the premium paid on the policy from the said 3rd of November, for the year's renewal of the policy; and they then require the trustees to forthwith execute to them the said deeds and transfer: following this, they specially notify the Company not to pay the trustees any other portion of the policy insurance on the said mills than the said balance and pro rata of premium, and forthwith to pay to them the balance of such insurance.

On the 26th of the same March the trustees sent in to the Company their claims filed of record for $11833.11, for the balance of their capital and interest and pro rata of insurance due to them, which the Company paid to them on the following 5th of May, and received from them a receipt and discharge substantially as follows:—After recital of the effecting of the policy on the mills, and the correspondence between them, as above, of the 3rd and 10th of November, 1866, covering the trustees from loss as therein stated, the destruction of the mills, and the loss suffered to the extent of $11833.11, being the entire amount of their interest at the time of the loss, the trustees acknowledge the receipt from the Company of that amount in full of their claim for loss (by fire) on building and machinery, the property insured by the Company, and release and discharge the Company from all claims against them by reason of the said policy, or of the letters above referred to.

Subsequently, on the 9th of January 1868, the trustees executed a deed of declaration and agreement in favour of the appellants, in which the above circumstances are recited, and thereby convey to the appellants the lands and tenements purchased as above upon part of which the mills had been built, and finally, "specially transfer, assign, and make over to the appellants all rights, interests, "claims, and demands which the trustees have or may exercise in and to the "said policy of insurance, No. 480,688, or in the monies due or to accrue there-"under." The foregoing details refer to the various documentary evidence of record upon which the action of the appellants is founded, and which claims from the Company the sum of $10,000 as the balance of the gross policy insurance after reduction of the payment made by the Company to the trustees as above stated in full, their insurable interest in the destroyed property, and their declaration to the appellants, and by all these several circumstances, including the deed of declaration by the trustees to them of the 9th January, and the covenant therein, the appellants demand against the Company directly, as being parties insured by the Company at the time of the loss, and which in their factum before this Court, they aver, "the appellants, hereby declaring their pretension "to be that under the terms of the sale to them, they were entitled to be, and "were, at once subrogated to the said trustees rights under the said policy." The respondents totally and absolutely deny the pretensions of the appellants; they aver that no transfer of the insurance was made to them either in law or fact; that no consent therefor was given by the Company, and that no privity or agreement existed by or between the Company and the appellants with regard to the said insurance or the policy therefor, and therefore the Company were not

liable. The evidence adduced was only as to the value of the mills, &c., at the time of the loss, of which there is no question. The other circumstances of fact are not questioned on either side.

In addition to their paramount pretension and right from the effect of their alleged subrogation by the mere effect of the sale, to be in the rights of the trustees in this policy, and to be the actual transferees of that policy, they contend that the trustees did, by the effect of the mentioned documents, agree to transfer the policy to them and specially by the covenants of the deed of declaration of the 9th January, 1868. As regards the trustees, it suffices to observe that they are not parties to this suit, which is between the appellants and the Company upon the question of the liability of the latter, as the insurers of the former, the purchasers of the insured property from the trustees by whom it had been insured, and who retained the policy as long as the risk lasted.

In connection with the question of the effect of the sale of the insured property upon the insurance of it, it may be premised, that the assured to claim indemnity for loss must have had an insurable interest in the property at the effecting of the insurance and also at the time of the loss, because otherwise they could suffer no loss, and could have no claim to indemnity for loss suffered, for the plain reason that the contract of insurance against fire is a personal contract between assurer and assured, to indemnify the latter for his actual loss; but if he has parted with the thing insured without retaining interest, before the loss, he has suffered no damage by the fire, and the contract between them is not broken. Being a contract for his personal indemnity, the policy therefor is obligatory for him against the assurer, no longer than the subject of the policy continues in his person. This avoidance is in conformity with our provincial law, the 2576 art., declaring our law and jurisprudence, declares the insurance is rendered void by the transfer of interest in the subject of it from the insured to a third person, unless such transfer is made with the consent or privity of the insurer, or as by the better rendered French version, "avec le consentement ou la participation de l'assureur." The trustees therefore were prudent in protecting themselves from loss, by seeking for and obtaining from the Company, the limited protection for themselves as agreed by the Company in the correspondence between them above referred to.

It is quite true that, as a general principle of our law, the contract of fire insurance is assignable, but only effectively so, upon the condition of the assent of the assurer, and this essential requisite is derived not only from the risk involved in the contract of insurance, but from the necessary reliance to a considerable degree upon the character of the assured. Something more of the *delectus personæ* or fault in the assured is infused into the contract of insurance, and as has been observed by Ch. J. Marshall, 2 Peters' U. S. Rep., p. 25, "Insurances "against fire are made in the confidence that the assured will use all precautions "to avoid the calamity insured against, which would be suggested by his interests." Our code in like manner provides that policies of insurance may be transferred, but in the 2483 article in this connection declares that "in the absence of any con- "sent or privity on the part of the assurer, *participation de l'assureur*, the simple "transfer of the thing insured does not transfer the policy: the insurance is thereby

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terminated." This article refers to the transfer of the insurance, the 2576 to the transfer of the subject of the insurance, the interest in the thing insured, which, to neither, is effective against the assurer without his consent or privity, *participation.*" It is manifest that the consent and participation of the assurer creates new and mutual relations and rights between the assignee and the assurer, which are personal, and cannot afterwards be changed or impaired by any acts of the assignor. Thus, if on transfer of the property, the subject of insurance, the vendor, the assured, assigns his policy, as of right he may do to the purchaser, and this is made known to the assurer and assented to by him, it contains a new and original promise to the assignee to indemnify him in like manner whilst he retains an interest in the subject of the insurance, and constitutes him the party assured; the exemption of the assurer from further liability to the vendor, and the premium being already paid for insurance for a term not yet expired, are a good consideration for such promise, and constitute a new valid contract between the assurer and the assignee.

It is a peculiarity incident to the contract of fire insurance, that the mode of transfer is immaterial, provided the essential requisite for its effectiveness, the covenant or participation of the insurer, is accorded. The 2482 art. of the code provides, that policies of insurance may be transferred by indorsement and delivery or by delivery alone subject to the conditions contained in them. Some policies contain special conditions or directions for their transfer which must be strictly complied with, as held in 1 Camp. Rep., 237, 2 M. and S., 290, &c., &c. If the policy contain no such direction, which frequently happens, as in this case, the mode of transfer would be as above stated, or if not so, then it should be according to our recognized and required legal form for transfers of pecuniary obligations, namely in writing by the assignor to the transferree, with equivalent notice to the insurer; whatever the form, the transfer is in no case effective against or binding upon the assurers without their consent or participation thereto. Now the record affords no evidence whatever against the insurers of the transfer of the policy to the appellants, or of the requisite consent or participation thereto of the assurers, and hence therefore the sale of the insured property did not in law carry with it to the appellants the policy of insurance effected upon it, and in the terms of the code article, "in the absence of any consent or privity, *participation*, on the part "of the insurer, the simple transfer of the thing insured does not transfer the "policy."

The appellants contend, however, that the above-stated legal requirements for the effectiveness of the transfer do not apply here, because by the law of modern France the policy is attached to the subject of it, and the transfer or sale of the latter necessarily carries the former with it as inseparable from the property. The law of France adopting this principle from marine insurances has assimilated it with and applied it to fire insurances. In marine policies the contract of insurance, from the nature of the risk and interest in the property insured, is specially applicable to the property itself, the subject of the insurance, rather than to the owner of it, and the law of France, adopting the marine rule, has therefore attached the fire policy to the property assured by it independent of the owner, and transfers both *uno actu* by the sale or transfer of the insured property. It is

simply sufficient to observe here that the law of France in this respect is not the law of this province for fire policies contracted here, and is plainly repugnant to the declaratory law of the 2483 article of the Civil Code, "the simple transfer of the thing insured does not transfer the policy," thereby rejecting altogether the principle of the law of France relied upon by the appellants.

It may be briefly stated that the words of the code articles above referred to, namely, *the consent or privity of the insured*, in the English version, *le consentement ou la participation de l'assureur*, in the French version, in connection with the transfer of the policy and of the interest in the assured property, indicate not only a divestment by the assured, but also an act done by the assurers to establish their adoption of the transfer of the policy and insurance, as between themselves and the transferree, to form thereby a personal binding contract and the creation of new and mutual relations between them which cannot be altered by any act of the transferrer or assignor. As already observed, no such consent or participation by the assurers, the Company, is of record.

The appellants, however, urge that by the documents above referred to before the deed of declaration and also by that deed, the trustees agreed to transfer the policy to them; if it were so, that is a matter between the trustees and the appellants which in no way affects the assurers without their assent to the agreement. The terms and conditions as well as covenants of the sale were between the vendors and purchasers only, and of the sale itself no notice of any kind was given to the Company except and until the trustees' letter of the 10 November, which notified to the Company an absolute sale, without particulars, and stating only their intention to convey the policies to be reconveyed to them only to cover the payments due, and thereupon they ask the Company to cover and protect their particular interest only, namely the balance of the price due to themselves, which special application is agreed to by the Company to *hold them, the trustees only, covered until they convey their interest by transfer; but* with the condition in the meanwhile that it was necessary *that the trustees should pay to the assurers, carpenters' risk*, $27.50 *per month, during the time the mills are under repair.* Now, in this subsidiary or secondary special agreement, but personal between the trustees and the Company, the appellants had no part whatever, and they therefore fall within the rule of law that no person can, by any subsequent act, entitle himself to claim the benefit of an insurance made by another, if it appear that his interest was not intended to be embraced by it when it was made. Moreover, with regard to the deed of declaration of the 9th of January, 1868, the transfer in that deed was 12 months after the fire and long after the 16th March, 1867, also after the fire, when the appellants notified the Company and the trustees that they had not yet obtained their deed and transfer referred to by them, and, moreover, this deed of declaration was between the trustees and appellants; and never received the consent or participation of the Company. Again, the deed itself was plainly inoperative as against the Company, because although thereby the trustees transferred and assigned to the appellants all rights, interests and demand which the trustees have or may exercise in the said policy of insurance, &c., or in the monies due or to accrue thereunder, yet long before the execution of the deed, the trustees, by their formal receipt of the 6th May, 1867, for

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the amount then paid to them, had *released and discharged the Company from all claim against them by reason of the said policy or of the letters before referred to*: the trustees having from that time no right or claim whatever over the policy could therefore have no rights or claim in the policy to transfer to the appellants, who, according to law as such transferrers, could have no more right than their assignors, and were therefore under that assignment without right or claim in the already released and discharged policy. The trustees had no existing interest in the policy to transfer, nor was a debt due to them by the Company which could be transferred.

Upon the whole, seeing that the insurance was a personal contract between the Company, assurers, and the trustees, assured, which, though susceptible of transfer, had never been transferred and was therefore inoperative against the Company, the respondents, and seeing that at the date of the deed of agreement no beneficial interest existed in the trustees to be by them transferred thereby, and that it is without effect against the respondents, the pretensions and demand of the appellants have no support in law, nor does there appear even an equitable claim which could be considered in the face of the positive law which governs the case.

The judgment appealed from must be confirmed.

CARON, J.—La question est celle de savoir: si la vente d'un immeuble assuré comporte de plein droit la cession de la police d'assurance sans qu'il y eut de cession expresse à cet effet.

Si cette question devait se décider d'après le droit existant au pays avant la promulgation du Code, il faudrait commencer par se demander et décider d'après quel droit devrait se résoudre la difficulté; serait-ce d'après le droit français en force dans le Canada, ou d'après le droit anglais applicable aux affaires commerciales.

Je suis d'avis que ce devrait être d'après le droit français, le droit anglais quant aux affaires de commerce même, n'étant applicable que quant à la manière de faire la preuve et non autrement. Mais il n'est pas nécessaire de se troubler à ce sujet puisque c'est d'après notre propre Code que l'on doit se prononcer, comme l'a fait le juge en première instance qui a basé son jugement exclusivement sur les articles de notre code applicable au sujet. (voir le jugement dont est appel, Factum des opposants, page 9). Quelque soit donc la différence existant sur la question posée plus haut, entre d'un coté le droit français en force au pays avant le code, et le droit anglais et américain, sans entrer dans la question de savoir auquel de ces deux droits il serait à propos de donner la préférence, tout ce que nous avons à décider c'est de savoir si le jugement dont on se plaint est ou non conforme à notre droit actuel introduit par notre nouveau code, qui doit être notre règle, vu qu'il est positif et clair sur le sujet; or les articles de ce Code qui servent de base au jugement sont l'art. 2483 et 2576. Le premier statuant que le simple transport de la chose assurée ne transmet pas l'assurance sans le consentement et l'approbation de l'assureur; et le second, que l'assurance serait nulle par la cession qui en est faite à un tiers, si ce transport n'est accepté par l'assureur, cela étant la loi applicable à l'espèce, nul doute que les appelants n'ont pas acquis l'assurance à moins qu'ils ne justifient qu'il y a eu en effet transport de la police d'assurance ou quelque chose d'équivalent, et qu'il y a eu consentement ou acceptation tacite ou autrement ou quelque chose d'équivalent.

Les appelants se sont efforcés de montrer, d'après ce qui s'est passé entre l'assureur et les vendeurs il y a eu transport de l'assurance et acceptation de la compagnie : c'est une lettre et autres papiers qui se trouvent copiés au Factum des opposants, qu'il faut référer pour se dire si les appellants ont réussi dans leurs efforts.

Pour moi je n'y trouve pas cette preuve, et pour cette raison je suis d'avis que le jugement qui renvoie l'action des demandeurs est correct et doit être confirmé.

Judgment of S. C. confirmed,

A. & W. Robertson, for Appellants.

Strachan Bethune, Q. C., for Respondent.

(S. B.)

COUR SUPERIEURE.

En Revision.

MONTREAL, 31 OCTOBRE 1871.

Coram Mondelet, J., Mackay, J., Torrance, J.

No. 94.

Rodier vs. Hébert.

Jugé—Que l'action hypothécaire pour une somme au-dessous de £100, accompagnée de conclusions demandant que le défendeur soit condamné à payer la dette, si mieux il n'aime délaisser; est une cause appelable (1).

Le jugement de la Cour Supérieure rendu en cette cause a déjà été rapporté au 15 vol. L. C. J. p. 269.

En révision, le demandeur prétendit que la jurisprudence a toujours sanctionné les conclusions telles que prises dans son action, et il cita Pothier, Hyp. p. 445. Loyseau, Traité du déguerpissement, liv. 3, ch. 1, § 4, 5, 6, 7, p. 109 à 110. 10 L. C. Jurist, p. 75 et 76—11 L. C. Reports, p. 282, 13 L. C. Reports, p. 499. Voir 34 Vict. ch. 4, Québec 1871. Code de Procédure Civile, art. 1054, no. 2.

Le jugement de la Cour de Révision qui a infirmé le jugement de la Cour de première instance est motivé comme suit :

La Cour Supérieure siégeant à Montréal présentement comme Cour de Révision ;

Considérant que l'action actuelle est une action hypothécaire et par conséquent de la jurisdiction de la Cour Supérieure.

Considérant que le déclinatoire plaidé par le défendeur est mal fondé et aurait dû être renvoyé et débouté.

Considérant par conséquent qu'il y a erreur dans le jugement dont est appel, renverse, etc.

Et il est ordonné et adjugé que le dit déclinatoire soit et il est débouté, le tout avec dépens contre le défendeur.

Exception déclinatoire renvoyée.

Trudel & De Montigny, avocats du Demandeur.

Cartier, Pominville & Bétournay, avocats du Défendeur.

(P.B.L.)

(1) 18 L. C. Jurist, p. 269.

COURT OF QUEEN'S BENCH, 1870.

MONTREAL, 9th DECEMBER, 1870.

Coram DUVAL, Ch. J., CARON, J., DRUMMOND, J., BADGLEY, J., STUART, J., *ad hoc*.

No. 100.

RANGER & VIR,

(*Opposants in the Court below,*)

APPELLANTS;

AND

SEYMOUR & AL.,

(*Plaintiffs par reprise d'instance in Court below,*)

RESPONDENTS.

HELD: That an order to the Sheriff to suspend all proceedings on a writ of *fieri facias de terris* causes the writ to lapse.

This was an appeal from a judgment rendered in the Superior Court at Montreal, on the 28th of November, 1867, by THE HON. MR. JUSTICE MONK, dismissing an opposition *afin d'annuler* fyled by the appellants (defendants in the Court below) to the sale of certain real estate belonging to them, and which the Sheriff advertized for sale, under a writ of *venditioni exponas*.

The property had been under seizure more than three years before under a writ of *fieri facias*, the proceedings upon which had been suspended, in consequence of a certain arrangement entered into between the plaintiff and the defendants, and without any renewal of the seizure, the property had been offered for sale under a writ of *vend. exp.*

DRUMMOND, J., remarked that, owing to the lapse of three years from the original seizure, he was of opinion that *peremption de saisie* had accrued, and he cited a number of authorities, and amongst others Hericourt, p. 93, and Pothier Proc. Civ., p. 246, but he said he preferred resting the judgment of the Court on the principle that the *saisie* had lapsed. The judgment of the Court below would, therefore, be reversed on that ground.

The following was the judgment of the Court:—

"The Court, considering that the seizure made by the respondent of the appellant's property under the writ of *fieri facias* by him issued was abandoned in consequence of certain extra judicial arrangements made between them before the day of sale, and thereby lapsed on that day;

Considering therefore, that no writ of *venditioni exponas* could legally issue for the purpose of selling the opposants' property after an advertisement of three weeks;

Considering that the opposition *afin d'annuler* of the appellants in this cause is well founded for the cause aforesaid, the Court doth maintain the same, and doth set aside, annul, and make void the said writ of *venditioni exponas* and all and every the proceedings had under and in virtue of the same with costs as well in the Superior Court as in this Court."

Judgment of Superior Court reversed.

Bondy & Fauteux, for appellants.

R. Laflamme, Q. C., for respondents.

(S.B.)

COUR SUPERIEURE.

EN REVISION.

MONTREAL, 31 OCTOBRE 1871.

Coram MONDELET, J., MACKAY, J., ET TORRANCE, J.

No. 1178.

Roy vs. *Vacher et al.*

JUGÉ :—1o. Que l'acceptation subséquente d'une donation, n'a aucun effet rétroactif. (1) 2o. Que le créancier inscrit postérieurement à cette donation non-enregistrée doit être payé au préjudice du donataire. (2)

MONDELET, J., dissentiens.—Le défendeur, dont la terre, sa propriété, a été déclarée hypothéquée à la dette de son père envers le demandeur, se plaint du jugement qui a été rendu dans ce sens, par la Cour Supérieure de Bedford, Ramsay, J., le 25 octobre 1870.

Le 10 septembre 1863, le père Vacher se donne à son fils, mineur.

Le 3 octobre 1864 il hypothèque cette terre en faveur du demandeur.

Le 5 du même mois d'octobre, l'enregistrement de cette hypothèque a lieu.

Le 18 août 1865, le fils du donateur qui était mineur, lors de la donation, étant devenu majeur, accepte la donation et le 20 du même mois d'août, il y a enregistrement de cette acceptation et ratification.

Question.—Le père a-t-il pu créer une hypothèque en faveur du demandeur, le 3 octobre 1864 ?

Réponse.—Je ne le pense pas. La donation à un mineur n'est pas nulle ; tout au contraire, elle est valable. L'acceptation, disons même, la ratification par le mineur, à son âge de majorité, remonte, quant à l'effet, au 10 septembre 1863, date de la donation ; en sorte que l'hypothèque créée par le père, le 3 octobre 1864 malgré l'enregistrement du 5 octobre 1864, ne peut être d'aucun avantage au demandeur.

Quant à la preuve, on ne peut opposer au mineur devenu majeur qu'il a continué de demeurer avec son père et qu'il n'y a pas eu de tradition. Il me semble d'abord qu'on ne peut exiger que le père se soit déplacé, encore moins qu'il ait emporté la terre avec lui pour en refaire livraison à son fils.

En second lieu, les travaux ont été faits par les deux, le père et fils.

D'après ce qui précède, il me paraît que le jugement dont est appel, est mal fondé et que l'action aurait dû être déboutée avec dépens. Il faut, suivant moi, infirmer le jugement.

MACKAY, J.—The question is whether the donation and an acceptance subsequently made by the donee of a property given by a donation *inter vivos*, becomes null and of no avail as against a mortgagee claiming under a deed or *acte* of obligation made by the donor, subsequently to the donation then yet unregistered, and which obligation has been duly registered. The majority of the Court considers that the donation and its acceptance and ratification are unavailing for

(1) C. C. art. 763, 786.
(2) C. C. art. 866.

Johnson vs. The Massawippi Valley Railway Company.

want of registration in due time, and that the mortgagee's claim is superior to the donee's right. The donation and acceptance were not registered until long after the registration of the mortgage. Under the Civil Code of Lower Canada, art. 793, an acceptance of a donation has not a retroactive effect. A minor may accept a donation, but, to avail against third parties in good faith, it must be registered. Until such registration took place the donor could sell or mortgage. C. C., art. 806. The judgment of the Court is as follows: the Court, considering that there is no error in the *dispositif* of said judgment of the 25th October, 1870, doth confirm the said judgment for the reasons mentioned in it, except the one of non-acceptation by defendant of the donation referred to, with costs against the defendant.

Jugement confirmé.

Abbott, avocat du demandeur.

Dorion, Dorion & Geoffrion, avocats des Défendeurs.

(P. R. L.)

COUR SUPERIEURE.

EN REVISION.

MONTREAL, 30 SEPTEMBRE, 1871.

Coram MONDELET, J., BERTHELOT, J., MACKAY, J.

No. 459.

Johnson vs. *The Massawippi Valley Railway Company.*

JUGE: Que l'erreur de contenance d'un immeuble dans le jugement de la Cour de première instance peut être rectifiée en révision; avec dépens contre l'appelant. (1)

Le jugement de la Cour de Révision à Montréal, est motivé sur ce point comme suit :

The Court here sitting as a Court of Review—

Considering that there is no error in the said judgment, other than an accidental one, in the statement of the quantity of land appropriated by Defendants, of the value of $159 found by said judgment, the quantity so appropriated being six acres, three roods, eleven perches, instead of three acres, eleven perches as stated in the said judgment after the words therein "Large portions thereof, to "wit of," in respect of which error, this Court doth, revising said judgment, reform the same, and therefore doth order that, as to the quantity of land, referred to, appropriated by Defendants, the said judgment shall read in favor of defendants as stating six acres, three roods, eleven perches, for which the said $159 have been and are allowed; and in all other respects the said judgment of the said Superior Court, District of St. Francis, is confirmed and with costs of this Court of Revision against said Defendants, Plaintiffs in Review, in favor of said Plaintiff, Defendant in Review.

Ives & Hovey, for Plff.

Hall & White, for Deft.

(P. R. L.)

(1) 10 L. C. J., p. 217. 13 L. C. J., p. 189.

COURT OF QUEEN'S BENCH, 1871.

MONTREAL, 9TH MARCH, 1871.

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

No. 79.

Mathewson, Appellant, and The Royal Insurance Company, Respondent.

HELD:—1st. That in the case of an insurance of a number of barrels of oil, purchased by the insured, but not actually identified and separated from other barrels of oil contained in the building in which the oil was stored, the insured has, nevertheless, an insurable interest as proprietor in the property sold.

2nd. That a verdict of a jury in favor of the Insurance Company, based on a charge of the judge that the property in the oil did not, under the circumstances, pass to the insured, will be set aside and a new trial granted.

This was an appeal from a judgment of the Superior Court, at Montreal, (Mr. Justice Beaudry) granting the motion of the respondent for judgment upon the verdict of the jury, and dismissing plaintiff's action.

The action of the appellant, as representing the theretofore firm of John Mathewson & Son, was brought to recover the sum of $2,150 insured under a policy of the respondent, dated 9th July, 1867, issued in their favor "on re-"fined coal oil, petroleum oil, and lubricating oil, the property of assured, con-"tained in Middleton's No. 1 oil shed, covered with earth, situate on the north "or city side of the G. T. Railway track at Point St. Charles, Montreal." A fire occurred in the oil shed referred to on the 19th of August following, which, with its contents, was destroyed by fire.

The declaration of the appellant set up the foregoing facts, and alleged that the quantities and kinds of oil consumed were as follows, viz.: 87 barrels of refined coal oil, 50 barrels of lubricating oil, and 20 barrels of petroleum oil. The value of this oil, $2,150, was claimed by the action.

The plea of the respondent admitted the execution of the policy, and that the oil shed referred to was consumed by fire, but alleged that the policy had been obtained under certain misrepresentations therein set forth. There was also appended a denial of the facts set up in appellant's declaration.

The issues of fact were tried before a special jury on the fourteenth day of April, 1868, and a verdict rendered in answer to the facts submitted. This verdict was, in some respects, defective, and the respondent was successful in an application for a new trial.

On the fifteenth day of February, 1869, the case went a second time to trial. Evidence was adduced on both sides, the respondent abandoning the allegations of misrepresentation forming the whole of the affirmative part of the plea.

The important questions submitted to the jury, and really in issue between the parties, were the following, viz.:

1. As to the ownership of the oil insured;
2. As to the amount of oil destroyed by fire, and its value.

The charge of the presiding Judge (Mr. Justice Torrance) as to the question of *ownership* was as follows, viz.:—"I charged the jury, in relation to sales, "that Mr. Ritchie was correct in saying that, by our law, a sale was complete, "as between the parties, by the agreement; but that, in order to pass the pro-

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"perty sold, there must be an identification of it where it formed portion of a "larger quantity, from which it was not separated. For example, in the sale "of a 100 hogsheads of sugar out of 1000 hogsheads, it was necessary to iden- "tify the 100 sold by separation, or otherwise marking them. I had in my mind "the 1026th and 1474th articles of the Civil Code, also *Story*, Sales § 296 (a) and note."

The jury adopted the view of the Honorable Judge, and found that the appellant was not the owner of any of the oil destroyed by the fire.

The appellant subsequently moved, unsuccessfully, for a new trial, and judgment was entered up in favor of the respondent, upon the verdict of the jury, as already stated.

BADGLEY, J., *dissentiens*:—It is necessary to premise only the material facts and averments of this cause:

1. That, on the 20th of May, 1867, John Mathewson & Son were the *proprietors, owners, and in possession of* 157 *barrels of oil, to wit,* 87 *of refined coal oil,* 50 *of lubricating oil, and* 20 *of petroleum oil, then contained in Middleton's No.* 1 *oil shed, at Montreal,* as averred in their declaration.

2. That, on the 9th of July, 1867, the respondents, by their policy, insured from that day to the 9th of October following, for J. M. & Son, the *property described in the policy, to wit, refined coal oil, petroleum oil, and lubricating oil, the property of the assured contained in the said No.* 1 *oil shed,* to cover the above specified quantities of oil.

3. That, on the 19th of August, 1867, the whole of the oil mentioned generally in the policy, and described as above specified, the *property of J. M. & Son,* and then being in the No. 1 oil shed, and of the then value of $2,150, was, with the oil shed itself, destroyed and consumed by fire, and became lost to J. M. & Son.

4. The plaintiff's declaration alleges these facts, and specially *the property and ownership of the specific quantities of oil by John M. & Son,* at the dates of the policy and loss respectively, and, therefore, they demand from the respondents $2,150, the value of the insured oil at the time of the fire.

5. The respondents pleaded the general denegation of all the alleged facts, except the making of the policy, and the destruction by fire of the oil shed with its contents.

6. The substantial issues—the others being immaterial here—are only two:

1st. The specified quantities of oil being in the oil shed at the times stated in the declaration, and

2nd. The ownership of those specified quantities of oil by John M. & Son at the times and as alleged in the declaration.

7. The cause was left to a jury upon specifications of fact settled judicially, which were actually the specifications filed by the appellants; the first and second alone are of importance here, namely,

8. *First.* Were John M. & Son, on and prior to the 19th August, 1867, proprietors of the quantity of oil, to wit, 87 barrels of refined coal oil, 50 of lubricating oil, and 20 of petroleum oil, referred to in the declaration and in the policy, or of some, or what portion thereof?

The finding upon this first specification is,—no ownership.

9. *Second.* Was the said oil or some, or what portion thereof, destroyed by fire at Montreal, on or about the 19th of August, 1367, as alleged in the declaration, and, if so, what was the value of the said oil, so destroyed by fire, at the time of its destruction?

The finding upon this second specification is,—no oil was destroyed belonging to the plaintiffs (read John M. & Son).

10. The appellants moved, unsuccessfully, upon various grounds set out in their motion, for a new trial upon these findings, but their motion was rejected, and judgment was rendered for respondents, dismissing the action of the appellants, whereupon this appeal, which, however, by their factum they have specially limited to one ground only, namely that part of the charge to the jury of the presiding Judge, with reference to the question of the alleged ownership by John M. & Son, and which question will be given here in the recorded words of the Judge.

11. The part of the Judge's charge objected against is:—

"I charged the jury, in [illegible] to sales, that Mr. Ritchie was correct in saying that, by our law, a sal[illegible]mplete, as between the parties, by the agreement; but that, in order to pass the property sold, there must be an identification of it where it formed portion of a larger quantity, from which it was not separated. For example, in the sale of a 100 hogsheads of sugar out of 1000 hogsheads, it was necessary to identify the 100 sold by separation, or otherwise marking them. I had in my mind the 1026th and 1474th articles of the Civil Code, also *Story*, Sales § 296 (a) and note."

Thereupon the appellants say, the only question which they intend to submit upon the present appeal is, as to the correctness or incorrectness of that portion of the Judge's charge which is quoted above, after which they remark, the proposition of Mr. Justice Torrance is in effect the following:—That, in order to have an insurable interest, as proprietor, in a number of specific articles, part of a larger quantity, it is necessary to prove complete ownership by separation or identification by marks. If there was misdirection on the part of the Judge, in his charge to the jury, the appellants are entitled to a new trial. It would only be a waste of time, at this stage of proceedings, to go into all the details of the case, for, if the learned Judge was right in his charge, there is an end to the case; if he was wrong, the appellants are entitled to have the verdict of a jury, properly directed as to the principles of law governing the case.

12. The appellants assert that the objected proposition is untenable and mistaken in law; but that it would apply to rival claims of ownership between two purchasers, where the purchaser of a part of the whole lot purchased by the other, had not separated or marked his part purchase, which, they aver, is widely different from their case, that is, the case of a party claiming against an *Insurance Company where the whole quantity out of which the purchase was made was consumed by fire. Interest is the measure of exceptions as well as of actions*, and they support their objection against the Judge's direction, as above, as being unjust and not law, by several authorities, ending with Bunyon, on Fire Insurance with reference to uninsurable interest, which will be noticed presently.

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13. Now the *fact* of the *ownership by John M. & Son, of the specific quantities of oil* alleged to have been insured, is *the main issue in the cause, and the substantive object of the two specifications submitted to the jury;* and this the appellants admit in their factum, page 1. They say the important questions submitted to the jury, and really in issue between the parties, were the following, viz:—

1. As to the ownership of the oil insured;

2. As to the amount of oil destroyed by fire, and its value.

The question of insurable interest had no place in the finding of ownership which was the issue, because, if that finding had been affirmative, it would necessarily and by law involve the insurable interest in the ownership of the insured property, whereas a negative finding as to ownership would, as in this case, prevent the possibility of such interest. Ownership involves insurable interest, but insurable interest does not necessarily involve ownership.

14. Insurable interest is nothing of itself merely, but requires to be attached to the ownership or right of the assured, and the Civil Code is precise in requiring that *the interest, must be specified.*

15. By the 2472 art. All persons capable of contracting may insure "objects "in which they have an interest, and which are subject to risk. By the 2174 "art. a person has an insurable interest in the object insured, whenever he may "suffer direct and immediate loss by the destruction of it, and, by the 2571 art., "the interest of an insurer against loss by fire may be that of an owner, or a "creditor, &c., *but the nature of the interest must be specified.*" And the "2569 art. as to the policy requires it to "contain the name of the party in "whose favour it is made, a description or sufficient designation of the object of "the insurance, and *of the nature of the interest of the insured.*"

16. The special requirements of the Code have been complied with: *John M. & Son* insured the *designated quantities of oil*, as *owners and proprietors in interest of it.*

17. Now all this only goes to support the proposition, that the party insuring John M. & Son must have an interest in the property insured to entitle them to recover, that is, they must have a property at the time of the loss, or they can sustain no loss, and, consequently, can be entitled to no satisfaction.

18. The question therefore is, were *the insured, John M. & Son, the owners and proprietors of the insured lost property.* This is a mixed question of law and fact, and involves the question, what constitutes ownership for insurance? It is quite evident that John M. & Son were not the original owners of the insured oil; they were acquired owners of it, purchasers under an alleged contract of sale by Middleton to them, on 9th July, 1867, the sale being made through Pearson, the clerk of John M. & Son; their ownership was, therefore, as purchasers.

19. By the 1025 art. of the C. C. a contract for the alienation of a thing certain and determinate makes the purchaser owner of the thing by the consent of the parties, although no delivery be made, and, by the 1026 art., if the thing to be delivered is uncertain or indeterminate, the creditor does not become the owner of it until it is made certain and determinate, and he has been legally

notified that it is so, and, by the 1027 art., "*these rules preceding apply as well to third persons as to the contracting parties,*" and hence may be legally taken advantage of by the respondents.

20. Again, in this connection, by the 1472 art., sale is a contract by which one party gives a thing to the other for a price in money, which the latter obliges himself to pay for it. It is perfected by the consent alone of the parties, although the thing sold be not then delivered. By the 1473, the contract of sale is subject to the general rules relating to contracts, and to the effects and extinction of obligation in the title of obligations, and, by the 1474 art., when things moveable are sold by weight, number or measure, *and not in the lump*, the sale is not perfect until they have been weighed, counted or measured, &c. It was prudent and proper to give the articles themselves.

21. This latter is a rule of all jurisprudence, and Bunyon is explicit to the same effect, p. 148, he says: "upon the sale of a chattel, directly the contract is complete, the property passes to the vendee, and will be at his risk, although not "removed by him, &c.; but, where there remains something to be done to the "goods, such as even ascertaining their number, or separating them from a large "bulk, until this is done, and they are specifically appropriated, it is considered "that the property does not pass, *and they will be at the risk of the vendor.*" See cases cited by Bunyon, among these.

22. In Gillett *vs.* Hill, 2 Crompt. & Meeson, p. 530, per Bayley, explaining the rule says: "if I agree to deliver a certain quantity of oil, as 10 out of 18 tons, no one can say what part of the whole quantity I have agreed to deliver to him until a selection is made: there is no individuality until it has been done." So, in Langton & Higgins, 4 Hurlst & Norman, p. 402, per Martin, J.: The rule of law is, when the article corresponds with that agreed to be sold, and everything which is to be done by the vendor is done by him, the property passes to the vendee," and Bramwell characterized the rule, as good law and good sense. So Blackburn, Treatise of Sale, p. 122–3, speaking *ex professo* as to the rules to ascertain whether an agreement amounts to a bargain and sale or not, says: The first of the rules, that the parties must be agreed as to the specific goods on which the contract is to attach, before there can be a bargain and sale, is founded in the very nature of things. Till they are agreed on the specific individual goods, the contract can be no more than a contract to supply goods answering a particular description, and since the vendor would fulfil his part of the contract, by furnishing any parcel of goods answering that description, and the purchaser could not object to them if they did answer the description, it is clear there can be no intention to transfer the property in any particular lot of goods more than another, till it is ascertained which are the very goods sold. It makes no difference, although the goods are so far ascertained that the parties have agreed that they shall be taken from some specified larger stock; in such case the reason still applies, because the transfer of the property was not in one portion more than in another, and the law does not transfer the property in any individual portion, and Blackburn refers to Pothier, vente 309, who holds the same, and says, because, until the thing to be done by the vendor is perfected, *non apparet quantum venierit.* Pothier is quite precise in support of the rule, and so is Story on Sales,

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§296, who says, no sale is complete, so as to vest in the vendee an immediate right of property, while anything remains to be done between the buyer and seller in relation to the goods, so §296 a, the goods sold must be separated, and identified by marks or numbers, so as to be completely distinguished from all other goods, or from the bulk or mass with which they happen to be mixed. This author has cited in support of these two propositions a vast number of corroborative authorities taken from both American and English books, which may be referred to.

23. As a legal proposition, therefore, the direction of Judge Torrance is fully maintained by American, English, French and Canadian law, and his direction, as such, is quite founded in law. Now, treating the appellant's objection as in the nature of a demurrer, because it must be observed, that the objection is only as to the correctness or incorrectness of the law contained in it, and, therefore, admitting the facts to which the direction applies, and which if found would be well found, the direction being founded in law, the demurrer with the legal objections, *dans son ventre*, must be rejected, and the appeal being limited to that law of the direction, ends the contention in favor of the respondents.

24. Now, if the applicability of the Judge's direction could be questioned, which it is not, it is evident from the evidence of record, that, of the large quantities of oil in store, none had ever been appropriated or individualized or separated from the mass for John M. & Son, whilst it was in evidence that oil of the description insured was not in the warehouse or *in the possession* of John M. & Son, as stated in their policy at the time of the fire.

25. In addition to the above, a few words remain to be said, as to the insurable interest urged by the appellants. Bunyon cited says, p. 6: "It is important to consider what is a sufficient, or what is termed an insurable interest. To "this inquiry it may be laid down in general terms that any subsisting right or "interest in the property to be insured, which will be recognized as such in any "Court, either of law or equity, is an insurable interest"; but he adds, "it "must be a legal, or, in contradiction to legal, an equitable claim, using the "term equitable in its technical meaning. A mere expectancy has been considered to confer no insurable interest as regards the property at risk. Neither "will a right binding in honor, but not in law, as that of purchaser by a mere "verbal contract, incapable of being enforced by reason of the statute of frauds." 9 Jur. N. S., 747—6 M. & W. 224. In this last case Lord Abinger said, cases of insurance for goods stand upon the assumption that the insured has in his own power the subject matter upon which the insurance is effected. And, per Parke B., if the contract is not capable of being enforced at law it is nothing, if there is no memorandum in writing of the statute, consequently no enforceable contract; and it is held by all the Judges that, if the memorandum were made after the loss, it would not avail. Shaw's Ellis on insurance says: "No insurable "interest will exist until everything has been done which is necessary to give "the lien legal effect and validity," and concludes, "but the contract must be "a valid one, and made according to law, or an insurance will not be sustained." Citing in support the above case from 6 M. & W. 224, and an American case.

Now in sales, the code has adopted the provisions of the Statute of Frauds, and requires a *writing signed by the vendor to validate the sale*; but, where there is no writing, then delivery of the goods will satisfy the Statute, which requires, however, not only an utter relinquishment of possession by the vendor, but also an absolute and final appropriation by the vendee: so by the 1235 art. of the C. C., sub. sec. 4: "Upon any contract for the sale of goods, unless the buyer has accepted or received the goods."

26. No delivery of the oil was ever made to John M. & Son, nor was any specific oil ever received or accepted by them; they never saw it; they did not know if it was in the oil shed, or even if in existence at all. They knew nothing about it except by Middleton, who, at the date of the alleged sale, (9th July, 1867) had no such descriptions of oil in hand, nor afterwards up to the time when the fire occurred. Again, no memorandum in writing of the sale was made by Middleton until after the fire. The bill of parcels produced was only made after the fire, but antidated for fraudulent purposes.

27. It is quite evident that, as mere matter of fact, the direction in the Judge's charge was quite within the facts of record, but

28. Independent of the Judge's charge, or its correctness in law, the evidence adduced shews such a mass of fraud and falsehood by Middleton and others as to the oil transactions with John M. & Son and others, some of these, with reference to John M. & Son, being known to and acquiesced in by them that it is not possible to deny the correctness in fact of the findings. The jury are within their indisturbable province as to the credibility of the evidence of the facts of the case, and specially of the ownership by John M. & Son, and every intendment in favour of the findings ought to be allowed to the jury; hence, therefore, as the demurrer to the Judge's direction is plainly untenable, the judgment should be confirmed, otherwise it would be holding out the most direct encouragement to the violation of law, by supporting a contract that secures an indemnity to the transgressor.

DUVAL, C. J., said the question was whether the appellant had an insurable interest. The Court was of opinion that he had. He had purchased oil from Middleton, and the oil it was said had not been delivered when the fire took place. The judgment would be reversed and a new trial granted.

CARON, J. Il est prétendu par l'appelant que lors de l'assurance, le demandeur Mathewson n'avait pas d'huile dans le hangar de Middleton, où il aurait été détruit par le feu. L'on dit que c'était une fraude entre Mathewson et Middleton, et partant que le jugement qui renvoie l'action aurait dû être maintenu.

Je ne lis pas la preuve de cette manière. Je ne suis pas prêt à dire que le demandeur Mathewson a prouvé légalement que toute la quantité d'huile pour laquelle il réclame paiement était, lors de l'incendie, dans le hangar, comme il l'allègue; mais il me parait hors de tout doute que lorsque l'assurance a été effectuée qu'il y avait dans le dit hangar une certaine quantité d'huile qui avait été acheté par le demandeur et qui était regardé comme lui appartenant. Ce fait me paraît établi et je ne vois aucun signe de fraude de la part du demandeur. Sous ces circonstances, il me semble que la charge du juge dont se plaint le demandeur, quant à la question de droit à décider, savoir, que pour pouvoir

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assurer valablement un objet il fallait en être propriétaire, en autres mots que le propriétaire seul pouvait assurer valablement, que dans le cas soumis le demandeur n'ayant pas eu tradition effective de l'huile achetée, lequel était resté mêlé avec la plus grande quantité dont il faisait partie, n'était jamais devenu propriétaire, et partant la police d'assurance sur laquelle il se fonde, était nulle.

Cette décision du juge qui est assurément erronée doit nécessairement avoir induit le jury en erreur et doit avoir influé la décision qu'il a donnée. Si la décision du juge n'est pas légale le demandeur avait sous les circonstances prouvé droit à un nouveau procès; c'est ce qu'il a demandé et qui lui a été refusé par le jugement dont il se plaint.

Je crois ce jugement fautif; c'est la légalité de la charge qui nous est soumise, si elle est mauvaise, il faut le dire, c'est ce qu'on fera en renversant le jugement et ordonnant un nouveau procès.

The following was the judgment of the Court:

"The Court *** considering that it is not established in evidence that the appellant, plaintiff below, as representing the theretofore firm of John Mathewson and Son, had not an insurable interest, as proprietor, in the 87 barrels of refined coal oil, 50 barrels of lubricating oil and 20 barrels of petroleum insured, with a larger quantity, under a policy of the Respondents dated 9th July, 1867, issued in favor of the said John Mathewson and son, stored in the oil shed mentioned and described in the said policy and destroyed by a fire which occurred in the said oil shed.

Considering that at the trial of the issues in this cause by a special jury on the 15th day of March, 1869, the Honorable the presiding judge erroneously charged the jury, to the effect, that there was no legal evidence that the appellant was proprietor of any of the oil destroyed by the fire in question, and that in consequence of such misdirection a verdict was found in favour of the defendants.

Considering, therefore, that in the judgment rendered by the Superior Court at Montreal on the 20th April 1869, whereby defendants' motion for judgment in their favor on the verdict and findings of the jury was granted and Plaintiff's action dismissed with costs, there is error, doth reverse, annul and set aside the said judgment, and proceeding to pronounce the judgment which the Court below ought to have rendered doth set aside the said verdict and findings of the jury and grant a new trial.

And it is ordered that the respondents do pay the appellant the costs by him incurred in this Court."

(The Honorable Mr. Justice Badgley dissenting.)

Judgment of S. C. reversed.

Torrance, Ritchie, Morris & Rose, for Appellant.

Abbott, Tait, Abbott & Bethune, for Respondent.

(S. E.)

COUR DE CIRCUIT.

MONTREAL, 31 OCTOBRE 1871.

Coram MACKAY, J.

No. 2087.

Hubert vs. *Dorion*.

Juge :—Que le loyer est quérable. (1)

Le demandeur poursuivait le défendeur devant la Cour de Circuit pour le district de Montréal, le 10 août 1870, pour arrérages de loyer, savoir, $75, et pour détérioration $44.26.

Le défendeur plaida qu'il avait fait des offres avant l'action et il les renouvela.

MACKAY, J.—Action for $75 rent and $44 damages to building by tenant. On the 7th day of July defendant tendered the rent, and $10 for damages. Plaintiff says that the writ had issued before tender and costs should have been offered. I find that on the 7th of July a writ had issued, which was returnable on the 20th of August, so this is not the writ that was then issued. *The rent is quérable, however, and there is no proof of its having been demanded before suit, so that plaintiff would not be entitled to costs.* The $10 tendered for damages are insufficient, as the evidence makes out $22.96½. Defendant claims the benefit of some $158 which he expended on the premises without authority from plaintiff. Such officious expenditure cannot be allowed. Plaintiff is to blame for bringing his action as an appealable case in this Court. Under the circumstances, judgment will go for plaintiff for $22,96½, but without costs.

Le jugement de la Cour est motivé comme suit:

The Court considering that the present action of the plaintiff, so far as the rent demanded is concerned, was unwarranted, seeing the offers made by the defendant of the rent due, offers well enough made on the 7th July 1870, seeing that said rent was *quérable*, but that defendant had never been properly asked to pay it before the suit was instituted, the Court doth declare the offer and deposit by the defendant of the sum of $75.00 for said rent, good and valid; and doth order that the said sum of $75 be paid over to the said plaintiff and damages $22.96½.

Arthur Desjardins, avocat du demandeur.

Wilfred Dorion, avocat du défendeur.

Vide 1 L. C. J. p. 69, David and Thomas.

(P. R. L.)

(1) C. C. art. 1152, 1619, 1626.

COUR SUPERIEURE.

MONTREAL, 30 NOVEMBRE 1871.

Coram BERTHELOT, J.

No. 808.

Léveillé vs. *Labelle & Houle*, Intervenant.

JUGE :—Que l'adjudicataire de meubles saisis, loués depuis leur vente judiciaire, ne peut les soustraire au privilège du locateur lorsqu'ils ont toujours garni la maison louée. (*)

Le demandeur ayant poursuivi le défendeur pour la somme de $132, arrérages de loyer dus et échus au 1er de mai dernier, en vertu d'un bail notarié en date du 8 février 1866 et ayant fait saisir-gager les biens meubles garnissant les lieux loués, le nommé Alexis Houle intervint dans la cause et allégua par son intervention, que les meubles saisis-gagés étaient sa propriété, les ayant acquis à une vente judiciaire chez le défendeur le 31 décembre 1870.

L'intervenant avait fait un bail de ces meubles au défendeur le 4 janvier 1871 pardevant notaire ; pour quatre mois expirant le 1er mai 1871 ; et par un autre bail notarié passé le 27 avril 1871, il les lui avait encore loués pour une année à compter du 1er mai 1871.

L'intervenant alléguait qu'il en avait donné avis au demandeur, qui y avait acquiescé et que le demandeur, lors de la vente judiciaire, avait fait une opposition afin de conserver sur les deniers prélevés par la vente de ces meubles.

L'intervenant concluait à ce qu'il fut déclaré propriétaire des susdits meubles saisis-gagés, et à ce que main-levée lui en fut donnée.

Le demandeur répondit spécialement à cette intervention, que l'intervenant n'avait pas payé les meubles avec ses deniers, mais bien avec les deniers fournis par le défendeur et l'épouse de ce dernier.

Que les parties sont parentes, qu'il y a eu simulation et fraude, et que les meubles garnissent les lieux loués au vu et su de l'intervenant et avec son consentement ; et partant le demandeur a un privilège de locateur sur iceux, que le demandeur n'a jamais été notifié ni n'a acquiescé et que le loyer réclamé est devenu échu depuis la vente judiciaire.

Les parties ayant procédé à leur preuve et ayant été entendues au mérite, la Cour Supérieure a maintenu la saisie-gagerie et a renvoyé l'intervention avec dépens.

Ce jugement est motivé comme suit :

La Cour, considérant que bien que l'intervenant soit devenu propriétaire des biens meubles et effets mobiliers mentionnés et désignés en son intervention par et au moyen de l'adjudication en justice qui lui en a été faite le 31 décembre dernier, il ne peut les soustraire au privilége du dit demandeur pour le payement des loyers à lui dûs par le dit défendeur ; les dit meubles et effets mobiliers étant toujours restés depuis la dite adjudication dans la maison louée par le demandeur au défendeur et par conséquent affectés au privilège du bailleur réclamé par le dit demandeur ; considérant de plus que le dit intervenant a failli de prouver que

(*) C. C. art. 1622.

le demandeur a renoncé à son privilège à cet égard, la Cour, pour ces raisons, renvoie la dite intervention avec dépens contre le dit intervenant et adjugeant en outre sur le mérite de l'action, condamne le défendeur à payer au demandeur la somme de $132 pour balance de loyer dû et échu et maintient la saisie-gagerie. Berlinguet et Prevost, et al.

Cartier, Pominville & Belournay, avocats du demandeur.

Duhamel & Rainville, avocats de l'intervenant.

(P. R. L.)

COUR SUPERIEURE.

MONTREAL, 31 OCTOBRE 1871.

Coram MACKAY, J.

No. 817.

Berlinguet vs. *Prevost* et al.

JUGE :—1o. Qu'une rente annuelle léguée à titre d'aliments et déclarée insaisissable par le testateur, peut être cédée par le légataire.

2o. Que le légataire est non-recevable à demander la rescision de cette cession, sur le principe que l'insaisissabilité et la nature alimentaire de cette rente, comportent son incessibilité. (*)

Le demandeur poursuivit les défendeurs, le 15 mai 1871, devant la Cour Supérieure à Montréal, pour la rescision des deux actes de transport, le premier en date du 4 juillet 1867, et le second en date du 2 Octobre 1867, comme faits en violation directe des intentions du testament de feu A. E. Montmartquet, en date du 14 juillet 1864, Mtre. J. Belle, N. P. et par lequel testament il légua au demandeur £15 par année à titre d'alimens et devant être insaisissables. Le demandeur avait cédé ses droits à ces aliments à l'un des défendeurs A. Prévost, les autres défendeurs étaient les exécuteurs testamentaires du testateur auxquels les transports avaient été signifiés.

Le demandeur alléguait que nonobstant la clause suivante contenue aux dits transports, " pour valeur reçue tant en argent qu'en effet de grocerie et provisions que le créancier lui a vendus et livrés pour subvenir aux besoins urgents de sa famille et ses aliments " il n'avait reçu aucune considération et demandait la rescision de la cession qu'il avait faite de sa rente annuelle alimentaire.

Le défendeur Prévost contesta cette action, et nia toutes les allégations du demandeur et en outre prétendit, qu'en consentant les transports, le demandeur n'avait nullement contrevenu aux dispositions du testament et que par son silence depuis leur passation il avait acquiescé aux paiements qui avaient été faits en vertu d'iceux.

Les parties ayant procédé à la preuve furent entendues au mérite.

MACKAY, J.—Action to set aside two transfers for want of consideration. It is true the consideration is not correctly expressed in the deed, but this does not render it null. *The moneys were made insaisissable by the will, but this does not make them inalienable.*

The plaintiff's allegations being disproved and the defendant Prévost having proved a sufficient cause for the two acts of transfer attacked by plaintiff, the action is dismissed with costs.

Doutre, Doutre & Doutre, avocats du demandeur.

Dorion, Dorion & Geoffrion, avocats du défendeur Prévost.

(P. R. L.)

(*) Rolland de Villargues—Dict. vo. cessible et vo. Aliments, sec. 7, No. 125.

COUR SUPERIEURE

En Revision.

MONTREAL, 31 OCTOBRE 1871.

Coram MONDELET, J., MACKAY, J., TORRANCE, J.

No. 133.

Graham vs. *Kemplry*.

Droit :— Quoique le cas où il n'existe aucune ligne de démarcation entre les héritages des parties, c'est l'action en bornage qui doit être intentée et non l'action pétitoire ; par celui des deux voisins qui se plaint d'un empiètement. (1)

Le jugement rendu par la Cour Supérieure siégeant à Ste. Scholastique dans le district de Terrebonne, le 14 mai 1870, a renvoyé l'action pétitoire dirigée par la demanderesse contre le défendeur auquel elle avait vendu un acre de terre.

Elle alléguait que le défendeur avait commis des empiètements sur son terrain, en enlevant la cloture qui servait de bornes entre leurs lots.

A cette action le défendeur plaida une exception par laquelle il alléguait qu'aucune action pétitoire ne pouvait être maintenue, avant qu'au préalable une action en bornage fut intentée; parce que lorsque le défendeur à pris possession, il n'existait aucunes bornes ou limites. La demanderesse a répondu spécialement, qu'elle avait fait au défendeur une vente en bloc et non à la mesure ; dont la quantité se trouvait contenue dans les limites qui existaient lors de la vente et partant elle ne pouvait pas prendre une action en bornage. Que le défendeur ne pouvait pas profiter de sa voie de fait pour changer les circonstances de la vente et forcer la demanderesse à porter une action en bornage lorsqu'il avait fait disparaître les bornes de sa propriété.

Les parties procédèrent à leur preuve et après audition au mérite, la Cour a renvoyé l'action avec dépens.

Ce jugement fut porté en Révision à Montréal et fut confirmé.

MONDELET, J., dissenting.— This is a petitory action. The action was dismissed in the Superior Court, Terrebonne, on the ground that there had been no line run between the parties. In my opinion the judgment is bad and should be reversed, but I have the misfortune to differ from my colleagues.

MACKAY J.—In 1861 the Plaintiff bought some land in the village of St. Andrews, and subsequently sold half an acre to defendant. The deed called it "half an acre," but the plaintiff says "half an *arpent*" was meant. Defendant, not getting his half in width, ran back where there was no boundary far enough to give him in all half an acre, English measure. Plaintiff complains of his taking possession of her land in rear; defendant brought on a surveyor who ran a line giving him all he wanted, but plaintiff refused to sign the *procès verbal*. There never has been any line established or recognized, and under the circumstances we consider the court below was perfectly right in dismissing the action.

Jugement confirmé.

MONDELET, J., différant.

Laflamme, avocat de la Demanderesse.
Mackay, avocat du Défendeur.
(P. B. L.)

(1) 13 L. C. R., 462, Robertson & Stewart.

COURT OF QUEEN'S BENCH, 1871.

MONTREAL, 10TH MARCH, 1871.

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

No. 36

CLAUDE MELANÇON,

(Opposant in Court below,)

APPELLANT;

AND

ROBERT HAMILTON, Tutor,

(Contestant in Court below,)

RESPONDENT.

HELD: 1.—That an *adjudicataire* at sheriff's sale of real estate [illegible] the provisions of the Code of Civil Procedure of L. C., cannot legally claim [illegible] by way of collocation on the proceeds of the sale, a portion of the price paid [illegible] ground, that the property proved to be of considerably less extent than advertised in consequence of an adjoining property having been erroneously included in the description.

2.—That under any circumstances the knowledge by the *adjudicataire*, at the time he bid, that the adjoining property did not belong to the defendants, and was included in the description by error, would be a complete bar to such claim.

This was an appeal from a judgment rendered by the Superior Court, at Montreal, sitting as a Court of Review, (Justices Mondelet, Mackay and Torrance presiding) on the 30th day of June, 1869, confirming a judgment rendered on the 4th day of March, 1869, by the Superior Court, at Montreal, (Justice Beaudry presiding), dismissing an opposition *à fin de conserver* fyled by the appellant in a case No. 1210, in which the respondent was plaintiff, and George W. Koester *et al.* were Defendants.

The appellant claimed by his opposition to be collocated by special privilege, and in preference to all others, on the moneys arising from the real estate which had been seized and sold in this cause, for the sum of $1592.68, currency.

The reasons assigned in his opposition were to the following effect:—

That on the 24th September, 1868, the opposant became the *adjudicataire* of the real estate seized and sold in the cause for $5000.

That the property had been described by the sheriff as containing 65 feet in front by 165 feet in depth, and as being bounded in rear by a street without a name and unopened.

That in making this purchase, the opposant had guided himself by the *designation*, and specially by the superficial contents stated in sheriff's advertisement.

That the buildings on the property he counted for nothing, as they were old, and, in his opinion, valueless.

That since the adjudication, he had discovered that the superficial contents were much less than the advertisement stated, inasmuch as the *désignation* as to boundaries included a lot of 43 feet 6 inches in front by 62 in depth, and 46 feet 9 inches in the rear line, French measure.

That this lot did not belong to the defendants, but to one Dame Mary Ann Koester, (widow Ashton) who was proprietor thereof under deed executed on

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the 4th of February, 1860; and that Mrs. Ashton had continuously, since the date of said deed, *occupied and possessed, publicly and openly*, the lot last described, and *did so at the time of the Sheriff's sale*, and was still in possession thereof, as the absolute owner and proprietor of the lot; and that, consequently, the sale by the sheriff of Mrs. Ashton's lot was radically null and void.

The opposant further contended that the lot sold (including Mrs. Ashton's lot) really measured only 61 feet instead of 65 feet in front, and was 172 feet deep instead of 165 feet.

He then contended that there was a deficit in the contents as advertised, after deducting Mrs. Ashton's lot to the extent of 2,987 feet, and that the proportionate value of the deficit, as compared with the whole purchase money, was $1392.68.

And he further claimed $100 for want of the street referred to in the advertisement as the rear boundary of the lot, and a further amount of $100 as general damages, by reason of the alleged deficit.

The plaintiff, the only hypothecary creditor whose claim could be affected by the opposition, contested the opposition and assigned the following reasons as *moyens de contestation*:—

"That according to law, and specially according to the 708th article of the Code of Civil Procedure, and according to the conditions of sale announced by the sheriff of this district, at the time the lot of land and premises seized and sold in this cause were put up to sale, and before the adjudication thereof to the said opposant, the adjudication of the said lot of land and premises was made without any warranty as to the contents or measurement or size of the said lot of land and premises.

That, even if the said opposant were legally entitled to any repetition of the price at which the said lot of land and premises were adjudged to him, by reason of any diminution in the size, such as alleged in said opposition, which the said plaintiff, however, in no way admits, the value of such diminution, proportioned to the whole of the said price, could not, under any circumstances, amount to anything near the amount claimed for such diminution in and by the aforesaid opposition.

And the said plaintiff saith that at the time of the seizure and sale of the said lot of land and premises, Dame Mary Ann Koester, widow of the late John P. Ashton, in the said opposition referred to, was, and for more than the seven years now past had been and has ever since continued to be and still is, in the open, public, and peaceable possession of the piece of ground, in the said opposition described as being so in her possession, as the owner and proprietor thereof, on which said piece of ground there were, at the periods aforesaid and still are, a dwelling-house and out-buildings.

That the said piece of ground, so belonging to and in the possession of the said Dame Mary Ann Koester, was, during all the said periods, and still is, separated from the lot of land and premises of which the said defendants were possessed during the same periods, and of which the said opposant so became the *adjudicataire* as aforesaid, by visible and well-defined boundaries, the said

lot of land and premises last mentioned being, during all the said periods, bounded in front by St. Antoine street and in rear by the said piece of ground so belonging to and in the possession of the said Dame Mary Ann Koester, and was and is separated therefrom by a large shed extending across the whole width of the said lot of land and premises so possessed by the defendants, and along the entire depth of the said piece of ground, the property and in possession of the said Dame Mary Ann Koester, which has always had its front on Mountain street.

That, before and at the time the said opposant so bid for and became the *adjudicataire* of the lot of land and premises seized and sold in this cause, he well knew all the foregoing facts, and he well knew that he was not purchasing and could not be purchasing the aforesaid piece of ground so belonging to and in the possession of the said Dame Mary Ann Koester, and that in reality he was only bidding for and purchasing the lot of land and premises then in the occupation of the defendants, and that its actual boundaries were such as above described.

And the said plaintiff further saith that, so well did the said opposant understand and know that he was in no sense bidding for or likely to become the *adjudicataire* of the said piece of ground so belonging to and in the possession of the said Dame Mary Ann Koester, that he, the said opposant, by deed executed on the 20th day of October, 1868, before James S. Hunter, notary public (whereof an authentic copy is herewith fyled, and specially referred to as forming part hereof) he, the said opposant, declared and acknowledged that he did not acquire by reason of the adjudication made to him in this cause, any right, title or interest whatever in or to the said piece of ground, and he did thereby then and there voluntarily, and without exacting any consideration for so doing, renounce, relinquish and release for ever, to the said Dame Mary Ann Koester, any claim or demand or right to the said piece of ground or against the said Dame Mary Ann Koester, which he might have or pretend to have by reason of the said adjudication.

That the said opposant, by reason of the said several premises, cannot in any sense be held to have been evicted from the aforesaid piece of ground so belonging to and in the possession of the said Dame Mary Ann Koester, or to have been deprived of any portion of the lot of land and premises really bid for and acquired by him as aforesaid.

And the said plaintiff further saith that the said lot of land and premises, so actually in possession of the defendants as aforesaid, and really purchased and acquired in this cause by the said opposant, were and are of the value of from $7000 currency to $8000 currency, and that no loss has occurred, or can possibly occur, to the said opposant of any portion of the price or sum of $5000, currency, at which the same were adjudged to him by the said sheriff.

And the said plaintiff lastly saith that all the allegations, matters and things in the said opposition set forth and contained, except in so far as the same are hereinbefore expressly admitted to be true, are false, untrue and unfounded in fact, and the said plaintiff hereby expressly denies the same and each and every thereof."

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The following was the judgment of the Superior Court:

"La Cour, après avoir entendu l'opposant Melançon et le demandeur, par leurs "avocats, examiné la procédure, pièces produites et preuve et sur le tout mure- "ment délibéré, considérant que le dit Claude Melançon par son opposition "réclame sur le prix de l'immeuble vendu en cette cause, en vertu du bref de "*Fieri Facias*, émané en cette cause le vingt-neuf Août mil huit cent soixante "et huit et duquel immeuble le dit Claude Melançon s'est rendu adjudicataire, "la somme de quinze cent quatre vingt douze *dollars* et soixante et huit centins "comme indemnité à raison du défaut de contenance du dit immeuble: Consi- "dérant que le dit immeuble a été mis aux enchères conformément aux disposi- "tions contenues dans les articles 675 et 708 du Code de Procédure Civile, "conditions auxquelles le dit Claude Melançon a souscrit en devenant adjudica- "taire du dit immeuble: Considérant qu'en vertu des dites conditions de vente "et du dit article 708 du Code de Procédure Civile, le dit Claude Melançon, "comme adjudicataire, a acquis le dit immeuble, sans garantie quant à la conte- "nance d'icelui et ne peut en conséquence réclamer aucune remise ou diminution "sur le prix de son adjudication et que son opposition est sans fondement, "déboute la dite opposition avec dépens."

And the following was the judgment of the Court of Review:

"La Cour Supérieure siégeant à Montréal présentement comme Cour de "Révision, ayant entendu le demandeur et l'opposant par leurs avocats respectifs "sur le jugement rendu dans et par la Cour Supérieure du district de Montréal, "le quatre Mars mil huit cent soixante et neuf, ayant examiné le dossier et la "procédure en cette cause, et ayant pleinement délibéré, considérant qu'il n'y a "point d'erreur dans le susdit jugement, confirme par les présentes le dit juge- "ment, en tous points, avec dépens contre le dit opposant."

Jetté, for appellant, (after stating pleadings):—Nous devons dire de suite, que le dernier *item* de cette réclamation, savoir $100, a été abandonné par l'appelant dès la première audition de la cause, devant la Cour de première instance.

Ainsi, en résumé, l'appelant évincé d'un tiers de l'immeuble à lui adjugé, et ayant payé *par erreur* pour ce tiers dont il ne peut avoir possession, réclame le remboursement de cette partie du prix qui représente la partie de l'immeuble dont il est évincé. Cette réclamation, il la fonde sur les articles 1140, 1501 et 1586 du Code Civil. Remarquons aussi que cette réclamation, l'appelant l'a fait valoir, lorsque les choses sont encore entières, que ce prix est encore entre les mains du Shérif et avant que la distribution n'en soit venue attribuer une partie quelconque à aucun créancier des défendeurs.

"D'après l'article 1586 du Code Civil: "Dans les ventes judiciaires sur "exécution, l'acheteur, au cas d'éviction, peut recouvrer du débiteur le prix "qu'il a payé avec les intérêts et les frais du titre; il peut aussi recouvrer ce prix "*avec intérêt* des créanciers qui l'ont touché, sauf leur exception aux fins de "discuter les biens du débiteur." Si donc l'acheteur peut recouvrer le prix qu'il a payé et du débiteur et des créanciers qui l'ont touché, après distribution, à plus forte raison est-il en droit de le recouvrer *avant distribution?* "Je crois, "dit Henrys, Tome 2, page 550, que l'adjudicataire est bien fondé à se pourvoir

" sur le prix de son acquisition, quand il n'est pas encore distribué aux créan-
" ciers ; et si le prix est consumé, il est bien fondé à revenir pour le tout contre
" le poursuivant."

C'est ce qu'a fait l'appelant.

L'intimé, créancier saisissant, et celui à la poursuite et en vertu des procédés duquel l'immeuble avait été vendu à l'appelant, intervient alors et conteste cette réclamation de l'adjudicataire se fondant sur l'article 708 du Code de Procédure Civile qui dit : " L'adjudication est toujours sans garantie quant à la conte-
" nance de l'immeuble, mais elle transfère tous les droits qui y sont inhérents et
" que le saisi pouvait exercer, ainsi que les servitudes actives qui y sont atta-
" chées, lors même qu'elles ne seraient pas énoncées au procès verbal."

Il allègue qu'en vertu de cet article, la vente à l'appelant a été faite sans garantie quant à la contenance et que l'éviction que souffre l'appelant résultant d'un défaut de contenance, l'article 708 le prive de tout recours.

Mis en présence de cet adversaire, l'appelant lui répond d'abord par l'article 1587 du Code Civil. Après avoir établi, en faveur de l'adjudicataire, par l'article 1586, le recours que nous avons invoqué ci-dessus, le Code ajoute : Article 1587. " Le dernier article qui précède est sans préjudice au recours que l'adjudi-
" cataire peut avoir contre le *créancier poursuivant à raison* des informalités de
" la saisie ou *de ce qu'elle a été faite d'une chose qui n'appartient pas ostensible-*
" *ment au débiteur.*"

D'où vient en effet, le déficit dont se plaint l'appelant ? Précisément de cette partie de l'immeuble vendu qui n'appartenait pas ostensiblement aux défendeurs. De cet emplacement de leur sœur Madame Ashton, dont cette dernière était en possession *ouverte et publique* depuis plus de dix ans, (l'intimé lui-même l'allègue) et que malgré l'avertissement formel donné à son huissier, par les défendeurs, l'Intimé a fait saisir avec le reste de la propriété de ses débiteurs, qu'il a fait annoncer en vente avec le reste du dit terrain et qu'il a fait adjuger à l'appelant, lorsqu'il devait savoir qu'il le trompait !

L'appelant s'autorisant donc de cet article 1587, répond d'abord à la contestation de l'Intimé, que par suite de la responsabilité qu'il a lui-même encourue envers l'appelant, il est non-recevable à contester sa réclamation, puisqu'en supposant même sa prétention bien fondée, l'appelant a encore contre lui un recours direct en vertu de cet article 1587 et des faits sus-relatés.

De plus, que créancier, premier inscrit au certificat du Régistrateur, il aurait été appelé à recevoir les deniers de l'adjudication si l'appelant n'avait pas réclamé et que l'article 1586, donnant à ce dernier le droit de s'adresser à lui-même après distribution, il est mal fondé à contester cette demande de l'appelant.

En second lieu l'appelant répond à la contestation de l'Intimé, que l'article 708 n'est pas applicable, dans l'espèce, et ne prive pas l'adjudicataire du recours qu'il a adopté.

Tels sont, en substance, les faits de la cause et les prétentions des parties.

La plus importante des questions que présente cette cause et celle que nous discuterons la première est de savoir si l'article 708 du Code de Procédure Civile, s'applique à l'espèce actuelle, et si cet article doit avoir la portée que veut lui donner l'intimé.

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Inutile de nier qu'au premier abord, il semble y avoir une singulière contradiction entre cet article 1586 du Code Civil, qui consacre en termes si formels le recours de l'adjudicataire évincé; et au bas duquel les codificateurs invoquent comme confirmative, la jurisprudence de cette Cour, en citant la cause de *Desjardins & La Banque du Peuple;* et cet article 708 du Code de Procédure qui parait faire si bon marché de ce recours de l'adjudicataire en lui refusant toute garantie quant à la contenance, et ce, à l'encontre de cette même décision de *Desjardins & La Banque du Peuple* que, cette fois, les codificateurs citent comme contraire à ce qu'ils déclarent être l'*ancien* droit du pays. Nous disons l'ancien droit du pays, car l'article 708 n'est pas donné comme droit nouveau.

Cette contradiction est-elle aussi réelle qu'apparente? Nous ne le croyons pas. Nous pensons, au contraire, que bien que par un brusque rapprochement de ces deux articles, on puisse en faire jaillir cette apparente contradiction que nous venons de signaler, néanmoins une étude réfléchie de l'ensemble des dispositions qui, dans chaque Code, complètent et expliquent ces deux articles, fournit promptement la raison de leur co-existence dans notre législation.

C'est ce que nous allons tenter de démontrer pour le succès de la cause que nous défendons.

Bien que l'article 708 du Code de Procédure Civile ne soit pas donné comme droit nouveau, il est cependant incontestable qu'il n'est pas conforme à notre ancien droit, et nous en avons l'aveu des codificateurs eux-mêmes dans la citation qu'ils font de la cause de *Desjardins & La Banque du Peuple*, qu'ils indiquent au bas de ce même article comme *contraire* au droit par eux établi. Impossible de nier, en effet, que cette Cour a par le jugement dans cette cause de *Desjardins & La Banque du Peuple*, fixé la jurisprudence du pays dans un sens contraire à cet article 708, consacré une doctrine entièrement différente, et interprétant l'ancien droit du pays, décidé qu'il y a lieu à la garantie de la contenance dans une vente par autorité de justice quand cette contenance est indiquée dans l'annonce du Shérif.

Il est également impossible de nier que l'article 638 du Code de Procédure qui règle ce que doit contenir le procès verbal de saisie d'un immeuble, s'il n'est pas formellement contraire aux anciennes ordonnances, change néanmoins radicalement l'ancienne procédure et l'ancienne pratique du pays, surtout quant à la désignation qu'il enjoint à l'huissier saisissant, de donner à l'immeuble saisi. Il y est dit que le procès verbal contiendra: "3o La description des immeu-" bles saisis en indiquant la cité, ville, village, paroisse ou township, ainsi que la " rue, le rang où la concession où ils sont situés *et le numéro de l'immeuble, s'il* " *existe un plan officiel de la localité sinon les tenants et aboutissants.*"

L'article 648 du même code, qui règle les annonces, dit qu'elles devront contenir: "4. La désignation de l'immeuble, ou des rentes, suivant le cas, "*telle* " *qu'insérée au procès-verbal, &c.*"

Ainsi nulle part il n'est fait mention de la contenance; au contraire, l'esprit de la loi est évidemment d'éviter toute mention de la contenance, puisque lorsque le cadastre des propriétés sera fait dans une localité, il suffira d'y indiquer l'immeuble saisi *par le numero* du cadastre, et qu'en attendant la loi n'exige que les tenants et aboutissants. Nulle mention même des bâtisses qui peuvent se trouver sur l'immeuble, un simple numéro et c'est tout.

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Rien de surprenant donc qu'après avoir posé les règles qui précèdent, les codificateurs n'aient pas hésité à promulguer l'article 708 qui déclare que l'adjudication est toujours sans garantie quant à la contenance. Après avoir pris soin d'élaguer, et du procès-verbal de saisie, et des annonces, toute déclaration de contenance, il était naturel que comme conséquence du système qu'il avait en vue, savoir de faire de la vente judiciaire, une vente de chose certaine et déterminée sans égard à la contenance, une vente d'immeuble représenté par un simple numéro, le législateur prescrivit que cette vente ainsi faite, serait toujours sans garantie quant à la contenance. C'était le couronnement nécessaire du système. Et cette disposition, ainsi réduite et expliquée, peut être acceptée comme juste et équitable. En effet l'acquéreur que l'on met à ce point sur ses gardes, à qui l'on refuse toute explication et tout renseignement, à qui l'on vend un simple numéro, ne peut se plaindre s'il fait un mauvais marché, car en lui indiquant simplement l'endroit où se trouve l'immeuble à vendre, on l'invite à l'aller voir, à se renseigner par lui-même et s'il ne le fait pas, tant pis pour lui.

Mais en était-il ainsi sous notre ancienne procédure? Assurément non. L'immeuble saisi était toujours soigneusement désigné et décrit, la contenance était toujours fidèlement indiquée, les bâtisses étaient décrites, enfin l'adjudicataire trouvait dans l'annonce de vente tous les renseignements qu'il pouvait désirer.

Notre système actuel est donc complètement différent de l'ancien, et ce sont ces précautions et ces restrictions introduites par le Code de Procédure qui justifient l'article 708 et peuvent en autoriser l'application.

Cet article 708, pris avec l'ensemble des dispositions que contient le Code de Procédure pour la vente des immeubles par autorité de justice, n'est que la conséquence logique de ces dispositions, et grâce aux prudentes réserves et restrictions des articles 638 et 648 il ne contient rien qui ne soit strictement juste.

Mais serait-il possible d'apprécier ainsi cet article 708, si loin de le faire précéder de ces formalités prudentes et protectrices, les codificateurs nous l'avaient imposé en nous conservant notre ancien droit et notre ancienne procédure? Nous ne le croyons pas.

Si donc, au lieu de se tenir dans les prudentes limites fixées par les articles 638 et 648, le saisissant prend sur lui d'indiquer la contenance de l'immeuble saisi, appliquera-t-on l'article 708? Qui ne voit à quelles désastreuses et immorales conséquences on serait alors entraîné! On annoncerait la vente d'un immeuble contenant 400 arpents de terre, il n'en aurait que 40 et les tribunaux seraient obligés de refuser tout recours à l'acheteur? Non, la loi ne peut être injuste à ce point. Si les formalités qu'elle a, elle-même, exigées ne sont pas strictement observées, si le saisissant allant au-delà des bornes qui lui sont prescrites, prend envers les enchérisseurs un engagement que la loi n'a pas voulu prévoir, il ne pourra ensuite invoquer la protection de cette même loi pour couvrir son imprudence ou sa mauvaise foi, au détriment de celui qui en aura injustement souffert.

Or la vente faite en cette cause, n'a pas été faite conformément aux dispositions du Code de Procédure, mais au contraire, d'après les errements de l'ancienne pratique et de l'ancienne procédure du pays. L'annonce de vente comme le

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procès verbal de saisie, de l'immeuble vendu à l'Appelant, indique formellement non-seulement sa contenance mais encore les bâtisses qui s'y trouvent, et les avantages mêmes de sa situation, par la mention particulière d'une rue projetée à la profondeur du dit immeuble. Voici cette annonce: "Un lot de terre situé, sis "et étant dans le faubourg St. Antoine de Montréal, *contenant soixante-cinq "pieds de front, sur cent soixante cinq pieds de profondeur*, borné en front par la "rue principale du dit faubourg, *en arrière par une rue qui n'a pas encore le "nom et qui n'est pas encore ouverte*, d'un côté par la rue de la Montagne, et "d'autre côté par un nommé Thomas Webb, comme représentant un nommé "Dupuis, *avec une maison, boutique, remise, appentis et autres bâtisses dessus "construites*."

Est-ce là la désignation requise par l'article 638 du Code de Procédure? Est-ce là la désignation que l'on doit donner à un immeuble que l'on veut vendre comme *corps certain*? Assurément non.

M. le Juge en Chef Lafontaine, dans la cause de *Desjardins & La Banque du Peuple*, faisait la citation suivante: "Un tel, aux *observations* sur Du Perrier t. 2, p. 387. "Si la vente commence par l'expression de la quantité et étendue de fonds vendu, avant qu'il soit fait mention des confins et limites, la vente est censée faite *ad mensuram, non ad corpus*; et par conséquent, le vendeur est tenu de suppléer ce qui peut manquer à cette quantité."

L'article 1501 de notre Code Civil dit de son côté: "Si un immeuble est vendu avec indication de sa contenance superficielle, *quelqu'en soient les termes*, soit à tant la mesure, *ou moyennant un seul prix pour le tout*, le vendeur est obligé de délivrer toute la quantité spécifiée au contrat, si cette délivrance n'est pas possible, *l'acheteur peut obtenir une diminution du prix suivant la valeur de la quantité qui n'est pas délivrée*."

Cet article qui reproduit les dispositions des articles 1617 et 1618 du Code Napoléon, est plus favorable à l'acheteur que ces deux derniers qui exigent formellement que la vente soit faite *à tant la mesure* pour qu'une diminution de prix puisse être exigée, tandis que notre droit admet cette réclamation de l'acheteur *même si la vente est faite moyennant un seul prix pour le tout*.

Il n'est donc pas douteux, que dans l'espèce actuelle, la vente a été faite aux termes de l'article 1501 de notre Code Civil. L'annonce de vente, et le procès verbal de saisie indiquent la contenance superficielle de l'immeuble, et quand le vendeur indique la mesure, dit Berlier, cette indication devient la règle de l'acheteur et sa garantie. L'adjudicataire était donc bien fondé à réclamer la diminution de prix qu'il a exigée, et à nier à l'Intimé le droit d'invoquer la protection de l'article 708 du Code de Procédure, puisqu'il avait lui-même renoncé et forfait à ce droit en mettant de côté les réserves et les conditions qu'exige le code lui-même pour l'application de l'article 708.

Quant à la justice de la réclamation de l'Appelant, il serait oiseux de citer ici les citations, tous les auteurs sont unanimes sur ce point. Nous nous bornerons à omettre cependant de citer quelques lignes de l'opinion du savant juge Mondelet dans la cause de *Desjardins* et *La Banque du Peuple* (8 Jurist, p. 111). Dans cette cause se trouve résumée en quelques phrases concises, mesurées et d'une clarté remarquable et qui s'appliquent on ne peut mieux, à la présente cause: "T

Respondent holds this money without title, *it does not represent any right of property of the debtor, and has been paid by error by the Appellant. It is not the question of garantie*, nor has the plaintiff been barred by time from bringing his action before the Court. Considering the case simply as it is, *a demand against the Respondent for receiving money by error paid to him and representative of no value whatever* or of any property of the debtor, and that it is held by the Respondent for the use and benefit of the Appellant, *common honesty and justice require* that the Judgment of the Superior Court should be set aside."

Ayant démontré que la vente faite en cette cause ne l'a pas été conformément aux prescriptions du Code de procédure, et que par suite l'article 708 n'est pas applicable à la réclamation de l'Appelant, il nous reste à établir, en second lieu, que les dispositions du Code civil qui s'appliquent à cette réclamation n'ont rien changé à notre ancien droit et que sous l'empir du Code l'Appelant est encore bien fondé à invoquer la jurisprudence établie, par cette Cour, dans la cause de *Desjardins et La Banque du Peuple*.

L'Appelant invoque d'abord les articles 1140, 1501 et 1586 du Code civil sur lesquels repose sa réclamation.

L'article 1501, déjà invoqué ci-dessus, est dans les termes suivants: "Si un "immeuble est vendu avec indication de sa contenance superficielle, quels qu'en "soient les termes, soit à tant la mesure, ou moyennant un seul prix pour le tout, le "vendeur est obligé de délivrer toute la quantité spécifiée au contrat; si cette déli- "vrance n'est pas possible, l'acheteur peut obtenir une diminution du prix, suivant "la valeur de la quantité qui n'est pas délivrée.

"Si la contenance superficielle excède la quantité spécifiée, l'acheteur doit "payer pour tel excédant; ou il peut, à son choix, le remettre au vendeur."

Cet article reproduit avec quelques légères modifications les articles 1617 et 1618 du Code Napoléon. Et notre article 1140 reproduit en toutes lettres l'article 1235 du code français.

L'article 1586 de notre Code Civil, se lit comme suit: "Dans les ventes judi- "ciaires sur exécution, l'acheteur, au cas d'éviction, peut recouvrer du débiteur "le prix qu'il a payé avec intérêts et les frais du titre; il peut aussi recouvrer ce "prix avec intérêt des créanciers qui l'ont touché, sauf leur exception aux fins "de discuter les biens du débiteur."

Or ces articles avec le 1587e qui les complète, sont tout à fait conformes à notre ancien droit et en renouvellent toutes les dispositions.

L'article 1587 est dans les termes suivants: "Le dernier article qui précède "(1586) est sans préjudice au recours que l'adjudicataire peut avoir contre le "créancier poursuivant à raison des informalités de la saisie ou de ce qu'elle a "été faite d'une chose qui n'appartenait pas ostensiblement au débiteur."

C'est, en résumé, la doctrine de tous les anciens auteurs.

2 Henrys, page 550, question 85e.

Nouveau Denizart, *verbo* Décret, page 46. Sec: 5. No. 3.

2 Bourjon, pages 728, 729. Titre 8 des Exécutions, Sec. 9, Nos. 131, 132.

De Héricourt, Vente des immeubles, page 302, No. 12.

Guyot, *verbo* adjudication, page 167.

Basnage, page 497.

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Et c'est aussi le droit français moderne, reconnu par tous les auteurs et consacré par une foule d'arrêts.

Nous nous contenterons de citer :

Marcadé, Tome 6, pages 255, 256, 257.

Carré et Chauveau, Vol. 5, question 2409.

Enfin et surtout c'est notre jurisprudence, puisque notre ancien droit n'est pas changé.

Desjardins et La Banque du Peuple, 10 Décis: des Tribunaux, p. 325, et 8 Jurist, page 106.

L'on a mis en doute en Cour Inférieure, le droit de l'Appelant de se prévaloir des dispositions de l'article 1586, en disant que le défaut de contenance dont il se plaint n'est pas une éviction et que par suite l'article ne lui est pas applicable. Bien que cette objection soit peu sérieuse, nous la refuterons de suite.

Marcadé, tome 6, page 252 : " On entend par éviction les privations que subit " un acheteur de tout ou de partie de ce que devait lui transmettre la vente.

" ..... Soit qu'après avoir possédé l'immeuble à moi vendu, je me le voie " enlever en tout ou en partie, par une action en revendication, soit que le déten- " teur refuse de me laisser mettre en possession du tout ou d'une partie, il y a " toujours éviction."

Pothier, *Vente*, Nos. 86 et 96.

Troplong, *Vente*, No. 415.

Inutile d'insister d'avantage.

Or l'éviction peut avoir lieu aussi bien pour partie que pour le tout ; et dans ce cas la réclamation de l'acheteur n'a lieu que proportionnellement au prix total. C. C. art. 1518. C'est aussi ce qu'a fait l'Appelant, évincé du tiers de sa propriété, il réclame le tiers du prix d'adjudication.

L'Appelant était donc bien fondé à faire sa réclamation nonobstant l'article 708 du Code de Procédure, puisqu'on ne lui avait pas vendu avec les formalités exigées pour avoir droit à la protection de cet article, et l'article 1588 lui donnant le droit de recouvrer le prix par lui payé, des créanciers qui l'auraient touché, on ne pourra certainement pas prétendre que si l'éviction arrive ayant que ce prix ne soit distribué aux créanciers, il faudra que l'acheteur attende que la distribution de ce prix soit faite avant de le réclamer. Ce serait, dans bien des cas, lui refuser un remède prompt et certain pour le forcer d'en adopter un risqué et plus dispendieux. Refuser à l'adjudicataire son recours direct en répétition sur le prix non encore distribué, pour le forcer de le réclamer après distribution seulement entre les mains de plusieurs créanciers d'une solvabilité peut-être douteuse, serait donner à la loi une interprétation aussi injuste qu'illogique. Or, dans l'espèce, l'Appelant a fait sa réclamation avant que le prix de son adjudication ne fut distribué. L'Intimé, ainsi qu'appert au certificat du Régistrateur (pièce No. 1 du dossier) est le créancier premier inscrit, et celui à qui les deniers seraient distribués ; la contestation est donc régulièrement engagée entre les deux parties, aux termes même de l'article 1586. Car ce que l'Appelant aurait droit de réclamer de l'Intimé après distribution, en vertu de cet article, il a certainement droit de le prendre de suite des mains du shérif.

Arrivons maintenant à l'article 1587. Comme nous l'avons vu plus haut, en

outre du recours que l'article 1586 accorde à l'adjudicataire évincé, contre le débiteur et les créanciers colloqués, l'article 1587 lui en accorde encore un autre contre le créancier saisissant " *à raison des informalités de la saisie, ou de ce qu'elle a été faite d'une chose qui n'appartenait pas ostensiblement au débiteur.*"

Or l'Appelant est en droit de demander, en cette cause, l'application rigoureuse de cet article à l'Intimé. Rappelons ici, en peu de mots, les circonstances de la saisie faite par l'Intimé, ou, comme dit parfaitement Henrys, ces circonstances du fait *ex quo jus oritur*, afin de démontrer avec quel à propos l'Appelant invoque contre l'Intimé cet article 1587.

L'Intimé, créancier hypothécaire des Koester, fait saisir sur ces derniers, l'immeuble affecté à sa créance. Il fournit au Shérif et à l'huissier saisissant une désignation de cet immeuble; l'huissier se rend sur les lieux et sans s'assurer de l'exactitude de cette désignation la copie dans son procès-verbal. Néanmoins, la loi lui imposant rigoureusement l'obligation d'interpeller les défendeurs de lui indiquer et *désigner* leurs biens immobiliers (C. P. C. art. 637), il le fait; et les défendeurs se conformant à la loi lui déclarent que la désignation par lui prise et inscrite dans son procès-verbal *est erronée.* Il consigne soigneusement cette déclaration dans ce même procès-verbal, dans les termes suivants, qui sont on ne peut plus clairs et précis: " And I have demanded of the said George W. " Koester and Alexander J. Koester, if the said lands and tenements, *as above* " *described*, was in their possession, and if it was the same as described in the " said mortgage, *whereupon they answered and said*, that the said description " is the same as described in the original deed and also in the said mortgage, " *but that previous to the granting of the said mortgage a portion of the said* " *lands and tenements were given to their sister now widow of the late John* " *Peacock Ashton.*" Puis il continue ses procédés sans plus s'occuper de ce grave avertissement, que si ce n'était pas son affaire. Averti que la désignation par lui donnée à l'immeuble qu'il a saisi est inexacte, il néglige de la rectifier et il fait tranquillement son rapport au demandeur et au shérif.

Il serait naturel de penser que ces derniers n'ont pas dû accepter avec autant d'indifférence cette déclaration des défendeurs, consignée en toutes lettres dans le procès verbal de l'huissier; et cependant, c'est tout le contraire, ni le demandeur (l'Intimé) ni le Shérif ne songent à rectifier la désignation de l'immeuble saisi, et par une négligence grossière et impardonnable, on procède sur cette désignation erronée, à annoncer et à vendre un immeuble qui renferme, dans les fausses limites que lui assigne le procès verbal de saisie, un emplacement de 43 pieds 6 pouces de front par 62 pieds de profondeur, qui, suivant la déclaration des défendeurs, appartient à leur sœur madame Ashton et dont cette dernière est en possession *ostensible, ouverte et publique.*

L'Appelant, ignorant l'erreur de désignation si grossièrement commise par le demandeur intimé et le Shérif, se rend à la vente et devient adjudicataire de l'immeuble tel que décrit dans l'annonce du Shérif. Il paie son prix d'acquisition $5000,00; puis, quelques jours après, découvre qu'il ne peut avoir livraison que des deux tiers de la propriété qu'il a achetée, l'autre tiers appartenant à madame Ashton et n'ayant pas pu lui être valablement vendu par le Shérif.

Tels sont les faits. Or, n'est-il pas évident que l'Appelant a été trompé et mis

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dans l'erreur par la négligence grossière et la faute lourde du Shérif et de son officier, faute dont l'Intimé est nécessairement responsable? Assurément.

N'est-il pas bien fondé à invoquer [illegible] de cet article 1587, contre l'Intimé responsable en vertu de [illegible]me, des informalités de la saisie; responsable envers l'Appelant de ce qu'après avoir fait saisir illégalement un immeuble, qui ostensiblement, publiquement et ouvertement appartenait à un tiers, il l'a ensuite fait vendre et adjuger à l'appelant. L'intimé pourrait-il à ce point profiter de sa propre faute! Non cela est impossible.

Carré et Chauveau, *Procedure Civile*, Tome 5, [illegible]

La réclamation de l'appelant, tel qu'il a été dit ci-dessus, est de $1502.68. Sur cette somme, l'appelant a abandonné dès l'audition en première instance, celle de $100 (dernier item) pour diminution proportionnelle de toute la valeur du terrain à raison de la moindre contenance. Sa demande actuelle n'est donc que de $1492.68 [illegible] suit:

1o. Pour les 2984 pieds de terrain qui lui manquent à 46½ cents par pied..... $1392.68

2o. Pour moins value résultant de l'absence de rue à la profondeur du terrain..... 100.00

Total.....$1492.68

Mais la preuve, que nous apprécierons sans exagération, est venue réduire encore ce chiffre: elle le laisse, croyons-nous, au moins à la somme de $857.39.

Voici le résumé de la preuve qui nous conduit à ce résultat: "L'emplacement de madame Ashton, compris dans l'immeuble vendu à l'appelant en étant retranché, les témoins ont été appelés à estimer d'abord le terrain de cet emplacement. Nous ne parlons pas des bâtisses sur ce terrain car tous les témoins en ont fait une estimation distincte, ou ne les ont pas estimé du tout. En second lieu les témoins ont estimé la diminution du prix que devait entraîner l'absence de rue, enfin la valeur du terrain qui manque à l'appelant sur la largeur de son immeuble, savoir une lisière mesurant en totalité 147 pieds en superficie.

Voici donc les diverses appréciations:

TEMOINS DE L'APPELLANT.

1o. *Desloges:*

Terrain de Madame Ashton.....	$1000	
Rue $400.....	100	
		$1100

2o. *Smardon.*

Terrain Ashton.....	1400	
Maison.....	100	
	1300	
Rue $200.....	100	
		1400

3o. *Lane.*

Terrain Ashton.....	1000	
Rue.....	100	
		1100

4o. *Valois.*

Terrain Ashton, 30 @ 35 cts. par pied.

Autre partie de l'immeuble. Terrain 40 @ 45 cts.
Surplus de valeur sur le tout pour la rue, 4 @ 5 cts. par pied:
Moyenne 45 cts. et 35 cts.

2790 pieds *a* 35 cts	$976.50	
197 " *a* 45 cts	88.65	
		1065. 15

5o. *Maillou.* $800.

TEMOINS DE L'INTIME.

6o. *Brown.*

2987 pieds *a* 50 cts	$1493.50	

7o. *Spier.*

Terrain Ashton 35 cts.
Autre terrain 50 cts

2790 pieds *a* 35 cts	$976.50	
197 " *a* 50 cts	98.50	
		1075.00

En prenant l'estimation la plus réduite, celle de Spier, témoin de l'Intimé, nous avons le résultat suivant:

1o. Pour le terrain Koester livré à l'appelant		4550.00
2o. Maison do do		1600.00
3o. Terrain Ashton		933.00
Valeur totale		$7083.00

Mais comme il faut prendre pour base le prix payé par l'appelant, savoir: $5000.00, nous arrivons à une valeur relative et proportionnelle comme suit:

Terrain Koester	3211.66
Maison do	1129.45
Terrain Ashton	658.89
	$5000.00

Donc, d'après l'estimation la plus réduite, le terrain Ashton, dont l'appelant est privé, vaut au moins $658.89

En ajoutant à cela l'estimation de la moins value causée par l'absence de rue 100.00

Et enfin le prix des 197 pieds manquant sur le front, à 50 centins 98.50

Nous arrivons au dernier chiffre $857.39

L'appelant a incontestablement droit à cette dernière somme qui représente, au chiffre le plus réduit, le tort qu'il a souffert par la faute grossière de l'intimé.

Et maintenant terminons par une dernière observation.

Nous avons établi victorieusement, croyons-nous, le droit de l'appelant à la répétition de cette somme de $857.39, sur le prix d'adjudication de l'immeuble vendu en cette cause.

Supposons néanmoins, (ce que nous sommes certes loin d'admettre) que nous nous soyons complètement trompés sur les points principaux que nous avons discutés, il restera néanmoins encore un point sur lequel l'appelant doit nécessairement réussir.

L'article 638 du Code de Procédure, ainsi que nous l'avons dit ci-dessus,

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exige que le procès-verbal de saisie contienne la désignation de l'immeuble, en indiquant la ville où il est situé, la rue et les tenants et aboutissants. Or l'immeuble vendu en cette cause, est désigné comme tenant en front à la rue St. Antoine et en profondeur à "*une rue qui n'a pas encore de nom et qui n'est pas encore ouverte.*" Il est prouvé et admis même, que l'immeuble livré à l'appelant tient en profondeur, non pas à une rue, mais à un autre emplacement. Il y a donc ici erreur grave, car le Code de Procédure exige une mention exacte des tenants et aboutissants. De plus il est prouvé qu'à part tout autre sujet de plainte, cette absence de rue à la profondeur de son terrain fait un tort considérable à l'appelant, et vaut beaucoup plus qu'il ne réclame.

L'appelant a estimé la moins value de son immeuble à raison de cette absence de rue à $100 et en a fait un item spécial de sa réclamation. La preuve ayant plus que soutenu son estimation il est certainement en droit de réussir sur ce point.

L'Intimé ayant annoncé un immeuble borné en profondeur par une rue, l'appelant a droit d'avoir cette rue, car il est évident que cette situation avantageuse de l'immeuble a dû être pour lui une considération importante dans l'estimation qu'il en a faite. L'appelant est donc en droit de dire au saisissant, livrez-moi l'immeuble tel que vous me l'avez vendu, ou si vous ne pouvez le faire, souffrez mon recours en diminution de prix. Et l'article 708 ne pourra venir au secours de l'Intimé sur ce point; sa protection ne s'étend pas aux tenants et aboutissants, car si au lieu d'être situé sur trois rues tel qu'annoncé et sur deux seulement tel que livré, l'immeuble en cette cause s'était trouvé complètement enclavé dans une propriété voisine, l'article 708 n'aurait certainement pas pu mettre l'intimé à couvert du droit de l'appelant de se faire indemniser.

Le Jugement de la Cour Inférieure, qui a nié à l'appelant tout droit de se plaindre, ne peut donc être confirmé et devra dans tous les cas être cassé par ce tribunal.

Mais nous le répétons, la réclamation de l'appelant est juste et bien fondée, non-seulement pour cette partie, mais pour le tout, et l'appelant est en droit d'obtenir de cette Cour un jugement pour la somme sus établie $857.39.

Hon. A. A. Dorion, Q. C., followed on the same side.

Bethune, Q. C., for respondent, argued, in effect, as follows:—

Admitting, for argument's sake, that the opposant was entitled to something, the plaintiff contends that the amount claimed ($1592.68) is grossly exaggerated.

On this point it is to be noted that the total superficies of the lot, *as advertised*, (65 feet by 165 feet) is 10,725 feet, and that the measurement is not stated to be either French or English.

The opposant has thought fit to claim it to be French, but it is submitted that under the circumstances he had no right to assume it to be so, in the face of the fact, proved by Plaintiff's witnesses Brown & Spier, that, although the front of the lot on St. Antoine street was only 61 feet *French* (as contended by opposant), it nevertheless measured 65 feet 8 inches English, or 8 inches *more* than advertised.

As matter of fact, too, Brown and Spier establish, *from actual measurement*, that the balance of the lot, *after deduction* of Mrs. Ashton's lot, measured 65 feet

8 inches in front by 140 feet in depth, or 9,193 feet in superficies, so that the total deficit, as advertised, was only 1532 superficial feet, instead of 2987 feet as pretended by opposant.

Now the buildings on the part of the lot occupied by the Koesters, have been proved to be worth at least 1600 dollars. If this amount be deducted (as it of course ought to be, in order to ascertain, in a legitimate way, the value of the mere deficit in superficial feet,) from the total purchase money ($5000), it will leave $3400 as the proportion of the purchase money representing the mere land itself.

By spreading these $3400 over the whole superficies as advertized (10,725 feet) it would give 31 cents and a fraction a foot, at which rate the deficit of 1532 feet would produce about $480 currency, instead of $1392.68 claimed by the opposition.

Then, as to the pretension that the want of an unopened street, without a name, as a rear boundary, gave rise to special damage, it is submitted that the advertisement in no way guarantees that the property is bounded in rear by a street; the street being referred to as being merely projected. Moreover, it is proved in the case that no street ever existed even at the side of Mrs. Ashton's lot (the rear boundary of the lot as advertised,) and, on the contrary, that all the property adjoining, down to Bonaventure street, has been built upon for years.

The claim of $100 for general damages was, of course, clearly unsustainable.

It is manifest that, even on the principle that opposant was legally entitled to something, he could not, under any circumstances, claim more than about $480 currency.

The Court, however, held that the opposant was not entitled in law to claim anything, and the plaintiff respectfully submits the following observations, as conclusive of the correctness of that decision.

At the argument, the opposant's counsel relied mainly on the provisions contained in articles 1586 and 1587 of the Civil Code of Lower Canada, which appear in the section "of forced sales."

Article 1586 enacts that, "in *judicial* sales under execution, the buyer, in "case of *eviction*, may *recover* from the *debtor* the price paid, &c.; he may *also* "*recover* from the *creditors* who have received it, the price, &c."—And Article 1587 enacts,—that "the last preceding article is without prejudice to the "*recourse* which the buyer has against the *prosecuting* creditor, by reason of "informalities in the proceedings, or of the seizure of property *not ostensibly* "belonging to the debtor."

These Articles (*vide* reference to authorities in Reports of Commissioners as regards articles 103 and 104 of the draft of the Code on Sales) were predicated on the judgment in the case of Desjardins *vs.* La Banque du Peuple, reported in the 10th Vol., L. C. Law. Rep., page 325, but the Article 708 of the Code de Procédure,—which enacts that (in sheriff's sales) "the adjudication is always *without any warranty as to the contents* of the immovable,"—had the effect of *repealing* the above provisions of the Civil Code, inasmuch as it was passed long subsequent to the Civil Code, and its provisions are antagonistic to those of the Articles of the Civil Code relied on. A reference, moreover, to the Commissioner's

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report establishes that such was intended, as we find there, that the case of Desjardins and La Banque du Peuple is referred to as being *contra*.

Then it is submitted that, in the present case, the opposant cannot be said to have been *evicted* from any portion of the property adjudged to him.

According to the opposant's own statement, as set forth in his opposition, Mrs. Ashton had been in the *open* and *public* possession of the piece of ground in question ever since the 4th of February, 1860, under a valid title, and, as pleaded and proved by plaintiff, this piece of ground was, during all the said period, separated from the lot possessed by the defendant, by visible and well-defined boundaries, and *specially by a shed which extended across the whole breadth* of the defendants' lot, *which fronted on St. Antoine street*, and along the *entire depth* of Mrs. Ashton's property, *which faced on Mountain street*.

The plaintiff, moreover, pleaded and proved that this adverse possession by Mrs. Ashton was notorious and must have been known to the opposant, and that the opposant, so far from being *evicted* from Mrs. Ashton's lot, *voluntarily and without exacting any consideration* for so doing, *abandoned* all pretension to the ownership of the piece of ground in question, by deed executed on the 20th October, 1868, before James S. Hunter, notary public; in which deed he declared and acknowledged that he did *not acquire*, by reason of the adjudication made to him in this cause, *any right, title or interest whatever*, in or to the said piece of ground, and *renounced, relinquished and released* for ever to Mrs. Ashton *any claim or demand or right* to the said piece of ground, or against Mrs. Ashton, which he *might have, or pretend to have*, by reason of the said adjudication.

That the opposant knew, when he bid at the sale, that he could not by any possibility be bidding for or acquiring Mrs. Ashton's lot, is fairly to be presumed from all the circumstances of the case, the opposant being a shrewd trader and not to be presumed to have bid $5,000 for a property without looking at it,—the actual, visible separation of the one lot from the other, by plain boundaries and especially by the shed, and the fact of the one lot facing one street and the other an entirely different one, and at right angles to the other, all patent to any one examining the property,—the *notoriety* of Mrs. Ashton's adverse possession and ownership,—the *intimacy existing between the defendant and the opposant*, which was such that the opposant *agreed* with Alexander Koester, one of the defendants, *to buy in the property for them*,—the fact of his getting the plan of the premises (which he has filed) made within two or three days after the sale, the fact of his paying his purchase money as late as the 6th of October, 1868, and long after getting this plan made,—the fact that *even in his opposition he does not declare* that the fact with regard to Mrs. Ashton's adverse ownership and possession only became known to him after his purchase, although he has taken pains to allege that the *short measurement* only came to his knowledge after the sale,—his apparent familiarity with the history of the whole property (defendant's and Mrs. Ashton's) as set forth in detail in his opposition,—and the fact that he *voluntarily and without consideration* abandoned all claims or pretensions to Mrs. Ashton's lot, in the manner already indicated.

There was, moreover, no real reason for any one to presume that Mrs. Ashton's lot was included in the property advertised. The rear boundary of an unopened

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street, without a name, and which never had existence, could not tend to mislead any one in that direction. And it could only, therefore, be the number of feet stated to be its depth which could possibly lead one to suppose that Mrs. Ashton's lot was so included. And, on the other hand, the description of buildings (*which the Koesters prove did not include Mrs. Ashton's*) and the visible separation of the two lots and their different positions, as before explained, clearly showed that Mrs. Ashton's lot was not and could not be really included in the lot as described.

It is further respectfully submitted, as matter of law that, even if what took place could be construed into an eviction, the knowledge which the opposant actually had or must be presumed to have had (under all the circumstances of the case), of the *cause* of eviction, operated as a complete bar to any demand on his part to claim a diminution of his purchase-money or a return of a portion thereof.

The opposant's counsel has contended that Article 1501 of the Civil Code of Lower Canada gave him a clear claim to demand a diminution of price or return of part thereof, but it is manifest that this Article (which, moreover, has reference to *private* and *not* to public or forced sales) has no kind of application to the present case.

It was also contended that, under Article 1140, the opposant had a right to recover back on the principle that he had paid in error a debt which did not really exist. But how can it be said here that no debt existed, as regards the proportion of the purchase money representing the deficit of contents? The opposant, a purchaser, *en justice*, bought a property, not at so much a foot, but *en block*, and without *any warranty* as to its contents. Under such a sale, the opposant had clearly to pay his full purchase money, no matter how deficient the contents should prove. The debt then existed and was in no sense paid in error. Moreover, when opposant paid his purchase money, he indubitably knew all the facts connected with his purchase, for he did not pay till the 6th October, having become *adjudicataire* on the 24th September, and having actually caused the plan he has fyled, as the ground-work of his opposition, to be made within two or three days after the sale.

The plaintiff would now lastly urge that the opposant is, in reality, without any true grievance before the Court. It was abundantly proved that the Koester's lot proper was and is worth, *without* the buildings thereon, from $5,000 to $8,000.

The mere deficit of contents, therefore, is clearly a case of *damnum sine injuriâ*.

On the whole the respondent confidently claims a confirmation, in all respects, of the judgments complained of.

Abbott Q.C., followed on the same side.

MONK, J., *dissentiens*.—I must confess to having entertained a certain amount of doubt as to the propriety of my dissenting from the judgment which is about to be pronounced by the majority of the Court, but as my BROTHER DRUMMOND entertained a strong opinion on the subject, I decided to do so.

The deficiency complained of was very considerable, and the fact that the plaintiff was notified of the mistake before the sale and that he took no steps to remedy it is, I think, important.

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It may be said that Melançon was also aware of the mistake before and at the time of the sale, but that would be of no consequence here, in the absence of fraud.

If a purchaser, under the circumstances of this case, cannot recover, a purchaser could not recover, even if the rear boundary had been given as the United States of America.

I am of opinion that the Article of the Code of Civil Procedure, referred to in the judgment of the Superior Court, does not apply, and that the deed of abandonment was made under reserve of all the purchaser's legal rights.

DRUMMOND, J., also dissented, contending that the property was not seized and sold as a *corps certain*, the rear boundary being given as that of a street *not opened*. As well might it have been given as the North Shore of the St. Lawrence. He relied on the notification given on the subject by the defendants, and on the judgment in the case of La Banque du Peuple & Desjardins, and specially the remarks of his BROTHER BADGLEY in that case.

DUVAL, CH. J. :—Entertained no doubt that Melançon knew perfectly well what he was purchasing. If there was an error, and he wished to take advantage of it, he ought to have brought an action to have the deed set aside altogether.

CARON, J. :—Il s'agit d'une opposition par laquelle un adjudicataire réclame une diminution de son prix d'adjudication, pour défaut de contenance.

Cette opposition est contestée, la prétention du contestant étant que, d'après le Code, sous l'empire duquel cette cause doit se décider, il n'y a pas de garantie dans la vente judiciaire, tous les immeubles décrétés étant censés vendus et adjugés comme corps certains, suivant l'article 708 du Code de Procédure. D'après la preuve, et aussi d'après les plans produits, il est constaté que la désignation contenue dans les annonces était fautive, et contenait une quantité considérable de terre de plus qu'il n'a pu en être livré à l'adjudicataire opposant, puisque dans les annonces un emplacement entier avec maison, et autres bâtisses appartenant au propriétaire voisin étaient compris, quoique ne faisant pas partie de l'immeuble décrété.

La cause de l'erreur paraît résulter de ce que la désignation de cet immeuble saisie a été prise dans un ancien titre qui comprenait avec celui-là l'immeuble voisin qui n'en fait plus partie depuis bien longtemps.

L'étendue de cette erreur était telle qu'il était impossible de ne pas s'en apercevoir sur chacun de ces emplacements différents. Il y avait une maison et d'autres bâtisses très distinctes les unes des autres, tandis que dans les annonces une seule maison était mentionnée, celle sur l'immeuble des défendeurs.

Cette erreur était d'autant plus facile à découvrir pour l'adjudicataire, qu'il est en preuve qu'il devait connaître les deux emplacements, d'après les relations qu'il avait eu avec les occupants.

Un autre fait à noter également établi par la preuve, c'est que l'immeuble livré au dit adjudicataire sans l'emplacement du voisin qu'il prétend lui avoir été adjugé, vaut seul et par lui-même beaucoup plus que la somme à laquelle il lui a été adjugé, de sorte qu'il se trouve avoir encore fait un excellent marché, comme il l'a reconnu par un certain acte fait avec le propriétaire voisin, dans lequel il a déclaré que, en vertu de son adjudication, il n'avait aucun droit ou prétention sur cet immeuble du voisin.

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L'opposant ne peut donc, sous les circonstances, avoir été induit en erreur par les annonces, il a eu tout ce que raisonnablement il avait droit de croire avoir acheté, et aussi pour plus que la valeur de la somme qu'il a payée.

Le jugement dont est appel (Beaudry, J.,) a renvoyé l'opposition de l'appelant, déclarant qu'il n'avait droit à aucune diminution de prix, mais pour un autre motif, savoir que les ventes judiciaires depuis le Code ne comportent aucune garantie (art. 675, et 708 du C. P. C.) de mesure, et que les immeubles adjugés le sont comme corps certains nonobstant toute mention de mesure.

Ce motif est énoncé en propres termes dans le jugement (Factum Int. p. 3) et est fondé sur l'article du C. de P. C., 675, lequel, référant aux articles du même Code 687, 688, 707, 708, déclare que les conditions des ventes judiciaires seront celles énoncées en ces articles, lesquelles seront publiées et insérées dans les annonces que fera le Shérif des dites ventes; or dans aucun de ces articles, il n'est ordonné que le Shérif donnera dans ses annonces, l'étendue et la quantité de terrain que contient l'immeuble saisie et annoncée en vente, et les articles 707, 708 disent positivement que l'adjudicataire prend l'immeuble dans l'état où il est lors de l'adjudication (art. 707) et que l'adjudication est toujours sans garantie quant à la contenance de l'immeuble (art. 708). Par ces dispositions prises ensembles, l'on voit que la contenance de l'immeuble n'est pour rien dans les ventes judiciaires; que le devoir du Shérif est d'indiquer l'immeuble saisie, quant à sa situation, ses voisins tenants et aboutissants, de manière à ce qu'on ne puisse pas s'y méprendre. Cette indication une fois faite et publiée, c'est à ceux qui désirent se rendre adjudicataires à voir quelle est l'étendue et si, quant à ce, l'immeuble leur convient.

L'article 708 cité plus haut me paraît convenable et adopté dans le but d'éviter à l'avenir les nombreuses difficultés et les réclamations mal fondées qui avaient lieu ci-devant, fondées sur des défauts de contenance que les adjudicataires connaissaient fort bien lorsqu'ils se faisaient adjuger l'immeuble saisie, mais dont cependant ils se prévalaient ensuite pour vendre, au préjudice des créanciers plus avantageux, un marché qui l'était déjà beaucoup. Au reste cet article 708, juste ou non, est clair et précis; il n'est pas susceptible de deux interprétations, il doit être suivi et par suite la diminution de prix dans notre espèce et autres semblables doit être refusée à l'adjudicataire.

L'on a prétendu que cet article du C. P. C., 708, qui abolit la garantie en fait de vente judiciaire, quant à la contenance, était en contradiction avec l'article 1586 du Code Civil qui dit que dans les ventes judiciaires sur exécution, l'acheteur au cas d'éviction peut recouvrir du débiteur le prix qu'il a payé avec les intérêts, etc., et aussi recouvrir ce prix des créanciers qui l'ont touché, que cette contradiction a l'effet d'empêcher l'application de l'article 708, du C. P. C., que c'est l'article 1586 qui doit gouverner dans l'espèce, et que partant l'opposant a droit à la diminution qu'il réclame.

L'on répond à cette prétention en disant d'abord qu'il n'y a pas de contradiction entre les deux Codes; que l'un, savoir l'art. 1586 du C. C., s'applique au cas d'éviction totale à laquelle l'adjudicataire peut être exposé; dans ce cas il est juste qu'on lui remette son prix puisqu'il n'a rien, il faut que celui ou ceux qui ont son argent le lui restituent, les annonces publiées ne le mettant pas en

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garde contre cette éviction totale. Elles contenaient du moins garantie, que l'immeuble appartenait au défendeur sur lequel il était vendu.

L'article 708 du C. P. au contraire, s'applique au cas où il y a déficit, défaut de contenance seulement.

Dans ce cas, il reste toujours quelque chose à l'adjudicataire, et c'est ordinairement aussi la plus grande partie qui lui reste.

Les annonces lui ont indiqué sinon la contenance, ce qui n'est pas nécessaire d'après le Code, du moins la situation, les voisins, les tenants et aboutissants, ou le numéro de l'immeuble.

Il ne pouvait dans ce cas et avec ces informations se tromper sur la valeur de l'immeuble qu'il achète dans ce cas comme corps certain.

S'il tient à en connaître la contenance précise, il peut se la procurer, et s'il ne le fait pas, c'est sa faute, et il y a [illegible] qu'il n'y tient pas.

Au reste, s'il y avait entre les deux Codes, la contradiction qu'y trouve l'opposant, c'est celui du Code de Procédure qui devrait prévaloir, puisqu'il est subséquent à l'autre et devrait être regardé comme ayant modifié le premier, et c'est le dernier dont il faudrait faire l'application, à notre espèce, ce qui aurait pour résultat encore de faire refuser à l'appelant l'indemnité qu'il réclame.

Pour toutes ces raisons qui se réduisent à deux propositions: 1o. L'opposant savait ou devait savoir lors de l'adjudication qu'il n'aurait pas et qu'il ne pouvait avoir la quantité de terrain portée aux annonces.

2o. Qu'indépendamment de cette connaissance, il n'y a aucune garantie de contenance en fait de ventes judiciaires.

Le jugement de la Cour Supérieure est donc correct et doit être confirmé.

BADGLEY, J.—Melançon became adjudicataire by Sheriff's decret of the following described property which was adjudged to him upon the conditions in such cases prescribed by law, contained in the code of procedure for Sheriff's sales: he signed his adjudication under those conditions, one of which was the 708th art. of that code. "The adjudication is always without warranty as to the contents of the immoveable," and thereupon paid his adjudication price of $5000. The immoveable adjudged was as follows:—

"A lot of land situate, lying and being in the St. Antoine Suburb of Montreal, "*containing sixty-five feet in front by one hundred and sixty-five feet in depth*, "bounded in front by the main street of the Suburb, *in rear by a street not "named and still unopened*, on one side by Mountain Street, and on the other side "to one Thomas Webb as representing one Dupuis, with a house, shop, outhouses, "and other buildings thereon erected." The Sheriff returned his levy, and Melançon, the adjudicataire, forthwith, and before report of distribution, *les choses étant entières*, fyled an opposition, claiming a reduction to be returned to him from the price paid by him, upon the ground that he had purchased the lot according to its superficial contents, and that the contents of the advertisement were diminished by an emplacement which belonged to Mrs. Ashton, which formed part of the adjudged lot, and being one-third of its superficial contents. It is unnecessary to set down further the measurements given of the sold lot and of Mrs. Ashton's emplacement, but it is established that her emplacement was enclosed and separated from and formed no part of the sold immovable, and Melançon, in his opposition, declares of his own knowledge that it was, for years before and at the decret, her

property and in her possession publicly and peaceably, that is, since 1860; and he knew that the sale would not include her property, whilst at the same time he was bound to know and did in effect know, the legal condition under which he purchased, that his adjudication was without warranty as to the contents of his purchase. He notwithstanding made his purchase with full knowledge of what this adjudication would convey to him, and, acquiescing in the condition and its legal effect, completed his purchase, well knowing what he acquired. Had he been dissatisfied with his purchase and with the deficiency in contents which he knew would be conveyed to him, he had the privilege by the Code accorded to purchasers in such cases, under 1502 article, of the Code Civil, and 714 article of the Code de Procedure, of vacating his purchase or avoiding the sale if the immovable differed so much from the description given of it in the minutes of seizure that it is to be presumed the purchaser would not have bought, had he been aware of the difference. "Now, Melançon, the adjudicataire, has neither vacated his adjudication nor abandoned his purchase, whilst he knew the material deficiency from his purchase, not only at the time of the decret but for years previously, during all which time he declares that Mrs. Ashton was the public and peaceable proprietor and possessor of the emplacement, which constitutes the deficiency for which he would not use his legal privilege of vacating his purchase, but for which he demands to be paid back one-third of his purchase money voluntarily paid by him without objection. It is plain, therefore, that not using his privilege, he has not shewn that he bought according to superficial contents, but according to the lot, the immovable, well known to him, with the buildings thereon. The lot he purchased had on it a house, shop, out-houses, and other buildings, whilst he describes the Ashton emplacement as having a dwelling-house and dependencies thereon. The difference between the two is plain, and the two lots, as he well knew, were distinctly and publicly separated from each other. Now, if the purchase had not been a sheriff's adjudication which excluded warranty of contents, and had been a contractual sale, with exclusion of warranty of contents, the 1510 art. of the Code Civil would still be against him, because that article is exceptional in its terms, and its protection against eviction does not avail, if the buyer knew at the time of the sale, the danger of eviction or had bought at his own risk. Both of these exceptions apply to the appellant at the time of his adjudication and purchase, and the 1512 art. of the Code Civil is the same where warranty was actually stipulated, but the causes of eviction were known to the buyer. The language of all the articles has reference to a certain determinate immovable thing purchased, for which a fixed defined price has been paid, without regard to quantity or measurement, whether mentioned or not, the privilege of vacation or abandonment attaching to the immovable as a whole, and to the price as a whole. Here the purchase was of a determinate lot of land and not of its superficial contents which could not apply to the buildings erected upon it and which went with it.

But the appellant, at page 3 of his factum, says—Cette reclamation est fondée sur les articles 1140, 1501, et 1586 du Code Civil, the price being in the Sheriff's hands. As matter of fact, it is not in the Sheriff's hands, the proceeds, less expenses, percentage &c., are returned into court for distribution. The 1140 is a mere legal truism, that every payment presupposes a debt, and does not affect this contention. The 1501 is in the code chapter on Contractual sales, as regards the

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matter of delivery, where the entire must be delivered, or if not possible from the extent of the deficiency, then the 1502 article, as a corollary to the 1501, gives the advantage of abandoning the sale altogether; but again, the next article 1503, controls both the preceding articles 1502 and 1501, and provides that the rules contained in the two last preceding articles do not apply, when it appears from the description of the immovable and the terms of contract, that the sale is of a certain determinate thing, without regard to the quantity by measurement, whether such quantity is mentioned or not. The thing sold here is a lot of land with house, shop, thereon &c., and the terms of the sale were a gross price for the whole. These three articles are new law, and vary from the former jurisprudence, they affirm the old law principle *caveat emptor*, accompanying it with the equitable principle of abandonment. Moreover, these articles are not applicable to Sheriff's sales, which for immovables are always without warranty of contents. The 1501 relied upon is of no avail, and is moreover controlled by the 1510, which makes the remedy rest upon the ignorance of the purchaser of the causes of eviction. As to the 1586 article which provides that in judicial sales the buyer in cases of eviction, may recover from the *debtor* the price paid &c., and also from the creditor the price received by him, these are plainly the execution debtor and creditor, after distribution of the price by judgment, but in neither, would this opposition hold because no distribution has been made; whilst the article technically affects the creditor collocated and paid under the judgment of distribution upon the Sheriff's return. It would be mere repetition and waste of time to shew, that the effect of the contractual warranty upon sales under the 1508 article is controlled by the 1510, and that the 1586 is in like manner controlled by the 1591 article. Moreover, it has been shown that contractual sales with warranty are not Sheriff's sales without warranty, under the 708 article of the Code de Procedure, and finally, that the buyer's knowledge of the danger of eviction, in other words, his buying at his own risk, overrides and rejects such a claim as contained in his opposition in this case, it being abundantly evident that he had a perfect knowledge at the time of his purchase, of the eviction to which he knew he must be exposed in making his purchase. If appellant has a rightful demand against the seizing creditor on account of irregularities in his seizure, he must adopt some other recourse, and cannot succeed in this indirect proceeding, which, moreover, has not been pleaded and has been broached in argument only. The system settled by the code has expressly set aside the old jurisprudence of the *quanto minoris*, applied to Sheriff's sales for deficiency of contents, and established the rule of *caveat emptor* instead of *caveat venditor* for such sales, in substance enforcing the rulings of Pothier and of Voet cited by him, that the seizing creditor is not the warrantor of the contents of the immovable or thing sold. For all these reasons the appellant's opposition is not sustainable and the judgment appealed from must be confirmed, with costs of both Courts in favour of the respondent.

Judgment of Court of Review confirmed.

Jetté & Archambault, for appellants.
Hon. A. A. Dorion, Q.C., counsel.
Strachan Bethune, Q.C., for respondents.
J. J. C. Abbott, Q.C., counsel.

(S.B.)

COUR SUPERIEURE, 1870.

MONTREAL, 30 NOVEMBRE 1870.

Coram BERTHELOT, J.

No. 1718.

Allard vs. *Benoit.*

PROCEDURE, EXCEPTION PEREMPTOIRE EN DROIT TEMPORAIRE.

JUGE:—Que c'est par exception péremptoire en droit temporaire, et non par exception dilatoire, que le défendeur doit invoquer le moyen résultant du non-paiement, avant l'institution de l'action, de la peine compromissoire.

Par acte d'accord, les parties avaient soumis à des arbitres certaines difficultés qu'elles avaient ensemble, et stipulé une peine de $100 contre la partie qui n'acquiescerait pas à la sentence arbitrale. Les arbitres rendent leur jugement, et nonobstant, sans préalablement payer la peine, le demandeur poursuit le défendeur pour une des difficultés soumises aux arbitres. Le défendeur produit une Exception Péremptoire en droit temporaire.

Le demandeur répond que ce n'est pas là le sujet d'une Exception Péremptoire en droit temporaire; mais d'une Exception dilatoire, et comme le défendeur ne l'a pas produite dans les quatre jours et ne l'a pas accompagnée du dépot exigé par les Règles de pratique, il conclut à ce que la dite Exception Péremptoire en droit temporaire soit déboutée avec dépens.

Les parties inscrivent en droit.

De Bellefeuille pour le défendeur: Le moyen employé par le défendeur ne forme pas le sujet d'une Exception dilatoire; il ne peut être employé que comme Exception Péremptoire en droit temporaire.

En effet, l'Exception dilatoire conclut à ce qu'il soit déclaré que le défendeur *n'est pas tenu maintenant de répondre;* elle tend seulement à procurer au défendeur *un délai avant de répondre,* sans examiner si l'action est bien ou mal fondée.

L'Exception Péremptoire en droit temporaire, au contraire, dit que l'action du demandeur *n'est pas encore échue;* en d'autres termes, qu'il n'y a pas encore ouverture à l'action du demandeur. Elle pourra être bien fondée plus tard; mais au moment où elle est intentée, le défendeur dit qu'il n'y a pas de lien entre le demandeur et lui.

Cette distinction a été faite par les auteurs.

Voir les paroles du Juge Sewell dans la cause de Forbes vs. Atkinson, p. 48 et suivantes de la brochure intitulée: "Cases argued and determined in the Court of King's Bench, &c. 1810." Pyke's Reports. Carré et Chauveau, *Procédure,* t. II, p. 152, Part. I. liv. III, tit. 9, note 2.

Duranton cité dans Carré et Chauveau, *loco citato.*

D'après ces principes, il est évident que le moyen employé par le défendeur, comme résultant du non-paiement de la peine stipulée au compromis, avant que le demandeur put être reçu à appeler de la sentence arbitrale, ne peut faire le sujet que d'une Exception Péremptoire en droit temporaire et ne peut celui d'une Exception dilatoire.

Blanchard et al. and Miller.

En effet, le défendeur ne demande pas un délai avant de répondre à l'action ; mais il prétend qu'il n'y a pas encore ouverture à l'action du demandeur, que celle-ci n'est pas encore échue et qu'elle ne le sera pas tant que le demandeur n'aura pas payé la peine stipulée au compromis.

Ainsi jugé dans la cause de Tremblay vs. Tremblay, 3 L. C. Reports, p. 482. Dans cette cause, quoique le rapport ne l'indique pas, c'est par Exception Péremptoire en droit temporaire que le défendeur a fait valoir le moyen résultant du non-paiement de la peine.

Mousseau pour le demandeur : Le moyen invoqué par la dite Exception Péremptoire n'est que suspensif. En le supposant fondé, le demandeur peut toujours continuer son action en déposant au greffe la somme de $100 pour le défendeur. Celui-ci aurait dû procéder par Exception dilatoire et conclure en démontrant que le demandeur fut déclaré non recevable à continuer son action et lui son tenu d'y répondre, tant qu'il n'aurait pas payé ou déposé la dite somme de $100.

PER CURIAM : L'Exception Péremptoire en droit temporaire produite par le défendeur est la vraie manière dont celui-ci devait invoquer le moyen qui en fait la base. C'est ainsi qu'on l'a toujours compris, et le jugement prononcé par les juges Bowen, Meredith et Caron, dans la cause de Tremblay vs. Tremblay, s'applique parfaitement au cas actuel. L'Exception Péremptoire en droit temporaire devra donc rester dans le dossier pour valoir ce que de droit.

Reponse en droit renvoyée avec dépens.

Mousseau & David, avocats du demandeur.

DeBellefeuille & Turgeon, avocats du défendeur.

(E. LEF. DE B.]

COURT OF QUEEN'S BENCH, 1871.

MONTREAL, 9TH MARCH, 1871.

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

Blanchard & al., Appellants, and Miller, Respondent.

HELD—That an appeal does not lie from a judgment or order of a judge given in vacation, appointing a *sequestre*.

DUVAL, C. J.—This an application to be allowed to appeal from an order given by a judge in vacation, appointing a *séquestre*. As I mentioned when the case was argued, the Statute, and also the Code, give a right of appeal from a judgment of the Superior Court, but not from an order of a judge in vacation. There is an exception in the case of *capias*, but the reason for this is obvious ; the *capias* restricts the liberty of the defendant. The rule must, therefore, be dismissed with costs.

Motion for appeal rejected.

Ritchie, Morris & Rose, for appellants.

Dorion, Dorion & Geoffrion, for respondent.

(S.B.)

SUPERIOR COURT.

In Review.

MONTREAL, 31st OCTOBER, 1871.

Coram MONDELET, J., MACKAY, J., TORRANCE, J.

No. 358.

May vs. *Richie.*

*HELD—That in a suit upon a foreign judgment, if the exemplification shows no cause of action, or that the defendant was duly summoned and regularly condemned, the action must be dismissed.

This action, in the Superior Court sitting in the District of Ottawa, was brought upon the exemplification of a judgment rendered by the County Court of the County of Carleton in the Province of Ontario, and the judgment was founded upon a promissory note, and rendered on the 23rd June, 1868, for $181,74. The defendant pleaded to this action, that he was not sued by the plaintiff as alleged, and was never served with any writ of summons issued out of the said County Court, and that he never was indebted to the plaintiff in any sum of money whatever.

From the judgment rendered in this cause against the defendant, an inscription for review was made before three judges in Montreal.

The plaintiff before the Court of Review contended that his proof consisted of what in the Province of Ontario is called an exemplification of the judgment, which in reality is an extract from the records of the said County Court.

The plaintiff submitted that the production of the said exemplification duly certified by the proper officer under the seal of the Court is sufficient evidence of the indebtedness of the defendant (1).

The defendant contended, in reference to the law upon foreign judgments, that, previous to our Statute, C. S. L. C., Chap. 90, secs. 1, 2, 3 and 4, the subject of foreign judgments was regulated by the law of France before the code Napoleon, to wit, by the ordonnance of 1629. Toullier, Vol. 10, p. 117, 125 and 124, Civil Code, art. 1220.

By the Statute it was enacted: in regard to Upper Canada judgments, that where service of process on the defendant was personal, or a defence had been made, no defence that might have been made to the original suit could be pleaded to that brought on the judgment, and by section 4 of that Statute it was enacted that, in cases where service of the process was not personal, and in which no defence was made, any defence that might have been set up to the original action may be made to the suit on such judgment.

The Code has omitted all the portions of Chap. 90, of C. S. L. C., and has placed all judgments rendered out of Lower Canada in the same category of proof. Art. 1220, No. 1, enacts that exemplification of such judgment shall be *primâ facie* proof, but the truth thereof may be denied, No. 6, and proof thereof required in the manner provided by the Code of Civil Procedure, which [illegible] Code

(1) Code C. P., art. 145, C. C., art. 1220. Con: Stat. L. C. sec. 5, Ch. 90.

Matthews vs. The Northern Assurance Company.

provides only that a plea denying the contents of such document must be accompanied by the giving of security for the costs of the commission required to obtain the proof of such document, see art. 145, C. C. P.

From the above it would appear that all judgments rendered out of Lower Canada are in the same category, no exception being made in favor of those of Ontario, that they are not *chose jugée*. The defendant contended that, inasmuch as the Code has omitted the only laws passed in Canada on this subject, it is left to the ordinance of 1629, and the arrêts thereon, to decide the question. The plaintiff was bound to prove the affirmation of the issues raised, even under the Statute, and, if repealed, he was bound *a fortiori* to prove the same.

PER CURIAM.—The exemplification of the Carleton judgment is irregular on the face of it. It says that defendant was a British subject out of the jurisdiction, and was to be summoned in a particular way, but does not say that he was so summoned, or even summoned at all. There is nothing to show, that the note was made in Ontario, and defendant denies that he ever made the note at all. Effect can only be given to foreign judgments when they are good on the face of them. See the Duchess of Kingston's case, in Smith's Leading Cases, where this is fully discussed.

The Court, considering that there is no evidence that the defendant was ever served with any writ of summons issued out of the County Court of the County of Carleton in the Province of Ontario;

Considering further, that there is no juridical evidence that the defendant is indebted to plaintiff, as he has pretended, and that there is error, reverses the judgment.

Action dismissed 1)

Abbott, attorney for [illegible]

Perkins, Monk & Foran, attorneys for defendant.

(P.R.L.)

SUPERIOR COURT, 1870.

MONTREAL, 31ST DECEMBER, 1870.

Coram TORRANCE, J.

No. 337.

Matthews vs. *The Northern Assurance Company.*

HELD—That when the plaintiff in his case in chief has adduced evidence to repel the case of the defendant as disclosed in his plea, he cannot adduce evidence of the same kind in rebuttal.

This was a motion by defendant, to revise a ruling at *Enquête* which rejected an objection by defendant, to the examination by plaintiff, of a witness in rebuttal, with regard to matters that he had already gone into in his evidence in chief; the plaintiff in his case in chief having gone into evidence generally to repel the case of the defendant as disclosed in his plea.

PER CURIAM: — "Considering that the plaintiff, before he closed his case,

(1) 6 L. C. Rep., p. 237. 5 L. C. Rep. p. 431. 8 L. C. Jurist, p. 196. 13 L. C. J. p. 224.

adduced evidence to repel the case of the defendant, especially by the deposition of Robert Alsop, a witness for the plaintiff, for the purpose of proving the safety of gasoline machines; doth grant the said motion, so far as to maintain the objections made by defendant to the evidence of the witness, John Baker Edwards, with costs."

Motion to revise ruling granted.

Perkins & Ramsay, for plaintiff.
N. W. Trenholme, for defendant.
(S.B.)

SUPERIOR COURT,

IN REVIEW.

MONTREAL, 30th NOVEMBER 1871.

Coram MACKAY, J., TORRANCE, J., BEAUDRY, J.

No. 2202.

Leroux vs. Archambault.

HELD:—That a private person, neither a constable nor a peace officer, is not entitled to serve warrants and is liable to damages for a false arrest, although having a warrant in his possession.

The plaintiff sued the defendant for $4000 damages for a false arrest, alleging that on the 11th August, 1870, the plaintiff being engaged in his professional duties as a doctor, was illegally arrested by the defendant who had no authority to do so.

The defendant is styled a yeoman and trader in the plaintiff's declaration. The plaintiff alleged that the defendant had no legal capacity to arrest him even with a warrant.

The plaintiff cited, Statuts Ref. du C., ch. 31, appendice, formules A & C, secs. 2, 8, and 10, ch. 29, sec. 2. 32 and 33 Vic. Canada, 1869, p. 263.

The defendant fyled a plea of justification and the general issue. He alleged in his first plea, the following facts:—

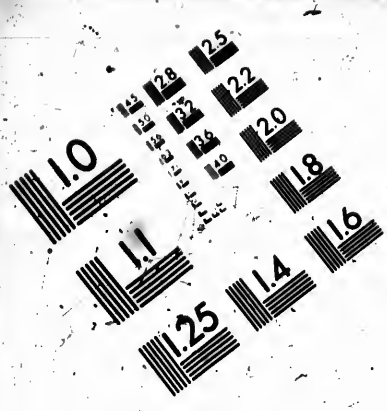
1o. Que l'huissier porteur du mandat d'arrestation aurait été intimidé;

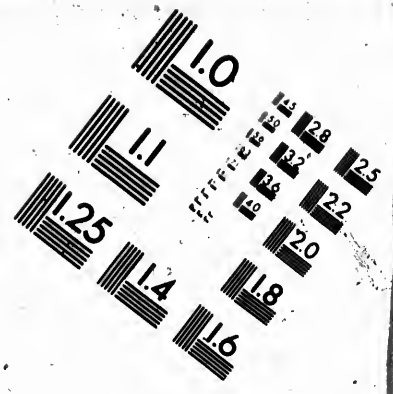
Que le juge de Paix, pour assurer les fins de la justice, aurait requis le défendeur verbalement d'assister le dit huissier et de faire l'arrestation du demandeur en obéissance au dit mandat, comme recors.

Proof having been made by the parties respectively and they having been heard upon the merits, the Superior Court at Montreal, (Berthelot, J.) rendered judgment on the 31st May, 1871 for £7. 10. 0 damages.

The judgment is *motivé* as follows: La Cour considérant que le défendeur est mal fondé en son plaidoyer et qu'il n'avait pas de caractère officiel pour procéder à l'arrestation de la personne du demandeur, ainsi qu'il l'a fait le 11 Août 1870, a renvoyé la dite défense et condamne le dit défendeur à payer au demandeur, la somme de £7. 10s. de dommage avec intérêt à compter de ce jour, et les dépens de cette action comme dans une cause de première classe de la Cour de Circuit.

This judgment was carried before the Court of Review at Montreal, and was confirmed.





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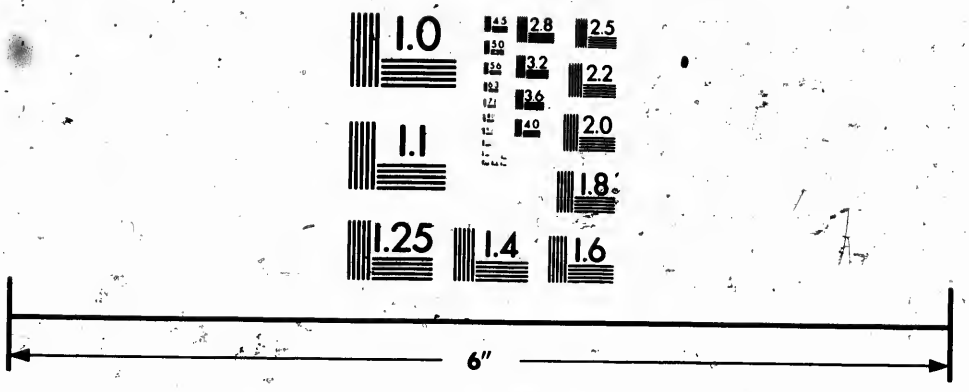

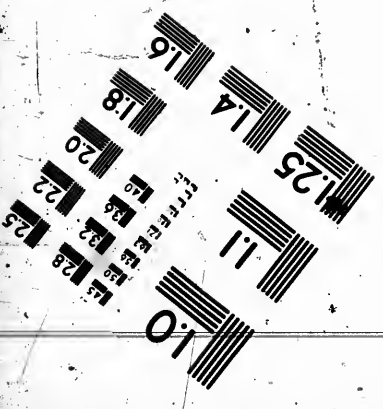

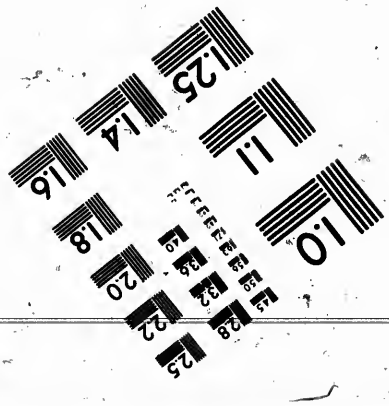

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The Mayor et al. of Montreal, vs. Scott et al.

PER CURIAM.—The defendant Archambault was condemned by the Superior Court, Montreal, to pay plaintiff £7, 10s. as damage for having illegally arrested him, Archambault not having at the time any official character. The appeal is from this judgment; but the Court of Review confirms it with costs—holding that a private person, neither a constable nor a peace officer, is not entitled to serve warrants of arrest, and is liable in damages although having a warrant.

Judgment confirmed.

Dorion, Dorion & Geoffrion, attorneys for plaintiff.
Cartier, Pominville & Béthune, attorneys for defendant.
(P. R. L.)

SUPERIOR COURT.

MONTREAL, 30th NOVEMBER 1871.

Coram BERTHELOT, J.

No. 260.

The Mayor, Aldermen & Citizens of the City of Montreal vs. *Scott & al.*

HELD:—That the proprietor of assessed property situated in the City of Montreal, will be condemned to pay ten per cent increase for non-payment of arrears of taxes, in terms of act 14 and 15 Vic. ch. 128.

The defendants being in arrear of taxes and assessments for several years past, upon certain real estate, situated in the city of Montreal, were sued before the Superior Court for the district of Montreal, for the recovery of said arrears and for ten per cent increase for non payment according to the act, 14 and 15, Vict. ch. 128.

The defendants contested the action. After proof made by the parties respectively, and the hearing upon the merits of the case, the following judgment was rendered:

"La Cour ..... considérant que les demandeurs n'ont établi leur demande "sur leur présente action que pour le montant ci-après adjugé, condamne les "défenderesses conjointement et solidairement à payer aux demandeurs la somme "de $528.65, étant la balance sur plus fort montant pour taxes et cotisations "imposées suivant la loi et les règlements de la dite Corporation sur "immeubles situés, Rues, etc., etc., de cette ville, pour les années écoulées "de 1852 à 1870, dix par cent pour arrérages de taxes et intérêts et "pour autres taxes, tel et ainsi qu'il appert au long et en détail à l'état ou "compte produit par les dits demandeurs; avec intérêt sur icelle de $452.38 à "compter du 2 Février 1871 jusqu'au paiement, et les dépens. Et la Cour "déboute les demandeurs du surplus de leur demande et action."

Roy & Devlin, attorneys for plaintiffs.
Leblanc, Cassidy & Lacoste, attorneys for defendants.
(P. R. L.)

PRIVY COUNCIL, 1872.

OSBORNE, 5TH FEBRUARY, 1872.

Coram THE QUEEN'S MOST EXCELLENT MAJESTY, LORD PRESIDENT, MR. SECRETARY BRUCE, EARL OF KIMBERLEY, SIR JAMES WEIR HOGG, BART., LORD CHAMBERLAIN, MR. ODO RUSSELL.

Wardle, Appellant, and Bethune, Respondent.

HELD:—That a builder is responsible for the sinking of a building erected by him, on foundations built by another, but assumed by him in his tender and contract, without protest or objection, although such sinking be attributable to the insufficiency of the foundations and of the soil on which they are built, and is liable to make good at his own expense the damage thereby occasioned to his own work.

This was an appeal from a judgment rendered by the Court of Queen's Bench for Lower Canada, on the 9th day of December, 1868, and reported in the 12th vol. of the L. C. Jurist, at p. 321 *et seq.*

The Lords of the Judicial Committee pronounced their judgment on the 30th January, 1872, as follows:—

Coram:

SIR JAMES W. COLVILLE.
SIR JOSEPH NAPIER.
SIR JOHN STUART.
SIR MONTAGUE SMITH.

This was an appeal from the judgment of the Court of Queen's Bench of Lower Canada, at Montreal, in an action that arose out of a contract for building the new Cathedral church of that city.

A Finance and Building Committee, of which the respondent was a member, having been duly appointed, the late Mr. Wills, of New York, an architect, was instructed by them in February, 1857, to prepare plans and drawings for the erection of the Cathedral and the execution of the works thereof, inclusive of the foundations and works thereto relating. These plans having been prepared and approved, Messrs. Brown and Watson, builders, of Montreal, were employed to dig trial pits in the site selected for the proposed Cathedral, for the purpose of testing the character and fitness of the soil. The charges for this work were certified by Mr. Wills, and paid by the Committee.

Mr. Wills having died, Mr. Thomas S. Scott, of Montreal, on the 29th April, 1857, was appointed by the Committee as their architect, on the understanding that the plans and designs of Mr. Wills were to be strictly followed and adhered to, and that all other necessary plans were to be made and properly prepared by Mr. Scott himself.

Wardle and Bethune.

Messrs. Brown and Watson having made a tender, which was accepted, for the execution of the work of the foundation, a formal agreement was entered into and duly executed on the 7th of July, 1856, by Brown and Watson, and also by the respondent. It was agreed that the work was to be done according to the plans or drawings thereof made by Mr. Wills, and in strict conformity with the specifications thereunto annexed and made part of the contract.

The document containing these was headed, "Specifications of excavators' and masons' work required to be done, and materials furnished, for the foundation walls of Christ Church Cathedral, Montreal, according to plans prepared by the late Frank Wills, architect." It was signed by Thomas S. Scott, architect, and bears date in May, 1857.

The work so undertaken was completed by Brown and Watson, in accordance with their contract, and was delivered up to the Committee, who accepted and paid for it. The Committee next proceeded to advertise for tenders, "for the erection of the Cathedral," and announced that plans and specifications could be seen at Mr. Scott's office. It was set forth in one of these—"The whole work executed on area floor to be taken as it stands, and allowed for."

The tender sent in by the appellant was as follows:

"I will undertake to provide all labour and materials required, and build Christ Church Cathedral according to the drawings and specification supplied by your architect (Mr. Scott) for 30,600*l*. The above amount includes work already done in foundations, which I value at 1,750*l*. Also for filling up and making good ground round building to the level given, and levelling ground in basement story as described, estimated at 250*l*. The waste in converting Caen stone, I calculate at 1-7th or 14⅓ per cent.

(Signed,) "W. WARDLE."

This tender was dated 29th July, 1857, and was accepted on the 5th August, subject to certain modifications; and, on the 15th August, 1857, the final contract for the building of the Cathedral was duly executed by the appellant and the respondent. The former undertook to execute in a proper, substantial, and workmanlike manner, and of the best and most approved materials of their several kinds, "the whole and every part of the works required to be done, and requisite and necessary to be done, in erecting, building, and completing the Christ Church Cathedral, to be erected on a lot of ground situate and being at the corner of St. Catherine Street, Union Avenue, and University Street, in the said city of Montreal, according to the plans or drawings thereof, numbered respectively from number 1 to 35 inclusive, made by Thomas S. Scott, Esq., architect, and in strict conformity with the specifications thereunto annexed, and forming part and parcel of the present contract, and also in conformity with such descriptions and details as may be furnished to the said contractor during the progress of the works by the architect."

The next clause in the contract provided that the works thereby undertaken should be commenced, prosecuted, and completed under the superintendence of the said Thomas S. Scott, and to his entire approval. It was also provided that, from the commencement of the said works until their final completion, delivery and acceptance, the care of the same, and whatever

appertained or belonged thereto, should be with the said contractor; and the said party of the second part should not be accountable for any part of the said works, or any materials or anything connected therewith, which might happen to be lost, stolen, burnt, damaged, or destroyed in any manner howsoever. And in case of the like occurring during the progress of, or before the final completion, delivery and acceptance of the said works, the said contractor should, and he did thereby engage to repair and replace such part of the said works as might happen to be lost, stolen, burnt, damaged, or destroyed, at his own expense and costs, and to the entire exoneration of the said party of the second part (the respondent.) It was further agreed that the contractor should, at his own cost and charges, provide all materials required, save and except the Caen stone that was to be furnished by the respondents, as set forth in the specifications.

After some other provisions, to which it is not necessary to refer more particularly, there is the following clause:—"The present contract and agreement is thus made and entered into for and in consideration of the price or sum of 30,100*l.*, &c., which sum the said party of the second part doth hereby promise, bind and oblige himself, &c., to well and truly pay to the said Walter Wardle."

This included the amount of the appellant's estimate of the value of the work of the foundation that had been executed by Brown and Watson.

The appellant proceeded to execute the works in strict conformity with the plans and specifications, and in a workmanlike manner; but the tower of the Cathedral, shortly after it was erected, and before the works under the contract were completed, began to sink, and it gradually subsided and sank down to the depth of several inches, causing serious injury to other parts of the building, and also causing extra expense and delay in the completion of the contract. The cause of this sinking, and of the damage consequent thereon, was ascertained to have arisen from the nature of the soil and the insufficiency of the foundation as it had been planned by Mr. Wills, and constructed by Brown and Watson.

In this state of things disputes arose between the appellant and the Building Committee; and on the 4th March, 1861, the former brought this action against the respondent to recover the balance that he alleged to be then due to him. The particulars of this demand are stated in the Appendix, p. 53. The balance claimed was 5,000*l.*, which included [redacted] disputed items, viz., 1,468*l.* 11*s.* 4*d.* for extra work, and 2,586*l.* 0*s.* [redacted] damages alleged to have been sustained by the appellant by reason of the inferior quality of the Caen stone that was furnished to him by the defendant under the contract. The defendant disputed the liability for damages in respect of the Caen stone, and for so much of the sums charged for extra work as was attributable to the work that was caused by the sinking of the tower. He made a statement of the account between him and the appellant, whereby the apparent balance due to the latter was 1,795 dollars and 36 cents. As to this, he insisted, in his pleading, "that the foundations of the said building, and specially of the said tower, were made to bear a weight of not less than eight tons to each superficial foot; whereas the area of such foundations ought, according to all well-

Wardle and Bethune

acknowledged rules in the art of building, to have been so extended as not to allow of more than two tons to be sustained on each superficial foot of area; and that, owing to the want of care, attention, and skill on the part of the plaintiff" (the appellant), "and the defective, unskilful, and unworkmanlike manner in which he constructed the said building, tower, and spire, and the consequent injury and damage done to the said building generally, it would cost an amount far exceeding the said sum of 1,795 dollars 36 cents, simply to repair such damage, and place the said building, tower, and spire, in the state and condition in which they ought to be under the said contract and specifications." He further alleged "that the said tower and spire, owing to the want of care, attention, and skill on the part of the said plaintiff, and the defective, unskilful, and unworkmanlike manner in which they had been so constructed by him, were still sinking and threatened to fall, so much so that it would be necessary to take the same down to the foundations and entirely reconstruct the same, including the said foundations—a work which would cost, including the repairs of the building connected therewith, an amount exceeding 30,000 dollars." He concluded with an averment that, by reason of the premises, the plaintiff was not entitled to recover any sum of money from the defendant; and he prayed judgment accordingly.

To this the plaintiff replied, that all the work done by him was well and substantially done; that the subsiding of the tower did not arise from any cause over which he had any control; that, as to the alleged defect in the foundations, he was wholly ignorant thereof, and that he had nothing to do with the calculations on which the foundations were constructed, or with the work of constructing said foundations, and never warranted said work nor was bound to, and was not liable therefor, and, in fact, never saw the foundations.

The evidence disproved the allegations of negligence or want of skill on the part of the appellant in the execution of the work done by him; but it showed that the cause of the sinking of the tower from the nature of the soil and the insufficiency of the foundation, could have been discovered and provided against, by diligence and skill, before the appellant entered into the contract or began to build.

From this statement it is obvious that the material question in the case was whether the appellant, as the builder of the church, was responsible for the damage that was caused by the sinking and subsiding of the tower? The liability of the respondents, in respect of the inferior quality of the Caen stone, could only have become material if the principal defence had failed. The case came before Mr. Justice Monk on the 24th of February, 1862. For the reasons stated in his judgment (Appendix, p. 5), he maintained the defendant's plea, and overruled and dismissed the plaintiff's demand for damages occasioned by the bad quality of the Caen stone, and for delays by the sinking of the tower; and held that the plaintiff was responsible for the damage caused by the sinking, and that the only sum which the plaintiff had established as coming to him was a balance of 1,795 dollars 36 cents, against which the defendant was entitled to set up in compensation the amount to which he was entitled for the damage of which he complained. The amount was ordered to be ascertained by a reference to experts.

Wardle and Bethune.

On appeal to the Court of Queen's Bench, this judgment of Mr. Justice Monk was affirmed in the month of June, A.D. 1864, with this variation, that, for the reasons stated in their judgment, the Court (*dissentiente* Meredith J.) allowed to the appellant the sum of 400 dollars, to be by him charged as and for extra work, thereby making the balance due upon the contract as and for extra work, the sum of 2,195 dollars 36 cents, leaving the same subject to compensation.

After various ineffectual proceedings to get a report of experts under the order of the Court, such a report was at last obtained and homologated, and a final decision of the Superior Court was pronounced on the 17th April, 1867, by which it was adjudged and declared that, inasmuch as it appeared from the report of experts, &c., that the balance of 2,195 dollars 36 cents was more than compensated, paid, and extinguished by reason of the damages set forth in the plea of the defendant, and which were occasioned to the defendant by the sinking of the tower of the Cathedral, the plaintiff was not entitled to recover any sum of money for the causes, matters, and things in his declaration set forth; and, therefore, that the action be dismissed with costs, except that each party was to pay the costs of his own expert.

On appeal to the Court of Queen's Bench, this judgment was affirmed on the 9th December, 1868, Mr. Justice Caron dissenting.

The liability of the appellant for the damages caused by the sinking of the tower was not taken to have been created by the contract into which he had entered; but it was held that, by the law of Lower Canada, this liability was imposed upon him in his capacity of the builder of the edifice that he undertook to erect, and that the contract into which he had entered had neither excluded nor qualified the application of the rule of the law. The case, on appeal, therefore appears to their Lordships to depend on the right apprehension and application of this law, by which a liability is imposed on architects and builders irrespective of contract, that is not so imposed on them by the law of England.

The law is thus stated in Article 1,688 of the Civil Code of Lower Canada:—"If a building perish in whole or part within ten years, from a defect in construction, or even from the unfavourable nature of the ground, the architect superintending the work and the builder are jointly and severally liable for the loss." In Article 1689 it is provided that, "if in the case stated in the last preceding Article, the architect do not superintend the work, he is liable for the loss only which is occasioned by defect or error in the plan furnished by him." The Code, it is true, did not come into operation until the first of August, 1866, after the commencement of the action; but the Articles referred to are declaratory, and, in part, expressly founded on the case of Brown *vs.* Laurie, which was decided in 1851 by the Superior Court at Montreal, affirmed on appeal by the Court of Queen's Bench in 1854, and has since been considered to be the leading case on this branch of Canadian law. Mr. Lloyd contended that this authority, although binding on the Courts of Lower Canada, was open to review, and ought to be reviewed by this Board. But their Lordships are of opinion that a case decided so long ago by Judges eminently conversant with the law of the country, and that has since been incorporated into the Civil Code, is not open to be reviewed on this appeal.

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It was an action on a contract for building seven houses in the city of Montreal, and a balance was claimed to be due on foot of the contract.

The defendant set up as a defence, that the plaintiff not regarding his legal liability as master mason, did not excavate skilfully the foundations, more particularly those of the three centre houses, but laid them on a soft substance, so that the walls, when partly built, gave way. He then set up his claim for the consequential damage against the claim of the plaintiff. The special reply of the plaintiff was, that the contract bound him to the specifications, plans and drawings, and placed him under the direction of an architect in charge; that the depth of the excavation had been particularly marked out on the said plans and drawings, and had been executed exactly as thereby required; that when the excavation had been so made, a stratum of sand and clay had been found, which had been carefully examined by the defendant and the architect in charge, and by them declared sufficient; that thereupon the foundations had been laid; that it was true the three centre houses had sunk a little more than was usual, which was caused by a mossy earth under the sand and clay, of which there was no indication; but that there had been no want of skill on the part of the plaintiff, who had acted in accordance with the contract and the special orders of the defendant. The Court held that it was sufficiently shown that proper precautions had not been taken to ascertain the nature of the ground by probing or otherwise, but that taking it for granted that the soil was all of the same character, there had been an omission to ascertain the fact in the way it ought to have been ascertained.

The reason of the law as it was explained by Mr. Justice Day in giving judgment, is two-fold: first, that the employer, who is supposed to be unskilled, has a right to expect that the builder who contracts to build houses for him will provide that the foundation shall be such that the houses erected on it shall stand; 2ndly, "there is a motive of public policy which would subject the builder to this risk, and render it necessary that he should take extreme care in the construction of buildings." The ancient law of of France is that which has prevailed in Lower Canada. Mr. Justice Day says, as to this law, that "on looking through the books anterior to the Code Napoléon the Court does not find any express warranty for what was called in that Code '*vices du sol*,' but the expression invariably made use of is, that the builder was bound to warrant the solidity of the building, which he could not do unless he warranted the solidity of the foundation, and therefore the one warranty must be held to include the other."

The Court decided that although the proprietor employs an architect to supervise and direct the work, and the builder follows his directions, this does not exonerate the builder from responsibility, but the law holds him jointly and severally bound with the architect; and "that the importance of guarding life and property makes this rule of law such as not to go beyond the strict bounds of reason." As the builder had not taken proper and available precautions, and the buildings proved unsound because of the insufficient foundation, he was held to be liable for the consequences.

The learned Judge (Rolland) who presided in the Court of Queen's Bench

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when the case came before it on appeal, adverts to the importance of establishing "a rule certain" for architects and builders, in the execution of works entrusted to them. He states that the "ancien droit Français" made all the responsibility for defaults to fall on the builder, and especially those that proceeded from the nature of the soil, because the builder was bound to know his art, and to make himself sure that the ground was sufficiently solid to sustain the buildings to be erected. The only restriction attached to this warranty was as to its duration, which was limited to ten years. The rules established by the new legislation in France, for deciding questions that might arise on this point, were not (he says) in force in Lower Canada. The old French authorities were abundantly cited in the argument, and considered by the Court.

Their Lordships are of opinion that the case of Brown *vs.* Laurie is a conclusive authority against the proposition that the work having been done according to the terms of the contract and under the superintendence of an architect selected by the employer, the builder is exempted from the liabilities which would otherwise attach to him. It is therefore unnecessary to examine the French authorities on which the learned counsel for the appellant relied in order to establish this proposition, whether they are cases decided on the old law of France, or on Article 1792 of the Code Napoléon, which (it may be observed) is not identical in its terms with Article 1688 of the Civil Code of Canada.

It has, however, been argued on behalf of the appellant that, admitting the authority of Brown *vs.* Laurie to its fullest extent, the case under appeal is not to be governed by it, inasmuch as the faulty construction in this case was in the foundation laid by Brown and Watson, and that the appellant cannot be held liable for the defects in their work. This is, in fact, the ground on which Mr. Justice Caron dissented from the judgment of the other Judges of the Court of Queen's Bench.

Their Lordships have not been altogether free from doubt on this point; but, after a full consideration of the learned and able arguments and of the authorities which have been adduced, they have come to the conclusion that the judgment under appeal is correct, and ought to be affirmed.

The broad general rule of law established by the case of Brown *vs.* Laurie—"the rule certain for architects and builders in the execution of the work entrusted to them," is that there is annexed to the contract, by force of law, a warranty of the solidity of the building that it shall stand for ten years at least. It was not expressly decided whether this was to be taken as an absolute warranty, or with an implied exception of cases in which the building gives way, within the time, wholly or in part, from causes that could not have been discovered or removed by due vigilance and competent skill. But this at least was expressly decided that the approval and direction of a supervising architect, or his omission to ascertain the nature of the soil of the foundation, by known and available tests, does not exonerate the builder from the consequences of following such direction, or of building on the foundation without making himself sure of its sufficiency.

When there has been a breach of warranty of the stability of the building, the onus is on the builder, to show that he is exempted from liability, by some

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exception in his favour. It is of primary importance that he should make sure of the sufficiency of the foundation on which he proceeds to build, for, without a sufficient foundation, the warranty could not be kept. It is an inseparable incident, an essential part of the warranty; the warranty of stability of the edifice, includes by necessary implication, the warranty of sufficiency of foundation; and such is the law as explained in Brown *vs.* Laurie. The architect and builder are therefore bound to provide whatever is essential to the stability warranted.

The exemption from responsibility on the part of the builder, for the breach of warranty, must be made out (if at all) by legal implication. There is not in the Code any express exception in favour of the builder; and there is none in his contract.

The exemption for which the Appellant contends is, in fact, that whether the foundation was altogether insufficient; whether it was constructed without the use of known and available tests for ascertaining the nature of the soil; whatever may have been the amount of negligence or want of skill in its construction, and however practicable for him, before he adopted it at his own estimate of its value as the basis of his building, to have ascertained that it was, in fact, insufficient (as it then stood) for such a purpose, yet he was in nowise concerned with the matter, and under no responsibility for the consequences of having upon this foundation erected the building which he had contracted to erect and complete, subject to the warranty of stability annexed by law. To sustain his contention it must be held that the warranty of sufficiency of foundation is not included in that of the stability of the building except in the case where the builder of the building is also the constructor of the foundation. But the sufficiency of the foundation is an inseparable incident to the stability warranted, and could not be the subject of an implied exception. The special responsibility for a breach of the warranty has been incurred by the builder, not as the constructor of an insufficient foundation, but because the stability of the edifice erected has in fact failed, and the failure has not been shown to have been excused by law. If it were otherwise, the law might be evaded by the contractor building only upon a foundation completed by another who was under no obligation to do more than to realize what the architect had designed, or even what the employer alone may have directed.

The French authorities relied on by the Appellants, exclusive of such as are inconsistent with what has been decided in Brown *vs.* Laurie, or such as are under the Code Napoléon, may be reduced to those which Mr. Justice Caron has selected in support of his judgment.

It is important, moreover, to keep in mind that the authorities which exonerate the builder from responsibility for a breach of the warranty, when he acts under the guidance of an architect, are set aside in Brown *vs.* Laurie on account of the importance of protecting property and life, which makes it strictly reasonable to maintain the responsibility of architect and builder alike. Accordingly, if the builder thinks fit to trust to the vigilance or skill of the architect, without the independent exercise of his own judgment, he acts at his own risk. He cannot escape from liability when he has omitted to use such known and proper precaution as he ought to have used if he had had the sole and undivided responsibility.

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If, then, for the purpose of public safety, the builder cannot act upon the design and under the direction of the architect, except upon his own responsibility for the consequences, how can it be consistently maintained that he can, without incurring any such responsibility, adopt and act upon the design of the foundation after it has been realized by the intervention of a third party who has been employed to do, and has done, nothing more than merely realize this design, in conformity with the direction of the architect or of the employer? If the public protection requires that the builder should not act upon the design in the first instance, except upon his own responsibility, it would seem to be not less requisite that he should not be exonerated from a like responsibility if, after it has been realized, he has estimated its value for the purpose of his contract, and adopted it as the basis upon which he erects the building which he has contracted to build, and the stability of which he is bound by law to warrant.

It is further to be observed, with reference to the French authorities, that not only are those to be excluded from consideration which proceed upon the opinion that the builder is not responsible when he follows the design or direction of a supervising architect, but also the distinction is to be noted which was well pointed out by Mr. Bompas in his able argument, between cases founded upon negligence in fact and those that depend simply upon a breach of the warranty of stability. There is a further distinction between the case of a head contractor who is the master builder, and that of particular sub-contractors, or distinct and separate workmen.

In the work of Fremy-Ligneville, to which Mr. Justice Caron refers, the head contractor is admitted to be equally responsible with the architect for "vices du sol." "La sûreté publique" requires, he says, that they should be so responsible.

Whatever may be said as to "vices de construction" in buildings where separate constructors have been employed, and the responsibility of each of the constructors has been confined to his own separate part of the work, no authority has been referred to which shows that the contractor, who is the builder of the edifice, has been exempted from full responsibility, when it was practicable for him to have ascertained beforehand, by the use of known and available tests, a defect that affects the stability of the building which he has contracted to erect.

The case on which most reliance has been placed on behalf of the appellant is Lambert's case, reported in Denisart's collection of new decisions (Vol. iii page 313, ed. 1784. In that case an architect prepared a plan of a house, which Lambert (a baker at Marseilles) approved. A mason contracted to build according to this plan. The building had been raised to the first story, under the supervision of the architect, who perceived the incapacity of the mason, and caused the contract to be rescinded, and a new agreement was made with another mason to finish the work. This mason, under the guidance of the architect, finished the work. The house soon after fell down. The public prosecutor instituted proceedings before the Judges of Police, who condemned the first mason to pay a fine of 1,000 livres, and suspended him for three years. They acquitted the architect.

The experts who first inspected the premises during these proceedings, reported that the walls of the foundation were not *à plomb*; that too soft stones had been

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used, and that the mortar was thin. A second set of experts added that the fall of the house was due exclusively to the fault of the first mason.

The second mason then sued the employer in the Civil Court of Marseilles for compensation for his work and labour, and also for damages for the loss of his tools, &c., which had been lost in the ruins. The employer cited the architect and the first mason in *garantie*.

The Court condemned the employer to pay the second mason the amount due for his work, and also damages for the loss of his tools, and it also condemned the architect and the first mason to guarantee the owner from this condemnation, as well as from the damages suffered by him from the fall of the house.

The architect appealed against this sentence, which was confirmed by the Parliament of Aix (24th of May, 1740), except as to the damages suffered from the fall of the house.

There is not a report of the arguments used, or of the reasons on which the judgment proceeded. The second mason, who was not employed to rebuild, but merely to finish the erection of the house, may not have been taken to be a builder of the edifice, subject to full responsibility within the meaning of the law of warranty. It was not shown that the default of the first mason was such as the second mason ought to have detected before he began to do his own work. The second report of the experts is rather to the contrary. The appeal was on behalf of the architect only; as all who were interested had been made parties to the proceedings, their equities, *inter se*, were adjusted according to the merits. The principal defaulter—the original contractor for building the house—was held responsible as well to the public as to the parties who suffered by his default.

No rule or principle of law can be safely collected from this Report, that could or ought to have been considered as authoritative in settling the law of Lower Canada otherwise than as it has been settled in the present case, in which the liability of the architect, or of Brown and Watson, has not been put in issue.

It is not necessary for their Lordships to consider what ought to have been the ruling of the Courts in Lower Canada, if the sinking of the tower, and the consequent damage, had been shown to have been caused by a latent defect in the work done before the date of the contract of the appellant, and which he could not by the exercise of care and skill have discovered. It plainly appears that, when he contracted to build the Cathedral, and accepted the foundation at his own estimate of its value as the basis of his work, he had the means of knowing the nature of the soil; he had the dimensions of the foundation; he had the plans of the architect before him, and he must be taken to have known the nature and special character of the structure he was about to erect. Applying his scientific knowledge to the subject, he ought to have known that this foundation was insufficient. Their Lordships, therefore, are of opinion that under the law of Canada he is liable, just as he must have been if he had in terms contracted to build from the ground on the bare site.

The parties concerned have proceeded on what proved to be a common error, but this cannot alter the rule of law. To use the language of Lord Mansfield as to a rule somewhat analogous, "At first the rule appears to be hard, but it is

settled on principles of policy, and when once established, every man contracts with reference to it, and there is no hardship at all." (3 Dougl. R. 390.) The contract here has been drawn up so as not to contain any express provision with a view to exclude or modify the full responsibility imposed by the law on the appellant. It superadds special clauses, protective of the employer, by which he is exonerated from contingent liabilities. The appellant must be assumed to have known the law when he entered into the contract. Whatever the hardship of the case may be, it is not within the province of their Lordships to relieve. Their duty is to decide what the law is by which the case must be governed. The principal point being thus decided against the appellant, they do not think it necessary to say more on the subordinate questions, and especially on that relating to the Caen stone, than that they agree with the Canadian Courts in their conclusion on these points, and in the reasons by which it is supported. Their Lordships will, therefore, humbly advise Her Majesty that the judgment appealed from ought to be affirmed, and the appeal be dismissed with costs.

Her Majesty, by and with the advice of Her Privy Council, was pleased to approve of the report of the judicial committee, and to order that the said judgment of the Court of Queen's Bench for L. C., be affirmed, and the present appeal dismissed with £524.18 sterling costs.

Geo. W. Barnard, atty. for appellant.

Horace Lloyd, Q.C., and J. Morgan Howard, counsel.

Bischoff, Bompas & Bischoff, attys. for respondent.

Sir Roundell Palmer, Q.C., and Henry Mason Bompas, counsel.

(s.s.)

SUPERIOR COURT, 1872.

SHERBROOKE, 6TH FEBRUARY, 1872.

Coram RAMSAY, A. J.

No. 761.

Henry P. Adams vs. The Hartford Mining and Smelting Company, and Sir Hugh Allan et al., Intervenants.

HELD:—That a creditor has a right to intervene in a suit brought by a third party against his debtor, for the purpose of contesting the claim of such third party, when the action is brought by collusion between the plaintiff and defendant, and with the view of enabling the plaintiff to obtain a judgment for a sum not really due by the defendant, and thus to prejudice the rights of the creditor.

In this case the plaintiff brought an action against the defendants to recover the sum of $43,528.84, which he alleged to be due to him for advances in cash made by him, and personal services performed for them in the conduct of their business of a mining and smelting company. The defendants made default. The intervenants fyled an intervention, by which they alleged that the defendants were indebted to them in the sum of $9,939.58, for the recovery of which an-

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action had been brought and was then pending. That the defendants were also indebted to the Baltimore Copper Company in the sum of $17,500, for the recovery of which another action was pending. That the defendants had ceased to carry on their mining and smelting operations, and were insolvent. That the plaintiff, Henry P. Adams, was the agent and manager of the defendants during all the time that they carried on their operations, and received all moneys paid to them for ores and other copper produce, and had an opportunity of paying and did pay himself for all services rendered and moneys advanced by him. That there was no sum whatever due by defendants to plaintiff, and that the action was brought by him fraudulently and in collusion with the defendants, and with the understanding that they should make no defence, and with the object of defrauding the intervenants and the other creditors of defendants, and of preventing them from obtaining payment *pro tanto* of their respective claims out of the property remaining to the defendants, which was insufficient to pay in full the just and legal claims existing against them, and of appropriating said property to the payment of the pretended claims of the plaintiff. The intervenants prayed that they be admitted to intervene and contest the plaintiff's action and demand, and the same be declared fraudulent and be dismissed.

The plaintiff demurred to the intervention, assigning as grounds of demurrer the following:

Because said intervenants do not shew that they have any interest in the suit pending between plaintiff and defendants, nor that they will in any way be prejudiced or injured by the judgment which might be rendered by this Court in favour of plaintiff against defendants, and they are attempting to interfere and delay the proceedings in this cause without any right to do so.

Because third parties though creditors have by law no right to intervene in a cause pending against their debtor nor to prevent judgment being rendered, as they have no interest in so doing, and they can only interfere when that judgment is attempted to be enforced to the prejudice of their rights, and then only contest the validity of the claim.

Because the intervenants do not allege or show in what way they would be injured or prejudiced by the judgment being rendered in this cause in favour of plaintiff against defendants, nor do they set up any facts by which it can be presumed by the Court that they would be so injured, nor do they set up in their intervention any facts which shew that they have any right to contest plaintiff's claim in this cause, or ask for the dismissal of his action, and their intervention in this cause even upon their own shewing is entirely without cause and gratuitous, and they have not any liquidated claim against defendants, but the same is still in dispute.

RAMSAY, A. J. The intervening parties come into the record, alleging that the defendant is their debtor, and the action is collusively carried on between the plaintiff and the defendants, who are insolvent, and that they, the intervening parties, have a right to step in and prevent the plaintiff from getting a judgment by which their rights will be jeopardised. This has been met by a demurrer on the part of the plaintiff, who says that the intervening parties have no interest in preventing him from getting a judgment against defendants, and

that all the rights of the intervening parties may be urged if it is attempted to execute the judgment.

I know of no case of intervention precisely like the present in any of our Courts. The case of Bryson *vs.* Dickson, 3 L. C. R., p. 65, does not appear to me to furnish a precedent. On reference to the books, we find very little to guide us to the cases in which a party is permitted to intervene. The governing principle is that interest is the sole rule in interventions, as it is the measure of actions. See the case of Seymour *vs.* St. Julien, and St. Julien, 2 L. C. R., p. 321, in which it was held that where an intervention had been fyled according to the procedure established by 12 Vic., cap. 38, sect. 92, it would be rejected on motion, if on its face it appears that the intervening party has no interest. The vendor of a house may intervene in the action to disturb the purchaser, 1 Pigeau, 334, and the *cédant* in an action by the *cessionnaire* against the debtor whose debt is assigned, 2 Carré, p. 78, qn. 1270, and the interest of costs will be sufficient, and so it was held in the case of Mitchell *vs.* Browne & al., and Baillie, 15 L. C. R., p. 425, that where the last endorser of a promissory note had paid the holder after the institution of an action for the recovery of the amount against the maker and payee, the last endorser might intervene and carry on the case to judgment against the maker and payee. In a note in Carré to the question cited above, the author refers to the case of the *partage* of successions provided for in Article 882 of the Code Civil, and he adds, "Nous croyons qu'en tout autre cas un créancier aurait le même droit sous la même condition, car il y a un intérêt qui peut se réaliser." Now if we compare the parallel article of our Code, it furnishes a stronger ground for the opinion of Carré than Art. 882 of the French Code, for our Code lays down a rule referable to a general principle. "The creditors of the succession and those of the co-partitioners have a right to be present at the partition if they require it." C. C. 745. But, unlike the disposition of the French Code, the failure to be present does not preclude the creditor with us from setting aside the partition made in fraud of his rights, and yet Carré holds that the French Code is really only setting up an example which may be extended to every other case of a creditor who apprehends fraud. We have also the case, which at one time was not uncommon in our Courts, of the creditor intervening to protect his rights in actions *en séparation de biens*. In the Nouv. Pigeau 1, p. 413, where the right to intervene is analysed, the author says: "Le cinquième cas où l'on peut intervenir est quand un tiers a intérêt à la conservation des droits de l'un des plaideurs, et qu'il a sujet de craindre de celui-ci négligence, ou collusion avec l'adversaire." I think, therefore, that the demurrer must be dismissed, and that the right of the parties to intervene must be maintained.

Demurrer dismissed.

Sanborn & Brooks, for plaintiff.
G. H. Borlase, for the intervenants.
(G H.B.)

COUR SUPERIEURE.

EN REVISION.

MONTREAL, 30 NOVEMBRE 1871.

Coram MONDELET, J., MACKAY, J., TORRANCE, J.

No.1138.

Esciot dit St. Antoine vs. *Lavigne.*

JUGÉ:—1o. Que l'acheteur peut exercer l'action en rescision de bail à raison de la sous-location faite par le locataire, contrairement aux dispositions du bail. (1)

2o. Que cette demande en rescision sera accordée, sans la mise en cause du sous-locataire. (2)

Le demandeur, par sa demande rapportée devant la Cour Supérieure à Montréal, le 19 de Juin 1871, alléguait qu'il avait acquis le 27 Janvier 1871, la propriété que le défunt mari de la défenderesse avait louée de sa venderesse, Mme. Whyte; et qu'elle, la défenderesse, avait sous-louée, vers le mois de Février 1871, malgré la défense de sous-louer ou céder son bail.

Le demandeur concluait à la résiliation du bail contre la défenderesse.

La défenderesse opposa à cette action, une défense au fond en droit par laquelle elle prétendit que le demandeur, par le contrat de vente, tel qu'allégué par lui en sa déclaration, n'avait pas acquis les droits de sa venderesse aux stipulations contenues au bail, quant à la défense de sous-louer ou céder le bail, et parcequ'il ne donnait pas l'option à la défenderesse, entre le rétablissement des choses dans l'état où elles étaient avant telle location et la résolution du bail.

Par son exception péremptoire, la défenderesse prétendait que la destination des lieux était toujours la même, savoir: l'exploitation d'une auberge, que le demandeur n'était pas cessionnaire des droits de sa venderesse au sujet de cette clause du bail, qu'il avait lui-même acquiescé à cette sous-location (†), qu'il n'en souffrait aucun dommage, et elle concluait à ce que dans le cas de rescision de son bail, il fut déclaré qu'elle était bien fondée à résilier le sous-bail fait par elle.

Les parties procédèrent à leur enquête.

La défenderesse ayant posé aux témoins des questions tendantes à prouver le consentement ou l'acquiescement entre la venderesse et la défenderesse et le sous-locataire et le demandeur, le demandeur s'y objecta sur le principe que ces questions tendaient à établir des conventions contraires aux actes, la venderesse ayant obligé l'acquéreur d'entretenir le bail; mais les objections furent rejetées à l'enquête; Beaudry, J. (‡)

Le demandeur fit la motion suivante: "Motion du demandeur que les objections par lui faites à l'enquête en cette cause soient maintenues et que la preuve

(1) Pothier, louage, nos. 289, 293, *in fine* et 299, 3 L. C. Jurist, p. 42.
(2) 2 L. C. Reports, p. 30.
2 Revue de Leg. p. 52.
10 L. C. J., p. 112.
3 Duvergier, Louage, No. 362.
Pothier, Louage, No. 283.
2 Bourjon, p. 42, Nos. 22, 23, 24.
(†) 11 L. C. R. p. 179.
(‡) 15 L. C. Jurist p. 265, Saunders et Déom.

faite par la défenderesse nonobstant telles objections soit déclarée illégale et inadmissible et que la Cour procède à rendre jugement en cette cause comme si telle preuve n'était pas au dossier."

Le jugement de la Cour Supérieure à Montréal, Berthelot, J., rendu le 11 Septembre 1871, est comme suit: La Cour après avoir entendu les parties par leurs avocats, tant en droit qu'au mérite et sur la motion faite par le demandeur que les objections faites par le demandeur à l'enquête en cette cause, soient maintenues et que la preuve faite par la défenderesse nonobstant ses objections, soit déclarée illégale et inadmissible, a accordé la dite motion, maintenu les dites objections et déclaré la preuve faite par la défenderesse à cet égard, illégale et inadmissible et a renvoyé la dite défense en droit .....

Considérant qu'à raison de tout ce que dessus, la dite défenderesse qui est aux droits du dit feu Jean-Baptiste Contremine dit Jolicœur, depuis le décès de ce dernier arrivé en 1868, comme sa légataire universelle, en contravention du dit bail et des clauses d'icelui, a sous-loué, et ce sans en avoir obtenu un consentement verbal ou par écrit de la dite Charlotte Wolfe ou du dit demandeur comme étant à ses droits, et son cessionnaire par l'acte de vente du 27 janvier 1871, et que par là elle a donné ouverture à la résiliation du dit bail.

La Cour pour ces raisons renvoie l'exception plaidée par la dite défenderesse et adjugeant sur l'action, casse, annule et rescinde à toutes fins que de droit, le dit bail..... ordonne que le dit demandeur soit mis en possession de la maison, et condamne la dite défenderesse à en livrer la possession au dit demandeur sous huit jours à compter du présent jugement, le tout tel et ainsi qu'il pourra appartenir par et sous l'autorité de cette Cour et avec dépens contre la défenderesse.

Cette décision ayant été portée en revision fut confirmée.

PER CURIAM.—Action to cancel lease on account of subletting by tenant in violation of a clause in the lease. Plaintiff and defendant are not the original parties to the lease, but their heirs and assigns. They however, stand in the same relative positions towards each other. Defendant has attempted to prove acquiescence by plaintiff in the subletting, but the evidence adduced was illegal and was rightly rejected. The judgment rescinding the lease is confirmed unanimously.

Jetté, Archambault & Christin, avocats du demandeur.
Doutre, Doutre & Doutre, avocats de la défenderesse.
(P. R. L.)

COURT OF QUEEN'S BENCH, 1871.

MONTREAL, 9TH MARCH 1871.

Coram DUVAL, CH. J., CARON, J., BADGLEY, J., LORANGER, J., *ad hoc.*

No. 22.

Lemoine, Appellant, and Lionais, Respondent.

HELD—That this Court cannot interfere with the printing of the Record for the Privy Council, and cannot therefore order that only certain portions of the record be printed.

DUVAL, C. J.—An application is made on the part of the appellant, that a portion of the record which is said to be immaterial may be omitted from the trans-

Johnson and Connolly.

cript. It is impossible for the Court to comply with this request, however reasonable it may seem, unless both parties consent. But when the application was made the respondent objected. The Court must, therefore, reject the application. The Privy Council, after hearing the case on the merits, might say that certain papers had been omitted, and that they would like to hear what were the other objections which had been taken to the action.

Motion respecting printing of record rejected.

J. R. Fleming, for appellant.

Leblanc & Cassidy, for respondent.

(S.B.)

COURT OF QUEEN'S BENCH, 1871.

MONTREAL, 9TH MARCH, 1871.

Coram DUVAL, CH. J., CARON, J., DRUMMOND, J., BADGLEY, J.

No. 79.

Johnson, Appellant, and Connolly, Respondent.

HELD—That after the allowance of an appeal to Her Majesty in Her Privy Council an order to put in new security, (one of them being insolvent and the other having left the Province) will be granted by this Court, but this Court cannot dismiss the appeal, in case such new security be not duly put in.

DUVAL, C. J.—This is a motion to compel the appellant to give new security, one of the sureties being insolvent, and the other having left the Province. The Court is of opinion that new security should be given, but it cannot dismiss the appeal now pending before the Privy Council. The order of the Court will therefore be, that security be given within six weeks. If security is not so given, then the respondent may go before the Privy Council with the present judgment, and ask that the appeal be dismissed. The reason for the decision is that the giving of security is an act to be done in the colony, and it will save much expense and loss of time for the Court here to order it at once, without the intervention of the Privy Council. But if the order of this Court is not complied with, and security is not put in within the delay fixed, then the opposite party may go before the Privy Council, and ask that the appeal be dismissed. It has already been expressly decided, in the case of Dufaux and Herse, that the Court of Appeals will not dismiss an appeal pending before the higher Court.

Motion that new security be put in granted.

Cross & Lunn, for appellant.

Perkins & Stephens, for respondent.

(S.B.)

COUR DE CIRCUIT, 1872.

DISTRICT DE ST. HYACINTHE.

ST. HYACINTHE, 26 FEVRIER, 1872.

Coram SICOTTE, J.

No. 8097.

Le Révd. Messire F. X. Isaïe Soly, vs. Charles Brunelle.

JUGÉ:—1o. Que le catholique romain qui renonce à sa religion n'est pas tenu, pour être exempt de la dîme à l'avenir, d'en informer son curé par acte notarié ni même par écrit sous seing privé, mais qu'un avis verbal suffit.

2o. Qu'il n'est même pas tenu de l'en informer verbalement, s'il pratique ouvertement une autre religion.

Le demandeur est le curé de la paroisse de La Présentation. Il réclame du défendeur la dîme que celui-ci lui doit comme catholique sur les grains décimables qu'il a récoltés en 1870. Il estime la valeur de cette dîme à $20.80, et il conclut à jugement pour cette somme, à moins que le défendeur ne vienne déclarer sous serment quelle quantité de grains décimables il a récoltée en 1870, et qu'il soit condamné en ce cas au paiement de la dîme sur la quantité de grains qu'il déclarera avoir recueillie.

Le défendeur plaida que depuis au-delà de deux ans il avait cessé de professer la religion catholique romaine; qu'il appartenait depuis lors de cœur et en pratique à l'église presbytérienne, dont il professait les doctrines et suivait le culte; que dans le cours de février 1870, c'est-à-dire avant les semailles et la récolte des grains dont le demandeur réclamait la dîme, il avait, en présence d'un témoin, dans le Presbytère du demandeur, signifié verbalement à celui-ci sa renonciation à l'église catholique et son entrée dans l'église presbytérienne; que là et alors il aurait remis au demandeur un papier signé de lui contenant la dite renonciation, après lui en avoir donné lecture;—et que partant il ne devait rien au demandeur.

Le demandeur, assigné comme témoin, dit qu'il ne se rappelait ni que le défendeur lui eût donné l'avis verbal ni fait lecture de l'avis écrit dont il est parlé plus haut, mais il admit avoir reçu du défendeur la remise d'un papier contenant ce qui suit et qu'il produisit en Cour:—

La Présentation, 12 février, 1870.

A F. X. I. SOLY, PRÊTRE ET CURÉ.

Monsieur,

CHARLES BRUNELLE.

Prenez avis par le présent que j'ai cessé d'appartenir à l'église catholique romaine, et que dès ce jour, vous ne devrez plus me compter au nombre de vos paroissiens.

Votre serviteur.

Un témoin établit que le défendeur suivait, à sa connaissance, les exercices du culte presbytérien, à St. Hyacinthe, depuis la fin de l'été dernier, c'est-à-dire dès avant l'institution de l'action.

Le défendeur déclara quelle quantité de grains il avait récoltée en 1870.

Le Rév. Messire Soly, vs. Brunelle.

Ray, pour le demandeur, prétendit que le défendeur ne pouvait être exempté de payer sa dîme, 1o. parce que l'avis de démission doit être en forme notariée ; 2o. parce que, supposant que tel avis pût être fait sous seing privé, celui que le défendeur avait remis au demandeur était informe, n'était pas signé, était adressé à un certain Charles Brunelle, et ne pouvait faire connaître aux successeurs du demandeur, qui le trouveraient dans les archives de la cure, que le défendeur avait renoncé à la religion catholique.

Lusignan, pour le défendeur, soutint qu'aucune loi n'exige que l'avis de démission soit notarié ; que plusieurs décisions judiciaires ont consacré la suffisance de l'avis sous seing privé ou de la lettre missive, mais qu'aucune n'a déclaré qu'un avis écrit fût nécessaire ; qu'un avis verbal suffit ; que dans l'espèce l'avis signifié au demandeur, tout informe qu'il était, manifestait clairement au demandeur l'intention du défendeur, ce qui suffisait pour le soustraire à l'obligation de payer la dîme.

PER CURIAM :—En ce pays, la liberté de conscience est la base de la société. En l'absence de lois statuant quelles formalités seront observées pour soustraire le citoyen aux exigences légales que lui impose tel culte ou tel autre, nous devons nous guider d'après la connaissance de ses convictions et de ses opinions religieuses, connaissance qui nous arrivera par celle de ses actes. Nulle loi n'oblige le catholique romain qui abjure sa religion à notifier le fait à son curé par acte authentique, s'il veut cesser de payer dîme ; aucune loi, je dirai plus, ne lui impose l'obligation de donner tel avis sous une forme plutôt que sous une autre. Plus que cela encore, rien ne le force à donner aucun avis quelconque de démission. Naturellement, celui qui, ayant été élevé dans la pratique de la religion catholique, serait protestant de cœur mais ne pratiquerait aucune religion, celui-là, en l'absence d'un avis à son curé, ne pourrait réclamer l'exemption de la dîme ; né dans une religion, il lui appartient aux yeux de la loi jusqu'à ce qu'il y ait renoncé ouvertement. S'il pratique publiquement une autre religion, il n'appartient plus qu'à celle-ci ; et personne ne peut exiger de lui ce que la loi ne lui demande pas, savoir, un avis de démission.

Dans l'espèce, le défendeur a beaucoup plus qu'il ne lui faut pour repousser la demande de son curé. De l'aveu de celui ci, le défendeur lui a remis, en son presbytère, en présence de témoins, l'avis qui est produit dans la cause, et cela avant les semailles de 1870. Il n'était pas besoin d'un avis écrit ; mais en eût-il été besoin, le papier que la demande trouve insuffisant et informe, était suffisant pour délivrer le défendeur de l'obligation de la dîme.

Action renvoyée avec dépens.

Roy et Chicoine, pour demandeur.

Baudry et Lusignan, pour défendeur (1).

(A.L.)

(1) 10 L. C. J. pp. 114 et 115.
5 L. C. J. p. 27.
6 L. C. J., pp. 226, 258.

COURT OF QUEEN'S BENCH, 1867.

MONTREAL, 8TH JUNE, 1867.

Coram DUVAL, C. J., DRUMMOND, J., BADGLEY, J., MONDELET, J.

Ex parte *Narcisse Fourquin & al., Petitioners for a Writ of Habeas Corpus.*

HELD—That a discharge may be ordered, upon a petition for a writ of *Habeas Corpus*, in the case of a defendant confined in gaol under civil process. (1)

On the 19th May, 1866, the petitioner Fourquin was discharged from gaol, upon a Writ of *Habeas Corpus*, *Coram* Loranger, J. He had been imprisoned and confined in the common gaol of the District of Richelieu, in the town of Sorel, under a writ of *Contrainte par Corps*, by reason of a *folle enchère*, in his suit as plaintiff against one Hébert, defendant, decided in the Superior Court sitting in the District of Richelieu; and under a judgment rendered on the 16th March, 1866—ordering such *Contrainte par Corps* (2) coercive imprisonment, for the difference between the amount of his bid and the price brought by the actual sale. Upon the motion of the defendant made on the 16th day of June, 1866, before the Superior Court sitting in the District of Richelieu, permission was given to defendant to issue a second writ of *Contrainte par Corps* in execution of the judgment rendered by said Superior Court on the 16th March, 1866, and the plaintiff was accordingly arrested a second time. The plaintiff Fourquin having made an application before the Court of Queen's Bench, sitting *in Banco*, it was referred to Chambers in vacation, and finally rejected on the 29th October, 1866, in Chambers.

On the 1st March, 1866, the plaintiff, Fourquin and Léonard Parent, his curator, as Fourquin was interdicted for prodigality, presented a second application in the form of a petition for a writ of *Habeas Corpus* to the Court of Queen's Bench, Crown side, to be released from his second arrest. The petition is in substance as follows:

L'humble requête de Narcisse Fourquin, détenu dans la prison commune du District de Richelieu et de Léonard Parent.....curateur au dit Narcisse Fourquin interdit; expose que votre requérant Narcisse Fourquin, est maintenant détenu dans la dite prison, en vertu d'un certain warrant sur pluries Bref de contrainte par corps. Que votre requérant a été illégalement emprisonné et est injustement détenu dans la dite prison pour entr'autres raisons les suivantes: 1. Parceque le dit warrant a été causé par l'insuffisance des produits d'une folle enchère faite sur le détenu dans une cause devant la Cour Supérieure du District de Richelieu où il était Demandeur et Louis Hébert, Défendeur; que la dite contrainte a été émanée pour toute la différence du prix de vente, à la réquisition du défendeur, sans donner au détenu crédit pour le montant de son jugement et les frais et intérêts. Parceque la dite contrainte a été émanée non seulement pour la différence du prix des deux ventes, mais aussi pour certains frais qui ne peuvent y entrer sous les Statuts. Parceque le détenu a été déjà emprisonné pour la même folle

(1) Sed contra, 8 L. C. R., page 216. 9 L. C. R., p. 285.

(2) Art. 695, C. C. P.

Phillips, et al. vs. Joseph.

enchère en vertu d'un warrant qui fut annullé et par conséquent ne pouvait être soumis à un nouvel emprisonnement pour la même cause. Qu'avant les procédés pris pour obtenir la dite contrainte et avant le jugement qui l'a prononcée, le détenu a été dûment interdit en justice.

The parties duly notified, to wit, the defendant and the Crown prosecutor, having been heard upon that petition for a writ of *Habeas Corpus*, (but no writ having issued) the Court rendered the following judgment:

Seeing that the writ of *Contrainte par Corps* in virtue of which the said Narcisse Fourquin is now detained in custody, hath illegally issued, it is ordered that the said Narcisse Fourquin be discharged from the custody of the sheriff of the District of Richelieu if detained for no other cause.

Petitioner discharged. (1)

Girouard, attorney for petitioners.
Brassard, attorney for defendant.
James Armstrong, *Q. C.*, Crown Prosecutor.
(P.R.L.)

SUPERIOR COURT, 1871.

MONTREAL, 27th OCTOBER, 1871.

Coram BEAUDRY, J.

No. 1785.

Phillips et al. vs. *Joseph*.

HELD:—That, in a case of *mandat* under the civil law, the only prescription that can apply is that of 30 years, unless the defendant shew by his pleas that some exception exists in his favour.

The facts of the case, as stated in the plaintiffs' declaration, are given at vol. 15, p. 335.

The defendant in his second and third pleas set up the prescriptions of five and six years respectively. The plaintiffs demurred.

The following is the judgment of the Court:

Considering that it is not set out in the defendant's second and third pleas that he, the said defendant, is a trader, nor that the receipt of the sums of money claimed by the plaintiffs was an act of a commercial nature, nor that the defendant acted as a commercial agent; and considering that in a case of *mandat* under the civil law no other prescription than that of thirty years can be invoked, and that the defendant does not by his pleas aforesaid show that any exception to the above rule existed in his favour, and that the aforesaid pleas are not founded in law;

Doth dismiss the said pleas, secondly and thirdly pleaded by the defendant, the whole with costs.

Dunlop & Lyman for plaintiffs.
G. Joseph for defendant.
Rouer Roy, *Q.C.*, counsel.
(F. S. L.)

(1) Vide Ex parte Desharnois, 4 L. C. Reports, p. 45.
Ex parte Donaghue; 9 L. C. Reports, p. 285.

COUR SUPERIEURE, 1871.

MONTREAL, 18 DECEMBRE, 1871.

Coram TORRANCE, J.

No. 1428.

Johanna Holland, vs. *Cornelius Caughlan.*

JUGÉ:—1o. Que lorsqu'un jugement en séparation de biens est rendu en faveur de la femme et que cette dernière accepte la communauté, ce jugement peut être exécuté volontairement par les parties, sans qu'il soit besoin de la nomination d'un praticien pour procéder à l'inventaire.

2o. Qu'en ce cas, et aussitôt que fidèle inventaire aura été fait des biens de la communauté, le jugement de séparation sera valablement exécuté, par le paiement réel fait à la femme, de sa part en la communauté, telle que constatée par acte authentique du partage des biens qui la composaient.

3o. Que cet acte de partage, sur motion à cet effet, pourra être homologué par la Cour. (1)

A cette action le défendeur fit défaut de comparaître et la demanderesse, après avoir observé les formalités prescrites par la loi, obtint jugement contre lui, le 29 octobre 1871.

Et comme il était loisible à la demanderesse d'accepter la communauté ou de la répudier ; à la réquisition des parties, il fut procédé par le ministère de L. O. Hétu, notaire, à la confection de l'inventaire des biens de leur communauté, après quoi la demanderesse l'accepta. Et après avoir fait procéder, par le dit notaire, au partage des biens qui la composaient, un compte fidèle fut rendu à la demanderesse de sa part en la communauté et le défendeur lui en fit le *paiement réel*, en présence du notaire qui consigna le fait en l'acte de partage.

Plus tard, le 17 novembre, 1871, motion fut présentée de la part de la demanderesse, demandant l'homologation de l'acte de partage et la cause fut inscrite pour audition au mérite sur cette motion, et après que le conseil de la demanderesse eût été entendu, la Cour rendit son jugement dans les termes suivants:—

" The Court having heard the plaintiff by her counsel *ex parte* upon the inscription by her made and fyled on the 17th November last, and also upon her motion of the same date, that the Deed of Partition, *Acte de Partage* of the estate of the community, *communauté de biens*, which has existed between plaintiff and defendant, her husband, said deed passed before Hétu, notary, on the 8th November, 1871, be by this Court homologated to all intents and purposes, having seen and examined the said Deed and deliberated;

" Considering that said plaintiff has in and by the said deed duly accepted the said *communauté*;

" Considering that the assets and liabilities composing the estate of the said *communauté*, have been duly establised by inventory and liquidated according to law, as appears in the said *Acte de partage*;

" Considering that the actual payment of the rights of plaintiff in the said *Communauté*, has been effected as stated in the said *Acte de partage*, made in

(1) Nota.—L'homologation de l'acte de partage ne paraît pas toutefois être de rigueur, puisque la loi permet l'exécution volontaire du jugement de séparation. Code de Procedure Civile, art. 981, Code [illegible] art. 1312.

The Corporation of the Village of Waterloo vs. Girard.

execution of the judgment *en séparation* rendered in this cause on the 27th of October 1871.

"Doth by these presents homologate and confirm the said deed of Partition, "*Acte de partage, à toutes fins que de droit*, to be followed according to its form "and tenor." &c., &c.

L. G. D'Amour, procureur de la demanderesse.

Acte de Partage homologué.

(L.G.D.)

SHEFFORD CIRCUIT COURT, 1872.

WATERLOO, 22th JANUARY, 1872.

Coram RAMSAY, A. J.

No. 5640.

The Corporation of the Village of Waterloo vs. *Girard.*

HELD:—1o. That a subscription note given to a municipal corporation, to aid in the erection of a public market, is not a contract or agreement contrary to good morals.

2o That such contract or agreement is one that the parties might lawfully make, and is not beyond the powers of a corporate body.

The plaintiffs in the year 1869 proposed to erect a market building in the village of Waterloo. In order to induce plaintiffs to construct the building in a particular place therein, certain rate payers subscribed sums of money for that purpose. Among the number of such subscribers was the defendant, who made and signed an obligation in the following terms, to wit:

Waterloo, 8th May, 1869.

Si le marché est bâti sur la pointe ou vis-à-vis l'hotel tenue par T. Saqui, je m'engage à payer à la Corporation de ce village la somme de cinquante dollars, en argent cur, de la manière suivante, savoir: douze dollars et cinquante centins par année jusqu'au paiement final de la dite somme de cinquante dollars.

(Signed.) A. D. GIRARD.

The plaintiffs having complied with the condition of the obligation stipulating that the market should be built opposite the Hotel of T. Saqui, brought suit for the recovery of two instalments of the obligation on the 14th June 1871. By their declaration, after reciting the obligation and their compliance with the condition requiring the market to be built at the said place, they alleged that it was through the inducements given by defendant and other rate-payers in similar obligations that they located and built the market where they did. That the obligations of defendant and others was the consideration that caused the plaintiffs to locate the market as aforesaid. That such location was a personal benefit to defendant, tending to increase the value of property which defendant owned near the site of said market, and was therefore a good and valuable consideration for his said obligation.

The Corporation of the Village of Waterloo, vs. Girard.

The defendant met the action :

1o. By a *défense en droit*, wherein he alleged that plaintiffs could not be a party to an obligation of the nature of the one sued upon; that said obligation was null and illegal; that the sum demanded was a part of the price of a purchase, *prix d'achat*, of a partial decision of the officers of the plaintiffs in regard to a choice of a site for a public market; that the conditions of the obligation sued upon were illegal inasmuch as plaintiffs could not claim payment for their decisions; that in selecting a site plaintiffs only fulfilled a public duty and had no right to demand pay for their decisions.

2o. By an *exception en droit* defendant pleaded that he had never received good and valuable consideration for the pretended obligation sued upon.

3o. By another exception defendant pleaded that there being no consideration for the obligation, it could only be taken as a donation, and as such was informal and invalid under the form in which it was made; that further, any promise of payment, donation or other agreement tending to influence the decision of plaintiffs would be null and illegal, and would give them no right of action; that plaintiffs in selecting a site were bound to look after the public interests alone.

4o. By a third exception defendant alleged that supposing, as plaintiffs falsely alleged, that the sum in question had been promised by the defendant to defray the cost of the construction of said market, plaintiffs had lost their right to collect it from the fact that they had imposed taxes for the same purpose upon the rate-payers, among the number of whom is the defendant, and the plaintiffs have thus raised a larger sum than was necessary for the construction of said market, and have no need nor right to compel defendant to pay under the circumstances any more than the other rate-payers.

Plaintiffs replied generally. The material facts having been admitted, the case was taken *en délibéré*, and on the 22nd day of January last the following judgment was rendered :

The Court having heard the parties by their counsel, examined the record, and on the whole deliberated : Considering that the contract or agreement sued on is not contrary to good morals, but such an agreement as the parties might lawfully make, and that such agreement is not beyond the powers of the said plaintiffs as a corporate body, and considering that defendant has had all the consideration he expected to have at the time of making the said agreement, as was admitted in open Court, doth order and adjudge the said defendant to pay and satisfy to said plaintiffs, twenty-five dollars, and interest from the fifteenth day of June last until paid, and costs of suit *distraits* to Messrs. Huntington & Noyes, attorneys for said plaintiffs.

Huntington & Noyes, for plaintiffs.
Girard & Girard, for defendant.
(J. P. M.)

COUR SUPERIEURE.

EN REVISION.

MONTREAL, 31 OCTOBRE, 1871.

Coram MONDELET, J., MACKAY, J., TORRANCE, J.

No. 555

Lynch et al., vs. *McArdle, et Brossoit, Intervenant.*

Jugé:—1o. Que les notaires peuvent instrumenter pour leurs parents lorsqu'il n'existe aucune fraude.

2o. Que les dispositions du Code Civil, sur cette matière, ne décrètent point la peine de nullité. (1)

Le jugement final porté en Révision à Montréal, avait été rendu par la Cour Supérieure à Beauharnois, dans le District de Beauharnois, Ramsay, J., le 22 décembre 1870, renvoyant l'intervention avec frais et maintenant l'action des demandeurs. Les demandeurs poursuivaient le défendeur par une action hypothécaire pour $214, montant d'une obligation consentie par le nommé Liggett, alors propriétaire de l'immeuble hypothéqué, en faveur de Thomas Brossoit, en date du 24 avril 1868, pardevant Mtre. Brossoit, N. P., son frère, et que ce créancier transporta aux demandeurs le 25 avril de la même année.

Le défendeur ne contesta point l'action. L'intervenant, par son intervention, alléguait que par acte en date du 14 août 1863, le dit Liggett lui avait transporté la somme de £331.10.0 à lui due par le défendeur, en vertu de l'acte de vente du 7 août, 1863, fait par Liggett au défendeur. Que la dite obligation avait été obtenue frauduleusement et qu'elle avait été illégalement passée par le frère du dit Brossoit qui n'avait aucune créance.

Les demandeurs répondirent entr'autres choses, que l'intervenant n'avait aucun intérêt à intervenir, vû que par le transport du 14 août, 1868, Liggett ne lui avait transporté que la somme à lui revenant due, après ce paiement des hypothèques affectant l'immeuble. Aucune fraude ne fut prouvée.

Le jugement de la Cour Supérieure à Beauharnois a déclaré l'acte d'obligation valable et a maintenu [illegible]

Les parties ayant [illegible] en Révision, le jugement fut confirmé.

MONDELET, J.—Dans cette cause il se présente deux questions.

1o. L'obligation en faveur de Thomas Brossoit, devant Mtre. Brossoit, son frère, est-elle valable ou est-elle nulle ?

2o. Y a-t-il preuve de fraude ?

Réponse négative à ces deux questions est la seule à faire.

Il n'y a aucune loi qui frappe de nullité cette obligation. L'arrêt de 1685 contre le notaire Odompet est un simple arrêt de discipline, lequel, au reste, n'aurait aucune force de loi en Canada.

Quant à la preuve de fraude, elle n'existe pas au dossier.

(1) Code Civil, B.C., Art. 1208.

Le jugement dont est appel, rendu par la Cour Supérieure à Beauharnois, le 23 décembre, 1870, en faveur du demandeur, est exact et doit être confirmé. Dageais vs. Douglas

Jugement confirmé.

Laframme, avocat des demandeurs.

A. & W. Robertson, avocats de l'intervenant.

(P.B.L.)

Vide Ferrière, Science des Notaires, Tome 1, p. 74, liv. 1, ch. 16.

Langlois, Traité des Notaires, ch. 44, p. CLVIII.

2nd partie, Recueil des chartes, p. 505.

Anc. Den., vo. notaires, Nos. 53 et 54.

Serpillon, Com. Ord. 1667, Tit. 2, art. 2, No. 9, p. 19. Cette parenté peut seulement servir de suspicion. Rousseau de Lacombe, com. posthume, Ord. 1735, p. 155, art. 46.

Pothier, Don. Test. ch. 1, art. 3, sec. 2, Ge al.

Recueil de Lacombe, p. 464, No. 15, part. 3e.

De Héricourt, vente d'immeubles, ch. 11, sec. 2, Tom. 35, p. 2

Soëfve, Tome 2, cent. 4, ch. XLII, p. 401.

Rép. de Guyot, vo. Notaire, p. 206. Jousse Justice Civile, p. 384, No. 41.

Droit français nouveau, 1 Massé, Science des Notaires, p. 58, art. 3, sur la loi du 16 mars, 1803, 8 Toullier, p. 130, No. 75.

13 Duranton, p. 29, No. 28, Rolland de Villargues, Dict. vo. acte notarié, Nos. 127 et 151.

Garnier-Deschênes, Traité élémentaire du notariat, p. 78, Fabvre, Loi du 25 ventôse, an 11, 1824, in 8o.

Dict. du notariat, vo. parenté, p. 203, sec. 4, no. 64 et seq.

COUR SUPERIEURE.

EN REVISION.

MONTREAL, 31 OCTOBRE 1871.

Coram MONDELET, J., MACKAY, J., CARON, J.

No. 261.

Dageais vs. *Douglas, et al.*

Jugé—Que le capitaine d'une barge n'a pas le droit ni le privilége de prendre une saisie conservatoire sur la barge pour ses gages pour le dernier voyage. (1)

Devant la Cour de Circuit pour le district de Montréal, le demandeur poursuivait les défendeurs, pour $105 pour gages comme capitaine de la barge Delphina (95 Tonneaux), durant le dernier voyage.

Le demandeur avait été engagé par le défendeur Douglas qui avait loué cette barge de l'autre défendeur Lalonde pour la saison de la navigation de 1870.

Le demandeur, pour conserver son privilége sur la barge, la fit saisir par voie de saisie conservatoire. Douglas n'a point comparu et Lalonde a contesté sur le principe que le capitaine d'une barge n'a pas de privilége de saisie-arrêt avant jugement pour ses gages.

(1) 15 L. C. Jurist, p. 262.

Dagenais vs. Douglas.

Le 30 décembre 1870, la Cour de Circuit pour le district de Montréal, (Berthelot, J.), a renvoyé l'action quant à Lalonde et lui a accordé main-levée de la saisie conservatoire. Ce jugement est motivé comme suit :

La Cour après avoir entendu le demandeur et le défendeur Isaie Lalonde, tant au mérite de l'action que sur l'exception et la défense plaidées par ce dernier.....

Considérant que le demandeur n'a fait apparaître d'aucune créance contre le dit Isaie Lalonde ou de pouvoir procéder contre lui par droit de saisie conservatoire pour faire saisir-arrêter la barge ou vaisseau "Delphina" dont il est question en la déclaration et au procès verbal de saisie, a renvoyé la dite action et saisie avec tous dépens en faveur du dit Isaie Lalonde, et adjugeant sur la demande contre le dit Douglas et vû la preuve, l'a condamné à payer au dit demandeur la somme de $85. pour balance de ses gages comme capitaine, etc.

Cette cause fut portée en Révision à Montréal.

Le demandeur prétendit que nonobstant les décisions rapportées au 7 L. C. J. p. 119 et 8 L. C. J., p. 334, néanmoins l'article 2383 du Code Civil donnait un privilége sur le vaisseau pour gages du maître pour le dernier voyage et que cet article s'applique tant aux bâtiments destinés au petit cabotage qui voyagent sûr les fleuves et rivières que sur la mer—voir les chapitres 1er, 2me, 3me et 4me du Code sur les bâtiments marchands, la cause de Tourville vs. Ruehle, en revision, jugement basé sur les arts. 2448, 2450 et 2451, C. C.

Merchant Shipping Act de 1854, Sect. 191 et Sect. 19.

En France, cette question ne souffre pas de difficulté, Code Com. art. 191; 1 Beaussant, Code Maritime p. 469, citant Sirey, 1834, 1, 10.

Caumont vo. Cabotage.—Boulay Paty, Droit Com. Mar., p. 100.

Pardessus, p. 597, 614.

Delfaru, Droit Com. Comparé s. 11, p. 259.

Valin, Com. p. 400.

Le défendeur Lalonde invoqua les décisions déjà rendues sur des questions semblables.

MONDELET, J., dissenting. Lalonde one of the defendants leased a barge to Douglas the other defendant, who engaged plaintiff as Captain. At the end of the season, there were $105 due him for wages, for which he seized the barge. The attachment was quashed in the Court below, but I think it should be maintained. I think that the Captain has a lien for his wages, and that he can attach the vessel as has been done in the case by a *saisie conservatoire*; but I am alone in my opinion.

MACKAY, J.—In my opinion this is a *saisie-arrêt* before judgment without an affidavit to support it. Even if plaintiff had a lien, a seizure should have been supported by affidavit. He is not in the position of a *dernier équipeur*. The President of the Court held his present opinion in Delisle *vs.* L'Ecuyer, but his judgment was reversed.

Jugement confirmé.

Girouard & Dugas, avocats du demandeur.
McCoy & Lefebvre, avocats du défendeur.
(P. R. L.)

COUR SUPERIEURE,

EN REVISION.

MONTREAL, 30 SEPTEMBRE 1871.

Coram MONDELET, J., BERTHELOT, J., MACKAY, J.,

No. 368.

Duhaut vs. *Lacombe.*

Jugé : Qu'une opposition fondée sur un titre, qui n'est pas accompagnée d'une déposition dûment et légalement assermentée, tel que requis par l'article 583 du Code de Procédure Civile, doit être renvoyée avec dépens, nonobstant les dispositions de la 82e règle de pratique ; qui se trouve abrogée par l'opération du Code de Procédure.

Le 17 septembre 1870, la demanderesse par reprise d'instance fit motion pour le rejet de l'opposition afin d'annuler des opposants, sur le principe que l'opposition n'était pas timbrée, que l'opposition n'était pas accompagnée d'un affidavit, que l'affidavit annexé était insuffisant, n'étant pas assermenté devant un officier compétent.

Le jugement rendu par la Cour Supérieure à Montréal le 31 octobre 1870, (Beaudry, J.,) a accordé la motion et il est motivé comme suit :

La Cour, après avoir entendu les parties par leurs avocats, sur la requête sommaire de la Demanderesse par reprise d'instance, produite le 17 septembre dernier, aux fins de faire rejeter l'opposition de la dite Dame Doucet et son époux ; considérant que la dite opposition n'est pas accompagnée d'une déposition duement et légalement assermentée, tel que requis par l'article 583 du Code de Procédure Civile, renvoie la dite opposition avec dépens.

Les opposants inscrivirent cette cause pour révision à Montréal, et prétendirent que la motion n'étant pas timbrée, aurait dû être rejetée ; et que la Demanderesse en reprise d'instance, quoique procédant *in formâ pauperis*, n'avait aucun intérêt dans la présente cause, (1) et que le Jurat était suffisant et dans le doute, la Cour aurait dû accorder un sursis et que l'absence d'un affidavit régulier, n'est pas une raison de rejeter l'opposition, mais uniquement d'enlever à cette opposition son caractère suspensif.

La demanderesse, par reprise d'instance, prétendait que les timbres étaient insuffisants aux termes du statut de 1864, 27 & 28 Vic. ch. 5.

Par l'art. 52 du Tarif, p. 61, le montant dû à la Couronne sur une opposition afin d'annuler est de :

1ere classe, au-dessus de $1000.....		$2.00
2eme classe	400	1.50
3eme classe	100	1.00

Donc, il fallait un timbre de $2.00 au lieu de $50 vû que la procédure était pendante dans le district de Montréal, que les timbres n'étaient pas effacés en la manière voulue par la loi, la sec. 20 de l'acte de 1864 dit que l'officier qui recevra la pièce, annulera le timbre en écrivant son nom, et les timbres en question portent les simples initiales M. M. sans indication de qualité, sec. 17.

(1) 15 L. C. Jurist p. 105.

Muir, et al., and Muir.

Le jurat do l'affidavit est illégal, il est comme suit: assermenté pardevant moi à Sorel, ce neuf juillet 1870.

(Signé) S. LAPALME,
C. C. S.

en sorte qu'il n'appert pas dans quel district ni si c'est devant un officier compétent que cet affidavit a été fait. (1)

MONDELET, J.—The judgment appealed from was rendered in the Superior Court, on the 31st. October, 1870. The question is whether the affidavit annexed to the opposition filed with the Sheriff is sufficient, or whether an affidavit was necessary to suspend the sale. The 82nd Rule of Practice dispenses with the affidavit, when the opposition is founded on title; but Art. 583 of the Code of Procedure, which is later law, takes away this exception. I consider the present affidavit insufficient, and the Sheriff should not have suspended the sale upon the opposition, but should have returned it into Court after the sale, as ordered by the 81st Rule of Practice.

BERTHELOT, J.—The affidavit is manifestly insufficient on three grounds: 1st. it does not say what sale the opposant seeks to annull, or that the opposant does not seek to retard unjustly; 2nd, the Commissioner does not say for what district he acts, but simply says "C. S. C.;" and 3rd, the stamps are insufficient.

Jugement confirmé.

Piché, avocat de la demanderesse.
Barnard & Pagnuelo, avocats des opposants.
(P. R. L.)

COURT OF QUEEN'S BENCH, 1871.

MONTREAL, 10TH MARCH, 1871.

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

No. 38.

Muir & al., Appellants, & Muir, Respondent.

HELD—That after an appeal has been allowed to Her Majesty in Her Privy Council, this Court cannot set aside the bail bond, for alleged irregularities, and dismiss the appeal.

This was a motion by the respondent, that the bail bond furnished by the appellants, as security for the due prosecution of the appeal which had been allowed to Her Majesty in Her Privy Council, should be set aside, for the reasons stated in the motion, and that the appeal should "be stayed and set aside," and the record remitted to the Court below.

DUVAL, CH. J.—When a case is before the Privy Council, this Court cannot interfere. The motion of the respondent cannot be granted.

Motion rejected.

H. L. Snowdon, for appellants.
Perkins & Monk, for respondent.
(S.B.)

(1) 12 Jurist p. 236, 8 Jurist 96, 100 et 101.

COURT OF QUEEN'S BENCH.

MONTREAL, 6TH SEPTEMBER, 1871.

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

No. 28.

Foster, Appellant, and Allis, Respondent.

HELD:—1. That no presumption can arise that a fire has been caused by the negligence of A. B., or his servants, from the mere fact that he occupied a portion of the building destroyed, the remainder of which was occupied by C. D., the proprietor of the building.

2. That the proof of negligence in such a case must be direct and positive.

This was an appeal from the judgment of the Court of Review, at Montreal, reported pp. 13 and seq. of the 15th vol. of the Jurist.

CARON, J., *dissentiens.*—La preuve établit que, lors de l'incendie, la grange incendiée était occupée partie par le propriétaire, intimé, et l'autre partie par le locataire, l'appelant. L'un occupait la partie ouest, et l'autre la partie est. C'est dans la partie occupée par le demandeur que le feu a été d'abord aperçu, quoique, d'après la situation des lieux et les autres circonstances prouvées, rien ne s'oppose à ce que le feu ait d'abord pris dans la partie occupée par le Défendeur et se soit ensuite communiqué à l'autre partie avant qu'on ait pu le voir de dehors.

Rien dans la preuve n'établit d'une manière satisfaisante quelle est la partie de la grange où le feu a été d'abord mis, ni sa cause, ni son origine. De ces deux faits prouvés, que la grange en question, lors de l'incendie, était occupée conjointement par les deux parties, et qu'on ignore dans quelle partie le feu a originé; il résulte que le demandeur ne peut pas invoquer la présomption créée par la loi que le locataire est responsable de l'incendie qui origine dans les bâtisses qu'il occupe. L'on doit donc dans le cas actuel, mettre de côté cette présomption légale et décider la cause d'après les faits qui ressortent de la preuve. Or, cette preuve qui est assez contradictoire, je l'ai examinée avec attention, et je l'ai comparée avec l'appréciation qu'en a faite le Juge Short, dont les notes se trouvent en tête du factum de l'intimé, et je dois dire que j'ai trouvé cette appréciation en tous points correcte. J'approuve entièrement le jugement qu'il a rendu, ainsi que les motifs sur lesquels il s'est basé: en étant ainsi, je n'entrerai pas dans les détails de la preuve; je me contenterai de dire qu'il est difficile, sinon impossible, d'en venir à une autre conclusion que celle de dire que ce sont les employés du défendeur qui ont causé l'incendie. Si c'était le demandeur ou ses employés qui aurait été cause de l'incendie, il faudrait que le feu eût été mis avant l'arrivée des hommes du défendeur, qui ne sont arrivés que tard, et lorsque le demandeur était au lit, tandis qu'il est en preuve que ni le demandeur ni ses gens ne sont allés à la grange après l'arrivée des hommes du défendeur. Il est au contraire en preuve que le cheval de Melançon, qui se trouvait dans la partie de la grange où les chevaux du défendeur ont été placés, a été par l'un de ses hommes conduit dans la partie occupée par les vaches du demandeur; or, lors de ce transport, si le feu eût été dans cette partie, la personne qui y a conduit le cheval de Melançon n'aurait pas manqué de l'aperce-

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voir; ce qui n'a pas eu lieu puisque c'est longtemps après et lorsque tout le monde était couché que le feu a été découvert et que l'alarme a été donné.

De l'ensemble du témoignage il résulte clairement que c'est le défendeur, qui, par ses hommes, est l'auteur de l'incendie, et qu'il est responsable du dommage qui en est résulté; c'est mal à propos que le défendeur a contesté la propriété du demandeur, puisqu'il avait lui-même loué du dit demandeur, la grange dont il s'agit.

Quant à la prescription plaidée, elle n'existe pas. L'art. 2261, qui au reste, est de droit nouveau, (quoiqu'il ne soit pas indiqué comme tel) n'est pas applicable au cas.

Il est assez singulier que le demandeur ait attendu si longtemps avant de porter son action; pourtant, ce long délai, dont bien des raisons peuvent avoir été la cause et dont il n'est pas tenu de rendre compte, ne saurait détruire son droit, si toutefois la loi ne l'en prive pas. Ce délai peut créer la présomption qu'il n'était pas très sûr de son droit, puisqu'il a été si longtemps à le faire valoir, mais cette présomption n'est pas de nature à faire renvoyer son action, si du reste, elle est bien fondée et soutenue par la preuve.

C'est ce qu'a décidé le Juge de première instance par son jugement confirmé par la Cour de Révision à l'unanimité, sauf le Juge Mondelet, qui paraît avoir fondé son dissentiment uniquement sur le long temps qu'avait laissé écouler le demandeur sans se plaindre. Cette raison n'est pas valable; l'admettre serait déclarer que les cours de justice ont droit de créer des prescriptions que la loi ne reconnaît pas; ce long délai, au reste, est en partie expliqué par ce fait prouvé dans la cause, que le demandeur a souvent requis le défendeur de l'indemniser, et de l'espoir qu'il avait droit d'entretenir qu'il finirait par l'être à l'amiable et sans le désagrément d'un procès. Au reste ce n'est pas au défendeur à se plaindre de ce délai tout en sa faveur.

Je confirmerais le jugement de la Cour de Révision qui confirme le jugement du Juge Short.

BADGLEY, J.—The facts of this cause as they are in evidence are the following:—Foster had a section contract in 1853-'54, on the Quebec and Richmond Railway, near Danville, where plaintiff had a dwelling house, barn and other outbuildings. He rented to defendant his house and barn and a shed which defendant, after hiring it, converted into a horse-barn, and he occupied the house with his family while he was completing his contract, and the barn and shed barn he used to keep his horses in, while his work was progressing. The barn had two stables, the cow stable in its western end, which had always been retained by the plaintiff, and where he kept his cattle and his hay, and where he had two cows at the time of the fire, which were then destroyed. The eastern end or half had the horse stables, in which the defendant kept horses required for his railroad work. The shed was near this eastern end of the barn, built at right angles to it but separated by 5 feet from it. In the early spring of 1854, the section contract at Danville having been completed and the horses no longer needed there, the defendant gave up the house and buildings to the plaintiff, having removed everything belonging to him out of the barns, only keeping at Danville two horses and some tools which were kept in the shed. The plaintiff

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at once resumed his residence in the house and the occupation of his buildings, keeping his grain and provendor in the barn, hay, straw, &c., and his cattle as before. The defendant having occasion to send his teams beyond Danville, from which they had been removed for about three weeks, ordered them to be taken back there *en passant*, and told his men to take them back and put them for the night where they had been stabled before, which the men did. There were two teams, one at Richmond and the other at Shefford: both reached Danville within half an hour of each other, between 9 and 10 at night of the 20th of August, 1854. There is no conflict in the evidence as to this time. The Shefford team of 9 horses with 3 or 4 teamsters arrived first and were stabled in the shed barn, the Richmond team, with 4 or 5 teamsters, followed and were stabled in the barn stables, whence they removed a passenger's horse which they found in those stables to the barn floor, the *batterie*. The teamsters had been separated for some time, and, having met together again, they were loud and jovial at their meeting, as was natural with persons of such a class, but were all sober and under the charge of a steady, respectable stable foreman or boss, Bessette. The horses were all put up by half-past 10, when the teamsters left the stables: no light was needed for the shed stable, but being wanted for the barn stable, Bessette gave them a lantern with a lighted candle in it which was hung at the back of the horses, or moved about behind them as was needed. The lantern was in good order, and the glass in it was whole: the horses' heads were towards the barn floor, the *batterie* so called, where their feeding boxes, *crèches*, were, and there was a passage behind the horses for the convenience of the teamsters, from whence the light from the lantern was sufficient for their work. The horses were not fed on the barn floor, but in their crèches, supplied from the hay there. When the work was done, Sheridan, one of the Richmond teamsters, who was the last of these men to leave, saw everything safe and went to his own house. Bessette, also, who had remained to the last, went away about half-past 10, taking the lantern with him and having seen that everything was safe. The teamsters had all previously gone away, some to their own homes near by, and the others afterwards went to sleep in the shed-loft. None of them that night went into the western end of the barn or into, or near, the cow stable. Bessette, having seen that everything was safe, shut the stables and went to his lodgings at plaintiff's house, where his family were. A little after 11 he returned to the stables, having his lantern which he had taken home with him from the stable, and accompanied by Melançon, a teamster, he again carefully examined the stables and finding everything quite safe and no sign of fire, he closed the stables and went home for the night, Melançon leaving him and going to sleep in the shed loft. Whilst Foster was in occupation of those premises, his teamsters and the labourers employed on the road slept in the two lofts, and upon his going away, plaintiff seems to have allowed the labourers to continue to do so, several of these, besides the unhoused teamsters, sleeping in each loft; amongst these labourers in the shed loft that night was Berthelet, one of the plaintiff's witnesses, who appears to have gone to the shed loft about midnight, and before, as he says, he got to sleep, saw fire in the barn, and, awaking Melançon and others, he gave the alarm and started off to alarm Bessette at Allis' house, an acre and a half or

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two from the barn. Bessette and others came up with him or near him, on his return, and it is proved by all the witnesses that the fire was in the barn and, by all who have spoken of it, that it was first seen at the western end, over the cow stable; that it crept gradually along from west to east, until the entire barn up to the east end was in flames, and only then the fire reached the shed barn, near that end of the barn, time being thereby allowed for the removal of the horses from the shed stable; but the fire was too rapid to save the horses in the barn stable which were destroyed. The plaintiff lost his barn and shed, his two cows, some hay, his barn fences, and a double waggon standing in the barn-yard. The fire happened on the 20th August, 1854, in full midsummer time, when the days are longest and the nights generally not absolutely dark before nearly midnight. Thirteen years after the event, the plaintiff instituted this suit against defendant for the recovery of his loss, estimated at $525. No difficulty could have arisen as to the decision of this cause, except what might have been found in the examination of and determination upon the evidence adduced, had not the plaintiff presented his cause all through, and even in this Court, as based upon the relation between the parties of landlord and tenant at the time of the fire, complicating the case not a little, and introducing into the rules for its decision, the legal principles involved in the rules of law connected with fires of leased premises and the presumption of fault in the tenant of the premises when a fire occurs in them. Both Courts have been manifestly under the influence of these fire laws, the judge *en première instance* observing, in giving his judgment, "when a fire occurs in premises occupied by a tenant the presumption is against the tenant, that it was caused by his negligence, and it is for him to rebut that presumption;" but, he adds, "this does not fully operate here, because plaintiff had two cows in the large barn, and there is, to a certain extent, a divided responsibility, so far as the presumption goes." One of the confirming judges in Review repeats, in a general manner, the observations of the original judge, whilst the other confirming judge sustains the original judgment by briefly saying, "that, when a fire occurred in a building occupied by a tenant, the presumption of law was that it was caused by the negligence of the tenant," making the fire law and presumption plainly predominant, as if this was a case within that rule. It was forgotten by both Courts that the fire principle of law and the presumption of negligence belonged exclusively to a very exceptional law, and could not be extended beyond their special circumstances. The judgment given and confirmed was for $450, viz., $350 for barn, shed and fences, $45 for the two cows, $50 for the waggon, and $30 for hay. This liability from tenancy is important, both as involving a question of evidence and a question of indemnity; the former casting the onus of proof upon the tenant to disprove the fault imputed and attached to him by the law, without proof by the landlord; the latter the nature and extent of the *indemnity*, as restricted alone to the leased premises injured or destroyed by the fire and which the tenant is condemned to repair and restore because he had the *custodia domus*, the indemnity not extending to the contents of the premises, as he had not leased and, therefore, had not the *custodia* of these, and for these, therefore, he owes no indemnity, nor could he, *ex vi termini* as tenant. And hence, therefore, a misconception by the Court of

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the proper and true relation existing at the time of the fire between the parties and a misapplication of the principles of law affecting them would lead to injustice. The 1629 art. of our C.C. reproduces the old law in cases of landlord and tenant; the terms in French, which are original and more explicit and better rendered than the English translation, are "Lorsqu'il arrive une "incendie dans les lieux loués, il y a présomption légale en faveur du locateur, "qu'il a été causé par la faute du locataire ou des personnes dont il est respon- "sable, et à moins qu'il ne prouve le contraire il répond envers le propriétaire de "la perte soufferte." The previous article, 1628, designates the persons for whom the tenant is responsible, namely, "les personnes de sa maison ou ses sous-locataires," the former including *ses domestiques*, his domestic servants. The principle of both the French and our Codes assimilate, but they differ in the relief afforded to the tenant, our Code being the more liberal and just in this respect, as our article relieves him if he disproves that he was in fault, the French article requiring him to prove that the fire occurred by *force majeure, cas fortuit ou vice de construction.* See Mareadé, Louage, art. 1733-34. This law has always been held to be a very special law, like all those which militate against the equitable principle on which justice rests, that the plaintiff must make out his case, and accordingly it is *strictissimi juris* and cannot be extended to cases not included in the jurisprudence or enactment enforcing it. It has, therefore, been held that the legal presumption which prevails in cases of fire, as between landlord and tenant, does not go beyond them to cases of a similar nature between neighbour and neighbour. See 1630 art. C.C. Almost every decision of the French Courts, and certainly the opinions of the ablest commentators upon French law, agree in that doctrine, and chiefly on the ground mentioned, that the exception to the general principle was not contemplated by the law to extend beyond the case provided for. See Merlin, Rep., Vo. Incendie, *inter alios*; and, therefore, if the relation of landlord and tenant do not exist, and specially is not averred to exist at the time of the fire, the presumption of fault will not apply, and any inference from it will be contrary to law as well as justice, and cannot be imported into the cause, in which the plaintiff, as all plaintiffs in cases not included within this fire law, must establish the negligence charged, by affirmative proof, positive and uncontradicted, because negligence is a *délit* in the nature of both *culpa* and *dol*, not proveable by implication or presumption, but must be distinctly proved, as Lacombe says, "*par des preuves claires et incontestables.*" Again, in connection with this fire law, it will be observed that the defendant is charged with a vicarious and imputed responsibility for the carelessness of his men, that is, his teamsters, the defendant not being present at the fire, and these persons are not those for whom he could be made responsible under the 1628 art. of the C.C., which mentions only *personnes de sa maison*, interpreted to include domestic servants, *et ses sous-locataires.* In order to exhaust this part of the plaintiff's pretention, the judge *en première instance* says that there was a divided responsibility between the plaintiff and defendant, the fact being that both were occupants of the barn, the defendant's horses being in the stable at the east end, and the plaintiff's cattle in the cow stable at the west end. The judge admits that all the witnesses on both sides prove the fact

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that the fire originated in the barn." Without more than this, the divided responsibility from joint occupation would raise the known principle of contributory negligence under which no liability could be made to attach to the defendant. The judge omitted to state in addition to the fact that the fire originated in the jointly occupied barn, that all the same witnesses proved that the fire originated in the western end of the barn where the plaintiff's cows were, and which had never been occupied by the defendant, but always retained and occupied by the plaintiff himself, and the result of the judgment under these circumstances is to make the defendant responsible for the plaintiff's carelessness, there being no fault proved or established against defendant's men. Jurisprudence has settled this point. In Sirey Rec. General; and Table Décen., 1851–1860, vo. incendie: "La présomption légale établie au cas d'incendie contre le locataire au profit du propriétaire cesse d'être applicable lorsque le propriétaire habitait aussi la maison incendiée. Le locataire ne pouvait pas être responsable qu'autant que le propriétaire établirait que l'incendie n'a pu commencer dans les lieux habités par lui." Cass. 20 Nov. 1855. (Cavalier) S. V. 56, 1, 103. P. 56, 1. 324. See 2 Troplong, Louage, No. 363 et seq. 17. Dur. No. 109. Marcadé sur l'art. 1733, No. 5. 3. Aubry et Rau sur Zachariæ §. 367 note 11. T. G. No. 45. Il en est ainsi, alors surtout que le propriétaire qui habite une partie de la maison, y a des chambres qu'il loue en garni et dont il a conservé la surveillance.

6 Marcadé No. 5. p. 471, on art. of the Code 1733, says:—Quand le propriétaire lui-même habite une partie de la maison incendiée, il est évident qu'il ne jouit plus de plein droit du bénéfice des lois 1733 et 1734, puisque tant qu'il y a incertitude complète sur la partie où l'incendie a ou n'a pas commencé, la présomption de faute du locataire ne peut plus naître.

Marcadé has treated these points with his usual perspicuity and precision, and his remarks under the Fr. Articles 1733–34 are conclusive. As already observed, the exceptional fire jurisprudence and presumption have affected the judicial decisions in both Courts, and given effect to evidence against the defendant which it should not have had, because the defendant has disproved the fault of negligence presumed against him, and shown that every possible care had been taken by his men; and he has also proved that the fire did not originate in his part of the occupied barn, but in that occupied by the plaintiff himself. Hence, therefore, the fire jurisprudence presumption could not have affected the defendant, even if he had been a tenant, or if the relation of landlord and tenant had continued between the parties, whilst it is shewn by the plaintiff in his declaration and factum that no such relation then existed. In his factum the plaintiff says: The plaintiff alleges in this cause that defendant, by his teamsters, placed a number of horses in plaintiff's barns at a late hour in the night, after plaintiff had retired to rest, and that by carelessness of his, defendant's men, plaintiff's barns were burned and their contents. And in his declaration he avers that "the defendant had had the barn and shed from the plaintiff for his teams and had used them for many months previous to the fire, but that he had given them up some time before the fire, and on the night in question the plaintiff occupied half of the large barn, having his cows and hay in the west end of it, while the

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defendant's horses were in the east end." The action is, therefore, a mere action for *tort*, for which the defendant can be responsible, not as a locataire, but as a master or employer, liable for the negligence of his servants and workmen, *domestiques et ouvriers*, under the general principle of the 1052 art., that every sane man is responsible for the damage caused to another by his fault, *soit par imprudence, négligence ou inhabilité*, extending the master's or employer's responsibility to the damage caused by "their *domestiques ou ouvriers dans l'execution des fonctions auxquelles ces derniers sont employés.*" The defendant pleaded two exceptions of 10 and 15 years' prescriptions which were rejected. He also pleaded a special plea of denial. An action of this nature requires that the plaintiff should prove his case affirmatively by *preuves claires et incontestables*, without presumptions or implications arising out of the relation of landlord and tenant, and the case is one mainly upon evidence and solely upon the evidence of Berthelet, which, in all the material points upon which the action is made to rest, has been contradicted by the weight of evidence of every other witness who has been examined or spoken upon those points stated by Berthelet, those other witnesses being brought up by the plaintiff himself as well as by the defendant. It will also be observed that Berthelet's evidence was adduced 14 or 15 years after the event, and that it was procured upon the terms stated by himself: "Le demandeur m'a demandé si j'avais eu connaissance de cette affaire; je lui ai répondu "oui." C'est jeudi dernier qu'il m'a parlé chez moi à Stukely. Il est arrivé chez moi jeudi soir vers 6½ à 7 heures; *il a couché chez moi. Il m'a donné une piastre et demie pour me rendre ici. Il m'a donné ensuite deux piastres que je lui ai demandé lorsque je suis arrivé ici avant de donner mon témoignage.* Si la Cour m' alloue encore quelque chose je prétends l'avoir, mais le demandeur ne m'a rien promis d'avantage." Upon this witness and his testimony the defendant observes, not without great reason: "It now only remains for him to refer to the evidence of Etienne Berthelet. It will be seen by the record that all the respondent's witnesses, except Berthelet, were examined together, and that after their examination the case of the respondent was clearly hopeless. He took two months more to hunt up this last witness, Berthelet, went to his house and remained there all night, and the result was that the testimony of Berthelet almost wholly contradicted all the other witnesses, both of appellant and respondent. How this result was arrived at, the appellant forbears to say, but it is surely a significant and suspicious circumstance."

As already stated, the only affirmative evidence in the case is that of Berthelet, and the points made by him are:—1. That the fire was in the centre of the barn near the horses, and that there was no fire in the cow stable. 2. The carelessness of the teamsters on their arrival, all being drunk as well as Bessette. And 3. That no lantern was used in the barn stable, but that the teamsters were lighted to their work in putting up their horses by a lighted candle which was stuck on a cross beam by its own tallow, and was at the head of the horses. It is sufficient almost to deny every point, but it will be more satisfactory to confront his evidence with its contradictions by the other witnesses on both sides. On the first point he says that when he got back from alarming Bessette and opened the large centre doors of the barn there was no fire where the plaintiff's

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cows were. Bessette, plaintiff's witness, who immediately followed Berthelet, says: When I went out I found the big barn on fire. *The westerly end of the barn was then burning, and the roof was burnt through.* "By the westerly end I mean where the cow stable was. The roof above the cow stable, when I went out, was all on fire. In the roof over the other end of this barn there was fire in many places in spots."

Q. How did the fire, in these places or spots, on the end of the barn over the horse stable, appear to have taken?

A. I expect they took it by sparks coming from the roof above the cow stable. I opened the big barn doors as soon as I came to the fire, in the centre of said barn. As soon as I opened these doors the fire came out in a blaze. I then opened the stable door in the barn, and the fire first began to drop down from the loft above. I only got out of the stable alive one horse. We could not get any more out on account of the fire becoming so hot.

And afterwards he answered, as to where the fire appeared to originate, that it commenced in the west end of the big barn, that is where the cow stable was. Charles or Claude Melançon, plaintiff's witness, who left Bessette at the barn at 11 o'clock, and slept in the shed barn, and was roused by Berthelet before going to alarm Bessette, says when he came down from the loft he found the barns *bien en feu*. The "fire was in the large barn above the cow stable near the "shed with the slab roof. The fire appeared to have commenced at the end of the "barn where the cow stable was. The fire was above where the cow stable was." There wasn't much wind when the fire commenced but it rose afterwards. The fire burned very quick. The fire gained the horses' stable in the big barn before there was any fire in the shed barn. It was the fire in the big barn that frightened the horses in the shed barn, as the fire was bursting out of the doors of the big barn and the door of the stable of the shed barn was at the corner between the big barn and the shed barn, as shown on plan, defendant's exhibit "%." "I am certain that the fire commenced at the end of the big barn where the cow "stable was, for I saw that the fire had burned most all that end. The fire ran along the roof by sparks from where it commenced and when the big barn doors were opened the air entered and seemed to form volumes of fire all through the barn. I did not go into the stable of the old barn."

Julien Melançon, whose mare had been removed from the barn stable and put into the batterie by his son Claude, without his knowledge, was at Bessette's when the alarm was given and rushed to the barn to save his mare. He says: "Je me rendis à la hâte aux bâtisses en feu, et je vis le feu au bout de la grange "où étaient les vaches; le feu sortait par la couverture au-dessus des vaches." "J'ouvris la porte de la batterie, mais je ne pus entrer dans la grange, car il y "avait aussi du feu dans la batterie; le feu roulait dans la grange dans ce moment-"là. "C'est dans la tasserie de l'adroite, c'est-à-dire où étaient les vaches, que "le feu était le plus fort; cette tasserie me paraissait tout embrâsée." Je revins alors à la porte de l'écurie des chevaux du défendeur, et j'entrai dans cette écurie et passai derrière les chevaux pour aller jusqu'au fonds de l'écurie, pour aller jusqu'à la dernière place, là où j'avais mis ma jument. Les chevaux du défendeur avaient la tête à la batterie, et lorsque j'entrai dans l'étable, le feu commen-

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çait à "prendre dans les crèches." Lorsque je passai derrière les chevaux, il n'y avait point de feu derrière eux; le feu venait par devant les chevaux, du bord de la batterie. Il n'y avait point de feu dans le plancher qui se trouvait au-dessus des chevaux; il pouvait y en avoir dans ce plancher, à leur tête, mais je n'en ai point vu.

He then goes on to say that he got out that last horse believing it to be his mare, but, learning from his son that she was in the *tasserie*, the centre of the barn, when he opened the great gates, it was too late, he lost his mare. This witness was much relied on by the Court at Sherbrooke. He goes on to say: Quand je suis arrivé à la grange, il n'y avait pas encore de feu sur ou dans l'écurie dont je viens de parler, mais peu de temps après le feu se communiqua à cette écurie. C'est bien mon idée que si le feu eût pris dans le bout de la grange où étaient les chevaux du défendeur, il se serait communiqué à la petite écurie avant que d'atteindre la tasserie où étaient les vaches du demandeur.

Villeneuve, defendant's witness, a man of the same class as Berthelet, says: A ma connaissance le feu a pris du coté de l'étable où étaient les vaches, et la raison qui me "fait dire que le feu a dû commencer dans l'étable du demandeur, c'est "que le vent soufflait ce soir-là sur la grande grange en venant sur la petite grange, "qui se trouvait tout près de l'autre et en était séparée par un passage de "voiture." Si le feu eût commencé dans le bout de la grange où étaient les chevaux du défendeur, la petite grange aurait pris en feu avant que la grande eût eu le temps de brûler, vu que le vent aurait poussé le feu sur la petite grange. Il ne ventait pas très-fort, mais il y avait un bon air, et le feu a pour effet d'animer le vent.

These witnesses, with Berthelet, are the only persons who speak of the place where the fire originated, and flatly contradict him in saying that the fire did not originate in the west end or cow stable part of the barn, and bear out the defendant's assertions in his factum that, whatever the cause of the fire might have been, "it originated in that part of the large barn which was then in the possession of the respondent, as already stated," as a cow stable and which had not been entered by defendant's men.

The second point of Berthelet's evidence relied upon by the plaintiff is the drunkenness of the defendant's teamsters. It will be noticed that his evidence upon this point is confined to the barn: he saw them arrive and go into the barn with their horses. He says:—

"Vers neuf ou dix heures du soir plusieurs des employés de Mr. Foster arrivèrent avec leurs chevaux qu'ils mirent dans la grande grange. Je suis moi-même entré ce soir là dans la grande grange et j'ai vu les hommes de Mr. Foster qui prenaient soin de leurs chevaux." In cross examination he says: "Je ne suis pas entré dans l'écurie mais je suis seulement demeuré en dehors de la porte pendant 12 ou 15 minutes que les hommes soignaient leurs chevaux." Commencing with this self contradiction, he then charges the teamsters as being drunk: "Tous les hommes qui conduisaient les chevaux paraissaient avoir bu de la boisson ce jour là, leurs façons paraissaient bien étranges. Ils chantaient et parlaient beaucoup." Mr. Bessette dont j'ai parlé plus haut était le premier employé de Mr. Foster pour avoir soin des chevaux. "Il m'a paru avoir pris

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des liqueurs fortes ce soir là." Which he afterwards explains in his cross-examination as follows: Je crois qu'il y avait quatre employés pour conduire les chevaux qui logeaient dans la grande grange. Je ne me rappelle que du nom d'Antoine Bessette et un autre du nom de Gros Jean ou Melançon. Je "connaissais bien tous ces quatre personnes dans ce temps là." J'ai vu "les hommes qui ont mis leurs chevaux dans la petite grange, mais je ne puis rien dire sur eux."

Q. Qu'ont fait ces quatre personnes là pour vous faire croire qu'ils étaient ivres?

Réponse. C'est par leur manière d'agir ce soir là différente de l'ordinaire.

Q. Se tenaient-ils bien et marchaient-ils droit?

R. Ils marchaient bien.

Now, Bessette referred to by this witness was the stable foreman who lived with his family in Allis' house, and whom Berthelet went there to alarm, and Melançon was the teamster who accompanied Bessette on his visit to the barn stable at 11 o'clock at night: he, as Berthelet says, slept in the shed loft and was aroused by Berthelet before he started for Bessette's. Melançon could scarcely have been in the barn loft and the shed loft at the same time. Dickson, plaintiff's witness, who also slept in the shed loft, was a Shefford teamster, and he says that neither he nor the other teamsters from Shefford tasted liquor on the day or the evening of the fire, and did not see any of defendant's hands worse for liquor on that day or evening. Bessette, plaintiff's witness, says, he took 10 horses with him from Richmond to Danville to the barn there. "All the teamsters that came with me under my charge were sober, and had not drank anything that day." The teamsters that came from Shefford put up their teams, and I did not pay much attention to them, and don't know whether they were in liquor or not.

Q. Did you see any signs of their being in liquor?

A. No, I did not. And he afterwards added that if any of the Shefford teamsters had been in liquor he would have seen it. Sheridan, a Richmond teamster, says he and the others left Richmond together and remained together until their arrival at Danville, where they put up their horses and where they met the Shefford teamsters, amongst whom were Dickson and Charles Melançon. He says: "Of the teamsters that were there, I never saw any of them drunk; I did not see that any of the teamsters were affected by liquor on that occasion;" they may have drank some, but not so that they could not take care of their teams as usual. "I did not see them drink on that day, and to my knowledge I never saw them drunk. The fact is, defendant was pretty strict, and a teamster had to be pretty straight or he would not be kept. I was a teamster for the defendant for two years or more. I am not a drinking man and never have been; I sometimes take a glass of beer or a glass of wine, but never anything stronger. But upon that day, to my knowledge, I had not drank any spirits, wine or beer." Our stable-boss' name was "Antoine Bessette; he was at the stable to receive us, and fed our horses as usual and appeared perfectly sober; he was generally the last one to leave the stable, and I think, but I am not sure, the last one to leave the stable on that night. Whenever we assembled together to unharness our

horses, there was always some loud talk and singing, and there might have been on that occasion. We had been separated for some time and probably talked a little more than usual. Dickson, one of the party, was a loud-talking, singing and jovial fellow, but not a drinking man." Mailloux, a road laborer, like Berthelet, says he saw the Richmond teams arrive; that Bessette, the stable-boss, et les gens qui conduisaient les chevaux des défendeurs me paraissaient tous sobres et prendre le soin ordinaire des chevaux. Julien Melançon, the old man, saw the teamsters arrive, and saw them unharness and put up their horses: J'ai vu plusieurs de ces charretiers, ils me paraissaient tous en bon état et bien sobres, &c. Camille Villeneuve, a laborer of the same class as Berthelet, saw all the teamsters arrive and unharness and stable their horses: Ces charretiers étaient sobres, &c. Bessette était certainement sobre. Saw him at the stable and afterwards at his own house, sober both times. Saw Charles Melançon arrive; he was sober also. Now, this evidence applies to the Richmond teamsters, whom Berthelet particularly charges, because he says: j'ai vu les hommes qui ont mis leurs chevaux dans la petite grange, mais je ne puis rien dire sur eux. These were the Shefford teamsters, and Dickson, one of them, says that neither he nor the others with him had tasted any liquor that day or evening. To all this may be added the evidence of Charles Melançon, a Shefford teamster, who says: The two other teamsters and myself were sober when we arrived at Danville; neither they nor myself had drank any thing all day. We arrived at Danville about nine or ten o'clock. I didn't pay much attention to the time. I went to see my father (after I arrived there and had put up my team,) who was stopping at my brother-in-law's. Neither he or any of the family had gone to bed. I remained there about an hour. I then went to the stables with my brother-in-law, Antoine Bessette. I did'nt enter the stables. I went to the loft of the shed barn and slept there with Alexander Dickson. We were both sober, for we had drank nothing, &c. And to the foregoing must be added that the defendant's men were obliged to be very careful in this respect, as he discharged those who failed in that way. It would argue an extreme perverseness of perception and judgment to give the least belief to the evidence of Berthelet upon this second point in the face of all this contradictory and uncontradicted evidence against him, and also against the very gratuitously incorrect assertion in the plaintiff's factum that the defendant's teamsters *were crazed with drink.*

There remains the third point in Berthelet's evidence. He says: "Je n'en ai pas vu les hommes dont je viens de *parler,* (the teamsters from Richmond) *se servir de fanal ce soir là, mais j'ai vu qu'ils avaient placé une chandelle sur le garde manger des chevaux et qui leur servait de lumière:* elle était environ 4 ou 5 pouces de long et elle était placée sur la poutre qui sert de division à la grange sans chandelier. Elle était à environ 3 ou 4 pieds de la terre à la tête des chevaux du même côté de la grange où le chevaux étaient: elle brulait encore lorsqu'il a sorti de la grange, les hommes étaient encore là avec leurs chevaux." On cross-examination he says: Je ne suis pas "entré dans l'écurie mais je suis seulement demeuré au dedans de la porte pendant douze ou quinze minutes pendant que ces hommes soignaient leurs chevaux." Je pense qu'ils les soignaient comme à l'ordinaire. "Antoine

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Bessette était dans l'écurie tout le temps que j' y suis demeuré." Je ne puis pas jurer "positivement que Bessette n'avait pas de fanal ce soir là dans l'écurie mais je ne lui en ai point vu." J'ai vu la chandelle à la tête des chevaux sur un *garde-grain ; le garde-grain* dont je veux parler est une poutre qui traverse la grange. La chandelle était collée là dessus avec du suif. La place où les chevaux mangeaient était le long de ce *garde-grain* là et immédiatement au dessous de la place où se trouvait la chandelle. Le foin dont ils se sont servis pour soigner les chevaux a été pris au dessus d'eux. Généralement les harnais étaient pendus en arrière des chevaux. Il n'y avait pas de cloison entre les chevaux et la batterie. J'ai crié à ceux qui couchaient avec moi lorsque j'ai vu le feu. Quelques uns sont sortis, les autres sont restés. J'ai été de suite à la maison chez Bessette.

The great manufactured evidence to be got from this credible and disinterested witness was the use of the open candle in the horse stable in the barn. It will be noticed that he did not go beyond the door and was only there a few minutes when the men began to put up their horses in the barn stable. Now, Bessette testifies, that when the teamsters drove up, "I went into the stable with them. They had no light, so I lighted a lantern and gave them a light. This lantern was in good order, and had no broken glass in it. They had no other light except this lantern in putting up their horses." Sheridan, a Richmond teamster, says: "The teamsters had a lantern upon that occasion with a light in it; it generally hung up in the middle of the stable, so that all could see. I did not see the candle taken out of the lantern on that occasion, nor did I see a candle stuck on a beam running across the stable; if there had been such a thing, I should have seen it. The stable boss was a careful man and always appeared so to me." The witness was the last to leave the stable before Bessette, and then every thing was safe, and he then went home 1½ miles away. He also testifies that the horses in the large barn stood with their heads towards the barn floor and there was room behind them to walk and hang up the harnesses on the wall of the barn; "and if a candle had been put upon the beam in front of the horses, next the barn floor, we could not have seen to take care of the horses, but if the light was hung up behind the horses we could see; but it was sometimes moved along in different places behind the horses as required so that we could see better." And on cross-examination says: I think it was a common square lantern of tin with glass windows; this to the best of my recollection was the one generally used there. I do not know who brought it there nor to whom it belonged. I thought it belonged to Mr. Foster. The stable-boss usually had the light when we came in. Does not know who carried the lantern away.

Mailloux, of the same labourer's class as Berthelet, says, he was in the barn for an hour, and more, that "les gens du défendeur quand ils soignaient leurs chevaux avaient un fanal éclairé par une chandelle, je crois. Je n'ai pas vu de chandelle ce soir-là hors la lumière du fanal. Je n'ai pas vu ce soir-là de chandelle planté sur la poutre qui servait de garde-grains entre la batterie l'écurie. S il y avait eu une chandelle plantée de même je l'aurais remarquée." He also says: Il n'est pas de ma connaissance que les charretiers se soient jamais servi de chandelle sans fanal. Julien Melançon, who lost his horse with the others in

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the barn stable, says: He did not go into the stable with the teamsters on their arrival. Mais je vis qu'il y avait de la lumiere à l'intérieur, je ne sais pas quelle lumière c'était. On cross-examination he says: La lumière que j'ai vu lorsque je suis allé à l'écurie lors de l'arrivée des chevaux me paraissait en arrière d'eux. Villeneuve, another of defendant's witnesses, "j'ai été à l'étable avec ces charretiers, je les vis dételer les chevaux et les soigner; Bessette, celui qui prenait soin des chevaux, était présent et je l'ai vu soigner les chevaux, &c. Je ne remarqua rien d'extraordinaire, tout se passa suivant l'habitude, et se servaient d'un fanal comme d'ordinaire, je n'y ai pas vu d'autre lumière, &c. Le fanal dont j'ai parlé était éclairé par une chandelle, je ne les ai pas vu ôter la chandelle du fanal et la poser seule dans la grange." Now, these extracts exhaust the evidence of the witnesses for both parties, with reference to Berthelet's testimony as to the use of the naked candle, and it would indicate extraordinary credulity indeed to believe that any credibility can be attached to his testimony upon the third point more than upon the two preceding ones. Without the assurance of these points, the case has nothing to support it, and when it is considered that the western end of the barn should be in flames and the eastern end not on fire, and yet it could be argued that the western end could be set on fire by the unignited eastern end, impossibilities could exist no longer either in nature or law. The judge at Sherbrooke must have misunderstood the case and the evidence entirely, and his judgment with its confirmation in review cannot stand and should be reversed.

DUVAL, C. J:—The judgment of the Court of Review would be reversed on these grounds. The case was presented as one of lessor and lessee. This would give the plaintiff, the lessor, the advantage, because the lessee would have to account for the fire. But in this instance the parties each occupied part of the barn, and therefore there was no such presumption against the defendant (appellant.) The plaintiff was, therefore, bound to prove that the fire originated in the part of the stable occupied by the horses of the defendant. This, the Court was of opinion, he had failed to do. The plaintiff's chief witness had stated facts which the judges must say they did not believe, because he was flatly contradicted by all the others, and especially by one Melançon, who was a stranger, and entirely disinterested. Melançon said he saw no one drunk. Then there was another fact of importance—Foster was very strict with his men. His Honor could not believe the evidence of Berthelet, which was in contradiction to that of all the others. Berthelet said he saw a naked candle put either upon a shelf or a piece of wood. If this had been true, the fire might be accounted for. But on this point Berthelet was contradicted by all the other witnesses who said the candle would have been of no use in the position mentioned. There was another fact; the fire was seen first in the west end of the stable, the wind was blowing from west to east, and the fire would have been blown in the opposite direction to that which the plaintiff pretended it took. The plea of prescription was not supported by law. But when, under such circumstances, a man allowed a large sum to remain unpaid for 13 years without bringing an action it showed that he was not very sure of the strength of his claim. He said he had frequently asked Foster to pay. There was all the more reason for pressing his claim, when Foster refused to settle.

Cayley vs. Camyré.

DRUMMOND, J., would only remark that the action was foundod apparently on the presumption of law existing against a tenant. That presumption had been entirely done away with by the joint occupancy of the premises which had been proved.

The following was the judgment of the Court:—

"The Court * * * considering that, at the time of the occurrence of the fire mentioned in this cause, as the ground of action by the respondent against the appellant, the appellant had ceased to be the tenant or lessee of the respondent's premises destroyed by the said fire, and that the said premises were in the occupation and possession of the respondent, and only temporarily for a part thereof by the appellant;

Considering, therefore, that the appellant could not be brought within the presumption of law against him as a tenant or lessee of the respondent for his said consumed premises;

Considering, therefore, that the said respondent was bound to prove his ground of action, and to establish the alleged negligence by him imputed to the appellant, or his servants, as the cause of the said fire;

Considering that the said respondent hath not proved the allegations of his declaration * * * doth reverse * * * and doth dismiss the action and demand of the said respondent * * *."

Judgments of S. C. reversed.

Felton & Felton for appellant.
Sanborn & Brooks, for respondent.
(S.B.)

SUPERIOR COURT, 1870.

MONTREAL, 30TH DECEMBER, 1870.

Coram BERTHELOT, J.

No. 1942.

Cayley vs. *Camyré*

HELD—That objections decided at *enquête* cannot be revised until the final hearing on the merits, if the deposition has been closed.

This was a motion to revise certain rulings at *enquête*, with regard to a deposition which had been subsequently closed.

PER CURIAM:—"Considérant qu'il n'y a pas lieu à adjuger sur icelle motion, attendu que la dite déposition a été close, et que le demandeur, selon la pratique suivie dans cette cour, devait et doit se pourvoir s'il y a intérêt, lorsque la cause sera entendue au mérite, et lui réservant son droit à cet égard, a renvoyé la dite motion pour être là et alors adjugé ainsi qu'il pourra appartenir en droit et en loi."

Motion to revise rulings rejected.

Mousseau & David, for plaintiff.
Doutre, Doutre & Doutre, for defendant.
(S.B.)

COURT OF QUEEN'S BENCH, 1871.

MONTREAL, 9th SEPTEMBER, 1871.

Coram DUVAL, CH. J., CARON, J., DRUMMOND, J., BADGLEY, J., POLETTE, J., *ad hoc.*

No. 27.

Papineau, Appellant, and Guy, et al., Respondents.

HELD:—That an order or judgment of the Superior Court, enjoining "The late Prothonotary of this "Court, Messrs. Monk, Coffin & Papineau, to wit, Samuel Wentworth Monk, William C. H. "Coffin and Louis J. A. Papineau, or their representatives," to pay a certain sum of money deposited with "Monk, Coffin & Papineau, Prothonotary," Mr. Papineau being still Prothonotary with other associates, is valid, and this, notwithstanding that both Monk and Coffin were dead when such judgment or order was pronounced, and that the same was pronounced, without any one of the said three individuals, or their representatives, being in any way parties to the case.

2. That under the circumstances above related the said Papineau is still an officer of the Court, and, as such, liable to be summarily impleaded, by rule for *contrainte par corps*, for non-compliance with said order or judgment.

3. That notwithstanding the fact that said Papineau, by the terms of his appointment by the Government and the consequent notarial agreement between himself and his colleagues, had no control over the business of the said Superior Court, or the moneys received by said Prothonotary, and abstained from exercising any such control, and did not participate in the emoluments of said office, (his powers and remuneration being limited to the business and emoluments of the Circuit Court), he nevertheless is liable and reponsible for all moneys which may at any time have been deposited with the said Prothonotary.

This was an appeal from a judgment of the Court of Review, at Montreal, rendered on the 31st March, 1870, and confirming the judgment of the S. C. reported at pp. 281 and seq. of Vol. 13 of the Jurist.

Bethune, Q.C., for appellant:—

It is respectfully submitted that the judgments now appealed from are, as regards the three answers, erroneous.

The judgment of the 25th November, 1867, was, in one sense, a judgment "against Mr. Papineau individually," but only so in that it was rendered against "the *late* Prothonotary of this Court," said to have been composed of two gentlemen (then dead) and of Mr. Papineau.

This judgment has proceeded on the principle that "the *late* Prothonotary" was still an officer before the Court, although two of the principal persons who filled the office jointly were then dead, and other persons (Hubert, Papineau & Honey) were then really the parties holding that office.

Whatever may be the responsibilities of Mr. Papineau in connection with the office of *late* Prothonotary, it is submitted that the moment Messrs. Coffin, Papineau & Honey were appointed to fill the office, made vacant by the death of Mr. Monk, Mr. Papineau ceased to be an officer of the Court, *quoad* his old office, and, therefore, the judgment which claimed to deal with him otherwise was null and void.

These remarks apply with equal force to the question raised by Mr. Papineau's second answer, by which he contended that as he really was not an officer of the Court, *quoad* his old office, at the time he was served with the rule for *contrainte*, he was not liable to be dealt with in that summary manner.

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On the merits of the case, as raised by the third answer to the rule, Mr. Papineau most confidently submits that, however the Court may be disposed to view the issue raised by the first and second answers, the Court cannot but conclude to reverse the judgments now appealed from.

The Court will not fail to observe that the facts as pleaded are all admitted by the Honorable Judge who pronounced the original judgment complained of, and that he made his judgment to turn on the single consideration that, according to his views of the matter, the responsibility of Mr. Papineau resulting from his mere appointment and acceptance of office could not be legally controlled by any agreement with the Government by whom such appointment was made.

As a legal proposition, it is most respectfully submitted that this view of the Honorable Judge is entirely erroneous. Upon what sound principle, either of law or equity, can a Court undertake to separate the mere appointment of one of its officers from the declaration of the very power which confers the appointment, as to the duties and responsibilities to result from such appointment? In this case the declaration defining the duties and responsibilities of the office was actually executed before the commission conferring the appointment was made out, and was in reality, therefore, the basis or ground work of the appointment itself. And, under the feeling and conviction that such was the case, the three gentlemen appointed executed a notarial agreement in which they agreed that their duties and responsibilities were to be of the character defined by the Government from whom their appointment was derived.

It cannot be said that the public was not informed as to the peculiar and restrictive character of Mr. Papineau's appointment, for the freest access could at all times be had to the public records of the Government, an examination into which would have established under what precise circumstances that appointment was made. In addition to which, as a matter of fact, the whole of the documentary evidence supplied by Mr. Papineau, as explanatory of the real character of his appointment, was printed and published in "the Blue Book" for 1853, by order of the Legislative Assembly, and was, consequently, matter of public notoriety long prior to the deposit of the money in question in this case.

As a closing remark I respectfully submit that, should this Court confirm the judgment now appealed from, it would consecrate the monstrously unjust doctrine that an individual may be imprisoned during the remainder of his natural life because his mere name has been unfortunately associated with a public office, with regard to which he not only never exercised or used any control or authority whatever, but, by the very nature of his appointment, he was absolutely prohibited from so doing.

Belle, for Respondents:—L'appel a été institué pour faire infirmer les deux jugements du 30 Septembre dernier et du 31 Mars aussi dernier. Ces décisions sont cependant justes et en tous points conformes à la loi.

Les faits qui ont donné lieu aux procédés contre l'appelant sont clairs et simples. Le dépôt a été fait entre les mains de Monk, Coffin et Papineau alors qu'ils étaient Protonotaire de la Cour Supérieure. Le jugement ordonnant la remise du dépôt indique les intimés comme devant le recevoir et chacun des dépositaires ou leurs représentants comme devant le rendre. L'appelant est le

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seul dépositaire survivant qui soit contraignable par corps, les représentants des autres dépositaires n'étant qu'en leurs biens. Ce jugement n'a jamais été révoqué ni infirmé en appel et a encore aujourd'hui toute sa valeur.

Maintenant, si l'on considère les prétentions de l'appelant, l'on voit immédiatement qu'elles ne peuvent lui servir. Du moment qu'il a été nommé Protonotaire, il s'est trouvé dans l'obligation de remplir cette charge suivant la loi et non suivant la volonté du Gouvernement. Le Gouvernement est un corps exécutif et non législatif; il ne pouvait soit par des instructions verbales, soit par des ordres écrits, diminuer la responsabilité de l'appelant comme Protonotaire; il pouvait peut-être, après avoir nommé trois personnes comme Protonotaire, leur conseiller ou même leur intimer de diviser entr'elles l'ouvrage de leur office; il pouvait même leur assigner des salaires différents proportionnés aux services qu'ils étaient en état de rendre; et si l'on examine avec soin les instructions en question, l'on verra qu'il n'a pas fait autre chose, qu'il s'en est tenu là. Mais, quant aux obligations que la loi imposait au Protonotaire, quant à la responsabilité de ce dernier, le gouvernement ne pouvait y apporter la moindre modification, et le fait est qu'il n'a pas pris cette latitude. Ce sont les personnes nommées à la charge de Protonotaire qui ont elle-mêmes essayé de régler entr'elles leur responsabilité par des conventions notariées. Ces conventions, plaidées par l'appelant comme une excuse, le condamnent au lieu de l'absoudre. C'est un principe élémentaire que les conventions n'ont d'effet qu'entre les parties contractantes. D'un autre côté, si l'appelant n'était pas tenu légalement, ainsi que Monk et Coffin, à la responsabilité en question, de quelle nécessité étaient ces conventions? En signant ces conventions, l'appelant admettait par-là même sa responsabilité telle que les intimés l'entendent.

Quant à la mort de Monk et ensuite de Coffin, cela n'empêche pas l'appelant d'être responsable du dépôt en question de la même manière que si Monk et Coffin existaient encore. L'appelant est toujours officier de la Cour quant à ce dépôt et toujours contraignable par corps.

BADGLEY, J., *dissentiens*:—By the 27 and 28 Vic., cap. 60, regulating the expropriation by the City Corporation of civic property, the Commissioners submit their report to the Superior Court or a judge for approval, and, by the 15th section of the Act, the Corporation deposits the price or compensation awarded in the office of the Prothonotary of the Court. Thereupon, by the 17th section, the Court determines the mode of calling in the creditors of the party and all others entitled to or interested in the money, and issues advisable and just orders for the distribution and delivery of the money, or for other matters in connection with the demands of the interested parties.

This is the entire extent of the power conferred by that statute upon the Superior Court acting in expropriation cases, which is not a matter of *autorité judiciaire* arising from its original jurisdiction in civil writs or other judicial matters in connection with them, and upon which it renders its judgment and enforces it by execution or otherwise as directed by law.

On the contrary, these expropriatory proceedings are purely and absolutely exceptional in character and effect to the constituted jurisdiction and statutory powers of the Superior Court and its judicial authority under the statutes of its

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creation and procedure, and therefore only confer upon the Court or judge acting under the Expropriatory Act, such and so much authority as is specially and in express terms delegated to either by that Act and its provisions.

On the 27th of April, 1863, the Corporation consigned to the office of the Prothonotary of the Superior Court the reported sum of $202, awarded to the respondents and in their interest.

On the 27th of November, 1863, the Superior Court, on the petition of the respondents, as to the said money, ordered the late Prothonotary of the Court, Messrs. Monk, Coffin & Papineau, or their representatives, to pay to the respondents the above sum, deposited for them in the office of the said late Prothonotary of the said Court, with the conclusion for the enforcement of the payment by all legal ways and means. The proceeding and the order were *ex parte* and without notice, and there was nothing of record to show that the office of Prothonotary had ceased to exist; moreover, the conclusion as to the enforcement was gratuitous by the Court, and illegal, not having been demanded by the petition, the Court having no power of itself *ex mero motu*, to originate and order what was not demanded from it by the applicant. The Court was not required to order nor did it order the *contrainte par corps*.

It is scarcely necessary to observe that this order against the late Prothonotary was a misapprehension, because the office of Prothonotary was by statute continued in its existence with the existence of the Court, of which it was a constituent, and therefore did not cease to exist or become *lote*, although the persons who performed its duties under their patent of appointment may have ceased to exist. Here this order is directed against the late Prothonotary, the office as principal and cannot be applied subsidiarily to the officials individually, who though named, are not averred to be or to have been the holders of the office at that or at any time. Such a judgment was informal, and legally unenforceable; but upon this informality the respondents movedt he Superior Court for a rule *nisi*, not against the late Prothonotary, but against Louis J. A. Papineau, to show cause why a *contrainte par corps* should not forthwith issue out of the Superior Court against him as *seul dépositaire survivant*, to compel his payment to them of the money deposited in the office of the late Prothonotary of the Court as expressly stated in the order, and thereupon the rule was granted upon the averments of the motion solely, and without any proof that the Papineau of the rule was he of the judgment, or that he was the late Prothonotary, or that any judgment had been rendered against him as *seul dépositaire survivant*. Now in cases of this extreme nature, where coercive imprisonment, *contrainte par corps*, is claimed and required to be executed, formal precision, at least, should be observed, and the Court should verify that the proceeding sought to be obtained has been adjudged and ordered against the party upon the demand of the applicant therefor, and that the *contrainte* is executory upon the party ruled against, who should not be alone constrained for the acts or deeds of other persons or their representatives as adjudged by the judgment: the grant of the rule, therefore, against Louis J. A. Papineau alone was a patent informality, and was not justified by the terms of the judgment, and unwarranted upon the mere allegation

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of the motion copied into the rule without proof that Louis J. A. Papineau was *seul d positaire survivant*. [See 2 L. C. R. 315—McPherson vs. Irvin.] Upon the grant of this rule he is brought in as a *mis en cause*, and allowed to urge his objections, which, amongst others, established the fact that at the time of the deposit in 1863, the office of Prothonotary was held by the Messrs. Monk, Coffin & Papineau, under letters patent of appointment to them. That on the 13th of March, 1865, Mr. Monk died, and the letters patent lapsed, Coffin and Papineau being no longer officers; that on the 5th of April, 1865, new letters patent issued appointing Messrs. Coffin, Papineau & Honey, as joint Prothonotary of the Court; that on the 30th of December, 1865, Mr. Coffin died, and the letters patent again lapsed, Papineau and Honey being no longer officers, but that on 11th of January, 1866, Messrs. Hubert, Papineau & Honey, by letters patent of that date, were appointed joint Prothonotary of the Superior Court, and have since continued as such. That though appointed with Monk and Coffin as Prothonotary, he, Papineau, was by executive order accompanying the appointment, in fact only appointed to the joint office of clerk of the Circuit Court; that by the lapse of the above-mentioned letters patent, by the deaths respectively of Messrs. Monk and Coffin, the office of Prothonotary did not lapse or cease, though the official tenure of the persons holding the office had ceased, there being no survivorship in the lapsed letters patent, nor continuance in the new ones previous to their respective dates, and having once lapsed, the office holders *pro hâc vice* ceased to be officers of the Court, under those lapsed patents; that there was no late office of Prothonotary that could be adjudged by the original order, or enforced against by the rule for *contrainte par corps*, and that the rule was illegal and void against the said Louis J. A. Papineau, the so-called *mis en cause*. By the judgment of the Superior Court of the 30th of September, 1869, the rule was made absolute against the appellant, upon the grounds, that by letters patent of the 5th of July, 1844, the said Louis J. A. Papineau was appointed jointly with the late Messrs. Monk and Coffin, Prothonotary of the late Court of Queen's Bench, and they were by statute of the late Province of Canada declared to be joint Prothonotary of this Court; that by virtue of his appointment to the said office, the said Louis J. A. Papineau became custodian of the money deposited in the office of the said Prothonotary, and that the restrictive orders of appointment and directions to him by the Executive Government were without effect, and in consequence a writ of *contrainte par corps* was ordered to issue against him, &c., &c. This last judgment is equally unfounded in law with the other proceedings of the case, and is a departure from the law applicable to the cause.

The statute regulating civic expropriations, the 27th and 28th Vic., cap. 60, a recent addition to the City Charter, has alone given the Superior Court the authority to act in such matters, by conferring upon it a merely exceptional official or subsidiary power, for the distribution and delivery of the money reported, to or amongst the parties entitled to it, and for that purpose to make advisable and just orders, or for other matters in connection with the claims and demands of the interested parties. No other powers are provided for or delegated to the Court for its action, and the statute has not thought proper to include within

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its delegation the coercive power of *contrainte par corps* in respect of the money deposited in the office of the Prothonotary. The deposit money is a matter simply between the Corporation and the expropriated owner or those interested in the property, and the Court is called in as a merely formal distributor of the money under the Expropriation Law, but it is not money which has come within its judicial authority by virtue of its own judicial authority, or of Court process which has levied or consigned it under its inherent jurisdiction or any constituent power by the statutes of the creation or procedure of the Court, from writs or process issued by itself. The money was consigned under the authority of the expropriating statute but not *en vertu de l'autorité judiciaire*. Now it is an established principle that Courts of Justice cannot exercise greater or more authority than is delegated to them expressly in exceptional matters, nor use a system of procedure which is not made expressly applicable to that authority. The 2271 Art. of the C. C. which is given as old law, has provided that *contrainte par corps*, "imprisonment, under a judgment rendered *in a civil* "*action, is not allowed* except against the persons and in the cases specified in "the following article." The 2272 Art. declares, "The persons liable to impri-"sonment are, 1st, tutors and curators, &c., 2nd, any person indebted as seques-"trator, guardian, or depositary," these are general terms, then follow "sheriff, "coroner, bailiff or officer having charge of moneys or other things under judicial "authority." The Prothonotary *ex nomine* is not named in the category, but is liable to be included under the terms *other officer*, &c. It is evident that even against such officer, the *contrainte* could only be allowed under a judgment rendered in a civil action, and that the *contrainte* could only go when expressly adjudged by the judgment, and thereby made executory as a legal remedy to enforce the payment adjudged. Here there was no civil action between the respondents and the late Prothonotary or between them and Messrs. Monk, Coffin & Papineau or their representatives, or between them and Louis J. A. Papineau; in fact there was no civil action whatever, upon which a judgment was rendered, namely, after writ issued and served and parties heard, by which alone a civil action could be formed for judgment. It is also an acknowledged principle of law that the Court is incompetent *ex mero motu* or of its own authority to originate a judgment of *contrainte* which can only be adjudged upon the conclusions therefor in the applicant's demand. Finally *contrainte* cannot be adjudged unless expressly allowed by law. Without this original adjudication and judgment of *contrainte*, in the judgment rendered, the Court would be incompetent to order it under any subsequent proceeding as an original judgment, and hence, therefore, the 781 Art. of the Code provides, that *contrainte par corps* cannot be carried into execution, *mise à exécution*, without a special rule granted by the Court, which by the 787th art. implies the executory enforcement of a rendered judgment and that in procedure it is the execution of the *contrainte* adjudged by the judgment that is within the special rule, and not an original judgment of *contrainte* rendered in the rule. It has been already observed the *contrainte* is a legal remedy or means for enforcing the payment of the adjudged money, under the execution of the adjudged *contrainte*, by means of the writ of *contrainte*, &c., the rule or application for it being predicated

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upon the judgment giving expressly the remedy by *contrainte*, and hence, therefore, the special rule must conform with the judgment, and not differ from its adjudication, and cannot be enforced at all by special rule, unless the original judgment has so ordered it. This is well exemplified in the cases of defaulting secretary-treasurers under the Municipal Law. An action is instituted by the municipality against its defaulting and indebted treasurer for the amount due by him, with conclusions for payment by him of the sum due, and also for *contrainte par corps* in future to pay it. The judgment is rendered upon these conclusions; he is condemned to *contrainte* on his failure to pay the debt; thereupon a special rule is afterwards obtained against him for the issue of the *bref de contrainte* for the execution of the judgment of *contrainte*. Weighed by these legal standards, the entire proceeding here, as regards the *contrainte* ordered against Louis J. A. Papineau is, fatally for itself, informal and incorrect. The judgment of the 25th of November, 1867, was bad, as being directly against the late Prothonotary, and further, as being alternative against Messrs. Monk, Coffin & Papineau, or their representatives. *Contrainte* was not demanded by the respondents' petition, nor was it granted by the original order on that petition, ordering the payment of the money. The granted rule of the 25th of June, 1868, to shew cause, was an absolute departure in its terms from the terms of the judgment, as being directed not against the late Prothonotary, but against one only of the persons named in the judgment, without the others, or the representatives. The absolute rule of the 30th September, 1869, was not predicated upon the original or any previous judgment adjudicating it, and in its terms is merely absolute for the issue of a writ of *contrainte* without any judgment of *contrainte*, and, therefore, without legal authority. That the proceeding for *contrainte* against this one individual assumes him to be the existing officer of the court at the time of the deposit, and as such existing officially at the dates of the granted rule and rule absolute, whereas he had ceased to be such officer, officially connected with the court by the lapse of the letters patent upon the deaths of Messrs Monk and Coffin and *pro hac vice* both on the 25th of June, 1868, and of the 30th of September, 1869, was only an individual person, indebted and possibly responsible by *contrainte*, after action brought and judgment therein rendered, but not summarily under procedure by rule of court against him as an existing officer of 1863; that the entire proceedings for *contrainte* are not supported by a judgment or a civil action whereby alone that remedy, could be enforced, and that any recourse against the appellant under the circumstances is by a direct action against him in connection with the representatives of the deceased Messrs. Monk or Coffin, or with the sureties of those parties deceased. The appeal should, therefore, be maintained, and the judgment appealed against set aside.

DRUMMOND, J., also *dissentiens*, said he fully concurred with Mr. Justice Badgley, in dissenting from the majority of the Court. If there was any point on which he could not come up to his view, it was with reference to the distinction made by Judge Badgley between moneys deposited under the Court's judicial authority, and moneys deposited under the later Act of the Legislature. On all other points he fully agreed with him. He never saw such a judgment as this. It

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was worse than a judgment against a dead man, for it was against a dead office. His Honor remarked that the pledge given ten or twelve years ago, that this system of joint responsibility should be abolished, had not been fulfilled. Lord Sydenham was horrified when he saw this system of joint officers. His Lordship said—make one man responsible for the department, and let him appoint his deputies. In Mr. Papineau's case, the injustice was manifest; one department alone was confided to his care, and now he was held responsible for other departments of the office. No one believed that Mr. Papineau ever touched a dollar of these monies, yet he was condemned to produce them or go to jail.

CARON, J.:—Cette cause est importante, non à cause du montant dont il s'agit, mais par suite des conséquences que le jugement peut avoir sur des réclamations semblables qui peuvent être dirigées contre l'appelant, dont les prétentions paraissent équitables, si elles ne sont pas conformes à la loi.

Les faits qui ont donné lieu au présent litige et qui font le sujet du débat en cette cause, sont clairement exposés dans le factum des Intimés et peuvent se résumer comme suit:

Le 5 Juillet 1844, par lettres patentes de cette date, les nommés Monk, Coffin & Papineau (le présent appelant) furent nommés prothonotaire conjoint de la Cour du Banc de la Reine, existant alors et depuis remplacée par la Cour Supérieure. Ces lettres patentes étaient dans la forme ordinaire et ne contenaient aucune clause particulière ou extraordinaire quant aux devoirs, obligations, priviléges, pouvoirs et émoluments attachés à la charge, ou quant à la manière dont les obligations et émoluments seraient partagés entre les titulaires. Mais elles étaient accompagnées d'une lettre adressée à chacun d'eux, signée du Secrétaire de la Province, ayant date le 4 Juillet (Veille de celle des Lettres Patentes) contenant entr'autres choses les mots suivants: "That it was the intention of His "Excellency the Governor-General that the business of the Superior Terms "should be conducted and the emoluments accruing from it divided by Messrs. "Monk and Coffin, and that Mr. Papineau should conduct the business and "receive the emoluments of the Inferior Terms."

Cette intention, exprimée par le Gouverneur, a été acceptée par les Titulaires, et pour lui donner effet, ils ont tous trois exécuté un acte d'accord d'après lequel il a été convenu que:—"Messrs. Monk & Coffin should alone be responsible for "the moneys deposited in the Superior Terms of the said Court, also for errors "and omissions committed or done in the said Superior Terms."

C'est pendant que les dits Monk, Coffin & Papineau exerçaient ainsi leur charge, que la somme qui fait le sujet de la présente contestation fut déposée entre leurs mains comme prothonotaire conjoint.

Après le dépôt fait le 27 Avril 1863, par la Corporation de Montréal pour être remis aux Intimés conformément à la loi, comme prix d'un terrain leur appartenant et qui leur était ôté par expropriation forcée, Monk est décédé en Mars, 1865, et à la suite, une nouvelle commission est émanée, nommant Coffin, Papineau & Honey, prothonotaire conjoint, et plus tard, Coffin étant aussi décédé, Hubert, Papineau & Honey ont été nommés à cette charge, qu'ils remplissent encore.

Les choses en étaient dans cet état et la somme déposée par les dits Intimés

n'ayant pas été payée, jugement fut rendu en date du 25 Novembre 1867, ordonnant comme suit; "That the late Prothonotary of this Court (Superior "Court), Messrs. Monk, Coffin and Papineau, to wit, etc., or their represen- "tatives, do pay the claimant (les Intimés), the sum of $200 currency, which "had been deposited in the office of the late Prothonotary of this Court (Messrs. "Monk, Coffin & Papineau.)" Ce Jugement fut suivi d'un protêt de la part des Intimés par Notaire, en date du 2 Décembre 1867, signifié à l'appelant, le requérant de payer la dite somme.

Sur refus de ce faire, les Intimés ont obtenu de la Cour Supérieure une règle pour contrainte par corps, en réponse à laquelle l'appellant a en substance prétendu par écrit.

1o. Que le jugement du 25 Novembre, 1867, sur lequel est basée la dite règle, est nul, parceque Monk et Coffin étant décédés, la charge de prothonotaire dont ils faisaient partie avec l'appelant, avait cessé d'exister, et que partant lui-même n'étant plus prothonotaire d'après la commission qui l'avait nommé conjointement avec eux, ne pouvait être condamné seul pour un fait *des trois*, sans que les deux autres, qui étaient décédés, fussent représentés dans une instance dirigée contre *les trois*.

2o. Que l'appelant n'étant plus prothonotaire d'après la commission qui l'avait nommé conjointement avec Monk et Coffin, ne pouvait être traité comme officier de la Cour pour des faits qui s'étaient passés pendant qu'il l'était, en d'autres termes que n'étant plus officier de la Cour quant au fait en question, il ne pouvait être traité sommairement, de même que s'il l'eût été encore.

3o. Que les instructions contenues dans la lettre du 4 juillet, 1844, qui accompagnait les dites lettres patentes, et auxquelles les parties nommés s'étaient conformées, déchargeaient le dit Appelant de toute responsabilité, puisque, conformément aux dites Instructions, il n'avait pris aucune part à la conduite des affaires du Terme Supérieur, ni aux dépôts d'argent provenant de cette Cour. En autres termes, que le gouvernement, par cette lettre, en le nommant, l'avait déchargé et avait pu l'exonérer de toute responsabilité quant à tout ce qui se ferait et se passerait dans les Termes Supérieurs.

L'appelant invoque aussi comme contribuant à la décharge de cette responsabilité, l'acte d'accord du 13 Mars, 1845, par lequel Messrs. Monk et Coffin se sont seuls chargés de cette responsabilité et en ont exonéré l'appelant. Lequel ajoute encore, pour sa défense, qu'il n'a touché aucun des dépôts provenant de la Cour Supérieure, lesquels ont tous été reçus et gérés par ses deux associés.

La réplique des Intimés se trouve à la page 2 et 3 de leur factum. D'après enquête faite de la part de l'Appelant seulement, il a été constaté que de fait, c'était Messrs. Monk et Coffin, mais surtout, sinon exclusivement Mr. Monk, qui avaient le contrôle des dépôts faits aux Banques entre les mains du prothonotaire sans que l'Appelant s'en mêlat aucunement, quant à Mr. Monk du moins. Mais il a été aussi prouvé que les dépôts faits aux Banques, tant ceux provenant de la Cour Supérieure, que ceux provenant de la Court de Circuit, se faisaient indifféremment au nom du prothonotaire, sans spécifier pour quelle Cour ils avaient été reçus et sans qu'il en fut tenu un compte distinct. (Voir témoignage de Honey, apparaissant au factum de l'Appelant.)

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De tout ce qui précède le, je suis d'avis que les prétentions de l'Appelant sont mal fondées et que celles des Intimés sont en tous points correctes. Je pense, avec le Juge en première instance, que le jugement du 25 Novembre, 1867, a été bien rendu, qu'il n'était pas nécessaire que les représentants de Monk et Coffin fussent en cause, que l'Appelant étant le seul survivant, les représentait tous, et pouvait être condamné, comme il l'a été, quoiqu'il ait cessé d'être prothonotaire en vertu de la commission qui les avait nommés tous trois; que ce jugement du 25 Novembre, 1867, a en outre acquis force de chose jugée, vu qu'il n'en a pas été appelé; au reste ce jugement n'était pas nécessaire pour servir de base à la règle du 23 Juin 1868, sur laquelle a été rendu le jugement dont est appel. Je pense que le mode sommaire, employé contre le dit Appelant, était convenable et légal, quoiqu'il eût cessé d'être officier de la Cour, en vertu de la commission qui le nommait conjointement avec Monk et Coffin, qu'il suffisait qu'il eût été officier de la Cour, et que, en cette qualité, il eût contracté des obligations qui n'étaient pas acquittées; le décès des deux autres n'exonérait pas l'Appelant des obligations pour l'accomplissement desquels il était solidaire avec eux.

Ces objections, que je déciderais contre l'Appelant, regardent la forme seulement; quant au mérite de la question qui consiste à savoir si la lettre du 4 Juillet 1844, qui accompagnait les lettres patentes du 5 Juillet, 1844, a eu l'effet de changer, mitiger ou diminuer les droits et obligations que la loi impose aux prothonotaires de nos Cours, lesquels, le Gouvernement Exécutif à bien droit de nommer, mais dont les devoirs et la responsabilité sont réglés par la loi, indépendamment du contrôle de l'Exécutif, auquel appartient seulement le droit de nomination et de destitution. Cette lettre d'instruction me paraît être sans effet quelconque sur la décision de la présente cause. L'arrangement ou accord du 13 Mars 1845 l'est également, pouvant valoir entre les parties contractantes, mais ne pouvant aucunement changer la position du public à leur égard.

La procédure adoptée contre l'Appelant était correcte et légale; le jugement préliminaire, lui ordonnant de payer la somme réclamée par les Intimés était valable, et pouvait servir de base à la contrainte par corps ordonnée, quoi qu'il ne fût pas nécessaire à cet effet. Et définitivement, au mérite, l'Appelant était responsable du dépôt dont est question, malgré le décès de ses deux associés, et quoi qu'il eût cessé d'être prothonotaire en vertu de la commission qui l'avait nommé avec eux.

Je confirmerais donc les deux jugements dont est appel, savoir celui rendu en première instance par le Juge Torrance le 30 Septembre, 1869, ordonnant la contrainte par corps sur la règle, obtenu de la Cour Supérieure en date du 25 Juin, 1869, et celui de la Cour de Revision le 31 Mars, 1870, confirmant le premier purement et simplement.

DUVAL, C. J., said the objection to the judgment was no more than a verbal criticism. The person who drew up the judgment wrote "the late Prothonotary." He should have said "the heretofore Prothonotary." He used language, however, which every man understands—language which is used every day. We use many similar expressions. This objection could not afford any ground for denying a party his rights. He came next to what appeared, at first sight, to be

a serious objection, though on examination it was found not so, for his Honour held that the monies in the Prothonotary's hands were held under judicial authority. It was said that this was an improper proceeding against the appellant; that the recourse should be by action and not by summary proceeding. It was evident, however, that there would be no use in bringing an action, for if there were no *contrainte par corps* on the summary proceeding, there would be none on the action. But he held the summary proceeding to be the correct one. Mr. Papineau was at the time Prothonotary, and was held jointly and severally for the monies. Did the death of Messrs. Monk and Coffin relieve him from this responsibility? Certainly not. Then, it was said that the Crown had relieved Mr. Papineau from this responsibility. A letter was produced which it was said relieved him. His Honour was satisfied that this letter never received the sanction of the Government of the day. It was evidently written by some one vested with a little brief authority in office, and was a most foolish letter. A private letter from a Secretary of State could not relieve Mr. Papineau from his responsibility. Even if the letter had been sanctioned by the Executive, it could have no such effect. Any exercise of the prerogative limiting the responsibility of an individual in such a manner would be a nullity. Such being the case, the judgment should be confirmed.

DRUMMOND, J., explained that he had not referred to the letter in support of his opinion.

Judgments of S. C. confirmed.

Bethune & Bethune, for appellant.
J. A. A. Belle, for respondents.
(S. B.)

SUPERIOR COURT, 1870.

MONTREAL, 30TH DECEMBER, 1870.

Coram BERTHELOT, J.

No. 755.

Morrison vs. *Delorimier.*

HELD—That when the plaintiff has closed his *Enquête*, he cannot cross-examine the defendant's witnesses in such a way as to endeavour to make proof of facts which he has an interest in establishing, unless such cross-examination arise fairly from the examination-in-chief.

This was a motion to determine an objection made at *Enquête* by defendant to a question submitted by way of cross-examination to one of defendant's witnesses, and which the presiding judge had reserved for hearing *in banco*.

The plaintiff had closed his *Enquête*, and the question tended to prove certain facts in favor of plaintiff, and did not arise fairly from the examination-in-chief.

PER CURIAM:—It is not competent to the plaintiff to make the defendant's witness his own, he having already closed his *Enquête*. The objection, therefore, is maintained, and the further examination of the witness is ordered to be continued.

Objection to evidence maintained.

John J. Maclaren, for plaintiff.
F. P. Pominville, Q.C., for defendant.
(S.B.)

COUR SUPERIEURE,

En Revision.

MONTREAL, 30 NOVEMBRE 1871.

Coram Mondelet, J., Torrance, J., Beaudry, J.

No. 1228.

Duchesnay et al. vs. *Vienne, et Vienne*, Demandeur en faux, *et Duchesnay* et al., Défendeurs en faux.

Juge :—Qu'il n'y a, en loi ni en fait, lieu à l'inscription de faux formée en cette cause ; bien que les irrégularités qui ont été commises sont réprehensibles.

Les deux pièces arguées de faux sont : 1o. un bref *d'alias venditioni exponas* en date du 5 avril 1870, rapporté devant la Cour Supérieure, à Montréal, par le Shérif du district de Joliette, le 9 mai 1870. 2o. Un fiat filé le 6 avril 1870, réquérant tel bref.

La requête en faux fut accordée par la Cour Supérieure à Montréal, (Beaudry, J.) le 9 juillet 1870 et il fut permis au défendeur opposant, de s'inscrire en faux tant contre le dit bref que contre le dit fiat.

La contestation ayant été liée et les parties ayant procédé à leur preuve respective, elles furent entendues au mérite sur la demande en faux.

Le demandeur en faux disait : le bref en question fut émané à Montréal le 5 avril 1870 et adressé au Shérif du district de Joliette.

Le 11 avril, le Shérif fit publier un premier avis de vente dans le No. 87 du Journal " La Gazette de Joliette," mais la deuxième annonce n'y pût paraître, vu la suspension soudaine de ce journal.

Le bref fut renvoyé par le shérif et le bref qui ayait été fait d'abord rapportable le 28 avril 1870, fut changé en y substituant le 14ème jour de mai, comme jour de son rapport ; et le fiat fut aussi changé pareillement.

Le shérif de Joliette recommença ses annonces dans le journal " La Minerve."

Une opposition afin d'annuler fondée sur ces moyens fut faite par le défendeur ainsi que l'inscription de faux.

Les défendeurs en faux disaient : Sur la demande des parties intéressées le bref fut changé quant au jour de son rapport par le Protonotaire qui parapha le renvoi, et ce changement eut lieu sur le bref même et dans le *fiat* et le régistre. Le shérif, examiné comme témoin, a déclaré que c'est sur ce Writ qu'il a toujours procédé, il est inutile de rappeler que le changement du rapport d'un bref s'est pratiqué constamment et que cela ne constitue pas un faux.

Le fait de rayer des mots dans un Writ et d'y mettre un renvoi n'est pas un faux, lorsque ce changement est fait par l'officier même qui a signé le writ et avant son exécution, ces irrégularités ne constituent pas un faux.

Le jugement de la Cour Supérieure à Montréal, (Mackay, J.) rendu le 30 novembre 1870, a maintenu l'inscription en faux. Il est motivé comme suit :

The Court having heard the parties by their counsel upon the merits of the *demande en faux*.....considering the moyens de faux well enough proved, that alterations were and have been made in the writ *alias venditioni exponas de*

terris referred to in the moyens de faux; considering that for various reasons and among them the fiscal one, the *moyens de faux* ought to be maintained, doth maintain the said *demande* on faux and doth declare the pieces attacked to be false and of no force against said opposant plaintiff *en faux*, with costs.

Ce jugement fut porté en Révision devant la Cour Supérieure à Montréal.

Les défendeur en faux par leur factum, prétendaient, qu'il n'y avait rien dans la preuve qui faisait voir que le fisc eût aucun intérêt, que les autorités font voir qu'il n'y a pas même lieu à l'inscription de faux lorsqu'un acte a été antidaté ou qu'on lui donne une date fausse dans le but de frauder le fisc.

Rolland de Villargues Vo. Faux, nos. 81 et 82.

Journal du Palais, 24 Prairial an 13.

Dalloz R. P. 1839, 1. 350.

Pour qu'il y ait faux, il faut qu'il y ait préjudice possible. 4 Boncenne, Proc. Civile p. 4. de Villargues Vo. Faux, no. 1, 9, 39, 65, 66, 75, 76.

2 Carré et Chauveau, p. 400, note 2.

4 Bioche, Dict. Proc. p. 243 No. 43.

Dalloz R. P. 1844, 1, p. 176.

Journal du Palais, an 13, p. 692, 3.

5 Jurist p. 41.

No. 274 Healy et Le Maire, etc., C. S., Montréal, 28 nov. 1857.

Dans tous les cas, le jugement aurait dû ne déclarer nulle que cette partie du bref qui avait été changée, et laisser subsister la pièce dans toute son étendue comme elle l'était avant l'altération prétendue.

12 Poullain du Parc, p. 629 no. 10.

4 Boncenne p. 130 et 131.

2 Carré et Chauveau, Proc. p. 455 no. CX, CIX, no. I.

Le demandeur en faux cita art. 578 et 633 du Code de Procédure Civile.

2 Carré et Chauveau, p. 363 et 368, et 372.

Sirez, 1835, I p. 939.

Bioche, Dict., Vo. Faux inc. no. 34 à 58.

12 Poullain du Parc, p. 624.

1 L. C. Reports p. 154.

9 L. C. Reports p. 465.

8 Dalloz, Jur. Genle. Vo. Faux, p. 325, 343.

La Cour de Révision, par son jugement, a renversé le jugement de la Cour de première instance et il est motivé comme suit:

La Cour considérant qu'il n'y a, en loi ni en fait, lieu à l'inscription de faux formée en cette cause, bien que les irrégularités qui ont été commises sont répréhensibles.

Considérant qu'il y a erreur dans le jugement dont est appel, savoir, le jugement du 30 novembre 1870. cette Cour infirme, casse et met au néant le dit jugement avec dépens. Mr. le juge Beaudry différant.

Dorion, Dorion & Geoffrion, avocats des demandeurs et défendeurs en faux.

Piché, avocat du défendeur opposant et demandeur en faux.

(P. B. L.)

Smith et al., and Hempstead.

COURT OF QUEEN'S BENCH, 1871.

QUEBEC, 19th JUNE, 1871.

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

No 74.

Kelly, Appellant, and Hamilton, Respondent.

HELD:—That the Court has no jurisdiction to grant an application, for delivery of the barge seized in the case under a writ of *revendication*, on security being given.

This was an application by the Respondent, of a similar character to the one made to a Judge of the S. C., and which was rejected, for the reasons reported at p. 168 of the 15th volume of the Jurist.

The hearing took place at Montreal, on the 10th of June, 1871, and the parties were notified that judgment would be rendered at Quebec.

PER CURIAM:—The difficulty with regard to the present application is as to the jurisdiction of this Court. The Code of Civil Procedure has given express jurisdiction to the S. C., and the Judges thereof, over matters such as are involved in the Respondent's petition, but no such jurisdiction is expressly given to this Court, or the members thereof. Under the circumstances [redacted] it is at the least doubtful that this Court has the required jurisdiction [redacted] premises, the application is rejected, but without costs.

Petition rejected.

Bethune & Bethune, for Appellant.
Dorion, Dorion & Geoffrion, for Respondent.
(S.B.)

SUPERIOR COURT, 1872.

MONTREAL, 30th MARCH, 1872.

Coram TORRANCE, J.

No. 489.

Ex parte *James Smith et al.* and *Hempstead*, mis en cause.

HELD:—That under 31 Vict., Cap. 76, the Court will compel the examination of a witness before Commissioners under letters rogatory from abroad.

TORRANCE, J.—This case comes before the Court on a novel application under the Act of the Dominion Legislature, 31 Vict., Cap. 76, by which this Court is authorized to order the attendance of a witness to be examined under a *commission rogatoire* issued out of a foreign court. The witness whom it is desired to examine makes default, and objects that the order was granted without any sufficient or legal evidence being adduced; and he also contends that this Act of the Dominion Parliament is unconstitutional, inasmuch as it has reference to a matter of procedure which is within the jurisdiction of the Quebec Legislature. This, however, is a matter of international comity, and the Act is one which the Dominion Parliament might very properly pass. Matters of international comity are more under its control than under the control of the Legislature of Quebec. The *contrainte* asked for against the witness must therefore be granted without any hesitation.

Kerr, Lambe & Carter, for petitioners.
Abbott, Tait & Wotherspoon, for *mis en cause*.
(J. K.)

COURT OF QUEEN'S BENCH, 1871.

MONTREAL, 9TH SEPTEMBER, 1871.

Coram DUVAL, CH. J., CARON, J., DRUMMOND, J., BADGLEY, J., POLETTE, J., *ad hoc.*

No. 86.

GEORGE A. OSGOOD, ET AL.,

APPELLANTS;

AND

ROBERT C. STEELE, ET AL.,

RESPONDENTS.

HELD:—That a receiver, appointed under the Statutes of New York to an insolvent Insurance Company, (whose powers and functions are the same as those of a foreign assignee in bankruptcy,) cannot intervene in a case in the S. C. here, wherein monies belonging to the Company have been attached before judgment on the ground of insolvency and secretion of estate, and claim to be paid the monies so attached [less plaintiff's costs] for distribution in New York, the legal domicil of the Company.

This was an appeal from a judgment rendered by the Superior Court (HON. MR. JUSTICE MONK presiding) on the 25th of November, 1867, in a case No. 2554, in which the respondents were plaintiffs, the Columbian Insurance Company, of New York, were defendants, the Bank of Montreal and others were *Tiers Saisis*, Benajah Leffingwell *et al.*, were intervening parties, and the appellants were intervening parties *par reprise d'instance*, dismissing the intervention of said intervening parties and appellants; which judgment was confirmed in Review, on the 31st of March, 1869, by JUSTICES MONDELET, BERTHELOT and BEAUDRY.

The judgments appealed from were so rendered under the following circumstances.

On the 20th November, 1865, at the City of New York, the Company, defendant, (a corporation under the laws of New York) granted two policies of insurance on certain portions of the cargo of a vessel called the "Micmac," in favor of one Daniel Butters or order.

The Company, defendant, became insolvent, and on the 22nd of January, 1866, one Cyrus Curtiss was appointed receiver, under certain legal proceedings instituted at New York, to take charge of the property and effects of the said corporation, and to collect, sue for and recover the debts and demands that might and may be due, and the property that might and may belong to the corporation, and to perform all such duties and be subject to such obligations as are imposed by the laws of the State of New York upon receivers, in case of the voluntary dissolution of a corporation.

On the 23rd of January, 1866, Benajah Leffingwell and Joseph Morrison were appointed receivers in lieu of said Cyrus Curtiss, and accepted the appointment on the same day, and gave security, according to the laws of said State, on the 24th day of January, 1866.

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The effect of such appointment, acceptance, and giving of security, was to *vest all* the estate, real and personal, of the corporation in the receivers, who thereupon became and were *trustees* of such estate *for the benefit* of the *creditors* of the corporation and of its stockholders. *Vide* answers of professional witnesses to interrogatory No. 6 of the intervening parties *commission rogatoire* to New York, and the schedule A, attached to such answers.

On the 24th January, 1866, the plaintiffs (claiming to be the assignees of Butters) *who are described as residing in Glasgow in Scotland*, sued out the attachment in the present case, on the affidavit of an alleged agent here, that the Company, defendant, was "insolvent, *en déconfiture*," and that defendant was immediately about to make away with its estate, property and effects.

On the 26th February, 1866, Leffingwell and Morrison intervened in the present case, and in their petition prayed that it should be adjudged and declared that in their said capacity they were legally entitled to have and demand possession for the benefit of the creditors and stockholders of the said Company, defendant, of all and singular the monies, &c., attached in this cause, and that the *Tiers Saisis* be ordered to deliver them over accordingly, the whole on payment by petitioners of all costs then taxable in the case in favor of the plaintiffs.

On the 22nd March, 1866, the plaintiffs contested the petition in intervention, admitting the insolvency of the defendant, but contending that the petition shewed no legal right to withdraw the monies attached from the jurisdiction of this Court.

In the month of April, 1866, Joseph Morrison resigned his appointment, and on the 11th of April, 1866, George A. Osgood was appointed receiver in his stead, and gave all necessary security on the 13th of the same month.

In or about the month of June, 1866, Benajah Leffingwell died, and on the 2nd July, 1866, Cyrus Curtiss was appointed receiver in his stead, and on the same day gave all necessary security.

On the 26th November, 1866, the said George A. Osgood and Cyrus Curtiss, on their petition to that end, were allowed to intervene and take up the *instance*, in the place and stead of the said Benajah Leffingwell and Joseph Morrison.

The parties having been heard, on the merits of the original intervention, before the Hon. Mr. Justice Monk, he rendered judgment on the 25th day of November, 1867, dismissing the intervention, as follows:—

"The Court, having heard the parties by their respective Counsel, as well "upon the merits of the said principal demand, and the attachment therein made, "as upon the merits of the intervention made and fyled in this cause; having "examined the record and proceedings in this cause, the pleadings, and the "proof and evidence of record, and having also seen and examined the declara- "tion made in this cause by the said *Tiers Saisi*, the Bank of Montreal, and "having maturely deliberated;

"Considering that it is established in evidence that the two policies of in- "surance, dated respectively the 20th November, one thousand eight hundred "and sixty-five, and made with the defendant by Daniel Butters, of the property "therein, and in the bills of lading thereof fyled in this cause, mentioned and "described, and were, as were also the said bills of lading, duly assigned and

"transferred to the said Plaintiffs who thereby became, and at the date of the "institution of this action were, assignees, holders, and owners of the said poli- "cies, and of the said goods shipped on board the vessel "Miemac," in a voyage "from Montreal to Glasgow, and were duly insured against the perils of the "navigation on said voyage to the amount of four thousand three hundred and "fifty dollars, currency, in all as mentioned in said policies of insurance, and "that the said vessel, during her said voyage, and also the said goods so insured "and so shipped on said vessel, were wholly lost and destroyed by perils of the "navigation insured against, and that the plaintiffs are entitled to recover the "amount of the said policies, this Court doth adjudge and condemn the said "Columbian Insurance Company, the defendant, to pay and satisfy unto the "said plaintiffs the said sum of four thousand three hundred and fifty dollars, "currency, being the amount of the said valued policies, with interest thereon "from the twenty-fourth day of January, eighteen hundred and sixty-six, date "of service of process in this cause, until actual payment, and costs of suit *dis-* "*traits* in favor of A. & W. Robertson, the attorneys of the said plaintiffs;

"And considering that the said intervening parties, by reason of anything in "said intervention alleged, or from the proof in support thereof, are not by law "nor by comity entitled to withdraw the monies, effects and property of the "defendant seized in the hands, custody, power and possession of the Bank of "Montreal as *Tiers Saisi*, and referred to in the declaration made in this "cause by said *Tiers Saisi*, nor any part thereof, and that the said monies, "effects, and property so seized, as aforesaid, must by law be distributed by this "Court, according to the course of proceedings therein and the laws of Lower "Canada, the Court doth declare the said Intervention to be insufficient to "maintain the conclusions therein taken, and doth dismiss the same with costs, "and adjudging on the attachment made in this cause in the hands of the said "*Tiers Saisi*, the Court doth declare the said seizure good and valid, and the "same is held and declared to be *tenante* for all purposes of law, and the Court "doth grant *distraction de frais*, as well in the said principal action and on "the intervention, to Messieurs A. & W. Robertson, the attorneys of the said "plaintiffs."

And the following was the judgment in review:—

"The Court, now here sitting as a Court of Review, having heard the parties "by their respective Counsel upon the judgment rendered in the Superio Court "for the District of Montreal, on the twenty-fifth day of November, one thou- "sand eight hundred and sixty-seven, having examined the record and proceed- "ings in this cause and maturely deliberated;

"Considering that there is no error in the said judgment, doth in all things "confirm the said judgment with costs against the intervening parties, distrac- "tion whereof is granted to Messieurs A. & W. Robertson, attorneys for "plaintiffs."

Bethune, Q.C., for appellants: (after reciting facts, pleadings and judg- ments:—

It is respectfully submitted that these judgments sin against the doctrine, that *moveables* have no *situs*, and accompany the person of the owner, so that in

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fictione juris they are always deemed to be in the place of his domicile,—*mobilia sequuntur personam et ejus ossibus adhærent*, and the well recognized principle that all statutable transfers under the bankrupt or insolvent laws of the country of the *domicile* of the *owner* are *universal* in their operation.

Burge, (Colonial and Foreign Laws, 3rd Vol., p. 905) says: "As the judgment is *universal* in bankruptcy, there would be *manifest inconvenience* if the tribunals of several countries, in which there were any effects of the debtor, could *each* take *cognizance* of and adjudicate on his bankruptcy, and *make distribution* of his estate." And at pages 906 and 907 he says: "On this foundation *jurists* maintain their doctrine on the *international effect* of bankrupt laws, and on the *extra territorial operation* of the *title* of the *curator*, *sequestrator* or *assignee*."

Pardessus, (Droit Com., 5 Vol., No. 1094) says, "L'état de faillite, *frappant l'universalité* de la fortune du commerçant, il est *évident* que le *seul tribunal compétent* pour en connaître est *celui de son domicile*."

Boullenois, in his Traité des Statuts réels et personnels, Tit 2nd Ch. 5 Obs.*** quoting RODINBURGH states the rule of law thus: (Ist vol. p. 818) "Il est de la règle, que si les biens d'un débiteur *solvable* sont vendus, *la vente s'en fasse dans le lieu où les biens sont situés, ou dans celui où ils sont saisis*."

"*Mais que si le débiteur est insolvable, la formalité est de se pourvoir en son domicile, parceque s'agissant*, en ce cas, de la discussion de tous ses biens, *les contestations* qui peuvent naître, *doivent être jugées par un seul et même Juge*: Autrement et si cette discussion se faisait dans plusieurs jurisdictions, *il pourrait y avoir des Jugements tout différents*."

P. 819. "*Ainsi, quant aux meubles, leur situation présumée étant dans le lieu du domicile du débiteur, c'est la loi de ce lieu qui en décide*, si ce n'est que le débiteur fût en possession de ses biens, *et que la déconfiture ne fut pas encore déclarée*: auquel cas il faudra suivre la loi du lieu où les meubles saisis se seront effectivement trouvés."

"Si le contrat a été passé hors le domicile du débiteur et que le lieu du contrat donne des priviléges au créancier, que ne donne pas la loi du domicile du débiteur, *dans ce cas c'est encore la loi du débiteur qu'il faut suivre*, celle du contrat ne décidant que de la forme, du mode, de la condition, et généralement de la nature en entier de l'engagement entre les contractants, mais ne faisant point loi à des tiers qui n'ont point contracté dans le lieu."

"Si le débiteur change de domicile, pour lors les droits que les créanciers avaient sur les meubles, *seront régis par les Lois de ce nouveau domicile* et ils se distribueront par privilége, si cette nouvelle Loi le veut; au lieu que par la Loi de l'ancien domicile, ils auraient dû se distribuer par contribution, parceque le changement de domicile fait que les meubles changent de condition."

"P. 834. En saisie de meubles et effets mobiliaires, le droit des saisissants sera réglé par la coutume du domicile du débiteur, quoique la saisie soit faite et exploitée en une autre coutume, de manière que la saisie des meubles d'un débiteur domicilié dans la coutume de Metz, ne donne aucune préférence au saisissant, quoique la saisie des meubles soit faite en la Coutume de Lorraine, dans celle de l'Evêché, ou dans celle du bailliage de Saint Michel, ou, ailleurs, où le premier

saisissant des meubles est préféré aux autres créanciers, bien qu'ils soient antérieurs en hypothèque; de sorte que s'il y a d'autres créanciers opposants à la même saisie, l'on gardera l'ordre de leurs hypothèques, suivant l'art. 17 du tit. 4 des actions personnelles de la Coutume de Metz, *parceque les meubles suivent la personne, et sont censés tre de la Juriadiction où la personne est domicilié.*

"Cette maxime est confirmée par *tous nos auteurs Français* et notamment par d'Argentré, ad consuet. Britann. art. 218, gl. 6, n. 30; Chopin, sur la Coutume de Paris, liv. 1, tit. 1, n. 4; et sur la Coutume d'Anjou L. 3, Chap. 2, tit. 1, n. 4; Bacquet, des Droits de Justice Ch. 3, n. 5, et plusieurs autres côtés par Brodeau, sur M. Louet, Lettre R. N. 31."

The same doctrine will be found in Merlin, Rép., *vo.* Faillite et banqueroute, sec. 11, § 11, art. x., par. 1 and 11, page 500 of 5th ed. Also in 2d vol. Felix, edited by Demangeat, page 204, note (a).

On the whole subject generally, and the right of a foreign assignee, curator, sequestrator, or administrator to control the moveable estate of the insolvent, reference is further made to the following authorities:—

3.—Burge, Colonial and Foreign Laws, from p. 904 to p. 919.

2.—Bell's Com. on the Laws of Scotland, ps. 682, 683, 684 and 685, and notes.

Westlake on Private International Law, from No. 277 to No. 281.

James' Bankrupt Law, p. 42.

Savigny, by Guthrie, ps. 209, 211, 212.

1 Doria & Macrae, ps. 546, 547.

3 Moore's P.C. Rep., ps. 98 and 134.

The attention of the Court is also drawn to the fact that the insurance money was not payable in Canada, but in Liverpool in England, so that the respondents (residents in Scotland) cannot, in any sense, claim to have any specially equitable right to money accidentally found here when the Company became insolvent.

With these remarks the appellants submit that the judgments complained of are erroneous and must be reversed by this Court, and judgment rendered in accordance with the conclusions of the intervention originally fyled by Leffingwell and Morrison.

Robertson, Q.C., for respondents:—It will be seen from the Intervening parties' Exhibit No. 2, annexed to the Commission taken by them to New York, that the receivers were declared to be appointed on a complaint and affidavit thereto annexed, whereby it appeared: "That the Directors of The Columbian Insu-"rance Company, the defendants, have made dividends which did not arise "from surplus profits, and that they have paid to the stockholders a part of the "capital stock thereof, and that the corporation has violated certain provisions "of Acts binding on said corporation."

Two witnesses were examined in New York on behalf of the intervening parties, one being Edward D. McCarthy, the other Dudley Field, who declares he acts as Counsel for the receivers.

They produce extracts from the *Revised Statutes* of the State of New York, and speak as to the powers of receivers appointed in New York State to insol-

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vent corporations, to take charge of the property of insolvent corporations, collect debts and demands due such corporations, and the property which may belong to it in their own name.

The attention of the Court is directed to the answers of these gentlemen to the cross interrogatories of plaintiff, to the seventh interrogatory-in-chief.

Mr. McCarthy says:—"In my opinion a receiver named in a foreign country to a corporation created there, and doing business in New York, could not intervene in a cause pending in New York between a citizen of New York, as plaintiff, and such corporation as defendant, and withdraw property and money seized in the cause from the jurisdiction of the Courts of New York, for distribution in England, or to be disposed of according to English law. And in my opinion the Courts of New York would not discharge a seizure so made, and would not order the property or money seized to be given up to a foreign receiver in such case. And in my opinion in such case, New York creditors would be first paid. And in my opinion the Courts of New York would not recognize and give effect to the power of a foreign assignee named in England to a bankrupt there, in order that they might intervene in a suit pending in the Courts of the State of New York, against the bankrupt at the suit of a New York creditor on transactions in New York, and allow the assignee to withdraw from seizure and from the jurisdiction of the Court, for distribution in England, the property or assets seized for distribution in England, and oblige the New York creditors to rank with the English. And in my opinion, in the case of money or effects seized in the hands of garnishees in the State of New York, a receiver and assignee in bankruptcy, named in a foreign country, could not, under the law of New York, intervene and claim successfully, and get possession of such money and effects seized, for distribution abroad. In my opinion in case monies are attached by New York creditors, as plaintiffs in a suit pending in this State against an insolvent foreign corporation as defendant, with whom he had contracted in New York, a receiver could not intervene in the New York Courts to obtain all the monies, but such monies would be applied to pay the debt of such plaintiff *and other creditors in New York*, before such receiver or assignee could control them."

Mr. Field gives an opinion in exactly the reverse sense, but admits that subsequent decisions to those quoted by him are against his views, but thinks that if the questions were "to be raised directly now, I have the fullest confidence that my opinion above expressed would be sustained. I wish to state that I am Counsel for the present receivers of the Columbian Insurance Company."

The plaintiffs also sent a Commission to New York, under which two lawyers were examined and elaborate opinions given, fully sustaining Mr. McCarthy's opinion, Mr. Birdseye having been a Justice of the Supreme Court of the State of New York and an attorney of 23 years standing. Mr. Emott having been eight years a Justice of the Supreme Court, and one year of that time in the Court of Appeals. Their evidence is printed in the appendix, to which the attention of the Court is directed. It appears therefore from the evidence under the Commissions:

That no such remedy or recourse as that sought for by the intervening parties would be allowed to Canadians in the Courts of New York.

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Comity, therefore, cannot be expected to go so far here, as to give foreigners *greater rights* in our Courts than their Courts allow us in theirs.

In addition to this the recourse sought for by the intervention is part *of the remedy* and must be governed by the *lex fori*.

"In enforcing *any civil right* by suit, the legal remedies—form of proceedings—rules of evidence, &c., are prescribed by the *lex fori*."—1 Burge, p. 30.

The *lex fori* governs exclusively all modes of proceedings, forms of remedies, and executions.—Story Conflict, Nos. 556, 568, 572, 574. 10 Bar. & C., p. 912.

So as to priorities and attachments.

" Foelix, sect. 125.

" Taylor on *Evidence*, p. 59.

" Pothier, *Prescription*, No. 247.

So in 10 B. & C., 912.—Lord Tenterden said: "The party suing and seeking to avail himself of the law of a particular country, must take that law as he finds it."

2 Kent, p. 463.—"The comity of Nations is sufficiently satisfied in allowing foreigners the use of *the same remedies* and to the same extent as citizens."

"Every legal step (to recover a debt) belongs *to the remedy*." 11 Am. Jurist, p. 104.

The respondents, therefore, *en resumé*, respectfully submit:

1. That the seizure before judgment in the hands of the Bank, and the distribution of the effects seized, form part of the remedy, and must be regulated by the *lex fori*.

2. That by the proof of record, it appears that no such privilege as is sought for by the intervening parties would be granted by the laws of the State of New York to any British subject resident out of the United States, and claiming such privilege in a Court of that State. Comity, even if it were applicable as between a single *State*, or the Courts of such State and the Courts of this country, does not require us to grant more than be granted to us in return.

3. The authorities relied on in the Superior Court, in reference to Foreign Assignments in Bankruptcy being recognised in England, are not applicable to this case, nor is the reasoning invoked from the maxim "mobilia sequuntur personam et ejus ossibus adhœrent."

There is neither a question of Bankruptcy nor of transmission of moveables *ab intest.*, in this case. The receivers in question are *officers of the Court* in New York, administrators to wind up the affairs of the corporation, and collect and distribute its assets under a local statute, and with no authority from the United States Government, or any General Law such as the law relating to bankruptcy. They are like the curators named in virtue of our Prerogative Writ Act, to take possession of the property of insolvent corporations, or corporations who have forfeited their charter. Their functions and responsibilities are created by the local act, and restricted by its terms.

Our own statute respecting Foreign Executors and Corporations, (Cons. St. L. C., Chap. 91, Sect. 2.—Says: Foreign "executors, and corporations shall "be held capable of suing and being sued in the same manner as they might be "within the jurisdiction wherein they were created, erected, or recognized."

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This Act speaks of executors and corporations, not of receivers or simple administrators under local Acts: and besides, the right of receivers within the jurisdiction of New York (where they were created) does not give the right claimed by this intervention; namely, to take the monies out of this Court for distribution abroad. An attachment, once made, vests the Court with the right of distribution. In a New York Court a receiver could not oust the Court of its jurisdiction over monies in its hands. Our statute does not recognize the quality of receiver, but gives to executors and corporations the rights of suing and being sued.

In Bruce *vs.* Anderson (Stuart's Rep., p. 127, quoted in Kent *ante*,) English assignees were allowed to fyle an opposition *a fin de conserver*, but not to disturb the rights of domestic creditors. They came in to claim under the law and practice of our Courts to share with other creditors. But the title of the receivers here is not so extensive as the rights of an assignee in bankruptcy, and yet their pretensions are more exorbitant.

The English authorities as to assignees in bankruptcy seem to rest on the supposition that the British Bankrupt Acts affect subjects all over the world, but would not sanction the pretension of the appellants. Even as to executors and administrators of the effects of a deceased person, the rule is, that their authority does not extend beyond the country where they are named.

See reason of this—Story, 2d Ed., sect. 512.

Sect. 513. The *residue* only after satisfying domestic creditors, is transmitted to a foreign country.

Even as to assignees in bankruptcy the weight of authority in the United States seems to be against their right *even to sue* in the United States. Ib., sect. 525.

And, if their power to sue be granted, their right take away to a foreign country the effects seized in this country, does not by any means follow.

Sec. 1, Mont. and Ayrton, p. 752.—Where a creditor (of a firm) who attached in the West Indies, was not compelled to account to the assignee of a partner in England, for the effects attached.

Ib., p. 357.—Where Sir Wm. Grant (3 Merivale, 381) denies the right of an assignee to recover personal property by legal process abroad.

Still less can a foreign administrator, curator, sequestrator, or other representative under local authority, of an insolvent or fraudulent corporation, come into an English Court and ask it to adopt a rule different from that followed by the usual practice of the Court, or to send the monies and effects seized into a foreign jurisdiction and thereby deprive domestic creditors of their rights.

It is submitted, therefore, that the judgment appealed from must be affirmed.

DRUMMOND, J., *dissentiens*, contended that the great question involved in this case was,—are bankrupt or insolvent laws local or universal? And that that question could only be properly answered in the sense that they were universal in their operation. The tendency of legislation has been to extend and not to limit the operation of these laws. The best writers all concur in making these laws universal. And His Honor has no doubt, on the authorities cited in the factum of the appellants (and from which he quoted at length), that the

receivers in this case had a legal right to intervene as they did and be paid the monies presently under attachment, in order that they might be duly distributed amongst the creditors of the insolvent Company at New York, which was the Company's legal domicil.

BADGLEY, J.:—The defendants, an Insurance Company, incorporated under the law of the State of New York, and established in business there, also carried on the business of marine insurance at Montreal, where they took marine risks and issued their policies: amongst these they issued two to cover the sum of $4350, which having become available to the plaintiffs, the respondents, they instituted an action at law in the Superior Court here to recover from the defendants the sum insured, and to this suit they subjoined an attachment and seizure *entiercement* directed to the Bank of Montreal, to arrest in the possession of the Bank, the monies and effects, the property of the defendants, held by the Bank, as garnishee. The Bank made and filed a declaration in garnishment of the defendants' property in its possession, as to which there is no contention, nor is there any to the plaintiffs' claim and demand against the defendants pending the action. The Appellants intervened in the suit, as receivers appointed under the law of the State of New York to wind up the business of the defendants, their nomination having been ordered by the Court at New York having authority therefor under the State law for that purpose, satisfactory cause having been shewn therefor, amongst which causes was the following, that "the "Directors of The Columbian Insurance Company have made dividends "which did not arise from surplus profits, and that they have paid to "the stockholders a part of the capital stock thereof, and that the corporation "has violated certain provisions of Acts binding on said corporation." Under this judicial authority receivers were appointed to take charge of the property of the defendants, to wind up the estate, and to perform the duties of receivers under the Municipal Law of the State. Receivers, as such, were originally appointed by Courts possessing chancery jurisdiction, to receive the rents and profits of land or the profits or produce of other property in dispute: the power to appoint them was discretionary with the Court, the appointment itself being provisional for the more speedily getting in of the estate in dispute and securing it for the benefit of such persons as might be entitled to it and did not affect the right: 3 Atk. 564. The receiver is an officer of the Court, and as such is responsible for good faith and reasonable diligence; he is bound to such ordinary diligence and care as belongs to a prudent and honest discharge of his duties, and such as is required of all persons who receive compensation for their services. These officials by the State Law were invested with special powers and duties necessary for effectually carrying out the purpose of their appointment, and, amongst others, the power of collecting the debts and property belonging to the institution or corporation which they were ordered to wind up, and of suing in their own name, in the State Courts, if proceedings at Law would be deemed necessary; they were notwithstanding only subsidiary officers of the Court, subject to its control and direction, but different *ex qualitis* from assignees in bankruptcy and insolvency acting under the general Bankrupt Law of the country, and would seem to assimilate almost altogether with the sequestrator under our Provincial Law. Here the appellants

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are the duly appointed receivers for the defendants and it may be assumed that they have been duly appointed and are properly before the Court in this cause. In the discharge of their duty, they have intervened in this suit, to collect and receive monies and effects of the defendants in the possession of the Bank of Montreal, and they aver that, as such receivers, they have become trustees of the estate of the defendants for the benefit of their creditors and its stockholders, and are legally vested with all the estate, real and personal of the defendants, including the monies, notes, and credits seized in the hands of the Bank of Montreal as *Tiers Saisis*: wherefore they conclude to be allowed to intervene, and that all the property seized be ordered to be delivered to the intervening parties, and the *Tiers Saisis* condemned to deliver the same, on payment of all costs presently taxable to the plaintiffs.

The plaintiffs, in the issues taken by them against the intervening parties, have denied their claim to intervene, as such officials, in the pending suit, and also their pretension to withdraw from the jurisdiction of the Court here the attached property, seized under its process; and they have likewise denied any obligatory force of the municipal law of New York either over the plaintiffs or their remedial proceedings at law here, and any interference with or control by that foreign law over the jurisdiction of the Superior Court from which the writ of attachment and seizure issued.

The judgment of the Superior Court condemned the defendants in plaintiffs' favour for the amount insured, and rejected the intervention fyled by the intervening parties, and the judgment was confirmed in review. This appeal is against that decision, and the contention here opens two points: firstly, the extent of the effect of foreign laws upon legal rights and proceedings here; and, secondly, the authority of such foreign receivers to, in effect, set aside the jurisdiction of the Provincial Court, and to withdraw from the legal effect of its process of attachment the distribution of the property seized under its authority. Upon the first point it is clear law in principle as demonstrated by Story, in his Conflict of Laws, that foreign laws are not extra territorial; he says: "It is difficult to conceive upon what ground a claim can be rested to give to any municipal law an extra territorial effect when those laws are prejudicial to the rights of other nations or to those of their subjects." And he adds: "A state has just as much intrinsic right and no more, to give to its own laws an extra territorial force as to the property of its subjects situated abroad, as it has in relation to the persons of its subjects domiciled abroad. Every nation has an exclusive right to regulate persons and things within its own territory according to its own sovereign will and public policy," and hence he concludes, "that whatever force and obligation the laws of one country have in another, depend solely upon the laws and municipal regulations of the latter, that is to say, upon its own proper jurisprudence and polity, and upon its own express or tacit consent." Now it is true that, in many cases, English Courts, as well as our own, inquire and act upon the foreign law, as in contracts made in a foreign country, where, by express reference or by necessary implication, the foreign law is incorporated with the contract, and proof and consideration of it are necessarily admitted, because the *lex loci contractus* and the *lex loci solutionis* prevail solely to show the circum

stances attending the existence of the contract, or for the purpose of construing the contract. It would seem, therefore, that upon general principles of law, the foreign municipal law of the State of New York cannot control or interfere with our jurisprudence or with the jurisdiction of our Courts of Justice, unless by express or tacit consent of our provincial law; and this introduces the second point above stated, namely, the right of the appellants not only to intervene in the cause but also to withdraw the seized property from the distribution and jurisdiction of the Superior Court. They have rested their claim in both matters upon their quasi legal quality of insolvent assignees of the defendants' estate, upon the principle that moveables are always deemed to be in the place of the domicile of their owner, and that statutable transfers under the bankrupt or insolvent laws of the country of the domicile of their owner, are universal in their application. Now, as to their right to intervene without authority, they are protected to that extent by the express sanction of our provincial law; assuming that they are clothed with the powers above referred to under the law of the State of New York, for the winding up of the estate of the defendants, and in their own names to sue in New York Courts for the collection of debts due to the defendants, the appellants are right in the cause as intervening parties, under the liberal and general provision contained in the 14th section of the first part of the Code of Procedure, under the head, General Provisions: "All "foreign corporations or persons duly authorized under any foreign law to "appear in judicial proceedings, may do so before any Court in Lower Canada." This provision sufficiently satisfies the comity of Nations by allowing foreigners to use the same remedies and to the same extent as citizens. The appellants are properly therefore intervening parties before the Court in this cause, but this does not authorize them to withdraw the seized effects from the jurisdiction of the Provincial Court. Admitting in principle the correctness of the rule generally, that moveables are presumed in law to follow the person of their owner, and are subject to the law of his domicile, and which in this cause being New York, the effects seized would be subject to the foreign laws of that State, that principle would effectively override our provincial jurisdiction, and compel our Courts of Justice to submit to the foreign law and set aside their legally issued process of attachment. But, as already stated, that result could only follow from the express or tacit consent of our law, and in this respect, our Civil Code has made express provision for the matter in contention, by providing this special exception to the general rule, *que les meubles suivent la personne et sont censés être de la jurispriudence où la personne est domiciliée.* By the 6th section of the preliminary title of the Civil Code, page 5, it is enacted: "Moveable property is governed by the law of "the domicil of its owner. But the law of Lower Canada is applied when- "ever the question involved relates to the distinction or nature of the pro- "perty, to privileges and rights of lien, *contestations as to possession, the "jurisdiction of the Courts and procedure, the mode of execution and attach- "ment*, public policy and the rights of the Crown, and also in any other "cases specially provided for by this Code." The French copy of the law is preferable to the English above, in its perfect clearness and precision. The

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attachment in this case is clearly within the exception of the Code to the generality of the rule for moveables, and must therefore stand. Under these circumstances, without adverting to other fatal objections against the claim of the appellants to withdraw the seized property from the jurisdiction of the Provincial Court, the conclusions of their intervention in this respect cannot be legally maintained, and the judgment for this cause must be sustained with costs.

CARON, J :—La contestation est sur l'intervention produite par les appelants laquelle a été renvoyée par le jugement dont est appel.

La partie de ce jugement qui condamne l'assurance (The Columbian Assurance Company) défenderesse dans l'action portée contre elle par les Intimés, demandeurs, ne souffre aucune difficulté non plus que cette autre partie du dit jugement qui déclare bonne et valable la saisie avant jugement faite à l'instance des dits Intimés entre les mains de la Banque de Montréal de certains argents dont elle était en possession appartenant à la dite Compagnie d'Assurance.

La question à résoudre est de savoir: Si les appelants en leur qualité de *Receivers*, charge à laquelle ils avaient été nommés par les tribunaux de New York, et qui équivaut à peu près à notre charge de Syndics (Trustees) aux banqueroutes, ont droit de retirer de la dite banque et de recevoir pour distribution, à New-York, les argents ainsi saisis, pour le profit et avantage des créanciers de la dite assurance, y résidents, en préférence et à l'exclusion des demandeurs, Intimés, et des autres créanciers du pays.

Telle était la prétention des appelants, fondée sur ce que les fonds et valeurs en question étant d'un caractère mobilier, devaient être régis, administrés et distribués d'après la loi de New-York, suivant laquelle la dite Assurance avait été incorporée et où elle avait le siége principal de ses opérations.

Le jugement dont se plaignent les appelants a décidé à l'encontre de cette prétention, en renvoyant leur intervention et en déclarant qu'ils n'avaient aucun droit de retirer de la Banque les fonds et valeurs qu'elle avait, appartenant à la dite Compagnie et qui avaient été saisis et arrêtés entre les mains de la dite Banque; lesquels devaient être distribués par la Cour Supérieure, qui rendait le dit jugement, suivant la loi et la procédure du Bas-Canada.

Ce jugement (Monk, J.,) confirmé en Cour de Révision, me parait correct et j'approuve en tous points les motifs sur lesquels il est fondé.

Au soutien du bien jugé, l'on peut consulter avec profit les raisonnements et les autorités qui se trouvent au factum des Intimés.—A ces autorités l'on peut ajouter l'art. 6, §§ II, de notre Code Civil, au bas duquel se trouvent nombre de citations, établissant la doctrine émise au dit Jugement.

L'on pourrait ajouter que le contrat, dont les intimés demandaient l'exécution par leur action, et par la saisie pratiquée comme dit plus haut, ayant été fait à Montréal, où la dite assurance faisait aussi des affaires comme telle, devrait être exécuté d'après la loi du Bas Canada, et les procédures et la pratique de ses tribunaux.

Je confirmerais donc le Jugement dont est appel, (le Jugement de la Cour de Révision) lequel confirme celui de la Cour Supérieure.

La règle générale sur le sujet, applicable au cas actuel, telle que posée par les

auteurs et entre autres par Fœlix (du droit International, édition par Demangeat, page 255 No. 125, 1 vol.) est que les formalités de justice sont réglées par la loi du pays ou la demande est formée. Cette maxime est reproduite dans notre art. 6, du Code Civil, cité plus haut. C'est dans le No. 126 de Fœlix 1er vol. page 257, que l'on trouve l'explication et l'application de cette règle, qui me parait décider notre question, comme l'a décidé la Cour de première instance, sans qu'il soit nécessaire de s'enquérir quelle est sur le sujet la loi de l'état de New-York; c'est notre propre loi qu'il faut suivre; or, cette loi est contre les appelants et en faveur du Jugement qui a renvoyé leur intervention.

Aux autorités d'autres parts, l'on peut ajouter Holcombe's Leading Cases on Commercial Law, Index, Ve., Assignments and Bankruptcy Law.

Judgments of S. C. confirmed.

Strachan Bethune, Q.C., for appellants.
A. & W. Robertson, for respondents.

(S.B.)

SUPERIOR COURT, 1872.

SWEETSBURG, 26TH FEBRUARY, 1872.

Coram DUNKIN, J.

Lequin et al., petitioners, vs. *Meigs et al.*, respondents.

HELD:—That a by-law of a village municipality may be legally repealed by a *resolution* passed by the body having power to change the by-law, when done in good faith, and without any public wrong or "substantial injustice" resulting therefrom.

PER CURIAM:—The petitioners, claiming to have been and to be duly qualified municipal electors of the village of West Farnham, in the county of Missisquoi, in this district, impeach the legality of the election of the respondents as councillors for that village, on the 8th of January last. They allege that on the 10th of November last, the council of the village, under Articles 617 and 618 of the Municipal Code, duly passed a by-law to divide the village into five wards, and provide (as in such case requisite) for the election of councillors in and for such several wards at the next general election; that such by-law was duly promulgated, and was in force on the 8th of January last; but that the election then held, instead of having been held (as it ought to have been) in and for such five several wards, was illegally held, under the authority of the said council, at only one place in and for the village as a whole; and that the election of the respondents, which took place thereat, was and is therefore wholly illegal. They pray accordingly that the same be so declared, and that a new election, to be held in and for the five several wards, be ordered.

Six of the seven respondents appeared and put in written pleadings by which they raise two distinct issues; the one, by denying the qualification of one of the petitioners to be received as such, by reason of his not having been and not being a municipal elector, from non-payment of school taxes due by him; the other, by alleging that, on the 11th of December last, the council of the village, by a so-

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called resolution, wholly repealed and annulled the pretended by-law in question, and that the election was therefore duly and legally held without reference to it.

Upon these issues the parties have gone to proof, and have been duly heard.

As regards the first, it is enough to say that both parties have been content to rest their case rather on presumptions which each claims to be entitled to draw from a certain want of precise proof offered by the other, than on such precise proof offered on their own behalf. The view taken by the Court on the other and principal issue makes it unnecessary to consider whether or not the respondents are entitled to judgment on the merely preliminary issue, of alleged want of quality on the part of the petitioners.

The by-law for dividing the village into wards is shown to have been passed on the 10th of November, at a meeting attended by only four members of the Council. The mayor being in the chair and one of the councillors opposing it and in vain trying to obtain a postponement of the question to the next meeting when a fuller attendance of councillors might be had,—it was thus carried by the votes of two councillors only.

The so-called resolution for its repeal is shown to have been passed on the 11th of December, at that next meeting which was attended by all the councillors. The mayor again presiding, the two councillors whose votes had carried the by-law formed the minority, and the repeal was carried by the votes of the other four. Both by-law and resolution are shown to have been promulgated in ordinary course, the latter on the 17th of December, considerably more than fifteen days before the date of the election. The council, after voting the repeal, also by a later order directed the holding of the election as it was held, at one and the same place for the village as a whole. Three out of the four councillors who had voted for the repeal were thereat elected, together with four new men; the two whose votes had carried the by-law not being elected.

The question turns upon the legality, or otherwise, of this alleged repeal, as warranting the election held.

The petitioners contend that article 460 of the Municipal Code defines restrictively the objects for which a council may act by resolution, in contradistinction from by-law,—the matter of the division of a village into wards under articles 617 and 618, not being of the number; that a by-law, in the nature of things, requires to be amended or repealed by by-law; and that article 463, which provides that by-laws submitted for approval of the electors, or of the Lieutenant Governor in Council, or of both, can only be amended or annulled by another by-law, approved in the same manner, very sufficiently confirms this view.

Admitting this, however, the question recurs, whether or not the informality of assuming to repeal a by-law by a vote of the council styled a resolution, and promulgated as such, instead of so doing by a vote of the council duly styled a by-law and promulgated under that designation, is, under the circumstances of this case, a fatal informality.

Looking back to cases indicative of the meaning originally assigned to the word "by-law," in reference to the action of corporations thereby, the Court does not find anything like a marked distinction between a by-law and a resolution. On

the contrary, (in the case, it must be admitted, of corporations having a merely private character,) it has been held, that a Court may even presume a by-law, its terms and adoption, from the usage and conduct of the corporation and its officers, and in like manner, from non-observance of one, may presume a subsequent by-law to repeal or alter it. (Attorney General vs. Middleton, 2 Vesey Sen. 328; cited Angell and Ames, edition 1846, p. 327.) Here, something less than a regularly proved resolution is made to serve as a by-law. In the case of Garrett vs. Newcastle (3 B. and Adolph. p. 252) where the question was of the action of a Corporation in England, of a municipal character, the terms by-law and resolution seem to have been used as absolutely interchangeable. Indeed, the rule in England seems to have been, and still to be, to regard the resolutions of a corporate body in respect of any matter with which it can deal by by-law, as having presumably the nature and quality of by-laws. What is insisted on in regard to amendment or repeal of by-laws is merely that the same power which alone can make shall alone assume to change or unmake. (Angell and Ames, *ubi supra*, and cases there cited.) And in a very late and interesting case, the latest probably bearing on this subject, the Royal Bank of India's case, (Law Rep., 4 Chanc. App. p. 252,), the Court of Chancery Appeal has even gone further. The Bank there in question, by the articles under which it was constituted a corporation, was expressly limited as to conduct of its business, "by such rules, regulations and by-laws as the Directors of the Company might from time to time make, *and which should be entered in a book kept for that purpose and signed by three Directors.*" The directors, or six of them, by a resolution, not entered in such book nor so signed, but simply recorded in their ordinary minute book, had assumed to lay down a rule materially variant from the tenor of an important by-law which had been duly so entered and signed. And the Lords Justices, though it was not necessary for the maintaining of the judgment they gave, that they should do so, yet did expressly hold that this resolution, though not properly a by-law, having been passed by the body which had power to change the by-law, was sufficient so to do.

The Court does not regard these considerations as warranting the conclusion that, under the Municipal Code, the words "by-law" and "resolution" are, as regards a Municipal Corporation, by any means interchangeable terms. The Code distinguishes between them; and a municipal council ought not to deal by mere resolution—whether in the way of original enactment, or in that of amendment or repeal—with any matter properly made by the Code the subject matter of a by-law, as opposed to a resolution.

But where it has done so in good faith, and no public wrong—or, to quote the phrase of article 16 of the Municipal Code, no "substantial injustice"—has resulted, the informality cannot be thought of by the Court, as fatal. Under article 16, it is to be regarded as fatal or otherwise, according as "substantial injustice" may or may not be the result of its being allowed to stand good as the reasonable equivalent of a by-law.

In this case, if only this repealing resolution had been entitled a by-law, and so promulgated, it would have been beyond the reach of criticism,—the law of the municipality, clearly in force on the 8th of January, and regulative of the

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election. No substantial injustice can be apprehended from a judgment of this Court condoning this informality. On the contrary, in view of the ulterior action of the late Council, and of the action of the electors at their meeting, the fair presumption (against which the petitioners have advanced nothing) is, that substantial injustice would be done, were this Court, upon a mere technicality, to give effect to what must be presumed to be the wish of a minority, as against that of the majority of the community interested.

Judgment must go, dismissing the petition with costs.

Judgment rejecting petition.

James O'Halloran, Q.C., for petitioners.

G. C. V. Buchanan, Ernest Ravicot, George B. Baker, for respondents.

(S. B.)

SUPERIOR COURT, 1868.

MONTREAL, 23RD APRIL, 1868.

IN REVIEW.

Coram MONDELET, J., BERTHELOT, J., MONK, J.

No. 802.

Leavitt vs. *Moss* et al.

HELD:—Where two defendants had raised separate contestations in the Superior Court, and in review made one inscription and one deposit, that on plaintiff's motion a double deposit under C. C. P. 497, would be ordered.

(MONDELET, J., dissenting.)

O'Halloran, for plaintiff.

J. J. C. Abbott, for defendants.

(J. K.)

SUPERIOR COURT, 1870.

MONTREAL, 24TH OCTOBER, 1870.

IN REVIEW.

Coram BERTHELOT, J., MACKAY, J., TORRANCE, J.

No. 1783.

Clement dit Lariviere vs. *Blouin* et al.

HELD:—That one inscription and one deposit in review, by the defendant and incidental plaintiff, is sufficient.

D. D. Bondy, for plaintiff.

R. Laflamme, Q.C., for defendants.

(J. K.)

PRIVY COUNCIL, 1872.

WESTMINSTER, 3RD FEBRUARY, 1872.

Coram SIR JAMES COLVILE, JUDGE OF THE HIGH COURT OF ADMIRALTY, SIR MONTAGUE SMITH, SIR ROBERT P. COLLIER.

THE HON. ROBERT JONES,

APPELLANT;

AND

THE STANSTEAD, SHEFFORD AND CHAMBLY RAILWAY COMPANY,

RESPONDENTS.

HELD:—That the fact of the respondent, under its charter, having built a railway bridge across the River Richelieu, and carried passengers, &c., over such bridge in connection with the ordinary railway traffic, within the limit within which the Legislature, by a previous charter to appellant, prohibited the erection of a toll-bridge and the carrying of passengers, &c., for hire across the Richelieu, did not give rise to an action in favor of appellant *en démolition de nouvel œuvre*, and for an injunction and damages.

This was an appeal from the judgment of the Court of Queen's Bench for Lower Canada, which confirmed the judgment reported in the 17th vol. L. C. Law Rep., pp. 81 *and seq.*

PER CURIAM:—This is an appeal from a judgment of the Court of Queen's Bench of Lower Canada, affirming a decision of the Superior Court of that Province, dismissing the appellant's action.

Whatever may be the precise technical nature of this action, it is plain that both in its substance and form it is founded on a supposed wrong done by the Railway Company to the appellant in the erection of a railway bridge over the River Richelieu, by which he alleges that certain rights, conferred upon him by Statute as the owner of a bridge over that river, have been unlawfully infringed.

There can be no doubt that the Company have Legislative authority under their Act to carry their railway over the river by a bridge, and it was admitted by the learned Counsel for the appellant, in the outset of his argument, that having such power, the building of the bridge would have been lawful, and this action, therefore, not sustainable, if the Company had taken proper proceedings under their Act to assess and give compensation to the appellant; but he contended that these proceedings were a condition precedent to the right of the Company to exercise their statutable powers, and that before taking them, they were in no better position than if the powers had never been granted, and they were strangers committing a wrong.

Much greater prominence has been given to this contention at their Lordships' bar than was done in the Courts below, where other important points arising in the case were more fully discussed.

The question thus raised involves the construction of the General Railway Acts of the Province, upon points of some practical importance, and if decided according to the appellant's contention, Railway Companies would be in peril of committing, involuntarily, a variety of wrongful acts in the execution of their works.

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The facts of the case are as follows:—

By a Statute of Lower Canada, (6 Geo. 4, c. 20,) the appellant was empowered to build a bridge over the River Richelieu; to take tolls or pontage from persons using it; and to erect toll houses and turnpike. He was bound by the Act to maintain the bridge. The benefits to be derived by the appellant from the tolls was protected by the 10th section of the Act, which is as follows:—

"As soon as the said bridge shall be passable and opened for the use of the public, no person or persons shall erect or cause to be erected any bridge or bridges, or works, or use any ferry for the carriage of any persons, cattle or carriage whatsoever for hire across the said River Richelieu, within one-half league below and one league above the said bridge; and if any person or persons shall erect a toll-bridge or toll-bridges over the said river within the said limits, he or they shall pay to the said Robert Jones, his heirs, executors, curators and assigns, treble the tolls hereby by this Act imposed for the persons, cattle and carriages which shall pass over such bridge or bridges: and if any person or persons shall at any time for hire or gain pass or convey any person or persons, cattle or carriages, across the said river, within the limits aforesaid, such offender or offenders shall, for each carriage or person, or animal so carried across, forfeit and pay a sum not exceeding forty shillings currency."

The bridge was built and has been used for several years by the public on payment of toll.

By another Canadian Act, 16 Vict., c. 107, the respondents were authorized to construct a railway from a point near Montreal to the Province line, in Stanstead.

In making this railway it became necessary to carry it over the River Richelieu, and, accordingly the Company built a bridge, which forms an integral part of their railway, across the river above the appellant's bridge, and within the prohibited limit, viz., a league of it.

It is not material to go into a minute description of the line taken by the Company for the railway, because it was admitted by the Counsel for the appellant that the act of the Company building the bridge in this place would have been within their powers, and lawful as against the appellant, provided that they had complied with the provisions of their Act.

Whilst the bridge was being built, the appellant served a notice on the Company—not claiming compensation, but denouncing the work as a violation of the privilege granted to him under his Special Act, and he subsequently commenced this suit, which appears to be, in part, an *action en dénonciation de nouvel œuvre*, wherein he claims, in effect, the demolition of the bridge, an injunction, and damages.

Some evidence was given by the appellant that people and carriages had been carried across the river by the respondent's trains, who would otherwise have gone by the appellant's bridge, thereby causing loss to him. It was denied by the Company that any loss was so caused.

Their Lordships do not think it necessary to go into this inquiry of fact on the present appeal, because, assuming that the claims in the action are divisible and independent, and they are all founded on a supposed wrongful proceeding of

the respondents, and unless this is established, the suit even for damages actually sustained cannot be supported.

The claim for damages in an action in this form assumes that the acts in respect of which they are claimed are unlawful; whilst the claim for compensation, under the Railway Acts, supposes that the acts are rightfully done under suitable authority; and this distinction is one of substance, for it affects not only the nature of the proceedings, but the tribunal to which recourse should be had.

It follows from what was admitted by the appellant's Counsel, viz., that the building of the railway would have been lawful provided the Company had complied with the provisions of their Act, and from what has been already said, that to succeed in this action the appellant must establish two things:—

1. That he has some right or property injuriously affected which entitled him to compensation under the Railway Statutes; and (2) that the making of such compensation was a condition precedent to the exercise of the powers granted by these Acts to the Company.

Their Lordships have come to the conclusion, for the reasons hereinafter stated, that, supposing the appellant is able to establish a right to compensation, the making of such compensation by the Company was not a condition precedent to the legality of what they have done.

Having arrived at this conclusion, it is not necessary for the decision of this suit to determine whether the right to compensation exists, but their Lordships think it desirable, in order to explain their view of the case, to consider the nature of the appellant's right, and the manner in which it may have been injuriously affected.

The right is not that of an ancient ferry, with the incidents attached to it by the ordinary law, but a privilege created by a Statute, and defined and limited by it. The right, so created, is to build the bridge over the river and to take toll. It is protected to a limited extent, and a limited extent only, by the prohibitions contained in the 10th section. If the remedies provided by this clause had been co-extensive with the prohibition, and had been all given for the benefit of the appellant himself, it would seem that in such case no action like the present would lie at all, even against a wrong-doer, upon the principle that where a new duty or prohibition is created by statute, and the same statute gives a remedy for the breach by penalty or otherwise, for the benefit of the party grieved, he has no other. (See Lord Campbell's Judgment in Couch *v.* Steel, 3 E. & B., 412, 413.) In the present case, however, the only remedy which is plainly given to the appellant, is the right to the treble toll, and it is by no means clear that the forty shillings payable for each person, &c., carried, is not a penalty which, by section 14, goes to the Crown and the informer. However, it is not necessary now to decide the point whether these remedies exclude the right of action; for their Lordships are not prepared to advise that the action be dismissed on that ground; and whether the right of action be so excluded or not, their Lordships consider that the appellant has a property by virtue of his special Act, which would entitle him to compensation under the provisions of the Railway Acts, if he can show that it has been injuriously affected within the

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meaning of those provisions—which leads to the consideration of the next question, whether it has been so affected, and if so, in what manner by the Acts of the Company?

It has been decided by the House of Lords upon the construction of the English Railway and Land Clauses Acts, that damage caused to property by the authorised use of a railway, after it is made, is not damage resulting from "the construction of the railway," or, "the execution of the works," so as to entitle the sufferers to compensation, and that those who have their properties rendered unfit for habitation by vibration or noise, unavoidably caused in the proper use and working of a railway, can neither bring an action for a nuisance, because such use and working are authorised and lawful, nor obtain compensation, because the Statutes have not in terms given it for such damage. (See Brand *v.* Hammersmith Railway Co., Law Rep. 4 H. L., 171; City of Glasgow Union Railway Co. *v.* Hunter, Law Rep. 2, Scotch Appeals, 78.) The provisions of the Canadian General Railway Acts appear to be substantially to the same effect as the English Statutes, so far as regards the points thus decided, and it was contended by the learned Counsel for the respondents, that the present case was within the principle of these decisions, on the ground that the injury was not caused by the construction of the bridge, but by its use. Their Lordships would certainly think it right to recognise the high authority of the above decisions in their advice to Her Majesty in any case where the circumstances were the same. But it was contended by the appellant's Counsel that the facts of this case were not the same. It was said that, although it may be true that the damage is not complete until the bridge is used for traffic, the injury done in the present case is not merely a nuisance incidentally affecting the enjoyment of property, but the very right of the appellant is directly infringed and disturbed by the competing bridge of the respondents.

To support this view, the recent case of The Queen *v.* Cambrian Railway Company, (Law Reports 6 Q. B., 422) was cited, where the Court of Queen's Bench held that the owner of a ferry was entitled to compensation from a Railway Company for building a bridge which disturbed his custom. In that case the bridge not only carried the railway, but was also a foot-bridge. The distinction between the case cited and those in the House of Lords is certainly fine, and was admitted to be so by the Court; because it was not the erection of the bridge, but the use of it, when made, which really disturbed the plaintiff's ferry. Mr. Justice Blackburn so allows when he says, "an action for the disturbance of a ferry would not have lain for merely building a bridge, but would only have lain where special damage was shown, viz., where it was shown that people used it to cross the river instead of using the ferry." The decision of the Court seems mainly to rest on the ground that the bridge built for the use of foot passengers, when so used, inevitably disturbed the ferry, and therefore was, in law, an infringement of the right. But although such use as would be made of a foot-bridge might inevitably cause a disturbance of an adjoining ferry, it by no means follows that the use of a railway bridge would do so; on the contrary, cases may be conceived where the railway might be so worked as to cause no loss of custom or disturbance to a ferry.

If, however, it be assumed, according to the appellant's contention, that the case cited from the Court of Queen's Bench was properly distinguished from the decisions in the House of Lords, and that the present case is within the principle of that distinction, their Lordships consider that it is not the construction of the railway bridge, authorised by the Statute, but the use of it, when constructed, for the conveyance of traffic, which injuriously affects the privilege of the appellant, and gives him, if at all, the right to compensation, and that in any view of this case he would have no such right unless he is able to establish loss of custom in fact, by the making and use of the railway.

This, then, being the nature of the claim to compensation, and assuming it could be established in law and in fact, can the appellant treat the bridge as being unlawfully built because he has not been beforehand compensated? This depends upon the construction of the Acts.

The 4th Clause of the "Railway Clauses Consolidation Act" of Lower Canada (14th and 15th Vict., c. 51), gives the general right to compensation. It enacts that the power to take lands for the construction of the railway "is to be exercised subject to the provisions and restrictions of the Act," and that compensation is to be made to the owners of lands so taken, "or injuriously affected by the construction of the railway for the value, and for all damages sustained by reason of such exercise as regards such lands of the powers vested in the Company;" the compensation to be ascertained and determined in the manner provided by the Act. By the interpretation clause (7) "lands" are to include all real estate and hereditaments.

The 9th clause, 4th subsection, gives the Company power to make the railway upon the lands on the line of it.

By the 10th clause, subsection 1, a plan is to be prepared of the lands "to be passed over and taken for the railway," and also a book of reference, with names of the owners; and by subsection 4, it is provided that until such plan and book are deposited in manner provided, "the execution of the railway shall not be proceeded with."

Then the 11th clause enacts "that the conveyance of lands, their valuation, and the compensation therefor," shall be made in the manner therein mentioned. This procedure provides for a notice to be given by the Company to the owner, which, in case no agreement is come to, forms the basis of an arbitration.

The 19th subsection provides that upon payment or tender of the compensation awarded or agreed upon, "the award or agreement shall vest in the Company the power forthwith to take possession of the lands, or to exercise the right, or to do the thing for which such compensation shall have been awarded or agreed upon, and, if resistance is offered, a Judge may issue a warrant to put the Company into possession, and to put down the resistance."

There is also a proviso that such possession may be given, where it is necessary to proceed with the railway, without such award or agreement, upon security being given.

It was contended for the appellant that upon these clauses, and especially subsection 19 of clause 11, the powers of the Act could not be exercised until compensation was made.

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Their Lordships consider that this might be so held with regard to the taking lands for making the railway,—a question which does not now arise. But it is a different question whether this is so in the case of lands or easements which are not taken, but only injuriously affected by the railway. It is obvious that cases must frequently occur where injuries may happen subsequently to the building of the railway, and as an unforeseen consequence of the works, such as damage to buildings having a right of support from the adjacent land, appearing only when the excavations for the railway are made, owing to some unknown state of the soil, or injury done to drains, or to rights of passage and communication, and to other non-apparent easements, of which the Company may have had no notice. It is not reasonable to suppose that when the Legislature gave powers to the Company to make the railway on the lands indicated on their plan, it intended that the Company should, in cases like these, be subject to action as wrongdoers, and to the legal liability of having their works stopped, because compensation had not been first made to all persons injuriously affected by the consequences of their operations.

Coming then to the appellant's case, and assuming that he may be able to establish a right which has been injuriously affected, his claim would be founded on this, that his statutable right was disturbed by the railway bridge, carrying passengers and traffic which would otherwise have crossed the Richelieu by his bridge. It has been already pointed out that this injurious effect does not arise necessarily from the construction of the bridge, but may do so from the use of it; and it is apparent that if the railway had never been completed, or if no disturbance had taken place by its carrying traffic, which would have otherwise come to his bridge, the appellant would not have been injuriously affected, or entitled to compensation at all.

The powers of the later Canadian Act (22 Vict., c. 66) appear to be substantially to the same effect as the earlier Act.

The practice under the English Acts has been, that possession of lands cannot be taken until the purchase-money has been paid or secured; but the making compensation for injuriously affecting lands has not been considered to be a condition precedent, so as to leave the Company open to actions, if it has not been made.

In the above case cited to support the claim of the appellant, the remedy was not an action, but proceedings by arbitration, under the Compensation Clauses (Reg. v. Cambrian Railway Company).

It is true the English Acts differ in some respects from the Canadian Statute, and it was pointed out by the appellant's counsel that the prohibition of the 84th section of the English Lands Clauses Act, is confined in terms to the entry upon lands; and that there is no clause in the Canadian Act, equivalent to the 68th Clause of the English Act, which provides a mode in which compensation when not made by the Company, may be enforced.

But it is to be observed, that there are no prohibitory words against entering on lands or exercising the powers of the Act before payment, in the Canadian Act. The words of the 19th subsection are affirmative, that upon payment or

tender, the award or agreement shall vest the power in the Company. It is not enacted that until this is done the authorised works shall not be executed. It is said that this is implied. But when an implication is made, it should be reasonable; and in construing these Acts, it may properly be made according to the subject-matter. Their Lordships are not now dealing with the lands taken for the railway, but with an interest injuriously affected, if at all, by matters arising subsequent, not only to the taking of the lands, but to the construction of the railway bridge. It is not a reasonable construction of the Statute to imply, as a condition precedent, that compensation must be paid for such consequential injuries before doing the work.

It was contended that no machinery was provided by the Act by which compensation can now be assessed, for it was said that unless the notice mentioned in the 7th subsection of the 11th Clause was given, none of the machinery provided by the act could be put in motion. If this is so, it might afford an argument against the right of the appellant to compensation at all, and it might be inferred from it that cases like the present, depending on the use of the railway, were not contemplated.

But it is obvious, as already pointed out, that there may be many cases of damage to property arising during or after the construction of the railway from the works themselves, which would certainly fall within the general obligation to make compensation imposed on Companies by the 4th clause. Their Lordships consider that if in such cases the Company did not, on application, take steps to appoint an arbitrator and proceed to arbitration, the claimant might take proceedings by way of mandamus to compel them to give the notice provided by the 7th subsection of the 11th clause, or to appoint an arbitrator. In such proceedings the Court would determine whether the claimant was entitled to compensation before issuing a peremptory mandamus, as in the case of Reg. *v.* The Cambrian Railway Company.

If the appellant's contention is allowed to prevail, Railway Companies would in all cases of possible contingent claims, however doubtful, be obliged to give notices declaring their readiness to pay compensation (in fact admitting the right to it) at the hazard, if they omitted such notices, of being treated as wrongdoers, and of having their works demolished or stopped.

Their Lordships, for the above reasons, have come to the conclusion that this suit cannot be maintained, and they will therefore humbly advise Her Majesty to dismiss the Appeal, and to affirm the Judgments of the Canadian Courts with costs.

Judgment of the Court of Queen's Bench confirmed.

Hensman & Nicholson, Attorneys for appellants.

Henry Matthews, Q.C., counsel.

Wilde, Wilde, Berger & Moore, attorneys for respondents.

Sir Roundell Palmer, Q.C., counsel.

(S. B.)

CIRCUIT COURT, 1872.

SWEETSBURG, 26TH FEBRUARY, 1872.

Coram DUNKIN, J.

Laraway, Petitioner, vs. *Brimmer et al.*, Respondents.

HELD:—In the case of an election of municipal councillors, that after the presiding officer has received, without objection, a requisition from five or more presumed electors for a poll, and has granted such poll and called on the electors to come up and vote, he cannot legally go back on what he has thus done, and, on the alleged ground of want of legal qualification in some of those who made the demand for the poll, act as if no such demand had been made and received.

PER CURIAM:—The petitioner alleges that at the municipal election held on the 8th of January last, for the East part of the Township of Farnham, in the County of Brome, in this District, he was a candidate, duly qualified, for election as a municipal councillor; that the respondents on the one hand, and himself and six other persons, all duly qualified, on the other hand, were respectively thereat put in nomination as candidates for such election; that the presiding officer, without objection or question from any quarter, received and proposed both nominations, and took the sense of the meeting upon them, and gave it as his opinion that the majority of the electors were in favor of the respondents; that thereupon upwards of twenty electors demanded a poll; that afterwards, when about an hour had elapsed from the time of opening the meeting, and the poll was on the point of being opened, objection was for the first time raised to the qualification of the proposers of the petitioner and his friends; and that, though many electors present instantly demanded to be substituted in their place, and though nearly half the electors present instantly demanded the opening of a poll, the presiding officer, after enquiry as to the qualification of the proposers of the petitioner and his friends, and without enquiry as to that of the proposers of the respondents, declared the nomination of the petitioner and his friends irregular and null, and that he could then receive no new nomination, and could grant no poll, and that the respondents were elected. And he prays accordingly, that the appointment of the respondents so made be declared null, and a new election ordered.

The respondents appeared; but put in no written pleading. The parties have gone to proof, and been heard on the merits of the case.

The material facts, to be established, are briefly these:—The respondents were first put in nomination collectively—their names and surnames given—by two well-known persons present, claiming to be electors, and whose names and surnames were given. The petitioner and six others were then put in nomination in like manner. The presiding officer received the two nominations and proposed them to the meeting, and called for a division, which was had; and he declared himself satisfied that the majority was for the first nomination. A poll was demanded on behalf of the supporters of the second nomination; five well known persons in particular, who claimed to be electors, giving in their names as making the demand. These proceedings not having occupied a full hour from the time

of the opening of the meeting, the presiding officer then waited for some time, and in fact until five or ten minutes after the expiration of the hour. He then set himself, with the secretary of the meeting, to prepare for taking the poll, and (as he states) called on the electors to come up and register their votes. Till then, there had been no question raised by any one as to the regularity of anything that had been done; but then, one of the proposers of the first nomination, addressing the presiding officer, objected that the two proposers of the second nomination, and the five persons who had demanded a poll, were not qualified electors, by reason of their not having paid all municipal and school taxes due by them, and insisted that the nomination was therefore not legally made, nor the poll legally demanded. Thereupon, at least one person present expressed objection to one of the proposers of the first nomination, as not being a British subject, and therefore not an elector; but the objection does not seem to have been formally addressed to the presiding officer, and certainly failed to catch his attention. The presiding officer, on the demand which was expressly made upon him, called up the seven persons who thus stood questioned in the interest of the first nomination, and proposed to them the electors' qualification oath prescribed by article 315 of the Municipal Code. Two of them—one a proposer, the other a demander of the poll—on hearing the oath read, declined to take it, saying they had not paid all their school taxes. Upon demand then made for substitution of other persons in their respective places, the presiding officer at first said he would give five minutes delay for this to be done. But within that delay, being struck by the consideration that the change asked involved, in effect, (as he thought) a new nomination, he concluded he could not allow it as the hour was more than expired, and so declared. And thereupon, in the midst of much confused opposition, which he thought himself precluded from regarding, he pronounced the second nomination and the demand of a poll irregular and null, and the respondents elected.

It was further put in evidence, that on the day in question, one of the proposers of the petitioner and his friends stood on the school assessment roll as owing a certain amount of school tax, which he still had not paid; and that the other of them—being also one of the five demanders of the poll—and also two others of the demanders of the poll, stood on the same roll as owing certain amounts of school tax, which they severally paid two days later.

The respondents, by their counsel, did not go so far in argument as to impeach the petitioner's quality of candidate as entitling him to contest the appointment here in question.

They did contend, however, that, as the second nomination and demand of a poll were not in fact made within the hour, by the requisite number of persons duly qualified as electors, both the one and the other were absolutely null and could neither be amended nor renewed in any shape or way; and in fact, that the presiding officer was altogether right in the course he took.

The petitioner by his counsel on the other hand, maintained that the four persons in question are not even now sufficiently shown to have been in arrear at the time in question for any amount of school tax; and that, whether they were so or not, the presiding officer had, at the meeting, no right to take cognisance

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of any such objection made to them, but was bound to take every one there present as being, for all purposes of the meeting, municipal electors, until such time as the voting should be in progress,—when, and when only, he could entertain question in that behalf, and must solve it purely and simply by the oath, or by the refusal to swear of the individual parties themselves.

The Court is unable to confirm these extreme pretensions advanced on either side. The fact that at a given time a person's name is borne on a school assessment roll for a school tax therein stated as due, raises—with a view to any issue of the kind here involved—a presumption of indebtedness, which such person (if desirous to be relieved from it) must rebut,—whether by showing that he really has paid, or by showing that the supposed tax, by reason of irregularity or otherwise was really not due. In this instance, it is shown, on the contrary, that one of the four persons here in question, said to the presiding officer at the meeting, that he had not paid, clearly implying his conviction that he owed, the tax; that another, besides so saying, paid his tax two days after; and that the remaining two, who at the meeting had said nothing, paid theirs within the same delay. The 84th section of chap. 15 of the C. S. for L. C., which was cited at the argument, merely requires the formalities therein set forth, in order to the constituting of such roll as "*conclusive evidence*,"—that is to say, of course, as conclusive evidence of a precise amount against persons and properties. There is nothing in it adverse to or limitative of the *prima facie* presumption of regularity which must subsist in favor of such roll. Much less is there, or can there be, in it anything limitative of the inferences unavoidably following from the admissions, whether by word or act, of the parties, who, if they pleased, might have contested,—should they, in fact (so far from contesting) practically admit its correctness as against themselves.

Nor can it, by any means be said that the presiding officer at a municipal election is bound absolutely to regard all persons present as electors. He must so presume, unless he knows, or reasonably believes, or is reasonably notified, to the contrary. But the Code is far from making him a merely ministerial officer, or from recognizing all persons present as electors. By article 309 it is not made the right of any two persons present to nominate a candidate or candidates. Two "*electors*" (and article 291 tells us what the word "elector" means, and just as clearly requires payment of all municipal and school taxes then due, as it does any other of the qualities enumerated, as a condition necessary to the constituting of any person as an elector at all) "two *electors* may *submit*" names to the presiding officer, either verbally or in writing; but it is only the presiding officer who can "*receive and propose*" the parties so named, "*as candidates*." He is bound to receive and propose all persons whose names are duly so submitted to him; and he is even expressly forbidden so to do, unless as well their names and surnames, as also those of their proposers, are given him. By inevitable inference, if the names and surnames, or any of them, are not given, or if the persons submitting to him the name and surname of any intended candidate are not electors, he is not bound to receive or propose the name of such intended candidate,—and, indeed, ought not knowingly [illegible] so. The petitioner's counsel, indeed, nat[illegible] shrank at the argument, from pushing his principle to the

extreme but fair test of a supposed nomination submitted by persons manifestly and notoriously under age, or of the female sex, or utter strangers to the municipality. It was urged, however, that the law vests in the presiding officer no power of inquiry as to a fact so complex, and which might be so far from easy of ascertainment, as that of a man's electoral qualification under article 291. This is quite true; but the inference supposed does not follow. Time could not possibly be spared for such inquiry, carried on at any length. Nor is it conceivable that occasion could ever really arise for it. Supposing a proposer's quality called in question, whether by the presiding officer or by any one else, there could never be the smallest trouble, in the case of any one *bona fide* about to become a candidate, in substituting or adding one or more proposers of undoubted quality. And any provision for defining and hedging round the presiding officer's discretion and powers in the premises would, therefore, have been almost absurdly out of place in the statute. He could do no real practical wrong, unless it were by a systematic refusal of good men, one after another, as proposers. And against such wrong as that—which would amount to fraud of the grossest kind—no mere text of law could guard. Nor would such fraud, in view of its presumable consequences to the guilty party, if on no other ground, be likely to be often resorted to.

It by no means, however, therefore follows, that after a presiding officer (as in this case) has, without objection raised from any quarter, deliberately received and proposed the names of any persons as candidates—and has taken the sense of the meeting upon them,—and has declared for which of them the majority of the electors present had pronounced—and has received, still without objection, a requisition from five or more presumed electors, for a poll,—and has called on the electors present to come up and vote,—he can go back upon all he has thus done, and on the ground that a nomination or demand of poll was not duly made by qualified electors—or indeed, on any ground—treat such nomination or demand as a simple nullity, and the case as one which requires him to declare candidates elected without a poll being held. It is true that the law contemplates the spending of no more than one hour upon the preliminaries of nomination and demand of poll. It is his duty, as soon as he possibly can after the hour, to proclaim a election, or grant a poll, or (as the case may be) do both. But there is no fatal moment after which he becomes legally incapable of doing either or both of these acts. On the contrary, indeed, reading together Articles 311 and 312, it will be seen that though they allow, they do not absolutely require the demand of a poll to be made within the hour; and that the presiding officer is merely required at the close of the hour, upon such demand made, to proceed "without delay" to hold the poll. Of course, such demand, too, if not made before, should be made "without delay" after. And the presiding officer would err in idly or wilfully extending the time. But the error would not therefore abate his functions as presiding officer. In this particular case, it is in evidence that from the perplexity as to his duty, felt by the presiding officer, in the novel and embarrassing position in which he found himself, nearly two hours passed before his final decision was declared and his proclamation made. And neither party contends that on that account his action can be set aside. To suppose that

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the Legislature meant him to be at one and the same time capable of validly judging and acting as to informalities in the transactions of a past hour, and incapable of so judging and acting in that behalf as to correct such informalities and so validate the transactions themselves, is simply impossible.

Indeed, after once a nomination has been put to vote and been affirmed on division by any considerable number of undoubted electors, it is hard to see to what practical end any question as to the qualification of the two original proposers can be raised. Every elector dividing for it, has in fact made himself a proposer; and must be presumed ready, if asked, instantly to give in his name as such. Not to say, that as matter of principle, the proposition that after such affirmance any amendment of the original nomination can be requisite, on pain of nullity of the nomination, would imply also, that even after election by the polled votes of ever so overwhelming a majority of the electors, the candidates elected would have to be unseated by reason of such nullity,—which then, certainly, would not admit of cure by any process of amendment.

The Court has thus no alternative but to annul the appointment complained of, on the ground of the non-observance of the formalities (necessary under the circumstances as established) of holding a poll and enregistering the votes of the electors.

It is with great satisfaction that the Court is able to add, that neither in the evidence taken, nor yet even in any heat of argument, has there been any suggestion made of intended fraud or unfair practice, as against the presiding officer, or indeed as against any one. The parties to the controversy have presented it purely as one of interpretation of the law,—upon points reasonably admitting of controversy,—and most especially so, where the parties to the controversy (as here) were non-professional men, and were dealing with a statute recently enacted, novel in its general style and phraseology, and in respect of the provisions here in question wholly unlike any older statute heretofore in force in that behalf.

The presiding officer is therefore entitled to be named, as by the judgment of the Court he accordingly is, to preside at the meeting to be held thereunder, on Wednesday, the 13th of March next, for election of Councillors for the Municipality.

Costs must be granted the petitioner, as he is driven, without default on his part, to exercise a legal remedy in maintenance of a right, from which the respondents (with however little sense or intention of wrong doing in the premises) have ousted him.

Judgment in favor of petitioner.

James O'Halloran, Q. C., for petitioner.
G. C. V. Buchanan, for respondents.

(S. B.)

COURT OF QUEEN'S BENCH, 1872.

DISTRICT OF ST. FRANCIS, MARCH TERM.

SHERBROOKE, 14TH MARCH, 1872.

Coram RAMSAY, A. J.

DAVID H. POPE,

AND

APPELLANT;

JOHN GRIFFITH,

(*Collector of Inland Revenue*),

RESPONDENT.

HELD:—That no appeal lies to the Court of Queen's Bench, exercising the jurisdiction of a Court of General Sessions of the Peace, from a conviction by two Justices of the Peace under the Act of the Legislature of the Province of Quebec, 34 Vict., cap. 2, "The Quebec License Act."

In this case the appellant had been summarily convicted by two Justices, under sections 4 and 5 of the Quebec License Act, for that he did, at the Township of Hatley, on the 8th January, 1872, at the inn (a place of public resort,) occupied by him in Hatley aforesaid, unlawfully keep and suffer to be kept and have in his possession, for retail at said inn, a quantity of spirituous liquors, without having a license to that effect, and was condemned to pay a penalty of $20 and costs, and, in default of immediate payment, to be committed to gaol for three calendar months, unless said fine, &c., should be sooner paid. The appellant deposited the amount of the penalty and costs, as required by section 195 of the License Act, and appealed to the Court of Queen's Bench, discharging the functions of the Court of Quarter Sessions, there being no Court of Quarter Sessions in the District of St. Francis. The points urged by the appellant were that the conviction was not supported by the evidence, that there was no proof that the appellant kept liquors for sale by retail, or otherwise, and that the sections 4, 5, 142, 152, 161 and 166 of the License Act, in virtue of which sections the appellant had been convicted, were illegal and null, and that the Legislature of the Province of Quebec was not authorized or empowered to enact these sections, which are in excess of the powers conferred by the British North America Act, 1867, upon Local Legislatures, which have no power to alter or amend the mode of procedure or the laws of evidence in criminal matters, or to alter the criminal law of this Province, nor to prescribe the mode by which the appellant should be tried for the alleged offence committed by him, and that the said Legislature could not give to the Justices the power of trying said offence in a summary manner. The appellant referred to section 91 of the British North America Act, 1867, which gives to the Dominion Legislature exclusive Legislative authority over "the criminal law, except the constitution of Courts of Criminal Jurisdiction, but including the procedure in criminal matters." After argument, the Court expressed a doubt whether an appeal existed from a conviction rendered under the Quebec License Act, and a re-hearing was had upon this point, when the appellant's counsel referred to the Dominion

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Statute 32-33 Vict., cap. 31, sec. 65, amended and altered by 33 Vict., cap. 27, sec. 1, which provides for appeals from summary convictions made by Justices out of sessions, also to section 195 of the License Act, which prescribes the conditions necessary to be complied with before an appeal can be allowed, and to section 150 of the same Act, which provides that such provisions of cap. 103 of the Consolidated Statutes of Canada as are not inconsistent with the License Act shall apply to all prosecutions instituted thereunder. Also to C. S. C., cap. 103, sec. 05, 66.

RAMSAY, A.J.—This case comes before this Court, exercising the jurisdiction of a Court of General Sessions, on an appeal from a conviction by two Justices under the License Act of this Province. A preliminary objection was taken to the reception and hearing of the petition, on the ground that the condition of the recognizance endorsed on the bond was not signed. No authority for this pretension of the respondent has been cited, and I cannot see any reason why the condition should be signed; it is sufficiently identified in the bond.

The conviction is under sec. 4, 34 Vict., cap. 2, of the Statutes of Quebec. The complaint is that appellant did unlawfully keep and suffer to be kept and had in his possession, at the inn occupied by him, being a place of common resort, for sale by retail, certain spirituous liquors, without having a license.

The grounds of the appeal are substantially that the conviction is not supported by the evidence, and that the Act, in so far as it prescribes any criminal procedure, is beyond the powers of the Legislature of the Province of Quebec.

With regard to the second of these questions, I have no doubt that it is competent for this Court, or indeed for any Court in this Province, incidentally, to determine whether any Act passed by the Legislature of the Province be an act in excess of its powers. This is a necessary incident of the partition of the Legislative power under the British North America Act, without reserving to any special Court the jurisdiction to decide as to the constitutionality of any of the Legislatures. The establishment of a general Court of Appeal for Canada, under the power given to Parliament by section 101 of the British North America Act, will not relieve the other Courts of the duty of deciding as to the constitutionality of Statutes; but, if an appeal lies to a general court from every judgment declaring an Act to be unconstitutional, it will have the effect of making the jurisprudence certain and uniform on these important questions. In the meantime it will be most inconvenient if the powers of the Legislature are to be questioned in cases like the present to be decided by one Judge, or on the return of writs of *habeas corpus*, and even by a simple Justice of the Peace. Such decisions will have little or no general authority, so that we may very fairly anticipate to see the most conflicting jurisprudence arising in the different Provinces and perhaps in the same Province. But with this inconvenience I have nothing to do, further than to point it out as illustrated by the case before me.

The argument of the appellant is, that by the British North America Act the powers of the Dominion Parliament are enumerated, and also those of the Local Legislatures. That the powers of the former are "the criminal law, except the constitution of Courts of Criminal Jurisdiction, but *including the procedure in criminal matters*." That among the powers of the Local Legislatures is the

imposition of punishment by fine, penalty, or imprisonment for enforcing any law of the Province made in relation to any matter coming within any of the classes of subjects enumerated in sec. 92 of the British North America Act. Appellant at once admits that the Local Legislature had the power to attach a fine, penalty or imprisonment to the sale or keeping of spirituous liquors without a license, but that having done that a crime was created, and that all the procedure connected with the infliction of punishment for this crime must necessarily be fixed by Parliament and could not be fixed by the Legislature of the Province. In support of this pretension appellant maintains that every infraction of a public law to which any penalty is attached is a crime.

This question naturally suggests the preliminary investigation as to whether any appeal lies from a conviction under the Quebec License Act. On Tuesday last I intimated my doubts to counsel, and my attention was directed to secs. 150 and 195 of the License Act.

It may be presumed from sec. 195, that the Provincial Legislature assumed that there was an appeal, but it seems to me to be going too far, to say that the Legislature took it for granted that the appeal was that prescribed by the Act of Parliament, 32 and 33 Vict., cap. 31, sec. 65. All that sec. 195 says as regards appeals is, that the delay for giving notice of appeal shall be forty-eight hours. Under cap. 99, C. S. C., the delay is three days. This is a step towards assimilating the statute law of the Province to that of the Dominion in this respect, it is, therefore, the reverse of admission that Parliament has the power to prescribe rules for conducting prosecutions under Provincial legislation. But, whatever may have been the prevailing impression with regard to the matter, we must look to the Dominion Act as our guide.

Whatever may be the definition of a crime, I would remind those who lean too much upon definitions, of their danger; it will not be denied, that, in one sense of the word, the act of which appellant is accused is a crime; but it is equally plain that it is not a crime in the sense of sub-section 27, sec. 91 of the British North America Act. Now if the signification attached to the word "criminal" is restricted, when referring to law in this sub-section, why should it be used in a different sense when applied to procedure? It cannot be presumed that in one short paragraph, particularly a paragraph of an enumeration of powers, the Legislature should have intended to apply two different meanings to the same word, especially when by doing so they would be transferring the legislation with regard to a purely local matter to Parliament. The rule is the other way. Sub-section 16 of section 92, reserves to the Local Legislatures generally, the right to make laws affecting all matters of a merely local or private nature in the Province. What can be more local than the procedure to give force to a local law? If this view be correct, it is not a question of clashing, and the provision of sect. 91, giving superior authority to the enumeration of the powers of Parliament, does not apply. The powers are perfectly distinct. Parliament makes the laws of procedure affecting the criminal law which it enacts, each of the Legislatures make the laws of procedure affecting the penal laws which they enact respectively. I am, therefore, of opinion that the appeal does not lie under the Dominion Act 32 and 33 Vict., cap. 31, sec. 65.

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Is there any other Act which gives this appeal? This brings us to consider sect. 150 of the License Act, which extends cap. 103 C. S. C. to the prosecutions under the License Act, in so far as the same have not been repealed by the Parliament of Canada, or are not repugnant to the License Act. It is not very easy to conceive why any allusion is made to the repeal of cap. 103 C. S. C. by Parliament, but it is of no importance in considering the present case, for the Canada Criminal Repeal Act (32 and 33 Vict., cap. 36,) does not "extend to matters relating solely to subjects, as to which the Provincial Legislatures have under the British North America Act, 1867, exclusive powers of legislation, *or to any enactment of any such Legislatures for enforcing by fine, penalty or imprisonment, any law in relation to any such subject as last aforesaid*, or to any municipal by-law relating to any offence within the scope of the powers of the municipality." The result, therefore, is that cap. 103 C. S. C. is in force, so far as it is applicable to local legislation.

There can be very little doubt that it was supposed that this Act gave an appeal from summary convictions in certain cases, that section 150 of the License Act extended it to license cases, and that sect. 195 modified it in some respects. But when we come to examine the matter closely, we find that there has been a misapprehension as to the dispositions of cap. 103 C. S. C., and to have given an appeal from conviction under the License Act, it would have been necessary to include cap. 99 C. S. C., as well as cap. 103 in sect. 150 of the License Act. This error arises from a curious dislocation of the subjects of appeal, and an alteration of the terms used in the 4 and 5 Vict., cap. 25, sect. 65. That Act provided an appeal, under certain conditions, "upon any summary conviction." Other legislation with regard to these appeals took place up to the time of the consolidation of the statutes. Then the clause giving the right of appeal was altered so as to apply only to summary convictions, "under any of the *foregoing* Criminal Acts," and thus amended the section was placed in the Criminal Procedure Act (cap. 99 C. S. C.) while the other dispositions relative to appeals were placed in the Summary Convictions Act (cap. 103 C. S. C.) which alone is extended to the Quebec License Act. We have, therefore, three sections telling us how such appeals shall be dealt with; but none giving the appeal. And although it appears to me that it is only an omission, the not mentioning cap. 99 C. S. C., I cannot go beyond the Statute. The right of appeal is a qualified right, which cannot arise by implication, or exist without express enactment, nor can it be extended by equitable construction.—*Dickinson's Guide to the Quarter Sessions, by Talfourd*, pp. 614, 898.

I am, therefore, under the necessity of declaring that this Court has no jurisdiction in this case, and therefore that the appeal must be dismissed, and the record be remitted to the Court below. Having no jurisdiction at all in the matter, I cannot award costs.

Appeal dismissed.

G. H. Borlase, for appellant.
J. S. Sanborn, Q. C., for respondent.
(G. H. B.)

CIRCUIT COURT, 1872.

SHERBROOKE, FEBRUARY, 1872.

Coram RAMSAY, A. J.

No. 1.

Lindsay B. Lawford et al., Petitioners, *and The Hon. J. G. Robertson et al.*, Respondents.

HELD:—1. That the election of six municipal councillors, who have been elected as such under the provisions of the Municipal Code of the Province of Quebec, may be contested by a single petition presented under Article 346 of the said Code, even though the grounds of contestation are separate and different as to each of the councillors whose election is contested by the petitioners and are not common to the whole of the respondents.

2. That, in such a case, a petition by five municipal electors against the return of all the candidates objected to, and a single bond of security for costs, are sufficient.

3. That the payment of all municipal and school taxes due at the period of a municipal election is an essential part of the qualification of a municipal elector, and that a nomination of candidates made by persons who, at the time of such nomination were indebted for taxes, is void, even although they were otherwise duly qualified electors, and notwithstanding the provisions of Article 16 of the Municipal Code.

4. That, in order to show that municipal taxes are due, it is not sufficient to produce and prove the by-law of the Municipal Council by which they were imposed, but it is also necessary to show that the collection roll of the municipality was made and deposited in the office of the Secretary-Treasurer, and notice of such deposit given as required by the Municipal and Road Act of 1860, sec. 59, § 9, 12 and 18, and Articles 964 and 960 of the Municipal Code, and that, until these formalities have been complied with, taxes are not due or exigible.

5. That a declaration made by the officer appointed to preside at the election, previous to the expiration of one hour from the commencement of the proceedings (Municipal Code, Articles 310, 311,) that certain candidates whose election was not opposed, were duly elected, is not a fatal irregularity, unless substantial injustice appears to have been caused thereby.

6. That, upon a contested election of municipal councillors, a scrutiny of votes may be had under Article 346 of the Municipal Code, even although the votes objected to by the petitioners were not objected to at the time they were given, nor any entry of objection made in the poll-book.

7. That a municipal election may be contested upon the ground of bribery used by candidates and their supporters.

8. That when an error in addition is apparent on the face of the poll-book, the result of which is to seat a candidate who actually received fewer votes than another who was not declared elected in consequence of that error, the mistake will be corrected, and the candidate who actually received the majority of votes will be declared elected.

At the election of municipal councillors for the town of Sherbrooke, held on the 8th and 9th January, 1872, were nominated the following candidates, the Hon. J. G. Robertson and R. D. Morkill—to whom no opposition was offered at the time, and against whom no candidates were proposed—and G. H. Borlase, J. A. Archambault, J. Campbell, J. Precourt and J. Harkness, in opposition to whom were nominated H. R. Beckett, H. C. Cabana, W. B. Ives, N. T. Dussault, and J. Griffith.

The officer appointed to preside at the election declared Messrs. Robertson and Morkill to have been elected unanimously, and a poll having been demanded against Messrs. Borlase, Archambault, Campbell, Precourt and Harkness, the election proceeded and resulted in the return of Messrs. Beckett, Borlase, Archambault, Campbell and Precourt.

The petitioners (five in number) presented to the Circuit Court a petition

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under Article 346 of the Municipal Code, in contestation of the election of Messrs. Robertson, Morkill, Borlase, Archambault, Campbell and Precourt, in which they alleged in substance:—

1. That the nomination of all the candidates whose election is complained of was illegal, inasmuch as they were all proposed and seconded by Wright, Chamberlin and Oliver Cameron, neither of whom were duly qualified municipal electors at the time of such nomination, being both indebted to the town of Sherbrooke for municipal and school taxes, and that the nomination and election of said candidates was, therefore, null.

2. That the candidates Robertson and Morkill were declared to be unanimously elected before the expiration of one hour after the opening of the meeting at which the election took place; that a feeling of opposition to the election of said Robertson and Morkill existed amongst a large number of electors of the municipality, who intended to propose candidates in opposition to them, but were prevented from doing so in consequence of such premature declaration of election, which declaration was therefore illegal, null and void.

3. That a large number of the votes polled for the candidates Borlase, Archambault, Campbell and Precourt, were illegal and null, such votes having been given by persons who were disqualified from voting, as not having paid their taxes, or from other causes; and a separate list of the alleged bad votes polled for each of the above candidates is given by the petitioners, who alleged that the majority of good votes was actually given in favor of the other candidates proposed, namely, Cabana, Ives, Dussault and Griffith.

4. That bribery and corruption were employed at the election, and that a large number of the votes recorded in favor of the said candidates, Borlase, Archambault, Campbell and Precourt, were obtained by means of bribery and corruption.

5. That the presiding officer and poll-clerk employed at the election acted with partiality and in a partizan manner in favor of the candidates petitioned against.

6. That, upon the face of the poll-book an error appeared, by which the candidate Griffith was credited with ten votes less than he actually received, the consequence of which was to change the result of the election as between the candidates Griffith and Precourt, the latter appearing by the return of the presiding officer to have a majority of one over said Griffith, whereas it should have appeared that Griffith had a majority of nine over Precourt.

The petitioners prayed that the election of all the councillors petitioned against be set aside; that the candidates Cabana, Ives, Dussault and Griffith, be declared to have been duly elected; and that a new election be ordered to fill such places as should, in the opinion of the Court, have been left vacant.

The respondents appeared separately, and moved for the rejection of the petition on the following grounds:—

Because the petitioners by their petition seek to set aside and annul the election of six municipal councillors who have been appointed as such councillors of the local municipality of Sherbrooke; and the grounds urged by the said petitioners in support of their petition are separate, distinct and different, as to each

of the councillors whose appointment is contested, and are not common to the whole of the respondents, and the validity of the election of all of the respondents cannot be legally tried or contested by the same petition, and the respondents are illegally joined with each other in said petition.

Because the requisite number of municipal electors have not taken part in the said petition, which seeks to set aside and have annulled the appointment and election of six municipal councillors.

Because the bond of security for costs put in by the petitioners (Articles 352, 353, of Municipal Code) is wholly irregular, illegal and insufficient, and because the said bond of security is only for the sum of $200, and the sureties mentioned in the bond have only justified as to their sufficiency to the extent of $200 and no more; and the said security is wholly insufficient to meet the expense of the separate contestations which must necessarily be raised upon said petition.

After hearing the parties upon these motions, and deliberation, the following judgment was rendered:—

RAMSAY, A. J.—This is a petition to set aside the election of six of the councillors elected at the recent election held on the 8th and 9th of last month, to wit, Joseph G. Robertson, Richard D. Morkill, George H. Borlase, Joseph A. Archambault, John Campbell and John Precourt, and to declare to be elected in the room and stead of four of them, John Griffith, Wm. B. Ives, Napoleon T. Dussault, and Hubert C. Cabana, and that a new election be ordered for the vacant places of councillor.

This proceeding is taken under the authority of Articles 346 and 348 of the Municipal Code.

The grounds of contestation may be classed under five heads.

1st ground.—That the mover and seconder of each of the councillors whose election is contested were not themselves electors entitled to vote.

2nd ground.—That before there was any opposition to two of them, to wit, of Mr. Robertson and Mr. Morkill, and before the expiration of one hour from the opening of the meeting, the presiding officer declared the said two gentlemen to be elected as councillors.

3rd ground.—That the candidature of the other four, to wit, Messrs. Borlase, Archambault, Campbell and Precourt, was supported by illegal votes, either by reason of indebtedness to the corporation, or by absence of sufficient qualification.

4th ground.—Bribery and corruption.

5th ground.—That the poll-book is incorrectly added, and that on the face of it, there is an apparent majority for Mr. Griffith over Mr. Precourt.

It is further alleged that all these irregularities were promoted by the partiality of the presiding officer and of the poll clerk who had been appointed by the influence of the councillors whose election is attacked.

The six councillors whose election is thus attacked have appeared separately, and each has filed a motion to reject the petition. The grounds of these motions are the same in substance. They are:—

1st.—That the six respondents have been improperly joined in the petition —that it is not a petition to set aside the election of certain councillors for an

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objection or objections common to all those petitioned against; but that the petition sets up grounds attacking each councillor individually, and that part of the grounds attach to one or other of the respondents but not to all.

Second.—That there are only five electors petitioners, and that it requires the concurrence of five electors to attack an election by such a petition.

Third.—That the security bond is insufficient, being only the security required for the contestation of the election of a single councillor.

It is at once evident that the three grounds of this motion are all included in the first, and that in reality the second and third are only illustrations of the inconvenience that might arise from allowing the joinder of two or more councillors in a proceeding of this sort.

In support of this motion it is urged that the terms of the law (Art. 346 M. C.) indicates that the petition must be against only one councillor, for the singular number is there used, "any appointment of councillor made by the electors may be contested," &c. It is further said that it would be manifestly unjust to involve, for instance, Mr. Robertson and Mr. Morkill, in the litigation as to the alleged illegal votes given to their colleagues when they were elected by acclamation; that by the accident of their election at the same time they have not incurred a joint responsibility to answer the petitioners, a bit more, said one of the learned counsel, than two men debtors of the same party on two different promissory notes because the debtors lived in the same house. It was also argued by analogy that there could be no such joinder,—that two sitting members of Parliament could not be petitioned against in the same petition; that two individuals could not be called to account for different things by the same prerogative writ.

In support of the petition it was argued that the word councillor in Art. 346 M. C. did not in the least indicate that a petition would only be against each councillor separately; that the form of the sentence showed that this was not the intention, and that, besides, by the interpretation acts the singular number includes the plural. Reference was also made to Arts. 349, 350 and 361, as indicating that the petition might be against several. On the part of the petitioners it was further urged, that they were joined on the same principle that parties liable for a *tort* were joined, that at all events some of the grounds of the petition were common to them all, and that a petition against all those objected to was the only way the candidate, wrongfully excluded, could get his seat without being exposed to making as many petitions as there were councillors, because the candidate was not the opponent of a particular other candidate.

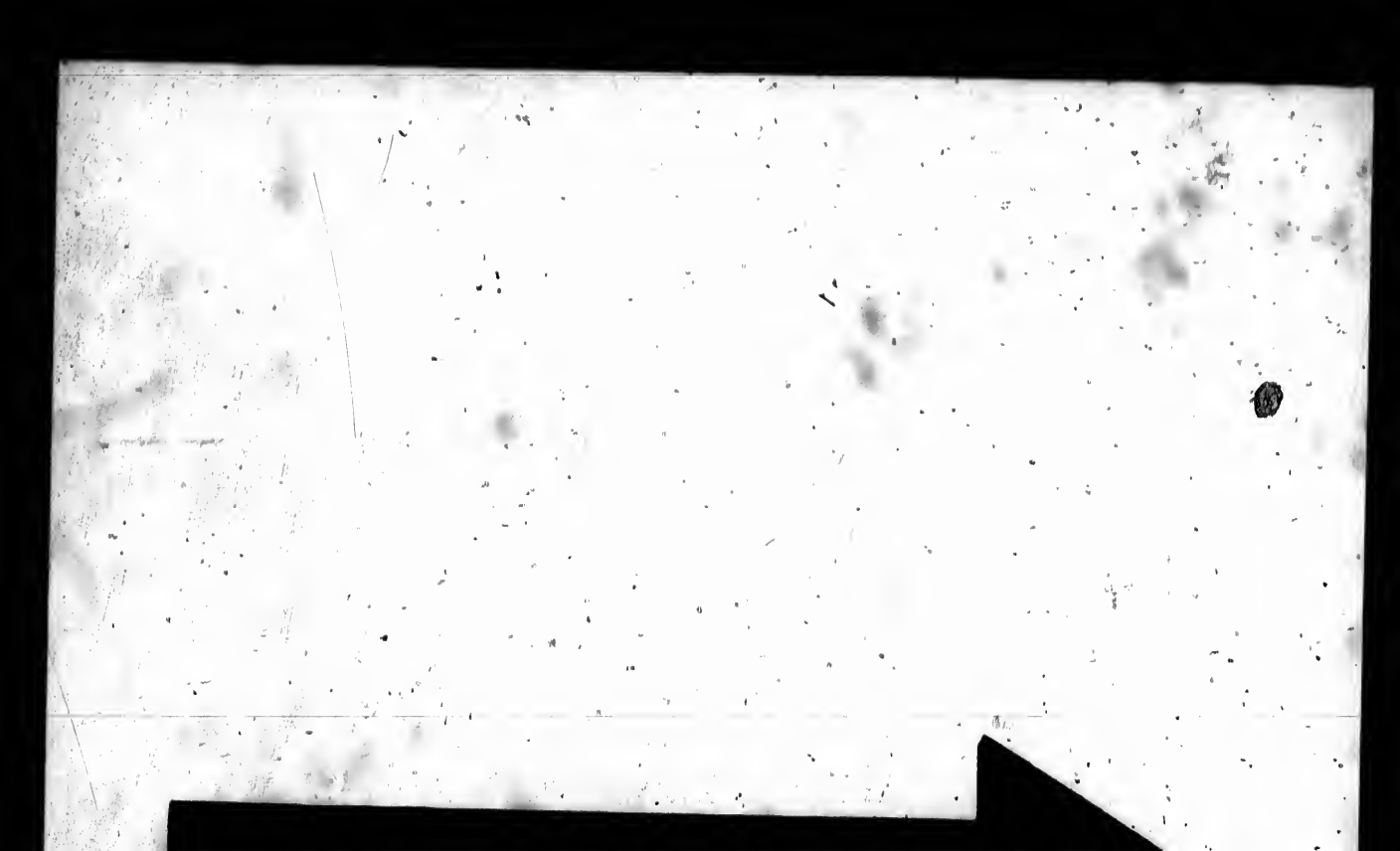
The argument drawn from the wording of Article 346, in support of the motions appears to me to be very unsatisfactory. "Any appointment of councillor," done into ordinary English, is "the appointment of any councillor," &c. This does not necessarily imply that the contestation of the appointment of each councillor shall be separate. On looking at the old law under the C. S. L. C., cap. 24, sect. 34 § 2, we find the expression to be "Every such election," &c., that is, "each one of all such elections," and yet if we look at § 1, we shall see that it was evidently contemplated that a contestation might be of all, or of one or more of the councillors of a local municipality. Again, if

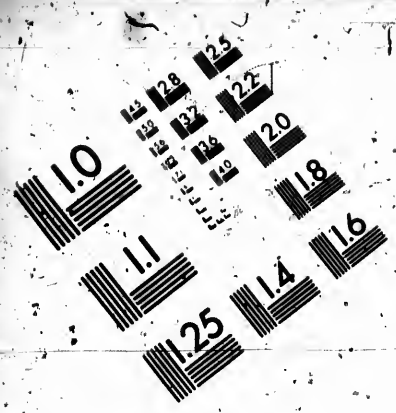
we look at the second paragraph of Art. 340 M. C., we find that "the petitioners may also in their petition, indicate the *persons* who have a right to *the* office in question." Now what is the office in question? Evidently it is not to a particular place of councillor, for more than one person could not have a right to [illegible] to the place of councillor generally, the wording being used in [illegible] in which it is used in Art. 346.

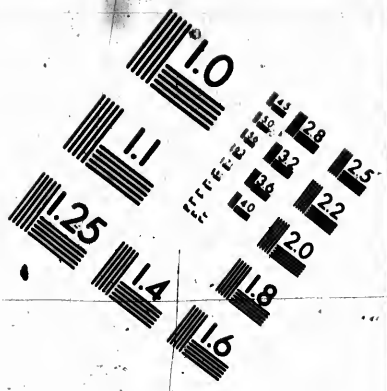
[illegible] says, a copy of *the* petition is served upon [illegible] councillor [illegible] the councillors) whose appointment is [illegible] are explicit. It says, "If *the* judgment annuls the election of [illegible] councillors or *any one of them*," &c. A single judgment may then dispose [illegible] than one election.

From these quotations it appears to be clear that the law contemplates the possibility of the election of more than one councillor being attacked by one petition. But, say the movers, conceding this, more than one councillor can only be joined in the petition where the ground of objection is the same, not similar. As an illustration of what I understand this answer of the respondents to mean —two or more councillors would be properly joined if the petition were of a nature to declare the whole election null from fraud, or because the essential formalities had been neglected, and so much seems to be admitted in the case of Walker et al. vs. Robertson et al., decided in this Court in 1860. It was a petition by ten electors against all the persons elected at one election, and although the form of the proceeding was attacked by an exception setting up a variety of grounds, the misjoinder of the respondents was not raised. Or, perhaps, even more than one might be joined when two or more councillors had joined in corrupt practices to secure their election.

This answer is only calculated to sustain the proposition that no conclusive argument can be drawn from the wording of the statute. I cannot, however, go so far as to say with the petitioners that, from the nature of the case, they were practically obliged to join all those whose elections are called in question by the petition; still less can I adopt the more extreme proposition of one of the counsel for the petitioners, that the respondents could not sever. I don't see that any practical inconvenience should necessarily have arisen if Mr. Griffith, leaving the grievances of Mr. Ives, Mr. Dussault and Mr. Cabana aside, had contested the election of Mr. Precourt, by whom it is admitted he was deprived of his right of being declared duly appointed by the suffrages of the electors; and what Mr. Griffith could do for himself, any five electors could have done for him. Again, there is no limit to the right of two or more defendants to sever in their defence, that I know of. That is, they may urge different pleas, they may be represented by different counsel. Again, the right to sever does not arise from misjoinder, but because one defendant may have a defence peculiar to himself, or a desire to place his defence in a different light before the Court. The separate trial in criminal matters, which is often described as the prisoners severing in their defence, and which formerly was said to extend to felonies and not to misdemeanors, depended entirely on the right to peremptory challenge. Chitty, Cr. Law, p. 535. But though formerly defendants on indictment for a misdemeanor could not have separate trials they could sever in their defence, and one plead







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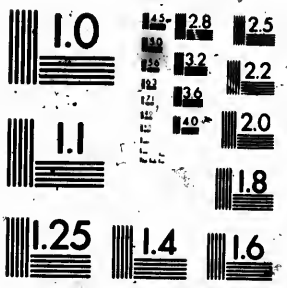

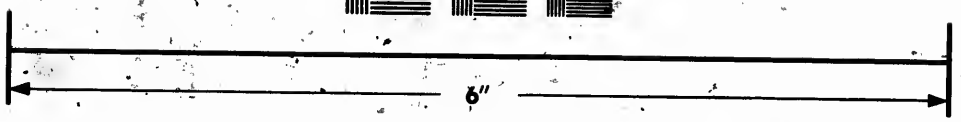

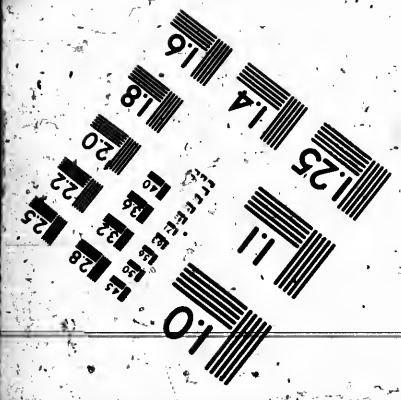

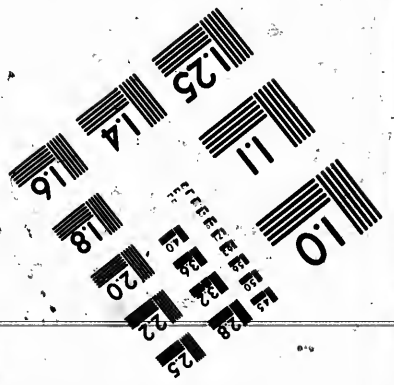

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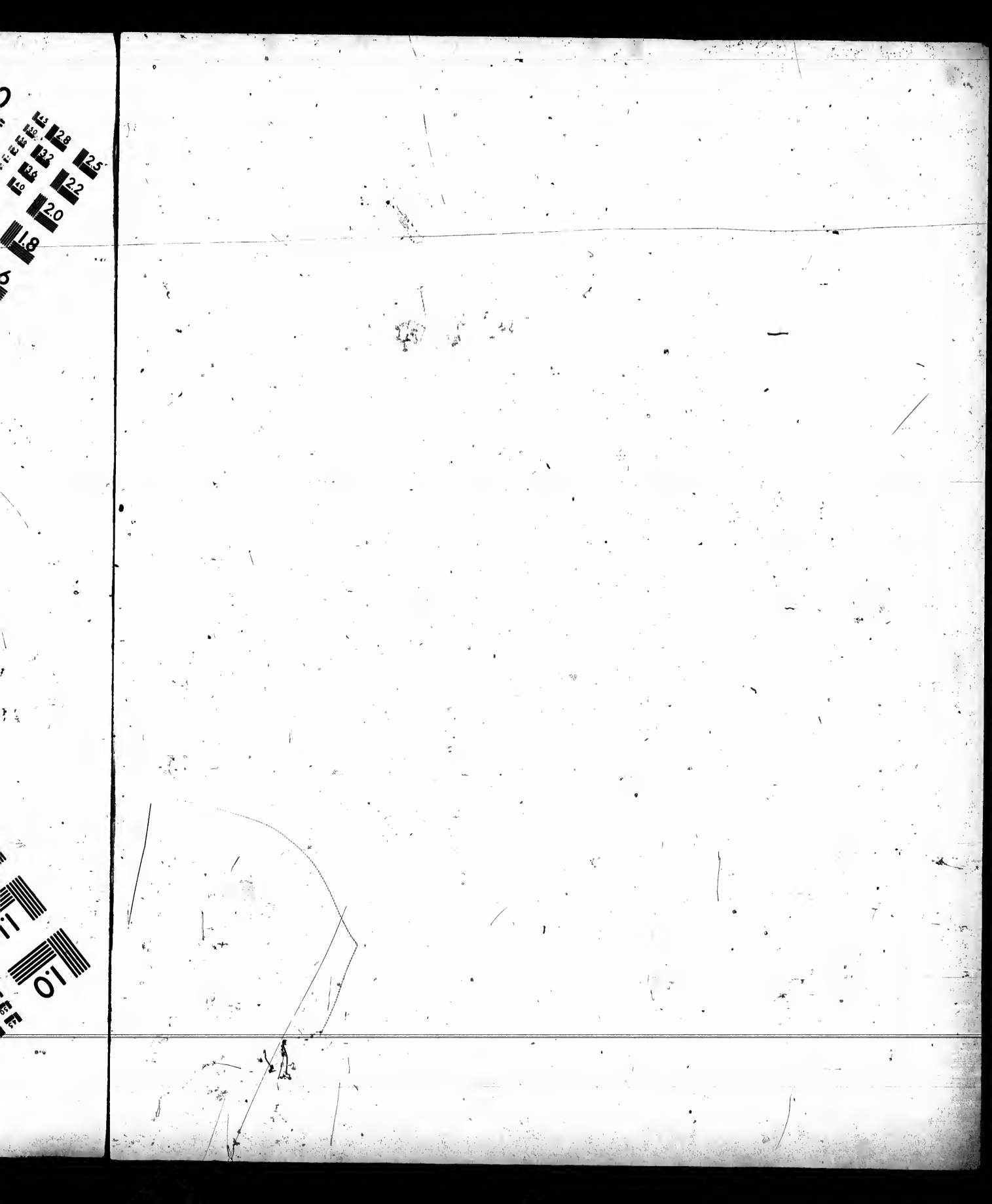

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not guilty and the other *autrefois acquit* or convict or a pardon. Or one might plead guilty and the other not guilty. I presume, in this case, the learned counsel would not have denied to any one of the respondents the right singly to confess judgment.

Nor do I see that the illustration of a *tort* helps us out of the difficulty. A joint *tort*, like a joint contract, gives rise to a joint obligation, and consequently two persons who have combined to do a common wrong may be joined as defendants in the same action. It is scarcely denied by the respondents if this were a petition accusing them of having combined to make a bad election for the purpose of causing themselves to be elected to the exclusion of the petitioners, that the respondents would have been properly joined in the petition; or, if the petition had been in favor of one of the excluded candidates, complaining of injury by the joint action of all the respondents, that, in that case also, they would have been properly joined in the petition; but the real difficulty here is, that it is said that five separate rights are attempted to be tried on one petition as against six separate persons, and that many, if not all the grounds of the petition, are individual to each respondent. Thus, for instance, the want of quality of the mover and seconder of Mr. Robertson has nothing whatever to do with the want of quality of the mover and seconder of Mr. Precourt, although, in fact, the same persons moved and seconded all. As an illustration of the argument of respondents, it is as though you were to sue six men in the same action for one trespass against A, another against B, another against C, and another against D,—nay, more, for the separate trespass of each against the four plaintiffs.

It is undoubtedly the general principle that courts will not take cognizance of distinct and separate claims or liabilities of different persons in one suit, though standing in the same relative positions. 1 Chitty on Pl., p. 44, and Kenyon, C. J., in Birkley and others vs. Presgrave, 1 East, p. 226. But it does not appear that this principle is applicable to matters of elections. In the contestation of the Montreal election separate petitions, it is true, were presented by the same electors against the return of two candidates; but in the Carlow County election the petition was directed againt the election and return of the two sitting members, and so far from the grounds of contestation being common to the two candidates, one ground against one of the sitting members, Mr. Raphael, was that he was an alien. Knapp & Ombler's election cases, p. 451.

If, again, we turn to the cases of *quo warranto* informations, used to test the legality of elections, we find that one *quo warranto* may be granted for distinct offices. Cole on Cr. Informations, p. 188. We next come to the precise case. Cole, p. 143. Also *Ib.*, p. 187. But it may be said that this decision is under a peculiar Statute, totally different from that under which this proceeding is taken. By referring to Symmers' case, where one information was fyled against six different persons for usurping three different offices, we find the whole question reasoned out, and what was decided.

Lord Mansfield said:

"As to the other part of this objection, that this is an information against *different* persons, the answer is, that the Act of Parliament gives a discretionary

power to the court to grant one or more informations, according to the nature and circumstances of the case: and to suppose extravagant cases, or that the court would be absurd enough to join two franchises in different corporations, is to suppose a case that cannot exist. The legislature trusts the court with the discretion of joining them; and upon an application for leave, the court goes into the nature of the question to be tried. In this case, nothing could be more proper than to join the several defendants and the respective franchises they claim, which are three. The right of election is exactly the same, the question is the same, and the evidence the same."

I think it is impossible to fail to perceive, after reading this judgment of Lord Mansfield, how manifestly the legislation in this country, with which we are now dealing, has been influenced by the legislation in England and Ireland, and the jurisprudence upon it. Can it be questioned if this were an information in the nature of a *quo warranto* that this Court could fail to recognize the authority of the Statute of Anne? It seems to me impossible to doubt that prerogative writs were introduced at the cession of the country, as they stood then as part of the public law of the realm, independently of the consideration of all special legislation on the subject since. But if any doubt did exist, surely it was dissipated by the 12 Vic., cap. 41. That Act, if not absolutely declaratory in its form, is at all events of a declaratory character. It is intituled "An Act to define, &c.," and in the preamble it takes the existence of the prerogative writs for granted. It further provides an easy and expeditious mode of proceeding before the Courts in Lower Canada, in matters relating to writs of prerogative and other writs. This is the historical source of the procedure prescribed in the M. C. and adopted in this case, and we may therefore say that a petition to the Circuit Court, such as that now before this Court, is to all intents and purposes a proceeding in the nature of a *quo warranto*. As the Statute of Anne gave the Court a discretion to grant leave to exhibit one information in the nature of a *quo warranto* to try the several rights of divers persons to certain offices and franchises whenever they may properly be determined by one information, so does our Statute require that the Court shall hear the parties on the merits of the petition before ordering proof. Art. 355. Nor do I conceive that this Statute of Anne is a violation of general principles. The electors have a right to insist that all intruders shall be expelled, and that all the rightfully elected shall be permitted to act. There is, therefore, a unity in their right to which the petitioners are entitled, and which they may perhaps have an interest to maintain. Taking this view of the question on general principles, looking at the wording of the M. C., especially of Arts. 349, 350 and 361, with the light thrown on the meaning of these articles by the history of their derivation from the English law as it stood in the 12th Victoria, I am forcibly led to the conclusion that there is no misjoinder of the respondents in the petition, and that the Municipal Code expressly sanctions such joinder, at all events if the alleged usurpations arise out of the same election.

It is scarcely necessary to add that, being of opinion that one petition is sufficient, only one bond is required and five petitioners.

The motions are, therefore, dismissed with costs.

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The respondents then fyled answers in writing to the petition, the first being in the nature of a demurrer, by which they urged that the petition should be dismissed:

1. Because the election of all the respondents was attacked by one petition, the grounds of contestation as to each being separate and different.

2. Because the alleged fact that W. Chamberlin and O. Cameron, at the time they proposed and nominated the said candidates for the office of municipal councillor, at the meeting of municipal electors mentioned in the petition, were indebted to the Municipality of Sherbrooke in certain sums of money for municipal and school taxes, is not a defect or irregularity which in any manner affected the election, and no substantial injustice, or injustice of any kind, could follow from such fact of taxes being due by said Chamberlin and Cameron, and because it is not alleged in the petition that such non-payment of taxes in any way affected the election or operated any injustice whatever.

3. Because the election of the said Robertson and Morkill was unanimous, and no candidates were proposed in opposition to them and no poll was demanded against them, and the alleged fact of non-payment of taxes by said Chamberlin and Cameron is immaterial and irrelevant; and because it does not appear that the nomination of the said two respondents made by said Chamberlin and Cameron was objected to or called in question by any person, but that such nomination was accepted and acquiesced in by the presiding officer and the electors present at said meeting; and it does not appear that any poll against said Robertson and Morkill was at any time demanded, nor that a poll was opened or voting commenced at any time previous to the expiration of one hour from the opening of the meeting.

4. Because it is not alleged and does not appear that the nomination of the said respondents Borlase, Archambault and Campbell was objected to or called in question by any person whatever, but, on the contrary, it appears that such nomination was accepted and acquiesced in by the presiding officer and the electors present at the said meeting, and that a poll was demanded and granted against said respondents.

5. Because the said petitioners are not entitled or permitted by law to demand or have a scrutiny of the votes polled at the said election, or to inquire into the legality or sufficiency of the votes polled thereat, and because the only grounds upon which the election of any said candidates can be contested are "violence, corruption, fraud, or incapacity or non-observance of necessary formalities," and because it was not contemplated by the Legislature that a municipal election should be contested on the ground of supposed illegal voting, and this Court is not empowered to enter into the scrutiny demanded, and because a penalty of illegal voting is provided by law, and also a means of testing the validity of votes by compelling each voter to make oath as to his qualifications.

6. Because it is not alleged and does not appear by the petition that any of the votes of the electors who voted for the said respondents, Borlase, Archambault and Campbell, were challenged or objected to by any person whatever, nor that any objection to said votes, or any of them, was made or entered in the poll-book of the election, and because the votes so received and recorded without objection cannot now be objected to or scrutinized.

7. Because it is not alleged, and does not appear by the petition, that the respondents committed any acts of bribery and corruption, or that the said election was in any way influenced by bribery or corruption, or that any influence, bribery or corruption was resorted to by the respondents, and because the supposed bribery and corruption alleged in the petition is not sufficiently stated to enable the petitioners to have the election set aside, and the allegations with respect to such bribery and corruption are vague and insufficient.

8. Because the allegations as to the supposed partiality displayed at the election by the presiding officer and poll-clerk, are altogether vague and insufficient, and it does not appear by the petition in what way such partiality or influence was exerted.

The respondents also fyled answers in fact, by which they alleged that the nomination of all the respondents, and the election of said Robertson and Morkill were acquiesced in by all the persons present at the meeting, amongst whom were the petitioners, and no objection to such nomination or election was made at the time. That if any nomination of candidates could be declared void in consequence of non-payment of taxes by the electors who made the nomination, then, that certain of the candidates supported by the petitioners were illegally nominated, that is, by persons who were indebted for taxes. That if a scrutiny of votes could legally be had, the respondents alleged that a larger number of persons disqualified from voting by reason of nonpayment of taxes and otherwise, had voted for the candidates supported by the petitioners than for the respondents. That the charges of bribery, &c., made against the respondents, were untrue and unfounded, but that large sums of money had been expended by the petitioners and the candidates whom they supported, and other friends and supporters of said candidates, in bribing and corrupting electors and in purchasing votes in order to secure their election. That the respondents, against whom a poll was demanded, were actually elected by a large majority of good votes.

The arguments and authorities urged in support of the demurrer sufficiently appear in the judgment thereon.

RAMSAY, A. J.—With leave of the Court respondents filed answers in writing to this petition, by which answers five of them contest the sufficiency in law of the allegations of the petition.

The *first* ground of demurrer urged by respondents has already been disposed of on the motions dismissed on Monday.

The *second* ground is also common to all five petitioners. It is, that the mover and seconder not having paid their municipal taxes, is not a material objection to the election itself, and that it was necessary for the petitioners to allege not only the irregularity, but that it had operated substantial injustice.

In support of this ground of demurrer, respondents refer to cap. 24, C.S.L.C., sec. 34, § 7; also to Art. 16 M. C. It is unnecessary to examine the disposition of cap. 24 C. S. L. C., which has been cited, as it appears to me to be superseded by Art. 16 M. C., which expressly provides for the particular matter of the paragraph cited. Art. 16 M. C. is in these words: "No objection founded upon form, or upon the omission of any formality even imperative, can be allowed

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to prevail in any action, suit or proceeding, respecting municipal matters, unless substantial injustice would be done by rejecting such objection, *or unless the formality omitted be such that its omission, according to the provisions of this code, would render null the proceedings or other municipal acts needing such formality.*" The question, therefore, comes to this: does the failure to pay a tax by an otherwise qualified voter render null his nomination of a candidate?

Art. 291 M. C. enumerates the conditions each person must possess to constitute him a municipal elector. Art. 309 only empowers the presiding officer to receive and propose as candidates the persons whose names are submitted to him by *at least* two of the electors present, and the name and surname of the candidate, as well as the names and surnames of his mover and seconder, must be given. It is argued for the respondents that, although all the conditions are included in one and the same article, the absence of one may be more fatal than the absence of another. This may be, but the thing to be shown is, that the failure to pay taxes belongs to the minor sort. Perhaps the failure of the officer of the Corporation to place a duly qualified elector on the list would not deprive him of the right of voting at the election, because it was not his fault, and might be at most only a clerical error. And some argument for such a distinction under the M. C. might perhaps be drawn from the form of the oath, which makes no special mention of the name being on the valuation roll. But here the party has himself failed to perform a duty which the law stipulates as a condition to his being an elector, and electors can alone nominate candidates.

In the case of Reg. vs. Parkinson, L. R., 3 Q. B., p. 11, it was held that "when a municipal borough is divided into wards, the person nominating a candidate for town councillor must be *entitled to vote* for the particular ward for which he nominates, and if he be entitled to vote only for another ward, his nomination and the election of the candidate are void." This case appears to me to be directly in point, and I must therefore hold the second ground of demurrer to be bad.

The *third* ground is, that there was acquiescence on the part of the petitioners as to any irregularity in the nomination. I do not see that this can be decided on demurrer, unless it be that the acquiescence consisted in demanding a poll. Acquiescence may be a plea in the mouth of those resisting the petition; but I don't know of any case in which the mere fact of demanding a poll, taken alone and without any other circumstance, was construed into an acquiescence. Besides there is no allegation that the petitioners demanded a poll, or that they knew that the mover and seconders were not electors. A corporator is presumed to know the contents of his charter, and the law arising therefrom; Reg. vs. Trevenen, 2 B. and A. 339, but he will not be held to know a fact personal to a rate-payer. See Rex vs. Morris, 3 East, 213, and Rex vs. Smith, 3 T. R., 573.

The *fourth* ground is, that there is no means of having a scrutiny of votes laid down in the law, and that the election can only be contested for violence, corruption, fraud, incapacity, or non-observance of the necessary formalities.

The scrutiny is the only way of arriving at the conclusion as to what votes are bad owing to corruption, fraud or incapacity, and it did not require to be indicated in the Statute, *qui veut la fin veut les moyens*. The respondents were

so sensible of this that they endeavored to limit incapacity to the incapacity of the candidate. I see no authority for that; but, putting incapacity aside, how is the corruption of the voter, the fraudulent vote, to be established except by examining the votes objected to, vote by vote, which is a scrutiny.

The *fifth* ground is, that it is not alleged that any of the votes given for the respondents Borlase, Archambault and Campbell, were objected to, or that the parties were sworn.

The words "sworn," "refused," and "objected to," directed to be recorded in the poll-book (Art. 319 M. C.) are borrowed from our legislation as to parliamentary elections. It is not difficult to see the use of the entries "sworn" and "refused," but what is the use of the entry "objected to," unless it be that it is only those "objected to" at the time, and so noted, that can be rejected on a scrutiny? It is not easy to answer this question satisfactorily; but certainly the law nowhere says that a bad vote not objected to at the time it is recorded shall count as a good vote, and I am not aware that the lists of voters objected to, handed in to the committee appointed to try a controverted election, are confined to an enumeration of the names of those objected to on the poll-book. Nor would it be reasonable to establish such a rule, for the objection to an illegal vote may not be known to the petitioner, or he might not be present. It would surely be too much to presume that every voter was present at the recording of the vote of every other voter during two days' polling.

The *sixth* ground is, that it is not alleged that the respondents did themselves commit any acts of bribery, or that the election was influenced by bribery.

On the argument of this ground of demurrer respondents said that at common law bribery at an election was not an offence at all, and that there was no penalty attached to bribery at an election; that the penalty of unseating a member convicted of bribery, and striking off the vote of the elector bribed, no matter by whom bribed, is a statutory provision; and that in cases to which no such statute is applicable, no such penalty or inconvenience attaches. It was further argued that the offence of bribery was only the bribery of officers of justice or others to do a wrong thing, and not the mere offering of money to a person to do that which he had a full right to do. In support of this pretension, a case of Wood and Hearn, 8 L. C. R., p. 332, is quoted. What Chief Justice Meredith said in that case was, "that under the English common law there were no authorities which would justify him in declaring the election of a city councillor null for bribery. Such being the case," he added, "and our statute law being silent on the subject, I think I ought not to do so, for I cannot pronounce a disqualification which the law has not pronounced." And again, "I cannot hold that bribery in municipal elections has the effect of *annulling the votes of the persons bribed*, and of *disqualifying the person by whom they were bribed*." The Chief Justice did not say that bribery was no offence at common law. On the contrary, he quoted Plympton's case, 2 Ld. Raymond, 1377, quoted by the counsel for petitioners, and also Woolrich, who says that offering such a bribe is the proper subject of indictment or criminal information. I have thought it necessary to say so much on the case of Wood and Hearn, as I was unwilling any impression should go abroad with regard to it calculated to shock the feelings

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or subvert the principles of those who look upon bribery with disfavor. I therefore repeat that it was never seriously questioned that bribery was an offence at common law; but it was a question whether, in the absence of any statutory provision, it annulled the vote of the person receiving the bribe, and disqualified the candidate offering the bribe. The law is now no longer silent, and corruption is joined with violence and fraud, as grounds for contesting an election. This must have a meaning, and we can scarcely hold it to be illegal, to allege as ground for contesting an election what the law expressly declares to be such ground. But it is said that corruption is not bribery, and that if bribery is to be proved it was, at all events, necessary to use the two words. I cannot agree with the respondents on this point. To corrupt is not necessarily to bribe, but to bribe is to corrupt, and therefore, by the use of the word of the code, corruption, their allegation in that respect is sufficient. But in addition to this, the words bribery and corruption are both used together in the petition. With regard to the two other points raised by this ground, namely, that the respondents are not accused of being parties to the corruption, and that it is not alleged that the acts of corruption affected the election, I think these objections are answered by reading the petition. It is said that the respondents and their friends obtained votes by means of bribery and corruption, and it is also said that a large proportion of the electors who recorded their votes for the five candidates, Borlase, Archambault, Campbell, Precourt, and Harkness, were influenced to vote for them by money promises and other corrupt practices, "employed and used by the said five candidates last named, and their friends; and twenty-three votes are indicated as having been bribed." The 8th and 9th grounds must stand, because the petition is against the whole election, and it might be that the whole election should be annulled on account of a partizanship so manifest as to make it appear that the true sense of the electors was not taken. It is specially alleged that one candidate who had the majority of votes on the face of the poll-book was not declared to be elected, and this was the fault of the officers, and whether occasioned by the partiality of the officers or by inadvertence, it signifies not. The demurrers must, therefore, be dismissed with costs.

The parties then proceeded to proof of the allegations contained in the petition and answers; and, after the examination of some witnesses, it was agreed between the parties that the scrutiny of votes on both sides, the allegations and counter allegations as to bribery and corruption, and the allegations of partizanship on the part of the presiding officer and poll-clerk, should be withdrawn. This virtually limited the contestation to the allegations that Messrs. Robertson and Morkill had been declared elected before the expiration of one hour from the opening of the meeting, and that the nominations were void in consequence of the non-payment of taxes by the parties making the nominations. As to the first point the evidence was conflicting—a number of witnesses being positive that the declaration of election was made at about half-past ten, and a larger number being equally positive that it was not made until eleven. The written return made by the presiding officer, however, stated that the declaration was made and the poll opened at eleven, *i. e.*, one hour after the commencement of the proceedings.

With respect to the non-payment of taxes, the petitioners admitted, in the course of the proceedings, that no taxes were due by W. Chamberlin, and with respect to the alleged indebtedness of O. Cameron, they produced and proved certain by-laws of the town of Sherbrooke imposing taxes, and title deeds in favor of Mr. Cameron, showing that he was the proprietor of real estate liable to taxation, and also examined the Secretary-Treasurer, to show that his taxes were unpaid at the time of the election.

At the final argument the respondents contended that there was no evidence that taxes were *due* although they had been imposed by by-law; that under the Municipal and Road Act of 1860 sec. 59 § 9, 12 & 13 it was a necessary preliminary to the collection of municipal taxes that the collection roll be made out and deposited in the office of the secretary-treasurer and public notice of such deposit given, calling upon all persons appearing on the collection roll to be indebted for taxes to pay the amount within twenty days, and that, until these formalities have been observed, no taxes are due or exigible and no proceedings for their collection could be adopted; that no proof had been adduced of the observance of these formalities. The respondents also contended that the petitioners, who were all present at the nomination, had acquiesced in and covered any irregularity which had been committed. As to this they cited the following authorities, Rex *vs.* Symmons, 4 T. R. 223; Rex *vs.* Parry, 6 Ad. & E. 810; Rex *vs.* Osbourne, 4 East 327; Rex *vs.* Trevenen, 2 B. & A. 339; Rex *vs.* Slythe, 9 D. & R. 181. They further contended that in any case the opposing candidate could not be declared elected, the votes given in their favor without notice of any irregularity in their nomination not being thrown away. Rex *vs.* Bridge, 1 M. & S. 76; Reg. *vs.* Towkesbury, L. R. 3 Q. B. 629.

It was admitted that an error was apparent on the face of the poll-book as between the candidates Griffith and Precourt, the former being credited with ten votes less than he had actually received.

RAMSAY, A. J.:—By the abandonment of allegations on both sides the scope of this case was considerably narrowed at the argument, and, by the view I feel myself compelled to take of it, its limits will be still further circumscribed.

The first point to which I shall advert is the alleged declaration of election of two of the respondents (Messrs. Robertson and Morkill) before the expiration of one hour from the opening of the meeting. On this point a great many witnesses were examined on both sides, and, as might be expected, the evidence is very contradictory. I am not disposed to think that any of the witnesses examined here were in bad faith. People in a crowded meeting very rarely agree in their recollection as to what took place, even when their attention is drawn to the fact to be remembered; how much greater then must be the divergence when they attempt to recall circumstances which at the time appeared to them to be of no moment? It is very probable that the presiding officer said something immediately after the nominations were over about there being no opposition to the election of Messrs. Robertson and Morkill, and that when he declared a poll as to the other five candidates he formally declared them elected. This supposition accords with the rule which prefers positive to negative testimony. "I did hear," is much more conclusive as to whether a thing was said than "I did not

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hear;" therefore we should be rather disposed to believe that the unopposed election of Messrs. Robertson and Morkill was twice spoken of by the presiding officer than that it was not spoken of at all, or only once. But it is hardly necessary to discuss the point. Although time in such matters is very important, the neglect of it does not seem to be a fatal irregularity, unless, by the neglect substantial injustice is done. I have not been able to find much authority on this point, but, in Warren's Parliamentary Election Law, I find that the approved doctrine is that no election shall be set aside from closing the poll too early, unless some one suffers, and so it was held in the Limerick case (Perry & Knapp, p. 373.) The case of the King against Osborne (4 East, 327) has been cited in support of this view; but it is right to observe that the head note is not supported by the report. Lord Ellenborough's reason for refusing to consider the question of time was that it was brought up as a second thought, and was not the main ground for seeking the rule. The petitioners, in the present case, seem to have thought it necessary to prove the importance of the time as affecting the result of the election, for they have alleged in their petition that, after the declaration, and before the expiration of an hour after the opening of the meeting, a large number of electors came for the purpose of proposing candidates in opposition to Messrs. Robertson and Morkill. But nothing can be more plain than the fact that no evidence could be produced to support this allegation. Not only were none of these electors produced but the presiding officer tells us that no one came to him to propose any candidate in opposition to these gentlemen, although he remained at the poll, not only an hour, but the whole day. We also have it from witnesses who may be perfectly relied on, that a powerful party, to which two or three of the petitioners belonged, tried all in their power to get candidates to oppose Messrs. Robertson and Morkill, and, finding it impossible to succeed, they made the best of what seemed to them a bad bargain and put the names of these gentlemen on their own party tickets.

The next point is the validity of the nomination of the respondents. It is said that Oliver Cameron, who seconded their nomination, had not paid his municipal taxes; that, therefore, he was not an elector, and, consequently, that the nomination was bad, and the election of all these candidates null.

To this the respondents answer that (1) there is no evidence that Oliver Cameron's taxes were due; (2) that this was not a ground to annul the election, and (3) that the petitioners had acquiesced in the irregularity and covered it.

The evidence is, first, the testimony of the secretary-treasurer who deposed to the fact that on the 8th January Cameron stood on the collection roll as being indebted to the corporation in the sum of $68.40 for general purposes, and $25.65 for school purposes, and that he paid on the 12th what he owed; second, the corporation By-laws levying taxes. It is contended that this is not sufficient; that the taxes do not become due by the passing of the By-law, that after that the secretary-treasurer must make his collection roll, and give public notice that it is completed and deposited in his office, and that all persons are to pay within twenty days and that until these twenty days have elapsed the amount is not due. It was also contended that the presumption was that the taxes were paid.

I think the respondents right in this, and that the taxes were not due

within the meaning of the act, until after public notice was given that the collection-roll was completed and deposited. It is probable that, in the absence of the collection-roll, I might have been induced to presume that what the law ordered the secretary-treasurer to do early in June he had done before the month of January, but the collection-roll has been produced and it does not appear by it that any public notice, such as is required by law, was ever made, and the secretary-treasurer was not interrogated upon that point to make up the deficiency in the evidence. It was said that in the case of Hart vs. The corporation of Clifton I had decided that absence of notice was of no importance. What I did decide was that the notice had been proved to have been given, and that by the statute in force at the time of the sale there was not any special form for giving notice. Under the M. & R. Act the form of notice the secretary-treasurer was obliged to give is laid down in the form E. E. Had the evidence then been confined to the testimony of the secretary-treasurer, the informal collection roll and the by-laws, I should have had no hesitation in deciding that the evidence of Oliver Cameron's indebtedness was insufficient; but there remains the admission of the indebtedness of Cameron by his paying what stood against him on the books. The answer to this is, that this is not an admission of indebtedness, and that the indebtedness may have existed on the 12th of January and not on the 8th, in the absence of any proof of the public notice by the secretary-treasurer. The last part of this answer appears to me to be conclusive. I cannot presume, particularl in the absence of the certificate that the public notice was ever given, and Cameron's payment on the 12th of January at most is only an admission that he owed on a day subsequent to the election.

Being of this opinion I must declare Messrs. Robertson, Morkill, Borlase, Archambault and Campbell to have been duly elected, applying the same rule of evidence to the alleged disqualification of Mr. Miller as an elector, as has been applied to the disqualification of Mr. Cameron, and correcting the error in addition in the poll-book, I must declare Mr. Precourt's election to be null and void and Mr. Griffith to have been duly elected.

This view of the case renders it unnecessary for me to express any opinion as to the other questions which have been so fully and so ably argued at the Bar.

Under all the circumstances I think each party should pay his own costs.

Petition dismissed.

Hall & White, for petitioners.

W. L. Felton, Q.C., Counsel.

G. H. Borlase, for respondents Robertson & Morkill.

Sanborn, Brooks & Camirand, for respondents Borlase, Archambault & Campbell.

L. E. Panneton, for respondent Precourt.

(G.H.B.)

SUPERIOR COURT, 1872.

SWEETSBURG, 29TH APRIL, 1872.

Coram DUNKIN, J.

No. 111.

Ex-parte *Duncan* for Certiorari.

HELD:—That no *certiorari* lies from a conviction by the District Magistrate, under the Pedler clauses of the Quebec License Act.

2nd. That the Quebec License Act is constitutional.

PER CURIAM.—This is an application for a writ of Certiorari, to bring up a conviction by the District Magistrate for this District, at the suit of the Revenue Officer, under the Pedler clauses of the Quebec Act, 34 Vic., c. 2, cominonly known as the Quebec License Act.

The affidavit of circumstances sets forth, that on or about the 18th of December last, the applicant was arrested at Sweetsburg, in this District, and brought before the District Magistrate, without summons or warrant; that he was then and there called upon by him "to answer a certain information for a certain alleged offence in a certain paper-writing called a declaration set forth," the greater part of which is given at length; that the applicant appeared by counsel, "and objected to the proceedings had and taken in the matter, and pleaded not guilty to the charge;" that, on the 22nd of the same month, the prosecutor put in such evidence as he saw fit, and closed his case; that the applicant "through counsel objected to all the proceedings had, and refused to examine any witnesses for the defence;" that "both parties then argued the case" before him, and he took the same *en delibéré*, and adjourned his court to the 3rd of January, to render judgment; that, on that day, upon application of the prosecutor, the District Magistrate "re-opened the whole case," and fixed it for the 10th of January for evidence generally, he, the applicant, taking exception to such order; that, on the 11th of January, the District Magistrate convicted him of the pretended offence in question, in terms set forth in the affidavit; and that the applicant holds the District Magistrate to have been without jurisdiction,—and the "information or paper-writing or declaration," and the conviction, to be illegal, insufficient, null, and void,"—for the following reasons:—

1stly,—Because "all the proceedings were irregular, illegal, null and void;" and the District Magistrate "acted illegally and irregularly throughout the whole proceedings,"—

2ndly,—Because no affidavit or affirmation, as required by law, was ever made or taken "to support the charge,"—

3rdly,—Because no summons or warrant ever issued in the matter, as required by law, and the conviction is not according to law,—

4thly,—"Because no offence was set forth in the information or in the said conviction, in the terms of the law in that behalf, inasmuch as they omit to allege that the offence took place within the limits for which the said prosecutor was appointed Revenue officer, and for other reasons,"—

5thly,—"Because the Act, 34 Vic., c. 2, of the Province of Quebec, known

as the Quebec License Act, under which the present prosecution was brought, is unconstitutional, and was so made and framed by the Quebec Legislature without any authority so to do, and contrary to the provisions of the British North America Act, 1867, which provides that all matters coming within the criminal law, including the procedure in criminal matters, are exclusively confined to the Parliament of Canada,"—

6thly,—Because there was no proof legal and sufficient, made before the said District Magistrate, to support the allegations of the said paper-writing or declaration, or to support the conviction rendered by the said District Magistrate, and consequently justice has not been done, and said conviction was grosly irregular and illegal,"—and

7thly,—Because the conviction condemned the applicant "not only to forfeit the sum of $40 fine, and $10.35 costs, but adjudged him to pay to Levi A. Perkins, the Revenue Officer, in his said capacity and on behalf of our Lady the Queen, said two sums of money, "contrary to the provisions of the 28th section of the Quebec License Act."

With the affidavit are produced a certificate showing that the applicant deposited with the Clerk of the District Magistrate the full amount of the penalty and costs, within the delay required by section 195 of the Quebec License Act; and also copies in full of the declaration and conviction in question. These latter follow faithfully the respective forms D and F, given by the Quebec License Act; the blank for the description of the offence charged being filled in as follows:—

—did "act and carry on business as a hawker, peddler, petty chapman and trading person, by going from town to town and to other men's houses in the District of Bedford, and then and there travelling and carrying to sell goods, wares and merchandise, and has been found so travelling, trading and carrying on business as such, and among other things has peddled, carried to sell and exposed to sale divers drugs, medicaments and patent medicines in the manner aforesaid, without the license required by the statute in such case made and provided, and without being in any way exempted from the requirements of the said statute."

The case was fully argued on both sides,—and with all the earnestness, care and ability which the interest and importance of the questions in issue required.

In rendering judgment upon it, the Court must first deal with a preliminary question raised by the Revenue Officer, as to whether or not the writ of *certiorari* is by law taken away in reference to it.

Section 29 of the District Magistrates Act (Quebec, 32 Vic., c. 23) as amended by Section 4 of the Quebec Act 33 Vic., c. 11, reads thus:

"No proceedings or suits in civil matters before any such District Magistrate or before a Magistrate's Court held under this Act, shall be removed to any other court, by *certiorari* or otherwise, nor shall any appeal lie from any order, judgment or conviction, made or rendered by such District Magistrate or Magistrate's Court, except in cases where a right to such appeal exists in virtue of any Act of the Parliament of Canada.

If, within the meaning to be here given to the words "in civil matters," this

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proceeding before the District Magistrate was a proceeding in a civil matter, the *certiorari* is therefore taken away as to it, by this section. The question is as to that meaning. And it is the more necessary to look carefully into it, because in effect the same question also underlies what may fairly be called the main pretension of the applicant,—that, namely, of the so-called unconstitutionality" of the Quebec License Act, or rather of those of its provisions which go to regulate the procedure for enforcement of its penalties. This procedure, he contends, is in its nature "criminal procedure," and therefore beyond the competency of the Quebec Legislature. If so, the section just cited cannot be held to govern this case; and, indeed, there can be no occasion for other or further inquiry; for, if the assignment of jurisdiction over it by the Quebec Legislature to the District Magistrate, was *ultra vires*, there is at once an end of the case.

The 91st section of "the British North America Act, 1867," assigns to the Parliament of Canada the exclusive right of legislation in reference to a very large class of matters, and among others, in reference to "the criminal law, except the constitution of courts of criminal jurisdiction, but including the procedure in criminal matters;" and the 92nd Section of the same Act assigns to the several Provincial Legislatures a like exclusive right of legislation in reference to another large class of matters, among which are enumerated—"shop, saloon, tavern, auctioneer and other licences, in order to the raising of a revenue for provincial, local or municipal purposes,"—the administration of justice, including the constitution, maintenance and organization of Provincial Courts, both of civil and of criminal jurisdiction, and including procedure in civil matters in those courts," and "the imposition of punishment by fine, penalty or imprisonment, for enforcing any law of the Province made in relation to any matter coming within any of the classes of subjects enumerated in this Section" (the 92nd) as exclusively pertaining to Provincial legislation.

It is clear that in these provisions of this Statute,—the fundamental law of the land, which only the Imperial Parliament can repeal or alter, to which the Parliament of Canada and the Local Legislature must alike refer for their authority to legislate at all, which they cannot transcend and from which they cannot derogate, and the phraseology of which cannot, therefore, be supposed to be ever out of the mind of our legislators, whether sitting in Parliament or Legislature,—these words "civil" and "criminal" are used in a sense which excludes from the idea conveyed by the latter, and includes within that conveyed by the former, this matter of "punishment by fine, penalty or imprisonment, for enforcing any law" which under this 92nd Section a Province alone can legally enact. Jurisdiction is characterised simply as being civil or else criminal. *Crime*—of whatever kind or degree—can be created, its punishment assigned, and procedure relative to it laid down, by Parliament alone. No enactment of a Local Legislature can give to any act that quality, or subject it to that punishment, or bring it within the purview of that procedure. But every Local Legislature, without let or hindrance from Parliament—and therefore without need of aid from Parliament,—can impose punishment by fine, penalty or imprisonment, for enforcing certain laws which it alone can make. To hold that while it can freely qualify infractions of such laws as punishable,

and assign to each its measure of punishment by fine, penalty or imprisonment, the procedure requisite in order to the infliction of such punishment (as being essentially procedure in a criminal matter) must be such only as Parliament may see fit to provide, would be to hold the doubly untenable doctrine, that (on the one hand) every Local Legislature can at will create certain crimes and assign certain criminal punishments, and that (on the other hand) Parliament can at will admit such crimes and punishments within, or exclude them from, the range of the procedure needed to repress such crimes by real infliction of such punishments.

Whatever infractions of law, whether as to matters of Dominion or Provincial Legislation, Parliament sees fit to designate as crimes, it—and it alone—can so declare, and as such punish, and to that end regulate procedure. Whatever infractions of any Provincial law coming within the purview of this 92nd Section Parliament may not see fit thus to deal with, the interested Province may punish by fine, penalty or imprisonment; but its so doing does not make the offence to be thus punished a crime, nor the procedure laid down in order to its punishment procedure in a criminal matter. On the contrary, such whole matter must remain a civil matter, within what is here the true meaning of these respective terms.

Accordingly, in 1868, Parliament at its first session, by the Act 31 Vic., c. 71, provided for the protection (so to speak) of the Provinces equally with the Dominion, as against the crimes of forgery and perjury, for making conspiracy to intimidate any Provincial Legislative body, a felony, and for making "any wilful contravention" of any Provincial Act not otherwise constituted "an offence of some other kind," "a misdemeanor." And these provisions are embodied in the consolidative criminal statutes of 1869. At any time, all or any of them might of course be changed at the pleasure of Parliament; so as to throw the enforcement of provincial statutes in such behalf, more or less, or even wholly, as a non-criminal, that is to say, as a civil matter, upon the direct legislative power (as against mere Provincial offences) of the provinces themselves.

The District Magistrates Act (Quebec, 32 Vic., c. 23) was passed by the Quebec Legislature in 1869, at its second session, with a view to constituting a new description of court, of minor civil and criminal jurisdiction. It purported to vest in the intended District Magistrates, all powers theretofore vested in any one or more Magistrates, though many of these powers were admittedly powers of criminal jurisdiction: and also certain other special powers of criminal jurisdiction, several of them theretofore vested in Recorders, Sheriffs and Stipendiary Magistrates; and lastly, under the designation of "Magistrate's Courts,"—certain other powers of peculiarly civil jurisdiction. So far as all this might affect criminal procedure, or any other matter under the exclusive control of Parliament, it was of course obvious that a mere Act of the Quebec Legislature could not suffice to authorise it. Presumably, it was all inserted in the Act, rather as the best or only way of making known what the Legislature wished done, than with any other view. And with the evident purpose of allowing opportunity for such legislation by Parliament as the case required, the last

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section of the Act provided that it should come into force only from a day to be named by Proclamation. The 29th Section of this Act, as thus originally drawn and passed, was in these words:—

"No proceedings or suits before any such District Magistrate, or before a Magistrate's Court held under this Act, shall be removed to any other Court by *Certiorari* or otherwise, nor shall any appeal lie from any order, judgment or conviction, made or rendered by such District Magistrate or Magistrate's Court."

Some months later in the same year, Parliament, at its second session, passed the series of Acts, 32, 3 Vic., cc. 18–36 (both inclusive), for assimilating and consolidating the criminal law of the Dominion: and made all needed provision (by Acts 32, 3 Vic., c. 32, s. 1; c. 33, s. 1; c. 34, s. 2; c. 35, s. 8; and c. 36, s. 8,) for enabling the intended District Magistrates for this Province to deal with such Dominion matters as it was deemed expedient to assign to them. And thereupon at the ensuing Session of the Quebec Legislature held early in 1870, the Quebec Act 33 Vic., c. 11, was passed, amending the District Magistrates Act, in the sense of bringing its provisions within the range of the attributions of Provincial legislation. The sections relative to criminal matters were to this end repealed or amended; section 29 in particular, being amended by inserting after the word "suits" in its first clause, the words "in civil matters,"—and by adding to its latter clause, the words "except in cases where a right to such appeal exists in virtue of any act of the Parliament of Canada;" and a 32nd section was added to the original Act, so as to place the object in view beyond controversy, in these words:—

This Act shall be construed as intended to apply to such matters only as are within the exclusive control of the Legislature of this Province, and shall be held to be complemental to any like provisions enacted by the Parliament of Canada, as regards matters within the exclusive control of that Parliament."

It was after having been thus amended, that the Act was brought into operation.

The Court can give no other meaning to these words "in civil matters," as used in amending this 29th section, than that indicated by the phraseology of "The British North America Act, 1867," with a distinct view to which the amendment was thus manifestly framed. The Legislature meant to remove from their statute all possible seeming of rivalry with Parliament as to matters beyond their own competency, and there is no indication whatever that they meant anything else. To hold that they did mean otherwise and used these words in another sense, and so as not to take away the *certiorari* in cases of summary procedure for enforcing any such punishments as they could legally impose by statute, would be to suppose them to have meant to raise against themselves the strange pretension that such summary procedure was after all procedure in a criminal matter, and therefore—as well the matter itself as the procedure—wholly beyond their power of legislatively dealing with it at all.

That they cannot have meant this, becomes (if possible) still more manifest, by reference to the co-incident legislation of Parliament on that express point which also the Legislature at the time had fully before them. The Dominion Summary Convictions Act, (32, 3 Vic., c. 31) by its first section, in express

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terms, limits the operation of its provisions to matters "over which the Parliament of Canada has jurisdiction." And in like manner the Dominion criminal Statutes Repeal Act (32, 3 Vic., c. 32) by its first section, as explicitly limits its repeal of previous laws, and among the rest, its repeal of the Summary Convictions Act of the late Province of Canada (Consolidated Statutes of Canada, c. 103), in these words:

"Such repeal shall not extend to matters relating solely to subjects as to which the Provincial Legislatures have, under 'The British North America Act, 1867,' exclusive powers of legislation—or to any enactment of any such Legislature for enforcing by fine, penalty or imprisonment, any law in relation to any such subject as last aforesaid,—or to any municipal by-law, relating to any offence within the scope of the powers of the municipality."

If, therefore, the Quebec Legislature did here mean to give such a sense to this word "civil" as should render summary procedure on matters within their own exclusive control "criminal," and so subject it exclusively to Dominion control, they must have been meaning to renounce a power of legislation which Parliament had just in plain terms, freely recognized as theirs.

It may be objected that there is, however, some confusion of phrase in the 10th section of the District Magistrates Act as it stands amended. In the original Act it reads thus:

"The Act chapter 102 of the Consolidated Statutes of Canada, respecting the duties of Justices of the Peace out of Sessions, in relation to persons charged with indictable offences, and the Act chapter 103 of the said Consolidated Statutes of Canada, respecting the duties of Justices of the Peace in relation to summary convictions and orders, shall apply in so far as may be consistent with the provisions of this act, to all proceedings had before such District Magistrates."

And it was amended by inserting before the words "shall apply," the words, "in so far as the said Acts have not been repealed by the Parliament of Canada," and also by adding at the end of the section the words, "and the Acts of the Parliament of Canada 32, 3 Vic., cc. 30 and 31 shall likewise apply to all proceedings had before the District Magistrates."

At the time of this amendment chapter 102 of the Consolidated Statutes, relating wholly to criminal matters, and, therefore, wholly beyond the reach of Quebec legislation, in fact stood repealed, with the exception of a single section, —the Act 32, 3, Vic., c. 30, being substituted in its place; and, therefore, neither the one nor the other could apply to any proceeding before a District Magistrate, as to which the Quebec Legislature had power to enact anything. And chapter 103 of the Consolidated Statutes, relating partly to Provincial and partly to Dominion matters, stood (as has been already shown) in full force as to the former, and had been in the main repealed *as to the latter only*, by substitution for it *pro tanto* of the Act 32, 3 Vict., c. 31; so that both could not possibly apply to the same proceeding, and the latter could not apply to any proceeding as to which the Quebec Legislature could enact anything. Limited, however, as the whole section is, by the terms of the new Section 32, already cited, it claims really to *enact* nothing as to any matter not within the exclusive control of the Province. Chapter 103, in so far as it may be consistent with the

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provisions of the District Magistrates Act, is made applicable to proceedings under control of the Province; and the other Acts named are recognized as applying in so far (that is to say) as Dominion Legislation may direct, to proceedings under control of the Dominion. The question of the meaning to be given to the word "civil" in the 29th section thus stands unaffected by this wording of the 10th.

Another objection may be suggested, from the terms of the 195th section of the Quebec License Act, which provides thus:

"Unless within 48 hours after any conviction, judgment or order, in any case under this Act, the Defendant deposits in the hands of the Clerk of the Justices or Court, the full amount of the penalty or sum, and all costs, no such suit, prosecution, conviction, judgment or order, shall be removed by *certiorari* or otherwise, into any of Her Majesty's Courts of Record; nor shall any notice of application for *certiorari* suspend, retard or affect the execution of any such conviction, judgment or order, nor, unless such deposit has been made, shall any appeal whatever be allowed from any such conviction, judgment or order, to any Court of General or Quarter Sessions."

The Applicant (as already stated) has made the deposit in question. But the Section does not admit of being read as bearing on the question here in issue. It is an enactment purely and simply restrictive of the right to *Certiorari* in regard to License Act cases generally, and has no reference to any question of the liability or non-liability to *Certiorari*, of any particular tribunal that may be called to deal with any of them; and it can by no means be held to abate in favor of that right, a restriction subsisting under other enactment, in respect of such particular tribunal itself.

The Quebec Legislature, then, having under the 92d Section of "The British North America Act, 1867," exclusive control in respect of the Licenses dealt with by the Quebec License Act, and of the imposition of punishment by fine, penalty or imprisonment, for enforcing its laws in that behalf,—and therefore of the procedure to that end, which procedure again is therefore not criminal but civil; and the Quebec License Act making such civil procedure a matter cognizable by a District Magistrate; the Court must hold that under the 29th Section of the District Magistrates Act, the right to *Certiorari* is taken away in respect of it.

This being so, it only remains to add, that the Court does not find the averments of fact embodied in the affidavit of circumstances, such as to require or warrant in this special case, the issue of a writ, notwithstanding the letter of the statute to the contrary.

It is obvious to remark, in reference to what may be termed the exceptional right of this Court (settled as matter of sound principle and unquestioned jurisprudence) to issue writs of *Certiorari* in apparent contradiction to statute,—that it is a right to be exercised with the utmost precaution, and only in those special cases of manifest want or excess or mere color of jurisdiction, which the statute cannot have been meant wrongfully to protect. And in enquiring whether or not a case is of this description, no doubt or conjecture can be resolved otherwise than favorably to the jurisdiction, in behalf of which the statute has interposed the letter of its *veto* against the writ.

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Now the 150th Section of the Quebec License Act brings into force, in respect of prosecutions under that Act, such provisions only of Chapter 103 of the Consolidated Statutes of Canada as are inconsistent with the provisions of that Act, and as apply to matters not in that Act expressly provided for. And the 53rd Section of that Act expressly authorizes the arrest, without process or formality of any sort, of any pedler, either being unlicensed, or (if licensed) refusing or neglecting to produce his license,—and his being carried (still without process or formality) within 48 hours of such arrest, before a District Magistrate for prosecution forthwith. Neither affidavit or affirmation, nor yet summons or warrant, is or can be necessary for this, or in order to vest in the District Magistrate jurisdiction over the charge thus unceremoniously initiated. According to the affidavit of circumstances, this was the course taken with the Applicant. A written "declaration" (so styled in terms of the License Act, and exhibiting the charge in manner and form as thereby required) was immediately put in by the Revenue Officer; and to this, the Applicant, present and assisted by Counsel,—while objecting to the proceedings,—pleaded "not guilty." His complaint that there was not, besides this declaration, a summons or warrant then served on him,—whatever it might or might not be worth, were the mere regularity in point of form of the procedure the matter for inquiry,—can have no bearing on the one question here relevant, that—namely—of the District Magistrate's jurisdiction over the case itself.

He complains, again, that the declaration and conviction fail to charge the offence as committed within the limits of the Revenue Officer's District, and are faulty in other unspecified particulars. But in fact, as already stated, both declaration and conviction closely follow the statutory forms which the 204th Section of the Act declares "shall be sufficient." And as to mention of the limits of the Revenue District, that is a detail not required or indicated by those forms and therefore cannot possibly be a matter essential in respect of jurisdiction,—whatever it may or may not be from the point of view of mere procedure.

So, too, the alleged re-opening of the case, on the Revenue Officer's motion opposed by the Applicant,—and the averment that no legal and sufficient proof was made,—raise only questions of procedure, and not that of jurisdiction.

His complaint further runs, that the conviction adjudges penalty and costs, and makes both payable to the Revenue Officer. But, supposing even that argument admits of being raised on this point,—a supposition, however, which (in view of the tenor of Sections 140 and 184 and Forms D and F of the License Act, and of Section 28 of the District Magistrates Act) the Court must guard itself from being thought to countenance,—such argument would again touch, not the jurisdiction of the District Magistrate over the subject matter, but only the correctness of his judgment.

Whether or not all that the District Magistrate may have done in respect of any of the proceedings connected with this case, was rightly done, is not here in issue. The law made him judge in that behalf, when this prosecution was before him; and it withholds from this Court the right to bring his acts as such judge, under its review, by writ of *Certiorari*.

Miller vs. Bourgeois.

The application must therefore be rejected, with costs.

Application for *Certiorari* rejected.

Fr E. Gilman, for Applicant.

Ernest Racicot, for Revenue Officer.

(S. B.)

A similar judgment was rendered in the case No. 112, *Ex parte* Marquis for *Certiorari*.

SUPERIOR COURT, 1872.

MONTREAL, 22ND APRIL, 1872.

IN REVIEW.

Coram MACKAY, J., TORRANCE, J., BEAUDRY, J.

No. 1582.

Morrison vs. *Wilson*, and *e contrà*.

HELD:—That where an inscription in review is made by defendant, of a judgment deciding at once the merits of a principal demand and of an incidental demand, only one deposit under C. C. P. 497, is necessary.

F. E. Gilman, for plaintiff and incidental defendant.

J. J. Day, Q.C., for defendant and incidental plaintiff.

(J. K.)

SUPERIOR COURT, 1872.

MONTREAL, 30TH APRIL, 1872.

Coram BERTHELOT, J.

Miller vs. *Bourgeois*, and *Holland, mis en cause*.

HELD:—That a guardian against whom a rule for *contrainte par corps* has issued, at the instance of a party absent from Lower Canada, is entitled to security for costs, under article 29 of the Civil Code.

The plaintiff in this case seized a quantity of coal under a writ of *saisie revendication*. Holland was appointed voluntary guardian. The seizure was maintained in the Superior Court, and the defendant appealed from this judgment. An arrangement was subsequently come to between the parties. Bourgeois discontinued his appeal, and Miller desisted from the judgment in his favor. Bourgeois then moved for a rule against the guardian to deliver the coal, which was granted *nisi*. The guardian appeared and moved for security for costs, producing an affidavit that Bourgeois was no longer a resident of Lower Canada.

Motion granted.

Girouard & Dugas, for defendant.

Ritchie, Morris & Rose, for guardian.

(W. R.)

COUR DE REVISION.

MONTREAL, 28 JUIN 1872.

Coram BERTHELOT, MACKAY, ET TORRANCE, JJ.

No. 2029.

L'HON. C. WILSON, *Demandeur*,

vs.

CYRILLE LEBLANC, *ès-qualité*, *Défendeur*;

ET

JOSEPH DOUTRE & al., créanciers colloqués, APPELANTS;

ET

LE DIT C. LEBLANC, *ès-qualité*, contestant, INTIMÉ.

DETTES ALIMENTAIRES.

JUGE.—Que la prohibition d'engager ou d'hypothéquer des biens substitués, légués comme aliments, n'empêche pas le grevé de les engager ou hypothéquer dans le but de les protéger contre une aggression tendant à en dépouiller le grevé; et que la validité de l'hypothèque, consentie par le grevé, pour cet objet, n'est pas affectée par l'insuccès des mesures adoptées pour empêcher la vente qui menace d'en dépouiller le grevé. En d'autres termes:

JUGE.—Que l'avocat qui représente le propriétaire d'un bien, déclaré alimentaire, inaliénable et insaisissable, pour tenter de le conserver au légataire, acquiert contre ce dernier une créance alimentaire pour la répétition de ses déboursés et honoraires. (Art. 558 C. P. C.)

2o. Que les admissions du propriétaire de biens déclarés alimentaires, si elles ne sont pas entachées de collusion, font preuve contre lui du caractère alimentaire de la créance, au paiement de laquelle on oppose la prohibition d'hypothéquer ou aliéner contenue dans un testament.

3o. Que la dette hypothécaire due par le curateur à la substitution et née de la défense des biens de la substitution, n'est pas contestable par le grevé, sur le motif que les biens lui ont été légués en usufruit et ont été déclarés inaliénables et insaisissables, pour lui assurer des aliments.

Le factum des Appelants contient en substance l'exposé suivant:—

FAITS.—Un immeuble ayant été vendu sur le défendeur ès-qualité de légataire en usufruit de feue Dame Julie Carrière, sa mère, les Appelants furent colloqués par le projet de distribution de la manière suivante:—

"8o. A Messieurs Joseph, Gonzalve et Jean Bte. Doutre, balance en principal et intérêts d'une obligation du Défendeur ès-qualité en leur faveur, passée devant C. H. Lamontagne, notaire, le 25 Mai 1869, et enrégistrée le même jour, le dit acte portant hypothèque sur l'usufruit de l'immeuble décrété en cette cause $294.71.

"20o. A Messieurs Joseph, Gonzalve et Jean Bte. Doutre, dividende sur $194.66, balance en capital, d'un jugement de cette Cour rendu en leur faveur contre Charles Leblanc en sa qualité de Curateur à la substitution créée par le testament et codicile de feue Julie Carrière, le 31 Octobre 1870 et enrégistré le 15 Novembre suivant..... .....$63.71."

L'intimé ès-qualité susdite, produisit une contestation de ces deux articles de collocation, alléguant:

Que par son testament du 20 Avril 1863 enrégistré en temps voulu, feue Julie Carrière légua à son fils, l'Intimé, en usufruit seulement, tous ses biens meubles et immeubles, l'instituant son légataire universel en usufruit, la propriété devant, au décès du dit Intimé, retourner et appartenir aux enfants nés de son légitime mariage,—et qu'il fut stipulé au dit testament que le dit usufruit serait

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insaisissable et inaliénable pour les dettes du dit Intimé, voulant la dite Testatrice que le dit usufruit lui serve d'aliments; que l'immeuble vendu fait partie des biens laissés par la dite testatrice; que la créance des dits Appelants, qui repose sur l'obligation que leur a consentie le Défendeur le 25 Mai 1869, en vertu de laquelle ils ont été colloqués par l'article 8 du projet de distribution, est une dette personnelle de l'Intimé; que la dite obligation n'a pas été consentie par le dit Intimé en reconnaissance d'une dette qui aurait été contractée pour servir dans son entier à la conservation du dit usufruit, qu'une partie seulement de cette obligation aurait servi à cette fin, savoir tout au plus de $60 à $75, ainsi que reconnu par un jugement du 30 Juin dernier; que les dits Appelants n'ont aucune hypothèque sur le dit usufruit pour le surplus de cette somme.

Que les dits appelants n'ont aucun droit sur le dit usufruit pour la somme de $63.71 qui leur est accordée par l'article vingt du dit projet de distribution; que le titre, en vertu duquel les Appelants ont été colloqués par l'article 20, existe contre Chs. Leblanc en sa qualité de curateur à la substitution créée par le Testament de feue Julie Carrière et est due par le dit Charles Leblanc, ès-qualité; que la considération de ce titre n'a pas servi à conserver l'usufruit de l'immeuble vendu en cette cause; que cette créance est postérieure au testament de la dite feue Julie Carrière et n'a été contractée ni dans l'intérêt de l'Intimé, ni dans celui de la substitution; que l'usufruit de l'immeuble vendu est insaisissable et ne peut pas servir à payer des dettes postérieures au décès de la dite Julie Carrière, sauf celles qui seraient créées dans l'intérêt du dit usufruit; que le contestant a des créanciers qui lui ont fourni des aliments et l'ont aidé à conserver l'usufruit du dit immeuble et ont conséquemment des droits sur le dit usufruit, mais n'ont pas été payés, vu que le montant prélevé en cette cause a été absorbé par les diverses collocations du dit projet de distribution, dont la plupart sont injustes et illégales, ce que le contestant se réserve le droit de démontrer; que les dits Appelants n'ont d'hypothèque sur le dit usufruit que pour $75; en conséquence, l'Intimé conclut à ce que, par le jugement à intervenir, il soit déclaré que le dit immeuble fait partie du dit legs en usufruit, que les dits Appelants n'ont d'hypothèques et de droits sur le dit usufruit que pour $75 et que partant la collocation faite à leur profit par le dit article huit soit mis de côté pour le surplus de $75.; conclut de plus que l'article vingt soit mis de côté, et à ce que le dit projet de distribution soit réformé de manière à laisser aux créanciers du contestant, qui ont des droits sur le dit usufruit, tel recours que de droit en temps et lieu, le tout avec dépens.

Les Appelants répondirent à cette contestation:—

Que l'obligation du 25 Mai 1869, sur laquelle est fondé l'art. 8 du projet de distribution, est d'un caractère et a été consentie pour des causes qui affectent l'usufruit légué, savoir pour frais, honoraires et déboursés, dans diverses causes mentionnées au compte produit, lesquelles causes avaient toutes pour objet le recouvrement de créances qui entraînaient comme conséquence la vente des biens légués au dit Contestant, et qu'en se défendant ou contestant les dits recouvrements, le dit Contestant tentait de protéger et conserver le dit usufruit, ainsi que le dit Contestant l'a souvent reconnu, même sous serment; que la collocation contenue en l'article vingt repose sur un jugement rendu contre le dit Charles

Leblanc, ès-qualité ; que la responsabilité de ce dernier ne serait qu'ajoutée à celle du dit Contestant et ne la diminuait en rien ; que de plus la responsabilité du dit Charles Leblanc ès-qual, n'est née qu'à la demande et requisition du dit Contestant, dans son intérêt et dans le but de protéger et conserver plus l'usufruit du dit Contestant que la nue propriété elle-même et dans l'intérêt commun du grevé de la dite substitution, savoir le Contestant, et des appelés à la substitution, représentés par le dit Charles Leblanc, ès-qualité, ainsi que l'a souvent reconnu le Contestant ; que d'ailleurs le dit Contestant fait voir lui-même qu'il n'a aucun intérêt dans sa présente contestation et qu'il ne fait par icelle qu'exciper du droit d'autrui.

L'Intimé répliqua que le Contestant n'avait pas profité des contestations et procès mus tant en Cour Supérieure et en Cour de Révision qu'en Appel, par le dit Charles Leblanc, ès-qualité, lesquelles loin de conserver son usufruit, lui en avaient fait perdre une grande partie ; que le Contestant avait allégué son intérêt à contester en alléguant qu'il existait des créanciers qui avaient droit à l'usufruit représenté par les deniers prélevés; que dans tous les cas, le Contestant avait le droit de contester toute collocation qu'il croyait injuste et illégale.

La preuve des Appelants consistant en ce qui suit :—

1o. L'obligation du 25 Mai 1869 du Contestant Intimé aux Appelants contient la déclaration suivante : " le dit débiteur (Intimé) affecte, oblige et hypothèque spécialement en faveur des dits créanciers, (Appelants,) l'usufruit des lots ci-après décrits; le dit usufruit lui ayant été légué par le testament de feue Dame Julie Carrière, sa mère, passé le 20 Août 1863 devant Mr. J. B. Houlé, enrégistré le 21 Janvier 1869, le dit débiteur déclarant que la dite somme de $400 est due aux dits créanciers pour frais déboursés et honoraires par eux faits dans le but de conserver le dit usufruit au dit débiteur.

" Il est entendu entre les parties que dans le cas où le procès maintenant en Appel entre le sieur Charles Leblanc, ès-qualité de curateur à la dite substitution et l'Hon. Charles Wilson, aussi de Montréal, serait décidé en faveur du dit Charles Leblanc, Appelant, alors et dans ce cas les dits Doutre, Doutre & Doutre seront obligés et ils s'engagent d'imputer sur le montant de la présente obligation tout ce qu'ils percevront du dit Honorable Charles Wilson, comme frais découlant du jugement de la Cour d'Appel."

2o. Dans une contestation précédente pour empêcher la ventilation ordonnée par le protonotaire, l'Intimé souleva toutes les questions par lui élevées sur le projet de distribution maintenant sous considération, et dans la déposition que l'Intimé fit alors sous serment devant la Cour, sur la contestation antérieure à la présente, il reconnut que l'obligation du 25 Mai 1869, avait été consentie pour les causes (alors terminées ou pendantes) mentionnées dans la pièce Exh. No. 2 des Appelants, et que " l'objet de toutes ces procédures était de sauver l'usufruit du dit Défendeur ;"—il reconnait de plus que " l'opposition de Charles Leblanc à la saisie par le Demandeur a été faite à sa demande, et qu'il devait en profiter."

3o. Examiné comme témoin sur sa contestation ainsi renouvelée, l'Intimé reconnait : 1o. que la déposition ci-dessus mentionnée a été donnée par lui ; 2o. que le compte (Exhibit No. 2 des Appelants) est le même que celui sur lequel il avait ainsi été examiné comme témoin ; 3o. qu'*item par item* ce compte se

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compose d'affaires qui affectaient directement son usufruit; 4o. que c'est lui qui a fourni les cautions pour l'appel institué au nom de Charles Leblanc, ès-qualité; 5o. que beaucoup des procédés qui ont été faits par les Appelants et mentionnés dans leur compte Exh. No. 2, avaient pour objet d'obtenir le temps de faire un emprunt et de sauver par là son usufruit.

Le jugement dont est appel a été rendu avec les considérants qui suivent :

" Vû la condition d'insaisissabilité contenue au testament et le caractère alimentaire du legs, les deniers ne peuvent être saisis, arrêtés, ni attribués aux créanciers du défendeur, sauf et excepté pour dettes alimentaires, tel que réglé par les arts. 557 (probablement 558) et 628 du Code de Procédure Civile,—considérant que les dits J. Doutre et al, n'ont pas prouvé que les créances pour lesquelles ils sont colloqués par les articles 8 et 20 sont des dettes alimentaires de la nature de celles mentionnées au Code de Procédure Civile, ni qu'ils aient droit d'être colloqués sur les deniers à distribuer pour une somme plus forte que $75 mentionnée et reconnue dans la contestation du défendeur, et que leur collocation pour plus que cette somme n'est pas justifiée,—maintient la contestation du dit défendeur, avec dépens, etc., et en conséquence ordonne que le dit rapport de collocation et de distribution soit réformé quant aux dits items et articles huit et vingt, et que par un nouveau rapport, au lieu et place des dites deux collocations, les dits J. Doutre et al. ne soient colloqués que pour $75, et que la balance des dits deux items soit payée et accordée à qui de droit."

Raisons d'Appel.—L'Intimé, à en juger par sa contestation, n'avait pas des notions très exactes des faits et du droit qu'il invoquait. Tantôt il admet que la créance des Appelants est alimentaire pour une partie, sans dire laquelle,—tantôt il dénie complétement ce caractère à leur créance.

L'Intimé n'a *jamais nié la dette des Appelants*, mais simplement son caractère privilégié. Il s'agit ostensiblement de combattre, dans cette contestation, pour conserver l'usufruit de l'Intimé,—mais on s'oublie jusqu'à affirmer positivement que ce n'est pas pour l'Intimé qu'elle a lieu, mais pour d'autres créanciers,—en sorte que l'Intimé, qu'il réussisse ou non, n'en perd pas moins son usufruit. Cette particularité n'a pas frappé la Cour de première instance, et la confusion qui règne dans les affirmations de l'Intimé est augmentée par le texte du jugement qui invoque deux articles du Code de Procédure entièrement étrangers aux questions débattues, (arts 557 et 628).

C'est de cette confusion de faits et de principes de droit qu'il s'agit de faire sortir une cause bien simple par elle-même.

§ 1° Défaut d'intérêt.—L'intérêt est la mesure des actions. Le Code de Procédure a adopté cette maxime dans l'Art. 13, dans les termes suivants : " Pour former une demande en justice il faut y avoir intérêt." Si l'Intimé eut nié les créances des Appelants, consacrées par les articles 8 et 20 du projet de distribution, il y eut eu pour lui l'intérêt invoqué dans la dernière partie de sa réplique et qui eut consisté à repousser une demande injuste et illégale. Mais l'Intimé n'a jamais mis en question l'existence légale de ces créances, il leur a nié le caractère de *créance alimentaire* (art. 558 C. P. C.)

L'intérêt de l'Intimé est tout concentré dans le caractère de ces créances et si cet intérêt n'est pas appréciable par le tribunal, il n'existe pas. Si en faisant

prévaloir la négation du caractère alimentaire de la créance des Appelants, cette négation ne tourne pas au profit de l'intimé, il se trouve constaté qu'il *a formé une demande sans y avoir d'intérêt.*

Or, il affirme en termes positifs, tant dans les prémisses que dans les conclusions de sa contestation, qu'il réclame la réformation du jugement de distribution, *de manière à laisser aux créanciers du Contestant qui ont des droits sur le dit usufruit, tel recours que de droit.*

Cette objection suffisait à elle seule pour faire rejeter la contestation.

Elever une prétention qui n'est pas pour *soi*, c'est exciper du droit d'autrui.

Berriat Saint Prix. Proc. Civ., t. 1er, pp. 188, 213, 214, 215.

Bioche, Vo. Action, nos. 64, 65, 66, 69, 71.

" Vo. Intérêt, nos. 2, 3, 6.

2. Caractère alimentaire des créances colloquées.—Le jugement affirme que les appelants n'ont pas prouvé que les créances colloquées par les articles 8 et 20 du projet de distribution fussent des dettes alimentaires.

Pour l'appréciation de la preuve faite, il est nécessaire de rappeler que la contestation a lieu entre les parties qui ont seules et directement participé à la création des deux créances et non entre l'une de ces parties et des tiers. En second lieu le Contestant Intimé ne, prétend pas avoir été amené par captation, surprise, fraude, ou aucun moyen illicite, à reconnaitre le caractère alimentaire de ces créances. Si donc l'on écarte tout vestige de dol et de fraude, nous nous retrouvons en présence des principes les plus positifs du droit naturel et civil pour repousser les prétentions de l'Intimé.

Nous avons ici l'aveu extrajudiciaire (art. 1244 C. C.) prouvé authentiquement dans l'obligation du 25 Mai 1869 ; nous avons de plus l'aveu judiciaire, deux fois répété, et l'art. 1245 C.C., dit : "L'aveu judiciaire fait pleine foi contre celui qui l'a fait." Outre le serment de l'Intimé, nous avons les pièces de procédure elles-mêmes qui témoignent des admissions du Contestant-Intimé.

Sur quels principes de droit ces aveux librement faits, cesseraient-ils de faire pleine foi ? Est-ce parceque l'Intimé n'aurait pas éventuellement recueilli, des services des Appelants, tout le bénéfice qu'il en espérait ? C'est là une des vicissitudes des luttes judiciaires, dont personne n'est responsable. Les procureurs font ce qu'ils peuvent,—quelquefois avec succès contre l'opinion même des juges de première instance, souvent sans succès, dans les questions qui divisent les meilleurs esprits,—mais sans y apporter moins de travail, que si leurs efforts étaient heureux.

Les procureurs qui soulèvent ces questions ne devraient être accueillis, si leurs prétentions légales ont quelque valeur, qu'en déclarant qu'ils agissent gratuitement et sans espoir de recours contre leur client, en cas d'insuccès. Si les services des procureurs ne sont pas tenus pour gratuits, dans des cas de ce genre, le caractère des créances des Appelants est incontestablement alimentaire.

Les définitions des auteurs et des arrêtistes sur ce qui doit être considéré comme *aliments*, n'ont pas beaucoup d'application en cette cause, ces définitions concernant généralement le recouvrement de créances fondées sur des fournitures ou provisions faites à celui qui possède une propriété à titre *d'aliments*. Elles servent toutefois à établir des points de comparaison. On tient pour créances

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alimentaires, ce qui a servi à l'existence matérielle de l'objet donné ou légué ou de la personne qui a reçu le don ou legs. Ainsi les réparations faites à l'immeuble légué à titre alimentaire sont une des charges privilégiées de cet immeuble. La nourriture, le vêtement, l'éducation sont des charges de l'immeuble donné ou légué à titre alimentaire.

Partant de là, tout ce qui sert à la conservation de la chose donnée ou léguée à ce titre est essentiellement créance alimentaire (C. P. C. art. 558). Un raisonnement pratique ressort de suite de l'examen du compte des Appelants.

Le Contestant Intimé est poursuivi pour marchandises à lui livrées pour l'enterrement de sa mère, la testatrice. Il prétend n'avoir pas reçu ces marchandises. Il est évident que s'il est condamné pour le prix de ces marchandises, les propriétés léguées par la testatrice seront vendues. Il est poursuivi pour réparations faites aux immeubles légués,—c'est-là une charge de la jouissance de ces immeubles. Or il prétend ne pas devoir ce qu'on lui réclame pour cet objet,—et ainsi de suite pour tout le compte des Appelants. Si, étant condamné justement u injustement, les immeubles sont saisis et mis en vente,—il *faudra qu'il laisse vendre*, s'il n'a pas le pouvoir d'employer un avocat pour empêcher la vente, à moins qu'il ne trouve un procureur qui offre gratuitement ses services. Au reste, supposons le Contestant Intimé saisi et menacé d'expropriation pour quoi que ce soit, disons pour un compte de liqueurs enivrantes,—supposons le même poursuivi pour une chose qu'il n'a jamais due, il faudra qu'il laisse vendre ou qu'il trouve pour arrêter la vente un avocat qui offre gratuitement ses services; car en supposant même qu'il n'arrive aucun accident judiciaire et qu'une opposition ne soit pas contestée, les frais tombent sur l'opposant. Et si l'opposant refuse de payer,—l'avocat pourra prendre un jugement contre un défendeur qui paiera s'il le veut bien; car si ses loyers sont saisis ou des immeubles légués comme aliments, il viendra dire à son avocat que ses loyers et ses immeubles sont alimentaires!

Il résulterait de cette doctrine que celui qui recevrait un legs d'aliments serait condamné à une mendicité prochaine, puisqu'il ne pourrait pas employer un avocat pour empêcher la vente de l'objet de son legs. Code Français, art. 581, 582.—Pigeau, Proc. Civ. T. 1er, p. 651.

Le Factum de l'Intimé, répond, en substance, ce qui suit :

Le défendeur a contesté ces collocations en alléguant qu'elles violaient la clause d'insaisissabilité insérée dans le testament de feue Julie Carrière, auteur de la substitution, et les articles 557 et 628 du Code de Procédure Civile.

L'art. 557 se lit comme suit : " On ne peut saisir les sommes ou objets " nés ou légués sous la condition d'insaisissabilité. Les sommes et pensions " données à titre d'aliments encore que le donateur ou testateur ne les ait pas " expressément déclarées insaisissables.

Les Appelants [illegible] avec l'Intimé que les dettes alimentaires seules du défendeur, peuvent être [illegible] sur les biens provenant de la substitution de sa mère, et ils prétendent que la créance participe de la nature de la dette alimentaire.

Quelle est cette créance? Ce sont des frais encourus dans des poursuites mues en Cour Supérieure, en Cour de Révision et en Appel, entre le demandeur, le défendeur et le curateur à la substitution.

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L'un de ces procès était mu entre le demandeur et le nommé Charles Leblanc, curateur à la dite substitution. Il s'opposait à la vente d'un immeuble substitué saisi sur le défendeur comme grevé, attendu que cet immeuble étant substitué, il devait être saisi sur le curateur à la substitution. Ce procès a passé par toutes les juridictions et a été jugé en Révision et en Appel en faveur du demandeur. Assurément on ne peut pas dire que les frais encourus pour ce procès sont une dette alimentaire du défendeur. En premier lieu c'est un procès fait dans l'intérêt des Appelés à la substitution, et le grevé n'est pas tenu d'en payer les frais sur son usufruit ; il n'est même pas partie à ce procès.

Les Appelants, pour montrer que ces frais sont une dette alimentaire, disent que ce procès a été fait ainsi que tous les autres, pour conserver au défendeur son usufruit.

Or en référant aux pièces produites, au certificat du Régistrateur et aux différents bordereaux de distribution qui forment partie du dossier, l'on voit que tous ces frais se sont élevés, y compris ceux du demandeur, au double de la créance du demandeur, et que trois immeubles de la substitution ont été vendus pour les payer ainsi que la créance du Demandeur ! !

Les dettes alimentaires, disent Pigeau et Pothier, comprennent la nourriture, le logement, les vêtements et les choses indispensables à la vie.

Si au lieu de faire tant de procès aux dépens du défendeur, le curateur à cette substitution avait laissé faire la première vente sans opposition, le demandeur eut été payé de sa créance ($1329.00) y compris les intérêts, et il eut suffi, pour cela, d'un seul immeuble avec les frais. Au lieu de cela, les parties en cette cause en sont maintenant à se distribuer le prix de vente d'un troisième immeuble, et toujours en vertu du Bref d'exécution du demandeur. Pour conserver l'usufruit du premier immeuble saisi, l'on a fait des frais tels, qu'il a fallu vendre deux autres immeubles.

Si l'on admet comme exacte la doctrine de Pothier et de Pigeau, il faudra aussi admettre qu'il est difficile de la concilier avec la prétention des Appelants. Il y a dans le dossier un règlement de compte qui démontre que Leblanc doit plus de $200.00 pour dette de pension.

L'Intimé croit devoir noter ici une remarque de l'honorable Juge qui a rendu le jugement attaqué, lorsqu'il a prononcé son jugement.

Dans le cas d'une poursuite fructueuse, l'avocat du créancier d'une dette alimentaire pourrait avoir une préférence pour ses frais, mais si la poursuite a été infructueuse pourrait-on en dire autant ? Dans ce dernier cas, c'est à son client qu'il s'adresse et il n'est plus qu'un créancier ordinaire. Lui sera-t-il permis pour se payer, de lui enlever ce qui lui a été donné comme aliments ? Non, car mieux que personne, il connaissait la condition de son débiteur et celle de ses biens.

AUTORITES DE L'INTIME.

1*ère Quest.*—Ce que c'est qu'une dette d'aliments.

Carré, Lois de la Proc. Civ., tome III, Question 1986, p. 818.

Dallos, Jur. du Roy, tome XI, p. 626.

Pigeau, tome II, p. 48, Edition 1808.

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2nde. Quest.—Insaisissabilité des biens donnés à titre d'aliment.
Sirey, année 1836, partie 2e, p. 354.
Roger, saisie arrêt, p. 201, commente cet arrêt.
Dalloz, Jur. du Roy, vol. 1er, p. 355.
Toullier, des Contrats, p. 466, no. 386, vol 7.
Pothier, cons. de rente, ch. VIII, p. 94, no. 252.
3ième Quest.—Le contestant peut-il demander lui-même la nullité de son acte?
Duranton, contrat de mariage, vol. 15, p. 41.
Nouv. Deniz., tome VI, p. 75, sec. 11.
Carré et Chauveau, Proc. Civ, vol. 8, p. 921, Ques. 3267.
Sirey, Rec. general, 1822, 1824, p. 137.
Perrault & Malo, C. S. Montreal.

BERTHELOT, J.—Le jugement de distribution préparé par le Protonotaire, a colloqué les messieurs Doutre comme créanciers du Défendeur ès dite qualité. Leur créance reposait sur l'obligation de leur débiteur ès dite qualité, en date du 25 mai 1869, et sur un jugement par eux obtenu sur icelle, le 31 octobre 1870, contre Charles Leblanc, curateur à la substitution créée par la dite Julie Carrière, et affectant l'immeuble vendu par décret tant qu'il ne sera pas attaqué ou annullé.

Par sa contestation, le dit Cyrille Leblanc n'attaque aucunement le titre des créanciers de dol ou de fraude, pas plus qu'il ne prétend qu'il n'est pas leur débiteur de la somme par eux réclamée de lui en vertu de la dite obligation; mais il prétend que la dette ainsi par lui contractée ne pouvait affecter l'usufruit des biens qui lui provenait de sa mère, Julie Carrière, parce que, par le testament de cette dernière, du 20 août 1863, cet usufruit avait été déclaré incessible et insaisissable pour les dettes de son légataire, après le décès duquel les dits biens devaient retourner aux enfants de ce dernier.

L'opposant dit de plus que les créances qui sont mentionnées aux dites collocations sont des créances qui lui sont personnelles, admettant cependant qu'une partie d'icelles pouvait affecter le dit usufruit et les deniers en provenant, ainsi que constaté par un précédent jugement du 30 juin 1871, en cette cause, ordonnant une ventilation àpropos de la créance des présents créanciers, messieurs Doutre et al.

Il ne demande pas que la dite obligation soit déclarée nulle vis-à-vis de lui, mais il prétend que d'autres de ses créancier qui lui ont fourni des aliments, (sans dire lesquels ou qu'ils soient en cause) n'ont pas été payés ni colloqués par le dit jugement, et que le montant prélevé sur son usufruit ou par la vente de son usufruit de l'immeuble a été absorbé par des collocations pour des dettes injustes ou illégales, ce qu'il se réserve le droit de démontrer, et sans dire lesquelles.

La conclusion de cette contestation rapporte succinctement les moyens invoqués ci-dessus par le contestant sur l'inaliénabilité de son usufruit du dit immeuble, tout en admettant de nouveau que les deniers prélevés sont le produit du dit usufruit, et demande que sur ce à même les dits deniers, messieurs Doutre et consors ne soient payés qu'au montant de $75, et que le surplus de l'article 8me soit rejeté et que l'article 20me soit entièrement mis de côté, et le projet de distribution réformé de manière à laisser aux créanciers du Contestant qui ont

droit sur le dit usufruit, tel recours que de droit sur le dit usufruit en temps et lieu.

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C'est réellement une manière étrange d'élever une contestation.

Le Contestant semble ne pas vouloir contester dans son intérêt, mais bien dans l'intérêt de gens dont il ne donne pas même les noms, pas plus qu'il n'indique la cause et le titre de leurs créances.

C'est prétendre plus que celui qui voudrait ou prétendrait plaider par procureur. C'est vouloir plaider hypothétiquement, en supposant que d'autres de ses créanciers qui se taisent ont de meilleurs droits ou plus de priviléges que ne peuvent avoir les dits messieurs Doutre et consors.

Il me semble qu'une réponse en droit à cette contestation, aurait pu en faire justice et la faire rejeter, car nul ne doit plaider dans son propre intérêt; celui de tiers ne pouvant être la mesure de son action, ou de la procédure en son nom. Il est prouvé que l'origine de la créance des Réclamants est pour honoraires et services professionnels par eux rendus au dit Contestant en sa qualité de légataire en usufruit de sa mère, pour se faire un asile sûr dans la jouissance et la possession de cet usufruit. Les aveux du Contestant sur ce point, tant dans l'obligation que lorsqu'il a été examiné comme témoin, sont tels qu'on ne peut entretenir de doute sur l'existence de la créance et sa légitimité. Un premier jugement de cette Cour lui avait donné gain de cause, lequel jugement fut revisé par cette Cour et suivi d'un jugement confirmatif de ce dernier par la Cour d'Appel.

Le Contestant prétend maintenant se soustraire au paiement d'une dette légitimement par lui contractée, en disant que n'ayant pas réussi devant toutes les Cours, les frais qu'il a encourus en se prévalant des services professionnels de ses avocats, étaient des frais qu'il encourait en violation de la clause d'inaliénabilité du testament de sa mère qui ne lui avait donné ses biens ou cet usufruit que pour ses aliments.

L'on ne doit pas supposer que cette dette a été encourue de mauvaise foi, puisque le Contestant ne le prétend pas même. Puisqu'il a eu un premier jugement en sa faveur, il faut supposer qu'il avait apparemment un bon droit de plaider et que les Réclamants avaient raison de lui rendre et donner leurs services professionnels.

S'il en était autrement, un légataire de biens avec une pareille clause d'insaisissabilité ne pourrait pas trouver d'avocats pour poursuivre ses loyers, pour demander à être admis à caution ou à sortir de prison, s'il était injustement incarcéré. Il ne pourrait pas se faire vêtir, ou avoir à manger ou se mettre en pension, sans que ses créanciers fussent exposés à se voir disputer par celui-là même qu'ils auront vêti ou nourri, la légitimité de leur créance.

Il se trouverait, par conséquent, à ne trouver personne qui voulut lui avancer ce qu'il y a de plus nécessaire à la vie.

Il y a peu d'années, j'ai vu un légataire, dans de pareilles circonstances, contester à celui qui l'avait pensionné ou nourri le droit d'obtenir jugement contre lui et de faire saisir sa rente en paiement de ce qui lui avait été avancé pour les besoins de la vie. La cause était entre gens de Longueuil.

Le droit de se défendre est aussi précieux et nécessaire que celui de la vie et de la nourriture dont on a besoin. Et un légataire qui ne pourrait pas

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engager dans des bornes justes et raisonnables, ce qui lui vient de la succession de celui qui a voulu le gratifier et lui assurer la vie, serait ou pourrait être entièrement privé de ce bienfait, de sa liberté même, s'il ne pouvait trouver un défenseur.

Le droit d'être payé par celui que l'avocat et procureur a défendu, ou pour qui il a plaidé de bonne foi, est aussi grand que le droit de celui qui l'a nourri et vêtu.

Est-ce que les avocats du Contestant, aujourd'hui, ne soutiennent pas une cause aussi bonne et aussi juste et sacrée à leurs yeux et au sens de leur client que celle que messieurs Doutre soûtenaient il y a quelques mois dans l'intérêt de leur client Leblanc, pour soustraire son usufruit à la saisie de ses créanciers?

Et dira-t-on que leur droit d'être payé par le légataire usufruitier doive dépendre de leur succès? Certainement non.

Pour ces raisons, nous croyons que le jugement du 29 février 1872, qui n'a maintenu la collocation 8me que pour $75, admis par le Contestant, et a ordonné que le surplus d'icelle ainsi que celle No. 20, fut accordée à qui de droit, doit être revisé et la contestation du dit Contestant renvoyée.

Le jugement du 29 février 1872 se fonde nominativement sur les articles 557, 558 et 628 du Code de Procédure sur les choses insaisissables. Après l'énumération de cinq cas, l'article 558 porte "Néanmoins les provisions alimentaires "(et choses données comme aliments) peuvent être saisies et vendues pour "dettes alimentaires." Nous sommes d'avis que les services rendus par les Réclamants au Contestant pouvaient être aussi précieux pour lui que des aliments qui lui auraient été fournis; partie de ces services lui ont été rendus pour le faire admettre à caution ou pour le faire sortir de prison, et d'autres pour soutenir une contestation sérieusement engagée pour soustraire cet usufruit à la saisie de créanciers qu'il croyait ne pas pouvoir l'affecter, et comme je l'ai dit, la Cour de première instance lui avait donné gain de cause, ce qui justifiait bien la contestation par lui soulevée, ou au moins doit la faire regarder comme ayant été faite de bonne foi pour soutenir la volonté du testateur.

Les avocats du Contestant ont cité la cause de Perrault *vs.* Malo, mais le cas qui y est présenté était tout différent. C'était celui d'un grevé de substitution avec clause d'insaisissabilité de son revenu qui devait lui servir comme pension alimentaire, qui avait malheureusement loué une de ses maisons pour un nombre d'années à un usurier, publiquement connu comme tel. Perrault se plaignait du dol et de la fraude de Malo, la défense en droit de ce dernier à l'action fut déboutée par la Cour sous ma présidence. Et je crois qu'au mérite, demande a réussi plus tard.

Dans le cas actuel, c'est la cause d'avocats honorables qui ont prêté généreusement leurs services pour ce qu'ils croyaient être juste. Celui à qui ces services ont été rendus ne se plaint aucunement de l'acte souscrit ni des services qui lui ont été rendus.

Il n'y a aucune parité entre les deux cas.

Le jugement est motivé comme suit.

Considérant qu'il y a erreur dans le dit jugement du 29 Février 1872.

Considérant que les créances pour lesquelles les dits créanciers colloqués, Joseph

Doutre et autres, ont été colloqués par les articles 8 et 20 du jugement de distribution, affectaient l'immeuble dont le produit est maintenant devant cette Cour en cette cause pour distribution, et que ces créances ont été légitimement contractées par le dit Cyrille Leblanc pour lui assurer la jouissance et l'usufruit des biens qui lui avaient été légués par la dite Julie Carrière, sa mère, et que par conséquent, le paiement de ces créances n'était pas affecté par la clause d'insaisissabilité de l'usufruit des biens légués au dit Cyrille Leblanc pour les dettes de ce dernier, et que les actes qui constatent les dites créances n'ont pas été attaqués par le dit Cyrille Leblanc ès dite qualité, lequel a, au contraire, reconnu avoir encouru les dites dettes et s'être obligé au paiement d'icelles en sa dite qualité.

La Cour a revisé et cassé le dit jugement du 29 Février 1872 et renvoyé la contestation de Cyrille Leblanc, et homologué et accordé les dites deux collocations, articles 8e et 20e du jugement de distribution, avec les frais de la dite Cour et de cette Cour de Revision, contre Cyrille Leblanc en faveur des dits Joseph Doutre et autres créanciers colloqués.

Doutre, Doutre & Doutre, pour les Appelants.

Loranger & Loranger, pour l'Intimé.

(C. B.)

COUR DE REVISION, 1872.

MONTREAL, 28 JUIN, 1872.

Coram BERTHELOT, J., MACKAY, J., TORRANCE, J.

No. 2029.

L'HON. C. WILSON,

Demandeur,

vs.

CYR. LEBLANC *ès qualité*,

Défendeur ;

ET

AUG. LAROSE et al., créanciers colloqués,

APPELANTS;

ET

LE DIT CYR. LEBLANC *ès qualité*, contestant,

INTIMÉ.

DETTES ALIMENTAIRES.

JUGE:—Qu'un grevé de substitution auquel des biens (déclarés inaliénables et insaisissables) ont été légués en usufruit, à titre d'aliments, peut valablement hypothéquer ces mêmes biens, envers des personnes qui deviennent cautions judiciaires, à sa demande, pour poursuivre l'appel d'un jugement dont l'exécution entraînerait la vente des dits biens, et par conséquent la perte de l'usufruit et des aliments; et que la validité de cette hypothèque n'est pas affectée par l'insuccès de l'appel.

Les faits, en cet instance, sont à peu près les mêmes que ceux de la cause précédente, c'est-à-dire qu'il s'agit de la distribution des deniers prélevés par la vente du même immeuble. Aug. Larose et al., avaient été colloqués pour la somme de $349.29, partie d'une somme de $1000 que le Défendeur s'était obligé de leur payer, par obligation enregistrée. Le Défendeur contesta cette collocation, sur le même motif que celles de MM. Doutre, dans la cause qui pré-

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cède. Cet acte contenait la stipulation suivante : " Attendu que les dits Larose et Lamontagne s'engagent par ces présentes à porter devant la Cour d'Appel, pour le profit et avantage du dit Cyrille Leblanc, le jugement de la dite Cour Supérieure, siégeant en Révision, et faire et avancer tous frais et déboursés, la présente obligation de $1000 doit et devra couvrir tous les dépens encourus et à encourir, sur ces différentes procédures, laquelle obligation ne devant valoir en faveur des dits Larose et Lamontagne qu'en autant que ces derniers auront à payer les dits frais et dépens comme susdit jusqu'à concurrence de la dite somme de $1000.

JUGEMENT :—Considérant qu'il y a erreur dans le dit jugement du 29 février 1872. Considérant que les créances pour lesquelles les dits créanciers colloqués, Augustin Larose et autres, ont été colloqués par l'article seizième du jugement de distribution affectant l'immeuble dont le produit est maintenant devant cette Cour en cette cause pour distribution, et que ces créances ont été légitimement contractées par le dit Cyrille Leblanc pour lui assurer la jouissance et l'usufruit des biens qui lui avaient été légués par la dite Julie Carrière, sa mère, et que, par conséquent, le paiement de ces créances n'était pas affecté par la clause d'insaisissabilité de l'usufruit des biens légués au dit Cyrille Leblanc pour les dettes de ce dernier et que les actes qui constatent la-dite créance n'ont pas été attaqués par le dit Cyrille Leblanc ès dite qualité, lequel a, au contraire, reconnu avoir encouru la dite dette et s'être obligé au paiement d'icelle en sa dite qualité,

La Cour a revisé et cassé le dit jugement du 29 avril 1872, et renvoyé la contestation du dit Cyrille Leblanc et homologue et accorde la dite collocation seizième du dit jugement de distribution avec les frais de la dite Cour et de cette Cour de Révision contre le dit Cyrille Leblanc en faveur des dits Augustin Larose et autres, créanciers colloqués.

L. L. Maillet, pour Appelants.

Doutre, Doutre & Doutre, conseils pour Appelants.

Loranger & Loranger, pour Intimé.

(J.D.)

COUR DE REVISION, 1872.

MONTREAL, 28 JUIN, 1872.

Coram BERTHELOT, J., MACKAY, J. TORRANCE, J.

No. 2029.

L'HON. C. WILSON, *Demandeur,*

vs.

CYR. LEBLANC *ès qualité,* *Défendeur.*

J. DOUTRE et al., opposants-saisissants *vs.* CHS. LEBLANC *ès qualité,* APPELANTS.

ET

CYR. LEBLANC, opposant, INTIMÉ.

JUGE:—1o. Que le Demandeur, porteur d'une exécution contre un curateur à une substitution, présentant son bref d'exécution au shérif, pendant que les biens de la substitution sont sous saisie, contre le grevé de substitution, le shérif doit, en obéissance à l'article 642, C.P.C., noter ce bref comme opposition afin de conservor.

2o. Que le Demandeur, dans ce bref ainsi noté, est bien fondé à obtenir un *Venditioni exponas*, pour faire vendre un autre immeuble de la substitution, dans la cause où son bref a été noté.

3o. Qu'une collocation, tant qu'elle n'est pas payée, ne peut être opposée comme paiement, et que dans l'exercice des différents moyens d'exécution, accordés au créancier, par l'article 554 du C.P.C., le créancier peut ne tenir aucun compte d'une collocation non payée.

4o. Qu'un bref de *Venditioni exponas* ne peut être annulé et cassé, si la partie opposante ne le demande pas.

5o. Sur l'insaisissabilité de l'immeuble, même décision que dans les deux causes qui précèdent.

Les faits de la cause sont exposés comme suit, dans le factum des Appelants:—

Le bref de *Venditioni exponas*, qui est la base de tout ce dossier, a été émis en exécution d'un jugement de la Cour Supérieure, en date du 18 novembre 1871, et contient l'exposé des faits qui l'ont précédé. On y voit que pendant que le Demandeur poursuivait l'exécution de son jugement contre l'Intimé, Cyrille Leblanc, ès qualité de légataire universel en usufruit de Dame Julie Carrière, sa mère,—il fut présenté au shérif un autre bref d'exécution émis dans une cause portant No. 2222, où les Appelants étaient Demandeurs contre Charles Leblanc, curateur à la substitution créée par le testament de la dite dame Julie Carrière.

Ces deux brefs, quoique non dirigés contre la même personne, commandaient au shérif de saisir les mêmes biens,—savoir les biens légués par le testament de dame Julie Carrière représentée par l'Intimé, comme usufruitier et par Charles Leblanc, comme curateur à la substitution, dont Cyrille Leblanc était grevé. Le shérif, sur la foi de la maxime: *saisie sur saisie ne vaut*, insérée dans l'art. 642 du Code de Procédure Civile, ne saisit pas en vertu du bref *in re* 2222, mais nota ce bref comme *opposition afin de conserver* et le rapporta ainsi noté à la Cour avec le produit de sa vente *in re* 2029. Le *Venditioni exponas* expose que les dits Joseph Doutre et al., n'ayant pas été payés du montant de leur exécution *in re* 2222 devenue opposition *in re* 2029, la Cour ordonna, le 18 novembre 1871, l'émission du bref de *Venditioni exponas* dont le dit Cyrille Leblanc ès qualité a suspendu l'exécution par l'opposition qui donne lieu à cette demande de révision.

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Cette opposition allègue que le jugement dont les dits J. Doutre et al. poursuivent l'exécution, a été rendu contre Charles Leblanc ès qualité, pour des frais accrus dans des poursuites mues entre le dit Charles Leblanc ès qualité, et le demandeur, Charles Wilson, lesquels frais s'élevaient à $311,—que ce jugement a été rendu le 30 octobre 1870 ; que le 25 mai 1869, par acte devant Lamontagne, N.P., l'opposant actuel, (Cyrille Leblanc ès qualité) a consenti une obligation avec hypothèque pour $400 sur l'usufruit d'un immeuble possédé par le dit opposant et qui a été vendu le 4 février 1871, par autorité de justice ;—que sur cette somme de $400, l'Opposant ne devait personnellement que celle de $89 ; que la balance, savoir $311, était pour les frais encourus dans les causes susdites mues entre le dit Chs. Wilson et le dit Charles Leblanc ès qualité ;—que le montant du jugement en exécution duquel l'immeuble saisi doit être mis en vente le 12 du courant (Déc. 1871) a été et est la considération de l'obligation du 25 mai 1869, jusqu'à concurrence de la dite somme de $311 ;—que les dits J. Doutre et al. ont reçu, sur le produit de deux immeubles vendus sur l'Opposant, $145.29, en déduction de la dite obligation du 25 mai 1869 ; qu'en supposant que la dite somme de $145.29 aurait servi à payer la partie de la dite obligation que l'Opposant devait personnellement, savoir $89, ils auraient reçu en déduction de leur jugement, qui fait la considération du reste de la dite obligation, la somme de $56.29, pour laquelle ils ne donnent aucun crédit sur le bref de *Venditioni exponas ;* qu'en outre de cette somme, les dits J. Doutre et al. ont été, le 30 octobre 1871, colloqués sur le produit de la vente d'un immeuble saisi par le Demandeur sur le dit Opposant, pour la somme de 294.71, représentant la balance de la dite obligation du 25 mai 1869 ; que cette collocation a été contestée par le dit opposant, qui a prétendu que la dite collocation devait être réduite à $75 et a reconnu qu'ils avaient droit à cette somme sur les deniers entre les mains du shérif ; qu'en ajoutant ces $75 aux $56.29 ci-dessus mentionnés, cela formerait $131.29 que les dits J. Doutre et al. *auraient reçus* en déduction du jugement en question, et pour lesquels ils n'accordent aucun crédit au dit Charles Leblanc ès qualité ; que par le testament de Dame Julie Carrière, mère de l'Opposant, daté le 20 août 1863, la testatrice a légué à l'Opposant en usufruit tous ses biens, à charge d'en transmettre la propriété aux enfants à naître de son légitime mariage, lequel usufruit fut légué à titre d'aliments et déclaré insaisissable et inaliénable pour les dettes du dit Opposant ; que l'immeuble saisi forme partie de ces biens ; que l'Opposant a intérêt que la créance des dits J. Doutre et al. et la saisie soient réduites à la somme de $131.29. En conséquence, il conclut à ce qu'il soit déclaré que l'immeuble en question soit déclaré insaisissable ; qu'avant l'émanation du bref, les dits J. Doutre et al. avaient reçu du dit Opposant $131 à compte du montant ;—à ce qu'il soit adjugé que les dits J. Doutre et al., ont à tort fait émaner le dit bref pour le montant du jugement qu'ils ont obtenu contre le dit Charles Leblanc,—à ce que la dite somme de $131 soit déduite du montant porté au dit gref,—à ce qu'en conséquence la saisie faite, quant à la dite somme de $131, soit déclarée nulle et mise au néant et main levée accordée au dit opposant avec dépens dans le cas de contestation.

La contestation de cette opposition par les Appelants nie tous les faits allégués

et notamment que le jugement en exécution duquel le dit immeuble était mis en vente, eut été la considération de la dite obligation jusqu'à concurrence du dit jugement,—qu'ils n'avaient reçu aucune partie du dit jugement,—que le montant pour lequel ils sont allégués avoir été colloqués était contesté ; elle allègue de plus que la qualité en laquelle le dit Charles Leblanc avait été condamné, excluait et repoussait tous les moyens invoqués par l'Opposant, comme résultant du testament de sa mère, cette qualité de curateur à la substitution donnant au dit jugement la même force et valeur que s'il eut été rendu contre l'auteur de la substitution ; que d'ailleurs la dite opposition démontrait elle-même que le dit opposant était la vraie partie en cause sous le nom du dit Charles Leblanc ès qualité,—que les procédés faits au nom du dit Charles Leblanc ès qualité, avaient eu lieu à la réquisition du dit opposant et pour protéger son usufruit. De plus, dénégation générale.

Outre la preuve écrite, l'Opposant a examiné J. Doutre, l'un des Appelants, qui établit : 1o. Que le jugement obtenu contre Charles Leblanc ès qualité, est pour les frais d'une opposition faite en cette cause (2029) par lui Charles Leblanc ès qualité,—de la révision du jugement rendu sur la même opposition et de l'appel du jugement en Révision ; 2o. que l'obligation du 25 mai 1869 comprenait les frais probables de cet appel ; 3o. que le compte A produit à l'enquête par l'Opposant contient la charge des frais de l'opposition ; 4o. que $145.29 ont été reçus sur des collocations antérieures en déduction de l'obligation ; 5o. que les frais d'opposition en première instance et de révision du dit Charles Leblanc, ne font pas partie des $400 de l'obligation ; 6o. que l'immeuble saisi fait partie des biens laissés par feue Julie Carrière.

La preuve des Appelants résulte de leur exécution et du jugement sur lequel elle est fondée.

Le jugement dont est appel contient les dispositions suivantes :

"Considérant, 1o. que l'immeuble n'a pas été saisi sur Charles Leblanc, mais sur Cyrille Leblanc ;

"2o. Que J. Doutre et al. ne font apparaître d'aucun titre exécutoire contre Cyrille Leblanc et qu'ils ne pouvaient, pour une dette de Chs. Leblanc ès qualité, de tuteur à la substitution, saisir et faire vendre des immeubles dont Cyrille Leblanc était en possession comme grevé de substitution ;

"3o. Que Doutre et al. ne pouvaient unir leur bref à celui du Demandeur, d'après l'article 642, C.P.C., et ne pouvaient procéder sous l'article 643 à exproprier le Défendeur ;

"4o. Qu'en supposant le bref légalement émané, l'immeuble était insaisissable et l'usufruit alimentaire et que la créance de J. Doutre et al. n'est pas de celles pour lesquelles la loi permet de saisir les choses léguées pour aliments ;

"5o. Considérant que pour les raisons ci-dessus, l'Opposant est bien fondé à s'opposer à la saisie et vente du dit immeuble.

"La Cour maintient la dite opposition et déclare nul et met au néant le dit *Venditioni exponas* avec dépens."

Les Appelants se plaignent de ce jugement, lequel, suivant eux, n'est pas dans la limite de la contestation liée et n'est pas conforme aux principes de droit qui dominent la cause.

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1o. *Annulation du Bref de Venditioni Exponas.*

Quelque bien fondés, en fait et en droit, que pourraient être les trois premiers motifs de ce jugement, les Appelants exposent qu'ils ne sont pas appelés à en discuter le mérite,—attendu que ces motifs ne portent sur aucune des prétentions des parties.

La Cour de première instance n'était pas saisie d'un litige soulevant les questions mentionnées dans ces trois premiers motifs; l'opposant n'invoquait aucun de ces moyens et n'appelait pas la protection du tribunal sur ces faits. Les appelants soumettent que, sous notre système judiciaire, le juge n'est pas plus autorisé à prononcer sur des questions qui ne lui sont pas soumises, qu'il ne le serait à faire *ex officio* des perquisitions dans les dossiers de la Cour, sur le motif de protéger ceux qui laissent dormir leurs causes dans les archives. Ainsi dans une opposition où le saisi demanderait la nullité de la saisie sur le seul motif qu'il aurait acquitté le jugement, mais ne prouverait pas ce paiement, le juge, empêché de déclarer la saisie nulle, par le défaut de cette preuve, ne serait pas autorisé à déclarer la saisie nulle, parcequ'il aurait découvert quelqu'irrégularité dans la procédure sur l'exécution. Il peut, sans doute, exister des cas où la procédure fournit au juge l'occasion d'appuyer une sentence sur des principes différents de ceux invoqués par les parties et il a été récemment soumis une cause à la Cour de Révision, qui en fournit un exemple. Dans la cause de *Laurin & Crevier*, la Demanderesse poursuivait la résolution d'une vente pour défaut de paiement. A cette demande, le Défendeur opposait un titre à lui consenti par un Syndic à une faillite, auquel il attribuait la valeur d'un décret, purgeant l'immeuble des droits qu'exerçait la Demanderesse, et il alléguait avec précision les circonstances sous lesquelles ce titre avait été passé. La demanderesse *niait tous ces faits* et soutenait en outre qu'en supposant que ce titre aurait la valeur d'un décret, il était insuffisant pour repousser son action. L'Hon. Juge, appelé à prononcer sur ces prétentions, ayant des doutes sur l'effet attribuable à cet acte, s'il avait la valeur d'un décret, débouta le Défendeur de ses prétentions, sur le motif que son titre était entaché de nullité, en conséquence d'irrégularités dans la procédure du Syndic, quoique ces irrégularités ne fussent pas spécifiquement signalées et invoquées. Mais elles l'étaient par la dénégation générale des faits allégués par le Défendeur.

Dans la présente instance, si la saisie n'eut pas été suspendue par l'opposition elle eut suivi son cours. Les moyens invoqués dans l'opposition étaient seuls de la compétence de la Cour. Les parties sont les meilleurs juges de ce qu'elles ont intérêt à soumettre aux tribunaux. Dans notre organisation judiciaire, le ministère public n'intervient pas comme en France, même dans des questions d'ordre public, lorsqu'elles sont agitées entre particuliers en dehors de son initiative. D'ailleurs, pourquoi le ministère public intervient-il en France, dans les matières d'ordre public, si ce n'est pour saisir le tribunal, si ce n'est parceque le juge ne peut *ex officio* suppléer au zèle des particuliers et à la surveillance de l'autorité politique? L'Art. 16 du C. P. C. dit que: "il ne peut être adjugé sur une demande judiciaire sans que la partie contre laquelle elle est formée ait été entendue ou duement appelée."

La loi suppose d'abord que la demande est formée, c'est-à-dire composée d'éléments qui la rendent appréciable et elle veut que la partie soit entendue.

Comment serait-elle entendue, si, au lieu de juger la demande formée, le tribunal décide sur d'autres éléments que ceux qui la composent?

Si les appelants étaient appelés à critiquer ces trois premiers motifs du jugement, ils les résumeraient d'abord en un seul, savoir: Le jugement des Appelants étant contre Leblanc, ès qualité, leur exécution ne pouvait être pratiquée contre Cyrille Leblanc, usufruitier, ni être greffée sur l'exécution du Demandeur Wilson dirigée contre ce dernier.

La saisie immobilière a moins en vue le détenteur, quoiqu'il en faille un, que l'immeuble lui-même. Le but évident de l'Art. 642 du C. P. C. et des origines de cette législation, était d'empêcher l'accumulation de frais inutiles. Ici il fallait évidemment exécuter et vendre à la poursuite des Appelants les mêmes biens que ceux contre lesquels le demandeur Wilson dirigeait. Cyrille Leblanc détenait ces biens comme grevé de substitution et Charles Leblanc les représentait comme curateur à cette même substitution. Le Shérif interprétant sainement l'Art. 642 C. P. C. ne fit pas saisie sur saisie, mais nota le bref des Appelants, comme une opposition *afin de conserver*, et ce bref n'étant pas satisfait, par la saisie de Wilson, le Shérif procéda ultérieurement, ainsi que l'Art. 643 C. P. C. lui enjoignait de le faire.

Au reste le Shérif était dirigé, dans sa procédure, non seulement par ces deux articles du Code de Procédure, mais encore par un ordre formel de la Cour. Par son jugement du 18 Novembre 1871, la Cour, après examen des circonstances, avait ordonné l'émission du Bref de *Venditioni Exponas* annulé, comme irrégulier, par le jugement dont est Appel. Ainsi ce n'est pas seulement l'acte ministériel du protonotaire que ce jugement casse et annule, c'est un jugement solennel de la Cour! Et cela, sans en avoir été requis par qui que ce soit!

Les Appellants n'insistent point d'avantage sur ce point.

2o. *Insaisissabilité de l'immmeuble saisi.*

L'autre motif du jugement casse le Bref et annule la saisie, parceque l'immeuble saisi a été légué à l'Intimé comme aliments et sous la condition de l'insaisissabilité. Le jugement ne touchant pas aux questions de paiements et d'imputations invoquées par l'Intimé, il n'en sera pas parlé.

Les Appelants soumettent humblement que si les autres motifs de ce jugement discutés ci-dessus sont écartés, comme mal fondés, celui-ci pèche encore, comme dépassant les conclusions de l'opposition et comme violant l'Article 17 du C. P. C. qui dit que " le tribunal ne peut adjuger au delà des conclusions de la demande."

Les Appelants mettent en fait que l'*Intimé n'a pas demandé l'annulation de la saisie;* mais simplement la réduction du montant pour lequel elle était pratiquée.

Il est bien vrai que dans ses conclusions l'Intimé demande que l'immeuble soit déclaré insaisissable; mais il n'a pas été plus loin là dessus. Au contraire il procède de suite à demander qu'il soit déclaré que la saisie, quant à une partie du montant pour lequel elle est pratiqué, savoir $131, soit déclarée nulle et mise à néant, mais alors elle devait subsister pour le reste.

Le juge n'est pas tenu, ni même autorisé à suppléer à l'insuffisance de la demande; tant pis si cette demande est mal formée et si le Juge est empêché

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d'arriver aux conséquences d'un principe, si l'application de ces conséquences n'est pas demandée. Or par la manière en laquelle cette question d'insaisissabilité était soumise au tribunal, elle restait dans la condition d'une théorie légale. La Cour, après avoir déclaré l'immeuble insaisissable, ne pouvait aller au delà, car elle n'était pas sollicitée de le faire.

Evidemment l'Intimé n'avait aucune confiance dans ce moyen, puisqu'il n'a pas songé à en tirer partie. Et il avait raison de n'y pas attacher d'importance.

§ 1o. Ainsi que les Appelants l'énoncent dans leur contestation de l'opposition, la qualité en laquelle Charles Leblanc était condamné à leur payer la somme dont les Appelants poursuivaient le recouvrement, savoir la qualité de curateur à la substitution, excluait et repoussait le moyen d'insaisissabilité invoqué par l'Intimé —le jugement des Appellants ayant la même force et valeur que s'il eut été rendu contre l'auteur même de la substitution.

Il est des circonstances où l'intérêt du grevé peut différer de celui des appelés à la substitution, ainsi qu'en témoignent plusieurs articles du Code Civil, (Arts. 945, 946, 959, &c.,) mais cette distinction n'avait pas sa raison d'être en cette instance. L'Intimé s'est chargé lui-même de démontrer, dans son opposition et par sa preuve, que l'origine de la créance des Appelants git dans une opposition faite par le dit Charles Leblanc, ès-qualité à la saisie du demandeur Wilson, laquelle saisie menaçait d'emporter le fonds et l'usufruit tout à la fois, comme de fait elle a emporté le fonds et l'usufruit, quant aux immeubles qui ont été vendus, en satisfaction du jugement du Demandeur. Il s'agissait, dans les procédures qui avaient donné lieu aux frais pour lesquels les Appelants ont obtenu le jugement en question, de sauver l'usufruit de l'Intimé, ainsi qu'il le reconnait lui-même, dans l'obligation du 25 Mai 1869.

§ 2o. En supposant que, sous les circonstances, l'usufruit de l'Intimé fût insaisissable, il ne pourrait tout au plus que demander par opposition, que la vente fut faite à la charge de lui conserver l'usufruit; mais il ne pourrait point empêcher la vente de la nue propriété.

§ 3o. Les termes mêmes du testament créant cette substitution repoussent les prétentions de l'Intimé. Il y est dit: "Je veux de plus que la jouissance de mon dit fils et les revenus et loyers provenant de mes immeubles, etc., ne puissent être saisis et vendus *pour les dettes de mon fils.*" Au reste la testatrice ne pouvait faire plus. S'agit-il ici d'une dette de son fils? Nullement. C'est une dette créée par celui qui représente à tous égards la testatrice elle-même.

L'art. 554 du C.P.C., dit que "le créancier peut exercer en même temps les différents moyens d'exécution que la loi accorde."

Or, quand ils ont sollicité et obtenu le *Venditioni exponas* en question, leur collocation de $294.71 était contestée, sauf les $75. Ces $75 étaient insuffisants pour payer les $104.81, que devait encore l'Intimé sur les $400 de l'obligation. En conséquence, cette collocation, tant qu'elle était contestée, n'affectait aucunement le montant du jugement dont les Appelants poursuivent l'exécution. Le créancier n'est tenu de constater sur le bref d'exécution que ce qu'il a reçu (Art. 555 C.P.C.). Or, il n'avait pas reçu les $75, encore moins les $294.71.

Le motivé écrit du jugement de première instance, communiqué aux parties, exprime presque un regret, en disant que l'équité est toute du côté des Appe-

lants. Or ces derniers croient avoir démontré encore une fois que l'équité est rarement, si jamais, autre chose que la loi elle-même.

Le factum de l'Intimé soutient de la manière suivante, le jugement de première instance :

Il s'agit d'un *Venditioni exponas*, et les dits messieurs Doutre ne pouvaient obtenir et de fait n'ont obtenu ce bref, que par subrogation des droits du Demandeur, à la saisie sur laquelle ils avaient greffé leur exécution. Le Demandeur ayant été payé de sa créance, ils se sont prévalus du fait qu'ils avaient été notés sur son bref d'exécution, pour prendre un *Venditioni exponas*.

Or, les dits messieurs Doutre étaient sans droit à greffer sur une exécution dirigée contre le Défendeur, un jugement qu'ils avaient obtenu contre un tiers et à demander que l'immeuble du Défendeur fût vendu sur lui, en exécution de ce jugement rendu dans une cause dans laquelle il n'est pas même partie.

Le Défendeur est un grevé de substitution, et comme tel est le seul propriétaire des biens substitués, jusqu'à l'ouverture de la substitution. Les substitués n'ont aucun droit ouvert qui puisse être saisi.

La saisie a été pratiquée sur le Défendeur pour une dette antérieure à la substitution, et comment messieurs Doutre peuvent-ils rechercher sur lui la vente de l'immeuble en question, en vertu d'un jugement rendu contre le curateur, pour une dette postérieure à la substitution ? En vertu de quel droit priveront-ils le grevé de la jouissance et propriété des biens substitués, quand ils n'ont contre lui aucun jugement ?

La procédure des messieurs Doutre est basée sur les articles 642-643 du C.P.C.

Ces articles ne s'appliquent qu'aux jugements rendus contre le saisi, mais ne donnent pas le droit de noter contre lui des jugements rendus contre des tiers et pour des créances qui ne le regardent pas.

Telle est la première raison pour laquelle la Cour Supérieure a maintenu l'opposition du Défendeur.

Par son opposition, l'Intimé prétendait, en outre, que l'immeuble saisi lui avait été légué à charge de substitution, l'usufruit à titre d'aliments, et avec clause d'insaisissabilité et prohibition d'aliéner, et que la créance de messieurs Doutre n'étant pas une dette d'aliments, ils étaient sans droits à faire vendre le dit immeuble.

Leur créance est pour frais encourus dans des procédés qu'ils ont défendus au nom du curateur à la substitution, en Cour Supérieure, en Révision et en Appel, et l'Intimé maintient que cette créance ne participe pas de la nature d'une dette d'aliments ; car l'on entend par dette d'aliments, disent Pothier et Pigeau, *les vêtements, la nourriture, le logement ou autres choses indispensables à la vie.*

On dit en réponse à cela, que les poursuites en question ont eu pour objet de lui conserver son usufruit. Il est difficile de le croire, quand on voit qu'aucune de ces poursuites n'a réussi, et qu'elles n'ont eu d'autre résultat que d'élever les frais au double de la somme due au créancier, que l'on a réussi à retarder par des poursuites.

Nul doute que les frais encourus dans une poursuite fructueuse du créancier d'une dette alimentaire, ne soit une dette d'aliments, et dans ce cas ces rais

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seraient payés de préférence à la créance. Peut-on en dire autant d'une poursuite infructueuse? L'avocat pourrait-il, dans le cas où son client aurait perdu sa cause, faire saisir ce qui lui a été laissé comme aliments?

Certainement non, car ainsi que le remarquait l'honorable Juge Beaudry, qui a jugé cette cause, il n'est plus qu'un créancier ordinaire. La clause d'insaisissabilité est absolue, et le Procureur moins que personne ne peut se plaindre, car il connaît l'état de son client, et la condition des biens dont il jouit.

L'Intimé prétendait en outre dans son opposition, qu'en supposant que messieurs Doutre auraient le droit de faire vendre le dit immeuble, ils avaient omis de lui donner crédit pour toutes les sommes d'argent qu'il leur avait payées.

BERTHELOT J.—Cette contestation, entre les Messrs. Doutre et l'opposant, a quelque connexité avec les causes et les contestations qui viennent d'être adjugées en cette instance entre les mêmes parties, sur la contestation du jugement de distribution. Voici ce dont il s'agit maintenant.

L'immeuble vendu par décret le 25 Janvier 1871, et dont le produit est maintenant devant cette Cour, avait été saisi sur l'opposant comme grevé de substitution, et avait appartenu à sa mère Julie Carrière, débitrice du demandeur.

Dès le 10 Janvier 1871, les Messieurs Doutre, créanciers par jugement du 30 Octobre 1870, contre Charles Leblanc, tuteur à la dite substitution, avaient présenté au Shérif de Montréal, une exécution pour la saisie du même immeuble, attendu que leur jugement contre le Tuteur à la substitution pouvait affecter le dit immeuble, non seulement pour l'usufruit mais pour le fonds même. Le Shérif, suivant l'article 642 du Code de Procédure, a noté le bref des Demandeurs en la cause No. 2222 sur jugement du 30 Octobre 1870, comme opposition afin de conserver, qu'il rapporta avec son retour des deniers dans cette cause No. 2029.

La distribution préparée par le protonotaire, qui accorda et alloua, par collocations Nos. 8 et 20, certaines sommes de deniers aux dits Messrs. Doutre & al., ayant été contestée par le dit Cyrille Leblanc (lesquelles contestations sont celles qui viennent d'être adjugées) les dits créanciers obtinrent, sur motion à cet effet, devant cette Cour, présidée par son Honneur le Juge Torrance, un jugement en Novembre 1871, pour être subatitué au Demandeur Wilson dont la créance avait été payée par la dite distribution et pour procéder à la vente *per Venditioni Exponas* d'un immeuble déjà saisi à la poursuite sur le dit Cyrille Leblanc et ce en conformité aux articles 642 et 643 du Code de Procédure.

Ce jugement est dans toute sa force et la révision n'en a jamais été demandée. Il doit être exécuté puisqu'il n'est pas mis en question. Nous le croyons juste, d'ailleurs.

Un writ de *Venditioni Exponas* fut émané le 20 Novembre 1871 et suivi d'une opposition par laquelle l'Opposant prétend que la saisie est pour plus qu'il n'était du aux Messrs. Doutre, soit par le Tuteur à la substitution représentant la testatrice Julie Carrière, ou par le grevé de substitution, Cyrille Leblanc, son légataire universel en usufruit. Pus aussi les mêmes moyens que ceux plaidés par lui dans les autres contestations fondées sur la clause d'insaisissabilité imposée par le testament de Julie Carrière.

L'opposant ne conclut cependant pas à la nullité de la saisie, mais seulement à la réduction du montant porté au bref de *Venditioni Exponas* dont il n'a pas

même contesté la régularité et la légalité si ce n'est pour 131 piastres, il semble admettre que pour le surplus il n'a pas à se plaindre.

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Les créanciers ont répondu à cette opposition que, loin d'avoir été payés, Cyrille Leblanc avait contesté les collocations qui leur avaient été accordées, Nos. 8 et 20, par le dit jugement de distribution, et que la qualité en laquelle le dit Charles Leblanc avait été condamné à leur payer, excluait tous les moyens invoqués par le dit Opposant, attendu que leur jugement contre le tuteur à la substitution avait autant d'effet que s'il avait été rendu contre l'auteur de la substitution. La contestation était ainsi limitée lors que la Cour par le jugement du 29 février 1872, sans égard au jugement du 18 Novembre qui est encore dans toute sa force, a détruit l'effet de ce jugement, en adoptant une autre manière de voir et d'interpréter les articles 642 et 643 du Code, que celle qui avait servi de motif au jugement du 18 Novembre 1871.

Le but de ces deux articles est de diminuer les frais de justice. Par le jugement du 30 Octobre 1870, Messrs. Doutre pouvaient exécuter le fonds et l'usufruit de l'immeuble et une fois notés comme créanciers hypothécaires par le Shérif—avec son retour d'exécution contre Cyrille Leblanc, sur qui le même immeuble avait été saisi, ils pouvaient bien, une fois le writ de Mr. Wilson épuisé et satisfait, être admis à s'en servir contre l'immeuble dont la vente avait été ordonnée en dernier lieu et déjà saisi par Wilson.

Les articles 642 et 643 ont eu en vue d'empêcher les frais multipliés des avertissements du même immeuble saisi.

Il était indifferent pour Cyrille Leblanc que ce dernier immeuble en question fut vendu sur lui ou sur Charles Leblanc, tuteur à la substitution. Le mode adopté par le jugement du 18 Novembre 1871, diminuait les frais avec profit pour Cyrille Leblanc, aussi il n'en avait pas fait un grief ou un motif de son opposition.

Quant au moyen résultant de la clause d'insaisissabilité, ce que nous avons décidé sur les autres contestations doit nous servir de règle sur celle-ci.

Le jugement dont la Révision est demandée a été beaucoup au delà de ce qui était demandé en déclarant nul et de nul effet le *Venditioni Exponas*.

Nous croyons que l'Opposant, tel qu'il l'a exprimé par les conclusions de son opposition, ne soulève qu'une question de chiffres entre les créanciers et lui. Elle pourra être réglée après l'homologation du jugement de distribution préparé par le Protonotaire.

Pour le moment, l'on doit reviser le jugement pour les raisons suivantes :—

1o. Que le jugement du 18 Novembre 1871 étant encore dans toute sa force ne pouvait pas être mis de côté sans aucune demande à ce sujet.

2o. Que la créance des Messrs. Doutre contre Charles Leblanc par jugement du 30 Octobre 1870, en toute sa force, pouvait être exécutée contre l'immeuble saisi—cet immeuble étant un de ceux saisis par le dit C. Wilson, et par lequel les Messrs. Doutre avaient droit à une saisie soit en leurs noms soit comme créanciers par hypothèque sur celui ci.

3o. Que l'Opposant, n'ayant pas fait preuve de ses allégués de paiement, le writ de *Venditioni Exponas* doit avoir son cours—réservant peut-être à l'opposant le droit de se pourvoir ci-après sur la distribution des deniers, après l'exécution du writ de *Venditioni Exponas*, s'il y a lieu.

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Il est certain que cette manière de régler cette longue contestation épargnera des frais à Cyrille Leblanc. Et il n'a pas réellement raison de se plaindre—avec la réserve que nous lui accordons par le jugement rendu.

JUGEMENT :—Considering that there is error in the said judgment of the 29th February 1872.

Considering that the *Venditioni exponas* in this cause, issued upon good and sufficient authority to wit, the judgment of the Superior Court of the 18th of November 1871, and the claim of said Joseph Doutre and consors was a good one and for which said immoveable seized might be, under the circumstances of this cause, sold under said writ through given by said Dame Julie Carrière subject to *insaisissabilité* and to serve as *aliments* to said Cyrille Leblanc.

Considering that the judgment complained of has gone beyond the prayer of the opposition of said Cyrille Leblanc, that the opposition did not attack the regularity and legality of the issue of said *Venditioni exponas* and that in so far as annulling the said writ the judgment of the 29th February last past was and is unwarranted.

Considering that the Opposant has not proved the averments and allegations of payment by him made in and by his said opposition, doth revise said judgment of the 29th February last past, and dismiss and reject the opposition of Cyrille Leblanc with costs, in said Superior Court, in favor of said Joseph Doutre et al., and with costs of this Court of Revision against said Opposant in favor of Joseph Doutre et al. Reserving to said Cyrille Leblanc, the Opposant, the right to renew his pretentions of payment against the amount for which said Writ of *Venditioni exponas* has issued by opposition *afin de conserver* on the distribution hereafter to be made when said writ has been executed.

Doutre, Doutre & Doutre, pour Appelants.

Loranger & Loranger, pour Intimé.

(J.D.)

COURT OF REVIEW, 1870.

MONTREAL, 30TH DECEMBER, 1870.

Coram MONDELET, J., MACKAY, J., BEAUDRY, J.

No. 2745.

The City of Glasgow Bank, Plaintiff; and *James Arbuckle et al.*, Defendants; and *John Kerry et al.*, Petitioners.

HELD:—1. Although a commercial firm be dissolved, the members thereof are still partners for the liquidation of the affairs of the old partnership, and a writ of attachment in compulsory liquidation against them as copartners is well founded.

2. In any case, under the above circumstances, upon the principle that interest is the measure of actions, a creditor of one of the individual partners has no right, as against the creditors of the dissolved firm, to oppose the attachment.

The petitioners alleged that at the time of the issuing of the writ of attachment in th isause, James Bruce, one of the defendants, was indebted to them in the sum of $159 and interest;

That James Bruce had, long prior to the issuing of the writ of attachment, carried on business alone in Montreal, under the style of James Bruce & Co.;

That at the time said writ was issued, said James Bruce was not associated with James Arbuckle, the other defendant, and had long before ceased to be his copartner, the said copartnership having been dissolved by the said James Arbuckle becoming insolvent in Scotland, and his estate having been administered according to the law in force there; of all which, and of the dissolution of the said copartnership, notice was given in the *Edinburgh Gazette*, published by authority, and the plaintiffs were thereby, and by circular, made fully aware of the same before the writ of attachment was issued;

That the affidavit upon which the plaintiff issued the writ of attachment in this cause, in so far as the same represented the defendants to be copartners and carrying on business together under the style and firm of Arbuckle & Bruce, is false and untrue, and the writ of attachment was illegally and informally issued against the said James Arbuckle and James Bruce, as still being copartners in trade, for the purpose of attaching the individual estate of James Bruce as being the property of Arbuckle & Bruce, and thereby to secure to plaintiffs, creditors of the old firm of Arbuckle & Bruce, a preference in the distribution of the estate over the petitioners and others, creditors of the said James Bruce alone;

That the said affidavit was and is moreover wholly insufficient to justify the issuing of a writ of attachment, inasmuch as it omits to set forth any legal reasons for issuing said attachment, and omits also to disclose any sufficient grounds for the belief of the party making the affidavit, or any justifiable cause for making the same;

That all the goods, wares and merchandize and other effects attached under the writ of attachment issued in this cause, were the property of James Bruce individually; and petitioners, as the creditors of the said James Bruce, have an interest in and a right to intervene in the suit for the purpose of contesting the said writ of attachment and the affidavit upon which the same issued, as also the appointment of an assignee;

That the said James Bruce, acting in compliance with a resolution of his creditors to that effect at a meeting convened according to law, made an assignment of his estate to Robert Watson, of the City of Montreal, accountant, on the 26th of May, 1868, before W. Ross, notary public, at the said City of Montreal, and that the plaintiffs, instead of ranking upon the estate of the said James Bruce concurrently with petitioners and other creditors, illegally caused the attachment to issue against Arbuckle & Bruce, who were their debtors and as still being in partnership, and the property of James Bruce to be attached, as if the same were the property of Arbuckle & Bruce, thereby injuriously affecting petitioners' rights by enabling the plaintiffs to rank for the full amount of their claim, to the exclusion of petitioners and the other creditors of the said James Bruce.

Wherefore they prayed that they be permitted to intervene in this suit for the purpose of contesting the said writ of attachment and the affidavit upon which the same issued, and that it be ordered that all proceedings upon the said writ of attachment be suspended until the present petition and intervention be determined; and further that, by the final judgment to be rendered thereon, the

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affidavit in this cause fyled by the plaintiffs, upon which the process of attachment was issued, as also the said writ of attachment, the attachment and seizure process verbal thereof, and all other proceedings had and taken under the said writ of attachment, be declared illegal, informal and null and void, and be quashed and set aside with costs.

The plaintiffs petitioned to reject the above petition, alleging:—That on the 26th of October, 1868, a writ of attachment, having for its principal object the appointment of an assignee to the insolvent estate of the defendants, was duly issued at the instance of the plaintiffs and was duly returned on the 11th of November then following.

That the defendant failed to fyle any petition to quash the said writ of attachment or to suspend proceedings as permitted by law, but on the 9th and 16th days of November, 1868, respectively, one Robert Watson, styling himself assignee of the estate of James Bruce, one of the defendants, fyled petitions to set aside the writ of attachment and all the proceedings in this matter, but the said petitions have been, by the judgment of this Honorable Court, confirmed in review and in appeal, finally rejected and set aside.

That by reason of the premises and by law the proceedings of the plaintiff could not further be contested, and the plaintiff had a right to have an assignee named to the insolvent estate of the defendants.

That the petition of the said petitioners, John Kerry et al., ought to be rejected without the plaintiff being held in any way to answer the same, for the following among other reasons:—

1. Because the proceeding adopted by the said petitioners was not known to the law, and they had no right by petition or otherwise to contest the writ of attachment issued, or any of the proceedings had, in this matter.

2. Because the said petitioners had no legal right or interest to prevent the appointment of an assignee to the insolvent estate of Arbuckle & Bruce, the defendants, the said petitioners not being creditors of the said estate.

3. Because the writ of attachment and proceedings for compulsory liquidation, in this matter, cover and include the individual estates of the said James Arbuckle and James Bruce, respectively, and the said petitioners will not be deprived of any of their rights by the appointment of an assignee to the estate of the defendants under the proceedings in this matter.

Judgment was rendered by His Honor Mr. Justice Torrance, on the 22nd of October, 1870, granting plaintiff's petition and rejecting that of Kerry, et al., who thereupon brought the matter before the Court of Review, which sustained the judgment of Mr. Justice Torrance.

MONDELET, J., (*dissentiens.*) "A creditor finds out that a debtor of his is forced into insolvency, as a copartner in a firm. This debtor, the creditor knows never to have been such copartner. He presents, in Chambers, a petition, wherein he alleges the fact, and prays to be permitted to present such petition, to the end that he may establish that his debtor is not, and never has been, such copartner. The Judge in Chambers permits the fyling of the petition, and subsequently the case is submitted to Mr. Justice Torrance, who, upon a counter-petition, dismisses that petition. The judgment (22nd October, 1870) is not motivé, and I infer that the learned Judge considered that an outside creditor

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cannot obtain the conclusions of such a petition, which he dismissed. I cannot acquiesce in such a course. L'intérêt est la mesure des actions. What greater interest can a creditor have, than in the position thus falsely and unjustly made to the debtor? Is it not evident that, by being forced into insolvency, the petitioner's debtor may be ruined, and the creditor lose his recourse and never get anything? Is it not clear that by refusing the creditor the opportunity of establishing that his debtor has never been a member of the pretended copartnership (the defendants) the Court will be exposed to declare, and persist in the declaration of a falsehood? The sec. 26 of the Insolvency Act of 1869, has no bearing whatever on the present case; it refers only to defendants, and cannot authorize the trampling upon the rights of other persons. The petitioners are creditors of one of the defendants (James Bruce), they have shewn their interest, —that interest is the measure of his present course, and should not have been overlooked.

It has also been submitted to the consideration of this Court of Review, whether Mr. Justice Torrance had the power to set aside the order obtained from another Judge, allowing the petitioners' petition to be fyled.

Upon the whole, I am of opinion that there is error in the judgment appealed from, that it should be reversed, and the petitioners allowed to make good, if they can, their allegations.

The majority of the Court of Review were of opinion that the judgment should be confirmed.

Judgment confirmed, Hon. Mr. Justice Mondelet dissenting.

Ritchie, Morris & Rose, for plaintiffs.

Carter & Hatton, for petitioners.

(J. L. M.)

COUR SUPERIEURE, 1872.

ST. HYACINTHE, 2 AVRIL, 1872.

Coram SICOTTE, J.

No. 1350.

Ex parte *Thomas Macfarlane*, requérant sur writ de *Certiorari*, et *F. X. Bourgault*, commissaire des petites causes, et *J. Bte. Surprenant*, poursuivant.

JUGE:—Que dans une poursuite faite devant une Cour de Commissaires, pour la décision sommaire des petites causes, la juridiction de la Cour doit apparaître à la face même des procédés mus devant la Cour.

2o. Qu'un Défendeur poursuivi comme domicilié dans le village d'Acton Vale, devant la Cour des Commissaires du township d'Acton, sans qu'il apparaisse par la sommation et par le jugement que le dit village d'Acton Vale est dans le township d'Acton, peut demander et obtenir la cassation du jugement, le condamnant à payer le montant réclamé, sur le principe, que ni la sommation ni le jugement ne font apparaître la juridiction de la dite Cour sur lui.

3o. Que lorsque le jugement a été une fois prononcé à l'audience, il n'est plus au pouvoir du juge de le changer, sous aucun prétexte, de manière à augmenter le montant de la condamnation, et s'il est ainsi altéré, la partie condamnée peut demander et obtenir la cassation du jugement, par la voie du Bref de *Certiorari*.

Les faits sont les suivants :—

Jean Bte. Surprenant avait poursuivi, devant la Cour des Commissaires du township d'Acton, Thomas Macfarlane, le requérant, comme domicilié dans le vil-

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lage d'Acton Vale, dans le district de St. Hyacinthe, pour la somme de $22.54. Au jour fixé pour la preuve, le requérant nia la juridiction de la Cour, et nia aussi les faits allégués dans la demande. La preuve fut faite, et le juge (F. F. Bourgault, commissaire) après avoir entendu la preuve, rendit jugement à l'audience pour la somme de $12.54. Après avoir entendu d'autres causes contre le même défendeur, pour des comptes de la même nature, et dans lesquelles il rendit jugement pour la somme de $22.54, il prétendit qu'il avait fait une erreur de calcul dans la première cause et demanda à l'avocat du requérant, dans la première cause, s'il pouvait changer son jugement, de manière à y entrer une condamnation pour $22.54 comme dans la seconde ; l'avocat du requérant s'y opposa, de sorte que le jugement ne fut pas changé. Plus tard, hors la présence des parties, le commissaire fit changer par le greffier la note du jugement fait sur le dossier; et fit mettre $22.54 au lieu de $12.54, comme étant le montant de la condamnation, mais la feuille d'audience ne fut pas changée, et le jugement sur cette feuille d'audience paraissait toujours être rendu pour $12.54.

SICOTTE, J.—La Cour des Commissaires a une juridiction très-limitée; ses pouvoirs, comme son existence, sont choses sommaires, d'un caractère essentiellement, exclusivement local. Les Cours Supérieures existent en vertu d'une législation à laquelle toute la société prend part. Les Cours des Commissaires sont des institutions particulières, devant leur organisation, leur durée à la volonté de certains propriétaires dans chaque localité. Tout est précaire, sommaire, inconnu, excepté dans la localité, quant à ces cours. Leurs attributions sont toujours limitées dans la lettre de la loi, rien au-delà, ni autrement, est possible comme chose légale. Toute déviation est illégalité, excès de pouvoir. Leur juridiction est de droit strict et rigoureux, nécessairement limitée aux choses et aux lieux sur lesquels elles ont attribution.

La loi constitutive de ces cours limite leur juridiction aux faits et éventualités qu'elle énumère. Ainsi, "La Cour des Commissaires prend connaissance de toute demande d'une nature purement personnelle, n'excédant pas la somme ou valeur de $25.

1o. Contre un défendeur résidant dans la localité même.

2o. Contre un défendeur résidant dans une autre localité, et dans un rayon n'excédant pas cinq lieues, si la dette a été contractée dans la localité pour laquelle la Cour est établie.

3o. Contre un défendeur résidant dans une localité où il n'y a pas de commissaires pourvu que cette localité soit dans le District, et dans un rayon n'excédant pas dix lieues.

Pour donner juridiction, il faut donc que le défendeur soit dans l'une de ces éventualités, quant à la résidence, ou quant à la création de la dette. Les papiers de la cause ne font voir et ne constatent aucune des éventualités, qui pouvaient donner juridiction. La juridiction doit apparaître à la face des procédés ; c'est chose de rigueur dans toutes les matières sommaires soumises aux tribunaux inférieurs. (Le Juge cite plusieurs précédents.)

L'autre moyen invoqué contre le jugement est tout particulier. Le commissaire avait rendu et prononcé son jugement condamnant le défendeur à payer $12.54. Ce jugement fut noté de suite par le greffier sur le dossier, dans la

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feuille d'audience, et subséquemment, après avoir entendu d'autres causes, dans lesquelles Macfarlane était aussi le défendeur, jugement fut rendu pour $22.54, en faveur des autres poursuivants.

Le demandeur, dans la cause dont il s'agit, interpella le commissaire, se plaignant que jugement n'avait été rendu en sa faveur que pour $12.54, quoique sa réclamation fut exactement la même.

Le commissaire demanda au défendeur s'il consentait à ce que le jugement fut changé, et vu le refus de ce dernier, aucun changement ne fut fait en présence des parties. Mais, toutefois, le jugement a été altéré sur le dossier, mais ne l'a pas été sur la feuille d'audience ; et dans la copie du jugement remise au défendeur, il y est dit qu'il a été condamné à payer $22.54.

M. Macfarlane se plaint de cette altération, faite sans son consentement et hors sa présence.

La question que soulève cette plainte est importante de toutes manières.

La règle pour toute Cour est que le jugement doit être prononcé à l'audience, Art. C. T. 467. "Dans toute cause contestée, le jugement doit être prononcé à l'audience."

Que veulent dire ces mots ? Pothier les explique comme suit : "Le juge prononce le jugement à l'audience, c'est cette prononciation du juge qui est le jugement. Il a sa perfection aussitôt qu'il a été prononcé contradictoirement."

Pigeau dit : "Lorsque le jugement est rendu, il n'est plus au pouvoir du juge de le changer." Voici comme Poncet, une des autorités les plus compétentes en matières de jugement, constate les droits acquis aux parties par le prononcé du jugement : "Le tribunal, en terminant la cause par son jugement définitif, a rempli complètement son office, et épuisé son autorité." "Le jugement rendu, il sort entièrement et irrévocablement du domaine des juges qui l'ont rendu, tellement qu'ils ne peuvent plus y revenir, ni le changer ou le modifier." "Après la prononciation, le jugement devient la propriété des parties." Le Juge cite Bioche.

Notre jurisprudence constate un précédent assez remarquable dans la cause de Palsgrave *vs.* Ross.

Voici comment M. le juge Duval exprimait l'opinion de la Cour d'Appel, alors présidée par M. le juge Lafontaine : "Il n'est pas douteux que lorsqu'une fois un jugement a été prononcé par la Cour, il n'est plus au pouvoir de personne de le changer ni de le corriger, sous quelque prétexte que ce soit."

Si la règle de ne rien changer après la prononciation du jugement, est aussi absolue dans les Cours Supérieures, il y a beaucoup plus de raisons de tenir rigoureusement à cette règle, sans déviation aucune, dans les affaires soumises aux juridictions inférieures et sommaires.

Des influences de toutes sortes interviennent trop souvent pour faire rendre un jugement d'amitié, d'intérêt, de partisan. Si à ces causes peu favorables à la bonne administration de la justice distributive, on ajoute les dangers de l'instabilité de la chose prononcée comme jugement, les possibilités d'altérations dans le secret, hors toute contradiction légitime, c'est enlever la responsabilité salutaire qui découle de l'affirmation publique de l'opinion du juge ; c'est permettre

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de substituer au jugement rendu sous cette salutaire influence, un jugement dicté par la faveur et les mauvaises obsessions.

Il n'y a rien à gagner à se départir de la règle, mais tout à perdre dans la sanction de tels procédés.

Les deux moyens de cassation invoqués sont valables. En conséquence, le jugement attaqué est infirmé.

Chagnon & Sicotte, avocats du requérant.

Fontaine & Mercier, avocat de F. X. Bourgault.

Bourgeois, Bachand & Richer avocats de Surprenant.

(H.W.C.)

COURT OF QUEEN'S BENCH.

MONTREAL, 7th SEPTEMBER, 1871.

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

No. 5.

ESSENER, *Tutor*, APPELLANT;

AND

DE BEAUJEU RESPONDENT.

HELD:—That a tutor cannot legally appeal without being specially authorized *en justice*.

PER CURIAM:—This is a motion by the respondent to dismiss the appeal, on the ground that the appellant, who sues in his quality of tutor, has never been specially authorized *en justice*. There can be no doubt upon the point, and the appeal is, therefore, dismissed.

Motion to reject appeal allowed.

Doutre, Doutre & Doutre, for appellant.

D. D. Bondy, for respondent.

(S. B.)

SUPERIOR COURT.

MONTREAL, 30TH NOVEMBER, 1871.

Coram TORRANCE, J.

No. 800.

Laurin vs. *Oliveau*.

HELD:—That the parent of a minor has no *qualité* to bring an action, in her own name simply, to recover damages for alleged illegal arrest of a minor son.

PER CURIAM:—This is an action by the mother of a minor to recover $207 for damages alleged to have been caused by the illegal arrest of her son. She brings the action in her own name and not as tutrix. There is no plea to the action, and the plaintiff has been heard *ex parte*. It is quite impossible for the plaintiff, however, to recover in this action, as she has no legal *qualité* to sue, and I must, consequently, dismiss the action.

Action dismissed.

Lanctot & Lanctot, for plaintiff.

E. Labelle, for defendant.

(S. B.)

COURT OF QUEEN'S BENCH.

APPEAL SIDE.

QUEBEC, MARCH, 1872.

Coram DUVAL, C. J., CARON, J., BADGLEY, J., DRUMMOND, J., & MONK, J.

B. C. A. GUGY,

(*Plaintiff below,*)

APPELLANT;

AND

W. BROWN,

(*Defendant below,*)

RESPONDENT.

HELD :—Where the Defendant after verdict awarding damages against him did not move for a new trial, but simply in arrest of judgment, that the Court may arrest the judgment and set aside the verdict, but cannot go beyond that and dismiss the action. C. C. P. Art. 422, 483.

This action was for £20,000 of damages suffered by Appellant from divers alleged vexatory actions at law instituted against him by the Respondent maliciously and unjustifiably. The issue was limited to the three first actions and whether instituted with malice and without probable cause. The verdict of the jury was for Appellant for $17,976, but judgment on the verdict was on Respondent's motion therefor arrested by the majority of the S. C. at Quebec, Chf. J. Meredith and Mr. Justice Stuart in elaborately considered judgments against Mr. Justice Taschereau, the trial judge, and the Appellant's action was dismissed. The particulars of the case are explained in the opinions of the judges sitting in Appeal, who by a majority set aside the judgment of the S. C.

BADGLEY, J., dissentient—A brief statement of facts of the litigation, out of which this cause has arisen, will serve as an introduction to my observations in this cause. The Plaintiff and Defendant—I use the terms, instead of Appellant and Respondent, as being more convenient—are owners of property lying for a considerable distance above and below the Beauport Bridge, and along a little stream called La Riviere de Beauport, which empties itself into the St. Lawrence in the neighborhood of this city. These properties were not contiguous, only because of their separation by this stream which, below the Bridge, becomes, at times, enlarged by the effect of the high tides in the St. Lawrence, and then expands itself shallowly from the Defendant's property on the one side, over the low-lying property of the Plaintiff on the other side, until arrested by the land ridge some distance from the natural channel of the stream. The stream itself for several years past, except for serving to move the mill-works, and to give passage to canoes and batteaux from below bringing grain to the Mill, appears to be of little conceivable value, except as an incentive to litigation. The Defendant has been the owner of the Mill and its dependencies for above 30 years, whilst the Plaintiff has, for a longer time, been the owner of his Domaine property of Beauport. The Defendant's mill property above and below the Bridge, borders the stream on one side, as does the Plaintiff's property on the other side; the banks of both properties, like the course of the stream itself, being irregular and tortuous.

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As already observed, the Mill is worked by the stream water from above, which is emptied by the Mill discharge into the stream below running along the bank of the Mill dependencies. In order to protect his bank from river abrasion, the Defendant, in 1850, inclosed a portion of his river bank by wooden works, which the Plaintiff two years afterwards followed by the erection of a long line of wharf below the mill on his side of the stream, intended to protect his low-lying land from being torn away by the water of the stream thrown upon his side, as alleged by him, by the effect of the Defendant's inclosure on his side. The Plaintiff's Wharf was completed in Oct. 1852, without the adoption of any process of law against the Defendant for the removal of the alleged encroachment; the building of the Wharf being adopted as the material protection against the wearing water upon his land. Subsequently in 1853, the Plaintiff erected another Wharf on his property on the stream above the Bridge, and opposite to the Defendant's property there. These Wharves, erected by the Plaintiff, have occasioned a great deal of litigation between the Plaintiff and Defendant, which has culminated in this action against the latter, the judgment in which, by the Superior Court, is now submitted for our consideration. The Defendant's inclosure appears to have remained unnoticed for two years, the Plaintiff having completed his Wharf, as alleged by the Defendant, on the 16th Oct., 1852, when the Defendant, conceiving that it was an illegal encroachment upon the stream, and an impediment to its use, as well as an injury to his working of his Mill, brought his first action under the No. 533, within twelve or thirteen days after the completion of the Plaintiff's lower Wharf, for the causes aforesaid, and concluded for the demolition of the Wharf, and subsidiarily for damages. It is manifest that the demolition of the work was the real cause of action, the damages being added technically to class the suit, because, in the interval of twelve days, no damages were actually suffered or were proved. In Jan. 1854, the Defendant brought a second action, which was for damages suffered in the interval from the first action by the continuing nuisance of the Wharf interruption, and in Oct. 1855, the Defendant brought a third action for alleged encroachment by the Plaintiff caused by the erection of the Wharf in 1853-4, above the Mill. The actions were all contested, *enquetes* of considerable length and expense were had, operations by *Expertise* were also had, until final judgment was reached by the Superior Court, as well as in Appeal, in due course, in each cause. The original judgments in the first and second cause were in Feb. 1860, and in the third cause in April, 1862. The judgment in Appeal in the first suit was rendered in May 1861, in the second, in Dec. 1861, and in the third in June, 1863. The first action only, No. 533, was appealed to England, where the final judgment of the Privy Council was rendered in Feb. 1864. A fourth action was brought by the Defendant at a later period than the above, namely, in 1864, which was for a different ground of complaint, and which was also dismissed in both Courts here, but in which the Plaintiff, on his cross action, obtained judgment of damages against defendant, for £45, with his costs. The suits and causes of action have been particularised, to show that the actual demand and conclusions of each were different. No. 533 concluded for the demolition of the Wharf below the Bridge, No. 183 for two years continued damage, by the con-

tinuance of that Wharf, and No. 325 for the demolition of the Wharf above the Bridge, and to show further, that the two latter actions were brought pending the first, No. 533, in which the final judgment of the Privy Council was rendered 15th Feb. 1864. Looking at the date of the plaintiff's declaration in this cause, 28th May 1864, and allowing time for receipt and entry here of the Privy Council judgment, this action may be said to have followed soon after that judgment. Briefly stated, the causes of action, set out in the plaintiff's declaration in the French language, are the institution against him, by the defendant, of the said three suits, Nos. 533, 183 and 325; to which the fourth, No. 581, is also added, and to each of these the plaintiff has alleged special grounds of aggravation. He avers that No. 533 was instituted by the defendant, *et il n'avait aucun fondement légitime, aucune cause honnête quelconque ce que le dit Brown savait bien, qu'il intenta aussi sciemment un procès injuste, par malice, par convoitise, et par chicane; qu'il est un mauvais plaideur, qui, en entreprenant ces procès vexatoires et iniques, a causé au demandeur des frais, des peines, des souffrances et des pertes incalculables au moyen de quoi le demandeur a droit de réclamer des dommages et intérêts.* As to No. 183, he asserts that the defendant, *mu par les mêmes sentiments de malice et d'hostilité et mauvaise foi, avec passion et haine, et dans le seul dessein de faire souffrir le demandeur, nonobstant la conviction intime du défendeur, par rapport à ce second procès, comme pour le premier, qu'il n'avait aucun sujet de plainte contre l'appelant;* and as to 325, the plaintiff Gugy asserts that the defendant Brown, *malicieusement et sans l'ombre de droit, de cause ou de raison, intenta un troisième procès.* To these causes of action the plaintiff also added complaints that the defendant had bought up causes of action against him, *mu par une malice infernale*, and had harrassed him with judgments and executions thereon. A demurrer having been pleaded to the action, on the technical ground that no action in law would lie for damages against a party, merely because he had not succeeded in the actions brought by him, the demurrer was maintained, and the plaintiff's action dismissed, but that judgment was overruled by the judgment of this Court of the 25th June, 1865, which settled absolutely the points and grounds upon which the plaintiff must rest his demand in damages, and that judgment has been rested and acquiesced in by both parties. The points settled were, that the cause of damage could be found only in the institution of the suits Nos. 533, 183 and 325 and in their institution by the defendant without reasonable or probable cause, leaving to the plaintiff to use No. 581 and the other suits mentioned for debts really due by the plaintiff, to be offered in evidence *quantum valeant* as proof of malice, by the defendant. The defendant joined issue by a *Défense au fond en fait*, and then followed the articulations for the decision of the jury, which were necessarily settled by the terms of the appeal judgment. 1.—Did the plaintiff institute and prosecute the suits Nos. 533, 183 and 325? The jury have answered in the affirmative. 2.—Did he institute them, or any of them maliciously, and without reasonable or probable cause? The jury have answered, yes, maliciously and without reasonable cause. 3rd.—Did the plaintiff suffer any, and what damage by the bringing of these suits? The jury have answered, yes—to the amount of $17,976. After the plaintiff had rested, that is, closed his case, the

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defendant prayed the presiding Judge to direct the jury that, as the principal matter in support of the suit had not been proved by the plaintiff, that is, that want of probable cause by the defendant had not been established by the plaintiff, the jury should render a verdict for the defendant. The Judge refused this request, and put the defendant upon his defence, upon the ground that the plaintiff had made out a *primâ facie* case. It would be waste of time to repeat what has been most correctly observed in the Court below, that there was no proof whatever of the defendant's want of probable cause. In suits of this description, where the question of probable cause or the want of it is admitted by a presumption of law founded upon facts, those facts must be proved in evidence, and where they are not proved the action cannot stand. Probable cause is a reasonable ground of suspicion supported by circumstances sufficiently strong in themselves, to warrant a cautious man in the belief, that the person charged is guilty of the matter with which he is charged. Mere *primâ facie* cases, with the ancient notions of *scintillas of evidence* have disappeared, and have been replaced by the practical good sense of modern times. Moreover the plaintiff had made those aggravating assertions in his declaration in reference to the institution of the suits by the defendant. These were his *allegata* and should have been *probata* by him. Our law required this as law, whilst it is manifest that he adduced no such evidence to support his cause. It is in fact the omission of the chief characteristic of his right of action, and having brought his adversary into Court, it was his duty to prove the reason why; not simply, that the defendant had instituted his three actions against the plaintiff, because that was no more than the exercise of a legal right, but that he had done so without any ground at all. As the case rested when the plaintiff closed, it was only proved that the three suits had been instituted, and defendant had been unsuccessful in them. That was not enough; the judgment of this Court, which settled the points, directed the plaintiff to prove, not alone the institution of these suits by the defendant, but their institution without reasonable or probable cause. The terms of that judgment upon his own appeal were for his guidance in that respect, and for that of the Judge before the jury. The Judge had no discretion. He was directed by the judgment of this Court to apply the law of probable cause to the evidence such as it was, and to adjudge, that the plaintiff had, or had not proved want of probable cause. He did neither; but, under the impression of a *primâ facie* case whether of probable cause or something else which could have no legal existence and was not in any way within the province of a jury, he put the defendant upon his defence. This proceeding was erroneous, because there were no contradictions nor controverted facts in evidence; they were simple proof of the institution of the three suits, and of their dismissal by judgment, and that dismissal was set up as proof of want of probable cause.

But, besides this, the evidence adduced actually disclosed that the defendant had acted with probable cause. The order by the Judge to the defendant to proceed notwithstanding, was erroneous; there was no legal proof made by the plaintiff in support of his action. The jury had no fact before them legally to constitute want of probable cause, and under such circumstances their verdict is merely nominal and solely under the direction of the Judge. It is not too

much to say that the nominal verdict is the verdict of the Jury. Such cases are precisely similar to proceedings at law not before juries, where the Judge stops the case if the plaintiff does not legally prove it, and where the Judge uses and applies the law, and dismisses the action for want of legal proof to support it, without calling upon the defendant to protect himself against an unproved demand. The course should have been to direct the entry of a verdict for the defendant. I do not think that the Courts or Judges here have the English right of using the non-suit, unless with consent of the plaintiff. The same effect is, however, obtained by the entry of directed verdict. The non-suit is a common practice in England. There, where the Judge is of opinion, either on the Plaintiff's showing, or on the uncontroverted evidence of the defendant, that there is probable cause, it is usual to non-suit the plaintiff—(Davis v. Hardy, 6 B. & C. 225.) It was also so held by Lord Chelmsford, in appeal (I Vol. P. C. C. Gubbins *vs.* McMullin) that evidence given by the defendant may be used for the purpose of non-suit. I should not be disposed to adopt that English practice, but would be guided by our own Code which does not, in terms, use the proceeding, and by our own practice. The defendant, having been put upon his defence, established probable cause even to the satisfaction of the trying Judge, who stated that fact to the jury, directing them that in law, the defendant had acted with and proved probable cause for the institution of these three cases; and yet, in the face of this declaration of the law, he allowed the jury to take the law out of his judicial hand, as the expounder of the law, and to find want of reasonable cause without any facts found by them, and in the teeth of the legal exposition from the Court, that the law found that the defendant had acted with probable cause. The contradiction is manifest. The result is to make the jury the expounders of the law, not of the facts of the case. Now, how is this to be corrected by this Court? Under the Code of Procedure, all the evidence and proceedings of the trial, with the various rulings, are carefully copied out, and under the signature of the presiding Judge are made to form part of the Record in case of appeal from the Court below. Now it is well known that in such cases in England all difficulties and rulings about evidence and procedure at the trial, are entered with great circumspection, under the care of the Judge, in a bill of exceptions which, in fact, is really the record, or such part of it as the Court in Banc or in Appeal proceeds upon. Here in this province the bill of exceptions has been abolished, and the made-up notes of evidence and of all the rulings at the trial supply its place for the consideration of the Superior Tribunal or for the Appeal Court upon the Nisi prius case. So here, according to our Code those notes of evidence and of the rulings with the other papers filed, constitute the record which is submitted in Appeal after decision thereon by three Judges of the Superior Court, according to the renewed requirements of the 14 and 15 Vict. ch. 89.

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If the evidence is to remain of record, it is manifest that this Court, to which the record is sent for judgment, is competent, and has constantly declared itself competent to decide finally upon the action—(Casey v. Goldsmith 2 L. C. R. 200; Ferguson v. Gilmour 2 L. C. R., 131,150; David v. Thomas 1 L. C. Jur. 69; Gibb v. Tilstone 10 L. C. R. 284; Beaudry v. Papin, 1 L. C. Jur. 135;

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Shaw v. Meikleham 3 L. C. Jur. p 5; Grant v. Etna In. Co., 1860; Clark v. Murphy, 11 L. C. R. 105.) It is plain that, if the Jury find facts which show that the verdict should not have been given for the favoured party, the Court can and ought to render judgment for the other party notwithstanding the verdict, as was done in Tilstone v. Gibb, and some other of our own adjudged cases, where the record containing the whole of the evidence has been examined, and decision upon the whole case rendered by the Court; in some of the adjudged cases in this respect, the Court rested its decision upon law rather than fact. It seems plain therefore, that the whole record is within the cognisance of this Court, and, being so, what is the judgment appealed from? The judgment of the three Judges of the Superior Court was upon the motion first, for judgment for defendant *non obstante veredicto and that the action be dismissed*, or second that the judgment on the verdict be arrested for the grounds stated, *and that the action be dismissed*. The Court below passed over the first part of the motion for judgment *non obstante veredicto*, but adjudged upon the motion to arrest the verdict, and thereupon to dismiss the action. What is this motion as defined by authority? A motion in arrest of judgement is "an application by the defendant that no judgment be rendered on a verdict "against him. By arrest of judgment is meant the refusal of the Court to "enter a judgment upon the verdict, for some cause apparent on the record. "The judgment of the Court being a conclusion of law from the facts of the "record, it must be collected from the whole record. If therefore the 'whole record shows no ground for judgment, it cannot be rendered even if a "verdict against the defendant be found." Where then is the conclusion of law to be found; only in the whole record sent up for appeal, containing the evidence and proceedings. It is true that article 432 of the Code of Procedure says, that arrest of judgment has the effect of annulling the verdict, and the practice in England is to follow it up by a motion to dismiss the action. In this case that final motion for dismissal is also made of record, and should be acted upon, because the jury trial was in fact exhausted by the verdict, and the cause rested before the Court on the merits as they were. Its allegations and averments being unsupported and moreover controverted by evidence, it was ripe for dismissal under the common practice of the Court for unproved causes; so in England the arrest of judgment annuls the verdict, but where the plaintiff had no verdict from his own fault or negligence, there a new trial is not given to him as of course, but the dismissal of the action follows as a necessity of practice, justice and law. It must be observed here that the record contains the plaintiff's motion for judgment upon the verdict, the mere arrest of the judgment would necessarily therefore leave that motion undetermined, and subject a terminated cause to further proceedings when neither party required it, because the Plaintiff has only moved for judgment upon the verdict, and the defendant has not moved for a new trial. In Shaw v. Meikleham Chief Justice Lafontaine very clearly explained our jury system. In the present case a motion in arrest of judgment was the only legitimate and practical course to be adopted, a non-suit, as already stated, could not have been granted, because our law does not provide for a non-suit. In such a case, as in Lumby v. Allday 1 Cr. & J. Exchequer Reports p. 305,

Mr. Justice Bayley says:—"When a general issue is pleaded, it puts in issue to be tried by the Jury, the question whether the facts stated exist. The legal effect of those facts, whether they constitute a cause of action or not, is not properly in question. The proper mode to bring that legal effect into consideration is before trial, by demurrer, and after trial, to move in arrest of judgment. The duty of the Judge, under whose direction the Jury finds matters of fact, is not to consider whether the facts charged give a ground of action, but to assist the Jury in matters of law, which may arise upon the trial of those facts." Here the matters of fact were sufficient to constitute a cause of action, it was for the Judge to determine whether the required facts were proved, and if proved, whether they constitute in law the issue to be found. Reverting to the findings of the Jury, it is necessary carefully to examine the second one, because the plaintiff's right of action rests upon that finding, and any irregularity there necessarily entails the arrest of judgment; for if the Jury do not find the constituent facts which it is their province to find, and upon which the law is to be applied by the Judge, or if they find facts disproved by the record, the favoured Plaintiff *would have his judgment on the verdict arrested, and could have no right to recover any sum. Art.* 432 *Code of Civil Precedure.* Now, the Jury find that the Defendant in the institution of those actions acted maliciously *and without reasonable cause.* Without finding any facts constituent of want of probable cause, they find directly that the defendant acted without reasonable cause, finding an absolute conclusion of law without any facts to support it. Now, the judgment in Appeal, which defined the facts to be established in support of this action, only declared in other words, that the Plaintiff should prove *what he had asserted in his declaration.* The foundation of the action is the malice of the defendant, which must be accompanied with the want of probable cause. This is a negative essential to the plaintiff's case, and specifically ordered by the judgment in Appeal, and if not proved, it entitles the Defendant to the benefit of the plaintiff's failure to establish it. Malice may be inferred from want of probable cause, but the most express malice will not imply the want of probable cause. Both must concur, because this action is for institution and prosecution of suits at law, legal in themselves, but maliciously and without probable cause. The ground of the action is that a legal prosecution was carried on without a probable cause, and hence this ground is essential because every other allegation may be implied from it, but this must be substantially and expressly proved, because it is an independent fact in itself. The leading case of Johnstone v. Sutton, decided in the House of Lords, and the opinions given by Lords Mansfield and Loughborough, have settled the principles, and served as a guide and rule to this day.

Baron Parke, Lord Wensleydale, in Mitchell v. Jenkins, 5 B. & C. R, 594, speaks of it as the ruling law, and says—no point of law was more clearly settled than that in such an action the plaintiff *must prove what is averred in the declaration*, namely, that the prosecution was malicious, and without reasonable or probable cause. In such case it is held that the plaintiff must adduce enough evidence to satisfy a reasonable man that the prosecutor had no grounds for proceed-

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ing against him, but his intent to injure the accused, no mere *prima facie* case —no scintilla of evidence, but the broad fact—see 6 Bingham—and the cases cited 1st Taylor pp. 37, 39. Numerous citations might be added to establish the necessity for requiring, in actions of this kind, the concurrent proof of malice and want of probable cause, for, as before observed, if want of probable cause is not established by the plaintiff, no action, on principles not only of justice, but of necessity, can be allowed to lie against the defendant. It is manifest, therefore, that the want of probable cause must be proved. Now the jury have found want of reasonable cause. What is that? A presumption of law. What constitutes it? Facts found by the jury or law found and applied by the court? Here the jury have found the law, the want of probable cause, which is the legal conclusion or inference to be settled and adjudicated by the Judge; but they found no facts for the Court to decide whether there is or is not want of probable cause. The learned Judge who presided at the trial says that this being a mixed question of fact and law, he gave up both to the Jury. He was in error. The mixed nature of the case is truly of fact and law, but the Jury find the facts as submitted by him, and upon the facts so found, he assists them with the law, and under his direction, probable cause or the want of it, is found, which in that case, makes the Jury, the finders of the fact, the mouth-piece of the law as given by the Judge. It is laid down in all the books that the question of probable cause is one for the disposal of the Judge and for his decision alone. If the evidence had been conflicting, to use the language of the Judge, in Haddrick v. Hislop, 12 Ad. & El. N. S. 269, it would have been his duty to put to the Jury any preliminary question of fact that might require determination in consequence of such conflict, and, upon finding thereof by the Jury, to decide whether such facts showed probable cause or not. So, in Black v. Dod, 2 B. & Ad. 184, Lord Tenterden observes—"I have considered the correct rule to be this, if there be any fact in dispute between the parties, the Judge should leave the question to the Jury, telling them they should find in one way as to that fact. Then, if, in his opinion, there was no probable cause, the verdict should be for the plaintiff. If they should find there was probable cause, their verdict should be for the defendant." In Turner v. Ambler, 10 Ad. & El. N. S. 253, the Judge put questions to the Jury as to certain facts in dispute, and as to the damages; the Jury answered as to the fact, and assessed the damages at £80, upon which he ordered the verdict to be entered for the defendant, on the ground that there was probable cause, but gave leave to the plaintiff to move for a verdict, which, however, was afterwards refused, and the rule discharged. Again in Mitchell vs. Williams 11 M. & W. 205, the Judge left three questions to the Jury, upon the disputed facts of the case, which they answered. He then told them there had been a want of probable cause, and left nothing to the Jury but the assessment of damages. See also 2 Ad. & El. N. S. pp. 104, 105. Pantin v. Williams. Taylor on Evidence pp. 37-9, speaking the language of the Courts for many previous years, says probable cause is a question exclusively for the Judge, the Jury being only permitted to find whether the facts alleged in support of the absence or presence of probability, and the inference to be drawn therefrom, really exist. But as the Judge has the right to act on all the uncontra-

dicted facts, it is only when some doubt is thrown upon the credibility of the witnesses, or where some contradiction occurs, or some inference is attempted to be drawn from a former fact not distinctly sworn to, that he is called upon to submit any question to the Jury." Now here the Judge himself admitted, in his charge to the Jury, three several facts which he declared in law constituted probable cause on the part of the defendant Brown with reference to the three actions brought by him. Therefore, so soon as the reasonable and probable cause was established, the belief in it by the defendant must be presumed until the absence of such belief should be proved. In this case absence of such belief was not proved, and therefore, there being no legal proof adduced by the plaintiff of want of probable cause, on the contrary the defendant having proved probable cause, as affirmed by the Judge himself, the jury should have been directed to find probable cause, and also to find for the defendant on the second articulation, taking the judicial direction as to the uncontroverted and uncontradicted fact of probable cause having been proved to have found it so. The conclusion was one of law which the jury could not reach except through the Judge, and could not set aside or avoid by their own views or impressions of the constituents of probable cause. But, it is said this action differs from the usual run of such cases, in which the foregoing principles are applicable. That is a fallacy; because the plaintiff has, in his declaration, alleged facts and circumstances of aggravation by Brown in support of his action which bring it within the application of those rules; and besides those allegations, there are the guiding and absolute requirements of the judgment of this Court in 1865, settling the questions to be submitted to the jury: by a judgment acquiesced in by both parties. The question in dispute is not, whether there was encroachment on the River Beauport by either party, or who was the aggressor, but whether the defendant, at the time of the institution of his actions, as stated in the judgment of 1865, instituted them with reasonable and probable cause; in other words, whether he acted in the belief that he was right, and had reasonable and probable cause for the institution of those suits for the causes stated in his declarations, and for the conclusions prayed for by him in each. This is the point at issue, and involves the question of probable cause. The plaintiff has drawn his declaration manifestly to meet the authorities from French law, and intended to claim his damages for the alleged vexatory character of the actions themselves. In proof of this he rested his case upon the mere fact of the unfavorable result of the actions to the defendant, as entitling him to *dommages et intérêts*, and as proof of want of probable cause. Now this is an error; vexatory actions are known in England under the common law, although no very modern case is to be found in the books. In this respect the common law is the same as the old and the modern French law, but in all such actions, under both systems of jurisprudence, the want of probable cause is the gist of the action, and the plaintiff must show it to maintain his suit. In Hobart's reports pp. 206, 266, Woolmer vs. Freeme, recognises the doctrine that, although an action be brought in the proper court, if the writ or proceeding be utterly without ground, and that, known to, or believed by the person himself, an action lies for the unjust vexation and damage to the plaintiff. Chief Justice Holt entered into a full exposition of the circumstances on which

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the action was founded. In 1 Wills. 232, it was held that express malice and grievance must be laid; *the declaration must be proved.* It is not sufficient to say, the Defendant brought an action against the Plaintiff *ex malitiâ* and *sine causâ, per quod* he put the Plaintiff to great charges, &c. In commenting upon this case, which is cited 17 Mass. R., the Judge observes—"If an action upon a false surmise is brought in a proper court, an action does not lie against him that brought it, and thereby to charge him with it as a fault directly, as if the suit itself were a wrongful act, for *executio juris non habet injuriam*, but the gist of this sort of action arises from some evil practice or malice in him who sues or prosecutes. It was held in 10 Johnson's R. 106, Vandayer v. Landstrom, S. C. N. Y., by Kent, Chief Justice—"No action lies merely for bringing a suit against a person without sufficient ground to sustain the suit. It must appear to have been without cause and malicious. See Pangban vs. Bull, 1st Wend. 305. That this is the ruling of the French law there is no doubt. The very terms of the law are to that effect, and the authorities are numerous. The reason is palpable, because the right to sue in a proper court is a legal right, as was held in old as well as in modern times in France. Vide Pigeau; and in such cases of vexatory actions, *dommages et interets* are given by the judge presiding in the very suit, vide Arret of 1660. "Il est etabli pour maxime que la bonne foi ou la calomnie de l'accusation doit decider les dommages et interets; *qua mente ductus processit ad accusationem.*" Arret of 1719, 7th Journal des Audiences. "On examine en général dans ces sortes de questions *si accusator justam habuit profitiendi ad accusationem causam*" The modern authors are to the same effect, *Sirey, Verbo* dommages et interets, "Des dommages et interets peuvent egalement être prononcés outre la condamnation aux depens contre celui qui est reconnu avoir elevé des difficultés *avec mauvaise foi.*" It is held in France "le delit doit être un fait dommageable, il doit être commis avec l'intention de nuire". For these reasons I am of opinion that the decision of the Court of Review, arresting judgment upon the verdict of the Jury, and dismissing the Plaintiff's (Gugy's) action is correct, and should be confirmed.

CARON, J.—My learned brother Badgley has so fully and lucidly stated the circumstances which have given rise to the present action, and the nature of the action itself, that it is quite unnecessary to add anything to his remarks thereon. The action in question was pleaded to; there was a hearing in law which, in the Superior Court, resulted in the dismissal of the action. On appeal to this Court, that judgment was reformed, or rather reversed, and it was ordered that proof should be given of the actions instituted by Brown,—certain of them only as tended to show the *animus* with which the others had been brought. A trial by Jury was had, and there was a verdict in favor of the Plaintiff, followed by a motion by the Defendant for *arrest of judgment;* upon refusal by the Court of first instance, recourse was had to the Court of Review, and the judgment of that Court granted the motion for arrest of judgment, set aside the judgment and the verdict, and dismissed the Plaintiff's action altogether. This is the judgment appealed from.

According to the Appellant, the evidence of record, as well parole as written, would fully justify the verdict rendered by the jury, while on the part of the

Respondent, it is contended that not only is this evidence insufficient to establish the Plaintiff's allegations, but that it establishes the pretensions of the Respondent.

As a point of departure it may be said that the foundation of the Plaintiff's action was the *want, the absence, of probable cause* which he alleges in his declaration: this essential allegation it is for him to prove. The proof of malice on the part of the Defendant in instituting the actions complained of by the Plaintiff, was not sufficient. The authorities cited by Chief Justice Meredith in his notes, on the rendering of the judgment, are positive, clear, and unanimous; the French law is upon this point in accordance with the English law.

Then, this proof, has the Plaintiff Gugy made it? I think not; it is the contrary which appears to me proved. This assertion I found upon the number of Judges who have been in favor of Brown in the different actions which he has instituted against the Appellant, which would shew at least that there was much to be said in support of Brown's pretensions. (The learned Judge expatiated upon this view of the case, which had been, he said, most forcibly expressed in the notes of the Chief Justice adverted to and continued):—Instead of making this essential proof of the *absence* [illegible]*nt of probable cause*, the Plaintiff himself produced all that was required [illegible]blish the contrary. (The learned Judge here stated at length the reas[illegible]on Brown had for believing that his actions were just and well founded in law as shown by the notes of Chief Justice Meredith.) At the trial before the Jury, the Plaintiff had finished his proof, which I appreciate as I have just stated, when, on the part of the Defendant, there was made, before the Judge presiding at the trial, a motion that the Jury should be told that it was not necessary that the Defendant should enter upon his defence, for the reason that the Plaintiff had not made the requisite proof; that motion was rejected, and consequently, the Defendant was ordered to enter upon his defence, which he did, with the result known to us, the Jury having returned a verdict against him for about $17,000, in the form of damages.

To relieve himself from this onerous verdict, the confirmation of which has been demanded by the Plaintiff and judgment in consequence, the Defendant had, before the Court of first instance, three modes. 1. To demand a new trial, on the ground of the exorbitancy of the damages. This first mode he has not employed, and he is not subject to blame for it; for considering the time taken up by the first trial and the enormous expenses attendant upon it, this means was to be avoided, if there were others to adopt; this was the belief of the Defendant, and consequently there was an application for judgment *notwithstanding the verdict*, which was the second method to adopt, and, also, that "*the judgment should be arrested*," which was the third method available to the Defendant, who adopted the two last, one of which, the last, was received favorably by the Court of Revision which, reversing the judgment of the Court of first instance, dismissed the Plaintiff's action.

The question is asked whether, under the circumstances of the case as proved and admitted, the Defendant had the two remedies which he adopted, or one of them, and which.

I entertain no doubt that he should have been granted a new trial, had he

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asked for it, seeing the enormity of the amount which had been awarded against him, without sufficient proof; but, as he did not ask for a new trial, it is useless to say any more about it. Without speaking of the recourse *non obstante veredicto*, which might perhaps have succeeded, it appears to me incontrovertible that the "arrest of judgment" could be granted, as it has been; for that is what has been granted to the Defendant by the Court of Review, and has caused the dismissal of the Plaintiff's action. According to articles 397, 398 of the Code of Civil Procedure, the Judge's notes form part of the Record and constitute the evidence in the cause; the Court, having this evidence, found that upon the very face of the Record, the Plaintiff had not established the essential allegations of his action, and that, according to that evidence, the Plaintiff had no right to recover any damages; this is what the Court did, by dismissing the action of the Plaintiff. Art. 431 says:—"The Defendant has a right to move in arrest of "judgment upon the verdict, whenever it appears on the face of the record that, "notwithstanding the verdict, the Plaintiff has no right to recover any sum, or "that the verdict differs materially from the issue joined, or that the judgment "would be reversed in appeal;" and Art. 432:—"Arrest of judgment has the "effect of annulling the verdict of the jury, which can no longer be carried out." It is under these two Articles that the Court of Review has set aside the verdict of the jury. It has "arrested the judgment." Reference must be had to the notes of Judge Meredith for the motives of the majority of the Court (Meredith and Stuart, Taschereau dissenting,) for coming to that conclusion and for the reasons which induced that Court to dismiss the action. I approve of those motives, and also the decision, in so far as it sets aside the verdict. The notes of Judge Meredith are excellent, and contain, in my opinion, all that can be said upon the subject.

In a cause of this importance, especially in relation to the interest in it taken by the parties, it may appear desirable that the details of the declaration should be farther gone into, but I am so entirely satisfied with the work done by Chief Justice Meredith in explanation of the judgment of the majority of the Court of Review, and I so entirely approve of it as a whole, that it seems to me useless to repeat, in another form and in other terms, the judicious observations expressed in so clear and satisfactory a manner.

I shall content myself with saying, in conclusion, that according to the proof made by the Plaintiff himself, to which it is not only the right but the duty of the Court to look, as forming part of the Record, it appears upon its face that notwithstanding the verdict, the Plaintiff has no right to recover any amount, and that according to Article 431, C. P., and according to Article 432, it was the duty of the Court to annul the verdict of the jury, which is excessive, and in no manner justified by the evidence. But I find that the Court has gone too far, in dismissing the action, which it had no right to do according to Article 432, which limits the effect of the judgment arresting the verdict.

As to the costs, according to the rule followed by this Court to grant costs to the party who succeeds upon any important point, as the Plaintiff Gugy has succeeded in saving his action, the costs of this appeal are given against the Respondent.

DUVAL, C. J.—The appellant would not, I think, have succeeded in his action, even in the Courts of France. Domat, who cites the Ordonnance of 1539, says that Ordonnance had gone almost out of use. It appears, however, to have been revived for vexatory actions, under the modern law of France.

All modern actions rest on the fact that there was no right of action in the prosecutor, that there was want of probable cause.

The moment probable cause was shown, the right to proceed as for a vexatory action disappeared. Then comes up the question of costs. The unsuccessful suitor is bound to pay all the costs whatever they may be, these being the penalty of the law upon him. I am, then, of opinion that the arrest of judgment by the Court below is a proper and correct decision. I go beyond that—in concurrence with the Court below—taking all the circumstances of the case, as it stands before this Court—a *venire de novo* ought not to issue.

It would be a prolongation of an interminable action a long time pending before the Courts, and in which the skill and talent of both parties have been exerted to the utmost. Everything has been done. We cannot expect anything more. I concur with the Judges of the Court below. The majority of this Court are of a different opinion from myself, and one of my learned colleagues. I think we have no right to decide a point which was for the Court below, and it is so laid down by the Chief Justice Lafontaine, in the case of Shaw *vs.* Meikleham, 3 L. C. Jur., p. 5.

In this case the plaintiff is satisfied. He moves for judgment only, not for a new trial. He could not ask for it. In the Court below, the arrest of judgment is followed by an application to dismiss the action. Under these circumstances the defendant has not asked for a new trial. The other party in the Court below did however. Is it competent for this Court, under the Code of Procedure, and in view of the principle laid down in Shaw *vs.* Meikleham—where these proceedings are to be taken in the first instance—to order a *venire de novo* to issue? I think not. Therefore I give my judgment entirely in concurrence with the Court below, which dismissed the action.

Col. Gugy begged to make a correction. The learned Judge must be stating what the record contradicted. There is a motion for a new trial made by the defendant.

The Chief Justice:—No; the Judges stated it was made too late. I believe, after giving the case the full consideration it merits, the judgment appealed from ought to be confirmed with costs. It is unnecessary for me, concurring with the learned Chief Justice of the Court below, as to the law and the facts, to go over the ground again. I will not repeat what has been said, but merely remark that this case ought to be decided by our own law. We have our own French law, to be found in Pigeau, Domat and the old Ordinances, which may be traced to the Roman law. It will be found explained in the 2nd vol. of Pothier's Pandectes de Justinien. We find there malice must be proved.

This principle, carried into the French law, has been adopted in the English law. The dictum that there must be absence of probable cause is entirely of old law origin. Having stated the law on the subject, the defendant's responsibility, and its extent, must be decided according to the principle of the French law.

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When we come to the province of the Jury, as distinct from that of the Judge, we must look at our own code, and as it expresses itself in very general terms, we must, in illustration, refer to the decisions pronounced in England. Our own code sets forth it is the province of the Judge to declare whether there is any evidence, and whether it is legal, and it is that of the Jury to say whether the evidence submitted is sufficient. The Jury finds as to the facts, but must be guided by the Judge as regards the law. The principle, in my opinion, may be thus expressed. When the plaintiff declares his case closed, the counsel for the defendant moves the Judge, not for a non-suit, but for a direction that the verdict shall be in favor of the defendant, on the ground that the plaintiff had not made out his case as the law requires.

It is useless to enter into the question whether a non-suit ought to be ordered in this country or not. It is incorrect to say the case has never occurred. In a case I myself brought for a Mr. Shaw against the late Mr. Reiffenstein, Sir James Stuart moved for a non-suit. I opposed it. The case went before the Jury, and Chief Justice Sewell afterwards acknowledged the direction he had given was not correct, and that he had expressed a different from his latter opinion. If a similar motion had been made by Mr. Parkin, counsel for the defendant here, I would have said it should be granted. That is the view I take now. The question of probable cause, or not, is not one for the Jury, but for the Judge. It is useless to do more than direct the attention of the Bar to the 1st vol. of Taylor on Evidence, in which all the latest decisions will be found cited. It has been decided in England that the question of probable cause is entirely for the Judge. The defendant's counsel was justified in making the application he did, and in saying, I call upon the Judge to direct the Jury, taking for granted the facts which the plaintiff himself has set forth. The question, in my opinion, comes up before us fairly. What would be the course of proceeding in England? Here it is our Court that makes the difference. In England, upon the Judge declaring—I will not comply with your request—defendant's counsel would tender a bill of exceptions, according to the old practice, and upon the facts stated in that bill of exceptions, the Court of Appellate Jurisdiction would have pronounced judgment. According to the 393th Article of the Code of Procedure, the bill of exceptions is entirely done away with. A fair copy of the evidence is ordered to be made out and submitted to the Court of Appellate Jurisdiction, when there is an appeal; also a fair copy of the prothonotary's notes, which is fyled of record. Therefore the question which it was necessary, according to the practice in England, to raise by the bill of exceptions, as to the proceedings, our law has entirely changed. The party comes before us now, as if he had fyled a bill of exceptions before the Judge, and we are to look at the evidence reported. Such being the view I take of the case, and being decidedly of opinion the motion of the defendant ought to be allowed, I come to the same conclusion and say the judgment appealed from ought to be confirmed. The Court will arrest the verdict, but it is as to further proceedings, there exists a difference of opinion among the Judges.

MONK, J.:—After the perusal of the factums, embodying as they do the judgment of the learned Judges of the Court below, I quite concur with the

Chief Justice and Judge Caron, that it would be a waste of time to enter into a detail of the facts, or any elementary discussion of the law. In point of fact we are all pretty much agreed upon the law as to whether this is a case which submitted to the Jury the question of probable cause. It was one for the Court, and the question of malice was one for the Jury. But we differ very essentially as to the course the Court below should have taken. For my part, and I believe I may say the same for my colleague on my right, we were inclined to think that the defendant, not having made a motion for a new trial, and limiting his application to the Court for a motion for judgment *non obstante veredicto*, and in arrest of judgment, not having been able to examine the evidence with a view to appreciate that testimony, our duty was to grant the motion of the plaintiff in the Court below for a verdict, and reverse the judgment of the Court of Review altogether. It became extremely difficult to come to any conclusion. We have adopted this middle course of saying that the judgment of the Court below is in part good and in part bad. The first inquiry is—what was submitted to the Jury? We have heard a good deal of discussion in the Court below, and there was a very strong opinion elaborately and learnedly given as to whether probable cause was a question for the Jury, and whether the question of malice was one for them also. We are agreed that, under the practice in England this latter is. The question of reasonable and probable cause is purely a question for the Court —that of malice, one for the Jury. But can we follow this practice under our system? The first point to be ascertained is—what was submitted to the Jury? The questions of malice and reasonable cause were expressly submitted. Now I am not aware of any process by which, under these circumstances, it can be considered a question left to the Court and left to the Jury. It was plainly left to the Jury at the time, not only by the settled articulations, but by judgment on those articulations. If, then, by the judgment of the Court, the question of probable cause is left to the Jury, I do not see how we can set aside the verdict pronounced upon it by that Jury. I am not aware there is any subsidiary judgment upon which the Court can give direction. The point is submitted to the Jury, and they have answered. With regard to this motion in arrest of judgment, I can quite understand that, on a motion for judgment *non obstante veredicto* an action may be dismissed. I am not aware our law or practice justifies us in dismissing an action on a motion in arrest of judgment, and more particularly when the reasons are founded upon an appreciation of the evidence. It was stated that in the Court below there was no evidence. Now it is plain the examination of this evidence has been made with a view to test its value. The evidence may be examined—all the proceedings of the case may be examined, but with a view to see whether there be an irregularity on the face of these proceedings—not to test the evidence. But, suppose we have that—will it be pretended there is not a *prima facie* case made out. We have a distinction made between a scintilla of evidence and a *prima facie* case. I do not know how it is to be decided whether it is a scintilla of evidence and a *prima facie* case, except by a jury. The Defendant has brought three actions which he complains were dismissed. It cannot be pretended, for a moment, that three actions following each other, and all dismissed, leave not a scintilla of evidence to show there was a want of pro-

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bable cause. I think, on examining the proceedings in these three cases, so far as they were presented to the Court, and in so far as they were submitted to the Jury, there was not only a scintilla of evidence that there was no probable cause, but there was a *prima facie* case made out. There is, then, evidence to show there was a want of probable cause and that there was intention. These three actions were instituted pretty much for the same object, and in relation to the same property, and all three failed. There is also collateral evidence given of the proceedings on the part of Brown, which shows he was determined to harrass, vex and annoy the plaintiff. Taking the dismissal of these three actions, I think the Judge in the Court below was perfectly justified in saying—no, there is not only a scintilla of evidence, but there is evidence, and of a character that I cannot believe there is no evidence. It would have been a most astonishing decision of a Judge if the Court below had declared—here is an action instituted maliciously and without reasonable or probable cause and; in the face of all the evidence, had stated to the Jury, there is not a scintilla of evidence to show malice, or this action is without probable cause. Such a ruling would have been very remarkable, to say the least. This brings us to another point in the case. Here is the Judge who tried it—a Judge of great eminence, who bestowed a great deal of care upon it. No complaint was found with his charge to the Jury. He seemed to think there was evidence to go to the Jury. What right have I, then, in face of these facts, to say there was no evidence whatever to go to the Jury, there was no conflict of testimony; the case is without a scintilla of evidence respecting which the Jury could have had the slightest doubt. More—I should have great hesitation in saying I would resist a judgment and dismiss the action. We have more to consider—namely the three questions submitted by a Judge of the Court. One is— was there malice—was there reasonable or probable cause? All the questions were answered in the affirmative—in favour of the plaintiff. We have, then, the evidence, the opinion of the Judges, the verdict of the Jury who say the plaintiff has made out his case fully upon every point, and they award a verdict of $17000 damages. I may be of opinion this verdict is very high; but when you come to disturb verdicts of Juries, even that are worth nothing—to set them aside arbitrarily, because the damages are excessive— you adopt a dangerous principle. It is with some regret I find myself bound here to arrest the judgment. If we had the power we should not dismiss the plaintiff's action altogether, which shows an array of circumstances in its favour. It would be extraordinary for us to say we will not only arrest the judgment, but say the verdict is illegal, and ought to be annulled because the Judge, in the face of all the evidence, did not chose to tell the Jury,—there is not a scintilla of evidence in favour of the plaintiff, and you must find for the defendant. When we come to dismiss the action the first enquiry is—can such a [illegible] done? Even if we had examined all the facts of the case have we the power? I am inclined to think not. I know as a matter of fact—and I do not believe it can be contradicted— that there is no instance of an action having been dismissed for these reasons, or for any reasons, upon a motion for the arrest of judgment simply. Am I justified, then, in doing it? I think the Code does not give that authority. It says the effect of an arrest of judgment would be the

setting aside the verdict. It goes no further. The Court below, notwithstanding the case presents itself under peculiar circumstances, have thought proper to dismiss the action. I cannot concur. In order to secure a judgment, I felt it my duty to give my views and say the judgment setting aside the verdict, must be to that extent confirmed. It was said we had no right to order a *venire de novo*. I do not know how any one could imagine we ever assumed that right. It will be for the plaintiff to say whether he will move for a *venire de novo* or not. B. C. A. Gugy, and W. Brown.

DRUMMOND, J.—I find myself placed in the most anomalous position I ever occupied on the bench. I need not go over the ground already traversed by my brother Judges. I will satisfy myself by saying I agree fully with my learned brother on my left (Monk.) Perhaps, indeed, I have rather a stronger opinion, which may have been forcibly expressed during the discussion of the case. Yet I am going to join the majority to-day in an act which I believe to be illegal—a very strange position to stand in. But if we, the minority, did not take this course, a greater evil would be done, because the action would be dismissed. The Statutes and the articles of the Code lay down the doctrine that under no circumstances can the Court dismiss an action except upon a motion *non obstante veredicto*. The law says it shall not be done. If I did not join the majority to some extent,—and I do so without abandoning my views of the law in this case—the action would be dismissed at once. The law says the object of a motion in arrest of judgment is to set aside the verdict, leaving the case in the same position it was before. I have taken a very strong view of the course that should be adopted in this case. I trust I will not be understood to imply any disrespect for the great authorities cited here, whether English or French; but at the same time, I would beg the gentlemen of the Bar to remember that Lord Mansfield, perhaps one of the greatest jurists that ever lived—a man of the most brilliant genius England ever produced—had not the good fortune to have read our Code of Civil Procedure, which established a system organized at the time I was in the Government, or we might have had different conclusions to consider. I believe the result of this judgment in which I am going to concur, in order to avoid a greater evil, will be to strike a severe blow at the root of our jury system. Let any man read that judgment, and he must come to the conclusion that the Court has taken upon itself to appreciate the evidence adduced. We have suffered in consequence of the encroachment of the Courts upon the province of the Jury. I hope to avoid that by using the plainest language in the world. I should not like to see this system set aside merely because one party has talked about probable cause. It is always mentioned in England and, in my opinion, is a most unphilosophical expression. I am not bound by it to set aside our Code. I am not going to be bound by any judgment in England or France to submit, without protesting against this attempt to break through our law. You do not find it in any statutes in England. It is the practice of the judges to declare whether there is any evidence. But a judge may say—there is no evidence to go to the Jury, you must give a verdict in favour of the defendant. Or, if that evidence is illegal, it is the province of the judge to declare whether there is any evidence, or if it is legal. Was this what the Judges did in the Court below? It is clear from their own words they have taken upon them-

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selves to appreciate the evidence. They did not say he had not produced any evidence, or that it was illegal, but took upon themselves to appreciate that evidence, by saying the Jury could not reasonably come to such a conclusion. They, therefore, in my opinion, judged the whole case. I stated my views very strongly during the argument. (His Honour here read the articles of the Code of Procedure relating to trial by Jury, saying they materially altered the old law.) The strong point referred to by the Chief Justice was the taking of notes. Article 398 ought to be very maturely considered in dealing with this case, in order to ascertain what meaning we should put upon the words:—"398. A copy of such notes is made out by the prothonotary, and after being certified by the judge, is filed of record, and in case of appeal is held to be the true record of the evidence adduced and of all other proceedings mentioned therein, and stands in lieu of any bill of exceptions by either of the parties against the evidence adduced on the trial, which bill can no longer be filed." Now what is this record? Is it really the record in the old sense of the term? Is it a record of the evidence? The judges have a right to ascertain whether that evidence has been taken legally, but no right to enter into an appreciation of the evidence. Then we turn to the various modes of dealing with verdicts. A motion of this kind amounts to a non-suit—when a motion is made to set aside the verdict, when the evidence does not establish the position assumed. It is to our Code we should refer when considering the various modes in which verdicts can be dealt with (See article 422.) Now, it is upon this very ground the verdict is about to be set aside. This is one of the cases for a new trial, and not for an arrest of judgment. Art. 431 states the grounds in reference to arrest of judgment. I consider the last words of the article very unintelligible. How can the judges below know whether their judgment will be arrested in the Court of Appeals or not? The other portion of the article is perfectly clear. Having read the article bearing upon judgments *non obstante veredicto*, His Honor called attention to the dictum that the Court may render judgment only in the case of an action being unfounded in law, and its insufficiency apparent on the face of it. He continued—then, I say the only case in which a verdict can be set aside, and the action dismissed, is upon a motion *non obstante veredicto*. The only case in which the trial can be set aside is on a motion for a new trial, on account of insufficiency of evidence, or excessive damages. There is here a motion for a new trial, but it is on record as submitted too late, or after the delay allowed by the law. We can not break through positive law, to do substantial justice. I believe it will be done by granting the motion for a new trial. I have come to the decision to join the majority of the Court, in order to obtain precisely the same ends I would have obtained by granting the motion for a new trial. I trust it will never be invoked to show that I am of opinion a verdict could be set aside on a motion for arrest of judgment—for any other reason than what appeared on the face of the record. It is only where there is no case made out on the face of the declaration that the action can be dismissed *non obstante veredicto*.

The appellant B. C. A. *Gugy*, Esq. for himself.

Messrs. *Parkyn, Q. C., & Holt, Q. C.*, for respondent.

(J. K.)

COURT OF QUEEN'S BENCH, 1871.

(APPEAL SIDE.)

MONTREAL, 9TH MARCH, 1871.

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

Nos. 51 and 62.

DAME ELIZABETH McCORMICK, ET VIR,

(*Defendants in the Court below,*)

APPELLANTS;

AND

DAME JANET BUCHANAN ET AL.,

(*Plaintiffs in the Court below,*)

RESPONDENTS.

HELD:—Where a married woman and her husband were each summoned in a cause, and a joint and several condemnation asked against them, the husband being summoned in his own name and right as well as to authorise his wife, and each appeared and pleaded separately by separate appearances and pleas but by the same attorney; that the wife will be held to be sufficiently authorized to *ester en jugement*.

The judgment in this case reversed that of the Superior Court, Mackay, J., of date 30th November, 1869, reported in 14 L. C. Jurist, p. 19.

Perkins, J. A., in support of the appeal argued:—

1st.—The French version of the Code of Lower Canada, which is the same as the old law, and the Code Napoleon, reads as follows:—

"Art. 176.—La femme ne peut ester en jugement sans l'autorisation *ou* "l'assistance de son mari."

This is very different from the English version, which is evidently a bad translation.

Biret, at the page cited by respondents, says "the want of authorization can only be invoked by the wife, the husband or their heirs."

But the appellants have no objection to admit, for the purposes of this argument, that it is a *nullité absolue*.

2nd.—In this case it is pretended: 1st, that she was not sufficiently authorized; 2nd, that if she was not sufficiently authorized, no proceedings and no judgment could be pronounced against her, until the respondents had placed her in a position to defend herself; that is, had caused her to be duly authorized.

Upon the first point the appellants beg to refer to the universal practice, in this country, of summoning and proceeding against married women. The husband is summoned to appear to authorize his wife. If he appears and declares that he refuses his authority, then a petition is made to the Court or Judge, who gives the necessary authority.

If the husband appears and remains silent, proceedings to judgment go on without any other formality, whether he pleads with the wife or not. If she

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appears alone, or if she does not appear at all, judgment goes against her, without asking from the Court any further authorization.

If it is admitted that when the husband makes default, the wife is sufficiently authorized to plead and to be condemned, *a fortiori*, she should be so considered when the husband appears in the case and allows her by his silence to plead and defend herself, because he must be presumed to be aware of all that passes in a cause to which he is a party, and wherein he is represented by the same attorney.

But the authorities upon this point cannot leave a shadow of doubt in one's mind of the correctness of the practice above referred to.

Pothier, cited by respondent, says: "Il est censé suffisamment l'autoriser lorsqu'il est en qualité dans l'instance conjointement avec elle."

Is not the husband in this case *conjointly* in the instance with his wife?

Have they not been summoned *conjointly*—that is, by the same attorney? Is it because the appearance is on two different pieces of paper that the Court will give it a different legal effect?

Is it not to be presumed that, by his silence, he consents to his wife defending herself? It is his interest that she should do so. He has no interest that she should not, because, being separated as to property, he cannot be liable for the costs of the defence.

Are we to presume that because the appearance is upon two different pieces of paper, the husband intended to *do* what it was his interest *not* to do, and what would have been all right, had the appearance been on one piece of paper only? Assuredly not. Otherwise we would come to this extraordinary conclusion, that an appearance in the following words: "John A. Perkins appears for Dame Elizabeth McCormick and for John McMillan, the defendants," would have a different meaning and different effect from that which would be made as follows:—

"John A. Perkins appears for Dame Elizabeth McCormick, one of the defendants."

"John A. Perkins appears for John McMillan, one of the defendants."

But why make two separate appearances? The reason is very evident. The husband in this instance is not only sued for the purpose of authorizing his wife; he is sued personally, and he has, from the mere inspection of the declaration, a different and distinct interest from that of his wife.

Sirey, t. 33, 11, 28, cited by respondents.

In this case the wife was acting as plaintiff, and of course could not intervene without her husband; but she appealed alone, and the Court maintained that the authorization could be given *pending the appeal*.

Sirey, col. nouvelle, 7, 2, 241.

"Une femme mariée appelée en intervention dans une instance engagée avec son mari est réputé suffisamment autorisé par le mari, si elle se fait defendre *par le meme avoué*, encore que le mari et le femme aient des interets distincts."

3rd.—The cases cited by respondents from the "*Journal de Cassation*" are cases in which the husband had not been summoned to authorize the wife.

4th.—The Court will authorize the wife when the husband refuses or makes default. It is a mere formality.

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Demolombe, vol. 4, art. 268.

"Si le mari assigné refuse l'autorisation ou fait défaut, le tribunal accorde l'autorisation sur les conclusions du demandeur, en même temps *qu'il statue sur la demande principale*."

Sirey, 1843, 1, 247.

5th.—If the wife was not sufficiently authorised, it was the duty of the plaintiffs to have her authorized, before moving to reject her appearance and pleas.

Demolombe, 4, No. 351.

Sirey, table générale, 1791, 1850. Vo. Autorisation de femme mariée, No. 153.

"Lorsque la femme défenderesse ne provoque pas l'autorisation du mari, c'est au demandeur à provoquer cette autorisation."

If, as the respondents pretend, the procedure of [illegible] a nullity, she could not be condemned to pay costs to plaintiffs, a[illegible] well founded.

Duranton, t. 11, No. 468.

The respondents have put of record their own condemnation. This honorable Court is referred to demand of certificate of default, and to such certificate of default against the appellants now of record. *Demand, &c. Default against defendant, Dame Elizabeth McCormick, and against her husband, John McMillan, as authorizing her.* How can respondents explain their own proceedings?

Morris, J. L., and *Abbott, Hon. J. J. C.*, Q.C., for respondents, submitted:—After the return of the writ, the defendant, Elizabeth McCormick, fyled an appearance in her own name, separate from and independent of her husband and with no word to shew that she was authorized.

The defendant, John McMillan, also fyled an appearance independently of his wife, for himself alone, and with no word in it to shew that he knew of his wife's appearance. Almost immediately afterwards, they both fyled separate and independent *exceptions à la forme*, in neither of which is there anything to shew that the husband knew of his wife's acts or that he authorized her.

The plaintiffs immediately moved that the appearance and *exception à la forme* fyled by the said Elizabeth McCormick, wife of John McMillan, in her own name, as Elizabeth McCormick, and without her husband, or his authorization, be rejected from the record, and declared illegal, null and void, because said appearances and *exceptions à la forme* did not contain or allege any authorization from said John McMillan to his wife to appear or plead in the cause, and the same were illegal and contrary to law.

MACKAY, J., in rendering judgment, referred to the fraud which he could perceive on the part of the defendants, and said he was with the plaintiffs. The law had not been met; the female defendant appeared separately from her husband, who was summoned in his own right and appeared for himself. She appeared without him and he without her. The plaintiffs were right in moving to reject the appearances and *exceptions à la forme*, which were irregularly and illegally fyled. It was better to do so now and have the matter remedied and the proceedings made regular than for the parties to go on and find out after a long contestation that all their proceedings were null, and that they had been fighting in vain. The motions would therefore be granted.

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The respondents now respectfully submit that the judgment appealed from was just and right. The appellants, pleading an insufficient authority, are invoking the aid of the Court to enable them to defraud the plaintiffs out of a large sum of money which they had lent them in good faith to build houses with, and improve their property. They have built their houses, and now wish to keep both property and money. The respondents summoned them in legal form, taking the proper precautions to get the husband's authority for the wife to *ester en jugement*. The ground of the expected defence to the action being that there was no *legal* authority from the husband to the wife to enable her to sign the obligations on which the action is based, the respondents were careful to see that the proceedings should be regular in all respects.

The appellants, husband and wife, whose interests are supposed to be in a great measure identical, even although *séparés de biens*, being sued as joint conspirators, and the husband also for the purpose of authorizing her in the suit, there could be no good reason for their severing in their appearances or in their defence, if he were willing to authorize her.

If their intentions were honest, they would naturally have been expected to appear and plead together, in order to keep down the costs of suit.

The authorities recognize the joint appearance and pleading of the husband and wife as sufficient, simply because their acting together creates a common sense presumption that in what she is doing she has his authority, though she does not explicitly say so. But not only is that presumption wanting in this case, but the fact that the husband appeared for himself alone, and the wife for herself alone, affords the strongest presumption that she was not authorised to appear and plead, and that the husband did not consent to her doing so, and did not even know of it, or if he did know of it, that the appearances were fyled in that way, again with the view of entrapping the plaintiffs, so that if they were successful in their suit the female defendant would turn round and say, as she says when called upon to pay a debt which she does not deny owing: "I was not authorized. Your judgment is worth nothing."

The correctness of the respondents' pretension can also be tested in this way. The effect of the husband and wife appearing and pleading separately and without each other was virtually to create two actions, *deux instances*. Supposing that the plaintiffs had discontinued their action against the husband, where would the wife be? Not more or less alone than she had been previously, but the husband would be out of the record entirely. All his proceedings, his appearance and plea would be null and of no effect. From whence would the wife then derive her authority? Might not the husband and the wife legally say to the plaintiffs, the husband appeared for himself alone, as the appearance proves; you have discontinued proceedings against him, the wife was not authorised to appear and plead, your proceedings are null, your judgment is null.

Could the plaintiffs, under the circumstances, be expected to fight a shadow? Surely not. The law is clear and supports the respondents' view. The Civil Code of Lower-Canada, Art. 176, says: "A wife cannot appear in judicial proceedings without her husband or his authorization." In this case she has not got his authorization, and she certainly has not appeared with him. She has

appeared and pleaded without him, and he without her. If they had appeared and pleaded together, *conjointement*, the law would have been met.

The sense of the authorities is, that if the wife appears and pleads without authority her proceedings are absolutely null.

If the respondents had met and answered the plea in this case, and gone on to judgment, that judgment could have been annulled on the demand of the defendants.

The respondents could not have acted otherwise than they did. As they were the complaining parties it was for them to ask for the authority of the husband. They did so first by their action and writ. Then, when they found that the female defendant had not obtained authority, and had fyled documents which on their face were null, they took the next step, by moving that the illegal documents be rejected.

The appellants have not been injured by the judgment dismissing the appearance and *exception à la forme* of the female defendant, who will now have an opportunity of meeting the case upon its merits. Until the proper authority for her to *ester en jugement* was had no judgment could have been obtained, or if rendered, it could be annulled. The plaintiffs could not proceed to judgment without such authority. Therefore, after clearing the way by getting rid of the documents fyled of record, which were illegal and null on their face, they would have had to petition the Court to authorise the female defendant to *ester en jugement*. Until they did this they would be paralyzed in their case, unless the defendants chose to ask to be allowed to fyle a proper appearance, which the plaintiffs, anxious to get on, would have been glad to allow them to do, and which the Court would never have refused. Instead of resorting to this simple remedy in the Court below, or waiting until the plaintiffs should complete their steps to regularise the proceedings, the defendants, prompted, doubtless, by malice and a desire to delay the hearing of the case as long as possible so that they may hold on to their ill-gotten gains, rush into appeal, in two cases, for there are two of a like character, involving two separate sums of money amounting together to $7,000. The respondents feel satisfied that the Court will never, even indirectly, assist the appellants in such an iniquitous proceeding, but will consider the present case pre-eminently one in which the law should be applied and enforced.

The following propositions and authorities were submitted by respondents:—

1st. A married woman cannot appear and plead in judicial proceedings without her husband or his authorization, and if she does so her proceedings are null. Civil Code of L. C., 176, 183. Code Napoléon, Art. 215.

Biret, des nullités, p. 134: "La femme ne peut plaider soit en demandant, soit en défendant, sans l'autorisation expresse ou présumée telle de son mari ou de la justice. Il paraîtrait donc naturel de conclure qu'il y a nullité absolue dans la violation de ces règles *ex defectu habilitatis aut potestatis*.

Sirey, Table général, 269: "L'autorisation de la femme pour ester en jugement est tellement nécessaire que tout jugement obtenu contre elle peut être annullé, sur sa requête, pour défaut d'autorisation."

Demolombe, vol. 4, art. 267.

La femme peut-elle plaider, même comme Défenderesse, sans autorisation? Non.

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Chauveau, p. 89, Art. 2, 17. "Lorsque une femme assignée conjointement avec son mari, demande à pouvoir plaider séparément, il y a lieu d'ordonner, avant de procéder sur cette assignation, qu'elle remplisse les formalités nécessaires pour en obtenir l'autorisation."

Code of Civil Procedure L. C., Art. 14: "Those who have not the free exercise of their rights must be represented, assisted or authorized in the manner prescribed by the laws, which regulate their particular status or capacity.

Idem, Art. 19. Tutors, curators and others representing persons who have not the free exercise of their rights plead in their own name in their respective qualities.

2nd. The authority is held to be sufficient and implied if the wife appears in the cause, and pleads *conjointly* with her husband.

Pothier, Traité de la puissance du Mari, t. 3, p. 482, § 3. Il est censé suffisamment l'autoriser, lorsqu'il est en qualité dans l'instance *conjointement* avec elle.

"Pour que la femme soit censée suffisamment autorisée à une demande, il suffit que sur l'assignation donnée à son mari et à elle, son mari et elle constituent conjointement Procureur et que le mari défende conjointement avec elle."

"A l'égard des actes judiciares, il est nécessaire que le mari dans l'instance soit en qualité de mari conjointement avec sa femme."

Rogron, t. 1, p. 40. "Ester en jugement, c'est-à-dire à se présenter devant le juge soit en demandant, soit en défendant (stare in judicio)."

"Au reste, la cour de Grenoble a jugé qu'il suffit que son mari et elle procèdent conjointement dans la même instance, même avec des intérêts distincts, pour que l'autorisation soit réputée accordée (arrêt du 21 Fer., 1832; Sirey, t. 33, 11, 28.)

Sirey, Table générale, 1791—1850. Mot autor. de femme mariée. No. 168, L'autorisation de la femme pour ester en jugement résulte suffisamment de la présence du mari dans tous les actes de la procédure: une autorisation expresse n'est pas nécessaire en ce cas (Carré n. 2214). 169. Ainsi, le mari qui plaide conjointement avec sa femme est censé, par cela seul, l'autoriser à ester en justice.

Idem, 172. Encore dans une instance, une femme ait des intérêts distincts de ceux de son mari, elle est suffisamment autorisée à ester en jugement par cela seul qu'elle procède ou qu'elle fait des actes conjointement avec lui.

Sirey 10 and 11, 2nd part, p. 384.

"Chauveau, p. 89, art. 4, 30. "Le mari qui plaide conjointement avec sa femme est censé par cela seul l'autoriser à ester en justice."

"Biret, des nullités, p. 132," uses exactly the same words as Chauveau.

Renusson, p. 143, No. 11. "La femme est censée autorisée suffisamment quand elle y procède conjointement avec son mari;" "il suffit que son mari soit partie avec elle et qu'ils procèdent conjointement."

Idem, p. 146, No. 15. "Si le mari ne désire pas procéder conjointement avec sa femme, ni être partie avec elle dans les procès qui concernent ses propres, il faut en ce cas que la femme soit autorisée de son mari." "Il faut que l'acte d'autorisation précède les procédures, autrement si la femme avait commencé à

procéder sans être autorisée, quoiqu'elle se fit autoriser dans la suite, elle pourrait prétendre qu'il y aurait nullité."

Guyot, Vo. autorisation, p. 820. "Il suffit, disent tous les auteurs, que le mari et la femme procèdent conjointement, pour que le premier soit censé avoir autorisé l'autre."

Marcadé Vol. 1, p. 556, No. 735. "Notre code apporte aux anciens principes deux dérogations. L'une sera indiquée sous l'art. 225. Voici en quoi l'autre consiste. Il fallait autrefois que l'autorisation donné par le mari à sa femme pour passer un acte, fût expresse et formelle. Il n'aurait pas suffi de l'autorisation tacite résultant de ce que le mari était lui-même partie dans cet acte; c'était seulement pour ester en jugement que l'autorisation tacite résultant du concours du mari suffisait. Le code rejette cette subtilité et l'autorisation tacite suffit aujourd'hui pour les actes extra judiciares comme pour les procès."

"Il est inutile d'ajouter qu'il faut un concours prouvant le consentement du mari. Ainsi, qu'un mari signe un billet et que la femme écrive au-dessous qu'elle s'oblige au paiement conjointement avec lui, il est clair que rien ne prouve l'autorisation. Il n'y a même pas concours des époux dans un seul acte; il y a deux actes, deux obligations dont la seconde, celle de la femme, a pu se former arrière du mari."

3rd. The husband cannot be presumed to authorise his wife because he figures in his own name in the same cause with her.

Journal de Cass. 1811, p. 188, arret of 25th August 1810. "La femme est-elle censée autorisée par son mari à ester en jugement par cela seul que celui-ci est partie dans l'instance lorsque les deux époux y ont des intérêts distincts. Res. Neg.

Journal de Cass. 1818, Supplement, p. 24, *arrêt* 25th April, 1817. "Le mari est-il presumé autoriser sa femme à ester en jugement par cela seul qu'il figure en son nom propre, dans la même instance qu'elle. Rés. Nèg.

4th. If a married woman do not obtain her husband's authority to *ester en jugement* the Court can give such authority on the plaintiff's demand. Civil Code L. C., 178.

Demolombe, vol. 3, art. 266. "Le tiers qui assigne la femme, assigne également le mari à l'effet de l'autoriser; et c'est ainsi qu'un tribunal de commerce peut valablement accorder l'autorisation à une femme mariée, en cas de refus ou de défaut de mari assignée par le demandeur; ce n'est qu'un simple incident, une sorte de formalité accessoire, *necessaire* pour régulariser la procédure."

Idem, 267. "On voit par là que c'est le tiers demandeur qui doit lui-même assigner le mari afin de le mettre en demeure d'autoriser sa femme," "pour ensuite, en cas de refus ou de défaut de sa part, conclure à ce que le tribunal accorde cette autorisation." "C'est au tiers demandeur, à remplir toutes les conditions nécessaires pour régulariser la procédure qu'il introduit; et d'ailleurs il faut bien vraiment qu'il en soit ainsi. *La femme peut-elle plaider, même comme défenderesse sans autorisation? Non.* Eh bien! puisque c'est vous qui voulez plaider contre elle, vous êtes bien obligé de faire tout ce qu'il faut pour que le procès puisse s'engager sûrement."

Idem, art. 268. Si le mari assigné refuse l'autorisation ou fait défaut, le tribu-

Dame Elizabeth McCormick, and Dame Janet Buchanan et al.

nal accorde l'autorisation sur les conclusions du demandeur, en même temps qu'il statue sur la demande principale. Mais il faut que le tribunal prononce en effet sur le chef des conclusions, comme sur tous les autres, par une déclaration formelle et par le dispositif de son jugement."

5th. If a married woman appears and pleads without authority, or if the husband not appearing, a judgment by default is rendered against her, all the proceedings will be declared irregular and null, and set aside by the Court.

JUR. DE CASS. 1806, p. 349. Wife pleaded alone—judgment against her. Proceedings set aside because she had no authority under 215 and 218 Code Napoléon.

Journal de cass. 1806, p. 472. A wife pleaded alone. Judgment set aside.

Jur. de cass. 1829, p. 240. A wife and husband were sued; the husband made default, the wife appeared alone without authority. The judgment rendered against her was set aside.

Le Brun, com. liv. 2, ch. 1, p. 200, No. 10. "Que si la procédure qui se fait contre le mari et la femme conjointement, est par défaut, ce sera une juste précaution de faire autoriser la femme en justice, car son mari absent et défaillant n'est pas censé l'autoriser; mais bien quand il agit ou défend conjointement avec elle. Ainsi tous les jugements intervenus contr'elle tombent d'eux-même à défaut d'autorisation."

Renusson, p. 146, No. 15. "Il faut que l'acte d'autorisation précède les procédures, autrement si la femme avait commencé à procéder sans être autorisée, quoiqu'elle se fit autoriser, dans la suite elle pourrait prétendre qu'il y aurait nullité."

Sirey, Table général, 1791, 1850, vo. autor., p. 233, No. 218. "La non comparution du mari équivaut à un refus d'autorisation. Chauveau sur Carré. N. 2911.

The following is the judgment recorded in appeal.

La Cour etc., considérant en droit que le mari de la femme séparée de biens, poursuivie comme telle "est censé suffisamment l'autoriser lorsqu'il est en qualité dans l'instance conjointement avec elle."

Considérant que dans la présente cause le mari de l'appelante, John McMillan, est poursuivi conjointement avec elle, et a lui-même et en son propre nom plaidé à l'action quoique à part et séparément de sa dite épouse;

Considérant que cette présence du mari dans l'instance est suffisante pour autoriser l'appelante à s'y défendre;

Considérant que pour ces raisons il y a erreur dans le jugement de la Cour Supérieure siégeant à Montréal en date du 30 jour de Novembre, 1869, lequel, sur motion du demandeur, intimé, rejette comme nulles et non avenues pour défaut d'autorisation, la comparution et l'exception à la forme produites par la dite appelante, casse et annulle le dit jugement, et procédant à rendre celui qui aurait dû être rendu par la dite Cour Supérieure, ordonne que la dossier soit remis à la dite Cour pour y être procédé ainsi que de droit avec dépens, &c.

Judgment reversed.

John A. Perkins, for appellants.
Thos. W. Ritchie, Q.C., for respondents.
Hon. J. J. C. Abbott, Q.C., counsel.
John L. Morris, counsel.
(J. L. M.)

COUR DE CIRCUIT, 1872.

ST. HYACINTHE, 26 MARS, 1872.

Coram SICOTTE, J.

No. 8218.

Perrault vs. *Couture*,

JUGE:—Qu'une promesse faite par un enchérisseur à un autre enchérisseur, à une vente judiciaire, de lui payer une certaine somme, pour lui faire cesser ses enchères, constitue une obligation illégale, et que la somme ainsi promise ne peut être recouvrée en justice.

Les faits de la cause sont les suivants :

Le shérif du district de St. Hyacinthe vendait en vertu d'une exécution dans une cause de la Cour Supérieure, un immeuble, sur lequel le demandeur et le défendeur mettaient des enchères. Le défendeur proposa au demandeur, que si ce dernier voulait cesser d'enchérir, il lui paierait la somme de $15. Le demandeur accepta et cessa d'enchérir. Le demandeur poursuivit le défendeur pour les $15 convenues, et l'action alléguait qu'attendu la cessation des enchères du demandeur, l'immeuble fut adjugé au défendeur à des conditions avantageuses, grâce à l'abstention du demandeur.

Une défense en droit fut faite par le défendeur, niant le droit d'action du demandeur, sur le principe que cette obligation était contre les bonnes mœurs et contre l'ordre public.

SICOTTE, J.—Notre Code, art. 989 et 990, donne la règle générale relative au défaut de cause des obligations dans les termes suivants: "Le contrat sans considération, ou fondée sur une considération illégale, est sans effet. La considération est illégale quand elle est prohibée par la loi, ou contraire aux bonnes mœurs ou à l'ordre public."

La loi, qui n'a pas le rigorisme minutieux d'un moraliste sévère, défend, toutefois, de faire tort à autrui, et rend toute personne, capable de discerner le bien du mal, responsable du tort causé par sa faute.

Toute manœuvre, toute combinaison, pour faire tort à autrui, est chose mauvaise en soi. On ne peut fonder un droit sur une telle manœuvre, dont le but et le résultat sont de nuire à autrui. Les ventes judiciaires ordonnées pour l'acquittement des jugements, sont d'un intérêt d'ordre public, l'intérêt général, comme celui des créanciers et des débiteurs, est que le bien se vende pour le plus haut prix. Une entente entre les enchérisseurs pour empêcher ce résultat, pour faire tort au créancier comme au débiteur, en prévenant et éloignant les enchères, est chose immorale, contraire à l'équité, à la justice, et punissable.

Suivant l'enseignement de Larombière, au nombre des causes contraires aux bonnes mœurs, on doit compter les causes injustes, c'est-à-dire celles qui offensent la bonne foi et l'équité essentielles aux relations entre les hommes.

La cause sur laquelle repose le contrat invoqué par le demandeur, est injuste ; le contrat est sans effet.

Fontaine & Mercier, avocats du demandeur.
Chagnon & Sicotte, avocats du défendeur.

Action déboutée.

(H.W.G.)

COURT OF QUEEN'S BENCH.

MONTREAL, 7TH SEPTEMBER, 1871.

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

No. 23.

HOPE, APPELLANT,

AND

FRANCK, RESPONDENT.

HELD:—That it is no longer necessary that the writ of appeal should be signed by the appellant's attorney.

PER CURIAM:—This is a motion to dismiss the appeal, on various grounds, the most of which can only be taken when the cause is heard on the merits. As to the point urged, that the writ is not signed by the appellant's attorney, it is enough to say that under the New Code of Procedure the attorney is not required to sign. The motion is therefore rejected.

Motion to dismiss appeal rejected.

Abbott, Tait & Wotherspoon, for appellant.

L. N. Benjamin, for respondent.

(S. B.)

SUPERIOR COURT, 1872.

MONTREAL, 20TH APRIL, 1872.

IN CHAMBERS.

Coram TORRANCE, J.

No 497.

Fortier v. *Trudeau*.

HELD:—That on a judgment for $50 and costs of the lowest class of the Superior Court, the new tariff existing at the date of the judgment for cases under $200 must apply.

This action was instituted on the 15th March, 1871, for damages laid at $3500, for slander of a medical man in his professional conduct, as well as for addressing to him opprobrious epithets.

Judgment was given for $50 on 30th March, 1872, with costs to be taxed as in an action of the lowest class of the Superior Court.

The Prothonotary taxed the costs at $83.25, as in an action under $400.

Geoffrion petitioned for revision of the taxation, contending that there was a new tariff for cases under $200, and that the judgment was according to the lowest tariff in the discretion of the judge rendering the judgment.

Taillon, e contra, cited *Brennan* v. *Molson*, *vide* p. 253, *post*.

The Judge in Chambers granted the petition, and held that by the tariff applicable was the tariff in force here since February last for the Superior Court under $200.

Petition granted.

L. O. Taillon, for plaintiff.

Dorion, Dorion & Geoffrion, for defendant.

(J.K.)

SUPERIOR COURT, 1872.

MONTREAL, 26TH JANUARY, 1872.

IN CHAMBERS.

Coram TORRANCE, J.

No. 18.

Brennan v. *Molson.*

HELD:—That until the promulgation of a tariff for cases of the Superior Court under $200, the tariff over $200 must apply.

This was an action of damages instituted on the 4th of January, 1871, for $500, and judgment was rendered on 29th December, 1871, for $189, and costs.

The costs were taxed by the Prothonotary as in a cause over $200.

Rose, for defendant, applied to have the taxation revised, contending that the tariff applicable was the tariff of the Circuit Court in cases under $200, there being no tariff of the Superior Court in Montreal in force for cases of that amount; that to uphold the present taxation, would be to apply the tariff of the Superior Court to a class of cases for which it was never intended.

Dorman, è contra, cited C. C. P. 28, 478,9; Quebec Act, 34 Vict. c. 4, A. D. 1870, amending C. C. P. 1054.

TORRANCE, J., took time to consider, and after conference with his colleagues at Montreal, and inquiry of the Chief Justice as to the practice at Quebec, decided that the taxation must stand.

Petition rejected.

S. W. Dorman, for plaintiff.

Ritchie, Morris & Rose, for defendant.

NOTE. A new tariff applicable to these cases was registered at Montreal, in February, 1872.

(J. K.)

SUPERIOR COURT, 1872.

MONTREAL, 29TH FEBRUARY, 1872.

Coram TORRANCE, J.

No. 424.

Ex parte Louisa Palmer, Petitioner for *certiorari*.

HELD:—That a notice of application for a writ of *certiorari* within the six months following conviction is not sufficient, if the application itself be not made until after the expiration of such six months.

PER CURIAM:—A motion was made in this case to quash a conviction under the liquor law. The question has been submitted on the merits. There is no difficulty in quashing the conviction as not having been made in due form. The prosecuting party has raised the objection that the application for the writ was not made within six months. I thought at first that the judge having allowed the writ to issue, I had nothing further to do with this question of the

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issue of the writ within the six months. The facts are these: The conviction was made on the 25th April last; on the 24th October, of the same year, almost six months after the day of the conviction, notice was given to the Recorder that an application for certiorari would be made, and the judge ordered the writ to issue. The Act 13 Geo. II. says that no writ of certiorari shall be granted to bring up a conviction where the application has not been made within the six months. It is not where notice has not been given, but where the application has not been made within the six months. Here the application was clearly made after the expiration of the six months. On this ground the motion of the prosecutor must be granted, and the writ of *certiorari* quashed, annulled and set aside with costs.

Writ of *certiorari* quashed.

Chapleau & McMahon, for petitioner.
Mr. Bourgouin, for the prosecutor.
(S. B.)

SUPERIOR COURT, 1872.

MONTREAL, 30th MARCH, 1872.

Coram BERTHELOT, J.

No. 2128.

McGauvran & al. vs. *Johnson*, and *The Royal Institution for the advancement of learning & al. T. S.*

HELD:—That the proprietor of a lot has no lien or right of retention on the building materials delivered there for the purpose of being incorporated in a building in course of erection on such lot, so long as they are not so incorporated.

PER CURIAM:—This is the case of a *Saisie arrêt* after judgment, and the declaration of the *Tiers Saisi* Lemuel Cushing has been contested. The question raised by the contestation is as to the right of the plaintiff to attach materials for a building in course of erection on Mr. Cushing's property and actually delivered on the lot, but not incorporated in the building. The 1025 article of the Civil Code has been cited in favor of the *Tiers Saisi's* pretensions, but I do not consider it applicable, and I shall therefore maintain the contestation and condemn the *Tiers Saisi* to pay £90, the value of the materials mentioned in his declaration and in the pleadings, with costs of contestation.

The following were the reasons assigned in the written judgment:—

"The Court . . . . . considering that the building materials claimed by the said Lemuel Cushing, situated as well in his own premises as in the shop of the said defendant, were not incorporated in the buildings in course of construction by the said defendant.

"Considering that by law a *proprietaire* has no *lien*, privilege or right of retention upon the materials prepared for or delivered on the premises for building purposes, so long as the same are not incorporated in the building, doth maintain said contestation &c."

Contestation of declaration of *Tiers Saisi* maintained.

Girouard & Dugas, for Plaintiffs.
Cushing, for the T. S.
(S. B.)

COUR DE CIRCUIT, 1872.

ST. HYACINTHE, 2 AVRIL, 1872.

Coram SICOTTE, J.

No. 1502.

Ex parte *Frs. Bourgault et al.*, requérants, et *F. X. Dalpé et al.*, conseillers municipaux contestés.

JUGE:—1o. Que lorsque l'élection des conseillers municipaux, en vertu du Code Municipal, a lieu dans les quinze jours précédant le premier jour du premier terme qui suit l'élection, la requête permise par l'article 349 du Code Municipal, pour contester l'élection, peut être présentée le premier jour du second terme;

2o. Que l'acte de cautionnement requis par l'article 353 du Code Municipal, ne doit pas nécessairement contenir la désignation des biens-fonds des cautions, mais que leur déclaration, énoncée sous serment dans l'acte, qu'ils sont propriétaires de bien-fonds de la valeur requise est suffisante.

Faits de la cause :

Une requête fut présentée par cinq électeurs municipaux du village d'Acton Vale, à la Cour de Circuit, siégeant dans et pour le district de St. Hyacinthe le premier jour du terme de mars dernier, savoir le 22 mars, demandant que l'élection de certains conseillers de ce village, fût pour certaines raisons mentionnées dans la requête, déclarée nulle, et que la Cour désignât ceux qui devaient les remplacer.

L'élection de ces conseillers avait eu lieu le 9 janvier dernier, et un terme régulier de la Cour de Circuit, fixé par proclamation, commençait le 22 janvier dernier, le 22 mars, jour où a été présenté la requête, n'étant que le premier jour du second terme qui suivait l'élection. De plus, les requérants avaient fourni aux désirs du Code Municipal, deux cautions, qui dans les actes de cautionnement, se déclaraient propriétaires de bien-fonds d'une valeur excédant 200 dollars en sus de toutes charges, mais dans lesquels aucune désignation de biens fonds n'était donnée.

Une motion fut faite par les conseillers contestés, représentés par leurs avocats, demandant le renvoi et rejet de la requête ; 1o. parce que la requête ne pouvait être présentée, d'après le Code mupicipal, le premier jour du second terme suivant l'élection; excepté dans le cas où l'élection aurait eu lieu dans les 15 jours précédant la *clôture* du premier terme, cas qui ne s'est pas présenté dans l'espèce soumise ; et 2o. parce que les actes de cautionnements ne donnaient aucune désignation des bien-fonds dont les cautions se déclaraient propriétaires.

SICOTTE, J.—La contestation doit être présentée dans les 15 jours après la nomination ; mais si cette nomination a eu lieu dans les 15 jours précédant le premier terme suivant, la requête pourra être présentée le premier jour du second terme. Si les 15 jours expirent avant le premier terme, la contestation pourra être présentée durant tous les jours du terme, mais ne pourrait plus l'être après sa clôture.

Dans l'espèce, la nomination a eu lieu le 9 janvier ; les 15 jours expiraient le 24 ; le terme commençait le 22. La nomination avait donc été faite dans les 15 jours précédant le premier terme. Le Code Municipal ne dit pas précédant le premier ou le dernier jour du terme, mais précédant le terme. Si on avait voulu ordonner que la contestation devait être présentée durant le premier terme

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qui suivrait l'élection, pourvu qu'il y eut 15 jours entre la nomination et la clôture du terme, on aurait dit : "la [illegible] présentée durant le premier terme, si le délai de 15 jours [illegible] expire avant la clôture." Avant n'est pas durant le terme ; ce [illegible] date doit arriver avant le commencement de la période de temps qui s'ouvre à la date indiquée.

C'est comme si le législateur, connaissant la date précise de nos termes, avait dit : Si une élection est faite dans les quinze jours précédant le 22 janvier, la contestation pourra être présentée le 22 mars, si on ne l'a pas présenté le 22 janvier.

Le cautionnement qu'on attaque est donné dans les termes mêmes du Code. Les cautions déclarent qu'elles sont propriétaires d'immeubles dans la municipalité de la valeur de $200 en sus de toutes charges, mais sans désignation d'aucune propriété. Le Code n'a pas donné de formule du cautionnement. Il faut donc expliquer et appliquer la loi telle qu'elle se lit, et d'après les règles ordinaires.

Ce qui n'est pas exigé par disposition particulière, pour valider l'exécution d'une chose que la loi ordonne, et qui peut être fait de manière à garantir tous les droits, en employant dans l'exécution et l'accomplissement du devoir prescrit, les termes mêmes de la loi pour qualifier la condition prescrite, peut-il être exigé comme ingrédient nécessaire à la légalité de cette chose ? Je pense que non.

Les Cours doivent permettre l'exécution de la loi, tel que la loi l'exprime et le déclare. Ordonner plus, requérir plus, c'est ordonner, c'est prescrire plus et autrement que la loi. C'est faire la loi et non pas l'appliquer et la faire exécuter.

Si dans son application toute littérale, toute formaliste, l'exécution d'une loi spéciale causait inévitablement tort, préjudice à quelque droit, à des intérêts quelconques, les Cours devront chercher une exécution, une application qui obtiendrait le but de la loi, par des moyens sanctionnés par la loi générale, sans causer tel préjudice.

Ainsi s'il était représenté que la caution donnée, conformément à la lettre du Statut, permet de fournir cautionnement évasif, sans valeur, on peut toujours contester la suffisance de la caution, suivant l'article 1939 du Code Civil, et les articles 517 et 518 du Code de Procédure.

L'esprit de tout le Code Municipal sur la nécessité et la valeur des formalités, est que toute omission ne peut faire préjudicier un droit que dans les cas où la formalité est prescrite à peine de nullité ; c'est même la disposition formelle de la clause 16. Il y a dans cette clause injonction aux tribunaux de rejeter toute objection relative à l'omission des formalités même impératives, à moins qu'une injustice réelle ne dût résulter du rejet de l'objection.

Dans les circonstances, aucun préjudice ne peut résulter du fait d'une caution donnée dans les termes généraux du Code ; car si l'objection était valable, la suffisance de la caution peut être attaquée et constatée, de manière à donner aux parties l'avantage du cautionnement requis et voulu.

Requête rejetée.

Chagnon & Sicotte, avocats des requérants.

Fontaine & Mercier, *Bourgeois, Bachand & Richer*, } Avocats des conseillers.

(H.W.C.)

COUR DE CIRCUIT.

SOREL, 9 OCTOBER, 1871.

Coram SICOTTE, J.

No. 943.

Guèvremont vs. Cardin.

JUGE:—Que la parenté du notaire en second à l'une des parties contractantes n'entraîne pas la nullité de l'acte sous l'empire de notre Code Civil.

Le demandeur Simon Guèvremont réclamait du défendeur la somme de $136.75, montant d'un transport que Louis Guèvremont lui avait consenti à Sorel, district de Richelieu, pardevant Mtre. Cartier, N.P., et assisté de Mtre. P. Guèvremont, notaire en second, le 10 septembre 1870. Le défendeur, par ses défenses, allégua que le notaire Pierre Guèvremont est parent du cédant Louis Guèvremont, savoir: son neveu; et que conséquemment aux termes des articles 843, 844, 845 et 1208 du Code Civil, ce transport n'était pas valable en loi.

Le demandeur répondit en droit à cette défense et les parties furent entendues tant en droit que sur la preuve faite subséquemment et sur le mérite.

Le jugement de la Cour est motivé comme suit: "La Cour, considérant que le défendeur n'a pas justifié les allégations de sa défense et exception, le déclare mal fondé en ses défenses et maintient le demandeur dans les conclusions de son action et l'autorise à donner valable décharge du paiement demandé, le tout avec dépens."

Jugement pour le Demandeur.

Germain, avocat du demandeur.
Gauthier, avocat du défendeur.
Lafrenaye, conseil.
(P. B. L.)

COURT OF QUEEN'S BENCH.

MONTREAL, 7TH SEPTEMBER, 1871.

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

No. 43.

THE GLEN BRICK COMPANY AND HENRY W. WALKER, APPELLANTS;

AND

HENRY SHACKELL, RESPONDENT.

HELD:—That when two parties, raising separate and distinct issues, appeal jointly by one and the same writ, the respondent may, with leave of the Court, fyle separate appearances on each issue.

PER CURIAM:—This is a motion by the respondent to be allowed to fyle a separate appearance on each separate issue raised by the appellants, who have appealed jointly and by one and the same writ. We see no objection to this, and the motion is therefore granted.

Motion of respondent granted.

A. & W. Robertson, for appellants.
Perkins & Monk, for respondents.
(S. B.)

COURT OF QUEEN'S BENCH.

QUEBEC, 8TH JUNE, 1872.

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

DAME E. M. EVANTUREL ET VIR,

(M. AND MADAME RÉMILLARD,)

(*Plaintiffs in the Court below,*)

AND APPELLANTS.

THE HONORABLE F. EVANTUREL,

(*Defendant in the Court below,*)

RESPONDENT.

A clause in a will, declaring that a legacy shall be forfeited if the legatee should contest the will, held to be comminatory, and as having been made *in terrorem*.

Where such a penalty is imposed for a contestation the Court will enquire into the facts, and if there were just and probable cause for suspecting the validity of the will, it will exercise a just discretion in giving or not giving effect to the clause of forfeiture.

Quære:—Is such a clause void, as contrary to the policy of the law, or as interfering with the jurisdiction of the Courts?

By her last will, dated 18th May, 1861, Mrs. Evanturel, the mother of the appellant Evanturel, and of the respondent, instituted the latter her universal usufructuary legatee, subject to the payment by him to each of his sisters of a life rent of £25 per annum. The will in question contained, among other provisions, the following clause: "Je veux et ordonne, et ma volonté expresse est "que si mes dites filles ou aucune d'elles venaient à faire, soit directement ou "indirectement, aucune démarche quelconque pour contester mon présent testa- "ment, qu'alors et dans ce cas, mes dites filles ou aucune d'elles qui voudraient "ainsi chercher à contester mon présent testament, soient privées ou soit privée "de tous droits quelconques dans ma dite succession et de la rente viagère sus- "dite, et que, quant à celles ou à celle qui voudront contester mon dit testament, "le legs à elle fait de la dite rente, soit non avenu et caduc, car telle est mon in- "tention expresse."

The judgment appealed from was rendered in revision at Quebec, in an action brought by one of the sisters of the respondent and assisted by her husband, for arrears of the rent, which was met by a plea that the appellants had contested the will in an action before the Superior Court, on the ground of informality, incapacity, fraud, suggestion and captation, &c., on all which points they had failed, as well before the Courts of Lower Canada as before the Queen in Her Privy Council, and had, under the clause of the will above recited, forfeited all claim to the bequest of the life rent.

To this plea the defendants replied specially that the clause was penal, null and void; that the action in which the will was contested was brought by Edward Rémillard, one of the plaintiffs, as head of the community; that the clause could not apply to him; and that his action could not affect the interests of his wife, the other plaintiff.

The suit referred to in the pleadings,* was one wherein the present appellants,

*Reported in Moore's Privy Council Cases, *Evanturel* vs. *Evanturel*, Vol. VI. p. 75.

besides setting up the nullity of the will, on the ground of alleged informalities, fraudulent suggestion and captation on the part of the defendant, contested its validity for the following reasons: Evanturel et Evanturel.

"Parcequ'à la date du dit prétendu testament, la dite défunte Dame Marie-"Anne Bédard était déjà attaquée depuis plus d'un an par la même maladie qui "l'a conduite au tombeau l'automne dernier, que l'effet de cette maladie se fai-"sait déjà sentir à la dite date, non-seulement sur le corps, mais aussi sur l'es-"prit; que toute les facultés de la défunte Marie-Anne Bédard se trouvaient déjà "affaiblies et paralysées; qu'elle n'avait plus la force et l'énergie nécessaires, ni "pour former une volonté distincte et l'exprimer clairement, ni pour résister "aux manœuvres et aux suggestions du défendeur; qu'elle était incapable de "faire, le dix-huit mai, mil huit cent soixante-et-un, un testament comme celui "que le défendeur prétend qu'elle a fait ce jour-là.

"Parceque même avant sa dite maladie, la dite défunte Dame Marie-Anne "Bédard, n'a jamais été capable en aucun temps, vu son peu de connaissance des "affaires et le peu d'avantages qu'elle avait eu sous le rapport de l'éducation, "n'ayant pas même appris à écrire, de faire un testament comme celui que le "défendeur allègue qu'elle a fait le dix-huit de mai, mil huit cent soixante-et-un."

On the 6th day of May, 1871, the Superior Court dismissed the defendant's plea, and maintained the plaintiffs' action for the following reasons, as stated in the judgment rendered by His Honor Mr. Justice Taschereau:

Considérant qu'une telle clause, sous les circonstances où elle se présente, et vu la nature de la contestation du dit testament, par les demandeurs, doit être considérée comme non-écrite: 1o. Parceque sous les circonstances cette clause est contraire à l'ordre public, qui exige dans la confection des testaments observation des formes extrinsèques prescrites par les lois, capacité chez le testateur de tester, absence de suggestion et captation frauduleuse et malicieuse; 2o. Parceque la stricte application d'une telle clause aurait pour effet de favoriser le faux, l'incapacité de tester, la suggestion et captation frauduleuse et malicieuse, qui tous sont des moyens de nullité reconnus comme légitimes et suffisants pour annuler un acte de dernière volonté; 3o. Parcequ'une telle clause, à moins de circonstances exceptionnelles et accompagnée d'absence de cause probable ou raisonnable, ne doit être considérée que *in terrorem* et doit être réputée comminatoire; 4o. Parceque les demandeurs en contestant le testament de feue leur mère et belle-mère n'ont pas agi par esprit de chicane, mais avaient une cause juste et probable de suspecter la légitimité du susdit testament, et d'en demander une vérification par les moyens légaux; 5o. Parceque les tribunaux dans l'application de clauses semblables ont une juste discrétion à exercer, sur et d'après l'ensemble du litige; 6o. Parce que dans l'opinion de cette Cour, la testatrice n'a pas voulu dire au moyen de cette clause de son dit testament que ses enfants auxquels elle ne donnait que le faible legs d'une rente annuelle et viagère, en seraient privés irrémissiblement s'ils contestaient à leur frère une succession de quinze à vingt mille louis, qu'elle lui léguait, sous le principe de faux de l'acte, insanité chez elle, et captation et suggestion frauduleuses, mais seulement s'ils contestaient la justice de la distribution de ses biens, et notamment s'ils contestaient cette partie du testament par laquelle elle donnait décharge à son fils, le

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défendeur, de l'obligation de rendre compte de la gestion et administration qu'il avait eue de ses biens et par laquelle elle reconnaissait que le défendeur lui avait rendu un compte fidèle et exact de sa gestion.

This judgment was afterwards submitted to the Court of Review, composed of MEREDITH, *Chief Justice*, and TASCHEREAU and BOSSE, *Justices*, by the majority of whom, Mr. JUSTICE TASCHEREAU dissenting, it was reversed on the 7th of December, 1871, for the reasons following:—

"Considérant que par son testament fait à Québec le dix-huit mai mil huit "cent soixante-et-un, feue Dame Marie-Anne Bédard veuve de Sieur François "Evanturel, légua à Dame Emilie-Malvina Evanturel, épouse de Edouard Ré- "millard, Ecuier, et à chacune de ses trois autres filles, une rente viagère de "vingt-cinq louis.

"Vu l'article six de cette pièce du dossier par laquelle il est dit: 'que dans le "cas où ses dites filles ou aucune d'elles viendrait à faire aucune démarche quel- "conques pour contester, soit directement ou indirectement, son dit testament, "qu'alors et dans ce cas ses dites filles ou aucune d'elles qui voudrait ainsi con- "tester son dit testament, serait privée de tous droits quelconques dans sa suc- "cession et de la dite rente viagère, et que quant à celle qui voudrait ainsi "contester son dit testament, le legs à elle fait de la dite rente serait non avenu "et caduc.

"Considérant que les demandeurs ont introduit une action en justice, alléguant "que ce testament était l'œuvre de la captation et de la fraude de la part du dé- "fendeur, que vu l'affaiblissement de ses forces et de ses facultés mentales, la "testatrice était le dix-huit mai, mil huit cent soixante-et-un, incapable de faire "ce testament et que vu son peu de connaissance d'affaires, et le peu d'avantage "reçu sous le rapport de l'éducation, n'ayant pas même appris à écrire, elle était "incapable de faire le dit testament et concluaient en conséquence à ce que "cet acte fut déclaré nul.

"Considérant que les prétentions des demandeurs, après avoir été décidées par "cette cour, ont été portées devant la Cour du Banc de la Reine de cette Pro- "vince, et enfin devant le Conseil Privé de Sa Majesté, qui les a rejetées, a décla- "ré le dit testament revêtu des formalités ou conditions extérieures exigées par les "lois, et exprimant légalement les volontés de son auteur.

"Considérant enfin, que la clause pénale imposée ne présente rien d'impossible "dans son exécution ou de contraire aux lois ou aux bonnes mœurs ou à l'ordre "public, et que les demandeurs ont, par conséquent, sans aucune raison, manqué à "la loi qui leur était imposée dans un acte valable et portant l'expression de la vo- "lonté de la testatrice, qu'ils doivent alors subir en entier les conséquences de cette "peine, sans que cette cour puisse s'arroger le droit de la diminuer ou modifier."

On the 7th May, 1872, the case was argued on the appeal which was taken from this judgment before their Honors DUVAL, *Chief Justice*, and CARON, DRUMMOND, BADGLEY and MONK, *Justices*. The grounds urged in support of the appeal covered those assigned by TASCHEREAU, *Justice*, at the rendering of the first judgment and on the review as follow:—

"Indubitablement, un testateur a le droit, en ce pays surtout, de disposer de ses biens en la manière qu'il jugera convenable et dans l'intérêt de

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ses légataires : nul a le droit d'y trouver à redire, même dans le cas de clauses pénales, clauses conditionnelles, ou de peines testamentaires ; les motifs et le legs sont et forment un seul et même document qui fait loi et que le légataire doit accepter ou répudier en son entier, à moins que la peine testamentaire, ou clause pénale, ou clause conditionelle, soient ou impossibles ou illicites comme contraires aux bonnes mœurs, aux lois, ou à l'ordre public, et dans ces cas notre code civil en son article No. 760, énonçant l'ancien droit, consacre ces principes d'une manière péremptoire.

Les questions qui s'élèvent sont donc : 1° La clause en question est-elle impossible ou illicite comme contraire aux bonnes mœurs, aux lois, ou à l'ordre public ?

Elle n'est certainement pas impossible, et sous un certain point de vue, elle n'est pas contraire aux bonnes mœurs, aux lois, ou à l'ordre public. Mais peut-on dire que le testateur, en insérant en son testament une telle clause, a eu en vue de priver les légataires du droit de constater son état mental, les faits de suggestion frauduleuse, et surtout de s'enquérir de la forme extrinsèque de son testament : ou ne doit-on pas dire que la clause pénale ne s'applique qu'au cas où par pur esprit de chicane, les légataires attaqueraient la justice et l'équité du testament ; ou au cas où les légataires, encore par pur esprit de chicane et sans cause probable ni justification quelconque, attaqueraient un testament par voie d'inscription de faux, ou sur le principe de captation, suggestion frauduleuse, ou incapacité de tester en raison de faiblesse d'esprit ou d'aliénation mentale complète. Je crois que la testatrice feue Madame Evanturel, en formulant cette clause de son testament, n'a pu avoir en vue de priver les légataires (qui sont ses enfants propres aussi bien que le défendeur) du droit de le contester, si en réalité, il était entaché des vices de forme, ou si elle avait été victime de captation et de la suggestion. Nous nous accordons tous à prononcer la nullité d'un testament non revêtu de formes légales, ou fait sous l'influence de la captation ou de la suggestion, ou lorsqu'il est le produit d'un cerveau malade, incapable de mémoire, jugement et entendement. Sous ce point de vue, la défense de contester un testament sous peine de perdre le legs, me semble blesser les lois ou les bonnes mœurs et contraire à l'ordre public qui veut que le testateur soit capable de tester, ne soit pas induement influencé, ni capté, et fasse son testament suivant les formes requises. La demanderesse et son mari, M. Rémillard, ont contesté le testament par la voie de l'inscription de faux, et pour cause de suggestion, captation et incapacité mentale chez la testatrice. Ils ont réussi en Cour Supérieure sur l'inscription de faux. Sur appel à la Cour du Banc de la Reine, à Québec, le jugement a été infirmé par trois juges sur cinq composant ce haut tribunal, et ce dernier jugement porté devant Sa Majesté, en son Conseil Privé, a été confirmé. Indubitablement sur ce premier grief ou reproche, les demandeurs avaient une cause probable ou raisonnable de suspecter l'existence légale de ce testament, puisqu'en Canada, trois juges ont appuyé de leur opinion les droits de l'inscription de faux, et que trois autres juges seulement ont maintenu le contraire.

Sous les autres chefs relatifs à la captation et à la suggestion et à l'incapacité de Madame Evanturel de faire un testament en l'état mental où elle se trouvait,

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tous les tribunaux, Cour Supérieure, Cour du Banc de la Reine et celui de Sa Majesté, en son Conseil Privé, se sont accordé à donner gain de cause au défendeur, M. Evanturel. Sous ce dernier rapport la position de M. et Mad. Rémillard ne me semble pas aussi favorable que celle qu'ils se sont fait relativement à l'inscription de faux. Mais peut-on supposer que pour le simple plaisir de faire une chicane au défendeur, Madame Rémillard et son mari se soient déterminés à attaquer la mémoire d'une mère qu'elle aimait, en lui reprochant faiblesse d'intelligence et de volonté jusqu'au point de déshériter tous ses enfants pour l'avantage d'un seul?—ou peut-on dire que Madame Rémillard, qui devait voir sa mère tous les jours éprouver tous les changements qui pouvaient s'opérer dans ses forces physiques et intellectuelles, qui pouvait craindre l'influence que le défendeur chez qui elle demeurait aurait pu exercer sur une femme âgée, faible et non instruite, a pu saisir chez sa mère de ces écarts d'esprit, de ces pertes de mémoire, qui peuvent échapper à des étrangers peu familiers, mais qui ne trompent pas l'œil d'un enfant perspicace. J'ai prononcé le jugement renvoyant les prétentions de M. et Mad. Rémillard relativement à la captation, suggestion et incapacité mentale de feue Mad. Evanturel, et si j'étais appelé aujourd'hui à réviser mon jugement, je ne me croirais pas justifiable à le renverser. J'ai dû être conduit par la preuve de cette cause là, et la preuve ayant été par moi trouvée insuffisante pour établir les griefs de M. et Mad. Rémillard, j'ai dû comme juge, prononcer contre eux; mais les demandeurs étaient-ils mus par un pur esprit de chicane, avaient-ils une cause probable ou raisonnable de contester le testament sous les rapports ci-haut mentionnés; il ne faut que lire l'enquête qui s'y rattache et qui se trouve reproduite en la présente cause pour se dire que leur conduite n'a pas été celle de gens agissant par pur esprit de chicane. Ils ont pu se faire illusion, des témoins étrangers ont peut-être partagé cette illusion de bonne foi, et ont pu ainsi engager les demandeurs à attaquer ce testament.

Madame Evanturel est morte d'une paralysie progressive qui a commencé en 1860, un an environ avant la confection de son testament fait en mai 1861. A la page 184 et suivantes du factum de M. et Mad. Rémillard, devant le Conseil Privé, en Angleterre, on voit une séric d'autorités tirées d'Orfila, (Médecine légale,) de Briandé et Chandé, (médecine légale,) démontrant les symptômes, les développements généraux, la marche progressive de la folie, et si l'on rapproche les symptômes généraux tels qu'exposés par ces hommes éminents, de ceux que les témoins ont indiqués chez Mad. Evanturel vers l'époque de la confection de son testament, on ne pourra se défendre de la conviction d'un singulier concours de circonstances comme tendant à justifier M. et Mad. Rémillard dans la contestation du testament de leur mère et belle-mère. Sous ce premier point de vue, je crois donc que la clause en question est contraire à l'ordre public, comme tendant à favoriser le faux dans les testaments, la captation, la suggestion et l'incapacité de tester chez les testateurs.

Mais on dit que la question de la légalité ou illégalité d'une telle clause est subordonnée au succès ou défaite des légataires. J'avoue que l'on trouve de telles autorités dans quelques commentateurs du nouveau droit français, mais en toute soumission, je ne me sens pas susceptible de comprendre la force d'un tel raisonnement qui, dans le fonds, n'est que celui-ci:—le légataire pour recouvrer

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son legs doit prouver la vérité de ses allégations et réussir devant les tribunaux, c'est-à-dire que s'il fait déclarer le testament faux et nul par la voie de l'inscription de faux, ou pour cause d'insanité, suggestion ou captation, alors il ne perdra pas son legs;—mais on perd de vue que dans ce cas, il n'y a plus de testament, ni de legs, tout a disparu pour ne plus exister, et que la succession est *ab intestat*. Quelle grâce aurait un homme à demander un legs en vertu d'un testament qu'il a fait déclarer faux et nul, qui a été nul *ab initio*, et qui en réalité est censé n'avoir jamais existé. Il faut conclure que l'on ne doit pas faire subordonner la légalité ou l'illégalité d'une telle clause, au succès ou défaite de la partie contestante. J'en conclus que la clause est contraire à l'ordre public et faciliterait beaucoup la fraude. Dans les transactions ordinaires de la vie, la fraude que l'on pourrait pratiquer à l'encontre d'un homme au moyen d'un contrat synallagmatique, peut se découvrir facilement et de suite: on peut y remédier, l'homme est vivant et peut éclairer les tribunaux par son témoignage; mais un testament destiné à ne voir le jour que lorsque le testateur aura disparu pour jamais, n'est pas susceptible d'être contesté ou critiqué aussi facilement, et l'on doit permettre à un héritier de suspecter un peu un testament qui donne à un autre la part du lion et ne lui laisse qu'une faible rente viagère qu'il perdra s'il fait la moindre démarche pour la contester pour aucune des causes reconnues en loi comme légitimes.

2° Une autre question qui s'élève en cette cause est celle de savoir si par l'ancien droit français une telle clause recevait toujours son exécution, ou n'était pas plutôt considérée être *in terrorem*, et si son application n'était pas laissée à la discrétion des tribunaux. Je suis disposé à adopter cette dernière manière d'apprécier une telle clause.

M. Merlin en son répertoire de jurisprudence, *verbo*, peine testamentaire, No. IX, p. 120, sur la question de savoir quel est l'effet de la charge ou condition de ne point troubler un légataire ou cohéritier, à peine d'être privé de ce qu'on a reçu du testateur, dit: "Il faut cependant convenir que dans la pratique on ne "donne guère d'effet à ces sortes de clauses. Paul de Castro, Balde, Sardus, "Stockmans, Voet, Ricard, et une foule d'autres auteurs, les regardent comme "purement comminatoires, en sorte que les peines qu'elles établissent, non seule- "ment ne sont pas encourues de plein droit par la contravention mais ne se "prononcent que dans les cas infiniment rares où les procès suscités par ceux à "qui le testateur avait défendu d'en élever, sont trouvés n'avoir d'autres bases "qu'un esprit de calomnie et de vexation."

M. Merlin, à la page 121, no. X, cite le cas jugé par un arrêt du 28 août, 1708, rapporté au Journal des Audiences. C'est celui d'un avocat du nom d'Etienne Bacquet qui avait légué 25,000 livres à chacun de ses neveux, à la charge que s'ils inquiétaient les exécuteurs, ou qu'ils intentassent aucune demande, ils seraient privés de leurs legs, mais qui, cependant, malgré les contestations qu'ils élevèrent, réussirent à obtenir leur legs. Pour assurer (dit Pollet qu'il cite) l'exécution de ses dernières volontés, on prend ordinairement la précaution d'imposer la peine de privation à ceux des héritiers qui entreprendront de les débattre. Cette précaution est aujourd'hui sans effet: l'héritier qui se pourvoit en justice contre la disposition du défunt, n'encourt pas la peine

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de la privation, *à moins que la poursuite ne puisse être accusée d'une calomnie toute évidente.* Il cite Ricard et autres auteurs et décisions, pour dire que les peines ne sont adjugées que lorsque la contravention dégénère en calomnie.

Pothier, Donations testamentaires, p. 321, ch. 2, art. 3. Legs faits *pœnæ causâ*, dit: "Du principe que nous avons établi qu'il était de la nature des legs "qu'ils eussent pour motif principal la bienveillance du testateur envers les per- "sonnes à qui ils sont faits, il parait s'en suivre que ceux que le testateur fait "plutôt et principalement par le motif de punir son héritier, que par celui de "faire du bien aux légataires, devraient être déclarés nuls. Par le droit du "Digeste, les legs *pœnæ causâ* étaient nuls" (et il cite un exemple). "Au reste, "il fallait en ce cas examiner avec grand soin qu'elle avait été la volonté du tes- "tateur et si sa vue principale avait été de punir l'héritier par le legs dont il le "grevait, ou simplement d'opposer une simple condition à ce legs, &c., &c. Jus- "tinien a abrogé l'ancien droit et admis le legs *pœnæ causâ* dans le cas où l'hé- "ritier ferait ou ne ferait pas quelque chose, pourvu que cette chose ne fut pas "contraire à l'honnêteté publique ou aux lois."

M. Furgole, 4 vol. p. 210, no. 14, dit: "Si dans un testament qui est nul "par quelque défaut de formalité, le testateur dit: Je veux que mon testament "soit exécuté, et si quelqu'un de mes successeurs légitimes l'attaque pour le faire "casser, j'institue héritier un tel hôpital. Une telle disposition sera nulle et "inutile, quand même par quelque privilége de l'héritier institué en cas de con- "travention, le testament ne manquerait d'aucune formalité pour le faire valoir "à son égard, parce que les solennités du testament sont du droit public, que les "formalités en sont réglées par la puissance de la loi, et que personne ne peut se "soustraire à cette puissance, ni faire par quelque précaution que ce soit, que "les lois ne puissent pas avoir lieu dans son testament.

Rousseau de la Combe, Verbo Testament. Distinction III, de l'institution *pœnæ nomine*, p. 717, dit: "La peine apposée par le testateur pour faire valoir "son testament qui pèche contre la forme est regardée comme non opposée." Page 718. "La peine opposée est souvent regardée comme comminatoire, de "sorte que s'il est dit qu'on cas que la disposition soit contestée par les héritiers "du testateur, il donne encore telle chose, l'on adjuge la première disposition, et "non le profit de la peine. Cependant ce profit de la peine est aussi quelquefois "adjugé par forme de dommages et intérêts lorsque ce profit est peu de chose et "dans le cas de vexation extraordinaire de la part des héritiers du testateur."

M. Troplong, en son traité des Donations testamentaires, Vol. I, No 266, dit que "si la nullité tenait à la forme extérieure, il n'en serait pas de même (c'est-à- "dire, que la clause pénale n'aurait pas d'effet). La forme du testament est de "droit public. S'il en était autrement, il dépendrait du testateur de soustraire "son testament aux plus sages précautions introduites par la loi civile et le droit "public: il forcerait ses héritiers à recevoir la loi testamentaire d'un acte qui "n'est pas testament." En toute soumission, ne serait-il pas contraire à l'ordre public de permettre à un insensé, à un incapable, à un homme pressuré de faire un testament et de protéger ce même testament au moyen d'une clause pénale de la nature de celle qui nous occupe, et en réalité, les motifs que M. Troplong invoque si bien quand il ne s'agit que de la forme ne pourraient-ils pas, même

avec plus de force, être invoqués lorsqu'il s'agit de quelque chose plus intéressante que l'observation d'une formalité, savoir, la capacité de tester, la liberté du testateur, l'absence de suggestion frauduleuse et de suggestion malicieuse? Je n'y vois pas grande différence—et si cette différence existe, elle milite en grande équité en faveur de la liberté de contester un testament suggéré, capté ou fait par un incapable, plutôt qu'en faveur d'un testament non revêtu des formes requises, mais qui peut être, malgré cela, l'expression des volontés légitimes d'un testateur ayant toutes les qualités pour tester. Au no. 265 du même vol. de M. Troplong il cite le cas d'un légataire qui, sous des circonstances absolument semblables à celle du présent litige, avait contesté le testament sous le principe de captation. La Cour de Paris décide que la condition était contraire à la liberté et qu'elle devait être considérée comme non écrite, mais sur pourvoi l'arrêt de la Cour de Paris fut cassé le 22 Decembre 1845. M. Troplong dit que: "dans cette affaire "il s'agissait d'un légataire qui avait attaqué le testament pour captation, qui "avait échoué dans ses attaques et par conséquent, *sans raison aucune*, avait "manqué à la loi qui lui était imposé dans un acte valable et portant l'expression "de la volonté du testateur." Peut-on dire que dans le cas présent, les demandeurs, M. et Madame Rémillard, n'avaient aucune raison de contester, et que leur contestation n'avait aucune base quelconque? *M. Larombière* en son 3me vol. de la théorie des obligations, no. 3 et page 3, nous dit qu'une telle clause est frappée d'une nullité radicale et absolue comme contraire aux lois, aux mœurs ou à l'ordre public, et que le maintien d'une telle clause aurait pour résultat indirect de maintenir des dispositions nulles et de faire fraude à la loi. Il fait cependant subordonner le rejet de la cause pénale au succès du contestant, qui dit-il, plaide à ses risques, et qui ne le fait impunément qu'à la condition de gagner son procès. Il ajoute que "les tribunaux ont en cette matière un très "large pouvoir d'interprétation touchant la volonté du testateur, et ils sont au"torisés à déclarer la peine non encourue, même au cas où l'attaque est déclarée "mal fondée, il leur suffit de baser cette décision sur l'interprétation de l'acte et "sur la volonté du testateur établissant qu'il n'a point entendu faire de la clause "pénale une clause irrémissiblement irritante;" mais il ajoute que ce droit d'interprétation est très-voisin de l'abus. J'ai cité les paroles de M. Larombière pour montrer: 1° qu'une telle clause est contraire à l'ordre public ou aux lois. 2° Que les tribunaux ont un grand pouvoir discrétionnaire à exercer. 3° Qu'en F[illegible] depuis le code Napoléon, les commentateurs diffèrent entr'eux (comme M. Troplong avec M. Larombière) sur les questions de savoir si une telle clause, comme refusant le droit de contester un testament pour insanité, captation ou suggestion, est ou non, contraire à l'ordre public. *M. Demolombe*, en son cours du Code Napoléon, vol. 18, étant le vol. I., des Donations entrevifs et testamentaires aux nos. 283, 284, 285 et 286, déclare une telle clause nulle et illégale, car dit-il, l'accomplissement de ses solennités "n'est pas seulement exigé dans "l'intérêt des héritiers, elle est aussi dans l'intérêt des testateurs, une garan"tie essentielle de la sincérité et de la liberté de leurs dispositions," et il ajoute au no. 286, que malgré une telle clause, les héritiers peuvent attaquer un testament pour captation, et il cite la décision de la Cour Suprême, (cassation du 27 mars 1855) déclarant une telle clause comme non écrite et

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contraire aux lois et aux mœurs. M. Zachariæ en son cours de droit civil français, en son 3 vol. p. 181, nous donne son opinion sur l'illégalité d'une telle clause comme portant atteinte au droit du légataire. Je conclus de tout ceci que les commentateurs du droit nouveau français même ne s'accordent pas sur l'effet à donner à une telle clause et que d'après eux, ce sont les circonstances spéciales de chaque cas particulier qui doivent faire apprécier la légalité d'une telle clause.

Si l'on veut se convaincre de l'état d'incertitude où se trouve la jurisprudence moderne française à ce sujet, l'on peut lire avec avantage ce que l'on trouve dans le vol. 3 de Marcadé, p. 386, où cet auteur cite les opinions d'auteurs très respectables, mais qui ont eu le soin de différer du tout au tout sur l'effet de clauses pénales moins sérieuses que celle qui nous occupe en cette cause.

Dans le 1er Jarman on Wills, p. 52, on voit qu'en Angleterre une telle clause n'est considérée qu'*in terrorem* lorsqu'il ne s'agit que de biens mobiliers, mais sujette à son exécution lorsqu'il s'agit de propriétés immobilières. Autres autorités 1er Grenier, Donation, Ed. 1844, No. 157, à la fin de la note A. 5 Toullier No. 262, 295—5 Journal des audiences, liv. 8, chap. 42, p. 197 et suivantes, Ricard, des Donations, III part., chap. 12, nos. 1544, 1546, 1548. Pour me résumer, je dois dire, que dans mon opinion, 1° une telle clause est contraire à l'ordre public qui exige dans la confection des testaments, observation des formes extrinsèques prescrites par la loi, capacité de tester, absence de suggestion et captation frauduleuse et malicieuse. 2° Une telle clause doit être (à moins de circonstances exceptionnelles dénotant un pur esprit de chicane) considérée *in terrorem*, et être comminatoire. 3° D'après l'ancien droit une telle clause était ainsi considérée, et recevait rarement son application. 4° Les auteurs modernes, commentateurs du Code Napoléon, ne s'accordent pas sur l'effet d'une telle clause. 5° Dans le doute, le juge doit interprêter avec une juste discrétion un testament qui donne presque toute une succession à un seul héritier, et déclarer si la contestation se porte sur la justice de la distribution ou sur des points affectant l'ordre public. 6° Je crois que Madame Evanturel, en insérant cette condition en son testament, n'a jamais eu l'intention de priver ses héritiers du droit de le contester dans le cas où ils auraient un juste sujet de soupçonner incapacité chez elle de tester, suggestion et captation frauduleuse, et enfin inobservation des formes légales d'un testament, mais qu'elle a simplement voulu priver ses héritiers de leur faible legs s'ils contestaient cette partie de son testament par laquelle elle déchargeait le défendeur de rendre compte de sa gestion des biens de sa mère, ou s'ils contestaient pour le seul objet d'attaquer la justice de ses volontés dernières.

At the rendering of the judgment in Review, Judge TASCHEREAU added:

"On va sans doute prétendre que le Statut Impérial 14 Geo. III, ch. 83, et que le Statut Provincial 41 Geo. III, ch. 4, ont changé nos lois sous le rapport qui nous occupe, en donnant aux testateurs une latitude presqu'indéfinie dans leurs dispositions testamentaires. J'avouerai que ces statuts ont modifié la loi des testaments sous certains rapports en donnant aux testateurs le droit de disposer de tous leurs biens en la manière qu'ils jugeront à propos, en enlevant même grand nombre des incapacités jusqu'alors existantes, mais ne perdons

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pas de vue que ces statuts n'ont eu en vue que de permettre le legs de tous biens à une seule personne, qu'elle soit l'enfant légitime ou naturelle—ou même toute autre personne jusqu'à là incapable de recevoir, tel qu'un confesseur, un médecin. Mais ces statuts n'ont pas voulu permettre aux testateurs de tester contrairement à la loi et aux bonnes mœurs. L'article 931 de notre Code Civil interprète ainsi ces changements comme droit ancien, et nous devons nous y soumettre. D'ailleurs, ce sera aujourd'hui pour la première fois que j'entendrai soutenir une doctrine contraire, savoir, que depuis le statut de 1801, un testateur puisse tester contrairement à la loi. Nous voyons donc que cet argument n'a pas la moindre valeur légale, et qu'il faut toujours en venir à la question de savoir si un testateur peut imposer à son légataire l'obligation de ne pas contester son testament pour cause de faux, suggestion, captation et incapacité chez le testateur—et si une telle clause est contraire à l'esprit de nos lois en général, et comme portant atteinte aux droits des légataires, qu'ils tiennent d'une volonté supérieure à celle du testateur, savoir de la loi même de leur pays. Un certain auteur a dit qu'une certaine clause imposant une obligation aussi terrible que celle qui nous occupe, était écrite non avec de l'encre, mais avec du fiel, et ne faisait pas honneur au cœur d'un testateur, surtout lorsque ce testateur était un père ou une mère. Dans le cas présent, la clause n'a pas été dictée par madame Evanturel lors de son entrevue avec un des notaires de son testament, le 16 mai 1861. Ce n'est que le 18 mai, jour de la passation finale du testament que cette clause est trouvée, écrite d'une main étrangère, à la grande horreur du notaire Petitclerc, en marge sur le projet du testament qu'il avait préparé. M. Petitclerc dit qu'il a de suite rayé cette clause, et que madame Evanturel ayant eu lecture de son testament, sans aucune mention de cette clause, a, alors pour la première fois, déclaré aux notaires qu'elle voulait ajouter cette clause malencontreuse, et qui fut de fait ajoutée comme dit M. Petitclerc. Peut-on dire que madame Evanturel, en faisant insérer cette clause en son testament, pouvait avoir en vue de déshériter ses trois filles, ou plutôt de leur enlever la faible pitance d'une rente viagère de £25 par année, dans le cas où elles contesteraient son testament pour cause de faux, insanité de sa part, suggestion frauduleuse et autres incapacités légales? Non, cette femme est représentée comme ayant eu un trop bon cœur pour voir eu ce dessein; dans ce cas la clause serait écrite avec du fiel et non avec de l'encre. Elle a dû simplement vouloir dire que si la justice des dispositions de son testament était contestée, telle par exemple celle où elle dit que son fils, le défendeur, lui a rendu un compte exact et fidèle de l'administration de ses biens depuis la mort de son mari, alors la clause pénale recevrait son application; et c'est là, suivant moi, tout ce que l'on peut dire de plus favorable aux prétentions du défendeur. Mais eût-elle voulu donner à cette clause toute la portée que la défense invoque, elle ne le pourrait pas, car une volonté est supérieure à la sienne, c'est celle de la loi.

Maintenant consultons les dossiers de notre cour. La cause Renaud *vs.* Tourangeau, et Tourangeau, opposant. (13 L. C. R., pp. 278, 350.) 7 Jurist, 238. L'opposant Tourangeau dont la propriété immobilière avait été saisie par le demandeur, fit opposition à la vente sur le principe que cette propriété lui avait été léguée par son père avec la clause de ne pas l'hypothéquer, ni l'aliéner

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pendant 20 ans. Cette opposition me fut soumise et je renvoyai l'opposition sur le principe que cette clause était contraire à la loi; que ce n'était dans le cas qu'un conseil que le père donnait à son fils, et pour rendre effective une telle clause, il aurait dû être déclaré qu'à défaut par le fils de s'y soumettre, la propriété irait à un tiers. Mon jugement approuvé par notre savant juge en chef, alors membre de la cour d'appel, fut renversé en appel, mais confirmé unanimement par le conseil privé en Angleterre—et cela, malgré les autorités nombreuses du nouveau droit français qui déclarent qu'une telle clause doit recevoir son exécution. Mon jugement était fondé sur l'ancien droit seul, qui nous régissait alors et que nous devons encore suivre, quoique dans bien des cas l'on puisse consulter les commentateurs du Code Napoléon comme raison écrite. Mais ce à quoi je veux surtout en venir en citant cette décision du conseil privé, qui se trouve rapportée au vol. 17 des rapports judiciaires du Bas-Canada, p. 456, est de montrer que la liberté presqu'indéfinie de tester que l'on invoque en la présente cause, n'a pas été appréciée en la cause de Renaud vs. Tourangeau, et Sir Roundell Palmer qui plaida la cause Renaud, exprimait que cette clause était "*null and invalid, as against public policy,*" et son opinion a été adoptée dans le jugement prononcé par Lord Romilly. On voit dans ce rapport que, suivant les lois d'Angleterre même, la restriction portée au testament de M. Tourangeau, était contraire à l'ordre public, et, comme telle, contraire aux lois anglaises, et des précédents sont cités par Sir Roundell Palmer dans ce sens. Donc la liberté de tester n'est pas absolue d'après le statut de 1801. Donc la loi peut revendiquer ses droits et déclarer telle ou telle clause illégale, illicite et contraire aux bonnes mœurs; c'est là une loi de tous les pays civilisés, et du nôtre en particulier.

Mais on dira pour dernier effort, au soutien d'une telle clause, que tout en admettant le principe qu'une clause de cette nature soit illicite, le succès du légataire est sa seule exception de la pénalité. En vérité, au risque de me répéter, je dois dire que si la clause est de nature à gêner la liberté du légataire dans l'exercice de ses droits de scruter un testament étrange qui le déshérite, et ce sous le rapport, non de la justice de ses dispositions, mais sous le rapport des conditions essentielles à son existence, une telle clause est non valable; autrement c'est forcer un enfant qui a une juste cause de suspecter la fraude à accepter un état de choses auquel tout homme d'honneur doit s'opposer, et ce, dans la crainte de voir une jurisprudence servile et esclave de l'expression d'un testateur le priver de son legs s'il ne réussit pas à prouver le faux ou l'incapacité du testateur. Il me semble que cette interprétation, telle que la défense la présente, est immorale, servile et qu'elle ne peut être favorablement mise en regard de celle-ci: 1° de considérer cette clause comme illicite, contraire à la liberté du sujet, de nature à favoriser la fraude; 2° de n'appliquer tout au plus la pénalité que dans les cas extrêmes dénotant un pur esprit de chicane; 3° de ne considerer cette clause, suivant l'ancien droit qui est le nôtre, que comme insérée *in terrorem*; 4° de donner aux tribunaux une juste discrétion dans l'appréciation des circonstances, avant d'appliquer la peine à celui qui ne peut être considéré comme téméraire plaideur. C'est dans ces divers sens que j'interprète l'article 760 de notre Code Civil, qui déclare nulle une telle clause sous le rapport que j'ai signalé, savoir, de défendre à un légataire de contester un testament comme faux,

suggéré ou fait par un incapable. D'après [illegible]*ier*, vol. 6, no. 815, la condition de ne pas faire de testament est une condition nulle. Pourquoi verrait-on d'un œil plus favorable de ne pas contester un testament? *Duranton*, vol. 8, no. 142, répète la même chose et dit: "On regardait anciennement comme illicite la condition "de renoncer à faire un testement, ou à jamais intenter aucune action judiciaire," et il ajoute: "il en serait assurément de même aujourd'hui." *Toullier*, vol. 5, nos. 252, 264, 267, 268, cite plusieurs conditions illicites, et à la page 270 il dit: "Les temps, les circonstances, les opinions régnantes influent toujours sur "de pareilles décisions, etc." 2e *Bourjon*, Droit commun de la preuve, pp. 353, 344, en traitant de la peine opposée par le testateur, dit: "Si le testateur a or- "donné que la portion héréditaire de celui de ses héritiers qui contestera son "testament, appartiendra à un certain hôpital, cette disposition n'est pas suivie, "et telle contestation ne révoque pas le legs qui serait ainsi fait à l'héritier, "autrement ce serait rendre le testateur maître d'éluder la loi, ce que l'on "ne peut admettre; c'est la loi qui règle l'effet de sa volonté, et non sa volonté "qui peut limiter l'effet et la sagesse de la loi." Dans les notes, on voit cet ajouté: "En effet on ne voit dans une telle disposition qu'une orgueilleuse "présomption qui s'élève contre la loi, et ces dispositions sont rejetées lorsque le "fait qui sert de fondement à la peine est impossible ou contre l'honnêteté et les "bonnes mœurs." *Bourjon* cite plusieurs autres cas semblables à la p. 344, à la lecture desquels nous invitons ceux qui désirent juger du mérite et de la valeur de ces clauses pénales telles qu'interprétées avant le Code Napoléon. Ricard, 1er vol. Donations, p. 817, dit: "Que de telles dispositions démontrent un esprit "d'arrogance qui se veut élever au-dessus de la loi pour empêcher l'exécution de "ce qu'elle permet et de ce qu'elle a ordonné, et qui veulent détruire la loi, sont "censées non écrites et on y a aucun égard, *parce qu'elles obligent à ne pas faire "ce que les lois permettent.*" Et dans le cas où la peine est ajoutée à une dis- position licite, il déclare que "ces peines sont généralement réputées comminatoires, "à moins d'une vexation extraordinaire de la part de l'héritier ou de celui qui "conteste la disposition."

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Pour terminer, on peut dire que M. et Madame Rémillard avaient un juste sujet de suspecter le testament et sous la forme extrinsèque de sa rédaction, et sous les autres chefs sur lesquels ils l'ont contesté. Ils ont dû compter un peu sur les lois de leur pays avant de s'engager dans le litige qu'on leur reproche, et se dire que d'après ces lois la clause en question qui, d'après toutes les autorités anciennes et modernes, est illicite, ne pourrait être reconnue valable, ou du moins n'être réputée que comme comminatoire, et il n'ont pas dû penser que les tribunaux s'en rapporteraient à des commentateurs d'un droit nouveau et étranger, pour dire que leur exception de la pénalité était subordonnée au succès de leur contes- tation du testament de leur mère, qui, en ne leur laissant qu'un très-mince legs, n'a jamais eu, n'a jamais pu avoir l'idée de les en priver pour aucune des raisons que présente la défense en cette cause."

FOR THE RESPONDENTS,—The reasons assigned by *Chief* [illegible] MEREDITH, at the rendering of the judgment in review, appealed from [illegible]re relied on. They are as follows:—

"In considering the authorities and reasoning applicable to this case, it is

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particularly necessary to bear in mind that it has been determined by the highest authority, namely, by the Judicial Committee of the Privy Council, that Madame Evanturel, when she made her will, was of sound and disposing mind, and that her will was made with all the formalities required by law. In a word, that it is in all respects a valid will. The present case, therefore, presents this question: Can a person of sound and disposing mind, making a valid will, effectually subject a legacy contained in such will to the condition of forfeiture, in the event of the legatee disputing the validity of the will?

By the laws of France in force in this colony at the time of the Conquest, a testator could dispose of a certain part of his property only, but by the Imperial Statute 14 Geo. III., cap. 83, and by the provincial statute 41 Geo. III., cap. 4, the law in this respect was changed, and the subjects of the Crown in Canada were as to the power of disposing of their property by will, given the same right as their fellow subjects in the mother country. Those provisions of law are reproduced in Art. No. 831, of the Civil Code, providing: "That every person of full age, of sound intellect, and capable of alienating his property, may "dispose of it freely by will, without distinction of its origin or nature, either "in favor of his consort or of one or more of his children, or of any other person "capable of acquiring and possessing, and without reserve, restriction or limita"tion, saving the prohibitions, restrictions, and causes of nullity mentioned in "this Code, and all dispositions and conditions contrary to public order "or good morals." The [illegible] power of disposing by will thus given by our law, according to the [illegible]ors, includes the power of bequeathing conditionally and subject to [illegible].

Furgole, speaking on this subject, says: "Comme la disposition du droit "ancien sur ce point n'avait aucun fondement solide, que les principes généraux "et la liberté indéfinie que la loi des douze tables avait donnée aux testateurs "de disposer comme ils trouvaient à propos, et d'imposer les conditions qu'ils "voulaient, et que l'imposition des peines faisait partie de cette liberté indéfinie, "l'empereur Justinien rétablit les choses dans l'état où elles étaient avant la loi "portée par l'empereur Antonin; il abrogea les lois antérieures qui avaient déclaré "nulles les dispositions pénales et il permit à tout testateur par la loi *un cod. ile his "quæ pœnae nomine in testam scribuntur*, d'imposer toutes les peines qu'il "jugerait convenables pour l'exécution de sa volonté, soit pour laisser, ou pour "révoquer, ou pour transférer les hérédités, les legs, les fidéi-commis, les "libertés et les autres libéralités; et il voulut qu'en cas de contravention, tout "ce que le testateur avait prescrit ou ordonné fut exécuté et que les dispositions "pénales fussent accomplies tout de même que les autres, qui étaient autorisées "par les lois antérieures."—*Furgole, Vol. 4, p. 205.* And Merlin also says: Vol. 23, p. 115, *peine Test.*—"L'imposition des peines devait faire partie de "cette liberté (*namely* la liberté indéfinie) que la loi des douze tables avait "accordée à tout père de famille, de disposer à son gré de ses biens."

Our law respecting conditional bequests is contained in art. 760 of our Code. "Gifts *inter vivos* or by will may be conditional. An impossible condition or "one contrary to good morals, to law, or to public order, upon which a gift "*inter vivos* depends, is void, and renders void the disposition itself, as in other

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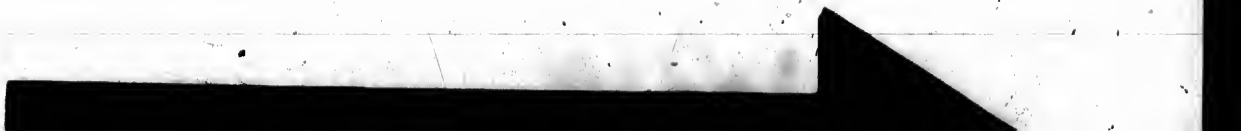
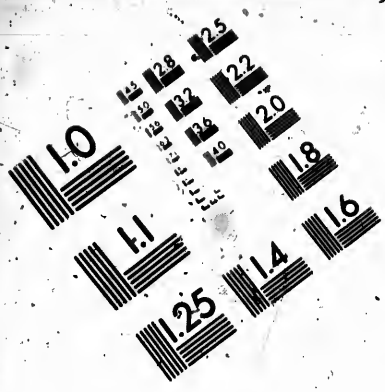
contracts. In a will such a condition is considered as not written, and does "not annul the disposition." The will before us, after certain legacies, in favor of the daughters of the testatrix, contains the following clau[illegible]: "Je "veux et ordonne et ma volonté expresse est que si mes dites fill[illegible] d'elles "venaient à faire soit directement ou indirectement, aucun[illegible] "pour contester mon présent testament, qu'alors et dans [illegible] "aucune d'elles qui voudraient ainsi chercher à contester m[illegible] "soient privées ou soit privée de tous droits quelconques da[illegible] "et de la rente viagère susdite, et que quant à celles ou à celle[illegible] "tester mon dit testament, le legs à elles fait de la dite rente soi[illegible] et "cadue, car telle est mon intention expresse.

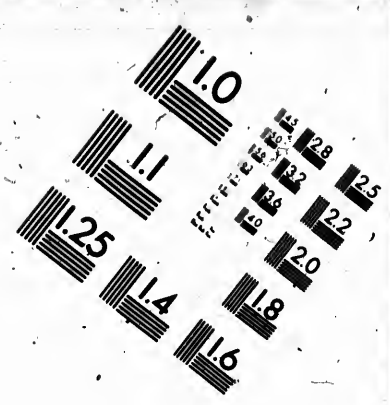
Notwithstanding this penal clause, the plaintiff in this cause, assisted by her husband, contested the will of her mother, not only on the ground of alleged informalities, but also on the ground of mental incapacity on the part of the testatrix; and on the ground of deceit, fraud and threats on the part of the universal legatee, he being the only son of the testatrix.

The present plaintiff, by her special answer in the former case, alleged: "Parce qu'à la date du dit prétendu testament, la dite défunte dame Marie "Anne Bédard était déjà attaquée depuis plus d'un an par la même maladie "qui l'a conduite au tombeau l'automne dernier, que l'effet de cette maladie se "faisait déjà sentir à la dite date, non-seulement sur le corps, mais aussi sur "l'esprit; que toutes les facultés de la dite défunte dame Marie-Anne Bédard, "se trouvaient déjà affaiblies et paralysées, qu'elle n'avait plus la force et "l'énergie nécessaires, ni pour former une volonté distincte et l'exprimer claire- "ment, ni pour résister aux manœuvres et aux suggestions du défendeur, qu'elle "était incapable de faire le dix-huit mai, mil huit cent soixante-et-un, un testament "comme celui que le défendeur prétend qu'elle a fait ce jour-là. Parce que "même avant sa maladie, la dite défunte dame Marie-Anne Bédard, n'a jamais "été capable en aucun temps, vu son peu de connaissance des affaires et le peu "d'avantages qu'elle avait eu sous le rapport de l'éducation, n'ayant pas même "appris à écrire, de faire un testament comme celui que le défendeur allègue "qu'elle a fait le dix-huit mai, mil huit cent soixante-et-un." And as regards the present defendant, the son and the universal legatee of the testatrix, the same pleading alleged: "Que le dit prétendu testament du dix-huit mai, mil "huit cent soixante-et-un, n'est pas la volonté de la dite dame Marie-Anne "Bédard; qu'il est le fruit de la fraude, suggestion, captation, menaces, "employées par le défendeur, et qu'il est parfaitement nul et d'aucune valeur." The plaintiff attempted to prove these allegations, but failed; and as to this part of the controversy between the parties there was no dissenting opinion in any of the three courts called to adjudicate upon the case.

The late madame Evanturel was aware, when she made her will, of the bad feeling existing between her son and some of her sons-in-law, she may reasonably have wished to prevent her estate from being wasted in litigation, and also to prevent law-suits, in which her own education, habits of life, bodily ealth and mental capacity, and also the conduct of her son, and the affairs of her family generally, would become, as we see they afterwards did become, the







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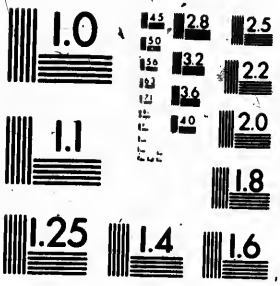

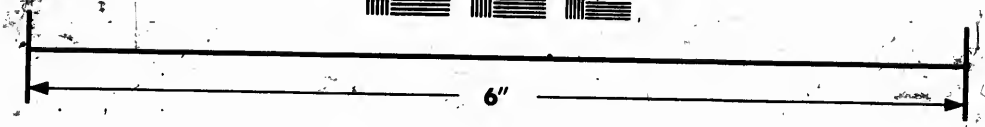

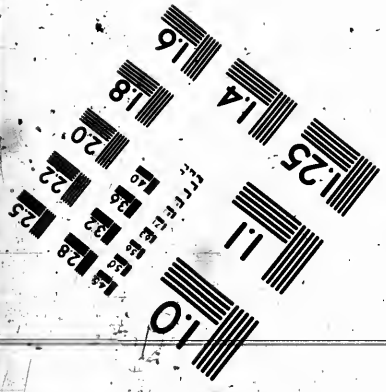

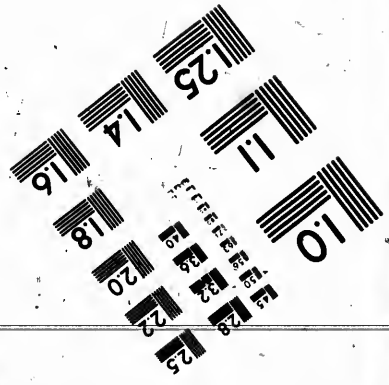

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subject of public judicial enquiry. Under these circumstances, bearing in memory that she was, as the judgment of the Privy Council establishes, of sound and disposing mind, and that she had taken all the precautions necessary to make a valid will, I do not think the clause tending to prevent unfounded contestations of that will can, upon the reason of the thing, be considered in any respect objectionable. But as the learned judge, who rendered the judgment now before us, has come to the conclusion that " une telle clause est contraire à l'ordre public," it becomes necessary to consider the authorities cited in support of that opinion, and having done so with care, it seems to me that, in the judgment under review, sufficient importance has not been attached to the fact that the penal clause in question had for its object the protection of a bequest in all respects unobjectionable.

It needs no argument to show that if a will, from any cause whatever, be null, it could not be made operative by a penal clause, and it is equally clear that a legacy prohibited by law could not be shielded by a penal clause; but I know of no authority or argument which would justify me in saying that a penal clause, such as that now under consideration, may not lawfully be made use of for the protection of a legal will or bequest. Indeed the learned writers cited in support of the judgment under review establish beyond doubt the distinction to which I have adverted. *Merlin*, the first of the authors cited in support of the judgment under review, expresses himself as follows: " Encore une fois, les dis- " positions pénales n'ont rien que de valable, de légitime et de conforme aux " principes de notre jurisprudence; mais cette règle admet les mêmes exceptions " que celle qui autorise un testateur à disposer sous telles conditions qu'il trouve " à propos, comme on rejette, dans les dispositions conditionnelles, tout ce qui " est impossible ou contraire aux bonnes mœurs, ou défendu par les lois, il faut " pareillement rejeter et regarder comme non-écrites, les clauses pénales qui ont " pour objet des faits au-dessus de la capacité de l'homme, déshonnêtes ou pro- " hibés." *Rep., Vol.* 23, *p.* 117.—And at the following page the same writer says: " Le fait sur lequel roule la peine est-il licite et possible ou ne l'est-il pas? dans " la première hypothèse la disposition est valable; dans la seconde, elle est nulle " et considérée comme non-écrite."

Pothier is the second author cited in support of the judgment, and in the passage next after that cited in the judgment, that great jurist expresses himself as follows: " Au reste, il fallait en ce cas examiner avec grand soin quelle " avait été la volonté du testateur, et si effectivement sa vue principale avait été " de punir l'héritier par le legs dont il le grêvait, ou simplement d'apposer une " simple condition à ce legs; car comme dit la loi 2 A *de his quæ pœn. caus.* " *pœnam à condirione voluntas testatoris separat.* " Justinien a abrogé l'ancien " droit et a admis les legs *pœnæ causâ*, dans le cas où l'héritier ferait ou ne " ferait pas quelque chose, pourvu que la chose que le testateur ordonnerait ne " fût pas une chose contraire à l'honnêteté publique ou aux lois. L. *un. cod.* " *de his quæ pœn. caus.*"—*Vol.* 6, *p.* 321.

Furgole, the third author whose opinion is given in support of the judgment, in the passage quoted, refers expressly to the case when a will is null " par " quelque défaut de formalité," so that the passage quoted has no bearing upon

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a case such as the present, where the will is in all respects unobjectionable. What *Furgole*, does say (according to my view), bearing upon the present case, is this. " L'effet de la charge ou condition de ne point troubler un légataire ou " un co-héritier, à peine de privation de la libéralité faite à celui auquel la con- " dition a été imposée, doit être règlée sur les principes que nous avons établis. " Cette condition a-t-elle un mauvais motif ? A-t-elle pour fondement un fait " prohibé par la loi, ou contraire aux bonnes mœurs ? Il faut la rejeter sans ba- " lancer ; mais au contraire, a-t-elle un motif juste, raisonnable ou un fait qui " n'a rien de contraire aux lois ni aux bonnes mœurs ? Il faut l'exécuter et lui " faire opérer tout l'effet que le testateur y a attaché et de la manière qu'il l'a " ordonné, parce qu'une telle condition n'affecte pas moins la libéralité à laquelle " elle est attachée que les autres espèces de conditions auxquelles la loi fait " opérer leur effet de plein droit, ainsi que nous l'avons expliqué au tôme 2, " chap. 7, sect. 4, no. 113 et suivants. Voilà pourquoi on ne doit avoir " aucun égard à l'opinion de quelques auteurs qui ont prétendu que ces sortes " de clauses ne devaient opérer aucun effet ou qui ont si fort resserré leur effet " par des restrictions ou des limitations qu'elles deviennent pres qu'inutiles, " parce que les sentiments de ces auteurs sont visiblement contraires aux véri- " tables règles."—*Vol.* 4, *p.* 213. And at page 207, the same writer, in a few words places the matter in a very clear light : " Toutes les difficultés sur la matière " des dispositions pénales se réduisent à ce point vertical et décisif, ou le fait " qui sert de fondement à la peine est licite et possible ou ne l'est pas ; au " premier cas la disposition est valable et efficace, au second cas elle est inutile " et considérée comme non-écrite." The only other authority from the old law quoted in support of the judgment is a passage from Rousseau de Lacombe, and in the following number the writer says : " Mais l'apposition de la peine est " permise pour soutenir une disposition licite en sa forme et en sa substance, et " pour empêcher un obstacle injuste à sa disposition licite." *p.* 746.

I now pass to the consideration of the modern French authorities, bearing upon this point, and these authorities also I find I cannot view in the light in which they have been regarded in the judgment under consideration.

The opinion of Larombière is referred to in that judgment as follows: " M. " Larombière, en son 3me volume de la théorie des obligations, no. 3 et page 3, " nous dit qu'une telle clause est frappée d'une nullité radicale et absolue comme " contraire aux lois, aux bonnes mœurs ou à l'ordre public, et que le maintien " d'une telle clause aurait pour résultat indirect de maintenir des dispositions " nulles et de faire fraude à la loi. Il fait cependant subordonner le rejet de " la clause pénale au succès du contestant, qui, dit-il, plaide à ses risques et qui " ne le fait impunément qu'à la condition de gagner son procès."

The passage in Larombière, which seems to be referred to in the judgment, is in the following terms ; " Il convient alors d'appliquer les dispositions de " l'article 900 aux clauses par lesquelles un donateur ou un testateur enjoint à " ses héritiers, donataires ou légataires, de respecter ses libéralités et de ne pas " attaquer l'acte qui les contient, sous peine d'être déchus de tous les droits " suivant lesquels ils ont été appelés à y participer. La clause pénale sera par " suite réputée non-écrite comme le serait la condition simple lorsqu'elle aura

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" pour objet d'assurer l'exécution d'une disposition qui est frappée d'une nullité " radicale et absolue, comme contraire aux lois, aux mœurs ou à l'ordre public." The meaning of this passage, as I understand, is not as the judgment supposes, that such a clause is radically null, as being contrary to law, good morals and public order ; but that such a clause is to be deemed null, "non-écrite, lorsqu'elle aura " pour objet d'assurer l'exécution d'une disposition qui est frappée d'une nullité " radicale et absolue comme contraire aux lois, aux mœurs ou à l'ordre public." *Larombière, vol.* 3, *p.* 3. Therefore it is plain that what is spoken of by the the author as being contrary to law and good morals, is not, as the judgment under review supposes, the penal clause, but the illegal object sought to be enforced or protected by such a clause.

The commencement of the same number shows beyond doubt, that Larombière is of opinion that the introduction of a clause such as that in question in a will is perfectly legitimate. " La stipulation d'une clause pénale peut avoir " lieu dans un testament aussi bien que dans un contrat. La volonté du testateur " n'est pas plus gênée dans son expression que celle d'un contractant et les prin- " cipes qui le régissent sont exactement les mêmes. Ainsi, un testateur peut " valablement, pour mieux assurer l'exécution de son testament, apposer une " clause pénale par laquelle il prive ses légataires ou héritiers de tout ou partie " du legs ou de l'hérédité s'ils attaquent ses dispositions. Cette condition n'a en " soi rien de contraire aux prohibitions de la loi civile. Qu'importe en effet que " le testateur les prive ainsi conditionnellement, quand il peut ne leur rien donner " du tout ? Maître absolu de sa succession, il peut en disposer de la manière qui " lui convient le mieux sans que nul soit fondé à s'en plaindre."

In the judgment under review it is also said : " M. Demolombe, en son " Cours du Code Napoléon, vol. [redacted]t le vol. 1 des Donations entrevifs et " testamentaires, aux nos. 283, [redacted]5 et 286, déclare une telle clause nulle " et illégale, car, dit-il, l'accomplissement de ces solennités n'est pas seulement " exigé dans l'intérêt des héritiers, elle est aussi dans l'intérêt des testateurs, " une garantie essentielle de la sincérité et de la liberté de leurs dispositions, et " il ajoute au no. 286, que malgré une telle clause les héritiers peuvent attaquer " un testament pour captation, et il cite la décision de la cour suprême (Cassa- " tion du 27 mars, 1855) déclarant une telle clause comme non-écrite et con- " traire aux lois ou aux mœurs." The extract from Demolombe in the above passage is taken from no. 285 of his work, where he refers to the case of a will qui " ne serait pas revêtu des solennités exigées par la loi," and therefore in my opinion is inapplicable to the case before us, in which all the formalities required by law have been observed. The *arrêt* of the 27th March 1855, referred to in the same passage of Demolombe, concludes with these words, (which Demolombe has placed in italics,) " sauf à voir ultérieurement si cette clause pénale devrait ou " non leur être appliquée," as to which he immediately adds : " Cette dernière " partie du considérant de l'arrêt témoigne que, s'il était décidé que le testament " qui a été attaqué pour cause de captation était l'œuvre de la volonté libre du tes- " tateur, la clause pénale devrait être appliquée à l'héritier qui aurait succombé " dans sa demande et qu'il n'en pourrait être affranchi qu'en réunissant. (Comp. " Cass., 1845, Mounier, Dev. 1846, 1, 5 ; voy. les inclusions de M. l'avocat gé-

" néral Delangle)." And Demolombe adds : " Et telle est en effet la doctrine qui " nous paraît devoir être admise, lorsqu'il s'agit d'une action en nullité qui était " fondée sur un motif d'ordre public (Comp. Aubry et Rau, sur Zachariæ, t. " VI. p. 6. 288). Bien plus ! lorsqu'il s'agit seulement d'une action en nullité, " fondée sur l'intérêt privée de l'héritier, il n'y a pas à considérer s'il a réussi ou " s'il a échoué, et il suffit en général, à moins de circonstances particulières, " qu'il ait contrevenu à la défense qui lui avait été imposée par le disposant, " d'attaquer l'acte par lui fait, pour que la clause pénale doive lui être appliquée. " C'est que, alors, comme il ne s'agit que de son intérêt privé, c'est à lui de " faire son option comme il l'entendra, et il l'a fait à ses risques et périls. " Ricard, toutefois, s'exprimait ainsi : Il est pourtant véritable que dans " l'évènement, nous avons coutume de prendre ces peines écrites dans un testa- " ment pour comminatoires ; et on se contente d'adjuger simplement le legs à " celui auquel il est fait, sans le profit de la peine. (Loc. suprà, No. 1548)." *Demolombe* then gives his own opinion thus: " Nous ne voudrions pas " avancer une telle proposition ; et nous pensons au contraire que le profit de la " peine doit être adjugé, lorsque l'héritier a manqué à la condition que le testa- " teur lui avait imposée de ne pas attaquer son testament; rien n'empêchant, " disait Ricard lui même, (no. 1547) que les volontés licites des testateurs soient " défendues par des conditions pénales ligatoires. Seulement, il y a lieu d'ex- " aminer, en fait, dans quel cas le légataire aura effectivement manqué à cette " condition. (Comp. Cass., 5 juillet, 1847, Florin, Dev. 1847, 1, 839.)"— *Demolombe*, 1 *Vol. Donations et testaments, no.* 288, *p* 319. It seems to me, therefore, sufficiently plain, not only that Demolombe cannot be regarded as holding such a clause to be illegal and null ; but, on the contrary, that, according to the opinion of that writer, such a clause is legal, if used for the protection of a legal bequest, and that it ought to be enforced where the legatee has really acted in opposition to the conditions of his legacy.

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The opinion of Troplong is, it is admitted, opposed to the judgment under consideration, but I desire, nevertheless, to quote a short passage from his treatise on donations and wills, which gives, in a few words, the opinion of that distinguished jurist, as to the question under consideration. After referring to the *arret* of the court of cassation of the 22nd December 1845, maintaining the validity of a clause such as that now before us, Troplong states his own views thus : " Je pense que cet arrêt servira de règle à l'avenir. Il n'y a [redacted] de plus " respectable que la volonté d'un testateur qui cherche à prévenir [redacted] procès " après la mort et oppose un frein à l'esprit contentieux de son héritier. La " clause pénale doit donc produire ses effets salutaires et telle est la décision de " Justinien, qui, repoussant d'anciennes subtilités, veut que toutes les peines " prononcées par le testateur soient exécutées, quand elles ne conduisent à rien " de honteux, d'impossible et de contraire aux lois."—*Troplong, Don. et Test. vol.* 1, *p.* 282 *no.* 265. Indeed, of all the modern writers quoted in support of the judgment under review, I know but one, Zachariæ, who holds that a clause such as that in question ought in all cases to be held illegal ; and his editors, Massé and Verge, do not seem to share his opinion, for they add in a note :—" La condition de ne pas attaquer un acte nul, quand cette nullité ne

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"touche en rien à l'ordre public, n'a rien que de licite;"—and cite a number of authorities in support of that opinion—*Zachariæ, Vol. III, p.* 181, *note* 14. The decisions of the French Courts, with hardly an exception, agree in holding the clause in question when used for enforcing a valid bequest or will to be indisputably legal; and it will be found that in a great number of those cases the penal clause was strictly enforced. In the case of *Montal vs. Richard*, it was held, according to the marginal abstract, that "celui à qui un legs est fait à condition qu'il n'élèvera aucune prétention sur une succession dans laquelle il peut "avoir des droits, est déchu du legs, s'il agit pour faire reconnaître ses "droits dans cette succession." The first judgment in this case was rendered by the tribunal de Figéac on the 30th day of December, 1839, and it declared that the legatee, Montal, had forfeited his legacy of 10,000 francs, in consequence of his having violated the condition attached to it by the will. This judgment was confirmed by the cour royale d'Agen, on the 21st day of December, 1844, one of the *considérants* of the cour royale being: "attendu que le "legs de 10,000 francs fait au sieur Montal, par le sieur Lavergne, ne devait "obtenir son effet qu'autant que le légataire s'abstiendrait de toute demande "sur la succession des père et mère du testateur, attendu que le sieur Monta "a formé la demande qui lui était expressément prohibée; qu'alors le legs condi-"tionnel a cessé d'exister; qu'il n'importerait peu que cette demande n'ait eu "aucun résultat utile sur la succession de l'aïeul; qu'il suffit que la demande "expresse ait été formulée pour que cette option eût fait disparaître et anéantir "toute l'utilité du legs." And this judgment was confirmed,—according to the conclusions of the Avocat Général, by the Cour de Cassation, on the 16th day of August, 1843, Mr. Troplong being Rapp.—*Sirey*, 1843, 1-374. *Mounier vs. Duquesnel*, decided by the Cour de Cassation, 22 December, 1845, *Sirey*, 1846,-1-6, is also an important case. The following is the marginal abstract: "Est licite et ne doit pas être réputée non-écrite la clause par laquelle un tes-"tateur impose à son héritier, en lui faisant un legs particulier, l'obligation de "ne pas attaquer le testament sous peine d'être privé de son legs, qui accroîtrait "alors au légataire universel." Messrs. Devilleneuve et Carette, in a note upon this case, after citing a number of authorities, continue thus: "Toujours on a "autorisé les testateurs à priver leurs légataires ou leurs héritiers de tout ou "partie du legs ou de la succession s'ils attaquaient le testament par lequel le "défunt en avait règlé la distribution entre ceux que sa volonté y appelait. Et, "en effet, en quoi l'ordre public est-il intéressé à ce qu'une succession soit dévo-"lue à telle ou telle personne, et à ce que les héritiers que la nature indique, "mais auxquels la loi n'accorde aucune réserve, soient conditionnellement privés "par le testateur d'une succession de laquelle ils pouvaient être absolument "écartés? Et en supposant que l'ordre public soit intéressé à ce que toute "personne puisse attaquer l'acte qui lui fait grief, cette faculté ne reçoit aucune "atteinte de la clause pénale qui en menace l'exercice. L'héritier ou le légataire "lésé par un testament qui lui impose l'obligation de respecter la volonté du "testateur, ne peut-être repoussé par aucune fin de non-recevoir, s'il critique le "testament; mais le critique à ses périls et risques. Si les attaques sont justes "et fondés, par exemple si dans l'espèce ci-dessus jugée la captation avait été

" prouvée, le testament aurait été annulé et la clause pénale, qui serait restée " sans effet, n'aurait pas été un obstacle au libre exercice des droits de l'héritier. " Mais quand l'action est jugée mal fondée et le testament maintenu, l'héritier " ne peut se plaindre de ce qu'il est privé d'avoir fait un mauvais exercice de " son droit et de s'être mis en contravention avec la volonté du testateur, pour " diriger contre cette volonté, des attaques injustes ou téméraires." The case *Regnier vs. Regnier* (D., 1849-1-253) is also well deserving of attention. In this case it was held: " La condition imposée par un testateur à son légataire " de ne pas contester son testament à peine de déchéance du legs est licite alors " que les dispositions du testament ne renferment rien de contraire aux lois, à " l'ordre public et aux bonnes mœurs." A judgment was rendered by the Cour Royale de Bésançon, enforcing a penal clause in the will before the Court. And this judgment was confirmed by an *arret* of the Cour de Cassation, on the 10th day of July 1849, one of the *considérants* of that *arret* being: " Attendu que " nul légataire ne peut réclamer les bénéfices des libéralités à lui faites, qu'en se " conformant aux conditions qui lui ont été imposées, à moins qu'elles ne soient " impossibles ou contraires aux lois ou aux mœurs, cas auquel elles doivent être " réputées non-écrites, attendu que la condition de ne pas critiquer les disposi- " tions de son testament, imposée par François Regnier à ses légataires, sous " peine de privation ou nullité de leur legs, ne présente rien qui soit impossible " dans son exécution, contraire aux lois ou aux mœurs. Qu'ainsi, en donnant " effet à cette clause pénale, l'arrêt attaqué, qui d'ailleurs a fait en faveur des " demandeurs, l'application d'une clause semblable, insérée dans le testament de " Pierre Régnier, n'a pas violé l'article 900, C. C., etc., etc." In the case of *Moreau et al, vs. Dumontier, Dalloz*, 1858-1-26, the tribunal de Rochechouart, on the 18th day of August 1853, maintained a will which had been impugned as informal, and thereupon enforced a penal clause contained in the will against a party who had acted contrary to it. This judgment was confirmed by the Cour Royale de Limoges, 25th July, 1856, and by the Cour de Cassation, on the 18th day of January 1858, (D., 1858-1-26,) one of the *considérants* of the Cour de Cassation being: " Attendu que la clause pénale par laquelle le testa- " teur, après avoir légué à sa femme l'usufruit de tous ses biens, ajoute que, en " cas de contestation de la part de ses héritiers, il lui lègue en toute propriété, tout " ce dont il peut disposer, n'a en soi rien d'illicite, si elle n'a pour objet que de " protéger contre des critiques mal fondées, des dispositions de dernière volonté " régulières en la forme et valables au fond; attendu que, à la vérité, la forme " des testaments étant de droit publique, la volonté du testateur ne peut, en " aucun cas, prévaloir contre les dispositions de la loi qui, sous peine de nullité " ont prescrit les solennités ou les conditions extrinsèques de validité d'un tel " acte, ni forcer par conséquent les héritiers à respecter un testament destitué " de toute force légale; qu'il ne saurait donc être interdit aux héritiers, au " moyen d'une clause pénale, d'attaquer pour vice de forme le testament qu'on " leur impose; qu'ainsi la clause pénale, soit qu'elle ait été insérée dans le tes- " tament argué de nullité, soit qu'elle ait été écrite dans un autre acte ayant une " existence indépendante et non contestée, est réputée non-écrite et sans effet " à l'égard des héritiers qui, en faisant prononcer la nullité du testament, ont

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" usé de leur droit; mais qu'ils exercent cette action à leurs risques et périls; " et que lorsque, par une décision devenue irrévocable, leur action a été déclarée " mal fondée et téméraire, ils doivent alors subir, dans toutes ses conséquences, " la condition qui, de la part du testateur, avait pour objet de prévenir une con " testation injuste; attendu qu'il suit de ce qui a été jugé sur la première " question que le testament argué de nullité était valable, que c'est dès lors à " un acte régulier et dont les dispositions exprimaient légalement la volonté de " son auteur que s'applique la condition avec clause pénale d'en respecter le " contenu; qu'ainsi cette clause devait recevoir son exécution. D'où il suit " qu'en le jugeant ainsi, l'arrêt dénoncé n'a violé aucune loi. Par ces motifs, " donnant défaut contre Joseph Alexis Brandy, l'un des défendeurs, rejette." Messrs. Devilleneuve & Caretto, after referring to numerous *arrets* and other authorities, make the following observations in relation to the above *arret*. " Le " nouvel arrêt maintient la distinction qui résulte de ses arrêts, car s'il déclare " la clause pénale encourue, dans l'espèce, quoiqu'il s'agit d'une nullité de forme, " ou, en d'autres termes, d'une nullité de droit public (Ricard loc. cit., et " Troplong, no. 266), c'est parceque l'héritier avait succombé dans sa contesta- " tion. L'action même fondée sur une pareille nullité, ne peut, en effet, être " exercée, malgré la clause pénale, qu'aux risques et périls de l'héritier ou du " légataire. Sans doute, cette clause ne saurait paralyser dans leurs mains un " droit dont l'exercice est autorisé et même commandé par une loi d'ordre " public; mais il ne suffit pas, pour que la clause pénale soit considérée comme " non avenue, que l'action se place sous la protection d'une loi de cette nature; " il faut encore qu'il soit démontré que le testament attaqué était bien réelle- " ment frappé d'une nullité d'ordre public; sinon, il n'y a plus qu'une contesta- " tion téméraire que doit atteindre la peine infligée par le testateur." But without adverting specially to a number of other *arrets*, which might be cited as supporting the same doctrine, I come now to Eschalie *vs.* Eschalie, (*Dalloz*, 1863. 1. 36), decided finally by the C[illegible] de Cassation, in 1869, which places the French law on this subject in a very clear light. In this case the Court of Dijon, on the 8th day of December 1859, enforced a penal clause contained in a will, without it first being ascertained that the object of the penal clause was in all respects legal. The Court of Cassation annulled that *arret*, the marginal abstract of the report of the case in Cassation being: " La clause pénale écrite " dans un testament comme moyen d'assurer l'exécution des dernières volontés " du testateur, n'est valable qu'autant que ces dernières volontés ne sont pas " contraires à la loi. Cette clause est réputée non-écrite, lorsqu'au contraire elle " couvre une illégalité." The last *considérant* of the judgment of the Court of Cassation is:—" Qu'il suit de là qu'en déclarant que la peine était encourue, " sans être préalablement assuré si les dispositions dont elle avait pour objet de " garantir l'exécution, ne portaient pas atteinte à la réserve de Léon Eschalié, " l'arrêt attaqué a violé l'article ci-dessus, etc., etc. Par ces motifs, etc., casse, " etc." In the note of the editors on this case we find the following observations: " Les clauses pénales qui tendent à mettre à l'abri de toute attaque les " dispositions de dernière volonté, doivent être valides ou réputées non-écrites, " selon que ces dispositions sont licites ou contraires à la loi." The editors then

refer to the opinions of Furgole and Ricard hereinabove cited. The same will was afterwards brought under the consideration of the Cour Impériale de Nancy, (*Dalloz*, 1867. 2. 36), and it being determined that the "héritier réservatoire" had unjustifiably contested the will, the penal clause was, by judgment of the 13th day of February 1867, enforced against him, and the reporters with respect to the last mentioned judgment say:—"La Cour de Nancy, tout en "adoptant, sur le fond, par suite de nouveaux faits accomplis, la même solution "que l'arrêt cassé de la cour de Dijon, s'est conformé aux principes posés par "l'arrêt de Cassation du 9 Décembre 1862," (above given). And the judgment so rendered by the Cour Impériale of Nancy, of the 13th day of February 1867 was confirmed by the Cour de Cassation, on the 2nd of August 1869, part of the marginal abstract of the last-mentioned report being as follows: "Lorsqu'un "testateur a déclaré qu'il réduit à la réserve l'un des héritiers, s'il conteste l'une "ou l'autre des dispositions de son testament, cette clause doit recevoir son "application si l'héritier désigné a contesté toutes les dispositions dont il s'agis- "sait, alors même que l'une d'elles serait illicite, pourvu que les autres soient "d'ailleurs valables."—Larombière cites three earlier judgments of the Court of Cassation as tending to establish the same doctrine, and the reporter with respect to one of these *arrets*, that of the first day of March 1831, makes the following note: "Les peines testamentaires sont autorisées par la loi de Justi- "nien, elles furent défendues par Antonin le Pieux, et les observations ne man- "quent pas sur la préférence due à l'un où à l'autre, mais la loi de Justinien a "toujours été admise en France, dans toutes les hypothèses non contraires aux "lois et aux bonnes mœurs." Demolombe cites (but disapprovingly) two *arrets*, one of the 2nd day of June 1824, [Poitiers], and the other of the 25th day of January 1841, and also the opinion of Zachariæ, as holding that a clause, such as that before us, ought to be held illegal and null. The second of the two *arrets* so cited was reversed by the *arret* of the Cour de Cassation of the 22nd day of December 1845, above referred to. The facts of the case in which the first of the said two *arrets* was rendered will be found somewhat special, and the opinion of Zachariæ, as I have already had occasion to observe, has been condemned by his own editors, Messrs. Massé and Verge.

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With these authorities before us, it seems to me impossible to maintain the judgment of the court below, in so far as it declares the clause in question to be contrary to public order. On the contrary, I hold it to be indisputably established, that such a clause, when used for the protection of a valid bequest, is in all respects unobjectionable. The foregoing remarks are, I fear, tediously lengthy; but I have felt it my duty to give to this part of the case my best atttention: as I think our judgment must turn on the legality of the condition attached by the will to the plaintiffs' legacy.

And now, before closing my observations as to this point, I shall advert to the second ground assigned in support of the judgment under review, namely, that the clause in question, unless under exceptional circumstances denoting bad faith, (un esprit de chicane,) ought to be held comminatory.

I think it more than probable that in former times the Courts in France would have treated that clause as being *in terrorem*: but it is to be recollected

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that, as I have already had occasion to observe, the power of disposing by will was in France less extensive, and was regarded with much less favor than with us. Besides the Courts in France arrogated to themselves the same powers with respect to contracts that they did with respect to wills. This doctrine of judicial interference was condemned as well with respect to contracts as with respect to wills by the ablest French jurists. Toullier says: "Cette jurisprudence était "marquée au coin de l'erreur la plus manifeste, destructive des conditions sans "lesquelles les contrats n'auraient pas eu lieu; qu'elle était attentatoire à la foi "publique et qu'elle attaquait les conventions dans leurs bases les plus sacrées." 6 Toullier, No. 550. The practice of the French Courts has been as strongly condemned with respect to wills as with respect to contracts. Furgole, with reference to the opinion of Ricard (also referred to in the passage from Merlin, quoted in the judgment of the court below) says: "Il y a des auteurs, entr'-"autres Ricard, tome I, part. 3, nomb. 1548, qui ont cru que, dans les dispo-"sitions pénales, la peine n'était que comminatoire, et qu'elle n'était pas encourue "de plein droit par la contravention. Ces auteurs n'appuyent leur décision par "aucune raison de droit; aussi est-elle évidemment mauvaise et contraire aux "règles du droit romain, qui attribue à ces dispositions, lorsqu'elles ont pour "fondement un fait honnête, licite et possible, le même effet qu'aux autres dis-"positions non pénales, qui tendent à laisser ou à ôter ou à transférer. *Et ge-"neraliter ea quæ relinquuntur, licet pœnæ nomine fuerunt relicta, vel adempta, "vel in alium translata, nihil distare à cæteris legatis constituimus, vel in "dando vel in adimendo, vel in transferendo.* Si donc les dispositions pénales "doivent avoir la même force et le même effet que les autres dispositions condi-"tionnelles qui tendent à laisser, ou à ôter ou à transférer, où peut-être la "raison qui puisse faire considérer comme comminatoire, la condition attachée "à la disposition pénale, tandisque les conditions attachées aux autres libéralités "non pénales opèrent leur effet de plein droit (comme nous l'avons prouvé au "Chap. 7, Sect. 3, nombre 113 et suivants) que la loi ne met aucune différence "entre les dispositions pénales et celles qui sont simplement conditionnelles."—4 *Furgole, p.* 213, 214. The opinion thus expressed by Furgole is quoted at full length, and approvingly, by Merlin,—*Merlin Rep. de Juris, Vol.* 23, *p.* 115, *Peine Test., No. X.*

The Courts in this country have in several instances refused to exercise powers with respect to the modifications of contracts, such as were formerly exercised by the French tribunals: Gagnon *vs.* Paradis. No. 231 of 1810. Hunt *vs.* Joseph, Vol. 2, Rev. de Leg., p. 52; Montreal S. C., Brousseau *vs.* Desjardins, 27 Sept., 1858; Richard *vs.* Fabrique of Quebec, 5 L. C. R., p. 3.; McNevin *vs.* Board of Arts, 12 L. C. R., p. 335.

The passages already quoted from Troplong, Demolombe and Larombiére, show that those learned authors thought a clause such as that before us ought not only to be held legal, but that it ought to be enforced when used for the protection of a valid bequest; and we have seen that in several of the cases already referred to, and more particularly in the three judgments in Montal *vs.* Richard, by the two judgments in Regnier *vs.* Regnier, by the three judgments in Moreau *vs.* Dumontier, and by the four judgments in the case of Eschalie *vs.*

Eschalle, the clauses of forfeiture were carried fully into effect. I do not, however, fail to bear in mind that Larombière says: "Comme les tribunaux ont "en cette matière un très large pouvoir d'interprétation, touchant la volonté du "testateur, ils sont autorisés à déclarer la peine non encourue même au cas où "l'attaque dirigée contre le testament a été déclarée mal fondée. Il leur suffit "de baser cette decision sur l'interprétation de l'acte et sur la volonté du "testateur, établissant qu'il n'a point entendu faire de la clause pénale une clause "irremissiblement irritante." And in a note to the *arrêt* of the 18th January, 1858, (D. 1, 25, note), I find the following observations: "Notons toutefois en "termanant que la clause penale n'est jamais nécessairement encourue et que les "tribunaux pourraient par une appréciation souveraine de volonté déclarer que "l'attaque dirigée contre le testament, n'a pas eu lieu en fait au mépris des "intentions du testateur, et qu'en conséquence il reste en dehors de la penalité "testamentaire, etc., etc." This right of interpretation "appréciation souveraine de volonté" is very properly said by Larombière, in the passage just cited, to be "très voisin de l'abus"; and a decided preponderance of authority in France is against the exercise of such power. But be that as it may, I do not think that, under our system, our Courts could exercise any such "appréciation "souveraine" with respect to the intention of the testator. Larombière, 3 vol., p. 4, (see also the *arrêt* cited, Cass. 22 Dec. 1845, *Sirey*, 1846, 1, 5.) Our duty is to ascertain the meaning of what the testator has said, without attempting either by an arbitrary "appréciation souveraine de volonté" or otherwise, to ascertain what may have been the intentions which the testator did not express. As Taylor says: "The duty of the Court, in all these cases, is to "ascertain not what the parties may really have intended, as contra-distinguished "from what their words express, but simply what is the meaning of the words "they have used. It is merely a duty of interpretation, that is, to find out the "true sense of the written words, as the parties used them; and of construction, "that is, when the true sense is ascertained, to subject the instrument to the "established rules of law."—(*Taylor on Ev. No.* 1087; *Sedgwick on Constitutional* [illegible] *p.* 246.)

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I had intended to notice an opinion expressed by some writers, that the penal clause ought not to be enforced whenever the will is impugned as to form only, but I do not think it necessary to do so, as in this case the contest involved not only the form of the will but the testamentary capacity of the testatrix, and the good faith of her son, the universal legatee.

A number of English cases are cited in the factum of the Appellant as tending to establish the validity of a condition in a will, to the effect that if the devisee dispute the will, the dispositions in favour of such devisee shall be revoked, but as I find the law is fully and clearly explained in one of the judgments referred to, *Cooke vs. Turner*, 15 *M. and W.*, I shall, considering the length these observations have already reached, confine myself to the citation of some passages from it. That case, it appears, was sent by the Vice-Chancellor of England for the opinion of the Court of Exchequer as to the effect of a proviso contained in the will of one Sir J. P. Turner. The judgment was rendered by Baron Rolph, afterwards Lord Cranworth, who, after stating the facts of the case, continued

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as follows:—"There is no doubt that by disputing the will and by refusing to "confirm it when required so to do, the devisee, Mrs. Eryer, has brought her- "self, both in letter and spirit, within the proviso by which her interest is "made to determine; so that her interest is clearly forfeited, unless the proviso "itself is void; and accordingly the argument on her behalf was that the "proviso is bad as being contrary to the policy of the law. The ground on which "the argument against the proviso was made to rest was, that every heir-at-law "ought to be left at liberty to contest the validity of his ancestor's will, and "that any restraint artificially introduced might tend to set up the wills of "insane persons, and would, in the language of the Touchstone, (132), be "against the liberty of the law; we cannot, however, adopt this reasoning. "There appears no more reason why a person may not be restrained by a con- "dition from disputing sanity than from disputing any other doubtful question "of fact or law on which the title of a devisee or grantee may depend." The learned Baron then referred to some English cases, and continued: "The "conditions said to be void, as trenching on the liberty of the law, are those "which restrain a party from doing some act which it is supposed the state has "or may have an interest to have done.

"The state, from obvious causes, is interested that its subjects should marry; "and therefore it will not in general allow parties, by contract or by conditions "in a will, to make the continuance of an estate depend on the owner not doing "that which it is or may be the interest of the state that he should do. So, "the state is interested in having its subjects embark in trade or agriculture, "and therefore will not allow a condition defeating an estate, in case its owner "should engage in commerce or should plough his arable land, or the like. The "principle on which such conditions are void is analogous to that on which con- "ditions defeating an estate, unless the owner commits a crime, are void. In "the latter case, the condition has a tendency to the violation of a positive "duty; in the former, to prevent the performance of what partakes of the "character of a duty of imperfect obligation. But in the case of a condition "such as that before us, the state has no interest whatever apart from the in- "terest of the parties themselves. There is no duty on the part of an heir, "whether of perfect or imperfect obligation, to contest his ancestor's sanity. It "matters not to the state whether the land is enjoyed by the heir or the devisee; "and we conceive therefore that the law leaves the parties to make just what "contracts and what arrangements they may think expedient as to the raising "or not raising questions of law or fact among one another, the sole result of "which is to give the enjoyment of a property to one claimant rather than to "another.

"The question whether this proviso is a proviso void, as being contrary to the "policy of the law, may be well tested by considering how the case would have "stood, if, instead of a condition subsequent, it had been made, as in substance "it might have been made, a condition precedent. Suppose the testator had "said, in case my daughter and her husband shall execute all deeds necessary "for settling my estates in manner hereinafter mentioned, then I give her, &c., "surely there would be no doubt of the validity of such a condition, as a condition

"precedent; and if so it must be good as a condition subsequent; for where a Evanturel
"condition is bad on grounds of public policy, it must obviously be bad whether Evanturel.
"precedent or subsequent. The law will no more allow anything contrary to
"public policy to be made the means whereby a party shall entitle himself to an
"estate than whereby he shall be made to lose that of which he is already in
"possession. On these grounds, thinking there is no question of public policy
"involved, and considering that the law leaves it to the parties interested in pro-
"perty, and to them alone, to decide for themselves what questions of law or of
"fact they shall insist on or abandon, we have come to the conclusion that this
"proviso is good, and we shall certify accordingly to the Lord Chancellor."

At the argument, I was particularly struck by this judgment, which, it seemed to me, treated the question now being considered, with remarkable lucidity; and having since given the subject much attention, I cannot regard the arguments advanced by Baron Rolph, in support of his judgment, otherwise than as being unanswerable.

In England, where the subject of the disposition is personal estate, it appears that if the legacy be given over upon a breach of the condition the clause of forfeiture will be enforced, and if not, it will be held to be *in terrorem* only.—*Jarman on Wills*, 2 *Vol., p.* 52.

This distinction is disapproved of by Jarman, and I know of nothing in our law, or indeed in reason, that would justify us in acting upon it here.

With reference to this subject, and more particularly in the case of *Cooke* vs. *Turner*, just cited, Jarman observes:

"The argument and judgment in Cooke *vs.* Turner both turned on the legality
"of the condition, and no doubt seems to have been entertained that if it was
"legal it must also be effectual. That this ought to be the sole criterion in all
"cases where the effect of a condition is brought in question, can scarcely be
"doubted; and that as no gift over will give effect to a condition in itself illegal,
"so a legal condition should never be rendered ineffectual by the absence of such
"a gift. The validity of a condition that the devisee shall not dispute the will
"was assumed in Violett *vs.* Brookman, although there was no gift over on
"breach; the only question was, whether the testator had, by concurring in the
"acts alleged as a breach, and by subsequent codicils confirming his will, waived
"the condition, and it was held he had."—*Jarman on Wills, Vol.* 2, *p.* 53.

The foregoing examination of the authorities bearing upon this case establishes, as I think, clearly, that the most esteemed French jurists, both ancient and modern, agree in the opinion that a clause of forfeiture such as that in question is lawful when used for the protection of a lawful will or legacy; and *that although the courts in France in former times generally treated such clauses as comminatory, yet that, since the passing of the Code Napoleon*, the jurisprudence in France has changed in this respect, and that such clauses have for many years, and in a great number of cases, been enforced in that country according to their true intent and meaning; the jurisprudence of the French courts being in this respect in accordance as well with the opinions of the most esteemed commentators on the *Code Napoleon* as with the law of England respecting devises of real estate.

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And now, viewing the case with reference to our own law, in my opinion it leaves us no choice as to the course to be pursued. Under the statutes and article of our code already cited, Madame Evanturel had a right to dispose of her property without reserve, restriction or limitation, and to subject any legacy made by her to any lawful conditions. The condition in question, as well upon the reason of the thing as according to all the authorities, both ancient and modern, French and English, must be held legal, having been used as it is for the protection of a valid will; and it being a legal condition, we are bound to respect it, and give it effect; and we cannot refuse to do so without awarding to the plaintiffs property belonging to the estate of Madame Evanturel, which according to the plain terms of the will of that lady, ought to go to the defendant.

There is, however, one consideration which I must say has caused me to hesitate as to disturbing the judgment under review. It is that madame Rémillard being a married lady, it may be supposed that the contestation of her mother's will was rather the act of her husband than her own. But madame Rémillard was married when the will was made, and as the clause in question includes the married daughters as well as the others I do not think we can exclude the married daughters from its operation. Besides, madame Remillard as a married woman, could be excluded from the effect of the clause in question only on the ground that she was not a free agent in the contesting of her mother's will, and I do not think she can be held not to have been a free agent with respect to proceedings in which she took part in the presence and with the sanction of the Court. It is doubtless a painful duty to carry out a will which excludes a daughter from participating in the estate of her parents; but on the other hand, even if there were no authorities on the subject, I would deem it only right that a person disposing by a valid will should have it in his power to make it for the advantage of those interested in his estate not to involve it in needless litigation, and not to question, without sufficient grounds, the sanity of the testator, or the honor, good faith and good conduct of those whom the testator may think best able and entitled to administer his estate, and most deserving of the enjoyment of his property.

For these reasons I think this Court should reverse the judgment under review.

FOR THE APPELLANTS: The following additional authorities were submitted particularly with reference to the opinion of Baron Rolfe afterwards lord chancellor Cranwerth, cited as influencing the opinion of the chief justice as above stated.

In re *Dickson*, which came before Baron Rolfe two years after the case of Cooke *vs.* Turner, he found it necessary to alter and modify his opinion as to the forfeiture of a legacy, in the following terms: —

"The same rule that prevails, in the case of legacies which are revoked on the marriage of the legatee, prevails also in the case of a legacy made void in *case the legatee should dispute the will of the testator*, and, on the same ground, viz. that the condition has been considered (whether justly or not it is unnecessary to enquire) as contrary to the policy, or according to the language of the *Touchstone, p.* 132,

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"*against the liberty of the law*;" such a condition, therefore, like a condition in restraint of marriage, has been considered as a *conditio rei non licitæ* and so it has been treated as a mere clause *in terrorem*, unless where there has been a gift over on the condition being broken. ** If, therefore, this was like a condition in restraint of marrige, or a condition *not to dispute the will*, to be treated as a *conditio rei non licitæ*, the doctrine to which I have referred would apply. The testator would have been treated *as merely expressing strongly his wish on a subject on which he had no right to impose restraint, and that expression of wish would have been inoperative*," 1 English Law and Equity Reports, p. 153.

Legacies given to persons with a condition not to dispute the validity of the will, or the bequests contained in it, are not obligatory, but *in terrorem* only; so that if there exists *probabilis causa litigandi*, an endeavor to set them aside will be no forfeiture. *Powell and Morgan*, 2 Vern. 90. *Norris* vs *Burrough* 1 Atk. 404. *Lloyd and Spillet*, 3 P. Wms. 344. Ingram and Strong 2 Phillim. 315. *Gow* on the disposal of a person's estate p. 225.

A condition that a legatee shall not dispute the will is considered as *in terrorem* only, and will be relieved against, and therefore a legatee will not by having disputed the validity or effect of a will, forfeit his legacy, when such will afterwards becomes established, or the effect of it ascertained, unless the legacy be given over. *Lowndes* on Legacies, p. 182.

If there is no bequest over the legacy is treated as pure and absolute, and the condition is made *in terrorem* only. 1 *Story's Equity Jurisprudence* 272, § 290.

The general doctrine of that law (the Roman) was, that clauses of nullity and penal clauses were not to be executed according to the rigor of their terms. Ibid, Vol. 2, p. 534, § 1318.

Courts cannot be ousted of their jurisdiction. Observations of lord *Kenyon* Ch. J., in case of *Thompson* vs *Charnock* 8 T. R. 139, "It is not necessary now to say how this point ought to be determined if it were *res integra*, it having been decided, again and again, that an agreement to refer all matters in difference to arbitration is not sufficient to oust the Courts of law or equity of their jurisdiction. And per *Sewell* Ch. J. Lower Canada.—"It is the duty of the Courts to retain the administration of the laws," *Stuart's* L. C. R. p. 158. *Scott* vs *The Phenix Assurance Company*. Even when the forfeiture of the legacy has been declared to be the penalty of not conforming to the injunction of the will, courts have considered it, if the legacy be not given over, rather as an effort to effect a desired object by intimidation, than as concluding the rights of the parties. If an unreasonable use be made of the power, one not foreseen, and which could not be intended by the testator, it has been considered as a case in which the general power of Courts of Justice to decide of the rights of parties ought to be exercised," *Per Chief Justice Marshall* in *Pray* vs *Belt* 1 *Peters*. 680; Decisions of the Superior Court U. S. *B. R. Curtis*. vol. 7. p. 766.

On the 8th June 1872, the court rendered the following judgment on the appeal from the decision of the court of review :

"Considérant que le défendeur a contesté la demande sur le principe que les "demandeurs ont formellement contesté le testament de la dite Marie Anne Bédard

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" par *inscription en faux*, pour cause d'insanité de la dite Marie Anne Bedard, " incapacité de tester, captation et suggestion frauduleuse et ce suivant les allé- " gations du défendeur, en violation d'une clause insérée au dit testament à " l'effet que, si aucune des filles de la testatrice, entr'autres la demanderesse, " faisait aucune démarche, directement ou indirectement, pour contester son dit " testament, elle serait privée de tous droits quelconques dans sa succession et " de la rente viagère susmentionnée, et que le legs de la dite rente en ce cas " serait considérée non avenu et caduc et que telle était sa volonté. Considé- " rant que cette clause, dans les circonstances où elle se présente, et vû la nature " de la contestation du dit testament par les demandeurs, doit être considérée " comme non écrite:—

" 1o. Parceque une telle clause, à moins de circonstances exceptionnelles et " accompagnées d'absence de cause probable ou raisonnable, doit être considérée " que *in terrorem* et doit être réputée comminatoire.

" 2o. Parceque les demandeurs, en contestant le testament de feue leur mère " et belle-mère, n'ont pas agi par esprit de chicane, mais avaient une cause juste " et probable de suspecter la légitimité du susdit testament et d'en demander " une vérification par les moyens légaux.

" 3o. Parce que les tribunaux, dans l'appréciation de clauses semblables, ont " une juste discretion à exercer sur et d'après l'ensemble du litige.—

" Cette cour infirme casse et annulle le jugement dont est appel, savoir celui " rendu en révision le septième jour de décembre 1871 et confirme le jugement " prononcé en première instance le sixième jour de mai 1871 avec dépens dans " toutes cours contre l'intimé."

Dissentiente l'Honorable Mr. le juge CARON. The Hon. chief justice DUVAL being unwell transmitted the following concurrence in writing; " I am " of opinion to reverse the judgment appealed from in this cause with costs " against the respondents."

G. Okill Stuart, Q. C. for the appellants.

J. G. Colston, for the respondent.

(I. T. W.)

COUR SUPERIEURE, 1872.

MONTREAL, 27 MARS, 1872.

Coram MACKAY, J.

No. 314.

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JUGE:—Que les cautions qui se sont obligés de représenter les effets revendiqués ou d'en payer la valeur, doivent être mis en demeure de représenter les effets, avant que de pouvoir être poursuivis pour leur valeur purement et simplement, nonobstant que les effets soient d'une nature périssable.

Le 29 novembre 1871, saisie-revendication par Dame M. A. Casavant, entre les mains du demandeur, Pierre Poulin, de la quantité de vingt-sept tinettes de beurre, valant $244.

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Les défendeurs se portèrent caution de M. A. Casavant, qui obtint la possession de cette quantité de beurre, saisie revendiquée.

Le 21 décembre 1871, défaut congé fut accordé au dit Pierre Poulin de la dite saisie-revendication.

Le cautionnement des défendeurs était que M. A. Casavant remettrait cette quantité de beurre au demandeur ou lui en paierait la valeur, si sa saisie-revendication n'était pas déclarée valable.

L'action de Casavant contre Poulin n'ayant pas été rapportée et défaut contre elle, congé de son assignation ayant été accordé à Poulin; celui-ci poursuivit les cautions pour la valeur de cette quantité de beurre, savoir, $244.

Les défendeurs cautions plaidèrent une défense au fond en droit. Leur moyen de défense en droit consistait en substance en ce qu'ils n'avaient jamais été mis en demeure de représenter la dite quantité de beurre et partant ne pouvaient pas être poursuivis pour en payer la valeur, et parce que par son action, le demandeur ne leur donnait pas l'option de représenter la dite quantité de beurre ou d'en payer la valeur.

Les parties ayant été entendues sur la défense au fond en droit, la Cour a rendu le jugement suivant:—

PER CURIAM.—A Madame Casavant took a *saisie-revendication* against twenty-seven tubs of butter in plaintiff's hands. Before the return day she petitioned to get the butter, and her petition was granted, and defendants became her sureties for the production of the butter or payment of its value if she failed in the suit. The action was not returned, so that Poulin was entitled to the butter. He now sues the sureties for $244, the value of the butter. A demurrer is pleaded, on the ground that he ought first to ask for the butter, which he has not done. The demurrer is maintained and action dismissed.

Le jugement est motivé comme suit:—

" La Cour, après avoir entendu les parties par leurs avocats, sur la défense en " droit produite par les défendeurs, et sur la réponse en droit du demandeur à " la seconde exception des défendeurs, avoir examiné la procédure et mûrement " délibéré.

" Considérant que par le cautionnement donné par Marie Antoinette Casavant " dans la cause mue devant cette Cour sous le numéro 2551, dans laquelle elle " est demanderesse contre Pierre Poulin, défendeur, les défendeurs en la présente " instance, cautions de la dite Dame Casavant, se sont obligés de représenter la " quantité de 27 tinettes de beurre saisies à la poursuite de la dite Dame Casa- " vant dans la susdite cause ou d'en payer la valeur."

" Considérant qu'il n'appert pas, par les allégations de la déclaration en la " présente cause, que les défendeurs aient été mis en demeure de représenter la " dite quantité de beurre.

" Considérant que par sa dite action, le demandeur devait donner aux défen- " deurs l'option de lui livrer la dite quantité de beurre, ou de lui en payer la " valeur, ce qu'il n'a pas fait, par sa dite demande et action.

" Considérant enfin que l'allégation du demandeur que le dit beurre est péris- " sable ne regarde pas les défendeurs et ne peut les affecter ni diminuer leurs

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" droits en aucune manière. Cette Cour maintient la dite défense en droit et " déboute l'action du dit demandeur avec dépens.

Duhamel & Rainville, avocats du demandeur.

Lorunger & Lorunger, avocats des défendeurs:

(P.R.L.)

PRIVY COUNCIL, 1872.

LONDON, 3RD FEBRUARY, 1872.

Coram SIR JAMES W. COLVILE, THE JUDGE OF THE HIGH COURT OF ADMIRALTY, SIR MONTAGUE SMITH, SIR ROBERT P. COLLIER.

MIGNEAULT,

(*Plaintiff in the Court below*),

APPELLANT;

AND

MALO ET AL.,

(*Defendants in the Court below*,)

RESPONDENTS.

HELD :— 1. That by the uninterrupted practice and usage of the Canadian Courts since 1801, the grant of probate is not of that binding and conclusive character which attaches to it in England, and does not prevent the heirs from impugning the validity of a will in their defence to an action brought by a legatee under the will.

2. That a testamentary paper unfinished and unexecuted, but proved to contain the testator's intentions, will be held valid, if it be shown satisfactorily that the fact of its not being completed was due to some cause other than the testator's abandonment of his intentions, as, for instance, his sudden death while the paper was being written from dictation.

3 The law which introduced into Canada the English law as to wills must be considered as having introduced it with all its incidents, and therefore with the admissibility of oral evidence.

This was an appeal from the judgment of the Court of Queen's Bench of the Province of Quebec, reported at 14 Jurist, p. 141. The judgment of the Lords of the Judicial Committee of the Privy Council reversed the judgment complained of, the reasons being stated as follows:—

PER CURIAM.—This is an appeal from a judgment of the Court of Queen's Bench for the Province of Quebec, which reversed the judgment of the Superior Court for Lower Canada.

The litigation relates to the execution of a will, and the following short statement of facts is necessary.

Prudent Malo, a merchant of Beloeil, died on the 25th of April, 1865, leaving an only daughter, and a property in moveables and immoveables of the value of about 8,000*l*. On the morning of this day Malo was dangerously ill, and being apprised of his danger by his medical attendant, desired him to fetch a notary named Brillon for the purpose of making his will. Brillon came, and had an interview with the deceased, who said he wished to make his will, and it was arranged that two witnesses of the name of Blanchard should attest it; the deceased said that he wished to bequeath an annuity of 25 louis to the Demoiselle Migneault, giving reasons for this wish; that he desired his debts to be paid; 25 louis to be given to the poor of his parish; the residue of all his property to his daughter, Madame Brousseau, for her life, and afterwards to her children

born or to be born of her present or any other marriage, and he named three executors. The deceased seems to have made a similar statement of his intentions to his medical attendant.

The notary and the witnesses arrived about 12 o'clock; in their presence the deceased said, "Je veux faire faire mon testament." He then said as follows:—

"Je recommande mon âme à Dieu; je veux que toutes mes dettes torts soient payés; je veux que mes funerailles soient faites avec le moins de pompe possible, en laissant cependant cela à la discretion de mes exécuteurs testamentaires; je donne aux pauvres de la Paroisse de Belœil cent piastres à leur être payés vingt-cinq piastres par an. Je veux qu'il soit payé à Mademoiselle Mignault vingt-cinq louis par an pourvu qu'elle ne se marie pas. Je donne et legue à ma fille, épouse de Jean Baptiste Brousseau, en jouissance tous mes biens tant qu'elle vivra, et la propriété je le donne aux enfants nés et à naitre du mariage avec M. Brousseau, ou de toute autre mariage contracté par la suite. Je nomme pour mes exécuteurs testamentaires mes amis le docteur Allard, le docteur Rottot, et mon gendre Brousseau. Il dit alors que c'était toutes ses dispositions. Je veux aussi que la majorité de l'opinion de mes exécuteurs testamentaires prévalent dans le règlement de mes affaires."

The notary asked the witnesses if they clearly understood what M. Malo had stated; he then proceeded to write, and having made what may be called a religious preface, proceeded as follows:—

"Deuxièmement. Veut et ordonne le dit Sieur Testateur que toutes ses dettes soient payées et torts par lui faites reparés, si aucun se trouvent par ses exécuteurs testamentaires ci-après nommés.

"Troisièmement. Veut et ordonne le dit Sieur Testateur que ses obsèques aient lieu de la manière la plus modeste possible; laissant tout à la volonté et discrétion de ses exécuteurs testamentaires ci-après nommés.

"Quatrièmement. Veut et entend le dit Testateur qu'il soit payé à Demoiselle Louise Mignault annuellement sa vie durante, pourvû qu'elle ne change pas de nom, une somme de cent piastres.

"Cinquièmement. Donne legue le dit Testateur aux pauvres de la Paroisse de Belœil une somme de cent piastres à leur être payée par payement de vingt-cinq piastres par an.

"Sixièmement. Quant à tous les autres biens tant meubles qu'immeubles, argent, or, en dettes et obligations, meubles de ménage et autres biens généralement quelconques que le Testateur délaissera et qui lui appartiendront à son décès sans en excepter."

When he had finished his last word the Testator died; before therefore the bequest to his daughter and the appointment of the executors was written, and before he had signed the paper.

It appears that the two witnesses afterwards retired to another room and wrote as follows:—

"Nous soussignés ayant été requis par feu Prudent Malo comme témoins de son testament, étant rendus auprès de lui avec M. Brillon, Notaire, il s'exprima ainsi: se tournant vers M. Brillon, il lui dit: 'Vous allez écrire mon Testament. D'abord que mes dettes soient payées, qu'une pension de 100 dollars par année

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soit payée à Delle. Mignault tant qu'elle ne changera pas de nom. Je donne aux pauvres de la paroisse de Belœil une somme de 100 dollars payable 25 dollars par année. Que mes services funéraires soit faits avec modération à la discrétion de mes Exécuteurs testamentaires.

"'Tous mes autres biens en jouissance à ma fille et en propriété à ses enfants nés et à naitre de son présent mariage et tous autres mariages qu'elle pourra contracter.

"'Je nomme mon ami J. B. Allard, mon ami le Doctr. Rottot et mon gendre Brousseau mes Exécuteurs testamentaires, qu'une majorité des trois prévale dans leurs délibérations.'

"Belœil, 25 Avril, 1865.

(Signé)

"ELZEAR BLANCHARD,
"V. BLANCHARD."

On the 20th of July the appellant, Dame Mignealt, presented a petition to a Judge of the Superior Court, praying for probate of the will as contained in the two paper writings to which I have referred. Madame Brousseau and her husband, the respondents, were cited to appear and did appear. The appellant examined the witnesses whom I have mentioned in support of the will, and they were cross-examined on the part of the respondents, who also put in an answer, or, as it was termed "défense au fond en droit." They did not, however, produce any witnesses, though special time was allowed to them for so doing, but addressed an argument to the Court by their Counsel against the validity of the will; and, on the 27th of December, the Court, consisting of a single Judge, Mr. Justice Monk, gave sentence in favour of the appellants, and directed Probate to be granted of the two papers as together containing the will of the deceased, and condemned the defendants in the costs.

In the month of September, 1866, the appellant brought her action in the Superior Court for the legacy, and for the costs awarded to her in the Probate Court; the action was formally contested by the respondents, and it was arranged that the evidence (subject to all exceptions) taken before the Court of Probate should be used. Mr. Justice Berthelot heard the cause, and decided in favour of the appellant, apparently on the double ground that the sentence of the Probate Court was valid,—

"Vû que la dite sentence du vingt-sept Décembre, mil huit cent soixante cinq, est dans toute sa force et vertu, et doit avoir tout l'effet que lui donne la loi;" —and that the Appellant was entitled to succeed upon the merits. The case was next heard before the Court of Revision, composed of three Judges, two of whom were Judges Monk and Berthelot, who maintained their opinion, the other Judge dissented; there was then an appeal to the Court of Queen's Bench, consisting of five Judges, who unanimously reversed the sentence of the Inferior Courts.

From this decision the present appeal has been instituted.

No controversy is raised as to the facts in this case. It is clear that the deceased was of perfectly sound mind—that he intended to make his will in solemn form, before a notary and two witnesses, and to dispose of his property in the manner described in the papers of which probate has been granted.

The contention is as to the law applicable to these facts.

The contention is two-fold:

The first is that the probate granted is not conclusive, as a judgment *in rem* or a judgment *inter partes*. There is no doubt that a probate in England granted in solemn form after due citation of parties would have this effect. And it is certainly much to be lamented if a rule of law and practice so obviously conducive to the interests of justice and the quieting of litigation does not prevail in Canada. Their Lordships, therefore, desired this part of the case to be argued separately. The result is as follows:

Previously to the year 1774, and the passing of the Imperial Statute, 14 Geo. III., cap. 83, wills, according to the Common Law of Canada, could be made only in one of three ways:

1. Before two notaries.
2. Before a notary and two witnesses.
3. By a holograph writing which did not require witnesses.

The Statute (or Quebec Act, as it is usually called) 14 Geo. III., cap. 83, however, introduced another form of will, enacting (section 10), "That it shall and may be lawful to and for every person that is owner of any lands, goods, or credits, in the said province, and that has a right to alienate the said lands, goods, or credits, in his or her lifetime, by deed of sale, gift, or otherwise, to devise or bequeath the same at his or her death by his or her last will and testament, any law, usage, or custom, heretofore or now prevailing in the Province, to the contrary hereof in anywise notwithstanding, such will being executed, either according to the laws of Canada, or according to the forms prescribed by the laws of England."

There appears never to have been, and not to exist at present, any Court which exercises a special jurisdiction with respect to wills.

A practice dictated by obvious convenience or necessity seems to have grown up in Canada, after the conquest of that country by England, of registering, or as it was somewhat loosely termed, proving, wills made according to English law before a Judge of the Civil Court. This practice, the legal effect of which was very doubtful, continued till 1801, when a Provincial Statute (41 Geo. III. c. 4, s. 2, incorporated in the Consolidated Statutes, c. 34, . 3), provided as follows:—"Whereas doubts have arisen touching the method now followed of proving last wills and testaments made and executed according to the forms prescribed by the laws of England, before one or more of the Judges of the Courts of Civil Jurisdiction in the province; be it therefore enacted that such proof shall have the same force and effect as if made and taken before a Court of Probate."

At first sight it certainly appeared to their Lordships that this language availed to introduce the law of England with respect to the conclusiveness of a probate duly granted, into the law of Canada; and that where, as in the present case, a suit as to the validity of a will had been contested in open Court, both parties appearing, pleading, and one examining, the other cross-examining, witnesses, and probate had then been granted, the same question could not be raised again, at all events between the same parties, before another tribunal; but that

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the production of the probate would operate as an estoppel to any such action. This, moreover, appears to their Lordships to be the true construction of the words, "such proof shall have the same force and effect as if made and taken before a Court of Probate."

Their Lordships, however, think that they cannot consider this matter now as *res integra*. They cannot disregard the practice of the Canadian Courts with respect to it for the last seventy years, and they have therefore made as careful an investigation into this practice as the circumstances permit.

It appears, in the first place, that no appeal has ever been instituted from a Decree or Grant of Probate made by the Court—that it is very doubtful whether any allegation or plea as to the merits, for instance, a plea or allegation setting up insanity or undue influence, could be propounded, or would be admitted on an application for probate.

It is enacted by the 23rd section of the 78th chapter of the Consolidated Statutes of Lower Canada, in the year 1860, that "any Judge of the Superior Court, at any place where the said Court or the Circuit Court is appointed to be held, shall, in any Court or out of Court, in term or out of term, or in vacation, and any prothonotary of the Superior Court at the place where his office is therein held, shall, out of Court, but in term or out of term, have, and may exercise within and for the district in which such place as aforesaid lies, the same power and authority as is then vested in the Superior Court and the Judges thereof, in what respects the probate of wills, the election and appointment of tutors and curators, as well under the general law as under the provisions of chapter 87 of these Consolidated Statutes relating to Insolvent Debtors, or any other Act, the taking of the counsel and opinion of relations and friends in cases where the same are by law required to be taken, the closing of inventories, attestation of accounts, *insinuations*, affixing and taking off seals of safe custody, the emancipation of minors, the homologation or refusal to homologate proceedings had at any *avis de parents* called or held by or before any notary, and other acts of the same nature requiring despatch; and the proceedings in all such cases shall form part of the records of the Superior Court at the place where they are had, or of the Circuit Court at such place, if the Superior Court be not held there."

(2.) "But the appointments and orders made by any prothonotary under this section, or made under the same by any Judge out of Court, shall be liable to be set aside by any Judge of the said Court, sitting in the same district in Court and term, in like manner and under the provisions of law in and under which appointments and orders made by one or more Judges out of Court, in matters requiring despatch may be set aside by the Superior Court" (12 Vict., c. 38; 20 Vict., c. 44, s. 91.)

In the Civil Code of Lower Canada, which became law in 1866, therefore, before the making of the will in question, it is enacted (section 3, §-856.) "The originals and legally certified copies of wills made in authentic form, make proof in the same manner as other authentic writings."

(§ 857) "Holograph wills and those made in the form derived from the laws of England, must be presented for probate to the Court exercising superior original jurisdiction in the district in which the deceased had his domicile, or, if he

had none, in the district in which he died, or, to one of the Judges of such Court, or, to the prothonotary of the district. The Court, or Judge, or the prothonotary, receives the depositions in writing, and under oath of witnesses competent to give evidence, and these depositions remain affixed to the original will, together with the judgment, if it have been rendered out of Court, or a certified copy of it, if it have been rendered in Court; parties interested may then obtain certified copies of the will, the proof, and the judgment, which copies are authentic, and give effect to the will until it is set aside upon contestation.

"If the original of the will be deposited with a notary, the Court or Judge, or the prothonotary, causes such original to be delivered up."

(§ 858.) "The heir of the deceased need not be summoned to the probate thus made of the will, except it is so ordered in particular cases.

"The functionary who takes the probate takes cognizance of all that relates to the will.

"The probate of wills does not prevent their contestation by persons interested."

In the Fourth Report of the Commissioners which preceded the enactment of the Civil Code, it is said (p. 179):

"The third section treats of the proof of wills and also of the preliminary probate, before a Judge, of such as have not been made in authentic form. A will frequently concerns several parties, by all of whom it would be difficult to have it acknowledged, though these persons and even third parties be interested in submitting its validity without delay to a preliminary test. The proceeding adopted for this purpose is well known in England and in this country under the name of probate; it is now particularly in use in England where wills have no form corresponding with our authentic form. In the old French law, as well as in the ancient practice in this country, traces are still found of a similar probate as regards holograph wills. It is not, however, necessary to extend the researches upon this point, the probate of holograph wills and of wills made in the English form having uniformly been effected in the same manner, which is that of the common form of probate adopted in England, where a more solemn form of probate is also practiced, to which the parties interested are summoned, and by which they are bound. This latter form of probate is not in use in this country, unless it be compared to a contested action before the Courts. The probate here takes place before a Judge and out of Court. Our Provincial Statute of 1801 merely says that the form of probate then in use shall continue to be practised." * * *

The "contestation" spoken of in the Report and the Code, does not appear to mean, as it would in England, a suit in the Court of Probate, before probate is granted or enforced, but in some other suit, a suit before a Civil Court, in which the validity of the will is impugned.

Upon the whole, it appears to their Lordships that, by the uninterrupted practice and usage of the Canadian Courts of Justice, since 1801, the law has received an interpretation which does not affix to the grant of probate, even in the circumstances of this case, that binding and conclusive character which it

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has in England, and that, according to that interpretation, it was competent to the respondent to impugn the validity of this will by way of defence to the action brought by the appellant for the payment of the annuity.

Their Lordships think that they ought not to advise Her Majesty that a different construction ought now to be put upon the law.

With regard to the form of action adopted in this case, their Lordships do not find that any objection was taken to it in the Court below.

It remains to consider the second branch of contention. It has been argued on behalf of the appellants,—

(1.) That though the deceased intended to make a will in solemn form according to the French law, yet, if he did in fact make one, bad according to that, but good according to the English law, it is valid.

Their Lordships have no doubt that this proposition is true.

(2.) It has been argued that, if the Judge was wrong in granting probate of both the papers, at all events the unfinished paper written by the notary from the instructions of the deceased, was a valid instrument according to the law of England before the last Wills Act, and that they, the appellants, are content to have probate of that paper alone.

Their Lordships are, therefore, relieved from the necessity of considering whether a nuncupative form of will was valid in Canada at the date of Prudent Malo's death, and before the recent Code came into operation; as to which, however, they desire not to be considered as expressing any doubt whatever, or whether a probate could be properly granted of a nuncupative will and unfinished instructions as together containing the will of the deceased.

The question before their Lordships is reduced within these limits. Is the paper of unfinished instructions such a document as would have been entitled to probate under the law in force in England before the present Wills Act? For if so it was before the promulgation of the Code, which appears to have adopted the Wills Act, a good will in Canada under the provisions of the Quebec Act. Upon this point their Lordships entertain no doubt.

The law is very clearly laid down by a most experienced Judge, Sir John Nicholl:— *

"The legal principles," he says, "as to imperfect testamentary papers, of every description, vary much according to the stage of maturity at which those papers have arrived. The presumption of law, indeed, is against every testamentary paper not actually executed by the testator, and *so* executed as it is to be inferred on the face of the paper, that the testator meant to execute it. But if the paper be complete in all *other* respects, that presumption is slight and feeble, and one comparatively easily repelled. For intentions, *sub modo* at least, need not be *proved* in the case; that is, the Court will presume the testator's intentions to be as expressed in such a paper, on its being satisfactorily shown that its not being executed may be justly ascribed to some *other* cause and not to any abandonment of those intentions so expressed, on his, the testator's part. But where a paper is unfinished, as well as unexecuted (especially where it is just

* Montefiore *v.* Montefiore, 2 Addams, p. 357.

Mignault and Malo et al.

begun, and contains only a few clauses or bequests), not only must its being unfinished and unexecuted be accounted for as above; but it must also be proved (for the Court will not presume it) to express the testator's intentions, in order to repel the legal presumption against its validity. It must be clearly made to appear, upon a just view of all the facts and circumstances of the case, that the deceased had come to a final resolution in respect to it, as far as it goes; so that by establishing it, even in such its imperfect state, the Court will give effect to, and not thwart or defeat, the testator's real wishes and intentions in respect to the property which it purports to bequeath, in order to entitle such a paper to probate, in any case, in my judgment."

. . . . . .

"If the instrument * is (as it clearly is), in legal construction, one in progress merely and unfinished as to the body of the instrument, the legal presumption surely is that, had the deceased not been prevented from finishing it, he would have gone on to provide for his children in a subsequent part of the instrument. I cannot assent to the proposition contended for by one of the Counsel, that if a testator dies while the instrument is in progress, that instrument, 'so far as it goes,' be its contents and effect what they may, must be valid. I know of no principle to that broad extent ever laid down; nor was any authority cited in support of it. The rule which I take to operate in the case of every unfinished paper is this: can the Court infer that, by pronouncing for it, it will carry into effect what it collects, from *all* the circumstances of the case, to have been the deceased's wish? In that event it will be its duty to pronounce for it, but surely not if it sees reason to believe that, by so doing, it will defeat, or counteract, instead of giving effect to that wish."

In another case the same learned Judge said:—†

"The facts are satisfactorily established. I have no doubt in pronouncing this to be the will of the deceased, as far as to the appointment of the executor; but it is perfectly clear that the other part was not committed to writing during the life of the deceased. Although the Court goes the utmost length to give effect to intention clearly proved and reduced into writing in the lifetime of the testator, yet it has never held that anything added to a will after death can be established. Death consummates the instrument; nothing can be added afterwards.

"The last clause must be pronounced against and struck out of the will.

"I have no doubt of pronouncing for the will without it."

It was suggested that these decisions, which were made in 1820–21, were judicial developments of the doctrine as to imperfect testamentary papers, and were not intended to be incorporated into the Canadian law by the Statute of 1801. But unfortunately for this argument, various decisions of Sir G. Lee, a most learned ecclesiastical Judge, in 1757, fully establish the doctrine which Sir John Nicholl in 1820–21, did not in truth develope, but declared to be the acknowledged existing law.

There can be no doubt that in this case it did completely express the wishes of the testator, and therefore, tried by the principles laid down in these and

* Montefiore v Montefiore, 2 Addams, pp. 352–60.

† Kooystea v. Buyskes, and others, 3 Phillimore, pp. 530–31.

J. Bte. Lepine, et al. and Alexis Cusson.

other cases the paper containing the instructions written out by the notary is entitled to probate.

It remains only to consider the objection that the evidence by which these instructions are proved to contain the testamentary intentions of the deceased is inadmissible according to the *lex fori*—that is, the Canadian French law; and for this position Article 1233, sec. 7, was relied upon, which requires that there must be "a commencement of proof in writing" (commencement de preuve par écrit), in order to admit the oral testimony of witnesses. If it were necessary to consider whether in this case this condition as to the commencement in writing had been fulfilled their Lordships would be strongly inclined to hold that it had been fulfilled; but in truth the case is not one to which the doctrine of the *lex fori* prevailing as to the admission of evidence is applicable at all. The law which introduced into the Colony the English law as to wills must be considered as having introduced it with all its incidents, and therefore with the admissibility of oral evidence, without which, indeed, the new law would be nugatory and of no effect.

Their Lordships have therefore arrived at the conclusion that the sentence appealed from should be reversed, that the Judgment of the Superior Court of Canada in favour of the appellant should be affirmed, and that the respondents should pay the costs of this appeal and those of the Court of Queen's Bench in Canada.

Judgment reversed.

E. Bayard, for appellant.
R. Laflamme, Q.C., for respondent.
(J. K.)

COURT OF QUEEN'S BENCH, 1872.

APPEAL SIDE.

MONTREAL, 20TH JUNE, 1872.

Coram DUVAL, C. J., CARON, J., BADGLEY, J., MONK, J.

No. 2.

[illegible]INE,

(*Plaintiff in Court below,*)

APPELLANT;

ET

ALEXIS CUSSON,

(*Defendant in Court below,*)

RESPONDENT.

HELD:—That the Court of Appeals ought not to interfere with rulings on points of practice in the Courts below.

The following remarks of the judges in appeal sufficiently explain the whole question and the judgment rendered by the Court of Queen's Bench in Appeal upon a point of practice in the Court below.

MONK, J., dissenting, remarked that by this appeal three interlocutory judgments of the Superior Court were brought up; one of these interlocutories declared the defendant's *enquête* closed, and the other two confirmed that. The Court was brought face to face with the question whether it had any authority over such interlocutory judgments rendered by the Court below. The plaintiff, Cusson, brought his action for some $400 or $500 for goods sold and delivered. The defendant pleaded that he had received short measure, and that the plaintiff had adulterated the liquor sold by him to defendant during several years; that it was true that he had promised to pay the account, but this he had done in error. Now, this was a serious plea. The parties went to *enquête*. The plaintiff's *enquête* was closed, and the defendant commenced the examination of witnesses. He had succeeded in establishing his plea to a certain extent, and a day was fixed for the examination of another witness. But the witness not being present at the time fixed, the judge, on application, declared the defendant's *enquête* closed. Here the defendant was cut off from showing, perhaps, a long series of frauds on the part of the plaintiff. He made two motions to re-open the *enquête*, but unsuccessfully. His Honour looked upon the ruling in the Court below as too stringent, and believed that if ever there was an instance in which it was the duty of this Court to interpose its authority it was the present. The Court below, with such a serious plea before it, should have allowed the *enquête* to be continued to another day. He therefore thought the judgments appealed from should be reversed.

BADGLEY, J., thought the case came within the rule which he had laid down for his guidance, that the Court of Appeals ought not to interfere with rulings on points of practice in the Court below. If the Court below had not some means of forcing on the proceedings before it, there would be no end to a suit. The plaintiff made his *enquête*, and then called upon the defendant to proceed with his. From that time until the judgment complained of was rendered there had been nothing but delays, and when the party was actually pinned down to a certain day he came up, put a few useless questions to his witness and then went away. If this mode of playing with the case had been allowed, the *enquête* might have been dragging on to the present day. Upon the face of the record the defendant was guilty of an utter evasion of the rule of practice, and the plaintiff's case would have been kept hung up for years had not the Court brought pressure upon the defendant. Under these circumstances his Honour could not go beyond the rule already stated, that the Court of Appeals should assist the judges of the Court below in maintaining order, and he had no hesitation in maintaining the judgment.

CARON, J., concurred, and the judgment was confirmed, MONK, J., dissenting.

The judgment of the Court of Appeals is as follows:

"La Cour..... Considérant qu'il n'y a pas mal jugé dans les jugements "interlocutoires rendus par la Cour Supérieure siégeant à Montréal, les 19 et "29 avril, et le 26 mai 1871, ainsi que dans une décision à l'enquête du 29 "mars 1871 et dont est appel, confirme les dits jugements avec dépens.

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"L'honorable M. le juge en chef Duval, qui a entendu la cause, se trouvant "absent, a transmis son concours par écrit."

Dissentiente, l'honorable juge Monk.

Jugements confirmés.

Mousseau & David, attorneys for appellant.
DeBellefeuille & Turgeon, attorneys for respondent.
Lafrenaye, counsel.
(P.R.L.)

COURT OF REVIEW, 1872.

MONTREAL, 31st MAY, 1872.

Coram MACKAY, J., TORRANCE, J., BEAUDRY, J.

No. 692.

Goodwin vs. *The Lancashire Fire and Life Insurance Company.*

HELD:—1st.—That when a party applies to one agent of an Insurance Company and is refused insurance, and afterwards applies to another agent of the same Company and secures insurance through him, without revealing to such second agent the fact of his first application and its refusal, his conduct is equivalent to a concealment of a material fact, and the insurance is void.

2nd.—That when a party is insured, by an interim receipt of an agent, which declares that the insurance is subject "to the conditions of the Company's policies," a failure to comply with a condition as to preliminary proofs of loss, and the bringing of the action for the loss before the expiration of the delay specified in another condition, endorsed on the policies usually issued by the Company, are fatal, and the party cannot recover the amount of his alleged loss.

This was a hearing in Review of a judgment rendered in the Superior Court for the District of St. Francis, by RAMSAY, A. J., on the 13th September, 1871.

The action was brought to recover the sum of $2000 alleged to be due by the defendants to the plaintiff for an amount insured by them upon a tannery, and the machinery, stock, &c., therein contained, including a steam engine used for propelling the machinery, and which was destroyed by fire on the 11th October, 1870.

The declaration alleged that on the 5th October, 1870, the plaintiff, being the proprietor of the said tannery, machinery, and stock, applied to Mr. E. P. Felton, the agent of the defendants at Sherbrooke, to insure the said property, and that he, after examination of the premises, accepted the risk and gave the plaintiff an interim receipt for the premium paid by him, which is in the following terms:

"LANCASHIRE FIRE AND LIFE INSURANCE COMPANY.
(Of England.)

"CAPITAL:.....TWO MILLIONS STERLING.
"Eastern Canada Branch, Chief Office, Jacques Cartier Buildings, St. John "Street, Montreal.

"Interim Receipt, No. 23.

"Sherbrooke Agency, 5th October, 1870.

"Received from Mr. George Goodwin, of Cookshire, tanner and currier, "seventy-five dollars, being the premium of an insurance to the extent of two "thousand dollars, on property described in his application of this date, with the

"understanding that he is insured until notified to the contrary, subject to the "approval of the Chief Office, Montreal, and the conditions of the Company's "policies. The money will be refunded if the application be not approved of, "less the proportion for time insured. And it is hereby expressly agreed between "the insured and the above-named Company, that if a policy be not delivered "within thirty days from this date, the contract of insurance shall wholly cease "and determine, and all liability on the part of the Company shall be at an end. "Premium $75.00.

"(Signed,) "E. P. FELTON.

"*Agent at Sherbrooke.*"

And which receipt is endorsed as follows:—"Insurance on building, tannery $1000, Engine $350, Stock $250, Splitting Machine $150, Grist Mill $150, Bark Mill $75, Leech $25." That the plaintiff's property thereby became insured until he should be notified to the contrary, and his money returned, or until the expiration of one month from the date of the receipt without the delivery of a policy of insurance by the defendants. That no policy was delivered, and that on the 11th October, 1870, the tannery and its contents were consumed by fire and became a total loss. That in consequence the defendants were liable to pay the plaintiff the sum of $2000, for which he prays judgment.

To this action the defendants pleaded in substance: 1o. That about the 1st September, 1870, the plaintiff applied to J. H. Hobson, the local agent of the defendants for that part of the Province in which the plaintiff resides, for an insurance in the defendants' Company upon the same tannery and other property mentioned in the declaration, which application was in due course transmitted to the Chief Office of the defendants in Montreal, and, after due inquiry, was declined, the defendants having reasons personal to the plaintiff for not accepting the risk, and that the plaintiff was notified of this immediately; that, notwithstanding his knowledge of such rejection, and that the defendants would not accept him as an insurer or policyholder, the plaintiff fraudulently applied to the said E. P. Felton, (who was not the defendants' agent for that part of the country in which plaintiff resides, and was not authorized or empowered by the defendants to take or receive such application, or to grant such receipt,) for an insurance upon the said property without informing said Felton of the rejection of his previous proposal, and by fraud induced him to accept the application, and to receive the premium, and grant a receipt therefor; that, immediately on the receipt of the application, at the Chief Office in Montreal, and before the occurrence of the fire, namely, on the 10th October, 1870, the defendants rejected the application and notified said Felton of such rejection; that the said Felton had no authority to accept the premium or to grant the receipt, and that his action in the matter was at once repudiated by the defendants, so soon as they were informed of it; that, on the 3rd December, 1870, the said sum of $75 was tendered back to the plaintiff who refused to receive it, and the said sum was brought into Court with the plea; that the defendants never made any contract of insurance with the plaintiff, and are not bound by the supposed contract, entered into by Felton, which was made through fraud, concealment and misrepresentation on the part of the plaintiff.

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2. That in the interim receipt given by E. P. Felton it is expressly stated that the insurance therein mentioned "should be subject to the approval of the Chief Office at Montreal, and the conditions of the Company's policies," to wit, the conditions of the fire policies ordinarily issued by the defendants. That the application of the plaintiff was not approved by the Chief Office of the defendants in Montreal, but was immediately rejected. That all fire policies issued by the defendants are made and issued subject to the following conditions, which form an essential part of such policies:

9. "Persons sustaining loss or damage by fire shall forthwith give notice "thereof in writing to the Company; and as soon after as possible they shall "deliver as particular an account of their loss and damage as the nature of the "case will admit, signed by their own hands; and they shall accompany the same "with their oath or affirmation, declaring the said account to be true and just, "showing also whether any and what other insurance has been made upon the "same property, and giving a copy of the written portion of the policy of each "Company; what was the whole cash value of the subject insured, what was "their interest therein, in what general manner (as to trade, manufactory, mer-"chandise, or otherwise,) the building insured or containing the subject insured, "and the several parts thereof, were occupied at the time of the loss, and who "were occupants of such building, and when and how did the fire originate as far "as they know.

"When merchandise or other personal property is partially damaged by fire, "the insured shall forthwith cause it to be put in as good a condition as the "case will allow, assorting and arranging the various articles according to their "kinds, separating the damaged from the undamaged goods, so that the damage "can be easily ascertained, and shall cause a list or inventory of the whole to be "made, naming the quantities, qualities and prices of each article, after which "the amount of damage shall then be ascertained by the examination and "appraisal of each article by two or three competent persons (who are not inter-"ested in the loss, as creditors or otherwise, nor connected with the insured or "sufferers,) to be mutually appointed by the insured and the Company or their "agent; the report of such appraisement to be made in writing under oath before "a magistrate, notary public or commissioner of deeds, (one-half of the appraiser's "fees to be paid by the insurers,) and no profit or advantage of any kind is to be "included in such claim; and the insured shall also, *if required*, submit to an "examination under oath by the agent or attorney of the Company, and shall "answer all questions touching his, her or their knowledge of anything relating "to such loss or damage or their claim thereupon, and shall subscribe such "examination—the same being reduced to writing; and, whenever required, the "insured or person claiming shall produce and exhibit to the Company, or their "agent, at the office of the Company, his books of account and other vouchers in "support of his claim, and permit extracts and copies thereof to be made; and "shall also exhibit to any person or persons named by the Company, and permit "to be examined by them, any property damaged in which any loss is claimed, "or any property saved which was insured by this policy. And until such proofs, "declarations and certificates are produced, and such exhibition of damages, pro-

"perty, books and vouchers be made, the loss shall not be payable. Such pay-
"ment shall be made within sixty days after the loss shall have been ascertained
"and satisfactorily proved to the Company without any deduction whatever.

"When a building, merchandise, or other personal property is totally des-
"troyed, the insured shall furnish the Company, or their agent, or the appraisers,
"appointed as above provided, with the best evidence the case will admit, of the
"cash value of the property immediately before the fire; the value of mer-
"chandise to be stated at wholesale cash prices. When a building is partially
"damaged the appraisers are to state the sum in cash that will pay the cost of
"repairing the damage; any fraud or false swearing shall cause a forfeiture of
"all claims on the insurers, and shall be a full bar to all remedies against the
"insurers or the policy. In case of any loss on or damage to the property
"insured, it shall be optional with the Company to replace the articles lost or
"damaged, with others of the same kind and quality, and to rebuild or repair
"the building or buildings, within a reasonable time, giving notice of their inten-
"tion so to do, within twenty days after having received the preliminary proofs
"of loss required by the 9th Article of these conditions.

"In case differences shall arise concerning any loss or damage by fire, the
"matter may, by mutual consent, be submitted to the judgment of arbitrators,
"indifferently chosen, whose award in writing, as to the amount of such loss and
"damage, shall be binding on both parties."

That the above conditions, being an essential part of the Company's policies, form part of the contract alleged by the plaintiff to have been made with him by the defendants, and contained in the interim receipt; that the plaintiff did not, at any time before the commencement of this suit, deliver to the defendants a particular account of his loss and damage by reason of the said fire, signed by him, and accompanied by his oath or affirmation, declaring the same to be true and just, or any account whatever of his said loss and damage, nor has the said plaintiff produced to the said defendants any such proofs, declarations and certificates, nor any such exhibition of damaged property as is required of him by the said conditions in order to make the amount of his alleged loss payable; and had made no proof whatever of said loss; that the plaintiff's action had been commenced within sixty days from the date of the alleged loss, the fire having taken place on the 11th October, and the writ having been issued on the 16th November, 1870, and that the action was, therefore, premature, and could not be sustained.

3. Défense au fond en fait:—

Issue having been joined the parties proceeded to evidence, and the following judgment was rendered by Mr. Assistant Justice Ramsay.:

"The Court, considering that the plaintiff's premises were insured by
"defendants on the 11th October, 1870, when the said premises were destroyed
"by fire; considering that defendants declined to recognise the said insurance,
"and did not grant plaintiff any copy of the policies of said Company, *and that*
"*in the event of no policy being issued, the plaintiff was not obliged to comply*
"*with the conditions usually endorsed on the policies of the Company;* con-
"sidering that a loss to the amount of $2,500 has been proved, and that plain-

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"tiff was insured for the amount of $1,000 in another Company, to wit, the "North British Insurance Company, which said Company has paid to said "plaintiff one third of his said loss, doth condemn said defendants to pay the "plaintiff $1,666.67 with interest," &c.

Borlase, for defendants:—The evidence in the case establishes that, on the 29th August, 1871, the plaintiff applied to Mr. Hobson, the defendants' agent in the township of Eaton, and who resides at a distance of about four miles from the plaintiff, for an insurance upon his tannery. This proposal was sent in due course to the Chief Office of defendants, in Montreal, and, after some correspondence and inquiry was declined early in September, the grounds of defendants' refusal being that they never took such risks, and this was notified to the plaintiff. The plaintiff appears, in the month of August, to have had through a third person some communication on the subject of insurance with Mr. Felton, the defendants' agent at Sherbrooke [about seventeen miles distant from plaintiff's tannery] and a letter was written by him to Mr. Hobbs, the defendants' chief agent at Montreal, inquiring the rate of insurance on a tannery, but without mentioning the name of the proprietor, or giving any particulars, to which an answer was received, stating generally that rate on tannery would be 3¾ per cent. This, however, was not followed up until on the 5th October he made through him a formal application for insurance, without, however, informing him in any way of the rejection of the application made through Mr. Hobson, and upon this application the interim receipt mentioned in the declaration was granted by Felton. The application was not received in Montreal until the 8th of October, and on the 10th [the 9th having been Sunday] the following answer was sent, being dated and post-marked at Montreal, the 10th October:

"E. P. Felton Esq.," "Montreal, Oct. 10th, 1870.

"Dear sir,

"Your favor to hand enclosing an application on the tannery of George Goodwin of Cookshire. When you first wrote in reference to the rate on this risk "you did not mention whose property it was, and on reference to our books we "find the risk has been offered to us previously by Mr. Hobson of Lennoxville, "and was declined by us; we are therefore sorry to say we must again decline it, "as we dislike the risk for many reasons.

"Yours very truly,

"[Signed,] "WM. HOBBS."

This answer was received at Sherbrooke early on the morning of the 11th October, the fire having occurred about one in the morning of that day, and on the same day Mr. Felton wrote a letter [defendants' Exhibit No. 5,] informing Mr. Hobbs of the facts, and that he proposed to go to Cookshire and inquire into the circumstances, to which letter the following answer was sent:

"E. P. Felton, Esq., "Montreal, 12th October, 1870.

"Dear Sir,

"I am astonished at the tenor of your note which is this moment to hand. I "cannot conceive that you have taken the risk referred to as destroyed while "the application was before us *unaccepted*. I did not direct you to take this "tannery or any tannery in particular in my letter of the 20th August, to which

"you have referred, because you had not at that time given the name of the per-
"son or any description of the property. Your letter and application, dated the
"5th, reached this on Saturday and was replied to on Monday, stating that for
"several reasons we declined the risk. I do hope you have not committed
"yourself or the Company in this matter, and further that you will not do so.

"It is not customary for our agents to take hazardous risks before submitting
"the application to us.

"Yours truly,
"[Signed,] "WM. HOBBS."

Mr. Felton states positively that plaintiff never informed him that he had made any application to the defendants, through Mr. Hobson or otherwise, for insurance in their Company, which application had been rejected, and adds, "if he had done so, I would not have accepted his application."

This, evidently is such a misrepresentation or concealment as is sufficient of itself to annul the contract.—"The insured is obliged to represent to the in-
"surer fully and fairly every fact which shows the nature and extent of the risk
"*and which may prevent the undertaking of it* or affect the rate of premium."
"C.C. 2485. "Fraudulent misrepresentation or concealment on the part either
"of the insurer or of the insured is in all cases a cause of nullity of the contract
"in favour of the innocent party." Ib. 2488. The plaintiff has evidently felt the force of this objection, for he has examined a number of witnesses with the object of showing that he is so ignorant and careless a man of business as not to know one Insurance Company from another, and that, in all probability, he did not know Mr. Hobson and Mr. Felton were acting for the same Company, and that there was therefore no fraudulent intention on his part. Taking this, for the sake of argument, as having been proved, the plaintiff's pretension amounts to this: "I am so ignorant or so careless, or both, as not to be able to manage
"my own affairs with ordinary correctness, or to know one Insurance Company
"from another, and, *therefore* you, the defendants, are bound to pay me $2000
"for a loss, the risk of which you never were willing to accept, and which on
"the contrary you always rejected." This conclusion scarcely appears to follow from the premises. The defendants, on the other hand, contend that, taking the plaintiff's own version of his conduct, it is characterized by such gross negligence and ignorance as to amount to a fraud in law, the *lata culpa* of the jurists, which is presumptive of fraud, and undistinguishable from it, even although there may possibly have been no intention on his part willfully to deceive. See Pothier Depot. No. 23. "If a material misrepresentation be
"made, although it be not embodied in the contract, it is considered
"as a constructive or legal fraud, although it be made without any
"wilful intention to deceive, but merely through carelessness, mistake,
"or ignorance; for, if a party be actually deceived by a misrepre-
"sentation, the practical result is the same, whether it were a wilful
"fraud or not." Story, on Contracts, No. 506. "All the authorities
"concerning matters of insurance concur in the position that, if the con-
"cealment is *material*, it will avoid the policy, notwithstanding the assured
"did not intend to commit any fraud." "A concealment which only the effect

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"of *accident, inadvertence* or *mistake* is equally fatal to the contract as if it were "designed." Angel, on Insurance, No. 175. Pothier Assurance, No. 196. The alleged contract upon which the plaintiff proceeds was made by error, and is therefore null. C.C. Nos. 991, 992. It is further to be remarked that the printed instructions furnished to Mr. Felton, in common with other agents of defendants, provide (p. 7) that "applications for insurance on property where "steam is used for propelling machinery must be approved by the Chief Office "at Montreal before the Company will be liable for loss or damage," and thus, in accepting this risk, Mr. Felton was not merely exceeding the limits of his territory, but was acting in excess of his powers and in direct violation of his instructions. Mr. Hobbs states that "the risk on plaintiff's tannery was "such a risk as our agents never accept without first sending us in an application "containing full particulars of the risk and the name of the individual applying "for the insurance." This was the course which Mr. Hobson very properly pursued when the plaintiff made his first application.

The conditions recited in the second plea of defendants are proved to be the ordinary conditions of all policies issued by the defendants, and are some of the conditions referred to in the interim receipt as "the conditions of the Company's policies." The plaintiff never, previous to the commencement of this suit, gave the defendants any notice in writing of the loss or damage sustained by him by reason of the fire, nor has he given them any account of his loss and damage signed and sworn to by him, nor, in fact, has he in any way conformed to the conditions recited. It is also obvious that his action is premature, *i.e.*, brought within the period of sixty days allowed the defendants for the settlement of losses. The defendants are at a loss to understand how the the Court at Sherbrooke could have come to the conclusion that, in the event of "no policy being issued, the plaintiff was not obliged to comply with the con- "ditions usually endorsed on the policies of the Company," when the receipts upon which plaintiff proceeds, and which is the sole evidence of the contract between the parties, states in express terms that the insurance thereby effected is "subject to the conditions of the Company's policies." Supposing that there had been no difficulty as to the validity of the contract, the defendants certainly would not have gone through the useless formality of issuing a policy in favour of the plaintiff, after all the property insured had been destroyed; yet it will hardly be contended that the plaintiff would thereby have been exempted from furnishing proof of his loss, and complying with the other conditions required by the Company. The plaintiff never applied for a copy of the conditions; had he done so and been refused the case might have been different.

It is well settled that the performance of these and similar requirements is a condition precedent to the payment of any loss. Angel, on Insurance, No. 224-227. 2 Greenleaf on Evidence, No. 406. Scott vs. The Phœnix Assurance Company. In Appeal, Stuart's Rep. p. 354. In *Racine* vs. The *Equitable Insurance Company of London*, 6 Jurist, p. 89, it was held that the furnishing of a certificate as required by the conditions of a policy of insurance, of three respectable persons, that they believed the loss had not occurred by fraud, is a condition precedent without compliance with which the assured

cannot recover. In *Western Assurance Company* vs. *Atwell*, 2 Jurist p. 181, it was held that the condition usually endorsed on policies of insurance, respecting double insurance is binding in law, and that its performance will not be held to be waived by the Company, if their agent, on being notified of such double insurance after the fire, makes no specific objection to the claim of the assured on that ground. Some American authorities were cited by the plaintiff, to the effect that a total repudiation of the claim of the insurer is a waiver of any imperfection in the preliminary proof and notices, but these cases do not appear to be in accordance with the laws either of England or of this Province, and were examined in the case of *Racine* vs. *Equitable Company*, cited above, and not adopted by the Court. In any case they only refer to cases where the proof is informal or imperfect, not where, as in this case, there is a total absence of proof. Supposing the doctrine to be a true one, it would not justify the plaintiff in bringing his action at the time he did. It would certainly be no excuse for suing on an obligation six months before the amount payable thereunder became due, to say, that the debtor had declared that he did not admit the validity of the obligation, and would not pay it at any time. The condition endorsed on a policy, that no suit or action shall be sustainable for the recovery of any claim under the policy, unless commenced within the term of twelve months next after the loss shall have occurred, is a complete bar to any such suit instituted after the lapse of that term—*Cornell* vs. *Liverpool and London Insurance Company*, 14 Jurist, p. 256.

The defendants submit that they have established all the grounds of defence taken by them, that the judgment of the Court below was erroneous, and that the action of the plaintiff should have been dismissed with costs.

Sanborn, Q.C., for plaintiff:—The defendants plead that E. P. Felton's agency did not extend to Cookshire, where the tannery was located. 2. That plaintiff applied to this Company for insurance once before on the same tannery, and the risk was declined. 3. That by defendant's policies parties insured are bound to give notice of loss, and name experts to value loss, and comply with divers formalities which plaintiff did not observe.

Plaintiff paid E. P. Felton, defendants' agent, $75, the premium, when he received the interim receipt. Before taking the application Felton wrote to defendants' general manager, Mr. Hobbs, on 17th August, 1870, to the effect that "a party" wished to effect an insurance on "a *tannery*, at Cookshire, with steam engine and heater," and giving a full description of the tannery and adjacent buildings, and their relative distances to each other, and explaining the amount of insurance required. The letter closed in these words—"Let me know by return of mail what is the lowest I can take this for" [plaintiff's Exhibit No. 1.] Hobbs answers [Plaintiff's Exhibit No 2.] "rate on tannery will be 3¾ per cent. We usually get from 3½ to 4 per cent."

This clearly recognizes Felton's agency at Cookshire, and authorizes the taking of the risk. After Felton visits the tannery and examines it he takes the premium and grants the usual interim receipt, which insures the property till the policy issues or till the risk is refused. This was granted on 5th October, 1870. Felton immediately sent a letter to Hobbs notifying him that he had taken the

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risk. Hobbs says this letter was only received on the 8th October, and was answered on the 10th October.

It is difficult to see how a letter could be three days going from Sherbrooke to Montreal, where the mail is transmitted twice a day. Defendants have not produced this letter, though they produced all the others. On the morning of the 11th October, 1870, and before plaintiff received any notification that his application was not approved, the tannery was burned.

Defendants' agent at Sherbrooke received a letter on the 11th October, after he had received information of the fire, that the plaintiff's application was not approved. Defendants sent out a person, Mr. Hobbs, brother of the manager to inquire into the loss. Plaintiff had also insured in the North British Fire and Life Insurance Company for $1000, which Company also sent a person with Mr. Hobbs. They inquired into the loss, and thought that $3000 ought to cover the loss, and considered that each Company should share the loss in the proportion to the insurance effected by each, that is to say, that the defendants should pay two thirds of $2,500 and the North British Fire and Life Insurance Company one third of $2,500. Note, here is sufficient proof of plaintiff's loss. The North British Fire and Life Insurance Company paid their proportion of insurance, and defendants refused to entertain plaintiff's claim. Defendants retained the premium, and did not offer it back till long after suit was brought. Here is the case, and it seems plain enough.

After all this defendants say Mr. Felton's agency did not extend to Cookshire. This is 18 miles from Sherbrooke. He deposes that he had taken risks much more remote from Sherbrooke, which were approved. There was no limit to his agency, and, as has been stated, he was specially authorized to take this risk. Then defendants say plaintiff some year or two before applied to have his tannery insured by their Company through Mr. Hobson of Eaton, and the risk was declined. This was true, but no fraud on the part of plaintiff is pretended. It is proved clearly enough that plaintiff was not aware that it was the same Company. He is a mechanic, and not much accustomed to transact business, and relied upon the agents as to the responsibility of the Company, and the application in this last case was made on the advice of Mr. McNicol, who went to Mr. Felton for plaintiff. However, it is quite immaterial, if defendants accepted the application, whether it was first or second application. It is a contract when it is accepted.

The plaintiff did not conform to the policy in giving notices, say the defendants. The plaintiff could not conform to a policy he had never seen, the necessity of notice of loss ceased when defendants refused to recognize the claim.

Defendants, in their final argument, say there is no proof of loss. The property was valued by their agent, Mr. Felton, before insurance was effected. The loss was estimated by Mr. Hobbs in connection with the agent of the North British Fire and Life Insurance Company after the fire, and besides this the burning of the tannery is proved by all the witnesses, and the value of the property which was destroyed, and the extent to which it was destroyed, is proved by François Plaisance, shewing that the loss as estimated by Hobbs and the agent of the North British Company was really less than the actual loss.

Contract of insurance commences when the interim receipt is given and premium paid. 2 Parsons on Contracts, 420. Ellis on Insurance, p 79. Pothier "Assurance" No. 7. p. 4.

The Court of Review unanimously reversed the judgment of the Court below, and dismissed the plaintiff's action, assigning the following reasons:—

"The Court . . . considering that the Plaintiff concealed a material fact "from the defendants' agent, E. P. Felton, in failing to disclose to him that the "plaintiff had already made an application for insurance to defendants through "the agent, J. H. Hobson, which they had rejected.

"Considering that the conditions of the policies of the Company invoked by "defendants, requiring preliminary proofs to be made by plaintiff before action "brought, have not been complied with by plaintiff.

"Considering that sixty days have not elapsed between the date of the "alleged loss by fire and the institution of this action.

"Considering, therefore, that there is error, &c., &c., &c."

Judgment of S. C. reversed.

Sanborn & Brooks, for plaintiff.
G. H. Borlase, for defendant.
(S. B.)

COUR DU BANC DE LA REINE, 1872.

En Appel.

MONTREAL, 22 JANVIER, 1872.

Coram Caron, J., Drummond, J., Badgley, J., Monk, J.

DAVID GRAHAM,

(*Défendeur en Cour Inférieure,*)

ET

Appelant;

JEAN COTE,

(*Demandeur en Cour Inférieure,*)

Intimé.

PRIVILEGE—GAGES—DERNIER EQUIPEUR.

Juge:—Que l'ouvrier ou homme de cage [1] employé dans les chantiers de bois en Canada, n'a aucun droit de rétention par voie de saisie, privilége ou droit de dernier équipeur, [2] et est mal fondé en droit de faire pratiquer une saisie conservatoire sur les radeaux formés des arbres de la forêt qu'il a confectionnés en radeaux.

Les décisions contradictoires de la Cour Supérieure siégeant en Révision à Montréal, et de la Cour d'Appel, sur cette question, sont rapportées au long dans la Revue Légale, 3 Vol. p. 571, et 4 Vol. page 3.

[1] Expression Bas-Canadienne française.
[2] Même expression dont l'acception est controversée par la perte des traditions.

David Graham et Jean Côté.

La Cour de Révision avait déclaré par son jugement rendu le 30 mars 1871, que cet ouvrier avait non-seulement un privilége, mais encore le droit de retention pour le paiement de ses gages par voie de saisie du bois par lui confectionné.

La Cour d'Appel a jugé qu'il peut avoir un privilége, mais qu'il n'a pas le droit de retention ; par suite d'un *casus omissus* de la loi, qui ne pourvoit pas au moyen légal de lui permettre d'exercer ce droit.

Le jugement prononcé par la Cour d'Appel, infirmant le jugement de la Cour de Révision, a été rendu comme suit :

DRUMMOND, J.—This is a seizure before judgment, called a "saisie-arrêt conservatoire." It is for wages due on a raft ; but in my opinion no such seizure is known to the law. There is nothing of the kind provided for in the Code, as it is neither a "Saisie Revendication," a "Saisie Arrêt" for absconding or secretion, nor a "Saisie on behalf of the dernier équipeur," which, besides "Saisie Gagerie," are the only seizures before judgment recognised by our law. The judgment of the Court of Review, maintaining the seizure, must be reversed.

MONK, J.—Côté was engaged to go to Quebec with a raft, but quarrelled with his employer. If he had gone to Quebec, and been refused his wages, I am not prepared to say that he would not have been entitled to a conservatory process to make good his lien on the raft, but under the present circumstances I do not think he has any such right.

Le jugement est motivé comme suit :

"La Cour..... considérant que la saisie conservatoire, la saisie avant "jugement est de droit positif, étroit et exceptionnel ; considérant qu'il ne peut "s'exercer que dans les cas spécialement prévus par la loi.

"Considérant que le bref de saisie-arrêt conservatoire dont il s'agit en cette "cause, a émané dans des circonstances qui n'entrent pas dans aucune des caté-"gories prévues par la loi, pour l'exercice de ce procédé rigoureux.

"Considérant que la requête du défendeur, en cour de première instance "appelant, en demandant l'annulation du dit Bref de saisie-arrêt, est bien fondée "en droit ; considérant partant que dans le jugement de la Cour de première "instance, ainsi que dans le jugement de la Cour de Révision qui le confirme, "il y a erreur, infirme, casse et annule les dits jugements."

Dorion, Dorion & Geoffrion, avocats de l'appelant.

Trudel & DeMontigny, avocats de l'Intimé.

(P.R.L.)

COURT OF QUEEN'S BENCH, 1872.

MONTREAL, 21ST MARCH, 1872.

Coram DUVAL, C. J., CARON, J., BADGLEY, J., STUART, J., *ad hoc*, POLETTE, J., *ad hoc*.

No. 13.

THOMAS ET AL.
(*Opposants in Court below*),
APPELLANTS;

AND

AYLEN
(*Plaintiff in Court below*),
RESPONDENT.

HELD:—In the case of an agreement (before our Civil Code) by A B to purchase from C D a lot of land for a specified sum, to be paid by instalments, followed by a bond from C D in a penal sum, to the effect that, on the purchase money being fully paid, C D would execute a deed of sale in due form, and followed also by actual and uninterrupted possession by A B, that the right of property of C D in the lot of land was unaffected, so long as any portion of the purchase money remained unpaid, and, therefore, that C D had a right to be collocated for such unpaid purchase money, in the distribution of the proceeds of a sale of the lot by the sheriff, in preference to duly registered judgments obtained by creditors of A B against him while in possession of the lot,—and this, without any registration either of the agreement or the bond.

This was an appeal from a judgment of the Superior Court sitting in Review at Montreal, confirming a judgment of the Superior Court at Aylmer, rendered on the 30th of November, 1868, by which the opposition of the opposants, representing the estate of the late John Egan, and claiming the proceeds of a lot of land which they alleged to belong to that estate, and which had been sold by sheriff's sale at the suit of the respondent, was dismissed.

The facts of the case appear to be as follows:

On the 31st of October, 1851, a memorandum was made at Quebec between John Newman of Buckingham, and the firm of John Egan & Co., in the following words:

"Mr. John Newman of Buckingham hereby purchases from John Egan & "Co., of Aylmer, that property in the Township of Hull known as the Stubbs "Farm, as well as the Kedder lot, making in all about two hundred acres, or "what may be contained in the patent from the Government, the whole for the "sum of one thousand and fifty pounds, payable as follows: Note for one hun- "dred payable 3 mos.: cash down the sum of one hundred pounds, the balance "in four yearly payments with the legal interest thereon. Bond to be given for "the land when required."

(Signed,) JOHN NEWMAN,
" JOHN EGAN & CO.

"Quebec, 31st October, 1851."

On the third day of November of the same year the bond mentioned in the foregoing memorandum was executed by Mr. Egan and delivered to Newman, and it was in the following words:

"Know all men by these presents, that I, John Egan, of the Town of Aylmer, "in the County of Ottawa, in that part of the province called Lower Canada,

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" merchant, am holden and firmly bound unto John Newman, of the Township " of Buckingham in the said County, land surveyor, in the penal sum of two " thousand one hundred pounds current money of the said province, to be " paid to the said John Newman, his heirs, executors, curators, administrators " and assigns, or his or their lawful attorney or attorneys, for which payment " well and truly to be made, I do hereby bind myself, my heirs, executors, cura- " tors and administrators firmly by these presents; dated the third day of " November in the year of our Lord 1851.

" Whereas it has been agreed by and between the said John Egan and the " said John Newman, his heirs or assigns, that as soon as the said John New- " man shall have paid certain notes granted this day to the said John Egan, " signed and endorsed by the said John Newman, bearing date the 31st of " October last, payable to his own order at the office of John Egan & Co., viz.: one " for £100 cy. at three months after date, one for £250 cy. at one year after " date, one for £200 cy. at two years after date, one for £200 cy. at three years " after date, and one for £200 cy. at four years after date, all bearing interest, " the said John Egan, his heirs and assigns, shall and will execute in due form of " law a deed of sale or conveyance of the lot of land and premises known as the " 'Stubbs Farm' and the 'Kedder lot,' being lot No. 24 in the second range of " the Township of Hull, in the said County of Ottawa, containing about two " hundred acres, or what may be contained in the patent from the Crown, with " appurtenances and dependencies; now the condition of the above written obli- " gation is such that if the said John Egan, his heirs and assigns, do and shall— " as soon after the aforesaid promissory notes shall be paid as shall be required " by the said John Newman, his heirs or assigns, or any of them, or by his or " their attorney or attorneys—well and sufficiently execute and grant to the said " John Newman, his heirs or assigns, or as he or they shall direct, by such deed " of conveyance or other acts and assurances in the law, as his or their counsel " shall advise, all and every the premises hereinbefore described with the appur- " tenances free and clear of all charges and incumbrances whatsoever; and that " without any further consideration to be paid by the said John Newman, his " heirs or assigns, than the hereinbefore mentioned promissory notes and the sum " of £100 paid this day by the said John Newman to the said John Egan; then " this obligation to be void, or else to be and remain in full force and vir- " tue."

(Signed,) JOHN EGAN, L.S.

The property sold in this cause is the north half of the lot so bounded; containing one hundred acres more or less, and bounded as in the advertisement of sale mentioned; and was so sold by the sheriff of Aylmer at the suit of the respondent on the 28th day of January, 1868, on a judgment obtained by him against Newman.

By the return of the privileges and hypotheca registered against the land, filed by the sheriff, there appear only certain judgments obtained against the defendant, the first of which is in favor of one Anthony Walsh; the next, for £234 18s. 8d., is in favor of the respondent, as is also the third, for £32 8s. 4d.; while the fourth, for £83 5s. 1d. and costs, appears to have been registered in favor of

Peter Aylen. On the return of the sheriff being made, the appellants filed an opposition *afin de conserver*, by which they claimed to be paid by privilege the sum of £732 15s. 2d. and interest as being the balance remaining due to them as representatives of Mr. Egan, under the agreement or bond, a copy of which is hereinbefore inserted, that sum being in fact the amount of three of the notes mentioned in that bond.

The opposants and appellants allege in effect, after setting up the instruments above copied, that the opposants, as representing the said late John Egan, have always been, and still are, ready and willing to execute a deed of sale of the said lot to the said Newman, as he agreed to do by the said bond, upon payment by him of the balance of money and interest represented by the said notes. But that Newman had never paid these sums of money, and that until they were so paid he had no title to the property in question. That the right of property in it never ceased to be in Mr. Egan and in his estate, and in them as representing his estate, and that as proprietors of the land itself they were entitled to receive its proceeds.

When they came before the Court they alleged, as anticipating the objections that would probably be made to their claim, that they, as representing Mr. Egan, had always a right to eject Newman from the land in question, so long as he failed to pay the notes he had given them. That his possession of the land was only conditional upon his payment of these notes; that he had no absolute or indefeasible title to the land; and that they, having the right of property in the land itself, of which they had never divested themselves, were entitled to convert that right of property into a claim upon the proceeds of the land, as they did by their opposition. And that as they had the undoubted right to treat the agreement of sale at any time as being at an end, in default of performance of the condition of payment, and regain possession of the property, they had the same right to obtain possession of its proceeds, if those proceeds came before a Court of Justice.

The opposants were collocated in conformity with their conclusion.

To this opposition the respondent pleaded first, a *demurrer* to the opposition, on the ground, first, that it did not appear that the instruments under which the opposants claimed to be collocated by special privilege upon the proceeds of the sale of the land in question had ever been registered, and for want of that registration, the privilege of the unpaid vendor ceased; and, secondly, because the opposition itself was contradictory, inasmuch as it alleged that the opposants had sold the land in question to Newman, and also alleged that in doing so they had retained a right of property in the land itself. And he further pleaded specially that on the 18th day of November, 1862, he obtained judgment against Newman for £234 18s. 8½d., and registered his judgment on the fifth of December of the same year; and that on the 12th of November, 1862, he obtained another judgment for £32 8s. 4d., and on the 11th April duly registered that judgment. That the memorandum of agreement which he styles in his exception a "deed of sale," and the bond subsequently given by Mr. Egan, had never been registered. That the lot sold was the property of, and had been in the possession of, the defendant since 1851; and therefore that the opposition of the appellants, in so far as it affected the respondent, should be dismissed with costs.

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The respondent also filed a general answer to the opposition.

Thereupon, these pleas being fyled on the 22nd March, 1868, the respondent on the same day contested the project of the report of distribution, fyled on the 24th of February previous, in which the opposants had been collocated for the proceeds of the property sold. In support of that contestation, he set forth the same facts as are contained in his previous special plea to the opposition of the plaintiffs, and by his conclusions he prayed that the said report of distribution, in so far as it related to the opposants' claim, should be amended, and the respondent collocated for the amount of his judgment, as registered before, and having preference over the appellants. In support of these pleadings, the respondent fyled copies of his judgments with certificates of registration, and a copy of the notice by him given to the registrar at the time of the registration of the judgment in question, whereby it appears, that he notified the registrar to register those judgments against the lot of land, part of which was sold in the present case. On the 2nd of June, 1868, the respondent inscribed the case for hearing on the contestation fyled by him of the report of distribution, and on the 30th of November, 1868, Mr. Justice Lafontaine rendered the following judgment:

"The Court having heard the parties by their respective counsel on the contestation fyled by the plaintiff to the report of distribution in this cause, examined the proceedings and proof of record, and having deliberated thereon; considering that the said opposants have failed to allege and establish their rights of *bailleurs du fonds* by them claimed in and by their said opposition, by a sufficient title, duly enregistered according to law, it not appearing in the certificate of the registrar of the County of Ottawa in this cause fyled; maintains the contestation by the said plaintiff of the report of distribution in this cause fyled, in so far as the same relates to the collocation of the claim of the said opposants; and, in consequence, it is ordered that the Prothonotary of this Court do prepare a new report of distribution of the monies levied by execution in this cause, and therein collocate the plaintiff for the amount of the judgments rendered in favor of the said plaintiff against the said defendant, as mentioned in the certificate of the registrar in this cause fyled, before and in preference to the said opposants, with costs to the said plaintiff.

This judgment was inscribed for Review, and was confirmed by the Court sitting at Montreal.

CARON, J., *dissentiens*:—Le sujet du litige est la contestation faite par le demandeur, d'un rapport de distribution dans lequel les appelants étaient colloqués comme cessionnaires de John Egan pour la balance du prix de la vente faite par le dit Egan, au nommé John Newman sous les circonstances et en la manière exposée au factum de l'Intimé pages 1 et 2.

La vente sur laquelle les appelants fondent leur droit est constatée par deux actes qu'ils ont produits et prouvés, savoir 1°. un sous seing privé, fait et signé à Quebec par le dit John Newman et John Egan & Co., Octobre 1851 (page 1 du Factum de l'Intimé) 2°. Un autre acte ou instrument, appelé par les parties Bond, signé par le dit John Egan le 3 November 1851.

Toute la difficulté roule sur l'effet qu'ont ces deux actes, qui à tout évènement, ne sont tous deux que des promesses de vente.

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Le demandeur contestant (intimé) prétend que ces actes, qu'on admet n'être que des promesses de vente, ayant été suivis de la tradition, Newman ayant été mis en possession des lots à lui vendus par les dits actes, est par là même devenu propriétaire, et était ainsi propriétaire des dits lots lors de la saisie qui en a été faite, que les appelants ne pouvaient avoir sur les lots qu'un privilége et hypothèque pour la balance qui leur revenait, comme représentant les vendeurs, mais que ce privilége ils l'avaient perdu, vû que les actes sur lesquels il était fondé n'avaient pas été enregistrés, tandis que les hypothèques que le demandeur avait, lui avaient été régulièrement enregistrés. En un mot les intimés soutiennent qu'eux et les appelants se présentent à la distribution comme créanciers hypothécaires, que les intimés ont enregistré leur titre de créance tandis que celui des appelants ne l'a pas été et partant les intimés devaient être préférés aux appelants, comme l'a decidé la Cour de Révision, en confirmant celui de la Cour Supérieure qui avait rejeté le droit de préférence des opposants colloqués. Tel est le résumé des prétentions sérieuses de l'intimé, car, quant aux objections de forme et de défaut de preuve, elles sont sans valeur, vû que sur une contestation d'un rapport de distribution, les faits doivent être regardés comme prouvés ou admis. A l'encontre de ces prétentions, les appelants soutiennent que les actes sur lesquels le dit intimé base le droit de propriété de son débiteur Newman, ne sont que des promesses de vente, faites conditionnellement, c'est-à-dire à la condition que le prix convenu serait payé, que cette condition n'ayant pas été exécutée, le dit défendeur Newman n'était jamais devenu propriétaire, que cette propriété n'était jamais sortie des mains des vendeurs et de leur représentant, qu'ils auraient pu demander la distraction de cette propriété, *saisie super non domino*—ou la nullité de la saisie, et qu'ils auraient également pu demander en justice la rescision des actes de promesse de vente et la remise des dits lots, faute de paiement, que n'ayant pas voulu exercer ces droits et ayant consenti à ce que la vente eût lieu sur la saisie, ils avaient droit de réclamer le produit de la vente comme tout propriétaire qui, n'ayant pas fait d'opposition à conserver sur les deniers, a permis que sa propriété ait été vendue.

Or, disent les appelants, pour la conservation de ce droit de propriété et de celui de faire résilier la vente faute de paiement, il n'y a pas besoin d'enregistrement. En cela les appelants ont raison, s'ils sont restés propriétaires et s'ils avaient droit de réclamer comme tels, l'enregistrement n'était pas nécessaire; c'est le contraire, s'ils ont cessé d'être propriétaires.

Les deux jugements dont est appel ont décidé que la promesse de vente produite, suivie de la tradition, avait rendu Newman propriétaire et que partant les appelants, vendeurs, ne pouvaient se présenter à la distribution que comme simples créanciers qui n'ont pas enregistré. Je suis enclin à croire que les jugements sont corrects. Je tiens à la maxime que *promesse de vente avec tradition vaut vente*. Si cette position est correcte, il suit que lors de la saisie, c'est Newman qui était propriétaire, et partant les opposants ne pouvaient être que créanciers avec privilége de bailleur de fonds; or ce privilége est sujet à enregistrement et se perd à défaut de l'obtenir. Pour ces raisons je serais d'avis de confirmer les deux jugements.

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BADGLEY, J. :—The respondent contests the collocation of the appellants in the Report of Distribution of the proceeds of the sheriff's sale of the north half of lot No. 26, in the 2nd range of Hull, which had been seized by the sheriff as in the defendant's possession and sold by execution at Aylmer, at the suit of the respondent, a creditor of defendant, by judgment registered against the half lot. The appellants, cessionaires of the late John Egan, claimed the proceeds of the sale in his behalf as the unpaid vendor of the property, and were duly collocated therefor. The circumstances connected with the case are in substance as follows: The late John Egan by two paper writings sous seing privé, filed of record, severally dated the 31st of October, 1851, and the 3rd of November following, the former being a memorandum of sale, to be followed by a bond for a deed, and the other being the bond for a deed, made a conditional agreement or promise to sell to the defendant the said lot No. 26, for £1050, the price stated in the writing, whereof £950 was represented by defendant's notes, one payable at 3 months, and the others at 1, 2, 3 and 4 years after date, with interest, it being expressly stipulated in the bond that Egan, *his heirs and assigns should execute to Newman, upon his requisition after the payment of the said notes, a sufficient deed of sale and conveyance of the said described premises, free and clear of all charges and incumbrances;* thereupon Newman was let into the occupancy of the lot No. 26, one half whereof has been sold by the sheriff as above mentioned. These writings have not been registered under the Registry Law. At the time of the sheriff's sale, Newman, the vendee, owed an unpaid balance of upwards of £700 with interest upon the price of his conditional purchase, for which the appellants by their opposition *à conserver* claimed to be preferably and primarily collocated upon the said proceeds, as unpaid vendors of the decreted property. The respondent contested their opposition by a demurrer and other pleadings upon which they joined issue, and he likewise fyled a written contestation to their collocation upon which they also took issue with him, and it is upon that contestation that this contention has arisen. It will, however, suffice to remark that the Court is not called upon to investigate any but the real grounds of objection taken by the respondent, which are, first, that the appellants are unregistered vendors, and, second, that the right of the unpaid vendor is limited to his recourse for the resolution of the agreement of sale of the land, and is not convertible into a claim upon its proceeds under sheriff's sale. The respondent's contestation was sustained by the judgment of the Superior Court at Aylmer, which set aside the appellant's collocation and ordered a new report of distribution to be made in his favor, as being the registered judgment mortgagee of the adjudged half lot, upon the ground that the appellants had *failed to establish their claims by sufficient title duly registered.* The judgment was subsequently confirmed at Montreal by the Court of Review *as being in all points without error.* The appellants have brought those judgments by appeal before this Court, and the conflict submitted is, whether the unregistered unpaid vendors, under the circumstances of this case, could prime the registered mortgage of the decreted but unpaid for property sold in the possession of the defendant; and, therefore, the first and principal inquiry is to ascertain the legal character of the writings above referred to, and the nature of

the agreement contained in them, because Newman can refer to no other title than these. Now in construction they must be taken together, because the intention of the parties to these writings can be found only in the covenants contained in them, which explicitly declare that no property in the lot should pass from Egan to Newman until after the latter had completed his payment of the stipulated price, when alone a deed of sale and conveyance of the lot should be executed by Egan in Newman's favor. It is manifest that no property did pass from Egan. The stipulated condition for the investment of the lot in Newman was the condition strictly precedent of the payment of his notes with interest, and until that precedent condition had been fully accomplished by Newman, Egan was not divested of his property, and the lot continued to remain vested in him absolutely, and which, as a matter of course, became vested in the appellants as his cessionaires, until Newman, by accomplishing his condition of payment, could claim to be vested with the property under the covenants stipulated. It is said that Newman had possession, but it is trite to say that mere possession is not synonymous with conveyance, nor of itself, under such circumstances as these, is it the equivalent of property. At best his possession was merely precarious, and subject to eviction at the pleasure of the unpaid vendor until the payment of the price had been completed. But the covenant is assimilated to our known *promesse de vente*, and the argument based upon it is supported by the old legal maxim, *promesse de vente vaut vente*. It is trite to say the conclusion is not correct, and Pothier, Vente, No. 476; Toullier, 9 vol. pp. 159, 163; Troplong, Vente, Nos. 129, 130, and others that might be cited, shew how baseless the maxim is. Old Dumoulin holds that *la promesse de vendre un fonds n'est pas vente, elle oblige*, as in this case, *de passer contrat quando omnia ad substantiam actus requisita presto, sunt*, and he adds that, *à défaut de passer contrat la promesse se réduit aux dommages intérêts*. It is manifest that the non-paying vendee Newman could neither have claimed his title nor damages, for an alleged breach of covenant by Egan, for refusing conveyance and title until Newman himself had perfected his own obligation of payment. It is also urged that by the 1478 Art of the C.C. *la promesse de vente avec tradition et possession actuelle équivaut à vente*; but this article is textually copied from the French Code, and is subject to the commentation of that Code, such as by Troplong, Toullier, Marcadé, and others, who refuse it the effect of investing the vendee with the unpaid property. Now the article at the utmost is only a general expletive of *promesse* with both tradition and possession combined, but as a rule of law allowing it that effect, it could not annul the covenants and conditional stipulations of the parties themselves, which are exceptions to the maxim and qualify the rule, leaving the conditional sale such as it is stipulated, according to the covenants of the parties, in conformity with the stringency of another legal rule paramount to that of the article, that *modus et conventio vincunt legem*. Although Newman might have permissive possession, his own covenant denies him the conveyance of the land until its price had been paid. It must be observed that the expressions *tradition et possession actuelle*, constituents required to make up the equivalent of sale of the article, are not the legal synonyms of each other. Tradition is the known legal complement and satisfaction of a sale, "*la tradition est la transmission du droit de*

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"*propriété c'est transférer sa possession dans l'intention de nous en faire avoir "la propriété,*" and is also expressed in different terms in the 1492 Art. "*Cest "la transaction de la chose vendue en la jouissance et possession de l'acheteur,*" whilst on the other hand possession, even though *actuelle*, is the mere occupancy of the *immeuble vendu*, the simply permitted use of the land. These terms are not technically equivalent of each other, because there may be possession without tradition, whereas tradition implies possession. Moreover it is a recognized principle of law, *que le vendeur n'est pas obligé de faire la tradition ou délivrance lorsque l'acheteur n'a pas payé le prix en entier ou autrement satisfait le vendeur.* There was no tradition here, and therefore the technical *vente* of the article does not apply. If it were a sale at all, it was only by the covenants of the parties themselves a conditional sale which could not divest the vendor of his property, until the expecting purchaser had paid for it. Until that event, the property in the lot remained undivested from its owner Evan, whose right of property, moreover, was not subjected to the requirements of the Registry Law, as it existed previous to the promulgation of the C.C. in 1866, as by that law the unpaid vendor was not bound to register his right of property. The confusion is constantly cropping up from misapprehension of the extent and effects of the Registry Law; it did not affect property, but it protected mortgage rights, and the effect of the previous uncodified law is fully explained in the considered remarks of the late Chief Justice Lafontaine and of Mr. Justice Caron, in the case decided in this Court, of Patenaude and Lerigé, 7 L. C. Rep. The dates of these writings in 1851, and the date of the respondent's judgment in 1862, being both without the jurisdiction of the codified Registry Law of 1866, did subject the rights of the contestant parties to the law of the previous time, whereby the unpaid vendor's privilege, even in the case of an actual sale, follows the property beyond the vendee, and against the purchasers from him; the unpaid vendor's right being held to be actual property in the land sold, independent of the rights of bailleur de fonds, why? Because the *droit de propriété* of the unpaid vendor involved the power to revoke and resiliate the sale and to revendicate into his possession the property itself, which was considered never to have been legally divested from him, by the effect of the vendee's non-payment of it. The right of the unpaid vendor was a pre-eminent right of property under that law, and was the foundation of his power to revendicate the property sold by him, by his exercise of his revocatory right. Grenier in his 2nd vol. Traité des Hypothèques, p. 211, speaking of the French Régime Hypothécaire and Registry system, says that the unpaid vendor where prescription is not set up against him, "peut tou-"jours réclamer au défaut de payement du prix, la résolution de la vente et l'envoi "en possession de l'objet vendu, même quand il aurait négligé de prendre les "mesures que la loi lui indiquait pour la conversation du privilége et du paye-"ment, et qu'il avait le droit de resolution de la vente et de la revendication de "l'immeuble on seulement contre l'acquéreur qui le posséderait, mais encore "contre les tiers détenteurs?" He says the principle was adopted from the Roman law, which held that the purchaser was not considered to be the owner of the property sold except after payment of the price; and, after referring to the Institutes of Justinian and to Domat, who says: "la vente renferme la condition que

"l'acheteur ne sera le maître qu'en payant le prix," he adds, "il n'y a pas un "auteur Français qui n'ait tenu le même language," and continues that the right of resolution of the sale, and of the revendication of the immoveable has been sustained by numerous arrêts, to several of which he refers, and gives the rule from the *motifs* of one which he cites, and which settles this contention in so far as registration is concerned. "Attendu, etc., qu'il ne faut pas confondre le "privilége qu'à le vendeur sur le bien pour le prix qui lui est dû avec le droit réel "qui lui assure la clause résolutoire," always implied by law if not expressed in the contract, "lequel n'a pas besoin d'inscription pour être conservé." The want of enregistration cannot therefore affect injuriously the unpaid vendor's proprietary right, *droit de propriété*, in the land, under the law and jurisprudence anterior to our Code, nor give to the enregistered mortgagee of the non-paying vendee a preferable right over the unpaid vendor upon the land in the debtor's possession, the *droit de propriété* in which has not been divested from the original owner, the unpaid vendor. Again, the vendôr's right of property is not abated or diminished because the agreement of sale was *à termes*, or because a balance of the price only remained due. In this case, after a seizure of the property by execution at the suit of the créditors of the vendees, the only recourse left to the unpaid vendor, before the sheriff's sale, would be by *opposition afin d'annuller*, or *afin de distraire* to enforce his resolutory right, or after the decrêt, by opposition *afin de conserver* upon the proceeds of the decrêt, the sole représentative of the immeuble so decreted, because *le vendeur a le droit de réclamer ou consentir à la vente et être préféré sur le prix*, and this right is affirmed in the 652 and 729 Articles of the Code de Procédure. The former provides for the conversion of an untimely opposition *qui a pour objet de revendiquer l'immeuble* into an *opposition afin de conserver sur les deniers prélevés:* and the latter article, after providing for the collocation of the frait de justice, etc., by the 728 article, then provides, "Après les "frais de justice doivent être colloqués suivant leur rang, ceux qui avaient quelque "droit réel dans l'immeuble vendu, et qui ne se sont pas pourvus à temps par op- "position afin d'annuller, afin de distraire ou afin de charge, mais qui ont produit "leur opposition sur les deniers déduction faite néanmoins des créances auxquelles "ils pouvaient être tenus et qui sont devenus exigibles par l'aliénation de l'im- "meuble et des dépens mentionnés dans l'article qui précède."

Upon the whole, the contestation of the respondent against the collocation of the appellants as unpaid vendors of the decreted half lot, and upon its proceeds, cannot be sustained, inasmuch as their droit de propriété in the said property as such unpaid vendors did not subject their right to registration under the provisions of the Registry Law in force in this province at the time, and could not therefore be taken away or primed by a subsequent enregistered mortgagee, because the *droit de propriété*, the title in the lot, being in the unpaid vendor, the vendee had no property in it *which he could have charged with a mortgage, nor upon which the respondent's judgment could attach.*

The following were the reasons assigned in the judgment:—

"The Court, etc., considering that the paper writings produced in this cause, and referred to in the said opposition, and pleadings, and contestation in this cause fyled, to-wit, the said memorandum of agreement of the thirty-first day of Octo-

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ber, one thousand eight hundred and fifty-one, and the said bond for a deed of the third day of November following, constituted only a conditional promise of sale by the said John Egan therein named to the said defendant.

"Considering that by the covenants of the said conditional agreement, the said defendant acquired no property in the lot of land, the subject of the said agreement, and the said John Egan in law could not be and was not divested of his right of property in the said lot until after the accomplishment of the said condition by the said defendant.

"Considering that the said defendant hath not accomplished the said condition covenanted in the said agreement, to wit, the payment by him of the price of the said lot, and hath not therefore acquired any property therein.

"Considering that until the payment by the said defendant of the said promissory notes payable by him, and remaining unpaid, the right of the said John Egan was a continuing right of undivested property in him, which did not require to be protected by registration under the provisions of the Registry Law, and therefore that the said paper writings above mentioned, constituting the said conditional agreement, were not subjected to such registration.

"Considering that, for the reasons above set forth, the said John Egan was not divested of his right of property in the said lot of land, and was at the time of the said adjudication thereof sole proprietor of the same, and that his claim for the balance remaining due to him is well founded in law.

"Considering that the said appellants, opposants below, are the representatives, *cessionnaires*, of the said late John Egan, and in the exercise of his proprietary right, *droit de propriété*, in and upon the said proceeds, have in law the right without registration thereof, or of the said paper writings, to be collocated and paid out of the said proceeds, according to their sufficiency, the balance remaining due and unpaid by the defendant of the said price, in preference to the said respondent, the said registered creditor of the defendant."

Judgments of Superior Court and in Review reversed.

Hon. J. J. C. Abbott, Q.C., for appellants.

Perkins & Ramsay, for respondent.

(S. B.)

[Reporter's Note.—In the discussion of the case it would seem that the following decisions were not noticed, either by the Counsel or the Court:—Dionne vs. Soucy & Soucy, oppt., 1 L. C. Law Rep., p. 3.; Shaw vs. Lefurgy, and Wilson and Atkinson, oppts., do p. 5; Lemesurier et al. vs. McCaw, and Dolan, oppt., 2 L. C. Jurist, p. 219.]

COURT OF REVIEW, 1872.

MONTREAL, 25TH JUNE, 1872.

Coram MACKAY, J., TORRANCE, J., BEAUDRY, J.

No. 490.

O'Halloran vs. *Sweet.*

HELD:—That the Court of Review will not interfere with the judgment complained of when the only question involved is one of costs.

MACKAY, J.—This is a review of a judgment rendered in the Superior Court for the district of Bedford, which dismissed the plaintiff's action, but

without costs, and we are asked by the defendant to reverse that judgment and to grant him costs. We have before decided that this Court will not interfere in a mere question of costs, and we, therefore, confirm the judgment.*

Judgment of Superior Court confirmed.

M. Doherty, for plaintiff.

Cornell & Racicot, for defendant.

(S.B.)

SUPERIOR COURT, 1872.

MONTREAL, 20TH SEPTEMBER, 1872.

Coram TORRANCE, J.

No. 543.

Ex parte Felix Papin, Petitioner for *certiorari*; and *The Mayor et al. of Montreal*, Prosecutors, & *J.P. Sexton, Esquire*, Recorder.

HELD:—That the Quebec Act 32 Vict. cap. 70, s. 17, exceeds the powers conferred upon the Local Legislature by Imperial Act 30 Vict. c. 3, s. 92, ss. 15, which only allows fine, penalty or imprisonment in the alternative.

The applicant was convicted on the 6th Nov., 1871, of the offence of playing cards for money contrary to the municipal by-laws of Montreal. The by-law was enacted under the authority of the Quebec Act 32 Vict. c. 70, s. 17, which gives power to inflict fine or imprisonment or both. The defendant was condemned to pay $20 and costs, amounting to $1.50, and further to be imprisoned for the space of two months.

Kerr, for the petitioner, contended that the Legislature of Quebec exceeds its powers by the above enactment. Its powers were conferred by the Union Act of 1867, 30 Vict. cap. 3, s. 92, ss. 15. The conviction as well as the by-law (Glackmeyer, p. 138, A.D. 1870) and Quebec Act should have been in the alternative. The case had already been decided by Mr. Justice Drummond, 15 L.C. Jur. 334.

Devlin was heard in support of the conviction.

The conviction was quashed by the following judgment:

"The Court, &c.

"Considering that the Legislature of the Province of Quebec had no power to fine as well as imprison, the B. N. A. Act, 1867, only conferring the power of fine, penalty or imprisonment in the alternative;

"Considering therefore that the conviction complained of is illegal, inas much as the petitioner was thereby condemned to pay a fine of twenty dollars as well as to be imprisoned for two months, doth reject motion of prosecutors, and doth grant motion of petitioners, and doth therefore quash and set aside the said judgment of the 6th Nov., 1871, with costs against prosecutors," &c.

Kerr, Lamb & Carter, for petitioner.

B. Devlin, for prosecutors.

Note.—The Court gave a similar judgment in No. 325, Ex parte McKiernan.

(J.K.)

* [Reporter's note: Vide MacDonald ex. Molleur, 13 L. C. Jurist, p. 189.]

COURT OF QUEEN'S BENCH, 1872.

MONTREAL, 21st JUNE, 1872.

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

No. 74.

KELLY
(*Defendant in Court below*),
APPELLANT;

AND

HAMILTON
(*Plaintiff in Court below*),
RESPONDENT.

HELD:—That a registered mortgagee of a barge, who is also holder of the certificate of ownership, can revendicate the barge in the hands of an *adjudicataire* thereof by judicial sale, under a judgment against the mortgagors, even when such mortgagors have at all times prior to the delivery to the *adjudicataire* been in the actual possession of the barge.

This was an appeal from a judgment rendered by the Superior Court at Montreal, sitting as a Court of Review, on the 30th day of January, 1871 (Justices Berthelot, Mackay and Beaudry), reversing a judgment rendered in the Superior Court at Montreal by the Hon. Mr. Justice Mondelet, on the 31st of October, 1870.

The question raised by the appeal was as to the legal effect of a forced judicial sale of a barge, *quoad* the mortgagee of such barge.

The plaintiff, by his action, claimed to revendicate a barge called the "Maple Leaf," from the defendant, on the ground that he (the plaintiff) was the duly registered mortgagee thereof at the Custom House, and holder of the certificate of registry.

The barge was mortgaged to the plaintiff by deed, executed 17th June, 1869, before Lighthall, N.P., by Adolphus Leroux, *alias* Rousseau, and Joseph Leroux, *alias* Rousseau, and the deed was registered in the Custom House here on the 2nd July, 1869.

The defendant pleaded as follows: "The said defendant for plea to the declaration and action of the said plaintiff saith that, notwithstanding the execution of the deed of the 17th June, in the said declaration mentioned, Adolphus Leroux, *alias* Rousseau, and Joseph Leroux, *alias* Rousseau, therein mentioned, continued to be openly and publicly possessed of the sloop or vessel called the "Maple Leaf," therein mentioned, uninterruptedly, until the same came into the possession of the said defendant, as hereinafter mentioned, and that the said plaintiff never had the possession of the said sloop or vessel.

"That, under and by virtue of a writ of execution, issued out of the Circuit Court, sitting in and for the Montreal Circuit, on the 7th day of January last (1870), and addressed to Médard E. Mercier, one of the bailiffs of this Honorable Court, in a certain suit or action bearing the number 7221, amongst the records of the said Court, wherein one Onésime Brunet was plaintiff, and the said Adolphus Leroux, *alias* Rousseau, and Joseph Leroux, *alias* Rousseau (therein styled Adolphus Rousseau and Joseph Rousseau), were defendants, the

said sloop or vessel was duly seized and taken in execution by the said bailiff, as the property of the said last-mentioned defendants, who were then in the open and public possession of the said sloop or vessel; and on the 25th January last (1870), the said sloop or vessel was duly adjudged by the said bailiff, under said writ of execution and seizure, to the said defendant John Kelly, as the last and highest bidder, for the price or sum of $60 currency, which was then and there duly paid by the said defendant to said bailiff—as the whole will more fully appear by reference to an authentic copy of the *procès verbal* of sale of said bailiff in said suit or action to which the said defendant specially refers as forming part of these presents.

"That the said defendant thereupon immediately took possession of the said sloop or vessel, and thereof continued in possession until the same was illegally seized in this cause, and did also cause the said copy of *procès verbal* of sale to be duly recorded in the Custom House, at Montreal, on the 27th January last (1870).

"That, by reason of the said several premises, and by law, the said defendant became, and was, and is, the absolute owner and proprietor of the aforesaid sloop or barge, free and clear of any such pretended claim as that which is set up in the said declaration; and the seizure thereof in this cause, in the possession of the said defendant, was and is illegal, null and void.

"And the said defendant further saith, that the ⅔ parts of and in the steamer called and known as the "Adolphus," referred to in said declaration, far exceed in value the sum of $1600 currency and interest, in the said declaration referred to, and that the seizure of the sloop or vessel was, under the circumstances, wholly unnecessary, and purely vexatious.

"And the said defendant lastly saith that all and every the allegations, matters and things in the said declaration set forth and contained (except in so far as the same are hereinbefore expressly admitted to be true) are false, untrue and unfounded in fact, and the said defendant hereby expressly denies the same, and each and every thereof."

Of the facts set forth in the plea the plaintiff's attorney granted the following admissions (paper 19 of Record):—

"The plaintiff admits: that, notwithstanding the execution of the deed of the 17th June, 1869, in the plaintiff's declaration mentioned, Adolphus Leroux, *alias* Rousseau, and Joseph Leroux, *alias* Rousseau, therein mentioned, continued to be openly and publicly possessed of the sloop or vessel called the 'Maple Leaf,' therein mentioned, uninterruptedly until the same came into defendant's possession, under the execution and sale referred to in the copy of *procès verbal* of sale, fyled as defendant's Exhibit Number One; that the facts set forth in such copy of *procès verbal* were and are true; that the defendant duly paid the sum of sixty dollars currency to the bailiff in said *procès verbal* mentioned; that Adolphus Rousseau and Joseph Rousseau in said *procès verbal* mentioned were and are the said Adolphus Leroux, *alias* Rousseau, and Joseph Leroux, *alias* Rousseau; that immediately after the sale in said *procès verbal* mentioned the defendant took possession of said sloop or vessel, and thereof continued in possession until the same was seized in this cause; that the defendant caused

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said copy of *procès verbal* to be registered in the Custom House, at Montreal, on the 27th day of January last; and that the sixty-four sixty-fourth parts of and in the steamer called and known as the 'Adolphus,' referred to in said declaration, far exceed in value the sum of sixteen hundred dollars currency and interest in the said declaration referred to." Montreal, 3rd June, 1870.

The following was the judgment rendered by the Court below in the first instance:

"La Cour après avoir entendu les parties, par leurs avocats au mérite de cette cause, examiné la procédure, pièces produites, et avoir délibéré: Considérant que par la vente qui en a été faite, par main de justice, le vingt-cinq janvier dernier, le défendeur en cette cause a acquis la propriété du vaisseau "Maple Leaf" dont il est question en cette dite cause:

Considérant que le demandeur en cette cause n'a pu acquérir subséquemment aucun droit de propriété, de privilége ou hypothèque sur le dit vaisseau au préjudice du dit défendeur et de ses droits acquis:

Considérant en conséquence, que la saisie revendication pratiquée en cette dite cause, par le demandeur, et illégale, la Cour la casse et met au néant, et déboute avec dépens, l'action du demandeur, distraction desquels dépens est accordée à Messieurs Bethune & Bethune, procureurs du défendeur sur leur motion à cet effet faite et produite ce jour."

The following was the judgment of the Court of Review:

"La Cour Supérieure siégeant comme Cour de Révision, ayant entendu les parties par leurs avocats, sur le jugement rendu dans la Cour Supérieure du District de Montréal, le trente-et-unième jour d'octobre mil huit cent soixante-et-dix, ayant examiné le dossier et la procédure en cette cause et mûrement délibéré:

Considérant qu'il y a erreur dans le dit jugement du trente-et-unième jour d'octobre mil huit cent soixante-et-dix, a revisé le dit jugement et l'a renversé, et procédant à rendre le jugement qui aurait dû être rendu en cette cause:

Considérant que la revendication pratiquée en cette cause par le demandeur, est légale:

Considérant que la vente du vaisseau enregistré "Maple Leaf" dont il est question en cette cause, au défendeur le vingt-cinq janvier mil huit cent soixante-et-dix, n'a pas pu avoir pour effet de détruire le droit qu'avait le demandeur sur ou dans le dit vaisseau en vertu de l'acte de vente (sale by way of mortgage) du dix-sept juin mil huit cent soixante-et-neuf par A. et J. Leroux, au demandeur, le dit acte enregistré à la Douane et endossé sur le certificat de propriété du dit vaisseau (tel qu'allégué dans la déclaration du demandeur) le deux juillet mil huit cent-soixante-neuf, c'est-à-dire longtemps avant le vingt-cinq janvier mil huit cent soixante-et-dix, date de la vente sur laquelle se fonde le défendeur.

Considérant que le titre invoqué par le défendeur à l'encontre de l'action et demande du demandeur n'a eu pour effet que de lui transporter les droits des dits Adolphus Leroux *alias* Rousseau et Joseph Leroux *alias* Rousseau comme à la date vingt-cinq janvier mil huit cent soixante-et-dix, et ne peut préjudicier aux droits du demandeur, sur le dit vaisseau "Maple Leaf."

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Considérant finalement les allégations du demandeur prouvées :

Cette Cour déclare la saisie revendication faite en cette cause du dit vaisseau "Maple Leaf" bonne et valable, adjuge et déclare que le demandeur a un lien et une hypothèque spéciale sur icelui pour la garantie du paiement de la somme de seize cents piastres, montant stipulé au dit acte du dix-sept juin mil huit cent soixante-et-neuf, avec intérêt sur icelle depuis le vingt-quatre avril mil huit cent soixante-et-neuf, et les frais ;

Ordonne et enjoint au dit défendeur de livrer et abandonner, sans délai, au demandeur, la possession et jouissance du susdit vaisseau "Maple Leaf," et ses agrès, pour iceux être vendus suivant le cours ordinaire de la loi, en satisfaction de la susdite dette, et à défaut par lui de ce faire, le condamne à payer au dit demandeur la susdite somme de seize cents piastres, avec intérêt sur icelle, à compter du dit vingt-quatre avril mil huit cent soixante-et-neuf, jusqu'à parfait paiement, le tout avec dépens contre le dit John P. Kelly, tant de la dite Cour Supérieure que de cette Cour de Révision dont distraction est accordée à Messieurs Dorion, Dorion et Geoffrion, procureurs du demandeur."

Bethune, Q. C., for appellant :—(After stating facts, pleadings and judgments)—Article 598 of our Code of Civil Procedure enacts that "the *adjudication of moveable* property under execution *transfers* by law the *ownership* "of the things *thus* adjudged." And Article 599 provides that such a sale cannot be annulled or rescinded, as against a purchaser who has paid the price (as in this instance), "*saving* the case of fraud or collusion,"—in no way invoked or even hinted at in this case.

Then, as proof that by the term "moveable" the Legislature meant every description of moveable, *including vessels*, reference is made to Article 605 of the Code of C. P., which declares that "the moneys" (arising from such adjudication aforesaid) "are distributed according to the order prescribed in the "title of Privileges and Hypothecs, and the title of *Merchant Shipping* in "the Civil Code, and in the provisions hereinafter contained." And Article 610 provides that "persons who have preserved the right of being collocated "upon the price of the thing sold, *by reason of a right of pledge*" (just such a right as the plaintiff's) "rank according to the nature of the *pledge*."

The Article in the Civil Code above referred to is the 2383rd, which enacts that "there is a *privilege* upon vessels for the payment of the following debts," —"6. *Hypothecations* upon the ship."

It will be thus seen that, according to law, the *adjudication* of the barge, under the execution referred to, *passed the property* in the barge *absolutely* to the appellant.

By Article 1585 of our Civil Code it is further provided that a judgment creditor may take in execution and cause to be sold the property, moveable and immoveable, of his debtor,—"except only the articles specially exempted by law." And Article 1588 declares that "the general rules concerning the *effect* of forced "judicial sales in the *extinction of hypothecs and other rights and incumbrances*, are declared in the title of Privileges and Hypothecs," and in the Code of Civil Procedure.

In the title of Privileges and Hypothecs of the Civil Code thus referred to, it

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will be seen, on reference to Art. 1994, that "the claims which carry a *privilege* "upon *moveable* property, are (amongst others).—4—The claims of creditors "who have a right of *pledge* or of retention." And, by Article 2001 (under the same title) "creditors having a right of *pledge* or of retention rank according to "the nature of their *pledge* or claim." And by Article 2081, under the same title, it is declared that "Privileges and Hypotheca become *extinct*.—6—*By sheriff's sale*."

So far is the effect of a forced judicial sale of moveable property carried under our system that, under Article 1490 of our Civil Code, it is declared that if a thing *lost or stolen* "be sold under the authority of law *it cannot be reclaimed*." And, by Article 608 and 609 of the Code of Civil Procedure, parties who have either leased, lent, pledged, lost, or had stolen from them, any moveable property, cannot revendicate it if it has been *judicially* sold.

It is also to be borne in mind that not only did the appellant acquire the barge in question at a forced judicial sale, but that the barge, although mortgaged to the respondent, had always remained in the possession of the Lerouxs, upon whom it was seized and sold; that the price of sale was duly paid by appellant; that a copy of the *procès verbal* of sale was duly recorded in the Custom House on the 27th of January, 1870; and that when the *saisie revendication* issued (28th March, 1870) the appellant had been since the date last mentioned the duly registered owner of the barge, and had been in the actual possession thereof since the 25th January, 1870.

On the whole, the appellant confidently claims at the hands of this Court a reversal of the judgment of the Court of Review, and a confirmation of that originally rendered by the Hon. Mr. Justice Mondelet.

Dorion, Q. C., for respondent:—The respondent respectfully submits: 1st. That there is no proof in the record that any of the formalities required by law to effect a judicial sale of the said vessel *Maple Leaf* were observed, and that as by his answers to appellant's plea he has distinctly raised that issue it was incumbent on the appellant to show that said formalities had been complied with.

2nd. That even if it had been proved that a regular judicial sale had taken place of the said vessel, such sale could not prevail against the anterior duly registered title of the respondent, and could in no wise affect his rights, because the appellant could not have his pretended sale registered and endorsed on the certificate of ownership as required by Articles 2366 and 2368 of the Civil Code to effect a valid transfer affecting the rights of third parties. That in fact the law regulating the transfer of inland or colonial registered vessels has not been and could not be complied with in this instance, and that the title of the respondent was therefore unimpaired by the pretended sale to the appellant.

The respondent relies on Articles 2359, 2360, 2361, 2366, 2367, 2368, 2369, 2371 and 2372; also Articles from 2374 to 2382 of the Civil Code of Lower Canada, and the Statutes therein mentioned.

These Statutes and the Code have introduced here the English rules and English forms with respect to the transfer of registered vessels, no doubt, to give to the registered owners of such vessels the same securities as are afforded by the English Statutes.

It is well known that in England no judgment creditor of a mortgage can sell a vessel without the consent of a previous mortgagee. It may well be asked what would be the value of the securities given to a mortgagee, if it was possible for any creditor or pretended creditor to sell a vessel under an execution issued from a Circuit Court, as in this case, or perhaps a Commissioner's Court, hundreds of miles away from the residence of interested parties, without any notice of such sale. Such proceedings would be disastrous to the shipping interests of any country, and the laws so wisely devised for the purpose of promoting those interests, and thereby extending the advantages of an enlarged and comprehensive national policy, would be the occasion of ruin to all those who, confiding in the apparent securities offered by the law, should invest their funds in such securities.

It will be contended that the Code provides for the sale by the sheriff of registered vessels, and also for the collocation of privileged and hypothecary claims on registered vessels, and that therefore nothing can prevent a judgment creditor from selling a vessel belonging to his debtor. There is no doubt that a judgment creditor can sell a vessel belonging to his debtor as long as the debtor has not disposed of his interest in such vessel either by selling it or by giving a *lien* upon it, as he does when he sells it by way of mortgage; and also if a mortgagee wants to realize his mortgage he must have the vessel sold, and there must be some provision for the distribution of the proceeds. It is for such cases that the Code has made provision for the sale of vessels by sheriff's sale, and for the distribution of the proceeds of the sale among the different classes of creditors; but none of the articles of the Code have authorized the sale of a mortgaged vessel without the consent of the first mortgagee, for the reason that the mortgage when duly registered creates a gage on the vessel in favor of the mortgagee, who cannot be deprived of his gage without his consent, except on the previous payment of the amount of his *lien* or gage.

In the case of Dickenson and Kitchen, Lord Campbell said: "*By virtue of "the mortgage, the property of the ship passed* prima facie *to the mortgagee,*" 8 Ellis and Blackburn, page 798.

How then could the vessel, the property of the mortgagee, be sold without his consent on the mortgagor?

Maude and Pollock, *Law of Merchant Shipping*, p. 38.

The rule laid down by Mr. Justice Mondelet, that the sale by sheriff of a mortgaged vessel was valid as against the mortgagee, who had no other right but to fyle his claim on the proceeds of the sale, must be applicable to both British and Colonial registered vessels, for the law respecting the sale of vessels is the same in every respect, and the Courts could not in applying the same law give it one effect as regards Canadian registered vessels and another as regards British registered vessels. It would therefore follow that the mortgagee of a British registered vessel might be exposed to hear at any moment that his *gage* worth thousands of pounds has been sold in Canada for a trumpery claim of a few dollars, and that there is no redress afforded to him against such sale.

The Court of Review has, by its decision, given a correct view of the law, by maintaining the action of the respondent, who confidently expects that the judgment will be confirmed by this Honorable Court.

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MONK, J., *dissentiens*:—(After stating facts)—This is a case of very considerable importance, and I and my learned brother on my right have felt it to be our duty to dissent from the judgment which the Court is about to pronounce. I must presume, in order to make the judgment appealed from consistent with the rules of law applicable to such a case as the present, that the Honorable Judges in Review must have gone on the principle that the sale was one *super non domino et non possidente*. It is true that the Merchant Shipping Act declares that the mortgagee is deemed, under the circumstances, to be the owner, but in so far only as may be necessary for rendering his mortgage available, by sale or otherwise, for the payment of the money secured by the mortgage. In a certain and modified sense, therefore, the respondent may be regarded as having been the owner of the barge in question here. It is, however, indubitable, that the Lerouxs never ceased to be the possessors of the barge, openly and publicly. So far as the public, therefore, was concerned, their possession was to all appearance that of absolute proprietors. But, whether their possession can be characterized as that of absolute owners or not, it is quite certain that they had as much as the respondent had, a modified ownership at least in the barge. And it is impossible to say that they did not possess the barge *animo domini*. Now it is not sufficient in law that the party on whom the property is sold was not the owner, or not the possessor, but, to render the sale on him a nullity he must be both *non dominus et non possidens*. The Lerouxs being admittedly, if not proprietors, in the actual and open possession of the barge, at the time of its sale, it cannot be said that they were neither owners nor possessors, and consequently the rule of law invoked cannot be made to apply. Then it has been said that the provisions of the Merchants Shipping Act are such as to exempt a registered vessel from the ordinary effect of a judicial sale. For my part, after an attentive examination of the Act and of our own Code, I cannot see that any exemption exists such as is here claimed in favor of a registered vessel. Whatever the effect of a sheriff's sale may be in Upper Canada or in England, the general rule here is to give full effect to such sales. I take up and adopt the logical statement, of our laws as set forth in the appellant's *factum*, and to the rule as there laid down I can find no exception in favor of shipping; but, on the contrary, I find the Merchants Shipping Act clearly included in and contemplated by our own Code. On the whole I must confess that I cannot understand how a different opinion can be entertained than was expressed by the Honorable Judge who rendered the original judgment which was afterwards reversed by the Court of Review.

DRUMMOND, J.,—also *dissentiens*: I fully concur in all that has been said by my brother Monk, and I cannot understand how merchant shipping can be considered exempt from the operation of our Court.

BADGLEY, J.:—The copartnership firm of A. & J. Leroux, forwarders, at Williamstown in Ontario, composed of Adolphus and Joseph Leroux, being the registered owners of the steamer Adolphus and the sloop Maple Leaf, on the 17th June, 1869, executed in favor of the respondent, before Lighthall, N.P., at Montreal, a deed of sale and transfer of the above named vessels for the security of a loan of $1600 which they had received from him. The deed was duly recorded at the Custom House at Montreal, and on the 2nd of July following was endorsed

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on the certificate of registry of the vessel as required by law. Subsequently one Onésime Brunet obtained judgment in the Circuit Court here against the firm, and under his writ of execution thereon, dated the 7th January, 1870, addressed to the Bailiff Mercier, seized and took in execution the sloop Maple Leaf, and on 25th of that month, by virtue of the execution, sold and adjudged the vessel to the appellant for $60, which the latter paid over to the bailiff, and thereupon took possession of the vessel, and on the following 27th caused the *procès verbal* of the adjudication to him to be duly recorded at the Custom House here. Up to that time there had been no alteration in the management or possession of the vessel, or apparent change of ownership by the firm. After the adjudication had been effected the respondent sued out of the Superior Court here a writ of *saisie revendication*, and thereby attached the vessel in the hands of the appellant, claiming to be proprietor thereof under the provisions of the Provincial Shipping Act as declared in the Code Civil, praying that he be so declared, and that the *saisie revendication* should by the judgment of the Court be held and maintained to be valid and according to law. The appellant by his pleadings averred the respondent's want of possession of the vessel and the absolute and binding effect in the appellant's favor of the judicial sale and adjudication to him of the vessel so attached. The respondent in reply objected to the invalidity of the bailiff's adjudication from his non-observance of the legal formalities required in such case, and further that no judicial sale could affect the respondent's title of property in the vessel or divest him thereof. The facts and circumstances above referred to are of record, and it is admitted that at the adjudication the value of the Maple Leaf was $1000 and that of the steamer $1600. Now it is plain that the chief contention here is the legal extent and effect of the respondent's deed of sale by way of mortgage of the vessel at the time of the seizure and sale thereof, and of his legal right thereto for the security of his claim against the firm, her registered owners. It will be borne in mind that shipping, and the property therein, are subject to special laws, adopted for the promotion and protection of the shipping interests of the country and the extension of an enlarged and generally advantageous national policy; the shipping laws in force in the Province will be found in the Imperial Merchant Shipping Acts, which have been made to apply comprehensively to the dependencies of the Empire, and in the provisions of the Provincial Act of 1845, respecting the registration of inland vessels, both of which Acts have been adopted into our Code Civil. It is only necessary to add with reference to the Provincial Act, that its principal provisions were copied textually from the existing Imperial Act in *pari materia*. Now, by the provisions of the law in force in the province, and which applied to Canada in general, an inland vessel may be transferred and mortgaged by her registered owners, for the security of the creditor or mortgagee of the owner therefor, and by the 2360 Article of the Code, the transfer of registered colonial vessels in the inland waters of the Province can be made only by a bill of sale, as required by the Act. The 2366 Article of the Code provides that when a bill of sale for the transfer of a vessel is entered in the registry of certificates of ownership, "*il* "*passes* the property to all intents and against every person, *il transfère* la chose "qui en est l'objet à toutes fins et à l'encontre de toute personne except subse-

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"quent purchasers and mortgagees who first procure the registry of their transfer "or mortgage." And by the 2371 Article it is provided, that when the transfer of a vessel duly registered is made only as a security for the payment of money (as in this case), the registered transferree is *deemed to be the owner of the vessel in so far only as may be necessary for rendering the same available by sale or otherwise for the payment of the money so secured.* And, lastly, by the following Article, the 2372, the right or interest of the registered transferree is prevented from being affected by any act of bankruptcy committed by the transferrer or mortgagor after the registry of the transfer or mortgage, although the latter at the time of becoming bankrupt be the reputed owner of the vessel, and have the same in possession or disposition. It is evident, therefore, that the transfer of this vessel, the "Maple Leaf," by way of mortgage to the respondent, was quite valid and made him her owner, as against all persons, for the payment of the money due to him secured by the transfer, although the vessel was not in his actual possession, but had continued in the possession or disposition of the firm, the original owners. By the articles of the Code, as adopted from the provisions of the Provincial Act, this instrument of transfer has the legal effect given to it by virtue of those laws, which, according to the terms used in them, vested the right of property in the vessel in the respondent for his security. As already observed, our Provincial law was copied from the Imperial Act, which was manifestly so adopted in its provisions, namely, those above referred to in the articles of the Code, for the assimilation of the law of the Empire and of the Colony with respect to provincial shipping. Under these circumstances the judicial propriety is unquestionable of resorting to the English authorities and precedents as explanatory of the provincial law, and the case Dickinson vs. Kitchem, 8 Ellis and Bl., 788 and seq., becomes entirely relevant. That case shews similiar features to the present one: the mortgage of a ship by the registered owner for an advance in money, the registration of the transfer, a subsequent judgment for the mortgage creditor, his seizure of the vessel in execution for debt and costs, &c.; but, upon claim made for the vessel, &c., by the mortgagee, the claim was sustained in the Q. B., by Lord Campbell, Ch. J., and Justices Coleridge, Wightman, and Crompton, unanimously, who held that by the effect of the provision of the shipping law in force in England (as copied into the Provincial Act *in totidem verbis*, and as adopted in the 2371 Article of the Code) the claimant becomes the owner of the vessel by reason of his mortgage, and is to be deemed the owner to an extent which is inconsistent with the alleged right of another creditor to seize and sell the mortgaged vessel, because it would be inconsistent with the right expressly retained by the law in favor of the mortgagee, whose security otherwise becomes nugatory and unavailable. The case of Benning vs. Cook, decided last year in this Court in favor of the mortgagee, Cook, against the judgment creditor and execution purchaser, Benning, of the steamer in question in that case, presented parallel features to this case, and was decided in principle upon the law as provided by the Provincial Act above referred to. The sale was made in that case in Ontario; but, upon the arrival of the steamer here in the ensuing spring, a similar process of *saisie revendication* for her attachment at the suit of the mortgagee, Cook, was

resorted to and sustained by this Court. It is only necessary to add that the law and the practice of the Courts are in favor of the respondent, and that the appellant's appeal against the judgment of the Court of Revision must be dismissed.

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Judgment in Review confirmed.

Bethune & Bethune, for appellant.
Dorion, Dorion & Geoffrion, for respondent.
(S. B.)

COURT OF QUEEN'S BENCH, 1869.

(APPEAL SIDE.)

MONTREAL, 9TH DECEMBER, 1869.

Coram DRUMMOND, J., BADGLEY, J., MONK, J., POLETTE, J., *ad hoc.*

No. 75.

DAME ELIZABETH WOOLRICH

(*Plaintiff in the Court below*),

APPELLANT;

AND

THE BANK OF MONTREAL

(*Defendants in the Court below*),

RESPONDENTS.

HELD:—Where a title to shares of Bank Stock is claimed by a plaintiff in an action against the Bank, to obtain *un titre recognitif*, and the Bank pleads that the shares in question had previously been transmitted to other parties who claimed transmission, it is the duty of the Court to order such other parties to be called into the cause.

This action was instituted in September, 1868, by Dame Elizabeth Woolrich, of Montreal, widow of the late James Tunstall, to compel the defendants to *transmit* in their register of shareholders, to her as one of thirteen of the "légataires universelles" of the late Dame Julia Woolrich, in her lifetime of Montreal, widow of the late William Connolly, a certain proportion of forty-nine shares of fifty pounds currency each, of the respondents' capital stock, belonging to the estate of the said widow Connolly, such proportion being alleged to be four and one-third of one-fourth of one of the said forty-nine shares.

The appellant's declaration, after alleging the possession by Mrs. Connolly at the time of her death, on the 27th of July, 1865, of the said forty-nine shares, set forth at great length her Will made at Montreal, before Mtres. J. Belle and another, Notaries, on the 28th January, 1861, the leading dispositions of which, in so far as they are applicable to the case, appear from the declaration to have been—

1st. That after bequeathing to her son, William Allan Connolly, the usufruct during his life of her *meubles meublans*, with a few exceptions, Mrs. Connolly bequeathed the residue of her estate, real and personal, to Thomas Richard

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Johnson, Daniel McCarthy, junior, and Thomas McCarthy, jointly and [illegible]ately, as trustees, *à titre fidéi-commis*, with power to sell, &c.

2nd. That from such residue and its income the trustees should pay an annuity or *rente annuelle et viagère*, of £250 currency to her said son during his life, and also divers other special legacies to her sisters and others, ending with a special legacy to each of four specified charitable institutions in Montreal.

3rd. That of the residue, namely, the residue after paying and providing for the special legacies, the interest should be paid to her said son during his life; but if he should die childless, or *sans descendants légitimes*, his widow should have during her life an annuity of £200 *per annum*.

4th. That the final residue should be divided as follows:

One-fourth thereof between the testatrix's two sisters, Margaret Woolrich and Elizabeth Woolrich, the appellant, and the children of her third sister, Mary Woolrich, wife of the Honorable Dominique Mondelet;—

One-fourth thereof between the respective heirs of the testatrix's late husband's three deceased sisters, namely, the late

Louisa Connolly, wife of Thomas Aylwin, of Quebec;—

Maria Connolly, wife of François Poulin, of Verchères;—and

Emilia Connolly, wife of Louis de la Marc, of France;—

One-fourth thereof between the testatrix's late husband's three natural children, William, Henry, and Emilia Connolly;—and

One-fourth thereof between each of the before mentioned four charitable institutions, namely:—

L'Institution des sourdes et muettes, filles établie à l'Hospice St. Joseph ou de la Providence à Montréal,

La Corporation des Femmes agées et infirmes communément appellée la Providence,—

La Corporation des Sœurs du Bon Pasteur à Montréal,—and

La Salle d'Asile à Montréal.

The declaration further alleged, that on the 27th of September, 1867, William Allan Connolly died, *sans laisser d'enfants ni descendants*, when the testatrix's succession *est échue à la dite demanderesse en sa qualité de légataire universelle pour un tiers sur un quart, c'est-à-dire, sur les quarante-neuf actions, la quotité afférante de quatre actions et un tiers sur un quart d'une autre action.*

That in virtue of Article 891 of the Civil Code the appellant had a right to "prosecute all claims resulting from the legacy without being obliged to obtain legal delivery,"—and that on the 29th of August, 1868, she demanded of the respondents *un titre recognitif* in their register of shareholders, but they refused,—to the appellant's damage of $1,600.

The declaration concluded with a prayer, that the respondents should be adjudged to give the appellant *un titre recognitif*, as a shareholder in lieu of the testatrix, of four shares and one-third of one-fourth of another share of their capital stock, and pay her dividends thereon accrued from the 28th of September, 1867, and within three days from the signification of the judgment to register such *titre recognitif*, and in default of their so doing that the judgment should be held tantamount thereto (*vaille comme titre*), and the respondents be

condemned to pay the appellant the said sum of $1,600, *avec intérêt à raison de quinze par cent et les dépens.* Woolrich and The Bank of Montreal.

By two peremptory exceptions the respondents pleaded,—

First,—The appellant's non-compliance with the 17th section of the respondents' Charter, 19th Vic. chap. 76, which requires the claimant of shares of their capital stock owned by a deceased shareholder to make known his claim by detailing it in a written declaration of transmission, supported by evidence,—and

Secondly.—In substance as follows:—

That at the death of Mrs. Connolly, on the 27th July, 1865, forty-nine shares of the respondents' capital stock stood in their register of shareholders in her name;

That on the 14th of the following December, by a declaration of transmission, made in conformity with the above-mentioned section of the respondents' Charter, Mrs. Connolly's executors and trustees, after-named, declared in substance—

"That Mrs. Connolly died on 27th July, 1865, and by her will, made in the French language, on the 28th of January, 1861, before Mtres. J. Belle and W. F. Lighthall, notaries, after certain directions and bequests, bequeathed and devised the residue of her estate, moveable and immoveable, to Thomas Richard Johnson, Daniel McCarthy, junior, and Thomas McCarthy, as trustees, *à titre de fidéi-commis*, jointly and separately, in trust for the several purposes specified, and appointed the said trustees, jointly and separately, executors of her will, with an extension of their powers as such;

"That by a codicil, made in the English language before witnesses, and dated the 17th of March, 1865, Mrs. Connolly appointed Casimir F. Papineau, of Montreal, Notary, an executor and trustee of and under her said will if either of the said Daniel McCarthy and Thomas McCarthy should refuse or decline to act; and if both of them should refuse or decline to act, then she appointed Joseph Belle, of Montreal, notary, to be, with the said Thomas Richard Johnson and Casimir F. Papineau, an executor and trustee;

"That Mrs. Connolly made another codicil in the English language before witnesses, and dated the 26th of May, 1865, but the same was not relevant to the said declaration of transmission;

"That after Mrs. Connolly's death, namely, on the 28th of July, 1865, before the Deputy Prothonotary of the Superior Court, at Montreal, probate of the two codicils was made and granted;

"That by an Acte passed at Sorel before Mtre. Precourt and his colleague, notaries, on the 31st of July, 1865, Daniel McCarthy, junior, and Thomas McCarthy, respectively, renounced the executor and trusteeship; by a similar Acte passed at Montreal before D. E. Papineau and his colleague, notaries, on the 7th of the following August, Joseph Belle renounced the executor and trusteeship; and by an Acte passed before the same notaries on the same day, and in the exercise of a power given them by the will, Thomas Richard Johnson and Casimir F. Papineau, the two remaining executors and trustees, appointed Charles Smallwood, of Montreal, M.D., LL.D., and D.C.L., to be, with themselves, an executor and trustee; and at the date of the said declaration of trans-

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mission, the said Thomas Richard Johnson, Casimir F. Papineau, and Charles Smallwood were the executors and trustees of and under Mrs. Connolly's said will, and they accordingly made the said declaration of transmission, and claimed the transmission to their own names, in their said capacities, of the forty-nine shares of the respondents' capital stock which then stood in their register of shareholders in the name of Mrs. Connolly, the testatrix, and the claim was supported by authenticated copies of the will and codicils, and notarial copies of the Actes of renunciation; 'all which,' as stated by the exception, 'more fully 'appears by the said declaration of transmission, and the said authenticated 'copies of the said will and codicils, and notarial copies of the said three notarial '*actes* herewith produced and fyled—the said declaration of transmission as the 'defendants' exhibit No. 1, and the remaining instruments, together, as the 'defendants' exhibit No. 2.'"

And, by their said second exception, the respondents further, in substance, alleged,—

That long before the action, and before making of the instrument in writing next after mentioned, the facts stated in the said declaration of transmission, and the consequent transmission of the forty-nine shares to the executors and trustees, were known to the appellant, but that, notwithstanding such knowledge, and that the executors and trustees were still living, and that the forty-nine shares still stood in their names in the respondents' register of shareholders, the appellant, by an instrument in writing, purporting to be such a declaration of transmission as was required by the 17th section of the respondents' Charter, dated the 29th of August, 1868, and left at the respondents' Bank in Montreal, claimed, as she claimed by the action, the transmission to her own name of four and one-third of one-fourth of one of the said forty-nine shares, alleging that she so claimed them as being, under the will, one of the "légataires universelles" of the said widow Connolly, and as having as such become entitled to claim them by the death, on the 27th of August, 1867, of the testatrix's son, William Allan Connolly, "without any lawful heirs" and "sans laisser d'enfants ni descendants;"

That neither in her said pretended declaration of transmission, nor in her declaration in the action in the Court below, had the appellant noticed either of the testatrix's codicils to her will, or either of the aforesaid notarial renunciations of the executor and trusteeship by the said Daniel and Thomas McCarthy and Joseph Belle, respectively, nor the respective appointments in their stead of the said Casimir F. Papineau and Charles Smallwood as executors and trustees, nor the transmission to the said Thomas Richard Johnson, Casimir F. Papineau, and Charles Smallwood, as such executors and trustees, of the said forty-nine shares of the respondents' capital stock;

That without the knowledge and consent of the said executors and trustees, the respondents could not legally either transmit or allow to be transmitted to the appellant the said four and one-third of one-fourth of one of the said forty-nine shares;

That the respondents did not know, and had not the means of knowing, (1) whether the said forty-nine shares formed the residue or part of the residue of

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the testatrix's estate, divisible among her ultimate residuary legatees in the proportions specified in her will,—or (2) whether they were set aside and held by her executors and trustees, to the end of applying the dividends arising from them to the payment of the several annuities and *rentes viagères* bequeathed by the testatrix,—such as £200 *per annum* during life to the widow of her said son; the interest of £400 during life to her sister, Margaret Woolrich, and after her death the capital to her niece, Marie Cecile Mondelet; the *rentes annuelles et viagères* of £25 to the appellant herself, of £30 to Susanne (*Sauvageau*) and of £30 to the widow Mectler during their respective natural lives; the interest of £100 to William Connolly, or, if he should be dead, the capital to his children, and £6 5s. annually for ten years, and £12 10s. annually for ten further years, to each of the four charitable institutions named in the will,—all of which annuities and *rentes viagères* were still payable—all the legatees being still in existence; and,

That the four and one-third of one-fourth of one of the said forty-nine shares claimed by the appellant were not *specifically* bequeathed to her by Mrs. Connolly, the testatrix, and no partition of the same, either specially or as the residue or part of the residue of the testatrix's estate, had ever been made among the residuary legatees, to wit: First, among the four *classes* into which the testatrix had divided them; and, next, among the individuals or parties of each of the four classes; nor was any such partition alleged either in the appellant's pretended declaration of transmission or in her declaration in the action, and that until such partition should be made, either amicably or by judgment ordering the same, and should be officially made known to the respondents by a declaration of transmission such as their charter required, the respondents could not be compelled to transmit, and in their register of shareholders record the transmission to the appellant of the proportion of the said forty-nine shares claimed by her said action.

And in regard also to the fraction of a share by her claimed,—the respondents alleged that, even if the appellant were held to be legally entitled thereto, it could not be, legally, either transmitted or transferred to her, because by the respondents' charter (S. 16), as well as by the charters and custom of all the incorporated Banks in Canada, no fractional part or parts of a share of their capital stock can be made either transmissible or transferable;

And the respondents lastly alleged, that by reason of anything in the appellant's declaration contained she could not legally obtain either the transmission or the transfer of any of the said forty-nine shares of their capital stock, save amicably from, or with the consent of, the executors and trustees of the testatrix, or otherwise by means of an action against such executors and trustees to compel them to render an account of their administration of the testatrix's estate, including the said forty-nine shares, and to make over to the appellant, as one of the thirteen residuary legatees, her share of the true residue thereof; and that to compel the respondents, without the intervention of the executors and trustees, to transmit or transfer to the appellant any of the said forty-nine shares, as claimed by her action, would be virtually to constitute the respondents—a corporation—executors of the testatrix's will, contrary to the true intent and meaning

Woolrich and The Bank of Montreal.

of the articles (365 and 908) of the Civil Code in that behalf provided. The respondents therefore prayed for the dismissal of the action with costs.

On the 19th of May, 1869, the Honble. Mr. Justice Beaudry rendered the following judgment, dismissing plaintiff's action:—"La Cour, après avoir entendu sur le mérite la demanderesse et la compagnie appelée *The Bank of Montreal*, assignée en cette cause sous le nom de la Banque de Montréal, par leurs avocats, examiné la procédure et sur le tout déliberé; considérant que dès le 4 de décembre 1866, sur une déclaration faite conformément aux dispositions du Statut du Canada, passé dans la 19 année du règne de Sa Majesté, ch. 65, sec. 17, Thomas R. Johnson, Casimir Fidèle Papineau et Charles Smallwood, en leur qualité d'exécuteurs testamentaires *et fidei* commissaires en vertu des testaments et codiciles de feue Dame Julia Woolrich, veuve de feu William Connolly, écuier, en son vivant de la dite cité de Montréal, ont été entrés dans les livres de la dite défenderesse comme représentant la dite feue Julia Woolrich, et investis des 49 parts ou actions dans la dite Banque qui appartenaient à la dite Julia Woolrich, lors de son décès; considérant que la déclaration de transmission faite par la demanderesse et produite à la dite défenderesse afin d'être déclarée propriétaire, et demande pour quatre parts et un douzième d'une part, portion des dites quarante-neuf parts était insuffisante et ne pouvait être reçue par la défenderesse tant que le titre des dits Thomas R. Johnson, Casimir F. Papineau et Charles Smallwood n'aurait pas été mis de côté et annulée par un jugement du tribunal compétent ou par un partage de la succession de la dite Julia Connolly: et considérant qu'il n'appert pas que tel partage ait jamais eu lieu, ou que le titre des dits Thomas R. Johnson, Casimir F. Papineau et Charles Smallwood ait été mis de coté ou annulé, et considérant que les dits Thomas R. Johnson, Casimir F. Papineau et Charles Smallwood en dite qualité n'ont pas été appelés en cette cause, non plus que les autres légataires appelés par le testament de la dite Julia Woolrich à recueillir le reste des biens de cette dernière et que la Cour ne peut sans léser les droits des autres intéressés dans la dite succession adjuger à la dite demanderesse les conclusions de sa demande; a débouté et déboute la dite action de la demanderesse avec dépens."

The Court of Appeals unanimously reversed the judgment of the Superior Court as follows:—

"The Court, &c., &c., considering that instead of dismissing the action of the plaintiff, appellant, the Court below should have ordered the persons, to wit, Thomas R. Johnson, Casimir F. Papineau and Charles Smallwood, named in the defendant's pleas and in the judgment appealed from, as holding a title from the defendant to the Bank shares, whereof the appellant by her action has demanded the transmission, to be made parties in this cause.

"Considering, therefore, that there is error in the said judgment, the Court here doth reverse, annul, and set aside the same.

"And proceeding to pronounce that judgment which the Court below should have given, the Court doth order that the said Thomas R. Johnson, Casimir F. Papineau and Charles Smallwood be brought into this cause as parties thereto, at the diligence and cost of the plaintiff, the whole with the costs of the appeal against the defendant, respondent."

Judgment of S. C. reserved, and parties ordered to be called in.

Henry Stuart, Q.C., for appellant.

F. Griffin, Q.C., for respondents.

(J.L.M.)

Miller vs. Bourgeois.

SUPERIOR COURT, 1872.

MONTREAL, 31st OCTOBER, 1872.

Coram TORRANCE, J.

No. 1366.

Miller v. Bourgeois, and *Holland* et. al., mis en cause, and the *Montreal Rolling Mills Company*, Intervening.

HELD:—1. That an intervention by a party interested in a contestation between the defendant and a guardian *mis en cause*, after determination of the principal suit, is regular.

2. That an intervention fyled without the allowance of the Court in term will not be summarily rejected from a record on motion.

3. *Semble* the allowance of an intervention by a judge in Chambers in term time is not a compliance with C. C. P. 156.

The original suit began with a saisie revendication of coal, and *Holland* et. al., *mis en cause*, were named guardians. The suit was subsequently discontinued, and the defendant, on the 25th March, 1872, took a rule against the guardians to produce the coal seized or pay the value thereof, alleged to be $3080, and in default thereof that they should be coerced by imprisonment.

Issue was joined by the guardians on this rule, and on the 25th September the Montreal Rolling Mills Company fyled an intervention after obtaining allowance of it by Mr. Justice Mackay in Chambers. On the 19th October, the defendant moved the Court to reject the intervention on a variety of grounds which will sufficiently appear by the remarks of the Court.

PER CURIAM. The defendant says that the intervention shows no interest. The Court is against the defendant on this point. The defendant says, further, that there is no suit or *instance* pending in terms of C. C. P. 154, to justify the intervention. The Court holds that the contestation between the defendant and guardians is a suit or instance. Further, the defendant says that the order of the Judge in Chambers during term is not a compliance with the C. C. P. 156. Admitting this to be so, there is here no ground for the rejection, on motion, of the intervention. There is a penalty for not obtaining the allowance of Court or Judge, namely, that the fyling of the intervention does not suspend the suit. Another ground urged by the defendant is that there was no notice given of application for allowance of the intervention. The Court has already ruled that an affidavit was not necessary in support of intervention, *Coates vs. The Glen Brick Company*, 14 L. C. Jur. 114, and as to not giving notice of the application for the intervention, the practice has certainly always been not to give notice.

Girouard & Dugas, for defendants.

Ritchie, Morris & Rose, for intervener.

(J.K.)

Carden vs. Lennen.

COURT OF REVIEW, 1872.

MONTREAL, 25TH JUNE, 1872.

Coram MACKAY, J., TORRANCE, J., BEAUDRY, J.

No. 684.

Griffith vs. *McGovern*.

HELD:—That an affidavit for attachment before judgment, made before the passing of the Quebec Act 35 Vic. ch. 6, sec. 18, to the effect merely that the defendant *is immediately about to secrete* his property, is insufficient.

MACKAY, J.—This is a hearing in Review of a judgment rendered by Mr. Assistant JUSTICE RAMSAY, in the Superior Court at Sherbrooke, rejecting the defendant's petition to set aside an attachment before judgment on the ground that the affidavit was insufficient. The affidavit alleged that the defendant was *immediately about to secrete* his property, whereas the 834th Art. of the Code of C. P. requires that the affidavit should state that he "*is secreting*." We are all of opinion that the affidavit is, under the circumstances, insufficient, and we are confirmed in this view by the provisions of the Act recently passed by the Quebec Legislature, 35 Vic. ch. 6, s. 18, which has amended the Art. 834, by adding, after the word "secreting," the words, "or is about to secrete," the Act being in no way declaratory but for the future. We are under the necessity, therefore, of reversing the judgment, and maintaining the defendant's petition.

Judgment of S. C. reversed.

G. H. Borlase, for plaintiff.
Sanborn & Brooks, for defendant.
(S.B.)

COURT OF REVIEW, 1872.

MONTREAL, 30TH JANUARY, 1872.

Coram MONDELET, J., BERTHELOT, J., MACKAY, J.

No. 1923.

Carden vs. *Lennen*.

HELD:—Admissions contained in a factum fyled in review are binding upon the party fyling the same.

By this action, the plaintiff claimed payment of the items of an account fyled by him, but in his factum in review made this allegation: "Comme il peut s'élever quelques difficultés quant aux items du compte Nos. 2, 4, 5, 10, 12, 14, 15, 16, 18, 19, 31, 32, formant $71.00, le demandeur préfère passer ces items sous silence, se contentant de demander jugement pour le surplus."

The Court of Review, in rendering judgment for the plaintiff, decided that the above items had been abandoned by the plaintiff in his factum.

His Honor Mr. Justice Mondelet dissented, declaring that, in his opinion, parties were not bound by the allegations of their factums, and that the Court could only give judgment according to the evidence, and that the factums did not form part of the record.

Judgment reversed.
Mondelet, J., dissenting in part.

Leblanc & Cassidy, for plaintiff.
M. Doherty, for defendant.
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OF THE

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COMPILED BY

STRACHAN BETHUNE, Q.C.

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" :—Upon a contested election of Municipal Councillors, a scrutiny of votes may be had under Art. 346 of the Municipal Code, even although the votes objected to by the petitioners were not objected to at the time they were given, nor any entry of objection made in the poll-book. (Do.) 173

" :—A municipal election may be contested upon the ground of bribery used by candidates and their supporters. (Do.)..... 173

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" :—When the election of Municipal Councillors, in virtue of the Municipal Code, takes places within the 15 days preceding the first day of the first term which follows the election, the petition allowed by the Municipal Code to contest the election may be presented the first day of the second term, and the security bond need not contain a description of the real property of the securities, but their declaration on oath in the bond that they are proprietors of real property of the required valued is sufficient. (Exp. Bourgault et al., petrs., and Dalpé et al., Municipal Councillors, contesting, C. C.) 255

NEGLIGENCE:—No presumption can rise that a fire has been caused by the negligence of A B, or his servants, from the mere fact that he occupied a portion of the building destroyed, the remainder of which was occupied by C D, the proprietor of the building. The proof of negligence in such a case must be direct and positive. (Foster, appellant, and Allis, respondent, Q.B.)..... 113

NOTARIES:—Notaries related to the contracting parties are not forbidden from executing deeds between them, and in the absence of fraud such deeds are valid. (Lynch et al. *vs.* McArdle, and Brethour, Int. party, S. C.)..... 108

" :—The fact that the second notary to a deed is related to one of the contracting parties is not a cause of nullity, under the Civil Code of L. C. (Guévremont *vs.* Cardin, C. C.)..... 257

OPPOSITION:—An, founded on title, must be accompanied by an affidavit such as required by article 583 of the Code of Civil Procedure, and in default of such affidavit the opposition will be dismissed. (Dufaut *vs.* Lacombe, C. of R.)..... 111

PRACTICE:—*Vide* CORPORATION.

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" :—An order to the Sheriff to suspend all proceedings on a writ of *fieri facias de terris* causes the writ to lapse. (Ranger and *vir*, appellants, and Seymour et al., respondents, Q. B.)..... 42

" :—*Vide* COURT OF REVIEW.

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" :—" EVIDENCE.

" :—A creditor has a right to intervene in a suit brought by a third party against his debtor, for the purpose of contesting the claim of such third party, when the action is brought by collusion between the plaintiff and defendant, and with the view of enabling the plaintiff to obtain a judgment for a sum not really due by the defendant, and thus to prejudice the rights of the creditor. (Adams *vs.* The Hartford Mining and Smelting Co., and Allan et al., Int. parties, C. of R.)..... 95

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" :—" APPEAL.

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" :—" PROTHONOTARY.

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" :—" COMMISSION ROGATOIRE.

" :—A collocation, so long as it is not paid, cannot be opposed as a payment. (Wilson *vs.* Leblanc, and Doutre et al., opposants, C. of R.)..... 209

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" :—" MARRIED WOMAN.

" :—" MUNICIPALITY.

" :—An intervention by a party interested in a contestation between the defendant and a guardian *mis en cause* after determination of the principal suit is regular. (Miller ex Bourgeois, and Holland et al., *mis en cause*, and the Montreal Rolling Mills Company, Int. party, S. C.)..... 335

" :—An intervention fyled without the allowance of the Court in term will not be summarily rejected from the record on motion. (Do.)..... 335

" :—*Vide* ATTACHMENT.

PRESCRIPTION :—In a case of *mandat*, where the matter does not appear to have been of a commercial character, the prescriptions of 5 and 6 years cannot be pleaded. (Phillips et al. *vs.* Joseph, S. C.)..... 104

PRIVILEGE :—The proprietor of a lot has no lien or right of retention on the building materials delivered there for the purpose of being incorporated in a building in course of erection on such lot, so long as they are not so incorporated. (McGauvran et al. vs. Johnson, and The Royal Institution et al., T. S., S. C.)..... 254

" :—A raftsman has no right to seize the raft on which he is employed for wages due him. (Graham, appellant, and Côté, respondent, Q. B..... 307

" :—In the case of an agreement (before our Civil Code) by A B to purchase from C D a lot of land for a specified sum, to be paid by instalments, followed by a bond from C D in a penal sum, to the effect that, on the purchase money being fully paid, C D would execute a deed of sale in due form, and followed also by actual and uninterrupted possession by A B, the right of property of C D in the lot of land was unaffected so long as any portion of the purchase money remained unpaid, and, therefore, C D had a right to be collocated for such unpaid purchase money in the distribution of the proceeds of a sale of the lot by the sheriff, in preference to duly registered judgments obtained by creditors of A B against him while in possession of the lot, and this without any registration either of the agreement or the bond. (Thomas et al., appellants, and Aylen, respondent, Q. B.)..... 309

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" :—Under the circumstances above related the said Papineau is still an officer of the Court, and, as such, liable to be summarily impleaded, by rule for *contrainte par corps*, for non-compliance with said order or judgment. (Do.)..... 127

" :—Notwithstanding the fact that said Papineau, by the terms of his appointment by the Government and the consequent notarial agreement between himself and his colleagues, had no control over the business of the said S. C., or the moneys received by said Prothonotary, and abstained from exercising any such control, and did not participate in the emoluments of said office (his powers and remuneration being limited to the business and emoluments of the C. C.), he nevertheless is liable and responsible for all moneys which may at any time have been deposited with the said Prothonotary. (Do.)..... 127

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QUEBEC :—The Act of the Province of, 32 Vic., ch. 70, s. 17, is in excess of the powers conferred by the British America Act, in that it allows fine *and* imprisonment, instead of fine *or* imprisonment. (Exparte Papin for *certiorari*, and The Mayor et al., of Montreal, prosecutors, S. C.)..... 319

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" " :—The seizure of the property affected does not suspend the necessity of re-registration required by Article 2172 of the Civil Code. (Do.)..... 19

REGISTRATION :—A donation, unaccepted and unregistered at the date of the registration of a mortgage by the donor, cannot avail against such mortgage, although the donee be a minor, and that he subsequently accepts when of age and then registers the donation and acceptance. (Roy *vs.* Vacher et al., C. of R.)..... 43

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" " :—*Vide* SECURITIES.

" " :—A registered mortgagee of a barge, who is also holder of a certificate of ownership, can revindicate the barge in the hands of an *adjudicataire* thereof by judicial [illegible] under a judgment against the mortgagors, even when such mortgagors have at all times prior to delivery to the *adjudicataire* been in the actual possession of the barge. (Kelley, appellant, and Hamilton, respondent, Q. B.)..... 320

SALE :—In an action for the price of an immoveable, the purchaser cannot claim security against mortgages which do not exceed in amount the balance of purchase money yet to remain in his hands. (Chabotte *vs.* Charley, C. of R.)..... 27

SECURITIES :—The, under [illegible] *revendication*, should be placed *en demeure* to produce the effects seized, before being sued for the value purely and simply, even when such effects are of a perishable nature. (Poulin *vs.* Audon et al., S. C.)..... 127

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VERDICT:—Where the defendant, after verdict awarding damages against him, does not move for a new trial, but simply in arrest of judgment, the Court may arrest the judgment and set aside the verdict, but cannot go beyond that, and dismiss the action. (Guay, appellant, and Brown, respondent, Q. B.) 235

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" :—By the uninterrupted practice and usage of the Courts in L. C. since 1801, the grant of Probate is not of that binding and conclusive character which attaches to it in England, and does not prevent the heirs from impugning the validity of the will, in their defence of an action brought thereunder. (Migneault, appellant, and Malo, et al, respondents, P. C.)..... 288

" :—A testamentary paper, unfinished and unexecuted, but proved to contain the testator's intentions, will be held valid if it be shown satisfactorily that the fact of its not being completed was due to some cause other than the testator's abandonment of his intentions, as, for instance, his sudden death while the paper was being written from dictation. (Do.)..... 288

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